The Territorial Principle in Criminal Law

Rollin M. Perkins
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There are four different theories of criminal jurisdiction, namely: (1) territorial, (2) Roman, (3) injured forum, and (4) cosmopolitan.

The territorial theory takes the position that criminal jurisdiction depends upon the place of perpetration. That is, the nation on whose territory the crime was committed has jurisdiction of the offense. It is a logical outgrowth of the conception of law enforcement as a means of keeping the peace. The perpetrator, rather than the place of perpetration, is the determinant under the Roman theory. A nation, in this view, has jurisdiction over its national wherever he may be and hence can hold him accountable for his criminal misdeed wherever committed. It is a logical outgrowth of the conception of law enforcement as a means of disciplining members of the tribe or clan. While sometimes referred to as the "personal" theory, the traditional label is "Roman" because this was the position of the Roman law which held the Roman citizen accountable to it wherever he might be.

The injured forum theory places the emphasis upon the effect of the crime. A nation may take jurisdiction of any crime which has the effect of causing harm to it. Although the label was not used, this was

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1. Some courts have listed five, designated as “territorial,” “nationality,” “protective,” “universality” and “passive personality.” Rivard v. United States, 375 F.2d 882, 885 (5th Cir. 1967); Rocha v. United States, 288 F.2d 545 (9th Cir. 1961); United States v. Rodriguez, 182 F. Supp. 479 (S.D. Cal. 1960). In each case the classification was taken, directly or indirectly, from the Introductory Comment to a proposed Codification of International Law. See American Society of International Law, Jurisdiction With Respect to Crime (pt. 1), 29 AM. J. INT'L L., 443, 445 (Supp. 1935). The so-called “passive personality principle,” based upon the nationality of the victim of the crime, was not included as a separate category in the proposed Code itself. See id. at 579. It is unnecessary, being clearly included within the “injured forum category,” designated therein as “protective.”
the theory relied upon in *Hanks*, which affirmed the conviction in Texas of one who was not a Texan for a forgery committed by him in Louisiana. Since the forged document purported to transfer title to Texas land, the court held that "[w]hen this forgery was committed in Louisiana, *eo instante* a crime was committed against, and injury done to, the State of Texas, because it affected title to lands within her sovereignty." Whether or not the forged document ever reached Texas was considered so unimportant that it is not even mentioned in the opinion. The crime had been committed, the court emphasized, the instant the false document was made.

The position of the cosmopolitan theory is that any nation has jurisdiction over any crime committed anywhere, by anyone. Needless to say, no nation has ever assumed to exercise such jurisdiction to its full extent—or to any considerable extent. On the other hand, no nation ignores it entirely. While seldom mentioned, this theory is drawn upon to the extent necessary to authorize any nation having actual control of a pirate, and evidence of his piracy, to convict him no matter who he may be, wherever his acts of piracy were committed, and without reference to the harm resulting therefrom.

With one exception, these theories were never thought of as being mutually exclusive. A nation, for example, which regards the Roman theory of primary importance does not hesitate to punish foreigners for crimes committed on its territory. The exception was that the common law recognized only the territorial theory of criminal jurisdiction. The common law judges did not hesitate to punish the pirate, wherever his piracy had been committed, but in doing so they were not applying the common law but the law of nations. And in deciding *Hanks*, it may be added, the court relied entirely upon a statute which expressly granted jurisdiction over the type of offense involved.

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3. *Id.* at 309.

4. "Pirates may, without doubt, be lawfully captured on the ocean by the public or private ships of every nation, for they are, in truth, the common enemies of all mankind, and, as such, are liable to the extreme rights of war." The Marianna Flora, 24 U.S. (11 Wheat.) 1, 40 (1826). "As an international crime it is within the jurisdiction of all maritime states wheresoever or by whomsoever committed." Dickinson, *Is the Crime of Piracy Obsolete?* 38 HARV. L. REV. 334, 335 (1925).

5. Blackstone, it is true, speaks of "the offence of piracy, by common law; . . ." but this is in his Chapter V "Of Offences against the Law of Nations," and he explains that the law of nations was adopted and "held to be a part of the law of the land." 4 BLACKSTONE, COMMENTARIES *69, 67. In like manner the law merchant, although distinct from the strict common law, became a part of the common law in the sense that it was not statutory law.
It would have been surprising if the common law had adopted any basis for criminal justice other than the territorial principle, because the beginning of our criminal justice in the troublous days of the dawn of civilization in the British Isles was concerned so exclusively with the problem of keeping the peace. This is evident from the old indictments which all concluded with some such phrase as "against the peace of the King." And the territorial principle was in fact adopted by the English judges in those early days, was carried forward there and into this country, and became so firmly entrenched as to call forth the statement that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."

Peculiarities of procedure resulted in a restricted application not inherent in the principle itself. It made its first appearance in the homicide cases. The grand jurors, before additional authority was granted by Parliament, could inquire only into happenings in the county for which they were sworn and could not inquire into any fact done outside of that county.

And to so high a nicety was this matter antiently carried, that where a man was wounded in one county, and died in another, the offender was at common law indictable in neither, because no complete act of felony was done in any one of them. While this was corrected by statute which, in such a case, authorized an indictment in the county in which the death should happen, it led to the conclusion that each crime has a situs which, in the absence of statute, determines the jurisdiction over that offense. The situs of homicide was held to be where the fatal force impinged upon the body of the victim.

6. "All offences are either against the King's peace, or his crown and dignity; and are so laid in every indictment." 1 BLACKSTONE, COMMENTARIES *268.

7. American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909). "It is fundamental that jurisdiction in criminal matters rests solely in the courts of the state or country in which the crime is committed. The nationality or citizenship of the offender is immaterial." Comment, Jurisdiction Over Interstate Homicides, 10 LA. L. REV. 87, 88 (1949). "Every offender must be prosecuted for his offense in the place where the offense was committed." Levitt, Jurisdiction Over Crimes, 16 J. CRIM. L.C. & P.S. 316, 324 (1925).

8. 4 BLACKSTONE, COMMENTARIES *303.

9. Id. In this country if the fatal force is received in one state or county, and death results therefrom in another, only the former has jurisdiction of the homicide in the absence of statute. State v. Carter, 27 N.J.L. 499 (Sup. Ct. 1859). Under an appropriate statute jurisdiction may be in either. Commonwealth v. Macloon, 101 Mass. 1 (1869).

This, together with another equally arbitrary and unnecessary rule, resulted in one of the most bizarre miscarriages of justice on record. H, standing in North Carolina, fired across the state line a shot which hit and killed B who was in the state of Tennessee. As there seemed to be no justification, excuse or mitigation for the killing, H was arrested in North Carolina, tried and convicted there for the murder of B. This conviction was reversed on the ground that since the fatal force took effect on the victim in Tennessee, only that state had jurisdiction over this offense. And later, when H was being held in custody to be turned over to Tennessee authorities in extradition proceedings, he was released by a writ of habeas corpus on the ground that the Constitution and statutes of the United States call for extradition of one "who shall flee from justice"—and no other, and H who had not been in Tennessee had obviously not fled therefrom. In each case the North Carolina court emphasized that the unfortunate result could have been avoided had there been appropriate state legislation.

The restricted application of the territorial principle was expressed in this form: "'Jurisdiction' to punish was given . . . to the state in which the actor's bodily movements 'took effect,' even though the physical motion, the 'act' in that sense, of the accused, occurred in another state." The development of this restricted application (prior to change by statute) reached such results as these: Where different jurisdictions are involved, the offense of obtaining property by false pretenses is triable where the property is obtained and not where the false pretense is made; robbery is triable where the property is taken from the victim and not where he was first seized, or where the property is subsequently taken; forgery is committed where the false instrument is made, and uttering a forged instrument is committed where it

13. The conviction of Hall in the first case could have been upheld if the state had had a so-called "in whole or in part" statute to be mentioned presently. And he would not have been released by habeas corpus if the state had had a statute embodying the authority found in section six of the present Uniform Criminal Extradition Act. This section, in substance, authorizes the governor to order the arrest and extradition of one who is not a "fugitive" in the constitutional sense if, while not being within the demanding state, he committed an act "intentionally resulting in a crime" therein.
15. Connor v. State, 29 Fla. 455, 10 So. 891 (1892).
17. 2 M. HALE, Pleas of the Crown *163.
is actually offered as genuine;\textsuperscript{18} receiving stolen property is committed at the place of receipt;\textsuperscript{19} libel is committed at the place of publication;\textsuperscript{20} bigamy is committed where the bigamous ceremony is performed;\textsuperscript{21} the offense of sending a threatening letter is committed where the letter is received;\textsuperscript{22} subornation of perjury is committed where the false testimony is given and not at the place where the suborner was when he exercised his influence over the witness;\textsuperscript{23} and an assault with intent to murder by shooting across the state line is committed where the intended victim was at the time.\textsuperscript{24}

One offense, larceny, did not receive this restricted application of the territorial principle. By resort to the so-called “continuing trespass” theory, the thief was indictable either in the county in which the goods were originally taken or in any county into which he later carried them.\textsuperscript{25} This was extended to include goods stolen in Scotland and carried into England, or vice versa, because it was all within the “United Kingdom.”\textsuperscript{26} In the application here some courts upheld the larceny conviction of a thief who brought into the jurisdiction goods he had stolen in another state,\textsuperscript{27} whereas others limited it to different counties within the state\textsuperscript{28} until a statute had expressly extended jurisdiction over the other situation.\textsuperscript{29}

The restricted application of the territorial principle did not necessitate selection of the place where the harm took effect as the situs of the crime. In fact, had it not been for the peculiar way in which the holding was developed, the place where the wrongdoer was at the moment of perpetration might well have been selected as the situs of the crime. But the development pushed in the other direction. The starting point, as mentioned earlier, was a homicide in which the stroke received in

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\item \textsuperscript{18} State v. Hudson, 13 Mont. 112, 32 P. 413 (1893).
\item \textsuperscript{19} State v. Rider, 46 Kan. 332, 26 P. 745 (1891).
\item \textsuperscript{20} Commonwealth v. Blanding, 20 Mass. 304 (1825). Compare State v. Moore, 140 La. 281, 72 So. 965 (1916), in which the court in applying this concept used “publication” in the popular meaning rather than the legal sense of “making known.”
\item \textsuperscript{21} 1 M. Hale, Pleas of the Crown *692-93.
\item \textsuperscript{22} The King v. Girdwood, 168 Eng. Rep. 173 (K.B. 1776).
\item \textsuperscript{23} Commonwealth v. Smith, 93 Mass. (11 Allen) 243 (1865).
\item \textsuperscript{24} Simpson v. State, 92 Ga. 41, 17 S.E. 984 (1893).
\item \textsuperscript{25} 1 M. Hale, Pleas of the Crown *507.
\item \textsuperscript{26} 4 Blackstone, Commentaries *305.
\item \textsuperscript{27} State v. Bennett, 14 Iowa 479 (1863); Worthington v. State, 58 Md. 403 (1882).
\item \textsuperscript{28} Simpson v. State, 23 Tenn. 455 (1844); Strouther v. Commonwealth, 92 Va. 789, 22 S.E. 832 (1895).
\item \textsuperscript{29} Henry v. State, 47 Tenn. 279 (1870). See People v. Merrill, 2 Parker’s Crim. Rep. 390, 396-98 (N.Y. Super. Ct. 1855).
\end{itemize}
one county resulted in death in another, with the common law impasse being solved by an act of Parliament expressly authorizing indictment in the latter county in such a case. The next step was a killing in which both the stroke and the death happened in one county from a a fatal force started by the slayer in another. The statute clearly authorized indictment for this homicide in the county in which the victim had been stricken and had died, whereas there was no statute authorizing an indictment in the county where the killer had been at the time. The assumption, that in the absence of statute a crime can be recognized as having been committed at one place only, left one point clear: the situs of the homicide depended not upon the location of the slayer but upon the location of the victim. The next point is not so clear. Despite the apparent impasse, Hale tells us where

a man had been stricken in one country and died in another . . . the more common opinion was, that he might be indicted where the stroke was given, for the death is but a consequent, and might be found in another county . . . and if the party died in another county, the body was removed into the county, where the stroke was given, for the coroner to take inquest super visum corporis. But application of the statute, enacted to prevent a possible miscarriage of justice, was not mandatory. It merely permitted the indictment to be found in the county in which the death should happen. Apparently the practice of carrying the body from the county in which death occurred back to the county in which the mortal stroke was received continued after the statute was passed; East tells us that "it seems from some authorities that the election to prosecute the appeal in either county still continues." And in upholding an indictment which alleged that the victim died in another county, Mr. Justice Patterson said: "The giving of blows which caused the death constitutes the felony." In any event, as the rule ultimately crystallized, it came to be, as previously stated, that the situs of criminal homicide was held to be where the fatal force impinged upon the body of the victim.

30. 1 M. Hale, Pleas of the Crown *426.
31. 2 & 3 Edw. 6, c. 24 f.2.
32. 1 E. East, Pleas of the Crown 362.
33. Rex v. Hargrave, 5 Car. & P. 170, 171, 172 Eng. Rep. 925, 926 (1831). The English statute was held to be common law in Missouri, and to authorize prosecution for murder either in the county in which the injury was received or the county in which death resulted. State v. Blunt, 110 Mo. 322, 338, 19 S.W. 650, 654 (1892).
34. In speaking of homicide it was said, "the criminal act is the impinging of the weapon, whatever it may be, on the person of the party injured, and that must necessarily be where the impingement happens." State v. Carter, 27 N.J.L. 499, 500 (1859); accord, United States v. Davis, 25 F. Cas. 786 (No. 14,982) (C.C.D. Mass. 1837); Green v. State, 66 Ala. 40 (1880); Commonwealth v. Apkins, 148 Ky. 207, 146
In explaining the result thus reached by the restricted application of the territorial principle, many judges made an unnecessary assumption—that the defendant must be present in the jurisdiction in which the death occurred—which then required resort to fiction. A Georgia court stated:

Of course, the presence of the accused within this State is essential to make his act one which is done in this State; but the presence need not be actual. It may be constructive. The well established theory of the law is, that where one puts in force an agency for the commission of crime, he, in legal contemplation, accompanies the same to the point where it becomes effectual. 35

And in this case the court pushed the fiction to the border of absurdity. It was a prosecution for assault with intent to murder based upon a shot fired into the state. The explanation continued:

He started across the river with his leaden messenger, and was operating it up to the moment when it ceased to move, and was therefore, in a legal sense, after the ball crossed the state line up to the moment that it stopped, in Georgia. 36

If that is the correct explanation for the result, the offense would not have been triable in Georgia if the victim had been spared because the bullet happened to lodge in a tree on the other side of the boundary. A judge like Holmes would scorn the fiction and say:

Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power. 37

The judges, in discussing the common law situs of a crime, it would be emphasized, when referring to an act in one state producing a "detrimental effect" in another, had reference to a direct physical effect and not some harm resulting indirectly. They had in mind some-

S.W. 431 (1912); State v. Foster, 8 La. Ann. 290 (1853); State v. Gessert, 21 Minn. 369 (1875); State v. Cream, 43 Mont. 47 (1911). "The great weight of the decisions hold that, independent of any statutory provision upon the subject, the crime is committed, and is punishable in the jurisdiction where the fatal wound or blow is given. In other words, that it is not the place of death. . . ." Debney v. State, 45 Neb. 856, 859-60, 64 N.W. 446, 447 (1895).


36. Id. at 46, 17 S.E. at 986.

37. Strassheim v. Daily, 221 U.S. 280, 285 (1911), quoted with approval in Charron v. United States, 412 F.2d 657, 659 (9th Cir. 1969). "To speak of constructive presence is to use the language of fiction, and so to hinder precise analysis. When a man is said to be constructively present where the consequences of an act done elsewhere are felt, it is meant that for some special purpose he will be treated as he would have been treated if he had been present, although he was not." Hyde v. United States, 225 U.S. 347, 386 (1912) (Holmes, J., dissenting).
thing such as a fatal force started in one state which impinged upon the
body of the victim in another, or a false pretense made in one state
which resulted in the victim parting with his property in another. A
state may be harmed by the forgery of its securities abroad even if the
forgeries remain abroad. If it becomes known that such forgeries have
been made, this may cause hesitation in the buying of genuine securi-
ties for fear that they may not be genuine. Hence such forgeries
abroad are properly within the injured forum principle but not within
the territorial. A crime is not committed within the jurisdiction under
the territorial principle unless at least some part of the offense is there
committed.

Nothing inherent in the territorial principle of criminal jurisdic-
tion requires the recognition of only one point where the actual perpe-
tration of the crime has covered two or more. And modern legislation
has tended to remove the restriction developed by the common law.
The most common enactment for this purpose has been the so-called
"in whole or in part statute." The wording is in some such form as that
punishability under the laws of the state shall include "all persons who
commit, in whole or in part, any crime within this state." Under such
a provision it was held that a person who caused the death of another
in Delaware, by mailing a box of poisoned candy from California, was
properly triable for this murder in California.

The wording of such a statute has been criticized as inaccurate.
The argument is that as a matter of scientific jurisprudence, in the case
mentioned, while the homicide was committed partly in California and
partly in Delaware, the California crime—the violation of California
law—was committed wholly in California. This has not tended in

38. In one case it was indicated that a statute expressly providing for the punish-
ment of those who should forge the state's securities outside the state was unconsti-
tutional. State v. Knight, 1 N.C. 44 (1799). But in this case the defendant was not
represented by counsel and the court ordered the prosecution dismissed because of
doubt as to the validity of the statute. The possibility of statutory authority for juris-
diction over crime beyond the territorial principle seems not to have been considered.

39. CAL. PEN. CODE § 27.

40. People v. Botkin, 132 Cal. 231, 64 P. 286 (1901). For an offense to be pun-
ishable under the "in whole or in part" statute what was done within the state must
have been sufficient to constitute an attempt to commit the crime if nothing more had

41. This argument seems not to have found its way into the printed record. But
when the American Law Institute's Code of Criminal Procedure was being drafted, it
was this argument in the committee room which prevented the inclusion of an "in whole
or in part" section in the proposed code. Such a provision received only casual mention
in the commentaries. ALI CODE OF CRIMINAL PROCEDURE 693 (official draft with com-
mentaries 1931).
the least to prevent the carrying out of the legislative intent, as in the case mentioned, but at times has resulted in an additional legislative effort, such as the following:

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. Where only one state is involved, there is not even any theoretical objection to a statute which places the venue in any county in which any part of an offense is committed.

Although the territorial principle was considered the exclusive basis of criminal jurisdiction by the common law, the judges did not hesitate to recognize the legislative power to establish jurisdiction on some other basis. Thus in Hanks, mentioned above, the statute was drawing upon the injured forum principle because the forgery in Louisiana, while it might cast a cloud upon the title to Texas land, could not, by any extension, be brought under the territorial principle. And an English statute in the early 1800's applied the Roman principle in a statute which provided for the punishment of any English subject for murder or manslaughter committed by him "whether within the King's Dominions or without." In this country it was assumed at one time that the Federal Government could, by statute, exercise criminal jurisdiction on the Roman principle, but that the individual states could not. The Supreme Court, however, did not recognize this limitation. Thus in Skiriotes the court held it was within the power of

42. "Fortunately courts . . . have therefore never, so far as I am aware, doubted the validity of legislation giving authority to punish to the courts of the state in which the accused was and in which he actually moved his body, even though the results of such bodily action take place beyond the territorial limits." Cook, The Logical and Legal Bases of the Conflict of Laws, 33 Yale L.J. 457, 463 (1924).
43. CAL. PEN. CODE § 778a. See 18 U.S.C. § 3237 (1964) which deals with offenses begun in one district and completed in another.
44. CAL. PEN. CODE § 781.
46. 9 Geo. 4, c. 31, § 7 (1828). The validity of this statute was upheld in Regina v. Azzopardi, 174 Eng. Rep. 776 (N.P. 1843).
47. "A nation recognized as such in the law of nations has jurisdiction over its nationals wherever they may be to require or forbid them to do an act unless the exercise of this jurisdiction involves the violation of the laws or public policy of the state where the national is." RESTATEMENT OF CONFLICTS OF LAW § 63 (1934). See People v. Merrill, 2 Parker's Crim. Rep. 590, 602 (N.Y. Super. Ct. 1855).
Florida to punish specified acts by its citizens in the Gulf of Mexico outside any territorial limits, where there is no conflict with acts of Congress.

In the so-called common law countries, all criminal jurisdiction not based upon the territorial principle must have statutory authority, and a discussion of such legislation is beyond the scope of the present undertaking except where a conflict may result. But the territorial principle holds such a dominant position that no state may punish its citizen for what he does in the exclusive territorial jurisdiction of another state where what was done was lawful. California could not validly make it a crime for its citizens to "play the slot machines" in Las Vegas, Nevada, where this is lawful. Such a statute would violate the full faith and credit clause.49

Under concurrent jurisdiction the problem is not so simple. Where a river forms the boundary between two states, the actual physical boundary is (in most instances) the center of the main navigable channel of the river.50 By act of Congress, however, the states have been given concurrent jurisdiction over the river.51 And while this is an extension because it goes beyond the actual territory of the state, it is jurisdiction under the territorial principle. An example is that Washington and Oregon have, by act of Congress, concurrent jurisdiction over the Columbia River where it forms their common boundary.52

Oregon had a statute making it an offense to fish with a purse net in the Columbia River and N, a citizen of Washington who had a Washington license to fish there with a purse net, was convicted in Oregon although his fishing had been on the Washington side of the river. This conviction was affirmed by the Oregon Court,53 but reversed

49. U.S. CONST. art. IV, § 1. "Full faith and credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State."
50. Iowa v. Illinois, 147 U.S. 1 (1893). For a different provision see Welsh v. State, 126 Ind. 71, 25 N.E. 883 (1890), where the states had concurrent jurisdiction over the river, although the low watermarks on each side of the river constituted the boundaries of the respective states.
51. See, e.g., Act of April 18, 1818, ch. 67, § 2, 3 Stat. 428.
52. By section 1 of the Act of Congress of March 2, 1853, ch. 90, 10 Stat. 172, all that part of the Territory of Oregon lying "north of the middle of the main channel of the Columbia River" was organized into the Territory of Washington, and by section 21 it is provided "that the Territory of Oregon and the Territory of Washington shall have concurrent jurisdiction over all offences committed on the Columbia River, where said river forms a common boundary between said Territories." This was extended to include "jurisdiction in civil and criminal cases" in the act of Congress admitting Oregon into the Union. Act of February 14, 1859, ch. 33, § 1, 11 Stat. 383.
by the Supreme Court of the United States. Concurrent jurisdiction, the Court said in substance, cannot authorize Oregon to punish what is done in Washington where it is lawful.

If Oregon had a statute expressly making it an offense for an Oregon citizen to fish with a purse net anywhere in the Columbia River where it forms the Oregon boundary and a citizen of Oregon should engage in such fishing even though exclusively on the Washington side of the river where such fishing was not unlawful under Washington law, a conviction in Oregon might possibly be upheld. A state may not by exercise of the Roman principle make criminal that which is done in the exclusive territorial jurisdiction of another state where it is lawful. And concurrent territorial jurisdiction will not authorize one state to punish what is done in the actual territory of the other, where it is lawful. But a combination of the Roman principle of jurisdiction coupled with concurrent (territorial) jurisdiction might be sufficient to uphold such a conviction in Oregon. This is a point not yet decided by the Court.

The territorial principle, with the constitutional limitation which does not permit one state to punish what is done within the exclusive territorial jurisdiction of another state, may be considered in other applications. The so-called "in whole or in part" statute is intended primarily to deal with the case in which the actor is himself in the enacting state when he does what results in the consummation of the harm in another state—such as killing by shooting across the state line. No statute is needed to give jurisdiction to the second state because that state has jurisdiction under the common law. What is done within the scope of the "in whole or in part" statute is not within the exclusive jurisdiction of another state since by definition it is done partly within the enacting state. Hence the limitation mentioned above does not apply.

A statute which prohibits leaving the state with intent to do what is therein prohibited is within the territorial principle because such a crime is held to have been committed within the territory of the state. Doing

56. In theory, at least, it would apply to an intermediate state in which part of the crime was committed.
57. E.g., People v. Botkin, 132 Cal. 231, 64 P. 286 (1901).
58. In State v. Hall, 114 N.C. 909, 922, 19 S.E. 602, 606 (1894), it was mentioned that Tennessee had such a statute although not essential to its jurisdiction of such a crime.
the prohibited act in another state is not the crime under such an enactment, but only evidence of the intent at the time of leaving. Such a statute may be worded in some such terms as:

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

There may be a valid conviction under such a statute even if what was ultimately done was lawful where done, because the very intent of the enactment is to punish the inhabitant for leaving the state to do what is prohibited within the state.

In the common law the territorial principle was the exclusive basis for criminal jurisdiction, but the English judges could not conceive of Englishmen being where there was no law. Hence if Englishmen went to an uninhabited island or a land inhabited only by savages, the impermissible vacuum was avoided by holding that the English law was taken to such a place. This has something of the appearance of the Roman principle, but the theory was entirely different.

Where Englishmen establish themselves in an uninhabited or barbarous country, they carry with them not only the laws, but the sovereignty of their own State; and those who live amongst them and become members of their community become also partakers of and subject to the same laws.

So controlling is the territorial principle of criminal jurisdiction in the so-called common law countries that a statute intending to establish such jurisdiction on some other principle must be very specific. The English statute mentioned which established the Roman principle for the offenses of murder and manslaughter expressly spoke of such offenses committed by his Majesty's subjects "whether within the King's dominions or without." This was sufficiently specific and was upheld, as mentioned above, but mere use of general words, broad enough to go beyond the territorial principle, will not be interpreted to accomplish that result.

60. Cal. Pen. Code § 231. The venue is in the county of which the offender was an inhabitant when the offense was committed. Id. § 780.
63. 9 Geo. 4, c. 31, § 7 (1828).
MacLeod is an excellent example. In this case defendant had been convicted of bigamy in New South Wales on proof that, having first married in that colony, he later married another woman in St. Louis, Missouri while the first wife was still living and not divorced. The conviction was under this statute:

Whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years.

This conviction was reversed by the Judicial Committee of the Privy Council. It was held that "whosoever" as here used means whosoever and so forth "and who is amenable, at the time of the offence committed, to the jurisdiction of the Colony of New South Wales," and that "wheresoever" as used in the statute means "wheresoever in this colony the offense is committed."

It may be that the legislative body intended to extend jurisdiction over bigamy by adding the Roman principle to the territorial, but this result could not be achieved without words so specific as to be unmistakable, because "every statute is presumed to be enacted with reference to the local jurisdiction of the legislature of each state." This presumption, perhaps thought of at one

65a. Id. at 456.
66. Id. at 457.
67. The court said that if the ordinary meaning were given to the words, "it would have been beyond the jurisdiction of the Colony to enact such a law." Id. at 458. As the court emphasized both "whosoever" and "wheresoever" it was obviously thinking in terms of the cosmopolitan principle rather than the Roman. Extending jurisdiction over the offense of bigamy by addition of the Roman principle would have done no more than England had done with the crimes of murder and manslaughter.
68. The general words of a statute that "every person" who and so forth, must be interpreted to mean who does what is thus prohibited within the territory of this state. People v. Merrill, 2 Parker's Crim. Rep. 590, 601 (N.Y. Super. Ct. 1855).

The nature of the crime itself might be such as to indicate very clearly an intent to extend it beyond the territorial theory, such as the law making it an offense for a United States consul knowingly to certify a false invoice, which is used for illustration in United States v. Bowman, 260 U.S. 94, 99 (1922). Additionally, see the other illustrations given there and the statute actually involved in the case.

In People v. Foretich, 14 Cal. App. 3d Supp. 6, 92 Cal. Rptr. 481 (Super. Ct. App. Div. 1970), this interpretation was recently applied to a statute reading: "It is unlawful to use or operate or assist in using or operating any net, trap, line, spear, or appliance, other than in connection with angling, in taking fish, except as provided in this chapter or Chapter 4 of this part." CAL. FISH & GAME CODE § 8603. This very questionable application was assumed to be supported by Skiriotes v. Florida, 313 U.S. 69 (1942), in which the Supreme Court made no attempt to interpret the Florida statute but held only that the statute, as interpreted by the state court, did not "transcend the limits of" state power.

time as conclusive, may be overcome by an unmistakable manifestation of the legislative intent, but not by words merely broad enough for such a possible interpretation.

The territorial principle of criminal jurisdiction extends to the ships of the nation which are its "floating territory," so to speak.\(^70\) So far as the territorial principle per se is concerned, this jurisdiction is exclusive when the vessel is on the high seas\(^71\) and concurrent when it is in a foreign port, in which situation the local jurisdiction is dominant.\(^72\) The established practice, however, is for the local jurisdiction to be exercised only in rather extreme cases. As said in a famous case:

And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require. But if crimes are committed on board of a character to disturb the peace and tranquillity of the country to which the vessel has been brought, the offenders have never by comity or usage been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority.\(^73\)

For an offense to disturb the peace and tranquillity of the port, it is not essential that the crime be such that it was known outside the vessel at the time.

If the thing done—"the disorder," as it is called in the treaty—is of a character to affect those on shore or in the port when it becomes known, the fact that only those on the ship saw it when it was done, is a matter of no moment.\(^74\)

Hence a Belgian who killed another Belgian on a Belgian ship in a

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70. "Upon the high seas, every vessel, public or private, is, for jurisdictional purposes, a part of the territory of the nation of its owners." People v. Tyler, 7 Mich. 160, 209 (1859).

71. Id. See also United States v. Holmes, 18 U.S. (5 Wheat), 412, 417 (1820). "The term 'high seas' does not . . . indicate any separate and distinct body of water; but only the open waters of the sea or ocean, as distinguished from ports and havens and waters within narrow headlands on the coast." United States v. Rodgers, 150 U.S. 249, 254-55 (1893).

72. "It is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement . . . ." Wildenhus's Case, 120 U.S. 1, 11 (1887).

73. Id. at 12.

74. Id. at 17.
New Jersey port was held for trial in New Jersey although the killing was with a knife and was known at the time only by other members of the crew on board.\textsuperscript{75}

Whatever the nature of the offense, the "home" country will not hesitate to try the offender if the local government does not see fit to do so. In one case,\textsuperscript{76} for example, the defendant, an American citizen, while a member of the crew of a vessel sailing under the British flag, killed another on board the vessel at a time when it was in the river Garonne, within the boundaries of the French empire. Having been charged with the murder in England, the accused claimed there was no jurisdiction to try him there. He was convicted of manslaughter. In affirming the conviction, the court said:

Although the prisoner was subject to the American jurisprudence as an American citizen,\textsuperscript{77} and to the law of France as having committed the offence within the territory of France, yet he must also be considered as subject to the jurisdiction of British law, which extends to the protection of British vessels, though in ports belonging to another country.\textsuperscript{78}

Novel situations developing in the "space age" have given rise to searching questions.\textsuperscript{79} One, which seems not to require extensive discussion is this: What would be the legal situation if in some future venture one of our astronauts should kill another, in the spaceship, while far out in space? The answer is obvious. Just as a waterborne vessel on the high seas is part of the "floating territory" of the nation whose flag it flies,\textsuperscript{80} and the people thereon fully under its jurisdiction, so a spaceship in space is part of the "flying territory" of the nation from which it was launched, and the astronauts therein fully accountable under its laws.

The question which seems to have given rise to the greatest controversy is this: If in some future moonlanding venture one of our astronauts should kill another after the spaceship had landed and the men were walking about on the moon, would there be any law applicable to this homicide?

For the answer to this question we need to turn to the common law of England. While this law did not adopt the Roman theory of

\textsuperscript{75} Id.  
\textsuperscript{76} Regina v. Anderson, 11 Cox Crim. Cas. 198 (1868).  
\textsuperscript{77} The court apparently assumed that the United States exercised the Roman principle of criminal jurisdiction in homicide cases.  
\textsuperscript{78} 11 Cox Crim. Cas. at 204.  
\textsuperscript{79} What follows did not appear in the original article because the problems had not received widespread attention at the time it was prepared.  
\textsuperscript{80} People v. Tyler, 7 Mich. 161, 209 (1859).
jurisdiction, it refused to accept any such concept as a legal vacuum. To repeat an earlier quotation:

Where Englishmen establish themselves in an uninhabited or barbarous country, they carry with them not only the laws, but the sovereignty of their own State; and those who live amongst them and become members of their community become also partakers of and subject to the same laws. 81

This, of course, is the basis of our common law in this country. When the English colonists came to these shores, finding no law here—or at least none that they recognized—they brought with them the English law. And this included not only the common law but the English statutes in force at that time. 82 "The common law is all the statutory and case law background of England and the American colonies before the American Revolution." 83

Hence with us, as in England, there is no such concept as a legal vacuum. If our people go to an uninhabited or barbarous place they carry with them not only the laws, but the sovereignty of the United States. Our astronauts who land on the moon are as completely subject to the federal law as if they had landed upon ground under the special territorial jurisdiction of the United States. 84

This does not mean that since our astronauts were first on the moon, the entire satellite is our territory, continuously subject to our law. The English colonists did not bring the law of England to this entire continent, but only to the part occupied by them and their followers and descendants. And had they all given up and returned to England they would have taken the English law back with them, leaving this continent as they had found it. If the decision to return had been made very promptly, but not until one Englishman had killed another on land here, the slayer would have been triable in England for that homicide. 85

81. Note 62 supra.
82. "These statutes being passed before the emigration of our ancestors, being applicable to our situation, and in amendment of the law, constitute a part of our common law." Patterson v. Winn, 30 U.S. (5 Pet.) 233, 241 (1831) (Story, J.).
83. People v. Rehman, 253 Cal. App. 2d 119, 150, 61 Cal. Rptr. 65, 85 (1967). As implied in Story's statement in the preceding note, this is subject to a slight qualification. A few of the provisions of the English law, such as those based upon feudalism, were not appropriate to the conditions here and were not recognized in this country.
85. This would have been long before an English statute had applied the Roman theory of criminal jurisdiction to English subjects who commit homicide abroad. See note 39 supra. But it is a necessary result of the concept of no legal vacuum.

The reference to Englishmen who "establish" themselves in an uninhabited coun-
The answer to the question posed is that if, during some future venture, one of our astronauts should kill another after they had landed on the moon and were walking around on the satellite, he would be triable for that homicide in the federal district court of the district in which he landed on his return, or any district in which he was found.\textsuperscript{86} If only two had gone on that particular trip there might be no evidence to convict of either murder or manslaughter. Even so the slayer could not safely boast of what he had done.\textsuperscript{87}

This leaves one important question unanswered: If on some future moonlanding adventure American astronauts and Russian astronauts (for example) should happen to land at the same time, and at approximately the same place, and moments later, while walking on the surface of the moon, a member of one group should kill a member of the other—what is to be said as to jurisdiction of this homicide if it is claimed to have been without justification or excuse?

The early judges did not give consideration to the problem arising out of the coincidental appearance of Englishmen and the nationals of another country at some barbarous or uninhabited place. They were clear that if the Englishmen were there first they took the laws and sovereignty of England with them and if others joined them they were "partakers of, and subject to the same laws."\textsuperscript{88} This would mean that the Englishmen, if they reached such a place already occupied by the others, would be subject to the laws of the other nation. We have, however, no firm basis for an answer to the question posed.

Rather than leave it unanswered until the factual situation is actually presented, it would be wise to have the situation covered by appropriate federal legislation. The act of Congress could be patterned

\textsuperscript{86} "The trial of all crimes . . . shall be held in the State where the said Crime 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." U.S. Const. art. III, § 2, cl. 3. "The accused in criminal prosecutions is entitled to a trial in the state and district wherein the crime was committed." \textit{Id.}, amend. VI.

If the crime were committed out of the jurisdiction of any state or district, the trial shall be in the district where the offender is found, or into which he is first brought. 28 U.S.C. § 102 (1964).

\textsuperscript{87} With reference to the corpus delicti rule, it may be pointed out that this would be entirely different from the ordinary case of a missing person. Under anything like present conditions, if two make a trip to the moon and only one returns, we would not need more to be satisfied that the other was dead. See R. \textit{Perkins}, CRIMINAL LAW 97-100 (2d ed. 1969).

\textsuperscript{88} Note 62 & accompanying text, \textit{supra}.
somewhat after the suggestion found in a proposed new Federal Criminal Code. This provision is to the effect that federal jurisdiction is to be extended to include an offense if it "is committed by or against a national of the United States outside the jurisdiction of any nation." 89

This would give the United States extraterritorial criminal jurisdiction by the exercise of the Roman principle (by a national of the United States) and the injured forum principle (against such a national). The power of Congress to extend criminal jurisdiction beyond the territorial in appropriate cases is well recognized, 90 but the suggested statute seems to be, in some respects, too broad, and in others too narrow. The wording would seem to give the federal courts jurisdiction over cases that from the first have been dealt with exclusively as state offenses. 91 An ordinary murder on Market Street in San Francisco, for example, is an offense "committed . . . outside the jurisdiction of any nation," 92 because California is not a nation. 93 On the other side, the suggested wording is questionable because of the emphasis placed by many countries on the Roman principle of criminal jurisdiction. Because of the French statute on the subject 94 it is arguable that no place where a citizen of France happens to be is "outside the jurisdiction of" France.

Despite possible arguments against these conclusions, it would seem wise to avoid controversy by wording such a statute in terms of extending the jurisdiction of the federal courts to include "an offense committed by or against a national of the United States outside the territorial jurisdiction of any state or nation."

89. STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE § 208(h) (1970) (prepared by the NAT'L COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS established pursuant to Pub. L. No. 89-801 (Nov. 8, 1966)).


91. One writer, without specific reference to the section quoted, says: "This study draft, if enacted, will be the charter of a national police force, with all this implies." Liebmann, Chartering a National Police Force, 56 A.B.A.J. 1176, 1180 (1970).

92. See note 89 supra.

93. Such a crime is within the United States but it is not "an offense within the jurisdiction of the United States" unless there is some federal aspect involved. That requirement would be satisfied if the victim were a federal marshal engaged in the performance of his official duties. 18 U.S.C. § 1114 (1964).

94. "Any French citizen who outside the territory of the Republic renders himself guilty of an act qualified as a felony punished by French law may be prosecuted and tried by French courts." FRENCH CODE OF CRIM. PRO., art. 689 (G. Kock transl. 1964). The second paragraph of the article makes a similar provision as to misdemeanors limited, for the most part, to acts punishable where committed.