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SPATIAL LEGALITY

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ABSTRACT—For too long, state interests have dominated public jurisdiction and private choice of law analyses regarding the reach and application of a state's law, or prescriptive jurisdiction. Individual rights—whether of criminal defendants or private litigants—have been marginalized. Yet states are projecting regulatory power over actors abroad with unprecedented frequency and aggression. State interest analyses proceed from the perennially critiqued but remarkably sticky concept of sovereignty. Now more than ever, legal thinkers, courts, and litigants need a bedrock concept from which to build individual rights arguments against jurisdictional overreach. And it should be one that holds not only theoretical cogency but also the promise of real-world traction in cases.

This Article introduces the concept of spatial legality. It recasts the familiar and deeply rooted notion of legality—that is, the idea of fair notice of the law—along spatial as well as temporal dimensions. Operating in time, legality vindicates individual rights, for example by prohibiting ex post facto laws. Spatial legality focuses on law's reach in space rather than its existence in time, but the problem is essentially the same: someone is being subjected to a law he could not reasonably have expected would govern his conduct when he engaged in it.

The Article begins by taking extant rules of jurisdiction in multistate systems and transforming them through the concept of spatial legality into a right to fair notice of the law applicable at the time of conduct. It then shows how a jurisdictional mix-up metastasizing in both U.S. and international law is presently aggravating spatial legality problems: namely, the use of personal jurisdiction over parties to bootstrap application of substantive law to their extraterritorial conduct. The mix-up occurs (1) on the criminal side, by using a defendant's postconduct presence in the forum to justify applying substantive law to prior conduct outside the forum, and (2) on the civil side, by using "general" personal jurisdiction over parties to justify applying forum law to activity outside the forum. Reorienting jurisdictional doctrine around the rights of parties instead of states generates important doctrinal and litigation payoffs: it clarifies and straightens out the law for courts and, where courts do err, supplies parties with rights-based arguments to challenge such errors as opposed to state-based arguments about sovereignty and comity. In this connection, the Article proposes a typology that weaves together public jurisdiction and private choice of law doctrines to identify how and when spatial legality claims will have the most traction on the current state of the law. It concludes by indicating the

limits of a spatial legality concept based only on notice and suggests other rule of law criteria like feasibility of compliance, avoidance of contradictory laws, and consistency that, going forward, may further inform analysis of the demands multistate systems with overlapping laws place on fundamental fairness.

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INTRODUCTION 71
I. SPATIAL LEGALITY 77
 A. *Postconduct Presence* 83
 B. *General Jurisdiction* 94
II. SOVEREIGNTY 104
III. TYPOLOGY 110
 A. *Absolute Conflicts* 112
 B. *True Conflicts* 114
 C. *False Conflicts* 117
 D. *Harmonization* 120
CONCLUSION 123

INTRODUCTION

The principle of legality constitutes a central pillar of any sophisticated legal system.[1] Its traditional Latin formulation is "*nullum crimen sine lege, nulla poena sine lege*," or "no crime without law, nor punishment without law."[2] At its most basic, the idea is that conduct cannot be subjected to a legal rule without adequate notice that the rule applies at the time of the conduct.[3] To violate the principle not only would be unfair in a particular case, it also would undermine the legal system itself. Indeed, the principle plunges to the root legitimacy of law: if people cannot predict how law will

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[1] The principle "dates from the ancient Greeks" and is one of the most "widely held value-judgment[s] in the entire history of human thought." JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 59 (photo. reprint 2005) (2d ed. 1960).

[2] Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 336 (2005).

[3] The principle is about adequate notice of an applicable law and not merely the existence of a law. Imagine a legislature passed a secret law. The law would exist, but its application would violate the principle of legality in the same way, and for the same reasons, as if there were no law at the time of the conduct. *See* KENNETH S. GALLANT, THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW 20 (2009) ("Notice requires not only that a law has been in existence but also that it has been applicable to the actor at the time of the act."). Also, for purposes of this Article, I put to the side the related doctrine of void for vagueness, which also triggers fair notice problems. *See* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 196 (1985) (describing the relationship between the void for vagueness and legality principles); *see also* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2718 (2010) ("A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." (quoting United States v. Williams, 553 U.S. 285, 304 (2008))); Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential [element] of due process of law.").

treat their behavior, law in turn loses legitimacy and effectiveness as a tool for shaping behavior.[4] Put another way, the less I am able to predict how the law will treat my behavior, the less incentive I have to conform my behavior to the law. It follows that how the law does end up treating my behavior is going to be arbitrary, chipping away at law's legitimacy over time. The more cases that fail to uphold the principle of legality, the more the rule of law crumbles within a given legal community.[5]

Lawyers typically think of legality along temporal dimensions.[6] For instance, it would violate the principle of legality if today State *A* passed a law prohibiting activity *X* and that law purported to reach back in time to apply to *X* committed by State *A* persons yesterday and punish them for it. Such an application of the law would be plainly ex post facto.[7] This Article argues that legality may also operate along spatial dimensions.[8] Suppose instead that State *A* gains custody of an individual and purports to extend State *A* law to conduct he committed in State *B*. If State *A* did not have jurisdiction to regulate his conduct at the time it occurred—even if State *A*'s law was on the books—there is a legality problem. That is to say, application of State *A* law to conduct State *A* could not regulate when it occurred would also be ex post facto. Conceptually speaking, the principle of spatial legality focuses on law's reach or application in space rather than on its existence in time, but the problem is essentially the same: someone is

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4 GALLANT, *supra* note 3, at 22–24; *see also* Beth Van Schaak, Crimen Sine Lege*: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 145–46 (2008). For an analysis of legality with respect to punishment, see Shahram Dana, *Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing*, 99 J. CRIM. L. & CRIMINOLOGY 857, 864–66 (2009).

5 LON L. FULLER, THE MORALITY OF LAW 39 (rev. ed. 1969); GALLANT, *supra* note 3, at 15; *see also* Jeffries, *supra* note 3, at 212 ("The most important concern underlying *nulla poena sine lege* . . . is the so-called 'rule of law.' . . . The rule of law signifies the constraint of arbitrariness in the exercise of government power."). Of course, scholars have identified many other features of the rule of law as well as many theories of compliance, most of which are outside the scope of this Article. The point here is only that legality is important to the rule of law as conventionally understood. *See, e.g.*, Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, *in* NOMOS L: GETTING TO THE RULE OF LAW 3, 4–6 (James E. Fleming ed., 2011) (including prospectivity as a staple formal element of the rule of law).

6 *See, e.g.*, Bouie v. City of Columbia, 378 U.S. 347, 354 (1964) (recounting "[t]he fundamental principle that the required criminal law must have existed when the conduct in issue occurred" (internal quotation mark omitted)).

7 Ex post facto translates to "from a thing done afterward," or "[a]fter the fact; retroactively." BLACK'S LAW DICTIONARY 661 (9th ed. 2009); *see also, e.g.*, Calder v. Bull, 3 U.S. (3 Dall.) 386, 390–92 (1798) ("[A] law shall not be passed concerning, and after the fact, or thing done, or action committed.").

8 For previous discussions linking legality and jurisdiction, see Anthony J. Colangelo, *Universal Jurisdiction as an International "False Conflict" of Laws*, 30 MICH. J. INT'L L. 881, 909–16 (2009) [hereinafter Colangelo, *False Conflict*]; Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 166 (2007) [hereinafter Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction*]; and GALLANT, *supra* note 3, at 407–08.

being subjected to a law he could not reasonably have expected would govern his behavior when he engaged in it. While other links such as national citizenship or allegiance can and do put individuals on notice that a particular state's law may apply to them, geographic space remains for better or worse the primary organizing principle of jurisdictional competences in multistate systems,[9] and I therefore use it as the conceptual baseline for my approach and build out from there.

Spatial legality problems are being aggravated now more than ever by an increase in extraterritorial jurisdiction, or the assertion of legal power by states over conduct outside their borders. And one doctrinal snarl in particular is the main culprit: across different types of cases—criminal, civil, U.S., and international—states are using jurisdiction to adjudicate a case in order to bootstrap jurisdiction to apply substantive law to that case.[10] Thus in criminal cases, U.S. courts have applied U.S. law to entirely foreign activity based on the subsequent presence of the accused in U.S. territory. And on the civil side, where the problem is often styled as a due process objection, U.S. courts have mixed up personal jurisdiction tests with choice of law tests, for example using general jurisdiction to subject a corporation to suit in a U.S. forum (say, where the corporation has U.S. offices) in order to apply U.S. law to the corporation's wholly foreign activities. This trend promises to sweep across the litigation landscape in U.S. state courts as well, as plaintiffs bring suits seeking application of state law to human rights abuses abroad.[11] U.S. courts are not alone. Judges on the International Court of Justice have also used this technique to suggest that the presence of the accused in a state predicates that state's exercise of what is called "universal jurisdiction" over conduct with no connection at all to the state.

In each of these scenarios, the links connecting the defendant to the forum—whether physical presence or "minimum contacts"—establish personal jurisdiction, a form of adjudicative jurisdiction. By adjudicative jurisdiction, I mean the authority of the forum to subject the defendant to judicial process. Yet as I will show, just because a state gains adjudicative jurisdiction over a defendant does not necessarily mean the state has prescriptive jurisdiction, or the ability to apply its laws to the defendant's conduct. In particular, if the state had no prescriptive jurisdiction over the conduct when the defendant engaged in it, there would be a spatial legality problem since the defendant could not reasonably have expected the state's law to apply at the time of conduct. In short, spatial legality precludes using adjudicative jurisdiction over a defendant to bootstrap prescriptive

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[9] *See, e.g.*, Dino Kritsiotis, *Public International Law and Its Territorial Imperative*, 30 MICH. J. INT'L L. 547, 547–48 (2009).

[10] The term "bootstrap" originally "was one among several variants of *to pull oneself up by one's bootstraps* (a futile effort)." GARNER'S DICTIONARY OF LEGAL USAGE 117 (3d ed. 2011).

[11] *See, e.g.*, Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 739 (2012).

jurisdiction over everything that defendant has ever done—specifically, activity the state had no prescriptive jurisdiction to regulate when it occurred.

Of course, none of this would really matter if the state could override legality deficiencies: that is, if legality were merely an admirable but abstract principle of justice that nonetheless bows to sovereign power in the end. Whether legality constrains sovereignty is a question with a loaded pedigree.[12] And in line with traditional conceptions, it has focused mainly on the sovereign's power in time, namely, the power to enact laws prohibiting activity after it occurs.[13] But spatial legality adds another dimension. Because it operates in space, it limits sovereignty not only as an abstract principle of justice but also as a matter of the sovereignties of other states. To return to our two-state hypothetical, absent a basis for prescribing law over a defendant's conduct in State *B* when it occurs, State *A* may not apply its law to the State *B* conduct even if State *A* gains adjudicative (personal) jurisdiction over the defendant at some later point. This is a matter not only of the rights of the defendant, but also of the sovereignty of State *B*. By applying State *A* law to the defendant's past State *B* conduct, State *A* retroactively projects its law into State *B*'s territory in a way that exceeds State *A*'s prescriptive jurisdiction under international law, thereby infringing State *B*'s sovereignty.

In this way, spatial legality rethinks and marries individual rights and sovereignty concepts that are often cast in opposition, such that enlarging one reduces the other. Temporal legality is emblematic of this perceived tradeoff: on the one hand, if legality protects individual rights to fair notice, the sovereign power to enforce retroactive law is weakened. On the other hand, if sovereignty overrides legality, the individual's right to fair notice is weakened. By contrast, spatial legality uses the mutually reinforcing power and forbearance norms by definition extant in multistate systems comprised of coequal sovereigns to shore up individual rights.

And here the concept packs important doctrinal payoffs and litigation value: by transforming jurisdictional rules among sovereigns at the time an individual acts into a fair notice right about what law potentially may apply to his activity, spatial legality both clarifies the law for courts and lawmakers and supplies parties with ways to enforce it. The concept highlights the error of using adjudicative jurisdiction over parties to bootstrap prescriptive jurisdiction over their extraterritorial conduct by distinguishing clearly between notice of the applicable law and notice of where a party may be subject to suit. Moreover, unlike state-centered doctrines, spatial legality gives parties viable legal arguments to challenge

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[12] *See, e.g.*, United States v. Göring, Judgment (1946), *in* 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 171, 219 (1947) ("[T]he maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice.").

[13] *See, e.g.*, *id.*

such mix-ups. For example, a major hurdle parties have faced thus far in challenging jurisdictional overreach has been that they simply have no legal basis on which to mount such challenges. Thus, a defendant in U.S. court may argue that the unexpected application of a U.S. statute to his conduct abroad violates international law; but if the U.S. statute applies by its terms—say the statute explicitly uses the defendant's postconduct presence in the United States as a jurisdictional hook[14]—his argument is immaterial because Congress may override international law.[15] Only by transforming the challenge into an individual rights argument can it have any hope of succeeding. I argue that that is exactly what spatial legality does through the Due Process Clause.

A couple of qualifications are probably in order at this point. One is that this Article does not attempt to resolve overarching questions about the permissibility of retroactivity in the law generally.[16] My aim instead is to persuade the reader that to the extent some retroactivity is impermissible in time, that nonretroactivity norm ought to extend across space too, and to offer ways of analyzing and evaluating such claims. Another qualification is that the concept of spatial legality does not preclude states from altering jurisdictional rules among themselves prospectively; rather, it is the retrospective alteration of rules subjecting parties to a law they could not have expected would govern their conduct when it occurred that is the Article's key concern.

The Article proceeds as follows. Part I elaborates the concept of spatial legality. It emphasizes a critical difference between exercises of adjudicative and prescriptive jurisdiction in multistate systems and focuses on two main scenarios in which courts are mixing up the law: (1) on the criminal side, using a defendant's postconduct presence in the forum to justify the application of forum law to that defendant's prior extraterritorial conduct and (2) on the civil side, using "general" personal jurisdiction—or jurisdiction based on the defendant's contacts with the forum unrelated to the specific issue being litigated—to apply forum law to suits involving

[14] *See, e.g.*, 21 U.S.C. § 960a(b)(5) (2006) ("There is jurisdiction over an offense under this section if . . . after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States.").

[15] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1)(a) (1987) ("An act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supersede the earlier rule or provision is clear or if the act and the earlier rule or provision cannot be fairly reconciled."); *see also, e.g.*, United States v. Yousef, 327 F.3d 56, 92 (2d Cir. 2003) ("Yousef argues that this statute cannot give rise to jurisdiction because his prosecution thereunder conflicts with established principles of customary international law. Yousef's argument fails because, while customary international law may inform the judgment of our courts in an appropriate case, it cannot alter or constrain the making of law by the political branches of the government as ordained by the Constitution.").

[16] A degree of retroactivity may sometimes be necessary for the law to function effectively. Generally speaking, for example, retroactivity is more acceptable in civil suits. Indeed, the overruling of precedent retroactively applies the new rule to one of the civil litigants. *See* FULLER, *supra* note 5, at 57.

activities or transactions outside the forum. Part II recasts sovereignty in terms of jurisdiction to give it some analytical heft in this context and explains why violations of spatial legality generally but not always imply violations of sovereignty.

Part III draws together private choice of law and public jurisdiction doctrine to develop a typology for evaluating when and why spatial legality claims will have the most bite on the current state of the law. It adapts in part modern choice of law nomenclature for describing choice of law dilemmas according to state interests and reorients the terminology around individual rights considerations to construct four main categories: (1) "absolute conflicts" of law, where forum law prohibits what foreign law in the place where conduct occurs requires; (2) "true conflicts" of law, where forum law prohibits what foreign law in the place where conduct occurs permits (but does not require); (3) "false conflicts" of law, where forum law and foreign law in the place where conduct occurs are distinct laws but reflect substantially the same rule; and (4) "harmonization" of law, where forum law and foreign law in the place where conduct occurs are fundamentally the same law. I argue that a spatial legality claim moves from strongest to weakest along these four categories.

The Article concludes by indicating limits to a spatial legality analysis that considers only fair notice. Because fair notice of the law is essentially a function of what the law provides, the inquiry can prove circular. Spatial legality seeks to break the circle by effectively freezing jurisdictional rules at the time of conduct; so long as every state's law does not apply everywhere, the concept will have some purchase. In this respect, the Article uses geographic space and attendant notions of sovereignty in multistate systems not as a priori principles but rather as generally recognized descriptors of jurisdictional allocations on which human beings may rely in planning their behavior. Yet in an increasingly shrinking world with an increasing amount of jurisdictional overlap, more and more activities promise to come under more and more laws. Indeed in theory, notice could be satisfied by states simply announcing their laws applicable everywhere.[17] In this connection, I suggest that the typology in Part III may

[17] This has not happened as a general matter. Certain areas, like combating drug trafficking, cybercrime, terrorism, and serious human rights abuses, have witnessed pushes in this direction, though usually there is either some connection to the state seeking to regulate, *see, e.g.*, United States v. Ivanov, 175 F. Supp. 2d 367, 367–70 (D. Conn. 2001) (prosecution of foreign hackers operating abroad for targeting computer systems in the United States), or the activity is subject not only to national law but also to an international law by virtue of treaty or customary law already applicable to the conduct when and where it occurred, *see, e.g.*, *Yousef*, 327 F.3d at 108–10 (upholding jurisdiction over foreign plane bombing under treaty law), thereby erasing any fair notice problem. I discuss this latter situation—and particularly the principle of universal jurisdiction—in more detail in Parts I.A and III.D respectively. Moreover, when states project purely national law abroad in a way not contemplated by existing jurisdictional rules of international law, it seems to me that defendants cannot be deemed on notice of that law without some factual showing, and accordingly may still be able to challenge the law "as applied" to them. *See* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV.

open up analysis of other rule of law criteria for evaluating situations of jurisdictional overlap, like feasibility of compliance, avoidance of contradictory laws, and consistency of the law.

I. SPATIAL LEGALITY

Legality is generally thought of in terms of time.[18] The natural reading of "no crime without law" implies that unless there is a law in existence prohibiting an activity at the time it occurs, the activity cannot be illegal. If we were to plot the principle in a purely temporal way, it might look something like Figure 1 below, with *X* representing the activity subject to regulation:

FIGURE 1: TEMPORAL LEGALITY

State *A* *then*---------------------|----------------------|-------------------**State *A*** *now*

Does not violate legality:	law against *X*	*X*
Violates legality:	*X*	law against *X*

If the law precedes the commission of *X* in time (top line), there is no problem. But if the commission of *X* precedes the law (bottom line), there was no law in existence prohibiting *X* when it took place, creating a legality problem.

The concept of spatial legality works much the same way, but its focus is on the reach of law in space as opposed to its existence in time. Instead of just one state, State *A*, where State *A* law indubitably applies, the international system comprises multiple states and limits the spatial reach of their laws. To plot it, we therefore must posit more than one state. We can start with State *A* and State *B*. As long as State *A* law does not apply to every activity everywhere in the world, spatial legality comes into play.

Consider the situation where State *A* law prohibits *X* but does not reach *X* inside State *B*—perhaps because *X* involves only State *B* persons acting in State *B*. Under international law, State *A* has no basis to apply State *A* law to this activity,[19] just as, for example, Germany has no basis to apply German hate speech laws to U.S. nationals speaking to other U.S. nationals

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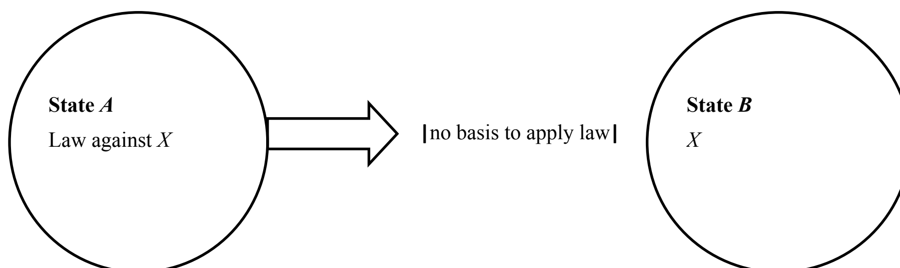
1209, 1232–35 (2010) (powerfully critiquing the imprecision of "facial" and "as-applied" challenges but explaining that "[u]nder current doctrine, an 'as-applied challenge' is somehow narrower, turning on the challenger's specific facts and implying a remedy tailored to those facts").

[18] *See* Bouie v. City of Columbia, 378 U.S. 347, 354 (1964) (recounting "[t]he fundamental principle that the required criminal law must have existed when the conduct in issue occurred" (internal quotation mark omitted)).

[19] *See infra* text accompanying notes 22–25 (outlining principles of jurisdiction in international law). An exception would be where *X* is a universal jurisdiction offense under international law, a scenario discussed *infra* Part III.D.

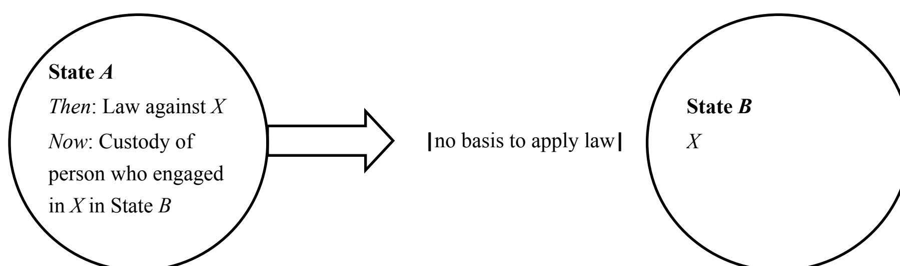
in the United States. We therefore have the following situation, represented by Figure 2, when *X* takes place:

FIGURE 2: SPATIAL LEGALITY



A spatial legality problem arises where State *A* gains custody of someone who engaged in *X* outside of State *A* and seeks to prosecute. For present purposes, let's say that *X* occurred in State *B*. This might be represented by Figure 3:

FIGURE 3: SPATIAL LEGALITY PROBLEM



Under international law, State *A* can claim adjudicative jurisdiction, or jurisdiction to subject persons in State *A* territory to judicial process.[20] State *A* might do so, for instance, in order to extradite a person back to State *B*.[21] International law does not render State *A*'s courts powerless to resolve such issues. Naturally State *A* may also employ its adjudicative jurisdiction to apply State *A* law to the individual—but only for activity over which State *A* had prescriptive jurisdiction to begin with. Under international law, states may exercise prescriptive jurisdiction over acts that occur in their territories as well as acts that have, or are intended to have, effects within their territories.[22] States may also assert jurisdiction over acts by their nationals

[20] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 421(2)(a) (1987).

[21] This scenario would occur, for example, if State *A* and State *B* were parties to an extradition treaty. *See id.* § 475.

[22] *Id.* § 402(1)(a), (c).

abroad, as well as acts against their nationals in some circumstances.[23] Further, under the protective principle, states may claim jurisdiction over acts abroad that threaten "the security of the state or other offenses threatening the integrity of governmental functions," like espionage or counterfeiting the state's currency.[24] And universal jurisdiction grants all states jurisdiction over certain especially harmful offenses against international law.[25]

Thus, if a State *B* national committed *X* in State *A*, State *A* courts clearly could apply State *A* law prohibiting *X* to that person, the same way a German court could apply German hate speech laws to a U.S. national speaking in Germany. But absent the initial authority to regulate activity as a matter of prescriptive jurisdiction, the existence of adjudicative jurisdiction at some later point does not retroactively bring within the compass of State *A*'s laws everything ever done outside State *A* by an individual now in State *A* custody—such as acts in State *B* over which State *A* lacked prescriptive jurisdiction when they occurred.[26] In terms of Figure 3, adding the line giving State *A* adjudicative jurisdiction (now) over the individual who committed *X* (then) does not alter the lack of State *A* prescriptive jurisdiction to apply State *A* law to *X* in the first instance.

This may all seem a little abstract, but we can easily translate it to concrete issues of extraterritorial jurisdiction in both U.S. and international law by looking at actual cases. Doing so also reveals that the problem is not limited to criminal cases; it can afflict civil cases too, at least in U.S. courts, since the Due Process Clause of the Constitution protects parties' expectations about what law applies to activity in both the criminal and the civil choice of law contexts.[27] Before turning to the cases in sections A and

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[23] *Id.* § 402(2), (3), cmts. e & g.

[24] *Id.* § 402(3), cmt. f.

[25] I discuss this principle in more depth *infra* Part III.D.

[26] *See, e.g.*, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 311 (7th ed. 2008) ("There is . . . no essential distinction between the legal bases for and limits upon substantive (or legislative) jurisdiction, on the one hand, and, on the other, enforcement (or personal, or prerogative) jurisdiction. The one is a function of the other. If the substantive jurisdiction is beyond lawful limits, then any consequent enforcement jurisdiction is unlawful." (footnote omitted)).

[27] *See infra* notes 35–39 and accompanying text (setting out due process limits on choice of law). As to temporal legality, while the Supreme Court has construed the Constitution's express prohibitions on ex post facto laws to apply only to criminal statutes, *see* Calder v. Bull, 3 U.S. (3 Dall.) 386, 390–91 (1798), due process places limits on retroactive civil statutes as well, *see, e.g.*, Pension Benefit Guar. Corp. v. R. A. Gray & Co., 467 U.S. 717, 728–30 (1984); *id.* at 730 ("[R]etroactive aspects of legislation [imposing withdrawal liability on employers participating in a pension plan] . . . must meet the test of due process . . . ."); *id.* at 733 ("[R]etrospective civil legislation may offend due process if it is particularly harsh and oppressive . . . ." (quoting U.S. Trust Co. v. New Jersey, 431 U.S. 1, 17, n.13 (1977)) (internal quotation marks omitted)); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 17 (1976) ("The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former."). The source of these limits has more recently become a matter of some debate. A plurality of the Court in *Eastern Enterprises v. Apfel* found the Takings Clause to place limits on retroactive civil legislation by virtue of the

B below, it is worth threading together fair notice doctrines from these traditionally separate criminal and civil contexts to demonstrate how due process can offer an especially fertile vehicle for analyzing and ultimately making spatial legality claims on the current state of the law.

In the criminal context, the Supreme Court has used due process to invalidate retroactive application of statutory constructions that defeat parties' expectations.[28] *Bouie v. City of Columbia* held that "[i]f a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect."[29] *Bouie* struck down the South Carolina Supreme Court's unanticipated construction of a South Carolina trespass statute.[30] In this respect, due process ensures fair notice of the applicable law in time: the law—or here, the construction of the law—must exist before it can apply.

What about fair notice of the applicable law in space? *Bouie* had something to say here as well. The South Carolina Supreme Court had relied on North Carolina law to construe the South Carolina statute at issue.[31] *Bouie* discarded this reliance, observing that "[i]t would be a rare situation in which the meaning of a statute of another State sufficed to afford a person 'fair warning' that his own State's statute meant something quite different from what its words said."[32] It follows that had the South Carolina Supreme Court simply decided to apply North Carolina law, that

government effectuating an uncompensated taking through retroactive legislation. 524 U.S. 498, 538 (1998). However, as part of this analysis, the plurality embraced due process considerations. *Id.* at 537 (using the Takings Clause to strike down application of a retroactive law but noting that "[o]ur analysis of legislation under the Takings and Due Process Clauses is correlated to some extent, and there is a question whether the Coal Act violates due process in light of the Act's severely retroactive impact" (citation omitted)); *see also id.* at 533 ("Retroactive legislation . . . presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." (quoting Gen. Motors Corp. v. Romein, 503 U.S. 181, 191 (1992) (internal quotation marks omitted))). Justice Breyer, joined by three other Justices in dissent, and Justice Kennedy, concurring in the judgment, rejected the plurality's reliance on the Takings Clause and instead would use solely the Due Process Clause to invalidate retroactive civil legislation. For Justice Breyer and the three dissenters, retroactive civil legislation violates due process where "an unfair retroactive assessment of liability upsets settled expectations, and it thereby undermines a basic objective of law itself." *Id.* at 558 (Breyer, J., dissenting). However, Justice Breyer went on to decide that the retroactive legislation did not violate due process. *Id.* at 559. For Justice Kennedy, "due process requires an inquiry into whether in enacting the retroactive law the legislature acted in an arbitrary and irrational way." *Id.* at 547 (Kennedy, J., concurring). Justice Kennedy would have found that the retroactive legislation at issue did in fact violate due process. *Id.* at 549.

[28] *See, e.g.*, Bouie v. City of Columbia, 378 U.S. 347, 354 (1964).

[29] *Id.* (quoting HALL, *supra* note 1, at 61).

[30] *Id.* at 355.

[31] *Id.* at 359–60.

[32] *Id.*

too would have violated due process.[33] Similarly, had North Carolina gained custody of the accused and applied North Carolina law, there would still be a due process problem, and for the same reason: the accused had no reasonable expectation that North Carolina law would ever apply to his conduct. As the sections below show, this is precisely the situation that arises when courts confuse prescriptive and adjudicative jurisdiction.[34] The point here is that irrespective of forum, the choice of North Carolina law over entirely South Carolina conduct would violate due process.

It so happens that courts have been dealing with these choice of law questions in the civil context forever. And it turns out that due process captures exactly this fair notice requirement concerning a law's application in space. With respect to activity outside a state's borders, the Supreme Court has held "that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[35] The "touchstone"[36] of this due process test is protecting parties from "unfair surprise or frustration of legitimate expectations" resulting from the choice of a law they could not have expected would govern their conduct when they engaged in it.[37] "When considering fairness in this context," the Court has stressed, "an important element is the expectation of the parties."[38] Thus, "[t]he application of an otherwise acceptable rule of law may result in unfairness to the litigants if, in engaging in the activity which is the subject of the litigation, they could not reasonably have anticipated that their actions would later be judged by this rule of law."[39] Needless to say, this sounds just like spatial legality.

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[33] *Cf.* Rogers v. Tennessee, 532 U.S. 451, 464 (2001) ("Due process, of course, does not require a person to apprise himself of the common law of all 50 States in order to guarantee that his actions will not subject him to punishment in light of a developing trend in the law that has not yet made its way to his State."). *Rogers* arguably may have weakened *Bouie* since it upheld the retroactive abolition of the so-called "year and a day rule"—which, "[a]t common law, . . . provided that no defendant could be convicted of murder unless his victim had died by the defendant's act within a year and a day of the act." *Id.* at 453. *Rogers* is not in tension with this Article's thesis, however, since the defendant in that case certainly did not rely on existing law to structure his conduct when he stabbed his victim in the heart with a butcher knife. *Id.* at 454.

[34] *See infra* Part I.A–B.

[35] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985) (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312–13 (1981)).

[36] *Hague*, 449 U.S. at 333 (Powell, J., dissenting) (agreeing with the plurality's test but not the application of the test to the facts).

[37] *Id.* at 318 n.24 (plurality opinion).

[38] *Shutts*, 472 U.S. at 822.

[39] *Hague*, 449 U.S. at 327 (Stevens, J., concurring in the judgment); *see also Shutts*, 472 U.S. at 822 ("There is no indication that when the leases involving land and royalty owners outside of Kansas were executed, the parties had any idea that Kansas law would control.").

These doctrines of fair notice in time and space combine to make out a constitutionally grounded spatial legality concept under the Due Process Clause. And the interstate jurisprudence holds strong analogical and litigation value for the concept in relation to U.S. extraterritorial jurisdiction in the international context. Although the interstate and international systems are by no means identical, both are comprised of legally coequal sovereigns; in this respect, the interstate cases supply a useful heuristic for thinking about U.S. extraterritorial jurisdiction vis-à-vis other nations. Moreover, the cases carry real weight when it comes to measuring the exercise of that jurisdiction since U.S. courts uniformly have held that the Due Process Clause also governs federal extraterritoriality and have borrowed from the interstate context to gauge it.[40] Hence the cases offer a helpful tool not only for thinking about U.S. extraterritorial jurisdiction claims, but also for actually resolving them. And that is, after all, the subject of this Article: namely, whether aggressive jurisdiction over foreign conduct like drug running, supporting terrorism, and abusing human rights satisfies spatial legality. What follows explains why, on a spatial legality analysis operating through due process, some decisions in these areas are wrong and perhaps unconstitutional while others may cut off jurisdiction unnecessarily.

The discussion also transitions spatial legality to controversial international law issues of jurisdiction recently debated in a series of opinions in the International Court of Justice.[41] Like U.S. law, international law also contains legality principles—for example, that "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed."[42] On its face, the principle ensures the existence in time of a substantive "national or international law" before conduct can be subject to that law. Spatial legality casts the principle across not only time but also space to take into account not only existing substantive law but also existing jurisdictional law. In this way, spatial legality seeks to ensure that conduct "constitute[d] a criminal offense, under national or international law" applicable not only "when it was committed," but also *where* it was committed.

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[40] *See infra* text accompanying notes 50–53. For a powerful explanation of why Fifth Amendment Due Process limits apply, see Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217 (1992).

[41] *See infra* text accompanying notes 93–117.

[42] International Covenant on Civil and Political Rights art. 15(1), *adopted* Dec. 19, 1966, 999 U.N.T.S. 171; *see also* Convention for the Protection of Human Rights and Fundamental Freedoms art. 7(1), Nov. 4, 1950, 213 U.N.T.S. 221 (articulating a substantially identical principle).

A. Postconduct Presence

Physical presence of the accused in the forum's territory has been used in both U.S. and international law to justify applying forum law to the accused's prior conduct outside the forum. Presence is fine to establish adjudicative jurisdiction, but it cannot alone justify the exercise of prescriptive jurisdiction. To begin with some recent headline-grabbing examples,[43] a number of cases bubbling up in federal court charge foreign defendants under U.S. narco-terrorism laws for agreeing with undercover U.S. Drug Enforcement Agency agents to run drugs abroad.[44] Some of the agreements charged appear to have no overt U.S. connection, like agreements to transport drugs across Africa into Europe.[45] To meet statutory jurisdiction requirements, the government accordingly has relied in large part on the narco-terrorism statute's provision creating jurisdiction where, "after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States."[46] The government has increasingly relied on this type of provision to prosecute foreign defendants for activity abroad unconnected to the United States, including providing material support to terrorism and receiving military training from a foreign terrorist organization. And the courts have been receptive.[47] For their part, defendants have tried to challenge the provision as exceeding jurisdictional limits of international law,[48] a clear loser of an argument given that Congress can override international law by express statutory provision.[49]

But if the only "jurisdictional hook," so to speak, is that the offender is later brought into the United States, application of U.S. law to entirely foreign conduct prior to the U.S. presence could create spatial legality

[43] *See* Benjamin Weiser, *For Prosecutor in New York, a Global Beat*, N.Y. TIMES, Mar. 28, 2011, at A1 (late edition).

[44] *See, e.g.*, Complaint at 9, United States v. Issa, No. 09 Cr. 01244 (RJH) (S.D.N.Y. Dec. 15, 2009).

[45] *See, e.g.*, *id.*

[46] 21 U.S.C. § 960a(b)(5) (2006); *see, e.g.*, Government's Memorandum of Law in Response to the Defendant's Motion to Dismiss the Indictment and for Pretrial Discovery at 16–17, *Issa*, No. 09 Cr. 1244 (RJH) (S.D.N.Y. Feb. 18, 2011). The other basis of jurisdiction relied upon by the government, that "the offense, the prohibited drug activity, or the terrorist offense occurs in or affects interstate or foreign commerce," § 960a(b)(2), runs into other constitutional hurdles where the foreign commerce is not with the United States. *See* Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 949, 1014–40 (2010).

[47] See, for example, *United States v. Ahmed*, No. 10 CR. 131 (PCK), 2011 U.S. Dist. LEXIS 123182 (S.D.N.Y. Oct. 21, 2011), in which the government relied on a similar statutory basis of jurisdiction, *id.* at *5 ("[E]xtraterritorial jurisdiction may be exercised when the 'offender is brought into . . . the United States . . . .'" (alteration in original) (quoting 18 U.S.C. §§ 2339B(d)(1)(C); 2339D(b)(3) (2006))), and the court rejected a defendant's challenge to it, *see id.* at *8.

[48] *See, e.g.*, Reply Memorandum of Law in Further Support of Defendant Idriss Abdelrahman's Pre-Trial Motions at 2–6, *Issa*, No. 09 Cr. 1244 (RJH) (S.D.N.Y. Mar. 25, 2011).

[49] *See, e.g.*, United States v. Yousef, 327 F.3d 56, 92 (2d Cir. 2003).

problems. Defendants have ways to make this type of challenge, too. As noted, courts have found that the Fifth Amendment's Due Process Clause places some constraints on the extraterritorial application of U.S. law.[50] The crucial question facing courts and litigants right now is: what are those limits? Different circuits have adopted different tests, but all seem to agree on the starting point that application of U.S. law cannot be "arbitrary or fundamentally unfair."[51] For one example, a leading test in the Second and Ninth Circuits[52] holds that "[i]n order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair."[53]

An important question thus becomes whether being "brought into or found in the United States"[54] is enough. Here defendants run into the controversial but enduring maxim *male captus bene detentus*, which translates roughly as "a person improperly seized may nevertheless properly be detained (and brought to trial)."[55] Or, to borrow the U.S. Supreme Court's language, "the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of 'forcible abduction.'"[56] In this respect, "due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards."[57] If it does not violate due process to forcibly abduct a defendant and bring him to stand trial in the

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[50] *See, e.g.*, United States v. Clark, 435 F.3d 1100, 1108–09 (9th Cir. 2006); *Yousef*, 327 F.3d at 111–12; United States v. Perez-Oviedo, 281 F.3d 400, 402–03 (3d Cir. 2002); United States v. Suerte, 291 F.3d 366, 369–77 (5th Cir. 2002); United States v. Cardales, 168 F.3d 548, 552–53 (1st Cir. 1999).

[51] *See Clark*, 435 F.3d at 1108; *Yousef*, 327 F.3d at 111–12; *Perez-Oviedo*, 281 F.3d at 403; *Suerte*, 291 F.3d at 377; *Cardales*, 168 F.3d at 553.

[52] The Supreme Court has yet to address the issue.

[53] *Yousef*, 327 F.3d at 111 (alteration in original) (quoting United States v. Davis, 905 F.2d 245, 248–49 (9th Cir. 1990)).

[54] 21 U.S.C. § 960a(b)(5) (2006).

[55] Louis Henkin, *International Law: Politics, Values and Functions*, 216 RECUEIL DES COURS 9, 305 n.** (1989); *see* Malvina Halberstam, *Agora: International Kidnaping: In Defense of the Supreme Court Decision in* Alvarez-Machain, 86 AM. J. INT'L. L. 736, 738 (1992) ("This rule has been applied by the courts of a number of states, including Canada, France, Germany, England and Israel. A treaty provision that would have prohibited the exercise of jurisdiction over a person illegally seized, proposed in 1935 by the Harvard Research in International Law, was never adopted. Nor has the rule been modified since then by the emergence of a new customary rule based on state practice. Although scholars are critical of the rule and have urged that it be reexamined and rejected, they acknowledge that it remains in effect." (footnotes omitted)).

[56] United States v. Alvarez-Machain, 504 U.S. 655, 661 (1992) (quoting Frisbie v. Collins, 342 U.S. 519, 522 (1952)). The issue of whether states (or state agents) as opposed to private individuals are allowed to engage in such forcible abductions under international law is beyond the scope of this Article.

[57] *Id.* at 662 (quoting *Frisbie*, 342 U.S. at 522).

United States, jurisdiction based on the accused being "brought into or found in the United States" would appear plainly constitutional.

But that argument mixes up two different types of jurisdiction. *Male captus bene detentus* goes to the adjudicative jurisdiction of the court, not the jurisdiction to prescribe and apply rules of conduct. In fact, if one looks at the Supreme Court case anchoring the doctrine in U.S. law, the question of prescriptive jurisdiction was a nonissue because the defendant committed his offense in the forum's territory and then fled to a foreign location. The doctrine famously traces its roots to a nineteenth-century case, *Ker v. Illinois*.[58] The defendant in *Ker* committed larceny in Illinois and fled to Peru.[59] He was later abducted in Peru and brought back to the United States to face trial (and, ultimately, conviction).[60] He challenged the state court's jurisdiction on due process grounds.[61] The Supreme Court rejected his challenge, holding that "forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence."[62] What "the right to try him for such an offence" meant, however, connected directly back to the existence of prescriptive jurisdiction. Because Ker committed his acts in Illinois, Illinois had the right to prosecute him. Or as the Supreme Court put it, "[s]o here, when found within the jurisdiction of the State of Illinois and *liable to answer for a crime against the laws of that State* . . . it is not easy to see how he can say that he is there 'without due process of law,' within the meaning of the constitutional provision."[63]

Male captus bene detentus and *Ker* thus stand only for the proposition that bringing the defendant within the forum's territory gives the forum adjudicative jurisdiction. Whether the forum has prescriptive jurisdiction to apply its law to the defendant's conduct is an entirely separate question and, according to *Ker* itself, predicates the exercise of adjudicative jurisdiction.[64] In sum, while postconduct presence may be enough to authorize U.S. jurisdiction as a statutory matter, it remains to be seen whether it also can justify jurisdiction as a constitutional matter of applying U.S. law to the foreign conduct in the first place.

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[58] 119 U.S. 436 (1886). A later Supreme Court case, *Frisbie v. Collins*, extended the rule in *Ker* to abductions in other U.S. states. *See* 342 U.S. at 522 (holding that the forcible abduction of a defendant in Illinois by Michigan police officers to bring the defendant back to Michigan to stand trial did not violate due process). For this reason, the doctrine is often referred to as the "*Ker–Frisbie* doctrine." *See, e.g.*, United States v. Oscar-Torres, 507 F.3d 224, 228 (4th Cir. 2007).

[59] *Ker*, 119 U.S. at 437–38.

[60] *Id.* at 437–39.

[61] *Id.* at 439–40.

[62] *Id.* at 444.

[63] *Id.* at 440 (emphasis added) (quoting U.S. CONST. amend XIV, § 1).

[64] *See id.* Generally, this principle will always be true in criminal cases, since one sovereign will not enforce the penal laws of another. *See, e.g.*, The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825) ("The courts of no country execute the penal laws of another . . . .").

This brings the discussion back to the Fifth Amendment due process test requiring a U.S. nexus for the United States constitutionally to apply U.S. law to activity abroad. This test did not materialize out of nowhere. It basically replicates in the international context under the Fifth Amendment the governing test in the interstate context under the Fourteenth Amendment discussed above,[65] which holds "that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[66] Again, the test is designed to protect parties from "unfair surprise or frustration of legitimate expectations" resulting from the choice of a law they could not have expected would govern their conduct when they engaged in it.[67]

Supreme Court jurisprudence on choice of law is therefore instructive. And it analogically rejects postconduct presence in the United States as a valid ground for extending U.S. law to prior conduct outside the United States. In particular, the Court has viewed with hostility claims that a postoccurrence move to a forum authorizes application of the forum's law to pre-move activities. In *Home Insurance Co. v. Dick*, for example, a Mexico domiciliary received an insurance policy in Mexico from a Mexican agency to cover a Mexican risk.[68] He then tried to use his Texas residency after the loss to apply Texas law to the policy's terms.[69] The Court held that application of Texas law violated due process because "nothing in any way relating to the policy sued on . . . was ever done or required to be done in Texas. . . . Texas was, therefore, without power to affect the terms of contracts so made."[70] The Court flatly observed that Dick's Texas residence was "without significance."[71] Similarly, in *John Hancock Mutual Life Insurance Co. v. Yates*, a Massachusetts insurer issued a life insurance policy to a New York resident in New York who died there soon after.[72] His widow then moved to Georgia and sued on the policy, seeking application of Georgia law, which the Georgia courts applied.[73] The Supreme Court found the application of Georgia law unconstitutional, explaining that "there was no occurrence, nothing done, to which the law of Georgia could

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65 *See supra* text accompanying notes 35–39.

66 Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985) (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312–13 (1981)).

67 *Hague*, 449 U.S. at 318 n.24 (plurality opinion); *accord Shutts*, 472 U.S. at 822 ("When considering fairness . . . an important element is the expectation of the parties.").

68 281 U.S. 397, 403–04 (1930).

69 *Id.* at 402.

70 *Id.* at 408.

71 *Id.*

72 299 U.S. 178, 179 (1936).

73 *See id.* at 179, 181.

apply."[74] The Court has since read *Dick* and *Yates* to stand for the broad proposition "that a postoccurrence change of residence to the forum State [is] insufficient in and of itself to confer power on the forum State to choose its law."[75] Or, put even more strongly by some members of the Court, "postaccident residence . . . is constitutionally irrelevant to the choice-of-law question,"[76] and "[w]hen the expectations of the parties . . . are the central due process concern, . . . an unanticipated postaccident occurrence is clearly irrelevant for due process purposes."[77]

Despite the differing degrees in the language above, the rationale behind all of it is the same: "there was no occurrence, nothing done" in the forum at the time of the events giving rise to the suit "to which the law of [the forum] could apply."[78] The language comes from different opinions in the same case: *Allstate Insurance Co. v. Hague*.[79] In *Hague*, a Wisconsin resident was killed in a motorcycle accident in Wisconsin.[80] His widow later moved to Minnesota and sued there on the deceased's auto insurance policy, seeking application of Minnesota law.[81] A plurality of the Court found that, although the postaccident move by itself could not justify application of Minnesota law, the widow's Minnesota residence was not constitutionally irrelevant.[82] By contrast, Justice Stevens in concurrence and three Justices in dissent found the postaccident move "constitutionally irrelevant."[83] The four Justices who considered the widow's Minnesota residence relevant to whether Minnesota law constitutionally could apply to her claim certainly were not without reason, at least when the contact is viewed from the perspective of state interests: Minnesota naturally had some interest in applying Minnesota law to benefit its residents.[84] But nobody thought that an interest arising out of a postoccurrence move alone could justify application of Minnesota law, especially considering the contact's obvious deficiency from the perspective of reasonable

74 *Id.* at 182. Although the Court relied primarily on the Full Faith and Credit Clause, *see id.* at 183, the analysis is the same under the Due Process Clause, and the two have since been combined, *see* Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 & n.10 (1981) (plurality opinion). Indeed, one member of the Court has since observed that "*John Hancock Mutual Life Ins.* is probably best understood as a due process case." *Hague*, 499 U.S. at 321, n.4 (Stevens, J., concurring in the judgment).

75 *Id.* at 319 (plurality opinion).

76 *Id.* at 337 (Powell, J., dissenting).

77 *Id.* at 331 (Stevens, J., concurring in the judgment).

78 *Yates*, 299 U.S. at 182; *see also* Home Ins. Co. v. Dick, 281 U.S. 397, 408 (1930) (holding that Texas law constitutionally could not be applied to contracts for which nothing "was ever done or required to be done in Texas").

79 449 U.S. 302 (1981).

80 *Id.* at 305 (plurality opinion).

81 *Id.*

82 *See id.* at 318–19.

83 *See id.* at 337 (Powell, J., dissenting).

84 *See id.* at 319 (plurality opinion).

expectations—a deficiency at least four other Justices felt disqualified it altogether from constitutional consideration.[85]

The salient lesson in all of these cases is that, because due process protects parties' reasonable expectations, a postoccurrence move to the forum cannot by itself constitutionally justify application of forum law to prior occurrences outside the forum. This reasoning extends seamlessly to federal extraterritoriality over foreigners "brought into or found in" the United States after their foreign conduct: a postconduct move to the United States cannot by itself constitutionally justify application of U.S. law to prior conduct outside the United States.

The good lawyer may try to distinguish the Supreme Court's choice of law jurisprudence from cases involving the application of U.S. law to conduct abroad by noting that it was the plaintiff in the Supreme Court cases, not the defendant, who subsequently moved to the forum. But that distinction is unpersuasive for a number of reasons. First, it is immaterial to the underlying rationale: in both situations "there was no occurrence, nothing done" in the forum at the time of the events giving rise to the suit "to which the law of [the forum] could apply."[86] It also cuts against *Ker*, a criminal case that squarely involved bringing the defendant back to a state to stand trial.[87] There the Court expressly predicated the state's exercise of adjudicative jurisdiction over the defendant, or its "right to try him," on the fact that he was "liable to answer for a crime against the laws of that state"[88] because he committed the crime in the state's territory and then fled.[89] The distinction moreover would impose unrealistic, and consequently unfair, burdens on defendants.[90] Having to gear one's everyday conduct toward compliance with the laws of every place one someday might travel would be absurd. Finally, it would severely interfere with the jurisdiction, and hence the "sovereignty," of other states, a point taken up in more detail below.[91] In any event, even if one thought the distinction had any traction, it vanishes where foreign defendants are "brought into or found in" the United

[85] *See supra* notes 75–77 and accompanying text. Justice Stewart took no part in the consideration or decision of the case. *Hague*, 449 U.S. at 320. The plurality relied on other contacts to support the application of Minnesota law. I discuss these contacts *infra* Part I.B.

[86] John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178, 182 (1936); *see also* Home Ins. Co. v. Dick, 281 U.S. 397, 408 (1930).

[87] *See* Ker v. Illinois, 119 U.S. 436, 437–38 (1886).

[88] *Id.* at 440.

[89] *Id.* at 444.

[90] Indeed, this critique has been applied even where conduct does exhibit a connection to a state but the defendant may not be adequately aware of that connection, as in the passive personality basis for jurisdiction. Thus, "[t]he principle has not been generally accepted for ordinary torts or crimes, but it is increasingly accepted as applied to terrorist and other organized attacks on a state's nationals by reason of their nationality, or to assassination of a state's diplomatic representatives or other officials." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. g (1987).

[91] *See infra* Part II.

States by forcible transfer via extradition or abduction.[92] Like a plaintiff's postoccurrence move, this postoccurrence contact with the forum is completely outside of the defendant's control.

The cases therefore support the proposition that a party's postoccurrence presence in a forum may give the forum adjudicative jurisdiction over the party, but to use such presence to justify prescriptive jurisdiction over prior activity outside the forum creates potential spatial legality problems. Even though the forum's law may have existed at the time of the conduct, the party's contact—or "nexus"—with the forum occurs after the conduct; therefore, the party may not have reasonably expected forum law would apply at the time of conduct.

This jurisdictional bootstrap, or blending of adjudicative and prescriptive jurisdiction, has seduced not only U.S. lawmakers and courts. In what has been called the International Court of Justice's "most important case on international criminal law since the 1927 *Lotus* decision,"[93] a number of judges appear to have endorsed the technique. The so-called *Arrest Warrant* case arose when Congo sued Belgium after a Belgian magistrate issued an arrest warrant for Congo's Minister of Foreign Affairs, Abdulaye Yerodia Ndombasi.[94] The case sparked controversy for a couple of reasons. First, Belgium had no territorial or national link either to the accused or to his alleged crimes motivating the warrant. The only basis of jurisdiction was the principle of universal jurisdiction, implemented at the time in Belgium's then-famous (and since-neutered) universal jurisdiction law.[95] As the name suggests, universal jurisdiction purports to grant all states jurisdiction over certain especially harmful offenses against international law, irrespective of where the offense occurs or the nationalities of the perpetrators or victims. Adding to the fracas in the *Arrest Warrant* case was the fact that Yerodia was not present in Belgium when the warrant issued, provoking complaints of "universal jurisdiction *in absentia*."[96] It was likely this wrinkle that bred confusion regarding the exercise of adjudicative versus prescriptive jurisdiction in a series of separate opinions addressing universal jurisdiction, to which I will return momentarily. The second controversial—and ultimately determinative—feature of the case was that, as noted, Yerodia was Congo's Minister of Foreign Affairs when the warrant issued. The Court disposed of the case on

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[92] *See, e.g.*, United States v. Ahmed, No. 10 CR. 131 (PKC), 2011 U.S. Dist. LEXIS 123182, at *5 (S.D.N.Y. Oct. 21, 2011).

[93] David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85, 92 (2004).

[94] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 9–10 (Feb. 14).

[95] Loi du 10 fevrier 1999 relative a la repression des violations graves du droit international humanitaire, Moniteur Belge, Mar. 23, 1999, at 9286 (Belg.), *translated in* 38 I.L.M. 918, 921–25 (Stefaan Smis & Kim Van der Borght trans., 1999).

[96] *See* Alain Winants, *The* Yerodia *Ruling of the International Court of Justice and the 1993/1999 Belgian Law on Universal Jurisdiction*, 16 LEIDEN J. INT'L L. 491, 500 (2003).

this ground, finding that Yerodia's office cloaked him with an immunity that rendered the warrant contrary to international law.[97]

Although the case was formally disposed of on immunity grounds, a majority of the judges weighed in on the universal jurisdiction question in a fractured series of separate opinions.[98] The most noteworthy are President Guillaume's, which rejected Belgium's ability to exercise jurisdiction, and the joint opinion of Judges Higgins, Kooijmans, and Buergenthal, which took a more permissive view.[99] Guillaume's view was categorical: "Universal jurisdiction *in absentia* as applied in the present case is unknown to international law."[100] To arrive at this result, Guillaume began with international conventional law, or treaty law.[101] His overall conclusion was in fact merely a more catholic restatement of his conclusion earlier in the opinion that "[u]niversal jurisdiction *in absentia* is unknown to international conventional law."[102]

But Guillaume's conclusion on the treaty law is incomplete at best. At worst, it obscures the concept of universal jurisdiction by focusing on only mandatory adjudicative jurisdiction and ignoring prescriptive jurisdiction. Guillaume noted that an increasing number of treaties covering international crimes establish jurisdiction for states parties where the offender is later found in the state, even if the crime did not occur on the state's territory or flag vessel or involve its nationals.[103] He then explains, correctly, that a state party is obligated to extradite or prosecute an offender found within its territory. Accordingly, "[the state party] must have first conferred jurisdiction on its courts to try him if he is not extradited. Thus, universal punishment of the offences in question is assured, as the perpetrators are denied refuge in all States."[104] Under the treaty regime, then, the offender's presence in a state party triggers that state's obligation to exercise adjudicative jurisdiction or, to borrow Guillaume's phrase, the "jurisdiction o[f] its courts to try him."[105] As a result, the offender has no

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[97] *Arrest Warrant*, 2002 I.C.J. at 33.

[98] *Id.* at 44, ¶ 16 (separate opinion of President Guillaume); *id.* at 61, ¶ 9 (separate opinion of Judge Koroma); *id.* at 54–58 (declaration of Judge Ranjeva); *id.* at 92, ¶ 6 (separate opinion of Judge Rezek); *id.* at 51, ¶ 12 (dissenting opinion of Judge Oda); *id.* at 83, ¶ 65 (joint separate opinion of Judges Higgins, Kooijmans & Buergenthal); *id.* at 125–27 (separate opinion of Judge ad hoc Bula Bula); *id.* at 164–77 (dissenting opinion of Judge ad hoc Van den Wyngaert).

[99] *Compare id.* at 44 (separate opinion of President Guillaume), *with id.* at 83, ¶ 65 (joint separate opinion of Judges Higgins, Kooijmans & Buergenthal). The two ad hoc judges were from countries opposing each other in the dispute. *See id.* at 100 (separate opinion of Judge ad hoc Bula Bula); *id.* at 137 (dissenting opinion of Judge ad hoc Van den Wyngaert).

[100] *Id.* at 42, ¶ 12 (separate opinion of President Guillaume).

[101] *Id.* at 37–40.

[102] *Id.* at 40, ¶ 9; *see id.* at 44, ¶ 16.

[103] *Id.* at 37–40.

[104] *Id.* at 39, ¶ 9.

[105] *Id.*

safe haven within the combined territories of states parties to the treaty. This is surely right as far as it goes; but Guillaume's opinion goes further. From the obligation to exercise adjudicative jurisdiction when the offender is present, he then extrapolates by a sort of hyper *expressio unius est exclusio alterius* construction a prohibition on jurisdiction when the offender is not present.[106] In other words, he uses an obligation in one context to preclude an option in the other.

Judges Higgins, Kooijmans, and Buergenthal rejected this strong *expressio unius* argument and took a more sympathetic view of Belgium's jurisdictional claim—though their joint opinion too has a lopsided focus on adjudicative jurisdiction. Like Guillaume's opinion, the joint opinion spotlights the treaty provisions obliging states parties to exercise jurisdiction over offenders found in their territories.[107] But unlike Guillaume, the joint opinion recognizes that "in these treaties is a principle of *obligation*, while the question in this case is whether Belgium had the right to issue and circulate the arrest warrant if it so chose."[108] Here the joint opinion understood that just because the treaties do not *require* states to exercise jurisdiction when the offender is not present in their territories, that does not mean states are *prohibited* from exercising jurisdiction in that circumstance. In line with this view, the joint opinion found that state practice "does not necessarily indicate . . . that such an exercise would be unlawful" and that it was "neutral as to [the] exercise of universal jurisdiction."[109] This has to be right, at least insofar as the treaties are concerned. Imagine that to demonstrate a norm of universal jurisdiction absent the offender's presence in a state, treaties needed to obligate state parties to exercise jurisdiction in that situation: for the vast majority of the relevant treaties, the result would be something like 190 states simultaneously claiming jurisdiction.

Yet despite its permissive view, the joint opinion was skeptical of universal jurisdiction. And its skepticism stemmed directly from a fixation on the offender's presence in a state as a jurisdictional trigger. To be sure, the joint opinion viewed the treaty provisions obliging states parties to exercise jurisdiction when offenders are present as not *really* evidence of "universal jurisdiction, properly so called," at all.[110] Rather, "[b]y the loose use of language the [jurisdiction required by the provisions] has come to be referred to as 'universal jurisdiction[,'] though this is really an obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere."[111] Put another way, the joint opinion viewed the treaty

[106] *See id.* at 39–40.
[107] *See id.* at 71–75 (joint separate opinion of Judges Higgins, Kooijmans & Buergenthal).
[108] *Id.* at 75, ¶ 44.
[109] *Id.* at 76, ¶ 45.
[110] *Id.*
[111] *Id.* at 75, ¶ 41.

provisions as merely obliging states parties to exercise territorial jurisdiction over offenders present in their territories. Thus, although Guillaume's opinion and the joint opinion disagree on what is needed to show the permissibility of universal jurisdiction under international law, underlying both opinions is the very intuitive and very pragmatic rationale that the presence of an offender in a state's territory strengthens that state's jurisdiction over her.

And indeed, I want to argue that that is exactly what presence does in this context: it strengthens the state's jurisdiction over the *offender*, not over her conduct outside the state. That is, presence goes to personal jurisdiction over the accused, which is a form of adjudicative, not prescriptive, jurisdiction. Taking this argument one step further—and this is where spatial legality rushes in—the exercise of personal jurisdiction necessarily must depend upon the existence of prescriptive jurisdiction in criminal cases since states will only apply their own criminal laws.[112] If the state had no authority to apply its law to the offender's conduct in the first place, it cannot now claim jurisdiction to do so just because the state gained custody of her. As in *Ker*, the state's right to try the defendant depends upon its ability to apply law to her conduct in the first instance. Only here, the conduct in question had no connection to the state when it occurred. Roger O'Keefe has made this point powerfully in the context of the *Arrest Warrant* case:

> 'Universal jurisdiction' . . . is shorthand for universal jurisdiction *to prescribe*, and refers to the assertion of jurisdiction to prescribe in circumstances where no other lawful head of prescriptive jurisdiction is applicable to the impugned conduct *at the time of its commission*. [And t]he term applies irrespective of whether this prescriptive jurisdiction is exercised *in personam* or *in absentia*: just as prescription and enforcement are logically and legally distinct, so too are they terminologically independent of each other.[113]

O'Keefe observes, "[i]f this were not the case, then the prescription of the prohibition in question—in other words, the proscription of the relevant conduct—would take place after the commission of the prohibited conduct and, as such, would amount to *ex post facto* criminalization."[114]

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[112] *See* The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825) ("The Courts of no country execute the penal laws of another . . . .").

[113] Roger O'Keefe, *Universal Jurisdiction: Clarifying the Basic Concept*, 2 J. INT'L CRIM. JUST. 735, 754–55 (2004).

[114] *Id.* at 742. Moreover, if a state purports to assert extraterritorial jurisdiction over an offense that is not an offense under international law, there could be legality problems, especially if the actor enjoys immunity. As Brad Roth explains:

> [I]t is possible for the *nullum crimen* defence to arise directly from immunity *ratione materiae*: where, in the name of redressing an international law violation that has not been established as an international crime, a domestic prosecution proceeds from extraterritorial penal legislation that somehow falls within the state's internationally recognized jurisdiction to prescribe, immunity *ratione materiae* blocks the prosecuting state's jurisdiction to prescribe within the scope of the

This way of viewing the prescriptive–adjudicative jurisdictional dynamic thus leads to one of two results: either (1) all of the treaty provisions requiring states parties to exercise jurisdiction when offenders are later found in their territories risk legality problems because the states obliged to exercise jurisdiction may have lacked the initial authority to apply law to the offense when it occurred or (2) the provisions simply require states parties to exercise personal adjudicative jurisdiction over offenders present in their territories in order to enforce a law that already applied to the offense by virtue of the treaty when the offense occurred. I submit that the latter view not only avoids spatial legality problems but also makes perfect sense under the treaties.[115] After all, their basic purpose is to prescribe an international law against the offense in the combined territories of the states parties and to ensure prosecution.[116] All the jurisdictional provisions do is obligate a state party to enforce that law when the offender is present in its territory because it now has personal jurisdiction over him. The consequence, as Guillaume noted, is that "universal punishment of the offences in question is assured, as the perpetrators are denied refuge in all States."[117]

This also suggests that the universal jurisdiction opinions drew awkward, or in Guillaume's case, backward, implications from the treaty provisions. Instead of precluding (Guillaume's view) or being orthogonal to (the Higgins, Kooijmans, and Buergenthal view) universal jurisdiction, the

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foreign-state agent's official capacity, thereby leaving no penal law that condemns the agent's conduct.

Brad R. Roth, *Just Short of Torture: Abusive Treatment and the Limits of International Criminal Justice*, 6 J. INT'L CRIM. JUST. 215, 223 (2008).

[115] *See* Roger O'Keefe, *The Grave Breaches Regime and Universal Jurisdiction*, 7 J. INT'L CRIM. JUST. 811, 817 (2009) (reviewing history of prosecute-or-extradite provisions and observing that "there is no point in bringing suspects before the courts unless those courts enjoy competence over the impugned conduct. In short, the . . . provisions mandate both the endowment of the courts with universal jurisdiction over grave breaches and, should the opportunity arise and the usual prosecutorial criteria be satisfied, the exercise of this jurisdiction by means of prosecution").

[116] *See id.*

[117] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 39, ¶ 9 (separate opinion of President Guillaume). The jurisdictional provisions support this view. They set out first the principal bases that require states parties to exercise jurisdiction, for example commanding that "[e]ach Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offence" where, inter alia, it takes place on the state's territory or involves its flag aircraft or nationals. *E.g.*, Convention for the Suppression of Unlawful Seizure of Aircraft art. 4(1), Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105. Then, in separate, subsequent paragraphs, the treaties direct that "[e]ach Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him . . . to any of the States mentioned" in the preceding paragraph. *Id.* art. 4(2). The international law generated by the treaty prohibits the offense, the states in the first paragraph are required to apply that prohibition based on their links to the offense when it occurred, and the state in the subsequent paragraph (in whose territory the offender is present) is required to apply it based on its current links to the offender.

treaty provisions strongly support it, at least as a matter of prescriptive jurisdiction. Only if the offense already was prohibited under a universal prohibition capable of application by all states parties—that a state subsequently must enforce if it obtains personal jurisdiction of an offender—does the exercise of jurisdiction stand. On this reading, the treaty provisions already postulate prescriptive jurisdiction over the offense, which is then enforced through the mandatory exercise of personal jurisdiction wherever the offender ends up within the combined territories of the states parties. Part III will return to universal jurisdiction as a solution to spatial legality problems in some situations. The objective here is to show how these problems have been stimulated through a blurring of the forum's personal jurisdiction over the offender with its jurisdiction to regulate his extraterritorial activity.

B. General Jurisdiction

Another maneuver courts have used to justify applying forum law to activity outside the forum is to rely on what is called "general" personal jurisdiction over the defendant in civil cases. As any U.S. law student will recognize—and as the Supreme Court recently confirmed in *Goodyear Dunlop Tires Operations, S.A. v. Brown*—personal jurisdiction can be either "specific" or "general."[118] "Adjudicatory authority is 'specific' when the suit 'aris[es] out of or relate[s] to the defendant's contacts with the forum.'"[119] That is, it "depends on an 'affiliatio[n] between the forum and the underlying controversy,' principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation."[120] We can put specific jurisdiction aside fairly quickly for present purposes because if the activity or occurrence takes place in the forum state and is therefore subject to the forum state's regulation, there is no prescriptive jurisdiction problem and, consequently, no spatial legality problem.

General jurisdiction, on the other hand, authorizes the forum state "to hear any and all claims against [defendants] when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State."[121] With general jurisdiction, the activities connecting the defendant to the forum are "so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."[122] According to the Supreme Court, "[f]or an individual, the paradigm forum for the exercise of general

[118] 131 S. Ct. 2846, 2851 (2011).

[119] *Id.* at 2853 (alteration in original) (quoting Helicopteros Nacionales de Colombia, S. A. v. Hall, 466 U.S. 408, 414 n.8 (1984)).

[120] *Id.* at 2851 (alteration in original) (quoting Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966)).

[121] *Id.*

[122] *Id.* at 2853 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945)).

jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home."[123] Thus, individuals can always be sued in the forum where they live, and corporations can always be sued in the forum where, for example, their principal places of business or corporate headquarters are located.

The doctrine is not, however, limited to these "paradigm" forums; it extends to any forum where a defendant's contacts are substantially continuous and systematic.[124] Hence, "[a] court may assert general jurisdiction over *foreign* (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are [substantially] 'continuous and systematic.'"[125] Moreover, general jurisdiction exists where defendants are served process while temporarily physically present in the territory of the forum state, even if the forum is not the defendant's home state.[126] This latter type of jurisdiction, often referred to as "tag" jurisdiction, is somewhat analogous to *male captus bene detentus* in the criminal law in that the party's physical presence in the sovereign's territory confers jurisdiction on its courts. Though, unlike in criminal cases, courts have found that fraudulently (and, by extension, one might say forcibly) obtaining the defendant's presence does not qualify to establish personal jurisdiction in civil suits.[127]

Because general jurisdiction contemplates "suit[s] against [defendants] on causes of action . . . entirely distinct"[128] from their contacts with the forum, the possibility arises of being haled into a forum's courts for conduct unrelated to that forum. Put another way, if I can always be sued in a forum with general jurisdiction over me, I can be sued there even for claims involving activities outside the forum. The question then becomes: does general jurisdiction of the forum's courts to entertain suits against me, even for activity unrelated to the forum, necessarily mean that the forum also has general jurisdiction to apply forum law to me, even for activity unrelated to the forum? Some courts have said yes;[129] the correct answer is no.

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[123] *Id.* at 2853–54.

[124] *Id.* at 2851.

[125] *Id.* (emphasis added); *see also* Helicopteros Nacionales de Colombia, S. A. v. Hall, 466 U.S. 408, 414 (1984) ("Even when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State, due process is not offended by a State's subjecting the corporation to its *in personam* jurisdiction when there are sufficient contacts between the State and the foreign corporation." (footnote omitted)).

[126] Burnham v. Superior Court, 495 U.S. 604, 610–11 (1990) ("Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State.").

[127] *See, e.g.*, Wyman v. Newhouse, 93 F.2d 313, 314–15 (2d Cir. 1937).

[128] Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2853 (2011) (quoting International Shoe Co. v. Washington, 326 U.S. 310, 318 (1945)).

[129] *See, e.g.*, Goldberg v. UBS AG, 690 F. Supp. 2d 92, 106–07 (E.D.N.Y. 2010).

Much like in the criminal cases in the previous section, the courts that have said "yes" have confused the jurisdiction of the forum's courts over the defendant with the jurisdiction of the forum to prescribe law over the defendant's activity outside the forum. The Ninth Circuit has repeatedly and unhelpfully blended these two types of jurisdiction in framing the Fifth Amendment nexus requirement, for example stating at the outset of its analysis that "[t]he nexus requirement serves the same purpose as the 'minimum contacts' test in personal jurisdiction. It ensures that a United States court will assert jurisdiction only over a defendant who 'should reasonably anticipate being haled into court' in this country."[130] The internally quoted language comes from *World-Wide Volkswagen Corp. v. Woodson*,[131] a famous personal jurisdiction case. And as the language affirms, it concerns only whether a defendant "should reasonably anticipate *being haled into court*" in the forum, not whether the forum's law applies. Nonetheless, lower courts have latched onto this description[132] and have relied on personal jurisdiction over a defendant to bootstrap forum law to the defendant's activity outside the forum.

In *Goldberg v. UBS AG*, for instance, the Eastern District of New York extended this analysis specifically to multinational corporations, finding that because UBS, a global financial institution, was subject to general jurisdiction in New York, U.S. law constitutionally could apply to claims against it for materially supporting terrorism in the Middle East.[133] According to the court, "there is nothing fundamentally unfair about requiring UBS, a large and sophisticated company which maintains a full-time active presence in the United States, to comply with United States law."[134] The court repeated this rationale on UBS's motion for an interlocutory appeal, quoting a series of personal jurisdiction decisions, including the language above from *World-Wide Volkswagen*.[135] To be sure, the court noted that because UBS is "a corporation that engages in systematic and continuous activities within the State of New York,"

[130] United States v. Klimavicius-Viloria, 144 F.3d 1249, 1257 (9th Cir. 1998) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)); *see also* United States v. Perlaza, 439 F.3d 1149, 1168 (9th Cir. 2006) ("The nexus requirement is a judicial gloss applied to ensure that a defendant is not improperly haled before a court for trial. . . . [It] serves the same purpose as the 'minimum contacts' test in personal jurisdiction." (alteration in original) (quoting United States v. Moreno-Morillo, 334 F.3d 819, 829 n.8 (9th Cir. 2003))).

[131] 444 U.S. 286.

[132] *Id.* at 297 (emphasis added); *see infra* notes 133–37 and accompanying text; *see also* United States v. Bout, No. 08 Cr. 365 (SAS), slip op. at 8, 2011 U.S. Dist. LEXIS 74318, at *8 (S.D.N.Y. July 11, 2011) (asserting that extraterritorial application of U.S. law satisfies due process where defendant "should reasonably anticipate being haled into court in this country"); United States v. al Kassar, 582 F. Supp. 2d 488, 494 (S.D.N.Y. 2008) (same).

[133] 660 F. Supp. 2d 410, 431 (E.D.N.Y. 2009).

[134] *Id.*

[135] Goldberg v. UBS AG, 690 F. Supp. 2d 92, 106–07 (E.D.N.Y. 2010).

precedent backed the application of U.S. law.[136] The precedent cited by the court on "systematic and continuous" contacts, however, related to general jurisdiction in the forum's courts, not choice of the forum's law.[137] A strong corporate presence in a forum certainly could be enough to subject the corporation to personal jurisdiction there, but whether the forum constitutionally can apply its law to the corporation's conduct unrelated to the forum is a different question.[138]

To begin to answer it, Supreme Court cases from the interstate context are again instructive. And here the Court has been crystal clear that the constitutional inquiries governing personal jurisdiction and choice of law are distinct. *Hague* put it succinctly: "[E]xamination of a State's contacts may result in divergent conclusions for jurisdiction and choice-of-law purposes."[139] And just last term in a case involving the exercise of jurisdiction internationally, the Court observed that "[a] sovereign's legislative authority to regulate conduct may present considerations different from those presented by its authority to subject a defendant to judgment in its courts."[140] This is all to say that general jurisdiction in the forum's courts does not mean the forum necessarily can apply forum law.

In *Yates*, for example, the defendant insurance company did enough business in Georgia unrelated to the suit to subject it to personal jurisdiction there.[141] If general jurisdiction of the forum's courts were enough to trigger general application of the forum's laws,[142] Georgia law constitutionally could have applied to the insurance policy at issue and that would have

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[136] *Id.* at 107.

[137] *See id.* (citing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 448 (1952), for the proposition that "personal jurisdiction [can be] present even where [the] cause of action is unrelated to the defendant's activities in the forum state provided that the activities are sufficiently continuous and substantial to make the assertion of jurisdiction reasonable").

[138] A different situation presents itself where a party's activity in a state where it is subject to general jurisdiction is linked to the charged offense or harm, some portion of which takes place outside the forum, thereby creating a relationship or jurisdictional nexus between the activity and the forum. *See, e.g.*, United States v. El-Mezain, 664 F.3d 467 (5th Cir. 2011) (upholding the conviction of a U.S. charity for materially supporting terrorism abroad by funding Hamas); Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 26 n.11 (D.C. Cir. 2011) ("The complaints at issue concern aiding and abetting liability where at least some of the conduct causing harm to the plaintiffs in Indonesia occurred in the United States. The district court . . . found that the plaintiffs had presented sufficient evidence of corporate control within the United States to go to trial."); *see also id.* at 70 (describing plaintiffs' argument "that Exxon Mobil knew about and participated, indeed directed, from the United States the allegedly culpable conduct to the detriment of plaintiffs"). Going forward, and particularly if the present thesis gains traction, establishing this type of relationship will comprise an important legal and factual element in cases involving transnational allegations.

[139] Allstate Ins. Co. v. Hague, 449 U.S. 302, 317 n.23 (1981) (plurality opinion).

[140] J. McIntyre Mach. Ltd. v. Nicastro, 131 S. Ct. 2780, 2790 (2011).

[141] *See* John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178, 179 (1936).

[142] *See Hague*, 449 U.S. at 338 n.4 (Powell, J., dissenting) ("This Court did not hint in *Yates* that this fact was of the slightest significance to the choice-of-law question, although it would have been crucial for the exercise of *in personam* jurisdiction.").

been the end of it. But as we know, the Court held the application of Georgia law unconstitutional.[143] More recently, *Phillips Petroleum Co. v. Shutts*[144] erased all doubt on this point. The Supreme Court found personal jurisdiction in Kansas state courts constitutional but invalidated the state courts' application of Kansas substantive law to the entirety of class action claims from the fifty U.S. states and several foreign nations seeking interest on suspended royalty payments for natural gas leases.[145] The Court couched its choice of law holding strongly in terms of notice: "When considering fairness in this context," the Court explained, "an important element is the expectation of the parties."[146] And because "[t]here is no indication that when the leases involving land and royalty owners outside of Kansas were executed, the parties had any idea that Kansas law would control," application of Kansas law was unconstitutional.[147]

In fairness to the district court in *Goldberg*, the *Hague* plurality muddied the waters in this area by finding personal jurisdiction relevant to the choice of law inquiry,[148] and *Goldberg* reasonably cited it for this proposition.[149] Yet, as with the postoccurrence move, the *Hague* plurality's consideration of this contact was highly context specific and is best read as limited to the particular facts and issues of that case—namely, auto insurance coverage for motorists traveling to neighboring states where the insurance company knew the insured would travel.[150] Read in context, the plurality immediately qualified its use of personal jurisdiction to weight the constitutional choice of law scale, hedging that "[t]here is no element of unfair surprise or frustration of legitimate expectations as a result of Minnesota's choice of its law" because Allstate "was undoubtedly aware that Mr. Hague was a Minnesota employee, [and therefore] it had to have anticipated that Minnesota law might apply to an accident in which Mr. Hague was involved."[151] The plurality then found that, in fact, "Allstate specifically anticipated that Mr. Hague might suffer an accident" in Minnesota in light of the policy coverage.[152]

By the plurality's own terms then, its use of general jurisdiction to attach forum law depended on other factors, specifically Allstate's knowledge at the time the policy was entered into of the deceased's extant

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143 *See supra* note 74 and accompanying text.

144 472 U.S. 797 (1985).

145 *Id.* at 799.

146 *Id.* at 822.

147 *Id.* The Court later held that application of Kansas's statute of limitations to out-of-state claims was constitutional because, as informed by principles of international law, such a rule is procedural as opposed to substantive. Sun Oil Co. v. Wortman, 486 U.S. 717, 722–23, 726 (1988).

148 Allstate Ins. Co. v. Hague, 449 U.S. 302, 317–18 (1981) (plurality opinion).

149 Goldberg v. UBS AG, 690 F. Supp. 2d 92, 107 (E.D.N.Y. 2010).

150 *Hague*, 449 U.S. at 318 & n.24.

151 *Id.* at 318 n.24.

152 *Id.*

contacts with the forum, and even more specifically, that he traveled to work there on a daily basis, leading to the probability of forum law being applied to his automobile insurance claim. Hence the dissent's curt retort to the plurality's use of personal jurisdiction as a choice of law hook: "But this argument proves too much. The insurer here does business in all 50 States. The forum State has no interest in regulating that conduct of the insurer unrelated to property, persons, or contracts executed within the forum State."[153] The dissent then called out the plurality's effort to avoid this result more broadly by focusing on other factors connecting the deceased to the forum: "The plurality recognizes this flaw and attempts to bolster the significance of the local presence of the insurer by combining it with other factors deemed significant . . . [like] the fact that the deceased worked in the forum State. This merely restates the basic question in the case."[154]

To sum up, the Supreme Court cases—including the most recent cases—are clear that different tests govern personal jurisdiction and choice of law and indicate that general personal jurisdiction over a defendant does not automatically authorize the application of forum law to that defendant's extraterritorial activities under the Constitution. Moreover, even where a plurality of the Court did consider general jurisdiction relevant, it instantly diluted that contact by qualifying it with other factors unique to the case before it. Yet general personal jurisdiction ordinarily does suggest a strong connection between a party and the forum, one that in certain circumstances perhaps can provide notice that forum law may apply to the party's conduct outside the forum. The more nuanced and precise constitutional question thus becomes when general jurisdiction in the forum coincides with contacts sufficient to authorize application of forum law to the defendant's out-of-state activity. Here there are a few scenarios that are very much open for debate after the Court's recent personal jurisdiction decisions.[155]

On one end of the spectrum, general jurisdiction may coincide with a party's nationality or citizenship, which may justify general application of forum law to the party's activities everywhere. This coincidence often will be captured by *Goodyear*'s reference to "paradigm" forums for general jurisdiction.[156] Thus, in many cases, a party's domicile or a corporation's principal place of business will coincide with the nationality of that person or entity; these ties to the forum establish notice not only that the party may

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[153] *Id.* at 338 (Powell, J., dissenting).

[154] *Id.* The court in *Goldberg* also tried to buttress its exercise of general jurisdiction with other contacts. I have explained elsewhere why the court got the law wrong as to those contacts. *See* Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1104–05 (2011).

[155] *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011); McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011).

[156] *Goodyear*, 131 S. Ct. at 2853–54.

always be subject to suit in the forum, but also that forum law may always apply to the party's activities.[157]

On the other end of the spectrum, temporary physical presence in the forum can provide the personal jurisdiction hook.[158] As noted, this is roughly equivalent to personal jurisdiction in criminal law (with the caveat that in civil suits, presence likely cannot be obtained by fraud or force).[159] But if the activity giving rise to the suit had no connection to the forum when it occurred, general jurisdiction in the forum's courts based on the party's subsequent presence cannot justify application of forum law for the reasons discussed in the previous section: postconduct presence is, to use the Supreme Court's words, "insufficient in and of itself to confer power on the forum State to choose its law."[160] This distinction promises to be important going forward as foreign plaintiffs increasingly bring suit for harms abroad under state tort law against foreign defendants who moved to the United States after the conduct alleged in the suit.[161] Although the defendants' U.S. presence establishes personal jurisdiction now, it cannot justify the retroactive projection of state law to the defendants' past foreign conduct.

In between these two scenarios are situations in which foreign persons or entities have substantial, continuous, and systematic contacts with the forum that establish general jurisdiction.[162] Unlike the temporary physical presence scenario, which is more likely to affect human beings, this scenario is more likely to affect corporations that do significant business in multiple jurisdictions.[163] Because the jurisdictional calculus can depend in part on the underlying substantive law of corporations, the problem becomes somewhat more complex. For example, a key question likely to take on even more prominence after plaintiffs belatedly raised it in *Goodyear* is when courts can assert personal jurisdiction over foreign

[157] *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) & cmt. e (1987); Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1298–99 (1989).

[158] *See supra* note 126 and accompanying text.

[159] *See supra* note 127 and accompanying text.

[160] Allstate Ins. Co. v. Hague, 449 U.S. 302, 319 (1981) (plurality opinion).

[161] See, for example, the plaintiffs' amended, consolidated complaint published as an appendix to the Eleventh Circuit opinion in Mamani v. Berzain, 654 F.3d 1148, 1168–71 (11th Cir. 2011) (alleging wrongful death, intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence in the fourth through seventh claims for relief under Florida law for activity in Bolivia by Bolivians against Bolivians where defendants later moved to the United States).

[162] *See, e.g.*, Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011) ("A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State.").

[163] *Accord id.*

subsidiaries of U.S. corporations.[164] In this respect, plaintiffs can try to "pierce the veil" between the entities or use agency theories to show the U.S. parent controlled the foreign subsidiary's conduct.[165] Presumably, if the veil is pierced or it is shown that the U.S. parent controlled the foreign subsidiary's conduct, U.S. law may apply since there is a jurisdictional nexus between either the corporation (through the veil-piercing) or its conduct (through the agency relationship) and the United States.

These complexities aside, however, the question remains whether general jurisdiction over a foreign corporation that does substantial, continuous, and systematic business in the United States means that U.S. law can apply to all of that foreign corporation's activities everywhere, even activities having no connection to the United States. This was essentially the situation in *Goldberg*, where the court found that UBS's entirely foreign conduct could be subject to U.S. law because UBS is "a corporation that engages in systematic and continuous activities within the State of New York."[166] At the very least, we now know the court's use of personal jurisdiction precedent to reach this conclusion mixed up prescriptive and adjudicative jurisdiction tests under the Constitution. The real question from the foreign corporation's and the Constitution's point of view is: do substantial, continuous, and systematic contacts with the United States also mean that all of the corporation's activities around the world are now subject to U.S. laws?

It is a tough question, which I will try to divide and conquer. To begin with, a lot depends on what type of notice we are talking about. If it is notice of the law per se—that is, of what U.S. law provides—doing substantial business in the United States would seem plainly to suffice: because UBS does business in the United States, it knows U.S. law. But if the relevant notice is not simply what the law provides, but also that the law applies to activity unconnected with the forum, the question gets harder. For example, I know that some European countries have hate speech laws, but I do not expect those laws to apply to my conversations in the United States with other U.S. citizens. And this is true even if I have vacation homes in those European countries. Maybe my intuition is wrong, or maybe

[164] *See id.* at 2857 ("Respondents belatedly assert a 'single enterprise' theory, asking us to consolidate petitioners' ties to North Carolina with those of Goodyear USA and other Goodyear entities. In effect, respondents would have us pierce Goodyear corporate veils, at least for jurisdictional purposes." (citation omitted)).

[165] *See* Alan O. Sykes, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEO. L.J. 2161, 2206–07 (2012); *see also* Doe I v. Exxon Mobil Corp., 573 F. Supp. 2d 16, 30–32 (D.D.C. 2008) (discussing and applying agency and veil-piercing theories in this context). Sykes notes "[a] potential difficulty" with agency theories "is that the relationship between a parent and a subsidiary is highly endogenous. Corporate lawyers, aware of these factors [courts use to identify agency], will counsel their clients to avoid running afoul of them." Sykes, *supra*, at 32.

[166] Goldberg v. UBS AG, 690 F. Supp. 2d 92, 106–07 (E.D.N.Y. 2010).

corporations are somehow different because, say, money is fungible so everything is connected to everything else at some level. But it is a question that courts should cleanly analyze under the appropriate constitutional criteria instead of mixing up the relevant tests for adjudicative and prescriptive jurisdiction. As a purely legal matter, straightening out the doctrine and insisting on better decisionmaking advances the law.

Indeed, the interstate context again provides a useful analogical tool and indicates that this is a weighty legal question with serious implications. Specifically, interstate commerce doctrine suggests that mooring the forum's ability to apply law extraterritorially in its general jurisdiction over defendants is bad policy. I say bad policy instead of bad law because, unlike due process, which governs both state and federal extraterritorial jurisdiction, interstate commerce doctrine does not govern federal extraterritoriality in the international system.[167] But the doctrine does reveal—and seeks especially to avoid—the dangers inherent in allowing states to regulate activity inside other states based only on adjudicative jurisdiction over defendants. Namely, allowing such regulation effectively forces defendants to comply with the most stringent requirements of any state where they do business, even for activities having no relationship to that state.[168] The result is a de facto imposition of the strictest law in the multistate system on all commercial activity of the defendant everywhere, severely hampering not only the policies of other states, but also interstate commerce.

For these reasons, the Supreme Court has held that the Interstate Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."[169] The Clause guards particularly "against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State"[170] that could "subject[] activities to inconsistent regulations"[171] and generate commercial "gridlock" within the system.[172] Thus, the Court has sought to prevent states from stifling through extraterritorial regulation "[t]he reallocation of

[167] For the differences between the Interstate and Foreign Commerce Clauses, see Colangelo, *supra* note 46, at 949, comparing and contrasting Congress's powers under the Foreign and Interstate Commerce Clauses.

[168] *See, e.g.*, Healy v. The Beer Inst., 491 U.S. 324, 339–40 (1989) ("[A brewer] must determine [beer] prices knowing that the lowest bottle, can, or case price in any State would become the maximum bottle, can, or case price the brewer would be permitted to charge throughout the region . . . .").

[169] *Id.* at 336 (quoting Edgar v. MITE Corp., 457 U.S. 624, 642–43 (1982) (plurality opinion)).

[170] *Id.* at 337.

[171] CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 88 (1987).

[172] *Healy*, 491 U.S. at 340.

economic resources to their highest valued use, a process which can improve efficiency and competition."[173]

The U.S. government may not care about such inefficiencies when it regulates "Commerce with foreign Nations,"[174] and it is hard to say that the Foreign Commerce Clause places legal constraints on Congress's power to project U.S. law abroad under a dormant Foreign Commerce Clause rationale.[175] On the other hand, it is reasonable to conclude that the U.S. government would wish to avoid frustrating foreign commerce with the United States through excessive extraterritoriality as a blurry byproduct of courts erroneously conflating two different types of jurisdiction. Subjecting to U.S. regulation all activities around the world of foreign corporations with a U.S. presence, including activities with no direct U.S. connection, is sure to disincentivize foreign corporate presence and investment in the United States. Alan Sykes made the point as follows: "Corporations subject to suit in the United States thus face potentially *discriminatory* liability standards, imposing the costs of litigation and any resulting judgments on them for alleged conduct that actual and potential competitors can undertake without fear of liability."[176] The other option (apart from pulling out of the U.S. market) would be for the foreign corporation to restructure so that only a spinoff or subsidiary does business in the United States, a strategy that presents a host of other potential inefficiencies.[177] This is again only a policy point, but it is a fairly compelling one based on our own experience facilitating commerce in a multistate system. It also does not concern U.S. regulation that applies to foreign activity where the activity itself evinces a relationship to the United States;[178] rather, the concern is a sloppy jurisdictional analysis that surreptitiously uses U.S. presence to capture foreign activities otherwise unrelated to the United States. The stakes are simply too high for courts to be messing up the law.

That said, it is not inconceivable that courts might develop prescriptive jurisdiction theories on which substantial, continuous, and systematic contacts with a forum put foreign defendants on notice that forum law applies to their activities everywhere. Unlike *Goldberg*, which drew from personal jurisdiction precedent, the relevant precedent in this context would be choice of law jurisprudence. And here courts would need to confront the fact that the Supreme Court has been clear that personal jurisdiction and

[173] *Edgar*, 457 U.S. at 643. Moreover, as Allan Erbsen points out, while "not typically understood as creating 'rights' . . . [the Dormant Commerce Clause is] privately enforceable, further cementing a role for individual citizens in the maintenance of constitutional order." Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 548–49 (2008) (footnote omitted).

[174] U.S. CONST. art. I, § 8, cl. 3.

[175] *See* Colangelo, *supra* note 46, at 1014–24.

[176] Sykes, *supra* note 165, at 22.

[177] *See id.* at 21–24.

[178] *See supra* notes 22–24 and accompanying text.

choice of law tests are constitutionally different and that personal jurisdiction over a defendant does not mean forum law necessarily can apply to its extraterritorial activity. Courts also would need to squarely consider the risk of defeating reasonable expectations and imposing burdens on defendants by forcing them to comply with the laws of every place they might be subject to suit, even for activity having no connection to the distant forums. To be sure, such a rule would be tantamount to coercing compliance with the strictest law in the system and authorizing that law to override the laws of every other state where the defendant acts, including states with far stronger links to the activity, like the state where the activity occurred.

This last point transitions the discussion to the next Part, which addresses directly the interests of those other states, often described as "sovereignty." It also presages issues of conflicting overlapping laws and other related rule of law considerations captured by the Due Process Clause and raised in Part III and the Conclusion.

II. SOVEREIGNTY

So far, the discussion has focused largely on individual rights—specifically, the right to fair notice that a particular law applies to an individual's conduct at the time the individual engages in it. And the discussion has shown that this right can operate not only in time but also in space, such that the exercise of extraterritorial jurisdiction may violate it. In temporal legality discussions, sovereignty is often cast in opposition to the fair notice right.[179] That is, the right to fair notice either limits the sovereign power to enforce retroactive laws or the sovereign power to enforce retroactive laws limits the right to fair notice. In this respect, temporal legality imagines a kind of tradeoff between sovereignty and individual rights, such that enlarging one reduces the other.

Sovereignty factors into a spatial legality discussion too, though in a somewhat different way. Especially in the international system, the frequently heard objection to extraterritorial jurisdiction is that it violates the "sovereignty" of other states.[180] Thus if State *A* asserts jurisdiction inside State *B*, the worry is that such an assertion might infringe State *B*'s sovereignty. But what does this mean? There has been a wealth of commentary deconstructing—and documenting the deconstruction of—the

[179] *See* Kenneth S. Gallant, *Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts*, 48 VILL. L. REV. 763, 776 (2003).

[180] *See, e.g.*, Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 251–52 (2d Cir. 2009) (describing a foreign government's argument that assertion of U.S. extraterritorial prescriptive jurisdiction over a corporation "infringed on its sovereignty").

concept of sovereignty.[181] Yet the term itself has remained remarkably sticky. The sovereignty concern in a spatial legality situation is not the same as in a temporal legality situation where an individual right purports to limit what the sovereign can do in its own domain. Rather, in a spatial legality situation, it is another state that impairs sovereignty by reaching in and exerting power inside the sovereign's domain. And once this analytical move is made, it becomes clear that instead of being in tension with individual rights, sovereignty actually reinforces them on a spatial legality analysis.

We can begin by giving "sovereignty" some analytical content in this context. Unless we know what sovereignty is, it is impossible to discern whether it has been infringed. The word itself does no independent work. Standing alone it reduces to a tautology; it cannot tell us on its own whether a given entity is a sovereign or what that status entails. Sovereignty is a label signifying the result of an allocation of power, not the reason for that allocation of power.[182] Once sovereignty means something, we can figure out when and how one state's exercise of extraterritorial jurisdiction may interfere with the sovereignty of other states. The discussion will then tie this analysis to spatial legality by showing that violations of spatial legality generally imply violations of sovereignty. In this way, spatial legality unites individual rights and sovereignty in a reciprocally reinforcing relationship that protects both.

In the international system, sovereignty essentially describes the aggregate bundle of powers or entitlements, recognized by international law, that states enjoy vis-à-vis one another, as well as the interface between the state and international law.[183] Every state enjoys the power or entitlement to make, apply, and enforce its laws inside its borders. These entitlements tend to define the state in relation to other states and to international law. Yet these relations are constantly morphing. For example, a state's entitlement to exercise power inside its own borders used to be far more absolute. Before World War II, how a state treated its inhabitants simply was not a subject of international law.[184] But now, while international law recognizes and indeed guarantees a state's extensive

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[181] *See, e.g.*, Jenik Radon, *Sovereignty: A Political Emotion, Not a Concept*, 40 STAN. J. INT'L L. 195 (2004); Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT'L L. 283 (2004).

[182] *See* Ronald J. Allen & John P. Ratnaswamy, Heath v. Alabama*: A Case Study of Doctrine and Rationality in the Supreme Court*, 76 J. CRIM. L. & CRIMINOLOGY 801, 818 (1985); *see also* Jeremy Waldron, *The Rule of International Law*, 30 HARV. J.L. & PUB. POL'Y 15, 21 (2006) ("What [a state's] sovereignty is and what it amounts to is not given as a matter of the intrinsic value of its individuality, but determined by the rules of the international order.").

[183] *See* Anthony D'Amato, *Is International Law Really "Law"?*, 79 NW. U. L. REV. 1293, 1308 (1985).

[184] Louis Henkin, Lecture, *That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM L. REV. 1, 3–4 (1999).

powers within its borders, they are less absolute. The state cannot legitimately claim power to, say, perpetrate serious human rights abuses upon its inhabitants. International law has developed to curtail state power in this regard. Sovereignty itself offers no analytically independent reason why states have or do not have power; it simply describes the power states do have at any given moment of development of the international legal system.

Yet one might argue that sovereignty at its purest describes absolute power, and therefore any outside interference with a state's regulatory powers inside its borders is an erosion of sovereignty. The apparent stability of this definition is also a mirage, however, as illustrated by states' powers vis-à-vis each other as coequal sovereigns in the international system. Entitlements to make, apply, and enforce law used to be strongly territorial in relation to other states, such that any exercise of jurisdiction in another state constituted an infringement of that state's sovereignty. The absolute power argument underwriting these jurisdictional rules comes through acutely in Chief Justice John Marshall's eloquent restatement of the law as it existed in 1812:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty . . . .
>
> . . . .
>
> . . . [Consequently] [t]his full and absolute territorial jurisdiction being alike the attribute of every sovereign . . . [is] incapable of conferring extra-territorial power . . . .[185]

Here too, however, international law has changed. And, in turn, so have the meanings and incidents of sovereignty. As noted at the beginning of this Article,[186] international law now authorizes states to exercise extraterritorial jurisdiction inside other states in a variety of situations, including over acts abroad that have, or are intended to have, effects within their territories,[187] acts by their nationals abroad,[188] acts against their nationals abroad in some circumstances,[189] and acts abroad that threaten the state's existence and governmental functions.[190]

[185] The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136–37 (1812).

[186] *See supra* text accompanying notes 22–25.

[187] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1987).

[188] *Id.* § 402(2).

[189] *Id.* § 402(3) & cmt. g.

[190] *Id.* § 402(3) & cmt. f. I bracket universal jurisdiction for the moment because, in my view, it is not really an exercise of a state's own prescriptive jurisdiction but is rather the enforcement by states of

Importantly, these modern bases are all about sovereignty. Just as the rigid territoriality of the nineteenth century was cast in terms of sovereignty, so too are these modern bases of extraterritorial jurisdiction cast in terms of sovereignty. That is, they all vindicate some ostensibly "sovereign" entitlement of the state—whether over territory (objective territoriality), persons (active and passive personality), or the state's existence and official functions (protective principle). In an increasingly interconnected world with an ever-growing amount of transnational activity, states' entitlements have expanded and now may overlap. Hence, while "sovereignty" previously was invoked to limit a state's jurisdiction to its own territory, it now justifies jurisdiction outside a state's territory and inside the territory of other states. In this context, the term is really just popular but protean shorthand for a state's powers recognized by international law, and these powers tend to shift over time.

Currently, these powers authorize the projection of a state's law into other states where a recognized basis of jurisdiction exists touching upon the first state's "sovereign" entitlements over its own territory, persons, or official state functions. Because international law gives all states power to exercise such jurisdiction, states are coequal sovereigns as a legal matter.[191] And just as rigid rules of territorial jurisdiction maintained coequal status in the nineteenth century, these rules of extraterritorial jurisdiction maintain coequal status today. It follows that if a state has a recognized basis to regulate extraterritorially under international law, there is no violation of the other state's sovereignty; but if a state extends law into another state absent a recognized basis to do so under international law, it has exceeded its power under international law and infringed upon the sovereignty of the other state. States may disagree about what international law does or does not authorize on any given set of facts, but the arguments all proceed from the same basic, widely agreed upon jurisdictional principles involving sovereign entitlements recognized by international law.[192]

The aim so far has been to add precision and analytical content to objections that exercises of extraterritorial jurisdiction interfere with sovereignty. Now that we know sovereignty is basically a description of the recognized powers of states under international law in this context, we can discern when it has been infringed by the exercise of extraterritorial jurisdiction. To return once again to our two-state hypothetical, if someone

an international prescriptive jurisdiction prohibiting universal offenses that covers the globe. *See infra* Part III.D.

[191] Put aside the obvious political, military, and economic power differences.

[192] *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (listing bases of jurisdiction). Virtually all states agree, for example, that the principles set out in the *Restatement*—objective territoriality, subjective territoriality, active and passive personality, and the protective principle—authorize jurisdiction in some cases. It is whether the facts of a given case satisfy the jurisdictional principle invoked that tends to form the basis of disputes.

in State *A* fires a gun into State *B* and causes harm there, State *B* has jurisdiction, even though the conduct—the firing of the gun—technically took place in State *A*. Or if a State *A* national commits an act in State *B* contrary to State *A* law—for example child sex tourism[193]—State *A* may exercise jurisdiction over its national's conduct abroad (State *B* of course also may exercise jurisdiction over acts committed in State *B* territory). None of these situations implies an infringement of the other state's sovereignty since international law authorizes all states with these same jurisdictional competences. However, if there is no basis in international law for the exercise of extraterritorial jurisdiction—say, State *A* claims to regulate conduct by State *B* nationals entirely in State *B* with purely State *B* effects—there *would* be a violation of State *B* sovereignty. One possible way around the violation would be if the conduct constitutes a universal jurisdiction offense,[194] a doctrine I will return to in the next Part. The important takeaway here is that if a state has a basis to regulate extraterritorially under international law, there is no violation of the other state's sovereignty; but if a state does not have a recognized basis to regulate extraterritorially, the regulation infringes the other state's sovereignty.

The point should now start to emerge in sharper relief that if a state violates the principle of spatial legality, it risks violating other states' sovereignties. This point ties directly back to the discussion above regarding the difference between adjudicative and prescriptive jurisdiction.[195] Under a spatial legality analysis, absent a basis for prescribing law over defendant's conduct *X* in State *B* when it occurs, State *A* may not apply its law to *X* even if State *A* gains custody (and hence adjudicative jurisdiction) over the defendant at some later point. This is a matter not only of the rights of the defendant, but also of the sovereignty of State *B*. By applying its law to defendant's conduct *X* in State *B*, State *A* is retroactively projecting its law into State *B* territory in a way that exceeds State *A*'s prescriptive jurisdiction under international law, thereby infringing State *B*'s sovereignty. Spatial legality thus ties individual rights to sovereignty and sovereignty to individual rights in a way that reinforces both.

Although this analysis innovatively links sovereignty and rights, I do not want to overstate the innovation. It may not always work this way. For example, some U.S. courts of appeals have held that application of U.S. law

[193] *See, e.g.*, Protection of Children Against Sexual Exploitation (PROTECT) Act, 18 U.S.C. § 2423(c) (2006) ("Any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both."). For my views on the constitutionality of this provision, see Colangelo, *supra* note 46, at 995–1003, 1029–40.

[194] *See infra* Part III.D.

[195] *See supra* Part I.

to activity on the high seas with no U.S. connection satisfies due process where the U.S. government requests and receives consent from the vessel's flag nation to board and apply U.S. law to the crew's activities.[196] In so holding, these courts have used sovereignty to potentially circumvent legality—specifically, they have used an agreement among sovereigns to apply a law to activity that otherwise did not apply but for the agreement. While flag-state consent may alleviate sovereignty concerns, it does not automatically quell fair notice concerns since the agreement among governments may occur irrespective of the expectations of the individual defendants to whom the law is being applied. More recently, other courts of appeals have pushed back against this trend, explaining that foreign government "consent to seize the members of [a foreign-flag vessel], remove them to the United States, and prosecute them under United States law in federal court does not eliminate the nexus requirement" under the Due Process Clause.[197] Rather, for jurisdiction to be proper under the Clause, "the Government still needs to establish some detrimental effect within, or nexus to, the United States."[198] And because the government had failed to do so in the case before it, the court dismissed the indictment.[199]

These cases illustrate a difference between a sovereignty-based jurisdiction approach and a rights-based jurisdiction approach. While the approaches often will coincide and reinforce each other since a violation of the right to fair notice generally will also imply a violation of sovereignty and vice versa, this may not always be so. A sovereign may always waive its own jurisdictional objections. But on a rights-based spatial legality analysis, it may not waive objections of individuals, at least not without fair notice. Spatial legality thus effectively takes extant rules of jurisdiction in multistate systems and transforms them into individual rights protections that provide fair notice of the potentially applicable law at the time of conduct. If the sovereign wishes to alter those jurisdictional rules for itself, it may do so at any time. It also may do so prospectively for individuals already subject to its jurisdiction in any number of ways.[200] What it cannot do, however, is alter jurisdictional rules retroactively in a way that defeats parties' expectations about the applicable law at the time of conduct.

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[196] *See* United States v. Perez-Oviedo, 281 F.3d 400, 403 (3d Cir. 2002); United States v. Cardales, 168 F.3d 548, 553 (1st Cir. 1999).

[197] United States v. Perlaza, 439 F.3d 1149, 1169 (9th Cir. 2006).

[198] *Id.*

[199] *Id.* ("Until [such a] nexus is established, we cannot apply United States aiding-and-abetting law . . . ."). Interestingly, there may have been a basis in international law, at least for the boarding of the ship. *See* United Nations Convention on the Law of the Sea art. 108, Dec. 10, 1982, 1833 U.N.T.S. 397.

[200] For example, states could enter into treaties with expansive provisions providing jurisdiction over their nationals by other states parties, absent any connection to the state asserting jurisdiction. *See, e.g.*, *supra* note 117 and accompanying text.

The cases also raise interesting follow-up questions for spatial legality: even if a state had no jurisdiction over conduct where and when it occurred, could the state nonetheless apply its law if the conduct were also prohibited under the law where it occurred? Is it enough that the defendant had notice that the conduct was illegal? Or does the defendant also need notice that that particular state's law might apply? The next Part fleshes out these and other questions about the scope and applicability of spatial legality on the current state of the law and supplies a way to analyze these types of questions going forward.

III. TYPOLOGY

This Part outlines a typology of spatial legality claims. The aim is not to propose any comprehensive doctrinal framework, but rather to sketch a guide for gauging the strength of a given claim in a given type of suit based on the law available right now. Thus as an initial matter we might suppose that spatial legality has stronger bite in criminal cases since legality principles generally have stronger bite in criminal law.[201] Or what about where a state claims not to apply only forum law to activity abroad but an international law that purports to apply everywhere, as in cases of universal jurisdiction? Here spatial legality claims may have less bite if the state's law faithfully incorporates international law. As these questions suggest, to discern whether and how strongly spatial legality applies requires drawing together different areas of law to construct and assess the claim. That is this Part's project.

Implicit in the project is that, like the doctrines it synthesizes, spatial legality is not a sharp, all-or-nothing proposition. Instead, as with ordinary legality, due process, or any other fairness doctrine, a claim's strength will depend on the facts and the law of a given claim, reducing to some variant of whether notice was fair under the circumstances. To cobble together Supreme Court language on state choice of law, for example, "[w]hen considering fairness in this context,"[202] the question is whether application of the law results in "unfair surprise or frustration of legitimate expectations."[203] This is vague but not vacuous and, like any jurisdictional test, its contours will congeal organically over time as cases get decided. But there are principled ways to distinguish some cases from others, and these distinctions in turn may augur more strongly in favor of spatial legality claims in some cases than in others. Moreover, just as spatial legality is a synthesized doctrine, so too is the typology, which weaves together public jurisdiction and private choice of law doctrines.

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[201] *See* FULLER, *supra* note 5, at 57–58.

[202] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822 (1985).

[203] Allstate Ins. Co. v. Hague, 449 U.S. 302, 318 n.24 (1981) (plurality opinion).

I construct four main categories, with the spatial legality claim moving from strongest to weakest: (1) "absolute conflicts" of law, (2) "true conflicts" of law, (3) "false conflicts" of law, and (4) "harmonization" of law. The "true" and "false" conflict categories nominally pull from the discipline of conflict of laws or private international law; however, my approach reorients them toward individual rights as opposed to state interests, which had initially inspired the categories in Brainerd Currie's governmental-interest approach to choice of law questions (though Currie himself referred to false conflicts as "false problems").[204] For Currie, courts deciding choice of law questions should look at the state policies expressed in their laws and discern whether the involved states have an interest in applying their laws to the facts of the case.[205] From this state-interest analysis, three categories emerge: false conflicts, true conflicts, and unprovided-for cases.[206] False conflicts exist when only one state has an interest in applying its law.[207] Because only one state is interested in applying its law, there is no conflict of laws and the sole interested state's law applies.[208] True conflicts exist when more than one state has an interest in applying its law.[209] And unprovided-for cases exist when no state has an interest in applying its law.[210] To restate the obvious, the categories are defined fundamentally according to state—not party—interests under Currie's approach.

I want to use the categories here in a different though not entirely novel way to evaluate individual rights by looking at the content of the laws themselves. As Justice Stevens explained in his concurrence in *Shutts*, there are other permutations of false conflict: "'[F]alse conflict' really means 'no conflict of laws.' If the laws of both states relevant to the set of facts are the same, or would produce the same decision in the lawsuit, there is no real conflict between them."[211] On the other hand, if the laws of the states differ and would produce different decisions, there is a true conflict of laws.

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204 *See* Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 253–55 (1958); Brainerd Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 239–43 (1958).

205 *See* Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 9–10 (1958).

206 *See id.* at 10 & n.3. Also, "[i]n his later work, Currie recognized a fourth category, what he called an '*apparent conflict*,' which is something between a false and a true conflict." Symeon C. Symeonides, *The American Choice-of-Law Revolution in the Courts: Today and Tomorrow*, 298 RECUEIL DES COURS 9, 44 (2002).

207 *See* Currie, *supra* note 205, at 10.

208 *Id.*

209 EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 28 (4th ed. 2004).

210 *Id.*

211 Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 838 n.20 (1985) (Stevens, J., concurring in part) (alteration in original) (quoting ROBERT A. LEFLAR, AMERICAN CONFLICTS LAW § 93, at 188 (3d ed. 1977)); *see also* Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 290 (1966) ("[I]f the laws of [all involved] states, relevant to the set of facts, are the same . . .

I then add two new categories: "absolute conflicts" and "harmonization" of law. An absolute conflict exists where one state's law prohibits what another state's law requires, such that it is impossible to comply with both laws at once. In this sense, an absolute conflict is a stronger species of true conflict, which is where one state's law prohibits what another state's law merely permits (but does not require). Harmonization represents the opposite pole of the spectrum and contemplates the same law operative in both states. It is a stronger species of false conflict because the law not only looks the same; it is the same. These four categories offer a useful guide for gauging the strength of spatial legality claims.

A. Absolute Conflicts

An absolute conflict of laws exists where forum law prohibits what foreign law in the place where conduct occurs requires. For example, State *A* prohibits *X* while State *B* compels *X*, and *X* occurs in State *B*. There is no way to simultaneously comply with both State *A* and State *B* law regarding *X*. The Supreme Court has described this situation as one in which defendants claim "[foreign] law requires them to act in some fashion prohibited by the law of the United States or claim that their compliance with the laws of both countries is otherwise impossible."[212] Although the idea surfaces in different areas via different doctrines,[213] perhaps the most

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then there is no real conflict of laws at all, and the case ought to be decided under the law that is common to [the] states."). For cases utilizing this permutation of false conflict, see, for example, Wachsman *ex rel.* Wachsman v. Islamic Rep. of Iran, 537 F. Supp. 2d 85, 94 (D.D.C. 2008); Gulf Grp. Holdings, Inc. v. Coast Asset Mgmt. Corp., 516 F. Supp. 2d 1253, 1271 (S.D. Fla. 2007); Greaves v. State Farm Ins. Co., 984 F. Supp. 12, 14 (D.D.C. 1997); and Brenner v. Oppenheimer & Co., 44 P.3d 364, 372–73 (Kan. 2002).

[212] Hartford Fire Ins. Co. v. California, 509 U.S. 764, 799 (1993) (citation omitted); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 cmt. e, § 415 cmt. j (1987) (describing provisions that apply only when compliance with the laws of two sovereigns, both validly claiming jurisdiction over an activity, is impossible). It is worth pointing out that the Supreme Court in *Hartford Fire* called this type of situation a "true conflict," which is in my view clearly wrong from a conflict of laws perspective. *See* Colangelo, *supra* note 154, at 1042. The Court also felt that, because the foreign conduct was permitted but not compelled by foreign law in that case, the foreign defendant had failed to meet this threshold. *Hartford Fire*, 509 U.S. at 788–89. I will refer to the situation presented in *Hartford Fire* in the next Part, appropriately, as a "true conflict."

[213] *See, e.g.*, Mahoney v. RFE/RL, Inc., 47 F.3d 447, 447–48 (D.C. Cir. 1995) ("If an American corporation operating in a foreign country would have to 'violate the laws' of that country in order to comply with the Age Discrimination in Employment Act, 29 U.S.C. § 623(f)(1), the company need not comply with the Act."). The "foreign laws" exception to the Act states:

> It shall not be unlawful for an employer, employment agency, or labor organization—
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where . . . such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located . . . .

29 U.S.C. § 623(f)(1) (2006). Congress built in the defense to "avoid placing overseas employers in the impossible position of having to conform to two inconsistent legal regimes, one imposed from the

self-evident is the aptly named "foreign sovereign compulsion doctrine," which "recognizes that a defendant trying to do business under conflicting legal regimes may be caught between the proverbial rock and a hard place where compliance with one country's laws results in violation of another's."[214] Under this doctrine, courts will not apply U.S. law prohibiting a party's foreign activity where the party shows that the conduct was actually compelled by foreign law (and not just encouraged or approved).[215]

The doctrine's underpinnings hold significance for spatial legality claims. Courts have considered it alongside the act of state doctrine, which bars U.S. courts from sitting in judgment of public acts of another sovereign in its own borders.[216] This doctrinal connection makes sense: if foreign law compels the foreign activity, then overriding the application of foreign law would be tantamount to U.S. courts invalidating the public act of another sovereign in its own territory.[217] But the two doctrines serve different purposes. While "[t]he act of state doctrine derives from both separation of powers and respect for the sovereignty of other nations,"[218] courts have found that foreign sovereign compulsion stems from individual rights. "Rather than being concerned with the diplomatic implications of condemning another country's official acts," the doctrine instead "focuses on the plight of a defendant who is subject to conflicting legal obligations under two sovereign states."[219] In this respect, the doctrinal anchor is fairness and, more specifically, due process.[220] To be sure, the Supreme

United States and the other imposed by the country in which the company operates." *Mahoney*, 47 F.3d at 450.

[214] *In re* Vitamin C Antitrust Litig., 584 F. Supp. 2d 546, 551 (E.D.N.Y. 2008); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 441–442.

[215] *Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 550–51; Trugman-Nash, Inc. v. N.Z. Dairy Bd., 954 F. Supp. 733, 736 (S.D.N.Y. 1997) (finding "an actual and material conflict between American . . . and New Zealand law" entitling defendants to invoke "foreign sovereign compulsion," and dismissing claims); Interamerican Ref. Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291, 1298–99 (D. Del. 1970).

[216] *See* Republic of Austria v. Altmann, 541 U.S. 677, 700 (2004); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964); Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

[217] *See* Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597, 606 (9th Cir. 1976) ("A corollary to the act of state doctrine in the foreign trade antitrust field is the often-recognized principle that corporate conduct which is compelled by a foreign sovereign is also protected from antitrust liability, as if it were an act of the state itself.").

[218] *Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 550.

[219] *Id.* at 551; *accord* Mahoney v. RFE/RL, Inc., 47 F.3d 447, 450 (D.C. Cir. 1995) ("[Section] 623(f)(1)'s evident purpose [is] to avoid placing overseas employers in the impossible position of having to conform to two inconsistent legal regimes, one imposed from the United States and the other imposed by the country in which the company operates.").

[220] *See* Don Wallace, Jr. & Joseph P. Griffin, Commentary, *The Restatement and Foreign Sovereign Compulsion: A Plea for Due Process*, 23 INT'L LAW. 593, 594–95 (1989) (noting that foreign sovereign compulsion is based on both due process and comity, and criticizing the *Restatement* for not emphasizing "due process/fairness components" in its sections on the doctrine, which "sometimes leads to a blurring of the foreign sovereign compulsion and the act of state doctrine").

Court case originating the doctrine, *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, held that compelling a party to violate a foreign sovereign's laws in foreign sovereign territory would deprive that party of due process under the Fifth Amendment.[221]

Significantly, in all of the cases that have used foreign sovereign compulsion to reject application of U.S. law, there was no dispute that the United States had jurisdiction to regulate the foreign conduct in question. Thus, even where the United States has jurisdiction to regulate foreign conduct, due process may block the application of U.S. law if it would put parties in a legally impossible position. By contrast, spatial legality presupposes the *absence* of U.S. prescriptive jurisdiction at the time of conduct. If due process precludes the application of U.S. law where the United States has prescriptive jurisdiction over foreign conduct in absolute conflict of laws situations, it *a fortiori* precludes the application of U.S. law where the United States did *not* have prescriptive jurisdiction at the time of conduct. Not only would the party who later finds herself in U.S. court be put in a legally impossible position, the party would not even have known of the legal impossibility when she acted in a way that was, again, compelled by the law governing the place of the conduct. It is difficult to imagine a scenario more deserving of due process protection through a spatial legality claim than where a local law coerces someone to engage in activity for which she is later punished under a foreign and exactly opposite law she had no reasonable expectation would apply to her conduct when she engaged in it.

B. *True Conflicts*

A true conflict of laws exists where forum law prohibits what foreign law in the place where conduct occurs permits (but does not require). Or, put with more commanding concision by the Supreme Court in the interstate context in *State Farm Mutual Automobile Insurance Co. v. Campbell*, "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred."[222] Although the Court cited *Shutts* in partial support for this rule,[223] which invalidated a state court's use of lawful out-of-state conduct in a punitive damages calculation, the Court couched the

[221] 357 U.S. 197, 211 (1958) ("It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign."). I should note that the cases in this area also require good faith. Thus, if the party attempts to use foreign law to evade U.S. law, the defense will not apply. *See id.* at 210; *see also* Wallace & Griffin, *supra* note 220, at 599 ("Foreign sovereign compulsion also requires good faith by the party invoking the doctrine.").

[222] 538 U.S. 408, 421 (2003).

[223] *Id.* at 421–22; *see* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821–22 (1985).

rule largely in sovereignty terms.[224] Yet the rule can function as an individual rights shield as well, the idea being that an individual who engages in lawful conduct in one state having no nexus to another state cannot be punished by the latter state for that conduct.[225] A contrary rule not only would, to borrow from *Campbell*, impermissibly extend the punishing state's "power or supervision over the internal affairs of another State,"[226] thus exceeding its "orbit[] of . . . lawful authority,"[227] but also would, to borrow from *Hague*, risk "unfair surprise or frustration of legitimate expectations" of parties.[228] In this respect, the multisovereign system operates to shore up individual rights.

Like absolute conflicts, true conflicts trigger spatial legality problems.[229] The problem is perhaps not as stark as in the absolute conflict situation, but the rationale is the same. When activity in conformity with local law is later subject to a prohibition in a state with no jurisdictional nexus to the activity when it occurred, parties reasonably may have lacked notice that the foreign prohibition would apply to their conduct. Such a situation gives rise to the "unacceptability in principle of imposing criminal liability where the prototypically law-abiding individual in the actor's situation would have had no reason to act otherwise."[230]

At first blush, these situations may not seem like especially acute problems since they presuppose no jurisdictional nexus with the punishing state. And where there is a nexus, defendants can be deemed on notice. Yet we have already seen a number of examples on the civil side in the U.S. interstate context: *Dick*, *Yates*, and *Shutts* were all "true conflicts," at least in the sense that forum law imposed some rule that did not exist under the otherwise applicable law, and as a result, the Supreme Court invalidated the applications of forum law in those cases as fundamentally unfair.[231]

224 *See Campbell*, 538 U.S. at 422 ("A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders . . . .").

225 *Cf. id.* (explaining that the forum courts erred by "award[ing] punitive damages to punish and deter conduct that bore no relation to the . . . harm" in the forum).

226 *Id.* at 421 (quoting Bigelow v. Virginia, 421 U.S. 809, 824 (1975)).

227 *Id.* (quoting N.Y. Life Ins. Co. v. Head, 234 U.S. 149, 161 (1914)).

228 Allstate Ins. Co. v. Hague, 449 U.S. 302, 318 n.24 (1981) (plurality opinion).

229 *Cf.* Bouie v. City of Columbia, 378 U.S. 347, 359–60 (1964) ("It would be a rare situation in which the meaning of a statute of another State sufficed to afford a person 'fair warning' that his own State's statute meant something quite different from what its words said.").

230 Jeffries, *supra* note 3, at 211–12. As Jeffries continues, "The person who has been treated unjustly is . . . the person who somehow runs afoul of a penal statute by doing nothing out of the ordinary." *Id.* at 231. Even in purely domestic situations, the Supreme Court, quoting Oliver Wendell Holmes, has observed that "[a] law which punished conduct which would not be blameworthy in the average member of the community" may violate due process. Lambert v. California, 355 U.S. 225, 229–30 (1957) (quoting OLIVER WENDELL HOLMES, THE COMMON LAW 50 (Boston, Little, Brown & Co. 1881)).

231 *See supra* Part I. As civil cases, these cases dealt with the scope of liability and recovery, as opposed to criminal prohibitions.

Nonetheless, for logistical and evidentiary reasons, these cases may tend to self-deter; it may be too much of a burden to prove, for example, that my First Amendment-protected speech in the United States to other U.S. persons violates, say, German hate speech law[232] or Pakistani blasphemy law[233] should I someday visit those countries.

The analysis gets trickier when the nexus itself becomes more plastic. The Internet for example holds massive potential to exacerbate these types of problems precisely because it can be understood to connect every statement posted on the web to every jurisdiction in the world. A ready illustration would be aggressive libel laws whose jurisdictional provisions can vacuum up "publications" from every nook and cranny of the web.[234] English libel law, for instance, "is generally regarded as the most claimant-friendly in the world,"[235] and authorizes jurisdiction over defendants temporarily in England or when the damage occurs there.[236] Substantively, this exceedingly claimant-friendly law makes it exceedingly easy to show damage, since "English courts take the view that material on the Internet is published in England whenever it can be downloaded in England. There is no requirement of targeting."[237] Consequently, as Trevor Hartley explains, "Since all material on the Internet can normally be downloaded anywhere, this means that *all* material on the Internet is regarded as being published in England."[238] Even books that are not themselves published in England but that can be ordered over the Internet by English residents qualify as "publications" under this rule.[239] Accordingly, "if one American resident puts material on the Internet that allegedly libels another American resident, the latter may sue for libel in England"[240]—even if the allegedly libelous material is protected under the First Amendment to the U.S. Constitution.[241]

[232] *See* STRAFGESETZBUCH [STGB] [PENAL CODE], Nov. 13, 1998, BUNDESGESETZBLATT, Teil I [BGBL. I] 3322, as amended, §§ 86, 130, *translated in* BUNDESMINISTERIUM DER JUSTIZ (Michael Bohlander, trans. 2011), *available at* http://www.gesetze-im-internet.de/englisch_stgb/index.html.

[233] *See* Act XLV of 1860, PAK. PENAL CODE (2000), v. 1, ch. XV, *translated in* PAK. PENAL CODE, 1860, at 260 (Dr. C.M. Hanif ed., 2000).

[234] The term "publication" can be quite broad under foreign law. Under English law, "each time an item is communicated to another person, there is a 'publication[.'] Each sale of a newspaper is a separate publication in English eyes; and each time a viewer watches a television program there is also a 'publication[.'] The place of publication is the place where this occurs." Trevor C. Hartley, *'Libel Tourism' and Conflict of Laws*, 59 INT'L & COMP. L.Q. 25, 26 (2010) (footnote omitted).

[235] *Id.*

[236] *Id.* at 29.

[237] *Id.* at 30.

[238] *Id.*

[239] *Id.*

[240] *Id.* The claimant must have a reputation in England before he can sue there. *Id.*

[241] *Cf.* Ehrenfeld v. Bin Mahfouz, 881 N.E.2d 830, 834 (N.Y. 2007) ("Plaintiff and her amici argue that this case is about 'libel tourism,' a phenomenon that they variously describe as the use of libel judgments procured in jurisdictions with claimant-friendly libel laws—and little or no connection to the author or purported libelous material—to chill free speech in the United States. However pernicious the

One could imagine similar results where foreign countries criminalize the speech in question.[242] Thus conceptually, true conflicts raise spatial legality problems when conduct permitted where it takes place has no nexus to the forum that later seeks to punish it. But the collateral question of whether there is a nexus may turn out to be a contentious legal and factual issue. A more difficult first-order conceptual choice presents itself where both the law of the place where the conduct occurs and the law of the forum prohibit the defendant's conduct, i.e., the false conflict.

C. False Conflicts

A false conflict of laws exists where forum law and foreign law in the place where conduct occurs are distinct laws but reflect substantially the same rule. Say State *A* and State *B* prohibit murder in substantially the same manner. For analytical cleanliness, let us stipulate that the punishments are also substantially similar.[243] Whether the person who commits murder in State *B* with no connection to State *A* nonetheless may be prosecuted for that act under State *A* law depends on how the court views the relevant notice criteria. More specifically, the question becomes whether the right to fair notice includes notice of the applicable law (State *A* law) or notice only of the legal prohibition (against murder). The law in this area is somewhat schizophrenic.

We saw already that the Ninth Circuit refused to extend U.S. law to drug smuggling on a foreign flag vessel with no nexus to the United States even where the foreign government specifically consented to U.S. jurisdiction.[244] As a matter of due process, the court found that the defendant "would have a legitimate expectation that because he has submitted himself to the laws of one nation, other nations will not be entitled to exercise jurisdiction without some nexus."[245] On the other hand, the Second Circuit

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effect of this practice may be, our duty here is to determine wither defendant's New York contacts establish a proper basis for jurisdiction . . . ."), *aff'd*, 518 F.3d 102, 104 (2d Cir. 2008) ("The Court of Appeals acknowledged the potentially 'pernicious' effect of what plaintiff Ehrenfeld called 'libel tourism' . . . to chill free speech in the United States."); David Partlett & Barbara McDonald, *International Publications and Protection of Reputation: A Margin of Appreciation but Not Subservience?*, 62 ALA. L. REV. 477, 487 (2011) (providing other similar examples of libel tourism).

[242] *See supra* notes 232–33 and accompanying text.

[243] *Cf., e.g.*, United States v. Waseta, 647 F.3d 980, 988 (10th Cir. 2011) (applying ex post facto principles regarding a criminal sentence and concluding that "a defendant may be deemed to have fair notice of his post-[change-in-law] sentence so long as the sentence imposed is not *wildly different* than a sentence that might well have been imposed" under the previous law (internal quotation mark omitted)); United States v. Lata, 415 F.3d 107, 112 (1st Cir. 2005). For an analysis of the punishment component to the principle in international law, see Dana, *supra* note 4.

[244] *See supra* notes 197–99.

[245] United States v. Perlaza, 439 F.3d 1149, 1168 (9th Cir. 2006) (alteration omitted) (quoting United States v. Klimavicius-Viloria, 144 F.3d 1249, 1257 (9th Cir. 1998)). Notably, this due process protection would not apply to persons on stateless vessels, precisely because "where a defendant attempts to avoid the law of *all* nations by travelling on a stateless vessel, he has forfeited these

recently ruled in an arms trafficking case, *United States v. al Kassar*, that "[f]air warning does not require that the defendants understand that they could be subject to criminal prosecution *in the United States* so long as they would reasonably understand that their conduct was criminal and would subject them to prosecution somewhere."[246] An added twist is that the Second Circuit had previously and explicitly adopted the Ninth Circuit's nexus requirement in a case involving foreign airplane bombing,[247] a decision I have critiqued elsewhere.[248] If, according to *al Kassar*, a U.S. nexus does not serve to ensure defendants have notice that U.S. law may apply to their conduct—since all they need to understand is that their conduct "would subject them to prosecution somewhere"[249]—it is unclear what purpose the nexus serves. As a legal requirement, it seems totally meaningless. Alternatively, if the nexus somehow applies to plane bombers but not to arms traffickers, it is just bizarre.

In any event, the difference between the two approaches above highlights the difference between the relevant notice criteria—notice of the applicable law versus notice that conduct is prohibited. The Ninth Circuit adopted the former test while the Second Circuit adopted the latter. Indeed, the Second Circuit appeared to dismiss altogether the idea that defendants need any notice at all that U.S. law might apply to their conduct so long as the conduct is "self-evidently criminal."[250] In support, the court cited *Bouie v. City of Columbia*, a Supreme Court case involving temporal legality that, as we know, reiterated "[t]he fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred.'"[251] Or, stated with a bit more flourish: "No one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offence was committed, and which existed as a law at the time."[252] *Al Kassar* thus cited a case about fair notice in time but elided the question of fair notice in space; namely, whether "one can be criminally punished in this country, . . . according to a law prescribed for his government by the sovereign authority" where the offense takes place completely outside of, and has no nexus to, that sovereign

protections . . . and can be charged with the knowledge that he has done so." United States v. Caicedo, 47 F.3d 370, 372–73 (9th Cir. 1995).

[246] 660 F.3d 108, 119 (2d Cir. 2011).

[247] *See* United States v. Yousef, 327 F.3d 56, 111 (2d Cir. 2003) ("The Ninth Circuit has held that '[i]n order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair.' We agree." (alteration in original) (citation omitted) (quoting United States v. Davis, 905 F.2d 245, 248–49 (9th Cir. 1990))).

[248] *See* Colangelo, *supra* note 154, at 1092–98.

[249] *al Kassar*, 660 F.3d at 119.

[250] *Id.*

[251] 378 U.S. 347, 354 (1964) (quoting HALL, *supra* note 1, at 58–59).

[252] *Id.* at 353 n.4 (quoting Kring v. Missouri, 107 U.S. 221, 235 (1883)).

authority. And *al Kassar* also failed to mention *Bouie*'s explicit rejection of the use of another state's law to supply notice in that case.[253]

Nonetheless, lower courts have begun to apply *al Kassar*'s rationale in short order.[254] In *United States v. Ahmed*, the Southern District of New York recently upheld charges of materially supporting and receiving military training from a designated foreign terrorist organization under U.S. law against an Eritrean national abroad, despite the fact that "[t]he indictment [did] not allege that the defendant engaged or intended to engage in specific acts either within the United States or directed at its citizens or property here or in other countries."[255] It was enough—under *al Kassar*—that the defendant's "acts [were] 'self-evidently criminal.' . . . Thus, the Due Process challenge fail[ed]."[256]

This leads to a follow-up inquiry if courts adopt a false-conflict model requiring notice only of the prohibition but not the applicable law: Is the conduct actually prohibited under foreign law? In my view, this inquiry requires that courts in fact look to the foreign law. If supporting the particular foreign organization is not illegal in the place where such support occurs, there is a true conflict.[257] This scenario is not farfetched; the Supreme Court recently held that supporting even lawful, peaceful activities of an organization, like training "on how to use humanitarian and international law to peacefully resolve disputes" or "how to petition various representative bodies such as the United Nations for relief," are punishable crimes under the material support statute.[258] It is not enough simply to say the conduct is "self-evidently criminal"; the court must conclude that the conduct is prohibited in substantially the same way under the law where it took place. The analysis would be akin to what courts do in civil choice of law cases when they discern false conflicts because the laws of the involved states are the same,[259] or in criminal extradition cases under the "dual criminality" principle, which provides that "extradition does not go forward unless the acts charged constitute a serious crime . . . under the law of both

[253] *See supra* text accompanying notes 31–33.

[254] In *al Kassar* itself, there was a U.S. nexus. *Al Kassar*, 660 F.3d at 118 (finding that the aim of extraterritorial conspiracy was "to harm U.S. citizens and interests and to threaten the security of the United States").

[255] No. 10 CR. 131 (PKC), 2011 U.S. Dist. LEXIS 123182, at *1 (S.D.N.Y. Oct. 21, 2011).

[256] *Id.* at *8.

[257] *See supra* Part III.B.

[258] Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2729 (2010). Interestingly, the Court used Congress's findings that "numerous multilateral conventions in force provid[e] universal prosecutive jurisdiction over persons involved in a variety of terrorist acts, including hostage taking, murder of an internationally protected person, and aircraft piracy and sabotage" to support its holding. *Id.* at 2726 (quoting 18 U.S.C. § 2339B findings and purpose (2006)). But none of the multilateral conventions prohibit the conduct at issue in *Humanitarian Law Project*.

[259] *See supra* note 211.

the requesting and the requested state."[260] Some European countries call this approach the "vicarious administration of justice" principle, and it requires a tight fit between the law of the prosecuting state and the law of the state where the offense occurred, including identical norms and elements of the offense, and use of the locus state's justifications and excuses, specifically because "the perpetrator could not have known of the applicability of foreign law."[261] If the law where the conduct occurred did not prohibit the conduct at the time it occurred, there is a spatial legality problem. The only way around the problem would be if the conduct also constitutes a universal jurisdiction offense under international law, to which we now turn.

D. *Harmonization*

Harmonization of laws exists where forum law and foreign law in the place where conduct occurs are fundamentally the same law. This situation arises most notably, though not exclusively, in cases of universal jurisdiction. The state properly exercising universal jurisdiction is by definition not applying just its national law to foreign conduct, but also an international law that applies everywhere and prohibits offenses including piracy, genocide, torture, war crimes, crimes against humanity, and terrorist acts like bombing and hijacking airplanes.[262] According to this principle, state practice and *opinio juris*, or the intent or belief that the practice has legal effect, have combined to denominate these offenses as contrary to international law and to authorize jurisdiction by all states,[263] evidenced also by the fact that the overwhelming majority of states in the world are party to treaties prohibiting the offenses and authorizing jurisdiction by all states parties.[264] Indeed, the only reason the state can claim jurisdiction to begin with over conduct having no relation at all to that state is that it is not extending purely national law to the conduct, but rather acts as a

[260] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 476 cmt. d (1987); *see also* John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1459 (1988) ("A maxim of international law, and a standard provision in nearly every United States extradition treaty, is that extradition will not take place unless the offense charged is a crime in both the demanding and the requested country."). Notably, "the offense charged must have been a serious crime in both states at the time it was committed." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 476 cmt. d.

[261] Jürgen Meyer, *The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction*, 31 HARV. INT'L. L.J. 108, 111, 116 (1990).

[262] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404; *see* THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 29 (Stephen Macedo ed., 2001).

[263] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmts. a–b (describing the order in which universal jurisdiction offenses have become "customary international law," a designation that incorporates state practice and *opinion juris*).

[264] *See* Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 VA. J. INT'L L. 149, 186–98 (2006) (detailing in an appendix the multilateral treaties covering universal jurisdiction crimes, including number of state parties).

decentralized enforcer of an international law that covers the globe.[265] In turn, no spatial legality problem arises in cases of existing universal jurisdiction offenses because the applicable law—international law—is the same everywhere.

A U.S. Supreme Court case from 1820, *United States v. Furlong*,[266] provides an early and sophisticated illustration of this point. *Furlong* addressed in dicta whether a double jeopardy defense would attach between different sovereigns regarding the universal jurisdiction offense of piracy on the one hand and the parochial offense of murder on the other. At the time, piracy was deemed outside the national jurisdiction of any state.[267] Pirates were, according to the Court, stateless "persons[] on board . . . vessels[] which throw off their national character by cruizing piratically[] and committing piracy on other vessels."[268] The offense thus was not "committed against the particular sovereignty of a foreign power; but . . . against all nations, including the United States."[269] As a result, all states could prosecute piracy, not under national jurisdiction, but rather under "universal jurisdiction" to enforce the law of nations, or international law.[270] Murder, by contrast, was a parochial offense over which each state had national jurisdiction when the offense involved the state's national territory or persons.[271] The Court noted that because piracy

> is considered as an offence within the criminal jurisdiction of all nations[,] [i]t is against all, and punished by all; and there can be no doubt that the plea of *autre fois acquit* [already acquitted] would be good in any civilized State, though resting on a prosecution instituted in the Courts of any other civilized State. Not so with the crime of murder.[272]

Because unlike piracy, murder "is punishable under the *laws of each State*, . . . an acquittal in [the defendant's] case would *not* have been a good plea in the Court of Great Britain."[273]

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[265] This argument was originally spelled out in Colangelo, *supra* note 264, and has been explicitly adopted by courts in recent cases addressing universal jurisdiction. *See* United States v. Ali, Cr. No. 11-0106, 2012 U.S. Dist. LEXIS 96889, at *19 (D.D.C. July 13, 2012) (finding universal jurisdiction over piracy off the coast of Somalia); United States v. Hasan, 747 F. Supp. 2d 599, 608 (E.D. Va. 2010) (same); *In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 256 & n.139 (S.D.N.Y. 2009) (finding universal jurisdiction over Apartheid-related crimes in South Africa). In a sense, this subsection integrates my work on universal jurisdiction in U.S. and international law into a discussion about legality and extraterritorial jurisdiction.

[266] 18 U.S. (5 Wheat.) 184 (1820).

[267] *See* United States v. Klintock, 18 U.S. (5 Wheat.) 144, 152 (1820).

[268] *Id.* at 144; *see* United States v. Holmes, 18 U.S. (5 Wheat.) 412, 417–19 (1820).

[269] *Klintock*, 18 U.S. at 152.

[270] *Furlong*, 18 U.S. at 197.

[271] *Id.*

[272] *Id.*

[273] *Id.* (emphasis added).

The Court's different treatment of piracy and murder centers on the nature of universal jurisdiction and, more specifically, on the conceptual move that when states exercise such jurisdiction they apply international law. On this rationale, if one state already applied the international law against piracy, another state cannot apply that same law again. Such a prosecution would constitute the paradigmatic double jeopardy violation—multiple prosecutions for the same offense under the same law (international law). But as to murder, because each state has its own separate national law prohibiting that offense—when it takes place on the state's territory or involves its nationals—each state may independently enforce its law.[274] The latter scenario is the well-known doctrine of "dual sovereignty" in U.S. law: "When a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences' . . . for each of which he is justly punishable."[275] The point for present purposes is that universal jurisdiction depends fundamentally on the application of international law and that law is the same everywhere, erasing any fair notice problem.[276]

This way of viewing universal jurisdiction has continued to the present day. For example, European courts that exercise universal criminal jurisdiction purport to do so on the ground that, to use the Spanish Constitutional Court's language, "[t]he international . . . repression sought through the principle of universal justice is based exclusively on the particular characteristics of the crimes covered thereby, whose harm (paradigmatically in the case of genocide) transcends the specific victims and affects the [I]nternational [C]ommunity as a whole."[277] And in the United States, where universal jurisdiction in civil suits has exploded into a

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[274] For a comprehensive elaboration of this double jeopardy theory in both U.S. and international law, see Anthony J. Colangelo, *Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory*, 86 WASH. U. L. REV. 769, 779 (2009).

[275] Heath v. Alabama, 474 U.S. 82, 88 (1985) (internal quotation marks omitted).

[276] O'Keefe, *supra* note 113, at 759 ("[Where] subsequent nationality and subsequent residency jurisdiction are actually, and merely, exercises of national criminal jurisdiction on the basis of universality over crimes under general international law—and, critically, over crimes that existed under general international law at the moment of their commission—they do not in any way infringe the prohibition on ex post facto criminalization embodied in international human rights law."). Moreover, as a choice of law matter, sovereignty concerns in this situation are substantially diminished or eliminated altogether since "no other State will have a legitimate contrary interest expressed in its laws. Either other States simply will not have laws contrary to the international norms proscribing universal crimes as a practical matter; or they cannot as a legal matter." Colangelo, *False Conflict*, *supra* note 8, at 899–900. This is not to say that other states with closer ties to the offense will not have objections to the choice of forum, but that is a different issue. My argument here concerns only the choice of law.

[277] S.T.C., Sept. 26, 2005 (B.O.E. 2005, No. 258) (Spain), *available at* http://hj.tribunalconstitucional.es/HJ/docs/BOE/BOE-T-2005-17753.pdf, *translated in* Constitutional Court Judgment No. 237/2005, of September 26, http://www.tribunalconstitucional.es/en/jurisprudencia/restrad/Pages/JCC2372005.aspx.

major legal and policy debate through the Alien Tort Statute (ATS)[278]—a debate now before the Supreme Court[279]—lower courts have justified entertaining suits by foreigners against foreigners for conduct abroad on the theory that "ATS jurisdiction [i]s limited to claims in violation of universally accepted norms" under international law.[280] That is, "[t]he norms being applied under the ATS are international, not domestic, ones, derived from international law. . . . [Thus,] the ATS provides a domestic forum for claims based on conduct that is illegal everywhere, including the place where that conduct took place."[281]

Of course, if a state purporting to exercise universal jurisdiction extends the offense definition beyond its extant definition in international law or makes up a new universal jurisdiction offense unsupported by existing international law, there is a problem: the defendant may not have been on notice of the prohibition, unless the state where the conduct occurred also had the same prohibition.[282] But where states faithfully incorporate existing international law against universal jurisdiction offenses into national law and apply it to foreign conduct, even conduct that bears no nexus to the prosecuting state, there is no spatial legality problem. The defendant was on notice of the applicable law—international law—at the time of the conduct.[283]

CONCLUSION

States are asserting extraterritorial regulatory power now more than ever. This unprecedented and increasingly aggressive phenomenon calls out for a legal analysis that incorporates not just state interests but also individual rights. And the analysis must come immediately, as mix-ups metastasize between adjudicative and prescriptive jurisdiction that surreptitiously underpin exorbitant claims to regulate conduct abroad. This Article synthesized principles of legality and jurisdiction to lay a bedrock concept from which individual rights arguments may build. And it gave such arguments not only theoretical cogency but also doctrinal grounding so that parties have available viable legal arguments in U.S. courts. In doing

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[278] 28 U.S.C. § 1350 (2006) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

[279] *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (2011).

[280] Sarei v. Rio Tinto PLC, 671 F.3d 736, 746 (9th Cir. 2011).

[281] *Id.*

[282] In which case, the situation might be categorized as a "false conflict." *See supra* Part III.C.

[283] I have argued that in U.S. constitutional law, universal jurisdiction interacts with the Fifth Amendment's Due Process Clause in this way. *See* Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction*, *supra* note 8, at 170–76. Courts seem receptive to this argument. *See* Goldberg v. UBS AG, 690 F. Supp. 2d 92, 109 (E.D.N.Y. 2010); *accord* United States v. Emmanuel, No. 06-20758-CR-ALTONAGA/Turnoff, 2007 U.S. Dist. LEXIS 48510, at *45 n.10 (S.D. Fla. July 5, 2007) (order on defendant's motion to dismiss the indictment).

so, the Article reformatted rule of law criteria regarding fair notice in the domestic system for the international system, and cast that fair notice right across space as well as time via extant jurisdictional rules among the states comprising the system.

This is only the beginning. Domestic systems have held dear rule of law criteria like fair notice for some time. Indeed, I used its manifestations in the U.S. domestic system to analogically bolster arguments about U.S. jurisdiction in the international system. Yet the growing phenomenon of extraterritoriality, and the growing amount of jurisdictional overlap that invariably will attend it, are placing novel and urgent demands on the rule of law in the international system. The crucial questions for scholars, courts, and litigants now, in both national and international law, are whether and how traditional rule of law criteria can be translated to meet these demands in a system poised to subject actors to a potentially massive and conflicting amount of jurisdictional overlap.[284] For as states continue to push against limits customarily observed on the geographic reach of their laws, the jurisdictional rules themselves will evolve to permit ever-expansive regulation. At present and for the foreseeable future, spatial legality's fair notice criterion may act as a rule of law constraint; as long as every state's law does not apply everywhere, it will have some traction. But because fair notice of the law is itself a function of jurisdictional rules, and those rules may evolve, it cannot operate alone. It protects parties' expectations by freezing jurisdictional rules at the time of conduct but says nothing about the development of those rules. In this respect, it is an endogenous limit within the law on how states may exercise jurisdiction after conduct occurs, not an exogenous limit on the future development of the law.

Yet how the law develops may generate other legality problems. For instance, in a world of rampant extraterritoriality, the constraint of fair notice may fall away and compliance may take its place. In such a world, the "absolute conflict" situation—in which actors are subject to opposing legal commands such that they cannot comply with both—is a variant of the formal rule of law element of avoiding contradiction in the law.[285] Only here it is not one contradictory law emanating from one sovereign but multiple contradictory laws emanating from multiple sovereigns. Moreover, the ever-increasing potential for jurisdictional overlap and "true conflicts" of

[284] *Accord* Waldron, *supra* note 5, at 26 ("The character of the [international law] constraint will no doubt be determined, formally and procedurally (if not substantively), by the ideal of the Rule of Law, adapted to the international context. Accordingly, it is a matter of some urgency—which more or less implies these days that legal philosophers are going to neglect it—to consider what that adaptation of this ideal to the international context involves."). I am not addressing the deeper jurisprudential question of whether international law is "law." For an insightful recent addition to this literature, see Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252 (2011).

[285] For the best-known account in the domestic system, see FULLER, *supra* note 5, at 65–66.

laws invites rethinking away from state interests and toward individual rights.[286] Here the rule of law may take on a protective role of ensuring liberty of behavior and movement[287] in the face of otherwise paralyzing burdens imposed by concurrent regulatory regimes. These liberty rights have systemic dimensions as well because they facilitate commerce and the efficient allocation of resources within the system, maximizing overall welfare.[288] Finally, as substantive international law expands to regulate more activity, and as states seek to apply this "harmonized" international law more in domestic courts, the law opens itself up to already mounting objections of "fragmentation"[289] in the sense that the more numerous and diverse the bodies purporting to determine and apply international law, the more fragmented and inconsistent that law will become. The conceptual and lawyerly challenge going forward will be how best to analyze and resolve these types of conundrums[290] in order to effectively adapt the rule of law—or "the objective of giving meaningful direction to human effort"[291]—to new and changing circumstances.

[286] *E.g.*, Brilmayer, *supra* note 157, at 1297 (setting out a "political rights model of choice of law").

[287] *Id.* at 1280 ("By and large, [political rights] are rights to be left alone.").

[288] For an innovative analysis of choice of law using an economic perspective, see Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883 (2002).

[289] *See* Andreas Fischer-Lescano & Gunther Teubner, *Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999, 1002 (2004) (translated by Michelle Everson) (observing that lawyers' fragmentation critiques "identify a danger to the unity of international law because the conceptual-doctrinal consistency, the clear hierarchy of norms and the effective judicial hierarchy that was developed within the nation-states, is lacking").

[290] I have ideas, probably hinted at already *supra* Part III.A and III.D, on how these types of issues can and should be analyzed. I will take up the questions in other articles—perhaps as installments with this Article being *Spatial Legality, Part I: Fair Notice*, the next being *Spatial Legality, Part II: Compliance*, and the next after that being *Spatial Legality, Part III: Consistency*.

[291] *See* FULLER, *supra* note 5, at 66.