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Each day vast quantities of drugs are smuggled into the United States. [1] Often a large ocean going ship, the "mother ship," waits offshore beyond the territorial seas of the United States. When the ship is not being observed, smugglers unload drugs onto high speed boats which then take the drugs to shore. In order to control the flow of drugs introduced into the country by this method, the Coast Guard must take action against the smugglers on the mother ship even though the ship is in international waters. [2]

The Coast Guard has the power to arrest violators of U.S. laws on "any vessel subject to the jurisdiction or to the operation of any law, of the United States." [3] With respect to drug smuggling on the high seas, [4] the Coast Guard derives extraterritorial jurisdiction from the Comprehensive Drug Abuse Prevention and Control Act of 1970, [5] and the 1980 Marijuana on the High Seas Act. [6] Because Congress intended that these statutes be applied in a manner consistent with international law, [7] their extraterritorial reach depends upon U.S. judicial interpretations of the principles of jurisdiction recognized by international law.

This note examines the contours of U.S. jurisdiction over drug smugglers on the high seas. [8] After a brief discussion of the two principal U.S. drug statutes, the note considers the territorial and protective principles of jurisdiction as defined by U.S. courts. Controversy currently centers around whether U.S. drug laws apply to foreign ships, carrying controlled substances on the high seas, where there has been no showing of an intent to import the drugs into the United States.

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CONGRESSIONAL INTENT UNDERLYING THE CURRENT DRUG LAWS

Congress designed the Comprehensive Drug Abuse Prevention and Control Act of 1970 to consolidate and simplify prior laws concerning the illegal use of drugs. [9] The Act provides in part that it is illegal to import, export, manufacture or distribute drugs knowing or intending that they will be unlawfully imported into the United States, and that it is illegal to possess such drugs on any vehicles, vessel, or aircraft in the United States or within the U.S. customs area. [10]

In passing the 1970 Drug Act, Congress repealed the Narcotic Drugs Import Export Act. [11] That Act provided in part that unexplained extraterritorial possession of drugs was sufficient for conviction where there was intent to illegally import drugs into the United States. Inadvertently Congress did not create a new statute to replace this provision. [12] The result was that a smuggler on a ship beyond the U.S. customs area could not be prosecuted for possession. He could only be prosecuted for attempted unlawful importation or conspiracy to do the same. Given the greater burden of showing an attempt or conspiracy to import drugs, prosecutors found it difficult to obtain evidence which established the guilt of the offenders. [13]

The 1980 Marijuana on the High Seas Act supplements the 1970 Act. The new Act provides in part that, "it is illegal for any person to possess, manufacture or distribute a controlled substance either knowing or intending that it be illegally imported into the United States." [14] Thus a simple showing of possession with knowledge that the drugs will be imported is now sufficient to convict a defendant. This relieves the prosecution of the burden—imposed by the 1970 Act—of showing an attempt or conspiracy.

Both the 1970 and 1980 Acts apply extraterritorially. At the outset, there was some uncertainty whether the 1970 Act so applied. Under established principles of statutory construction, however, the courts have determined that the Act extends to offenses committed outside the United States, because the Act's scope and usefulness would be seriously curtailed if it did not. [15] To avoid any ambiguity, Congress expressly stated that the 1980 Act reaches, "acts of possession, manufacture or distribution committed outside the territorial jurisdiction of the United States." [16]

While the two drug statutes now clearly extend to extraterritorial offenders, the scope of their application depends upon the principles of jurisdiction recognized by international law. This is so first because—absent an express legislative intent to the contrary—courts will construe statutes in a manner consistent with international law. [17] Congress did not express any views on jurisdiction in the 1970 Act and thus is presumed to have intended compliance with the principles of jurisdiction. With respect

to the 1980 Act, Congress explicitly indicated that the statute affords the Justice Department, "the maximum prosecutorial authority permitted under international law." [18]

Whatever the legislative intention, the principles of jurisdiction may impose a second, more fundamental constraint on the extraterritorial reach of the drug statutes: "[a] necessary condition to the competence of a state to enforce its laws is that it have the capacity to prescribe them." [19] As will be discussed in detail below, the courts have consistently defined prescriptive capacity in terms of the principles of jurisdiction recognized by international law. [20] The courts' views of these principles have evolved as the problem of drug smuggling has grown.

PRINCIPLES OF JURISDICTION

Several principles are relevant to the assertion of jurisdiction over drug smugglers at sea. [21] First, the territorial principle recognizes that a sovereign state has jurisdiction over all acts committed within its territory. [22] Given the problem of crimes occurring in more than one state, the strict territorial definition was expanded to include the objective and subjective territorial principles. [23] The subjective principle applies where criminal acts are initiated in the state asserting jurisdiction but come to fruition elsewhere. [24] The objective territorial principle applies where the act is initiated outside the state asserting jurisdiction but produces effects within it. [25] U.S. courts have frequently employed both the subjective and the objective principles. [26]

Another theory on which courts have relied to find jurisdiction in drug smuggling cases is the protective principle. The Harvard Draft Convention on Jurisdiction with Respect to Crime defined this principle in the following manner:

> A state has jurisdiction with respect to any crime committed outside its territory by an alien against the security, territorial integrity or political independence of that State, provided that the act or omission which constitutes the crime was not committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed. [27]

Although the acts proscribed according to this principle vary from country to country, they generally include acts against a nation's security such as treason and acts against state officials. [28] U.S. courts have recognized this principle in cases of fraud in an application for a U.S. visa, and counterfeiting. [29]

Finally, the nationality principle rests on the inherent power of a sover-

eign state to regulate the acts of its citizens. It provides that a nation has jurisdiction over the acts of its citizens wherever they may be. Although a state cannot enforce its criminal law within the territory of another state, a state may compel observance of its law by punishment if a person who has broken the law outside the state's territory returns to it. [30] In several cases, U.S. courts have used the nationality principle to uphold jurisdiction over the extraterritorial acts of U.S. citizens. [31]

APPLICATION OF INTERNATIONAL JURISDICTIONAL PRINCIPLES: INTERPRETATION IN U.S. COURTS.

The Territorial Principle

The traditional definition of the objective territorial principle requires an actual effect on the United States before jurisdiction can attach to criminal acts. [32] In order to capture drug smugglers, it is often necessary for the Coast Guard to intercept a mother ship stationed beyond the territorial seas of the United States, before an actual effect on the United States occurrs. Under the traditional definition no jurisdiction would obtain over the acts of foreign smugglers on board the mother ship. In order for jurisdiction to attach the Coast Guard would need proof of an attempt to illegally import drugs that had actual effects on the United States, or would have to wait until the smugglers entered U.S. waters.

U.S. courts have responded to this problem by broadening the definition of the objective territorial principle to require only an intent to produce effects in the territory of the United States. [33] The courts also have refined the subjective and objective territorial principles to apply to the inchoate crime of conspiracy to import drugs: where one overt act of the conspiracy has occurred within the United States, jurisdiction will be exercised over all the conspirators. [34] Pressured by the need for effective law enforcement against drug smugglers, the courts have pushed the principles of jurisdiction to their limits.

The Actual Effects Requirement

Mr. Justice Holmes' traditional formulation of the objective territorial principle in *Strassheim v. Dailey* [35] is the one most commonly cited. In *Strassheim,* Dailey was convicted to inducing a Michigan public official to pay bills presented to the state which the official knew to be fraudulent. Dailey was never in Michigan and defended his extradition from Illinois on the grounds that the facts alleged did not constitute a crime against the laws of Michigan. In sustaining Michigan's assertion of jurisdiction over the defendant's acts, Justice Holmes stated,

> Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he (the actor) has been present at the effect, if the State should succeed in getting him within its power. [36]

Even though *Strassheim* involved application of a particular state's law beyond its territory, the *Strassheim* formulation of the objective territorial principle has been used to extend U.S. law to the high seas and to foreign countries.

A 1967 drug smuggling case, *Rivard v. United States,* [37] entailed a variation on the Strassheim formulation. In *Rivard,* Canadian nationals were prosecuted under U.S. law for conspiracy to smuggle heroin into the United States, and one defendant was charged with the substantive offense of smuggling heroin. The defendants had arranged for drugs to be bought abroad and then by various means to be transported to and sold in the United States. Eventually one of the defendants was arrested in Laredo, Texas when he brought seventy-six pounds of heroin into the United States. On the basis of this defendant's testimony, the other conspirators were extradited from Canada and were convicted in Texas.

The major defense raised on appeal was that the district court did not have jurisdiction to try the alien defendants since they never entered the United States. The court of appeals rejected this defense and held that jurisdiction over the offense existed. The court employed a test propounded by Mr. Justice Taft in *Ford v. United States,* [38] an early liquor smuggling case:

> The overt acts charged in the conspiracy to justify indictment . . . were acts within the jurisdiction of the United States, and the conspiracy charged, although some of the conspirators were corporally [beyond U.S. territory], had for its object crime in the United States and was carried on partly in and partly out of this country. . . . [39]

Using this standard, the court held the defendants' acts were within U.S. jurisdiction.

The traditional definition of the objective territorial approach was sufficient to sustain jurisdiction in *Rivard* since the conspiracy had come to fruition and had produced effects within the United States. However, in cases of attempt or conspiracy which lack an effect within the United States, the traditional definition would not suffice. Courts have therefore de-emphasized the need for an actual effect, present in both *Ford* and *Rivard.* Instead they have employed the two other elements suggested by the *Ford* test: an intent to violate U.S. laws and an overt act committed within the United States.

The Overt Acts Formulation as Applied to Drug Smuggling Cases

One of the first drug smuggling cases where the overt acts formulation was used was *United States v. Postal.* [40] In *Postal* the Coast Guard stopped the smugglers' ship—carrying a flag of the Grand Cayman Islands—at points eight to sixteen miles off the Florida coast. After boarding the ship, the Coast Guard discovered that it carried several tons of marijuana, and arrested the crewmen and took them to Miami.

One of the jurisdictional defenses raised on appeal of the crew's conviction, was that the "United States lacked competence to prescribe rules making [the defendant's] conduct on the high seas criminal." [41] The Fifth Circuit responded to this defense by first noting that the "United States has long adhered to the objective principle of territorial jurisdiction." [42] According to the court, the objective territorial principle "holds that [the United States] has jurisdiction to attach criminal consequences to extraterritorial acts that are intended to have an effect in the United States, at least where overt acts within the United States can be proved." [43] The court found that the requisite intent had been shown and that the outfitting and sale of the LaRosa, which occurred in Florida, satisfied the overt act requirement. Thus the court concluded that the U.S. had jurisdiction over the defendants.

Postal represented a significant modification of the objective territorial principle since jurisdiction was upheld over a conspiracy even though its effects had not occurred in the United States. Unlike *Rivard* and *Ford, Postal* involved a conspiracy whose effects had been cut short. Although it did not explicitly recognize the point, the court thus extended the objective territorial principle to a new situation: where an effect on the United States was intended but did not come to pass, and where at least one overt act occurred in the U.S. Given the apparent origination within the United States of an objectionable activity—a conspiracy to import drugs, jurisdiction in *Postal* might also have been maintained under the subjective territorial principle, but the court did not recognize this point.

A Further Modification of the Objective Territorial Principle: Intent to Produce Effects in the United States

While *Postal* and several other cases pointed to intent and an overt act in furtherance of a conspiracy as the elements required by the objective territorial principle, more recent decisions have eliminated any requirement of an overt act. These cases hold that mere intent to violate U.S. drug laws suffices for jurisdictional purposes. [44] This further relaxation of limitations on the objective territorial principle appears to have stemmed from language in *United States v. Postal.*

In a footnote, the *Postal* court suggested that proof of an overt act may no longer be required for jurisdictional purposes. [45] In support of its suggestion the *Postal* court cited three cases: *United States v. Johnson;* [46] *United States v. Littrel;* [47] and *United States v. Thomas.* [48] The facts of these cases, however, show that the conspiracies in question occurred entirely in the United States. The holdings that no overt act need be proven were related to the proof needed to sustain a conspiracy conviction under the 1970 Act, not whether mere intent would suffice to uphold a court's jurisdiction over acts committed on the high seas; in evolving jurisdictional standards that comport with international law, the court relied on statutory standards for upholding conspiracy charges that bear no relation to the concerns embodied in international principles of jurisdiction. The *Postal* court erred in relying on these cases to suggest that mere intent might sustain jurisdiction. Although the suggestion is dictum, *Postal's* discussion of jurisdiction created a new line of reasoning.

In a series of recent cases, courts in the First [49] and Fifth [50] Circuits have concluded that mere intent to violate U.S. drug laws is sufficient to sustain jurisdiction over an extraterritorial conspiracy to import drugs and, in two cases, over extraterritorial possession with intent to distribute. In all of these cases the defendants were importing large quantities of drugs but had not committed any overt act within the United States. The Coast Guard apprehended these smugglers in various areas of the seas, anywhere from six to 150 miles from the U.S. coast.

The arguments against jurisdiction in these cases focused on the lack of any overt act occurring in the United States. For instance, in *United States v. Williams,* [51] the defendant admitted the conspiracy was designed to have effects within the territory of the United States. The defendant, however, pointed to *United States v. Winter* [52] where the court stated that jurisdiction obtained over a group of conspirators, "if there [were] sufficient proof that at least one of the conspirators committed an overt act in furtherance of the conspiracy within the territorial jurisdiction of the district court." [53]

Relying in part on the *Postal* dictum, the Williams court rejected this argument. Their first response was that the *Winter* court itself stated that the relevant statutory prohibition does not explicitly require proof of an overt act. The court then concluded that, because the statute does not explicitly require an overt act, an overt act is not a prerequisite for jurisdiction. [54] This conclusion is erroneous, however, because the court confused the issue of jurisdiction with the issue of proof needed to sustain a conviction for conspiracy.

Similarly, other courts have reasoned that in order for the drug statutes to be most effective, they must apply to cases where only intent can be shown. [55] Again, however, the courts have relied on the statutes to determine the scope of jurisdiction. This is incorrect because—for the reasons

noted above [56]—the extraterritorial application of the statutes is constrained by principles of jurisdiction recognized under international law. [57] If the courts intend to refine the principles of jurisdiction, they should address directly the issue of the proper reach of a nation's extraterritorial jurisdiction.

The courts' faulty reasoning is especially disturbing because the results to which it leads are unprecedented. In smuggling cases, the Supreme Court and all lower courts prior to 1979 had only refined the territorial principle to allow for extraterritorial jurisdiction where some overt act had occurred within the United States. [58] Yet, relying on the dictum of *Postal,* recent cases have established a new jurisdictional standard in the drug smuggling cases: intent to violate U.S. drug laws suffices to establish jurisdiction under the objective territorial principle.

Although this new standard may not ultimately prove to be objectionable, its recent development is questionable. In most cases employing the mere intent doctrine alternative, more established grounds of jurisdiction were available. In four of the cases all the defendants were American, so the courts could have asserted jurisdiction over them purely on the basis of the nationality principle. [59] Additionally two cases involved U.S. vessels, justifying special U.S. maritime jurisdiction. [60]

United States v. Ricardo [61] did involve foreign defendants captured on board a foreign vessel. Even in *Ricardo,* however, the court could arguably have sustained jurisdiction under the overt acts doctrine. At the outset, some of the conspirators apparently left Florida in a smaller vessel in order to meet the mother ship. [62] In addition, the vessel which was to have received the drugs from the mother ship may have originated in the United States, again satisfying the jurisdictional requirements of the overt acts doctrine. [63]

While the courts may have reached the correct results in *Ricardo* and the other cases, they employed innovative reasoning when it was not necessary. *United States v. Egan* [64] is the only case in which the mere intent formulation may actually have been necessary to sustain jurisdiction. In *Egan,* foreign defendants were captured on board a stateless vessel forty miles off the U.S. coast. There were no apparent overt acts within the United States. Yet, the district court found jurisdiction, relying primarily on the questionable cases discussed above.

The Current Status of the Objective Territorial Principle

Under the formulation of the objective territorial principle currently employed by the courts, mere intent to violate U.S. drug laws suffices to uphold jurisdiction. This supercedes or at least supplements the overt acts plus intent formulation which preceeded it. This new development may ultimately be necessary for effective drug enforcement. However, in the

cases developing this refinement of the territorial principle, alternative bases of jurisdiction were available and should have been employed instead. Perhaps even more disturbing is the lack of convincing reasoning to support the mere intent formulation. The courts have yet to discuss a justification for this formulation or its precedential basis. Moreover, the cases do not indicate when and how the courts may infer intent to violate U.S. drug laws.

Protective Principle

An alternative principle of jurisdiction is the protective principle. In the case of drug smugglers, the government has used the protective principle to justify extraterritorial jurisdiction in only a few cases. In these cases, the protective principle has been used generally as an alternative justification for asserting jurisdiction. [65] The reluctance to use the principle may stem from questions concerning its legitimate application in drug smuggling cases. The courts have traditionally applied the protective principle only to acts threatening the national security, or governmental interest. [66] As discussed below, [67] it is difficult to see how drug smuggling threatens these interests.

In spite of the uncertain theoretical basis for employing the protective principle in drug smuggling cases, *United States v. Angola* [68] relied exclusively upon the principle to support jurisdiction. There, the defendant foreign nationals had been picked up amid the islands of the Bahamas, 300 to 350 miles from the United States. [69] They were charged with possession of a controlled substance with intent to distribute. In sustaining jurisdiction over the defendants' act, the court concluded that the protective principle "supports assertion of extraterritorial jurisdiction without a showing of actual effects on the nation. It is enough to show that the activity which the nation seeks to regulate has a potentially adverse effect on the nation." [70]

The court reasoned that "it is necessary to attempt regulation of vessels on the high seas notwithstanding the observance of any objective proof of an intent to import into the United States." [71] Although the court restricted its holding to the case of stateless vessels, the court suggested in dicta that the protective principle might offer a basis of jurisdiction in other cases. [72] There is virtually no support in the case law for the position taken by the court. The *Angola* opinion itself is virtually a verbatim quote from an unreported opinion, *United States v. Pauth-Arzuza.* [73] In neither *Angola* nor *Pauth-Arzuza* does the court examine the rationale behind the protective principle or consider why it should apply in drug smuggling cases.

Fortunately, not all of the courts have been so cavalier in extending jurisdiction under the protective principle. In *United States v. James-Robin-*

son, [74] Columbian citizens were arrested on a stateless vessel more than 400 miles from the continental United States. The defendants were charged with possessing a controlled substance with an intent to distribute it, in violation of the 1980 Marijuana on the High Seas Act. The prosecution stipulated that it would not attempt to prove at trial that the defendants had the intent to unload or distribute controlled substances in the United States.

In sustaining the defendants' motion to dismiss for lack of jurisdiction, the court first reviewed the congressional intent underlying the 1980 Act. [75] The court concluded that Congress intended to abide by international law, and therefore had to consider whether the indictment was proper under the international law of jurisdiction. The court then examined the international bases of jurisdiction and asserted that the indictment had to "stand or fall on the protective principle of the international law of jurisdiction." [76] The objective territorial principle would not suffice because "the United States [had] specifically declined to assert that the acts of the defendants on the high seas were intended to cause an effect here." [77] The court stated that "the protective principle is limited to situations where there is at least a potentially adverse effect on the sovereign's security or its governmental functions." [78]

With respect to how this principle has been applied in the United States the court indicated (without noting *Angola*):

> All cases which have invoked the protective principle were actions where there was a demonstrable effect on the United States in particular. Never in a published opinion of an American court has a potentially generalized effect, which might or might not also be an effect on the United States, been sufficient to invoke the protective principle of international law. [79]

Given this case law and the fact that the government would not show a nexus between the smugglers and the United States, the court rejected the government's claim of jurisdiction over the acts of the defendants and dismissed the indictment. [80]

The rationale of *James-Robinson* and *Angola* are clearly irreconcilable. So too are their results: both boats were seized 300 to 400 miles from the U.S. coast. *Angola* in fact presented highly questionable circumstances for upholding jurisdiction. The defendants there were sailing much closer to the Bahamas than they were to the United States.

In light of the prosecution's failure to offer proof as to the intention of the defendants in *Angola,* it is quite possible that they had no intention to come to the United States and that they planned to sell their cargo elsewhere. If this was the case, the United States had no justification under

international law for exercising jurisdiction. Indeed, the Justice Department itself stated:

> To have jurisdiction over . . . distribution of a controlled substance by a non-U.S. citizen on foreign vessels on the high seas, the United States must show an actual or potential adverse effect within its territory. It is doubtful that such an adverse effect could be demonstrated in the absence of intent to import the substance into the United States or knowledge that it will be imported. [81]

Even where there is an intent to violate U.S. drug laws it is doubtful that the protective principle should be a basis for jurisdiction. Courts have applied the principle only to acts threatening national security or a governmental function. The protective principle has historically been limited to acts of treason or counterfeiting the seal or currency of the United States. [83] Drug trafficking may have an adverse effect on the health of the American people, but its effect is not the same as treason, which results in an immediate threat to the security of our country. If the protective principle is applied in drug smuggling cases, it could be applied in almost any situation. Without principled limits to jurisdiction there is the possibility of international confrontation.

The use of the protective principle in drug smuggling cases is not only theoretically questionable, it is unnecessary—especially if the objective territorial principle merely requires an intent to violate U.S. laws. Even if the courts adopt a more conservative view of the objective principle, as demonstrated above, they can sustain jurisdiction in most cases. In any event, there should be a minimum limit to the reach of U.S. jurisdiction in the drug smuggling cases: where the United States cannot at least prove an intent to affect U.S. interests, the courts ought to deny jurisdiction. Absent such an intent, it is difficult to justify U.S. jurisdiction over the acts of the accused.

CONCLUSION

The courts have extended both the objective territorial and the protective principles of jurisdiction in drug smuggling cases. This article has examined the demise, since *Postal*, of any overt acts requirement for the exercise of jurisdiction under an objective territorial principle, and has questioned the legitimacy of the judicial reasoning behind this demise; in moving toward the position that mere intent to produce effects in the U.S. will support jurisdiction, the courts mistakenly relied on a statutory standard relating to conspiracies occurring in the U.S. In justifying this extension of

jurisdiction, the courts have failed to address the more fundamental considerations behind the principles of jurisdiction.

This article has also expressed skepticism toward any use of the protective principle as a basis for asserting jurisdiction in typical drug smuggling cases, for such cases lack a clear nexus between the offense and national security. Without a clear nexus, this principle could too easily be abused. In light of the courts' expansion of the territorial principle, such questionable use of the protective principle appears unnecessary as well as unwise.

NOTES

[1] In 1970, for example, an average of over 2000 kilograms of marijuana was imported into the United States each day. MARIJUANA: A SIGNAL OF MISUNDERSTANDING, THE TECHNICAL PAPERS OF THE NATIONAL COMMISSION ON MARIJUANA AND DRUG ABUSE 600 (1972).

[2] *Coast Guard Drug Law Enforcement: Hearings before the Subcomm. on Coast Guard and Navigation of the Comm. on Merchant Marine and Fisheries on H.R. 2538,* 96th Cong., 1st Sess. 2 (1979) (statement of Mario Biaggi, chairman of the subcommittee).

[3] 14 U.S.C. § 89 (1976). Section 89 authorizes the Coast Guard to inquire, examine, inspect, search, seize, and arrest on the high seas to prevent, detect, and suppress violations of U.S. law:

> for such purposes . . . officers may at any time go on board any vessel *subject to the jurisdiction,* or *to the operation of any law, of the United States,* address inquires to those on board, examine the ships' documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. (emphasis added.)

[4] There are at least three major divisions of jurisdiction over waters adjacent to the United States: (a) the territorial seas extending three miles, 43 U.S.C. § 1301(a)(2) (1976); (b) the contiguous zone extending twelve miles for customs enforcement, 19 U.S.C. § 1401(j) (1976); (c) the economic zone for regulating fishing within 200 miles of the United States, 16 U.S.C. § 1811 (1976). U.S. courts have recognized that the high seas, as defined by the United States, applies to that area of the ocean beyond three miles. United States v. Louisiana, 394 U.S. 11, 22 (1969); United States v. Warren, 578 F.2d 1058, 1064, n.4 (5th Cir. 1978) (*en banc*), *cert. denied,* 446 U.S. 956 (1980). In another case the government conceded that the area from three to twelve miles is part of the high seas for criminal jurisdiction purposes. United States v. Baker, 609 F.2d 134, 136 (5th Cir. 1980).

One other basis for a statutory definition of the extent of U.S. jurisdiction over adjacent waterways is the 1935 Anti-smuggling Act, 19 U.S.C. §§ 1701-11 (1976). It provides that the United States has jurisdiction over seas up to sixty-two miles away from the U.S. coast and 100 miles laterally from any ship stopped within that zone, when there is a reasonable suspicion that the ship is engaged in smuggling. At least one scholar has suggested that this would offer a basis for jurisdiction over hovering "mother ships." Ficken, *The 1935 Anti-Smuggling Act Applied to Hovering Narcotics Smugglers Beyond the Contiguous Zone: An Assessment under International Law,* 29 U. MIAMI L. REV. 700 (1975).

[5] The Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended in scattered sections of 21 U.S.C.).

[6] 21 U.S.C.A. § 955a(a)-(h) (West 1981).

[7] *See infra* notes 15-20 and accompanying text.

[8] This note does not discuss issues pertaining to the fourth amendment or the Convention on the High Seas. 450 U.N.T.S. 82, 13 U.S.T. 2312 (1958).

For an excellent discussion of fourth amendment issues raised by the apprehension of drug smugglers on the high seas, see Carmichael, *At Sea with the Fourth Amendment,* 32 U. MIAMI L. REV. 51 (1977). *See generally* Note, *High on the Seas: Drug Smuggling, The Fourth Amendment, and Warrantless Searches at Sea,* 93 HARV. L. REV. 725 (1980). For a discussion of how U.S. courts have applied the Convention on the High Seas to drug smugglers seized in international waters, *see* Note, *"Double Jeopardy" on the High Seas: International Narcotics Traffickers Beware,* 10 GA. J. INT'L & COMP. L. 647 (1980).

9 H.R. REP. No. 1444, 91st Cong., 2d Sess. 2, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 4566, 4567.

10 21 U.S.C. §§ 952-55 (1976).

11 Pub. L. No._____, _ Stat. __ (____).

12 S. REP. No. 855, 96th Cong., 2d Sess. 2, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2785.

13 *Coast Guard Drug Law Enforcement, supra* note 2, at 32 (statement of Benjamin A. Gilman, member of Congress).

14 21 U.S.C.A. § 955a(d) (West 1981).

15 Courts may declare that Congress intended a law to apply extraterritorially, given the nature of the offense, under the "Bowman doctrine." In United States v. Bowman, 260 U.S. 94 (1922), the Supreme Court sustained jurisdiction over a conspiracy to defraud a U.S. agency even though the conspiracy took place abroad. After referring to the principle that crimes "which affect the peace and good order of the community, must of course be committed within the territorial jurisdiction of the government" in the absence of express evidence of a contrary intent on the part of Congress, Chief Justice Taft continued:

> But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependant on their locality for the Government's jurisdiction but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated. . . . Some such offenses can only be committed within the territorial jurisdiction of the Government because of the local acts required to constitute them. Others are such that to limit their *locus* to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute. . . . In such cases, Congress has not thought it necessary to make specific provision in the law that the *locus* shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense.

260 U.S. at 98. The Court left open the question whether the statute was applicable to aliens as well as to nationals for acts committed abroad.

The Bowman doctrine has been used by U.S. courts to assert that Congress intended the 1970 Comprehensive Drug Abuse Prevention and Control Act to apply extraterritorially. *See e.g.,* United States v. Perez-Herrera, 610 F.2d 289, 290 (5th Cir. 1980); United States v. Egan, 501 F. Supp. 1252 (S.D.N.Y. 1980).

16 21 U.S.C.A. § 955a(h) (West 1981).

17 *See, e.g.,* Murray v. The Schooner Charming Betsey, 6 U.S. (2 Cranch) 64, 118 (1804); United States v. James-Robinson, 515 F.Supp. 1340, 1343 (S.D. Fla. 1981); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 3(3) (1965) (providing that, where statutes are ambiguous, they will be interpreted in a manner consistent with international law).

18 S. REP. No. 855, 96th Cong., 2d Sess. 2 (1980).

19 United States v. Postal, 589 F.2d 862, 885 (5th Cir. 1979), *cert. denied* 444 U.S. 832 (1979).

20 *See, e.g., id.*

21 The passive personality and universality principles are two principles of jurisdiction that are widely recognized, yet inapplicable to this note. Jurisdiction based on passive personality is exerted over the perpetrators of a crime who have injured a victim of the nationality of the prosecuting country. This concept has been generally rejected as a basis of jurisdiction

in Anglo-American law and consequently will not be explored in this note. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 30(2), comment e (1965) (rejecting the passive personality principle); *see also* Zenith Radio Corp. v. Matsushita Electric Industrial Co., 494 F.Supp. 1161, 1179 n.38 (E.D. Pa. 1980). *But see* United States v. Layton, 509 F.Supp. 212, 218 n.5 (N.D. Cal. 1981), *dismissing appeal from,* 645 F.2d 681 (9th Cir. 1981), *cert. denied,* 101 S.Ct. 3128 (1981) (alternate holding) (passive jurisdiction found over a defendant accused of killing a U.S. Congressman in Guyana).

The universality principle of jurisdiction recognizes the existence of certain offenses that a state may punish even though a state has no territorial or nationality links to the criminal or the crime. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 34 (1965). However, the only examples of crimes over which there is universal jurisdiction are piracy, slave-trade, and war crimes. L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW 449 (1980). Other crimes, such as traffic in narcotics, may be universally condemned but are not as yet subject to the universality principle of jurisdiction. *Id.*

22 "A state has jurisdiction to prescribe a rule of law (a) attaching legal consequences to conduct that occurs within its territory, whether or not such consequences are determined by the effects of the conduct outside the territory, and (b) relating to a thing located, or a status or other interest localized, in its territory." RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 17 (1965).

23 *Harvard Research in International Law, Jurisdiction with Respect to Crime,* 29 AM. J. INT'L L. 435, 484-85 (Supp. 1935) [hereinafter cited as *Harvard Research*]. *See also,* J. BRIERLY, THE LAW OF NATIONS 186 (3d ed. 1942); Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws,* 33 BRIT. Y.B. INT'L L. 146, 159 (1957); 1 C. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 798 (2d revised ed. 1945).

24 *Harvard Research, supra* note 23, at 484-85.

25 *Id.* at 487-94.

26 *Id.* at 484-94. *See, e.g.,* United States v. Mann, 615 F.2d 668 (5th Cir. 1980), *cert. denied,* 450 U.S. 994 (1981) (drug-smuggling case using objective territorial approach).

27 *Harvard Research, supra* note 23, at 543.

28 *Id.* at 552

29 *Id.* at 554; *see, e.g.,* United States v. Archer, 51 F.Supp. 708 (S.D. Cal. 1943) (Court relied on the protective principle to punish an alien who committed perjury before a diplomatic officer in Mexico in connection with an application for a non-immigrant visa); *see also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 33 (1965).

30 W. HALL, A TREATISE ON INTERNATIONAL LAW 56-57 (A. Higgens 8th ed. 1924).

31 *See, e.g.,* United States v. Daniszewski, 380 F.Supp. 113 (E.D.N.Y. 1974) (U.S. court has jurisdiction to prosecute a U.S. citizen for distribution of heroin in Thailand when done with the intent that the drug be illegally imported into the United States); *see also* Blackmer v. United States, 284 U.S. 421 (1932); Skiriotes v. Florida, 313 U.S. 69 (1941).

32 *Harvard Research, supra* note 23, at 488.

33 *See infra* note 50.

34 United States v. Postal, 589 F.2d 862 (5th Cir. 1979), *cert. denied,* 444 U.S. 832 (1979); United States v. Winter, 509 F.2d 975 (5th Cir. 1975), *cert. denied,* 423 U.S. 825 (1975); United States v. Cadena, 585 F.2d 1252 (5th Cir. 1978), *reh'g denied,* 588 F.2d 100 (5th Cir. 1979).

35 Strassheim v. Dailey, 221 U.S. 280 (1911).

36 *Id.* at 285.

37 Rivard v. United States, 375 F.2d 882 (5th Cir. 1967).

38 Ford v. United States, 273 U.S. 593 (1927).

39 *Id.* at 624, *quoted in Rivard,* 375 F.2d at 886.

40 United States v. Postal, 589 F.2d 862 (5th Cir. 1979), *cert. denied,* 444 U.S. 832 (1979).

For other cases using the overt acts formulation, *see, e.g.*, United States v. Cadena, 585 F.2d 1252 (5th Cir. 1978); United States v. Winter, 509 F.2d 975 (5th Cir. 1975).

41 *Id.* at 885. The principle issue was whether the defendants had been seized in violation of the Convention on the High Seas, *opened for signature* Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82, and the Convention on the Territorial Sea and the Contiguous Zone, *opened for signature* Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205. The court held that the treaties were not self-executing and that therefore the court had jurisdiction over the defendants. For a criticism of *Postal*, see, Note, United States v. Postal: *Lost on the High Seas*, 31 MERCER L. REV. 1081 (1980); Case Comment, United States v. Postal, 6 BROOKLYN J. INT'L L. 134 (1980). In support of the decision, see Note, *The Long Arm of Federal Courts: Domestic Jurisdiction on the High Seas*, 37 WASH. & LEE L. REV. 269 (1980).

42 *Postal*, 589 F.2d at 885.

43 *Id.* at 885.

44 *See infra* note 50.

45 *Postal*, 589 F.2d at 886 n.39.

46 575 F.2d 1347 (5th Cir. 1978), *cert. denied*, 440 U.S. 907 (1979), *cited with approval in Postal*, 589 F.2d at 886 n.39.

47 574 F.2d 828 (5th Cir. 1978), *cited with approval in Postal*, 589 F.2d at 886 n.39.

48 567 F.2d 638 (5th Cir. 1978), *cert. denied*, 439 U.S. 833 (1978), *cited with approval in Postal*, 589 F.2d at 886 n.39.

49 United States v. Arra, 630 F.2d 836 (1st Cir. 1980).

50 United States v. Williams, 589 F.2d 210 (5th Cir. 1979), *aff'd on rehearing en banc* 617 F.2d 1063 (1980); United States v. Baker, 609 F.2d 134 (5th Cir. 1980); United States v. Perez-Herrera, 610 F.2d 289 (5th Cir. 1980); United States v. Mann, 615 F.2d 668 (5th Cir. 1980), *cert. denied*, 450 U.S. 994 (1981); United States v. Riccardo, 619 F.2d 1124 (5th Cir. 1980), *cert. denied*, 449 U.S. 1063 (1980). *See also* Recent Developments, *Extraterritorial Jurisdiction—Mere Intent to Violate Criminal Statute is Sufficient to Maintain Jurisdiction Under the Objective Territorial Principle*, 16 TEX. INT'L L. J. 149 (1981).

51 United States v. Williams, 589 F.2d 210 (5th Cir. 1979), *aff'd on rehearing en banc* 617 F.2d 1063 (1980).

52 United States v. Winter, 509 F.2d 975 (5th Cir. 1975), *cert. denied*, 423 U.S. 825 (1975).

53 *Id.* at 982, *quoted in* Williams, 589 F.2d at 213.

54 United States v. Williams, 589 F.2d 210, 213 (5th Cir. 1979). Although on rehearing en banc the Fifth Circuit did not specifically consider this issue, it did affirm the earlier decision. United States v. Williams, 617 F.2d 1063 (1980) (reh'g en banc).

55 United States v. Baker, 609 F.2d 134, 138 (5th Cir. 1980); United States v. Mann, 615 F.2d 668, 671 (5th Cir. 1980); United States v. Arra, 630 F.2d 836, 840 (1st Cir. 1980); United States v. Egan, 501 F. Supp. 1252 (S.D.N.Y. 1980).

56 *See supra* notes 15-20 and accompanying text.

57 *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 3(3) (1965) (providing that courts will apply international law without the necessity of pleading it and that where words in statutes are ambiguous, they will be interpreted in a manner consistent with international law).

58 The first cases to rely on mere intent to sustain jurisdiction were *Williams*, 589 F.2d 210 (5th Cir. 1979), *aff'd on rehearing en banc* 617 F.2d 1063 (1980), and United States v. Baker, 609 F.2d 134 (5th Cir. 1980).

59 *Williams*, 589 F.2d 210 (5th Cir. 1979), *aff'd on rehearing en banc* 617 F.2d 1063 (1980); United States v. Baker, 609 F.2d 134 (5th Cir. 1980); United States v. Mann, 615 F.2d 668 (5th Cir. 1980), *cert. denied*, 450 U.S. 994 (1981); United States v. Arra, 630 F.2d 836 (1st Cir. 1980). *See also* United States v. Ricardo, 619 F.2d 1124 (5th Cir. 1980), *cert. denied*, 449 U.S. 1063 (1980) (two of the defendants were American).

[60] *Mann*, 615 F.2d 668 (5th Cir. 1980), *cert. denied*, 450 U.S. 994 (1981); *Baker*, 609 F.2d 134 (5th Cir. 1980).

[61] *Ricardo*, 619 F.2d 1124 (5th Cir. 1980), *cert. denied*, 449 U.S. 1063 (1980).

[62] United States v. Ricardo, 619 F.2d 1124, 1127-28 (5th Cir. 1980) (the two American defendants explained that their sailboat had sunk and that the ship, on which they were found, had rescued them. The court assumed these facts to be true).

[63] *Id.* at 1127 (charts thrown overboard during the search which were later recovered showed that the ship carrying the drugs was to have met another ship, approximately sixty miles off the coast at Matagorda, Texas, for the purpose of transferring marijuana).

[64] 501 F. Supp. 1252 (S.D.N.Y. 1980) (but note that the protective principle provided an alternative holding).

[65] *See, e.g.*, United States v. Egan, 501 F.Supp. 1252 (S.D.N.Y. 1980); United States v. Keller, 451 F.Supp. 631 (D.P.R. 1978).

[66] United States v. Pizzarusso, 388 F.2d 8, 10 (2d Cir. 1968); United States v. Archer, 51 F.Supp. 708 (D.C. Cal. 1943). *See also* United States v. Columbia-Cobella, 604 F.2d 356, 358-59 (5th Cir. 1979); United States v. James-Robinson, 515 F.Supp. 1340, 1345 (S.D. Fla. 1981); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 33 (1965) (defining the protective principle).

[67] *See infra* text accompanying notes 81-82.

[68] 514 F.Supp. 933 (S.D. Fla. 1981).

[69] The court in *Angola* states "[t]he case at law involves a stateless or assimilated vessel in close proximity to the United States, just west of the Bahamian island of San Salvador." *Angola*, 514 F. Supp. at 936. Later the court states "[t]he Mayo was seized near the coast of Florida." *Id.* The island of San Salvador, however, is approximately 300-350 miles away from Florida. J. BARTHOLOMEW AND SON, LTD, THE TIMES ATLAS OF THE WORLD, 116 (1980).

[70] United States v. Pauth-Arzuza, No. 80-577 Cr-CA (S.D. Fla. Apr. 20, 1981), *quoted in Angola*, 514 F.Supp. at 935.

[71] *Id.*

[72] This follows from the court's expansive reading of 21 U.S.C. § 955(a). *Angola* 514 F.Supp. at 936.

[73] *Id.* at 935.

[74] 515 F.Supp. 1340 (S.D. Fla. 1981).

[75] *Id.* at 1342-43.

[76] *Id.* at 1344.

[77] *Id.* at 1342.

[78] *Id.* at 1345.

[79] *Id.* at 1345.

[80] The court, however, did state:

> There could be a different result if the controlled substance in question is found near U.S. territory, or if the shipment is bound for the United States, or if the foreign defendants know or intend that their illegal cargo will be distributed in this country. Subject matter [jurisdiction] may exist in those circumstances. *James-Robinson*, 515 F.Supp. at 1346.

[81] Letter from Patricia M. Wold, Assistant Attorney General, to House Committee on Merchant Marine and Fisheries (April 11, 1979), *reprinted in* H. R. REP. No. 323, 96th Cong., 1st Sess. 16 (1979). This comment was delivered as part of an analysis of the 1980 Act, prior to its enactment. The Department was concerned about the failure of the Act to require intent for a conviction.

[82] *See supra* notes 27-29 and accompanying text.