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Extraterritorial Confusion: The Complex Relationship Between Bowman and Morrison and a Revised Approach to Extraterritoriality

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EXTRATERRITORIAL CONFUSION: THE COMPLEX RELATIONSHIP BETWEEN *BOWMAN* AND *MORRISON* AND A REVISED APPROACH TO EXTRATERRITORIALITY

I. INTRODUCTION

In 1994, Ramzi Yousef planted a "test bomb" aboard an international flight from the Philippines to Japan.[1] During a layover, Yousef disembarked the plane.[2] On the second leg of the flight, the test bomb detonated successfully, resulting in the death of a Japanese passenger and the injury of several other innocent civilians.[3]

Authorities eventually detained Yousef, and an investigation indicated that the test bomb was practice for a more devious plan, in which Yousef intended to place similar bombs onboard several United States-bound commercial aircraft.[4] Yousef was extradited to the United States and found guilty of planting and detonating the bomb on the Philippine commercial flight.[5] Yousef challenged this conviction, questioning how he could be charged for a bombing that took place wholly outside of the United States in which none of the victims were U.S. citizens or residents.[6] The United States's answer to his challenge was extraterritoriality.[7]

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1 United States v. Yousef, 327 F.3d 56, 80–81 (2d Cir. 2003). In preparation for this bombing, Yousef and several other co-conspirators bombed a movie theater in Manila, resulting in the injury of several patrons. *Id*. at 79.

2 *Id*. at 81. Yousef exited the plane during a layover in Cebu, another city located in the Philippines. *Id*.

3 *Id*. at 79.

4 *See id*. at 81–82, 110 ("The bombing of the Philippine Airlines flight at issue in Count Nineteen, which killed one Japanese national and maimed another, was merely a test-run that Yousef executed to ensure that the tactics and devices the conspirators planned to use on United States aircraft operated properly.").

5 *Id*. at 80, 82. Yousef was convicted and found guilty of other offenses as well, including the 1993 bombing of the World Trade Center. *Id*. at 79–80.

6 *Id*. at 88. For this crime, Yousef was charged with violating 18 U.S.C. § 32(b), which allows for the prosecution of those placing bombs on foreign, civilian aircraft regardless of where the act is committed. *Id*. § 32(b) prescribes jurisdiction over foreign offenders if they are "found within the United States." *Id*. (quoting 18 U.S.C. § 32(b)). Yousef argued that he was not "found in the United States" but was instead extradited against his will for the perpetration of other crimes; however, the court found the extradition was sufficient to fulfill this requirement. *Id*. at 88, 90.

7 *Id*. at 87–88. Extraterritoriality is the exercise of enforcing a law beyond a nation's boundaries. *See infra* note 9 and accompanying text (explaining the definition of extraterritoriality). While 18 U.S.C. § 32(b) explicitly prescribes extraterritoriality, Yousef challenged such extraterritorial jurisdiction. *Id*. at 91. The court found jurisdiction proper under the protective principle of international law. *Id*. at 91–92.

Traditionally, the United States has combated some forms of international conduct by giving extraterritorial effect to some federal laws.[8] Extraterritoriality, the exercise of enforcing a law beyond national boundaries, is by no means a new issue; however, it is one that has garnered some attention as of late.[9] In the last twenty years, the world has become more global, and it is common for the substance of many crimes to have connections in more than one country.[10] However, extraterritoriality regularly results in an encroachment upon another nation's sovereignty.[11]

The United States's treatment of extraterritoriality is inconsistent.[12] The United States, in its early beginnings, appeared to foster

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[8] *See* CHARLES DOYLE, CONG. RESEARCH SERV., RL 94–166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 7 (2010), http://www.fas.org/sgp/crs/misc/94-166.pdf (explaining how the "nature and purpose of a statute" may call for it to apply extraterritorially); Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110, 111–14 (2010) (discussing the United States's use of extraterritorial jurisdiction to punish crimes abroad that have a harmful effect on the nation). Throughout this Note, I will be using the term "geoambiguous" to characterize laws that are nondescript in their extraterritorial reach. I have borrowed this term from Professor Jeffrey A. Meyer's article, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*. *Id*. at 114.

[9] *See* Meyer, *supra* note 8, at 122–24 (discussing how the development of international organizations, borders, and legal norms leads to an inevitable increase in extraterritorial conduct). Extraterritorially applying laws to combat heinous conduct does not always result in an international uproar, but is nevertheless a contentious issue. *See* Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1048–49 (2011) (discussing the controversial extraterritorial extension of federal statutes by Congress). Extraterritoriality is especially controversial when it is prescribed unilaterally or when a federal statute is silent on its geographic scope. *Id*. This Note focuses solely on the United States's approach to extraterritoriality. A comparative analysis with other nations is beyond the scope of this Note.

[10] *See* Ellen S. Podgor & Daniel M. Filler, *International Criminal Jurisdiction in the Twenty-First Century: Rediscovering* United States v. Bowman, 44 SAN DIEGO L. REV. 585, 592 (2007) (discussing how the world has become increasingly interconnected, resulting in what President George H.W. Bush described as a type of "new world order").

[11] *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936) (discussing the importance of sovereignty and the ability of nations to govern their own laws). Extraterritorial jurisdiction can encroach upon a nation's sovereignty and deny a nation its full rights. *Id*. Extraterritoriality is often seen as a controversial means of enforcing foreign policy. *See* Charles Tait Graves, *Extraterritoriality and Its Limits: The Iran and Libya Sanctions Act of 1996*, 21 HASTINGS INT'L & COMP. L. REV. 715, 716 (1998) (explaining that extraterritoriality is recognized in limited contexts). *See generally* Jordan J. Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanactions*, 43 VAL. U. L. REV. 1535 (2009) (highlighting some of the controversial tactics that the Bush administration used to gain jurisdiction over alleged terrorists).

[12] John H. Knox, *The Unpredictable Presumption Against Extraterritoriality*, 40 SW. U. L. REV. 635, 640 (2011). Such an inconsistency makes the standards of overcoming the presumption against extraterritoriality difficult to define. Meyer, *supra* note 8, at 164.

international law and restrained its use of extraterritoriality.[13] This approach changed in the 1920s, and courts suddenly became more lax in allowing laws, particularly criminal laws, to apply extraterritorially.[14] But the U.S. Supreme Court's recent decision in *Morrison v. National Australia Bank Ltd.* appears to reinforce a strict presumption against extraterritoriality.[15] It seems that the only thing consistent is the courts' inability to effectively define and manage the limitations of extraterritoriality.[16]

The emergence of new global issues has brought the presumption against extraterritoriality under fire.[17] Crimes are becoming more intricate and complex, and continual developments call for the United States to alter the way it applies federal laws extraterritorially.[18] To

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[13] Murray v. Schooner Charming Betsy (*Charming Betsy*), 6 U.S. (2 Cranch) 64, 118 (1804) (construing the *Charming Betsy* canon, which states that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"); *see* Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909) ("All legislation is prima facie territorial." (quoting *Ex parte* Blain, L. R. 12 Ch. Div. 522, 528; State v. Carter, 27 N. J. L. 499 (1859); People v. Merrill, 2 Park. Crim. Rep. 590, 596)). The *Charming Betsy* doctrine states that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Charming Betsy*, 6 U.S. at 118. The *Charming Betsy* doctrine is considered an early example of a presumption against extraterritoriality. John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351, 371 (2010).

[14] *See* United States v. Bowman, 260 U.S. 94, 102 (1922) (allowing the government to protect itself from obstruction of fraud by using extraterritorial application). *Bowman* has consistently been the precedent used to apply laws extraterritorially. *See* Zachary D. Clopton, Bowman *Lives: The Extraterritorial Application of U.S. Criminal Law After* Morrison v. National Australia Bank, 67 N.Y.U. ANN. SURV. AM. L. 137, 167 & n.125 (2011) (discussing cases and situations that cite *Bowman* in order to establish extraterritorial jurisdiction).

[15] *See* 130 S. Ct. 2869, 2878 (2010) ("When a statute gives no clear indication of an extraterritorial application, it has none.").

[16] *See* Knox, *supra* note 12, at 650 (discussing the Supreme Court's inconsistent treatment of the presumption against extraterritoriality).

[17] *See* Stephen I. Adler, Comment, *Fighting Terrorism in the New Age: A Call for Extraterritorial Jurisdiction over Terrorists*, 18 U.S.F. MAR. L.J. 171, 173–74 (2006) (discussing emerging global issues that may become problematic for the United States). Because of heightened dangers within modern society, including the war on drugs and war on terror, some individuals have called for lighter restraints on the United States's approach to extraterritoriality. *Id*.

[18] *See* Phillip R. Trimble, Commentary, *The Supreme Court and International Law: The Demise of* Restatement *Section 403*, 89 AM. J. INT'L L. 53, 57 (1995) (asserting that, as technology advances, government regulation of private behavior is imperative). Paul Schiff Berman has noted:

> [T]he growth of global communications technologies, the rise of multinational corporate entities with no significant territorial center of gravity, and the mobility of capital and people across borders mean that many jurisdictions will feel effects of activities around the globe, leading inevitably to multiple assertions of legal authority over the same act, without regard to territorial location.

Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1159 (2007).

properly combat such issues without overstepping congressional authority, this Note endorses a new approach to extraterritorially applying federal laws—one that allows the United States to adequately maintain national security and combat criminal offenses that specifically target the United States and its citizens while simultaneously minimizing unexpressed statutory interpretations and encroachment on the sovereignty of other nations.

This Note first discusses the meaning, history, and development of extraterritoriality within the United States.[19] Second, this Note analyzes the treatment of the presumption against extraterritoriality, why its application reflects courts' public policy concerns, and why international principles of law have been abused, resulting in increased extraterritorial interpretation.[20] Finally, this Note provides a solution to extraterritoriality by endorsing a Modified-Exception Test, which emphasizes national security and promotes a clear statement, literal reading of statutes while providing an exception for extraterritorial application.[21]

II. BACKGROUND

Extraterritoriality is a beneficial means of governmental assertion of authority over international conduct that causes domestic harm.[22] Part II.A first discusses statutory construction and the definition of extraterritoriality, as well as the traditional approaches to interpreting the extraterritorial reach of geographically silent statutes.[23] Second, Part II.B provides the history of extraterritorial application of federal laws that are silent in their territorial scope.[24] Finally, Part II.C discusses the current state of extraterritoriality.[25]

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19 *See infra* Part II (discussing the background and history of extraterritoriality).

20 *See infra* Part III (explaining why the Court's presumption against extraterritoriality in *Morrison v. National Australia Bank Ltd.* is facially a strong policy, but fails to foster consistent, predictable results).

21 *See infra* Part IV (creating a new test that balances the approaches of *Morrison* and *Bowman* while giving full consideration to the conduct in question and the contemplation of the actor).

22 *See* United States v. Bowman, 260 U.S. 94, 102 (1922) (noting that the government has the right to protect itself and its property); *see also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 33(1) (1965) (noting the state's ability to protect itself from threats to its security).

23 *See infra* Part II.A (explaining the definition of extraterritoriality and its effects on the sovereignty of other nations).

24 *See infra* Part II.B (discussing the development of extraterritoriality and the effect that *Morrison* may have on such application).

25 *See infra* Part II.C (discussing the current state of extraterritoriality and the unclear effect of *Morrison* on *Bowman* and the treatment of criminal statutes).

A. The Precise Meaning of Extraterritoriality and the Issue of Statutory Construction

A law is extraterritorial when it regulates activities beyond a nation's borders.[26] Congress has the ability to explicitly construct laws to apply extraterritorially; however, extraterritoriality is problematic when a statute is silent on the issue.[27] The general relationship between extraterritoriality and national sovereignty is complex, and courts have yet to find a uniformed balance.[28] A state's sovereignty is built on the idea of autonomy and the ability to regulate conduct within its borders.[29] Extraterritoriality often involves an invasion of sovereignty, resulting in strained relations between states.[30] The seriousness of the crime, even if

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[26] *See* Meyer, *supra* note 8, at 123 (defining the difference between territorial and extraterritorial laws). Extraterritorial laws regulate conduct outside of a nation-state's borders, regardless of whether or not an offense was committed by a national or an alien. *Id*. Extraterritoriality transforms laws from national to international in nature. *See also* Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 127–28 (2007) (discussing the relationship between prescriptive jurisdiction and international law).

[27] Meyer, *supra* note 8, at 148–49. Determining the territorial scope of a statute is problematic when a law is geoambiguous or lacks content indicating extraterritorial applicability. *See id*. (noting that courts sometimes allow U.S. law to apply extraterritorially even without explicit statutory language or history). Nevertheless, even when a statute explicitly contains language allowing for extraterritorial application, prescription, and enforcement, it may still violate international law if adequate jurisdiction is lacking. Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 291 (1982).

[28] *Compare* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936) (noting that extraterritorial application of laws invades the rights of other nations, thus denying those nations complete sovereignty), *with* United States v. Peterson, 812 F.2d 486, 494 (9th Cir. 1987) (stating that extraterritoriality can be used by the United States as a legitimate means of protecting the country). *See also* Meyer, *supra* note 8, at 123–24 (discussing how the extraterritorial regulation or prohibition of conduct affects more than just the nation prescribing the regulation or prohibition).

[29] Meyer, *supra* note 8, at 121–22. Territorial jurisdiction is a source of authority for nations applying legal rules to govern conduct within their borders. *Id*. at 123. Territorial jurisdiction is the right of every sovereign nation. Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 137 (1812); *see* U.N. Charter art. 2, para. 7 ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . . ."). No nation can regulate conduct of another nation without explicit consent. Meyer, *supra* note 8, at 131.

[30] Colangelo, *supra* note 9, at 1025 (noting that extraterritoriality can disrupt relations with other nations, especially when there is a conflict of laws); *see* United States v. Mitchell, 553 F.2d 996, 1003–05 (5th Cir. 1977) (declining to extend the Marine Mammal Protection Act of 1972 extraterritorially because doing so would regulate the sovereign territory and resource development of other states).

it explicitly targets a particular nation, does not necessarily alleviate such tensions.[31]

Theories that stress the importance of sovereignty insist that extraterritorial application of laws encroach upon a nation's ability to govern itself and suggest that increased pressure should instead be placed on nations to prosecute crimes domestically.[32] However,

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[31] *See* Colangelo, *supra* note 9, at 1025, 1027 (discussing how "the risk of jurisdictional overreach, clashes with foreign law, and applying U.S. national values and preferences inside other countries" implicate sensitive foreign policy matters); *see also* Robert F. Blomquist, *The Theoretical Constitutional Shape (and Shaping) of American National Security Law*, 30 ST. LOUIS U. PUB. L. REV. 439, 448–49 (2011) (explaining how differences in constitutional construction, as well as political and cultural differences, make it difficult for foreign laws to "fit" with U.S. national security laws). Even prosecuting matters of extreme violence, such as terrorism, may implicate international matters beyond prima facie concerns. Patrick M. Connorton, Note, *Tracking Terrorist Financing Through Swift: When U.S. Subpoenas and Foreign Privacy Law Collide*, 76 FORDHAM L. REV. 283, 283–85 (2007) (discussing how U.S. interests and initiatives, especially regarding the war on terror, often conflict with those of nations that highly value privacy, such as many European nations). For example, after the September 11th attacks, the United States sought to track terrorist finances by obtaining financial information collected by the Society for Worldwide Interbank Financial Telecommunication ("SWIFT"). *Id.* at 283–84. However, by granting the United States access to such information, SWIFT violated Belgian and European Union privacy laws. *Id*. at 284. These nations reprimanded SWIFT, declared their behavior a violation of "fundamental European principles," and attempted to thwart their continued compliance with the United States. *Id*. at 284 & n.11 (citing Press Release, European Union Article 29 Working Party, Press Release on the SWIFT Case (Nov. 23, 2006)). The United States's attempts to pursue its self-interests regularly results in conflicts with other foreign laws, and in describing the United States's use of extraterritoriality, specifically within the realm of antitrust laws, David J. Gerber notes:

> Outside the United States, the extraterritoriality issue has been seen largely in a defensive context—namely, how to respond to excessive jurisdictional claims by the United States. These problems have reached critical dimensions. While American courts and commentators flail about in search of principles to use in grappling with jurisdictional issues, major allies have ceased trying to cooperate with the United States to avoid excessive conflicts of jurisdiction and have turned to so-called blocking legislation to attempt to protect their nationals and enterprises from the reach of United States antitrust laws.

David J. Gerber, *The Extraterritorial Application of the German Antitrust Laws*, 77 AM. J. INT'L L. 756, 756 (1983) (footnotes omitted). *See also* William S. Dodge, *Antitrust and the Draft Hague Judgments Convention*, 32 LAW & POL'Y INT'L BUS. 363, 363 & n.1 (2001) (stating that many nations have enacted blocking legislation in response to the United States's excessive extraterritorial application of its antitrust laws). It is likely that other nations will apply their statutes extraterritorially against the United States and its citizens in retaliation. Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 857 (2009).

[32] *See* Beth Stephens, *Accountability for International Crimes: The Synergy Between the International Criminal Court and Alternative Remedies*, 21 WIS. INT'L L.J. 527, 540–44 (2003) (discussing state accountability and encouraging states to enforce laws domestically when

expanding globalism, communications, and technology will inevitably result in multi-jurisdictional conduct, leaving some nations without redress unless they apply their laws extraterritorially.[33]

In the United States, the extraterritorial capabilities of a federal statute are not controlled by constitutional reach; rather, it is a question of statutory construction.[34] Courts have developed general rules to analyze the territorial scope of statutes that are silent on this issue.[35] The

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there is a violation within their territory, especially when the violation is one of an international nature); *see also* Sarei v. Rio Tinto, PLC, 550 F.3d 822, 832 (9th Cir. 2008) (noting that exhaustion of domestic remedies is a prerequisite to using federal laws extraterritorially). Defendants who commit crimes are usually subject to prosecution by the country where the crime occurred. *See* United States v. Gatlin, 216 F.3d 207, 223 (2d Cir. 2000) (explaining that civilians who commit crimes on military installations are usually subject to prosecution by the country in which the installation is based). Some laws unilaterally apply extraterritorially to fight conduct committed abroad; however, such a practice is generally discouraged. *See* Austen Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 VAND. L. REV. 1455, 1505 (2008) (explaining that resolving international problems with domestic law rather than international law may result in other nations doing the same, thus threatening U.S. interests). Absent territorial or national link, unilateral application of one nation's law into another state's territory via prescriptive jurisdiction is a violation of international law. Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 VA. J. INT'L L. 149, 153 (2006).

[33] *See Extraterritoriality*, 124 HARV. L. REV. 1226, 1228 (2011) (noting that extraterritoriality may be a legitimate means of serving state and non-state interests in "an age of terrorism, international business, and globalization"); Christopher L. Blakesley & Dan E. Stigall, *The Myopia of* U.S. v. Martinelli: *Extraterritorial Jurisdiction in the 21st Century*, 39 GEO. WASH. INT'L L. REV. 1, 8–11, 45 (2007) (discussing how social and technological advancements result in an increasingly necessary use of extraterritoriality); Meyer, *supra* note 8, at 112–13 (suggesting that extraterritoriality is an appropriate means of battling emerging and evolving crimes); *see also* United States v. Ivanov, 175 F. Supp. 2d 367, 374–75 (D. Conn. 2001) (holding that federal laws prohibiting hackers from targeting U.S. computer systems applied extraterritorially to non-nationals acting outside of the United States).

[34] DOYLE, *supra* note 8, at 7. Congress undoubtedly has the ability to enforce its laws beyond the borders of the United States. EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991). To determine whether Congress exercised such authority, courts must look at the statutory construction of the laws. *Id.*

[35] *See* DOYLE, *supra* note 8, at 7 ("[A] statute will be construed to have only territorial application unless there is a clear indication of some broader intent.") (footnote omitted). Several statutes contain explicit language allowing for extraterritoriality. *See, e.g.*, 18 U.S.C. § 175 (2006) (prescribing "extraterritorial Federal jurisdiction" over developing or stockpiling biological weapons); 18 U.S.C. § 1513 (2006) (prescribing "extraterritorial Federal jurisdiction" over acts of retaliation against witnesses); 18 U.S.C. § 1751 (2006) (explicitly prescribing "extraterritorial jurisdiction" to crimes of assassinating, kidnapping, or assaulting the President or presidential staff members); 18 U.S.C. § 2339B (2006) (prescribing "extraterritorial Federal jurisdiction" over the crime of providing material support or resources to terrorist organizations). Such specific language is not always required for a statute to be extraterritorial, and Congress often fashions the extraterritorial reach of a statute meticulously. *See, e.g.*, 18 U.S.C. § 37 (2006) (explicitly conditioning extraterritorial jurisdiction over acts of violence at international airports, such as when the offense took place in the United States, the offender or victim was a national, or when the

first general rule of statutory construction holds that a statute only applies domestically unless a broader intent is *clearly* indicated.[36] The second rule states that the nature and purpose of a statute may indicate whether Congress intended the statute to apply extraterritorially.[37] Finally, the last general rule holds that a statute may not be interpreted as being inconsistent with international law unless contrary intent is clearly indicated by Congress.[38]

Determining whether a statute is consistent with international law requires further analysis.[39] To ensure that an interpretation is consistent with international law, courts commonly look to customary principles to resolve the issue of extraterritoriality.[40] The United States generally

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offender is found within the United States); 18 U.S.C. § 351(i) (2006) (explicitly prescribing "extraterritorial jurisdiction" to crimes of assassinating, kidnapping, or assaulting members of the Supreme Court or Congress).

[36] DOYLE, *supra* note 8, at 7. This is essentially a clear statement rule approach to the presumption against extraterritoriality. *See Aramco*, 499 U.S. at 248 ("[U]nless a contrary intent appears, [federal laws are] meant to apply only within the territorial jurisdiction of the United States.").

[37] DOYLE, *supra* note 8, at 7. For example, crimes such as smuggling are interpreted to imply extraterritorial application, because "smuggling by its very nature involves foreign countries." Brulay v. United States, 383 F.2d 345, 350 (9th Cir. 1967). This rule was first clearly announced in *United States v. Bowman*. 260 U.S. 94, 97–98 (1922) ("The necessary locus, when not specially defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations.").

[38] DOYLE, *supra* note 8, at 8. This principle, referred to as the *Charming Betsy* canon, states that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." Murray v. Schooner Charming Betsy (*Charming Betsy*), 6 U.S. (2 Cranch) 64, 118 (1804). Nevertheless, the United States is not constrained by international law. *See, e.g.*, Medellín v. Texas, 552 U.S. 491, 510 (2008) (holding that decisions made by the International Court of Justice are not controlling or "enforceable domestic law"); Al-Bihani v. Obama, 590 F.3d 866, 871 (D.C. Cir. 2010) (holding that international law is not controlling when there is an existing U.S. law that is conflicting); United States v. Yousef, 327 F.3d 56, 91 (2d Cir. 2003) (holding that U.S. law is not subordinate to international customary law). However, the United States's approach towards international law gives the impression that it is extremely limiting with regards to combating illegal conduct that occurs beyond its borders; however, international law is often more flexible and applicable, and the denial of such principles can be seen as a form self-restraint. Colangelo, *supra* note 26, at 122–23.

[39] DOYLE, *supra* note 8, at 9. "International law supports rather than dictates decisions in the area of the overseas application of American law." *Id.* Additionally, "[n]either Congress nor the courts are bound to the dictates of international law when enacting or interpreting statutes" prescribing extraterritorial application. *Id. See Yousef*, 327 F.3d at 86 ("If [Congress] chooses to do so, it may legislate with respect to conduct outside the United States, in excess of the limits posed by international law." (quoting United States v. Pinto-Mejia, 720 F.2d 248, 259 (2nd Cir. 1983))).

[40] *See* DOYLE, *supra* note 8, at 9 (explaining that Congress looks to international law when it evaluates the policy consideration associated with legislation that may have international considerations). In defining customary international law, nations look to customs, usage,

utilizes five principles of international law to address public policy considerations and national interests when determining whether a statute applies extraterritorially.[41] The first national interest is referred to as the "territorial principle," which allows domestic laws to apply to conduct that occurs within a nation's geographical boundaries, including its territorial waters.[42] The second interest is the "nationality principle," which allows for laws to apply extraterritorially to the conduct of its citizens while abroad.[43] The third interest, the "effects principle," allows

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and treaties of civilized nations. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 131 (2d Cir. 2010) (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 733–34 (2004)). Customary international law develops through customs and practices among nations and not existing norms or judicial decisions. *Id*. at 140–41. "Repeated violations of a rule of customary international law by a critical mass of states can modify or eliminate the rule." Note, *The Offences Clause After* Sosa v. Alvarez-Machain, 118 HARV. L. REV. 2378, 2381 (2005) (footnote omitted). Unilateral recognition of new norms of international customary law could potentially create friction among nations and is not universally accepted. *Id*. at 2381–82. Certain principles of international law allow for extraterritorial application of domestic laws despite a conflict of laws. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(3) (1987) (stating that when there is a conflict of laws, deference is given to the state whose interest is greater). International law stresses that certain international principles are legal obligations. *Id*. § 102(2). Customary international law is generally fostered by democracies. Jordan J. Paust, *Customary International Law and Human Rights Treaties* Are *Law of the United States*, 20 MICH. J. INT'L L. 301, 321 (1999).

41 *See* DOYLE, *supra* note 8, at 9 (providing the five principles that the United States uses in addressing these issues). The segmenting of national interests into five specific categories was first discussed in a 1935 Harvard Law School study. *Id*. While the five principles of international law can be used as interpretative guides to finding extraterritoriality, "[t]hey cannot overcome a clear expression of Congressional intent to the contrary." CHARLES DOYLE, CONG. RESEARCH SERV., RL 33658, FEDERAL EXTRATERRITORIAL CRIMINAL JURISDICTION: LEGISLATION IN THE 109TH CONGRESS 6 (2006) (footnote omitted). The Supreme Court has used the international principles to determine that it is within the national interest of the government to protect itself from conduct that may have harmful effects on the United States. *Bowman*, 260 U.S. at 98. While these principles are generally recognized as a means to extend jurisdiction, many cases, including *Bowman*, utilized these principles to interpret the extraterritorial reach of laws. *Id*. at 98–100; *see* Chua Han Mow v. United States, 730 F.2d 1308, 1312 (9th Cir. 1984) ("Extraterritorial application of penal laws may be justified under any one of the five principles of extraterritorial authority." (citing United States v. King, 552 F.2d 833, 851 (9th Cir. 1976))).

42 DOYLE, *supra* note 8, at 9–10 (discussing the territorial principle of international law, which allows for extraterritorial application of federal laws to crimes that may have an effect within the United States); *see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (recognizing a nation's right to prescribe jurisdiction over conduct within or that effects the territory of a nation); *see also* United States v. Neil, 312 F.3d 419, 421–22 (9th Cir. 2002) (finding that molestation of a child within non-territorial waters had detrimental effects within the United States and thus fell under the territorial principle of jurisdiction). The territorial principle is flexible and applies to, among other things, acts within geographical borders or territorial waters and conduct that has an impact within the territory. DOYLE, *supra* note 8, at 10.

43 DOYLE, *supra* note 8, at 9, 11–12; *see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (recognizing a nation's right to prescribe jurisdiction over conduct committed by or

for extraterritorial application of a nation's laws when conduct occurring abroad has an effect within the nation.[44] The fourth interest is the "protective principle," which allows for extraterritorial application of laws if conduct threatens national security or has adverse consequences within a country.[45] The final interest is referred to as the "universal principle," which allows for universal jurisdiction over acts that are especially heinous and recognized as an international concern.[46]

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against nationals outside of its territory). *But see* U.S. DEP'T OF DEF., MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 60.c.(4)(c)(ii), at IV-101 (2012 ed.) (stating that a person subject to court-martial cannot be prosecuted for acts committed "in a foreign country merely because that act would have been an offense under the United States Code had the act occurred in the United States"). While the nationality principle allows the United States to prosecute offenses by nationals committed abroad, it does not alone establish that a statute applies extraterritorially. United States v. Shahani-Jahromi, 286 F. Supp. 2d 723, 730–31 (E.D. Va. 2003). Some statutes explicitly allow for extraterritoriality under the nationality principle. *See, e.g.*, 18 U.S.C. § 1119 (2006) (prescribing extraterritoriality to the murder of a U.S. national by another U.S. national outside the United States).

44 Clopton, *supra* note 14, at 144 (defining the effects principle as "the notion that a state should be able to regulate conduct outside its borders that has effects inside its borders") (footnote omitted); *see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (recognizing a nation's right to prescribe jurisdiction over conduct committed by or against nationals outside of its territory). The effects principle, often referred to as the passive personality or objective territorial principle, has regularly been used over the last century to govern extraterritorial conduct. Clopton, *supra* note 14, at 144.

45 DOYLE, *supra* note 8, at 9, 11–12; *see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (recognizing a nation's right to prescribe jurisdiction over conduct outside of its territory that threatens security or some national interests). Under international law, the protective principle allows nations to assert jurisdiction over conduct outside of a state "that threatens its security as a state or the operation of its governmental functions." United States v. Vilches-Navarrete, 523 F.3d 1, 21–22 (1st Cir. 2008) (citation omitted); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 33 (1965). "The protective principle does not require that there be proof of an actual or intended effect inside the United States." United States v. Gonzalez, 776 F.2d 931, 939 (11th Cir. 1985). The protective principle is one that is evolving, and over time courts have expanded the types of cases that fall under the protective principle. *See, e.g.*, United States v. Delgado-Garcia, 374 F.3d 1337, 1347–48 (D.C. Cir. 2004) (holding that encouraging illegal immigration into the United States has an effect on the United States and federal laws prohibiting such conduct apply extraterritorially); United States v. Yousef, 327 F.3d 56, 96–97 (2d Cir. 2003) (holding that attacks intended to alter foreign policy have an effect on the United States and may be prosecuted extraterritorially under the protective principle); United States v. Vasquez-Velasco, 15 F.3d 833, 841 (9th Cir. 1994) (holding that the overseas murder or attempted murder of federal employees falls under the protective principle); United States v. Ayesh, 762 F. Supp. 2d 832, 841 (E.D. Va. 2011) (holding that the conversion of government money abroad by a non-national threatens the national interest); United States v. Layton, 509 F. Supp. 212, 217–18 (N.D. Cal. 1981) (holding that the protective principle can be used to apply statutes criminalizing assaults on U.S. Congressmen extraterritorially).

46 DOYLE, *supra* note 8, at 11, 14, 16; *see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 404, 423 (1987) (explaining that universal jurisdiction may be had for crimes that universally concern the international community, including crimes of slavery, piracy, genocide, war crimes, and some acts of terrorism). The Supreme Court acknowledged the

Universal jurisdiction allows any state to prosecute conduct that is deemed to be an egregious violation of international norms and obligations, such as crimes against humanity and genocide, regardless of territorial or national nexus.[47] Universal jurisdiction has been praised as

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principle of universal jurisdiction early within its history. *See* United States v. Furlong, 18 U.S. (5 Wheat.) 184, 196–97 (1820) (recognizing universal jurisdiction over piracy). Universal jurisdiction most commonly applies to crimes such as piracy, genocide, slavery, war crimes, and crimes against humanity. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 404, 423. However, these categories are not limiting; the flexible nature of international law, along with newly emerging global problems, has resulted in the expansion of categories of universal violations. *Id.* § 404 & cmt. a; *see id*. at cmt. b (stating that universal jurisdiction is not limited to criminal law and may possibly be applicable in cases such as tort remedies); Colangelo, *supra* note 32, at 151 (noting that the expansion of categories of universal crimes may soon include sex, drugs, and nuclear arms trafficking). For example, it has been recognized that universal jurisdiction may perhaps be applicable to "certain acts of terrorism." United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991). *But see Yousef*, 327 F.3d at 106–08 & 107 n.42 (refusing to recognize terrorism as a universal crime because of a lack of consensus regarding an internationally accepted definition).

[47] Colangelo, *supra* note 32, at 150–51. Some nations, including the United States, grant themselves universal jurisdiction by prescribing language within legislation directing universal applicability. *See, e.g.*, 18 U.S.C. § 32 (2006) (prescribing universal jurisdiction over the destruction of aircraft); 18 U.S.C. § 37 (2006) (prescribing universal jurisdiction over violent acts occurring at international airports); 18 U.S.C. § 546 (2006) (prescribing universal jurisdiction over the smuggling of goods into a foreign country from an American vessel); 18 U.S.C. § 831 (2006) (prescribing universal jurisdiction over threats, theft, or unlawful possession of nuclear material); 18 U.S.C. § 844(f)(1) (2006) (prescribing universal jurisdiction over actions causing malicious damage to or destruction of any building, vehicle, or other personal or real property owned, possessed, or leased by the United States by means of fire or explosive); 18 U.S.C. § 2332a (2006) (prescribing universal jurisdiction over the unlawful use of weapons of mass destruction against the United States or its nationals); 18 U.S.C. § 2332b (2006) (prescribing universal jurisdiction over acts of terrorism that target, affect, or intend to affect the United States, its officials, and its property). Such statutory construction can be found within the laws of other nations. *See, e.g.*, Anthony J. Colangelo, *Universal Jurisdiction as an International "False Conflict" of Laws*, 30 MICH. J. INT'L L. 881, 896 (2009) (discussing how Spanish law prescribes universal jurisdiction over the crime of torture); Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888, 888–89 (2003) (discussing the rise and fall of the Belgian law of universal jurisdiction over "human rights atrocities"). While states have the ability to prescribe universal jurisdiction, international law may forbid such application if it is determined to be unreasonable. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403(1). In determining reasonableness, a number of factors must be considered:

> (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
>
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
>
> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states

a means of bringing warlords and international criminals to justice, but its unpredictable use and expansion into new grounds raises questions of abuse.[48]

Before further exploring the United States's approach to extraterritoriality, it must be understood that other nations' treatment of extraterritoriality varies.[49] Germany's criminal code, for example, explicitly states that criminal laws only apply to acts committed within

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> regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
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> (d) the existence of justified expectations that might be protected or hurt by the regulation;
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> (e) the importance of the regulation to the international political, legal, or economic system;
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> (f) the extent to which the regulation is consistent with the traditions of the international system;
>
> (g) the extent to which another state may have an interest in regulating the activity; and
>
> (h) the likelihood of conflict with regulation by another state.

Id. § 403(2). In addition, the *Restatement* states that when more than one state has an interest in exercising jurisdiction, deference is given to the state with the greatest interest. *Id*. § 402(3). However, universal statutes are considered controversial and are often used to manipulate international law or pursue political agendas. *See* Colangelo, *supra* note 26, at 134 (stating that states may begin to take superfluous legal action against other nations or individuals under universal law and that some states might "manipulate the doctrine for their own political agendas"); *see also* Colangelo, *Universal Jurisdiction as an International "False Conflict" of Laws*, *supra*, at 902 (explaining how a particular nation's definition of a universal crime, such as torture, may not mirror the definition of torture recognized under international law). Unilateral prescription of universal jurisdiction can also be problematic in that citizens of one nation are often unaware of the laws of another nation. *Id.* at 910. For this reason, the substance of prescribed universal law should attempt to conform with definitions recognized by international law with no enforcement of national entitlement. *Id*. at 889.

[48] Colangelo, *supra* note 26, at 134; *see also id*. at 127–28 (prescribing that jurisdiction governing conduct in another nation contravenes that nation's sovereignty). Such uncertainty is in the nature of universal jurisdiction, and the continual expansion of universal jurisdiction makes the interpretation of its limits even more problematic. Meyer, *supra* note 8, 162–63. A modern example of the abuse of universal jurisdiction is the Belgium War Crimes Statute, which granted universal jurisdiction over war crimes. Ratner, *supra* note 47, at 888–89. It was clear that many of the allegations coming under this statute were merely political in nature. *Id*. at 890–91. The law was repealed in 2003 after several nations, including the United States, threatened Belgium with sanctions. *Id.* at 891.

[49] *See* John T. Soma & Eric K. Weingarten, *Multinational Economic Network Effects and the Need for an International Antitrust Response from the World Trade Organization: A Case Study in Broadcast-Media and News Corporation*, 21 U. PA. J. INT'L ECON. L. 41, 93 n.208 (2000) (discussing how the treatment and degree of extraterritoriality varies depending on the nation). In addition, the consequences for applying one's laws extraterritorially vary by nation as well. Stephen J. Choi & Andrew T. Guzman, *National Laws, International Money: Regulation in a Global Capital Market,* 65 FORDHAM L. REV. 1855, 1888 n.72 (1997).

German territory, except for certain specifically stated provisions.[50] Generally, European laws apply extraterritorially "so long as there is some meaningful connection with the asserting state."[51] However, many nations are hesitant to give significant weight to the "effects principle" of international law to allow extraterritoriality.[52] Nevertheless, many nations have recently begun to recognize extraterritoriality and regularly use it to obtain jurisdiction over conduct committed abroad.[53] With that in mind, this Note now discusses the history of the United States's treatment of extraterritoriality.[54]

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[50] STRAFGESETZBUCH [STGB] [PENAL CODE], May 15, 1871, REICHSGESETZBLATT [RGBL.] 3322, as amended, §§ 3, 6–7 (Ger.). The German Criminal Code provides extraterritoriality to acts against internationally protected legal interests, such as human trafficking, drug dealing, certain types of pornography, offenses involving nuclear energy, and treaty provisions. *Id*. § 6. In addition, German criminal laws may apply extraterritorially if the offense was committed by a German and if the act is a criminal offense in the location of its commission or if that location is not subject to any criminal jurisdiction. *Id*. § 7. However, in 2001, the High Court in Germany allowed extraterritorial jurisdiction over criminal acts having an effect within Germany. *See* John R. Schmertz, Jr. & Mike Meier, *German High Court Decides Novel Issue in Holding that German Law May Impose Criminal Liability on Foreign Owners of Internet Websites Who Design Their Sites to Stir Up Racial Hatred Within German Society*, INT'L L. UPDATE, Jan. 2001, at 6, 7 (discussing how crimes inciting hatred and "capable of disturbing the peace in Germany" may be applied extraterritorially and holding that extraterritorial criminal liability may be found if the "success necessary to constitute a crime" took place in Germany).

[51] Christopher L. Blakesley & Otto Lagodny, *Finding Harmony Amidst Disagreement over Extradition, Jurisdiction, the Role of Human Rights, and Issues of Extraterritoriality Under International Criminal Law*, 24 VAND. J. TRANSNAT'L L. 1, 9–10 (1991) (footnote omitted). European nations place a stronger emphasis on the nationality principle of international law if the conduct was punishable in the place where it was committed. *Id*. at 25. In addition, "European nations generally do not extradite their own nationals" for crimes. *Id.* (footnote omitted).

[52] *See id*. at 24 (discussing how international recognition of the passive personality principle (that is, the effects principle) is in disrepute, especially with regard to international terrorism, and that other international principles of law may be necessary for jurisdiction, based on this principle, to be recognized). *But see* Parrish, *supra* note 32, at 1458 & n.13 (explaining how some European nations have begun to use the effects principle to obtain extraterritorial jurisdiction, especially with regard to acts with economic effects). Nations recognize different definitions of the effects principle. Ulrich Immenga, *Export Cartels and Voluntary Export Restraints Between Trade and Competition Policy*, 4 PAC. RIM L. & POL'Y J. 93, 143 (1995). Since "customary international law is founded upon the consent of nations," it is questionable as to whether the United States's traditionally "low standard of proof of effects" is in fact "legal under international law." Erika Nijenhuis, Comment, *Antitrust Suits Involving Foreign Commerce: Suggestions for Procedural Reform*, 135 U. PA. L. REV. 1003, 1036 (1987).

[53] *See* Parrish, *supra* note 31, at 854–56 (stating that other nations have begun to apply their domestic laws extraterritorially, especially in regards to cyber-crimes, criminal conduct, human rights violations, and anti-competition laws).

[54] *See infra* Part II.B (discussing the history and development of the treatment of extraterritoriality within U.S. courts).

B. The History and Development of the Extraterritorial Treatment of Federal Laws

The U.S. courts recognize a presumption against extraterritorial application of federal laws.[55] This presumption against extraterritoriality is not a restriction on "Congress's power to legislate," but rather a means of interpreting federal laws.[56] While federal laws must not be construed by courts to conflict with international laws, Congress has the ability to prescribe extraterritorial conduct without regard for international law.[57] Despite these common principles, the territorial scope of geoambiguous federal laws has been construed inconsistently.[58] To better understand extraterritoriality, it is necessary to discuss its history and evolution within the courts.[59] Exceptional focus will be placed on the seminal case *United States v. Bowman*, the subsequent cases interpreting *Bowman*, and the Supreme Court's decision in *Morrison v. National Australia Bank Ltd*.[60]

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55 Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2881 (2010). Such a presumption against extraterritoriality applies in all cases. *Id*. *But see* United States v. Al Kassar, 660 F.3d 108, 118 (2d Cir. 2011) (stating that the presumption against extraterritoriality does not apply in cases involving criminal statutes (citing United States v. Bowman, 260 U.S. 94, 98 (1922); Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 173 (1993))). The presumption can be overcome if the context of the statute provides a clear indication of extraterritoriality. *Morrison*, 130 S. Ct. at 2883. However, it has not yet been clarified what a "clear indication" entails when overcoming the presumption. Meyer, *supra* note 8, at 148.

56 *Morrison*, 130 S. Ct. at 2877. In interpreting whether a statute applies extraterritorially, courts may look to the context of the statute. *Id*. at 2883. Although there is a presumption against extraterritoriality, Congress has the legislative capacity to construct federal statutes to apply extraterritorially. EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991). For example, federal laws concerning terrorism and conduct at international airports often contain extraterritorial language. *See, e.g.*, 18 U.S.C. § 2332b(e)–(f) (2006) (prescribing extraterritorial jurisdiction to acts of terrorism transcending national boundaries); 18 U.S.C. § 2339B(a)(2) (2006) (prescribing extraterritorial jurisdiction to providing material support or resources to designated foreign terrorist organizations); 18 U.S.C. § 3042 (2006) (prescribing extraterritorial jurisdiction over U.S. citizens).

57 *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115 (1987) (stating that federal laws and other acts of Congress can supersede international laws or agreements if intended for that purpose). U.S. federal laws are "not subordinate to customary international law[s]" and may conflict with it, if so necessary. United States v. Yousef, 327 F.3d 56, 91 (2d Cir. 2003); *see* Al-Bihani v. Obama, 590 F.3d 866, 871 (D.C. Cir. 2010) (holding that international law is not controlling over U.S. law and cannot be used to limit the President's war powers).

58 *Compare Bowman*, 260 U.S. at 98–99 (allowing for a loosened application of the presumption against extraterritoriality), *with Aramco*, 499 U.S. at 248 (applying a strict presumption against extraterritoriality).

59 *See infra* Part II.B.1 (describing the early development and evolution of extraterritoriality in U.S. law).

60 *See infra* Part II.B.2 (discussing how courts' treatment of extraterritoriality has developed into its modern state).

1. Early History of Extraterritoriality Leading to *United States v. Bowman*

One of the original sources of extraterritoriality is found within the Constitution itself, which authorizes Congress "[t]o define and punish . . . Offences against the Law of Nations."[61] The Constitution also expressly permits universal jurisdiction over acts of piracy.[62] However, the Supreme Court was quick to place limitations upon statutory interpretation, and in 1804 stated, "[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[63] This doctrine, which became known as the *Charming Betsy* canon, states that federal statutes must not be interpreted in a way that violates international laws unless there is no other possible way of construing them.[64]

The presumption against extraterritoriality appears early in the United States's history as a means to avoid international conflicts.[65] In

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61 U.S. CONST. art. I, § 8, cl. 10. Congress shall have the power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." *Id.* This clause, known as the Offences Clause, allows the United States to prescribe laws regulating conduct that is considered to be a violation of all nations. Colangelo, *supra* note 26, at 137. Today, the "law of nations" is analogous with international customary law. *The Offences Clause After* Sosa v. Alvarez-Machain, *supra* note 40, at 2381. The constitutional drafters did not take a fixed view of international law and designed the clause to allow for flexibility to allow proper management as international law evolves. *Id.* By constructing the Constitution in this manner, the United States drew its authority to legislate from several nations. *Id.*

62 U.S. CONST. art. I, § 8, cl. 10; *see* United States v. Furlong, 18 U.S. (5 Wheat.) 184, 196–97 (1820) (recognizing that Congress has universal jurisdiction over piracy).

63 Murray v. Schooner Charming Betsy (*Charming Betsy*), 6 U.S. (2 Cranch) 64, 118 (1804); *see* McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21 (1963) (explaining that the National Labor Relations Act is directly at odds with the Honduran Labor Code and unreasonably interferes with a nation's sovereign authority, and thus is inapplicable).

64 Meyer, *supra* note 8, at 143. Under the *Charming Betsy* canon, geoambiguous laws must be interpreted to conform to customary international law in order to avoid interference with other nations. *Id.* The reason for this doctrine, arguably, is that the United States's foreign affairs power comes from international law, and, thus, the United States is obligated to obey international law. Colangelo, *supra* note 26, at 156. However, despite this doctrine, the United States is not subordinate to customary international law or treaties. United States v. Yousef, 327 F.3d 56, 91 (2d Cir. 2003).

65 *See, e.g.*, The Paquete Habana, 175 U.S. 677, 708, 714 (1900) (finding that U.S. courts govern with respect to the law of nations and are thus obliged to recognize and give effect to international law); The Apollon, 22 U.S. (9 Wheat.) 362, 370 (1824) ("The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. . . . [T]he phrases used in our municipal laws . . . must always be restricted in construction, to places and persons, upon whom the Legislature have authority and jurisdiction."); *see also* Knox, *supra* note 13, at 371 (stating that the *Charming Betsy* canon is construed as an older, weaker presumption against extraterritoriality). The earliest cases

1909, the Supreme Court reiterated this stance in *American Banana v. United Fruit Co.*[66] In *American Banana*, the Supreme Court found that the Sherman Antitrust Act did not apply extraterritorially and held that all statutes are "*prima facie* territorial" and that, as a general rule, "the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."[67] However, as communication and transportation began to improve and offenses began to "exhibit an inter-jurisdictional flavor," the Court began to question the strict application of the presumption against extraterritoriality.[68] These factors, along with increasing threats to national security, culminated in the Supreme Court case *United States v. Bowman*.[69]

In *Bowman*, the Court found that a criminal statute prohibiting fraud against the United States applied extraterritorially.[70] The Court recognized that criminal statutes can be interpreted to apply in such a way if they are "not logically dependent 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, especially if committed by its own citizens."[71] In addition, the Court in *Bowman* declared that crimes against individuals, their

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involving extraterritoriality "often involved offenses committed aboard American ships or by or against Americans." Brian L. Porto, *Extraterritorial Criminal Jurisdiction of Federal Courts*, 1 A.L.R. FED. 2D 415 (2005).

66 213 U.S. 347, 356–59 (1909).

67 *Id.* at 356–57 (citations and quotations omitted). In *American Banana*, the American Banana Company, located in what is now Panama, was acquired by an Alabama corporation. *Id.* at 354. After purchasing the company, United Fruit Company intended to control and monopolize the banana trade in parts of Central and South America. *Id.* With this intent in mind, United Fruit Company convinced government and military officials to prevent American Banana from doing business in the area. *Id.* at 354–55.

68 Colangelo, *supra* note 26, at 128.

69 260 U.S. 94 (1922).

70 *Id.* at 98–100. In *Bowman*, three Americans were charged with conspiring to defraud the U.S. Shipping Board Emergency Fleet Corporation, a company of which the United States was the sole stockholder. *Id.* at 95–96. The conspiracy was concocted in Brazil, and the context of the federal statute being used against them was silent on its territorial scope. *Id.* at 96–97.

71 *Id.* at 98. *Bowman* explicitly allowed some criminal laws to apply extraterritorially to U.S. citizens; however, the Court declined to rule whether extraterritorial application applied to non-citizens acting abroad. *See id.* at 102–03 (declining to predict whether the statute could apply extraterritorially to a non-national). Several years following the *Bowman* decision, federal courts began to allow laws to apply extraterritorially to foreign nationals as well. *See, e.g.*, United States v. Benitez, 741 F.2d 1312, 1317 (11th Cir. 1984) (finding that theft of personal property of the United States applied extraterritorially to foreign nationals); United States v. Bin Laden, 92 F. Supp. 2d 189, 194–95 (S.D.N.Y. 2000) (finding that extraterritorial laws can be applied to the conduct of foreign nationals); United States v. Zehe, 601 F. Supp. 196, 200 (D. Mass. 1985) (applying the Espionage Act extraterritorially to a foreign national).

property, and the community cannot be applied extraterritorially without prescription.[72] Here, the Court found that the security of the U.S. government took precedent over the security of its individual citizens.[73]

Bowman is a pivotal point in guiding America's handling of extraterritoriality and international law.[74] However, *Bowman* still left many questions—for example, it was undetermined if criminal statutes could be applied extraterritorially to non-citizens.[75] As a result, courts began to interpret the territorial scope of federal statutes inconsistently, providing no clear guidance to lower courts or litigants.[76]

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[72] *Bowman*, 260 U.S. at 98. Circuit courts have expanded on this ruling, and many allow some crimes against individuals and the community to apply extraterritorially. *See, e.g.*, United States v. Frank, 599 F.3d 1221, 1230 (11th Cir. 2010) (finding that a statute criminalizing sexual misconduct against minors applied extraterritorially); United States v. Vasquez-Velasco, 15 F.3d 833, 841 (9th Cir. 1994) (finding that violent crimes against Americans in furtherance of a racketeering operation applied extraterritorially); United States v. Erdos, 474 F.2d 157, 159 (4th Cir. 1973) (finding that a federal manslaughter statute can be applied extraterritorially).

[73] *See Bowman*, 260 U.S. at 98 (recognizing the government's right to defend itself from extraterritorial conduct, but explicitly declining such right to individuals). *Bowman* can be construed to say that there is no presumption against extraterritoriality for violations of federal criminal law that are "not logically dependent on their locality." *Id.*; *see* Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 333 (2001) (construing *Bowman* to mean that there is no presumption against extraterritoriality when crimes focus on an extraterritorial matter).

[74] *See* Blakesley & Stigall, *supra* note 33, at 45 (discussing how *Bowman* was a turning point in modern legal history by recognizing that social and technological advancements and changes called for an increasing necessity for extraterritorial use of laws).

[75] One of the biggest questions left unanswered, which was explicitly left unaddressed in *Bowman*, was whether laws can be interpreted to apply extraterritorially to non-citizens of the United States. *See Bowman*, 260 U.S. at 102–03 (questioning the applicability of jurisdiction over the unapprehended defendant, who was a citizen of Great Britain). *Bowman* confirmed that the nationality, protective, and effects principles may be used to apply domestic laws extraterritorially. *See id.* at 100–02 (allowing extraterritorial application of federal laws to conduct committed by nationals that had effects within the territory of the United States and induced the government to protect itself). Soon after *Bowman*, the Supreme Court confirmed that the nationality principle can apply extraterritorially to govern conduct committed by its citizens abroad. *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936) (stating that the Constitution and federal laws have no force in foreign nations unless applied to U.S. nationals). However, lower courts have determined that extraterritorial jurisdiction may also apply to non-citizens acting abroad as well. *See* United States v. Delgado-Garcia, 374 F.3d 1337, 1345–46 (D.C. Cir. 2004) (stating that, under *Bowman*, citizenship is irrelevant, and laws can be applied extraterritorially to both citizens and non-citizens); United States v. Ayesh, 762 F. Supp. 2d 832, 840 (E.D. Va. 2011) (finding that federal laws may apply extraterritorially to non-citizens); *see also supra* note 71 (exploring cases in which federal laws were applied extraterritorially to non-citizens).

[76] Knox, *supra* note 12, at 643. The guidelines handed down by courts to overcome the presumption have varied widely, "ranging from statements that a clear expression of

2. Extraterritoriality post-*Bowman* and *Morrison*

Following the ruling in *Bowman*, lower courts began to gradually give extraterritorial effect to some federal laws, including civil statutes.[77] However, the Supreme Court reaffirmed the presumption against extraterritoriality in 1949 with *Foley Brothers, Inc. v. Filardo*.[78] Over forty years later, the Supreme Court again revived the presumption in *EEOC v. Arabian American Oil Co. (Aramco)*, which promoted a "clear statement" rule requiring express language within a statute indicating extraterritoriality.[79] Nevertheless, courts continued to apply laws exterritorially during this time, and circuit courts seemed to develop their own means of evaluating the territorial scope of statutes.[80] The

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congressional intent is necessary, to indications that the structure, legislative history, and agency interpretations of the statute are relevant, to decisions that some circumstances justify extending law extraterritorially without any direct evidence of legislative intent at all." *Id*. (footnotes omitted).

77 *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764, 795–96 (1993) (finding that civil provisions of the Sherman Act apply extraterritorially when foreign conduct produces a substantial effect in the United States); United States v. Aluminum Co. of Am., 148 F.2d 416, 443–44 (2d Cir. 1945) (citing *Bowman*, 260 U.S. at 98) (determining that the Sherman Act applies extraterritorially); *see also* Clopton, *supra* note 14, at 167 (discussing how *Bowman* is "routinely reconstruct[ed]" to overcome the presumption against extraterritoriality and apply criminal laws extraterritorially). However, after *Bowman*, a general presumption against extraterritoriality still continued to exist. *See infra* note 78 (discussing *Foley Brothers, Inc. v. Filardo*).

78 *See* 336 U.S. 281, 285 (1949) ("The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States . . . is a valid approach whereby unexpressed congressional intent may be ascertained . . . ." (citing Blackmer v. United States, 284 U.S. 421, 437 (1932))). In *Foley Brothers*, the Supreme Court determined that the Eight Hour Law did not apply extraterritorially to a U.S. citizen employed abroad. *Id*. at 289–90.

79 EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 258 (1991). In *Aramco*, the Supreme Court found that Title VII of the Civil Rights Act of 1964 does not regulate employment practices of U.S. employers employing U.S. citizens abroad. *Id*. at 248–49. *Aramco* further enhanced the presumption against extraterritoriality by requiring express language (or a "clear statement") to overcome the presumption. *See id*. at 248 (requiring an "affirmative intention" of Congress to be "clearly expressed" for the presumption to be defeated). The dissent in *Aramco* argued that a clear statement rule was too stringent and believed that congressional intent could be ascertained to overcome the presumption. *Id*. at 261 (Marshall, J., dissenting).

80 Knox, *supra* note 13, at 393. While the *Bowman* case discussed territorial effects, its legitimate reasoning utilized the protective principle. *Id*. Generally, this is the Second Circuit's approach to extraterritoriality. *Id*. However, the Third, Fifth, and Eleventh Circuits appear to utilize an effects test in evaluating extraterritoriality. *Id*. The Eleventh Circuit has gone so far as to state that, after *Bowman*, many circuits "inferred congressional intent to provide for extraterritorial jurisdiction over foreign offenses that cause domestic harm." United States v. Plummer, 221 F.3d 1298, 1304–05 (11th Cir. 2000) (citations omitted). The D.C. and Ninth Circuit have an even broader evaluation of extraterritoriality. Knox, *supra* note 13, at 393. Under these two circuits, there is no

development of technology and foreign relations eventually led to more complicated issues regarding extraterritoriality.[81]

The war on terrorism has also had a particularly profound effect on the presumption.[82] After September 11, 2001, courts began interpreting several statutes to apply extraterritorially in an effort to fight terrorists conducting operations abroad.[83] It appeared that the standard had perhaps been lowered; however, the Supreme Court soon reinvigorated the approach of a firm presumption against extraterritoriality.[84]

In 2010, the Supreme Court heard *Morrison v. National Australia Bank Ltd.*—a securities case in which Australian investors sued a bank in Australia for fraudulently reporting the numbers and documents of a

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presumption against extraterritoriality when the concern of the statute is not limited to domestic affairs. *Id.*; *see Delgado-Garcia*, 374 F.3d at 1345 (finding that federal law prohibiting encouragement of illegal immigration into the United States applied extraterritorially because it was "fundamentally international, not simply domestic, in focus and effect").

81 *See supra* note 17 and accompanying text (discussing how recent social and technological advancements, the increase in international business, and terrorism may call for an increased need in extraterritoriality).

82 Adler, *supra* note 17, at 183. For example, historically, the United States had no reason to apply its immigration laws extraterritorially. *Id.* However, after September 11, there was a sudden interest in preserving our borders so as to prevent the entry of would-be terrorists. *Id.* Suddenly, there was an interest in applying immigration laws extraterritorially. *Id.*; *see Delgado-Garcia*, 374 F.3d at 1347–48 (holding that encouraging illegal immigration into the United States has an effect on the United States and federal laws prohibiting such conduct apply extraterritorially).

83 *See, e.g.*, United States v. Yousef, 327 F.3d 56, 91 (2d Cir. 2003) (finding that federal laws can apply extraterritorially to non-citizens conspiring to commit some terrorist acts); United States v. Reumayr, 530 F. Supp. 2d 1210, 1221 (D. N.M. 2008) (holding that federal law applied extraterritorially to a Canadian citizen for a terrorism plot to blow up the Alaskan Pipeline); United States v. Bin Laden, 92 F. Supp. 2d 189, 222 (S.D.N.Y. 2000) (suggesting that there might be universal jurisdiction over some acts of terrorism). Cases applying extraterritoriality to acts of terrorism still attempt to appease international law, especially with regard to extraterritorial jurisdiction and due process. *See Reumayr*, 530 F. Supp. 2d at 1221–22 (stating that international law allows for extraterritorial application of federal terrorism laws under the protective principle); *Bin Laden*, 92 F. Supp. 2d at 196 (finding that the protective principle established in *Bowman* is consistent with international law); *see also* DOYLE, *supra* note 8, at 11 (discussing how the protective principle is often used to combat terrorism); Knox, *supra* note 13, at 357 (discussing international principles that could be used to fight terrorism abroad). This is odd considering some of these cases deny the controlling authority of international law. *See Yousef*, 327 F.3d at 91 (holding that the United States is not subordinate to international law); *Bin Laden*, 92 F. Supp. 2d at 214 (finding that Congress has the power to override international law (citing Cook v. United States, 288 U.S. 102, 119–20 (1933))).

84 Colangelo, *supra* note 9, at 1043 ("On the other hand, the Court's recent reinvigoration of the presumption against extraterritoriality in *Morrison* appears strongly to support a separation of powers model that preferences foreign territorial sovereignty as a default rule.").

Florida-based mortgage company owned by the bank.[85] In *Morrison*, the Court explicitly stated that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[86] The Court confirmed that the presumption against extraterritoriality applies in all cases, and a possible extraterritorial interpretation of a statute does not override the presumption against such application.[87] Furthermore, the Court stated that a statute only has extraterritorial effect if Congress clearly expresses such an intention within the context of the statute.[88] But, after finding that the law in question did not apply extraterritorially, the Court assessed whether the domestic conduct within the case was sufficient to establish a domestic connection.[89] The Court stressed the *focus* of

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[85] Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2875–76 (2010). Before *Morrison*, circuits varied in their method of assessment of extraterritorial application of securities laws, and the two most common means utilized by lower courts to establish extraterritoriality were the "effects test" and the "conduct test." *Id*. at 2879. The effects test was used to determine whether the conduct had a "substantial effect" on the United States or its citizens. *Id*.; *see* Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968), *abrogated by Morrison*, 130 S. Ct. at 2887–88 (finding that securities laws can apply extraterritorially when conduct affects American securities). The conduct test sought to determine where the illegal conduct actually took place. *Morrison*, 130 S. Ct. at 2879. *See* SEC v. Kasser, 548 F.2d 109, 114 (3d Cir. 1977), *abrogated by Morrison*, 130 S. Ct. 2869 (holding that securities laws may only apply extraterritorially when at least a part of the conduct "designed to further a fraudulent scheme occurs within this country"). Both of these tests, in some way, attempted to conform to the territorial principle of international law. *See* Colangelo, *supra* note 9, at 1080 (explaining that the effects test demonstrated the objective territorial principle of international law, and the conduct test demonstrated the subjective territorial principle of international law).

[86] *Morrison*, 130 S. Ct. at 2878. Before *Morrison*, federal courts had been applying extraterritoriality to securities laws for over forty years. Colangelo, *supra* note 9, at 1080; *see Morrison*, 130 S. Ct. at 2878 (noting that courts had been giving extraterritorial effect to securities and exchange acts for decades).

[87] *See Morrison*, 130 S. Ct. at 2881 (finding that the presumption against extraterritoriality had become unpredictable and holding, "Rather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects") (footnote omitted).

[88] *Id*. at 2883. In renewing the presumption against extraterritoriality, the Court stated that a statute's context may be consulted in determining whether it can apply extraterritorially. *Id*. While there must be a clear indication of extraterritoriality, a statute is not required to say "this law applies abroad" to have extraterritorial effect. *Id*. This ruling bolstered a strong presumption against extraterritoriality, but it did not require, as the Court did in *Aramco*, express language or a "clear statement rule" to overcome extraterritoriality. *Compare id*. (explaining that the presumption against extraterritoriality is not a "clear statement rule"), *with* EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 258 (1991) (requiring the existence of a clear statement rule to overcome the presumption against extraterritoriality). In regards to the statute in question in *Morrison*, the Court stated that it gave "no clear indication" of an extraterritorial application. *Morrison*, 130 S. Ct. at 2883.

[89] *Morrison*, 130 S. Ct. at 2883–84. The petitioners in *Morrison* attempted to avoid the issue of extraterritoriality altogether by asserting that the conduct committed within the

congressional concern when evaluating statutes and found that the existence of *some* domestic activity was not enough to overcome the presumption.[90]

Morrison does not explicitly overrule *Bowman*; however, it definitely questions its applicability.[91] While *Bowman* permits a broader interpretation of statutes that allow for an assumption of Congress's intent, *Morrison* requires Congress's affirmative intent to be clearly expressed.[92] The Court in *Morrison* found that the context of a statute may be helpful in determining its extraterritorial reach, but it promoted a

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United States was sufficient for a domestic claim, but the Court disagreed. *See id*. at 2885–88 (discussing the lack of substantial conduct within the United States to establish a domestic claim). The Court criticized overemphasis on domestic activity (and, consequentially, the effects and conduct tests, as well as the territorial principle of international law) in determining whether laws can apply extraterritorially. *Id*. at 2884. Instead, the Court took a "purely domestic" approach in *Morrison*. Lea Brilmayer, *The New Extraterritoriality:* Morrison v. National Australia Bank, *Legislative Supremacy, and the Presumption Against the Extraterritorial Application of American Law*, 40 SW. L. REV. 655, 685 (2011) (explaining that treating some cases as purely domestic, even when they have connections to more than one state, ensures that the transactions will be regulated). After *Morrison*, Congress amended some provisions of the U.S. Securities Act to explicitly grant extraterritorial application. *See generally* Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010).

90 *Morrison*, 130 S. Ct. at 2884. In order for a federal statute to apply extraterritorially, Congress must clearly express such an affirmative intent. *Id*. at 2877. In *Morrison*, the "focus" of the statute in question was *not* on the location of the offense but on the precise conduct being addressed. *Id*. at 2884. However, the mere existence of some domestic activity does not overcome the presumption. *See id*. ("But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case.").

91 *See* United States v. Finch, Cr. No. 10-00333 SOM-KSC, 2010 WL 3938176, at *4 (D. Haw. Sept. 30, 2010) (finding that, despite defendant's argument, *Morrison* neither implicitly nor explicitly overrules *Bowman*). The argument has been made that the Supreme Court's decision in *Morrison* overrules *Bowman*; however, thus far courts have disagreed. *See, e.g.*, United States v. Campbell, 798 F. Supp. 2d 293, 303–04 (D.D.C. 2011) (stating that *Morrison* neither limits nor overrules *Bowman*); *Finch*, 2010 WL 3938176, at *3–5 (recognizing that anti-bribery statutes were similar to the types of statutes *Bowman* allowed to apply extraterritorially and dismissing the defendant's argument that *Morrison* overruled *Bowman*); *see also* United States v. Leija-Sanchez, 602 F.3d 797, 798–99 (7th Cir. 2010) (dismissing defendant's argument that the presumption against extraterritoriality in civil cases did not overrule *Bowman*, which explicitly allowed extraterritorial application of some criminal statutes). It is possible that both *Morrison* and *Bowman* can co-exist. *See* Clopton, *supra* note 14, at 194 (noting that *Bowman* "can be maintained consistently with the Court's decision in *Morrison*").

92 *Compare Morrison*, 130 S. Ct. at 2883 (finding that some activity or effect is not sufficient to establish extraterritorial application, and in order for a statute to apply extraterritorially, a clear indication of extraterritoriality must be expressed), *with* United States v. Bowman, 260 U.S. 94, 98–99 (1922) (holding that extraterritoriality can "be inferred from the nature of the offense").

form of the "clear statement" rule by which extraterritoriality cannot apply unless such statutory language is explicitly found.[93]

C. The Current State of Extraterritoriality

The current state of extraterritoriality is difficult to thoroughly define, but it can be stated with certainty that the presumption against extraterritoriality is more easily overcome within the context of criminal offenses.[94] Cases immediately following *Morrison* indicate that lower courts generally favor *Bowman* over *Morrison*, particularly in criminal cases.[95] The presumption is even lower when criminal conduct

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[93] *See Morrison*, 130 S. Ct. at 2891–92 (Stevens, J., concurring) (discussing how the majority's insistence on a "clear indication" from Congress to apply a statute extraterritorially appears to re-establish the "clear statement" rule laid out by the Court in *Aramco*).

[94] *See* Kollias v. D & G Marine Maint., 29 F.3d 67, 71 (2d Cir. 1994) (interpreting *Bowman* to not apply to all cases and stating that, under *Bowman*, "only criminal statutes, and perhaps only those relating to the government's power to prosecute wrongs committed against it, are exempt from the presumption"). *Bowman* specifically refers to the extraterritorial application of criminal statutes, explicitly stating that crimes against individuals and their property, including "assaults, murder, burglary, larceny, robbery, arson, embezzlement, and frauds of all kinds," do not apply extraterritorially without statutory prescription. *Bowman*, 260 U.S. at 98; *see Leija-Sanchez*, 602 F.3d at 798–99 (stating that *Bowman* explicitly treats criminal statutes differently from civil statutes). Some courts have expanded *Bowman* to allow for some crimes against individuals, specifically children, to apply extraterritorially. *See* United States v. Frank, 599 F.3d 1221, 1230 (11th Cir. 2010) (finding that, under *Bowman*, federal statutes prohibiting sexual exploitation of minors apply extraterritorially); United States v. Harvey, 2 F.3d 1318, 1327 (3d Cir. 1993) (determining that child pornography statutes applied extraterritorially (citing *Bowman*, 260 U.S. at 98)). In *Bowman*, the Court determined that there is no presumption against extraterritoriality for criminal acts not logically dependent 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." *Bowman*, 260 U.S. at 98.

[95] The language of *Morrison* is sweeping. *See Morrison*, 130 S. Ct. at 2878 ("When a statute gives no clear indication of extraterritorial application, it has none."). However, since the Court decided *Morrison*, lower courts have ignored the decision with regard to criminal statutes and rely more heavily on *Bowman*. *Compare* NewMarket Corp. v. Innospec, Inc., No. 3:10CV503 HEH, 2011 WL 1988073, at *3–4 (E.D. Va. May 20, 2011) (holding that civil federal price discrimination laws have no extraterritorial application under *Morrison*), *with* United States v. Belfast, 611 F.3d 783, 811, 813–14 (11th Cir. 2010) (finding that a criminal law prohibiting conspiracy to commit torture applies extraterritorially), *Campbell*, 798 F. Supp. 2d at 304–05 (finding that criminal bribery statutes may apply extraterritorially when the United States is a victim), United States v. Ayesh, 762 F. Supp. 2d 832, 840 (E.D. Va. 2011) (finding that bribery statutes can be applied extraterritorially when the U.S. government is a victim), United States v. Hasan, 747 F. Supp. 2d 642, 686 (E.D. Va. 2010) (finding that use of a firearm to commit a violent crime against a member of the uniformed services applies extraterritorially without discussion of *Morrison*), *and Finch*, 2010 WL 3938176, at *3–4 (finding that criminal bribery and money laundering statutes apply extraterritorially and holding that *Morrison* does not overrule *Bowman*). *But see* Sarei v. Rio Tinto, PLC, 671 F.3d 736, 744–747 (9th Cir. 2011) (finding that

somehow affects the United States.[96] For example, the United States often applies federal laws extraterritorially when an individual attempts to defraud or terrorize the U.S. government.[97]

Because *Morrison* is still young in its jurisprudence, its ultimate effect on *Bowman* is unclear.[98] It is acceptable to believe that the broad

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Morrison does not prevent the Alien Tort Statute from applying extraterritorially, especially when the basis of the claim includes criminal violations of international law); United States v. Jack, No. 2:07-cr-00266 FCD DAD, 2010 WL 4718613, at *12 (E.D. Cal. Nov. 12, 2010) (holding that criminal law regarding transferring or possessing a machine gun does not apply extraterritorially without discussion of *Morrison*).

[96] *See Bowman*, 260 U.S. at 98 (holding that there is no presumption against extraterritoriality for "criminal statutes which are, as a class, not logically dependent 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"). Courts often cite the protective principle under international law to justify extraterritorial application of federal laws when it is a party to a case. Colangelo, *supra* note 9, at 1078; *see* United States v. MacAllister, 160 F.3d 1304, 1308 n.8 (11th Cir. 1998) ("On authority of *Bowman*, courts have routinely inferred congressional intent to provide for extraterritorial jurisdiction over foreign offenses that cause domestic harm.") (citations omitted).

[97] *See, e.g.*, *Bowman*, 260 U.S. at 99–100 (holding that the United States may apply its laws extraterritorially to protect itself from fraud); United States v. Yousef, 327 F.3d 56, 87 (2d Cir. 2003) (explaining that federal laws can apply extraterritorially to terrorist acts aboard civilian aircraft); United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991) (finding that certain federal laws addressing terrorism may apply extraterritorially); *Campbell*, 798 F. Supp. 2d at 306 (determining that bribery statutes can apply extraterritorially when the United States is a victim); *Ayesh*, 762 F. Supp. 2d at 840 (providing that bribery statutes can be applied extraterritorially when the U.S. government is a victim); United States v. Bin Laden, 92 F. Supp. 2d 189, 201–02 (S.D.N.Y. 2000) (finding that statutes pertaining to murders committed during the course of an attack on a U.S. facility apply extraterritorially).

[98] Some lower courts have read the ruling of *Morrison* literally, and the Second Circuit, as well as some district courts, has relied on *Morrison* to deny civil extraterritorial application to the RICO Act. *See* Norex Petroleum Ltd. v. Access Indus., Inc., 631 F.3d 29, 32–33 (2d Cir. 2010) (finding that, in light of *Morrison*, the RICO Act cannot be applied extraterritorially, even with the inclusion of broad, general language); Sorota v. Sosa, 842 F. Supp. 2d 1345, 1348–51 (S.D. Fla. 2012) (holding that the RICO Act does not apply extraterritorially and finding that *Morrison* abrogates the Eleventh Circuit's traditional approach that RICO does have extraterritorial reach); United States v. Philip Morris USA, Inc., 783 F. Supp. 2d 23, 27–29 (D.D.C. 2011) (finding that there is a presumption against applying the civil provisions of the RICO Act extraterritoriality). The fact that the RICO Act has both criminal and civil provisions further complicates matters, and it is unclear if *Morrison* would be interpreted as applying to criminal RICO provisions as well. *See* Clopton, *supra* note 14, at 188–89 & n.206 (noting that some statutes, such as the Sherman Antitrust Act and RICO, contain both civil and criminal provisions and that "[a]ny preference for flexibility in criminal cases would have to be weighed against the desire to give a consistent meaning to the same statutory text") (footnote omitted). Some cases have continued to loosely apply extraterritoriality and look to *Bowman* rather than to *Morrison*. *See, e.g.*, *Rio Tinto*, 671 F.3d at 744–47 (finding that *Morrison* does not prevent the Alien Tort Statute from applying extraterritorially, especially when the basis of the claim includes violations of international law); United States v. Weingarten, 632 F.3d 60, 65–67 (2d Cir.

language in *Morrison* will begin to affect criminal law.[99] Thus far, it is too soon to determine *Morrison*'s long-term effect on the presumption, especially in regards to criminal statutes.[100] Nevertheless, the Supreme Court has demonstrated a continued trend of establishing a strict presumption against extraterritoriality.[101]

III. ANALYSIS

A clear indication of extraterritoriality is required to overcome the presumption, but there are no specific guidelines defining what "a clear indication" entails.[102] Courts, in practice, sometimes apply laws

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2011) (recognizing *Morrison* but relying on *Bowman* to determine that laws prohibiting the transportation of minors for sexual purposes applies extraterritorially); *Belfast*, 611 F.3d at 811, 813–14 (mentioning *Morrison* but relying on *Bowman* in determining that laws prohibiting conspiracy to commit torture apply extraterritorially); *Campbell*, 798 F. Supp. 2d at 300–04 (recognizing *Morrison* but relying on *Bowman* in determining that bribery statutes can be applied extraterritorially when the United States is a victim); *Ayesh*, 762 F. Supp. 2d at 840–41 (relying on *Bowman*, without mentioning *Morrison*, in determining that bribery statutes can be applied extraterritorially when the U.S. government is a victim).

[99] *See* Clopton, *supra* note 14, at 181 ("A court looking at an ambiguous criminal statute may treat *Morrison* as the straw that broke *Bowman*'s back, requiring a stringent presumption [against extraterritoriality] in criminal as well as civil cases.").

[100] *See supra* note 91 (discussing criminal cases exploring the early relationship between *Morrison* and *Bowman*). The Court in *Morrison* determined that the presumption against extraterritoriality applied "in all cases." *Morrison*, 130 S. Ct. at 2881. However, it is possible that *Bowman* simply remains to be an "exception" to the presumption. Meyer, *supra* note 8, at 135. Additionally, many courts have expressed the belief "that *Bowman* and the civil law precedents live in harmony." Clopton, *supra* note 14, at 166 (footnote omitted). For example, in *United States v. Leija-Sanchez*, which was decided just months prior to *Morrison*, the Seventh Circuit held that civil decisions "cannot implicitly overrule a decision holding that criminal statutes are applied differently." 602 F.3d 797, 798 (7th Cir. 2010).

[101] *See Morrison*, 130 S. Ct. at 2877, 2881 (discussing the "longstanding principle" of the presumption against extraterritoriality and holding that the presumption applies "in all cases"); EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991) (promoting a strong presumption against extraterritoriality); Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949) (endorsing a presumption against extraterritoriality); Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909) ("All legislation is prima facie territorial." (quoting *Ex parte* Blain, L. R. 12 Ch. Div. 522, 528; State v. Carter, 27 N. J. L. 499 (1859); People v. Merrill, 2 Park. Crim. Rep. 590, 596)). *But see* William S. Dodge, Morrison*'s Effects Test*, 40 SW. L. REV. 687, 688 (2011) (discussing the Supreme Court's inconsistent treatment of extraterritoriality). Despite these cases, many lower courts have continued to interpret geoambiguous statutes to apply extraterritorially. *See supra* notes 91, 95 (listing cases citing *Bowman* to find extraterritoriality after the *Morrison* decision).

[102] *See Morrison*, 130 S. Ct. at 2878 ("When a statute gives no clear indication of an extraterritorial application, it has none."); Meyer, *supra* note 8, at 148 ("[I]t is far from clear what must exist for the presumption against extraterritoriality to be overcome."); *see also* Clopton, *supra* note 14, at 167 ("[C]ourts routinely reconstruct *Bowman* to overcome the presumption and apply a U.S. criminal law abroad.") (footnote omitted).

extraterritorially without any clearly stated indication.[103] It is not uncommon for courts to rely on principles of international law to justify the extraterritorial application of domestic law.[104] However, these principles can easily be manipulated to liberally interpret the territorial scope of statutes.[105] While extraterritorial interpretation may abuse the intended confines of a statute, strictly applying the presumption can have a severely limiting effect and may result in excessive restraint.[106]

U.S. courts often juxtapose the presumption with international principles, particularly the effects and protective principles, when evaluating extraterritoriality, and a court's use of one of these principles over another appears to involve an intricate "balancing" test.[107] In Part

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[103] Meyer, *supra* note 8, at 148–49 & n.180 (providing examples of cases where the court ruled that the laws applied extraterritorially); *see, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764, 814 (1993) (recognizing the extraterritorial effect of the Sherman Act despite its silence on geographical reach); United States v. Al Kassar, 660 F.3d 108, 118 (2d Cir. 2011) (finding that a federal law criminalizing conspiracy to kill U.S. officers applies extraterritorially, despite the fact that the statute "contains no explicit extraterritoriality provision"); United States v. Delgado-Garcia, 374 F.3d 1337, 1347–48 (D.C. Cir. 2004) (finding that 8 U.S.C. § 1324(a)(iv), which criminalizes encouragement of illegal entry into the United States, applies extraterritorially despite its silence on specific geographical applicability).

[104] *See* Meyer, *supra* note 8, at 143–45 (discussing the use of international law to justify applying laws extraterritorially); *see also* United States v. Davis, 905 F.2d 245, 249 n.2 (9th Cir. 1990) (stating that the principles of international law may also be used to establish a nexus and fulfill due process requirements).

[105] *See* Knox, *supra* note 12, at 650 (discussing how international law can provide a jurisdictional basis to apply statutes extraterritorially without evidence indicating such intent by Congress). The international principles of law lack a guiding criterion with regard to their application. Meyer, *supra* note 8, at 150. They are inherently difficult to ascertain and can easily be manipulated. *Id.* at 150–51. Determining extraterritoriality based exclusively on these principles could very well allow the United States to apply almost any federal law globally. *Id.* In addition, applying the principles of international law does not avoid the fact that they may conflict with the laws of other foreign nations. Knox, *supra* note 13, at 384–85.

[106] *See* Meyer, *supra* note 8, at 150 (noting that the presumption against extraterritoriality may be overly broad and may restrict application of domestic law, even when there is no conflict with international law); *see also* United States v. Clark, 435 F.3d 1100, 1108 (9th Cir. 2006) (finding that the PROTECT Act would be "severely" limited if it was prohibited from applying extraterritorially). A strong presumption against extraterritoriality may actually result in discord with foreign nations if it prevents the United States from fulfilling international obligations. Colangelo, *supra* note 9, at 1023–24.

[107] *See* Meyer, *supra* note 8, at 146 (discussing how the principles of international law allow courts to balance interests and circumvent "traditional territorial" restrictions of laws). Section 403 of the *Restatement (Third) of Foreign Relations Law* suggests the use of a balancing test in determining whether extraterritorial jurisdiction is appropriate. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403(2) (1987). But section 403 has gone beyond jurisdiction and has been used to determine the appropriateness of applying statutes extraterritorially as well. *See* United States v. Vasquez-Velasco, 15 F.3d 833, 839–41 (9th Cir. 1994) (discussing section 403's role in determining that the extraterritorial

III.A, this Note examines problems associated with a strict presumption against an extraterritoriality approach by courts.[108] It focuses particularly on the analysis found within the *Morrison* case.[109] Additionally, this Note examines why the current state of affairs renders this approach archaic if applied absolutely.[110] Next, Part III.B evaluates *Bowman* and discusses the dangers of conservatively applying the presumption.[111] It also analyzes the intermingling of international principles with federal laws and techniques that courts use to obtain extraterritoriality.[112]

A. The Impracticality of a Strict Presumption Against Extraterritoriality

Although a strong presumption against extraterritoriality prevents U.S. laws from conflicting or interfering with foreign law, it may also impede the United States from exercising its sovereign power to protect itself and its citizens.[113] While the presumption has been a cornerstone of U.S. law and policy, the emphasis of the presumption has fluctuated between a focus on the content and context of laws to an evaluation emphasizing the interests of the United States.[114] In *Morrison*, the Court avoided supplemental considerations that stretch the extraterritorial

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application of a statute punishing violent crimes committed in aid of a racketeering enterprise to violent crimes associated with drug trafficking is reasonable under international law principles). While section 403's balancing test is useful in guiding extraterritoriality, in practice, "balancing interests" would likely be biased in favor of application and may result in foreign affair gaffes. Knox, *supra* note 13, at 380; *see also* Meyer, *supra* note 8, at 160 (discussing the dangers of using section 403 to determine extraterritorial application).

108 *See infra* Part III.A (discussing the presumption against extraterritoriality, the Court's reasoning in *Morrison*, and the consequences of the presumption).

109 *See infra* notes 128–45 and accompanying text (analyzing *Morrison*).

110 *See infra* notes 139–45 and accompanying text (explaining how a strict application of the presumption against extraterritoriality fails to adequately promote the modern legal interests of the United States).

111 *See infra* Part III.B (analyzing *Bowman* and explaining how over-applying federal laws extraterritorially violates sovereignty and promotes judicial activism).

112 *See infra* notes 161–84 and accompanying text (analyzing the courts' use of international principles and vague statutory construction to achieve extraterritoriality).

113 *See* Colangelo, *supra* note 9, at 1037 (discussing how the purpose of the presumption against extraterritoriality is to prevent discord with foreign laws); *see also* United States v. Bowman, 260 U.S. 94, 98–99 (1922) (discussing how the presumption against extraterritoriality may prevent the United States from adequately defending itself in some cases). Although one of the main functions of the presumption against extraterritoriality is to avoid conflicts with foreign laws, it applies even when no conflict exists. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2877–78 (2010).

114 *Compare Morrison*, 130 S. Ct. at 2884 (stressing the focus of a statute when analyzing its geographic reach), *with Bowman*, 260 U.S. at 98–99 (discussing the overriding interest of protecting the government when evaluating extraterritoriality).

capabilities of statutes and instead reemphasized the focus of the statute itself.[115] While strictly applying the presumption fosters uniformity and prevents over-applying laws to reach extraterritorial conduct, it is also an inefficient means of handling contemporary legal issues.[116] For example, applying the presumption to a territorially silent federal law that simply criminalizes conspiracies to kill U.S. employees complies with the United States's methodology, sets precedent, and respects international boundaries; however, the government sometimes requires its employees to travel internationally, and applying the presumption in these cases hinders the effectiveness of the law.[117]

Such a hindrance demonstrates the restrictive nature of a strict interpretation of the presumption against extraterritoriality.[118] The presumption restrains the United States from effectively battling new, illegal conduct absent explicit statutory provisions.[119] In a sense, when a domestic law does not explicitly prescribe extraterritoriality, the United

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[115] *Morrison*, 130 S. Ct. at 2884. The Court noted that such an approach also encourages Congress to legislate and construct laws more precisely. *Id*. at 2881. The previous approach to the presumption against extraterritoriality appeared to be more dynamic—especially with regard to achieving national interests. Meyer, *supra* note 8, at 147–48.

[116] *See* Meyer, *supra* note 8, at 113–14 (noting how the presumption approach may not adequately handle new-age crimes).

[117] *See, e.g.*, United States v. Al Kassar, 660 F.3d 108, 118 (2d Cir. 2011) (finding that a law prohibiting conspiracy to kill U.S. officers or employees applies extraterritorially despite the absence of an explicit extraterritorial provision, because "a significant number of those employees perform their duties outside U.S. territory"); United States v. Benitez, 741 F.2d 1312, 1317 (11th Cir. 1984) (applying a law prohibiting the attempted murder of DEA agents extraterritorially, because it "is exactly the type of crime that Congress must have intended to apply extraterritorially").

[118] *See* Meyer, *supra* note 8, at 150 (explaining that one of the shortcomings of the presumption against extraterritoriality is its restrictiveness). While sometimes the courts find that the presumption can be overcome if an extraterritorial act produces effects within the United States, this is not a hard-line rule. *See* Knox, *supra* note 13, at 351. However, the fact that an act committed abroad produces effects within the United States does not necessarily mean that a law must be construed to apply extraterritorially to reach such conduct. *See Morrison*, 130 S. Ct. at 2883–84 (evaluating the effects of a security fraud committed abroad and localizing the effects instead of relying on extraterritoriality). In *Morrison*, the Court did not even attempt to address or reconcile previous judicial decisions that did not take a strict approach against extraterritoriality. Knox, *supra* note 12, at 647.

[119] *See* Meyer, *supra* note 8, at 113–14 (discussing how the presumption can be an ineffective approach to handling "new-age scenarios"). In *Morrison*, the Court noted that, in making a determination on extraterritoriality, "context [of the statute] can be consulted as well" as the text itself. *Morrison*, 130 S. Ct. at 2883. However, the definition of "context" is unclear, thus leaving lower courts with a confusing standard. Colangelo, *supra* note 9, at 1043. Courts sometimes conservatively apply the presumption against extraterritoriality to battle new and evolving illegal conduct. *See Bowman*, 260 U.S. at 98, 102 (recognizing that improvements in communication and travel make it likely that crimes will occur outside U.S. territory); United States v. Ivanov, 175 F. Supp. 2d 367, 374 (D. Conn. 2001) (applying laws extraterritorially to computer hacking committed abroad).

States's customary approach is akin to legal isolationism—essentially, unless otherwise indicated, U.S. laws do not extend to actions outside of its territory and are not flexible enough to do so.[120] But the presumption against extraterritoriality is simply a judicially created standard, and "there is no evidence" indicating that Congress prefers this approach.[121] It is conceivable that exceptions to this standard, such as the one created in *Bowman*, are an appropriate and alternative means of handling heinous, unpredictable offenses that demand immediate justice.[122]

The purpose of the presumption may be a separation of powers issue.[123] Viewed within this context, the presumption restrains courts from acting as legislatures and unilaterally amending the geographic scope of laws.[124] The fact that Congress often explicitly prescribes extraterritoriality with respect to some laws demonstrates that Congress understands the importance of self-restraint when legislating.[125]

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120 *See* Smith v. United States, 507 U.S. 197, 204 n.5 (1993) (stating that Congress legislates domestic matters, not foreign ones). Laws that are silent on the issue of extraterritoriality do not apply extraterritorially. *Morrison*, 130 S. Ct. at 2878. Unilateral application of laws is unwise and may leave the United States susceptible to foreign law as well. Parrish, *supra* note 32, at 1491. However, the approach of strictly applying the presumption might prevent the United States from fulfilling international obligations. Colangelo, *supra* note 9, at 1034.

121 Knox, *supra* note 12, at 647. The presumption is purely a judicial creation and there is no code instructing such an approach. *Id.* Courts sometimes appear to be more concerned with avoiding extraterritoriality than Congress. *Id*.

122 *See* United States v. Frank, 599 F.3d 1221, 1230 (11th Cir. 2010) (discussing how the *Bowman* exception allows extraterritoriality to "be inferred from the nature of the offense[] and Congress' other legislative efforts to eliminate" similar types of crimes (quoting United States v. Baker, 609 F.2d 134, 136 (5th Cir. 1980); United States v. MacAllister, 160 F.3d 1304, 1307–08 (11th Cir. 1998))); Clopton, *supra* note 14, 166–71 (discussing how *Bowman* can be considered an exception to the presumption and is often utilized to immediately address certain types of criminal offenses).

123 Knox, *supra* note 13, at 386 (explaining that the separation of powers concerns express "a general reluctance for the judicial branch to insert itself into questions of foreign policy, which should be left to Congress and the executive").

124 *Id*. Questions of international relations may be better left to Congress than to courts. *Id*. But the presumption against extraterritoriality is possibly an overly aggressive approach to the separation of powers. *See id*. (explaining that the separation of powers informs courts that they are not in a proper position to determine foreign affairs, now that they must narrowly interpret laws).

125 *Id*. at 396. "Congress normally expects its statutes to be construed to avoid inadvertent conflicts with other countries, to address domestic concerns, and to respect the separation of powers in the U.S. government." *Id*. For example, in *United States v. Azeem*, the Second Circuit stated, "In general, congressional consideration of an issue in one context, but not another, in the same *or similar* statutes implies that Congress intends to include that issue only where it has so indicated." 946 F.2d 13, 17 (2d Cir. 1991) (emphasis added) (citing United States v. Diaz, 712 F.2d 36, 39 (2nd Cir. 1983)). However, this was explicitly ignored in *United States v. Bin Laden*, which found that, even though two similar statutes differed only in their territorial prescription, courts are not forced to presume that

Similarly, the Court's language in *Morrison* conceivably promotes judicial-restraint.[126] Nevertheless, it is arguable that Congress tacitly approves of a court's interpretation of a statute's territorial reach unless it amends the statute post-decision.[127]

In *Morrison*, the Court articulated its insistence on a strong presumption against extraterritoriality.[128] Curiously enough, however, in making its ultimate determination, the majority in *Morrison* circumvented extraterritoriality.[129] Instead, the Court "localized" the law—that is, they treated the case as a purely domestic issue that did not call for extraterritoriality.[130] The Court's approach in *Morrison* modifies

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the one silent on territorial scope does not apply extraterritorially. 92 F. Supp. 2d 189, 200 (S.D.N.Y. 2000).

126 *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2877–78 (2010) (discussing the Court's duty to respect the meaning of the statute as provided by Congress and recognizing Congress's ability to prescribe laws extraterritorially when such language is provided).

127 *See* Meyer, *supra* note 8, at 148 (discussing the frequency of extraterritoriality interpretation and postulating that Congress may leave such interpretation to the courts). It might be presumed that a court's interpretation of the territorial reach of a statute is valid unless Congress actively amends the reach of the statute in question following a judgment. *See, e.g.*, Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1864–65, 1871 (June 25, 2010) (extending extraterritoriality to some provisions of the U.S. Securities Act following the court's ruling in *Morrison*); *Frank*, 599 F.3d at 1232 ("Congress has . . . amended its laws to allow for extraterritorial application when it has discovered loopholes in its statutory scheme." (citing *Baker*, 609 F.2d at 137–38)); Clopton, *supra* note 14, 153 n.74 (discussing how Title VII was amended to apply extraterritorially after the Supreme Court's decision in *Aramco*).

128 *Morrison*, 130 S. Ct. at 2877–78. A strict presumption against extraterritoriality was by no means a new development for the Court. *See supra* note 101 (discussing the Supreme Court's continued endorsement of a presumption against extraterritoriality). The Court in *Morrison* attempted to avoid creating a "clear statement" rule and stated that a law need not say "this law applies abroad" in order to apply extraterritorially. *Morrison*, 130 S. Ct. at 2883. In interpreting the territorial reach of a law, "context can be consulted as well." *Id*. Justice Stevens, in his concurring opinion, strongly disagreed with the majority's holding that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none," going so far as to refer to it as "dictum." *Id*. at 2892 (Stevens, J., concurring). Stevens stated that, in interpreting whether a law applies extraterritorially, "evidence legitimately encompasses more than the enacted text." *Id*. Even though the majority disputed Stevens's claim, it failed to elaborate on how instructive context actually is. Colangelo, *supra* note 9, at 1043. In order to provide full clarity, the inclusion of language such as "this law applies abroad" may actually be much more constructive to interpreting extraterritoriality. *Morrison*, 130 S. Ct. at 2883. It is not uncommon to find such language located within the text of some statutes. *See, e.g.*, 18 U.S.C. § 2332b (2006) (prescribing extraterritorial jurisdiction to terrorist acts transcending national boundaries).

129 *See* Dodge, *supra* note 101, at 693 (explaining how *Morrison* refocused "the presumption against extraterritoriality on the location of the effects").

130 *Id*. at 691. In his article, Dodge notes that, since Congress is concerned primarily with domestic conditions, focusing a statute domestically makes logical sense. *Id*. This

the *focus* of the act from one that emphasizes its extraterritorial nature to one that emphasizes domestic repercussions.[131] In evaluating domestic repercussions, the Court utilized an effects test.[132] By relying on domestic effects to avoid extraterritoriality, the Court resurrected "an outdated private international law approach," which has been "largely abandoned for its reliance on the formalist fiction that multi-jurisdictional claims can be 'localized' to a single territory."[133] This approach allows federal laws to apply extraterritorially without reliance on any extraterritorial indication, so long as courts focus on the domestic effects of the act.[134]

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approach essentially waives the presumption, resulting in what appears to be localization and an attempt to avoid a conflict of laws. Colangelo, *supra* note 9, at 1080.

131 Dodge, *supra* note 101, at 690. Despite the presence of foreign activity within this case, the Court took a strictly domestic approach. Brilmayer, *supra* note 89, at 685.

132 *See* Dodge, *supra* note 101, at 692 ("*Morrison* substituted a narrower effects test that turns solely on the location of the specific transaction affected by the fraud.") (footnote omitted). In *Morrison*, the Court criticized the Second Circuit for utilizing an effects test to find extraterritoriality; however, in its analysis, the Court also used an effects test to determine whether the law could apply domestically. *See Morrison*, 130 S. Ct. at 2878–81 (criticizing lower courts for attempting to discern Congressional intent of extraterritoriality by using the effects test without "put[ting] forward a textual or even extratextual basis for these tests"). To comprehend the Court's reasoning, it must be understood that the effects test used by the Second Circuit was, according to the majority in *Morrison*, vague and unpredictable and forced courts to combine effects and then weigh them against the United States's interests. Dodge, *supra* note 101, 691–92.

133 Colangelo, *supra* note 9, at 1040. Instead of applying the presumption against extraterritoriality, the Court simply localized the effects. *Morrison*, 130 S. Ct. at 2881–84. Such localization is "reminiscent of the traditional approach to conflict of laws"; however, there was no conflict of laws issue in *Morrison*. Colangelo, *supra* note 9, at 1080 (footnote omitted); *see also* Brilmayer, *supra* note 89, at 685 & n.152 (discussing how this particular approach of localization is an archaic means of avoiding conflict of laws by focusing solely on the domestic aspect of the case and relying on this focus to exclude other pertinent factors). It should be recognized that past multijurisdictional cases that have utilized the effects test at least recognized that the statute in question was in fact being used in an extraterritorial manner. *See, e.g.*, Hartford Fire Ins. v. California, 509 U.S. 764, 796 (1993) (finding that civil provisions of the Sherman Act apply extraterritorially when an act has substantial effects within the United States); Smith v. United States, 507 U.S. 197, 203–04 (1993) (finding that a federal tort law did not apply extraterritorially because it had no domestic effect); United States v. Bowman, 260 U.S. 94, 97–100 (1922) (finding that a statute prohibiting conspiracies to defraud the United States applies extraterritorially to foreign conduct that has an effect within the United States).

134 Colangelo, *supra* note 9, at 1045. *Morrison* communicates that Courts can avoid conflicts of law and the presumption of extraterritoriality by simply focusing on the local effects of the crime. Brilmayer, *supra* note 89, at 685. This approach now allows domestic laws to regulate international conduct and allows extraterritoriality without expressly stating so. Colangelo, *supra* note 9, at 1045–46. In essence, this approach promotes the practice of ignoring extraterritoriality as long as the effects principle applies. Dodge, *supra* note 101, at 690–92. In her assessment of the Court's emphasis on the focus of statutes in *Morrison*, Lea Brilmayer notes:

On its face, localization allows courts to avoid the issue of extraterritoriality altogether; however, in practice, this approach is not an adequate means of handling legitimate international conflicts of law and discord among nations.[135] To put it bluntly, if a law is being used to prosecute effects or conduct that occurs abroad, it is being used extraterritorially, regardless of its domestic effects.[136] Instead of promoting predictability and uniformity, *Morrison* promotes the use of judicial loopholes and creativity to avoid extraterritoriality.[137] Under *Morrison*, courts can now determine whether a law applies extraterritorially *and* consider whether the conduct in question has any effect within the United States, thus giving courts "two bites at the apple."[138]

> Rather than undertaking a thankless (and probably fruitless) search for indications about what Congress wanted, a court need only decide that the presumption against extraterritoriality is inapplicable because the "focus" of the substantive law in question is something that took place in the United States. The irony is that the evidentiary standard needed to invoke the loophole [to avoid the presumption against extraterritoriality]—which no one pretends has been authorized by Congress—is considerably lower than the evidentiary standard needed to satisfy the presumption—a presumption that supposedly reflects what Congress wanted.

Brilmayer, *supra* note 89, at 663–64.

135 Colangelo, *supra* note 9, at 1045–46. Regardless of localization, if there is more than one jurisdiction involved, there is inevitably possible interference with a nation's sovereignty or conflict of law. *Id*. Applying a law extraterritorially and utilizing principles of international law to achieve such application may be preferable because this approach directly conforms to international law. *See* Murray v. Schooner Charming Betsy (*Charming Betsy*), 6 U.S. (2 Cranch) 64, 118 (1804) (holding that laws should be construed in a manner that is compatible with and does not violate international law). *But see supra* note 39 (discussing how the United States is neither constrained nor subordinate to international law).

136 *See* Meyer, *supra* note 8, at 123 ("[A] law is extraterritorial if it governs acts that occur outside the nation-state's borders, even if committed by the nation's own citizens.") (footnote omitted). Simply localizing a crime does not suspend the reality that a law is being used extraterritorially. Colangelo, *supra* note 9, at 1040; *see also* Brilmayer, *supra* note 89, at 685 & n.152 (discussing how localization is an archaic means of attempting to avoid conflict of laws).

137 Colangelo, *supra* note 9, at 1045–46; *see* Brilmayer, *supra* note 89, at 667–68 (explaining that the effects test gives rise to "judicial creativity" because it allows courts to shift their analysis onto the "focus" of the law).

138 Brilmayer, *supra* note 89, at 663. *Morrison* appears to make it easier for courts to base their interpretation of the geographic scope of a statute on judicially created concepts rather than on the intentions of Congress. *Id.* at 663–64; *see* Colangelo, *supra* note 9, at 1045 (discussing how the creativity of the Court in *Morrison* gives lower courts multiple means of applying laws extraterritorially without explicitly stating so).

Nevertheless, *Morrison*, read narrowly, reasserts domestic borders to territorially ambiguous laws.[139] But the pressing necessity of such a reassertion is suspect—especially when, before *Morrison*, courts were applying § 10(b) of the Securities Exchange Act (the statute in question in *Morrison*) extraterritorially for forty years.[140] Surely forty years of such an application qualifies as tacit consent from Congress.[141] In fact, following the Supreme Court's decision in *Morrison*, Congress amended the U.S. Securities Act to expressly allow extraterritorial application of some sections.[142] The blanket approach of a presumption against extraterritoriality significantly curbs the application of laws and prevents the United States from taking part in the international legal community.[143] More importantly, the presumption often fails to effectively promote modern legal concerns of the United States, such as terrorism, economic crimes, and cyber crimes.[144] A loosened approach to the presumption against extraterritoriality would more adequately bring such acts to justice.[145]

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139 Colangelo, *supra* note 9, at 1026.

140 *Id*. at 1080; *see also* Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968), *abrogated by* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010) (declaring that § 10(b) of the Exchange Act applies extraterritorially).

141 *See Morrison*, 130 S. Ct. at 2890–91 (Stevens, J., concurring) (discussing how Congress's failure to reject courts' extraterritorial interpretation of securities laws amounted to tacit approval); Knox, *supra* note 13, at 385 (discussing how, if courts interpret a statute in a manner inconsistent with Congress's intent, Congress would assuredly overrule courts by amending the statute).

142 *See* Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1864–65, 1871 (2010) (June 25, 2010) (extending extraterritoriality to some provisions of the U.S. Securities Act following the court's ruling in *Morrison*).

143 *See* Colangelo, *supra* note 9, at 1036–37 (discussing how the blanket approach to the presumption does not help achieve U.S. interests). One of the most damaging effects of *Morrison* is that it declares that the blanket presumption against extraterritoriality exists "regardless of whether there is a risk of" conflict of laws. *Morrison*, 130 S. Ct. at 2877–78. Now, the only existing justification for the presumption is that Congress normally legislates with regard to domestic issues. Dodge, *supra* note 101, at 688–89.

144 *See* Meyer, *supra* note 8, at 113–14 (noting how the presumption approach may not adequately handle new-age crimes).

145 *See, e.g.*, United States v. Yousef, 327 F.3d 56, 87 (2d Cir. 2003) (relying on the exception to a presumption against extraterritoriality in *Bowman* to apply a statute criminalizing conspiracies to attack commercial aircraft extraterritorially); United States v. Ivanov, 175 F. Supp. 2d 367, 374–75 (D. Conn. 2001) (applying a statute criminalizing cyber fraud extraterritorially); United States v. Bin Laden, 92 F. Supp. 2d 189, 218 (S.D.N.Y. 2000) (relying on *Bowman* to apply a statute prohibiting the use of weapons of mass destruction extraterritorially regardless of the actor's nationality).

B. Manipulating Statutory Construction to Create Extraterritoriality

Extraterritoriality can be just as problematic as the presumption against it.[146] In exercising extraterritoriality, courts generally examine the construction and nature of the statute, public policy implications, and the principles of international law.[147] This practice began with *Bowman*, and following this decision the floodgates began to slowly open and other courts began to find extraterritorial language within statutory construction.[148] Subsequent cases expanded *Bowman*, and criminal statutes were generally more likely to be granted extraterritorial reach.[149]

In *Bowman*, the Court recognized that a strict adherence to a presumption against extraterritoriality is inadequate in handling emerging world issues.[150] *Bowman's* use of international principles and focus on the evolution of technology to justify extraterritoriality attempts

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[146] Podgor & Filler, *supra* note 10, at 592 (discussing how liberally applying laws extraterritorially is problematic within the current global environment in which many nations seek to enforce respective interests).

[147] United States v. Bowman, 260 U.S. 94, 97–98 (1922); *see supra* notes 34–38 and accompanying text (discussing the approaches to interpreting the territorial scope of federal statutes that are geoambiguous). These principles are utilized in an attempt to comport with the *Charming Betsy* canon and to avoid conflicts of law. Meyer, *supra* note 8, at 143.

[148] *See* Clopton, *supra* note 14, at 139 (noting that *Bowman*'s use of the protective principle of international law to establish extraterritorial jurisdiction over acts of fraud against the U.S. government opened the door to extraterritorial application of other federal criminal laws). The Supreme Court has also allowed states to apply their statutes extraterritorially to their citizens if the state has a legitimate interest and it does not violate an act of Congress. *See, e.g.*, Skiriotes v. Florida, 313 U.S. 69, 77 (1941) (allowing Florida to apply its laws extraterritorially).

[149] *See* Kollias v. D & G Marine Maint., 29 F.3d 67, 71 (2d Cir. 1994) (interpreting *Bowman* to not apply to all cases and stating that, under *Bowman*, "only criminal statutes, and perhaps only those relating to the government's power to prosecute wrongs committed against it, are exempt from the presumption [against extraterritoriality]" (citing *Bowman*, 260 U.S. at 98; United States v. Larsen, 952 F.2d 1099, 100–01 (9th Cir. 1991))). However, after *Bowman*, courts have interpreted some civil laws to apply extraterritorially as well. *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993) (finding that civil provisions of the Sherman Act apply extraterritorially when foreign conduct produces a "substantial effect in the United States"); Sarei v. Rio Tinto, PLC, 671 F.3d 736, 744–747 (9th Cir. 2011) (finding that *Morrison* and the presumption against extraterritoriality do not prevent the Alien Tort Statute from applying extraterritorially). There is a legitimate possibility that courts may begin regularly interpreting *Morrison* to apply to criminal statutes as well. *See* Clopton, *supra* note 14, at 181 ("A court looking at an ambiguous criminal statute may treat *Morrison* as the straw that broke *Bowman*'s back, requiring a stringent presumption in criminal as well as civil cases.").

[150] *See* Meyer, *supra* note 8, at 136–37 (discussing the Court's departure from strictly territorial jurisdiction and "emerging international law" at the time of the *Bowman* decision).

to harmonize international law and constitutional requirements.[151] The Court in *Bowman* limited such an interpretation of laws to criminal offenses committed against the government.[152] Yet, modern courts often allow for extraterritoriality when the government is not the victim.[153]

Bowman did not excuse courts from making an ultimate determination regarding a statute's ability to apply extraterritorially.[154] Nevertheless, extraterritoriality is sometimes determined on a case-by-case basis regardless of the territorial scope of the law in question, such as when the statute is an ancillary one dependent on another statute.[155]

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[151] *See Bowman*, 260 U.S. at 98–100 (citing to "the right of the government to defend itself," that is, the protective principle of international law, to justify extraterritorial jurisdiction and application). "[A]lthough principles of international law might not determine conclusively the constitutionality of Congress's extraterritorial legislative reach, they nonetheless inform the analysis." Colangelo, *supra* note 26, at 169 (footnote omitted). Giving statutes extraterritorial effect simply because an international principle of law could be applicable would not alleviate international discord. Knox, *supra* note 13, at 382–83.

[152] *Bowman*, 260 U.S. at 98. The Court in *Bowman* declined to extend such a reading to crimes committed against individuals, stating:

> Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement, and frauds of all kinds, which affect the peace and good order of the community must, of course, be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard.

Id.

[153] *See* United States v. Vasquez-Velasco, 15 F.3d 833, 839 n.4 (9th Cir. 1994) (finding that a statute prohibiting violent crimes in aid of racketeering activity applied extraterritorially, even though the United States was not a victim of the crime, because not doing so would undermine the scope and effectiveness of the law); *see also supra* note 72 (discussing cases in which the government was not the victim and extraterritoriality was found). Unfortunately, it does not appear that extraterritoriality will apply when aquatic mammals are the victims. *See* United States v. Mitchell, 553 F.2d 996, 1002–05 (5th Cir. 1977) (finding that the Marine Mammal Protection Act of 1972 does not apply extraterritorially, because such an application would attempt to regulate the resource development and sovereign territory of another state).

[154] *See Bowman*, 260 U.S. at 97, 102 (noting that extraterritoriality is a question of statutory construction and finding that legislative intent must be fairly construed in determining whether a law applies extraterritorially).

[155] *See, e.g.*, United States v. Baker, 609 F.2d 134, 136 (5th Cir. 1980) (reading *Bowman* as allowing courts to infer congressional intent for extraterritoriality based on the "the nature of the offenses and Congress' other legislative efforts to eliminate the type of crime involved"); *see also* Meyer, *supra* note 8, at 148–49 ("Although insisting on a need for a clear showing of congressional intent to apply its law abroad, the courts in practice sometimes follow the judicial unilateralist approach to allow extraterritorial application of U.S. law without explicit support in the text of the statute or legislative history.") (footnote omitted). Ancillary statutes are dependent on another crime and often do not contain extraterritorial

When determining the nature and purpose of the statute, courts sometimes make reflexive presumptions that extraterritoriality is implied.[156] It is common for criminal laws to apply extraterritorially if a court believes that the situation involves imperative public policy and an international principle of law can be used to reach such conduct.[157]

However, questions of public policy are better left for Congress as opposed to courts, and courts walk a fine line in violating a separation of

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language; however, courts usually interpret such statutes to apply extraterritorially. *See, e.g.*, United States v. Belfast, 611 F.3d 783, 812–13 (11th Cir. 2010) (holding that a conspiracy to commit a crime may apply extraterritorially when the underlying act itself applies extraterritorially); United States v. Mardirossian, 818 F. Supp. 2d 775, 777 (S.D.N.Y. 2011) (finding that a statute criminalizing the use of a firearm to commit a violent crime applied extraterritorially when the underlying crime applies extraterritorially).

156 *See, e.g.*, United States v. Frank, 599 F.3d 1221, 1230–33 (11th Cir. 2010) (interpreting a statute prohibiting sex tourism to apply extraterritorially because of the extraterritorial language found in similar statutes). Courts have claimed that extraterritoriality can be inferred from some statutes based on the nature of the crime. *See, e.g.*, United States v. Delgado-Garcia, 374 F.3d 1337, 1345 (D.C. Cir. 2004) (finding that a federal law prohibiting encouragement of illegal immigration into the United States applied extraterritorially because it was "fundamentally international"); *Vasquez-Velasco*, 15 F.3d at 839 n.4 (finding that crimes furthering drug-trafficking enterprises apply extraterritorially, because drug-trafficking by its "very nature" is international); *Baker*, 609 F.2d at 136 (stating that extraterritoriality can be inferred based on the nature of the offense and similar "legislative efforts to eliminate the type of crime involved"); Brulay v. United States, 383 F.2d 345, 350 (9th Cir. 1967) (finding that federal smuggling statutes applied extraterritorially, because "smuggling by its very nature involves foreign countries").

157 *See, e.g.*, United States v. MacAllister, 160 F.3d 1304, 1307–08 (11th Cir. 1998) (holding that the extraterritorial effect of laws can be inferred, especially when an alternative reading would undermine the statute, and that the principles of international law can establish extraterritorial application); Chua Han Mow v. United States, 730 F.2d 1308, 1312 (9th Cir. 1984) ("Extraterritorial application of penal laws may be justified under any one of the five principles of extraterritorial authority." (citing United States v. King, 552 F.2d 833, 851 (9th Cir. 1976))); *King*, 552 F.2d at 850–51 (recognizing that criminal laws may be applied extraterritorially based on the international principles of law, so long as the act has an adverse impact within the United States); *see also* Ved P. Nanda & David K. Pansius, *Federal Criminal Statutes*, *in* 2 LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 8:9 (2011) (stating that a "common approach" to extraterritoriality with regard to criminal statutes "is to ignore the presumption where limiting the territorial reach of the statute substantially frustrates its effectiveness") (footnote omitted). Courts no longer limit themselves to the holding in *Bowman* and often "consider policy justifications," as well as "comprehensive statutory scheme[s]," when interpreting extraterritoriality. Clopton, *supra* note 14, at 170–71; *see, e.g.*, *Frank*, 599 F.3d at 1231 (finding that a statute prohibiting the buying and selling of children applies extraterritorially, because it "is part of a comprehensive scheme created by Congress to eradicate the sexual exploitation of children and eliminate child pornography, and therefore warrants a broad sweep") (citations omitted); *Baker*, 609 F.2d at 136–37 (holding that statutes combating drug-trafficking applied extraterritorially, because they were "part of a comprehensive legislative scheme designed to halt drug abuse in the United States").

powers issue when they take such considerations head-on.[158] The fact that Congress explicitly constructs some laws to apply extraterritorially and regularly amends the territorial reach of statutes demonstrates that it is aware that the absence of extraterritorial language means that it will only be construed to apply domestically.[159] However, all of this may be legal fiction—the possibility exists that inaction after a statute is granted or denied extraterritorial reach demonstrates congressional approval because an unsatisfactory determination would result in intervention.[160]

Courts must look to the purpose and nature of a statute to determine territorial scope, but extraterritoriality is essentially a matter of "national interests" implicating international law.[161] The United States typically uses the international principles of law to establish jurisdiction and

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[158] *See supra* notes 123–25 and accompanying text (discussing how the separation of powers prevents courts from unilaterally amending or over-extending the territorial scope of federal laws). "Primarily it is for the lawmakers to determine the public policy of the state." Twin City Pipe Line Co. v. Harding Glass Co., 283 U.S. 353, 357 (1931) (citations omitted); *see* United States v. Funez-Pineda, No. 5:11-cr-14, 2011 WL 5024364, at *9 n.7 (D. Vt. Oct. 20, 2011) ("It is the legislatures, not the courts, which are tasked with making the public policy determination of whether certain conduct constitutes a crime.") (citations omitted); *see also* Blomquist, *supra* note 31, at 452–53 (discussing how courts often face problems of "knowledge," "conduct," and "governance" when reviewing national security laws and policy making).

[159] *See supra* note 127 (discussing amendments expanding the territorial scope of some statutes). The Supreme Court presumes that Congress is aware of the Court's decisions. Cannon v. Univ. of Chi., 441 U.S. 677, 696–99 (1979) ("[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them."). *But see* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 337 n.12 (1991) (stating that the same cannot be said of lower court decisions and noting that Congress is usually unaware of many of them). If this is true, then Congress should be aware of the Supreme Court's consistent preservation of a presumption against extraterritoriality and therefore legislate with this in mind. *See supra* note 101 (listing Supreme Court cases over the last 100 years that consistently refer to the presumption against extraterritoriality). Congress's insistence on including extraterritorial language in some statutes, but not others, is further indication that Congress understands how courts will interpret the scope of statutes. *See* United States v. Azeem, 946 F.2d 13, 17 (2d Cir. 1991) ("In general, congressional consideration of an issue in one context, but not another, in the same *or similar* statutes implies that Congress intends to include that issue only where it has so indicated.") (emphasis added) (citations omitted).

[160] *See supra* notes 125–26 and accompanying text (discussing the possibility that congressional inaction after judicial interpretation of a statute results in acceptance or agreement of such an interpretation).

[161] *See* DOYLE, *supra* note 8, at 11 (explaining that extraterritorial application is a question of national interest); *see also* Blomquist, *supra* note 31, at 457 (discussing how "constantly shifting" public policies and national values shape the United States's national security interests). Under *Bowman*, protecting national interests was determined to outweigh the presumption against extraterritoriality. *See* Clopton, *supra* note 14, at 169 (explaining that the Court in *Bowman* came to its decision by relying on the interests of the government).

accommodate international norms.[162] But one has to wonder whether the consistent appearance of the international principles when evaluating jurisdiction has less to do with due process and more to do with justifying territorial expansion of federal laws to the international community.[163] Incorporating international law via due process may, in practice, guide the extraterritorial application of federal laws.[164] But

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[162] *See* Porto, *supra* note 65, § 2 (discussing the international principles and how they relate to extraterritorial jurisdiction). When seeking extraterritorial jurisdiction over crimes, courts consider whether exercising such jurisdiction is consistent with international law. *Id*. Even in cases where the courts rejected the authority of international law, many still applied the principles of international law in finding extraterritorial jurisdiction. *See* United States v. Yousef, 327 F.3d 56, 91, 110 (2d Cir. 2003) (finding that, although U.S. laws are not subordinate to international customary laws, the crime at hand met the requirements of the protective principle under international law); United States v. Bin Laden, 92 F. Supp. 2d 189, 214, 220 (S.D.N.Y. 2000) (finding that international law could be overridden by Congress, but holding that the protective principle allowed for the law at issue to apply extraterritorially). Some suggest that the use of international principles should be the nexus norm for establishing extraterritorial jurisdiction. *See* Colangelo, *supra* note 26, at 166 (stating that, absent a nexus connecting a defendant to the United States, international principles are an efficient means of "ensur[ing]" that extraterritorial application is not arbitrary or unfair). The purpose of a nexus is to put the actor on notice that he may be subject to the laws of the United States. *Id*. at 162–63. However, some circuits have gone so far as to hold that no nexus needs to exist to establish extraterritorial jurisdiction over some acts. *See* United States v. Suerte, 291 F.3d 366, 376 (5th Cir. 2002) (holding that no nexus between the defendant and the United States is required to apply the Maritime Drug Enforcement Act extraterritorially); United States v. Perez-Oviedo, 281 F.3d 400, 403 (3d Cir. 2002) (stating that the Maritime Drug Enforcement Act can be applied extraterritorially without a jurisdictional nexus); United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056 (3d Cir. 1993) ("Inasmuch as the trafficking of narcotics is condemned universally by law-abiding nations, we see no reason to conclude that it is 'fundamentally unfair' for Congress to provide for the punishment of persons apprehended with narcotics on the high seas.").

[163] *See* Colangelo, *supra* note 26, at 162–63 (examining extraterritoriality with respect to due process). In this sense, the international principles have a dual use: they help to establish extraterritoriality *and* fulfill constitutional requirements. *Id*. Extraterritorial jurisdiction is essentially stretched according to national interests, and national interests often serve as the basis for extraterritorial application. *Id*. at 164. While American notions of territoriality have been drawn from international law, these eventually evolved "to reflect American national interests." KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 7 (2009). As a result, territory is not static, and it "has been stretched and pulled over time in an effort to achieve national ends within the existing international order." *Id*.

[164] *See* Colangelo, *supra* note 26, at 167 (explaining that international law will help determine whether a certain application of international law comports with due process). Such an incorporation of international law "both *expands* the United States' ability to extend its laws to conduct outside U.S. territory, and effectively addresses a major objection to the imposition of due process limits on federal extraterritorial legislation." *Id*. But this approach can cause courts to "lose sight of the ultimate question: would application of the statute to the defendant be arbitrary or fundamentally unfair?" United States v. Davis, 905 F.2d 245, 249 n.2 (9th Cir. 1990). Once again, the issue of extraterritorial application ties in

using the international principles of law to establish extraterritorial application is problematic and still involves a violation of foreign sovereignty.[165] Additionally, these principles, even though they comport with international law, are so overbroad that they "are readily susceptible to misapplication" and may be used in a manner that is unfair or arbitrary.[166] Relying on these principles to obtain extraterritoriality is a double edged sword: while the five principles of international law provide protection to the United States and its citizens, they also subject these same classes to foreign laws.[167] This puts the United States and its citizens in special danger when a nation is determined to pursue its self-interests.[168] Furthermore, such use allows judges to act as lawmakers and amend statutes by applying them extraterritorially, once again raising a separation of powers issue.[169]

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the underlining issue of constitutional constraints, which this Note will not fully delve into; but it should be recognized that some courts have used the principles of international law to find extraterritoriality, while others have used them as a nexus to due process. *See* Colangelo, *supra* note 26, at 167–70 (discussing the use of international legal principles in establishing a nexus between conduct and the United States).

165 *See* Colangelo, *supra* note 9, at 1084–86 (describing how using the international principles of law to obtain extraterritoriality disrespects the sovereignty of foreign states).

166 Meyer, *supra* note 8, at 150; *see also* Colangelo, *supra* note 26, at 168–69 (explaining that if the international principles can be used to apply domestic laws abroad, due process would be the only true constraint on extraterritoriality); *supra* note 105 (discussing how the international principles of law lack guiding criteria and can be easily manipulated to stretch federal laws universally).

167 *See* Meyer, *supra* note 8, at 150–51 (stating that using these principles encourages harmonization with international laws and norms but also jeopardizes the nation and its citizens); Parrish, *supra* note 32, at 1505 (discussing how unilateral application of laws leaves the United States vulnerable to foreign law).

168 *See, e.g.*, Ratner, *supra* note 47, at 888–91 (discussing international complications caused by the Belgian War Crimes Statute). A good example of an abuse and overuse of international norms and principles is the Belgian War Crimes Statute, which was repealed in 2003. *Id.* at 891. Under this law, Belgium granted universal jurisdiction over war crime claims. *Id*. at 889. Soon, the Belgian courts became flooded with claims. *Id*. In many cases, it appeared that the claims were strictly political. *Id*. at 891. Many nations were unsatisfied with the law and believed that it disrespected sovereignty. *Id*. Belgium finally repealed the law after the threat of sanctions from several nations. *Id*. This statute demonstrates an abusive use of unilateral laws that are given extraterritorial effect based on international law. *Id*. at 888.

169 *See* Colangelo, *supra* note 9, at 1039 (explaining that by construing geographically silent statutes extraterritorially, courts are able to use modern international rules of jurisdiction to amend statutes in a way that could interfere with the rights of other sovereigns). It may be possible for courts to use international rules to amend geoambiguous statutes to force them to apply extraterritorially, thus encroaching on the sovereign rights of other nations. *Id*. The principles of international law may be better suited as a means to establish extraterritorial jurisdiction and due process as opposed to an extraterritorial gauge. *See Davis*, 905 F.2d at 249 n.2 (finding that the principles of international law may be used to establish a nexus and fulfill due process requirements).

The effects and protective principles of international law seem to evaluate policy concerns and are the most commonly cited principles regarding conduct that threatens the government, such as piracy, terrorism, and cyber attacks.[170] The two principles often intermingle, and, when applying the protective principle, courts consider the effects or intended effects within the United States.[171] Nevertheless, the exact interpretation of the protective principle has been questioned over the years, given that these principles can be used regardless as to whether an act has an effect on the United States.[172] This alternative use of the protective principle demonstrates how easily it can be manipulated and abused.[173] Additionally, the United States traditionally uses a lower standard of proof for the effects test, and such a deviation from the norms practiced by the international community calls into question the international legality of the United States's approach.[174] If such treatment of the effects test is, in fact, illegal under international law,

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170 Blakesley & Stigall, *supra* note 33, at 22 (explaining that the protective principle allows jurisdiction over conduct potentially harming the state); *see* United States v. Bowman, 260 U.S. 94, 98 (1922) (using the protective principle to safeguard essential state interests that are threatened); United States v. Yousef, 327 F.3d 56, 110 (2d Cir. 2003) (recognizing the protective principle to combat terrorism).

171 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmt. f (1987). "The protective principle may be seen as a special application of the effects principle . . . but it has been treated as an independent basis of jurisdiction." *Id.* Under the *Restatement*, the protective principle and the effects test are equated with territoriality. Meyer, *supra* note 8, at 147. Laws can be applied extraterritorially to reach acts that intended an effect as well. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmt. d.

172 *See, e.g.*, United States v. Vasquez-Velasco, 15 F.3d 833, 839 n.4 (9th Cir. 1994) (finding that laws prohibiting drug-trafficking applied extraterritorially via the protective principle, because not doing so would undermine the scope and effectiveness of the law, even though the United States was not an actual victim of the crime).

173 Meyer, *supra* note 8, at 153–54. The effects test and protective principle are vague at best, providing no clear definition establishing what qualifies as "substantial" effects or state interests. *Id.* This makes the protective principle and, in effect, the effects test easy to manipulate and prone to bias. *Id.* The effects test might better serve as a tool to meet due process and nexus requirements rather than as a means of giving statutes extraterritorial effect. *See, e.g.*, *Yousef*, 327 F.3d at 112 (using the "substantial intended effect[s]" test to fulfill due process requirements); United States v. Medjuck, 156 F.3d 916, 918–19 (9th Cir. 1998) (using the effects test to establish due process over an extraterritorial act).

174 *See* Nijenhuis, *supra* note 52, at 1036 (discussing how the United States's standard of proof of effects is usually lower than that of other nations and may be illegal under international law); *see also* Parrish, *supra* note 32, at 1480 ("The ease with which [U.S.] courts employ the effects test is troublesome . . . ."). Although the effects test has become recognized by several other nations, the United States's broad approach has, in the past, sparked international protest. *Id.* at 1491–92. The Supreme Court has criticized lower courts' use of the effects test to determine congressional intent without "put[ting] forward a textual or even extratextual basis for these tests." Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2879 (2010).

then the United States would risk violating the *Charming Betsy* canon every time the principle was summoned.[175]

While the United States would like to apply the international principle of universal jurisdiction over some conduct, such as terrorism, such an application would be ill-advised.[176] Definitions of particular crimes vary by country, and such a difference in definition is critical enough to deter unilateral declaration of universal law.[177] However, it is possible for the United States to influence international recognition of universal laws through the enactment of treaties.[178] Through actively prescribing universal reach over particular conduct, the United States might assist in creating a norm that may eventually become globally accepted.[179]

But eliminating the use of the international principles would not altogether stop courts from applying geoambiguous laws extraterritorially—some lower courts utilize broad, boilerplate language within statutes to interpret extraterritoriality.[180] For example, when

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[175] *See* Murray v. Schooner Charming Betsy (*Charming Betsy*), 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . .").

[176] *See Yousef*, 327 F.3d at 106–08 & 107 n.42 (explaining that there is a lack of an international consensus on what type of misconduct qualifies as terrorism, and applying terrorism laws universally may cause disaccord among nations). For this reason, the Second District Court of Appeals held that terrorism is not subject to universal jurisdiction because international law has failed to produce a uniform definition. *Id*. at 97, 103. *But see* Colangelo, *supra* note 9, at 1094–95 (discussing how widespread acceptance of treaties acknowledging terroristic acts as crimes create an international norm by which acts of terrorism fall under universal jurisdiction). Furthermore, terrorism is a complicated issue in and of itself, especially considering that "one man's terrorist is another man's freedom fighter." United States v. Afshari, 426 F.3d 1150, 1155 (9th Cir. 2005).

[177] *See supra* notes 47–48 and accompanying text (discussing how the definition of particular crimes may vary from nation to nation, and applying a generally unrecognized definition of a particular crime universally is fundamentally unfair).

[178] Bartram S. Brown, *The Evolving Concept of Universal Jurisdiction*, 35 NEW ENG. L. REV. 383, 395 (2001). Treaties may be the best sources of evidence regarding the precise contours of universal jurisdiction. Colangelo, *supra* note 47, at 904.

[179] Colangelo, *supra* note 47, at 907 (discussing how increased use of universal jurisdiction will help define and create acceptable norms).

[180] *See, e.g.*, United States v. Weingarten, 632 F.3d 60, 65–66 (2d Cir. 2011) (finding that the term "foreign commerce" was not considered boilerplate in regards to a statute criminalizing sexual misconduct with minors and thus could be used to interpret extraterritoriality, despite discussing *Morrison*'s disapproval of the use of terms such as "foreign commerce" and other boilerplate language to interpret extraterritorial application); United States v. Clark, 435 F.3d 1100, 1106–07 (9th Cir. 2006) (finding that the phrase "foreign commerce" could be used to indicate that the PROTECT Act applies extraterritorially); United States v. Hasan, 747 F. Supp. 2d 642, 683–84 (E.D. Va. 2010) (finding that broad terms, such as "any person" and "any crime" in an ancillary statute, could be used to interpret extraterritoriality); *see also* United States v. Erdos, 474 F.2d 157, 160 (4th Cir. 1973) (stating that, with regard to extraterritoriality, "[w]here the power of the

analyzing the nature and purpose of laws, some courts have given statutes extraterritorial application based solely on broad language and phrases, such as "foreign commerce," even though the Supreme Court has discouraged such practices.[181] Even when such language is absent, courts have "interpreted" extraterritorial intent solely on the treatment of laws concerning similar crimes, even when their statutory construction differs.[182] These types of practices have been discouraged as well,[183] and

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Congress is clear, and the language of exercise is broad . . . [there is] no duty to construe a [criminal] statute narrowly").

[181] *See supra* note 180 (discussing cases using statutory language, such as "foreign commerce," to interpret extraterritorial application); *see also* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2882–83 (2010) (holding that statutes that contain broad terms, such as "foreign commerce," do not apply extraterritorially without any further "affirmative indication" of such application); EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 251–53 (1991) (holding that boilerplate phrases, such as "foreign commerce," cannot be used to interpret congressional intent regarding extraterritorial application). *But see* United States v. Frank, 599 F.3d 1221, 1230–31 (11th Cir. 2010) (holding that broad statutory language, such as "interstate or foreign commerce," indicates that Congress intended for crimes of selling or buying children to apply extraterritorially).

[182] *See, e.g.*, United States v. Baker, 609 F.2d 134, 136 (5th Cir. 1980) (finding that extraterritoriality "may be inferred from the nature of the offenses and Congress' other legislative efforts to eliminate the type of crime involved"). Some statutes are given extraterritorial effect because they are part of a "comprehensive statutory scheme" to combat particular conduct, even if extraterritorial language is not indicated within the statutes. Clopton, *supra* note 14, at 170–71. There appears to be two types of crimes that are particularly susceptible to such an analysis; the first are child pornography laws. *See Frank*, 599 F.3d at 1231 (finding that statutes combating child pornography are part of a "comprehensive scheme" created by Congress to "eliminate child pornography" and thus apply extraterritorially); United States v. Harvey, 2 F.3d 1318, 1327 (3d Cir. 1993) (holding that Congress created a "comprehensive scheme" to combat child pornography that required extraterritorial application); United States v. Martens, 59 M.J. 501, 504 (C.A.A.F. 2003) (finding that a geoambiguous statute criminalizing the distributing or receiving of child pornography was part of a "comprehensive statutory scheme to eradicate sexual exploitation of children" and was intended to apply extraterritorially (quoting United States v. Thomas, 893 F.2d 1066, 1068 (9th Cir. 1990))). The second are drug distribution laws. *See Baker*, 609 F.2d at 137 (holding that the Comprehensive Drug Abuse Prevention and Control Act was a "comprehensive legislative scheme" created to eradicate and control drug abuse within the United States and thus applied extraterritorially). However, judicial decisions interpreting these "comprehensive statutory schemes" are not uniform. *See, e.g.*, United States v. Lopez-Vanegas, 493 F.3d 1305, 1312–13 (11th Cir. 2007) (finding that a statute criminalizing the intent to distribute a controlled substance did not apply extraterritorially despite similar efforts to combat such conduct); United States v. Martinelli, 62 M.J. 52, 59–61 (C.A.A.F. 2005) (finding that the Child Porn Protection Act does not contain any language indicating extraterritorial applicability and thus only applies domestically).

[183] *See, e.g.*, United States v. Azeem, 946 F.2d 13, 17 (2d Cir. 1991) ("[C]ongressional consideration of an issue in one context, but not another, in the same *or similar* statutes, implies that Congress intends to include that issue only where it has so indicated.") (emphasis added) (citation omitted); United States v. Diaz, 712 F.2d 36, 39 (2d Cir. 1983) (holding that statutory language will not be implied when one statute is silent in regards to

serve as a manifestation of aggressive judicial activism.[184] As discussed earlier, courts seem to have no reservations with applying a law extraterritorially, so long as they consider the crime at hand to be one that carries public policy implications and national interests.[185]

With *Morrison*, one would imagine that lower courts' liberal use of extraterritoriality would diminish; however, subsequent cases indicate that courts have only been slightly deterred in extraterritorially applying federal laws.[186] *Morrison* is often eschewed, and the international principles, as well as judicial activism and loose interpretations of the purpose and nature of statutes, continue to be used to obtain extraterritoriality.[187] The current trend appears to be a loose reading of

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a particular issue but similar statutes address the exclusion). At least one district court has held that statutory ambiguity does not prevent a finding of extraterritoriality if it is found that the statute was perhaps poorly authored. *See* United States v. Layton, 509 F. Supp. 212, 223–24 (N.D. Cal. 1981) (interpreting a statute criminalizing the murder of an "internationally protected person" to apply extraterritoriality even without clear statutory language, because it was legislated to meet treaty obligations that were not explicitly found within the statute).

184 *See* Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505, 550–51 (1997) (explaining the dangers of judicial activism, especially within the context of international law and extraterritoriality); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 861 (1997) (discussing judicial activism and how judges lack the competence to make decisions regarding foreign affairs); Clopton, *supra* note 14, at 153–54 (discussing the dangers of judicial activism, especially when it implicates foreign governments).

185 *See* Nanda & Pansius, *supra* note 157, § 8:9 (explaining that the "'importance' of enforcing [a] criminal law" is a determining factor for extraterritorial application and that the presumption against extraterritoriality is often ignored when it "substantially frustrates" a statute's effectiveness); *supra* note 157 and accompanying text (discussing the influence of public policy and national interests in applying laws extraterritorially).

186 *See supra* notes 95, 98 (listing cases discussing the treatment of extraterritoriality post-*Morrison*). Generally, it appears that courts prefer to rely on *Bowman* in criminal cases, despite the clear language that *Morrison* applies in all cases. *Id.* While it initially appeared that *Morrison* controlled all civil statutes, the Ninth Circuit has determined that *Morrison* does not prevent the Alien Tort Statute from applying extraterritorially. Sarei v. Rio Tinto, PLC, 671 F.3d 736, 744–47 (9th Cir. 2011).

187 *See supra* notes 95, 98 (discussing how courts have consistently interpreted extraterritoriality after *Morrison*); *see also* sources cited, *supra* note 184 (discussing the dangers of judicial activism). The Second Circuit appears to follow *Bowman* in criminal cases and *Morrison* in civil cases. *Compare* Norex Petroleum Ltd. v. Access Indus., Inc., 631 F.3d 29, 33 (2d Cir. 2010) (discussing *Morrison* and holding that civil RICO provisions do not apply extraterritorially), *with* United States v. Al Kassar, 660 F.3d 108, 118 (2d Cir. 2011) (ignoring *Morrison* and citing *Bowman* in determining that the presumption against extraterritoriality does not apply to criminal statutes); United States v. Weingarten, 632 F.3d 60, 65–66 (2d Cir. 2011) (acknowledging *Morrison*, but recognizing *Bowman* as controlling over criminal statutes, and using the term "foreign commerce" to establish extraterritorial application over a statute criminalizing sexual misconduct with a minor,

the presumption against extraterritoriality, and the presumption's limits post-*Morrison* are unknown.[188] Therefore, a new approach must be created that upholds the traditional presumption against extraterritoriality but allows laws to apply extraterritorially to especially heinous international acts that victimize the United States and its citizens.[189]

IV. CONTRIBUTION

The presumption against extraterritoriality serves as an obvious safeguard to prevent unauthorized extraterritorial application of federal laws without Congress's consent; however, the international principles of law, particularly the effects and protective principles, are, in reality, the governing factors in obtaining extraterritoriality even when courts abstain from citing to them directly.[190] While strict adherence to the presumption against extraterritoriality has traditionally been useful in preventing judicial activism, national security concerns and the development of technology has made such an approach obsolete when handling criminal matters where prompt, immediate response takes priority over equivocal congressional provisions.[191] To properly balance these two concerns, it is imperative for courts to take a new, uniform approach in determining the extraterritorial effect of federal statutes.

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despite discussing *Morrison*'s disapproval of using boilerplate terms to interpret extraterritoriality).

188 *See* Parrish, *supra* note 32, at 1470–71 (discussing how the unrestrained definition of the effects test "marked the beginning of the end for meaningful territorial limits on legislative jurisdiction"). Zachary D. Clopton, in his article *Bowman Lives*, posits that *Morrison* and *Bowman* adequately co-exist. Clopton, *supra* note 14, at 184. He notes that both cases relied on the presumption against extraterritoriality and the focus of the statute, as well as the *Charming Betsy* canon. *Id*. at 184–85. When analyzed in this manner, the application of the presumption against extraterritoriality is guided by the statute's focus. *Id*.

189 *See infra* Part IV (discussing a new approach to extraterritoriality that holds true to the presumption against extraterritoriality while allowing for a specific exception to combat criminal conduct that threatens national security).

190 *See, e.g.*, Chua Han Mow v. United States, 730 F.2d 1308, 1312 (9th Cir. 1984) ("Extraterritorial application of penal laws may be justified under any one of the five principles of extraterritorial authority." (citing United States v. King, 552 F.2d 833, 851 (9th Cir. 1976))). As we have seen, the same can be said for extraterritorial jurisdiction as well. *See* United States v. Davis, 905 F.2d 245, 249 n.2 (9th Cir. 1990) (stating that the principles of international law may be used to establish a nexus and fulfill due process requirements).

191 *See supra* note 18 and accompanying text (discussing how globalization and the development of technology calls for the government to increase its governing authority over conduct abroad).

Under this new approach, which can be referred to as the Modified-Exception Test,[192] courts will first evaluate the statute based on a strict reading of the presumption against extraterritoriality.[193] Next, courts will evaluate the statute based on selected principles overtly discussed by the Supreme Court in *Bowman*.[194] Finally, courts will look to the status of the accused and the nature of the alleged act.[195] This test focuses specifically on the intended victim of the extraterritorial conduct, and inherently violent acts are weighed more heavily than non-violent acts. This ideal test is one that would take into account both the Supreme Court's decisions in *Morrison* and *Bowman*, as well as contemporary national security concerns, and attempt to balance them in a complimentary manner, rather than a conflicting one. Such an approach would consider the simplified, bare-language of these cases in a three-step analysis in determining extraterritoriality.

Under the first step, courts will evaluate a statute based on a strict reading of *Aramco* and *Morrison*.[196] Using these two cases to start this analysis works directly to ensure a presumption against extraterritoriality.[197] As the Supreme Court instructed in *Morrison*, "When a statute gives no clear indication of extraterritorial application, it has none."[198] This holding would be combined with the "clear statement" rule in *Aramco*,[199] and only the specific, non-boilerplate language will be used in determining the extraterritorial application of a statute.[200] This approach abandons evaluating the context, legislative history, or similar federal laws in determining the extraterritorial effect

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192 The name of this test is the creation of the author.

193 *See infra* notes 197–204 and accompanying text (explaining the strict application of the presumption against extraterritoriality).

194 *See infra* notes 205–09 and accompanying text (using specific principles in *Bowman* to establish extraterritoriality).

195 *See infra* notes 210–15 and accompanying text (explaining how the status and intent of an actor can guide extraterritorial application).

196 *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2878, 2883 (2010) (stating that some activity or effect is not sufficient to establish extraterritorial application, and, in order for a statute to apply extraterritorially, a clear indication must be expressed within the statute's context); EEOC v. Arabian Am. Oil Co. (*Aramco)*, 499 U.S. 244, 248 (1991) (stating that Congress must clearly express whether a statute can be used extraterritorially).

197 *See Morrison*, 130 S. Ct. at 2881 (promoting the traditional approach of a presumption against extraterritoriality in all cases).

198 *Id*. at 2878.

199 *See Aramco*, 499 U.S. at 248 (holding that statutes do not apply extraterritorially "unless there is '[an] affirmative intention of the Congress clearly expressed'" (quoting Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957))).

200 *See supra* note 180 (discussing cases in which broad, boilerplate language was utilized to allow extraterritorial application).

of a statute because such considerations are easily manipulated.[201] In addition, the localization approach taken by the Supreme Court in *Morrison* will be discarded,[202] because localization gives courts excessive influence over the territorial aspects of an act, thus leaving statutes open to over-interpretation.[203]

If, after the *Morrison* and *Aramco* evaluation, a statute is found to have no specific language indicating extraterritoriality, courts would proceed with evaluating the statute based on selected principles in *Bowman*.[204] Under the *Bowman* evaluation, the courts will consider two issues: first, whether the statute in question is criminal in nature;[205] and, second, whether the conduct poses a direct threat to national security.[206] To successfully pass this analysis, the conduct in question must be criminal and not civil.[207] The act must also be an actual threat to national security. Such an analysis closely conforms to the protective principle of international law in that it allows the United States to properly protect itself from perceived threats.[208] In order to qualify as a threat to national security, the act must specifically target either the U.S. government or its citizens *because* of their status or perceived status as U.S. citizens.[209] In interpreting the threat, no consideration or reliance should be given to the secondary effects of the conduct.[210] Admittedly, determining an actual threat to national security is a broad guideline. Therefore, a sliding scale interpretation must be followed where violent actions are weighed more heavily than non-violent actions and conspiracies to commit crimes.[211] Thus, a particularly destructive crime, such as a

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201 *See supra* notes 180–84 and accompanying text (discussing manipulative means of interpreting statutory language to find extraterritoriality).

202 *See supra* note 130 and accompanying text (discussing how the Court in *Morrison* promoted localizing statutes as a way to avoid extraterritoriality and combat conduct committed abroad).

203 *See supra* notes 135–37 and accompanying text (discussing how localization is manipulative and promotes judicial creativity).

204 United States v. Bowman, 260 U.S. 94 (1922).

205 *See id*. at 98 (expressly allowing some criminal statutes to apply extraterritorially).

206 *See id*. (allowing statutes that are "enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated" to apply extraterritorially).

207 *See id*. (extending extraterritoriality to only some criminal statutes).

208 *See supra* note 45 (discussing the protective principle of international law).

209 For example, under the Modified-Exception Test, an individual could be held criminally liable if he or she violently attacked a Liberian Embassy after confusing its flag for that of the United States.

210 That is, the primary purpose of the act could only be perceived as one committed to cause injury to the United States or its citizens because of their status as U.S. citizens.

211 Under this sliding scale, violent acts are granted more deference because of their immediate and often permanent effects, which are more easily measurable.

terrorist bombing, is more apt to be considered vulnerable to extraterritoriality.[212] If, based on the *Bowman* evaluation, the conduct regulated by the statute in question is considered more violent than non-violent, then there is an exception to the presumption against extraterritoriality in the specific case.

However, if, based on the *Bowman* evaluation, the conduct regulated by the statute in question is considered more non-violent than violent, a third and final step should be applied. This final step extends extraterritorial effect to fraud and cyber attacks against the U.S. government or its citizens.[213] In addition, under this approach, conspiracies to commit fraud, cyber attacks, or violent acts could only apply extraterritorially if the conspirator was a national of the United States, which directly follows the Court's opinion in *Bowman*.[214] If the conduct in question falls under one of these categories, then there is an exception to the presumption against extraterritoriality in the specific case.

Therefore, to put the Modified-Exception Test in a simplified manner, the presumption against extraterritoriality applies strictly unless the primary purpose of the crime specifically targets the U.S. government or its citizens *because* of their status or perceived status as U.S. citizens. If the act is inherently violent, then the statute may apply extraterritorially in the specific case. If an act is not inherently violent, but falls under the category of fraud or a cyber attack, then the statute may also apply extraterritorially in the specific case. Finally, conspiracies to commit any one of the previously mentioned acts may apply extraterritorially if committed by a national of the United States.

Under this new extraterritorial test, criminal statutes may not always appear static. In fact, it is entirely possible that several criminal statutes may be applied extraterritorially; nevertheless, overly abusive extraterritorial application is curbed by the specificity of the analysis. Additionally, this test does not *presume* statutes to be territorially flexible; rather, it adheres to the presumption against extraterritoriality while allowing for a specific exception. This test, by placing a stronger

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212 This approach, however, attempts to prevent extending universal jurisdiction over all terrorist attacks. *See supra* note 176 and accompanying text (discussing the dangers of granting universal jurisdiction over terrorism).

213 Under this step, fraud and cyber crimes targeting corporations and organizations would be exempt from the exception unless they were committed *because* of the fact that the company had national ties to the United States.

214 *See* United States v. Bowman, 260 U.S. 94, 98 (1922) (allowing some crimes against the United States to apply extraterritorially, "especially if committed by its own citizens, officers, or agents").

emphasis on the violent nature of an act, also allows for more immediate justice when an act has resulted in irreversible damage.

The Modified-Exception Test, while referring to *Bowman*, is different in two important ways. First, it does not force courts to painstakingly determine the territorial locus of a statute.[215] It instead focuses on the action and the purpose of the action, not the location. Second, the Test does not grant a statute extraterritorial effect.[216] Instead, it evaluates crimes on a case-by-case basis and only allows extraterritoriality when the circumstances around the conduct adequately meet the requirements of the Modified-Exception Test.[217]

An argument could be made that such a test is unnecessary because courts' current approach to interpreting criminal statutes is adequate, and if extraterritorial application is wrongly interpreted, then Congress will provide for clarification.[218] While this may be true, the Modified-Exception Test fills in perceived holes of the current approach. First, the current approach assumes that Congress is properly informed of every instance in which a court allows a statute to apply extraterritorially.[219] This is a large assumption and can result in damaging determinations by lower courts when their precedent influences future treatment of the statute.[220] Second, the modern approach of loosely applying extraterritoriality while relying on Congress to alleviate any confusion after a decision promotes judicial activism rather than the presumption against extraterritoriality.[221] This is exactly what the Supreme Court was

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[215] *See id*. at 97–98 (holding that to determine whether a statute applies extraterritorially, courts must examine the "locus" of the crime).

[216] *See supra* note 154 and accompanying text (discussing how extraterritoriality is dependent upon statutory construction and is not a case-by-case decision).

[217] Such an approach is beneficial because it allows the United States to adequately protect its national security interests without being overly restrained by statutory construction. At the same time, it also prevents courts from aggressively applying federal laws extraterritorially when national security concerns or congressionally determined public policy implications are not triggered.

[218] *See supra* note 126 (discussing how Congress's unwillingness to amend statutes after they have been territorially interpreted by the courts demonstrates Congress's tacit approval of such interpretation).

[219] *See* Cannon v. Univ. of Chi., 441 U.S. 677, 696–98 (1979) (stating that the Supreme Court presumes that Congress is aware of its decisions). *But see* Eskridge, *supra* note 159, at 337 n.12 (stating that Congress is usually unaware of lower court decisions).

[220] *See, e.g.*, United States v. Al Kassar, 660 F.3d 108, 118 (2d Cir. 2011) (relying on previous precedent in determining the extraterritorial reach of 18 U.S.C. §§ 1114 and 1117, despite the absence of any "explicit extraterritorial provision" within the statutes).

[221] *See supra* notes 135–37 (explaining how tactics, such as localization, promote judicial activism and creativity); *see also supra* note 184 (discussing the dangers of judicial activism). Judicial activism is regularly used to obtain extraterritoriality, even though such activism is often considered dangerous when decisions implicate foreign nations. *See supra* notes 183–84 and accompanying text. Courts may face the "overarching philosophical problems" of

attempting to curb in *Morrison*.[222] The Modified-Exception Test follows the "clear statement" rule regarding the presumption against extraterritoriality,[223] while providing a loophole for circumstances where national security is actually threatened without relying on malleable statutory interpretation or the international principles of law.[224] By evaluating the presumption against extraterritoriality with a vigorous "clear statement" rule, courts give Congress increased notice regarding the structural limitations of statutes.[225] Finally, the Modified-Exception Test grants deference to the national security of the United States and its citizens and promotes the goals of the nation when it is at its most vulnerable.

V. CONCLUSION

Courts' extraterritorial treatment of geographically silent federal statutes has become increasingly liberal over the last several years to the extent that the presumption against extraterritoriality is sometimes merely a mirage—especially within the context of criminal statutes. While this could be seen as increased vigilance, it, in actuality, is over-application, and courts have begun to take it upon themselves to frame public policy and foreign relations.[226] Facially, the *Morrison* decision attempts to curb liberal territorial readings of statutes that are silent in their territorial scope by reaffirming the controlling nature of the presumption; however, lower courts have been sluggish in following the principle literally and it is often lost in criminal cases. While justice may sometimes be served, it comes at the cost of judicial activism and the normalization of manipulative statutory interpretation.

A strict, specific exception to the presumption is imperative to adequately respond to emergency situations involving breaches of national security. The growth in technology, transport, and telecommunications has led to new and innovative ways for criminals to place the United States and its citizens at risk. While globalism often

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knowledge, conduct, and governance when reviewing national security laws and policy, and oftentimes they are not in a position to adequately address these problems. Blomquist, *supra* note 31, 452–53.

222 Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2878 (2010).

223 *See* EEOC v. Arabian Am. Oil Co. (*Aramco)*, 499 U.S. 244, 248 (1991) (promoting a strict reading of the presumption against extraterritoriality).

224 *See* United States v. Bowman, 260 U.S. 94, 98 (1922) (using extraterritoriality to allow the government to protect itself).

225 Unlike the Court in *Morrison*, the Modified-Exception Test would advocate the use of statutory content, such as "this law applies abroad." *Morrison*, 130 S. Ct. at 2883.

226 *See supra* notes 157–58 and accompanying text (discussing how courts attempt to frame public policy concerns when they apply geoambiguous laws extraterritorially).

requires extraterritoriality to effectively combat international issues, generously applying federal laws in such a way may violate international laws, as well as personal and national sovereignty. Thus, it has become increasingly difficult for courts to juxtapose the insurance of national security with the presumption against extraterritoriality. A new approach must be adopted that simultaneously preserves the presumption and adequately addresses extraterritorial activity causing immediate harm to the nation and its citizens. Rather than the current all-or-nothing approach to statutory interpretation, courts should follow the Modified-Exception Test, which endorses a clear statement rule regarding the presumption against extraterritoriality while providing a loophole for unforeseeable or destructive conduct that specifically targets the United States and its citizens. Such an approach preserves the legal tradition of the presumption against extraterritoriality and ensures that justice will be served when an actor harms national security and attempts to hide behind territorially ambiguous federal laws.

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