THE EXTENSION OF UNITED STATES CRIMINAL JURISDICTION TO OUTER SPACE*

I. INTRODUCTION

In the near future, increasing numbers of people will be shuttled into space for extended periods of time. Astronauts, scientists, technicians, and researchers of diverse training and national origin will comprise teams of spacefarers sent aloft to determine the resources and habitability of outer space. With such missions underway, specialists in space law have expressed concern over suggestions by behaviorists that some individuals may lose psychological equilibrium during flights of long duration.[1] Space travel presents problems of cramped living quarters, continuous work demands, and a hostile environment immediately exterior to the spacecraft. These conditions are expected to create sufficient strain to touch off surprising and possibly explosive behavioral responses,[2] in addition to the usual sorts of criminal behavior mankind typically demonstrates.

Recently, Congress passed into law an amendment[3] to the

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*Funds for support of this study have been allocated by the NASA-Ames Research Center, Moffett Field, California, under Interchange No. NCA2 OR685-202.

1. G. ROBINSON, LIVING IN OUTER SPACE 86-87 (1975).

2. *See generally id.* (citing *The Problem of Sensory Deprivation in Space Medicine*, 1 KOSMICHESKAYA BIOLOGIYA I MEDITSINA, vol. 4, at 1-8 (1967)); Sells, Emerging Problems of Human Adaptability to Military Flying Missions (June 5-6, 1956) (paper presented to the Human Factors Technical Symposium, Chicago, Illinois); Wheaton, Fact and Fantasy in Isolation and Sensory Deprivation (Report to the School of Aviation Medicine, Randolph, Texas 1968).

3. National Aeronautics and Space Administration Authorization Act, Pub. L. No. 97-96, § 6, 95 Stat. 1210 (codified as amended at 18 U.S.C.A. § 7(6) (West Supp. 1981)) [hereinafter cited as the Amendment]. The amendment extends special maritime and territorial jurisdiction of the United States to include:

> Any vehicle used or designed for flight or navigation in space and on the registry of the United States pursuant to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies and the Convention on Registration of Objects Launched into Outer Space, while that vehicle is in flight, which is from the moment when all external doors are closed on Earth following embarkation until the moment when one such door is opened on Earth for disembarkation or in the case of a forced landing, until the competent authorities take over the

tion for the courts and that the law's overall approach to providing for jurisdiction in space is fundamentally incorrect. The critique begins with a review of the traditional principles of criminal jurisdiction in order to show that they are inappropriate jurisdictional formulas in the context of outer space. The discussion will suggest the variety of factors a statement of jurisdiction must comprehend to be suitable for application to outer space. Next, it will reveal, through detailed analysis of the Amendment, that the present grant of extraterritorial criminal jurisdiction contains shortcomings as serious as those of the traditional jurisdictional principles. In conclusion, it will argue that jurisdiction should be determined by application of the concept of minimum contacts, a superior approach which could be tailored to provide criminal jurisdiction in the res nullius, or res communis, space environment inhabited by mixed groups of nationals.

II. THE TRADITIONAL PRINCIPLES OF CRIMINAL JURISDICTION

Historically, courts have recognized various principles to govern the proper exercise of jurisdiction over criminal matters. In 1935, a comprehensive study known as the Harvard Research on Jurisdiction with Respect to Crime[5] identified the usual principles which serve as bases for asserting jurisdiction. The four principles are as follows: the territorial principle,[6] the nationality principle,[7] the protective principle,[8] and the universality principle.[9] A fifth jurisdictional basis, the passive personality principle, has also come into recognition.[10]

Most commonly used is the territorial principle, which allows a state to exercise jurisdiction over acts occurring wholly or partly within its territory, regardless of the actor's nationality.[11] Second in prevalence is the nationality principle,

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5. *Harvard Research on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. SUPP. 435 (1935).

6. *Id.* at 480.

7. *Id.* at 519.

8. *Id.* at 543.

9. *Id.* at 563.

10. The passive personality principle is described in S. LAY & H. TAUBENFELD, THE LAW RELATING TO ACTIVITIES OF MAN IN SPACE 55 (1970), and in Sloup, *Legal Regime of International Space Flight: Criminal Jurisdiction and Command Authority Aboard the Space Shuttle/Skylab*, PROCEEDINGS OF THE TWENTY-FIRST COLLOQUIUM ON THE LAW OF OUTER SPACE 148 (1978).

11. *See* S. LAY & H. TAUBENFELD, *supra* note 10, at 55 n. 143 (citing to Ameri-

which allows a state to exercise jurisdiction over acts committed by its own nationals, regardless of where the act is committed.[12] Next is the protective principle, recently applied with greater frequency, which allows a state to exercise jurisdiction over acts having a substantial effect on the interests of the state.[13] Fourth in prevalence is the universality principle, which allows a state to exercise jurisdiction over universally condemned crimes, regardless of where or by whom the crime was committed.[14] Last is the passive personality principle, which permits a state to exercise jurisdiction over an act committed abroad by a foreigner, if the act substantially affects the person or property of a citizen of the state.[15]

A. *The Territorial Principle*

The United States courts tenaciously adhere to the territorial principle,[16] which had its beginnings in the birth of the Renaissance state in the 17th century.[17] As the concept of sovereignty grew, criminal jurisdiction began to be based on the principle of territoriality. At that time, it was reasonable for the state within whose boundaries the crime was committed to assume jurisdiction, since there was little international mobility and the actor was likely to be present in the very place the act was planned, executed, and received.[18] Today, in the context of an extraterrestrial and international setting, the terri-

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can Banana Co. v. United Fruit Co., 213 U.S. 347 (1909)); Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 6, 136 (1812).

12. *See* S. LAY & H. TAUBENFELD, *supra* note 10 at 55 n.143 (citing Kawakita v. United States, 343 U.S. 717, 732 (1952); Skiriotes v. Fla., 313 U.S. 69 (1941); Blackmer v. United States, 284 U.S. 421 (1932); Cook v. Talt, 265 U.S. 47 (1924); United States v. Bowman, 260 U.S. 84 (1922)).

13. *See* S. LAY & H. TAUBENFELD, *supra* note 10, at 55 n.145 (citing United States v. Rodriguez, 182 F. Supp. 479 (S.D. Cal. 1960), *aff'd*, 288 F.2d 545 (9th Cir. 1961)).

14. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 404 (Tent. Draft No. 2) (1981).

15. *See* The Case of the S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J., ser. A, no. 10.

16. "For historical reasons, which have been incorporated in the constitutional system, and on account of the influence of arguments drawn from the nature of sovereignty, American law strongly emphasizes the territorial element." Preuss, *American Conception of Jurisdiction with Respect to Conflicts of Law on Crime*, 30 TRANS GROTIUS SOC'Y 184, 198 (1944).

17. *See* Sarkar, *The Proper Law of Crime in International Law*, in INTERNATIONAL CRIMINAL LAW 50 (1965).

18. *Id.*

torial principle is somewhat obsolete.[19]

The application of the territorial principle initially presents the difficulty of there being no international agreement over what constitutes the place called "outer space" because the outer perimeter of a nation's territorial airspace is not precisely defined.[20] Several theorists have advanced notions for delimiting the frontier between airspace and outer space.[21] Nonetheless, neither a technical nor political definition has gained general acceptance.[22] The reluctance to determine the border indicates a conscious restraint by nations from making sovereign claims to outer space.[23] Nations have considered the airspace above them as their own territory since the end of World War I.[24] But attempts to project sovereign claims into outer space on the same basis have been rejected by the international community.[25] The recent Outer Space Treaty,[26] signed in 1967, shows that nations concur that

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19. "Despite the prevalence of the territorial concept of jurisdiction in our jurisprudence, studies of international law . . . indicate that as a statement of the entire international law of jurisdiction it is inadequate." United States v. Rodriguez, 182 F. Supp. 479 (S.D. Cal. 1960).

20. Indicative of this are the following remarks by then United States Ambassador to the United Nations Adlai Stevenson: "[W]e have not attempted to define whether outer space begins. In our judgment it is premature to do this now. The attempt to draw a boundary between airspace and outer space must await further experience and a consensus among the nations." Address by Ambassador Stevenson to the First Committee of the General Assembly of the United Nations (Dec. 4, 1961) (full text reproduced in 46 Dept. State Bulletin No. 1179, 180, 181 (Jan. 29, 1962)).

21. The definitions of outer space run the gamut. Some are: The height at which humans can live without artificial breathing apparatus; the maximum height to which aircraft can ascend; altitude beyond that at which conventional aircraft fly; the base of the exosphere (about 300-500 miles above earth's surface); the Von Karman line; the volume of space between the surface of the earth at sea level and an altitude of 80,000 meters above it. For a full exposition, see generally S. LAY & H. TAUBENFELD, *supra* note 10, at 39-48.

22. *See id.*

23. "It is clear from the outset that, despite suggestions of many commentators, the states, at least the major powers, have been quite unready to set limits by altitude to their claims to sovereign right." *Id.* at 40.

24. "The proof of the military utility of aircraft in the First World War, combined with the demands of economic nationalism, led to universal agreement that each state had absolute sovereignty in the airspace above its territory." *Id.* at 37.

25. "[T]he official position of all major states, including the two major space powers, and the overwhelming majority of writers flatly reject claims to unlimited sovereignty [overhead]." *Id.* at 52.

26. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967. 18 U.S.T. 2410, T.I.A.S. No. 6347, U.N.T.S. No. 205 [hereinafter Outer Space Treaty].

"outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."[27]

It becomes apparent that it is neither logical nor politically viable for the United States to treat acts committed in space as acts occurring in its own territory. Use of the territorial principle to gain jurisdiction over criminal acts in space is not appropriate since the borders of space are still undefined, and the United States has agreed that space may not be appropriated as territory.[28]

Courts have, on occasion, applied the territorial principle expansively to find jurisdiction over criminal acts which occurred in territory outside the United States, but which have affected United States' interests.[29] A court may do this by reasoning either that one element of the crime, however trivial, was committed in the United States or by reasoning that a crime affecting the United States can be treated as if one of its elements was committed domestically.[30] In the latter case, it is noticeable that what the courts call an elasticization of the territorial principle is essentially a restatement of the protective principle.[31]

Modification of the territorial principle arose because the territorial principle is too narrow a doctrine to take account of complex foreign elements in crimes.[32] However, there is a rec-

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27. 18 U.S.T. 2410, at 2413.

28. *See supra* note 26, at art. II.

29. *See* Sakar, *supra* note 17, at 50.

30. Some American jurisdictions purposefully inhibit the tendency to stretch the territorial principle. One example is California, where one court held that:

> Though Pen. Code, § 27, subd. (1), provides for punishing persons who commit, in whole or in part any crime within the state, and Pen. Code, § 778a, states that a person is punishable if, with intent to commit a crime, he does any act within this state in execution or part execution or such intent, which culminates in the commission of a crime either within or without the state, both sections are construed as requiring the doing, in California, of an act amounting to an "attempt" to commit the offense charged, within the definition of attempt in criminal cases generally—i.e., there must be acts beyond mere preparation.

People v. Utter, 24 Cal. App. 3d 535, 101 Cal. Rptr. 214 (1972).

31. That is, the state can exercise jurisdiction over acts having an effect on the state. However, the decisions following this line of reasoning by relying on territorial language are regarded as exceptional because, unlike the protective principle cases, the "effect test" is not presented as a positive basis of jurisdiction. *See* Sarkar, *supra* note 17, at 69.

32. *See* Sarkar, *supra* note 17, at 72.

ognized danger in expanding the territorial principle. As one commentator has noted, "case[s go] too far when 'jurisdiction' is assumed over foreigner's foreign agreements, merely because it has been possible to allege some effects on United States imports or exports, and because the agreement would have been illegal if made in the United States."[33] The question which continues to arise over use of this theory is to what extent is an effect on the United States necessary to make the exercise of jurisdiction reasonable.

This very consideration would be at issue if the expanded territorial principle were to be adopted for use in space. With crews of mixed nationality functioning in a non-sovereign arena, there is a possibility the United States would suffer only minor consequences from, and have little real interest in, a particular incident of criminal conduct in space. In addition, the interests of the United States may be no greater than those of another country. Other nations may charge the United States courts with overreaching when issuing indictments to foreigners for crimes which do not, in their view, substantially affect the United States.

To summarize, the territorial principle fails as an appropriate doctrine under which to assert jurisdiction in space for three reasons. First, it is generally inapplicable since territorial boundaries in space are not yet demarcated and space cannot be possessed as sovereign territory. Second, without an expansive application, the territorial principle is too narrow to cover crimes with foreign elements. Third, if applied too expansively, it can be employed dilatorily as a pretext to reach matters not legitimately within the court's dominion.

B. *Nationality Principle*

Several jurists express the view that the nationality principle is the most expedient means of achieving comprehensive and satisfactory jurisdiction over extraterrestrial criminal activity[34] because it is a principle widely recognized by the

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33. Jennings, *Extraterritorial Jurisdiction and the United States Anti-trust Laws*, 33 BRIT. Y. B. INT'L L. 146, 175 (1957).

34. Interview with former NASA attorney, George P. Sloup, Esq., a member of the Illinois Bar and of the Astrolaw Societies of White's Inn, a private space law research center (May 1982). The Inn, and its space law orientation, is described in Vilkin, *Space Law*, 2 CALIF. LAW. 30 (1982).

United States and foreign courts.[35] It avoids the inherent "overreaching" problems of the territorial principle in as much as it can be applied to a citizen anywhere he acts. While a rule with such inherent simplicity is very attractive at first blush, it nevertheless has considerable shortcomings when applied to activities in outer space. Its major failure is its inability to provide a nation with jurisdiction over a non-national even though the nation, for example, the United States, might have legitimate legal interests in prosecuting the criminal under its law.[36] In addition, even where a nation claims an individual to be its national, international law maintains that, in certain instances, other nations may disregard that status for purposes of jurisdiction.[37] Grounds for this disregard are founded on the rationale that the nation claiming the individual as its national and asserting jurisdiction has failed to show a demonstrable bond of attachment between it and the individual.[38] This situation might arise where a nation confers the status of national on an individual after a crime or a politically sensitive event has occurred.[39]

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35. *See* S. LAY & H. TAUBENFELD, *supra* note 10, at 55.

36. This would typically occur where, for example, the foreign national commits a crime onboard a U.S. spacecraft. The U.S. may have a particular interest in prosecuting because the crime occurred during the unique circumstances of a U.S. space mission, U.S. nationals were witness to the crime, relevant evidence remains with the U.S. space vehicle, or the crime impacts substantially on U.S. interests.

37. *See generally* Nottebohm Case (Lichtenstein v. Guatemala), 1955 I.C.J. 4.

38. *Id.*

39. Nationality can be conferred by a nation for political reasons. Raoul Wallenberg, Swedish Ambassador to Hungary during World War II, had arranged for the issuance of false Swedish passports for thousands of Hungarian Jews to aid them in their flight from the invading Nazis. At the end of the war, when the Soviets entered Budapest where Wallenberg was posted, he disappeared and has not been officially located since. Soviet prisoners and exiles who have since emigrated to the West have claimed to have knowledge that Wallenberg has been detained or imprisoned in the Soviet Union, but these allegations remain unsubstantiated.

The United States conferred nationality upon Wallenberg after the war in order to motivate the Soviets to respond to the United States' efforts to locate him, but, as noted, the tactic failed to achieve its intended purpose. *See generally* Lester & Werbell, LAST HERO OF THE HOLOCAUST, N.Y. Times, Mar. 30, 1980 § 6 (Magazine) at 20.25.

Nationality has also been revoked for political reasons. For instance, after the Bolshevik Revolution in Russia, the Soviet government denationalized all nationals living abroad who had opposed or who were considered to have opposed the Bolshevik regime. In 1941 Germany denationalized all German Jews residing outside Germany. Italy revoked all nationalizations granted to Jews after January 1, 1939 (during the Fascist regime). *See generally* P. WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW (1979).

A final problem with the nationality principle is that it can cause a defendant to be subject to prosecution under two penal codes. For example, if a United States astronaut were to commit a crime onboard a foreign vehicle, he would, by virtue of his citizenship, be answerable to United States courts and principles of law, yet he would likely also be triable by the foreign country under its laws, assuming that country's jurisdiction covers criminal acts by foreigners onboard its vehicles. The United States and the foreign country would seemingly have concurrent jurisdiction. The question of which forum would prevail is, perhaps, a matter of comity, yet as one legal critic has commented,

> application of the nationality principle, even with moderation, contains grave potential dangers . . . . Jurisdiction on this basis may, therefore, develop parallel to jurisdiction on a territorial basis, and an individual who has committed an act regarded as criminal by both the state of his nationality and the state of the *locus delicti* may be tried twice for the same act, even though the municipal laws of both States forbid double jeopardy.[40]

To recapitulate, the nationality principle suffers from a dichotomous problem regarding its application to extraterrestrial assertion of jurisdiction. On the one hand, it is too narrow to secure a nation's jurisdiction over non-nationals visiting or residing in its spacecraft or platforms. On the other hand, it can be so broad as to make possible jurisdiction over persons in whom a nation has no definite interest. It can also cause tension in international relations because two or more countries may have concurrent jurisdiction.

C. *Protective Principle*

The protective principle seems, at first glance, to solve the inadequacies of both the territorial and nationality principles. Jurisdiction invoked under this principle can reach a spacetraveler irrespective of his nationality or the situs of the

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The conferring of the status of a national by the United States upon a defecting Russian cosmonaut might serve as an example of a potential problem occurring in outer space wherein such a situation might arise. Indeed, such a prospect, although unlikely, could arise in the course of a United States-Soviet "link-up" of their respective vehicles in outerspace. *See also infra* note 76 and accompanying text.

40. *See* Sarkar, *supra* note 17, at 64-65.

crime. The principle looks to the nature of the interest injured to determine jurisdiction. Its employment is generally justified by nations or a state on the ground of the right to self-defense. One commentator has explained its adoption into law thusly: "With regard to crimes and delicts against the security of the State, every State attributes an extraterritorial competence to itself and arrogates to itself the right to deal with similar crimes and delicts even when they are committed on foreign territory."[41]

The advisability of adopting the protective principle for purposes of asserting jurisdiction in space is that it mandates that courts review the circumstances of the criminal act to determine if the crime has sufficient impact on that nation's interests to justify jurisdiction. Court review in such instances is highly advantageous since the unknowns of outer space and the nature of man's role there make it difficult for anyone to define in advance what national interests will be affected by criminal conduct off the earth's surface. Certainly, it is more desirable for courts to assert jurisdiction by evaluating the pertinence of the affair to the nation, rather than to mechanically apply a formula based on the site of the crime or the nationality of the actor.

In the past, however, the protective principle has been extended by courts in a boundless fashion.[42] For example, rather than establishing a standard to determine when the impact of a crime justifies the assertion of the jurisdiction of the United States, courts have found such jurisdiction in an arbitrary fashion. One commentator has disapprovingly noted that "[w]hile the principle is soundly based and now generally accepted it is subject . . . to extravagant extensions of state power."[43]

This outcome greatly reduces the principle's serviceability in space. Since the principle can be applied without conforming to objective standards, international conflict may occur when a nation attempts to claim jurisdiction over a non-national astronaut whose criminal activity allegedly affects that nation's interests.[44] Although the causes are different, the

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41. Sarkar, *supra* note 17, at 68 n.80 (1965) (quoting Stenuit, *La Radiophonie et le Droit International Public*, 137 (1932)).

42. *See* Sarkar, *supra* note 17 at 69.

43. *Id.* at n.86 (quoting P. JESSUP, TRANSNATIONAL LAW 43 (1951)).

44. About an analogous area, one author comments, "[t]he United States has

same result was demonstrated to show the ineffectiveness of the nationality principle. As was previously pointed out, crews of United States spaceships are expected to be composed of persons from many nations.[45] If the United States were to assert jurisdiction over a foreigner without calling into question the propriety of the act, it must do so in accord with well-defined and accepted prescripts. The United States must not act arbitrarily, and the requisites for its claim of jurisdiction must not be so politically malleable that it may be called a mere pretext for intervention.[46] On these grounds, the protective principle is distinctly unfit. Indeed, the use of the principle has been characterized as an unrestrained exercise of sovereignty in disregard of international principles.[47] The theory underlying the principle has similarly been criticized, as well as its untempered employment by the courts, in that it is difficult to draw "a hard-and-fast rule once one accepts the protective principle."[48]

The protective principle also presents to the United

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expanded its delimitation of legal authority to allow the assertion of legal control over economic arrangements centered in other states. Such practice is notable especially in the area of anti-trust regulation. It has occasioned protest." R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL ORDER 36 (1964). For a survey of the leading cases, see U.S. ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS REPORT 66-01 (1955).

45. Article 7(f) of the Spacelab Agreement states that the United States will provide Spacelab flight crew opportunities to nationals of the European Space Agency countries involved in the space programs. *See generally* Mossinghoff & Sloup, *Legal Issues Inherent in Space Shuttle Operations*, 6 J. SPACE L. 47, 56 (1978) (citing to Agreement Between the Government of the United States of America and Certain Governments, Members of the European Space Research Organization, for a Cooperative Programme Concerning the Development, Procurement and Use of a Space Laboratory in Conjunction With the Space Shuttle System, executed at Neuilly-sur-Seine, August 14, 1973, entered into force for the United States, August 14, 1973, 24 U.S.T. 2049, T.I.A.S. No. 7722 (Spacelab Agreement)). Since the conclusion of the agreement, the European Space Research Organization (ESRO) has been succeeded by the European Space Agency (ESA), which remains bound by the Spacelab Agreement.

46. "States, by characterization, are able to extend the traditional reach of the jurisdictional principles, *e.g.*, United States v. Aluminum Co. of America, 148 F.2d 416, 439-48 (2d Cir. 1945) (territorial principle); Joyce v. Director of Public Prosecutions, [1946] A.C. 347 (nationality principle). These decisions are intended only to illustrate the *process* of characterization at work in rather extreme situations." R. FALK, *supra* note 44, at 28 n.24.

47. *See* Mora, *Criminal Jurisdiction over Foreigners for Treason and Offenses Against the Safety of the State Committed Upon Foreign Territory*, 19 U. PITT. L. REV. 567, 568 (1958).

48. P. JESSUP, TRANSNATIONAL LAW 51 (1959).

States the problem that if the nation adopts it, not only international disagreements may result, but United States astronauts may be the subjects of unexpected and unfounded claims of jurisdiction by other nations. After all, turnabout is fairplay, especially in international politics.[49] History reveals that reciprocal action has repeatedly been a method for one country to discipline the disfavored conduct of another country.[50] It has been urged that this could "encourage states to delimit their jurisdictional competence in accord with standards of reasonableness"[51] and that in international law, it is often "mutually more advantageous to defer on a reciprocal basis than it is to assert legal control."[52] The purport of such an interdependent system is that "reciprocal patterns can preserve a desirable legal order . . . ."[53] Since the protective principle does not lead to stable international relations, it should be rejected as the method for establishing jurisdiction in outer space.

D. *The Universality Principle*

The universality principle, although a recognized basis for extending domestic criminal jurisdiction extraterritorially, must be summarily dismissed because it cannot provide comprehensive criminal jurisdiction in space. The universality principle, by definition, applies to a small class of crimes which are cognizable under international law as crimes against mankind or crimes affecting the interests of all states in general.[54] Piracy is the oldest example of a crime punishable by any nation and the only crime uniformly recognized under the

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49. Retortionary measures within the domestic jurisdiction of the complaining state such as trade or financial discriminations or embargoes of merchant vessels are not contrary to international law and may be used to bring pressure for the rectification of legal injuries. . . . Efforts may even be made to induce other states to cooperate. . . . Measures of this kind, however, are likely to militate to the . . . disadvantage of all concerned rather than to rectify the wrongs complained of.

Wright, *Non-Military Intervention*, in THE RELEVANCE OF INTERNATIONAL LAW (1971).

50. *See generally* R. FALK *supra* note 44, at 46.

51. *Id.*

52. *Id.* at 46.

53. *Id.*

54. *See Harvard Research on Jurisdiction with Respect to Crime, supra* note 5, at 563.

principle.[55] The list of enumerated universal crimes can be enlarged by international agreement or custom, of course, but even that obscure possibility would not cause a body of law equivalent to that applicable under section 7 of Title 18[56] to be effective in space. The principle should not suffer total abandonment, however. It may be utilized in those unusual cases in which a universally-cited crime is committed extraterrestrially.

E. *Passive Personality Principle*

The passive personality principle is also a basis for asserting jurisdiction which can be summarily dismissed as being inadequate to handle the jurisdiction within outer space. As described earlier, this principle permits a nation to exercise jurisdiction over a non-national if the criminal act committed substantially affects the person or property of a citizen of that nation or state.[57] The theory of the principle is widely acknowledged, but United States courts categorically deny its operation in American law.[58] The United States has even strongly objected to its use by other nations as a means of asserting jurisdiction over American citizens.[59]

In summary, the five traditional principles discussed above are each inadequate in varying respects, to place space-travelers and their activities under a canopy of criminal jurisdiction. It is the enormous and unprobed place of outer space that challenges the limits of conventional legal devices and thought and makes it necessary for a more modern concept of extraterritorial criminal jurisdiction to be developed.

III. The New Amendment to the Special Maritime and Territorial Jurisdiction Act

The Amendment[60] is the latest attempt by Congress to create a unique jurisdictional model capable of handling the problems involved in the exercise of criminal jurisdiction in

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55. S. Lay & H. Taubenfeld, *supra* note 10, at 55 n.146.
56. 18 U.S.C.A. § 7 (West Supp. 1981).
57. *See Harvard Research on Jurisdiction with Respect to Crime, supra* note 5, at 480.
58. 2 Moore, *The Cutting's Case*, Digest of International Law 231-40 (1906).
59. *See* S. Lay & H. Taubenfeld, *supra* note 10, at 55-56.
60. 18 U.S.C.A. § 7(6) (West Supp. 1981).

outer space. While the Amendment properly circumvents reliance on the existing models just discussed, and thus avoids their inherent pitfalls, it was drafted with such imprecision and ambiguity that it is very likely to generate as many problems as it eliminates.

A. *History of the Amendment*

The Amendment was distilled from jurisdictional concepts found in two proposed Senate bills, the Criminal Justice Reform Act of 1975[61] and the Criminal Code Reform Act of 1977.[62] The authors of the 1975 and 1977 proposed Acts were specifically concerned with modifying the criminal code to provide for criminal jurisdiction in outer space. The Senate Judiciary Committee's Report on the proposed Act of 1975 stated:

> [T]here still remain areas where no sovereign can yet be said to have established jurisdiction. Examples are such places as Antarctica and outer space. It is in these areas, and other areas as yet uncharted, that there exists both an interest and a legitimacy in the exercise by the United States of extraterritorial jurisdiction over persons for the purpose of effectuating an arrest.
> The exercise of such arrest jurisdiction is limited to offenses described in section 204 (Extraterritorial Jurisdiction) and to fugitives from justice where the offender or the fugitive is outside the jurisdiction of the United States and outside the jurisdiction of any nation.[63]

The proposed Acts each provided for circumstances in which United States' federal jurisdiction would attach extraterritorially for criminal acts. Two of those circumstances which were referred to in both proposed Acts are relevant to the United States Space Shuttle and other manned space programs.[64] Under either proposed Act, jurisdiction would attach where:

> (i) the offense is committed by or against a national of the United States at a place outside the jurisdiction of

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61. S. 1, 94th Cong., 1st Sess. (1975).
62. S. 1437, 95th Cong., 1st Sess. (1977).
63. STAFF OF SENATE COMM. ON THE JUDICIARY, 94TH CONG., 1ST SESS., CRIMINAL JUSTICE REFORM ACT OF 1975, REPORT OF THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE TO ACCOMPANY S. 1 35-37 (Comm. Print 1975).
64. *See* S. 1, 94th Cong., 1st Sess. § 204 (1975); S. 1437, 95th Cong., 1st Sess. § 204 (1977).

any nation; or

(ii) the offense is comprehended by the generic terms of, and is committed under circumstances specified by, a treaty or other international agreement, to which the United States is a party, that provides for, or requires the United States to provide for, federal jurisdiction over such offenses.[65]

However, neither the 1975 Justice Reform Act nor the 1977 Criminal Code Reform Act were ever enacted into law.[66]

When the proposed Acts failed, lawyers at the National Aeronautics and Space Administration warned that the events which came to pass in a troublesome international incident in 1970 could be repeated in outer space.[67] In *United States v. Escamilla*,[68] jurisdiction over a murder committed outside the territory of the United States, in international waters, was barely confirmed by the courts. Defendant Escamilla was a civilian technician working with other civilian and United States military personnel on "T-3" or "Fletcher's Ice Island," an island in the Arctic Ocean.[69] In an argument over a vat of raisin wine, Escamilla used his bear rifle to fatally shoot a colleague in the chest.[70] The question of jurisdiction confounded officials immediately.[71] No one was certain if an ice island was sufficiently similar to "ships, boats, rafts, and debris" to fall under the Special Maritime and Territorial Jurisdiction of the United States, 18 U.S.C. section 7.[72] Jurisdiction was found by the United States District Court at the trial,[73] yet at no time did the judge state the basis for his decision on the jurisdictional issue. The Fourth Circuit, en banc, was divided by

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65. *Id.*

66. S. 1630 is the latest criminal code reform bill which Congress failed to enact. Following its predecessors, S. 1630 included an excellent statement of extraterritorial jurisdiction applicable to space. *See* S. 1630, 97th Cong., 1st Sess., 127 CONG. REC. 9770-76 (1981).

67. Interview with former National Aeronautics and Space Administration (NASA) attorney, George P. Sloup, Esq. (May 1982). *See also supra* note 34; Note, *Criminal Jurisdiction Over Arctic Ice Islands: United States v. Escamilla*, 4 U.C.L.A.-ALASKA L. REV. 419 (1975).

68. 467 F.2d 341 (4th Cir. 1972).

69. *Id.* at 343.

70. United States v. Escamilla, 210-70-A (E.D. Va. 1971).

71. *See* Holmquist, *The T-3 Incident*, U.S. NAVAL INST. PROC. 45, 49, 50, 53 (Sept. 1972).

72. *Id.* at 52.

73. United States v. Escamilla, 210-70-A (E.D. Va. 1971).

equally on the issue of jurisdiction. As a result, the district court's holding of jurisdiction was affirmed on appeal.[74]

Escamilla reaffirmed the need for legislation concerning extraterritorial jurisdiction, of which both NASA and the Department of Justice were aware.[75] The unprecedented success of both the space shuttle program and joint manned space ventures between nations[76] made the need for that legislation all the more immediate. It was obvious that in the future people of different nations would be working and residing in space, a vast jurisdictional void.[77] Sadly, *Escamilla* further evidenced the fact that even societies' most highly trained technicians, working on specialized projects, are capable of committing criminal acts in such settings.

Rather than amending the Criminal Code directly, either with an entirely new act or by adopting a version of one of the 1975 or 1977 proposed Acts, Congress chose instead to pass its new jurisdictional model by attaching it to a NASA appropri-

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74. In his appeal, his first contention that the district court was in error when it ruled that the special maritime and territorial jurisdiction of the United States extended to crimes committed on T-3 is one upon which the *in banc* [sic] court is equally divided and so we affirm the district court's exercise of jurisdiction.

467 F.2d 341, 343.

75. Neil Hosenball, General Counsel for NASA, testified:

Questions regarding criminal jurisdiction on the Shuttle have been raised in the course of NASA testimony before these subcommittees the last two years. Our response was that, if the legislation on criminal code reform pending before the 96th Congress matured into law, the need for specific legislation to address this problem would be obviated. However, because the legislation on criminal code reform was not passed by the last Congress and flights of the Shuttle will be occurring in the near future, we recommend that the matter be resolved now. The amendment was drafted by NASA in close consultation with the Department of Justice and it has their approval.

Hearings on H.R. 1257 Before the Subcommittee on Space Science and Appropriations of the House Committee on Science and Technology, 97th Cong., 1st Sess. 2601 (1981) (statement of Neil Hosenball, General Counsel, NASA).

76. The 1975 hook-up of an American and Soviet manned spacecraft is known as the Apollo-Soyuz Test Project. That great achievement in astrotechnology and global coordination is destined to become standard practice in the years ahead.

77. Gaps in jurisdiction have occurred in other contexts and resulted in the inability to prosecute criminal offenders. For example, in United States v. Cordova, 89 F. Supp. 298 (D.N.Y. 1950), defendant Cordova was charged with assault of passengers and crew members of a United States airplane while it was flying over the high seas between Puerto Rico and New York. The Court arrested its judgment of conviction because it held there was no jurisdiction to try the case under The Special Maritime and Territorial Jurisdiction of the United States, 18 U.S.C. § 7 (1976). *See also infra* note 91 and accompanying text.

ations bill.[78] While this new model, the Amendment, borrowed much of its language from the 1975 and 1977 proposed Acts, the two very provisions of those Acts specifically written to cover United States criminal jurisdiction in outer space were omitted.[79] What language the Amendment did borrow from the proposed Acts was actually from a section originally written to cover United States jurisdiction over crimes occurring on "special" aircraft.[80] Undoubtedly, Congress envisioned that a space vehicle was similar enough to a "special" aircraft to consider the jurisdiction provided by that section to be sufficient.

The Amendment itself was considered to have such limited application that it was added as a sixth provision to the catchall category of the special maritime and territorial jurisdiction of the United States.[81]

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78. *See supra* note 3.

79. *See* S. 1, 94th Cong., 1st Sess. § 204(h)(i) (1975); S. 1437, 95th Cong., 1st Sess. § 204 (i)(j) (1977).

80. The Criminal Code Reform Act of 1977 defined a special aircraft as:

(1) an aircraft that belongs in whole or in part to:
  (A) the United States;
  (B) a state or locality;
  (C) an organization created by or under the laws of the United States or of a state.
(2) a civil aircraft of the United States, as defined in secion 101 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301);
(3) any other aircraft with the United States;
(4) any other aircraft outside the United States:
  (A) that has its next scheduled destination or last point of departure in the United States, and that next lands in the United States; or
  (B) that has an "offense," as defined in the Convention for the Suppression of Unlawful Seizure of aircraft, committed aboard, and that lands in the United States with the alleged offender still aboard; and
(5) any other aircraft leased without crew to a lessee who has his principal place of business in the United States, or, if the lessee has no principal place of business, who has his permanent residence in the United States;

during the period that such aircraft is in flight, which is, for the purpose of this subsection, from the moment when all the external doors of such aircraft are closed following embarkation until the moment when any such door is opened for disembarkation, or, in the case of a forced landing, until a competent authority takes over the responsibility for the aircraft and for the persons and property aboard.

S. 1437, 95th Cong., 1st Sess. (1977).

81. 18 U.S.C.A. § 7(6) (West Supp. 1981).

B. *The Amendment: Too Much Space Between the Lines*

The Amendment provides for jurisdiction over:

> [A]ny vehicle used or designed for flight or navigation in space and on the registry of the United States pursuant to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies and the Convention on Registration of Objects Launched into Outer Space, while that vehicle is in flight, which is from the moment when all external doors are closed on Earth following embarkation until the moment when one such door is opened on Earth for disembarkation or in the case of a forced landing, until the competent authorities take over the responsibility for the vehicle and for persons and property aboard.[82]

This language presents a conservative solution to the problem of extending criminal jurisdiction to space. In classifying spacecraft as "special" United States jurisdictional territory, it mandates that United States law cover all persons and acts committed aboard.[83] Providing for jurisdiction by designating particular areas as "special territory" is not a new practice. Section 7 of Title 18, the Special Maritime and Territorial Jurisdiction of the United States,[84] already defines five other places to which United States criminal law applies, although those places are outside the territory of the United States.[85]

The main thrust of the Amendment is to make much of the federal criminal code operative within the space vehicle, not just those few specific statutes containing express grants of extraterritorial jurisdiction or those in which a court determines that Congress intended extraterritorial application.[86]

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82. *Id.*

83. *See* 18 U.S.C.A. § 7(6) (West Supp. 1981), *reprinted supra* note 4, at § 7(6). *See also infra* text accompanying note 81.

84. 18 U.S.C.A. § 7(6) (West Supp. 1981).

85. *Id.*

86. Dr. J. Henry Glazer, Chief Counsel for NASA-Ames, poses the question whether terrestrial criminal codes can logically be extended in their entirety to outer space since he suggests that some behavior deemed criminal on earth may be less offensive, possibly necessary, or even appropriate in outer space. Dr. Glazer postulates that survival-homicide may become an accepted practice during space missions of long duration where, for example major casualty to the spacecraft's oxygen system means some must be sacrificed if any are to survive. Moreover, he believes some acts which are laudable on Earth may be deemed criminal in space. For instance, child bearing in a gravityless state may cause severe birth defects, leading lawmakers to

The Amendment grants jurisdiction over a space vehicle which is on the registry of the United States pursuant to the Outer Space Treaty and the Convention on Registration while the vehicle is in flight, which is from the moment when all external doors are closed on Earth following embarkation until the moment when one such door is opened on Earth for disembarkation.[87] This list constitutes the definition of the special territory in space to which United States criminal jurisdiction attaches.

1. *A Space Vehicle*

The definition is seriously flawed by its failure to provide criminal jurisdiction beyond the space vehicle's portals. The limited scope of this definition is of particular importance because in 1967 the United States became a party to the Outer Space Treaty,[88] which strenuously maintains that space and the celestial bodies are not capable of national appropriation.[89] To remain consistent with the Treaty, the United States must avoid any suggestion that it considers space generally to be United States territory, or that the place occupied by spacecraft aloft is to be deemed United States territory. But limiting jurisdiction to the vehicle raises serious practical problems. Missions increasingly explore the ability of man to function outside the confines of the spaceship. Shuttle astronauts, for example, are now routinely equipped with extravehicular mobility units and trained to perform a variety of tasks in open space.[90] Since, in the past, courts have construed the Special Maritime and Territorial Jurisdiction narrowly,[91]

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prohibit, under pain of penal sanction, pregnancies in space under other than rigidly controlled conditions. Interview with Dr. J. Henry Glazer at White's Inn (Sept. 1982). *See also supra* note 4.

87. *See* 18 U.S.C.A. § 7(6) (West Supp. 1981).

88. *See supra* note 26 and accompanying text.

89. *Id.*

90. *Some Unsuitable Workmanship,* TIME 68 (December 20, 1982).

91. *See* United States v. Cordova, 89 F. Supp. 298 (D.C. N.Y. 1950). The issue in that case was whether 18 U.S.C. § 7 was broad enough to cover an airplane flying over the high seas. The Court interpreted the statute narrowly to hold that an airplane is not a "vessel" within the meaning of the statute and that "upon the high seas" does not include the airspace over them. In consequence of this case, the statute was amended to include aircraft. Act of July 12, 1952, ch. 695, Pub. L. 514, 66 Stat. 588 (1952) (codified as amended at 18 U.S.C.A. § 7(5) (1976)). The statute was later amended to extend United States criminal jurisdiction to apply to acts committed in outer space. *See* 18 U.S.C.A. § 7(6) (West Supp. 1981). *See also supra* text accompanying notes 3-4.

it is likely that the courts today will interpret the Amendment similarly, resulting in jurisdiction being strictly limited to acts committed within the vehicle itself. Extravehicular activities appear, therefore, to be beyond the reach of the present jurisdictional grant.

Similarly, conduct on the surface of a celestial body, if undertaken outside the spacecraft which is landing or has landed on a celestial body, will not be within the scope of the statute. This jurisdictional gap is undesirable because there is no reason to believe that criminal conduct cannot occur in open space or on some celestial body.[92]

Another problem with limiting jurisdiction to the vehicle involves the possibility of criminal conduct occurring on objects fabricated in space itself. A shuttle-type spacecraft has the facility to carry objects into space and to support the assemblage there of new vehicles, space stations, and satellite centers.[93] Some commentators talk of harnessing the resources of the planets to do large scale mining and construction projects.[94] Facilities made in space likewise appear to be beyond the scope of the new Amendment because, as with extravehicular activities discussed above, they are not contained in the "space vehicle" definition of special United States territory.

The Amendment contains additional problematic terms. For example, as has already been demonstrated, criminal jurisdiction does attach to a space vehicle because Congress mandated that space vehicles are "special" United States territory.[95] It is uncertain, however, whether foreign craft temporarily docked to United States space vehicles will be within the province of United States courts. Further, it leaves unexplained the jurisdictional reach of United States courts over United States astronauts committing crimes while they are aboard foreign space vehicles, or over foreign astronauts who commit crimes aboard foreign space vehicles docked to United

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92. Space walks and planet exploration could be prime arenas for criminal conduct since crimes committed there may be beyond the observation of witnesses.

93. *See generally* Holub, *Star Labs: Scientists Give NASA Designs for Space Colony*, San Jose Mercury, Nov. 30, 1982, at 1E, 4E.

94. *See generally* INTERNATIONAL CONFERENCE ON DOING BUSINESS IN SPACE: LEGAL ISSUES AND PRACTICAL PROBLEMS AMERICAN LAW INSTITUTE—AMERICAN BAR ASSOCIATION (1981).

95. *See supra* text accompanying notes 81-83.

States space vehicles.

It is unlikely that such docked spacecraft can reasonably be considered within the scope of the Amendment merely as a result of short term contact. However, if life support systems are intermingled for any appreciable length of time, and if United States launched astronauts have free run of the docked spacecraft, there is greater reason to view the attached spacecraft as "special" United States territory for purposes of jurisdiction.[96]

Obviously, however, foreign states will undoubtedly object to having their spacecraft considered special United States territory. Thus, political constraints could make it impossible, for example, for the United States to exercise jurisdiction over American astronauts who commit crimes just outside the doorjamb of the United States spacecraft. Even greater problems of jurisdiction will exist if the criminal actor is not a United States national.[97]

2. *Registration*

The significance of registration as referred to in the Amendment[98] raises the issue of whether the mere listing of a space object on some national registry should entitle the nation of registry to jurisdiction and control over the object. If jurisdiction automatically attaches by registration, the United States may be inclined to include on its registry space objects over which it has no logical right to exercise continuing legal authority. For example, the United States, as an advanced space power, may be commissioned by less advanced nations to launch their objects. These objects may be foreign built and foreign manned, and they may eventually return to territory outside the United States. It is unreasonable for the United States to exercise jurisdiction over such objects simply be-

96. *Id.*

97. Furthermore, it is likely that many spacecraft which temporarily dock alongside U.S. craft will operate under foreign registry. The express terms of the Amendment preclude the extension of U.S. criminal jurisdiction to vehicles not on the registry of the U.S. Thus, even where political considerations might not interfere with the power of the U.S. to reach criminal conduct occurring on a docked foreign spacecraft, the status of that spacecraft would likely prevent the U.S. from taking action. Such a limitation is unfortunate because it would simply be the result of poor legal draftsmanship and would have nothing to do with the real interest which the U.S. may have in the criminal act or actors.

98. *See* 18 U.S.C.A. § 7(6) (West Supp. 1981).

cause they were launched by the United States and thereby came to be listed on the United States registry. Jurisdiction should not necessarily be tied to the act of registration since the rationale for registration may be quite different from the rationale for exercising jurisdiction.

While it is understandable for the United States to limit its interest in space vehicles to those that are on the United States registry, the Amendment goes so far as to exclude from jurisdiction unregistered United States spacecraft. It seems obvious that government constructed vehicles will be registered, but under the Amendment, privately owned and operated space enterprises, which are rapidly approaching launch capability, can send manned vehicles into space without registering them with the United States government.[99] If such private efforts proliferate and become more sophisticated, many future space travellers may be on board craft lacking registration and thus outside the protective quilt of United States laws.

The Amendment's statement of jurisdiction, which fails to comprehend an entire class of vehicles, is probably contrary to the jurisdictional directives of the 1967 Outer Space Treaty.[100] Article VI and article VIII of the Treaty can be read together to mean that nations shall retain jurisdiction over their own national activities in space.[101] The Treaty appears to mandate that nations bear responsibility for the conduct of their nationals, irrespective of whether they operate in official or unofficial capacities. Presumably, the goal is to ensure order in space by subsuming private activities under the authority of the state. The Amendment fails to conform to the prescripts of article VI and article VIII. It is ironic in light of the fact that the Amendment predicates jurisdiction on compliance with the Outer Space Treaty and the Convention on Registration.[102] Apparently, the Amendment's terms are in-

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99. The Federal Aviation Administration must first be notified in order to clear the airspace, and permission for the incidental transmission of any telemetry must be obtained from the Federal Communications Commission. The National Aeronautics and Space Administration itself, however, has no authority over such private launchings. *See* Mossinghoff & Sloup, *supra* note 45 at 66.

100. *See* Outer Space Treaty, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205.

101. There remains, however, the threshold question of whether the Treaty is meant to pertain to criminal as well as civil jurisdiction.

102. *See* G.A. Res. 3235, I U.N. GAOR Supp. (No. 31) at 16, U.N. Doc. A/9631

consistent. Its reference to the Outer Space Treaty suggests that the United States subscribes to the Treaty mandate that nations retain jurisdiction over all national activities in space, yet the Amendment limits United States jurisdiction to registered United States spacecraft. Unless the registration reference is deleted or additional laws are passed making registration of space vehicles compulsory, current domestic law will fail to give effect to this international agreement, which the United States is bound to support. In addition to the legal inconsistency, United States domestic law may be inoperative to resolve troublesome disputes which may occur if foreign nations demand the United States take responsibility for events involving unregistered spacecraft.[103]

3. *In Flight: The Door Test*

Another problem with the Amendment is that jurisdiction attaches to a space vehicle only when it is in flight.[104] Oddly enough, the new law defines flight as "the moment when all external doors are closed on Earth following embarkation until the moment when one such door is opened on Earth for disembarkation . . . ."[105] Under this definition, the "door test," it is possible for jurisdiction to be based on the most trivial of justifications. The following example is illustrative. If a space vehicle is privately owned, launched from private property in a state of the United States, and its astronaut committing the crime is a citizen of that state, the vesting of state or federal jurisdiction would turn on whether the vehicle's door was closed. If the door is open at the time of criminal conduct, the vehicle is not legally "in flight" and federal criminal jurisdiction cannot attach. However, if the door is closed when the crime is committed, the vehicle, whether moving or stationary, is technically "in flight" and covered by federal criminal jurisdiction. Were technical malfunctions prior to takeoff to occur, the questions raised border on the absurd. For example, the door could be opened and closed several times over a period of hours while adjustments were being made. At which closing is the door officially "closed" for purposes of jurisdiction? What if the "door" is closed but

(1974).

103. *See also supra* note 97.

104. 18 U.S.C.A. § 7(6) (West Supp. 1981).

105. *Id.*

other means of access to the vehicle remain open? There appears no need nor is it desirable, for federal jurisdiction to attach while the vehicle is, in fact, grounded, since state law properly governs criminal acts occurring within the State. The "door test" is therefore not only arbitrary, but leads to conflicts between state and federal prosecutorial interests.

The "door test" is equally awkward in determining when federal jurisdiction ends. Jurisdiction under the Amendment is maintained until "one such door is opened on Earth for disembarkation."[106] This language indicates that the opening of the external door must combine with the intent to disembark from the spacecraft, or jurisdiction under the Amendment does not terminate. Such a statement of jurisdiction is unnecessarily vague. For example, it is unclear whether the disembarkation of goods as well as persons will trigger the termination of federal criminal juirisdiction. In any case the result is arbitrary since it should not matter for purposes of jurisdiction whether the vehicle is grounded for disembarkation, refueling, maintenance, or some other reason. Once the vehicle touches down on state territory, whether its external doors remain closed or open for any reason, continuing jurisdiction under the Amendment is concurrent with state jurisdiction and potentially conflict producing.

The very unnatural definition of "flight" in the Amendment may cause further negative consequences. For example, jurisdiction under the Amendment may neither attach to a vehicle constructed in space nor to a vehicle carried into space with its external doors open and extraterrestrially introduced for service. In both cases, the space vehicle obviously flies, yet, under the Amendment, it cannot be considered "in flight" because it will never have closed its external doors on Earth. The anomolous result is that the vehicle and its passengers remain outside the control of the United States courts.

4. *Forced Landing*

The final provision covers jurisdiction during a forced landing. "Special" jurisdiction over the vehicle will continue in the case of a forced landing until competent authorities take responsibility for the craft and its crew.[107] Several issues

106. *Id.*

107. *See* 18 U.S.C.A. § 7(6) (West Supp. 1981).

are raised by these terms. First, the term "forced landing" is not defined.[108] Second, the Amendment fails to adequately consider the situation where the United States spacecraft is forced to land in foreign territory or territory over which no nation has jurisdiction. In the first instance, the foreign nation will have concurrent jurisdiction with the United States from the moment the spacecraft enters the sovereign's territorial airspace. In the second instance, should a foreign nation reach the downed vehicle first, it could claim jurisdiction over it.[109] That concurrence of jurisdiction will continue until United States special jurisdiction terminates, when competent authorities take responsibility for the craft and its personnel.[110] It is not customary for the United States to assert jurisdiction over criminal acts occurring on foreign soil. Foreign governments may object to such a practice on the grounds that it infringes on their exercise of sovereign power.

Third, the Amendment fails to define the term "competent authority." This may be quite consequential, as several authorities may claim responsibility for a spacecraft. Government ships will likely be retrieved by the National Aeronautics and Space Administration or the Department of Defense. Privately launched vessels may be claimed by their owners, or by the state of registry of the vessel, or by the state whose citizens comprise the crew. When crews are international, authorities from many countries may be interested in taking responsibility for the vehicle, persons, and property aboard. Because the Amendment fails to define the authority concerned, it leaves United States jurisdiction in dispute. Since special United States jurisdiction terminates once the authority takes responsibility for the vehicle, it is crucial to designate the intended authority in order to establish the moment at which special jurisdiction ends.

Finally, the Amendment fails to define the term "taking responsibility."[111] This phrase can be interpreted to mean an-

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108. One recognized definition of a forced landing is "a landing made because of engine failure or bad weather." 17 Words and Phrases 358 (West 1958) (citing to McCallum v. Executive Aircraft Co., Mo. App., 291 S.W.2d 650, 657).

109. An example which readily comes to mind is one in which a space vehicle is forced down in international waters, a foreign fishing ship takes the vehicle under tow or brings the astronauts aboard ship, and a crime occurs before competent authorities take control of the space vehicle and its crew.

110. *See* 18 U.S.C.A. § 7(6) (West Supp. 1981).

111. *Id.*

ything from acknowledging ownership of or control over the craft, to completing its retrieval. The ambiguousness of the phrase impacts significantly on the question of jurisdiction since jurisdiction terminates the moment authorities "take responsibility" for the craft. Under the present version of the Amendment, it is impossible to know when the crew of the spacecraft is no longer amenable to United States prosecution following a forced landing.

IV. Jurisdiction Based on the Minimum Contacts Principle

It is an inescapable conclusion that the Amendment is inadequate for the task of extending criminal jurisdiction to outer space. Criticism of the Amendment's major provisions reveals that it is dangerously unworkable because it provides incomplete jurisdictional coverage, it encourages conflict between state and federal law and between United States and foreign laws, and it is vague and confusing. The Amendment fails not only by the inadequacies of its separate provisions. It fails just as the traditional principles of criminal jurisdiction fail, principally because it links the existence of jurisdiction to a single factor. In the Amendment, jurisdiction is based solely on a spacecraft being in flight. A better model of jurisdiction must consider several factors because, as this comment demonstrates, the question of jurisdiction in space presents an unusually complex set of possibilities.

A preferable theory for extending criminal jurisdiction to outer space is to predicate jurisdiction on the principle of minimum contacts. The nature and degree of the accused's connection with a nation[112] and the interest the nation has in the subject matter of the offense should determine the existence of jurisdiction. Courts' rulings should result from the application of a balancing test in which several specific factors are decisively poised against each other. It is the purpose of this section of the comment to establish why the minimum contacts principle should be adopted by the United States as its basis for criminal jurisdiction in matters involving outer

112. For the purposes of this comment, the word "nation" will hereinafter be used to refer either to a state of the United States or to a nation such as the United States because the minimum contacts principle is generally applied identically by both such entities.

space.

The minimum contacts approach diverges from the main, and deficient, characteristic of the Amendment and of the traditional principles in that it does not isolate a single rationale to explain why a nation may assert legal control. Its suggested adoption is premised on the belief that "there exists an obvious need to enlarge the framework of inquiry beyond the Harvard Research formulation,"[113] if, in the complex setting of space, jurisdiction is not to be unresponsive to novel incidents nor unaccountable to the relevance of international interdependence and reciprocity.

The history of the Outer Space Treaty[114] teaches that control over space will not, in the foreseeable future, be relinquished by sovereign nations to an international authority.[115] As a result, there is great urgency for a national legal authority in space to be well-defined, comprehensive, and yet flexible enough to accommodate the emerging patterns of extraterrestrial interaction between nations. The minimum contacts principle can naturally function as the conduit for a message to other nations regarding the responsible attitudes toward the duties of a judiciary in outer space. It requires courts to justify their assertions of jurisdiction in light of specific considerations. This will encourage other nations to take a similarly reflective approach when adjudicating matters concerning a United States citizen or concern.[116] One commentator

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113. R. FALK, *supra* note 44, at 54.

114. *See supra* note 26.

115. In June 1959, The United Nations Ad Hoc Committee (of the Technical & Legal Subcommittees) debated whether international control was necessary, owing to the danger to the rest of the world of abuses of the use of space. The Ad Hoc Committee concluded against investing authority in a specially created international agency or even in an existing agency. The United States insisted on "modest proposals" to meet only the most pressing concerns. In 1962, when the United States offered to act as a world-clearinghouse of space information, the USSR objected. That same year, the proposal that advance consent be obtained from countries concerned about possibly harmful uses of space lacked a consensus. In 1964, negotiations regarding the rules for the rescue and return of astronauts saw the United States and Soviet Union divided over the rights of international organizations to act independently of their member countries. The Treaty on Rescue and Return was realized in 1967 only because the parties agreed not to include express provisions regarding the forum for the settlement of disputes. The 1967 Outer Space Treaty also leaves the solution of disputes to normal diplomatic channels. *See* S. LAY & H. TAUBENFELD, *supra* note 10, at 214-38.

116. *See* R. FALK, JURISDICTION, IMMUNITIES, AND ACT OF STATE: SUGGESTIONS FOR A MODIFIED APPROACH, ESSAYS ON INTERNATIONAL JURISDICTION 9 (1961).

has observed that "this is especially serious for the international legal order because it relies heavily on self-delimitation and possesses only very marginal techniques to reconcile inconsistent national claims of legal competence."[117]

A. *The Components of Minimum Contacts as Developed By Domestic and International Law*

The concept of establishing the minimum contacts principle as the standard criterion for determining extraterritorial criminal jurisdiction is unique. However, the use of the principle to determine jurisdiction has substantial precedence in United States civil law and international law. Since 1945, with *International Shoe v. Washington,*[118] federal law has consistently held that the amenability of a party to suit is based on the party's connections with the forum state. In *International Shoe,* the United States Supreme Court stated that the due process clause of the United States Constitution[119] requires a minimum contacts balancing test. The Court stated,

> Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to ensure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has not contacts, ties or relations.[120]

Eight years later, in *Lauritzen v. Larsen,*[121] the United States Court of Appeals utilized a similar balancing test in deciding to not apply United States law in a case involving a foreigner and a transaction occurring primarily outside the United States.[122] Although the issue in *Lauritzen* was not jurisdiction but choice of laws,[123] the Court's reasoning is nonetheless germane.

First, the Court in *Lauritzen* noted the inability of the territorial principle to comprehend misconduct arising in an

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117. R. FALK, *supra* note 44, at 54.
118. 326 U.S. 310 (1945).
119. U.S. CONST., amends. V and XIV.
120. 326 U.S. at 319.
121. 345 U.S. 571 (1952).
122. *Id.* at 592.
123. *See id.* at 573.

international setting. Justice Jackson asserted that "the test of location of the wrongful act or omission, however sufficient for torts ashore, is of limited application to shipboard torts, because of the varieties of legal authority over waters she may navigate."[124] Having dispensed with the territorial principle as a means of designating the choice of law, Justice Jackson listed seven factors which influenced the Court's ultimate decision. The considerations include: 1) The place of the wrongful act; 2) the law of the vessel's flag; 3) the allegiance or domicile of the actor; 4) the allegiance of the affected party; 5) the place of contract; 6) the inaccessibility of a foreign forum; and 7) the policy of the forum asserting jurisdiction.[125] This checklist is plainly applicable to the weighing of contacts which this comment advocates as the suitable process for finding criminal jurisdiction in outer space.

Justice Jackson's opinion provides a useful guideline for such a balancing process regarding incidents occurring in outer space. His opinion is also relevant with reference to outer space because he warns that in an international sphere, it is not a wholesome equilibration to base jurisdiction on the mere sufficiency of contacts.[126] Foreign interests likely to be affected by assertions of United States power must be considered as a threshhold matter. In words that are strikingly adaptable to law dealing with events in outer space, he cautions that, "[i]f, to serve some immediate interests, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea."[127] The minimum contacts principle proposed for application to events in outer space must include this concern for foreign interests if it is to promote the peaceful and prosperous exploitation of the galaxy.

Significantly, a source of authority other than case law interprets jurisdiction in terms of minimum contacts. The Restatement (Second) Conflicts of Law offers this definition: "A state may create or affect legal interests whenever its contacts with a person, thing, or occurrence are sufficient to make such action reasonable. The power to create or affect legal interests

124. 345 U.S. at 583.
125. *See generally id.* at 583-90.
126. 345 U.S. at 581-82.
127. *Id.*

is 'jurisdiction' as the term is used in the Restatement of the subject."[128] The Restatement formulation confers discretion upon the courts to base jurisdiction on the contacts calculus in a setting, like space, where more than one legal authority is operative.

International law has also recognized the minimum contacts principle as a proper basis for jurisdiction. The International Court of Justice[129] has specified that the following factors should be weighed to determine the existence of jurisdiction under its "Link Test:"

> Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the center of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.[130]

In the famous case of *Lichtenstein v. Guatemala* (the Nottebohm Case),[131] the International Court of Justice found that the nation of Lichtenstein had no standing to invoke the jurisdiction of the International Court because Lichtenstein had no true bond of attachment to the individual on whose behalf the claim was made.[132]

The court asserted that a nation can only invoke the jurisdiction of the International Court of Justice for the purpose

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128. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 42(1) (Tent. Draft No. 3, 1956).

129. The International Court of Justice is the

> [j]udicial arm of the United Nations. It has jurisdiction to give advisory opinions on matters of law and treaty construction when requested by the General Assembly, Security Council or any other international agency authorized by the General Assembly to petition for such opinion. It has jurisdiction, also, to settle legal disputes between nations when voluntarily submitted to it. Its judgments may be enforced by the Security Council. Its jurisdiction and powers are defined by statute, to which all member states of the U.N. are parties. Judges of such court are elected by the General Assembly and Security Council of U.N.

BLACK'S LAW DICTIONARY 732 (rev. 5th ed. 1979).

130. Nottebohm Case (second phase) (Lichtenstein v. Guatemala), 1955 I.C.J. Rep. 4.

131. *Id.* at 22.

132. Lichtenstein, claiming the wealthy Mr. Nottebohm as its national, instituted proceedings against Guatemala before the International Court of Justice to recover restitution for unlawful measures taken by Guatemala against the economic interests of Nottebohm. *Id.* at 40-41.

of redressing the claims of a private person when the nation acts on behalf of its national.[133] As a rule, international law has left the determination of national status to the nation asserting jurisdiction. Thus, it has been sufficient for international jurisdiction for the claimant nation to prove that the subject individual is a national according to its domestic law. In the Nottebohm Case, however, the International Court of Justice made a dramatic departure from the tacit acceptance of nationality claims. It held that, henceforth, to invoke the jurisdiction of the International Court, a claimant nation has to prove nationality by asserting strong factual ties linking the individual and the nation.[134]

The International Court's use of the "Link Test" in Nottebohm is relevant to the extension of criminal jurisdiction to outer space because it indicates a tacit approval in international law for the minimum contacts principle of jurisdiction.

B. *The Functional Superiority of Minimum Contacts Jurisdiction*

While it is clear that the new law is unfit to provide fair and comprehensive criminal jurisdiction in space, it remains to be demonstrated that the principle of minimum contacts is functionally superior. This can best be shown by applying the minimum contacts principle to the very fact patterns which confound the jurisdiction under the Amendment.

The first factual incidents that are problematic under the Amendment concern conduct in space which takes place outside the confines of the space vehicle. Most obviously uncomprehended by the Amendment are the following: 1) extravehicular activity; 2) activity aboard objects fabricated in space; and 3) activity outside the vehicle on a celestial body. The minimum contacts principle presents no problem in reaching criminal acts in any of the above circumstances. The situs of the act is but one factor the court must consider in determining whether to exercise jurisdiction.[135] If one refers back to the list of factors Justice Jackson cited in *Lauritzen v. Larsen*,[136] it becomes apparent that the place of the wrongful

133. *Id.* at 20-21.
134. *Id.* at 22.
135. *See generally supra* notes 83-93 and accompanying text.
136. 345 U.S. 571 (1952).

act is of primary concern to the Court. A nation obviously has a great interest in exercising jurisdiction over a criminal act occurring inside its own spacecraft because the crime most likely involves its nationals and impacts upon its interests. There may be slightly less reason to exercise jurisdiction over a crime occurring outside the craft, yet the court may assert jurisdiction because other factors, such as the nationality of the actor or the effect of the crime on national interests, weigh in its favor. Thus, the court must substantiate that the United States, for instance, has some legitimate interest in conduct occurring outside the spacecraft sufficient to support the exercise of jurisdiction.

A more complicated problem is presented by the situation in which a foreign vehicle temporarily docks alongside a United States spacecraft. The Amendment provides the United States has jurisdiction over a visiting foreigner who commits a crime onboard a United States vehicle,[137] but it does not have jurisdiction over a United States national who commits a crime onboard a foreign craft.[138] This result is an arbitrary conclusion because it has nothing to do with the United States' interest in the criminal act or actor. Rather than mechanically applying the law, the minimum contacts principle demands that the court evaluate the reasons the United States may have to assert jurisdiction over a person, whether he or she acts on a United States or foreign spacecraft. Where the offender is a United States national acting onboard a foreign vehicle, the Court may exercise jurisdiction as long as it can show good cause for doing so.

This may, of course, potentially give United States courts and a foreign sovereign concurrent jurisdiction over the same crime. Under the minimum contacts principle, however, the United States may choose to refrain from exercising jurisdiction where it sees that the foreign sovereign has greater interest in prosecution. This is, as Justice Jackson advised, because relevant foreign interests likely to be affected by assertions of United States power must be considered as a threshold matter.[139] Additional factors found relevant by the International Court could also be persuasive, though not binding, on a

137. *See supra* note 97 and text accompanying notes 95-97.
138. *Id.*
139. Lauritzen v. Larsen, 345 U.S. 571, 581.

United States court making such a determination.

A third category of problems is presented by the possibility that people will be onboard unregistered spacecraft. The Amendment is incapable of reaching crimes that occur on unregistered spacecraft.[140] The minimum contacts principle would allow jurisdiction, however, where the court finds that an unregistered vehicle and the criminal actor aboard it have a significant connection to the United States, provided it is not unreasonable for the court to exercise jurisdiction.

Conversely, while the registration of a vehicle to the United States will likely weigh in favor of United States jurisdiction, there may be cases in which another forum is more appropriate. This may be true when foreigners obtain United States registration as a flag of convenience, in order to circumvent restriction on their enterprise or to escape disadvantageous tax and regulatory laws operative in their own countries. Their criminal activities in space, even aboard a United States registered ship, may offend their country of origin more than the United States. The United States court could defer from invoking jurisdiction in such a case.

A fourth problem under the Amendment is that, because of its unnatural definition of flight, jurisdiction attaches under the Amendment while the vehicle is grounded but has its door closed.[141] Thus, federal and state jurisdiction overlap when there is a private launch from a private facility. This is entirely avoidable under the minimum contacts principle. The federal court would simply have no reason to assert jurisdiction over acts occurring in state territory where the federal government had only a minimal link with the actor or the act, and no strong constitutional grounds for asserting its jurisdiction.

A final problem is raised by the possibility that the spacecraft will be forced to land unexpectedly. The Amendment provides that jurisdiction will continue until competent authorities take responsibility for the spacecraft and its personnel. This is too vague a basis on which to predicate the court's power. Further, United States law and foreign law may conflict if the spacecraft lands in foreign territory and criminal

140. *See supra* notes 99-100 and 102-03 and text accompanying notes 99-103.
141. *See supra* text accompanying notes 103-06.

acts are committed there.[142] The minimum contacts principle, however, provides a firm and sensible basis for the assertion of jurisdiction in such circumstances. It allows the court to evaluate the very unique instance of a forced landing and to decide on the facts whether, and at what point, the United States has such an interest in the criminal act that it may justifiably prosecute.

The minimum contacts principle can accommodate the problem of concurrent United States and foreign state(s) jurisdiction because it is equipped to register the interest of the foreign sovereign(s) and to compare it to the interest of the United States. The United States court may justify the exercise of its jurisdiction when it evinces a substantial interest in the criminal conduct, or greater interest that any other forum.

V. CONCLUSION

Three important points emerge from this analysis. First, the Amendment does not accomplish the goal of providing comprehensive jurisdiction over criminal acts committed extraterrestrially. Second, further efforts to predicate criminal jurisdiction on the traditional principles will also be inadequate because the principles themselves are inappropriate for use in the problematic environment of space. Third, the minimum contacts principle is the superior basis for jurisdiction, provided the judiciary carefully defines the contacts calculus and applies the principle in light of its impact on United States international relations.

Justice Miller said, over a century ago in *The Slaughter-House Cases*,[143] that,

> A privilege of a citizen of the United States is to demand the care and protection of the Federal Government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt . . . .[144]

When Justice Miller wrote of the extraterritorial reach of the United States courts in 1873, he could never have seriously imagined extending jurisdiction to outer space. If he were writing today, however, the learned Justice would likely say it

142. *See supra* notes 107-10 and accompanying text.
143. Slaughter-House Cases, 83 U.S. 36 (1873).
144. *Id.* at 79.

is a person's privilege to be legally protected, and the United States has a duty to provide adequate legal protection both on and off the surface of the Earth.

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