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# State Jurisdiction Over Interstate Telephonic Criminal Conspiracy

# STATE JURISDICTION OVER INTERSTATE TELEPHONIC CRIMINAL CONSPIRACY

A picks up his telephone and dials B's telephone number. B answers his telephone and the following conversation ensues:

A: I've got a line on a bank job I figured you might be interested in. This safe's begging for a break-in.

B: I've got no cash, and I'm gonna need a lot real soon. . .if you think it's a good deal, you know you can count on me.

A: I'm glad you're in. . .Now, this is the deal. . .

At common law, A and B have formed a criminal conspiracy.[1] If A and B are both in the same state, they are subject to prosecution for criminal conspiracy in that state.[2] If A and B are in different states, however, determining the location of the conspiracy for the purpose of vesting a court or courts with criminal jurisdiction is problematic.[3] Common-law

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1. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 6.4 (2d ed. 1987) [hereinafter LAFAVE] (discussing origin and elements of criminal conspiracy). A common-law criminal conspiracy consists of an agreement between two or more persons to achieve an unlawful end, or a lawful end through unlawful means. *Id.* The agreement is the act component of the crime, and the intent to commit an unlawful act is the mental state component of the crime. *Id.* The crime is complete and subject to prosecution, therefore, when the conspirators make an agreement, regardless of whether the conspirators ultimately achieve the unlawful goal of the conspiracy. *Id.*; *see* 4 WHARTON'S CRIMINAL LAW §§ 721-40 (C. Torcia 14th ed. 1981 & Supp. 1987) (surveying common law of conspiracy); 16 AM. JUR. 2D *Conspiracy* §§ 1-2, 10, 15 (1979 & Supp. 1987) (noting elements of criminal conspiracy); 15A C.J.S. *Conspiracy* §§ 34-35 (1967 & Supp. 1987) (same); *cf.* MODEL PENAL CODE § 5.03 (1985) (codifying and extending common-law conspiracy). The Model Penal Code defines conspiracy as an agreement to engage in crime coupled with an overt act in furtherance of the crime. MODEL PENAL CODE § 5.03 (1985). If the crime that is the object of the agreement is a first or second degree felony, however, the Model Penal Code does not require an overt act in furtherance of the crime. *Id.*; *see infra* notes 27-38 (discussing statutory overt act requirement of conspiracy).

2. *See* 16 AM. JUR. 2D *Conspiracy* § 21 (1979 & Supp. 1987) (noting that state court has jurisdiction to prosecute criminal conspiracy when either agreement or overt act in furtherance of conspiracy occurs within state); 15A C.J.S. *Conspiracy* § 83 (1967 & Supp. 1987) (noting that indictment for conspiracy is sufficient to confer jurisdiction on state court if indictment alleges that either agreement or act in furtherance of conspiracy occurred within state). Criminal jurisdiction, like civil jurisdiction, is of two types. *See* 22 C.J.S. *Criminal Law* § 107 (1961 & Supp. 1987) (discussing criminal jurisdiction). To try a case, the court must have both subject matter jurisdiction over the crime and personal jurisdiction over the defendant. *Id.* §§ 127-48. Interstate telephonic conspiracies, which are the subject of this article, present problems of subject matter jurisdiction to courts. State extradition statutes govern the courts' personal jurisdiction over the conspirators in any conspiracy. *Id.*

3. *See* Hyde v. United States, 225 U.S. 347, 361 (1912) (noting that, when location of conspiratorial agreement is unknown, assertion of jurisdiction is problematic); *infra* notes 23-27 and accompanying text (discussing inapplicability of common-law territorial jurisdiction to interstate telephonic conspiracies). The dearth of case law on the jurisdictional question which interstate telephonic conspiracies present suggests that state courts generally assume jurisdiction over interstate telephonic conspiracies without addressing the courts' power to do so. A

criminal jurisdictional principles are territorial in nature, and dictate that each state has jurisdiction only over crimes that occur within the state's boundaries.[4] In the interstate telephone hypothetical, the agreement that constitutes the crime of conspiracy occurs in the telephone wires between the two states.[5] Thus, the traditional method of determining jurisdiction under territorial principles is not directly applicable to interstate telephonic conspiracies.[6] Solving this jurisdictional problem requires adoption of a nonterritorial principle on which to base criminal jurisdiction for interstate conspiracies.[7] An analysis of the states' interests in asserting jurisdiction over conspiracies and of the defendants' due process interests suggests as a solution to the jurisdictional problem a departure from common-law territorial jurisdictional principles and adoption of a protective approach to jurisdiction.[8] Under a protective approach to jurisdiction, the state or states

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defendant, however, may not waive or consent to a court's inappropriate assertion of criminal jurisdiction over a crime that the court does not have the authority to decide. *See, e.g.*, Harris v. State, 46 Del. 111, ____, 82 A.2d 387, 388 (1951) (noting that court cannot proceed to hear case without validly asserting subject matter jurisdiction over crime); State v. Fisher, 270 N.C. 315, 318, 154 S.E.2d 333, 336 (1967) (same); State *ex rel.* Lea v. Brown, 166 Tenn. 669, ____, 64 S.W.2d 841, 848 (1933) (same), *cert. denied* 292 U.S. 638 (1934). *See generally* 21 AM. JUR. 2D *Criminal Law* § 339 (1981 & Supp. 1987) (noting that defendant may not consent to subject matter jurisdiction over crimes that are not properly before court).

4. *See* Berge, *Criminal Jurisdiction and the Territorial Principle*, 30 MICH. L. REV. 238, 238-69 (1931) (discussing territorial principle of criminal jurisdiction); Levitt, *Jurisdiction Over Crimes*, 16 J. CRIM. L. & CRIMINOLOGY 316, 316-37 (1925) (same); Perkins, *The Territorial Principle in Common Law*, 22 HASTINGS L. J. 1155, 1155-72 (1971) (same); *infra* notes 10-22 and accompanying text (same). *See generally* 21 AM. JUR. 2D *Criminal Law* § 343 (1981 & Supp. 1987) (discussing common-law criminal jurisdiction principles that vest state in which crime occurred with jurisdiction over offense); 22 C.J.S. *Criminal Law* § 133 (1961 & Supp. 1987) (same).

5. *See* Hyde v. United States, 225 U.S. 347, 359 (1912) (noting that gist of conspiracy is agreement); Dealy v. United States, 152 U.S. 539, 547 (1894) (noting that gist of conspiracy is conspiratorial agreement); 16 AM. JUR. 2D *Conspiracy* § 10 (1979 & Supp. 1987) (noting that place where agreement occurs is situs of offense of criminal conspiracy); 15A C.J.S. *Conspiracy* § 36 (1967 & Supp. 1987) (same). *See generally* LAFAVE, *supra* note 1, § 6.4(d) (discussing agreement as gist of conspiracy offense).

6. *See infra* notes 23-28 and accompanying text (discussing territorial principle of criminal jurisdiction).

7. *See* LAFAVE, *supra* note 1, § 2.9(c) (discussing non-territorial bases for criminal jurisdiction); Berge, *supra* note 4, at 264-68 (discussing protective principle of jurisdiction); George, *Extraterritorial Application of Penal Legislation*, 64 MICH. L. REV. 609, 613-38 (1966) (discussing nonterritorial approaches to criminal jurisdiction); *infra* notes 82-107 and accompanying text (discussing nonterritorial, protective approach to criminal jurisdiction over interstate telephonic conspiracies); *cf.* Note, *Jurisdiction Over Interstate Felony Murder*, 50 U. CHI. L. REV. 1431, 1447-57 (1983) (discussing application of nonterritorial principles of criminal jurisdiction to interstate felony murders).

8. *See* State v. Mueller, 44 Wis. 2d 387, 395, 171 N.W.2d 414, 418 (1969) (holding that statute regulating marriage of divorced father with in-state dependents could have extraterritorial effect). In *State v. Mueller* the Wisconsin Supreme Court noted that, in determining whether a statute can have extraterritorial effect, a court should balance the legitimate protectible interests of a state against inconvenience to the accused and invasion upon the sovereignty of sister states. *Id.*; *see* Note, *supra* note 7, at 1450 n.104 (noting that courts apply interest

threatened by the object of the conspiracy can assert jurisdiction over the conspiracy, regardless of where the conspirators formed the agreement.[9]

Common-law criminal jurisdiction historically has used territorial principles that limit state jurisdiction on the basis of the state's physical boundaries to determine whether a court has jurisdiction over a crime.[10] Under the territorial rationale a state has the power to condemn the acts of its citizens and of aliens while they are present within the state's

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analysis to resolve conflict of law issues, but that interest analysis is also appropriate for resolving jurisdictional issues); *infra* notes 61-81 and accompanying text (analyzing state's interests in prosecuting interstate telephonic conspiracy).

9. *See infra* notes 82-125 and accompanying text (discussing application of protective principle of jurisdiction to interstate telephonic conspiracies).

10. *See* MODEL PENAL CODE § 1.03, at 36 (1985) (discussing territorial jurisdiction); Berge, *supra* note 4, at 238-48 (discussing common-law tradition of territorial criminal jurisdiction); George, *supra* note 7, at 609-12 (same); Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 HARV. L. REV. 193, 193-201 (1932) (same); Levitt, *supra* note 4, at 316-29 (same); Perkins, *supra* note 4, at 1155-63 (same); Rotenberg, *Extraterritorial Legislative Jurisdiction and the State Criminal Law*, 38 TEX. L. REV. 763, 773 (1960) (same); Note, *supra* note 7, at 1433-36 (same). *See generally* 21 AM. JUR. 2D *Criminal Law* § 343 (1981 & Supp. 1987) (discussing territorial principles of jurisdiction); 22 C.J.S. *Criminal Law* § 133 (1961 & Supp. 1987) (same).

The development of a territorial theory of criminal jurisdiction began in the earliest days of British civilization, when the overriding concern of the government was keeping the peace. *See* Perkins, *supra* note 4, at 1157 (discussing origins of territorial principle). The law in early England characterized all crimes as violations of the Crown's peaceful property, and thus, all trials took place in the Crown's dominion. *See* MODEL PENAL CODE § 1.03, at 37 (discussing reasons for development of territorial principle). Additionally, the criminal system relied on a trial by jurors who had knowledge of the crime, and therefore, the trial logically took place where the crime occurred. *Id.* One commentator has suggested that the historic foundation for the territorial principle has three elements. Levitt, *supra* note 4, at 325-28. First, primitive religious notions of deities that controlled specific areas of life evolved into the concept that a ruler only can punish a crime where it occurs. *Id.* at 325. Second, within the ancient societies the community had responsibility for its own offenders. *Id.* at 326. The community was responsible for the acts of its members, and the physical boundaries of a group's territory determined who was in which group. *Id.* Finally, the development of the concept of trial by jury was very important to the evolution of the territorial principle. *Id.* at 327. In ancient trials, the jurors were the witnesses and testified about facts and events about which they had personal knowledge. *Id.* The jurors represented the community, and the responsibility of the community stopped at its boundary lines. *Id.* Therefore, criminal jurisdiction also stopped at the boundary line. *Id.*

Territorial jurisdiction is one of several types of international jurisdictional principles. *See* Perkins, *supra* note 4, at 1155 (listing four different theories of international criminal jurisdiction). *See generally* Harvard Law School Research in International Law, *Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435 (Supp. 1935) (discussing international theories of criminal jurisdiction). Most courts define four principles of jurisdiction: territorial, nationality, protective, and universality. *Id.* at 445. The territoriality principle determines jurisdiction on the basis of the physical boundaries of the sovereign. *Id.* The nationality principle determines jurisdiction on the basis of the offender's citizenship. *Id.* The protective principle examines the national interest that the offense injured, and the universality principle provides for jurisdiction on the basis of which country has custody of the offender. *Id.*

boundaries.[11] Conversely, the criminal laws of a state have no extraterritorial effect.[12] One state may not enforce the laws of another state, nor may any state enforce its own laws if a criminal breaks the laws outside the state's physical boundaries.[13] The territorial rationale for assigning jurisdiction derives from the state's interest in controlling conduct and maintaining the peace and dignity of conduct within the state.[14]

Applying the territorial principle of criminal jurisdiction to a specific crime requires that a court determine exactly where the crime occurred.[15] Many crimes, however, consist of several elements, the commission of which may have occurred in several states.[16] For example, a defendant may fatally wound his victim in one state, but the victim may die in another state.[17] The murder appears to have occurred partially in both states, with neither state having a complete murder to prosecute.[18] Many courts have adapted the common-law territorial approach to complex crimes such as murder by selecting a particular element of the crime that represents the gist of the

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11. *See supra* note 4 and accompanying text (discussing territorial principle at common law).

12. *Id.*

13. *See id.*(discussing common-law territorial principle of jurisdiction). *But see infra* notes 82-117 and accompanying text (noting that some state courts and legislatures have recognized nonterritorial bases for criminal jurisdiction).

14. *See* Levitt, *supra* note 4, at 325-29 (discussing historical and metaphysical bases for territorial jurisdiction); *supra* note 10 (noting historical foundations for territorial principle).

15. *See* Berge, *supra* note 4, at 242 (noting that application of territorial principle requires that each crime occur in definite place); Levitt, *supra* note 4, at 325 (same); Perkins, *supra* note 4, at 1157, 1159 (same); Note, *supra* note 7, at 1434 (same).

16. *See* Note, *supra* note 7, at 1434 n. 23 (listing complex crimes that frustrate application of territorial principle of jurisdiction). Embezzlement is an example of a crime that is difficult to locate in one place. *Id.* Often a criminal in one place will induce a victim in a different place to send money to the embezzler. *Id.* When the embezzler spreads the embezzlement between two places, the law considers the embezzlement to have occurred in the victim's location, where the embezzler breached the victim's trust. *Id.*

17. *See* 4 BLACKSTONE, COMMENTARIES *303 (noting problem confronting grand jurors when crime occurred in more than one state). A murder, the elements of which occurred in two states, was the jurisdictional problem that presented the initial impetus for expanding the territorial principle. *Id.* The jury in the state where the fatal blow occurred had no body to examine to see if a death occurred, and the jury in the state where the body lay had no evidence of the fatal blow. *Id.* Therefore, neither state could prosecute the offender. *Id.*; *see* Perkins, *supra* note 4, at 1157 (discussing jurisdiction over murder that occurred in two states).

18. *See supra* notes 16-17 (discussing jurisdiction over murder when murder occurred in two separate states). The most famous case in which strict application of the territorial theory worked an injustice occurred in North Carolina and Tennessee. State v. Hall, 114 N.C. 909, 19 S.E. 602 (1894); State v. Hall, 115 N.C. 811, 20 S.E. 729 (1894). The defendant, while standing in North Carolina, fired his gun and killed the victim, who was over the state line in Tennessee. State v. Hall, 114 N.C. at ____, 19 S.E. at 602. North Carolina attempted to prosecute the defendant first, but the conviction was reversed because the fatal force had its effect in Tennessee. *Id.* at ____, 19 S.E. at 604. Tennessee then attempted to prosecute the defendant. State v. Hall, 115 N.C. at 811, 20 S.E. at 729. Because the defendant was in North Carolina, however, and never entered Tennessee, Tennessee could not seek extradition of the defendant from North Carolina. *Id.* at ____, 20 S.E. at 730. Under the extradition statute a defendant must be a fugitive from the demanding state for valid extradition. *Id.*

offense.[19] The gist of the offense, also referred to as the gravamen of the offense, is the most important element of the crime.[20] Under the common-law territorial approach to jurisdiction, the place where the gist of the offense occurred determines jurisdiction.[21] Although this technique for determining jurisdiction is often arbitrary because it forces the court to designate one element of the offense as the most important, commentators have praised the rule for its clarity and ease of application.[22]

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19. *See* Perkins, *supra* note 4, at 1158 (discussing gist of offense principle); Note, *supra* note 7, at 1432, 1434 (same). Some common offenses that courts have reduced to one element for jurisdictional purposes include robbery, which courts have deemed to occur where the thief takes the property. Note, *supra* note 7, at 1434 n. 23. Embezzlement occurs where defendant breaches trust, bigamy occurs where the second marriage takes place, and libel occurs at the place of circulation rather than publication of the libelous material. *Id.*

To solve the jurisdictional problem that complex crimes such as embezzlement present to the courts, many states have enacted legislation that codifies the common-law territorial principles of jurisdiction, but which also provides the courts with greater flexibility to apply the rule to some of the recognized trouble situations. *See* MODEL PENAL CODE § 1.03 at 39-40 (1985) (discussing and listing state criminal jurisdiction statutes); ARIZ. REV. STAT. ANN. § 13-108 (1978) (codifying territorial principle of jurisdiction); KY. REV. STAT. ANN. § 500.060 (Michie/Bobbs-Merrill 1985) (same); *see also* Berge, *supra* note 4, at 248-59 (discussing modern criminal jurisdiction statutes); Note, *supra* note 7, at 1436-39 (same).

20. *See supra* note 19(discussing gist of offense approach to territorial jurisdiction).

21. *Id.*

22. *See* Note, *supra* note 7, at 1435 (noting that territorial principle is clear rule). Although the territorial rule appears clear, when courts apply the rule they frequently use a number of legal fictions to adapt the rule to different situations. *See* Berge, *supra* note 4, at 248-59 (discussing legal fictions associated with territorial jurisdiction); Levitt, *supra* note 4, at 333 (same); Note, *supra* note 7, at 1435 (same); *see also* MODEL PENAL CODE § 1.03, at 39 n.9 (1985) (discussing extension of strict territorial rule through legal fictions); 21 AM. JUR. 2D *Criminal Law* §§ 344-53 (1981 & Supp. 1987) (noting exceptions to territorial rule); 22 C.J.S. *Criminal Law* § 134 (1961 & Supp. 1987) (same). The most common legal fictions that courts use in jurisdictional questions are constructive presence and continuing offense. The theory of constructive presence provides that a defendant need not be physically present within a state if his actions set in motion a force that has an effect within the state. *See* Grayson v. United States, 272 F. 553, 557 (6th Cir.) (holding that defendant was constructively present within state when he caused liquor illegally to enter state by placing liquor on train going to state), *cert. denied*, 257 U.S. 637 (1921). The continuing offense theory, which courts frequently apply to the crime of conspiracy, provides that an offense does not end when the defendants complete all the elements, but rather the offense continues with each additional act by the defendant. *See* Lucas v. United States, 275 F. 405, 406 (8th Cir. 1921) (holding that conspiracy continues in any state in which defendants act to execute their plan), *cert. denied*, 258 U.S. 620 (1922). Some courts have been very creative in their attempts to make a crime fit the territorial theory. *See* State v. Devot, 66 Utah 319, ____, 242 P. 395, 397 (1925) (holding that innocent party to fraudulent scheme was agent of defendant for purposes of providing state with jurisdiction). In *State v. Devot* the defendant, while in California, fraudulently induced a victim in Utah to wire money to the defendant in California. *Id.* The Supreme Court of Utah held that the telegraph agent, who received the money from the victim in Utah, was the agent of the defendant and delivery of the money to the agent was delivery to the defendant. *Id.* Therefore, although the defendant had never been in Utah, the court deemed him to have received the money in Utah and held that the fraud took place in Utah. *Id.*

Some commentators criticize the use of legal fictions to extend the application of the territorial rule because the use of fictions places too much discretion in the hands of the court.

Despite the apparent clarity and simplicity of the territorial approach, however, the territorial approach does not solve the question of jurisdiction over an interstate telephonic conspiracy.[23] The gist of a criminal conspiracy is the agreement.[24] The agreement in an interstate telephonic conspiracy, however, does not occur in a discernible place, but rather in the telephone wires between the two conspirators. Therefore, to apply the territorial principle to interstate telephone conspiracies, courts must attach jurisdictional significance to an element of the conspiracy other than the agreement.[25] A common-law conspiracy has no element other than the agreement to engage in unlawful activity.[26] Many states, however, have added to the definition of conspiracy the requirement that one or more of the conspirators perform an overt act in furtherance of the conspiracy.[27] The overt act element of statutory conspiracy conceivably could provide courts with an element other than the agreement with which to establish jurisdiction over interstate telephonic conspiracies consistently with territorial principles.[28]

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*See* Berge, *supra* note 4, at 242 (criticizing extensive use of legal fiction in area of criminal jurisdiction); Levitt, *supra* note 4, at 333 (same); Note, *supra* note 7, at 1443 (same). Additionally, critics claim that legal fictions mask the general insufficiency of the territorial approach to criminal jurisdiction. *See* Berge, *supra* note 4, at 242 (criticizing extensive use of legal fiction in area of criminal jurisdiction); Levitt, *supra* note 4, at 333 (same); Note, *supra* note 7, at 1443 (same).

23. *See infra* notes 24-28 and accompanying text (noting that common-law territorial principles do not solve jurisdictional problem of interstate telephonic conspiracies).

24. *See supra* note 5 and accompanying text (noting that in criminal conspiracy agreement is gist of offense).

25. *See infra* notes 27-38 and accompanying text (discussing courts' use of overt act element to determine jurisdiction of conspiracies when location of agreement is unknown or unclear).

26. *See* Hyde v. United States, 225 U.S. 347, 357-59 (1912) (noting that common-law conspiracy is complete when conspirators form agreement); LAFAVE, *supra* note 1, § 6.4(d) (noting that common-law criminal conspiracy is complete upon agreement among conspirators); WHARTON'S CRIMINAL LAW, *supra* note 1, § 721 (same); Developments in the Law, *Criminal Conspiracy*, 72 HARV. L. J. 920, 945-46 (1959) (same); 16 AM. JUR. 2D *Conspiracy* §§ 1-2 (1979 & supp. 1987) (same); 15A C.J.S. *Conspiracy* §§ 34-35 (1967 & Supp. 1987) (same); *see also supra* note 5 (noting that gist of conspiracy is unlawful agreement). *See generally* G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 663-713 (2d ed. 1961) (discussing conspiracy); Pollack, *Common Law Conspiracy*, 35 GEO. L. J. 328 (1947) (same). In common-law conspiracy the agreement to engage in crime is the *actus reus*, and the intent to engage in crime is the *mens rea*. LAFAVE, *supra* note 1, § 6.4(d).

27. *See, e.g.*, Ala. Code § 13A-4-3(a) (1982) (requiring overt act for criminal conspiracy); ARK. STAT. ANN. § 41-707(2) (1977) (same); COLO. REV. STAT. § 18-2-201(2) (1986) (same); *see also* MODEL PENAL CODE § 5.03(5) (1985) (requiring overt act in furtherance of conspiracy unless object of conspiracy is first or second degree felony); WHARTON'S CRIMINAL LAW, *supra* note 1, § 728 (discussing overt act requirement); Developments in the Law, *supra* note 26, at 945-49 (discussing overt act requirements in conspiracy statutes). Like many state statutes, the federal conspiracy statute requires an overt act for an indictable conspiracy. Hyde v. United States, 225 U.S. 347, 359 (1912) (noting that agreement is foundation of offense, but overt act completes offense).

28. *See infra* notes 29-38 and accompanying text (discussing courts' use of overt act as element on which to base jurisdiction of conspiracies when location of agreement is unknown).

Current case law suggests that, in states with and without overt act requirements, courts have used the commission of an overt act to resolve the jurisdictional question that interstate telephonic conspiracies present.[29] The common law regards an overt act that any one of the members of a conspiracy committed as an act that all of the members of the conspiracy committed.[30] Moreover, courts consider the overt act to be a renewal of the agreement itself.[31] Therefore, if one of the conspirators within a state committed an overt act in furtherance of the conspiracy, a court will regard all of the conspirators as having repeated the entire conspiratorial agreement in the same state.[32] Accordingly, any state in which a conspirator acts in furtherance of a conspiracy has jurisdiction over the conspiracy.[33] A court in the state where a conspirator has acted need not determine the location of the original conspiratorial agreement itself.[34] Additionally, because the vicarious liability of coconspirators is a common-law principle that exists independently of any statutory overt act requirement, any state may use the overt act analysis to determine jurisdiction consistently with territorial principles.[35] Even if an overt act is not part of a particular state's definition of conspiracy, an overt act within the state gives the state jurisdiction over the conspiracy through the principle of vicarious liability.[36] If, however, the

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29. *See, e.g.,* Carter v. State, 418 A.2d 989, 992 (Del. 1980) (noting that entry of defendants into state was overt act in furtherance of conspiracy that defendants formed outside state, and thus, state had jurisdiction over conspiracy); State v. Overton, 60 N.C. App. 1, 36, 298 S.E.2d 695, 716 (1982) (holding that court had jurisdiction over conspiracy when overt act occurred in state, regardless of where conspirators formed agreement); State v. Davis, 203 N.C. 13, 32, 164 S.E. 737, 747 (noting that court has jurisdiction over conspiracy if conspirators formed agreement in state, or if act in furtherance of conspiracy occurred in state), *cert. denied*, 287 U.S. 649 (1932).

30. *See* Blumenthal v. United States, 332 U.S. 539, 557-58 (1947) (noting that conspirators are vicariously liable for acts of their coconspirators); Bannon v. United States, 156 U.S. 464, 468-69 (1895) (same); MODEL PENAL CODE § 1.03 at 49-50 (same); LAFAVE, *supra* note 1, § 6.5(c) (same); 15A C.J.S. *Conspiracy* §§ 73-74 (1961 & Supp. 1987) (same).

31. *See supra* note 30 and accompanying text (discussing principle that each conspirator is responsible for acts of coconspirators).

32. *See id.* (discussing principle of vicarious liability of coconspirators).

33. *See* Rivera v. United States, 57 F.2d 816, 819 (1st Cir. 1932) (noting that location of conspiracy is immaterial provided overt act occurs within court's jurisdiction); State v. Davis, 203 N.C. 13, 32, 164 S.E. 737, 747 (noting that state in which acts or agreement occur has jurisdiction over conspiracy), *cert. denied*, 287 U.S. 649 (1932); *see also* 16 AM. JUR. 2D *Conspiracy* § 21 (1981 & Supp. 1987) (noting that jurisdiction will lie where acts occur regardless of where conspirator formed agreement); 15A C.J.S. *Conspiracy* § 83 (1961 & Supp. 1987) (same); 22 C.J.S. *Criminal Law* § 136(i) (1967 & Supp. 1987) (same).

34. *See supra* note 33 and accompanying text (state where conspirator acts has jurisdiction over conspiracy even if location of agreement is unknown).

35. *See* LAFAVE, *supra* note 1, § 6.5 (noting that coconspirators are vicariously liable for all acts that each conspirator commits in furtherance of conspiracy).

36. *See* United States v. Mayo, 721 F.2d 1084, 1089 (7th Cir. 1983) (noting that overt act within state boundaries grants jurisdiction to prosecute conspiracy regardless of whether conspiracy statute requires overt act); United States v. Williams, 589 F.2d 210, 213 (5th Cir. 1979) (noting that, although conspiracy statute requires overt act, proof that overt act occurred

state conspiracy statute does require an overt act, the commission of the act outside the state does not deprive the state of jurisdiction over the conspiracy, provided the conspirators formed the initial agreement within the state.[37] Thus, by focusing on the location of an overt act, courts may assert jurisdiction over a conspiracy consistently with territorial principles if the agreement occurs within the state, or, if the location of the agreement is unknown, if an overt act in furtherance of the agreement occurs within the state.[38]

Although courts use the commission of an overt act to aid in establishing jurisdiction over conspiracies when the location of the agreement is unclear or unknown, the validity of this technique is questionable.[39] If courts are going to attribute jurisdictional significance to the overt act requirement, the overt act should be a substantively important part of the crime of conspiracy. Whether the additional overt act requirement has substantive significance to the crime of conspiracy, however, never has been clear.[40]

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within state is not required for assertion of jurisdiction); State v. Pooler, 141 Me. 274, ____, 43 A.2d 353, 358 (1945) (noting that prosecution may occur where acts in furtherance of conspiracy occur, regardless of whether statute requires overt act).

37. *See* State v. Pooler, 141 Me. 274, ____, 43 A.2d 353, 358 (1945) (holding that state where conspirators form conspiracy has jurisdiction, even if required overt act element occurs outside state).

38. *See supra* notes 29-37 and accompanying text (discussing courts' use of overt act element to establish jurisdiction over conspiracies).

39. *See infra* notes 40-55 and accompanying text (discussing validity of use of overt act to determine jurisdiction).

40. *See* Developments in the Law, *supra* note 26, at 964 (noting that intent of legislatures in including overt act requirement is subject of debate among courts and legal scholars). The formation of an agreement is an event that rarely produces physical evidence. *Id.* Usually, prosecutors can prove the existence of a conspiracy only by demonstrating that the conspirators' actions imply a previous agreement. *Id.* Because prosecutors usually must prove a conspiratorial agreement by inference rather than by direct evidence, many prosecutors included proof of an overt act in their cases before grand juries. *Id.* Thus, the statutory overt act requirement merely may have reflected the prosecutor's practices at the time that the legislators drafted the conspiracy statute. *Id.* Dicta in an early United States Supreme Court opinion suggested that the overt act merely was a *locus penitentiae* that gave the conspirators an opportunity for withdrawing from the conspiracy before their criminal liability attached. United States v. Britton, 108 U.S. 199, 204 (1883). In a later case, the United States Supreme Court interpreted the overt act requirement as an element of the offense that consummates the guilt of the conspirators, and also provides a ready method for determining proper venue for conspiracy trials. Hyde v. United States, 225 U.S. 347, 359 (1912). *See generally* MODEL PENAL CODE § 5.03 at 452-53 (discussing function of overt act requirement); LAFAVE, *supra* note 1, § 6.5(c) (same).

Courts agree that the overt act need not be criminal. *See* Yates v. United States, 354 U.S. 298, 333-34 (1957) (noting that overt act in furtherance of conspiracy need not be criminal act); Braverman v. United States, 317 U.S. 49, 53 (1942) (same); Developments in the Law, *supra* note 26, at 946 (noting that overt act need not be criminal, and may be very insignificant). The commission of one overt act is sufficient to complete the conspiracy for all the conspirators. Bannon v. United States, 156 U.S. 464 (1895). Some state statutes require the act to be a substantial step towards the object of the conspiracy. *See, e.g.*, ME. REV. STAT. ANN. tit. 17-A, § 151(4) (1983) (requiring substantial step toward contemplated crime); OHIO REV. CODE

Some courts have interpreted the overt act as an additional substantive element of the offense that is necessary to hold the conspirators culpable, while other courts have considered the overt act merely as proof of the existence of a criminal agreement.[41] In the most recent United States Supreme Court decision on the issue, the Court interpreted the overt act requirement as an element of proof that merely demonstrates the conspiratorial agreement, rather than a separate element of the crime that is necessary for criminal culpability.[42] Despite the Supreme Court's decision, however, some commentators argue that an overt act requirement manifests the state legislatures' opinion that the common-law crime of conspiracy, which consists only of an agreement, is no longer a sufficient basis for criminal prosecution.[43] Because the courts and legislatures have not resolved the criminal significance of the overt act requirement, the overt act should not be a jurisdictionally significant element of the crime of conspiracy.

Although the state courts' use of the overt act requirement to establish jurisdiction is questionable because the approach attaches jurisdictional significance to a relatively insignificant act, the state courts appear to have adopted the approach from the federal court system.[44] The United States Supreme Court explicitly has encouraged the use of overt acts to determine the location for federal conspiracy trials.[45] In the federal system, however,

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ANN. § 2923.01(B) (Baldwin 1986) (same); WASH. REV. CODE § 9A.28.040(1) (1988) (same); *see also* LAFAVE, *supra* note 1, § 6.5(c) (noting that some states require overt act to be substantial step toward completion of planned crime).

41. *See* Developments in the Law, *supra* note 26, at 947 (discussing overt act element as element of proof). The majority and dissenting opinions of the United States Supreme Court in *Hyde v. United States* reflect the two sides to the debate over the function of the overt act requirement. Hyde v. United States, 225 U.S. 347, 357-60 (1912); *id.* at 387-91 (Holmes, J., dissenting). The majority in *Hyde v. United States* reasoned that the overt act was necessary for and completed the offense. *Id.* at 359. Therefore, according to the majority, the overt act was more than evidence of the conspiratorial agreement; the overt act consummated the conspiracy. *Id.* Justice Holmes dissented from the view of the majority and reasoned that the overt act is simply evidence that the conspiracy has "passed beyond words." *Id.* at 389. According to the Holmes dissent, the act is no more a part of the crime than is the existence of an unexpired statute of limitations. *Id.*

42. Yates v. United States, 354 U.S. 298, 334 (1957).

43. *See* MODEL PENAL CODE § 1.03 at 39, § 5.03 at 452-53 (1985) (discussing view that overt act requirement reflects legislatures' opinion that agreement alone is not enough to warrant penal sanctions); LAFAVE, *supra* note 1, § 6.5(c) (same); Developments in the Law, *supra* note 26, at 948 (same); *see also* People v. George, 74 Cal. App. 440, ____, 241 P. 97, 104 (1925) (noting that agreement alone is not enough to warrant prosecution).

44. *See* State v. Pooler, 141 Me. 247, ____, 43 A.2d 353, 358 (1945) (citing federal cases in support of state assertion of jurisdiction on basis of overt act); State v. Davis, 203 N.C. 13, 32, 164 S.E. 737, 747 (same), *cert. denied*, 287 U.S. 649 (1932); State v. Harrington, 128 Vt. 242, ____, 260 A.2d 692, 698 (1969) (noting that federal method of locating trials wherever overt act occurs should apply to state jurisdiction); Rios v. State, 733 P.2d 242, 245 (Wyo.) (noting that state courts have applied federal venue principles to state jurisdictional issues), *cert. denied*, 108 S. Ct. 108 (1987); *see also* Developments in the Law, *supra* note 26, at 978 (noting that state jurisdiction principles parallel federal venue principles).

45. *See* Hyde v. United States, 225 U.S. 347, 361-62 (1912) (noting that courts can use overt act element of conspiracy to establish venue when location of agreement is unclear or unknown).

courts use the overt act to decide proper venue for a trial, rather than jurisdiction over an offense.[46] The concepts of venue and jurisdiction are fundamentally different.[47] When a federal court attempts to decide in which state a crime occurred, the court is not deciding whether it has the authority to hear the case, but rather which court in the federal system is the appropriate forum for resolving the case.[48] The proper venue for a trial is largely a procedural issue, in which the primary concerns are the convenience of the forum for the government and the defendant.[49] Therefore, the federal court may be warranted in using an insignificant action by a conspirator as a convenient, perhaps arbitrary means of deciding the forum for the trial.[50]

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46. *See* Rios v. State, 733 P.2d 242, 245 (Wyo.) (noting that sixth amendment to United States Constitution applies to federal venue provisions, rather than jurisdictional provisions), *cert. denied*, 108 S. Ct. 108 (1987).

47. *See* Lane v. State, 388 So. 2d 1022, 1026 (Fla. 1980) (noting that courts must not confuse venue and jurisdiction, and that venue cases are inapplicable to jurisdiction cases); State v. Baldwin, 305 A.2d 555, 558 (Me. 1973) (noting that a vast difference exists between policy considerations governing venue and jurisdiction); George, *supra* note 7, at 610 (distinguishing venue and jurisdiction); Levitt, *supra* note 4, at 330 (same); 21 AM. JUR. 2D *Criminal Law* § 336 (1981 & Supp. 1987) (same).

48. *See* 21 AM. JUR. 2D *Criminal Law* § 361 (1981 & Supp. 1987) (discussing difference between venue and jurisdiction).

49. *See* United States v. Mayo, 721 F.2d 1084, 1091 (7th Cir. 1983) (holding that defendant's arrival in district was overt act that established proper venue). The United States Court of Appeals for the Seventh Circuit in *United States v. Mayo* noted that determining venue on the basis of mere overt acts might provide the federal government with dangerous power to locate trials in districts that are unfair to the defendant. *Id.* The court noted, however, that many criminals would escape prosecution entirely if the government could locate trials only where conspirators formed the agreement. *Id.* The *Mayo* court concluded, therefore, that courts must base their assertion of venue in conspiracy cases on overt acts because otherwise defendants might escape prosecution completely. *Id.*; *see* 21 AM. JUR. 2D *Criminal Law* § 361 (1981 & Supp. 1987) (noting that venue is largely procedural question). The concern that conspiracy defendants might escape prosecution entirely is not a valid one for states, however, because one state's refusal to assume jurisdiction does not affect another state's ability to assert jurisdiction. *See* LAFAVE, *supra* note 1, § 2.9(d) (noting that, under the separate sovereign principle, double jeopardy does not attach to criminal trials for the same act in different states).

50. *See* Hyde v. United States, 225 U.S. 347, 363 (1912) (noting that use of overt act to determine venue is solution to problem of conspiracy formed in unknown place); United States v. Strickland, 493 F.2d 182, 187 (5th Cir. 1974) (holding that telephone calls into district are overt acts sufficient to sustain venue in that district). A federal statute provides that, for any offense which defendants perpetrate through use of the mails or transportation in interstate commerce, venue is proper in any district from, through, or into which the commerce or mail moves. 18 U.S.C. § 3237 (1985). Courts have applied the statute to crimes involving interstate telephone calls. *See* United States v. Spiro, 385 F.2d 210, 212 (7th Cir. 1967) (citing cases in which courts have applied federal statute to telephone calls). Therefore, the United States could prosecute an interstate telephonic conspiracy in either the district in which the call originated, or the district in which the call was received. *See* State v. Whitaker, 372 F. Supp. 154, 158 (M.D. Pa. 1974) (holding that venue of trial for conspiracy to operate illegal gambling business could be in district where each defendant had placed or received calls), *cert. denied*, 419 U.S. 1113 (1975).

In contrast with the federal venue question, however, the question of a state court's jurisdiction over a conspiracy is substantive.[51] In deciding whether a state court has jurisdiction over a crime, the court is deciding whether it has an interest in prosecuting the crime.[52] If the only act that occurred wholly within the state is a relatively insignificant and often completely legal overt act by a conspirator, the state's interest in punishing that act is minimal.[53] On the other hand, a conspiracy may pose grave danger to a state in which no overt act occurred.[54] Therefore, the location of the overt act does not necessarily determine which state or states are threatened by the conspiracy, and so the territorial principle is not a rational means of determining jurisdiction over conspiracies.[55]

Although the overt act approach to interstate telephonic conspiracies may be inappropriate in the context of state trials, the approach provides courts with a pragmatic solution to jurisdictional problems.[56] Courts can resolve the question of jurisdiction over interstate telephonic conspiracies consistently with the territorial principles of the common law by applying the overt act analysis.[57] Additionally, the overt act rule is easy to apply, provided a conspirator committed an overt act.[58] Although pragmatic, the territorial approach is limited to protecting a state's interest in preserving the peace and dignity of life within the state's boundaries and, therefore, disregards other interests that a state has in prosecuting conspiracies.[59]

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51. *See* 21 AM. JUR. 2D *Criminal Law* § 361 (1981 & Supp. 1987) (discussing state jurisdictional concerns).

52. *See* Lane v. State, 388 So. 2d 1022, 1026 (Fla. 1980) (noting that jurisdiction is power of state to exert influence of its courts over defendant); George, *supra* note 7, at 611 (discussing common tendency of courts to confuse concepts of venue and jurisdiction).

53. *See* Carter v. State, 418 A.2d 989, 992 (Del. 1980) (holding that mere act of returning to state was overt act sufficient to confer jurisdiction on state court); *see also* Developments in the Law, *supra* note 26, at 978 (noting that state in which act occurs may have minimal interest in prosecuting conspiracy).

54. *See* Developments in the Law, *supra* note 26, at 978 (conspiracy may endanger state although no act occurs within state); *cf.* Note, *supra* note 7, at 1441 (analyzing jurisdiction over felony murder and noting that location of crime does not necessarily correspond with state's interest in prosecuting crime).

55. *See supra* notes 39-54 and accompanying text (noting that courts' use of overt act element of conspiracy to establish jurisdiction when location of agreement is unknown does not serve states' interests in prosecuting conspiracies).

56. *See infra* notes 57-58 and accompanying text (noting that overt act approach to jurisdiction is pragmatic).

57. *See supra* notes 29-38 (discussing courts' use of overt act analysis to determine jurisdiction over interstate conspiracies consistently with common-law territorial principle).

58. *See* Hyde v. United States, 225 U.S. 347, 361 (1912) (noting that, by pinning jurisdiction on overt act, courts eliminate issue of where conspiratorial agreement took place). *But see supra* note 22 and accompanying text (discussing courts' use of legal fictions to make territorial principle fit crimes).

59. *See* George, *supra* note 7, at 626 (noting that territorial principle insufficiently addresses state's interests and needs reform); Levitt, *supra* note 4, at 333-35 (noting that mechanical application of territorial principle may disregard legitimate state interests); Note, *supra* note 7, at 1443 (noting that limiting jurisdiction to serve only territorial interests is

Ideally, a state's exercise of jurisdiction should serve all of the state's interests in prosecuting conspiracies.[60]

A state has two broad goals in asserting jurisdiction over and prosecuting crimes.[61] First, a state has an interest in controlling the conduct of the people within its boundaries, and thus, maintaining the peace and dignity within the state.[62] Second, the state has an interest in protecting itself and its citizens from threatened harm from any source.[63] A criminal conspiracy may threaten both of the state's interests.[64] First, a conspiracy injures the peace within a state as soon as the conspiracy forms.[65] A state has an interest in preventing people from conspiring within its boundaries, just as a state has an interest in preventing people from fighting within its boundaries.[66] When conspirators form a conspiracy within a state, the conspiracy has violated the need of the state to control the conduct of the people within the state, and thus, to keep the peace within the state.[67] As evidence

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logically spurious). If courts apply the territorial approach to jurisdiction to interstate telephonic conspiracies, states that do not require proof of an overt act to prove a conspiracy would be in the anomalous position of imposing a higher burden of proof for a state to assert jurisdiction than is necessary to prove the crime itself. *See* United States v. Williams, 589 F.2d 210, 212 (5th Cir. 1979) (noting that prosecutor need not prove that overt acts took place within state's boundaries, because conspiracy statute does not require overt act and, thus, court cannot require more proof for jurisdiction than for crime).

60. *See* MODEL PENAL CODE § 1.03, at 35, 40 (1985) (noting that jurisdiction should reflect interests of sovereign asserting jurisdiction, and therefore, the Model Penal Code contains nonterritorial bases for jurisdiction to prevent danger of injustice); Berge, *supra* note 4, at 243, 269 (noting that courts must adopt realistic view of modern crimes, and that courts should recognize frankly extraterritorial elements of state interests without resort to legal fiction); Note, *supra* note 7, at 1441-44 (noting that jurisdiction must reflect all interests of state, and that any state with legitimate interest in prosecuting crime should be able to assert jurisdiction over crime); *see also* Currie, *Conflict, Crisis and Confusion in New York* in SELECTED ESSAYS ON THE CONFLICT OF LAWS 690, 699-701 (1963) (noting that, if pragmatism were only concern in determining jurisdiction, all homicide trials would take place in Alaska); Note, *supra* note 7, at 1439-40 (noting that pragmatism alone is not sufficient reason to justify states' assertion of criminal jurisdiction over crime).

61. *See* Note, *supra* note 7, at 1448 (noting that interests of states in prosecuting crime are to control peace within state and to protect state and its citizens from harm); *infra* notes 62-63 and accompanying text (describing two state interests in prosecuting crime).

62. *See* Perkins, *supra* note 4, at 1155 (noting that state has interest in controlling peace and dignity within state); Note, *supra* note 7, at 1447 (same).

63. *See* Note, *supra* note 7, at 1448 (noting that interests of states in prosecuting crime are to control peace within state and to protect state and its citizens from harm).

64. *See* United States v. Feola, 420 U.S. 671, 694 (1975) (noting that conspiracy poses threat of group activity and of more successful criminal enterprises); MODEL PENAL CODE § 5.03, at 387 (1985) (noting that criminal conspiracy is crime for two reasons); *infra* notes 65-72 and accompanying text (discussing two harms that conspiracy poses to states).

65. *See* Iannelli v. United States, 420 U.S. 770, 778 (1975) (noting that conspiracy is harmful in itself, independently of threat that substantive offense poses); Dennis v. United States, 341 U.S. 494, 573 (1951) (same); Krulewitch v. United States, 336 U.S. 440, 448 (1949) (same); United States v. Rabinowich, 238 U.S. 78, 88 (1915) (same).

66. *See supra* note 65 and accompanying text (discussing danger to peace that conspiracy poses to state in which conspirators form agreement).

67. *See supra* note 62 and accompanying text (discussing need of state to control conduct within state boundaries).

of the inherent threat that the crime of conspiracy poses to states, some state statutes provide that a defendant's incapacity to commit the substantive offense that is the object of the conspiracy is not a defense to the conspiracy itself.[68]

In addition to violating the peace of a state, the formation of a conspiratorial agreement also threatens the state's second goal of protecting itself and its citizens from harm.[69] A group of people that combine their talents and resources toward an illegal end pose a greater societal threat than an individual who plans illegal acts.[70] The cumulative effort of a group increases the likelihood of ultimate criminal success.[71] Therefore, the prosecution of the crime of conspiracy is necessary not only to preserve the peace within the state but also to protect a state and its citizens from the increased danger of a successful criminal enterprise in the future.[72]

The traditional common-law territorial principle of jurisdiction protects the interest of a state in maintaining peace within the state, but does not protect the state's additional interest in protecting itself from the future harmful effects of extrastate conspiracies.[73] A state has an interest in protecting itself from harm, regardless of where the criminals initiate the harm.[74] If the goal of a conspiracy formed in Maine is to burglarize a house in California, California has an interest in prosecuting the conspiracy because the conspiracy threatens harm to California and its citizens.[75] The location of the conspiratorial agreement is irrelevant to the protective interest of a state in prosecuting the conspiracy to prevent future harm to the state or its citizens. The relevant consideration is the criminal objective that the conspirators formed the conspiracy to achieve.[76] Thus, in most cases the

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68. *See* United States v. Rabinowich, 238 U.S. 78, 86 (1915) (noting that lack of capacity to commit crime which is goal of conspiracy is not defense to conspiracy); State v. Moretti, 52 N.J. 182, ____, 244 A.2d 499, 502 (same), *cert. denied*, 393 U.S. 952 (1968). *See generally* Annotation, *Impossibility of Consummation of Substantive Crime as Defense in Criminal Prosecution for Conspiracy or Attempt to Commit Crime*, 37 A.L.R.3D 375 (1971).

69. *See* Callanan v. United States, 364 U.S. 587, 593 (1961) (noting that conspiracy threatens state by increasing likelihood that crime which is object of conspiracy will be successful); *see also supra* note 63 and accompanying text (discussing state interest in protecting itself and its citizens from harm).

70. *See supra* note 69 and accompanying text (noting that conspiracy threatens states' protective interests).

71. *Id.*

72. *Id.*

73. *See infra* notes 74-77 and accompanying text (noting that territorial principle does not allow state to protect itself from threatened harm that extrastate conspiracies pose).

74. *See* Pennington v. State, 308 Md. 727, 746, 521 A.2d 1216, 1225 (1987) (holding that state may punish defendant for obstruction of justice even though defendant's acts occurred completely outside state).

75. *But see infra* notes 120-25 and accompanying text (noting that state's interest in protecting individual citizens may be less compelling than state's interest in protecting citizens generally).

76. *See* Strassheim v. Daily, 221 U.S. 280, 285 (1911) (noting that act which occurs outside state and produces harmful effects in state justifies state in punishing actors).

traditional common-law approach to jurisdiction only partially serves the states' interests in prosecuting conspiracies.[77]

In the case of interstate telephonic conspiracies, the traditional territorial approach to jurisdiction does not serve either of a state's interests.[78] The first rationale for prosecuting conspiracy is that the initial formation of the conspiracy is disruptive of the peace within the state where the conspiracy formed.[79] Under normal circumstances, the formation of a conspiracy is like an explosion that disrupts the peace of the place where the conspirators join together and conspire.[80] When a conspiratorial agreement occurs in the telephone wires between two states, however, theoretically the disruptive collusion occurs in the wires above the states, rather than wholly within either state. Although each state subsequently may suffer the ill effects of the explosion, the explosion itself did not disrupt the peace within any state. Because a conspiracy that is not formed in any particular state does not disrupt the peace within either state, neither state should be able to assert jurisdiction over an interstate telephonic conspiracy on purely territorial grounds. Furthermore, unless the conspirators commit an overt act within the state that is the target of the conspiracy, the territorial principle of jurisdiction does not allow the target state to protect itself by prosecuting the conspiracy.[81] Therefore, the territorial approach to jurisdiction is completely insufficient to serve either interest that states have in prosecuting interstate telephonic conspiracies.

To be most effective in serving all of a state's interests, courts should develop a nonterritorial basis for jurisdiction over conspiracies that allows the states to protect themselves from all harm.[82] Some courts have recognized the validity of a nonterritorial protective theory of criminal jurisdiction in certain situations.[83] These courts have realized that, for some crimes, the harm that threatens a state does not necessarily correspond to the place where the crime occurred.[84] These courts apply a protective rather than

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77. *See supra* notes 73-76 and accompanying text (noting that territorial principle of jurisdiction does not serve all of states' interests in prosecuting conspiracies).

78. *See infra* notes 79-81 and accompanying text (noting that territorial approach to jurisdiction over interstate telephonic conspiracies does not serve any interest that states have in prosecuting conspiracies).

79. *See supra* notes 65-68 and accompanying text (noting that first interest of state in prosecuting conspiracies is to protect peace within state).

80. *See id.* (discussing interests of state in preventing conspiracies from disrupting peace within state's borders).

81. *See supra* notes 29-38 and accompanying text (noting courts' use of overt act to establish jurisdiction over conspiracies when location of agreement is unknown).

82. *See infra* notes 83-95 and accompanying text (introducing protective theory of criminal jurisdiction).

83. *See* Strassheim v. Daily, 221 U.S. 280, 285 (1911) (holding that state has power to punish defendant for acts occurring outside state that produce harmful effects within state); Commonwealth v. Carroll, 360 Mass. 580, ____, 276 N.E.2d 705, 709 (1971) (same); Traveler's Health Ass'n V. Commonwealth, 188 Va. 877, 892, 51 S.E.2d 263, 268-69 (1949) (same), *aff'd*, 339 U.S. 643 (1950).

84. *See supra* note 83 (noting that some courts have applied nonterritorial principles of

territorial theory of jurisdiction, under which the relevant jurisdictional consideration is the location of the harmful effects of the crime.[85] Thus, a state may prosecute a defendant who never has been in the state, if the defendant's actions outside the state threaten harm to the state or its citizens.[86] The United States Supreme Court recognized the protective basis for asserting jurisdiction in *Strassheim v. Daily*.[87] In *Strassheim* a grand jury in Michigan indicted the defendant for bribery and obtaining money from the state under false pretenses.[88] While in Illinois, the defendant had arranged with a state official in Michigan fraudulently to sell used machinery to the state under a contract that called for new machinery.[89] The governor of Illinois took the defendant into custody in Illinois for the defendant's extradition to Michigan.[90] The defendant challenged his custody through a habeas corpus petition which claimed in part that the defendant had committed no crime under the laws of Michigan because he never had committed any act in Michigan.[91] The Illinois district court granted the defendant's petition, and the state of Michigan appealed the case to the United States Supreme Court.[92] The Supreme Court noted initially that the defendant personally had committed no act in Michigan in furtherance of his scheme to defraud the state.[93] The *Strassheim* Court held, however, that if the defendant had induced by fraud a payment by the state of Michigan, Michigan had an interest in punishing the defendant.[94] The Court asserted that a state's interest in punishing a defendant who committed criminal acts outside the state's borders, but intended the acts to produce a detrimental effect within the state's borders, is equally as strong as the state's interest in punishing a defendant that was physically present at the place where the criminal actions had their intended effect.[95]

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criminal jurisdiction to extrastate crimes); *see also infra* note 96 (listing state decisions applying nonterritorial jurisdictional principles).

85. *See* Perkins, *supra* note 4, at 1155 (discussing protective principle of criminal jurisdiction); Note, *supra* note 7, at 1451 (same).

86. *See supra* text accompanying notes 83-85 (discussing nonterritorial principles of jurisdiction); *see also* MODEL PENAL CODE § 1.03(1) (f) (1985) (providing for jurisdiction when conduct outside state bears reasonable relation to legitimate state interest).

87. 221 U.S. 280 (1911).

88. Strassheim v. Daily, 221 U.S. 280, 281 (1911).

89. *Id.* at 282.

90. *Id.* at 281.

91. *Id.*

92. *Id.*

93. *Id.* at 284.

94. *Id.*

95. *Id.* at 285. Although courts have cited the *Strassheim v. Daily* decision in support of asserting extraterritorial jurisdiction over crimes when the defendants intended that their acts have detrimental effects within the state, the actual language that the Court used in providing for nonterritorial jurisdiction was, "[a]cts done outside a jurisdiction, but intended to produce *and producing* detrimental effects within it." *Id.* (emphasis added). In the case of an extrastate conspiracy, the defendants may not have completed the crime that was the object of the conspiracy, and therefore, the acts of the defendants may not have produced any actual detrimental effects within the state other than the threat of future harm.

State courts frequently cite the Supreme Court's holding in *Strassheim* to support a state's assertion of jurisdiction over crimes occurring outside the state, but having harmful effects inside the state.[96] For example, in *Pennington v. State*[97] the Supreme Court of Maryland considered whether it had jurisdiction to prosecute a defendant for obstruction of justice when all of the defendant's acts occurred completely outside the state.[98] While in the District of Columbia, the defendant had stabbed a woman to prevent the woman from testifying in a Maryland assault case.[99] Maryland has no criminal jurisdiction statute, and thus, common-law principles govern the subject matter jurisdiction of offenses.[100] The *Pennington* court discussed the territorial basis for criminal jurisdiction at common law, and noted that the territorial principle required that each crime have a particular situs for jurisdictional purposes.[101] The court observed that, for crimes which are defined in terms of an act, the situs of the crime is the place where the act occurs.[102] The court then referred to the *Strassheim* decision, and noted further that some crimes are defined in terms of an effect or result, and the situs for those crimes is the state in which the effect or result of the criminal acts occurs.[103] The *Pennington* court concluded that the crime of obstruction of justice is an effect-oriented crime.[104] The court determined that, because the effect of the defendant's acts was to obstruct justice in Maryland, jurisdiction lay in Maryland.[105] The protective principle of jurisdiction, which the Maryland court adopted for effect-oriented crimes, serves a state's interest in protecting itself from harm, whether the harm initiates inside or outside the state.[106] Accordingly, the protective principle allows a state to prosecute crimes that have harmful effects in the state, but that the state would not be able to prosecute under a strict common-law territorial approach to jurisdiction.[107]

Although the *Pennington* court limited its discussion to crimes that threaten state governmental functioning, such as contempt and obstruction of justice, the federal courts have used the same protective analysis to

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96. *See* Wheat v. State, 734 P.2d 1007, 1008 (Alaska Ct. App. 1987) (citing *Strassheim v. Daily*); Johnson v. Burke, 238 Ind. 1, 6, 148 N.E.2d 413, 416 (1958) (same); Commonwealth v. Levin, 11 Mass. App. Ct. 482, 502, 417 N.E.2d 440, 451 (App.Ct. 1981) (same); State v. Darroch, 305 N.C. 196, 202, 287 S.E.2d 856, 860 (same), *cert. denied*, 457 U.S. 1138 (1982); *see also* Strassheim v. Daily, 221 U. S. 280, 285 (1911) (noting that states may assert extraterritorial jurisdiction over some crimes).

97. 308 Md. 727, 521 A.2d 1216 (1987).

98. Pennington v. State, 308 Md. 727, ____, 521 A.2d 1216, 1216-25 (1987).

99. *Id.* at ____, 521 A.2d at 1216.

100. *Id.* at ____, 521 A.2d at 1217.

101. *Id.* at ____, 521 A.2d at 1217-18.

102. *Id.* at ____, 521 A.2d at 1218-19.

103. *Id.* at ____, 521 A.2d at 1219.

104. *Id.*

105. *Id.* at ____, 521 A.2d at 1225.

106. *Id.*

107. *See supra* notes 22-25 and accompanying text (noting that, under territorial principle, no state may assert jurisdiction over interstate telephonic conspiracies).

protect not only the United States, but also its citizens.[108] For example, in *United States v. Bowman*,[109] the defendants, while on a ship at sea, had formed a conspiracy to defraud a United States corporation.[110] Not only did the conspirators form the agreement outside the country, but all of the overt acts in furtherance of the conspiracy occurred outside the territorial limits of the United States.[111] Although the federal conspiracy statute did not specifically provide for extraterritorial jurisdiction over conspiracies formed at sea, the United States Supreme Court held that, to give the statutes their intended effect, courts must interpret the statute to include extraterritorial conspiracies.[112] The Court reasoned that, for crimes such as conspiracy to defraud the United States, the government's exercise of jurisdiction cannot logically depend on the locality of the defendant's acts.[113] The Court recognized that conspirators are very likely to plan and execute conspiracies from outside rather than inside the country.[114] The Court noted that a strict territorial approach to jurisdiction which required that acts occur within the country for the federal government to assert jurisdiction over a crime would not serve the purpose of the conspiracy statute, which was to protect the United States from crime.[115] The Court added that to prohibit the United States from asserting jurisdiction over offenses of the type that logically and frequently would occur outside the territorial limits of the United States would curtail the scope of criminal statutes and provide immunity from prosecution for a large class of offenders.[116] Thus, the *Bowman* Court held that, although the conspirators had perpetrated the conspiracy entirely outside the country, and although the federal conspiracy statute did not explicitly provide for extraterritorial jurisdiction, the United States could employ a protective rationale to assert jurisdiction over a conspiracy to defraud a United States corporation.[117]

Since the *Bowman* decision, the federal courts have applied the protective rationale of the *Bowman* court to many crimes other than conspiracy to defraud a United States corporation, including conspiracy to distribute drugs within the United States.[118] Although the *Bowman* Court was con-

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108. *See infra* notes 109-119 and accompanying text (discussing use of protective principle by federal courts to extend common-law jurisdiction over crimes).

109. 260 U.S. 94 (1922).

110. United States v. Bowman, 260 U.S. 94, 97 (1922).

111. *Id.*

112. *Id.*

113. *Id.* at 98.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *See* United States v. Mann, 615 F.2d 668, 671 (5th Cir. 1980) (applying protective principle to drug smuggling offense), *cert denied*, 450 U.S. 994 (1981); United States v. Postal, 589 F.2d 862, 886 n. 39 (5th Cir.) (same), *cert. denied*, 444 U.S. 832 (1979); United States v. Pizzarusso, 388 F.2d 8, 10 (2d Cir.) (same), *cert. denied*, 392 U.S. 936 (1968); Rivard v. United States, 375 F.2d 882, 886 (5th Cir.) (same), *cert. denied*, 389 U.S. 884 (1967). The

cerned with federal assertion of jurisdiction, the protective argument that the federal government uses to justify its assertion of jurisdiction over extraterritorial conspiracies applies to the individual states. Just as the United States needs to protect itself from conspiracies occurring at sea or abroad, the states must be able to protect themselves and their citizens from threats originating outside the states' boundaries.[119] Thus, even if conspirators formed their agreement entirely outside a state, the state would have justification to assert jurisdiction over a conspiracy to import drugs into the state on the ground that the conspiracy statute would not serve its protective purpose if the statute were not enforceable extraterritorially.

The *Bowman* decision is important to the question of interstate telephonic conspiracies not only because the *Bowman* Court recognized the validity of nonterritorial jurisdiction, but also because the Court's opinion implicitly suggested limits on the scope of nonterritorial jurisdiction.[120] The Court in *Bowman* noted in dicta that courts may prosecute crimes committed against private individuals or private property only when the crime occurred within the boundaries of the state.[121] Thus, the *Bowman* opinion suggests that courts may use only the territorial approach, and not the protective approach, to jurisdiction over crimes committed against individuals.[122] Although the *Bowman* Court did not explain the basis for the distinction between crimes against private individuals and crimes against a private corporation, presumably the country's interest in protecting individual citizens is not as great as the country's interest in protecting its corporations from fraud. The weaker interest in protecting individuals, therefore, is insufficient to justify the country's assertion of extraterritorial jurisdiction. Accordingly, the federal courts have been careful to classify conspiracies to distribute drugs as offensive to the general welfare of the American people, rather than offensive to individual citizens.[123] Analogously, the *Bowman* opinion may preclude state courts from asserting nonterritorial jurisdiction over an interstate telephonic conspiracy when the object of the conspiracy is a crime against a private individual or his property.[124] Although states

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federal courts also have applied the protective principle to the area of antitrust prosecution. *See* United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945) (noting that United States antitrust laws extend to activity affecting trade and commerce of United States regardless of where activity took place).

119. *See* State v. Darroch, 305 N.C. 196, 205, 287 S.E.2d 856, 862 (noting that each state may protect its own citizens in enjoyment of life, liberty, and property by punishing all acts that, in contemplation of law, occur within the state), *cert. denied*, 457 U.S. 1158 (1982).

120. *See infra* notes 121-25 (noting that protective principle may not be applicable to acts that threaten individual citizens or their property).

121. United States v. Bowman, 260 U.S. 94, 98 (1922).

122. *Id.*

123. *See* United States v. Brown, 549 F.2d 954, 957 (4th Cir.) (noting that substantial and detrimental effect on health and general welfare of American people justifies United States' assertion of jurisdiction over conspiracy to import narcotics), *cert. denied*, 430 U.S. 939 (1977).

124. *Bowman*, 260 U.S. at 98. In *Battle v. State* the Florida District Court of Appeals

generally have not asserted jurisdiction over extraterritorial crimes that threaten only private individuals, no court explicitly has held that states do not have the power to assert jurisdiction in such cases.[125]

The United States Constitution does not address directly the power of the states or the federal government to assert extraterritorial jurisdiction over crimes.[126] Under the "necessary and proper" clause of the Constitution, however, Congress has the power to make all laws necessary to execute certain specific grants of power.[127] One commentator has argued, therefore, that the federal constitution delegates to Congress the power to assert extraterritorial jurisdiction over crimes if the assertion of jurisdiction is necessary to execute a specifically delegated power.[128] Because the tenth amendment to the Constitution reserves to the states all powers that the Constitution does not delegate expressly to the federal government, the

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took a cautionary approach to nonterritorial jurisdiction in the case of an extraterritorial solicitation charge. Battle v. State, 365 So. 2d 1035, 1036-37 (Fla. Dist. Ct. App. 1978). In *Battle* the defendant, while in New Jersey, solicited the murder of a man in Florida. *Id.* at 1036. The defendant performed no acts in Florida. *Id.* at 1037. The *Battle* court ruled that, although the solicitation had as its object a murder in Florida, Florida had no ground to assert jurisdiction because the defendant had performed no acts within the state. *Id.* The holding of the *Battle* court is in accord with the principle that harmful acts which threaten only individuals do not justify a state in asserting extraterritorial jurisdiction over a crime. *See supra* notes 119-21 and accompanying text (noting that states may not apply protective principle of jurisdiction to crimes against individuals). However, in *Battle*, Florida also had attempted to charge the defendant with conspiracy to murder. *Battle*, 365 So. 2d at 1036. Interestingly, the Florida court did not dismiss the conspiracy charge on jurisdictional grounds. *Id.* at 1037. The *Battle* court did not make any distinction between the solicitation charge and the conspiracy charge, but the court had noted earlier in the opinion that solicitation was a complete crime when the defendant committed it in New Jersey. *Id.* The court apparently found that the conspiracy continued into Florida as the hired killer traveled into Florida, and that the continuing nature of conspiracy distinguished conspiracy from solicitation. *Id.* Therefore, the court held that jurisdiction over the conspiracy charge was valid. *Id.*; *see* MODEL PENAL CODE § 1.03, at 56 (1985) (noting that some states have enacted jurisdictional statutes that allow state exercise of jurisdiction over acts occurring outside of state if actor's intent was to cause any crime within state).

125. *But see* Berge, *supra* note 4, at 267 (arguing that protective principle of jurisdiction should apply to crimes against individuals as well as crimes against state functions).

126. *See* George, *supra* note 7, at 614-15 (noting that federal constitution does not directly address power of government or states to enact criminal code).

127. U.S. CONST. art. I, § 8, cl. 18.

128. *See* George, *supra* note 7, at 615-16 (arguing that Congress has power to legislate extraterritorially to execute delegated powers); *see also* Perkins, *supra* note 4, at 1172 (noting that power of Congress to extend criminal jurisdiction beyond territorial principle is well-recognized). In *United States v. Curtis-Wright Export Co.* the United States Supreme Court suggested a different approach to the question of federal power to legislate extraterritorially. United States v. Curtis-Wright Export Co., 299 U.S. 304, 315-16 (1936). The Court reasoned that the powers inherent in sovereignty that England exercised in the American colonies vested in the colonies collectively when the colonies separated from England. *Id.* at 316-18. Therefore, the new United States had the same powers that any other nation had to legislate extraterritorially. *Id.* The Court's approach denies to the several states the powers inherent in sovereignty, and one commentator has criticized the approach. *See* George, *supra* note 7, at 615 (criticizing Court's opinion in *United States v. Curtis-Wright Export Co.*).

states retain the powers inherent in sovereignty.[129] These inherent sovereign powers include the power to enact legislation that grants to state courts extraterritorial jurisdiction over crimes occurring outside the states' boundaries.[130] Thus, the Constitution does not prevent states from controlling extraterritorial conduct by statute if the legislation does not conflict with the federal power to regulate foreign affairs, does not reach a federally preempted area, or does not conflict with the interests of other states.[131]

Although the Constitution generally allows the states to assert jurisdiction over extraterritorial crimes, the exercise of extraterritorial jurisdiction may be unconstitutional in specific instances if it conflicts with a defendant's right to due process.[132] The due process clause of the fourteenth amendment to the Constitution, which applies to the states, safeguards a defendant's right to a fundamentally fair trial.[133] A trial in a state the location of which impairs the defendant's ability to secure witnesses and otherwise prepare for trial may violate the defendant's right to a fair trial under the fourteenth amendment.[134] One criminal court has looked to the civil jurisdictional principle of foreseeability and has concluded that a state cannot prosecute

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129. U.S. CONST. amend. X; *see* Skiriotes v. Florida, 313 U.S. 69, 77 (1941) (noting that states retain powers of sovereign); George, *supra* note 7, at 616-17 (arguing that states retain powers inherent to sovereigns, including power to extend criminal jurisdiction beyond state boundaries).

130. *See* Skiriotes v. Florida, 313 U.S. 69, 77 (1941) (holding that states may extend criminal jurisdiction beyond territorial limits to serve legitimate state interests). In *Skiriotes* the state of Florida had enacted legislation making the removal of sponges from the Gulf of Mexico illegal. *Id.* at 70-71. The defendant challenged the statute on the ground that the state did not have the power under the Constitution to extend its criminal jurisdiction beyond the territorial limits of the state. *Id.* at 71. The United States Supreme Court held that the state of Florida retained the powers of a sovereign and, thus, could control the extraterritorial conduct of its citizens. *Id.* at 77. The Court qualified its holding by noting that a state could not enact legislation that conflicted with federal legislation. *Id.* at 79. The *Skiriotes* holding specifically referred to the power of a state to control the conduct of its own citizens, but logically a state criminal statute should be applicable to any offender. *See id.*; *see also* Wheat v. State, 734 P.2d 1007, 1008 (Alaska Ct. App. 1987) (noting that power of states to rely on nonterritorial bases for criminal jurisdiction is well-settled); State v. Darroch, 305 N.C. 196, 201-07, 287 S.E.2d 856, 860-61 (noting that many states assert jurisdiction on grounds other than territorial principle), *cert. denied*, 457 U.S. 1138 (1982); MODEL PENAL CODE § 1.03, at 54 (1985) (same).

131. *See Skiriotes*, 313 U.S. at 79 (noting that states' assertion of extraterritorial jurisdiction may not conflict with federal statutes); George, *supra* note 7, at 617 (noting limits on state power to legislate extraterritorially).

132. *See* U.S. CONST. amend. XIV, § 1 (providing that no state shall deprive any person of life, liberty, or property without due process of law); *cf.* E. SCOLES & P. HAY, CONFLICT OF LAWS §§ 3.20-.35 (West 1982) (noting that fourteenth amendment due process right may limit states' assertion of jurisdiction in civil cases).

133. *See supra* note 132 (noting that fourteenth amendment due process clause may limit states' assertion of criminal jurisdiction).

134. *See* MODEL PENAL CODE § 1.03, at 55 (noting that fourteenth amendment places limits on state legislative jurisdiction); Developments in the Law, *supra* note 26, at 978 (same); *supra* note 132 and accompanying text (noting that fourteenth amendment due process clause may limit state's assertion of criminal jurisdiction).

a defendant when the defendant could not foresee that his actions would violate the laws of that state.[135] In *State v. Palermo*[136] the state of Kansas charged the defendant with the sale of heroin.[137] The defendant lived in Missouri and, through an accomplice, sold heroin to an informant in Kansas.[138] Kansas tried the defendant for the illegal sale, although the defendant never had been in Kansas.[139] The jury found the defendant guilty of the illegal sale of narcotics, but after the trial, the defendant moved for acquittal on the ground that the court had no jurisdiction over the defendant's crime.[140] The trial judge ruled for the defendant because the defendant had not committed any criminal acts in the state, and the state appealed the trial court's decision to the Supreme Court of Kansas.[141] The supreme court affirmed the decision of the trial court, and dismissed the charges against the defendant.[142] The supreme court acknowledged that the defendant was an "aider and abettor" under Kansas law and, therefore, the state could try the defendant as if he were a principal offender.[143] The court also restated the rule that the United States Supreme Court announced in *Strassheim v. Daily* that a state may prosecute individuals for acts committed outside a jurisdiction when the effect of the acts is the commission of a crime within the jurisdiction.[144] The *Palermo* court noted, however, that the defendant had no intent to sell drugs in Kansas and did not know that his accomplice would sell the drugs in Kansas.[145] The *Palermo* court concluded, therefore, that a state may not assert jurisdiction over a defendant for a crime occurring within the state if the defendant was not physically present in the state, did not intend to commit a crime within the state, and could not reasonably foresee that his act would cause, aid, or abet the commission of a crime within the state.[146]

Although the *Palermo* court did not phrase its holding in terms of the defendant's due process rights, the holding presupposes that a defendant has a right to trial only in a jurisdiction in which the defendant's criminal liability was foreseeable.[147] In the case of conspiracy, however, a court may

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135. *See infra* notes 136-46 and accompanying text (discussing one court's application of civil principle of foreseeability to criminal jurisdiction).

136. 224 Kan. 275, ____, 579 P.2d 718, 719 (1978).

137. State v. Palermo, 224 Kan. 275, ____, 579 P.2d 718, 719 (1978).

138. *Id.*

139. *Id.*

140. *Id.* at ____, 579 P.2d at 720.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* (citing Strassheim v. Daily, 221 U.S. 280, 285 (1910)).

145. *Id.*

146. *Id.*

147. *See* E. SCOLES, *supra* note 132, §§ 3.20-.35 (discussing due process rights of civil defendants). Although civil choice of law principles are not applicable directly to criminal cases, the federal constitution provides a defendant with due process rights that do not depend on whether the defendant is subject to criminal or civil liability. U.S. CONST. amend. XIV, §

assume that the conspirators who plan to commit the crime know where the crime is to have its effect. Only a conspirator who joined the conspiracy after the initial agreement and thus was unaware of the target location of the conspiracy might be able to make a due process argument similar to the defendant's argument in *Palermo*.[148] Ordinarily, therefore, a conspiracy defendant will not be able to argue convincingly that a trial in the state in which the defendant planned his actions to have an effect would prejudice the defendant's ability to prepare for trial.[149]

Beyond the due process restrictions that the federal constitution places on the power of the states to assert extraterritorial jurisdiction over a crime, the individual state constitutions may restrict states by providing explicitly that criminal trials must take place in the jurisdiction where the criminal actions took place.[150] A defendant does not have a federal constitutional right to a state criminal trial only where the crime occurred.[151] The federal constitution provides only the minimal requirements for defendant protection, however, and the states have the power to provide more protection to defendants through state constitutional provisions.[152] Thus, a state consti-

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1. In *Watson v. Employer's Liability Assurance Corp.* the United States Supreme Court noted that a state has a legitimate interest in safeguarding the rights of persons injured within the state. Watson v. Employer's Liability Assurance Corp., 348 U.S. 66, 70-73 (1954). Additionally, the Court noted that trial in a state does not affect a defendant's due process rights if the defendant should have known that his actions might bring him into court in the state. *Id.* If trial in a state where the defendant should have known he would be liable does not violate the due process rights of a civil defendant, a criminal trial based on the same argument also should survive a due process attack.

148. *See* LAFAVE, *supra* note 1, § 6.5 (noting that defendants who join conspiracy after original agreement occurred become members of conspiracy).

149. *See supra* notes 136-46 (discussing foreseeability as standard for due process violation in civil context).

150. *See* George, *supra* note 7, at 636 (noting that state constitutions may limit extraterritorial penal legislation).

151. *See* People v. Pascarella, 92 Ill. App. 3d 413, 418, 415 N.E.2d 1285, 1289 (noting that fourteenth amendment does not require states to provide defendant with right to trial in district where crime occurred), *cert. denied*, 454 U.S. 900 (1981). Article three of the United States Constitution states that every criminal trial shall take place in the state and district in which the crime occurred. U.S. CONST. art. III, § 2, cl. 3. The sixth amendment to the Constitution also requires that every defendant have a trial by an impartial jury selected from the state and district where the crime occurred. U.S. CONST. amend. VI. The right to trial where the crime occurred, however, applies specifically to trials in the federal courts, and no decision has applied the right to the states. *See* People v. Pascarella, 92 Ill. App. 3d 413, 418, 415 N.E.2d 1285, 1289 (noting that no court has applied to states federal right to trial where crime occurred), *cert. denied*, 454 U.S. 900 (1981).

152. *See* J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW § 1.6 (West 1986) (noting that states may exceed federal courts in granting rights to defendants, provided states do not violate federal law). In *McCormick v. State* the Minnesota Supreme Court addressed the constitutionality of a statute that provided for extraterritorial jurisdiction over crimes occurring outside the state but producing harmful effects within the state. McCormick v. State, 273 N.W.2d 624, 625 (Minn. 1978). The statute specifically provided for jurisdiction over child custody disputes when the defendant parent had detained a child outside the state. *Id.* The *McCormick* court noted that the statute conflicted with common-law principles of jurisdiction,

tution could limit the states' exercise of criminal jurisdiction to crimes that defendants execute within the states' boundaries.[153]

The common-law method of determining criminal jurisdiction by applying the territorial principle is insufficient to resolve the question of jurisdiction over interstate telephonic conspiracies.[154] Territorial principles do not directly apply because the crime does not occur in a definite place.[155] Extending territorial principles to include interstate telephonic conspiracies would place artificial significance on the location of a relatively insignificant element of the conspiracy.[156] Additionally, the territorial principle does not protect the interests of the states in safeguarding themselves and their citizens from harm that criminals initiate from locations outside the state.[157] A protective approach to jurisdiction, therefore, would better serve the interests of the states in prosecuting all conspiracies, including interstate telephonic conspiracies.[158] Under the protective approach, a state could exercise jurisdiction over a conspiracy if the conspiracy would have a criminal effect in the state.[159] Although no court has addressed directly the constitutionality of a state's extraterritorial assertion of criminal jurisdiction, the federal constitution appears to place only minimal due process limitations

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which require action within a state for the state to assert jurisdiction. *Id.* at 626-28. Without a discussion of the constitutional issues, the court held that extraterritorial jurisdiction contravened both the sixth amendment to the United States Constitution and the analogous provision of the Minnesota Constitution. *Id.* at 628; *see* U.S. CONST. amend. VI (providing defendant with right to criminal trial in state and district where crime occurred); MINN. CONST. amend. VI (same). *But see* Rios v. State, 733 P.2d 242, 248-50 (Wyo.) (holding that tenth amendment to United States Constitution implies that courts can enforce child custody statutes extraterritorially), *cert. denied*, 108 S. Ct. 108 (1987). In *Rios v. State* the Wyoming Supreme Court addressed the constitutionality of a child custody statute similar to the statute in *McCormick v. State*. *Id.* at 244. The *Rios* court reviewed extensively the background and development of the territorial principle of jurisdiction. *Id.* at 245-48. The court also noted the large number of modern exceptions and adaptations to common-law territoriality. *Id.* The court cited and rejected the rationale of the *McCormick* court, and held that substantial precedent and public policy supported a departure from territorial jurisdiction in some cases. *Id.* at 246-50. The *Rios* court also noted briefly that the tenth amendment to the United States Constitution, which reserves to the states all powers that the Constitution does not delegate to Congress, grants the states the power to legislate extraterritorially. *Id.* at 249.

153. *See supra* notes 150-52 and accompanying text (noting that state constitutions may extend defendants' protection beyond federal constitution).

154. *See supra* notes 23-28 and accompanying text (noting that common-law territorial jurisdiction does not apply to interstate telephonic conspiracies).

155. *See id.* (noting that common-law territorial jurisdiction principles do not apply to interstate telephonic conspiracies because crime does not have discernible situs).

156. *See supra* notes 29-38 and accompanying text (discussing use of overt act element of conspiracy to locate crime in one place and establish territorial jurisdiction).

157. *See supra* notes 61-81 and accompanying text (discussing state interests in prosecuting conspiracies and most effective jurisdictional principle that courts should use to achieve state interests).

158. *See supra* notes 82-125 and accompanying text (discussing benefits of protective principle of jurisdiction in serving state interests in prosecuting conspiracies).

159. *See id.* (discussing application of protective principle to crimes having harmful effects within state).

on the states' assertion of extraterritorial jurisdiction over conspiracies.[160] In sum, a protective approach to the question of jurisdiction over interstate telephonic conspiracies and over conspiracies in general would advance state prosecutorial interests more effectively than the traditional common-law territorial approach.

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160. *See supra* notes 126-53 and accompanying text (discussing constitutional limitations on states' power to legislate extraterritorially).