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Jurisdiction over Crimes

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JURISDICTION OVER CRIMES—II

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III—THE COSMOPOLITAN THEORY

Two theories of jurisdiction over crime dominate our law. The first is the territorial theory.[1] According to this theory the matter of prime importance is the determination of the place where the offense was committed. The courts of the territory within which the offender committed his offense have jurisdiction over that offense. Courts outside of that territory had no power to try the offender or to take cognizance of the offense in any way. The place where the "gist" of the offense occurred fixed the *locus* of the crime. The gist of the offense was deemed to be that element of the offense without which the offense could not be said to exist. Sometimes the gist of the offense was looked upon as the *act* which was done, as in the case of homicide, where the act of shooting was the gist of the offense. At other times the *consequence of* the act was held to be the gist of the offense, as in the case of an abortion, where the voiding of the foetus is the gist of the offense. Soon, however, it was seen that both act and consequence might be harmful to the territory in which either occurred and the second theory of jurisdiction over crimes emerged and was developed.

This was the general security theory.[2] According to this theory, any act of consequence which is, or tends to produce, an injury within the territory where the one, committing the act or producing the consequence, may be gives jurisdiction over the offense and the offender to the courts of that territory. It is immaterial whether the act or the consequence is that element which is called "the gist of the offense" or not. So long as the activity or its results are harmful or likely to prove harmful to the persons or property within the territory, the sovereign of that territory will do what he can to protect his subjects from further danger from the offender and punish the offender for his antisocial activities. Both of these theories are based upon the idea that each sovereign is to protect his own territory and to leave the protec-

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[1]See Levitt, Jurisdiction Over Crimes; Territorial Theory, XVI JOUR. CRIM. LAW AND CRIM. 3.

[2]See Levitt, Jurisdiction Over Crimes; General Security Theory, ... JOUR. CRIM. LAW AND CRIMIN.

tion of the territories of other sovereigns to them. Each territorial unit is looked upon as being self-sufficient, self-protecting, and unconnected with any other territorial unit.

From very early times, however, a third theory of jurisdiction over criminal offenses has existed. This is the cosmpolitan theory. It is based upon the ideas that civilized nations are inter-connected and interrelated; that what is harmful to one is very likely to prove harmful to all the rest; that the important factor in criminal law is not *the place* where a harmful act occurred, nor the likelihood that the act would prove harmful in a given bit of territory, but that a human being existed who had exhibited tendencies which the history of civilization has shown to be harmful to other human beings. It did not matter *where* the dangersome activities occurred. They may occur outside of the domain of a particular sovereign, harm may result from them to humans who are not subjects of the sovereign, and no harm whatever may come to the sovereign, his domain and subjects because of the activities, yet the sovereign will give his courts the power to try and punish those who were guilty of such activities, if they are found or brought within his domain.

In Anglo-American law there are just two types of activities which come within the cosmopolitan justice theory of jurisdiction. The first concerns piracy and the second concerns aggressions against so-called uncivilized peoples who are not subjects of any civilized sovereign.

Piracy is an offense against the laws of all nations. It consists of illegal aggressions against persons and property upon the high seas. The nature of the illegality can be found in the customs and usage of maritime nations. Pirates are enemies of all mankind. They are unprotected by any sovereign, are outside of all law, and are subject to punishment by any sovereign no matter where the piratical acts were committed or who the victims were. The courts of every country have jurisdiction over piracy.

Aggressions against uncivilized peoples who are not subject to any civilized sovereign are forbidden in English law by section nine of the Pacific Islanders Protection Act of 1872, and in American law by section three hundred eight of the Penal Code of 1910.

The English Act provides that if British subjects engage in aggressions, in the nature of kidnapping or enslaving, against "natives of islands in the Pacific Ocean, not being within the King's dominions nor within the jurisdiction of any civilized power" they are guilty of a felony and are within the jurisdiction of the Supreme Courts of the

Australian States, the Dominion of New Zealand and the Fiji Islands. It will be noted that the act by its terms is confined to British subjects. In this regard it seems to differ in its scope from the American statute, which probably applies to all persons, regardless of their nationality or citizenship.

The American statute reads as follows:

"Sec. 308. Whoever being subject to the authority of the United States shall give, sell, or otherwise supply any arms, ammunition, explosive substance, intoxicating liquor, or opium, to any aboriginal native of any of the Pacific islands lying within . . . (certain designated limits) . . . not being in the possession or under the protection of any civilized power, shall be fined not more than fifty dollars, or imprisoned not more than three months, or both . . .

"Sec. 309. All offenses against the provisions of the section last preceding, committed on any of the said islands, or on the waters, rocks, or keys adjacent thereto, shall be deemed committed on the high seas on board a merchant ship or vessel belonging to the United States and the courts of the United States shall have jurisdiction accordingly."

The phrase "being subject to the authority of the United States" might be taken to mean that only citizens of the United States might be amenable to the statute, but the language of section 309 indicates that activities on the islands are to be considered for jurisdictional purposes as though they were activities on board an American ship. Such activities are subject to American law even though the actors may be of non-American citizenship and nationality. This fact coupled with the obvious intention that the aboriginal inhabitants of the islands were to be safeguarded from exploitation by brutal and unscrupulous traders and adventurers leads almost irresistibly to the conclusion that it will be applied against all persons.

These statutes are humanitarian to a high degree. They indicate the purpose of England and America to protect human beings from aggression and extinction. These humans live upon territory which is not yet thought of sufficient value to annex to the domain of any civilized sovereign. The territories may not be worth the taking. But the humans living upon them are of worth and should be protected. For this reason, two powerful, humane nations throw the protection of their laws over them. The theory is that those who injure human beings must be punished even though the victims are completely outside of civilized society and the offenders are our own subjects. That the victims lack all other protection gives us an added warrant for extending our protection to them.

Proposed Extension of the Cosmopolitan Theory of Jurisdiction over Criminal Offenses

In the preceding pages it was indicated that there appears to be, in Anglo-American law, a tendency to depart from the strictly territorial theory of jurisdiction over criminal offenses, which considers all offenses to be local, that is, accepts the idea that all offenses must be tried in the judicial unit within which they were committed, and to accept a theory of jurisdiction which looks upon offenses as being transitory, that is, as calling for the trial of offenders not only in the judicial unit where the offense was committed, but also in any judicial unit where the offense may have produced harmful results or where the offender may be apprehended. The territorial theory stresses the locus of the offense, the general security theory is concerned with the protection of a given territorial unit from harmful activities and their results, while the cosmopolitan theory goes back to the source of the offense and its harmful results and deals with the person of the offender.

It is submitted, therefore, that the cosmopolitan theory of jurisdiction is a greater aid in carrying out the purpose of the criminal law, because, as will be shown later, the real danger to society comes not from the fact than an offense was committed within a specific political division of territory, nor from the fact that harmful consequences have occurred within a given area of land, but because there are in existence human beings with anti-social tendencies. These human beings have to be controlled wherever they may be. Their dangersomeness does not cease simply because they step across a boundary line between counties or states or nations. It is, therefore, our purpose to urge in the following pages: (1) that all offenses within a given category, to be indicated below, be made transitory, and that (2) the presence of the offender be all that is required to give jurisdiction over him and his offenses to the courts of the place where he may be; and (3) to present a practical method for bringing about the proposed change.

1. A Category of Transitory Offenses.

An analysis and comparison of the penal codes found in the Anglo-American legal system will result in the discovery that there are three distinct types of criminal offenses. These are: (i) offenses against rules of convenience; (ii) offense against rules which have an inher-

ent local application, and (iii) offenses against standards and principles of conduct which are set up in Anglo-American penal codes.

(i) *Offenses against rules of convenience.*

Rules of convenience are rules of conduct which are adopted simply for the purpose of getting uniformity of activity and thus avoiding confusion and danger, which results from the attempts of various persons to reach the same ends in different ways. The simplest and most obvious illustrations of rules of convenience is found in the rules governing traffic regulation, i. e., driving on the right hand side of the road; no left-hand turns; one-way streets; passing vehicles on the left; parking parallel to the sidewalk or at an angle from it, etc. Such rules call for uniformity of conduct simply for the greater convenience of the members of the community. Where the parking space, for example, is limited, more persons can park if the parking is at an angle to the sidewalk and not parallel with it. On the other hand, in narrow streets, parallel parking gives more room for vehicles to pass each other and to use the street. In a wide street, however, it makes no difference to passing vehicles whether cars are parked parallel with or at an angle to the sidewalk. Whichever rule seems more convenient is adopted by the legislative body. Outside of convenience, there is no reason why some other rule should not be adopted. In England, for instance, one must drive on the left hand side of the road and not on the right hand side, as the rule commands in the United States. But English traffic is regulated just as well by the left-side rule as American traffic is regulated by the right-side rule. The same result is obtained by the English or the American rule. All that is needed is uniformity of conduct on the part of all persons driving vehicles along the public highways. The speed of transportation is increased and the dangers resulting from transportation are minimized by the adoption of such rules. But there is nothing in the nature of the rule which makes it necessary that the identical rule should be adopted in every community. Various rules will produce desired results. All that is required is orderliness and uniformity of conduct.

There is no reason, therefore, why offenses against rules of convenience should be made transitory. The rules differ in different states. Sometimes they differ in the same state, and, indeed, in the same city or town. It depends entirely on the surrounding circumstances. As it is a matter of no real importance which rule is adopted,

New York does not need to be interested in what happened in California or in England. The breach of an arbitrary, local rule of convenience is of interest only to the locality in which the breach occurred. No other locality need consider it. Therefore, it need not have jurisdiction to punish it.

It can, of course, be argued that so far as the offender is concerned, the breach of a rule of convenience may be as much of an index to the existence of an anti-social character, as the breach of the laws against homicide. And if it is such an index then any court which can get control of the person of the offender should inquire into the possible dangersomeness of the offender. He may be a menace in other ways and the particular infraction may be an unimportant by-product of what might be found to be a very dangerous characteristic.

It is conceded that this argument is a sound one. Psycho-analysis has shown that the seemingly insignificant and innocuous things of life are, or may be, of profound importance. But as a practical matter the criminal law cannot deal with all the details of human activity in matters where there is plenty of room for difference of opinion. That a violation of the traffic rules of England may be an index of great criminality of nature is true. But it may also be true that the violation is simply a lack of swift adaptation to a change in local surroundings, as when an American goes to England for the first time. Many a bus has been missed by waiting on the wrong side of the street. Where there is such a possibility, and where the existence of a different rule is of no importance, the old maxim *de minimis non curat lex* may properly be applied. Rules of convenience may be ignored so far as a consideration of transitory offenses is concerned.

(ii) *Offenses against rules which have an inherently local application.*

Rules having an inherently local application are rules which deal with a subject matter that cannot exist in another locality. Offenses against such a rule cannot be committed in any other locality. For example, Maryland forbids fishing with a certain type of net in the waters of the Patapsco River. The only place that an offense against that rule can occur is in the Patapsco River. No other state has a Patapsco River. There isn't the slightest chance that the offense will occur anywhere alse. There is not the remotest chance that dan-

ger will result to any other state from a violation of this particular Maryland rule.

Statutes and ordinances dealing with the removal of snow from sidewalks, which are common in the Atlantic states, can be of no possible moment to the Philippine Islands or Egypt. They are only applicable in certain localities. There is no reason why offenses against such statutes should be made transitory. For purely practical reasons, they may be ignored. The offender, whatever may be his proclivities has no opportunity to exercise his anti-social characteristics in the places where conditions are such that certain activities cannot possibly occur. A man cannot murder another on the high seas so long as both of them remain in Idaho. An offense should not be made transitory unless a similar offense can be committed in the place where the offender may go after being guilty of criminal conduct in some other place.

(iii) *Offenses against standards and principles of conduct set up in Anglo-American penal codes.*

The principles and standards of conduct set up in the penal codes of the states governed by the Anglo-American system of law are practically the same. Certain differences and variations exist. But these are practically immaterial. For instance, one state will have provisions creating two degrees of murder and four of manslaughter and another will have provisions creating only one degree of murder and two of manslaughter. But in both homicide is a crime. The principle is the same; Thou shalt not kill. The standard may vary as to details, but not as to essence; voluntary killing is murder, while involuntary killing is manslaughter. What is true of homicide is also true of rape, larceny, burglary, abduction, mayhem, treason, forgery, perjury and many other offenses. Some differences as to details of definition or degrees of the offenses committed exist. But the broad principles and standards are practically alike. The same activities are forbidden. There is not a state in the Union which does not make murder a crime. The same is true of treason, perjury, larceny, rape, etc. English law is the same as American law in this regard. A prosecution for burglary in New Zealand would be marked by the same presentation of legal principles as would a similar prosecution in New York or Kansas. A spectator dropping into court during the progress of argument by counsel could not tell from the argument whether the accused was being tried for a violation of the penal statutes of one state or another.

The crimes are practically identical in definition and the legal principles applied are practically the same. The terminology is for practical purposes the same. The judges sitting in one state are familiar with the principles of law in force in the other states. The decisions of all the states are easily and readily accessible in any state. The language in which they are printed is a common language. All the statutes are written in English. A Texas judge can understand what a Maine legislature has enacted. The same legal system, with all due allowance being made for local variations, exists throughout the English-speaking world. There are no insurmountable difficulties in the way of making all the offenses which are common to all the penal codes of the component parts of the Anglo-American world, transitory offenses, and is within the jurisdiction of any court which gets control of the offender.

It is submitted, therefore, that the rule governing jurisdiction over criminals in the United States and Great Britain should be as follows:

If a person's activities in one county, state or country, are or result in a criminal offense, in whole or in part, in any other county, state or country, where that person may thereafter be, had the activities or results or both occurred in such other county, state or country, then such a person is to be deemed to have committed a transitory offense and to be within the jurisdiction of the courts of any judicial unit in which he may be apprehended, brought or found.

Four illustrations will make the working of this rule clear:

(a) X and Y are both in New York City. X kills Y and is immediately apprehended. X may be prosecuted in New York City. The activities are an offense in the place where they occurred and where the offender was apprehended.

(b) X, in New York, fires across the boundary line between New York and New Jersey, and kills Y, who is in New Jersey. Assume that firing a pistol at another is not an offense in New York and that the New Jersey rule is that homicide occurs where the pistol is fired; and that the killing occurred with malice aforethought. Immediately after the shooting, X gets into New Jersey, where he is apprehended. X would be within the jurisdiction of the New Jersey courts, because had all the elements of the offense occurred in New Jersey, there would have been a homicide in New Jersey, and had they all occurred in New York, where only some of them occurred, there would have been a homicide in that state.

(c) X steals a bag of gold from Y in Alaska. Later X is found in New Zealand. He may be prosecuted for the theft in New Zealand. For, as the rule indicates, had the taking occurred in New Zealand it would have been 'arceny there.

(d) X, with malice aforethought, standing in North Carolina, shoots Y in Tennessee, in which place Y dies. X gets into Georgia. Assume that the North Carolina rule is that murder occurs in the place where the victim is struck, that the Georgia rule is that murders occur where the victim dies, and that the Tennessee rule is that murder occurs where the shot is fired. Under the law as now exists, North Carolina would not have jurisdiction, because the victim was struck in Tennessee; Tennessee would not have jurisdiction because the shot was fired in North Carolina; Georgia would not have jurisdiction because the victim died in Tennessee. But under the proposed rule Georgia would have jurisdiction because it had the offender, and if all the elements of the offense had occurred in Georgia, or North Carolina, or Tennessee, where some of them occurred, there would have been a murder committed.

(2) JURISDICTION BASED ON THE PRESENCE OF THE OFFENDER.

The rule as above stated is founded on the idea that the presence of a person accused of committing a criminal offense in any judicial unit is enough to give the courts of that unit jurisdiction to try that person. The territorial idea as to jurisdiction is retained only in so far as to make sure that the activities or their results or both would have been an offense against the laws of the judicial unit had they occurred within the territory of the sovereign creating the judicial unit.

Is the idea that jurisdiction over criminal offenses should be based upon the presence of the offender a sound one? The writer submits that it is. The reasoning that supports it is simple and should be conclusive:

(a) The primary function of the criminal law, that is, the protection of society, can best be carried out by preventing the commission of criminal offenses. The prevention may consist in frustrating offenses which are about to be committed, or in deterring all persons from committing offenses. The first results in a battle of wits between the police and the criminal classes. In this battle the police are not usually the victors. The occasions when offenders are caught in the act of committing offenses are comparatively few. The police department in every city, state or country devotes most of its resources to apprehending offenders after the offenses have been committed. The value of a police system really consists in the belief that if such a system exists, offenders are more likely to be caught and punished than they would be if such a system did not exist. The power of the Northwestern Mounted Police and the Pennsylvania Constabulary resides in the fact that the simple order, "Get your man!" means a re-

lentless pursuit of an offender which ends only with his capture or death. Knowledge of inevitable punishment is a strong deterrent from criminal activity. If there is a possible chance of evading punishment, the person with criminal propensities will take that chance. Eliminate that chance and there is a likelihood that he will be deterred from following his impulses toward illegal conduct. Make the chance that he will be caught greater and the likelihood will be increased. Make escape impossible and the deterrent effect becomes almost certain. Our suggested rule makes escape less possible than any of the existing rules of jurisdiction.

(b) After the offender has committed an offense it is too late to think of deterring *him* from committing that particular offense. It is an accomplished fact. So far as that offense is concerned, all that can be done is to punish the offender, or reform him, or rehabilitate him. Whatever is done looks to the future activities of the offender. But whatever is to be done to him he first must be *caught*. If he remains in the place where he committed his offense the chances that he will be caught are whatever the efficiency of the police force of that place may make them. If he leaves that place the chances of his being caught are greatly lessened. This is particularly so if he leaves the state and more so if he leaves the country, as there are only two methods in existence at the present time for apprehending offenders who leave the state where they commit their offenses. These are extradition (or rendition) proceedings and the violation of the laws of the state where the offender may go. The last is frequently used. The officials of one state will go to another state and there seize the offender they wish and bring him into their own state for trial. The courts of this state will make no question as to the methods by means of which the offender was brought before them. Sometimes the state whose laws have been violated in this way will protest against such action. But most often nothing is said of the violation. The result is that the community is treated to the spectacle of having officers of the law violate the laws of a sister state in order to get hold of a person who violated the laws of their state. This is hardly conducive to obedience to the laws. When those whose duty is to enforce the laws violate them, others will not be very much deterred nor remain respectful toward those who wish to deter them.

Extradition proceedings are slow, cumbersome and technical. So far as offenders in foreign countries are concerned, they can be extradited only if the treaty of extradition between the two nations con-

cerned allows for extradition for the particular offenses. If the particular offense is not mentioned in the treaty, extradition is not allowed. Most offenses are non-extraditable. An offender who commits a crime in the United States and gets to a foreign country is practically immune. Rendition proceedings are equally slow and technical. Besides this, prosecuting officers are loathe to start them. Only extraordinary or unusual offenses move them to act. So that offenders who get across a state boundary are practically immune from arrest and punishment. It is true, of course, that if the officials of one state send out a "general alarm" in regard to an offender, the police authorities of other states will keep watch somewhat and if the offender appears he will be held until the proper persons appear to take charge of him. But few such alarms are sent out, because the perpetrators of offenses are not always known, and because the results are practically nil, for the officials of other states are not prone to bother about capturing offenders for the alarm-sending state to try.

The result is that offenses may be committed in one state and the offender by getting away safely to another state is immune from punishment. The large cities become havens for offenders who seldom violate the law of the place where they take refuge. Even when the police officials of such havens know definitely, and such knowledge is common, that certain individuals have committed offenses in other states, they cannot act, because of the fact that the offense was committed outside of their territory. The consequence is that a premium is placed upon the capacity to get across a state line. Another consequence is that habitual offenders congregate in a place and use it as a base for depredations upon the surrounding country. That community becomes a menace to other communities. At the same time it is also in constant danger. For, sometimes the offenders *do* commit their crimes in the community which is their usual haven and leave for other havens. The mere presence of the offenders is a potential danger which should be destroyed. Whatever theory would aid in lessening such a danger should be adopted. It is submitted that if the offender could be punished wherever he was apprehended for transitory offenses committed in any part of the United States and Great Britain, more offenders would be caught and punished. There would be an incentive to the police officials to "pick up" all the offenders they had in their territory. Their records for arrests would be increased. Prosecuting attorneys would have more cases to try against foreign offenders and so without the difficulties of political machinations which usually surround attempts to prosecute local offenders. Another, and this is a more

important consequence, would be that offenders would realize that they were practically outlawed everywhere. No state could be a haven for them. Wherever they went they could be prosecuted. State boundaries would no longer be protections. England would be like California and South Africa like Maine. Wherever he went in the Anglo-American world he would be within the jurisdiction of a court which could punish him. The deterrent effect of such a situation, it is submitted, would be considerable. Even the most hardened of criminals does not like to play an absolutely losing game. Some possibilities of success must exist before he will take the chance of committing another offense. The most important possibility is that of not being punished. Criminals know practically all the rules of law which are in their favor. They count on the rules of jurisdiction which are now in force to aid them in escaping punishment. Cut down the possibility of escape from punishment, which is based on the rules of jurisdiction, and in that far, at least, another deterrent is added to future criminal activity. Whatever makes for increased protection from criminal offenders should be accepted and utilized.

After all, the important element of a criminal offense is the offender. It is of practically no importance where the offense was committed. Whatever harm is done cannot be undone. Even if it could be there would be no protection, to the place where the offense was committed, against the repetition of the offense by the offender, simply in the fact that the offense had been committed there. The offender may commit a similar offense later on. Even if he is outside of the place where the first offense was committed, modern means of transportation are such that he could swiftly return to that place, commit a second offense and then leave the place again. State lines and national boundaries are absolutely no protection against the incursions of criminals. The criminal is the menace. Wherever he is, the danger exists. He is the center of potential harm. He can operate in any direction. He must be guarded against. The best way to guard against him is to get him into custody. The decision as to what is to be done with him can be made *after* he is apprehended. Once he is caught he should receive "a speedy, public trial." The speedier the trial the better. The sooner it is begun the better. Swift justice is deterrent justice. Try the criminal when you get him, at the place where you have him. Not the situs of the offense but the presence of the offender should give jurisdiction over criminal offenses.

3. Practical Procedure Required to Modify the Existing Theory of Jurisdiction over Criminal Offenses.

Assuming that the theory that criminal offenders should be tried in the judicial district where they may be apprehended as well as in the judicial district where the offense was committed is a sound and practically valuable one, there still exists many difficulties in the way of adopting it. Some of these difficulties will now be considered in both British and American law.

(a) *British Law.*

There are no legal difficulties in the way of Great Britain's adopting the proposed theory of jurisdiction over criminal offenses. An act of parliament is all that is required, in each of the component parts of the British Empire. The statute should provide that every person who commits a transitory offense may be tried, convicted and punished in the place where the offense was committed, or in any place in the British Empire, where he is apprehended, or found, or into which he is brought.

The practical difficulties are similar to those in the United States. They will be considered together below.

(b) *American Law.*

Provisions in the federal and states' constitutions prevent the acceptance of the proposed theory at the present time. Before it could be adopted, slight and simple amendments would have to be made to the constitutional provisions. These amendments will be indicated.

(i) The Federal Constitution.

The federal constitution provides in article three, section two, as modified by the sixth amendment, that every person accused of committing a criminal offense is entitled to a trial in the "state and district where the offense was committed." If the offense was committed outside of a state it can be tried wherever the Congress may direct. These provisions apply, of course, only to federal offenses. They do not affect offenses against the laws of the several states.

The federal constitution, therefore, does not stand in the way of the adoption of the proposed theory of jurisdiction by the several states. So far as offenses against the United States, which have been committed outside of the limit of any state, are concerned, the proposed theory could be adopted by the passage of a statute by the Congress providing that all transitory offenses could be prosecuted in the

place where they were committed or where the offender was apprehended, found or brought. The constitution gives express authority to the Congress to pass such a statute.

Before the theory could be adopted so as to apply to federal offenses committed within the territorial limits of one of the several states, the sixth amendment would have to be amended by the addition of the words "or in any district where the offender is apprehended, found or brought," to follow after the phrase "in the state and district where the offense was committed."

After the above proposed amendment to the federal constitution had been adopted two further steps would be necessary if the several states declined to accept the theory. The first is that a treaty would have to be concluded between the United States and Great Britain, the terms of which would provide that thereafter any person committing a transitory offense in any part of the domain of either country might be punished in the place where the offense was committed or in any place within the two domains where the offender was apprehended, found or brought. The second would be for the Congress to enact a statute giving the federal courts jurisdiction over all offenses included in the treaty.

The treaty provisions would over-ride the statutes and constitutional provisions in force in the several states. The statute would allow the federal prosecuting officers to begin such prosecutions as they saw fit. If the treaty and statute were couched in permissive rather than in mandatory terms, the legal difficulties growing out of questions of enforcement, which often lead to a legal *impasse,* would be avoided. All that is urged at the present time is this: If a prosecuting officer wishes to prosecute a person who has committed an offense in another state, because the presence of the offender is a potential danger, he should not be stopped from his protective action simply because an outworn theory of jurisdiction stands in his way.

(ii) State Constitutions.

Legal difficulties preventing the acceptance of the proposed theory of jurisdiction exist at present in some of the states. They grow out of the interpretation given to constitutional provisions. Two classes of interpretation are found. The first declares that persons accused of committing crimes must be prosecuted in the county or district or state where the offense was committed, even though the constitution does not in express terms impose the strict territorial theory of jurisdiction over criminal offenses. A *fortiori* if the constitution did im-

pose this theory in express terms the interpretation of the constitution would also come under this class. The second class of interpretation allows for the punishment of offenses in any place which the legislature may indicate.

In the states where the first class of interpretation is law it would be necessary to have one of two things occur before the proposed theory of jurisdiction could be adopted. Either the courts would have to overrule all previous decisions which interpreted the constitutional provisions or there would have to be a constitutional amendment enacted. The first thing would hardly occur. Ordinarily, judges will not depart entirely from pre-existing law. The second is the more practical method to adopt. It would be a simple matter, legally, to amend the state constitution so as to permit the trial of offenders in the place where they committed the offense or in any place where they may be apprehended, found or brought.

In the states where the second class of interpretation is law, there are no constitutional difficulties in the way of the acceptance of the proposed theory of jurisdiction.

In all the states, however, it would probably be desirable to have a positive law passed providing, in effect, that all persons who commit crimes at home or abroad may be punished in any place where they are apprehended, found or brought, if the offenses are within the category of transitory offenses as indicated above. The existing rule that offenders may be punished in the place where the offense was committed would remain in force, and the new protective rule would be added to the existing one.

4. Objections to the Proposed Theory of Jurisdiction over

Various objections to the proposed theory of jurisdiction over criminal offenses may be urged upon theoretical and practical grounds. Some of these objections will be considered.

(a) *Objections based upon theories.*

(i) Theory of the Independent Sovereignty of States.

It may be urged that the adoption of the proposed theory of jurisdiction would be an infringement of the independent sovereignty of the several states, of the United States and of the component parts of the British Empire. The argument would run in this fashion: Whatever occurs within the territorial limits of one state is of no concern to another state. If an offense is committed in New York that is not

within the purview of the state of California. New York is able to take care of itself. It needs no assistance from California. It is not the business of the state of California to punish a person who breaks the laws of New York. California is not the guardian of the safety of New Yorker. Any attempt on the part of California to punish offenses committed in New York is an attempt to exercise sovereignty over events in New York. No foreign state should be given that power. An independent sovereignty can brook no control of its citizens by a foreign sovereign, nor allow what occurs within its territorial borders to be punished by another. After all, the offender has broken the laws of New York and not the laws of California and it behooves California to wait until a breach of her laws occurs before she moves to punish anyone for illegal conduct. She probably has enough to do to take care of offenses against her own laws, without trying to take cognizance of offenses against the laws of an independent sister state.

The answer to this objection is obvious and simple. The function of the criminal law is, inter alia, to protect the community. Preventive measures are a greater protection than punitive measures. The presence of one who has committed a crime in a foreign state is a menace to the state where he may be. Most offenders are recidivists. What they have once done they will probably do again. There is no need for waiting until the law of the state where the offender is is broken before measures are taken to guard against his activities. The state where the offense has been committed has proved its inadequacy because it allowed the offender to get away, and no rendition proceedings have been instituted. If the offender is returned to the state where the offense was committed and nothing is done there to punish him, or he is allowed to escape and roam at large in a third state, the menace has simply been transferred to another state. He might return to this state and be a further menace here. No theory of sovereignty should be permitted to interfere with the safety of a state. If a potential offender against the laws of the place where he may be can be controlled there is no reason why a theory of sovereignty should prevent such control. Furthermore, if the theory of independent sovereignty is to be accepted in favor of New York it should also be accepted in favor of California. California has complete jurisdiction over all persons within its territories. If it wishes to try a man for an offense which he committed against the laws of New York, surely New York cannot presume to tell California not to try him. New York has nothing to say as to what shall be done to persons in California. The power of a state stops at its boundary lines! In addition, it is to be urged that

California *is* concerned with what occurs in New York. Activities in New York may have consequences in California. California does not need to wait until the consequences have actually eventuated before she tries to guard against them. She can prevent their occurring. If such prevention is secured by taking jurisdiction over offenders against the laws of New York and by punishing them for their offenses in New York, that is within the power of California, and New York cannot stop the exercise of that power, without the exercise of force. That means interstate war, which the federal government will not permit.

The theory of the independent sovereignty of states cuts two ways. If enforced it allows dangerous persons to roam untouched in foreign states. In that case it should not be invoked and conserved. On the other hand, if applied with rigorous logic it allows for the acceptance of the proposed theory of jurisdiction, and thus is not an argument against such acceptance.

(ii) Theory that No State Can Enforce the Penal Laws of Another State.

This theory grows out of the preceding one. The argument is that the laws of a state have efficacy only within its own territory. That no state will bother, nor should it bother, to enforce the penal laws of another state, because it has not the power to enforce the laws of another sovereign.

The foundation of this theory is an historical one. It grew up when all offenses were considered to be strictly local. One state could not punish offenses committed in another state, because they had to be punished where they were committed. But there is no reason why a rule which was, perhaps, adequate to fifteenth century needs, should be retained in the twentieth century, when it no longer meets with the protective needs of the latter time.

But a more direct answer is, that the state which punishes an offender for offenses committed outside of its territory is not enforcing the penal laws of another state, but is enforcing its own penal laws. *Its* law provides that persons found in its territory after committing offenses outside of its territory will be punished. That is, the presence of one who has broken the laws of another state is an offense, and as such it will be punished. Indeed, from this point of view, even the strict territorial theory would permit of the punishment of those who committed offenses outside of the state. For the offense would consist of coming into the state, or remaining in the state, after an offense was committed without the state. This offense would be committed

wherever the offender entered the state, or remained within the state. If the state wishes to punish him for this offense in the same way as it would have punished him had he done that within the state which he did outside of the state no one can gainsay that. The legislature can fix what punishments it pleases so long as it keeps within constitutional bounds. There is nothing irrational about this position. It has much to commend it. Keeping those with criminal propensities out of the state is an excellent way of protecting the state from criminal offenses. If the barn can be locked before the horse is stolen, there is no reason for waiting until the thieves have driven the horse away. Preventing a crime is better than punishing it.

(iii) Theory of Locus Poenitentiae.

It may be urged that the proposed theory of criminal jurisdiction should not be accepted because it removes all chance that the offender may find a place where he may live after honestly repenting for the commission of the offense. It can be pointed out with truth that oftentimes the commission of the offense, especially by first offenders, is so much of a shock to them that they are completely inhibited from ever breaking the laws again. Hence, to make such persons amenable to punishment wherever they may go is barbaric and brutal. Whatever treatment is given the offender, the function of it should be reformative or rehabilitative. Nor does it matter how the reform or rehabilitation begins or occurs. If the offender's conscience is potent in this respect that is all which is required.

There is, of course, much force in these arguments, but the answer to them is cogent and irrefutable. In the first place, it is to be recalled that the proposed theory is not mandatory, but permissive. Courts do not need to punish offenders brought before them. If the facts in a given case are such that the offender should be let off with clemency, there is nothing to prevent the officials from acting in accordance with such facts. All that the proposed theory does is to allow the courts to take jurisdiction if the facts warrant it. The present theories prevent the exercise of jurisdiction under, practically, any circumstances if the offense has been committed outside of the judicial district where the exercise of jurisdiction is desired.

In the second place, it is to be remembered that there are times when the individual must be sacrificed for the general good. The honest reform of one offender may be outweighed by the need that all other actual and potential offenders be impressed with the fact that escape from punishment can not be brought about by leaving the place where

the offense is committed. When such a need arises, the power of the law should not be diminished because of the existence of a theory of jurisdiction which does not protect society when protection is most needed.

(iv) Immutability of Constitutions.

To some minds constitutions of states are and should be immutable. The fundamental law of the nation should not be changed. The wisdom of the fathers should not be departed from. Whatever was considered right by those who drafted the organic law of the land must necessarily be right a hundred or a thousand years later. The constitution of the United States was "the greatest document ever struck off at a given time by the mind and purpose of man." The constitutions of the several states are modelled on the lines of the federal constitution. Hence, although not so perfect as their prototype, they, too, are as near to perfection as it is humanly possible to come. To change them would be to depart from perfection of judgment and of government. Therefore, the proposed theory of jurisdiction over criminal offenses must necessarily be wrong, as it necessitates constitutional changes. Whatever does that cannot be wise, just, or valuable. To adopt the proposed theory would be detrimental to the welfare of the nation. And the conclusion is obvious that the proposed theory should not be accepted.

Were it not for the great, almost devout, earnestness with which the constitutional fundamentalists present their views, it would be difficult to consider them with any degree of patience, respect and seriousness. The earnestness comes from a deep and sound instinct that the organic law of a nation should not be changed lightly and thoughtlessly. This idea is gladly conceded. Constitutional changes should not, indeed, they cannot, be easily made. Only when the welfare of the nation or state makes changes imperative should constitutions be altered. But, it is submitted, the belief that constitutions should never be changed is untenable. If needed legislation cannot be enacted because of constitutional provisions, those provisions should be amended. After all, constitutions are made for the better welfare of society. If social developments finds constiutional provisions of one sort or another inadequate, the provisions must be modified. Static constitutions have only a limited usefulness in dynamic societies. They prevent, too, precipitous evolution. In this regard they are invaluable. But when they are transformed into fetiches which block all progress, they lose their value. If a choice has to be made between making a slight, beneficial

change in our federal and state constitutions and retaining theories of jurisdiction over criminal offenses which prevent greater protection from criminal activities, then, it is submitted, the change should be made. The function of the constitution is to promote the general welfare, not to retard it.

(v) Variation in the Definitions of Crimes.

It may be urged that the definitions of crimes differ in the various states; that what is manslaughter in the first degree in one state, for example, might be manslaughter in the second degree in the second state; or that it might not be manslaughter at all. Therefore, the accused might be punished in the second state for something which he did not do at all in the first state. But the answer is that *names* are unimportant. If what the accused did is an offense in state A, and is also an offense in state B, then the potential dangersomeness of the accused to both state A and state B is established, and that is all that is necessary so far as the proposed theory is concerned. If what the accused did is not an offense in both state A and state B then it is *not* a transitory offense, as defined above, and so the proposed theory would not apply. If, for example, that which is manslaughter in the second degree in New York happens not to be manslaughter at all in Canada, then activities of the accused in New York would not be a transitory offense in Canada and the proposed theory would not apply. But if manslaughter in the first degree in New York is manslaughter in the second degree in Canada, what difference does it make whether you put one label or the other upon the offense? The punishments, to be sure, might differ. But punishments are not elements of any offense. They have nothing to do with the exercise of jurisdiction. They deal with the treatment of the offender after he has been adjudged guilty and not with the inquiry as to whether or not he *is* guilty.

(b) *Objections based upon practical considerations.*

The most important of the practical considerations which can be urged against the proposed theory of jurisdiction over criminal offenses are connected with the trial of an accused if jurisdiction over him should be assumed.

(i) The first of these is that there would be considerable difficulty in knowing when a crime had been committed in another state. The objection is conceded. But the answer is that if knowledge of the foreign offense does not exist there would be no occasion for prosecuting anybody.

(ii) It is also true that there would be considerable difficulty in proving that an offense known to have been committed was actually committed. The difficulty would be two-fold; law would have to be proved and facts would have to be shown and substantiated.

As to the law. It would, of course, have to be shown in court that an offense against foreign law had been committed. This would call for the ascertainment of what the foreign law is. As the proposed theory of jurisdiction is confined to the Anglo-American system of law, all difficulties of language and interpretation are eliminated. English decisions are quoted and referred to in proceedings all of the time. There is hardly a reported case which does not contain references to the cases in other states than the one from which the case is reported. Furthermore, there appear to be no insurmountable difficulties in proving the meaning and content of the laws of Civil Law countries in our courts in civil actions. Experts are readily found to prove as a fact what the law of France, Germany, Italy, Japan, Peru, Siam, and Cambodia may be. What can be done in civil cases can be done in criminal cases. The law of a foreign country is a fact and can be proved, like any other fact, by competent witnesses.

(iii) As to the facts. There are, of course, difficulties in proving the facts which establish a crime. But those difficulties are not connected with time and space. For example, suppose an offense was committed on the street which divides Kansas City, Kansas, from Kansas City, Missouri. According to the present theories of jurisdiction if the offense was committed on the Missouri side of the street, the Kansas courts would not have jurisdiction over it. If it were committed on the Kansas side of the street, the Kansas courts would have jurisdiction over the offense. But it is inconceivable that there should be more difficulty in proving what occurred on one side of a street than on another side. And it surely seems irrational to bar jurisdiction over an offense because the offense was committed on one side of a street rather than on another.

But it may be urged that an example has been chosen which is most favorable to the theory proposed. If the offense occured a long way off from the place where jurisdiction is to be assumed, it would be another matter. That objection, however, can be met fairly and squarely. For, offenses committed anywhere within a county can be tried in that county. It has already been shown above that some counties in Texas are larger than one or more of the smaller states in the Union. Yet it is not considered an insurmountable difficulty to prove

in one part of the county that an offense had been committed in another part of the county. Again, in states which hold that larcenies committed outside the state can be treated as larcenies committed inside the state, if any of the stolen goods are brought within the state, cases are constantly arising under the statutes and offenders are constantly being punished. Yet proof of the offense of larceny in the foreign state must be made out as a foundation for the exercise of jurisdiction and the punishment of the offender in the home state. Furthermore, offenses against the United States, committed outside of any state, can be tried anywhere that Congress may direct. So that if a murder is committed in Guam, it could be tried in New York, if Congress so directed; and a rape committed in Virgin Islands could be tried in Alaska. Offenses committed on the high seas are tried in the district where the offender is first found or brought. That three thousand miles may separate the locus of the offense from the situs of the court wherein the offender is to be tried, is immaterial so far as jurisdiction is concerned.

Then, too, it should be remembered that if the prosecuting officer feels that he cannot make out his case, he is not compelled to prosecute the suspected offender under the proposed theory any more than he is compelled to prosecute him under the existing theories of jurisdiction. The value of the proposed theory is, inter alia, that if the official thinks he has a good case against the suspect, and he wishes to prosecute him, he is not prevented from doing so by the fact that the offense was committed outside of the state where the official may legally function. Existing difficulties in the protection of a community from criminal offenders are not added to, but one difficulty is removed, by the proposed theory of jurisdiction.

(iv) Witnesses. It may, however, be urged that even though the proof of the commission of a foreign offense could be established in a domestic court that there is the great difficulty of getting the witnesses before the court. This holds true of witnesses for the prosecution and also for the accused, who is entitled to compulsory process to secure witness in his behalf. The accused is also entitled to be confronted by the witnesses against him, which makes it imperative that the prosecuting witnesses be produced in court at the time of the trial. Assuming, for the sake of the objection, that Dean Wigmore's contention that depositions secured under cross-examination may be substituted for confrontation is wrong, and that actual confrontation is required, still the answer to the objection is readily forthcoming.

Comity between the states would make compulsory process against witnesses easily obtainable. The officer wishing to serve a subpoena against a witness in a foreign state could take it to a court in that state and have it made enforceable in that state. The witness in the foreign state would be ordered to proceed to the state where the trial was to be held and testify there. So far as the writer is aware, a statute making it compulsory upon a person to proceed to a foreign state to testify in a criminal proceeding there when ordered to do so, does not exist in the Union. But there appears to be no legal reason why such statutes should not be passed and enforced. Procedure in the federal courts does allow for such compulsory attendance of witnesses and their transportation from one part of the country to another.

(v) Expenses of Transporting Witnesses. The objection based upon the expensiveness of transporting witnesses from the scene of the crime to the state where the prosecution is to occur has three angles—the expense to the state, the expense to the accused and the expense to the witness. An application of the objection to a given case will make the force of it apparent. Suppose that X commits rape in New Zealand. He then is found in New York City. The New York prosecuting officers wish to punish X for the offense committed in New Zealand. The objection to the proposed theory is that the prosecution would be too expensive to New York State, to the accused, and to the witnesses.

As to the expense to the state. At the outset it must again be repeated that the proposed theory is permissive and not mandatory. So that if the expense to the state would be prohibitive there would be no compulsion upon the state to prosecute the supposed offender. But assuming that the offender should be prosecuted, the expensiveness of the prosecution should not be a barrier, because the security of the community is of greater value than the money required to maintain that security. Furthermore, it seems rather ludicrous to urge the matter of expense when one considers the amount of waste and graft that is a part of the government of our states. A small portion of that which is wasted would probably meet the needs of any state which wished to prosecute foreign offenders. It is submitted that it would be more advantageous to any state to prosecute foreign offenders than to compensate political henchmen.

As to the expense of the accused. There is, of course, no doubt that the expense to the accused might be more than he could stand and that, therefore, he would not have the benefit of a fair trial. But there is no reason why the prosecuting government should not bear this

expense. The accused is already entitled to counsel without cost to him. Witnesses in his favor should also be produced at no cost to him. The duty of the state is to give him a fair trial. That cannot be done unless he has witnesses in his favor. If the prosecution is started, the witnesses in favor of the accused should be brought into court. That it may be expensive is true, but the expense should be borne as part of the burden of securing the safety of the state from criminal depradations.

As to the expense to the witnesses. It is no doubt true that attendance at court oftentimes interferes seriously with the witnesses' economic interests. At the present time, the rule is to give witnesses a fair compensation for their services, and to meet their traveling expenses. Some further compensation might be arranged. But probably, full protection from loss could not be assured to the witness. It is submitted, however, that the economic interests of the witnesses are not of paramount importance. If the general security of the state or nation demands the sacrifice, to some extent, of the individual's economic interests they should be sacrificed. In times of war, the individual is completely sacrificed for the general good. The states' powers of eminent domain are based upon the same theory. If land can be taken for public parks, railroads and other public uses, there is no reason why time, energy and earning power should not be taken for the purpose of securing protection from criminal offenders. The general welfare calls for such protection. Money and persons should be sacrificed, if need be, to secure it. The proposed theory of jurisdiction over criminal offenses adds to the general security. This is an unassailable reason why it should be accepted and adopted.