THE TORTURED TALE OF CRIMINAL JURISDICTION

MATTHEW GOODE*

[The word 'jurisdiction' is used in many ways in the law. In the conflict of laws, it tends to mean 'adjudicatory jurisdiction', that is, the power of a court to hear a case otherwise within its remit but which has non-domestic features. Adjudicatory jurisdiction is, however, something more than that when the case is criminal. Because criminal courts almost always apply domestic law to the trial and associated matters, criminal adjudicatory jurisdiction rolls up traditional conflicts jurisdiction and choice of law questions. This article examines a range of decisions on criminal jurisdiction with a view to giving a pragmatic view of how and why courts decide to take or decline criminal jurisdiction. A conflicts point of view is taken to the subject matter. In general terms, the common law is an unprincipled mess of ad hoc *decisions with no sound theoretical underpinnings and containing no overarching or principled justifications beyond the expediency of the moment.]*

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* LLB (Hons) (Adel), LLM (Dal); Senior Legal Officer, South Australian Attorney-General's Department; Adjunct Associate Professor, Faculty of Law, University of Adelaide. The views expressed are those of the writer and not those of the Department or the Faculty.

I GENERAL INTRODUCTION — THEORIES OF CRIMINAL JURISDICTION

In the historical world of theoretically sovereign and equal states, the legislator and the Crown exercised supreme authority over all persons and things within the territory controlled by the legislature and the Crown — but no further.[1] By the early part of the nineteenth century, the common law had adopted the 'territorial theory' of criminal jurisdiction, which is firmly based on that view of the world.[2] Hence, common law has been based primarily on the view that criminal jurisdiction is limited territorially and that criminal choice of law does not exist; that is to say, in conflict of laws terms, the court always applies the law of the forum.

As is the case in the conflict of laws, one must use the term 'jurisdiction' with care. A territorial authority almost always has 'jurisdiction' over the body of the person found within its territory.[3] It is another question whether that authority will assume 'jurisdiction' over the *legal subject-matter* with which that person is concerned. It is the latter question with which this article is concerned.

The practical legal effects of a strict view of the 'territorial theory' are that: (a) a criminal court has jurisdiction only over crimes committed within the territory over which it has domain; (b) once a criminal court has such jurisdiction, it always applies its own criminal law; and (c) no offender can be prosecuted in a place where he or she is not alleged to have committed a criminal act.[4]

[1] It is likely that this view was founded on the fundamental and indispensable role of the jury as the local expert tribunal of fact. See, eg, *R v Keyn* (1876) 2 Ex D 63, 162.

[2] A much quoted example is the judgment of Marshall CJ in *The Schooner Exchange v McFaddon*, 11 US (7 Cranch) 116 (1812), 116: 'The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent as that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself.' It might be interesting for an historian to trace the connections between this statement of law and international policy and the politics of a post-revolutionary United States, at war with England yet again. See also Albert Levitt, 'Jurisdiction Over Crimes' (Pt 1) (1925–26) 16 *Journal of Criminal Law, Criminology and Police Science* 316; Albert Levitt, 'Jurisdiction Over Crimes' (Pt 2) (1925–26) 15 *Journal of Criminal Law, Criminology and Police Science* 495; Walter Cook, 'The Application of the Criminal Law of a Country to Acts Committed by Foreigners Outside the Jurisdiction' (1934) 40 *West Virginia Law Quarterly* 303; *Folliott v Ogden* (1789) 1 HLC 123; 126 ER 75; *Ogden v Folliott* (1790) 4 Broc PC 111; 2 ER 75; *Jefferys v Boosey* (1854) 4 HLC 815; 10 ER 681; *Cox v Army Council* [1963] AC 48, 67; *The Appollon*, 22 US (9 Wheat) 362 (1824); *The Antelope*, 23 US (10 Wheat) 66 (1825); *American Banana Co v United Fruit Co*, 213 US 347 (1909).

[3] 'In one sense, a court always has "jurisdiction" over a defendant who has been properly brought before it; strictly, it is incorrect to refer to our courts having (or lacking) "jurisdiction" to try someone for a particular offence, since to say that our courts lack jurisdiction to try someone for a particular offence is to say that he has not committed the offence': English Law Commission, *Criminal Law: Jurisdiction Over Offences Of Fraud And Dishonesty With A Foreign Element,* Report No 180 (1989) [2.1] citing *R v Osman* [1988] *Criminal Law Review* 611.

[4] See, eg, Levitt, (Pt 1), above n 2, 324; English Law Commission, *Codification of the Criminal Law: Territorial and Extraterritorial Extent of the Criminal Law,* Working Paper No 29 (1970). Other useful articles are: Lotika Sarkar, 'The Proper Law of Crime in International Law' in Gerhard Mueller and Edward Wise (eds), *International Criminal Law* (1965) 50; Wendell Berge, 'Criminal Jurisdiction and the Territorial Principle' (1930) 31 *Michigan Law Review* 238; and Robert Leflar, 'Extrastate Enforcement of Penal and Governmental Claims' (1932) 46 *Harvard Law Review* 193.

International law, on the other hand, recognises four principles of criminal jurisdiction in addition to the territoriality principle. They are: (a) the protective principle; (b) the nationality principle; (c) the passive personality principle; and (d) the universality principle.[5]

(a) *The protective principle* — Under this principle, the forum has jurisdiction in relation to any conduct engaged in by any person anywhere which is contrary to the forum's criminal law and which threatens the peace, security or good government of the forum. The protective principle comes from the period of radical nationalism which produced the French and American revolutions. It was originally limited to what would today be called 'national security crimes',[6] but has progressed far beyond that point and is now a major influence on the common law.[7]

(b) *The nationality principle* — On this theory, the forum has jurisdiction in relation to any conduct engaged in anywhere which is contrary to local law and which is alleged to have been committed by a national of the forum. On this basis, if an Australian national commits an act in, for example, Germany that is legal in Germany, but is contrary to Australian law, that person could be tried and convicted in Australia. This basis for jurisdiction is commonly used in treason and related crimes[8] as a matter of common law, or as a statutory basis for jurisdiction in related areas.[9]

(c) *The passive personality principle* — While the nationality theory is based on the nationality of the alleged offender, the passive personality principle is based on the nationality of the alleged victim. Under this principle, jurisdiction exists over any conduct engaged in anywhere which is contrary to local law and which victimises a national of the forum. This principle is rarely employed.[10]

5 Toohey J nominated these categories in his judgment in *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 659 ('*Polyukhovich*'). See also Harvard Research on International Law, 'Jurisdiction with Respect to Crime' (1935) 29 *American Journal of International Law* 474.

6 See, eg, Manuel Mora, 'Criminal Jurisdiction Over Foreigners for Treason and Offences Against the Safety of the State Committed upon Foreign Territory' (1958) 19 *University of Pittsburgh Law Review* 567.

7 Examples of its legislative influence may be found in the *Crimes Act* 1914 (Cth) ss 3A and 85E(2). The common law influence of the principle is traced in the discussion below.

8 See, eg, *R v Jameson* [1896] 2 QB 425; *R v Lynch* [1903] 1 KB 444; *R v Casement* [1917] 1 KB 98; *Joyce v DPP* [1946] AC 347.

9 An example is the *Crimes (Foreign Incursions and Recruitment) Act* 1978 (Cth). The *Crimes Act* 1914 (Cth) s 50AD (inserted by the *Crimes (Child Sex Tourism) Amendment Act* 1994 (Cth)) claims jurisdiction over crimes committed wholly abroad on the basis that the accused was at the time of the offence one of the following: (a) an Australian citizen; (b) a resident of Australia; (c) a company incorporated under a law of the Commonwealth, a State or a Territory; or (d) a company carrying on business principally in Australia. But see also s 9 of the *Offences Against The Person Act* 1861 (UK) which asserts jurisdiction over murder committed anywhere by a British subject. A version of it may be found in the legislation of some Australian States and Territories: see, eg, s 12 of the *Criminal Law Consolidation Act* 1935 (SA).

10 An example is the assertion of jurisdiction by the United States over the killers of a US legislator visiting a South American jurisdiction on the basis of the victim's status. More recently, and unusually, the *Crimes (Female Genital Mutilation) Amendment Act* 1994 (NSW) bases jurisdiction over female genital mutilation committed abroad on the basis of the place of residence of

(d) *The universality principle* — Under this theory, the forum has jurisdiction simply because the offender is within the territory. It is traditionally reserved for offences thought to be of a particularly heinous character and which are criminalised by international agreement. Piracy and genocide are classic examples.[11]

Special cases aside, the most common bases for jurisdiction over crime in common law based systems are the territorial theory and some variation on the protective principle. In common law based systems of law there is a tension between the two — or, interpreted differently, an inconsistent movement from one to the other. A common perception of the present position is accurately summarised by Morgan as follows:

> [I]t did not take long for courts to recognize that strict invocation of the territoriality principle could potentially render certain transborder crimes unpunishable anywhere. In an effort to avoid such a result, the common law courts developed a number of interpretive techniques for characterizing the location of any given crime. The cumulative result of these varying interpretative mechanisms, however, has fallen far short of analytic clarity. ... [T]he courts have taken different stances at different times and the general result ... is one of doctrinal confusion. ... [C]ourts ... [have] devised so many techniques for locating frauds, conspiracies, and other offences inside or outside a given jurisdiction that no one principle can possibly be said to reconcile the various pronouncements.[12]

The discussion which follows is directed to weaving a way through the tangled web of law in this area. Two points should be emphasised at the outset. First, since there is no cohesive general theory of criminal jurisdiction, the courts have a general tendency to treat each crime or type of crime separately. While generalities are uttered, specifics tend to be limited to the type of crime under consideration. Second, there is an indiscriminate and inconsistent legislative overlay in relation to jurisdiction over specific crimes within Australian criminal law.

The discussion which follows will commence with an examination of the way in which the common law courts have dealt with individual cases and the theoretical devices that they have employed in order to justify the particular result in a given case. That will be followed by an outline of theoretical structures which have been suggested in order to give coherence and predictability to this area of law, which, it will be seen, is badly in need of it. Issues of inter-jurisdictional double jeopardy and criminal procedure will then be discussed, and a concluding section will deal with statutory interventions in the area.

the victim. American authority on the use — and failure to use — this basis of jurisdiction is detailed in David Lanham, *Cross-Border Criminal Law* (1997) 32–5.

11 Recent examples are the *Crimes (Torture) Act* 1988 (Cth) and the *War Crimes Amendment Act* 1988 (Cth). On war crimes prosecution, see *Polyukhovich* (1991) 172 CLR 501, in which there was some controversy between members of the High Court on the amplitude of the power of the Commonwealth to legislate for 'universal jurisdiction'. For a discussion of the issue in Canada, see *R v Finta* (1989) 50 CCC (3d) 236.

12 Edward Morgan, 'Criminal Process, International Law, and Extraterritorial Crime' (1988) 38 *University of Toronto Law Journal* 245, 270–1 (footnotes omitted), where he paraphrases and quotes the judgment of La Forest J in *Libman v The Queen* [1985] 2 SCR 178 ('*Libman*').

II THE TERRITORIAL THEORY

A *The Territorial Theory in Practice: Some Preliminary Comments*

In theory the territorial rule was based on the notion of sovereign and equal states. In practice, however, the rule was adopted because it was thought that it would be easy to apply and would produce certainty of result. That turned out to be a vain hope. The fallacy of certainty and ease of application was quickly demonstrated by a series of cases involving the homicide of escaping slaves in the United States. What was the position where a slave owner standing in a slave state killed an escaping slave standing in an emancipist state? The killer acted legally where he stood but illegally where the victim died.[13] Where was the alleged offence committed? Was the killer guilty of homicide in the emancipist state?

Locating the place where an alleged offence is committed is central to the operation of the territorial theory. Even placing the problem of locating multi-state events aside, the theory assumes that the territorial boundaries of the courts' jurisdiction can be ascertained with certainty. In most cases that is not a problem. But complex issues can arise in three types of cases. In the first type, the boundary line is in issue.[14] This may involve complex questions of law and history. In the second type, the crime takes place at sea. In Australia, that involves complex and difficult constitutional questions.[15] In the third type, the location of the offence is not known at all. This last problem will be discussed in more detail below.

The territorial theory was once thought to imply that only one locality can have jurisdiction over any one given crime. As we shall see, with the development of more flexible or, according to one point of view, result-oriented jurisdictional claims, that is not the case. One crime may be justiciable in a number of localities — and to approach the area with the idea that criminal jurisdiction is exclusive in this sense produces confusion.

The last preliminary observation to be made is that any principle of criminal jurisdiction seems to act not only to localise common law crimes, but also statutory ones, at least in the absence of explicit statutory direction to the contrary. Consequently, if territorialism is to rule, statutory criminal provisions should be interpreted so as to apply only to conduct engaged in within the territory of the enacting jurisdiction.[16] A good example of this approach is that of Lord Scarman in *Air India v Wiggins*:

[13] See also Joel Bishop, *Commentaries on the Criminal Law* (7th ed, 1882) vol 1, 111–6. A non-slave example is provided by *Simpson v State*, 17 SE 984 (1893).

[14] See, eg, *Ward v The Queen* (1980) 142 CLR 308.

[15] See, eg, Cheryl Saunders, 'Maritime Crime' (1979) 12 *Melbourne University Law Review* 158; R Sibley, 'Maritime Crime and the Extra Territorial Jurisdiction of the Queensland Courts' (1988) 4 *Queensland University of Technology Law Journal* 161; and *R v Olney* [1996] 1 Qd R 187. An example from Canada is *R v Frisbee* (1989) 48 CCC (3d) 386. This area of constitutional law will not be considered further in this paper. See also Lanham, above n 10, 203–24.

[16] The famous expression of this doctrine is to be found in the much quoted decision of the Privy Council in *Macleod v Attorney-General for NSW* [1891] AC 455. That decision, however

> There are ... two canons of construction to be observed when interpreting a statute alleged to have extra-territorial effect. The first is a presumption that an offence-creating section was not intended by Parliament to cover conduct outside the territorial jurisdiction of the Crown. ... The second is a presumption that a statute will not be construed as applying to foreigners in respect of acts done by them abroad. ... Each presumption is, however, rebuttable: and the strength of each will largely depend upon the subject matter of the statute under consideration.[17]

B *The Territorial Theory in Practice: A General Overview*

1 *Locating the Crime*

Cases may arise in which it is simply not possible to say with any degree of certainty where the behaviour in question was committed. The most notable Australian example is *R v Thompson*,[18] in which the accused was charged with the murder of two women whose bodies were found in a burnt out car in the Australian Capital Territory, but very close to the NSW border. The accused's story was that he and the women had been travelling from New South Wales to the Australian Capital Territory when the car ran off the road, crashed into the tree, and burst into flames. The case for the Crown was that the women died from gunshots to the head inflicted by the accused — but the Crown could not prove where that event happened.

The accused was tried and convicted in the Australian Capital Territory. The High Court dismissed an appeal. On the question of jurisdiction, the court was not unanimous. Mason CJ and Dawson J, with whom Gaudron J agreed, took the view that where there was an issue as to the location of a crime, the Crown must bear the onus of proof to establish locality on the balance of probabilities.[19] Brennan and Deane JJ, for different reasons, held that the civil onus applies where the law in the possible jurisdictions is identical in all relevant respects, but that location must be established beyond reasonable doubt where it is not.[20] For

widely quoted today, is undeniably anachronistic in (a) its view of the common law of criminal jurisdiction and (b) its view of the constitutional power of the Australian States to legislate extraterritorially.

17 *Air India v Wiggins* [1980] 2 All ER 593, 597 (citations omitted) ('*Wiggins*'). For examples of the latter canon of construction at work, see *Holmes v Bangladesh Biman Corporation* [1989] AC 1112 and *Brownlie v State Pollution Control Commission* (1992) 27 NSWLR 78, 83–4 (Gleeson CJ) ('*Brownlie*').

18 (1989) 169 CLR 1 ('*Thompson*'). For another case in which this problem occurred, see *R v Graham* [1984] VR 649. In *R v Hayes* (1996) 105 CCC (3d) 425, the accused was charged with importing drugs but it could not be shown where the drugs actually entered Canada. The court held that jurisdiction could be taken by the Province in which the arrangements leading to the importation occurred. This is not a particularly persuasive decision.

19 *Thompson* (1989) 169 CLR 1, 13–15 ('Notwithstanding differences in statute law in the various States and Territories'), 39 (Gaudron J).

20 Ibid 29–30 (Brennan J), 35–6 (Deane J). In brief, Brennan J founded his view on what was and what was not a matter of 'jurisdiction' as opposed to an element of the offence; Deane J founded his view on the idea that, where the relevant laws were identical, the accused is subject to the 'national common law'. His Honour, adumbrated upon his extensive view of the nature of a federal common law in the Australian federal structure set out in his judgment in *Breavington v Godleman* (1988) 169 CLR 41: ibid 34. That view is dealt with in Part VII(A) below.

Brennan J, the onus is changed where the difference would 'expose the offender to punishment of a higher order'.[21] For Deane J, the higher onus applies where there is a significant difference in the substantive law. He was also inclined to the view that that would also be so where there was a significant difference in penalty.[22] The court was unanimous in its view that, where the issue was contentious, the jury should be required to deliver a special verdict on the matter.[23] The majority approach was, therefore, to apply the civil onus to establishing location and therefore justiciability.

The minority view in this case appears correct. The question of locality jurisdiction is only really significant in cases in which the question of forum has an important consequential effect on the case for the accused. That may be because of interstate differences in substantive law, procedural or evidentiary law, or sentencing law. In a case such as *R v Ward,* where the availability of the defence of diminished responsibility was at stake, the appropriate assessment of the culpability of the accused was at issue.[24] In such cases, the public policy behind the insistence of the common law that proof beyond reasonable doubt is required is brought into play. As all the judges in *Thompson* pointed out, however, where that is not the case, the argument that the locality of the alleged crime must be established beyond a reasonable doubt looks legally attractive but is really without substantial merit. It is an affront to 'justice, policy and common sense'.[25]

A number of jurisdictions have enacted statutes in an attempt to deal with this problem. Under a recent statutory scheme adopted by the Standing Committee of Attorneys-General and enacted by New South Wales, South Australia, the Australian Capital Territory and Tasmania, if the defendant wants to argue that the court lacks criminal jurisdiction in the territorial sense, the defendant must prove that lack on the balance of probabilities.[26] This is, of course, an approach which not only fails to discriminate between cases in which the question of jurisdiction actually matters and cases in which it does not, but also puts the accused in the position of being compelled, in practice, to confess to a crime elsewhere. If the location of the alleged crime is unknown, as in *Thompson*, for example, or is known only to the perpetrator, and the accused is innocent, how precisely could he or she *prove* that the relevant events were not located in a

21 *Thompson* (1989) 169 CLR 1, 30.

22 Ibid 38.

23 Ibid 15 (Mason CJ and Dawson J), 30 (Brennan J), 39 (Gaudron J). Deane J, did not comment on the issue beyond remarking that a special verdict was not required in this case as the implied allegation of locality was sufficient to found jurisdiction in this case: ibid 38. In so far as the headnote of the case published in the Australian Law Journal Reports, (1989) 63 ALJR 447, implies that Brennan and Deane JJ hold that the question is one for the trial judge, it is wrong. See also *R v Collins* (1986) 44 SASR 214.

24 Ward was eventually convicted of manslaughter: *Ward* (1981) 3 A Crim R 171.

25 *Thompson* (1989) 169 CLR 1, 39 (Deane J).

26 Respectively, *Crimes Act* 1990 (NSW) s 3A, *Criminal Law Consolidation Act* 1935 (SA) s 5C, *Crimes Act* 1990 (ACT) s 3A, *Criminal Law (Territorial Application) Act* 1995 (Tas). In Lanham, above n 10, 73, it is said, referring to s 15 of the *Criminal Code*, that in the Northern Territory, 'the physical link does not have to be proved at all' It is doubtful whether that conclusion is the law, but that doubt must await litigation.

particular place?[27] This approach is sensible if and only if there is no real difference in the legal regimes applicable to a case involving competing Australian jurisdictions. That is not currently the case — as *Ward* demonstrates.[28]

Thompson does not solve all possible problems of lack of proof as to location. Gaps will still occur. In *R v Kron*,[29] the accused was charged with obtaining a valuable thing by deception. The case for the Crown was that the accused had made false representations in New South Wales as a result of which he had obtained title to land in Queensland. It could not be established where the accused came into possession of the title, although the accused asserted that he obtained it in Queensland, but, following *Thompson,* the trial judge asked the jury for a special verdict on the place where the title was obtained. The verdict was that the jury was satisfied on the balance of probabilities that it was obtained in New South Wales. The New South Wales Court of Criminal Appeal held that there was no evidence sufficient to justify that verdict, particularly bearing in mind that the transfer was prepared by a solicitor in Queensland and related to Queensland land.

2 *Strict Territorialism in Operation*

There are a number of decisions which illustrate the strict operation of the territorial principle in a more or less straightforward way.

In *R v Harden*,[30] the accused sold refrigerators. The operation was financed by a company in Jersey. Harden was based in England. He posted hire purchase agreements from England to Jersey. The documents included an 'offer for sale' which included the sentence: 'This offer may be accepted by you at any time within one month of the date hereof by sending your cheque for the net amount'. When an offer was accepted, the Jersey company would then post a cheque in satisfaction to the accused.

Some of the hire purchase forms were alleged to be fictitious. The accused was charged with obtaining the cheques by false pretences. The court held that it lacked jurisdiction to try the case. On an examination of the documents, the court concluded that the accused and the victims had agreed that receipt of the documents by the post office in Jersey amounted to receipt by the accused. On that basis, any obtaining which took place as a result of the false pretences took place in Jersey — and out of the territorial jurisdiction of the English courts. The effect of the decision is that an agreement between the parties to a fraudulent transaction may determine the location of the crime and the jurisdiction of the courts.

[27] The form of this question assumes the traditional approach of placing emphasis on locating events. As will be seen, that is an outmoded approach. The right question becomes even more difficult if varying judicial approaches to the question of jurisdiction, discussed below, are employed.

[28] *Ward* (1981) 3 A Crim R 171.

[29] (1995) 78 A Crim R 474 ('*Kron*').

[30] [1963] 1 QB 8 ('*Harden*').

The decision has survived, despite considerable judicial criticism.[31] However, it is often distinguished, or characterised as a 'high water mark' in territorialism.[32]

In *R v Hildebrandt*,[33] the accused was charged with, in substance, 'putting' or 'depositing' a bomb on an aircraft which was travelling between Sydney and Brisbane. The bomb was brought onto the aircraft in pieces and assembled by the accused on the flight. There was no evidence whether the accused 'put' or 'deposited' the completed bomb on the aircraft while it was over New South Wales or Queensland. The court held that in such circumstances, a Queensland court had no jurisdiction to try the accused for those offences. It further held that 'putting' and 'depositing' were single acts, so that, even if the bomb was assembled and put and deposited in New South Wales, the Crown could not successfully argue that the 'putting' and/or 'depositing' were continuous acts which, having been done in New South Wales, continued in effect when the aircraft entered Queensland airspace.[34]

In *R v Lyons*,[35] the accused was charged in New South Wales with the offence of uttering a forged document. While in Victoria the accused handed three forged documents to two directors of a New South Wales company. The object was to induce the New South Wales company to enter into an agreement with a company of which the accused was a director. The question was whether the New South Wales courts had jurisdiction.

Street CJ held that there was no jurisdiction.[36] Having examined a number of nineteenth century authorities, he found that there was no event within the territory of New South Wales to locate the crime there, although, in another factual setting, the doctrine of agency could be employed to that end:

> In order to found a conviction, it must be possible to identify some actual dealing with the document in this State which can be ascribed to the appellant either directly or through a person or agent acting for him. I can find no evidence to support the conclusion that the role filled by the two directors of [the New South Wales company] was such as to import the requisite representative

[31] See especially *R v Treacy* [1971] AC 537, 551 (Lord Reid), 563 (Lord Diplock) ('*Treacy*') and *DPP v Stonehouse* [1978] AC 55, 66 (Lord Diplock) ('*Stonehouse*').

[32] A good example of distinguishing *Harden* is *R v Tirado* (1974) 59 Cr App R 80 ('*Tirado*'). In that case, the accused was also charged with obtaining property by deception. The accused ran an employment agency in England. He wrote to Moroccans in Morocco offering jobs for a fee. The Moroccans deposited money in a bank in Morocco at the suggestion of the accused. The bank then sent a draft to the accused who deposited it in his bank. The court held that it had jurisdiction on the basis that the accused eventually obtained the proceeds in England. The court distinguished *Harden* on the tenuous basis that the suggestion made by the accused as to the method of payment by the victims did not amount to an agreement, express or implied, that deposit in the Moroccan bank concluded the transaction with the accused. *R v Selkirk* [1965] 2 CCC 353 is very similar to *Harden* and has come under similar criticism in, eg, *R v Horbas* (1968) 67 WWR 95 and *Re Chapman* [1970] 5 CCC 46. In *Ancuta v R* (1990) 49 A Crim R 307, it was conceded that there was no jurisdiction where both the initial obtaining and the false pretences seem to have taken place outside the forum.

[33] [1964] Qd R 43 ('*Hildebrandt*').

[34] The matter of 'continuing' offences or elements of offences is dealt with below in Parts II(B)(4) and II(B)(5). Hildebrandt was convicted of equivalent offences in New South Wales: *R v Hildebrandt* (1963) 81 WN (NSW) Pt 1 143.

[35] (1983) 10 A Crim R 253.

[36] Ibid 260 (O'Brien, Chief Judge of the Criminal Division, concurring).

> link with the appellant so as to identify him, in a criminal sense, with the actual physical handling of the documents when brought back to the company's office in this State ... I agree ... that posting the documents in Victoria addressed to the company in New South Wales would expose the person posting them to liability in New South Wales to conviction of uttering in this State. The Post Office would, in such a case, be the agent for the person posting them to effect delivery in New South Wales.[37]

Begg, Chief Judge at Common Law, dissented:

> In my judgment if a person, knowing a document to be forged, gives it to a person or persons outside New South Wales, knowing and intending that that person would bring it into New South Wales and present it to a New South Wales company, and if there is evidence that he intended to defraud that company then in my view he can be convicted in New South Wales of uttering the document.[38]

It is interesting to note that, on the majority view, the question of jurisdiction was determined by the entirely fortuitous circumstance of whether or not the appellant gave the documents to the victims in person or posted them.[39]

In *R v Waugh,*[40] the accused was charged in Victoria with attempting to obtain by false pretences. He posted a letter containing a false pretence from Melbourne to Launceston. Madden CJ found jurisdiction on two alternative bases. The first was that the crime of attempt is complete when the accused commits an act sufficiently proximate to the desired offence and that the attempt was therefore committed where and when the accused posted the letter in Victoria.[41] The second ground was that, if the accused had been successful, the completed crime would have taken place in Victoria because the accused would have obtained the money there.[42]

In *R v Atakpu,*[43] the appellants schemed to hire motor vehicles outside England, drive them into England, alter their identity and sell them to unsuspecting

[37] Ibid 259.

[38] Ibid 261.

[39] The majority in this case, like the court in *Hildebrandt,* felt unable to use the device of continuation to bring the acts of the appellant into the State of New South Wales. Begg, Chief Judge at Common Law, in dissent was appealing to the protective principle — the point he was making is that the effect of the offence is to be felt in New South Wales and that therefore that State has an interest in taking jurisdiction over the crime. These techniques will be examined below. Neither view is *legally* 'right' or 'wrong' — merely illustrative of technique.

[40] [1909] VLR 379 ('*Waugh*').

[41] In general, it should be noted that the location of acts committed by post is, in the criminal law, but unlike the law of contract, treated as inconsistently as any other aspect of criminal jurisdiction. Cf, eg, *Harden* [1963] 1 QB 8; *Treacy* [1971] AC 537; and *Attorney-General's Reference [No 1 of 1982]* [1983] 2 All ER 721.

[42] There are two bases which combine to found that reason; first, that the crime of obtaining by false pretences is committed where the obtaining takes place and not where the false pretences are communicated; the second, that jurisdiction can be found over an attempt to commit a crime if the forum would have had jurisdiction over the completed crime, had the attempt been successful. Both reasons are impeccable territorial arguments on their own terms, and both are examined further below. The first premise is based on, eg, *R v Ellis* [1899] 1 QB 230 ('*Ellis*'), discussed in Parts II(B)(3) and II(B)(4) below. The second premise is reflected in, eg, *Board of Trade v Owen* [1957] AC 602 ('*Owen*'), discussed in Part II(B)(6) below.

[43] [1993] 4 All ER 215 ('*Atakpu*').

purchasers. They used false documents obtained in England to hire the cars in Germany and Belgium and were apprehended on entry into England. They were charged with conspiracy to steal. Because of the decision in *Board of Trade v Owen*[44] the question for the court was: assuming that the vehicles were stolen, where did the theft occur?

Under English law, that question was: where did the appropriation occur? After consideration of authority, notably *DPP v Gomez*,[45] the court concluded, with the utmost regret, that

> if goods have once been stolen, even if stolen abroad, they cannot be stolen again by the same thief exercising the same or other rights of ownership over property. ... If the jury had been asked when and where these motor cars were stolen they could only have answered that they were stolen in Frankfurt or Brussels. The theft was complete abroad and the thieves could not steal again in England.[46]

The final example of the operation of straightforward territorialism is *Wiggins*.[47] In that case, the defendant airline carried a cargo of live birds from India to England. There was a delay in Kuwait, and, owing to heat and a lack of ventilation, most of the cargo died in transit. Of the 2000 birds, 89 arrived alive. There was evidence that the deaths all occurred outside British airspace. The accused was charged with carrying an animal in a way that was likely to cause that animal injury or unnecessary suffering.[48]

A question of law was put to the House of Lords. It was assumed that all of the dead birds had died before entering British airspace. The House of Lords held that the offence, properly interpreted, did not apply to the behaviour. Lord Diplock held that:

> [T]he offence ... is a 'conduct crime' not a 'result crime'. It was no doubt a continuing offence so long as the parakeets were being carried on the aircraft in such a way as to cause or be likely to cause suffering to them; but the commission of the offence ceased at the moment when their suffering and all likelihood of their further suffering ended with their death. ... [T]his must have occurred at Kuwait ... So no offence was committed by Air-India in respect of the birds which were dead on arrival at Heathrow. It is not disputed by Air-India that of-

[44] [1957] AC 602. See below Part (II)(B)(6)(a) for discussion of the principle involved.

[45] [1993] AC 442 ('*Gomez*'). The decision in *Gomez* has not been without its critics: see generally the discussion in Model Criminal Code Officers Committee, *Model Criminal Code, Chapter 3 — Theft, Fraud, Bribery and Related Offences, Final Report* (1995) 35–41.

[46] *Atakpu* [1993] 4 All ER 215, 224. This reasoning is criticised by G Sullivan and Colin Warbrick in 'Territoriality, Theft and *Atakpu*' [1994] *Criminal Law Review* 650 on the basis that, if the *Theft Act* 1968 (UK) is territorial, the cars could not have been stolen by English law in Belgium or Germany because the English crime of theft does not apply there. Therefore, it is said, the cars were 'stolen' once they reached England in possession of the accused. It is submitted that this reasoning is fallacious. The problem is the rule in *Owen* [1957] AC 602. That rule requires the court to take jurisdiction over the conspiracy if it would have had jurisdiction over the crime conspired to be committed; ie — on the assumption that what was charged was theft of the cars, does England have jurisdiction over that theft? The answer, as the authors admit, is no. There are other ways around this decision though, as subsequent discussion reveals.

[47] [1980] 2 All ER 593.

[48] Contrary to art 5(2) of the *Transit of Animals (General) Order* 1973, made under s 23(b) of the *Diseases of Animals Act* 1950 (UK).

> fences were committed in respect of the 89 birds that were still alive; but it is not possible to identify the individual crates which contained any live birds.[49]

The results of the above cases may have been avoidable in various ways. Discussion now turns to the variety of ways in which territorial theory is capable of manipulation in the hands of a determined court.

3 *Evasion Technique (1): Gist of Offence Analysis*

Where an offence contains more than one element and one or more of those elements occur in different localities, the territorial theory is difficult to apply. One way of overcoming the difficulty is to interpret the offence in such a way that the location of one element becomes more important than that of the other(s). That more important element becomes 'the gist of the offence' and its location is crucial.

A standard example of the gist of the offence approach is *R v Treacy*,[50] in which the accused was charged with blackmail, that is, demanding money with menaces. The accused posted a letter in England to the victim in West Germany. The letter contained the menaces. By a majority, the House of Lords held that the English courts had jurisdiction to try the offence. Lord Hodson, with whom Lord Guest agreed, held that the *Theft Act* 1968 (UK)[51] applied on its own terms to the facts of this case. That was so because it criminalised the making of the demand and the demand was made when and where the letter was posted. This was so because the superseded *Larceny Act* 1916 (UK)[52] would have covered the case and it was presumed that Parliament, in enacting the *Theft Act* 1968 (UK), did not intend to change the law in this respect.

Lord Diplock gave two reasons for agreeing with the result. The first ground involves his theory of criminal jurisdiction and will be examined in more detail in Part III below. The second was based on his interpretation of the *Theft Act* 1968 (UK). He took the view that the Act was designed to replace the technical and complex structure and content of the common law and ancient statutory offences with common sense offences phrased in ordinary language. He then asked rhetorically: 'would the ordinary person have said "I made my demand" when he posted the letter or when it was received?' In his view, the ordinary person would say 'I have made my demand' when the letter was posted, and hence that was where the offence was committed.

Lords Reid and Morris dissented, their disagreement lying in their analysis of the 'gist of the offence'. Lord Morris, for example, stated:

> [T]he notion of making an unwarranted demand with menaces involves that the demand is made to or of someone who could comply with it and who could be influenced by the menaces which accompany the demand. The act of making the demand is not, in my view, committed until it is communicated to the person who is being unjustifiably menaced. There must be contact between the

[49] *Wiggins* [1980] 2 All ER 593, 597.
[50] [1971] AC 537.
[51] Section 21(1).
[52] Sections 29–31.

> demander and the victim. ... A demand is not made until it is communicated. If the demand is contained in a letter it is not made until the letter is received.[53]

On the dissenting view, then, the 'gist of the offence' was the communication of the demand and that did not take place within the forum.

An important example of early gist of the offence reasoning, which has since dominated fraud cases, is *R v Ellis*,[54] in which the alleged offence was obtaining by false pretences. The false representations were made in Scotland. The accused received or 'obtained' the goods in England. The question was whether the English courts had jurisdiction over the offence.

Wills J held that the 'obtaining' element of the offence was the gist of the offence and hence that its location was determinative:

> The making of the false pretences is antecedent to, and not a part of, the obtaining the goods. It is a material circumstance, because it stamps the illegality of the obtaining the goods. The gist and kernel of the offence is the obtaining the goods by improper means, not in using the improper means whereby goods were obtained, and there was therefore an entire offence within the one county, though the circumstance which stamped it with illegality took place beyond the jurisdiction.[55]

It is important to note that, for Wills J, the obtaining was *not* the gist of the offence because it was the *last* event necessary to constitute the offence, but because the *purpose* of the offence, in his view, was to deter people from depriving other people of their property by telling lies, rather than to deter them from telling lies. The analysis is problematic.[56] It could equally be argued that people obtain goods or money as a commonplace activity — what makes an obtaining of goods, otherwise an unremarkable everyday event, of particular concern is the fact that it was caused by a lie. The material part of the offence is deception — the *causative relationship* between the lie and the obtaining. That is borne out by the fact that an obtaining accompanied by a false pretence is not an offence unless there is a causative relationship between the two.[57]

Subsequent decisions have ignored the reasoning in this decision and applied it mechanically. For example, in *Kron*[58] the New South Wales Court of Criminal Appeal said:

> The authorities in England establish that the crime of obtaining property by false pretences is committed in the locality where the property is obtained, re-

[53] *Treacy* [1971] AC 537, 555–6.

[54] [1899] 1 QB 230.

[55] Ibid 237.

[56] Although it must be conceded that there is some weak authority for the proposition: *R v Burdett* (1820) 4 B & Ald 95; 106 ER 873 and *Pearson v McGowran* (1825) 3 B & C 700; 107 ER 893.

[57] See, eg, *R v Button* [1900] 2 QB 597; *R v Perera* [1907] VLR 240; *R v Clucas* [1949] 2 KB 226; *R v Edwards* [1978] *Criminal Law Review* 49. Even so, the common law courts have always paid central attention to the place of the obtaining: see, eg, *Harden* [1963] 1 QB 8 and *Waugh* [1909] VLR 379.

[58] (1995) 78 A Crim R 474.

> gardless of where the false pretences occur.[59] ... This view, together with the related 'terminatory' theory of jurisdiction was questioned ... [h]owever it accords with the prevailing opinion in Australia.[60]

In reality, the technique involved is that one finds the 'gist of the offence' — the vital element — and if that happens in the territory, then *the entire offence* happens there. Although one may *call* this the 'terminatory theory', it is submitted that to do so cloaks the reasoning involved rather than explicating it. For Wills J the crucial fact was *not* that the obtaining was the last event — it was the key event. Calling this the 'terminatory theory' merely conceals the reason behind a meaningless legal label.

Two further points must be made. The first is that it may be difficult to locate the place of the obtaining.[61] An extremely complex analysis of commercial and civil doctrines may be required.[62] *R v Thompson* is a good example.[63] The accused was employed by a bank in Kuwait. Using a computer, he arranged to transfer credits from other accounts to his own. He then went to England and arranged for the Kuwaiti bank to telex the credits to his bank in London. He was charged in England with obtaining property by deception. The accused argued that he had 'obtained' the money when and where he transferred the credits to his own account — in Kuwait. The Court of Appeal rejected the argument. May LJ held that when the accused had done that, he had 'obtained' nothing. The credit balances could not be described as choses in action, as they were merely liabilities that were capable of immediate defeasance once the fraud was discovered. The obtaining took place at the earliest when the amounts were credited to the English accounts — in England.[64]

The second point is that analogous offences which *look* like obtaining by false pretences may produce a different analysis. In *R v Collins*,[65] the case for the Crown was that the accused had falsely represented to investors that he had access to large sums of money for loan. As a consequence, the victims of the scheme had paid 'loan application fees' to the accused either directly or through his agents. Thirty-nine counts involved victims interstate. In those cases, the victims either paid the agents of the accused interstate or posted cheques to the

[59] Citing *Harden* [1963] 1 QB 8; *Tirado* (1974) 59 Cr App R 80; *R v Governor of Pentonville Prison; Ex parte Khubchandani* (1980) 71 Cr App R 241; *R v Thompson* (1984) 79 Cr App R 191.

[60] *Kron* (1995) 78 A Crim R 474, 476, citing *Ward v R* (1980) 142 CLR 308; *R v Crowley* (1963) 82 WN (NSW) Pt 1 238; *Fisher v Bennett* (1987) 85 FLR 469.

[61] In *Kron* (1995) 78 A Crim R 474, it was not possible to tell where the obtaining happened. See Part II(B)(1) above.

[62] Cf extensive criticism of the fraud cases on this ground by the English Law Commission, *Criminal Law*, above n 3, [2.6].

[63] (1984) 79 Cr App R 191. This case is described as illustrating 'the erratic effect' of these rules by the English Law Commission, *Criminal Law*, above n 3, [2.6]. Cf *R v Tomsett* [1985] *Criminal Law Review* 369.

[64] See also *R v Governor of Pentonville Prison; Ex parte Herbage [No 3]* (1987) 84 Cr App R 149; *R v Bevan* (1987) 84 Cr App R 143 ('*Bevan*'); and *R v Nanayakkara* [1987] 84 Cr App R 125. The burden of proof issue has not arisen for decision in these cases.

[65] (1986) 44 SASR 214.

accused. In either case, the proceeds were banked to the disposition of the accused in the forum.

On appeal on the question of jurisdiction, Jacobs J held that, whatever may be the status in authority of *Harden*,[66] the accused was not charged in this case with 'obtaining' by false pretences, but rather with 'causing a valuable security to be delivered' to him by false pretences.[67] He also held that it was clearly open to the jury to find that the 'delivery' took place in the forum by means of the agents of the accused and/or the post office.

A final example of the gist of the offence analysis is the decision in *Gold Star Publications Ltd v DPP*.[68] The appellants were in possession of crates of obscene magazines in England. Section 3 of the *Obscene Publications Act* 1959 (UK) authorised police to seize, and courts to order the forfeiture of, obscene articles 'kept for publication for gain'. The appellants argued that, since the magazines were kept exclusively for export to other countries, the statutory words should be read down so as to apply only to articles kept for publication for gain within the territorial jurisdiction of England.

The House of Lords rejected the argument. Lord Wilberforce held that Parliament could not be taken to have intended that England should become a source of a flourishing export trade in pornography to other places in the world — including Scotland and Ireland. He held that although proof of a tendency to deprave and corrupt and the content of the defence of public good gave rise to particular difficulties in a case where the goods are exclusively for export, those difficulties must be faced and dealt with by the English courts. Lord Roskill agreed. His view was that the object of the legislation was the attack on monetary profit and that profit would have occurred within the territory.

Lord Simon dissented. He held that: (1) if the objective of the legislation included the high-minded ideal that the world should be protected from English pornography, it would and should have said so; and that (2) English courts should not be asked to determine whether the peoples of the world of widely varying development and comprehension would be depraved and corrupted or whether the publication would be for the good of that society. The difficulty of those tasks was such that Parliament could not have intended to impose them on the courts. He also argued that considerations of international comity dictated that a sovereign state should not meddle with the reading habits of the subjects of foreign sovereigns.

Again, the difference between the majority and the minority lies in differing interpretations of the objectives of the legislation and *hence* the gist of the offence and the location of its commission. It is *not* about 'terminatory' theories and the like. On one view, the principal purpose of this legislation was its attack on the profit to be made from the corruption of the morals of others and that profit, and the organisation of it, was located in the forum. On the other view, the object of the legislation was the prevention of the corruption of other human

[66] [1963] 1 QB 8.
[67] *Criminal Law Consolidation Act* 1935 (SA) s 195.
[68] [1981] 2 All ER 257 ('*Gold Star*').

beings, and those events, if they occurred at all, occurred outside the forum. Thus, the differing interpretations of the object of the legislation led to a differing emphasis on the gist of the offence and, hence, the location of the behaviour labelled criminal by the legislation. The key point is, of course, that the correct analysis of what is the 'gist of the offence' must depend upon an analysis of the purpose and objects of the offence and not the happenstance of whether the element in question occurs first, last or in the middle of the commission of the offence as a whole.

Comparing *Wiggins*[69] and *Gold Star*,[70] one is tempted to wonder at the distinction (if any) between the protection of animal health and the protection of human morality. On the facts, however, the lesson may be that the courts are prone to take an inclusive view of criminal jurisdiction where the essential activity regulated by the legislation takes place largely within the jurisdiction *whatever the legislative words defining the prohibited aspect of that activity.*[71]

4 *Evasion Technique (2): Continuing Elements of Offences*

In some cases, it is possible to assert jurisdiction under the territorial theory even though the main (gist) or only element of the offence *looks like* it took place outside the territory of the forum. That can be done if the crucial element of the offence can be regarded as 'continuing' until it takes place in the forum as well. Put another way, this approach asserts that a conventional territorial analysis of a multi-element offence which seems to show that two or more elements of that offence are located within different territorial jurisdictions is insufficiently precise, and with a little ingenuity all elements of the offence can be located within one territorial jurisdiction.

An early example of this technique is *Ellis*.[72] In that case the accused made false representations in Scotland. As a result, he obtained goods on credit in England. He was charged in England with the offence of obtaining goods by false pretences. The majority in that case adopted a 'gist of the offence' analysis. On that basis, the English court had jurisdiction. Although Wright J agreed that such an approach would solve the problem, he was also prepared to use an alternative route to the same end:

> The evidence is that the goods were delivered to, and therefore obtained by, the defendant in [England] under a representation in [Scotland], and I think that his possession of the goods may be treated as a possession in [England] under a representation made in [Scotland] and continuing in [England].[73]

69 [1980] 2 All ER 593.

70 [1981] 2 All ER 257.

71 See also *R v W McKenzie Securities Ltd* (1966) 55 WWR 157; *R v Wall* [1974] 2 All ER 245 and *R v Elhusseini* [1988] 2 Qd R 442 as examples of 'gist of offence' reasoning. In *Ibbotson v Wincen* (1994) 122 FLR 385, an abducting parent was held to have acted in contempt of the Family Court in relation to an 'abduction' held to have occurred at the place at which the *failure* to return the child occurred.

72 [1899] 1 QB 230. Cf *Bevan* (1987) 84 Cr App R 143.

73 [1899] 1 QB 230, 241.

The key word is, of course, 'continuing'. The false representation accompanied its maker back to England. Consequently, he was still 'making' it to agents of the victim after his return to England. On this analysis, therefore, *both* the false pretence *and* the obtaining were located in England.

A similar approach was adopted by Lord Hodson in *Treacy*.[74] In that case a majority of the House of Lords concluded that where an accused posted in England a letter containing a demand with menaces to a victim in West Germany, the offence of blackmail was committed in England because the demand was located where the letter was posted. What *then*, it was asked, of the case where a person in West Germany posts in West Germany a letter containing a demand with menaces to a victim in England? On the approach adopted by the majority, it was argued, the offence would be located in West Germany and therefore England would not have jurisdiction. Not so, said Lord Hodson. In such a case, the demand could be viewed as having been made abroad, but as continuing in effect until it reached the jurisdiction containing the victim. In short, the offence could be regarded as having been committed in *both* localities, in one by locating the gist of the offence, in the other by employing the device of the continuing demand through the agency of the post.[75]

This technique has been rejected in a number of cases. For example, in *Kron*, it was held that the 'obtaining' element of obtaining by false pretences did not 'continue': 'obtaining is an act, not a continuing state of affairs'.[76] More controversially, in *Atakpu*, the English Court of Appeal held that theftuous appropriation 'is a finite act — it has a beginning and it has an end' and that 'at what point the transaction is complete is a matter for the jury to decide' but that 'no case suggests that there can be successive thefts of the same property (assuming of course that possession is constant and not lost or abandoned, later to be assumed again).'[77]

5 *Evasion Technique (3): Continuing Crimes*

If elements of offences may be analysed as continuing, so may whole crimes. The classic example is the crime of conspiracy. In *DPP v Doot*,[78] the accused were charged with conspiring in a number of European and African countries to import drugs into England with a view to their shipment to the ultimate destination in the United States. The House of Lords held unanimously that the English courts had jurisdiction to try that crime. However, they were not unanimous about why that was so. Two of the Law Lords used the device of a continuing crime. Lord Pearson and Viscount Dilhorne thought that there was jurisdiction because,

[74] [1971] AC 537.

[75] Another example of a continuing element of an offence is *MacKenzie v The Queen* (1910) 6 Cr App R 64.

[76] (1995) 78 A Crim R 474, 477 (Gleeson CJ, Simpson and Berr JJ agreeing).

[77] *Atakpu* [1993] 4 All ER 215, 223, cf 224: '[*Gomez*] ... leaves little room for a continuous course of action ... [but we] will leave it open for further argument.' (citations omitted). The court cited the telling arguments in Glanville Williams, 'Appropriation: A Single or Continuous Act?' [1978] *Criminal Law Review* 69.

[78] [1973] AC 807 ('*Doot*').

in their view, an agreement, once made, continues in effect wherever the conspirators are present. If the conspirators come to the forum, then the agreement comes with them, and is located there.[79] This is so, even if only one conspirator ventures to the forum, despite the fact that the law of conspiracy requires two to conspire as logic requires at least two pigeons to make a flock. The agreement makes the rest 'present' by a fiction like the fiction of constructive presence.[80] Although conspiracy does not require proof of an overt act under the agreement, the commission of an overt act is often vital to the proof of the agreement itself.[81] So, in relation to jurisdiction, the proof of an overt act by the conspirator(s) in the forum is vital to proving the continuance of the agreement there.[82]

It is also common to apply the continuing crime technique where the accused acts outside the forum while attempting to commit a crime within the territory of the forum. In *R v Baxter*,[83] the accused posted two football pool claims from Northern Ireland to companies in England. The claims were fraudulent and the accused was charged in England with attempting to obtain by deception. The court held that it had jurisdiction on the basis that the acts constituting the attempts continued in effect until the letters reached the intended victims in England and tried to deceive them there. As with blackmail, therefore, the combination of *Waugh* and *Baxter* shows that an attempt may be regarded as having been committed *both* in the place where the proximate act is committed *and* in the place in which it is intended to take effect.

In *DPP v Stonehouse*,[84] the accused was a prominent politician who ran into financial problems and decided to start life anew. He wanted to make provision for his family, so he took out life insurance policies for £125,000 and then faked his own death in Miami. One issue was whether he could be tried in England for

79 This was not a new notion by any manner of means. The same result and reasoning are to be found in *R v Brisac* (1803) 4 East 164; 102 ER 792 ('*Brisac*'), citing the unreported case of *R v Bowes* (King's Bench Division, 1787) and *R v Burdett* (1820) 4 B & Ald 95; 106 ER 873. *Brisac* was widely regarded as correct: see, eg, *R v Connolly* (1894) 1 CCC 468 (Ontario, High Court of Justice); *R v Kellow* [1912] VLR 162 and *Hyde v United States* (1912) 225 US 347. For later cases following *Doot*, see, eg, *R v Borro* [1973] *Criminal Law Review* 513; *R v Governor of Pentonville Prison; Ex parte Tarling* (1978) 70 Cr App R77 discussed in J Smith, 'Theft, Conspiracy and Jurisdiction: Tarling's Case' [1979] *Criminal Law Review* 220; *R v Sanders* [1984] 1 NZLR 636; *Johnston* [1986] BCL 1155 discussed in G Orchard, 'Jurisdiction over Extra-Territorial Conspiracy — An Addendum' [1986] *New Zealand Law Journal* 335. See also English Law Commission, *Criminal Law*, above n 3, [95]. The holding raises certain detailed difficulties about the limits of the doctrine which are analysed in Matthew Goode, *Criminal Conspiracy in Canada* (1975) 164–7.

80 See also *R v Simmonds* [1969] 1 QB 685.

81 There is a consistent series of Canadian cases which hold that proof of an overt act within the forum is sufficient to found jurisdiction, no matter where the agreement was formed and no matter where its eventual objective was to be completed: see, eg, *R v Isbell* (1928) 60 OLR 489; *R v Lebrique* (1941) 75 CCC 117; *R v Container Materials Ltd* (1939) 72 CCC 383 (Ontario, Supreme Court); (1940) 74 CCC 113 (Ontario, Supreme Court); (1941) 76 CCC 18 (Ontario, Court of Appeal); *R v Howard Smith Paper Mills* (1954) 109 CCC 65; *R v Cassidy* (1974) 18 CCC (2d) 1. On continuation of the conspiracy, see generally Terry Aronoff, 'Acts of Concealment and the Continuation of a Conspiracy' (1983) 17 *Georgia Law Review* 539.

82 But there now may be no need to show any overt act at all — see *Liangsiriprasert v Government of the United States of America* [1991] 1 AC 225 ('*Liangsiriprasert*') discussed in Part II(B)(6) below.

83 [1972] 1 QB 1 ('*Baxter*').

84 [1978] AC 55.

attempting to obtain that money by deception in relation to the life insurance policies. The House of Lords held that the English courts had jurisdiction, but again took a number of different routes to achieve the result. Lord Salmon and Lord Keith decided that the proximate acts, once committed outside the jurisdiction, continued in effect within it and were therefore committed there.[85]

This reasoning may apply to substantive crimes as well as inchoate crimes. In *Clements v Her Majesty's Advocate*,[86] for example, the accused were charged with being involved in the supply of cannabis resin. The evidence was that X travelled from Scotland to England and, while in England, obtained from the accused about seven kilograms of cannabis resin which he took back to Scotland. There was no evidence that the accused was in Scotland at any time, but the court was prepared to draw the inference that the accused knew that the drugs would be taken back to Scotland. The Scottish court took jurisdiction on a number of grounds. One of them was that the supply offence continued from England to the ultimate destination in Scotland.[87]

6 *Evasion Technique (4): Protective Reasoning*

(a) *Disclaiming Jurisdiction: The Rule in* Owen

Some courts and judges have, in recent years, shown a tendency to cast aside strict territorial principle and the gimmicks which surround it and to think instead of criminal jurisdiction as co-extensive with the need to protect the public interest of the forum. They have not openly espoused the 'protective principle' of jurisdiction and consigned territorialism to history; rather, they have built on an emphasis on the place of impact of the criminal behaviour — and hence, of course, have been led to focus necessarily on locating the elements which complete the crime. An early and remarkable example of this thinking is the decision of the House of Lords in *Owen*.[88]

In that case, the accused agreed in England to defraud the government of West Germany by inducing it to issue export licences in West Germany for the export of certain metals. This was done by the presentation of forged documents, the idea being to circumvent a West German embargo on export to Soviet Bloc countries. The accused were charged with conspiracy to defraud the West German government. Prior to this decision, it was thought that the place of the agreement would have jurisdiction. The whole 'gist and kernel' of the offence is the agreement and the crime is complete once the agreement is complete.[89] On

[85] Viscount Dilhorne and Lord Diplock used variations on the 'gist of the offence' theory to hold that, in effect, since an English forum would have had jurisdiction had the offence been completed, the English forum would have jurisdiction over the attempt: ibid 71 (Viscount Dilhorne), 64 (Lord Diplock). Lord Edmund Davies and Lord Keith were prepared to assume jurisdiction on the basis of a protectionist approach, which will be examined immediately below: ibid 80 (Lord Edmund Davies), 89 (Lord Keith).

[86] [1991] JC 62 ('*Clements*').

[87] Ibid 72–3 (Lord Coulsfield), 76 (Lord Wylie).

[88] [1957] AC 602.

[89] There is plenty of authority for this: see, eg, *Mulcahy v The Queen* (1868) LR 3 HL 306; *R v Gunn* (1930) 30 SR (NSW) 336; Gerald Orchard, '"Agreement" in Criminal Conspiracy' (Pt 1) [1974] *Criminal Law Review* 297.

that basis, the conspiracy is located where the agreement is completed.[90] But Lord Tucker, who delivered the opinion of the House of Lords, rejected that view in favour of a test based on the place in which the agreement would have an impact:

> I think ... that it is necessary to recognise the offence to aid in the preservation of the Queen's Peace and the maintenance of law and order within the realm with which, generally speaking, the criminal law is alone concerned. ... [I]t seems to me that the whole object of making such agreements punishable is to prevent the commission of the substantive offence before it has even reached the stage of an attempt, and that it is all part and parcel of the preservation of the Queen's Peace within the realm. I cannot, therefore, accept the view that the locality of the acts to be done and of the object to be attained are matters irrelevant to the criminality of the agreement.[91]

Lord Tucker stated that, as a general principle, the forum would have jurisdiction over an agreement in the forum to commit a crime outside the forum only if the forum would have had jurisdiction over the crime committed or contemplated in the furtherance of that agreement.[92] This moves beyond the consideration of the location of a crime by reference to the place where the last act necessary to complete it is committed to a view of jurisdiction as co-extensive with the protection of the public peace or public interest of the forum. The decision in *Owen* and its doctrine in the specific situation contemplated — that is, conspiracy in the forum to commit a crime outside the forum — has been widely adopted.[93]

Obviously, the *Owen* rule declining jurisdiction does not apply where the agreement contemplates at least some part of its performance in the forum,[94] and, equally obviously, the rule may be varied by statute.[95] Two further exceptions to the rule appear from the decision itself. The first is the case in which the agreement is made in the knowledge that the object might be achieved within the forum or the parties to the agreement are recklessly indifferent about that possibility. In that case, the court has jurisdiction even though, as it turns out, the object of the agreement is achieved wholly outside the territory of the forum.[96]

The second exception is somewhat more controversial in scope. Lord Tucker said:

90 And so it was held in, eg, *Ecrement v Cusson* (1919) 33 CCC 135.

91 *Owen* [1957] AC 602, 625–6.

92 Ibid 634.

93 See, eg, *R v Cox* [1968] 1 WLR 88 (heavily criticised in the 'Note' [1968] *Criminal Law Review* 163); *R v Governor of Brixton Prison; Ex parte Rush* [1969] 1 All ER 316; *Attorney-General's Reference [No 1 of 1982]* [1983] 2 All ER 721; *R v Tomsett* [1985] *Criminal Law Review* 509; *McPherson v The Queen* [1985] *Criminal Law Review* 508; *R v Governor of Pentonville Prison; Ex parte Osman* (1990) 90 Cr App R 281, 293 ('*Ex parte Osman*').

94 See, eg, *Re Chapman* [1970] 5 CCC 46.

95 See, eg, the *Crimes Act* 1958 (Vic) s 321A.

96 The basis for this exception is *R v Kohn* (1868) 4 F & F 68; 176 ER 470. The accused was a foreign national who had conspired to scuttle a foreign ship in order to defraud the owners of goods on board and/or their insurers. The ship might have sunk in English waters or on the high seas — in fact it sank on the high seas — but the court had jurisdiction: *Owen* [1957] AC 602, 630–1. *Clements* [1991] JC 62 may also be an example of this kind of reasoning. See also R Wright, *The Law Of Criminal Conspiracies and Agreements* (1873) 58; Roland Ritchie, 'The Crime Of Conspiracy' (1938) 16 *Canadian Bar Review* 202.

> I would, however, reserve for future consideration the question whether a conspiracy in this country which is wholly to be carried out abroad may not be indictable here on proof that its performance would induce a public mischief in this country or injure a person here by causing him damage abroad.[97]

The meaning of this passage is open to some doubt. The English Law Commission was of the opinion that this meant that the forum would have jurisdiction over the conspiracy if the performance of the object of the conspiracy abroad would have effects within the forum sufficient to constitute an unlawful act in the forum.[98] This view assumes that in using the phrase 'public mischief', Lord Tucker was making a technical reference to the supposed crime at common law of conspiracy to commit a public mischief. But in 1975 the House of Lords decided that no such category of conspiracy existed and it is likely that that view would also find favour in Australia.[99] The Law Commission took the view that, if the category did not exist, Lord Tucker's exception vanished with it.

However, this view of the exception may well be wrong. The exception may merely be a statement that the forum has jurisdiction over a conspiracy to be performed wholly outside the forum if the performance of the agreement will also cause some offence to be committed within the forum. This now appears to be the appropriate interpretation of that remark. Where there is alleged to be an agreement in the forum to commit a crime outside the territory of the forum, a comparison of *Attorney-General's Reference (No 1 of 1982)*[100] and *McPherson v The Queen*[101] is instructive.

In the former case there was an agreement in England to export whisky to the Lebanon via Germany. The whisky was to be sold as the product of the victim company. The conspiracy was charged as a conspiracy to defraud the English victim company and not the deceived Lebanese purchasers. The court held that the case was covered by *Owen* and did not fall within the exception — despite the form of the charge:

> The real question must in each case be what was the true object of the agreement entered into by the conspirators? In our judgment, the object here was to obtain money from prospective purchasers of whisky in the Lebanon by falsely representing that it was X Co's whisky. It may well be that, if the plan had been carried out, some damage could have resulted to X Co, but that would have been a side effect or incidental consequence of the conspiracy, and not its object. ... It would be contrary to principle, as well as being impracticable for the courts, to attribute to defendants constructive intentions to defraud third parties based on what the defendants should have foreseen as probable or possible consequences. ... Had it not been for the jurisdictional problem, we have no

97 *Owen* [1957] AC 602, 634.

98 English Law Commission, *Criminal Law*, above n 3, [94].

99 The House of Lords decision is *DPP v Withers* [1975] AC 842 ('*Withers*'). Australian hostility to open-ended conspiracy categories in this area is evidenced by *R v Howes* (1971) 2 SASR 293. See also *R v Freeman* (1985) 3 NSWLR 303. *Boston v The Queen* (1923) 33 CLR 386 may be read as supporting the category, but obviously requires reconsideration after *Withers*. In Victoria, the category, if it ever existed, has been abolished by statute: *Crimes Act* 1958 (Vic) ss 321, 321F(1). But so too was the rule from *Owen*: see s 321A.

100 [1983] 2 All ER 721.

101 [1985] *Criminal Law Review* 508.

> doubt that the charge against the conspirators would have been conspiracy to defraud potential purchasers of the whisky, for that was the true object of the agreement.[102]

This emphasis on discerning the true object of the agreement is echoed in *McPherson*.[103] In that case, the accused were charged in England with conspiracy to defraud on the basis that they had agreed in England to cash stolen English cheques in West Germany. The result of this would be that an English bank would suffer the loss. It was held that the question of jurisdiction would turn on whether or not one of the objects of the agreement was to defraud the English bank, and that this in turn would depend on whether the accused realised that what they had planned and done 'would inevitably, and directly, defraud the English banks'. That was a matter about the scope of the agreement, which was for the jury to determine.

The rule in *Owen* has been endorsed and applied in Australia. In *Re Anne Hamilton-Byrne*,[104] Hamilton-Byrne and others were charged in Victoria with conspiring in Victoria to defraud the public authorities of New Zealand into issuing what were in fact false birth documents for three children, the documents to be used in Victoria to establish the identity of the children as being born to Hamilton-Byrne. Hamilton-Byrne and others were the subject of extradition proceedings from the United States on these charges. As common law conspiracy to defraud had survived a partial codification of the law of conspiracy in Victoria, a consideration of the principle in *Owen* was clearly required. Tadgell J noted the principle and cited the authority which had followed it. It appears that, although the Crown argued that there would be a sufficient impact in Victoria for Victoria to take jurisdiction, the argument was not strongly pressed.[105] The major argument was that *Owen* should not be followed and that the approach taken in *Libman*[106] should be preferred. Tadgell J (and, with considerably more reluctance, Ormiston J) refused to do this, in large part because when reforming the law in 1984, Parliament had left that part of the law undisturbed.

In *R v Catanzariti*,[107] 10 people, all of whom lived in South Australia, were charged with conspiring in South Australia to grow cannabis in the Northern Territory. It was alleged that at least some of the crop(s) were sold in South Australia and the accused shared the proceeds there. The first information charged conspiracy to produce cannabis. Later, a second information was filed charging conspiracy to cultivate cannabis. At trial, it was argued that the information should be stayed because it was an abuse of process, having been filed in an altered form so late in the day, or, alternatively, quashed because it was not triable in South Australia.

[102] *Attorney-General's Reference [No 1 of 1982]* [1983] 2 All ER 721, 724.
[103] [1985] *Criminal Law Review* 508. See also *Ex parte Osman* (1990) 90 Cr App R 281.
[104] [1995] 1 VR 129. See also Barbara Hocking, 'Re Hamilton-Byrne' (1996) 20 *Criminal Law Journal* 54.
[105] [1995] 1 VR 129, 138 and a list of 'contacts' at 140 (Tadgell J).
[106] [1985] 2 SCR 178. See Part III(C) below.
[107] (1995) 65 SASR 201 ('*Catanzariti*').

The court held that South Australian courts could not try the crime alleged. The cultivation of cannabis is not a crime at common law and conspiracy to cultivate cannabis is not a crime at common law. The accused could not be charged in South Australia with conspiracy to breach Northern Territory law. Further, authority was to the effect that they could not be charged with conspiracy to breach a South Australian statute for conspiracy to produce cannabis wholly in the Northern Territory. The law in this respect was held not to have been altered by s 5C of the *Criminal Law Consolidation Act* 1935 (SA). The content and purpose of this section will be discussed in detail in Part VII(B).

In *Isaac*,[108] the accused had been charged with conspiracy in New South Wales to commit robbery in the Australian Capital Territory. Some planning took place in Canberra, but the Crown case was that the agreement was complete in New South Wales before they went to Canberra. Hunt CJ, with whom Dunford and Dowd JJ agreed, held that the courts of New South Wales had 'jurisdiction' to try the offence[109] but that the offence charged was not 'justiciable' (in the sense of being known to the law) in New South Wales.[110] In so doing, the court held that the common law position remained unaffected by s 3A of the *Crimes Act* 1990 (ACT) which is identical in all relevant respects to s 5C of the *Criminal Law Consolidation Act* 1935 (SA).[111]

(b) *Claiming Jurisdiction*

The courts generally use the protective approach to claim jurisdiction rather than, as occurred in *Owen,* to disclaim it. Some of the judges in *Stonehouse* and *Doot* were prepared to hold that the forum had jurisdiction over the attempt and the conspiracy because the impact of the crime would take effect within the territory of the forum.[112] Other examples of the utility of the protective approach with respect to a variety of crimes include *R v Hansford,*[113] *R v Millar,*[114] *R v El-Hakkaoui,*[115] and *Stanley v The Queen.*[116]

In *Hansford*, the accused was charged with fraudulent conversion in South Australia in relation to a maze of dealings involving companies and bank accounts in South Australia and Victoria. These dealings seemed to represent an attempt to use the money of others to gamble on the price of volatile shares. The court on appeal was hard pressed to disentangle the facts and law in order to determine whether the accused had committed fraudulent conversion — but there

108 (1996) 87 A Crim R 513.
109 Ibid 515.
110 Ibid 523.
111 These decisions are discussed and criticised in detail in Matthew Goode, 'Contemporary Comment — Two New Decisions on Criminal "Jurisdiction": The Appalling Durability of Common Law' (1996) 20 *Criminal Law Journal* 267.
112 See Part II(B)(5) above. In *Doot* [1973] AC 807, Lord Wilberforce (817–8) and Lord Salmon (832–3) rested jurisdiction on the threat that the conspiracy posed to the Queen's Peace and its characterisation as an attack on the laws of the forum.
113 (1974) 8 SASR 164 ('*Hansford*').
114 [1970] 2 QB 54 ('*Millar*').
115 [1975] 2 All ER 146 ('*El-Hakkaoui*').
116 [1985] LRC (Crim) 52.

was also the question of jurisdiction. The majority fastened on the idea that the South Australian court had jurisdiction because the last act necessary to complete the transaction was the crediting of the bank account of the accused in Adelaide, but that finding is, to say the least, problematic, particularly given the nature of the crime and the facts involved. Wells J cut through the technical analysis, however, by saying:

> The true basis, in my opinion, for the conclusion that acts performed or taking place partly in South Australia and partly outside may be governed by South Australian laws is that it is proper for them to be so governed when they constitute behaviour that affects, and is clearly linked with, the peace, welfare and good government of the State. Where behaviour of that kind is placed before the court the only question that then remains is one of interpretation.
>
> The acts attributed to the defendant in the case at bar plainly, in my opinion, fall within the category of behaviour that poses a threat to the South Australian community.[117]

In *Millar*,[118] a company and one of its directors were charged with counselling and procuring the causing of six deaths by dangerous driving. The director had required an employee to drive a truck from Scotland to England knowing that the truck had a defective tyre. The tyre exploded and six people were killed in the resulting crash in England. Despite the fact that the counselling or procuring took place in Scotland, the Court of Appeal held that the forum had jurisdiction, in part because the accused had set in train a chain of events which had disastrous effects in England.[119]

In *El-Hakkaoui*,[120] the accused was charged in England with conspiracy to possess firearms and ammunition with intent to endanger life. Under the rule in *Owen,* the court would have had jurisdiction over the conspiracy offence if it would have had jurisdiction over the substantive offence. The accused argued that the English courts lacked jurisdiction because there was no intention to endanger the life of any person in England. The arms were to be used solely in operations abroad. The purpose of the statutory offence was the protection of lives and safety in England, not everywhere in the world.

The court rejected the argument. It held that both the possession of the goods and the formation of intent to endanger human life took place in the forum and that the location of those who might suffer as a result of the intention was

[117] (1974) 8 SASR 164, 195. See also *McNeilly v The Queen* (1981) 4 A Crim R 46, where it was held that a NSW court had jurisdiction over a charge of attempted murder where the accused posted a letter bomb in Queensland to an address in NSW. The court found jurisdiction either on the basis that the crime terminated in NSW when the bomb was delivered there as the accused intended or, more straightforwardly, the impact of the crime was to be felt in NSW.

[118] [1970] 2 QB 54.

[119] Followed in *Rajalingam Sivaprahasam v The Queen* [1972] WAR 137; *R v Smith* [1973] 2 All ER 1161; and *R v Wall* [1974] 2 All ER 245. These cases concern persons who, while overseas, were involved in the importation of drugs into the forum. The reasoning is avowedly protective in nature. The court in *Millar* was also prepared to hold that it had jurisdiction on the alternative ground that the counselling or procuring, having begun in Scotland, continued in England.

[120] [1975] 2 All ER 146.

irrelevant. It also held that the purpose of the offence was to regulate the possession of arms in England without regard to the location of their intended use.[121]

As a contrast with *El-Hakkaoui,* consider the decision in *Stanley v The Queen.*[122] There, the Gibraltar Court of Appeal declined jurisdiction in a case in which the accused was charged with possession of drugs with intent to supply the drugs to another person in England. The court distinguished *El-Hakkaoui,* confining it to the interpretation of the particular statute involved. It held that there was nothing in the legislation to suggest that the intent of the legislature was to prohibit possession with the intent to supply another person anywhere in the world.

In all of these cases, the courts have retained the guise of the territorial theory, however flimsily, and have applied the gloss of protective reasoning to attach central importance to some event within the territory of the forum, however minimal or speculative in nature, in order to find the territorial nexus.[123]

It may now be the case that the courts will be prepared to forget the guise and avow the reality of the protective principle. The leading case is the decision in *Liangsiriprasert.*[124]

This was an extradition case which came before the Privy Council on appeal from Hong Kong. For the purposes of this discussion, the question was whether the Hong Kong courts would have had jurisdiction over a charge of conspiracy to traffic in dangerous drugs in Hong Kong against a Thai national, where the agreement and its performance took place in Thailand. In short, this was a *Doot* case, except that the accused had not committed any overt act in the territory of the forum at all.

Lord Griffiths for the court held that Hong Kong would have had jurisdiction in such a case. He quoted at length from *Owen, Baxter, Doot, Treacy* and *Stonehouse,*[125] and noted that, apart from isolated dicta, no authority supported the assertion of jurisdiction in such a case — although no authority, it was said (without any justification whatever), militated against asserting jurisdiction in such a case. Lord Griffiths held:

> Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality. Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England.[126]

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[121] This decision is thus very similar to that of the House of Lords in the *Gold Star* case. See Part II(B)(3) above.

[122] [1985] LRC (Crim) 52.

[123] Leigh takes the view that these kinds of limitation are highly desirable: L Leigh, 'Territorial Jurisdiction and Fraud' [1988] *Criminal Law Review* 280, 287.

[124] [1991] 1 AC 225.

[125] Lord Griffith also cited from the expansive view of criminal jurisdiction taken in *Attorney General v Yeung Sun Shun* [1987] Hong Kong Law Reports 987.

[126] *Liangsiriprasert* [1991] 1 AC 225, 251.

The assertion of jurisdiction is avowedly protective in nature, and does not depend on any territorial connection at all:

> If the inchoate crime is aimed at England with the consequent injury to English society, why should the English courts not accept jurisdiction to try it if the authorities can lay hands on the offenders, either because they come within the jurisdiction or through extradition procedures? ... [W]hy should an overt act be necessary to found jurisdiction? In the case of a conspiracy in England the crime is complete once the agreement is made and no further overt act need to be [*sic*] proved as an ingredient of the crime. The only purpose of looking for an overt act in England in the case of a conspiracy entered into abroad can be to establish the link between the conspiracy and England or possibly to show the conspiracy is continuing. But if this can be established by other evidence, for example the taping of conversations between the conspirators showing a firm agreement to commit the crime at some future date, it defeats the preventative purpose of the crime of conspiracy to have to wait until some overt act is performed in pursuance of the conspiracy.[127]

This piece of judicial advocacy, marked by leading rhetorical questions, should be treated with considerable care. In particular, in taking such an expansive view of criminal jurisdiction, it pays no attention to the possible difficulties of double criminality,[128] which are addressed in the extradition setting but not in the normal criminal case, and it pays no attention to the problem of differing criteria of criminal responsibility in competing jurisdictions. It would require the overruling of *Owen* and a number of cases of a similar kind. Moreover, it is one thing to punctuate a ringing endorsement of a move to the protective principle with examples based on organised crime and terrorism; it is quite another when one is dealing with a pathetic attempt at blackmail[129] or the sad end to a collapsed public life.[130] It has, nevertheless, been applied enthusiastically to drug[131] and terrorism[132] offences.

7 *Evasion Technique (5): Minimal Contacts*

This heading is the only explanation that can be found for the quite remarkable decision of the House of Lords in *Secretary of State for Trade v Markus*.[133] The accused in that case set up a fund of some kind in England and issued a false prospectus on the basis of which sales staff in West Germany induced West Germans to part with their money. The money and the documentation were sent to company headquarters in England for 'processing'. The accused was charged with an offence of entering or offering to enter into a specified type of fraudulent

127 Ibid 250–1.
128 See extensive discussion by the English Law Commission, *Criminal Law*, above n 3, [5.23].
129 See, eg, *Treacy* [1971] AC 537.
130 See, eg, *Stonehouse* [1978] AC 55.
131 Notably in *R v Fan* (1991) 24 NSWLR 60; *Clements* [1991] JC 62; *R v Sansom* [1991] 2 QB 130 and *Winfield v The Queen* (1995) 83 A Crim R 301 ('*Winfield*').
132 Notably in *Ellis v O'Dea and the Governor of Portlaoise Prison [No 2]* [1991] IR 251.
133 [1975] 1 All ER 958 ('*Markus*').

agreement.[134] The House of Lords decided by a majority that the English court had jurisdiction over this offence. Lord Diplock spoke for the majority:

> The offences with which the appellant was charged were 'result-crimes' of the same general nature as the offence of obtaining goods by false pretences which was the subject of the charge in *R v Ellis*. That case is well-established authority for the proposition that, in the case of what is a result-crime in English law, the offence is committed in England and justiciable by an English court if any part of the proscribed result takes place in England.
>
> The proscribed result in the instant case is the taking part in the arrangements by the victim of the fraudulent inducement. So if anything the victim did in England amounted to taking part in the arrangements, the offence was committed in England and is justiciable in this country.[135]

What then did the victims, who never left West Germany, do in England? Lord Diplock pointed to two things. First, the post office acted as the innocent agent of the victims in delivering the documents in London and, second, some of the victims had signed a power of attorney in favour of an English company. Although one can understand the court's reluctance to allow the forum to be used as a haven for organised fraud directed at the citizens of a foreign state, the fact is that, in the overall scheme, and in relation to the offence with which the accused was charged, these contacts with the forum are absurdly tenuous at best.

Viscount Dilhorne dissented. He pointed out, with considerable justification, that *Owen* is authority for the proposition that agreements in England to defraud people wholly in West Germany are not justiciable in England, and that cases like *Ellis* were inapplicable because the offence in the instant case did not require an obtaining as one of the ingredients of the offence. The offence was complete when the victims were induced to agree — which had happened in West Germany. *Markus* is inexplicable except on the basis that minimal contacts will suffice for jurisdiction where the court is determined that evil-doing in the forum will not be permitted to escape due prosecution.

III Attempts to Provide Overall Coherence to the Law of Criminal Jurisdiction

A *Rationalising the Territorial Theory*

1 *'Result Crimes' and 'Conduct Crimes'*

On a number of occasions, Lord Diplock reached jurisdictional conclusions on the basis of the territorial principle (or something which closely resembles it), by classifying offences as 'result crimes' or 'conduct crimes' and applying consequential locational reasoning.[136] The *exact* distinction between the two types of

[134] Contrary to s 13(1) of the *Prevention of Fraud (Investments) Act* 1958 (UK).

[135] *Markus* [1975] 1 All ER 958, 965–6 (citations omitted). Properly analysed, *Ellis*, of course, stands for no such proposition. See above Part II(B)(1).

[136] See, eg, *Stonehouse* [1978] AC 55; *Treacy* [1971] AC 557; *Wiggins* [1980] 2 All ER 593 and *Markus* [1975] 1 All ER 958.

offence is not precisely clear, but the general idea is simple. Some crimes concentrate on the results achieved by the conduct of the accused, and in that case the location of the result, actual or intended, is crucial.[137] 'Conduct crimes' take place where the conduct happens; 'result crimes' take place where the result happens. These labels and the analysis have been employed in a significant number of subsequent cases.[138]

Despite the fact that these labels have proved attractive to some judicial minds, this sort of analysis hinders more than it helps and should be avoided. It is an embroidery on the 'gist of the offence' analysis — the gist is either the conduct or the result of the conduct — but it replaces with a simplistic label what should be an explicit interpretation of the purpose of the offence which proper 'gist' analysis requires. Put another way, the label attached to an offence ('conduct' or 'result') serves only to hide an analysis of the legislative intention in creating the offence. It may well be that, for example, obtaining by false pretences is a 'result crime' — but that label avoids the central question, which is why the courts take the view that the element of obtaining is more important in terms of legislative intent than the element of telling a lie.[139] The legislature may have attached equal abhorrence to both the conduct and its result. Even if it did not, it may be impossible to tell which element was predominant in the legislative mind. Is the offence of carrying an animal in such a way as to cause it injury or unnecessary suffering a 'result crime' or a 'conduct crime'? Lord Diplock thought the latter.[140] But an equally persuasive case can be made for the former.

Further, the reasoning is inverted from that which is incorrect. Primary attention in recent times has been on the protection of the interests of the forum by imposing criminal sanctions where those interests are threatened. It may well be that the public interests of the forum are threatened by the fact that the result of the crime — or its intended result — will occur in the forum and *therefore* the location of the result is crucial. However, simply because the crime is formulated by the legislature as punishing a result does not necessarily mean that such a conclusion is inevitable. The labelling of offences as 'conduct crimes' or 'result crimes' has no rational foundation in jurisdictional analysis and should be abandoned.

[137] As noted in Part II(B)(7), Lord Diplock was of the view that obtaining by false pretences is a 'result crime' and hence the location of the result — obtaining — is crucial.

[138] Aside from subsequent English decisions, recent examples are *Clements* [1991] JC 62, 73; *Brownlie* (1992) 27 NSWLR 78, 83; *R v Toubya* [1993] 1 VR 226, 234.

[139] See Part II(B)(3) above. The English Law Commission takes the more moderate line that, while the distinction is 'difficult and controversial', it is useful for some crimes, such as obtaining by false pretences, 'which fit easily into the pattern of conduct on the part of the accused followed by a defined result of that conduct.' English Law Commission, *Criminal Law*, above n 3, [2.2]. The Commission has not thought that concession through.

[140] *Wiggins* [1980] 2 All ER 593.

2 *'Terminatory' and 'Initiatory' Theory*

In 1965 Glanville Williams wrote an influential analysis of the way in which the common law had reacted to jurisdiction and venue problems.[141] He distinguished between the 'terminatory theory' and the 'initiatory theory' of criminal jurisdiction. According to the terminatory theory, the crime is committed where the crime is completed, that is, where the last act necessary to constitute the offence occurs. If this is applied to the killing of the slave escaped across the border, the result is that the slave owner is subject to the homicide jurisdiction of the free state. According to the initiatory theory, the crime is committed where the offender acts to set the crime in train. Again, in the escaped slave situation, application of this theory would mean that the slave owner is not amenable to the homicide jurisdiction of the free state.

The terminatory theory is based on the idea that the purpose of the criminal law is to protect the public and the individual. The initiatory theory is based on the idea that the purpose of the criminal law is to regulate or deter behaviour. Glanville Williams argued that the general trend of the common law had been to adopt the terminatory theory, but that the initiatory theory was the better of the two.

In fact, however, the common law has not followed any one theory consistently, but has adopted the most convenient analysis of the facts and the law in each individual case.[142] Although there is still an emphasis on the terminatory view of the crime, this is being transformed into an examination, not of the place where the crime is complete, but of the location in which the criminal behaviour impacts.[143] Those two locations may be the same, but need not be. Glanville Williams' analysis is therefore of limited value.

B *Lord Diplock and Comity*

In concurring with the majority in *Treacy*,[144] Lord Diplock suggested a theory of criminal jurisdiction which, when applied to the facts in that case, supported the conclusion that the English forum had jurisdiction over the blackmail. It will be recalled that the case involved a demand with menaces posted in England to an intended victim in Germany. His theory may be summarised as follows:

(a) A sovereign Parliament, subject to the rules of its own constitution, has the theoretical power to make it an offence for anyone to do anything anywhere. It does not do so. Instead, it limits the application of its legislation, not only because it would be futile to make it an offence for French people

[141] Glanville Williams, 'The Venue and Ambit of the Criminal Law' (Pt 3) (1965) 81 *Law Quarterly Review* 518.

[142] See also Julian Lew, 'The Extra-Territorial Criminal Jurisdiction of English Courts' (1978) 27 *International and Comparative Law Quarterly* 168.

[143] See generally Nicholas Katzenbach, 'Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law' (1956) 65 *Yale Law Journal* 1087, 1141–2; H Hanbury, 'The Territorial Limits of Criminal Jurisdiction' (1952) 37 *Grotius Society* 171, 172–3.

[144] [1971] AC 537.

to drink French wine in France, for example, but also because of principles based on international comity that are designed to prevent one sovereign from unreasonably interfering with the sovereignty of another.

(b) There is nothing in these principles of international comity to prevent Parliament from making or intending to make it an offence to do something in its territorial jurisdiction having harmful effects elsewhere because people within the territory owe allegiance to local law and must conduct themselves in conformity with it. Equally, there is nothing in the principles of international comity to prevent Parliament from making or intending to make it an offence for persons located outside its territorial jurisdiction from doing something which has harmful effects within the jurisdiction.

(c) Consequently:

> [T]he rules of international comity ... do not call for more than that each sovereign state should refrain from punishing persons for their conduct within the territory of another sovereign state where that conduct has no harmful consequences within the territory of the state which imposes the punishment. ... [W]here the definition of any such offence contains a requirement that the described conduct of the accused should be followed by described consequences the implied exclusion is limited to cases where neither the conduct nor its harmful consequences took place [within the jurisdiction].[145]

This analysis has much to commend it in terms of the reality of legislative power and intentions and the results that the courts want to reach. It has not, however, been explicitly employed as a principal method for achieving a result in any particular case since it was formulated.[146]

C *La Forest J and Real and Substantial Link*

In *Libman*,[147] the accused was charged in Canada with fraud and with conspiracy to defraud in relation to a telephone solicitation scheme. From Canada the accused directed the telephoning of residents of the United States to invite them to invest in South American companies. The money was sent to various South American countries. The accused went to those places, collected the money and returned with it to Canada.[148]

La Forest J delivered the judgment of a unanimous Supreme Court of Canada. Having surveyed the English and Canadian authorities at length, he held that the Canadian courts had jurisdiction. In doing so, he discarded the approaches based on the territorial principle. Instead, borrowing from Lord Diplock, he created a

[145] Ibid 564 (emphasis omitted).

[146] Lanham, above n 10, 39–44 contains a more detailed discussion of what the comity limitation may entail.

[147] [1985] 2 SCR 178.

[148] It should be noted that the Canadian *Criminal Code*, RSC 1970 c C-34, contains legislative provisions designed to widen the jurisdiction of Canadian courts over Canadian based conspiracies.

new approach to the question of criminal jurisdiction. His judgment may be summarised as follows:

(a) The English and Canadian courts began with the strict territorial theory based on locating the crime in the place in which the crime was completed, but soon found it necessary to devise a series of reasons or devices, not entirely consistent with each other, to avoid the perceived undesirable consequence of freeing an accused on an unmeritorious technicality.

(b) The law on the subject has acquired an air of unreality and is characterised by such anomalies as the decision in *Harden*,[149] which shows that it is possible for a clever international criminal to arrange his or her affairs so as to manipulate criminal jurisdiction, if a strict territorialist view is taken.

(c) The instant case was also a good example of a possible anomaly. To say that the gist of the offence of fraud is the obtaining smacks of unreality because not only the obtaining, but also the fraud must be proved. The scheme involved the enjoyment of the fruits of the crime in Canada. The law would certainly be an ass if it could be avoided by the simple expedient of persuading the victims to send their money to another country where it could be 'obtained' by the accused.

(d) A Canadian court has jurisdiction over a crime if 'a significant portion of the activities constituting the offence took place in Canada' or there is 'a 'real and substantial link' between the offence and this country'.[150] The only significant limitation on this is the doctrine of comity,[151] and that is certainly not infringed if Canadian courts convict those of their citizens who prey on neighbouring residents. In short:

> In a shrinking world, we are all our brothers' keepers. In the criminal arena this is underlined by the international co-operation schemes that have been developed among national law enforcement bodies.[152]

There is much to be said for this robust, common sense way of approaching the question of criminal jurisdiction. As La Forest J pointed out:

> [This] is in fact the test that best reconciles all the cases. The only one [*sic*] that do not fall within it are *Harden* and *R v Brixton Prison Governor; Ex parte Rush* which, in my view, should no longer be followed.[153]

[149] [1963] 1 QB 8.

[150] *Libman* [1985] 2 SCR 178, 213, followed in *R v Douglas* (1989) 51 CCC (3d) 129, a conspiracy charge which ordinarily may have run foul of the rule in *Owen* if charged at common law. See the similar attitude in *Laird v Her Majesty's Advocate* [1985] JC 37.

[151] Cf the discussion in Part II(B)(2) of the judgment of Lord Diplock in *Treacy* [1971] AC 537.

[152] *Libman* [1985] 2 SCR 178, 214 (La Forest J).

[153] Ibid 232 (citations omitted). *Harden* [1963] 1 QB 8 is discussed in Part II(B)(2) above. *R v Brixton Prison; Ex parte Rush* [1969] 1 All ER 316 was an extradition case in which the accused sent letters and circulars from Canada to the United States inviting the recipients to purchase shares. The purchase money was sent to Panama and Nassau but eventually reached Canada by one route or another. The question for the English court was whether a Canadian forum would have jurisdiction. It held that it would not. The court held that the 'gist of the offence'

The approach advocated by *Libman* has not found favour elsewhere. Indeed, Australian courts have recently gone to considerable lengths to avoid its application. Hunt CJ devoted some space to *Libman* in *Isaac*.[154] He acknowledged that the effect of *Libman* was to overrule *Owen*, albeit that the Supreme Court of Canada was dealing with a different kind of case. But Hunt CJ held that the Canadian courts have been in error. Here is why:

> [T]he Canadian cases have all proceeded upon the basis that the House of Lords had decided *Board of Trade v Owen* upon a jurisdictional question only. That was, with respect, an erroneous interpretation. The decision was based upon the justiciability of a conspiracy to commit a crime outside the jurisdiction — that is, whether such a conspiracy was known to the law — not whether there is (or should be) jurisdiction to hear such a charge. The Canadian cases appear simply to have assumed that such a conspiracy was known to the law of England. As pointed out earlier, Canada now has a statutory provision.[155]

Libman and the Canadian jurisprudence is therefore to be dismissed, without further discussion on the merits of its doctrine or result, on the basis of some arcane distinction between 'jurisdiction' and 'justiciability'.[156] This explains the otherwise extremely odd concession, made by Hunt CJ earlier in his judgment, that the New South Wales court did have 'jurisdiction' over the offence charged because the offence was committed in New South Wales where the agreement was made, concluded and/or committed.

This dismissal of *Libman* as persuasive authority might make some sense if there was any *relevant sense* in the distinction between 'jurisdiction' and 'justiciability' — but there is not. The fact is that the courts appear to have used both terms over the years. The two authorities cited by Hunt CJ do not support the idea that the distinction — if there is one — is a key to the understanding of the law.

In the first, *R v Martin*,[157] Devlin J explained, in a rather heavy-handed way, that there are certain crimes that are crimes wherever they are committed and there are other crimes limited by locality. In the former case, a court simply declines to hear the trial of the 'crime' because of judicial comity. But the case is no authority for the proposition that the distinction between 'justiciability' and 'jurisdiction' is a key to the proper doctrinal basis of the law and, in any event, the distinction between crimes which are crimes wherever they are committed and other crimes was rejected in *Owen* itself.[158]

The second authority cited was a passage from the judgment of Brennan J in *Thompson*.[159] But Brennan J went on to disapprove *Martin* and to say:

was the obtaining and that the money was obtained either when and where it was posted in the United States or when and where it was received in Nassau or Panama. Rush was later convicted in Canada of receiving stolen money: *R v Rush* [1970] 2 CCC 29.

154 (1996) 87 A Crim R 513.

155 Ibid 522.

156 Contrast *Winfield* (1995) 83 A Crim R 301 in which *Libman* is not followed because Lander J correctly recognised that it would require him not to follow *Owen* and its progeny.

157 [1956] 2 QB 272, 285 ('*Martin*').

158 *Owen* [1957] AC 602, 633.

159 (1989) 169 CLR 1, 19.

> *It matters not what terminology is used.* What is critical is that the accused is not liable to conviction under the statute unless the prosecution discharges the onus of proving locality.[160]

In short, the authority cited is no authority. The distinction between 'jurisdiction' and 'justiciability' is sterile and is certainly no basis for failing to consider the merits of the law and policy of *Libman*.

Hunt CJ conceded that 'it is logical, efficient and convenient to prosecute in the State where all of the activity took place.'[161] He declined, however, to so deal with the rule in *Owen* to achieve that result, because: (a) courts should not create new offences, and this would create a new offence;[162] (b) conspiracy is limited to those cases in which the means or objects pursued are criminal;[163] and (c) it is more appropriate for the legislature to make such a change.[164]

None of these reasons is persuasive. Reason (a) rests on the idea that this is not a 'jurisdiction' issue but a 'justiciable' issue — the latter meaning that the crime does not exist according to the law of New South Wales. It has been argued above that that view of the law is incorrect. The idea that the crime of conspiracy to rob is not known to the law of New South Wales is not credible. Reason (b) is simply incorrect. The most notable example of conspiracy to commit an act which is not otherwise criminal is the protean crime of conspiracy to defraud at common law.[165] Reason (c) is a common reaction — but, as we shall see, the legislature had acted.

D *Professor Lanham's Policy Considerations*

In a recent book, Professor Lanham has suggested that the law in this area should be guided by nine 'policy considerations'. They are:

(1) there should be no legal vacuum;
(2) defendants should not be held liable in one place for obedience to the law in another;
(3) penalties should not exceed those under the most appropriate law;
(4) defences under the most appropriate law should be available wherever the defendant is tried;
(5) appropriate evidence must be accessible;
(6) international sensitivities should be respected;
(7) prosecutorial resources should be appropriately deployed;
(8) criminal trials should not be unduly complicated;
(9) defendants should not be punished twice for the same offence.[166]

[160] Ibid 27–8 (emphasis added).
[161] *Isaac* (1996) 87 A Crim R 513, 523.
[162] Ibid 523–4.
[163] Ibid 524.
[164] Ibid.
[165] Recent examples are *Adams v The Queen* [1995] 1 WLR 52; *Wai Yu-Tsang v The Queen* [1992] 1 AC 269.
[166] Lanham, above n 10, 16.

The core of these principles is Professor Lanham's notion of 'the most (or the substantially) appropriate court/law'. Professor Lanham suggests that 'the place where the harm occurs or is intended has a better right to try than the place where the act causing the harm is performed.'[167] Of the principles listed above, principles (1), (2), (5), (6), (7) and (8) are very much the same as some of the factors that courts consider when determining the convenient forum for the purposes of civil litigation. These concepts require further exploration.

Of the others, principles (3) and (4) represent types of choice of law rule. Both depend on the utility of the concept of the 'most appropriate law'. But even conceding that, it is hard to see why they should be adopted. Why would not one equally say that *inculpatory* principles should be those under the most appropriate law? Once one ventures into the idea that choice of law is appropriate in the criminal trial, there is no logical reason to confine that choice to 'defences', even if it is sensible to separate 'defences' from other criminal legal principles employable by a defendant. Furthermore, the relationship between jurisdiction and choice of law (if there is to be one) is very subtle.[168] Where, as is presently the case, criminal law does not overtly permit any choice of law at all (or, put another way, the forum always applies the law of the forum),[169] jurisdiction *determines* choice of law. Criminal jurisdiction now necessarily involves a major choice of law decision. Incorporating a choice of law rule of any kind will alter fundamentally the role, function and, therefore, content of jurisdictional rules. Both sets of concepts interact in a subtle, but legally central way. Form follows function and not the other way around. If, therefore, *general* choice of law rules are to be incorporated into multi-jurisdictional criminal trials, the effect will be to move legal combat from the jurisdictional question to the choice of law question — or, if the civil arena is any guide, the same question will be relitigated in two — or more — different legal guises.

The notion of the 'most appropriate forum' is also problematic. It is apparent in the civil law that the phrase can give rise to legal complexities of the most enigmatic kind. The High Court of Australia has, in the general context of 'the convenient forum', taken a path that diverges in form and, it appears, in content from that taken in England, Scotland and the United States.[170] But it is difficult to tell in practice whether the different formula has had entirely different results. In the interests of simplicity, it can be said that the fundamental difference between

[167] Ibid 17.

[168] The relationship between choice of law and jurisdiction in civil law is the subject of a wealth of legal literature. The most thoughtful work on this is American. See, eg, Arthur von Mehren and Donald Trautman, *The Law of Multi-State Problems* (1965) 599–601; Carol Myers, 'At the Intersection of Jurisdiction and Choice of Law' (1971) 59 *California Law Review* 1514.

[169] Subject to what is discussed below in Part V(B).

[170] The leading Australian decisions are *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 and *Henry v Henry* (1996) 185 CLR 571. In the former case, the High Court declined to follow the approach upon which the House of Lords finally settled in *Spiliada Maritime Corporation v Consultex Ltd* [1987] AC 460. There is a wealth of literature on this subject. See generally, Alan Stickley, 'Conflict of Laws: A Comparative Analysis of the Forum Non Conveniens Doctrines in the USA, the UK and Australia' (1994) 15 *Queensland Lawyer* 19. The relevant Canadian decision is *Amchem Products Inc v British Columbia (Workers' Compensation Board)* (1993) 102 DLR (4th) 96.

the Australian approach and that of other jurisdictions is that Australian law gives greater prominence to the right of the plaintiff to institute proceedings in the forum of his or her choice. Analogously, does the Crown have a right to prosecute in the forum of its choice? And, if so, what limits, if any, should be placed upon that right in the context of the procedural balance set by the criminal justice system (considered as a whole) between the prosecution and the accused?

These are weighty questions which are beyond the scope of this paper. Considered generally, it appears that there is little to differentiate Professor Lanham's proposals from the more precise formulation suggested in *Libman*. Both appeal to a general factor test based on 'significant relationship' (*Libman*) or 'appropriate law' (Lanham). But a word of caution is appropriate. In the area of tort law, significant emphasis has been placed upon application of the law of the place of the tort,[171] and there is significant pressure to make this the primary choice of law rule in Australia. Systems of law placing significance on the law of the place of the tort are characterised by manipulation and evasive legal techniques to avoid the result of the application of the law of the place where the tort was committed (whatever that may mean) because it gives rise to anomalous and/or unjust results.[172] It has been demonstrated above that a similar rule has produced the same or similar results in the area of criminal jurisdiction (effectively criminal choice of law). In the area of torts, this led to the generation of a vast amount of legal scholarship and a great deal of judicial anguish about replacing the territorial rule with a more flexible rule or approach based on 'significant relationship' or some other general approach.[173] This movement has been stoutly resisted in Australia largely because it would lead to 'uncertainty'.[174] Without passing comment on the obvious incongruity of such a claim, there can be little doubt that any proposal to adopt an overtly more flexible approach to criminal jurisdiction/choice of law will meet with the same response, no doubt with similar effect.

[171] In the United States, the rule was exclusively based on the *lex loci delicti* until the 1950s. The literature on what happened then is vast and it would be foolish to attempt even a representative sampling in this note. In Australia, the rule in *Phillips v Eyre* (1870) LR 6 QB 1 prevailed without question until *Breavington v Godleman* (1989) 169 CLR 41, in which the High Court failed to achieve a coherent majority on any question, including the survival of *Phillips v Eyre* versus a return to the law of the place of the tort or some variation on it, but *Phillips v Eyre* prevailed in some form by later decision: *McKain v RW Miller (SA) Pty Ltd* (1992) 174 CLR 1, 39 (Brennan, Dawson, Toohey and McHugh JJ); *Stevens v Head* (1993) 176 CLR 433. The rule in *Phillips v Eyre*, and its variations, gives a flexible role to both the law of the forum and the law of the place of the tort. That role depends entirely on interpretation. See, eg, Matthew Goode, 'Dancing on the Grave of *Phillips v Eyre*' (1984) 9 *Adelaide Law Review* 345.

[172] For a summary of the United States experience, see, eg, Robert O'Toole, 'The Place of the Wrong Rule: "An Unrepealed Remnant of a Bygone Age, A Drag on the Coat-tails of Civilization?"' (1978) 13 *New England Law Review* 613.

[173] The 'most significant relationship' was introduced by the American Law Institute in its *Second Restatement of the Law, Conflict of Laws* (Proposed Official Draft, 1968) § 145. See Willis Reese, 'Conflict of Laws and the Restatement Second' (1963) 28 *Law and Contemporary Problems* 679. There is a very large number of alternative approaches and/or rules in the academic literature and a number have been adopted by American courts. A 'flexible exception' (based on a version of the *Second Restatement*) to the law of the place of the tort in the rule in *Phillips v Eyre* was given authoritative status in *Chaplin v Boys* [1971] AC 356, but has had a chequered career in the case law since that time, and has failed to command majority support in the High Court.

[174] See generally Australian Law Reform Commission, *Choice of Law*, Report No 58 (1992).

This may explain the reluctance of courts to abandon the cloak of territorialism, despite evasive reasoning which, to say the least, brings territorialism into disrepute, and it may also explain the Australian reluctance to embrace the kind of reasoning employed in *Libman*.

IV INTERNATIONAL AND INTERSTATE DOUBLE JEOPARDY

Since the courts have taken a more expansive view of criminal jurisdiction beyond strict territorialism, and the idea that a crime may be 'committed' in more than one place has taken hold, there has been a corresponding increase in the possibility that an offender may be exposed to criminal prosecution in more than one jurisdiction for the same offence or a similar offence arising from the same criminal transaction. At common law, however, it was clear from an early stage that the doctrine of double jeopardy attached to a foreign criminal proceeding in much the same way, generally speaking, that it did to a criminal proceeding in the forum.[175]

The law of double jeopardy, even without jurisdictional differences, is fiendishly complicated and difficult to follow.[176] In addition, the double jeopardy protections may extend beyond the *autrefois* pleas to *res judicata* and abuse of process.[177] Any of these doctrines may well be applicable in a multi-jurisdictional case. For example, in *R v Leskiw*[178] the accused were unwise enough to agree in Canada to sell narcotics in Florida to an undercover Florida police officer. As a result of that agreement, the accused travelled to Florida and were arrested there on charges of conspiracy to traffic in cannabis and possession of cannabis. The conspiracy charge was dropped. The accused pleaded guilty to the possession charge and received five years probation. When they returned to Canada, they were charged with conspiracy to traffic in cannabis in relation to the same activities.

The trial judge acquitted the accused. Although they had never been in technical jeopardy on the conspiracy charge in Florida, and although the Canadian conspiracy charge was sufficiently different from the Florida possession charge for the *autrefois* doctrines not to attach, the trial judge held that the charge was barred by the Canadian doctrine of *res judicata*, which applied as equally to international as to domestic offences.

By way of contrast, in *Van Rassell v The Queen*,[179] the accused, a Canadian police officer engaged in a co-operative law enforcement effort with American

[175] Early authorities are *R v Captain Roche* (1775) 1 Leach 134; 168 ER 169; *Hutchinson* (1671) 3 Keble 785; 84 ER 1011 also discussed in *Beak v Thyrwhit* (1678) 3 Mod 194; 87 ER 125; *Aughet* (1918) 13 Cr App R 101. The early cases are the subject of an interesting discussion in Lanham, above n 10, 51–3. The exact coverage of common law rules of double jeopardy, which is a fearsomely difficult area of law, is not further explored in this article.

[176] See, eg, *O'Louglin; Ex parte Ralphs* (1971) 1 SASR 219; *Maple v Kerrison* (1978) 18 SASR 513.

[177] The doctrine of issue estoppel was assimilated into abuse of process by the High Court in *Rogers v The Queen* (1994) 181 CLR 251.

[178] (1986) 26 CCC (3d) 166.

[179] (1990) 53 CCC (3d) 353.

authorities, disclosed confidential information to a suspect in the United States. The accused was prosecuted in the United States for accepting a bribe to disclose that information. He was acquitted. He was then charged in Canada with offences of breach of trust in relation to the same incident. The Supreme Court of Canada held that the doctrine of *autrefois acquit* did not apply. It held that the offences were sufficiently different to take them outside the *autrefois* doctrine and that he could not rely on the defence of *res judicata* because that defence did not apply in the case where there were two different victims — in this case, the two different governments.

In *R v Lavercombe*,[180] the accused were charged in Thailand with conspiracy to keep possession of cannabis for sale. They were fined and given suspended sentences. On their return to England, they were charged with conspiracy to import the same cannabis into the United Kingdom on the basis that the agreement was formed in England and the object of the possession was importation into England. It was held that the accused could not plead *autrefois convict.* There was in this case not one conspiracy but two conspiracies — one to violate Thai law and one to violate English law — and the fact that the evidence was similar in each case was immaterial. However dubious this decision might be in the characterisation of the conspiracy and the reach of double jeopardy principles, it is clear that counsel for the accused was ill advised to abandon any plea of *res judicata* in this case.[181]

It should be noted, however, that there is at least one instance in which a court has held that the jurisdictional nature of the double jeopardy issue altered what would otherwise have been the domestic effect of the rule. In *R v Thomas*,[182] an Englishman working in Italy fraudulently transferred money from his employer's account to an account of his own in England. The appellant then returned to England and claimed the money. An Italian court convicted him of fraud in his absence, and sentenced him to a fine and imprisonment. When it was sought to prosecute him in England for the theft of that money, the accused pleaded *autrefois convict.* There was evidence that he could not be extradited to Italy or forced in any other way to suffer the consequences of the Italian conviction.

It was clear that the English forum had jurisdiction over the offence. The Crown conceded that the charges concerned the same offence and that the doctrine of double jeopardy would normally apply. Nevertheless, the court upheld the conviction in England. Macpherson J held:

> [T]his appellant was never truly in jeopardy abroad. If the accused had been before the court in Italy and had been acquitted or convicted, then he would have been able successfully to plead autrefois acquit or convict. But where an accused man is absent, and takes no part whatsoever in the foreign proceedings ... it would, in our judgment, be wholly contrary to the principles underlying the pleas in bar and unjust that a conviction recorded in such circumstances should inhibit the English court. Those principles are based on the idea that a

[180] [1988] *Criminal Law Review* 435.
[181] Ibid 436–7.
[182] [1984] 3 WLR 321.

> man shall not be twice in peril or in jeopardy. Unless the relevant conviction has or can reasonably have some effect, as of course it would have if the accused were in reach of the court which tried him, we believe that the principles ... simply do not bite.[183]

While the common sense behind this reasoning can be appreciated, the case is wrongly decided and should not be followed. If the court was of the view that the accused should not be able to escape punishment for the theft, it should have recognised that the problem lay in the combined effect of two factors — first, the determination of the Italian court to proceed to conviction and sentence in the absence of the accused, and second, the lack of an extradition arrangement. The *autrefois* doctrines should not be manipulated to overcome the effect of these two deficiencies.

V CRIMINAL PROCEDURE AND EVIDENCE

A *'Personal Jurisdiction' by Illegal Extradition*

Occasionally, a court will be faced with a person charged with a criminal offence over which it has jurisdiction, but the presence of the person to be tried — what might be called 'personal jurisdiction' — is due to doubtful or illegal law enforcement practices. In *R v Horseferry Road Magistrates Court; Ex parte Bennett*,[184] the English police colluded with the South African police to have the appellant taken to England against his will. After an exhaustive examination of authority, the House of Lords held that:

> [W]here process of law is available to return an accused to this country through extradition procedures our courts will refuse to try him if he has been forcibly brought within our jurisdiction in disregard of those procedures by a process to which our own police, prosecuting or other executive authorities have been a knowing party. If extradition is not available very different considerations will arise on which I express no opinion.[185]

The prosecution is to be stayed as an abuse of the process of the court — not on the ground that the accused cannot have a fair trial, but on the ground that the court will not lend its aid to the illegality involved.

The United States Supreme Court has taken a different view. In *United States v Alvarez-Machain*,[186] the accused, a Mexican resident and citizen, was kidnapped by US Drug Enforcement Agency ('DEA') officials to face charges of participating in the kidnapping and murder of a DEA agent. The court held that the fact of

[183] Ibid 325–6. Obviously, if foreign proceedings are stayed so that the accused can be extradited, the accused has not been in jeopardy: *R v Frisbee* (1989) 48 CCC (3d) 386.

[184] [1994] 1 AC 42.

[185] Ibid 62.

[186] 112 SCt 2188 (1992).

the accused's forcible abduction did not prevent the trial of the accused in the United States.[187] No Australian authority is directly on point.

R v Barker[188] provides a contrast. The accused was charged with housebreaking and larceny. The case against him rested on a confession. The accused and some others were arrested by South Australian police about 50 metres on the South Australian side of the border with Western Australia. The charge at that time was the unlawful possession of the car in which the accused and the others were travelling. The fact of the arrest obliged the police officers to take the accused and others to the nearest police station in South Australia, which happened to be 408 kilometres away. The arrest took place at 1.30 am, and the Western Australian town of Eucla was only 13 kilometres away. The police officers had been on duty since 9.00 am and so they took the accused and the others to Eucla and held them overnight in the town gaol. The next day they travelled back 500 kilometres to Ceduna in South Australia, where the accused was formally charged and interviewed.

At trial in South Australia the accused argued that, once across the South Australian/Western Australian border, his detention became illegal and that the admissions subsequently made at Ceduna were inadmissible because of that illegality. The trial judge held that the detention of the accused in Western Australia was unlawful, but that he was in lawful detention in South Australia and that the confession was therefore admissible. On appeal, the Court of Criminal Appeal held that the crucial question was whether the accused was in lawful custody in Ceduna. The formal charging in Ceduna made the custody lawful and the confession was therefore admissible.

Differing views were expressed as to the legality of the detention of the accused in Western Australia. Hogarth ACJ held that the custody in Western Australia was unlawful. His Honour stated:

> [W]hen the South Australian police officers took the appellant into Western Australia, however sensible that course might have been from a practical point of view, the appellant was no longer lawfully in their custody. It is open to argument whether the custody became lawful again when the appellant was brought back into South Australia and if so, whether it again ceased to be lawful on the party's passing ... the nearest police station to the point of arrest.[189]

However, it should be noted that Wells J (Mitchell J concurring) held that:

> [N]ot in every case should it be concluded that an officer is acting outside the purview of [the law] ... by reason only of his travelling into and out of an adjacent State or Territory while engaged, after effecting a lawful arrest, in 'forthwith deliver[ing] into the custody of the member of the police force who is in

[187] The reasoning is of course more complex. There is a vast American literature on the case. For more domestic comment, see Myint Zan, '*US v Alvarez-Machain*: "Kidnap" Case Revisited' (1996) 70 *Australian Law Journal* 239.

[188] (1978) 19 SASR 448.

[189] Ibid 449.

charge of the nearest police station' ... the person so arrested. It will, I apprehend, be a question of fact and degree in every case.[190]

B *Choice of Law Issues*

Occasionally, criminal cases pose choice of law questions in spite of the general rule that the forum invariably applies its own criminal law. *United States v Hollinshead*[191] is a good example. The accused was a dealer in pre-Columbian artefacts, and he managed to bribe certain Guatemalan officials to connive at the export of a valuable stela from Guatemala to the United States. The accused and others were charged with conspiracy to transport stolen goods in interstate and foreign commerce. The problem was that it was not an offence against United States law to remove artefacts from Guatemalan sites. Nevertheless, the accused was convicted. For that to occur, the goods had to be characterised as 'stolen'. That could only be done by the application of Guatemalan law to that element of the offence.[192]

Choice of law questions may also arise in other ways. The most common is the applicability of forum rules about criminal investigation — and their evidentiary consequences — to police conduct in another jurisdiction. There is one Australian authority on point. In *R v Killick*,[193] the accused was arrested by New South Wales police in Sydney. They suspected that he was involved in an armed robbery which had taken place in South Australia. They found some money in his possession, and they charged him with being in possession of money stolen outside the State of New South Wales knowing it to have been stolen. It was later found as a fact that the police were using this as a 'holding charge' while investigations into the robbery in South Australia continued. The accused was not informed of the grounds for his arrest. He was interviewed and made admissions. He was not taken before a justice as required by New South Wales law. While in custody in Sydney, the accused was again interviewed, this time by South Australian detectives. Again, he made admissions. The question was whether either set of admissions was admissible at his trial for robbery in South Australia.

Mitchell J found that the initial arrest was illegal because the accused was not informed of the grounds for the arrest.[194] Moreover, the Sydney police had acted in contravention of s 352 of the New South Wales *Crimes Act* 1990 in detaining him for interview. Hence, the custody was tainted by New South Wales law and the admissions were excluded. On the other hand, Mitchell J applied South Australian law to the questioning of the accused by South Australian police, albeit that the questioning had taken place in New South Wales.[195] It therefore

[190] Ibid 454.
[191] 495 F2d 1154 (9th Cir, 1974).
[192] See, generally, William Hughes, '*United States v Hollinshead*: A New Leap in Extraterritorial Application of Criminal Laws' (1977) 1 *Hastings International and Comparative Law Review* 149.
[193] (1979) 21 SASR 321.
[194] Ibid 324–5, applying *Christie v Leachinsky* [1947] AC 573.
[195] (1979) 21 SASR 321, 330.

seems that the choice of law rule applied in this situation was the law governing the authority of the police officer whose conduct was sought to be impugned.

The problem has arisen more often in Canada because of that country's border with the United States. In both *Harrer v The Queen*[196] and *Terry v The Queen*,[197] the Supreme Court of Canada dealt with cases in which the accused had been interrogated in the United States about Canadian offences. The interrogations had been conducted in accordance with US rules but not in accordance with the more stringent Canadian rules. In both cases, the Court held that, absent some exceptional rule of international law, the rules imposed by the Canadian *Charter of Rights* did not apply to investigations outside the territorial boundaries of Canada. In the latter case, it was held:

> The general rule that a state's criminal law applies only within its territory is particularly true of the legal procedures enacted to enforce it; the exercise of an enforcement jurisdiction is 'inherently territorial'[198] ... Consequently, any co-operative investigation involving law enforcement agencies of Canada and the United States will be governed by the laws of the jurisdiction in which the activity is undertaken.[199]

There are at least three further points to make about this rule. First, the Canadian forum will still determine the right of the accused to a fair trial according to its own laws.[200] Second, it may be that a different rule applies where the investigative activity abroad is undertaken by forum investigators. The Canadian Supreme Court has left this question open.[201] Third, it may be that the application of the laws of the place where the investigatory activity took place will be qualified in cases in which that law is 'grossly unfair' or is 'anathema to the Canadian conscience'.[202]

On the other hand, a different result was reached, albeit in *obiter*, by the Victorian Court of Criminal Appeal in *Perfili*.[203] In that case, the accused, before a Victorian court on a charge of conspiracy in the Solomon Islands to import wildlife into Victoria, was questioned in the Solomon Islands by Solomon Islands police. On the question of the legality of the questioning, the court said:

> [W]e should not have thought that the *Bunning v Cross* discretion was enlivened solely by non-compliance with a foreign law dealing with a matter of

196 (1995) 101 CCC (3d) 193 ('*Harrer*').

197 (1996) 106 CCC (3d) 508 ('*Terry*').

198 Citing D O'Connell, *International Law* (2nd ed, 1970) vol 2, 603.

199 *Terry* (1996) 106 CCC (3d) 508, 515 (McLachlin J) citing Sharon Williams and J Castel, *Canadian Criminal Law: International and Transnational Aspects* (1981) 320. See earlier examples in *Re Filonov* (1993) 82 CCC (3d) 516 and *R v Haughton [No 2]* (1982) 38 OR (2d) 496. The latter case came to an interesting conclusion. The court held (at 504): 'From my research into the issue, the rule which is stated in the standard texts is that questions with respect to the admissibility of evidence are to be decided in accordance with the *lex fori*. Accordingly, in deciding the issue of admissibility I have applied the law of Canada.' Of course, all courts apply forum law in one sense. The interesting question is whether forum law refers to non-forum law.

200 *Terry* (1996) 106 CCC (3d) 508, 517–8 (McLachlin J).

201 *Harrer* (1995) 101 CCC (3d) 193, 200.

202 Ibid 213–4 (McLachlin J, with Major J concurring).

203 (1995) 84 A Crim R 26.

> procedure and normally disregarded in the foreign country itself ... An Australian court should be very wary of assuming to protect the integrity of a foreign law enforcement process or to pass judgment on the manner in which its procedural requirements are observed.[204]

These examples pose a true choice of law problem. The forum's rule of admissibility may require a standard of conduct which itself could be judged by reference either to forum law or some other law. Should the forum apply the procedural law of the place of detention and questioning in deciding admissibility?

The answer should depend on the purposes of the rule of evidence concerned. For example, the purposes of an exclusionary rule of evidence based on an exemption of the legality of the behaviour of the police are likely to be one of the following: (a) the effect of the illegality on the likely truth of the admissions; (b) the need to deter illicit police behaviour; and (c) the need to protect the integrity of the courts from the tarnish implied by the apparent condoning of police misconduct in receiving the evidence. Reason (a) would seem to point to the application of forum law; reason (c) would seem to point to the application of the foreign law; and reason (b) is equivocal, depending on whether the forum court is seen to have any interest in deterring the misbehaviour of police officers in another jurisdiction.[205]

A related issue arose in *R v Bengert [No 8]*.[206] In that case a Canadian court heard a conspiracy charge. The Crown sought to introduce as evidence a transcript of telephone calls made in Costa Rica between the accused and an unidentified co-conspirator. The interception was illegal in Costa Rica and would have been illegal if done in Canada. The Crown argued that the interception legislation in both countries was territorially limited, that the Canadian legislation did not apply, and that the Costa Rican law, not being forum law, could not be enforced in the Canadian court. The Crown further argued that, as there was no legislative rule that was applicable, the gap should be filled by common law. In Canada, the common law position is that illegally obtained evidence is admissible if relevant.[207] Nevertheless, the trial judge excluded the evidence:

> The result of the strict application of the ... [common law rule] in the case at bar leads to an absurdity. In my view, the rule ... should not be construed in a way that frustrates the public policy exemplified by the [Canadian] Act.[208]

[204] Ibid 30.

[205] See generally William Theis, 'Choice of Law and the Administration of the Exclusionary Rule in Criminal Cases' (1977) 44 *Tennessee Law Review* 1043. The United States Supreme Court has held that the protection of the Fourth Amendment (against, inter alia, unreasonable search and seizure) does not protect an *alien* outside the territory of the United States: *US v Verdugo-Urquidez*, 108 L Ed 2nd 222 (1990). A discussion of the issues prior to that decision may be found in the note entitled 'The Extraterritorial Applicability of the Fourth Amendment' (1989) 102 *Harvard Law Review* 1673.

[206] (1979) 15 CR (3d) 37 ('*Bengert*').

[207] *R v Wray* (1971) 11 DLR (3d) 673.

[208] *Bengert* (1979) 15 CR (3d) 37, 40. See also *R v Abizeid* (1981) 67 CCC (2d) 373, in which the interception of a telephone conversation between Canada and France was made in Canada in accordance with Canadian law.

Bengert was a relatively simple case. But suppose a harder one where the telephone conversation is between Canada and Costa Rica, and its interception is legal in Canada and illegal in Costa Rica. If the interception is made in Canada, there would seem to be little problem — but what if the interception is made in Costa Rica? Shouldn't the interception be classified in a Canadian forum as having been illegally made?

The last example of a choice of law issue is the question which arose in *F E Seeley Nominees Pty Ltd v El Ar Initiations (UK) Ltd.*[209] The South Australian plaintiff was engaged in a commercial dispute with the Greek defendant. As well as suing the defendant in South Australia, the plaintiff lodged a criminal complaint against the defendant in Greece. The Greek defendant applied for a stay of the South Australian civil proceedings until the Greek criminal proceedings were completed, on the ground that the defendant might, in the course of the civil proceedings, be compelled to incriminate himself for the purposes of the Greek proceedings. The question then was whether South Australian law on self-incrimination referred to incrimination under Greek law. Zelling AJ held that it did not.[210]

VI Recognition Issues

The general rule is that the courts will not recognise or enforce the criminal or penal *judgment* of another forum. Nevertheless, it is conceivable that recognition issues can arise with respect to criminal matters which are not judgments. The best example of this is *Jackson v Gamble*.[211] That case concerned an investigation pursuant to the *Companies Act* 1961 (Vic) into the affairs of a New South Wales company in liquidation. The respondent was an officer of the company who had been committed for trial in New South Wales on a charge of conspiracy to defraud the Commonwealth. The applicant was an inspector appointed by the Attorney-General of New South Wales to investigate the affairs of the company. He had also been appointed an inspector under the comparable Victorian legislation. The respondent in Victoria refused to answer questions put to him by the applicant on the ground that the answers might have a tendency to incriminate him in the criminal proceedings in New South Wales. The relevant Victorian provision stated that a person in the situation of the respondent would not be excused from answering a question on the ground that it might incriminate him or her, but that the question and the answer would not be admissible in criminal proceedings.[212] The respondent argued that the Victorian provision should be localised to criminal proceedings in Victoria and that, therefore, the removal of

[209] (1990) 96 ALR 468.

[210] Ibid 473, in effect approving *The King of Two Sicilies v Willcox* (1850) 1 Sim (NS) 301; 61 ER 116 and, as mentioned at 472, disapproving *Government of the United States of America v McRae* (1867) LR 3 Ch App 79. This question has arisen in pointed form in the attempt to prosecute alleged war criminals in the United States for making false visa applications: see, eg, Diego Rotsztain, 'The Fifth Amendment Privilege Against Self Incrimination and Fear of Foreign Prosecution' (1996) 96 *Columbia Law Review* 1940.

[211] [1983] 1 VR 552.

[212] Subject to certain exceptions not relevant for present purposes: ibid 557.

the privilege should be similarly confined. If the argument had succeeded, the result would have been that the common law privilege would remain where a person in the position of the respondent claimed it in relation to proceedings outside the forum. However, the argument was rejected. Young CJ held that the purpose of the provision was to abrogate the privilege against self-incrimination without limitation. Moreover, if the consequential 'immunity only operates in Victoria, so be it.'[213] However:

> [T]he Companies legislation has for some time been substantially similar in all States and Territories of the Commonwealth and if ... [the respondent] ... claimed in one State that the answer to a question might tend to incriminate him I cannot imagine that a court of another State would allow the answer to be given in evidence upon his trial. Even if the equivalent section did not of its own force operate because the answer had been given in a State other than the State where the trial was taking place, every reason of policy, comity and fairness would combine to require the Court to refuse to allow the answer to be given in evidence.[214]

The judgment of Young CJ fails to deal with the real question posed by the case, which was whether or not the question and answer made in the Victorian examination would be admissible in the criminal proceedings in New South Wales. If not, there was no difficulty in compelling the answer. That question divides into two sub-questions: first, is the removal of the privilege limited to investigations in relation to Victorian proceedings; and second, does the Victorian immunity provision have any effect in New South Wales criminal proceedings? Young CJ effectively decided that the abrogation of the privilege was unlimited territorially (at least within Australia) but that the conferral of the subsequent privilege was limited spatially to proceedings in Victoria.[215] If that other state conferred an immunity of its own by reason of comity, policy or fairness, then that immunity could be invoked; but that was a matter for that state.

This is pre-eminently a situation in which the 'full faith and credit' provision of the *Australian Constitution* should be given a role.[216] The fact that the reasons for the privilege are unlimited spatially — the investigating officer was validly appointed under the legislation of both States; there was an attempt to provide an interlocking system above the realities of State lines; and the investigation may and should concern all operations of the company wherever located — is, in addition, a fact calling for the application of full faith and credit.[217]

213 Ibid 559.
214 Ibid 557.
215 Ibid 559.
216 *Australian Constitution* s 118.
217 Similar reasoning in relation to interlocking 'national' schemes and full faith and credit are to be found in *Borg Warner (Aust) Ltd v Zupan* [1982] VR 437 and the judgment of Zelling J in *Hodge v Club Motor Insurance Agency Pty Ltd* (1974) 2 ALR 421, 431–6. See further below n 228.

VII A National Perspective

A *Judicial Decisions*

In *Mayer v Henderson*,[218] the defendant was charged with conspiring with another in Tasmania to defraud banks in Victoria. The only overt acts took place in Tasmania. After some technical argument about the effect of ss 8 and 297(1) of the *Criminal Code* (Tas), the question came down to the application and authority of *Owen*. Wright J distinguished *Owen* (and other authority) on the ground that in this case it was clear that the defendant had committed one or more overt acts within Tasmania in order to effect his overall purpose.

This distinction is no distinction at all. To some extent, it may be argued that his Honour in effect decided that the *Owen* exception applies to any overt act committed within the forum pursuant to the agreement, thus answering some of the questions posed above about the meaning of the English cases on the scope of the agreement. But his Honour never reached these questions. There is no doubt that the decision arose from a desire to avoid the rule in *Owen* on policy grounds. In particular, his Honour quoted passages from the judgment of Deane J in *Thompson*[219] to the effect that the States and Territories of Australia should not be treated as if they were independent nations, referred to the idea that Tasmania should not become a 'sanctuary for conspirators',[220] and stated:

> It may be said that in the Commonwealth of Australia there is little reason to limit the prophylactic effect of a prosecution for conspiracy in one State where the commission of the substantive crime or proscribed act is to occur in another part of Australia.[221]

In *Catanzariti*, Matheson J simply distinguished *Mayer v Henderson* because that case was decided on the ground that overt acts pursuant to the conspiracy were performed in Tasmania.[222] That distinction is simply unsound. It does not reflect the reality of the decision. It is and remains an unsound way of distinguishing *Owen* and, in any event, there were plenty of overt acts pursuant to the *Catanzariti* conspiracy in South Australia.

Mayer v Henderson was cited and quoted by Hunt CJ in *Isaac*. His Honour simply failed to further discuss the decision, or its reasoning, beyond pointing out that the views of Deane J on a constitutionally based national legal system, as expressed in such cases as *Thompson*[223] and *Breavington v Godleman*,[224] have not had majority status in law. That is, of course, entirely true. There was no such

[218] (1993) 68 A Crim R 155.
[219] (1989) 169 CLR 1, 59–60.
[220] (1993) 68 A Crim R 155, 161.
[221] Ibid 160. See also *R v Bachrack* (1913) 21 CCC 257, 265 in which the court said: 'The law would be lame if it were powerless to reach conspirators so long as they took care to agree to carry into effect their wrongs beyond the borders of the country in which they conspired to do the wrongs.'
[222] (1995) 81 A Crim R 584, 594–5.
[223] (1989) 169 CLR 1, 34–5.
[224] (1989) 169 CLR 41, 120–1.

majority in either of those cases, and Deane J's view was finally rejected in *McKain v R W Miller & Co (SA) Pty Ltd.*[225]

Nevertheless, a cogent policy-based argument can be made for a more national approach to the question of criminal jurisdiction, resting upon constitutional grounds. It is clear that there is no majority in the High Court for the quite radical use of the full faith and credit provision[226] espoused by the minority in such cases as *Breavington v Godleman*,[227] but, equally, it is simply not true to say that full faith and credit has had no substantive effect in Australian jurisprudence.[228]

Australian courts have simply not been able to devise a coherent legal interpretation of the constitutional provision dealing with full faith and credit.[229] *Owen* and its foreign progeny did not fall to be decided in a federation with such a constitutional command. If common law conspiracy to commit an unlawful act encompasses more than conspiracy to commit a crime against forum law (which is undoubted), why can the concept of criminal conspiracy 'unlawfulness' not encompass the breaking of the law of another Australian jurisdiction, to which law the doctrine of full faith and credit demands that the forum give full faith and credit?

Another 'federation' has begun to take this path. In *Clements*,[230] the accused were charged in Scotland with being concerned in the supplying of a controlled drug to another. The supply took place entirely in England by accused who had not left England. They did not know that the drugs were destined for Scotland. There was, in short, no conspiracy to import the drugs into Scotland that might

225 (1992) 174 CLR 1.

226 *Australian Constitution* s 118; *State and Territorial Laws and Records Recognition Act* 1901 (Cth) s 18 repealed by s 3(1) of the *Evidence (Transitional Provisions and Consequential Amendments) Act* 1995 (Cth).

227 (1989) 169 CLR 41.

228 In *Merwin Pastoral Co v Moolpa Pastoral Co* (1933) 48 CLR 565, it was held that the public policy exception to the enforcement of a contract was ousted by full faith and credit; and in *R v White; Ex parte T A Field Pty Ltd* (1975) 133 CLR 113, it was held that the common law rule against the enforcement of a sister state revenue judgment was ousted by full faith and credit. In *Bond Brewing Holdings Ltd v Crawford* (1989) 1 WAR 517, Ipp J refused an application for an order restraining defendants from taking action on an order of the Victorian Supreme Court in their favour (despite the apparent sympathy of Ipp J for the case for the applicant) on full faith and credit grounds; and in *Censori v Holland* [1993] 1 VR 509, Harper J held that full faith and credit required Victorian prison authorities to comply with the conditions on which the Governor of Western Australia had commuted the prisoner's death sentence. In *Brownlie* (1992) 27 NSWLR 78, despite acknowledgement that the views of Deane J on full faith and credit had not commanded majority acceptance, Gleeson CJ quoted extensively from them at 85–6 with evident effect on the result in that case, and in *Dempster v National Companies and Securities Commission* (1993) 9 WAR 215, the Supreme Court of Western Australia held that the presumption of territoriality does not apply in relation to the co-operative regime constituted by the various Companies Codes (*contra Danae Investment Trust plc v Macintosh Nominees Trust plc* (1993) 61 SASR 341 — but that was an international case). In *Isaac* (1996) 87 A Crim R 513, 522 Hunt CJ simply said that in *Brownlie*, Gleeson CJ acknowledged that Deane J's view had no majority acceptance. This is true but disingenuous. The idea had, it is submitted, a marked influence on the latter decision and its reasoning. Lastly, and perhaps most significantly, in *Borg Warner (Aust) Ltd v Zupan* [1982] VR 437, there is a highly persuasive and sensible attack on the foolishness of applying international conflict of laws choice of law rules within the Commonwealth of Australia.

229 See, eg, Peter Nygh, 'Full Faith and Credit: A Constitutional Rule for Conflict Resolution' (1991) 13 *Sydney Law Review* 415.

230 [1991] JC 62.

have lead the court to follow such decisions *Fan*,[231] *Liangsiriprasert* [232] and *R v Sansom*.[233] This was, of course, a case in which, while the conduct took place wholly outside the territory of the forum, it did have an effect within the forum, and in such cases, particularly when they involve demonised drugs, courts are inclined to dispense with the niceties of the territorial principle. Lords Coulsfield and Wylie did so. But the Lord Justice General, Lord Hope, also said:

> The problem in this case is one as to territorial limitation as between different jurisdictions within the United Kingdom. This depends on constitutional practice and not international comity. ... [F]or the purposes of the present case it is, I think, sufficient to look only at the situation within the United Kingdom and to ask why the courts of one part of it should be denied jurisdiction if the activities of persons elsewhere in the United Kingdom are seen to have their harmful effects in that part. *The presumption [of territoriality] ... does not apply.*[234]

B *Statutory Intervention*

South Australia, New South Wales, the Australian Capital Territory and Tasmania have enacted a criminal jurisdiction statute recommended by the Standing Committee of Solicitors-General and adopted by the Standing Committee of Attorneys-General after and as a result of the High Court decision in *Thompson*.[235] As an example, the material part s 5C of the *Criminal Law Consolidation Act* 1935 (SA) says:

(1) An offence against the law of the State is committed if —

  (a) all elements necessary to constitute the offence (disregarding territorial considerations) exist; and
  (b) a territorial nexus exists between the State and at least one element of the offence.

(2) A territorial nexus exists between the State and an element of an offence if —

  (a) the element is or includes an event occurring in the State; or
  (b) the element is or includes an event that occurs outside the State but while the person alleged to have committed the offence is in the State.

Sub-section (3) contains a presumption that the territorial nexus is satisfied unless rebutted under sub-s (4). Sub-section (4) requires that the trial proceed in any event and that the question of territorial nexus be decided at the end of the trial.

231 (1991) 56 A Crim R 189.
232 [1991] 1 AC 225.
233 [1991] 2 WLR 366.
234 [1991] JC 62, 69 (emphasis added).
235 (1989) 169 CLR 1. The statutes are: *Criminal Law Consolidation Act* 1935 (SA); *Crimes (Application of Criminal Law) Amendment Act* 1992 (NSW); *Crimes (Amendment) Act* 1995 (ACT); *Criminal Law (Territorial Application) Act* 1995 (Tas).

It was and is plain that the offence in *Catanzariti* (conspiracy in South Australia to cultivate cannabis in the Northern Territory) was caught by s 5C. Nevertheless, Matheson J ruled to the contrary:

> In my opinion, s 5C is not an offence creating section. It is only concerned with the determination of whether a South Australian offence has been committed. It does not extend the jurisdiction of this court to include offences against the law of another country, or even, and more relevantly of another State or Territory of the Commonwealth of Australia. The word 'offence' must mean a South Australian offence. ... Section 5C does not purport to recognise the laws of the Northern Territory or of anywhere else.[236]

It is submitted that the ruling is plainly wrong. Conspiracy to produce or cultivate cannabis is a South Australian offence. The facts of this case are plainly and obviously caught by the operative subsections. Section 5C was intended to catch such cases as this — and does so.[237]

It is, in addition, quite unclear what is meant by the phrase 'offence creating section'. Matheson J probably meant that s 5C is not to be interpreted to create a criminal offence where there was none before. But that can have two meanings. Certainly, in a first meaning, s 5C was not intended to enact a new criminal offence in the sense that, for example, the recent parliamentary enactment of 'stalking' offences creates new offences. But in its second meaning, s 5C was intended to create criminal liability where there was none before because it was intended to remove 'jurisdictional' obstacles to the prosecution and, if appropriate, conviction of offences which may not have been possible in the past. Conspiracy to cultivate cannabis has been an offence for quite some time and s 5C (and its equivalents) do not create it. They may create a new *liability* — not a new offence. These two meanings are quite different and it is, with respect, at best unhelpful to confuse them.

Hunt CJ in *Isaac* held that the New South Wales equivalent did not catch those accused either:

> In the present case, the agreement to commit the robbery in the Australian Capital Territory existed, and all of the events necessary to establish that agreement occurred within this State. There was no event which occurred outside this State to which s 3A could apply. Even the intention to carry out the robbery (which, as a state of mind, is excluded from the definition of an event) existed in this State. Insofar as the appellants still held that intention when they travelled to Canberra, again that intention does not amount to an event (as defined) which occurred outside the State. If the agreement formed inside this State to commit a crime in the Australian Capital Territory did not constitute an offence known to the law of this State (as *Board of Trade v Owen* says that it does not), then s 3A did not constitute it an offence against the law of this State simply because the object of the agreement or conspiracy involved the commis-

236 (1995) 65 SASR 201, 215.

237 Section 5C was also referred to by Lander J in *Winfield* (1995) 83 A Crim R 301, 331–3 but that was a standard case of a conspiracy outside the forum to commit a fraud inside the forum and could be resolved, with ease, without reference to statute. Lander J, at 334, left open the proper construction of s 5C but was inclined to agree with *Catanzariti*.

> sion of a crime in another State or Territory of the Commonwealth. Section 3A is irrelevant to the present case.[238]

This reasoning defies rational analysis. The crime in question is so tied to New South Wales, it is said, that a statute, manifestly intended to extend the 'jurisdiction' of the New South Wales courts, cannot apply to it. For common law purposes, it is said, the offence charged is a crime in the Australian Capital Territory. For statute purposes it is a crime in New South Wales! Neither suffices for conviction.

The reasoning involved is fallacious. The statute applies to the case on its plain words. There is *nothing* in s 3A which requires that an 'event' take place *outside* the State.

The result and reasoning in these decisions are untenable. The accused in *Catanzariti* will, presumably, be taken via the *Service and Execution of Process Act* 1901 (NSW) to the Northern Territory and tried there. What of the accused in *Isaac*? Again, one might presume that the law involved in such decisions as *Doot*[239] makes the New South Wales conspiracy 'justiciable' in the Australian Capital Territory. One could be excused for thinking that in a nation such as Australia, prohibiting the prosecution of two such commonplace offences in one component of the federation and therefore requiring prosecution in another serves no rational purpose of the criminal justice system or, in general terms, the public interest.

It appears that the 'jurisdictional' statute so carefully thought out by the Standing Committee of Solicitors-General will be so interpreted as to achieve nothing that was not already achieved by common law. It was and remains clearly beyond argument that this was not its objective.

VIII CONCLUSION

The law of criminal jurisdiction is in an unhappy state. The common law is very unsatisfactory. The reasoning used to justify the results in common law decisions is almost invariably weak, espousing theoretical justifications for conclusions that the theories do not justify and employing reasoning that is usually dubious. Rulings which either deny or accept jurisdiction seem almost random when viewed from a policy perspective. The use of empty slogans such as 'result crime' or 'terminatory theory' is common. When faced with a statute which attempts to make sense of the area, courts seem bent on denying it all meaning, in defiance of its clear and obvious purpose. It remains to be seen whether governments and parliaments will remain quiescent under such obvious frustration of legislative intention.

[238] *Isaac* (1996) 87 A Crim R 513, 525.
[239] [1973] AC 807.