COMMENT

Neither Here nor There: Wire Fraud and the False Binary of Territoriality Under *Morrison*

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Fraudulent schemes increasingly rely on wire transmissions and the internet as the economy and communications digitize. To combat these schemes, prosecutors have applied the wire fraud statute, 18 U.S.C. § 1343, to defendants located domestically and abroad. Applying the current standard for extraterritoriality under Morrison v. National Australia Bank Ltd.*, circuit courts disagree as to whether the wire fraud statute applies extraterritorially. But courts consistently apply an easily met standard when determining if the wire fraud statute should apply domestically under* Morrison*. This reaches many defendants located abroad. This Comment argues*

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that this broad domestic application of the wire fraud statute shields courts from asking whether the statute applies extraterritorially. Further, this Comment argues that courts' domestic application of the wire fraud statute is sufficiently broad as to begin to resemble extraterritoriality because courts can almost always find sufficient domestic activity to apply the wire fraud statute. This Comment argues that wire transmissions are sufficiently geographically ambiguous that using a singular statutory focus under Morrison *to evaluate whether wire fraud applies domestically is inadequate. In response to that inadequacy, this Comment proposes a new solution that incorporates additional statutory information in evaluating the statute's domestic application. This solution would better protect defendants from arbitrary domestic application of the wire fraud statute and validate the tenets underlying the doctrine of extraterritoriality.*

INTRODUCTION

Since the early days of the internet, internet scams—including fake bachelorettes looking for wealthy husbands,[1] internet auctions where the items do not exist,[2] messages threatening blackmail on the basis of compromising information,[3] and foreign vacation-rental scams—have been a prevalent and harmful force online.[4] For example, in 1995, Dr. Jai Gupta was approached by two men claiming to work for a Nigerian holding company that had not yet been paid $28.5 million by the Nigerian government for lighting installation.[5] Gupta agreed to pay the scammers $712,500 for the promise of millions in return, but he never saw a penny in repayment.[6] One of the scammers was ultimately charged with and convicted of wire fraud.[7] Although a half-century old, the wire fraud statute has gained newfound prominence as the economy digitizes and the world interconnects. Federal prosecutors have called the wire fraud statute "our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—and our true love" due to its "simplicity, adaptability, and comfortable familiarity."[8] The U.S. Sentencing Commission found that 4,823 people were

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1 C.J. Chivers, *Russian Gal Seeking Comrade? No, It's an Internet Scam*, N.Y. TIMES (Nov. 3, 2004), https://perma.cc/P29B-AP9A.

2 *See* Katie Hafner, *How to Avoid Auction Scams*, N.Y. TIMES (Mar. 20, 2004), https://perma.cc/75EY-ZUPT.

3 J.D. Biersdorfer, *An Old Scam with a New Twist*, N.Y. TIMES (July 23, 2018), https://perma.cc/6DPM-4YYK.

4 Seth Kugel, *Burned! A London Vacation Rental Scam*, N.Y. TIMES (Jan. 25, 2011), https://perma.cc/9GVB-NANV.

5 United States v. Achiekwelu, 900 F. Supp. 812, 814 (E.D. Va. 1995).

6 *Id.* at 814–16.

7 *Id.* at 813.

8 Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 771 (1980).

sentenced for federal fraud, theft, and embezzlement charges in 2020.[9] About 22% of those sentenced were not U.S. citizens.[10] The statute can apply to essentially any scheme to defraud that uses wire transmissions. Because the modern internet is composed of cable connections rather than satellite links,[11] nearly every internet transaction is possibly a vehicle for wire fraud prosecution.

Like with any criminal statute, prosecutors are only able to apply the wire fraud statute, 18 U.S.C. § 1343, if they have jurisdiction over a defendant. The wire fraud statute is used to prosecute frauds committed using U.S. telephone, telegraph, or telecommunications wires. The statute, which was designed for the age of telegraph wires, is now commonly used in the age of the internet. Due to the statute's anachronisms, circuit courts have differed over its extraterritorial application—that is, how and when the wire fraud statute applies to foreigners abroad.[12] This causes some purported scammers to be prosecuted while others walk free. More troubling, however, is a trend of courts exercising nearly universal jurisdiction over those who commit wire fraud, regardless of where they or their victims are located.

Such wide jurisdiction, however, is inconsistent with *Morrison v. National Australia Bank Ltd.*,[13] which formulated the current standard for assessing whether a statute should be applied extraterritorially. Specifically, this broad application of the wire fraud statute violates conventions of comity that limit the application of domestic statutes to foreign defendants and may allow for arbitrary prosecutions of foreigners who only incidentally use U.S. wires as part of schemes to defraud. Take four hypothetical defendants: Alpha, Bravo, Charlie, and Delta. Each of these defendants solicits money for disaster relief but pockets the funds instead.[14] Alpha is a fraudster based in the United States. She solicits funds only from U.S. citizens and deposits the funds in a U.S. bank account. Bravo is located in Japan but solicits funds

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9 U.S. SENT'G COMM'N, UNITED STATES SENTENCING COMMISSION QUARTERLY DATA REPORT: FISCAL YEAR 2020, at 2, (2021).

10 *Id.* at 8.

11 *See* Senay Boztas, *Buried at Sea: The Companies Cashing In on Abandoned Cables*, THE GUARDIAN (Dec. 14, 2016), https://perma.cc/4AA8-379X.

12 *Compare* United States v. Georgiou, 777 F.3d 125, 130 (3d Cir. 2015), *with* Eur. Cmty. v. RJR Nabisco, Inc., 764 F.3d 129, 133–34 (2d Cir. 2014), *rev'd on other grounds*, 579 U.S. 325 (2016).

13 561 U.S. 247 (2010).

14 According to the FBI, this is a common scheme. *Charity and Disaster Fraud*, FBI, https://perma.cc/5YXP-9H5M.

from U.S. citizens and Japanese citizens. He deposits the funds in both a Japanese bank account and a U.S. bank account. Charlie is located in Japan, but her scheme targets only U.K. residents. She sends emails to U.K. citizens to solicit funds and deposits them in a Japanese bank account. Delta is located in Japan and fears the harsh U.S. criminal justice system. He takes pains to solicit funds only from Japanese residents via email. He verifies that his targets live in Japan, and he collects the money in cash.

In some circuits, Alpha and Bravo would be liable for wire fraud while Charlie and Delta would walk free. In other circuits, all but Delta would be liable for wire fraud. And, in a growing number of courts, all four would be liable for wire fraud.[15] This divide among courts radically changes the possible liability for fraudsters around the world. This Comment aims to resolve this division by arguing that the anachronisms inherent in the wire fraud statute—namely the assumptions that acts are committed in a fixed location and that wire fraud is exclusively either extraterritorial or domestic—makes it possible to expand the wire fraud statute's application to unjustifiable limits and infringe on other nations' sovereignty. This Comment further argues that this expansion allows courts to dodge the question of when and how the wire fraud statute should apply extraterritorially.

This Comment is composed of four parts. Part I provides an overview of wire transactions, the statutory elements of wire fraud, the legal definition of a U.S. wire, and the modern standard for determining whether jurisdiction applies extraterritorially. Part II describes the current circuit split as to whether the wire fraud statute applies beyond U.S. borders and the expansive conception of what constitutes the United States for domestic jurisdiction under the statute. Part III argues that the wide formulation of what constitutes domestic jurisdiction stems from the assumption that offenses can be described in terms of a particular location and that this assumption obscures the reality of wire fraud and similar offenses. Part IV presents a solution that resolves overly expansive domestic jurisdiction by arguing that less geographically ambiguous portions of statutes can be read to help

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[15] For example, a defendant was bribed with cash and luxury items to rig the selection process for a television vendor. Because the luxury items were paid for using money from a U.S. bank account, and because the cash was exchanged from one currency to another using U.S. wires, the defendant was convicted of wire fraud and sentenced to nine years in prison. *See* United States v. Napout, 963 F.3d 163, 175–78 (2d Cir. 2020). This closely resembles Delta in this Comment's stylized example.

determine whether jurisdiction applies. This Part then applies this solution to the wire fraud statute to help resolve its overexpansive jurisdiction and the circuit split over its extraterritorial application.

I. MODERN STANDARDS AND OLD STATUTES

This Part provides an overview of the technology of wire transmissions, the wire fraud statute, and the modern standard for assessing the application of a statute beyond U.S. borders.

A. A Primer on Wire Transactions

Modern telecommunications infrastructure is primarily composed of wires that transmit data from one point to another.[16] While we may access the internet through Wi-Fi or phone data, those systems are supported by a massive network of physical cables that transmit information across the world.[17] For example, an email from Atlanta to San Antonio inevitably travels at nearly the speed of light through fiber-optic cables linking the two cities.[18] This physical network of wires and cables supports essentially all modern telecommunication infrastructure. Emails, telephone calls, wire transfers between banks, internet access, and website hosting all rely on this interconnected web of cables.

Even global transactions rely on wires—the telecommunications links between continents are made by submarine fiber-optic cables wrapped in protective steel and plastic.[19] More than three hundred of these cables zigzag across the ocean floor.[20] For example, an email from Japan to England would travel through one of nine cables linking Japan to the United States, such as the Pacific

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[16] *See* Edward J. Malecki & Hu Wei, *A Wired World: The Evolving Geography of Submarine Cables and the Shift to Asia*, 99 ANNALS ASS'N AM. GEOGRAPHERS 360, 362–63 (2009). Approximately 99% of all telecommunications are transmitted through wires, not satellites. Prachi Bhardwaj, *Fiber Optic Wires, Servers, and More than 550,000 Miles of Underwater Cables: Here's What the Internet Actually Looks Like*, BUS. INSIDER (June 23, 2018), https://perma.cc/PD2P-ZSVG.

[17] Adam Satariano, *How the Internet Travels Across Oceans*, N.Y. TIMES (Mar. 10, 2019), https://www.nytimes.com/interactive/2019/03/10/technology/internet-cables-oceans.html.

[18] *Cf.* Jane Tanner, *New Life for Old Railroads; What Better Place to Lay Miles of Fiber Optic Cable*, N.Y. TIMES (May 6, 2000), https://perma.cc/N38N-KZGQ.

[19] Satariano, *supra* note 17; *see also* Cecilia Kang, *Melting Arctic Ice Makes High-Speed Internet a Reality in a Remote Town*, N.Y. TIMES (Dec. 2, 2017), https://perma.cc/26CR-NWZH.

[20] Bhardwaj, *supra* note 16. For a description of these cables, see generally Stewart Ash, *The Development of Submarine Cables*, *in* SUBMARINE CABLES: THE HANDBOOK OF LAW AND POLICY 19 (Douglas R. Burnett et al. eds., 2014).

Crossing-1 (PC-1) cable, before being routed across the United States and then to England through one of four cables linking England to the United States, such as the GTT Atlantic Cable.[21]

The route of a wire transmission is not predetermined. Depending on bandwidth and the servers relied upon, the hypothetical email from Japan to England could alternatively be routed under the Sea of Japan to Russia and through the Russia-Japan Cable Network before being relayed across Russia and mainland Europe through any number of land-based cables.[22] The person sending the email would have no knowledge of which cables were implicated—before or after the email was sent of which cables were implicated. These observations are important because jurisdiction for wire fraud depends on which cables are implicated in a transmission.

B. The Elements of Wire Fraud Under 18 U.S.C. § 1343

Demand for cable use has only increased as the economy has digitized and become globally interconnected.[23] Global internet traffic is growing, and communications and banking transactions are increasingly digital.[24] Instances of misuse of wires—through fraud, for instance—will only increase as the overall use of wires increases.[25] Wire fraud, as defined under § 1343, will then become an increasingly useful tool for prosecutors to target foreign fraudsters. This Section reviews the elements of wire fraud under § 1343 and explains why prosecutors rely so frequently on the wire fraud statute in prosecuting alleged offenders.

Federal white-collar-crime prosecutors rely on the wire fraud statute as their "Louisville Slugger" due to its simplicity and familiarity.[26] Scholars have described the wire fraud statute as "the most prevalent and lethal weapon in the federal prosecutor's

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[21] *See* SUBMARINE CABLE MAP, https://perma.cc/572H-2UDS.

[22] *Id.*; *see also* Malecki & Wei, *supra* note 16, at 362–63.

[23] *See* Paul Brodsky, *Let's Just Say Demand Is Thriving in the Global Bandwidth Market*, TELEGEOGRAPHY BLOG (May 1, 2020), https://perma.cc/6MFQ-GN22.

[24] J. Clement, *Data Volume of Global Consumer IP Traffic from 2017 to 2022*, STATISTA (Feb. 28, 2020), https://perma.cc/Q9Q9-XPEE; *see also* Paul Brodsky, *Internet Traffic and Capacity in Covid-Adjusted Terms*, TELEGEOGRAPHY BLOG (Aug. 27, 2020), https://perma.cc/M9MM-UJEP.

[25] One type of wire fraud involves criminals impersonating senior executives to convince staff to wire money to fraudulent accounts. The FBI found that this type of fraud resulted in over $26 billion of losses to businesses from 2016 to 2019. Kate Fazzini, *Email Wire Fraud Is So Simple for Criminals to Pull Off, It's Cost Companies $26 Billion Since 2016, Says FBI*, CNBC (Sept. 11, 2019), https://perma.cc/CA9T-PR78.

[26] *See* Rakoff, *supra* note 8, at 771.

arsenal" in the twenty-first century, and the federal wire fraud statute has increasingly been used to federalize frauds previously prosecuted under state law.[27] Additionally, this statute carries increasingly harsh penalties. With the passage of the Sarbanes-Oxley Act of 2002,[28] the statutory maximum for imprisonment for wire fraud quadrupled from five to twenty years, raising the stakes for defendants.[29] Although the number of wire fraud prosecutions is difficult to reliably estimate, wire fraud is one of the most commonly prosecuted federal white-collar offenses.[30] One source estimates that the federal government prosecuted approximately 4,800 cases of fraud, theft, and embezzlement, including wire fraud, in 2018.[31] Although not all of these cases involved extraterritorial conduct, approximately 22% of these defendants were noncitizens.[32] Foreigners convicted in U.S. courts may face possible extradition, be unable to travel to the United States, have fines imposed on their U.S. bank accounts, and be referred to their own country for prosecution.[33] The limits on prosecuting wire fraud are then essential for prosecutors and defendants alike in assessing possible liability.

Initially passed in 1952, the wire fraud statute has a sparse legislative history.[34] The legislative history of the mail fraud statute (the wire fraud statute's "sister statute" and the statute after which the wire fraud statute was explicitly modeled) provides some clues as to how to interpret the wire fraud statute.[35] Indeed, much of the operative language was directly copied into the wire fraud statute. Courts have regarded the statutes as requiring equivalent analyses, noting that the "statutes share the same language in relevant part, and accordingly we apply the same

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[27] *See* Jack E. Robinson, *The Federal Mail and Wire Fraud Statutes: Correct Standards for Determining Jurisdiction and Venue*, 44 WILLAMETTE L. REV. 479, 479 (2008); Julie Rose O'Sullivan, *The Extraterritorial Application of Federal Criminal Statutes: Analytical Roadmap, Normative Conclusions, and a Plea to Congress for Direction*, 106 GEO. L.J. 1021, 1075 (2018).

[28] Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15 U.S.C. and 18 U.S.C.).

[29] 18 U.S.C. § 1341.

[30] O'Sullivan, *supra* note 27, at 1075.

[31] *White Collar Prosecutions Fall to Lowest in 20 Years*, SYRACUSE UNIV.: TRAC (May 24, 2018), https://perma.cc/9SV2-7DCZ.

[32] U.S. SENT'G COMM'N, *supra* note 9, at 8.

[33] For illustration, see Bill Miller & Pierre Thomas, *Three Nigerians Charged with Bilking VA. Firm*, WASH. POST (Sept. 15, 1994), https://perma.cc/JL9L-GX6M.

[34] *See* C.J. Williams, *What Is the Gist of the Mail Fraud Statute?*, 66 OKLA. L. REV. 287, 305 (2014).

[35] *Id.*

analysis to both sets of offenses."[36] The original mail fraud statute was enacted in 1872 as part of an omnibus act to modify laws surrounding the post office.[37] The mail fraud statute appeared on its face designed to protect the U.S. postal services and mails from misuse.[38] The original statute was titled "Penalty for Misusing the Post-Office Establishment," emphasizing its focus on mail.[39] Even with amendments to the statute that expanded liability to include fraud through private mail carriers,[40] courts in subsequent years held that the statute was limited to protecting against the misuse of U.S. mail.[41] Correspondingly, many courts have found that the focus of the wire fraud statute was to protect against the misuse of U.S. wires.[42]

This is not to say, however, that wire fraud and mail fraud are wholly equivalent. Most centrally, the element establishing jurisdiction for mail fraud (the use of mail) differs from the element establishing jurisdiction for wire fraud (the use of U.S. interstate wires) because wire transmissions can be sent from anywhere in the world, and transmissions can involve the use of U.S. interstate wires without one's foreknowledge or awareness. While mail can also be sent from anywhere in the world, its path is more predictable. A letter sender can reasonably anticipate whether the letter will be routed through another state. In contrast, a wire transfer has a less determined path. Further, mailings are more confined than wire transmissions or wire activity. For example, a bank wire from one foreign account to another foreign account may involve financial institutions in the United States to process the transfer or to exchange currency. Emails and web hosting similarly involve a more complex web of transmissions than mailing does. Further, the volume of transmissions that involve the

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36 Carpenter v. United States, 484 U.S. 19, 25 n.6 (1987).

37 *See* Rakoff, *supra* note 8, at 779.

38 *Id.* at 780.

39 Williams, *supra* note 34, at 292. There is some debate as to whether Congress was motivated to draft a more generalizable fraud statute but feared judicial override at the time. *See* Rakoff, *supra* note 8, at 785–86.

40 Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-332, 108 Stat. 2087 (codified as amended in scattered sections of 16 U.S.C., 18 U.S.C., and 34 U.S.C.).

41 *See* Rakoff, *supra* note 8, at 780; Pereira v. United States, 347 U.S. 1, 8–9 (1954) (holding that intent or knowledge that a mailing would occur was unnecessary if the scheme "caused" the mailing to occur). Scholars, however, have argued that the mail fraud statute, like the wire fraud statute, has become a generalized fraud statute. *See* Williams, *supra* note 34, at 300–04.

42 *See, e.g.*, United States v. Elbaz, 332 F. Supp. 3d 960, 973 (D. Md. 2018) (holding that "the transaction sought to be regulated by the wire fraud statute is the wire transmission itself").

use of wires—including emails, bank wires, and internet uploads, for example—is substantially higher than that of mail.

Violations under § 1343 occur where:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.[43]

Courts have interpreted this language to require four elements. First, the defendant must "voluntarily and intentionally devise[ ] or participate[ ]" in a scheme to defraud another. Second, the defendant must do so "with the intent to defraud." Third, it must be "reasonably foreseeable that interstate wire communications would be used" as part of the scheme to defraud. And fourth, interstate wires must in fact be used.[44]

For purposes of the fourth criterion, courts have interpreted the use of interstate wires under § 1343 broadly. Courts have found that interstate wires include all wires whose origin and destination are in different states or whose route passes through another state.[45] For example, a wire stretching from Texas to New York would be considered an interstate wire. A wire from Albany, New York, to New York City would not be considered an interstate wire; however, if that wire happened to route through Pennsylvania or New Jersey en route to New York City, then it would be considered an interstate wire.

Interstate wires also include wires that originate in or terminate in the United States but connect to a foreign country. For example, a wire that links New York and London would be considered an interstate wire. And wires that link foreign countries but are routed through the United States would likely be

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43 18 U.S.C. § 1343.

44 United States v. Proffit, 49 F.3d 404, 406 n.1 (8th Cir. 1995).

45 *See, e.g.*, Ideal Steel Supply Corp. v. Anza, 373 F.3d 251, 265 (2d Cir. 2004) (vacating dismissal of a complaint on the grounds that an electronic filing sent within one state may have been routed out of state), *vacated*, 547 U.S. 451 (2006); *see also* United States v. Davila, 592 F.2d 1261, 1263–64 (5th Cir. 1979) (holding that even when the origin and destination of a wire transfer are within the same state, interstate transmission of that wire transfer is not merely incidental to a fraudulent scheme).

considered interstate wires because courts' conception of what constitutes an incidental use of interstate wires in assessing jurisdiction may be sufficiently expansive to include transmissions that merely pass through the United States.[46] Using the example from above, an email sent from Japan to England that passes through submarine cables under the Pacific Ocean, across the United States, and through a submarine cable to England would thus involve the use of U.S. interstate wires.

The third element—that the use of interstate wires be reasonably foreseeable—is also quite inclusive. To commit wire fraud, a defendant need not have actual knowledge that wire transmissions would occur as part of the scheme to defraud; rather, it must only be reasonably foreseeable that the fraudulent activity would result in the use of wire communications.[47] Defendants further need not know or intend for their wire communications to route through another state to be liable for using interstate wires.[48] Instead, a specific intent to defraud is the only mens rea requirement under § 1343.[49]

Courts have liberally construed reasonable foreseeability with respect to wire transmissions. Courts have consistently found that the reasonable foreseeability element is satisfied even in cases where wire transmissions were only incidental to the scheme to defraud and not integral to its success.[50] Additionally,

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[46] *See* Robinson, *supra* note 27, at 532 (noting that jurisdiction is proper for wire fraud in any location on its route, which would extend to international transmissions as well).

[47] *See* United States v. Ratliff-White, 493 F.3d 812, 818 (7th Cir. 2007) ("Our case law does not require that a specific mailing or wire transmission be foreseen."); United States v. Weiss, 630 F.3d 1263, 1273 (10th Cir. 2010) (holding that a real estate broker "could have reasonably foreseen that the use of wire communications would follow in the wake of his fraudulent applications for FHA-insured loans"); United States v. Cusino, 694 F.2d 185, 188 (9th Cir. 1982) ("One 'causes' use of . . . wire communications where such use can reasonably be foreseen, even though not specifically intended.").

[48] *See* United States v. Blassingame, 427 F.2d 329, 330 (2d Cir. 1970) ("The statute does not condition guilt upon knowledge that interstate communication is used.").

[49] *See, e.g.*, United States v. Jinian, 725 F.3d 954, 967 (9th Cir. 2013) ("No *mens rea* requirement exists with regard to the jurisdictional, interstate nexus of Jinian's actions under 18 U.S.C. § 1343, which requires only that Jinian used—or caused the use of—interstate wires in furtherance of his scheme to defraud."); United States v. Bryant, 766 F.2d 370, 375 (8th Cir. 1985) (holding that the statute does not require knowledge that a wire communication is interstate).

[50] *See, e.g.*, *Ratliff-White*, 493 F.3d at 818–19; United States v. Embry, 644 F. App'x 565, 569 (6th Cir. 2016); United States v. Mullins, 613 F.3d 1273, 1281 (10th Cir. 2010) ("The wire fraud statute doesn't require that a defendant be able to anticipate every technical detail of a wire transmission, before she may be held liable for causing it. It's enough if she 'set forces in motion which foreseeably would involve' use of the wires." (quoting United States v. Roylance, 690 F.2d 164, 167 (10th Cir. 1982))).

the defendant need not be the one to send the communication. Rather, this element is satisfied whenever the "defendant 'knowingly caused' the use of interstate wire communications."[51] For example, in *United States v. Lindemann*,[52] the defendant appealed his conviction for an insurance fraud scheme where he asked an employee to arrange to have his racing horse killed for the insurance money.[53] Although the defendant never spoke with the horse killer, the Seventh Circuit affirmed his conviction because it was reasonably foreseeable that his employee "would have to make telephone calls to arrange the hiring" for the killing.[54]

Depending on the path of transmission, foreign defendants may or may not use interstate wires as part of their schemes to defraud. This matters because the use of interstate wires may lead to liability under § 1343. Returning to this Comment's hypothetical defendants, Alpha is based in the United States and targets U.S. residents. She uses interstate wires in her scheme by emailing U.S. residents. Bravo is based in Japan and targets Japanese and U.S. residents. Bravo uses U.S. interstate wires in soliciting U.S. residents for donations, though his solicitation of Japanese residents likely does not involve U.S. interstate wires. Charlie is based in Japan and targets U.K. residents. Charlie likely uses U.S. interstate wires, although this is not guaranteed. Depending on how her communication is routed to the U.K., she may use U.S.-Japanese submarine cables or land-based U.S. wires. Delta is based in Japan, intentionally targets only Japanese residents, and avoids using U.S. banks. Delta, at surface level, does not use U.S. interstate wires. A reasonably crafty prosecutor, however, could attempt to locate some predicate transaction involving U.S. interstate wires, like a bank exchange or wiring from a victim's U.S. account. Because Alpha, Bravo, Charlie, and Delta use interstate wires differently, a prosecutor's ability to satisfy jurisdiction in each case would vary.

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51 United States v. Andrews, 681 F.3d 509, 529 (3d Cir. 2012) ("[T]he statute does not require that the defendant himself sent the communication or that he intended that interstate wire communications would be used. Rather, § 1343 requires that the defendant 'knowingly caused' the use of interstate wire communications." (quoting United States v. Bentz, 21 F.3d 37, 40 (3d Cir. 1994))); *see also* United States v. Deavers, 617 F. App'x 935, 937 (11th Cir. 2015) ("Where one does an act with knowledge that the use of interstate wires will follow in the ordinary course of business . . . then he 'causes' the interstate wires to be used." (quoting United States v. Ross, 131 F.3d 970, 985 (11th Cir. 1997))).

52 85 F.3d 1232 (7th Cir. 1996).

53 *Id.* at 1235–36.

54 *Id.* at 1241.

C. Current Standards for Assessing Jurisdiction and Extraterritoriality

Jurisdiction for criminal offenses can be either domestic or extraterritorial. Extraterritorial jurisdiction is the application of U.S. law outside of U.S. territory.[55] Extraterritoriality is relevant for this Comment's hypothetical defendants based abroad because they may still be liable in U.S. courts for their schemes committed abroad with foreign victims.[56] Not all statutes, however, apply extraterritorially. Indeed, there is a "longstanding principle of American law" and a canon of statutory construction that statutes are presumed to not apply extraterritorially.[57] This presumption stems from two principal concerns.

First, the presumption against extraterritoriality originates out of concerns about violating foreign countries' sovereignty and international comity.[58] States are assumed to administer their own laws and maintain control over their own territory.[59] This assumption is a guiding principle for international relations and international law.[60] Extending U.S. law into a foreign nation's territory through extraterritoriality "impl[ies] a diminution of [ ] sovereignty" of the foreign state because it no longer exercises complete administration of law within its borders.[61] Such intrusions may result in international friction and the application of U.S. law contrary to a foreign state's wishes.[62] Congress, however,

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55 *See* Anthony J. Colangelo, *What Is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303, 1312–14 (2014). *See generally* Franklin A. Gevurtz, *Determining Extraterritoriality*, 56 WM. & MARY L. REV. 341 (2014).

56 *See* Colangelo, *supra* note 55, at 1344–45.

57 EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991). Scholars have debated whether this presumption is truly "longstanding" as the presumption fell into disuse from the 1940s through the 1990s. *See, e.g.*, William S. Dodge, *The Presumption Against Extraterritoriality in Two Steps*, 110 AM. J. INT'L L. UNBOUND 45, 45 n.1 (2016).

58 *See* Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1038 (2011); *see also* Natascha Born, *The Presumption Against Extraterritoriality: Reconciling Canons of Statutory Interpretation with Textualism*, 41 U. PA. J. INT'L L. 541, 551–53 (2020).

59 *See generally* Hans Kelsen, *Sovereignty and International Law*, 48 GEO. L.J. 627 (1960).

60 *See* Winston P. Nagan & Craig Hammer, *The Changing Character of Sovereignty in International Law and International Relations*, 43 COLUM. J. TRANSNAT'L L. 141, 149–50 (2004).

61 The Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812); *see also Aramco*, 499 U.S. at 248 (noting that the presumption serves "to protect against unintended clashes between our laws and those of other nations which could result in international discord").

62 Colangelo, *supra* note 58, at 1033–34.

may still elect to apply law extraterritorially regardless of the geopolitical risk. But such a decision should not be assumed by the courts because assuming so displaces the executive and Congress as decision makers in foreign policy.[63] The presumption against extraterritoriality ensures "that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches" and reduces the overall number of intrusions on foreign states' sovereignty.[64]

The second basis for the presumption against extraterritoriality is that Congress is assumed to focus on matters of domestic concern.[65] Although Congress does not only legislate on domestic issues, this assumption creates a predictable background rule.[66] For a statute to apply extraterritorially, Congress must affirmatively indicate that it wants to modify the default rule.[67] This background presumption allows Congress to legislate and protect against "judicial-speculation-made-law."[68] This assumption further protects against executive overreach by prosecutors who seek to apply statutes in a manner that Congress did not intend to authorize.[69]

The presumption against extraterritoriality, however, was not always applied consistently or uniformly.[70] Scholars agreed that resolving questions of extraterritoriality was difficult and that courts applied the doctrine in confusing ways.[71] In some

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63 David Keenan & Sabrina P. Shroff, *Taking the Presumption Against Extraterritoriality Seriously in Criminal Cases After* Morrison *and* Kiobel, 45 LOY. U. CHI. L.J. 71, 88–89 (2013).

64 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 116 (2013).

65 *See* William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582, 1592–95 (2020); *see, e.g.*, Foley Bros., Inc. v. Filardo, 336 U.S. 281, 284–85 (1949) (noting that the presumption is based on Congress's presumed focus on domestic concerns without reference to international law or comity).

66 Keenan & Shroff, *supra* note 63, at 87–88.

67 One scholar has analogized this presumption to deciding which side of the road cars should drive on, noting that it does not necessarily matter what the convention is, so long as courts stick to one. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 276–78 (1994).

68 *Morrison*, 561 U.S. at 261.

69 Keenan & Shroff, *supra* note 63, at 89–90.

70 *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764, 795–96 (1993) (holding that it is "well established by now that the Sherman Act applies to foreign conduct" but acknowledging that "the proposition was perhaps not always free from doubt").

71 *See, e.g.*, John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351, 361–78 (2010); Gevurtz, *supra* note 55, at 350; *see also* Colangelo, *supra* note 58, at 1021.

cases, the presumption was ignored.[72] In other cases, the presumption was found to be inapplicable because the conduct occurred in the United States or its controlled territory.[73] In all these cases, however, the Supreme Court adhered to the view that the presumption turned on the location of the conduct in question, which could be labeled as either territorial or extraterritorial.[74]

Out of this chaos, in 2010 the Court articulated the modern standard for extraterritoriality in *Morrison*. This standard requires courts to examine a statute's jurisdictional reach through two tests.[75] In the first test, a court examines whether a statute provides an affirmative indication that it applies extraterritorially (to rebut the longstanding presumption against extraterritoriality).[76] This question is one of statutory interpretation. The statute, not the facts before a court, must provide sufficient indication that Congress meant for the statute to apply to conduct committed outside of U.S. borders. This inquiry is meant to be robust: a mere "fleeting reference" to foreign activities or a "general reference to foreign commerce in the definition of 'interstate commerce'" does not overcome the presumption against extraterritoriality.[77] If the presumption is rebutted, the statute may be applied extraterritorially, and courts need not proceed to the second test.

In the second test, the court identifies the "'focus' of congressional concern" to determine whether sufficient domestic conduct occurred for the statute to apply domestically without looking to extraterritoriality.[78] Like the first test, this inquiry is principally one of statutory interpretation. The court looks to the language of the statute and its legislative history to determine its focus. The court then examines the relevant facts of the specific case to determine whether this targeted conduct occurred domestically or abroad.

The Supreme Court did not articulate any particular test or standard for identifying the focus of congressional concern

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72 *See, e.g.*, *Hartford Fire Ins. Co.*, 509 U.S. at 794–99.

73 *See, e.g.*, Rasul v. Bush, 542 U.S. 466, 480 (2004) (finding that the presumption did not apply in assessing whether the habeas statute applied in Guantanamo Bay).

74 *See* Dodge, *supra* note 65, at 1602.

75 *Morrison*, 561 U.S. at 261, 266.

76 *Id.* at 261.

77 *Id.* at 263; *see also* Lea Brilmayer, *The New Extraterritoriality:* Morrison v. National Australia Bank*, Legislative Supremacy, and the Presumption Against Extraterritorial Application of American Law*, 40 SW. L. REV. 655, 658–63 (2011).

78 *Morrison*, 561 U.S. at 266 (quoting *Aramco*, 499 U.S. at 255).

through statutory interpretation, but it suggested that this would be done through an analysis similar to the one it uses when determining whether the statute applies extraterritorially.[79] The Court further warned that lower courts should not read domestic jurisdiction too widely, noting that the presence of "*some* domestic activity" does not render the presumption against extraterritoriality irrelevant.[80] This second *Morrison* test aimed to distinguish extraterritorial and domestic cases to avoid this overreach; however, lower courts have struggled to define that distinction in some cases.[81]

The Supreme Court has indicated that the test assessing express extraterritorial application should usually be applied first. The Court in *RJR Nabisco, Inc. v. European Community*[82] noted that, because a finding that a statute applies extraterritorially would "obviate" the second test's focus inquiry, "it will usually be preferable for courts to proceed" with the tests sequentially.[83] But courts may start at the second test "in appropriate cases."[84]

In the context of wire fraud, many courts have started with the second test to avoid questions of extraterritoriality.[85] This ordering has left the answer as to whether § 1343 applies extraterritorially underdeveloped because courts can avoid the question by using the broad application of domestic jurisdiction. In the next Part, this Comment describes the circuit split and how courts, regardless of their extraterritoriality holdings, have applied an exceedingly broad standard for conferring domestic jurisdiction.

II. THE EXTRATERRITORIALITY OF WIRE FRAUD

This Part serves two purposes. First, it describes a split among the circuit courts with respect to whether § 1343 applies extraterritorially. Circuit courts that hold that the wire fraud

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79 *Id.* at 266–69. Broadly, the Supreme Court articulated that the "focus" under the *Morrison* test is "'the object of its solicitude,' which can include the conduct 'it seeks to regulate' as well as the parties and interests it 'seeks to protect' or vindicate." WesternGeco LLC v. ION Geophysical Corp., 138 S. Ct. 2129, 2137 (2018) (quoting *Morrison*, 561 U.S. at 267).

80 *Morrison*, 561 U.S. at 266 (emphasis in original).

81 *See* Patrick J. Borchers, Kiobel*'s "Touch and Concern" Test in the Eleventh Circuit (and Elsewhere) and a New Paradigm for the Extraterritorial Application of U.S. Law*, 50 CUMB. L. REV. 259, 266 (2019).

82 579 U.S. 325 (2016).

83 *Id.* at 360 n.5.

84 *Id.*

85 *See, e.g.*, United States v. Coffman, 574 F. App'x 541, 557–58 (6th Cir. 2014) (beginning the *Morrison* analysis with the location of the securities transactions at issue).

statute applies extraterritorially appear to be incorrectly reading Supreme Court dicta. Second, this Part describes how courts, regardless of whether they hold that the wire fraud statute applies extraterritorially, have broadly applied domestic jurisdiction in wire fraud cases. For some courts, the logic behind this broad application may allow for incidental use of U.S. wires to confer domestic jurisdiction. By applying domestic jurisdiction so widely, courts can avoid questions of extraterritoriality, which may undermine the principles of comity and legislative intent that the presumption against extraterritoriality is meant to protect.

A. Courts Holding That § 1343 Applies Extraterritorially

The circuit split as to whether the wire fraud statute applies extraterritorially stems in large part from dicta in *Pasquantino v. United States*.[86] In 2005, Carl Pasquantino, David Pasquantino, and a coconspirator were convicted of wire fraud for carrying out a scheme to smuggle liquor into Canada from the United States.[87] While in New York, the Pasquantinos ordered discount liquor from wholesale stores in Maryland before their coconspirator hid the liquor and drove it over the Canadian border to avoid Canadian excise taxes on liquor.[88] The defendants were convicted of wire fraud for using U.S. telephone lines to coordinate the scheme.[89] The Pasquantinos appealed their convictions, alleging that the U.S. government lacked sufficient interest in enforcing Canadian revenue laws such that they had not perpetrated a scheme to defraud.[90]

The Supreme Court granted certiorari to resolve whether a scheme to defraud a foreign government of tax revenue violates § 1343.[91] The Court concluded that the petitioners were properly convicted because the United States has an interest in ensuring that interstate wires are free from fraudulent use. But the Court went on to address the concern of the dissent that its interpretation of the wire fraud statute gave it extraterritorial effect.[92] The Court maintained that it did not give the statute extraterritorial effect because "[t]heir offense was complete the moment they

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86 544 U.S. 349 (2005).
87 *Id.* at 353.
88 *Id.*
89 *Id.*
90 *Id.* at 354.
91 *Pasquantino*, 544 U.S. at 354, 370.
92 *Id.* at 370–71.

executed the scheme inside the United States."[93] While holding that "[t]his domestic element of petitioners' conduct is what the Government is punishing," the Court nevertheless noted that "the wire fraud statute punishes frauds executed 'in interstate or foreign commerce'" such that "this is surely not a statute in which Congress had only 'domestic concerns in mind.'"[94] This language around extraterritoriality in *Pasquantino*, however, appears to be dicta. *Pasquantino* addressed whether frauds to defund a foreign state of tax revenue constituted a scheme to defraud in violation of the wire fraud statute.[95] The Court was not ruling on the extraterritoriality of the wire fraud statute.[96] Because the discussion of extraterritoriality was not necessary to reach the Court's holding, it can be considered dicta.[97]

The First and Third Circuits nevertheless relied on this language to hold that the wire fraud statute applies extraterritorially. In *United States v. Georgiou*,[98] George Georgiou and his coconspirators were convicted of engaging in a stock fraud scheme from 2004 to 2008 centered on manipulating stock prices.[99] Georgiou and his coconspirators opened brokerage accounts in Canada, the Bahamas, and Turks and Caicos in order to trade stocks between various accounts. This created artificial demand for the stocks, thus inflating their prices.[100] Georgiou was sentenced to twenty-five years in prison for wire and securities fraud connected to this scheme.[101] In assessing whether the wire fraud statute applies extraterritorially, the Third Circuit relied on *Pasquantino*'s dicta that "the explicit statutory language indicates that . . . [the wire fraud statute] 'is surely not a statute in which Congress had only domestic concerns in mind'" to rebut the presumption against extraterritoriality.[102] The Third Circuit thus

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93 *Id.* at 371.

94 *Id.* at 371–72 (quoting Small v. United States, 544 U.S. 385, 388 (2005)).

95 *Id.* at 354 ("We granted certiorari to resolve a conflict in the Courts of Appeals over whether a scheme to defraud a foreign government of tax revenue violates the wire fraud statute.").

96 *Pasquantino*, 544 U.S. at 371 ("Finally, our interpretation of the wire fraud statute does not give it 'extraterritorial effect.'").

97 *See* O'Sullivan, *supra* note 27, at 1073–75.

98 777 F.3d 125 (3d Cir. 2015).

99 *Id.* at 130.

100 *Id.*

101 *Id.* at 132.

102 *Id.* at 137–38 (quoting *Pasquantino*, 544 U.S. at 371–72).

affirmed that the prosecution of Georgiou was a permissible extraterritorial application of the wire fraud statute.[103]

The First Circuit similarly relied on *Pasquantino* in *United States v. Lyons*.[104] The defendant in *Lyons* worked for a gambling business in Antigua where some forms of bookmaking, not permitted in the United States, are legal.[105] As part of this business, Lyons collected losses from bettors and distributed payouts to winners in the United States before sending the balance to the business's headquarters in Antigua.[106] The First Circuit—like the Third Circuit—cited *Pasquantino* to hold that, "because [the wire fraud statute] explicitly applies to transmissions between the United States and a foreign country," the wire fraud statute rebuts the presumption against extraterritoriality.[107] The First Circuit concluded that § 1343 applies extraterritorially as a predicate offense for Racketeer Influenced and Corrupt Organizations Act[108] (RICO Act) liability.[109]

In circuits that have not ruled definitively on the extraterritoriality of the wire fraud statute, some district courts echo the perspective of the First and Third Circuits. For example, in *Drummond Co. v. Collingsworth*,[110] a Northern District of Alabama court held that the wire fraud statute applies extraterritorially.[111] In *Collingsworth*, Albert van Bilderbeek, a Dutch citizen and resident of the Netherlands, was found liable for facilitating false witness statements in order to steal Drummond's oil rights in Colombia.[112] As part of the scheme, van Bilderbeek purportedly bribed witnesses via wire transfers to Colombia and created false media narratives in the Netherlands.[113] The district court held that the wire fraud statute applies extraterritorially because "the First and Third Circuits have the better side of the debate," without further elaborating on its analysis.[114]

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103 *Georgiou*, 777 F.3d at 138.

104 740 F.3d 702 (1st Cir. 2014).

105 *Id.* at 711.

106 *Id.*

107 *Id.* at 718.

108 Pub L. No. 91-452, 84 Stat. 941 (1970) (codified at 18 U.S.C. §§ 1961–1968).

109 *Lyons*, 740 F.3d at 718.

110 No. 15-cv-506, 2017 WL 3268907 (N.D. Ala. Aug. 1, 2017).

111 *Id.* at *16–17.

112 *Id.* at *2–6.

113 *Id.*

114 *Id.* at *16–17. For other examples of district courts holding that the wire fraud statute applies extraterritorially, see Yordanov v. Mulsnic, 250 F. Supp. 3d 540, 549 (C.D.

B. Courts Rejecting the Extraterritorial Application of § 1343

The Second Circuit, in *European Community v. RJR Nabisco, Inc.*,[115] held that § 1343 does not apply extraterritorially. RJR Nabisco was found liable under the RICO Act for a complicated scheme involving money laundering and smuggling illegal narcotics into Europe.[116] As part of this scheme, RJR Nabisco employees were alleged to have violated the wire fraud statute as a predicate offense for RICO liability by using U.S. interstate wires to coordinate the scheme and U.S. financial accounts to send money to participants.[117]

The complaint was dismissed, but the plaintiff appealed, arguing that the RICO Act and its predicate offenses should apply extraterritorially.[118] In its analysis, the Second Circuit evaluated the wire fraud statute's extraterritorial application by looking to whether it rebutted the presumption against extraterritoriality. The Second Circuit highlighted that the only references to foreign conduct in the wire fraud statute were descriptions of communications "'in interstate or foreign commerce' in the execution of a scheme to defraud."[119] Citing *Morrison*'s articulation that "a general reference to foreign commerce . . . does not defeat the presumption against extraterritoriality," the Second Circuit found that "the references to foreign commerce in these statutes, deriving from the Commerce Clause[ ] . . . do not indicate a congressional intent that the statutes apply extraterritorially."[120] Unlike the First and Third Circuits, the Second Circuit did not rely on *Pasquantino* in applying the first *Morrison* test.[121] Instead, the court looked to only the plain text of the statute. Ultimately, the court held that § 1343 does not apply extraterritorially, and RJR Nabisco avoided extraterritorial liability for racketeering.[122]

Cal. 2017); GolTV, Inc. v. Fox Sports Latin Am., Ltd., No. 16-24431-CIV, 2018 WL 1393790, at *14 (S.D. Fla. Jan. 26, 2018).

115 764 F.3d 129 (2d Cir. 2014), *rev'd on other grounds*, 579 U.S. 325 (2016).

116 *RJR Nabisco*, 764 F.3d at 133–34.

117 *Id.* at 134.

118 *Id.* at 135.

119 *Id.* at 140–41.

120 *RJR Nabisco*, 764 F.3d at 141 (quoting *Morrison*, 561 U.S. at 255).

121 *Id.* at 141 n.11 ("Because that statement is dictum, and because *Morrison* explicitly rejects the reasoning on which it relies, we do not read *Pasquantino* to require us to construe the 'foreign commerce' language of the wire fraud statute as rebutting the presumption against extraterritoriality.").

122 *Id.* at 141. However, the court did allow the RICO Act to be applied on the basis of domestic conduct. *Id.* at 142.

A handful of district courts have similarly held that § 1343 does not apply extraterritorially. In *ASI Inc. v. Aquawood*,[123] a Minnesota corporation sued U.S. and Hong Kong toy companies and their executives for using illegal shell corporations to avoid paying damages from a prior judgment.[124] Specifically, the defendants were sued under the RICO Act with wire fraud as a predicate offense.[125] Acknowledging that the Eighth Circuit had not ruled with respect to the extraterritoriality of the wire fraud statute, the District of Minnesota held that the wire fraud statute does "not indicate an extraterritorial reach" because the presumption against extraterritoriality had not been overcome.[126] The district court did not undertake additional statutory analysis and instead relied only on another Second Circuit opinion.[127] Other district courts, including the Northern District of California, have reached similar conclusions.[128]

Recall that Alpha is based domestically and targets U.S. victims. Any application of the statute to Alpha would not be considered extraterritorial because she is located in the United States. The circuit split is therefore not implicated by her scheme to defraud.

But for Bravo, Charlie, and Delta, who are based abroad, the story is different. For Bravo's schemes targeting U.S. victims (and, therefore, using U.S. wires), the wire fraud statute would be applied extraterritorially in the First and Third Circuits because he is abroad. For Bravo's schemes targeting Japanese victims, the wire fraud statute would not apply because his scheme does not use any U.S. wires.

Because both Charlie and her targets are abroad, the wire fraud statute would not apply to her conduct even in the First and Third Circuits—so long as she does not use U.S. wires in the

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123 No. 19-763, 2020 WL 5913578 (D. Minn. Oct. 6, 2020).

124 *Id.* at *1–3.

125 *Id.* at *11–12, *14–15.

126 *Id.* at *7, *12 (quoting Bascuñán v. Elsaca, 927 F.3d 108, 121 (2d Cir. 2019)).

127 *See id.* (citing *Bascuñán*, 927 F.3d at 121).

128 *See, e.g.*, United States v. Sidorenko, 102 F. Supp. 3d 1124, 1132 (N.D. Cal. 2015) (holding that the wire fraud statute contains no "clear indication of extraterritorial intent"); Nuevos Destinos LLC v. Peck, No. 19-cv-45, 2019 WL 6481441, at *19–20 (D.N.D. Dec. 2, 2019) (holding that the wire fraud statute does not apply extraterritorially); Petersen v. Boeing Co., No. cv-10-999, 2015 WL 12090213, at *8 (D. Ariz. Feb. 18, 2015) (holding that the predicate fraudulent activity as a whole must take place in the United States for the RICO Act to apply); Exceed Indus., LLC v. Younis, No. 15 C 14, 2016 WL 128063, at *3 (N.D. Ill. Jan. 12, 2016) (acknowledging that the "wire fraud statute[ ] underlying this case [is] not extraterritorial").

course of her scheme. Similarly, Delta is based in Japan and targets only Japanese victims. The wire fraud statute would not apply to his conduct, even in circuits where extraterritoriality is found, because he does not use any U.S. wires as part of his scheme to defraud.

However, Charlie and Delta may not be home free, even where extraterritoriality does not apply. Many courts, regardless of their holdings with respect to extraterritoriality, may nevertheless find sufficient domestic activity for the wire fraud statute to apply. Although Charlie and Delta are based in Japan and target only foreign victims—according to some courts' understanding of what constitutes sufficient domestic activity—any incidental routing through U.S. wires may allow for domestic application of the wire fraud. This Comment now turns to this expansive view on domestic application of the wire fraud statute.

C. A Second Layer: The Broad Domestic Application of § 1343

Courts are largely in consensus over what constitutes sufficient domestic conduct to permit a domestic, rather than extraterritorial, application of the wire fraud statute. Courts—applying the second *Morrison* test—generally agree that the use of U.S. interstate wires is the focus of congressional concern for the wire fraud statute.[129] This focus greatly expands the scope of § 1343's domestic application, allowing courts to avoid confronting whether it applies extraterritorially.

Although the Second Circuit held in *RJR Nabisco* that the wire fraud statute does not have extraterritorial application, it nevertheless articulated a broad standard for domestic jurisdiction in *Bascuñán v. Elsaca*.[130] Bascuñán, a Chilean resident and citizen, sued Elsaca, also a Chilean resident and citizen, for fraud.[131] Elsaca had opened a number of accounts in New York, the Cayman Islands, and the British Virgin Islands to siphon off dividends and money belonging to Bascuñán.[132] The Second Circuit held that wire fraud involves sufficient domestic conduct to apply § 1343 domestically when "(1) the defendant used domestic mail or wires in furtherance of a scheme to defraud, and (2) the use of mail or wires was a core component of the scheme to

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[129] *See, e.g.*, United States v. Coffman, 574 F. App'x 541, 557–58 (6th Cir. 2014).
[130] 927 F.3d 108 (2d Cir. 2019).
[131] *Id.* at 112–15.
[132] *Id.*

defraud."[133] Although both Elsaca and Bascuñán were located in Chile during the scheme, a "core component of each allegation [was] that Elsaca repeatedly used domestic mail or wires to order a New York bank to fraudulently transfer money out."[134] Domestic jurisdiction was therefore proper.[135]

The Second Circuit found that the statute's focus was on "the use of the mail or wires in furtherance of a scheme to defraud."[136] This would mean that the emphasis of the statute is not on the location of the scheme—which would require a substantial amount of the scheme to be formulated or carried out in the United States[137]—but instead on the use of U.S. wires.[138] The Sixth and Ninth Circuits have similarly found that the focus of congressional concern in § 1343 was on the use of U.S. wires and thus have broad standards for domestic jurisdiction.[139] While not ruling on the domestic conduct required for domestic application of the wire fraud statute, other circuit courts have found that the use of interstate wires (rather than the scheme to defraud) is the conduct punishable under the statute.[140] It is thus likely that they would follow the approach taken by the Second Circuit. Additionally, some district courts have also found that the wire fraud statute applies domestically where a scheme to defraud involves the use of interstate wires.[141]

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[133] *Id.* at 122.

[134] *Id.* at 123.

[135] *Bascuñán*, 927 F.3d at 123.

[136] *Id.* at 122 (emphasis omitted).

[137] For example, prior to *Bascuñán*, several district courts within the Second Circuit had found that the focus of congressional concern was on the scheme to defraud rather the use of interstate wires. *See, e.g.*, United States v. Gasperini, No. 16-CR-441, 2017 WL 2399693, at *8 (E.D.N.Y. June 1, 2017); United States v. Prevezon Holdings, Inc., 122 F. Supp. 3d 57, 71 (S.D.N.Y. 2015).

[138] While not precedential, the Second Circuit had previously ruled in a summary order that the use of domestic wires to transfer funds was too incidental to merit application of domestic jurisdiction. Petroleos Mexicanos v. SK Eng'g & Constr. Co., 572 F. App'x 60, 61 (2d Cir. 2014). *Bascuñán* abrogated this prior order.

[139] *Coffman*, 574 F. App'x at 557–58 ("[W]ire fraud occurs in the United States when defendants use interstate wires as part of their scheme."); United States v. Hussain, 972 F.3d 1138, 1144 (9th Cir. 2020) ("[Section] 1343 criminalizes a broad array of fraudulent schemes, which is consistent with the notion that the 'focus' of the statute for *Morrison* purposes is the instrumentalities used to perpetrate those schemes.").

[140] *See, e.g.*, United States v. Jefferson, 674 F.3d 332, 367 (4th Cir. 2012) ("In a mail or wire fraud prosecution, the mailing or wire transmission itself—i.e., misuse of the mail or wire—has consistently been viewed as the *actus reus* that is punishable by federal law.").

[141] *See, e.g.*, United States v. Elbaz, 332 F. Supp. 3d 960, 973 (D. Md. 2018) (holding that "the transaction sought to be regulated by the wire fraud statute is the wire transmission itself"); Joseph v. Signal Int'l LLC, No. 13-CV-324, 2015 WL 1262286, at *12 (E.D. Tex. Mar. 17, 2015) (holding that the use of U.S. wire systems suffices to trigger domestic

Courts that hold that the wire fraud statute applies extraterritorially also tend to construe conduct as domestic. The First Circuit, which held that the wire fraud statute applies extraterritorially,[142] has applied the same standard as the Second Circuit when determining whether conduct is sufficiently domestic for the wire fraud statute to apply. In *United States v. McLellan*,[143] Ross McLellan had been convicted of securities fraud and wire fraud for orchestrating a scheme to defraud institutional investors by applying hidden commissions on the purchase and sale of U.S. securities.[144] McLellan, based in the United Kingdom, promised institutional investors from Ireland, the Netherlands, the United Kingdom, and Kuwait that their securities transactions would be "zero commission" or contain only a small fee as a percentage of the value of the transaction.[145] McLellan then instructed his trading counterparts to apply large hidden fees totaling millions of dollars.[146]

Although McLellan and his victims were located abroad, the First Circuit nevertheless found that McLellan had engaged in sufficient domestic conduct for the wire fraud statute to apply because the statute's "focus is not the fraud itself but the abuse of the instrumentality in furtherance of a fraud."[147] Because McLellan sent emails directing his victims to use U.S. wires, the First Circuit found that domestic application was proper.[148] Such a broad conception of sufficient domestic conduct can begin to function like extraterritoriality in cases like this one (where McLellan, his scheme, and his victims were all located abroad).

Some outlier courts, however, have found that the focus of congressional concern in § 1343 was not on the use of interstate wires. In *United States v. All Assets Held at Bank Julius*,[149] Pavel Lazarenko, a Ukrainian politician, was charged with wire fraud for using U.S. banks and negotiating electronically with U.S.

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liability under the wire fraud statute); *Exceed Indus.*, 2016 WL 128063, at *3 (holding that the use of U.S. bank accounts and wire services supports a domestic claim); *Petersen*, 2015 WL 12090213, at *8 (evaluating a claim under the wire fraud statute on the basis of the use of wires rather than the scheme itself).

142 *Lyons*, 740 F.3d at 718.

143 959 F.3d 442 (1st Cir. 2020).

144 *Id.* at 449–50.

145 *Id.* at 450–55.

146 *Id.*

147 *Id.* at 468–69.

148 *McLellan*, 959 F.3d at 469–71.

149 251 F. Supp. 3d 82 (D.D.C. 2017).

participants to divert money for personal use.[150] The U.S. District Court for the District of Columbia, found that the focus of congressional concern of the wire fraud statute was on the scheme to defraud.[151] To apply jurisdiction, the defendant must have "commit[ed] a substantial amount of conduct in the United States" where the conduct was "integral" to the scheme to defraud and where "some of the conduct involves the use of U.S. wires in furtherance of the scheme to defraud."[152] This standard is notable for two reasons. First, it incorporates wire use as an element to confer jurisdiction without fixating on it. Second, it requires a more substantial nexus of activity to the United States to confer jurisdiction. This holding, however, is an outlier and is nonprecedential.

The majority consensus about the domestic application of the wire fraud statute is so broad that it stretches the bounds of what is "domestic." The underlying logic of these decisions suggests that the wire fraud statute may be applied domestically when wire transmissions incidentally involve U.S. cables or U.S. financial institutions.[153] Part III describes this broad conception of "domestic" conduct and how this approach has prevented courts from answering whether the wire fraud statute applies extraterritorially.

III. THE DOMESTIC APPLICATION OF THE WIRE FRAUD STATUTE RESEMBLES EXTRATERRITORIALITY

This Part outlines how the application of domestic jurisdiction resembles extraterritoriality because courts—when focusing on the use of U.S. wires—can almost always identify a reason to exercise domestic jurisdiction over cases involving the wire fraud statute. The assumptions baked into the *Morrison* tests—namely, that location is a fixed concept and that a location for a wire fraud is exclusively either extraterritorial or domestic—do not reflect the reality of wire transmissions. The violation of these assumptions helps explain why most circuits' domestic application of the wire fraud statute begin to resemble extraterritoriality. This is troubling for defendants because, as domestic jurisdiction expands, more foreign defendants can be held liable for acts

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150 *Id.* at 85–87.

151 *Id.* at 101.

152 *Id.* at 102–03.

153 The logic behind this argument most closely resembles *United States v. Napout*, 963 F.3d 163, 173–75 (2d Cir. 2020). While this case did not involve purely incidental use of interstate wires, the defendant's contact with the United States was limited to predicate wire transactions. This case is discussed in more detail in Part III.

committed abroad with negligible connection to the United States. This could lead to seemingly arbitrary prosecutions and violations of other nations' sovereignty.

A. The Mirage of Domestic Jurisdiction: How the Domestic Application of the Wire Fraud Statute Resembles Extraterritoriality

Courts' domestic application of the wire fraud statute has allowed them to avoid answering whether the statute applies extraterritorially. As mentioned above, courts can apply the *Morrison* tests without regard for their intended order if doing so would promote judicial efficiency.[154] And where circuits apply the second *Morrison* test first, they universally find domestic jurisdiction.[155] For example, in *Georgiou*, the Third Circuit held that the wire fraud statute applied extraterritorially and that Georgiou was properly convicted for his schemes to defraud investors in the Bahamas as well as Turks and Caicos.[156] But the court noted that because he emailed with a U.S. coconspirator and wired money to U.S. bank accounts, "the record contain[ed] ample evidence that Georgiou used interstate wires."[157] Hypothetically, if the Third Circuit had applied the First Circuit's standard for domestic jurisdiction from *McLellan*,[158] Georgiou's scheme to defraud would have had sufficient contact with the United States for the statute to apply domestically, regardless of the court's holding with

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[154] *McLellan*, 959 F.3d at 468 ("While it is 'usually . . . preferable for courts to proceed in [this] sequence,' we may 'start[ ] at step two in appropriate cases.'" (quoting *RJR Nabisco*, 579 U.S. at 360 n.5)); *see also* WesternGeco LLC v. ION Geophysical Corp., 138 S. Ct. 2129, 2136 (2018) ("One reason to exercise that discretion is if addressing step one would require resolving 'difficult questions' that do not change 'the outcome of the case,' but could have far-reaching effects in future cases." (quoting Pearson v. Callahan, 555 U.S. 223, 236–37 (2009))).

[155] *See, e.g.*, Samuel v. Signal Int'l LLC, No. 13-CV-323, 2015 WL 12765986, at *10 (E.D. Tex. Jan. 26, 2015) ("However, the undersigned need not guess at which test applies, since under any approach, Signal's conduct is domestic in nature."); United States v. Coffman, 574 F. App'x 541, 557 (6th Cir. 2014) (declining to examine whether the statute applies extraterritorially because the defendants' conduct was sufficiently "domestic"); United States v. Hussain, 972 F.3d 1138, 1143 (9th Cir. 2020) (finding that the focus of the wire fraud statute was on the use of interstate wires and declining to review whether the statute applied extraterritorially).

[156] *Georgiou*, 777 F.3d at 137–38.

[157] *Id.* at 138.

[158] *McLellan*, 959 F.3d at 469.

respect to extraterritoriality.[159] In other words, the extraterritoriality inquiry would matter only if it came first.[160]

Further, domestic jurisdiction appears arbitrarily broad because any use of interstate wires may be sufficient to confer jurisdiction.[161] Accordingly, such jurisdiction could extend even to unintentional but reasonably foreseeable interstate wire use or predicate transactions that set the stage for fraudulent activity.[162] And because most telecommunications are transmitted through wires—many of which incidentally involve U.S. submarine cables and overland wires—this understanding of domestic jurisdiction is unreasonably broad.[163] U.S. financial institutions process a large percentage of global financial transactions, and many purportedly non-domestic financial transactions will involve a U.S. financial institution in some predicate transaction.[164] For example, a wire transfer from a bank account in Brazil to a bank account in Argentina may not directly involve any U.S. interstate wires; however, the currency exchange from Brazilian reals to Argentine pesos may involve a U.S. bank. Because prosecutors (or plaintiffs) need to find only one such transmission to confer domestic jurisdiction, this predicate exchange would be sufficient to confer domestic jurisdiction.[165]

This concern is not entirely theoretical. For example, *United States v. Napout*[166] concerned a foreign national living in Argentina and an official for the Fédération Internationale de Football

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159 The First Circuit would have arrived at a similar conclusion in *Lyons* because Lyons regularly communicated with U.S. bettors over the phone and internet and wired money from the United States to the Bahamas. *See Lyons*, 740 F.3d at 711–12.

160 *See, e.g.*, *Coffman*, 574 F. App'x at 557 ("We do not need to decide the reach of the *Morrison* presumption because defendants' domestic conduct falls within the ambit of each of the statutes."); *Hussain*, 972 F.3d at 1143 ("[T]he 'focus' of the wire fraud statute is the use of the wires in furtherance of a scheme to defraud, which here occurred domestically. We therefore need not and do not decide whether § 1343 applies extraterritorially.").

161 *See* United States v. Napout, 963 F.3d 163, 178–81 (2d Cir. 2020).

162 *See, e.g.*, United States v. Deavers, 617 F. App'x 935, 937 (11th Cir. 2015) ("Where one does an act with knowledge that the use of interstate wires will follow in the ordinary course of business . . . then he 'causes' the interstate wires to be used." (quoting United States v. Ross, 131 F.3d 970, 985 (11th Cir. 1997))); *see also* United States v. Cusino, 694 F.2d 185, 188 (9th Cir. 1982) ("One 'causes' use of . . . wire communications where such use can reasonably be foreseen, even though not specifically intended.").

163 Bhardwaj, *supra* note 16.

164 *See generally* M. Ayhan Kose, Csilla Lakatos, Franziska Ohnsorge & Marc Stocker, *The Global Role of the U.S. Economy: Linkages, Policies, and Spillovers* (World Bank Grp. Pol'y Rsch. Working Paper No. 7962, 2017), https://perma.cc/45NP-2K49.

165 *See Napout*, 963 F.3d at 173–75.

166 963 F.3d 163 (2d Cir. 2020).

Association (FIFA).[167] Juan Angel Napout was bribed with luxury goods and hand-delivered cash payments to secure an exclusive broadcasting and marketing agreement.[168] The Second Circuit found that the trial court properly conferred domestic jurisdiction because the hand-delivered cash was "American banknotes from U.S. bank accounts that had been wired to a cambista (money changer) in Argentina" and because the luxury goods that Napout received were purchased using U.S. bank account wires.[169] Napout was sentenced to nine years in prison.[170]

Similarly, in *United States v. Hayes*,[171] Roger Darin was convicted of wire fraud for conspiring to manipulate the London Interbank Offered Rate (LIBOR) benchmark interest rate for yen.[172] The Southern District of New York found domestic jurisdiction because Darin's scheme "caused" the manipulated LIBORs to be published in New York and because his coconspirator traded with a counterparty located in New York.[173] And in *United States v. Hutchins*,[174] Marcus Hutchins, a U.K. citizen and resident, developed and sold a form of malware to a third party.[175] The Eastern District of Wisconsin held that the complaint had alleged sufficient domestic conduct because after Hutchins distributed the malware to a foreign third party, that party used interstate wires to distribute the malware to someone in Wisconsin.[176]

In most fraud cases, prosecutors should be able to locate some predicate transaction that involves U.S. financial institutions or communications. Because the standard for reasonably foreseeable use of interstate wires is porous,[177] most wire transactions will involve a U.S. wire. This raises line-drawing questions that are left unanswered by the current domestic standard. For instance, should foreign-exchange conversions—which occur naturally as part of the banking system and are not directed or requested by a defendant—that use U.S. banks as a counterparty suffice to confer domestic jurisdiction? These conversions are common in

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167 *Id.* at 168.

168 *Id.* at 173–75.

169 *Id.* at 180–81.

170 *Id.* at 170.

171 118 F. Supp. 3d 620 (S.D.N.Y. 2015).

172 *Id.* at 623.

173 *Id.* at 628–29.

174 361 F. Supp. 3d 779 (E.D. Wis. 2019).

175 *Id.* at 784–85.

176 The court did not rule on whether § 1343 applies extraterritorially but also did not dismiss the complaint due to Hutchins's "domestic" activity. *Id.* at 797–99.

177 *See supra* notes 50–54 and accompanying text.

ordinary international banking transactions. Should all internet-based frauds merit domestic application of the wire fraud statute because internet communications that use U.S.-based website hosting platforms use interstate wires? And should exchanges of information using cloud-based repositories merit the same treatment as direct wire transfers to and from the United States? It is not easy to draw lines around these hypotheticals, but the logic surrounding the porousness of the requirement for domestic use of U.S. wires and the foreseeability of wire transactions suggests that any of these events may be sufficient to establish domestic jurisdiction.

Domestic jurisdiction would potentially apply to all four of this Comment's hypothetical defendants under the common standard. Alpha's entirely domestic conduct would clearly warrant domestic application of the wire fraud statute. By using some U.S. wires and depositing the money in U.S. accounts, Bravo would be subject to domestic jurisdiction. Charlie, by sending emails from Japan to London, may be subject to domestic jurisdiction because email transmission may incidentally route through U.S. wires. While courts have not ruled on cases of incidental routing, the logic of this conclusion seems plausible given that courts have found that interstate wires were used when a wire transmission sent to and from parties within the same state used interstate routing.[178] And while Delta conspicuously avoids using U.S. wires, it is likely that some predicate transaction relies on or travels through U.S. wires. For example, a victim may withdraw cash to pay Delta in person, but the victim's Japanese bank account may have received deposits from a U.S. bank account. Delta could potentially then face U.S. jurisdiction due to this predicate transaction's contact with U.S. wires.

And based on the above examples, prosecutors are likely to use the nearly limitless domestic jurisdiction of the wire fraud statute—their "Louisville slugger"—to aggressively prosecute foreign defendants. The Supreme Court in *Morrison* explicitly warned against this type of overreach, stating that the presumption against extraterritoriality "would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case."[179] If prosecutors are consistently able to locate some event to confer domestic jurisdiction, the concerns of

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[178] *See* Ideal Steel Supply Corp. v. Anza, 373 F.3d 251, 265 (2d Cir. 2004), *vacated*, 547 U.S. 451 (2006).

[179] *Morrison*, 561 U.S. at 266 (emphasis in original).

extraterritoriality become irrelevant (which would be a problem for defendants and foreign states). Consider the watchdog kenneled.

B. Blurring the Binary: How Wire Fraud Is Neither Here nor There in the Context of Territoriality

Domestic application of the wire fraud statute begins to resemble extraterritorial application because global wire transmissions unpredictably—and often inevitably—involve contact with U.S. interstate wires. As discussed earlier, the presumption against extraterritoriality stems from concerns about violating other nations' sovereignty and the desire to create a predictable background for legislation. Both concerns rest on the assumption that acts can be described territorially. To presume that Congress meant to legislate only domestically, it must be possible for an act to occur exclusively within a single jurisdiction. Concerns about violating other nations' sovereignty require conduct that can be described as having taken place on a foreign nation's soil. In reflecting on these assumptions, *Morrison* tried to create stable lines to avoid "judicial-speculation-made-law."[180] The use of interstate wires, however, vexes these assumptions because it cannot be described as occurring territorially or in strictly one place.

First, predicate transactions can make it ambiguous whether a wire transfer is domestic or extraterritorial. For example, imagine a scheme that involves a wire transfer between two bank accounts in Argentina. To deposit the money in the first Argentinian bank account, money is wired from a bank account in the Seychelles. To deposit money in the Seychelles account, money is wired from a bank account in New York. Does the presence of this initial transfer from New York to the Seychelles then render the transfer between the two Argentinian accounts in a wire transfer domestic in the United States? According to the Second Circuit, it does.[181]

Second, the location of the parties involved does not seem to affect whether wire use is domestic or extraterritorial, which cuts against the assumptions underpinning *Morrison*. For example, a defendant based in Japan who sends a wire transfer to someone in New York is just as "domestic" as someone based in Albany who

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[180] *Id.* at 261.

[181] *See Napout*, 963 F.3d at 180–81.

sends a wire transfer to New York.[182] If the Japanese defendant is domestic to the same extent as the Albany defendant, a nation's borders begin to look meaningless. This could invite international friction and undermine the foreign state's sovereignty by intruding on its ability to regulate and prosecute crime within its borders. This violation of international comity—a primary justification for the presumption against extraterritoriality[183]—may extend the reach of the wire fraud statute beyond what Congress intended, given that the wire fraud statute does not appear to be designed to make the United States a global watchdog for fraud.[184]

Third, whether a wire transfer is domestic is viewpoint dependent. In a classic example, imagine that a person in one nation shoots a rifle across the border and kills a victim standing in another nation.[185] In such an event, it is ambiguous whether either nation would be applying its law extraterritorially if it were to prosecute the shooter for murder.[186] To defeat this viewpoint-dependent inquiry, the *Morrison* tests examine whether the focus of the statute was on the use of the rifle or the location of the victim. Wire fraud complicates this question because courts have determined that domestic jurisdiction stems from the location of the wire—a source akin to the bullet in the example above—rather than the location of the fraudster or victim. To complicate matters further, a wire—unlike a bullet—can realistically travel across multiple countries during its route.

Relying on the use of interstate wires to determine domestic application of the wire fraud statute creates ambiguity and arbitrariness. The use of interstate wires can be termed "geoambiguous" because—depending on one's perspective—such use can be domestic or extraterritorial.[187] This dependency on perspective exists because the focus of congressional concern is on conduct that occurs both domestically and extraterritorially. This dependence on perspective violates the fundamental assumption in *Morrison*

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[182] *See, e.g.*, United States v. Brennerman, 818 F. App'x 25, 28 (2d Cir. 2020) (holding that the use of domestic wires to send emails, make telephone calls, and wire money to a U.S. bank account is sufficient for a domestic wire fraud statute violation).

[183] *See* Keenan & Shroff, *supra* note 63, at 88–89.

[184] *See* Williams, *supra* note 34, at 304–05.

[185] *See* Gevurtz, *supra* note 55, at 352–53.

[186] *See id.* at 353–55.

[187] *See* Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110, 125–30 (2010).

that an act is either territorial or extraterritorial.[188] And this viewpoint-dependent standard can lead to arbitrary infringement of other nations' sovereignty and arbitrary prosecution of defendants.[189]

Opponents of this argument may counter that the focus of the wire fraud statute is territorial and not "geoambiguous" because U.S. wires can be physically located within or connected to the United States.[190] This rebuttal proves too much. First, as noted earlier, determining whether a given wire is "extraterritorial" requires adopting a perspective, something that extraterritoriality is meant to protect against. In other words, it relies on the legal fiction that all objects are reducible to a physical location in a single country, which the concept of wire fraud disconfirms.[191] Second, it is not clear that the wire fraud statute's sole focus is to prevent the misuse of interstate wires. Scholars have argued that § 1343 more closely resembles a generalized fraud statute and that courts have misread the purpose of the statute as criminalizing only improper wire use.[192] If so, the physical location of wires would not determine jurisdiction.

Third, this reading allows for domestic jurisdiction to be extended such that extraterritoriality would rarely be a concern for courts. A court will almost inevitably find contact with the United States at some point in a scheme's chain of communication or wire transfers. And because foreseeability is interpreted so broadly, jurisdiction then relies "on seemingly arbitrary or irrelevant facts."[193] Such limitless reach also violates other nations' sovereignty, which is a principal basis for the presumption against

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188 The idea that wire fraud is geoambiguous is not sui generis. Data is also nonterritorial because parts of it can be located anywhere at a given point in time and it moves too quickly to meaningfully have a particular location. These concerns also vex domestic and extraterritorial jurisdiction. *See* Kristen E. Eichensehr, *Data Extraterritoriality*, 95 TEX. L. REV. 145, 147–54 (2016); *see also* Jennifer Daskal, *The Un-territoriality of Data*, 125 YALE L.J. 326, 365–78 (2015).

189 *See* Keenan & Shroff, *supra* note 63, at 87–90.

190 *See, e.g.*, *Napout*, 963 F.3d at 180 (finding that "the government presented ample evidence that the appellants had used American wire facilities").

191 *See* Aaron D. Simowitz, *The Extraterritoriality Formalisms*, 51 CONN. L. REV. 375, 402–04 (2019) [hereinafter *Extraterritoriality Formalisms*]; *see also* Aaron D. Simowitz, *Siting Intangibles*, 48 N.Y.U. J. INT'L L. & POL. 259, 284–85 (2015) (describing wire transfers—along with LLC interests, corporate shares, and debts—as "intangible" assets without a physical location).

192 *See, e.g.*, Rakoff, *supra* note 8, at 785–86 (arguing that Congress attempted to "dress[ ] up" the mail fraud statute—the model for the wire fraud statute—to target all kinds of fraud by inserting mail-centric language to protect against judicial override).

193 *See Extraterritoriality Formalisms*, *supra* note 191, at 403.

extraterritoriality.[194] As the Court wrote previously, such wide jurisdiction "not only would be unjust, but would be an interference with the authority of another sovereign, *contrary to the comity of nations*, which the other state concerned justly might resent."[195] *Morrison* warned against this possibility.[196] We should therefore be cautious about allowing unmitigated reach of the statute, even if wires can be physically located within the United States.

IV. RESOLVING JURISDICTIONAL CREEP: THE MULTIFOCAL APPROACH

To prevent the wire fraud statute's domestic reach from resembling extraterritoriality, this Part proposes a multifocal approach that expands the relevant statutory language for courts to examine. This approach has three steps. Step one looks to whether a statute has multiple focuses of congressional concern. Step two asks whether a statute's primary focus of congressional concern can be considered geoambiguous. The answer to this question helps identify instances where domestic jurisdiction may become overly expansive and may violate other nations' sovereignty. For statutes with multiple statutory focuses, step three applies both the nongeoambiguous and geoambiguous statutory focuses to determine whether jurisdiction is conferred. This would allow a court, in determining jurisdiction, to evaluate additional information that was relevant to Congress. For statutes without multiple statutory focuses, courts should assume a given application is extraterritorial. This assumption tracks the goals of the presumption against extraterritoriality under *Morrison*. This Part concludes by using this three-step framework to reevaluate the circuit split with respect to the extraterritoriality of the wire fraud statute.

In step one, courts should look to whether a statute has multiple focuses of statutory concern. Under the second *Morrison* test, statutes can arguably have more than one focus. While lower courts have historically recognized only one statutory focus, scholars have argued that this formalism distorts the central holdings

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194 *See* Colangelo, *supra* note 58, at 1038; *see also* Pierre-Hugues Verdier, *The New Financial Extraterritoriality*, 87 GEO. WASH. L. REV. 239, 282–83 (2019).

195 *See* Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) (emphasis in original).

196 *See Morrison*, 561 U.S. at 269.

of *Morrison*.[197] *Morrison* does not require a singular focus of congressional concern for conferring domestic jurisdiction.[198] While a statute may have a primary focus for jurisdiction, it may then have one or more secondary focuses that Congress also intended to regulate.[199] Acknowledging that a statute may have more than one statutory focus does not provide courts with more avenues to identify sufficient domestic conduct. Rather, it frees courts to examine additional information in cases where one's perspective may determine whether a statute is primarily focused domestically. Steps two and three address how to weigh this information.

In *RJR Nabisco*, the defendant corporation argued that the RICO Act's focus was on the affected enterprise, not on the pattern of racketeering.[200] The Court, while not ruling on this standard, noted that this focus "would lead to difficult line-drawing problems and counterintuitive results" in part because there was "no satisfactory way of determining whether an enterprise is foreign or domestic."[201] In contrast to *RJR Nabisco*'s approach, the U.S. government argued that the statute had two focuses: the "pattern" of racketeering activity and the nature of the enterprise as foreign or domestic.[202] Under the government's interpretation, racketeering activity conducted sufficiently within the United States would allow for the RICO Act to apply domestically regardless of whether the enterprise was foreign or domestic. And, regardless of whether the activity was committed domestically or abroad, the RICO Act could still apply domestically to domestic enterprises. The Court ultimately did not rule on the government's approach, but it did not dismiss the analysis either, and it

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[197] *See* Dodge, *supra* note 65, at 1607–08; *Extraterritoriality Formalisms*, *supra* note 191, at 409–10.

[198] *Morrison* did not state that all statutes have only one focus of congressional concern. While the Court found that the securities statute in *Morrison* had only one focus of congressional concern, other statutes may have multiple focuses. A concurring opinion in *Morrison* also offered both the "public interest" and the "interests of investors" as possible statutory focuses. *Morrison*, 561 U.S. at 283–84 (Stevens, J., concurring); *see also Extraterritoriality Formalisms*, *supra* note 191, at 398 (noting that, while *Morrison* was "tailored to the question of equity securities traded on a public exchange," the singular-focus requirement is not "trans-substantive").

[199] *See Extraterritoriality Formalisms*, *supra* note 191, at 397–98.

[200] *See, e.g.*, *RJR Nabisco*, 579 U.S. at 340.

[201] *Id.* at 343.

[202] *Id.* at 345; Brief for the United States as Amicus Curiae Supporting Vacatur at 9, *RJR Nabisco*, 579 U.S. 325 (No. 15-138), 2015 WL 9268185; *see also* Dodge, *supra* note 65, at 1607.

has never ruled on whether multiple statutory focuses would be permitted under *Morrison*.[203]

Applying this concept to § 1343, the statute's two focuses are to protect against the misuse of interstate wires and to protect against schemes to defraud. These focuses reflect the split among lower courts with respect to the second *Morrison* test.[204] Acknowledging these two focuses also validates both the concern that courts have too heavily stressed the use of wires in assessing jurisdiction for wire fraud and the assertion that the statute targets fraud generally.[205]

In step two, courts should ask whether the statute's primary focus is geoambiguous. Courts can identify if a focus is geoambiguous by examining whether the location of that focus, depending on one's perspective, could be described as either domestic or extraterritorial. For example, in *RJR Nabisco*, the presence of a domestic subsidiary supported viewing the enterprise as domestic, but because the nerve center and most of the enterprise's operations were overseas, the enterprise could also have been seen as extraterritorial.[206] Applied to wire fraud, almost every scheme to defraud will have contact with U.S. wires through some predicate transaction or incidental routing.[207] The presence of these predicate transactions can then introduce uncertainty, making them geoambiguous.

In step three, courts should complete one of two analyses depending on whether a statute has more than one focus. The first path handles statutes with multiple focuses where the primary focus is geoambiguous. For these statutes, courts should determine whether sufficient contact with the United States occurred to confer jurisdiction by evaluating a case's facts against both the primary, geoambiguous focus and any secondary, nongeoambiguous focuses. This expands the number of relevant variables in

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[203] *See Extraterritoriality Formalisms*, *supra* note 191, at 409–10.

[204] The First and Third Circuits, among others, hold that the focus of the statute is on the use of interstate wires. *See, e.g.*, *Bascuñán*, 927 F.3d at 122 ("[T]he regulated conduct is not merely a 'scheme to defraud,' but more precisely the use of the mail or wires in furtherance of a scheme to defraud." (emphasis omitted)); *McLellan*, 959 F.3d at 469 ("[I]ts focus is not the fraud itself but the abuse of the instrumentality in furtherance of a fraud."). The District Court for the District of Columbia had previously held that the focus of the statute was on the scheme to defraud. *See All Assets Held at Bank Julius*, 251 F. Supp. 3d at 102.

[205] *Cf.* Rakoff, *supra* note 8, at 785–86; Williams, *supra* note 34, at 304–07.

[206] *RJR Nabisco*, 579 U.S. at 340–44.

[207] *See, e.g.*, *Napout*, 963 F.3d at 180–81 (finding a domestic predicate transaction to the transmission of funds that were distributed in person).

assessing domestic jurisdiction rather than relying solely on geoambiguous facts.

For example, the Court in *RJR Nabisco* held that the RICO Act's primary focus, among other possible statutory focuses, was to protect against corruption of domestic enterprises.[208] This focus is geoambiguous, however, because determining whether a corporate subsidiary is domestic is viewpoint dependent and requires arbitrary line drawing.[209] Courts should then turn to the secondary focuses of the relevant statute. In *RJR Nabisco*, for instance, Congress's secondary focuses were to prevent fraud and regulate enterprise conduct.[210] To assess whether domestic application of the RICO Act would be appropriate, courts should weigh whether the racketeering enterprise participated in domestic fraud or interstate commerce and whether the enterprise was domestic or extraterritorial, in addition to whether the corporate entity was domestic. In cases where these factors are in tension, the primary statutory focus should control. This approach would reframe the inquiry around not just whether the corporate subsidiary is located in the United States but also whether the fraud occurred in the United States, allowing foreign states to regulate fraud committed within their borders. This would also allow for greater regulation of foreign corporations' subsidiaries operating in the United States that commit fraud in the United States. Incorporating the secondary statutory focuses does not eliminate evaluation of the first statutory focus; rather, it makes the jurisdictional analysis more robust by incorporating less perspective-based conduct.

For the wire fraud statute, the primary statutory focus would be on the misuse of interstate wires, and the secondary focus would be on the scheme to defraud.[211] Accordingly, courts would evaluate both the misuse of U.S. wires and whether the scheme to defraud was conducted domestically. This analysis is not unlike that done by the District Court for the District of Columbia.[212] Under that standard, domestic application of the wire fraud statute occurs when a defendant or coconspirator engages in a

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[208] *RJR Nabisco*, 579 U.S. at 341–42.

[209] *Id.* at 343–44.

[210] *Id.*

[211] *See, e.g.*, *Bascuñán*, 927 F.3d at 122 (finding three elements to wire fraud: "(1) a scheme to defraud, (2) money or property as the object of the scheme, and (3) use of the mails or wires to further the scheme" (emphasis omitted)).

[212] *See supra* Part II.C.

substantial amount of conduct in the United States, when the conduct is integral to the scheme to defraud, and when at least some of the conduct involves the use of U.S. wires in furtherance of the scheme to defraud.[213] Because the primary focus of the statute is arguably to protect against misuse of U.S. wires, courts should weigh the misuse of U.S. wires most heavily; however, the addition of other facts would help avoid instances of arbitrary jurisdiction.

In the alternative, for our third step, courts should presume that statutes are extraterritorial when they have only one statutory focus or only geoambiguous focuses. For courts to confer jurisdiction, they must find that the presumption against extraterritoriality has been rebutted. Courts should make this presumption to avoid applying domestic jurisdiction in an extraterritorial manner. This presumption best protects foreign states' sovereignty while still allowing Congress to legislate extraterritorially. Requiring clear congressional intent ensures that Congress, and not the courts, makes the relevant policy judgments about extraterritoriality.[214] This presumption thus reinforces the presumption against extraterritoriality as a predictable background rule that reduces "judicial-speculation-made-law."[215]

Returning to this Comment's hypothetical defendants, courts should examine the multiple statutory focuses of the Wire Act to assess domestic jurisdiction: the use of U.S. wires, the extent to which their scheme was carried out in the United States, and the degree to which that conduct was integral to the scheme to defraud. Domestic jurisdiction would still apply to Alpha under this standard because she is based in the United States, targets U.S. residents, and largely uses U.S. wires in her scheme. Domestic jurisdiction would apply to Bravo—based in Japan and targeting Japanese and U.S. citizens—for his schemes that target U.S. victims or that deposit money in U.S. bank accounts. Depending on how integral U.S. wires are to his scheme to defraud Japanese residents, Bravo may also be domestically liable for defrauding Japanese residents.

Charlie—based in Japan and targeting U.K. residents—does not target U.S. residents, nor does she conduct her scheme in the

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[213] *All Assets Held at Bank Julius*, 251 F. Supp. 3d at 103.

[214] *Cf.* Jennifer Mitchell Coupland, *A Bright Idea: A Bright-Line Test for Extraterritoriality in F-Cubed Securities Fraud Private Causes of Action*, 32 NW. J. INT'L L. & BUS. 541, 562–63 (2012); Dodge, *supra* note 65, at 1591–1610.

[215] *Morrison*, 561 U.S. at 261.

United States. Incorporating the secondary statutory focus to prevent fraud, her conduct would thus be too incidental to merit domestic jurisdiction, even if her transmissions may involve U.S. submarine cables or overland wires. Similarly, evaluating Delta's scheme to defraud beyond predicate transactions or incidental interaction with U.S. wires, his contact with the United States is too fleeting to apply domestic jurisdiction. To prosecute Charlie and Delta, courts would need to apply the wire fraud statute extraterritorially.

While it is difficult to calculate how many Bravos, Charlies, and Deltas this would affect, the U.S. Sentencing Commission found that 4,823 persons were sentenced for federal fraud, theft, and embezzlement charges in 2020.[216] Of those 4,823, 22% were not U.S. citizens.[217] While the number of persons extraterritorially convicted of wire fraud would be a subset of this figure, many defendants would avoid arbitrary prosecution under this Comment's solution. For instance, the defendant in *Napout* somewhat resembles Delta because Napout conspicuously avoided using U.S. wires and was bribed in cash and luxury goods.[218] Under this Comment's solution, the wire fraud statute would need to be applied extraterritorially to Napout because his contact with the United States was too incidental to confer domestic jurisdiction. Of course, Argentina could still prosecute him for his alleged fraud.

Critics of this solution may argue that this approach would lead courts to ignore congressional intent and not pursue the statute's primary focus. In the case of wire fraud, critics could argue that Congress intended to regulate the misuse of interstate wires and that it ultimately does not matter where the offender was located or where their scheme was committed.[219] Arguably, the intended focus of § 1343 is somewhat ambiguous. While most circuit courts have held that the statute's focus is on the use of interstate wires, an alternative case can be made that the statute is a generalizable prohibition against fraud and that courts have

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216 U.S. SENT'G COMM'N, *supra* note 9.

217 *Id.*

218 While Napout's scheme involved a U.S. bank account, his personal conduct—like Delta's—had only incidental contact with the United States. While Napout's scheme involving television rights affected more countries than Delta's scheme—potentially complicating which entities could ultimately take action against the fraud—the victims of his scheme were nevertheless based outside the United States. *Napout*, 963 F.3d at 180–81.

219 *See Pasquantino*, 544 U.S. at 371 (noting that wire fraud "was complete the moment they executed the scheme inside the United States").

overemphasized the misuse of wires.[220] Further, prosecutors and courts can still pursue the statute's primary focus under this Comment's multifocal solution, but jurisdiction would not be conferred in arbitrary situations or situations which may encroach on other nations' sovereignty.

As applied to wire fraud, critics may also argue that this approach would "effectively immunize offshore fraudsters" from liability for wire fraud conviction.[221] While this Comment's solution would reduce the number of fraudsters liable under domestic jurisdiction, prosecutors and courts would still be able to hold liable fraudsters who substantially use U.S. interstate wires or target U.S. victims. Furthermore, given Congress's focus on domestic wires and the lack of language pointing to extraterritorial application, it is not clear that the wire fraud statute was ever intended to reach international fraudsters so broadly.

Once the domestic shield is removed by eliminating overexpansive domestic jurisdiction, this Comment's solution can help address the circuit split as to whether the wire fraud statute applies extraterritorially. The First and Third Circuits' holdings rely on dicta in *Pasquantino*.[222] The question in *Pasquantino* was whether a scheme to defraud a foreign government of tax revenue violates § 1343.[223] The Court only addressed the question of extraterritoriality because it was raised by the dissent.[224] And the Court noted that its decision did not give the statute extraterritorial effect.[225] The First and Third Circuits' reliance is therefore misplaced.

Even if the Court's elaboration in *Pasquantino* is not dicta, the Court's standard for extraterritoriality has since shifted. Ten years before *Morrison*, *Pasquantino* relied on the statute's minimal reference to "interstate or foreign commerce."[226] But in *Morrison*, the Court held that a "fleeting reference" to foreign activities or a "general reference to foreign commerce in the definition of 'interstate commerce'" was insufficient to give a statute extraterritorial effect.[227] Without additional indication, such a reference is

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220 *See* Rakoff, *supra* note 8, at 785–86; Williams, *supra* note 34, at 304–07.

221 *Bascuñán*, 927 F.3d at 123.

222 *See supra* Part II.A.

223 *Pasquantino*, 544 U.S. at 354.

224 *Id.* at 371–72.

225 *Id.*

226 *Pasquantino*, 544 U.S. at 371–72 (quoting Small v. United States, 544 U.S. 385, 388 (2005)).

227 *Morrison*, 561 U.S. at 263.

insufficient to meet the updated standard under *Morrison*. Accordingly, the language of the wire fraud statute does not rebut the presumption against extraterritoriality.

CONCLUSION

Courts are divided over whether § 1343 applies extraterritorially. However, they agree on the wide-reaching application of domestic jurisdiction under the statute, and they use this expansive conception of domestic jurisdiction as a way to avoid examining whether the wire fraud statute applies extraterritorially. This Comment argues that this domestic jurisdiction begins to resemble extraterritoriality because its logic applies without limit to foreign and domestic conduct. This type of jurisdiction is inconsistent with *Morrison*, which confined overly expansive domestic jurisdiction. This Comment proposes a novel solution that courts can use to cabin overexpansive domestic jurisdiction. For statutes with geoambiguous focuses, courts should use the statute's other focuses, in addition to a statute's geoambiguous focus, to assess whether sufficient domestic conduct occurred to confer jurisdiction. This approach would protect foreign scammers and defendants from arbitrary prosecution. This approach would also better protect foreign states' sovereignty by not freely extending U.S. jurisdiction onto their soil, a result that may be useful for similar statutes like the RICO Act. Finally, this approach would allow courts to reassess their holdings with respect to the extraterritoriality of the wire fraud statute, because many of their holdings rely on outdated standards and Supreme Court dicta.