SPACE CRIME CONTINUUM: DISCUSSING IMPLICATIONS OF THE FIRST CRIME IN SPACE

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ABSTRACT

In August of 2019, Anne McClain, a decorated NASA astronaut, was aboard the ISS for a six-month mission when she accessed the bank account of her estranged spouse, Summer Worden. Worden filed a complaint with the Federal Trade Commission and with NASA's Office of Inspector General accusing McClain of identity theft and improper access to financial records. Although investigations ultimately cleared McClain of wrongdoing, this was the first alleged criminal activity to have taken place on the ISS and thus raises questions regarding how criminal activity in space should be addressed. In this note, I discuss the procedural implications, the jurisdictional analyses, and the ethical considerations that have arisen in the wake of Anne McClain's case in three differing scenarios – revolving around the hypothetical nationality of McClain as the perpetrator and Worden as the victim. The procedural analysis focuses on the proper filing mechanisms available for the victim, and whether U.S. prosecution would be appropriate by looking to the extraterritorial application of U.S. criminal laws in each scenario. The jurisdictional analysis investigates which countries would have proper jurisdiction in each scenario under Article 22 of the ISS Agreement. The ethical analysis discusses constitutional protections available for the perpetrator in each scenario, and whether it is appropriate to subject perpetrators to the laws of non-national countries.

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INTRODUCTION

The International Space Station ("ISS") is a large spacecraft in orbit around the Earth that serves as a unique science laboratory for several nations.[1] The elements of the ISS are provided and operated by an

[1] Sandra May, *What is the International Space Station*, NAT'L AERONAUTICS & SPACE ADMIN. (Feb. 6, 2020), https://www.nasa.gov/audience/forstudents/5-8/features/nasa-knows/what-is-the-iss-58.html.

international partnership of space agencies.[2] The partner space agencies ("Partner States") are the United States ("U.S."), Russia, Japan, Canada, and eleven countries from the European Space Agency.[3] These European countries are Belgium, Denmark, France, Germany, Italy, the Netherlands, Norway, Spain, Sweden, Switzerland, and the United Kingdom.[4] Because of its unique structure, the ISS has been defined as the "most politicly complex space exploration program ever undertaken."[5]

The ISS's construction began in November of 1998, when the control module was launched into space.[6] After numerous assembling missions, the first crew arrived at the ISS only two years later, on November 2, 2000.[7] The ISS has been continuously occupied ever since.[8] As of January 29, 2021, a total of 242 people from nineteen countries have been aboard the ISS.[9] Despite the extensive visitation, there have been no allegations of criminal activity taking place on the ISS – until now.[10]

In August of 2019, Anne McClain, a decorated NASA astronaut, was aboard the ISS for a six-month mission when she accessed the bank account of her estranged spouse, Summer Worden.[11] McClain denies any wrongdoing, claiming that she accessed the account in order to manage the couple's still-intertwined finances, and that she still had permission to access the account as she routinely did in the past.[12] Worden, however, filed a complaint with the Federal Trade Commission ("FTC") and with NASA's Office of Inspector General accusing McClain of identity theft and improper access to financial records.[13] NASA launched an internal investigation on the

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[2] Mark Garcia, *International Cooperation,* NAT'L AERONAUTICS & SPACE ADMIN. (Feb. 28, 2019) https://www.nasa.gov/mission_pages/station/cooperation/index.html [hereinafter International Cooperation].

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] May, *supra* note 1.

[7] *Id.*

[8] Mark Garcia, *International Space Station Facts and Figures,* NAT'L AERONAUTICS & SPACE ADMIN. (July 16, 2020) https://www.nasa.gov/feature/facts-and-figures [hereinafter ISS Facts and Figures].

[9] Mark Garcia, *Visitors to the Station by Country*, NAT'L AERONAUTICS & SPACE ADMIN. (Nov. 25, 2020), https://www.nasa.gov/feature/visitors-to-the-station-by-country/ [https://perma.cc/ZT8P-4C5G] [hereinafter Visitors to the ISS].

[10] Mike Baker, *NASA Astronaut Anne McClain Accused by Spouse of Crime in Space*, N.Y. TIMES (Aug. 27, 2020), https://www.nytimes.com/2019/08/23/us/nasa-astronaut-anne-mcclain.html.

[11] *Id.*

[12] *Id.*

[13] *Id.*

allegations and refused to comment on McClain's personal life.[14] Although investigations ultimately cleared McClain of wrongdoing, this presents the first alleged instance of criminal activity aboard the ISS and thus raises questions regarding how criminal activity in space should be addressed.[15]

A uniform criminal law in outer space is a necessity in our developing society, and Anne McClain's case proves the immediacy of this need.[16] The international nature of the ISS creates tension between the competing criminal laws at play.[17] With human nature comes human conflict.[18] Therefore, "criminal behavior onboard spacecraft has the potential to cause harm far beyond whatever consequences may normally flow from such acts on Earth."[19] However, criminal law in space seems to lack a foundational code or international agreement.[20] While the development of a presumptively new area of law will spark various questions, this paper will be assessing those specific to the circumstances surrounding McClain's allegations.

I. SOURCES OF SPACE LAW

The entirety of space law is founded on the "common heritage of mankind" principle, which signifies the idea that "outer space cannot be owned or claimed by any sovereignty."[21] Moreover, space law is compartmentalized into two components. The first "involves principles of international treaties, essentially earth-oriented law in the areas of launch liability and contracts."[22] There are five main international treaties that govern space conduct.[23] Two of these, the Rescue Agreement and the Moon Agreement, although vital to space law, are not directly applicable to the conduct involved with or on the ISS. Under the Rescue Agreement, nations are ordered to "perform rescue

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[14] *Id.*

[15] *Id.*

[16] *See generally* Lee Seshagiri, *Spaceship Sheriffs and Cosmonaut Cops: Criminal Law in Outer Space*, 28 DALHOUSIE L.J. 473 (2005) (advocating for the creation of a universal legal regime and criminal code for outer space).

[17] Sherri R. Malpass, *Legal Aspects of the United States/International Space Station*, 14 HOUS. J. INT'L L. 183, 204 (1991).

[18] Seshagiri, *supra* note 16, at 478.

[19] *Id.*

[20] R. Thomas Rankin, *Space Tourism: Fanny Packs, Ugly T-Shirts, and the Law in Outer Space*, 36 SUFFOLK U. L. REV. 695, 716 (2003).

[21] Malpass, *supra* note 17, at 191; *see also* Seshagiri, *supra* note 16, at 480-481 (finding that international law sees outer space as "*res communis*. . . and therefore jurisdiction cannot be attached to claims of territorial sovereignty over specific locations in the cosmos").

[22] *Id.* at 197.

[23] Julie C. Easter, *Spring Break 2023 – Sea of Tranquility: The Effect of Outer Space Tourism on Outer Space Law and World Policy in the New Millennium*, 26 SUFFOLK TRANSNAT'L L. REV. 349, 359 (2003).

duties for other nations experiencing trouble while in outer space."[24] The Moon Agreement addresses the property rights on the moon and "details how nations may access the Moon and other planets."[25] The remaining treaties – the Outer Space Treaty, the Liability Convention, and the Registration Convention – are directly applicable to conduct involved with or on the ISS and will be discussed below. These treaties were negotiated in anticipation of future conflicts, rather than as reactions to current demands.[26] Therefore, this first component of space law, namely international treaties, can be thought of as the proactive approach. Whereas, the second component of space law, referred to as "astrolaw," is more reactive.[27] Astrolaw is the law of living and working in outer space, and it "deals with more futuristic legal concepts to be applied to the social order of long-duration manned missions, such as will exist aboard the [ISS]."[28] In this way, astrolaw is designed to react to the needs of life and work in space.

A. International Treaties

1. Outer Space Treaty

The 1967 Outer Space Treaty ("OST") was the first United Nations treaty to address space law applicable to the ISS.[29] The OST formally adopted the "common heritage of mankind" philosophy for outer space[30] and states that "no nation on Earth can claim sovereignty over outer space, the other planets, or earth's moon."[31] The OST allows "the nation on whose registry an object launched into outer space" to have jurisdiction and "control over such object, and over any personnel thereof, while in outer space or on a celestial body."[32] Moreover, under the OST "states are internationally liable for any damage

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[24] *Id.* at 362; Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, Apr. 22, 1968, 19 U.S.T. 7570, 672 U.N.T.S. 119 [hereinafter the Rescue Agreement].

[25] Rankin, *supra* note 20, at 703; Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Dec. 5, 1979, 1363 U.N.T.S. 3 [hereinafter Moon Agreement].

[26] Malpass, *supra* note 17, at 193.

[27] *Id.* at 197-198.

[28] *Id.*

[29] *Id.* at 193.

[30] *Id.*; *see* Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter Outer Space Treaty].

[31] Rankin, *supra* note 20, at 702; Outer Space Treaty, *supra* note 30, 18 U.S.T. at 2413, 610 U.N.T.S. at 208.

[32] Malpass, *supra* note 17, at 193; Outer Space Treaty, *supra* note 30, 18 U.S.T. at 2416, 610 U.N.T.S. at 209; *see* Easter, *supra* note 23, at 361.

caused by their objects or personnel while in space."[33]

The *Outer Space Treaty* requires each nation to bear legal responsibility for persons and objects it launches into space.[34] The ISS's international nature paired with each nation's obligation under the OST require "several systems of law [to] coexist within the few cubic feet of the space station."[35] Russia, notably, is the only Partner State that is not a party to the OST.[36]

2. Liability Convention

The 1972 Liability Convention was the United Nations' second major space treaty.[37] "This agreement provides for strict liability for damage caused by launching vehicles on land, sea, or air. However, a mere negligence standard is applied for damages caused in space."[38] The discrepancy in standards is due to the "inherently dangerous nature of space activity and the unknowns [of] space exploration, [making] anything other than a negligence standard" inconsistent with the goals of space activities.[39] Russia, along with three countries of the European Space Agency – Italy, Norway, and Spain – are not parties to the Liability Convention.[40] Every other Partner State is a party to the Liability Convention.[41]

3. Registration Convention

The 1975 Registration Convention is the final space treaty that is applicable to the ISS.[42] This agreement "formalized the process for countries or private entities to register their space objects in order to maintain jurisdiction and ownership of such objects."[43] Specifically, the Registration Convention states that "when two or more States jointly launch an object,

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[33] Easter, *supra* note 23, at 361; Outer Space Treaty, *supra* note 30, 18 U.S.T. at 2415, 610 U.N.T.S. at 209.

[34] Seshagiri, *supra* note 16, at 483 ("Though not referring specifically to criminal jurisdiction, the intent of the *Outer Space Treaty* seems clear: if a nation puts something or someone in space, or partakes in an international venture to do so, that nation should bear legal responsibility for the results."); *see generally* Outer Space Treaty, *supra* note 30, 18 U.S.T. 2410, 610 U.N.T.S. 205.

[35] Malpass, *supra* note 17, at 198; *see generally* Outer Space Treaty, *supra* note 30, 18 U.S.T. 2410, 610 U.N.T.S. 209.

[36] *See generally* Outer Space Treaty, *supra* note 30, 18 U.S.T. 2410, 610 U.N.T.S. 205.

[37] Malpass, *supra* note 17, at 193.

[38] *Id.* at 193; Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 24 U.S.T. 2389, 961 U.N.T.S. 187 [hereinafter Liability Convention].

[39] *Id.* at 194.

[40] *See generally* Liability Convention, *supra* note 38, 24 U.S.T. 2389, 961 U.N.T.S. 187.

[41] *Id.*

[42] Malpass, *supra* note 17, at 194.

[43] *Id*; Convention on Registration of Objects Launched into Outer Space, Nov. 12, 1974, 28 U.S.T. 695, 1023 U.N.T.S. 15 [hereinafter Registration Convention].

only one State registers the object."[44] However, "the States can agree among themselves as to which State will maintain jurisdiction and control over the object."[45] Once again, Russia is the only Partner State that is not a party to this treaty.[46]

B. Laws Governing the International Space Station

1. International Principals

The ISS Partner States "have agreed that the basic principles of international law will apply to the space station."[47] The Partner States reasoned that existing international law principles serve "in the interest of maintaining international peace and security and promoting international cooperation and understanding."[48] However, the legal regime of the ISS is primarily astrolaw.[49] The Partner States have agreed that the U.S. has criminal jurisdiction over "anybody on board the space station whose misconduct endangers the facility or other crew members."[50] However, in cases like McClain's, where the activity in question did not endanger the faculty or crew, "future arrangements" will determine the required jurisdictional analysis.[51] Before the ISS was operational, John O'Brien, former General Counsel of NASA, believed that most long-term issues should be left to develop as the "common law of the space station."[52] O'Brien described this system as a natural development that is desirable, if not necessary, due to the "general lack of familiarity with the effects of a space station environment in the context of a permanent manned presence and the undefinable parameters of the extent of interaction between representatives of diverse societies."[53]

2. Intergovernmental Agreement on Space Station Cooperation

The Partner States of the ISS signed and enacted the Intergovernmental

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[44] Malpass, *supra* note 17, at 194; Registration Convention, *supra* note 43, 28 U.S.T. at 699, 1023 U.N.T.S. at 17.

[45] Malpass, *supra* note 17, at 194; Registration Convention, *supra* note 43, 28 U.S.T. at 699, 1023 U.N.T.S. at 17.

[46] *See generally* Registration Convention, *supra* note 43, 28 U.S.T. 695, 1023 U.N.T.S. 15.

[47] Malpass, *supra* note 17, at 191.

[48] *Id.* at 192.

[49] *Id.* at 198.

[50] *Id.* at 205.

[51] *Id.*

[52] *Id.* at 198.

[53] Andrew J. Young, *The U.S./International Space Station: Aspects of Technology and Law*, 81 AM. SOC'Y INT'L L. PROC. 505, 508 (1987).

Agreement on Space Station Cooperation ("ISS Agreement").[54] The ISS Agreement was designed to establish a long-term international cooperative framework based on "genuine partnership."[55] Therefore, the ISS Agreement primarily addresses the political commitments of the Partner States and determines the "legal regime within which the program will operate."[56] The ISS Agreement sought to make decisions at all levels by achieving consensus.[57] If, however, "consensus cannot be achieved, NASA is authorized under the [ISS Agreement] to make those decisions necessary for safety and efficiency aboard the space station."[58]

Article 22 of the ISS Agreement is "the only positive source of criminal law that currently exists in outer space."[59] Under Article 22, Section 1, "each Partner State retains jurisdiction over its nationals, regardless of where they are currently located on the ISS."[60] Section 1 specifically provides that "Canada, the European Partner States, Japan, Russia, and the U.S., may exercise criminal jurisdiction over personnel in or on any flight element who are their respective nationals."[61] Section 2 of Article 22 allows "for the transfer of jurisdiction and prosecution powers over one national to a separate Partner State:"[62]

> In a case involving misconduct on orbit that: (a) affects the life or safety of a national of another Partner State or (b) occurs in or on or causes damage to the flight element of another Partner State, the Partner State whose national is the alleged perpetrator shall, at the request of any affected Partner State, consult with such State concerning their respective prosecutorial interests. An affected Partner State may, following such consultation, exercise criminal jurisdiction over the alleged perpetrator provided that, within 90 days of such consultation or within such other period as may be mutually agreed, the Partner State whose national is the alleged perpetrator either: (1) concurs in such

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[54] Malpass, *supra* note 17, at 186-187; Agreement Concerning the Cooperation on the Civil International Space Station, Jan. 28, 1998, T.I.A.S. No. 12,927 [hereinafter ISS Agreement].

[55] Malpass, *supra* note 17, at 186-187; ISS Agreement, *supra* note 54, at 3.

[56] Malpass, *supra* note 17, at 195; *see generally* ISS Agreement, *supra* note 54.

[57] Malpass, *supra* note 17, at 196; ISS Agreement, *supra* note 54, at 6.

[58] Malpass, *supra* note 17, at 196; ISS Agreement, *supra* note 54, at 6.

[59] Taylor Stanton Hardenstein, *In Space, No One Can Hear You Contest Jurisdiction: Establishing Criminal Jurisdiction on the Outer Space Colonies of Tomorrow*, 81 J. AIR L. & COMM. 251, 281 (2016); *see also* Rankin, *supra* note 20, at 710 ("The [ISS Agreement] allows a member country to apply its own criminal laws when its citizens are involved in criminal acts on the ISS.").

[60] Hardenstein, *supra* note 59, at 281; ISS Agreement, *supra* note 54, at 17.

[61] ISS Agreement, *supra* note 54, at 17.

[62] Hardenstein, *supra* note 59, at 281; ISS Agreement, *supra* note 54, at 17.

exercise of criminal jurisdiction, or (2) fails to provide assurances that it will submit the case to its competent authorities for the purposes of prosecution.[63]

Article 22 of the ISS Agreement therefore defines criminal jurisdiction on the ISS through its "clear, concise nationality-principle-approach."[64] "Article 22 of the [ISS Agreement] will likely be the foundation on which humanity will base all future outer space jurisdiction."[65]

C. Domestic Law

1. United States Federal Criminal Code

In 1982, Congress addressed the issue of jurisdiction in outer space by modifying the criminal code to grant jurisdiction over spacecraft.[66] The U.S. also uses "nationality and passive personality" principles to gain jurisdiction over any offense outside U.S. territory "by or against a national of the United States."[67]Although the U.S. Federal Criminal Code addresses certain areas of criminal law in space, it fails to adequately address criminal conduct and procedure governing the ISS. For example, even though "U.S. criminal jurisdiction in outer space seems broad at first glance, the range of substantive offenses available under the American code is limited to those offenses expressly within the federal special maritime and territorial jurisdiction."[68] Additionally, "the United States criminal code applies to all activity aboard the shuttle regardless of a person's nationality from the moment when all external doors are closed on earth until the moment when each door is opened on Earth."[69] Despite this provision's explicit application of U.S. criminal code to shuttle activity, "such specificity has yet to be achieved for criminal law aboard the space station."[70]

2. Extraterritorial Application of United States' Criminal Laws

The U.S. Constitution suggests the applicability of "American law beyond the geographical confines of the United States."[71] The Commerce Clause

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[63] ISS Agreement, *supra* note 54, at 17.

[64] Hardenstein, *supra* note 59, at 280; ISS Agreement, *supra* note 54, at 17.

[65] Hardenstein, *supra* note 59, at 281.

[66] Malpass, *supra* note 17, at 205.

[67] Seshagiri, *supra* note 16, at 485.

[68] *Id.* at 485-86.

[69] Malpass, *supra* note 17, at 205.

[70] *Id.* at 205-06.

[71] Charles Doyle, *Extraterritorial Application of American Criminal Law,* EVERY CRS REPORT (Oct. 31, 2016), https://www.everycrsreport.com/reports/94-166.html.

grants Congress the power "[t]o regulate Commerce with foreign nations,"[72] and thus "affords it apparent authority to enact criminal statutes with extraterritorial application."[73] The Supreme Court case, *RJR Nabisco v. European Community,* identifies "the extraterritorial scope of U.S. law" by finding prosecution proper if either (1) "there is a sufficient United States connection with respect to the 'focus' of the underlying statute," or (2) "Congress 'affirmatively and unmistakably' expressed an intention to apply a law extraterritorially."[74] The Supreme Court, in *United States v. Morrison*, established a focus test under which courts "must evaluate what 'territorial event' or 'relationship' is the 'focus' of the statue to identify the conduct that must occur in the United States for the suit to be deemed domestic, as opposed to extraterritorial."[75] "As applied to [most][76] statutes, the focus test may well mean, as it did in *Morrison*, that the site of only one element of a multi-element statutory provision will control the determination of whether the relevant offense was committed in United States or abroad."[77] Because Congress rarely identifies a statutory focus, *Morrison*'s focus test is malleable and subjective.[78]

The Supreme Court conducted *Morrison*'s focus test in the 2005 case, *Pasquantino v. United States.* The defendants were indicted for "wire fraud for carrying out a scheme to smuggle large quantities of liquor from the United States, thereby depriving the Canadian government of the required excise taxes."[79] The Court analyzed whether this was an extraterritorial application of the wire fraud statute.[80] In doing so, the Court looked to the only two elements of the statute: "a scheme to defraud and an interstate wiring in furtherance of that scheme."[81] Because the "scheme was apparently

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[72] U.S. CONST. art. 1, § 8, cl. 3.

[73] Doyle, *supra* note 71.

[74] David Rossman, *El Alcance Extraterritorial De Los Delios De Cuello Blanco De Los Estados Unidos [Extraterritorial Reach of US White Collar Crime]*, THE LAWYER: REVISTA CENTROAMERICANA (Jan. 21, 2019), https://www.thelawyermagazine.com/post/el-alcance-extraterritorial-de-los-delitos-de-cuello-blanco-de-los-estados-unidos (translation provided by author); *see generally* RJR Nabisco v. European Cmty., 136 S. Ct. 2090, 2101 (2016).

[75] Julie R. O'Sullivan, *Extraterritorial Application of Federal Criminal Statutes: Analytical Roadmap, Normative Conclusions, and a Plea to Congress for Direction*, 106 GEO. L.J. 1021, 1060 (2018); Morrison v. Nat'l Austl. Bank, 561 U.S. 247, 266-267 (2010).

[76] O'Sullivan*, supra* note 75, at 1060 ("The Morrison Court identified one element of the securities claim to be decisive, ruling that the subjective territoriality is only present in civil securities fraud cases involving transactions in securities listed on domestic exchanges, and domestic transactions in other securities.").

[77] *Id.*

[78] *Id.*

[79] *Id.* at 1074; Pasquantino v. United States, 544 U.S. 349, 353 (2005).

[80] O'Sullivan*, supra* note 75, at 1074; *Pasquantino,* 544 U.S. at 371.

[81] O'Sullivan*, supra* note 75, at 1074; *see also Pasquantino*, 544 U.S. at 371.

hatched in the United States," and because of the "defendants' use of U.S. interstate wires," the Court determined that this was a "domestic, not an extraterritorial, application of the wire fraud statute."[82] Even though "[t]he victim was a foreign sovereign, the object of the fraud was the Canadian tax revenues due, and the actual fraud concerned misrepresentations made to Canadian officials."[83] None of these circumstances are elements of the crime, and therefore irrelevant under the *Morrison* focus test.[84]

If a case's focus is deemed domestic, there is a sufficient U.S. connection and prosecution is therefore proper.[85] If, however, a case's focus is deemed extraterritorial, courts must then decide whether Congress intended the statute to apply to extraterritorial conduct.[86] "In *Morrison,* . . . the Court ruled that, unless Congress specifies otherwise, the question whether a statute applies extraterritorially does not go to subject-matter jurisdiction but is, instead, a 'merits' question."[87] If a court determines that it was Congress's intent to apply a law extraterritorially, prosecution is proper. Conversely, if a court finds this congressional intent to be lacking, prosecution is improper.

The Supreme Court in *RJR Nabisco* found the necessary congressional intent present. Here, the European Community and twenty-six of its member states sued RJR Nabisco and numerous related entities (collectively "RJR") in the Eastern District of New York in 2000.[88] The European Community alleged that RJR had violated The Racketeer Influence and Corrupt Organizations Act ("RICO"), by "participat[ing] in a global-money laundering scheme in association with various organized crime groups."[89] The complaint alleged "a scheme in which Colombian and Russian drug traffickers smuggled narcotics into Europe and sold the drugs for euros that . . . were used to pay for large shipments of RJR cigarettes into Europe."[90] The complaint also alleged that RJR acquired "Brown & Williamson Tobacco Corporation for the purpose of expanding these illegal activities."[91] RJR moved to dismiss the complaint, claiming that RICO did not apply extraterritorially.[92] The Court disagreed, stating that because RICO defines "racketeering activity to include a number of predicates that plainly apply to at least some foreign conduct," Congress intended for RICO to apply

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[82] O'Sullivan*, supra* note 75, at 1074; *see generally Pasquantino*, 544 U.S 349.

[83] O'Sullivan*, supra* note 75, at 1074; *see generally Pasquantino*, 544 U.S. 349.

[84] *See* O'Sullivan*, supra* note 75, at 1074.

[85] Rossman, *supra* note 74.

[86] O'Sullivan, *supra* note 75, at 1056.

[87] *Id.* at 1062.

[88] *RJR Nabisco*, 136 S. Ct. at 2098.

[89] *Id.*

[90] *Id*.

[91] *Id.*

[92] *Id.* at 2099.

extraterritorially.[93]

Conversely, the Supreme Court in *Morrison* found the requisite congressional intent to be lacking. Here, National Australia Bank Limited ("National"), the largest bank in Australia at the time, traded its Ordinary Shares[94] "on the Australian Stock Exchange and on other foreign securities exchanges, but not on any exchange in the United States."[95] In 1998, National bought HomeSide Lending, a "mortgage-servicing company headquartered in Florida."[96] In July of 2001, "National announced that it was writing down the value of HomeSide's assets by $450 million; and then again on September 3, by another $1.75 billion."[97] Russel Leslie Owen and Brian and Geraldine Silverstock (collectively "Petitioners"), all Australian citizens, had purchased National's Ordinary Shares before the writedowns.[98] Petitioners "sued National, HomeSide, Cicutto, and the three HomeSide executives ["Respondents"] in the United States District Court for the Southern District of New York for alleged violations of §§ 10(b) and 20(a) of the Securities Exchange Act."[99] "Respondents moved to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim under Rule 12(b)(6)."[100] Therefore, it was up for the Court to determine whether "§ 10(b) of the Securities Exchange Act of 1934 provides a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges."[101] The Supreme Court held that because Congress has made "no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially," the Court concludes that it does not.[102]

3. Constitutional Limitations on the Extraterritorial Application of United States' Criminal Laws

Due process issues have been a topic of discussion in a growing number

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[93] *Id.* at 2101-03 ("Short of an explicit declaration, it is hard to imagine how Congress could have more clearly indicated that it intended RICO to have (some) extraterritorial effect.").

[94] Morrison v. Nat'l Austl. Bank, 561 U.S. 247, 251 (2010) (clarifying that Australian "Ordinary Shares" are called "common stock" in America).

[95] *Id.*

[96] *Id.*

[97] *Id.* at 252.

[98] *Id.*

[99] *Id.*

[100] *Id.* at 253.

[101] *Id.* at 250-51.

[102] *Id.* at 265. Also, the Court agreed with the argument that using "congressional silence as a justification for judge-made rule violates the traditional principle that silence means no extraterritorial application." *Id.* at 261.

of U.S. lower court decisions relating to extraterritoriality.[103] "The Supreme Court has not yet addressed whether Fifth Amendment due process limitations apply to extraterritorial applications of federal law."[104] The Due Process Clause of the Fifth Amendment promises that "[n]o person shall. . . be deprived of life, liberty, or property, without due process of law."[105] U.S. Federal Courts of Appeals agree that "Fifth Amendment due process limitations on the exercise of extraterritorial criminal jurisdiction exist but they are split on what the applicable test is: whether due process only required that extraterritorial prosecution not be arbitrary and unfair, or whether the Due Process Clause also requires proof of a sufficient 'nexus' between the defendant and the United States."[106]

Some courts describe a due process requirement that "demands some nexus between the United States and the circumstances of the offense."[107] Other courts have specified that the nexus test ought to serve the same purpose the "minimum contacts" test does in personal jurisdiction: "It ensures that a United States court will assert jurisdiction only over a defendant who 'should reasonably anticipate being haled into court' in this country. This test appears to concern whether a defendant could have contemplated that the United States has the *power* to exert jurisdiction over the defendant."[108] Occasionally, courts look to international law principles to inform their decision on whether the nexus requirement has been met.[109]

On the other hand, other circuits completely reject the nexus inquiry and the analogy to minimum contacts standards.[110] These courts believe that "[f]air warning does not require that the defendants understand that they could be subject to criminal prosecution *in the United States* so long as they would reasonably understand that their conduct was criminal and would

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[103] Doyle, *supra* note 71.

[104] O'Sullivan, *supra* note 75, at 1076.

[105] U.S. CONST. amend. V.

[106] O'Sullivan, *supra* note 75, at 1076-1077; *see also* Doyle, *supra* note 71.

[107] Doyle, *supra* note 71 (citing to United States v. Baston, 818 F.3d 651, 669-70 (11th Cir. 2016) ("The Due Process Clause requires at least some minimal contact between a state and the regulated subject."); United States v. Rojas, 812 F.3d 382, 393 (5th Cir. 2016); United States v. Medjuck, 156 F.3d 916, 918 (9th Cir. 1998) (finding that in order "to satisfy the strictures of due process, the Government [must] demonstrate that there exists a sufficient nexus between the conduct condemned and the United States such that the application of the statute [to the overseas conduct of a non-U.S. defendant] would not be arbitrary or fundamentally unfair to the defendant"); United States v. al Kassar, 660 F.3d 108, 118 (2d Cir. 2011) ("In order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair.").

[108] O'Sullivan, *supra* note 75, at 1077 (emphasis in original).

[109] *Id.*

[110] *Id.*

subject them to prosecution somewhere."[111] "There is further uncertainty over whether defendants who are non-U.S. citizens (as they often are, given the extraterritorial nature of these cases) can claim a U.S. constitutional due process right to object to their prosecution."[112]

While the debate surrounding due process leaves several questions up for debate, the courts have discussed two other constitutional limitations on the extraterritorial applicability of U.S. criminal law. First, in deciding *United States v. Verdugo-Urquidez*, the Supreme Court ruled that "the Fourth Amendment, [which protects against unreasonable searches and seizures,][113] is not violated by a warrantless search of the foreign property of a non-U.S. national who has no substantial and voluntary relationship to the United States."[114] "Accordingly, when government agents conduct a search overseas, the Fourth Amendment does not apply – at least if the person involved is an [non-U.S. national] with no substantial connection to the United States."[115] Second, lower courts have addressed whether the Fifth Amendment, which also protects the right against compelled self-incrimination,[116] ought to be claimable by defendants who are not U.S. citizens.[117] "Although the Supreme Court has not yet explicitly so held, lower courts have ruled that the Fifth Amendment right against compelled self-incrimination, being a trial right, should be claimable by [non-U.S.] defendants who made compelled statements abroad but are on trial in the United States."[118] The analysis of whether constitutional provisions are extended to non-U.S. defendants "appears to turn to some extent on the nature of the constitutional privilege at issue. It is fair to say, however, that two primary determinants of defendants' rights to claim U.S. constitutional protections are the nationality of the individual involved and the perceived site of the alleged constitutional violation."[119]

II. PARALLELS BETWEEN OUTER SPACE AND ANTARCTICA

Many scholars have drawn significant similarities between outer space and

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[111] *Id.* at 1077-78 (emphasis in original).

[112] *Id.* at 1078 ("[Non-U.S. citizens] within U.S. territory are generally entitled to Fifth and Sixth Amendment protections. . . But the Supreme Court has ruled that the Fifth Amendment's due process guarantee cannot be claimed by [non-U.S. defendants] tried abroad by U.S. Authorities.").

[113] U.S. CONST. amend. IV.

[114] O'Sullivan, *supra* note 75, at 1078 (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 269-273 (1990)).

[115] *Id.* at 1079.

[116] U.S. CONST. amend. V.

[117] O'Sullivan, *supra* note 75, at 1079.

[118] *Id.*

[119] *Id.* at 1078-79.

Antarctica. Both regions share similar physical characteristics.[120] Most notably, both possess a harsh and inhospitable environment: isolated, difficult to survive, "lack of permanent population, only recently accessible, and unsuitable to the type of habitation in temperate regions of the earth."[121] Additionally, both outer space and Antarctica are "subject to varying international and domestic treaties that attempt to provide a legal framework over a barren area."[122] Especially, a "side-by-side comparison of the Antarctic Treaty and the Outer Space Treaty is striking because they both cover similar ground, and do so in a way that sounds strikingly similar."[123] Both agreements call for the regions to be used only for peaceful purposes; both agreements call for the freedom of scientific investigation; both agreements ban the use of nuclear weapons; and neither agreement allows for the appropriation of territory.[124] "Because the [Antarctic T]reaty does not recognize or establish territory or sovereignty claims," general jurisdiction over observers and scientists is afforded to their own nations, under Article VIII:[125] "to facilitate the exercise of their functions under the present treaty[,] . . . observers . . . and scientific personnel . . . shall be subject only to the jurisdiction of the Contracting Party of which they are nationals . . . while they are in Antarctica . . . ."[126] However, the Antarctic Treaty does not discuss "jurisdiction or prosecutorial power should a crime occur on the continent."[127] Rather than providing a concrete plan illustrating how nations are to cooperate if a crime occurs, the Antarctic Treaty only includes a vague provision at the end of Article VIII: "the Contracting Parties concerned in any case of dispute with regard to the exercise of jurisdiction in Antarctica shall immediately consult together with a view to reaching a mutually acceptable solution."[128] Therefore, because McClain and Worden are both citizens of the U.S., the U.S. is the only contracting party concerned with the case. For that reason, the U.S. retaining jurisdiction over the matter would be an acceptable solution. If, hypothetically, either McClain remained a U.S.

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[120] Malpass, *supra* note 17, at 191; *see* Hardenstein, *supra* note 59, at 269; *see also* Rankin, *supra* note 20, at 699.

[121] Malpass, *supra* note 17, at 191; *see* Hardenstein, *supra* note 59, at 269; *see also* Rankin, *supra* note 20, at 699.

[122] Hardenstein, *supra* note 59, at 269; *see also* Rankin, *supra* note 20, at 699.

[123] Hardenstein, *supra* note 59, at 269.

[124] *Id*. at 269-70 (citing to Outer Space Treaty, *supra* note 30, 18 U.S.T. 2410, 610 U.N.T.S. 205; Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71 [hereinafter "Antarctic Treaty"]).

[125] *Id.* at 270 (citing to Antarctic Treaty, *supra* note 124).

[126] *Id.* at 270-71 (quoting Antarctic Treaty, *supra* note 124).

[127] *Id.* at 271.

[128] *Id.* at 271 (quoting Antarctic Treaty, *supra* note 124).

national and Worden was a citizen of another Contracting Party,[129] or vice versa, the U.S. and the other Contracting Party would be required to reach a mutually acceptable solution of jurisdiction.

III. ANALYSIS

In this section, I will discuss the procedural implications, the jurisdictional analyses, and the ethical considerations that have arisen in the wake of Anne McClain's case – as it is the first alleged crime to have occurred in space. Moreover, I will address these analyses in three differing scenarios. First, I will be analyzing the implications as if the perpetrator and the victim were both U.S. citizens – as is the case with Anne McClain and Summer Worden. Second, I will be analyzing the implications as if the perpetrator, McClain, had been a citizen of a Partner State other than the U.S., and as if the victim, Worden, had been a citizen of the U.S. Lastly, I will be analyzing the implications as if the perpetrator, McClain, had been a U.S. citizen, and as if the victim, Worden, had been a citizen of a Partner State other than the U.S.

The procedural analysis will focus on the proper filing mechanisms available for the victim, and whether U.S. prosecution would be appropriate by looking to the extraterritorial application of U.S. criminal laws in each scenario. The jurisdictional analysis will analyze what countries would have proper jurisdiction in each scenario under Article 22 of the ISS Agreement. The ethical analysis will discuss constitutional protections available for the perpetrator in each scenario and whether it is appropriate to subject perpetrators to the laws of non-national countries.

A. Existing Facts: Both Perpetrator and Victim as Citizens of the United States

1. Procedural Analysis

Summer Worden, as a U.S. citizen, filed a complaint with the FTC accusing Anne McClain, another national of the U.S., of identity theft and improper access to financial records.[130] The FTC is a bipartisan federal agency that seeks to protect consumers while promoting competition.[131] The FTC serves as an avenue for consumers who have been the victim of fraud, identity theft, or any other unfair or deceptive business practices to formally file a complaint, thereby initiating investigations and enforcement actions

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[129] Of the Partner States to the ISS, the following six countries are *not* parties to the Antarctic Treaty: Russia, Canada, Italy, Spain, Sweden, and Switzerland. Antarctic Treaty, *supra* note 124.

[130] Baker, *supra* note 10.

[131] *About the FTC: What We Do*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/what-we-do (last visited Jan. 6, 2021).

whenever it is warranted.[132] With its goal to protect consumers "by stopping unfair, deceptive, or fraudulent practices in the marketplace," the FTC "conduct[s] investigations, sue[s] companies and people that violate the law, develop[s] rules to ensure a vibrant marketplace, and educate[s] consumers and businesses about their rights and responsibilities."[133]

The analysis of the extraterritorial applicability of U.S. criminal laws determines whether prosecution within the U.S. would be proper. As mentioned above, the Supreme Court has found prosecution proper if either the focus of the underlying statute is sufficiently connected to the U.S., thus effectively domestic, or if Congress has "affirmatively and unmistakably" expressed an intention to apply the law extraterritorially.[134] Under *Morrison*, the focus of the statute is determined by the location where the elements of the statute are committed.[135] The focus is deemed sufficiently connected to the U.S. if the "only one element of a multi-element statutory provision . . . was committed in [the U.S.]"[136]

Regarding the allegation of improper access to financial records, 18 U.S.C. §1030(a) governs Fraud and Related Activity in Connection with Computers, which occurs when an individual "intentionally accesses a computer without authorization or exceeds authorized access,[137] and thereby obtains – information contained in a financial record . . . of a card holder[138] . . . or contained in a file of a consumer reporting agency on a consumer."[139] There are three main elements to this statute. The first two elements are, respectively, intentionally exceeding authorized access and obtaining information.[140] In order to prove the first element, the government will have to rebut McClain's claim that she did not intentionally proceed without authorization – that she believed she had implied authorization as she had not received instruction to stop accessing Worden's bank account. Regardless, McClain was on the ISS when she exceeded her access and obtained

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[132] *See Identity Theft: Filing a Complaint*, FED. TRADE COMM'N, https://www.ftc.gov/news-events/media-resources/identity-theft-and-data-security/filing-complaint (last visited Jan. 6, 2021).

[133] *About the FTC: What We Do*, *supra* note 131.

[134] *RJR Nabisco*, 136 S. Ct. at 2100 (2016); Morrison v. Nat'l Austl. Bank, 561 U.S. 247, 255 (2010).

[135] O'Sullivan, *supra* note 75, at 1060; *see Morrison*, 561 U.S. at 266-67.

[136] O'Sullivan, *supra* note 75, at 1060; *see Morrison,* 561 U.S. at 267.

[137] 18 U.S.C. § 1030(e)(6) (defining "exceeding authorized access" as access to a computer without authorization and to use such access to obtain or alter information in the computer that the accessor is not entitled to obtain or alter).

[138] 15 U.S.C. § 1062(m) (defining "card holder" as any person to whom a credit card is issued or any person who has agreed with the card issuer to pay obligations arising from the issuance of a credit card to another person).

[139] 18 U.S.C. § 1030(a)(2)(A).

[140] *Id.*

information. The last element, obtaining information contained in a financial record of a card holder,[141] occurred in the U.S., because Worden's bank account is U.S. based, rendering the connection between the statute and the U.S. sufficient. Therefore, under the *Morrison* focus test, the elements of the statute render the prosecution under 18 U.S.C. §1030(a) proper in this scenario.

In regards to the allegation of identity theft, 18 U.S.C. § 1028(a) governs Fraud and Related Activity in Connection with Identity Documents, Authentication Features, and Information.[142] Identity theft occurs when an individual "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, or in connection with, any unlawful activity that constitutes a violation of Federal law."[143] This analysis is substantially similar to the improper access analysis. There are also three main elements of the statute. The first and third elements are, respectively, knowing possession of identification without lawful authority and the use in connection with unlawful activity.[144] Given McClain's claim that she believed Worden had been given her authority to access the bank account, it is debatable whether the first element, specifically the knowing intention, will be able to be sufficiently proven. However, regarding the focus analysis, these elements occurred on the ISS, as McClain was aboard the ISS when she possessed the identification means to access Worden's bank account without actual authorization. The second element is the means of the identification of another person.[145] Worden's identification is the means at issue in this case, and as a U.S. national, she was in the U.S. at the time this crime occurred. Therefore, under the *Morrison* focus test, the elements of the statute render the prosecution under 18 U.S.C. §1028(a) proper in this scenario. Given the analysis above, in addition with the fact that both parties in this scenario are U.S. nationals, it is very likely that the application will be deemed domestic. Therefore, there is no need to determine whether "Congress 'affirmatively and unmistakably' expressed an intention to apply [the laws] extraterritorially."[146]

2. Jurisdictional Analysis

Article 22 of the ISS Agreement defines criminal jurisdiction on the ISS through its "clear, concise nationality-principle-approach."[147] Under Section

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141 *Id.*

142 *Id.* at §1028(a)(7).

143 *Id.*

144 *Id.*

145 *Id.*

146 Rossman, *supra* note 74; *RJR Nabisco*, 136 S. Ct. at 2100.

147 Hardenstein, *supra* note 59, at 278.

1, "each Partner State retains jurisdiction over its nationals, regardless of where they are currently located on the ISS."[148] Therefore, irrespective of where McClain was on the ISS when she accessed Worden's bank account, the U.S. retains jurisdiction. Moreover, Section 2 of Article 22 allows for the "transfer of jurisdiction and prosecution powers over one national to a separate Partner State."[149] However, this transfer of power addresses situations in which the victim is a citizen of a different Partner State than the perpetrator. Since McClain and Worden are both citizens of the U.S., Section 2 does not come into play. Therefore, the U.S. will retain complete jurisdiction.

3. Ethical Analysis

The U.S. Constitution grants several essential protections to perpetrators in the American criminal justice system. The Due Process Clause of the Fifth Amendment promises that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."[150] The Fifth Amendment also promises that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself," thus granting a privilege against self-incrimination.[151] The Fourth Amendment secures "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ."[152] Because McClain and Worden are both citizens of the U.S., there is no question as to whether McClain would be afforded these constitutional protections. Moreover, perpetrators who are citizens of the U.S. "can likely claim that the extraterritorial application of a U.S. statute violates their due process rights but, given their obvious nexus to the country and presumed knowledge of its law, they are unlikely to prevail."[153] Also, because both McClain and Worden are citizens of the same country, they are familiar with the same criminal code and therefore are not subjected to the risks associated with differing criminal codes, procedures, and definitions.

B. Perpetrator as a Citizen of a Partner State & Victim as a Citizen of the United States

1. Procedural Analysis

Hypothetically, if McClain, as a citizen of a Partner State other than the

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148 *Id.* at 281.

149 *Id.*

150 U.S. CONST. amend. V.

151 *Id.*

152 U.S. CONST. amend. IV.

153 O'Sullivan, *supra* note 75, at 1079.

U.S., was accused of identity theft and improper access to financial records of a citizen of the U.S., the victim would likely be able to file with the FTC. Consumers who have been the victim of "fraud, identity theft, or other unfair deceptive business practices" can file a complaint with the FTC.[154] Subsequently, the FTC collaborates "with law enforcement partners across the country and around the world to advance [its] crucial consumer protection and competition missions."[155] This collaboration could insure that a complaint filed by a U.S. citizen regarding a citizen of another Partner State would be handled adequately. The FTC also "cooperate[s] with international agencies and organizations to protect consumers in the global marketplace."[156] One international agency in particular – E-Consumer[157] – serves as another viable filing option for the victim in this scenario. E-Consumer allows individuals to "report international scams and learn about other steps [he or she] can take to combat fraud."[158]

Specifically, E-Consumer has two components – both are applicable in this scenario. The first is a "public website that allows consumers to make cross-border fraud complaints."[159] The second is "a secure econsumer.gov website that allows law enforcement around the world to share and access consumer complaint data and other investigative information. The secure website is hosted through the Consumer Sentinel Network platform by the U.S. Federal Trade Commission."[160] However, of the Partner States, Russia and two countries in the European Space Agency – France and Germany – are not member countries to E-Consumer.[161] This would therefore limit the success of the victim filing her complaint with E-Consumer if the perpetrator was a citizen of one of these three Partner States.

As stated above, the Supreme Court has outlined two avenues to apply U.S. criminal laws extraterritorially. The first is if "there is a sufficient United States connection with respect to the 'focus' of the underlying statute."[162] The Supreme Court in *Morrison* established a test to determine the focus of the statute: "the site of only one element of a multi-element statutory provision will control the determination of whether the relevant offense was

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[154] *Identity Theft: Filing a Complaint*, *supra* note 132.

[155] *About the FTC: What We Do*, *supra* note 131.

[156] *Id.*

[157] ECONSUMER.GOV, https://econsumer.gov/#crnt (last visited Oct.12, 2020).

[158] *Id.*

[159] *E-Consumer: About Us*, ECONSUMER.GOV, https://www.econsumer.gov/AboutUs#crnt (last visited Jan. 6, 2021).

[160] *Id.*

[161] *Member Countries*, ECONSUMER.GOV, https://econsumer.gov/MemberCountries#crnt (last visited Jan. 6, 2021).

[162] Rossman, *supra* note 74; *Morrison*, 561 U.S. at 266-67.

committed in U.S. or abroad."[163] The second avenue looks to the congressional intent and whether Congress "'affirmatively and unmistakably' expressed an intention to apply [the] law extraterritorially."[164]

An individual who has violated 18 U.S.C. § 1030(a) has, in effect, improperly accessed financial records. In this scenario, with a U.S. national as the victim and a citizen of a Partner State other than the U.S. as the perpetrator, the analysis of the statutory elements is very similar to the analysis completed in the first scenario, with U.S. citizens as both the perpetrator and the victim. This is because the bulk of the analysis comes down to the location of the third element of 18 U.S.C. § 1030(a): the information contained in a financial record of a card holder.[165] If the victim is a U.S. citizen, the location of this information and the location of the record itself, i.e., the bank account, is within the U.S. The location of the first two elements - intentionally exceeded authorized access and obtains information[166] - remains the same: the ISS is where McClain exceeded her access and obtained such information. However, the location of only one element needs to be deemed domestic in order to prove a sufficient connection between the statute and the U.S.[167] Therefore, under the *Morrison* focus test, the elements of the statute also render the prosecution under 18 U.S.C. § 1030(a) in this scenario proper.

An individual who has violated 18 U.S.C. § 1028(a) has, in effect, committed identity theft. Parallel to 18 U.S.C. § 1030(a), the heart of the analysis revolves around the second element of the statute: the means of the identification of another person.[168] Worden's citizenship in this scenario remains American. Therefore, because Worden's identification is the means at issue in this case, and as a U.S. national, she was in the U.S. at the time this crime occurred. McClain, regardless of nationality, was aboard the ISS when she accessed Worden's back account without actual authorization. Therefore, the first and third elements - knowing possession of identification without lawful authority and the use in connection with unlawful activity[169] - were committed aboard the ISS. Regardless, because the second element occurred within the U.S., under the *Morrison* focus test, the elements of the statute render the prosecution under 18 U.S.C. §1028(a) in this scenario proper as well.

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163 O'Sullivan, *supra* note 75, at 1060; *see generally Morrison*, 561 U.S. at 247.

164 Rossman, *supra* note 74; *Morrison*, 561 U.S. at 255.

165 18 U.S.C. § 1030(a)(2)(A).

166 *Id.*

167 O'Sullivan, *supra* note 75, at 1060.

168 18 U.S.C. § 1028(a)(7).

169 *Id.*

2. Jurisdictional Analysis

Article 22 of the ISS Agreement defines criminal jurisdiction on the ISS through its "clear, concise nationality-principle-approach."[170] Under Section 1, "each Partner State retains jurisdiction over its nationals, regardless of where they are currently located on the ISS."[171] Therefore, in this scenario – McClain as a citizen of a Partner State other than the U.S. – such Partner State would retain jurisdiction over McClain. Under Section 2, jurisdiction could be transferred to the U.S. if several circumstances are present. First, the misconduct must affect the life or safety of a national of another Partner State.[172] In this scenario, Worden is a citizen of the U.S. and McClain is a citizen of another Partner State. McClain's actions of allegedly accessing Worden's bank account without authorization have affected the life and safety of Worden. Therefore, the first circumstance is present in this scenario. Second, the U.S., as the affected Partner State, must request to consult with McClain's Partner State "concerning their respective prosecutorial interests."[173] If, "within 90 days of such consultation or within such other period as may be mutually agreed,"[174] either McClain's Partner State concurs in the U.S.'s exercise of criminal jurisdiction *or* McClain's Partner State "fails to provide assurances that it will submit the case to its competent authorities for the purposes of prosecution,"[175] the U.S. may exercise criminal jurisdiction. If neither of those circumstances happen within the agreed upon time period, McClain's Partner State would retain jurisdiction, under Article 22. However, the U.S. may have the ability to retain jurisdiction after certain federal courts prosecuted foreign citizens whose crimes dealt with the use of computers connected to the U.S.: in *Rushaid v. Pictet & Cie*, the use of a U.S. bank to facilitate bribe payments "was enough to sustain money laundering charges" in the U.S.; and in *United States v. Yücel*, the court found that Congress has the authority to regulate "all computers connected to the internet."[176] Each case is discussed below.

In *Rushaid,* Rasheed Al Rushaid – a Saudi resident, co-owner of Al Rushaid Petroleum Investment Corporation ("ARPIC"), and owner of Al Rushaid Parker Drilling, Ltd. ("ARPD")[177]– sued Pictet & Cie[178] ("Pictet")

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[170] Hardenstein, *supra* note 59, at 280.

[171] *Id.* at 281.

[172] ISS Agreement, *supra* note 54, at 17.

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] Rossman, *supra* note 74.

[177] Rushaid v. Pictet & Cie, 68 N.E.3d 1, 4 (N.Y. 2016). Both ARPIC and ARPD are Saudi companies.

[178] *Id.* Defendants also included Pierre-Alain Chambaz and Pictet's eight general partners.

– a "private bank with its principal place of business in Geneva, Switzerland" – "in New York state court for concealing ill-gotten money from a scheme orchestrated by three of plaintiffs' employees."[179] In addressing the defendants' motion to dismiss for lack of personal jurisdiction, the court noted that in order to be subjected to the jurisdiction of the court, defendants need not enter New York, "so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted."[180] Because the "defendants chose New York, when other jurisdictions were available," the New York connection is therefore "volitional and not [merely] coincidental."[181] Pictet was also "actively engaged in a cycle of banking transactions wherein money went from vendors to New York to Geneva, and then from Geneva to the employees."[182] Moreover, "the money laundering could not proceed without the use of the correspondent bank account," and the plaintiffs' claims required "proof that the bribes and kickbacks were in fact paid."[183] Therefore, the court concluded that the "defendants' use of the correspondent bank accounts was purposeful and that plaintiffs' aiding and abetting and conspiracy claims arise from these transactions."[184] Woodard, in this scenario, is a citizen of the U.S. Assuming the bank account McClain accessed from the ISS was associated with a U.S. bank, the U.S. would arguably be able to retain jurisdiction because of McClain's use of a U.S. bank to facilitate fraudulent actions, as did the defendants in *Rushaid*.[185]

In *Yücel,* the defendant, a citizen of Sweden, was charged in the U.S. District Court for the Southern District of New York for conspiracy to commit computer hacking.[186] Yücel allegedly created a malicious software program that allowed an individual to seize control over other computers via the internet.[187] In denying Yücel's motion to dismiss, the court adopted the Computer Fraud and Abuse Act's ("CFAA") definition of protected

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[179] *Id*. The employees "breached their fiduciary responsibilities by accepting bribes and kickbacks from certain vendors, in exchange for inflated prices and ignoring deficiencies in the vendors' services." *Id.* at 5.

[180] *Id.* at 7 (citing to Fischbarg v. Doucet*,* 880 N.E.2d 22 (2007)).

[181] *Id.* at 11 (internal quotations omitted).

[182] *Id.*

[183] *Id.* at 12.

[184] *Id.* at 6.

[185] *See generally id.*

[186] United States v. Yücel, 97 F. Supp. 3d 413, 416 (S.D.N.Y. 2015).

[187] *Id.* at 416 ("Yücel is alleged to be the original developer of the Blackshades [remote access tool] and controlled the server that hosted the Blackshades website. That server, according to the government, contained thousands of stolen usernames and passwords. This, together with email correspondence in which Yücel told a business partner that he had stolen credit card numbers, supports, in the government's view, its assertion that Yücel not only sold malware but made use of it himself.") (internal citations omitted).

computer: "a computer 'which is used in or affecting interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that *affects interstate or foreign commerce or communication of the United States.*"[188] The Supreme Court has recognized that Congress coined the phrase "affecting interstate or foreign commerce" as a "signal that it is exercising its full power under the Commerce Clause."[189] Because "the internet is an instrumentality of interstate commerce,"[190] and the "Commerce Clause allows Congress to regulate [such] instrumentalities,"[191] Congress has the authority to regulate computers connected to the internet.[192] McClain, while aboard the ISS, used a computer that had access to the internet in order to gain access to Woodard's U.S. bank account. Therefore, Congress arguably has the authority to regulate her conduct relating to this computer usage.[193]

3. Ethical Analysis

In this scenario, McClain, the perpetrator, is not a citizen of the U.S., but rather a citizen of another Partner State. Therefore, the ethical analysis considers whether McClain in this scenario would be afforded constitutional protections. The Supreme Court has ruled that "the Fourth Amendment is not violated by a warrantless search of the foreign property of a non-U.S. national who has no substantial and voluntary relationship to the United States."[194] Therefore, if government agents conduct a search outside of U.S. territory, the Fourth Amendment would only protect McClain, if she *has* a substantial connection to the U.S.[195] Conversely, lower courts have held that the Fifth Amendment's protection against self-incrimination ought to be claimable by defendants who are not U.S. citizens.[196] "Although the Supreme Court has not yet explicitly so held, lower courts have ruled that the Fifth Amendment right against compelled self-incrimination, being a trial right, should be claimable by [non U.S.] defendants who made compelled statements abroad but are on trial in the United States."[197] Additionally, U.S. Circuit Courts are

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[188] *Id.* at 417-18 (emphasis added) (citing 18 U.S.C. § 1030(e)(2)(B)).

[189] *Id.* at 419 (citing Russell v. United States, 471 U.S. 858 (1985)).

[190] *Id.* (internal citations omitted).

[191] *Id.* (citing Pierce Cnty., Wash. v. Guillen*,* 537 U.S. 129 (2003)).

[192] *Id.* ("Any computer that is connected to the internet is thus part of a system that is inexorably intertwined with interstate commerce and thus properly within the realm of Congress's Commerce Clause Power.").

[193] *See id.* at 419.

[194] O'Sullivan, *supra* note 75, 1078; *Verdugo-Urquidez*, 494 U.S. at 269-73.

[195] *See* O'Sullivan, *supra* note 75, at 1078; *see also Verdugo-Urquidez*, 494 U.S. at 269-73.

[196] O'Sullivan, *supra* note 75, at 1079.

[197] *Id*.

in agreement that "Fifth Amendment due process limitations on the exercise of extraterritorial criminal jurisdiction exist but they are split on what the applicable test is: whether due process only required that extraterritorial prosecution not be arbitrary and unfair, or whether the Due Process Clause also requires proof of a sufficient 'nexus' between the defendant and the United States."[198] Under either approach, the fact that McClain allegedly harmed a U.S. national renders extraterritoriality neither arbitrary nor unfair, and establishes a sufficient nexus between McClain and the U.S. Therefore, a due process claim is unlikely to succeed.[199] Another ethical implication to consider is the fact that the perpetrator and victim are citizens of different countries and therefore familiar with differing criminal codes. This discrepancy might pose a disadvantage to the perpetrator, especially if McClain did not know that her actions constituted a crime under U.S. criminal code if her actions would not amount to a crime in her Partner State of nationality.

C. Perpetrator as a Citizen of the United States & Victim as a Citizen of a Partner State

1. Procedural Analysis

If Worden, as a victim of identity theft, was a citizen of a Partner State other than the U.S., but the alleged perpetrator was a citizen of the U.S., Worden would likely still be able to file a complaint with the FTC. As mentioned above, the FTC is designed to protect consumers against "fraud, identity theft, or other unfair deceptive business practices" and does so through collaboration "with law enforcement partners across the country and around the world."[200] The fact that the victim is not a citizen of the U.S. should not prohibit her from filing a complaint with the FTC. Moreover, the perpetrator, as a citizen of the U.S., would be under the FTC's purview. Nevertheless, Worden in this scenario would also be able to "report [the] international scam and learn about other steps [she could] take to combat fraud"[201] through E-Consumer, provided Worden is not a citizen of Russia, France, or Germany.[202]

Extraterritorial prosecution of U.S criminal laws is proper if the "focus" of the underlying statute is sufficiently connected to the U.S., thus effectively domestic, or if Congress has "affirmatively and unmistakably" expressed an

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[198] *Id.* at 1076-77; *see also* Doyle, *supra* note 71.

[199] *See* O'Sullivan, *supra* note 75, at 1080 ("In any case. . . [non-U.S. citizens'] odds of succeeding on a due process claim are vanishingly small.").

[200] *About the FTC: What We Do*, *supra* note 131.

[201] ECONSUMER.GOV, *supra* note 157.

[202] *Member Countries*, *supra* note 161.

intention to extraterritorially apply the law.[203] The Supreme Court instructs courts to look to the location of the statutory elements in determining whether the focus was sufficient.[204] In this scenario, where the perpetrator is a U.S. national but the victim is a citizen of another Partner State, it is a much closer call as to whether the violation of the following statutes are sufficiently connected to the U.S.

In order to violate 18 U.S.C. § 1030(a) and thus improperly access financial records, an individual must "intentionally access a computer without authorization or exceed authorized access" and therefore obtain "information contained in a financial record of a financial institution."[205] The third element – that the information contained in a financial record of a financial institution[206] – revolves around the location of the victim in this case, and therefore the location of the bank account and information contained within. This scenario is different from the previous two, as the victim is no longer a citizen of the U.S. Therefore, the location of this third element is not within the U.S. and cannot be the claim of the connection. The first two elements of the statute – that the individual intentionally exceeded their authorized access and that the individual actually obtained[207] – deal with the actions of the perpetrator. Since McClain was aboard the ISS when she allegedly obtained information from Worden's bank account without authorization, it is harder to definitively determine the "location" of the actions of these elements. However, because the perpetrator is a U.S. national, this connection might be sufficient to determine that the prosecution is proper. If not, under *RJR Nabisco*, the extraterritorial application will turn on whether "Congress 'affirmatively and unmistakably' expressed an intention to apply a law extraterritorially."[208] In scenarios such as this one where the perpetrator is a U.S. citizen, Congress likely intended for the U.S. Criminal Code to apply to extraterritorial actions committed by a U.S. citizen. Therefore, while it is a much closer call, the prosecution under 18 U.S.C. § 1030(a) is likely proper as well.

In order to violate 18 U.S.C. § 1028(a), and thus commit identity theft, an individual must knowingly transfer, possess, or use, "without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, or in connection with, any unlawful activity that constitutes a violation of Federal law."[209] The second element – the means

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[203] *RJR Nabisco*, 136 S. Ct. at 2100; *Morrison*, 561 U.S. at 255.

[204] O'Sullivan, *supra* note 75 at 1060; *Morrison,* 561 U.S. at 267.

[205] 18 U.S.C. § 1030(a)(2)(A).

[206] *Id.*

[207] *Id.*

[208] Rossman, *supra* note 74; *Morrison*, 561 U.S. at 255.

[209] 18 U.S.C. §1028(a)(7).

of the identification of another person[210] – revolves around the citizenship and location of the victim. This element is insufficient to establish a sufficient connection between the statute and the U.S. because the victim is a citizen of a Partner State other than the U.S. and therefore the location of the identification is abroad. The focus therefore must come from either of the remaining two elements - knowing possession of identification without lawful authority and the use in connection with unlawful activity.[211] McClain was aboard the ISS when she possessed the identification means to access Worden's bank account without actual authorization. McClain's location does not necessarily render the connection to the U.S. sufficient. However, McClain's citizenship of the U.S. might. If not, congressional intent is likely sufficient and renders extraterritorial prosecution under 18 U.S.C. § 1028(a) proper, for the same reasons discussed in the analysis above regarding whether it is proper to apply 18 U.S.C. § 1030(a) extraterritorially in this scenario.

2. Jurisdictional Analysis

The jurisdictional analysis is essentially the same as the previous scenario, with the respective countries switched because here, McClain would be a citizen of the U.S. and Worden would be a citizen of another Partner State. Article 22, Section 1 of the ISS Agreement provides that "each Partner State retains jurisdiction over its nationals, regardless of where they are currently located on the ISS."[212] Therefore, in this scenario the U.S. would retain jurisdiction over McClain. However, Section 2 allows for the transfer of jurisdiction if several qualifications are met. First, the misconduct must affect the life or safety of a national of another Partner State.[213] For the same reasons as mentioned above, this is satisfied because the perpetrator and the victim are citizens of different Partner States and, more importantly, the misconduct affected Worden's life and safety. Second, Worden's Partner State, as the affected Partner State, must request to consult with the U.S. "concerning their respective prosecutorial interests."[214] If, "within 90 days of such consultation or within such other period as may be mutually agreed,"[215] either the U.S. concurs in the transfer of criminal jurisdiction to the other Partner State or the U.S. "fails to provide assurances that it will submit the case to its competent authorities for the purposes of prosecution,"[216] Worden's Partner State may exercise criminal jurisdiction.

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210 *Id.*

211 *Id.*

212 Hardenstein, *supra* note 59, at 281.

213 ISS Agreement, *supra* note 54, at 17.

214 *Id.*

215 *Id.*

216 *Id.*

If, however, neither of those circumstances happen within the agreed upon time period, McClain's Partner State would retain jurisdiction, under Article 22.

U.S. retaining jurisdiction might be available through other avenues after *Rushaid* and *Yücel*, even though McClain is a U.S. national. If Woodard's bank was associated with a U.S. bank, McClain would therefore have used a U.S. bank to facilitate fraudulent actions. This would arguably give the U.S. jurisdiction over the matter.[217] However, because Woodard is not a U.S. national in this scenario, her bank account being associated with a U.S. bank is unlikely. The court in *Yücel* determined that because "the internet is an instrumentality of interstate commerce,"[218] and the "Commerce Clause allows Congress to regulate [such] instrumentalities,"[219] Congress has the authority to regulate computers connected to the internet.[220] Therefore, Congress would likely have the authority to regulate McClain's conduct in this scenario because she used a computer with internet access to sign in to Woodard's bank account.[221]

3. Ethical Analysis

In this scenario, McClain, as the perpetrator is a U.S. national and is thus afforded the full range of constitutional protections in the American criminal justice system, regardless of the nationality of the victim. McClain could argue that the extraterritorial application of a U.S. statute deprives her of life, liberty, or property without the due process of law.[222] However, as discussed above, the "obvious nexus" to the U.S., along with her "presumed knowledge of its law," renders this due process claim "unlikely to prevail."[223] McClain would also be afforded the Fifth Amendment's privilege against self-incrimination, as well as the protections of the Fourth Amendment. However, because McClain and Worden would be citizens of different countries in this scenario, it might unfairly disadvantage Worden as the victim. For example, various countries almost always have differing criminal codes, and therefore different definitions of what constitutes criminal conduct. Because the perpetrator would be a citizen of the U.S., and therefore familiar with the codes of the country, the victim might not be able to receive the adequate remedy if the perpetrator had done something that constituted a crime in the

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217 *See generally Rushaid*, 68 N.E.3d 1; Rossman, *supra* note 74.

218 *Yücel*, 97 F. Supp. 3d at 419 (internal citations omitted).

219 *Id.* (citing Pierce Cnty., Wash. v. Guillen, 537 U.S. 129 (2003)).

220 *Id.* ("Any computer that is connected to the internet is thus part of a system that is inexorably intertwined with interstate commerce and thus properly within the realm of Congress's Commerce Clause Power.").

221 *See id.*

222 U.S. CONST. amend. V.

223 O'Sullivan, *supra* note 75, at 1079.

victim's country, but does not amount to a crime in the U.S. Arguably, it would be unfair to "harness individuals with knowledge of the criminal laws of other participating nations."[224]

CONCLUSION

The allegations facing Anne McClain amount to the first criminal allegations regarding conduct that occurred in outer space. This is an unprecedented situation that calls for enormous amounts of analysis to fill in the gaps of the existing space law. As John O'Brian predicted, these long-term issues have been left to develop as the "common law of the space station." [225]

Procedurally, regardless of the citizenship of the perpetrator or victim in a case like this, the victim would have the option to file a complaint with the FTC, as Worden did in August of 2019. If, however, either the perpetrator or the victim was a citizen of a Partner State other than the U.S., the victim would also have the opportunity to file a complaint with E-Consumer. The procedural analysis also discussed the extraterritorial application of U.S. criminal law in the various scenarios. Given the existing facts as they are, with both McClain and Worden as U.S. nationals, prosecution would be proper under the extraterritorial doctrine. Similarly, if McClain had been a citizen of the U.S. but Worden was a citizen of another Partner State, extraterritorial application would still be appropriate given the sufficient connection with the U.S. Lastly, in the scenario where Worden was a citizen of the U.S. and McClain was a citizen of another Partner State, extraterritorial application would likely be proper either due to the sufficient focus of the statutes or the congressional intent present.

In the present case, with both McClain and Worden as U.S. nationals, Article 22 of the ISS Agreement awards the U.S. complete jurisdictional control. However, in the second scenario – with McClain as a citizen of a Partner State and Worden as a citizen of the U.S. – the U.S. would retain jurisdiction only if it requests a consultation with the Partner State and either the Partner State agrees within some agreed upon time frame, or fails to provide adequate assurances that submit the case to competent authorities. McClain's Partner State, however, would retain jurisdiction if the U.S. fails to request consultation or the U.S. does request consultation but the Partner State either fails to agree with the transfer of jurisdiction or the Partner State provides the adequate assurances necessary. Conversely, in the third scenario – with McClain as a citizen of the U.S. and Worden as a citizen of another Partner State – the Partner State would retain jurisdiction only if it requests a consultation with the U.S. and either the U.S. agrees within some agreed upon

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[224] Young, *supra* note 53, at 508.

[225] Malpass, *supra* note 17, at 197-98.

time frame, or fails to provide adequate assurances that submit the case to competent authorities. The U.S., however, would retain jurisdiction if Worden's Partner State fails to request consultation or the Partner State does request consultation but the U.S. either fails to agree with the transfer of jurisdiction or provides the adequate assurances necessary.

The actual circumstances of the case – with both parties as U.S. nationals – pose the least amount of ethical implications. Here, McClain is awarded any and all constitutional protections and is subjected only to her own nation's laws. In the second scenario, however, with McClain as a citizen of another Partner State, McClain would not receive Fourth Amendment protections. She would have the privilege against self-incrimination and be entitled to due process. However, the differing criminal justice systems might unfairly harm McClain. Lastly, if Worden was a citizen of a Partner State other than the U.S., McClain would still receive all constitutional protections as a U.S. national. However, the differing criminal justice systems might unfairly harm Worden.

There remain many unanswered questions regarding space law. The rapid rate at which technology is advancing will likely result in a substantial increase in space exploration, giving lay persons a greater opportunity to visit outer space.[226] "When this occurs, there must be laws in place to circumscribe human behavior; for where there are humans there is inevitably potential for human conflict."[227] Political and economic interests prohibit space to be "seen as a lawless vacuum."[228] The future success of spaceflight, therefore, requires a uniform criminal code.

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[226] Seshagiri, *supra* note 16, at 477; *see* Easter, *supra* note 23, at 351 ("[R]ecreational travel is among one of the rising branches of commercial space activity, with both private and public entities expanding their uses of space.").

[227] Seshagiri, *supra* note 16, at 477.

[228] *Id.* at 478.