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Extraterritorial Criminal Enforcement of Securities Fraud Regulations after *United States v. Vilar*¹

**EDGARDO ROTMAN**

In August 2013, the Court of Appeals for the Second Circuit in the case of *United States v. Vilar* denied extraterritorial application of the criminal law antifraud provisions contained in the Securities Exchange Act. The specific object of this paper is to criticize this decision and negate its premises.

¹ A German-language version of this paper was presented at the Max-Planck Institute for Criminal Law in Freiburg, Germany, on October 8, 2014. The English-language version was presented at the University of Miami School of Law, in Florida, United States, on November 19, 2014. The paper draws from a chapter in a larger project about the internationalization of business-related criminal law. I thank Dr. Johanna Rinceanu, Prof. Attilio Nisco, and Dr. Marc Engelhart, who in June of 2014 encouraged me to pursue my project based on applying German criminal law theoretical categories to the *United States v. Vilar* analysis. I am indebted to Caroline Bradley and Elliott Manning for their crucial insights and information. I am also grateful to Prof. Dr. Ulrich Sieber, director of the Max-Planck Institute; Prof. Dr. Klaus Tiedemann; Prof. Dr. Albin Eser; Dr. Benjamin Vogler; Dean Patrick Gudridge; Prof. Richard Williamson; and Prof. Robert Rosen for valuable comments after my presentations in Germany and in the United States. Parker Crouch, Aleksa Rego, Kelsey Bloomenfeld, Alice Riviere, Katharina Funcke, Zhenying Li, and Magena Rodriguez provided outstanding research assistance. Nadia Amlaz, Alice Riviere, and Katharina Funcke helped in translating the original English text into German. Pamela Lucken provided superb reference librarianship. Doreen Yamamoto and Magena Rodriguez made excellent editorial suggestions.

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After delving in depth into the notion of extraterritoriality, the paper offers a dynamic interpretation of the 1922 Supreme Court’s decision in United States v. Bowman, which is still the governing precedent on extraterritorial application of criminal laws. Furthermore, the paper criticizes the application of the 2010 Supreme Court’s decision in Morrison v. National Australia Bank to criminal cases and explains the Dodd-Frank Act’s failed attempt to overrule it.

The paper undertakes a detailed analysis of each of United States v. Vilar’s supporting arguments, using the German criminal law model to identify some of this decision’s significant shortcomings. The paper begins with a discussion of the extent and significance of the United States v. Bowman exception to the presumption against extraterritoriality in light of the need to protect the integrity of a delocalized capital market. Next, the paper interprets section 32(a) of the Securities Exchange Act in accordance with modern developments of criminal law theory. Consequently, the paper analyzes the significant distinctions between criminal and civil law in contrast with their equation by the Vilar court. The discussion ultimately leads to a justification of the Securities Exchange Act’s extraterritorial enforcement through a contextual and dynamic interpretation of section 32(a), taking into consideration the transnational nature of market integrity and public wealth values protected by this provision.

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INTRODUCTION

In August 2013, the Court of Appeals for the Second Circuit in the case of United States v. Vilar denied extraterritorial application of the criminal law antifraud provisions contained in the Securities Exchange Act. The specific object of this paper is to criticize this decision and negate its premises.

After delving in depth into the notion of extraterritoriality, the paper offers a dynamic interpretation of the 1922 Supreme Court’s decision in United States v. Bowman, which is still the governing precedent on extraterritorial application of criminal laws. Furthermore, the paper criticizes the application of the 2010 Supreme Court’s decision in Morrison v. National Australia Bank to criminal cases and explains the Dodd-Frank Act’s failed attempt to overrule it.
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I. THE CRUCIAL ROLE OF EXTRATERRITORIAL ENFORCEMENT OF UNITED STATES CRIMINAL LAW IN THE PREVENTION AND REPRESSION OF FINANCIAL FRAUD

A. Evolution of the Notion of Extraterritoriality

In the past, extraterritorial application of national criminal laws was very limited. Extraterritoriality grew with the emergence of

2 David Hume wrote that Scottish courts “are not instituted to administer justice over the whole world, but in our country, or a particular district of it only.” 2 DAVID HUME, COMMENTARIES ON THE LAW OF SCOTLAND RESPECTING CRIMES 52 (1797), quoted in MICHAEL HIRST, JURISDICTION AND THE AMBIT OF THE CRIMINAL LAW 29 (Oxford U. Press 2003). John Austin considered extraterritorial applications of jurisdictional rules “anomalous cases” in THE PROVINCE OF JURISPRUDENCE DETERMINED 355 (Prometheus Books 2000), cited by GÜNTER HANDL, JOACHIM ZEKOLL & PEER ZUMBANSEN, BEYOND TERRITORIALITY: TRANSNATIONAL LEGAL AUTHORITY IN AN AGE OF GLOBALISM 17 (Martinus Nijhoff Publishers 2012). In MacLeod v. Attorney-General for New South Wales [1891] AC 455, 458 (Austl.), the court asserted that “all crime is local” and “the jurisdiction over the crime belongs to the country where the crime is committed.” With respect to the United States, Cedric Ryngaert points out that “[t]hroughout the history of US law, US courts have time and again pointed out the importance of the territorial principle.” CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 59 (2d ed. 2008). In their contributions to a book on the harmonization of
modern forms of globalization. In the field of securities laws, the comments to § 416 of the Restatement (Third) of Foreign Relations explain that “[a]s organized securities markets in different states are increasingly connected through electronic and institutional links,” territorial factors in the exercise of prescriptive jurisdiction may become less relevant and extraterritorial factors more important.

In early English common law, a court could not hear a case if any of what we currently call “elements of a crime” occurred outside of England. For example, in 1583, a murder committed on the foreshore came within the exclusive jurisdiction of the criminal admiralty court only “because it occurred on the seabed owned, by the Crown under the Royal Prerogative . . . .”

In the United States, the notion of extraterritoriality experienced dramatic changes since its early formulation in the 1824 Appollon case. According to this decision, a nation is entirely precluded from extending its laws beyond its own borders, “except so far as regards its own citizens.”

In the present era of globalization, the exercise of extraterritorial jurisdiction has been deemed inevitable. “The expansion of commercial and financial interstate links has increased the vulnerability
of States to adverse domestic effects of foreign activities.”

In the field of securities law, the extraterritorial reach of national law may become necessary when some states set low standards to attract investors, refuse to criminalize certain fraudulent activities such as insider trading, or avoid stringent corporate governance regulations.

There is a certain parallel between the evolution of American law and German law on the subject, especially in light of how these laws’ extraterritorial reach expanded from the end of the nineteenth century onwards.

To understand this evolution, I turn to a late nineteenth-century classic text on extraterritoriality from Ernst Beling, one of the most prestigious German scholars of that period. In 1896, extraterritorial questions were limited to the legal status of governments, diplomats and their property, ships, and certain German representatives abroad. In sharp contrast, Peter Roegele’s 2014 book, significantly titled *German Criminal Law Imperialism*, shows how German criminal law today applies extraterritorially in manifold ways. Globalization of crime, the intensification of interstate relations, and the need to protect transnational vital interests and values have determined the continuing expansion of German criminal law beyond its national borders since 1871.

**B. Extraterritoriality of Business-Related Criminal Law in a Globalized Economy**

Although criminal law, as “the most parochial of legal disciplines,” has traditionally been a stronghold of territoriality, the challenge of transnational business crimes in today’s interconnected world requires the extraterritorial application of business-related criminal laws as an indispensable condition of their effectiveness.

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10 *Id.*

11 *Id.*

12 *See generally* Ernst Beling, *Die Strafrechtliche Bedeutung der Exterritorialität* (1896).

13 *See id.*


15 *Id.* at 2, 236.

Globalization of financial markets, advances in communications and transportation technologies, decreasing relevance of national borders, emergence of computer networks, reduced state authority, increasing cyber finance and offshore banking, and high demand for American securities abroad and vice versa, have increased the potential for transnational criminal securities fraud.

The extraterritorial application of national laws constitutes an immediate response to such challenges. Other forms of internationalization of business-related criminal law that would presumably eliminate safe havens and prevent securities fraud are: a) international treaties requiring an expanding number of nations to criminalize certain business crimes; b) preventive efforts by a number of international financial institutions and standard-setting, and transgovernmental regulatory networks; and c) “soft law” harmonization of national legislations eventually resulting in convergent national business-related criminal law systems.

C. The Pros and Cons of Extraterritorial Enforcement of Business-Related Criminal Law

An inquiry into the normative aspects of extraterritorial enforcement of geographically ambiguous statutes will facilitate the understanding of specific aspects of the Vilar decision.

The extraterritorial application of criminal law provisions governing securities fraud raises significant normative issues relating to respect of the sovereignty of other nations and established principles of international law, such as non-intervention, comity, and sovereign equality. Also, such extraterritorial application may infringe upon the domestic constitutional principle of separation of powers. Moreover, from the viewpoint of democracy, extraterritorial jurisdiction may impose national laws on foreign legal subjects who did not participate in their enactment.

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18 RYNGAERT, supra note 2, at 188.
19 Id.
20 Id.
However, as John C. Coffee, Jr. points out, curtailments of extraterritoriality, when not expressly mandated by statutory provisions, “miss much, and the unfashionable word—’extraterritorial’—cannot be avoided.” He mentions four basic reasons that weigh heavily to support his conclusion: 1) the extreme mobility of major financial institutions and their ability to park abroad their high-risk operations, thus escaping the regulatory reach of their national legal systems; 2) because major financial institutions are “too interconnected to fail,” regulation of systemic risk requires extending regulations beyond domestic financial institutions to their foreign counterparts as well; 3) the preference of some countries to keep “soft law” standards “aspirational and ineffable” because they profit from extremely risky unregulated havens; and 4) the assertion of extraterritorial authority by the major financial nations as the best way to spur international bodies to develop a high consensus leading to meaningful “soft law” standards.

Another set of normative arguments supporting the extraterritorial application of national statutes can be drawn from the customary international law justifications of extraterritoriality, especially from the protective principle. Transnational securities fraud may cause serious damage to the integrity of financial markets, affecting vital economic interests of a nation. Such territorial impact justifies the extraterritorial reach of national laws under international law.

In addition, to support the extraterritoriality of securities fraud-related criminal provisions, it is useful to draw from the area of competition law: the extraterritorial reach of national criminal sanctions “enables states to protect their domestic market[s] from anti-competitive activities which, while taking place elsewhere, adversely affect the home jurisdiction.” This basic argument can be applied by analogy to the field of securities fraud. Also, here, extraterritoriality adds a deterrent effect by addressing violations unchallenged by the

22 Id. at 4–5.
23 Ariel Ezrachi & Jiří Kindl, Cartels as Criminal? The Long Road from Unilateral Enforcement to International Consensus, in CRIMINALISING CARTELS: CRITICAL STUDIES OF AN INTERNATIONAL REGULATORY MOVEMENT 419, 424 (Caron Beaton-Wells & Ariel Ezrachi eds., 2011).
home jurisdiction due to lack of legislation or enforcement powers.24 As in the case of competition law, “extraterritoriality of criminal sanctions [for securities law violations] may supplement administrative procedures in other jurisdictions.”25

In the area of competition law, the extraterritorial reach of antitrust prohibitions makes a conceptual contribution to the public perception of the need for delivering markets from restrictive practices. In this respect, the extraterritorial application of competition law-related criminal provisions has been praised for its export of “competition values.”26 The extraterritorial application of securities fraud-related criminal provisions may similarly contribute to global consensus on a fair and efficient securities market. Furthermore, the extraterritorial application of criminal law provisions to countries operating in the global market force-feeds the criminalization agenda to jurisdictions that resist extraterritoriality.27

Austen L. Parrish advocates resolving global challenges through multilateral agreements rather than through unilateral domestic action.28 He recognizes, however, that “[e]xtraterritorial regulation is not always a bad idea. In under-regulated areas, extraterritoriality can sometimes fill a gap. And it may be that extraterritorial regulation can serve as a placeholder before more comprehensive international agreement can be reached.”29

Also, the rigid application of the presumption against extraterritoriality ignores some positive effects created by the extraterritorial application of United States law, such as “promot[ing] international negotiation and cooperation.”30 A similar, positive effect had been noted in the extraterritorial application of anti-bribery laws, based

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24 See id.
25 Id.
26 Id. at 425.
27 The idea of force-feeding is used in the field of competition law. See id.
29 Id. at 402.
on the Organisation for Economic Co-operation and Development on Combating Bribery of Public Officials in International Business Transactions, by generating mechanisms that should help firms do ethical business and comply with this type of legislation.31

Sarah C. Kaczmarek and Abraham L. Newman carried out an empirical study showing that extraterritorial application of the Foreign Corrupt Practices Act dramatically increases the likelihood that foreign countries enforce their own anti-bribery norms.32 Through econometric analysis, Kaczmarek and Newman determined that “the odds of a country enforcing its first [anti-corruption] case are twenty times greater if a country has experienced extraterritorial application of the [United States Foreign Corrupt Practices Act].”33 By the same token, some pre-Morrison federal court decisions gave credit to the extraterritorial application of United States antifraud provisions for encouraging Americans to achieve a high standard of business ethics in the securities industry.34

On the negative side, the extraterritorial application of business-related criminal sanctions in one jurisdiction may undermine administrative or compliance programs in another.35 Also, extraterritorial application of this type of criminal norm may bring about a host of double-jeopardy problems.36

Mireille Delmas-Marty warns that a unilateral expansion of internal law under the guise of combating impunity risks becoming an “internationalization of hegemonic type.”37 Also, Stephen Kim Park recognizes that the possibility of this unilateral extraterritorial reach

33 Id.
35 Ezrachi & Kindl, supra note 23, at 425.
36 Id.
is “contingent on highly concentrated state power,”38 and that” the project[ion] [of a state’s] regulatory rules . . . depends on its status as an economic hegemon.”39

While recognizing the superiority of multilateral solutions, the extraterritorial application of United States securities fraud-related criminal norms cannot be dismissed merely because of their characterization as “hegemonic.” The immediate extraterritorial reach may be indispensable not only to protect investors and punish unscrupulous manipulators, but ultimately to protect the integrity of financial markets intimately related to the protection of public wealth.40 For instance, market integrity has a constitutional rank in Italy as a condition of the market economy. 41 In this regard, Salvatore Panagia believes that Article 41, section 2, in combination with Article 47 of the Italian Constitution, demonstrates that without criminal law protection of the integrity of financial markets against abuses and speculative excesses, these illegal abuses would not only destroy people’s savings, but also the private will to invest.42

The most damaging effects of securities fraud, like those of other business-related crimes, are that they create distrust toward the system and its healthy components. Sutherland underscores that the most important damage resulting from white-collar crimes is the one caused in social relations by destroying trust, depressing social morale, and producing disorganization.43 Because public trust constitutes the vital sapping of international commerce,44 an attack on it by white-collar crimes poses a challenge that justifies the extraterritorial application of national criminal laws.

38 Park, supra note 17, at 754.
39 Id.
42 Id.
43 EDWIN H. SUTHERLAND, WHITE COLLAR CRIME 13 (1967).
44 EDGARDO ROTMAN, LOS FRAUDES AL COMERCIO Y A LA INDUSTRIA 30 (1974).
II. OVERVIEW OF United States v. Vilar’s Fundamental Precedents

A. United States v. Bowman

In United States v. Bowman, the Supreme Court decided a fraudulent fuel oil claim brought by a United States-owned corporation for one of its ships. The fraud consisted of purchasing 1,000 tons of fuel oil and delivering only 600 tons. The money paid for the undelivered 400 tons was then divided among four defendants. Bowman—the ship’s engineer—and the master concocted the fraud aboard the ship with the participation of two other co-conspirators based in Rio de Janeiro.

In Bowman, the Supreme Court established that the presumption against extraterritoriality does not apply to criminal statutes that are not “logically dependent on their locality for the government’s jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud, wherever perpetrated . . . .” Limiting the locus of some criminal offenses, the Court explained, would greatly “curtail the scope and usefulness of the statute and leave open a large immunity for fraud[]” committed in a foreign country. In other words, Bowman held that the presumption against extraterritoriality is not applicable when it undermines the statute’s purpose.

B. Morrison v. National Australia Bank

In June 2010, the United States Supreme Court decided Morrison v. National Australia Bank, a case of obvious abuse of American judicial resources by Australian plaintiffs through a foreign-cubed securities fraud class action. As pointed out by Justice

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45 260 U.S. 94 (1922).
46 Id. at 95.
47 Id. at 95–96.
48 Id. at 95.
49 Id. at 98.
50 Id.
51 Id. at 102.
53 Foreign-cubed is defined as cases where there is a foreign plaintiff suing a foreign defendant for acts committed on foreign soil. See Morrison v. Nat’l Austl. Bank Ltd., 547 F.3d 167, 172 (2d Cir. 2008).
Stevens in his concurring opinion, the “case has Australia written all over it.”

_Morrison_ significantly limited the extraterritorial scope of the antifraud provisions contained in section 10(b) of the Securities Exchange Act and SEC Rule 10(b)(5), finding that these provisions do not create a private right of action for foreign purchasers of foreign securities outside the United States. Prior to _Morrison_, the Court of Appeals for the Second Circuit required that the alleged wrongful conduct had to have substantial effects in the United States in connection with securities and transactions abroad (“effects test”) or that sufficient fraudulent conduct occurred in the United States in connection with securities transactions abroad (“conduct test”). In _Morrison_, the Supreme Court knocked down nearly forty years of federal courts’ decisions, replacing their “conduct” and “effects” tests with a new “transactional” test, limiting the scope of section 10(b) to causes of action that involve “only transactions in securities listed on domestic exchanges and domestic transactions in other securities.” The Court applied a strict presumption against extraterritoriality when the “focus” of the relevant statute occurred outside the territory of the United States. The Court concluded that the “focus” of the Exchange Act “is not on the place where the deception originated, but on purchases and sales of securities in the United States.”

C. _Morrison’s Casualties_

_Morrison_ left investors unprotected in a number of situations. As explained below, _United States v. Vilar_ has compounded such flaws by depriving victims of criminal law protection.

Some of these consequences are mentioned by Justice Stevens in his concurring opinion in _Morrison_. He gives the imaginary example of an American investor buying shares of a foreign corporation that has a major American subsidiary with executives based in

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54 _Morrison_, 561 U.S. at 286 (Stevens, J., concurring).
57 _Morrison_, 561 U.S. at 273.
58 _Morrison_, 547 F.3d at 171.
59 _Morrison_, 561 U.S. at 267.
60 _Id._ at 266.
New York City. The executives mastermind a massive deception inflating the corporation’s stock, which is only listed on an overseas exchange, causing the price to plummet. To this situation Justice Stevens adds another imaginary one in which the same executives persuade an unsophisticated retiree in Manhattan, on the basis of material misrepresentations, to invest her life savings in the company’s doomed securities. Steinberg and Flannigan give a similar example of “a retiree, after being sold a doomed security in a door-to-door sale by an executive of a foreign owned U.S. subsidiary, might be barred from bringing a section 10(b) action.”

A group of forty-two professors provide a list of dismissals of securities-fraud cases since Morrison, underscoring that this deficiency in investor protection would not have happened with a “conduct” and “effects” test because these tests captured the potential complexity of the relationships among investors and issuers. Among these cases, I highlight one of a Norwegian securities firm and seven Norwegian municipalities that brought suit against various Citigroup entities. This case concerned the sale of fund-linked notes that were issued and traded outside the United States, but were structured, arranged, and managed in the United States by Citigroup’s New York subsidiaries. Applying the conduct test, the district court found that the essential core of the alleged fraud occurred in New York. Six months later, after the Supreme Court decided Morrison, the district court reversed its previous decision and granted defendant’s motion to dismiss because the fund-linked notes were listed on European stock exchanges, notwithstanding the

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61 See id. at 285 (Stevens, J., concurring).
62 See id.
63 See id.
67 See id. at 444–45.
fact that the essential core of the alleged fraud occurred in New York.69

It is noteworthy that in transnational securities fraud cases covered in the past by circuit courts’ “conduct” and “effects” tests, in both situations something happens in the United States, and therefore, Congress has an interest in them, and a presumption against such interest is unfounded.70 Precisely this circumstance is appropriately expressed in one of the earliest securities fraud Second Circuit decisions, where Judge Friendly pointed out “[t]he New Yorker who is the object of fraudulent misrepresentations in New York is as much injured if the securities are of a mine in Saskatchewan as in Nevada” and “that Congress would have wished protection to be withdrawn merely because the fraudulent promoter of the Saskatchewan mining securities took the buyer’s check back to Canada and mailed the certificate from there.”71 This is precisely one of the situations deprived from protection in Morrison.72 Federal courts adopted Judge Friendly’s position for four decades without congressional reaction, while Morrison’s interpretation lasted less than four weeks until the Dodd-Frank Wall Street Reform and Consumer Protection Act attempted to reinstate both the “conduct” and the “effects” test for actions brought by the Securities and Exchange Commission (“SEC”) and the Department of Justice (“DOJ”).

D. The United States Congress’ Failed Attempt to Overrule Morrison

Morrison left ambiguous the SEC and DOJ’s authority to bring extraterritorial actions under § 10(b). In July 2010, Congress addressed this issue in sections 929P(b) and 929Y of the Dodd-Frank Wall Street Reform and Consumer Protection Act; the most important financial reform legislation since 1934.73 These norms grant the SEC and DOJ jurisdiction over conduct within the United States

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69 See Terra Secs. ASA Konkursbo, 740 F. Supp. 2d at 444–47.
72 Knox, supra note 70.
that constitutes significant steps in furtherance of the violation, even if the securities transactions occur outside the United States and involve only foreign investors, or conduct occurring abroad that has a foreseeable, substantial effect within the United States.\footnote{See id.} In other words, Congress provided extraterritorial jurisdiction for SEC and DOJ actions under § 10(b) by using a “conduct” and “effects” test similar to the one used by the federal courts before \textit{Morrison}.

Representative Paul Kanjorski, chairman of the committee that drafted the Dodd-Frank Act sections 929P(b) and 929Y in Title IX, in his floor statement, expressed that the purpose of the reform was to grant authority to the SEC and DOJ to bring civil or criminal enforcement proceedings involving transnational securities fraud under both the “conduct” and the “effects” tests developed by the courts regardless of the jurisdiction of the proceedings.\footnote{156 CONG. REC. H5237 (daily ed. Jun. 30, 2010) (statement of Rep. Kanjorski).} Addressing the very recent Supreme Court decision in \textit{Morrison}, Representative Kanjorski reaffirmed that the bill’s provisions concerning extraterritoriality are intended to rebut the presumption against extraterritoriality “by clearly indicating that Congress intends extraterritorial application in cases brought by the SEC or the Justice Department.”\footnote{See id.}

Conversely, George T. Conway III, the lawyer who argued and won the \textit{Morrison} case for the defendant, concluded that section 929P(b) does not rebut the presumption against extraterritoriality because the provision addresses only the “jurisdiction” of the “district courts of the United States” to hear cases involving extraterritorial elements.\footnote{George T. Conway III, \textit{Extraterritoriality After Dodd-Frank}, THE HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Aug. 5, 2010), http://corpgov.law.harvard.edu/2010/08/05/ extraterritoriality-after-dodd-frank/.} Conway points out that the drafters of the Dodd-Frank Act ignored that in the \textit{Morrison} decision the Supreme Court reiterated the long-standing principle that the territorial scope of a federal law does not present a question of jurisdiction, but rather a question of substance.\footnote{See id.; see also Wulf A. Kaal & Richard W. Painter, \textit{The Aftermath of Morrison v. National Australia Bank and Elliott Associates v. Porsche}, 8 EUR.
David He considers it unlikely that any lower court would interpret the statute in contradiction with Congress’s objectives “because it is clear that Section 929P(b) intended to reinstate the conduct and effects approach for civil and criminal enforcement actions brought by the government against overseas violators . . . .”\textsuperscript{79} In addition, He cites Painter,\textsuperscript{80} expressing that “[m]ost judges will not be willing to tell Congress that, because of the way a statute is worded, it fails to accomplish anything at all.”\textsuperscript{81}

If the SEC were free from \textit{Morrison}’s jurisdictional limitations in civil actions, as the Dodd-Frank Act intended, the SEC investigations and DOJ prosecutions of criminal violations of the Securities Acts would unquestionably be free from the same restrictions. This paper challenges the \textit{Vilar} decision that extends the \textit{Morrison} jurisdictional limitations to criminal cases. \textit{Vilar} implicitly assumes that the Dodd-Frank Act was ineffective. If the Dodd-Frank Act were effective, \textit{Vilar} would become irrelevant.

### III. Critical Analysis of \textit{United States v. Vilar}

#### A. United States v. Vilar

In \textit{United States v. Vilar}, appellants Alberto Vilar and Gary Alan Tanaka were convicted of securities fraud, securities investment fraud, and conspiracy, and they were sentenced respectively to 108 and 60 months of imprisonment, required to pay $35 million in restitution, and ordered to forfeit $54 million.\textsuperscript{82} Exploiting their positions as prominent investment managers and advisors, Vilar and Tanaka solicited millions with the promise of investing the funds in predominantly safe, short-term deposits, but instead invested the money in highly volatile technology and biotechnology stocks.\textsuperscript{83}

\textsuperscript{80} Kaal & Painter, \textit{supra} note 78, at 19.
\textsuperscript{81} He, \textit{supra} note 79, at 169 n.69.
\textsuperscript{82} United States v. Vilar, 729 F.3d 62 (2nd Cir. 2013).
\textsuperscript{83} \textit{See id.} at 68.
The dot-com bubble burst of 2000 led to the precipitous fall of their investment. See id. In the midst of the catastrophe, they obtained $5 million dollars from a client by deceiving her with the false promise of an illusionary investment, while actually embezzling the entrusted funds to meet various personal and corporate obligations. See id. at 68–9. In this case, the Second Circuit held that securities fraud prohibitions section 10(b) and Rule 10b-5 do not apply extraterritorially in criminal cases. See Vilar, F.3d at 98.

B. How a Comparative Analysis of the German Criminal Law Model Can Help Identify Significant Shortcomings in United States v. Vilar

The German model consists of a set of abstract criminal law categories adopted by most of continental Europe, Latin America, and diverse parts of the world. This model is based on a comprehensive and consistent methodology that “lends itself to application to any system of criminal law regardless of its legislative foundations.”

Traditionally, German jurisprudence is regarded as a science that shares the scientific status of the social and behavioral sciences. Indeed, a prominent Spanish criminal law scholar considers the German system of criminal law to be an achievement of the human sciences.

The use of a foreign model is justified by the paucity of categorizations existing within the common law to resolve issues presented

84 See id.
85 See id. at 68–9.
88 See Vilar, F.3d at 98.
by the *Vilar* case. This conceptual dearth is decried by a number of American scholars. I will draw on the German model to develop my critical analysis of *Vilar* and include references to American scholars’ complaints about insufficiencies of United States law in this field.

C. Discussion of Each of United States v. Vilar’s Supporting Arguments

In the following sections I will cite in bold characters the relevant parts of the *Vilar* decision, followed by my respective rebuttal.

1. FIRST CRITIQUE OF *VILAR*

   “[T]he presumption against extraterritoriality applies to criminal statutes, and section 10(b) is no exception.”

   a. The extent and significance of the Bowman exception

   The *Bowman* decision excludes the presumption against extraterritoriality, as already explained, in criminal statutes that are not logically dependent on their locality for the government’s jurisdiction, but are enacted because of the right of the government to defend itself against obstruction or fraud, wherever perpetrated.

   Relying on some lower court decisions, the government claimed in the *Vilar* case that *Bowman* excluded the presumption against extraterritoriality in *all* criminal law cases. The *Vilar* court accurately rejected this incorrect interpretation. Indeed, the *Bowman* decision excludes the presumption against extraterritoriality only in *some* cases.

   However, the *Vilar* court grievously misinterprets *Bowman* by excessively narrowing its exception to the point of making it inoperative. The *Vilar* court’s erroneous interpretation of *Bowman* consists of limiting the exception to self-defense from attacks against government representatives or government property. Indeed, the *Bowman* exception to the presumption against extraterritoriality also

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92 *Vilar*, 729 F.3d at 74.
93 *Id.* at 72.
94 *Id.*
95 *Id.* at 73.
96 *Id.*
applies to governmental functions and to the vital social interests
and goals served by the government.

To demonstrate the correctness of this argument, I will start with
a grammatical interpretation. According to the 1922 Bowman de-
cision, a limitation of the locus of some crimes to the strictly territorial
jurisdiction would greatly “curtail the scope and usefulness of the
statute and leave open a large immunity for frauds as easily commit-
ted” in foreign states as in the United States.97 Furthermore, the de-
cision refers only to criminal statutes “enacted because of the right
of the Government to defend itself against obstruction, or fraud
wherever perpetrated . . .”98

The Bowman exception to the presumption against extraterritor-
iality should not be limited to natural persons that represent the
government or to the government’s property, but should be extended
to the government’s functions as well as to its vital interests and
goals. In a democratic system, the government is a means to achieve
highly important social interests. This teleological interpretation is
also confirmed by the Bowman decision when it uses the word “ob-
structions.”99 The word “obstructions” clearly refers to governmen-
tal functions.100 This interpretation is also confirmed by the exam-
pies provided in the Bowman decision as cases in which “Congress
has not thought it necessary to make a specific provision in the law
that the locus shall include the high seas and foreign countries, but
allows it to be inferred from the nature of the offense.”101 For in-
stance, “bribing a United States officer of the civil, military or naval
service to violate his duty or to aid in committing a fraud on the
United States.”102

It is also important that the Bowman decision was later used to
protect higher governmental interests, such as the environment and
the integrity of insolvency procedures. Consider the Skiriotes v.
Florida103 decision. In this case, the Florida statute forbidding the
use of diving equipment for the purpose of taking commercial

98 Id. (emphasis added).
99 See id.
100 Id.
101 Id.
102 Id. at 99.
103 313 U.S. 69 (1941).
sponges from waters within Florida’s territorial limits was applied extraterritorially on the basis that the United States is not limited by any rule of international law from extending its laws extraterritorially to protect vital national interest such as natural resources. In this happens on the high seas and in foreign countries, provided that the rights of another nation or its nationals are not infringed.

In Stegeman v. United States, the Stegemans were convicted of having transferred property from the state of Oregon to Canada after filing a petition in bankruptcy, thus knowingly and fraudulently concealing property belonging to the bankruptcy estate. The court considered that, as in Bowman, “Congress has not thought it necessary to make a specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense.” On this basis, the court considered that Congress enacted section 18 U.S.C. § 152 to serve important governmental interests and “not merely to protect individuals who might be harmed by the prohibited conduct.”

Under the exceptions to the presumption against extraterritoriality, my interpretation of Bowman therefore encompasses the criminal law provisions protecting the integrity of capital markets. Because of today’s interconnectedness of capital markets through electronic and institutional links, the importance of their location plays such a reduced role that one can no longer speak of “local” markets. The globalization of capital markets requires a global system of investment protection; as long as this does not exist, the extraterritorial application of American legal provisions remains necessary.

b. The Presumption Against Extraterritoriality Called into Question

Another line of arguments questions the merit and value of the presumption against extraterritoriality, which was challenged by some scholars after the 2010 Morrison decision. In fact, these publications followed an article published in 2010 by John H. Knox in

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104 Id. at 72–77.
105 425 F.2d 984 (9th Cir. 1970).
106 See id. at 985.
107 Id. at 986 (quoting United States v. Bowman, 260 U.S. 94, 98 (1922)).
108 Id. at 986.
the *American Journal of International Law*. Knox made a painstaking historical analysis of the presumption against extraterritoriality, showing its changing underlying rationale through time, and pointing to its contradictions and incoherent application by the United States federal courts. Dissatisfied with these jurisprudential inconsistencies, he proposed a new interpretive canon—a presumption against “extrajurisdictionality,” the most predictable of the possible options.

Knox looked into the bases of jurisdiction under international law. In those cases where the United States has sole or primary jurisdiction, the courts are free to construe statutes without any presumption against their application. When international law provides United States courts with only some basis of jurisdiction, the courts should apply a soft presumption against the application of the statute—that is, allow the courts to overcome it by indication of a legislative intent to do so. It is only when the United States entirely lacks any basis of jurisdiction under international law that a strict presumption against application of the law should be overcome by only express and clear legislative statement.

In a subsequent 2011 article, Knox addressed the *Morrison* decision, rebutting its claim that the presumption against extraterritoriality provides “a stable background against which Congress can legislate with predictable effects.” He explained how *Morrison* “exacerbated longstanding confusions in the Court’s treatment of extraterritoriality” and noted that “virtues of a presumption against extrajurisdictionality are illustrated by the very circuit court decisions that *Morrison* rejected.” Knox renewed his proposal for a presumption against extrajurisdictionality, underscoring the need to

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110 See generally id.
111 Id. at 389.
112 Id. at 353.
113 Id.
114 Id.
115 Knox, supra note 70.
117 Knox, supra note 70, at 635.
return to the roots of the presumption in the international law of legis- 

teative jurisdiction to bring the Supreme Court jurisprudence back “into coherence and in better alignment with reasonable as-

sumptions of congressional intent. . . .”

Knox pointed out that the Supreme Court showcased the pre-

sumption against extraterritoriality as predictable and stable; when 

in the Supreme Court’s hands, however, the presumption was used 

neither predictably nor stably. He underscored that the Court missed 

the opportunity to resolve the ambiguity regarding extraterritorial 

actions that affects the United States, compounding the confusion 

by emphasizing the “focus” of the statute in determining its ex-

traterritorial reach.

More recently, Zachary D. Clopton challenges the validity and 

meaningfulness of the presumption against extraterritoriality and 

proposes to replace it altogether. Clopton makes an inventory of 

all the purported justifications of the presumption against extrater-

toriality and concludes that none of them hold water. These justi-

fications from courts and scholars are based primarily on the need 

to avoid foreign conflicts and Congress’ overriding concern with 

domestic conditions. To a lesser degree, other justifications in-

clude the need to affirm the principle of separation of powers by 

avoiding judicial activism and the prevention of due process viola-

tions through extraterritorial suits.

Clopton analyzes in depth each of these purported justifications, 

showing that they are weakened by contradictory judicial decisions

\[118\] Id. Knox explains how a presumption against extrajurisdictionality would be more consistent with congressional intent and more predictable than the Court’s strict presumption against extraterritoriality.

\[119\] Id. at 653.

\[120\] Morrison, 561 U.S. at 266. The Court concluded that the “focus” of the Exchange Act “is not upon the place where the deception originated, but upon purchases and sales of securities in the United States.”

\[121\] Knox, supra note 70, at 643.


\[123\] See generally id.

\[124\] See generally id. at 10–15.

\[125\] See generally id. at 15–20.
and that these decisions reveal “the presumption is poorly attuned to either of these laudable goals.”

It is significant for the purposes of my argument that Clopton negates the absolute and immutable status of the presumption predicated by the *Morrison* decision, reminding us that the presumption is a relative tool of federal statutory interpretation and not a constitutional principle. In fact, Clopton indicates the possibility of replacing it altogether.

It is equally important that Clopton emphasizes that the rules regarding extraterritoriality should be different for civil, administrative, and criminal statutes. It is disappointing, however, that Clopton’s proposed replacement for the presumption against extraterritoriality in criminal cases happens to be the rule of lenity, a rule of interpretation that, though important within its narrow ambit of application, cannot be generalized to all cases of extraterritorial application of criminal law. The Supreme Court explains, “[t]he rule of lenity applies only if, ‘after seizing everything from which aid can be derived,’ [a court] can make ‘no more than a guess as to what Congress intended.’”

It is necessary to distinguish the external geographical ambiguity of the field of application of a criminal statute from the intrinsic ambiguity relating to the prohibition and penalties contained in the definition of the criminal offense. Here, we are not dealing with an intrinsic grievous ambiguity of a criminal statute, but with a situation in which the extraterritorial purpose of the statute, although implicit, is clear and obvious to a point that makes it unnecessary to spell out.

The cases covered by the *Bowman* exception to the presumption against extraterritoriality interpret statutory silence in situations where the unexpressed statutory purpose is clear. Without this

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126 Id. at 1.
127 See id. at 3–8.
128 Id. at 21.
129 Id. at 22–45.
130 Id. at 30–31.
provision, a misguided rule of lenity would eliminate all extraterritoriality of statutes that omit an express mention of their obvious purpose of extraterritorial application across-the-board, including the Bowman situation. Keeping the presumption against extraterritoriality limited by the exception introduced by United States v. Bowman is a more adequate solution.

2. SECOND CRITIQUE OF VILAR

The Supreme Court has already interpreted Section 10(b), and it has done so in unmistakable terms: ‘Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States.’ To permit the government to punish extraterritorial conduct when bringing criminal charges under Section 10(b) ‘would establish . . . the dangerous principle that judges can give the same statutory text different meanings in different cases.’

Refusing to apply Morrison’s decision to the criminal enforcement of securities fraud is not giving a statutory text two different meanings. Indeed, we speak about two different rules within the same statute.

Section 10(b),134 in itself, is no more than a private law prohibition. It is only when this behavior is carried out “willfully” that it becomes part of the criminal law definition contained in section 32(a).135 Section 32(a) is the proper criminal law norm.136 It establishes a serious criminal penalty and the conditions that the conduct has to meet in order to become criminal.

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136 See id.
137 See id.
The court in *Vilar* ignored that section 32(a) contains the definition of the crime, while section 10(b) generates only civil and administrative responsibilities, playing only a supplementary role when it is incorporated by reference into a criminal law rule to complete section 32(a)’s definition.138

Here, among other instances, the German criminal law model provides an answer to an American legal question. In the present case, the answer comes from the category of blanket criminal norms. Incorporation by reference into a criminal norm has received considerable doctrinal development in countries belonging to the civil law system.139 The doctrine of blanket criminal laws (*Blankettstrafgesetze*, *leyes penales en blanco*, *leggi penali in bianco*) basically consists of a special case of legislative drafting techniques that entail the incorporation by reference of a norm existing elsewhere in the legal system to complete a criminal provision.140 Karl Binding coined the word *Blankettstrafgesetze* (Blanket criminal laws) in his trailblazing work, *Die Normen und ihre Übertretung* (*Norms and their Transgression*). In the first volume of his 1922 five-volume edition, he defined blanket criminal laws as those that contained only the sanction and referenced a number of statutes and administrative or police regulations to complete the precept.141 Until such

139 The expression “civil law” is used to demarcate those systems of law derived from Roman law, including private and public law, and that are mainly located in Western Europe and Latin America, but can be also found in numerous other parts of the world. Among other sources, see HAROLD J. BERMAN & WILLIAM R. GREINER, THE NATURE AND FUNCTIONS OF LAW 571–72 (Foundation Press 1980).
140 Among many examples, see Article 310 of the Peruvian Criminal Code, “Whoever extracts aquatic flora and fauna species in prohibited times, quantities, and areas or uses prohibited fishing or hunting procedures will be punished with imprisonment no less than one year and no more than three years.” See also Article 334 of the Colombian Penal Code: “Whoever, without the permission of a competent authority or infringing existing norms, performs, experiments, introduces or propagates animals, vegetables, or hydro-biological species, or biochemical or biological agents that endanger the health or existence of those species or alter the animal or vegetable population will be punished with imprisonment of two to six years and a fine of 50 to 200 minimum monthly salaries.”
secondary rules are enacted, the blanket law is “like a wandering body searching for its soul.” Further development of this doctrine included in the category of blanket criminal laws the incorporation by reference of provisions existing within the same statute. In 1931, Edmund Mezger expanded the concept of blanket criminal law to include situations where the same body of law contains the precept in another section. These cases are called improper blanket criminal laws and cover precisely the situation of the Securities Exchange Act. This category plays a central role in business-related criminal law, where the application of blanket statutes is not only frequent, but is also typical. An example of the completion of a blanket provision is § 3 of the German Law about business crimes (WiStG) dealing with the regulation of prices, as well as with laws regulating wine (WeinG). This theory perfectly applies to the Securities Exchange Act, where section 32(a) is the blanket criminal law norm that incorporates by reference section 10(b).

As a subsidiary argument, I underscore the relativity of the unitary principle invoked by the Vilar court; that is, both civil and criminal liabilities should be dealt with in the same way when they arise from the same statute. In addition, as Jonathan Siegel recognizes, it is impossible to anticipate every possible circumstance in which a canon of construction might someday apply. “It is an error to believe that the process of statutory interpretation can ever be mechanized or reduced to a set of determinate, nondiscretionary rules.” Furthermore, in United States v. Nippon Paper Industries, Circuit Judge Lynch expressed in his concurring opinion that sometimes the

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142 Id. at 162.
143 EDMUND MEZGER, STRAFRECHT: EIN LEHRBUCH 196 (Verlag von Duncker & Humblot, 3d ed. 1949).
144 See id.
146 Id.
147 Id. at 54.
148 Id. at 56.
149 See generally United States v. Vilar, 729 F.3d 62 (2d Cir. 2013).
151 Id.
same language in a statute should not necessarily be read the same way in all contexts to which the language applies: “New content is sometimes ascribed to statutory terms depending upon context.”\textsuperscript{152} In \textit{Robinson v. Shell Oil Co.}, the Supreme Court explained that, depending on context, a statutory term might have different meanings in different sections of a single statute.\textsuperscript{153} Furthermore, Justice Stevens has repeatedly recognized that the same word can have different meanings in the same statute.\textsuperscript{154}

3. Third Critique of \textit{Vilar}

I will next address the third ground of the \textit{Vilar} decision. The government contended that section 10(b) had different requirements in private law and criminal law; therefore, they should be interpreted in a different way.\textsuperscript{155} The “government observe[d] that only private plaintiffs must prove reliance, economic loss, and loss causation, whereas only the government (in criminal cases) must prove that the fraud was committed willfully.”\textsuperscript{156} Here is the \textit{Vilar} response followed by my critique:

\begin{quote}
Critically, however, none of these differences relate to the \textit{conduct} proscribed by Section 10(b) . . . . As for the element of willfulness in criminal cases, it comes directly from Section 32 of the Securities Exchange Act of 1934, which permits criminal liability to attach to a violation of Section 10(b), only when the violation is willful. But like the elements relevant only to private plaintiffs, the requirement of proving willfulness has nothing to do with the text or interpretation of Section 10(b). In other words, Section 32 provides no basis for \textit{expanding} the conduct for
\end{quote}

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\textsuperscript{152} United States v. Nippon Paper Indus., 109 F.3d 1, 10 (1st Cir. 1997).
\textsuperscript{155} United States v. Vilar, 729 F.3d 62, 75 (2nd Cir. 2013).
\textsuperscript{156} \textit{Id.}
\end{flushright}
which a defendant may be held criminally liable under Section 10(b).157

This is another instance in which the contribution of the German criminal law model is fundamental. We concede that the conduct described in section 10(b) of the Securities Exchange Act,158 when read in isolated from Section 32(a),159 as a description of the external phase of a behavior, is the same for criminal and private law. This external conduct corresponds in German law only to the objective phase of the definition.160 The same external conduct, however, gains full significance when it is incorporated into a criminal law norm.161 Criminalization operates as King Midas. In the same way that everything King Midas touched became gold, criminalization changes the nature of the behavior it addresses. While the traditional understanding of United States common law is that conduct relevant to criminal law is basically “a willed muscular contraction,”162 this naturalistic notion of human action has long been abandoned in the majority of civil law countries.163 Following the German criminal

157 Id.
160 Modern developments in criminal law theory following the German model structure the definition of the criminal offense in two phases: an objective and a subjective. See, e.g. 1 ENRIQUE CURY URZÚA, DERECHO PENAL, PARTE GENERAL 278–79, 294 (Editorial Juridica De Chile, 2d ed. 1992).
161 When a certain behavior is criminalized, its statutory definition entails a negative judgment value, technically called the “disvalue of the action.” See HANS-HEINRICH JESCHECK & THOMAS WEIGEND, LEHRBUCH DES STRAFRECHTS ALLGEMEINER TEIL 238–46 (Dunker & Humblot Berlin 1996).
163 See definition of “civil law system” in footnote 139. Some examples of scholarship from the numerous civil law countries where a naturalist notion of conduct was overcome are from Peru, see JOSE HURTADO POZO, MANUAL DE DERECHO PENAL, PARTE GENERAL 381–394 (3d. ed. 2005); from Colombia, see FERNANDO VELAZQUEZ V., DERECHO PENAL, PARTE GENERAL 508–22 (4th ed. 2009); from Costa Rica, see GUSTAVO CHAN MORA & JAVIER LLOBET RODRIGUEZ, FRANCISCO CASTILLO GONZALEZ Y EL DERECHO PENAL COSTARRICENSE, cited in HOMENAGE AL PROF. FRANCISCO CASTILLO GONZALEZ EN SUS 70 ANOS 38–39 (2014); from Argentina, see EUGENIO RAUL ZAFFARONI,
law model, most of these countries have developed a more comprehensive and deeper concept of the nature of conduct in criminal law, which is still evolving and undergoing scholarly inquiry.  

Since the first half of the twentieth century, human conduct is no longer regarded by most civil law system specialists as a simple muscular contraction, but rather as an indivisible blend of objectivity and subjectivity. After a long process of theoretical transformation, especially since the normative theory of culpability, and even more so since the goal-oriented theory of conduct was formulated, intent and negligence are no longer considered forms of...
culpability, but part of the subjective phase of the definition of the criminal offense.

In addition to the correspondence of a particular conduct with the definition of the criminal offense, both in its objective and subjective phases, such conduct must also be wrongful and culpable in order to constitute a criminal offense. A particular conduct is wrongful when it contradicts legal norms protecting vital legal interests and values that are significant enough to justify retributive consequences instead of mere compensatory ones. This is clear in the Vilar case, where the possible punishment may reach a twenty-year sentence of imprisonment and criminal fines far exceeding the extent of the damages. Moreover, such wrongful conduct must also be culpable in the sense that the perpetrator must be personally blameworthy for the wrongful conduct.

of the value judgment. Therefore, intent and negligence are no longer elements in the structure of culpability, but elements belonging to the definition of the criminal offense to which the conduct should adjust. The teleological or goal-oriented theory of culpability revamps the structure of culpability, which is now composed of three elements. The first element is the capacity of culpability; that is, the general capacity to understand the significance of one’s wrongdoing and to determine oneself according to such understanding (e.g., infants and the insane are not capable of culpability). The second element is the possibility to understand the significance of one’s wrongdoing in a concrete situation. When actors not only lack the actual consciousness of their wrongdoing, but also lack the possibility of attaining it, they cannot be blamed (cases of mistake about the legal prohibition). The third element is the possibility to determine oneself in conformity with the requirements of the legal order. In other words, it is necessary that attendant circumstances warrant a fair expectation that actors act in harmony with the legal order to consider them blameworthy. In this respect, it is not fair to expect law-abiding behavior in situations of duress, concealment of close relatives from criminal persecution, and illegal superior orders. See generally H. Welzel, Derecho Penal Alemán, Parte General (11th ed. 1970).

168 See Jescheck & Weigend, supra note 161, at 218.

169 German criminal law considers the theory of Rechtsgut as the basic tenet of criminal law. “Rechtsgut” can be translated as the vital interests and values of the individual and society that are protected by criminal law.

170 See Jescheck & Weigend, supra note 161, at 256–60.


172 See Welzel, supra note 167, at 197.
Within the context of securities fraud, the specific word “willfully” contained in § 32(a)\textsuperscript{173} means that the action externally described in §10(b)\textsuperscript{174} must be committed with the consciousness of its wrongfulness.\textsuperscript{175} The \textit{Vilar} court erroneously stated that “willfulness” has nothing to do with the text or the interpretation of §10(b).\textsuperscript{176} Quite the contrary, “willfully” indicates the specific subjective requirement needed for the structural transformation of the conduct externally described in section 10(b) into the complex combination of external and internal elements that actually constitute a particular criminal conduct.\textsuperscript{177} To understand this transformative role of the expression “willfulness,” one should of course connect it with the high degree of wrongfulness of which the perpetrator should be aware.\textsuperscript{178} In this context, the subjective requirement of

\begin{itemize}
\item \textsuperscript{173} 15 U.S.C § 78ff (2012).
\item \textsuperscript{174} 15 U.S.C. § 78l (2012).
\item \textsuperscript{175} In the United States, the term “willfully” is surrounded with interpretive confusion. The Supreme Court has pointed out that the word “willful” is a “word of many meanings.” Spies v. United States, 317 U.S. 492, 497 (1943). In the context of securities fraud, however, the Ninth Circuit has interpreted this term correctly. The Ninth Circuit interpreted “willful” as “intentionally undertaking an act that one knows to be wrongful.” United States v. Tarallo, 380 F.3d 1174, 1188 (9th Cir. 2004). This decision is case-specific and in the United States, neither courts nor scholars have categorized this concept within a comprehensive theory of the criminal offense. “Willfulness” has neither been related to the conduct nor to the values and interests protected by the criminalization of such conduct, as it is the case in the German model.
\item \textsuperscript{176} See \textit{Vilar}, 729 F.3d at 75–76.
\item \textsuperscript{177} See \textit{supra} note 165.
\item \textsuperscript{178} See \textit{supra} note 161. The term “willfulness” (see \textit{supra} note 175) as defined by the Ninth Circuit in \textit{United States v. Tarallo}, 380 F. 3d 1174, 1183 (2004), links the intentionality with the high degree of wrongfulness needed to transform the securities fraud into a criminal offense. The decision of Congress to make a behavior criminal implies the requirement of a serious culpable wrongdoing; that is, the willful conduct should contradict basic vital social values consisting in this case in the integrity of the financial market as a crucial part of the economy. While civil and administrative actions are available for the infringement of any rule under the Securities Exchange Act, only a limited number are subject to criminal enforcement. For example, filing violations would be excluded from the latter. It is necessary that the culpability of the perpetrator should be based on a degree of wrongfulness enough to compromise the integrity of the financial market and to thus arouse the moral condemnation of society.
\end{itemize}
“willfulness” indicates a high degree of antisociality enough to justify the application of the criminal justice system. To criminally enforce a statute means that its infringement has attained such gravity that it deserves the moral condemnation of all society.

We have already used theoretical German legal approaches to reformulate the notion of human conduct to challenge the Second Circuit’s assumption that the notion of conduct is the same in both civil and criminal contexts and to interpret the nature and scope of the word “willfully.”

The adverb “willfully” is given a pivotal role in section 32(a)’s definition of the crime. It corresponds in American terminology to the mens rea of securities fraud. As mentioned earlier, some American scholars have noted insufficiencies in American law regarding this concept. These well-founded scholarly complaints justify the present article’s reliance on foreign legal systems in search for conceptual clarification. Consider, for instance, Michael L. Seigel’s complaints. Seigel denounces the massive confusion related to the interpretation of the phrase mens rea and undertakes a review of the multiple and conflicting interpretations of this key phrase, which determines whether the actor has committed a crime or not.

Seigel praises the Model Penal Code (“MPC”), published by the American Law Institute in 1962, for unifying and simplifying the common law’s mens rea terminology, and he recommends emphatically its adoption in the field of securities-related criminal offenses. It is true that the MPC has improved and unified mens rea

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179 See supra note 178.
183 See Leng-Chia Hung, Securities Markets—A Place to Get Rich Quick or a Quicksand Going Straight to Jail? The “Mens Rea” Required for Insider Trading Criminal Liability, 5 Nat’l Taiwan U. L. Rev. 2 (2010).
185 Id. at 1565.
terminology; however, it has not reached the conceptual depth achieved by other legal systems since 1962. A comparative perspective might provide American scholarship with the intellectual instrument to better understand the role and significance of a particle such as “willfully” within the context of a statute that criminalizes behavior otherwise considered to be a mere civil or administrative wrong. The need for such a contribution can be inferred from Joshua Dressler’s insights into the ambiguity of the term mens rea. Although apparently Professor Dressler is not aware of theoretical criminal law developments in the civil law world, or at least he does not refer to them, he intuitively understands some of the categories elaborated in these countries.

Dressler has clearly perceived that the words “mens rea” hide two different meanings: the “culpability” meaning and the “elemental” one. According to the former, mens rea denotes a morally blameworthy state of mind, while the latter indicates “the particular mental state” elements included in the definition of certain criminal offenses. Such a perception has led to the reformulation of the concept of criminal offense in countries that follow the German model.

In German legal literature, which has influenced most civil law countries in the last half of the twentieth century, the notions of “action,” “behavior,” and “conduct” are dealt with as inextricably linked with intent, as opposed to older approaches in which human beings were viewed as responsive machines. The expression

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188 Originally, culpability was conceived as a nexus or psychological link between the actor and the act. This link manifested itself in two forms: intent and negligence. In the latest developments of criminal law theory, culpability became a pure judgment of blameworthiness composed of three elements: capacity of culpability (i.e. sanity or age), the actual possibility of knowing the wrongfulness of the action, and the ability to conform the action to the requirements of the law. See WELZEL, supra note 167, at 214.

189 See DRESSLER, supra note 180, at 118–19.

190 See id.

191 See id.

192 See id.

193 Wolfgang Naucke, An Insider’s Perspective on the Significance of the German Criminal Theory’s General System for Analyzing Criminal Acts, BYU L. REV. 305 (1984); see also Dubber, supra note 90.

194 See GRAMMAR OF CRIMINAL LAW, supra note 162, at 289.
“willfulness” cannot be seen, as in the Vilar decision, as a mere appendage that triggers the intervention of the criminal justice system; rather, it must be viewed as a crucial element in the definition of a crime, transforming the nature and substance of the defined conduct. In these new developments of criminal-law thought, human conduct is no longer conceived as “a willed muscular contraction” but as goal-oriented. 195 Intent, therefore, traditionally defined as a form of culpability, becomes an essential component of the notion of conduct. 196 Culpability, on the contrary, is a judgment about such conduct that takes place at a later stage of analysis. 197 It consists of determining the personal blameworthiness of the perpetrator, taking into account circumstances such as mental health, maturity, possibility of knowing the transgressed legal precept, and absence of duress. 198 Dressler, as explained above, has picked up on the ambiguity of the word *mens rea*, used indifferently as a descriptive element of a particular state of mind or as culpability in the general sense of blameworthiness. 199 This is to a certain extent an approximation to similar modern doctrinal developments in the civil law system. 200

The crime of securities fraud is actually defined in section 32(a), in which “willfulness” is an essential element of this definition. For the rest, it incorporates 10(b) by reference. 201 Accordingly, it is misleading to affirm, as Judge Cabranes does in *Vilar*, that the willful commission of the fraud does not relate to the conduct prescribed by

195 Id. at 269; see Basic Concepts of Criminal Law, supra note 162, at 51–53.
196 See Cury Urzá, supra note 160, at 249, 294.
197 See Welzel, supra note 167, at 214.
198 See id.
199 See Dressler, supra note 180.
200 In the modern civil law system developments, intent has been removed from the notion of culpability and has become part of the notion of conduct and therefore of the definition of the offense. Culpability, on the other hand, is a separate element of the criminal offense considered in the last stage of the crime’s analysis consisting of a pure judgment of blameworthiness, as specified in note 188. Dressler understands that, on the one hand, the word *mens rea* means intent as part of the definition of the offense, while, on the other hand, it refers to a general judgment of blameworthiness.
section 10(b).\textsuperscript{202} Quite to the contrary, “willfully” is an essential element of the conduct, transmuting section 10(b) after its incorporation by reference to section 32(a).\textsuperscript{203}

The confusion of the court can be traced to the ambiguous nature of \textit{mens rea} in the Anglo-American tradition and how this ambiguity “loops back and undermines our understanding of human action.”\textsuperscript{204}

Judge Cabranes erroneously concludes that proving willfulness has nothing to do with the text or interpretation of section 10(b).\textsuperscript{205} He ignores that willfulness transforms the nature of the conduct. By using such an expression, the Exchange Act refers to a particular conduct that poses a social threat to the vital values and interests of the community and becomes the object of moral condemnation of a whole society.\textsuperscript{206} This is, however, just the beginning of our argument. Any homicide, rape, or larceny is criminal conduct subject to social condemnation and moral opprobrium, but the circumstances in themselves do not justify their extraterritorial application.\textsuperscript{207} \textit{Bowman} expressly underscores that many intrinsically local crimes fall within the territorial jurisdiction of the state and cannot be applied extraterritorially without an express mandate from Congress.\textsuperscript{208}

Further inquiry into the governmental and social value protected by 32(a) combined with 10(b), that is, the integrity of the securities market, leads us to conclude that such value is similar to those values protected by the Supreme Court in \textit{Bowman} and used to affirm

\begin{footnotes}{
\textsuperscript{202} United States v. Vilar, 729 F.3d 62, 75–76 (2d Cir. 2013).
\textsuperscript{204} GRAMMAR OF CRIMINAL LAW, supra note 162, at 288.
\textsuperscript{205} Vilar, 729 F.3d at 75–76.
\textsuperscript{206} See DRESSLER, supra note 180, at 118–19.
\textsuperscript{207} To justify their extraterritorial application without an express congressional mandate, it is necessary, using Chief Justice Taft’s words, that these “o[ffence]s are such that to limit their [prosecution] to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute.”’\textit{ALEJANDRO CHEHTMAN, THE PHILOSOPHICAL FOUNDATIONS OF EXTRATERRITORIAL PUNISHMENT} 76 (Oxford U. Press 2010) (internal citation omitted).
\textsuperscript{208} See United States v. Bowman, 260 U.S. 94, 98 (1922).
\end{footnotes}
the will of Congress to apply the criminal provision extraterritorially.\textsuperscript{209} The globalization of securities markets has brought about its delocalization and, therefore, places it under the \textit{Bowman} exception to the presumption against extraterritoriality.\textsuperscript{210}

After having determined that “willfulness” transforms the nature of the definition of fraud provided by section 10(b) into a criminal offense, the next step is to determine that the social value protected by such criminal provision rises to the nature of governmental interest that, according to \textit{Bowman}, justifies its extraterritorial application. The Securities Exchange Act was basically enacted to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation necessary to sustain economic growth.\textsuperscript{211} The delocalization of securities markets requires the extraterritorial application of the Act to attain these goals.

4. FOURTH CRITIQUE OF \textit{Vilar}

Here is \textit{Vilar}’s last relevant proposition, followed by my critique:

\begin{quote}
The government argues that criminal statutes ‘are concerned with prohibiting individuals . . . from defrauding American investors and from using the infrastructure of American commerce to defraud investors’ and that applying the presumption against extraterritoriality to criminal statutes ‘would create a broad immunity for criminal conduct simply because the fraudulent
\end{quote}

\textsuperscript{209} As for example, the environment in \textit{Skiriotes v. Florida}, 313 U.S. 69 (1941), and the integrity of the bankruptcy proceeding in \textit{Stegeman v. United States}, 400 U.S. 837 (1970).

\textsuperscript{210} \textit{See} note 132; \textit{see also} \textsc{Ryngaert, supra} note 2, at 187.

scheme culminates in a purchase or sale abroad.’ But much the same could be said of civil fraud statutes: Applying the presumption against extraterritoriality immunizes thieves and swindlers from civil liability for defrauding Americans abroad.\(^{212}\)

To justify the application of *Morrison* to criminal cases, the *Vilar* court considers that the strict application of the presumption against extraterritoriality has the same consequences in civil and criminal realms.\(^{213}\) If it were the same to dispense civil wrongdoers from liability as to immunize perpetrators from criminal responsibility for a certain behavior, there would be no reason to criminalize such behavior in the first place. There is a fundamental difference between reduced protection of individuals against personal damages and reduced protection of society against attacks to its vital social interests and values, such as the integrity of financial markets. This qualitative difference is reflected in the difference between civil and criminal law procedures. Securities fraud can reach such gravity as to concern not only the direct victim, but also the entire society.\(^{214}\) The award of compensatory damages results in a money transfer from one person to another, while a criminal law conviction implies the moral condemnation made by an entire society.

Business-related criminal law typically protects supra-individual vital interests and values, such as the integrity of securities markets.\(^{215}\) In a globalized economy, these legally protected collective interests have experienced such a delocalization that, to be meaningfully protected, they can hardly be constrained by strict territorial limitations.

Another aspect of the distinction between civil and criminal law that justifies its separate treatment regarding extraterritoriality is the motivation and purposes of private litigants as opposed to those of

\(^{212}\) United States v. Vilar, 729 F.3d 62, 74 (2d Cir. 2013) (internal citations omitted).

\(^{213}\) See *id*.


public prosecutors.\textsuperscript{216} *Morrison*’s merit was to curtail the abusive use of the American judicial system by Australian plaintiffs in an intrinsically Australian case.\textsuperscript{217} This case was an illustration of Lord Denning’s remark: “[a]s a moth is attracted to the light, so is a litigant drawn to the United States.”\textsuperscript{218} Foreign litigants often elect the United States forum, searching for handsome jury awards, punitive damages, contingency fees, ample discovery, and other attractions offered by American courts.\textsuperscript{219} In private actions, profit considerations command the forum selection and eclipse any public policy considerations.\textsuperscript{220}

A criminal action initiated by a public plaintiff, such as the Department of Justice, is unlikely to ignore potential international conflicts and will try to avoid them. The main reason supporting the presumption against extraterritoriality is dispelled when a branch of the United States government seriously concerned with avoiding international friction prosecutes the securities fraudsters.\textsuperscript{221} This is the


\textsuperscript{221} For a similar argument, see Daniel E. Herz-Roiphe, *supra* note 216.
reason why the Dodd-Frank Act attempted to reintroduce the “conduct” and “effects” tests for public enforcement of the United States law, whether by the SEC or the DOJ.\textsuperscript{222}

\section*{Conclusions}

The \textit{Vilar} decision incorrectly applies the \textit{Morrison} holding to a very different factual and legal setting. \textit{Morrison} is about a private law class action involving an evident abuse of the United States judicial system by Australian litigants.\textsuperscript{223} This abuse led to a unanimous rejection by the district and circuit federal courts as well as by the totality of the Supreme Court justices.\textsuperscript{224} In contrast, \textit{Vilar} is about an action brought by the Department of Justice against transnational criminals to preserve social values of the highest rank, such as financial market integrity and investors’ trust.\textsuperscript{225} The severity of the punishment, imprisonment of up to twenty years and significant fines, demonstrates the gravity of the crime for which Vilar and his accomplice were accused.\textsuperscript{226} Unlike the National Australia Bank agents in \textit{Morrison}, Vilar and his accomplice were not trying to gain U.S. jurisdiction, but rather were attempting to avoid it.\textsuperscript{227}

The Supreme Court’s \textit{Morrison} decision is silent on whether its interpretation of the Securities Exchange Act covers criminal prosecutions.\textsuperscript{228} What’s more, Justice Stevens’s concurrence was in the understanding that public enforcement of the Exchange Act’s anti-fraud provisions was not included in the holding.\textsuperscript{229}

The \textit{Vilar} court extended \textit{Morrison}’s restrictive holding to the criminal antifraud provisions of the Exchange Act, disregarding essential substantive and procedural differences between the civil and

\textsuperscript{224} See generally \textit{id.}; see also \textit{Morrison}, 547 F.3d at 172 (2d Cir. 2008).
\textsuperscript{225} See generally \textit{United States v. Vilar}, 729 F.3d 62 (2d Cir. 2013).
\textsuperscript{226} See generally \textit{id}.
\textsuperscript{227} See generally \textit{Morrison}, 561 U.S. at 247; \textit{Vilar}, 729 at 62.
\textsuperscript{228} See generally \textit{Morrison}, 561 U.S. at 247.
\textsuperscript{229} See \textit{id}. at 274 (Stevens, J., concurring).
criminal law ambit.\textsuperscript{230} The Court further ignored the dynamic character and the purposes of the Securities Exchange Act in a world of internationalized financial markets.\textsuperscript{231}

Despite its wholehearted adherence to \textit{Morrison}’s interpretation of the Act, \textit{Vilar} recognized that \textit{United States v. Bowman} had survived \textit{Morrison}.\textsuperscript{232} Such recognition opens a significant crack in the presumption against extraterritoriality, a seemingly iron wall in Justice Scalia’s own statutory interpretative methodology.

After undermining the presumption against extraterritoriality by recognizing the validity of the \textit{Bowman} exception, \textit{Vilar} tried to backtrack by giving the narrowest possible interpretation of \textit{Bowman}.\textsuperscript{233} This artificial conclusion betrays not only \textit{Bowman}’s words, but also its spirit.

It is important to bear in mind that the presumption against extraterritoriality is not a constitutional principle; it is a canon of interpretation with dubious precedential value.\textsuperscript{234} This is a case in which \textit{Morrison}’s supportive rationale should not be binding, and its interpretative methodology should not be adopted—all the more so, as in this case, when they are applied to new and different factual contexts.

Statutory interpretative methodology is not part of the holding. “[U]nder the doctrine of \textit{stare decisis} a case is important only for what it decides—for the ‘what,’ not for the ‘why,’ and not for the ‘how.’”\textsuperscript{235} In this respect, Randy J. Kozel warns against precedents defined “capaciously and inclusively in constraining future courts,” as is often the case in contemporary federal practice.\textsuperscript{236} \textit{Morrison} is an example of this unwarranted broadening of the holding’s scope.

\textsuperscript{230} See generally \textit{Vilar}, 729 at 62.

\textsuperscript{231} See id.

\textsuperscript{232} See id.

\textsuperscript{233} See id.


\textsuperscript{235} In re Osborne, 76 F.3d 306, 309 (9th Cir. 1996).

Scalia himself believes that dicta are “binding upon neither” the Supreme Court nor the inferior courts, and that they do not deserve *stare decisis* weight.\(^{237}\) Moreover, as Judge Leval pointed out, “[t]he Supreme Court’s dicta are not law,” and judges “may not treat Supreme Court’s dictum as dispositive.”\(^{238}\) Although Scalia emphasizes that the presumption against extraterritoriality has historical lineage,\(^{239}\) such circumstance does not prove binding force.\(^{240}\)

Furthermore, sections 10(b) and 32(a) of the Securities and Exchange Act should be interpreted systematically and in accordance with the purposes of the Securities Exchange Act.\(^{241}\) The definition of the crime prosecuted in *United States v. Vilar* is contained in section 32(a).\(^{242}\) As a blanket provision, this section incorporates by reference section 10(b), which provides the external description of the criminalized behavior.\(^{243}\) Moreover, section 32(a) criminalizes securities fraud by punishing it with a severity commensurate to the values protected by such criminal provision.\(^{244}\)

The term “willfully” in section 32(a) is inextricably related to the conduct externally described in section 10(b) and incorporated by reference into the criminal provision of section 32(a).\(^{245}\) The law requires a specific state of mind when securities frauds have reached the magnitude that justifies their criminalization (that is, threatening both market integrity and public wealth).\(^{246}\) The protection of these vital social values that are instrumental to the workings of the economy led the legislator to create a new criminal provision. This provision includes the more stringent requirement of consciousness of a type of wrongfulness, the magnitude of which explains such criminalization. Perpetrators must be aware of the contradiction of their

\(^{237}\) *Id.* at 187 (citations omitted) (internal quotation marks omitted).


\(^{239}\) Parrish, *supra* note 28, at 98.

\(^{240}\) Kozel, *supra* note 236, at 191.

\(^{241}\) See *supra* note 211.


\(^{244}\) 15 U.S.C § 78ff.


\(^{246}\) See *supra* notes 161,178.
behavior with vital social values to an extent that justifies their criminal law protection under section 32(a) of the Securities Exchange Act.247

Therefore, in the context of securities frauds, the adverb “willfully” stands for a manipulative or deceptive device or contrivance made unlawful by section 10b of the Exchange Act, carried out with the awareness of its inherent highly detrimental nature. The magnitude of the action’s harmfulness should be measured against its aptitude to compromise the integrity of the financial market, thus reaching the point that had led Congress to criminalize it in the first place.248 “Willfully,” therefore, is not a mere appendage disconnected from the conduct externally described by section 10(b), as Vilar shortsightedly believes.

Moreover, it is precisely the transnational nature of the values of market integrity and public wealth protected by section 32(a) that justifies the extraterritorial application of the Securities Exchange Act antifraud provisions. The globalization of financial markets regulated by the Securities Exchange Act demands a dynamic interpretation of the Act, in light of its “present societal, political, and legal context.”249

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247 See id.
248 See id.