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CPL § 20.20(2)(b): Criminal Jurisdcition Exercised Over Out-of-State Assault Committed Aboard an In-Flight Aircraft

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the *Berlin* court inadvertently may have engaged in an unwarranted act of judicial legislation.

CRIMINAL PROCEDURE LAW

CPL § 20.20(2)(b): Criminal jurisdiction exercised over out-of-state assault committed aboard an in-flight aircraft.

Section 20.20(2)(b) of the CPL provides that a New York court may exercise jurisdiction over a criminal offense in which no criminal conduct occurred in the state if "[t]he statute defining the offense is designed to prevent the occurrence of a particular effect in this state and the conduct constituting the offense committed was performed with intent that it would have such effect."[102] This potentially broad jurisdictional grant is limited by CPL § 20.10(4) which defines a "particular effect" as "a materially harmful impact upon the governmental processes or community welfare of a particular jurisdiction."[103] Despite the restrictive effect of this definition, the New York City Criminal Court, Queens County, in *People v.*

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difficulty in litigation and has been condemned as unfair in operation and unsound in principle by every modern student of the law of evidence.

Id. As a result of fervent opposition, the committee later withdrew this recommendation. *See* RICHARDSON, *supra* note 78, § 396. Professor McCormick, a noted commentator on the law of evidence, also had recommended that the statute be eliminated. According to McCormick, if the interested witness is permitted to testify, a "searching cross-examination," along with an observation of the witness' demeanor on the stand, will furnish a sufficient basis for evaluating the witness' credibility. In rejecting the statute's positive aspects, Professor McCormick stated that "[o]ne who would not balk at perjury will hardly hesitate at suborning a third person, who would not be disqualified, to swear to the false story." C. MCCORMICK, LAW OF EVIDENCE § 65 (2d ed. E. Cleary 1972).

It would appear that the Dead Man's Statute is disfavored by the New York courts. *See* Phillips v. Joseph Kantor & Co., 31 N.Y.2d 307, 291 N.E.2d 129, 338 N.Y.S.2d 882 (1972), wherein the Court, faced with an accounting malpractice situation, permitted evidence excludable at trial under CPLR 4519 to be utilized to defeat a motion for summary judgment; Ward v. Kovacs, 55 App. Div. 2d 391, 390 N.Y.S.2d 931 (2d Dep't 1977), wherein an interested plaintiff introduced into evidence the deceased defendant's deposition taken prior to trial and was then permitted to testify regarding transactions with the decedent covered in the deposition. One commentator reasoned that decisions such as *Phillips* reflect a "reluctance of the higher courts in this state to impose the bar of the statute if there is any possibility that it may be averted." 5 WK&M ¶ 4519.06. Although courts thus may seek to limit the provisions of CPLR 4519 whenever possible, the courts in *Phillips* and *Ward* did not deny completely the statute's applicability. In *Phillips*, the court ruled that the statute contains language rendering it applicable only at the actual trial, while in *Ward* the court merely construed an express exception in the statute. *See, e.g.*, Nay v. Curley, 113 N.Y. 575, 21 N.E. 698 (1889). In contrast to the decision in *Berlin*, however, the Court of Appeals in *Phillips*, stated that "[u]pon a trial, the full policy of the Dead Man's Statute will be given unstinting application." 31 N.Y.2d 307, 315, 291 N.E.2d 129, 133, 338 N.Y.S.2d 882, 888 (1972).

[102] CPL § 20.20(2)(b). *See generally* 1 M. WAXNER, NEW YORK CRIMINAL PRACTICE ¶ 1.2[1] (1976 & Supp. 1977).

[103] CPL § 20.10(4).

Corsino,[104] expansively construed section 20.20(2)(b), holding that New York may criminally prosecute an assault committed on board a jet aircraft in airspace outside the territorial jurisdiction of the State.[105]

Jose Corsino was charged with two counts of assault in the third degree,[106] and one count of harassment[107] for allegedly striking a flight steward employed by American Airlines. The incident giving rise to the prosecution took place aboard a flight originating in the Dominican Republic and bound for John F. Kennedy Airport in Queens County. Since the plane was not in New York airspace at the time of the event in question, defendant contended that the criminal court lacked jurisdiction to try him.[108] Remarking that the issue was one of first impression,[109] Judge Zelman ruled that CPL § 20.20(2)(b) provided a basis for jurisdiction because "[m]isdemeanor assaults that occur on planes en route to New York could have a materially harmful impact upon the welfare of New York's community."[110] By creating the "threat of physical harm to visitors and to residents . . . who use the airports as a means of ingress to the State,"[111] the court reasoned, such assaults have a particular effect in New York within the meaning of CPL § 20.20 (2)(b).[112] Therefore, Judge Zelman denied defendant's motion to dismiss and directed that the action proceed to trial.[113]

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[104] 91 Misc. 2d 46, 397 N.Y.S.2d 342 (N.Y.C. Crim. Ct. Queens County 1977).

[105] *Id.* at 49, 397 N.Y.S.2d at 344.

[106] N.Y. PENAL LAW § 120.00 (McKinney 1975).

[107] *Id.* § 240.25.

[108] 91 Misc. 2d at 47, 397 N.Y.S.2d at 343. Had the assault occurred in New York airspace, jurisdiction would have been available under CPL § 20.20(1)(a), which extends the power of the State criminal courts to conduct occurring within "New York State as its boundaries are prescribed in the state law, and the space over it." CPL § 20.10(1).

[109] 91 Misc. 2d at 47, 397 N.Y.S.2d at 344. Although the CPL has been in effect for over 6 years, the "particular effect" provision rarely has been the subject of judicial interpretation. It appears, however, that Judge Zelman overlooked two recent New York cases which construed this statute. *See* Steingut v. Gold, 54 App. Div. 2d 481, 388 N.Y.S.2d 622 (2d Dep't 1976); People v. Puig, 85 Misc. 2d 228, 378 N.Y.S.2d 925 (Sup. Ct. N.Y. County 1976), *discussed in* notes 118-120 and accompanying text *infra*.

[110] 91 Misc. 2d at 48, 397 N.Y.S.2d at 344.

[111] *Id.* In order to convict Corsino of the offenses with which he was charged, the criminal court first had to establish that it had jurisdiction pursuant to § 20.20 of the CPL, which prescribes the criminal jurisdiction of the state. Since the remaining subsections of CPL § 20.20 were inapplicable to the circumstances of *Corsino*, *see* CPL § 20.20, the court had to fit the case within the language of § 20.20(2)(b) or dismiss for lack of jurisdiction.

[112] 91 Misc. 2d at 49, 397 N.Y.S.2d at 344.

[113] *Id.* at 50, 397 N.Y.S.2d at 345. It would seem that defendant Corsino could have been prosecuted under the Federal Aviation Act, 49 U.S.C. §§ 1301-1542 (1970 & Supp. V 1975). Section 1472(j) of that Act provides:

It would seem that the *Corsino* court erroneously applied the statutory formula of section 20.20(2)(b). To the extent that it confers criminal jurisdiction over extraterritorial acts merely threatening to have an effect in New York, section 20.20(2)(b) appears to be derived from the protective theory of jurisdiction. Under this principle, a state may prosecute conduct occurring totally without its borders if such conduct might have an adverse impact upon the governmental processes of the state.[114] Protective jurisdiction classically would be exercised only over activities proscribed by statutes enacted to preserve the sovereignty of the state or uphold other important state interests.[115] Similarly, CPL § 20.20(2)(b) may be

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> Whoever, while aboard an aircraft within the special aircraft jurisdiction of the United States, assaults . . . any flight crew member or flight attendant (including any steward or stewardess) of such aircraft, so as to interfere with the performance by such member or attendant of his duties . . . shall be fined . . . or imprisoned.

Id. § 1472(j) (1970). The "special aircraft jurisdiction of the United States" includes "any . . . aircraft within the United States" as well as "any other aircraft outside the United States that has its next scheduled destination or last point of departure in the United States, if that aircraft next actually lands in the United States . . . while that aircraft is in flight." *Id.* § 1301(34)(c), (d), (e) (Supp. V 1975). An examination of federal cases indicates that assaults upon aircraft crew members have been prosecuted under 49 U.S.C. § 1472(j). *See, e.g.*, United States v. Meeker, 527 F.2d 12 (9th Cir. 1975) (assault upon pilot of private plane); Mims v. United States, 332 F.2d 944 (10th Cir.), *cert. denied*, 379 U.S. 888 (1964) (assault upon flight crew member).

In sustaining the exercise of jurisdiction in *Corsino*, the court rejected the argument that this federal criminal statute preempted state prosecution of in-flight crimes. 91 Misc. 2d at 49, 397 N.Y.S.2d at 344-45 (citing H.R. REP. No. 958, 87th Cong., 1st Sess. 4, *reprinted in* [1961] U.S. CODE CONG. & AD. NEWS 2564), wherein Congress declared its intention that the state criminal law coexist with the federal statute. The *Corsino* court noted that a state statute will not be deemed to have been preempted in the absence of either a congressional intent to occupy the entire field or a direct conflict between the state and federal legislation. 91 Misc. 2d at 49, 397 N.Y.S.2d at 344. *Accord*, Head v. New Mexico Bd. of Examiners, 374 U.S. 424, 430 (1963). *See also* Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975). Finding neither of these factors present in the instant situation, Judge Zelman concluded that New York may prosecute defendant for an in-flight assault. 91 Misc. 2d at 49-50, 397 N.Y.S.2d at 345.

[114] As traditionally stated, the protective theory empowers a state "to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its security as a state or the operation of its governmental functions, provided the conduct is generally recognized as a crime under the law of the states that have reasonably developed legal systems." RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW § 33 (1965) [hereinafter cited as RESTATEMENT].

[115] *See* note 114 *supra*. The protective theory was exhaustively treated in a landmark study of the principles of criminal jurisdiction. *See Harvard Research in International Law, Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435 (Supp. 1935) [hereinafter cited as *Harvard Research*]. According to this study, protective jurisdiction renders states competent to legislate for the punishment of crimes threatening the "security, integrity, or independence" of the state. *Id.* at 543. *See* United States v. Pizzarusso, 388 F.2d 8, 10-11 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968); RESTATEMENT, *supra* note 114, § 33, Comment d at 93. *But see* United States v. Daniszewski, 380 F. Supp. 113 (E.D.N.Y. 1974), wherein the court, in the course of upholding federal criminal jurisdiction, indicated that the purview of the protec-

invoked as a jurisdictional predicate when "[t]he statute defining the offense is designed to prevent the occurrence of"[116] conduct having a "materially harmful impact upon the governmental processes or community welfare of a particular jurisdiction."[117] As construed in several recent New York decisions, this language authorizes criminal prosecution of extraterritorial offenses violative of enactments "designed to uphold the integrity of governmental or judicial processes of the State or its subdivisions;" it does not permit the exercise of jurisdiction over offenses defined by penal statutes relating to the general community welfare.[118]

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tive theory is not "confined to those species of conduct abroad that threaten certain narrowly defined interests in the security of the enacting state and in the integrity of its governmental operations"; rather, the court was of the opinion that the theory encompasses all "acts abroad which threaten the peace of the enacting state as that peace lies in the security of its citizens from criminal intrusion." *Id.* at 115-16.

The protective theory must be distinguished from another principle of jurisdiction known as the objective territorial theory. Pursuant to the latter principle, a state may prosecute an individual for extraterritorial conduct that *actually produces* adverse effects in the state. *See, e.g.*, Ford v. United States, 273 U.S. 593 (1927); Strassheim v. Daily, 221 U.S. 280 (1911); United States v. Fernandez, 496 F.2d 1294 (5th Cir. 1974); RESTATEMENT, *supra* note 114, § 18. In contrast, where the out-of-state conduct only has a *potentially* adverse effect upon the governmental processes of the state, the proper basis for jurisdiction is the protective principle. *Id.*, § 33, Comment d at 93.

The federal courts have made extensive use of the protective and objective territorial theories to prosecute foreign perpetrators. *See, e.g.*, United States v. Fernandez, 496 F.2d 1294 (5th Cir. 1974) (jurisdiction under objective territorial theory to try defendant for uttering in Mexico forged checks drawn on the United States Treasury); United States v. Williams, 464 F.2d 599 (2d Cir. 1972) (objective territorial theory relied upon to prosecute Jamaican citizen for aiding illegal aliens to gain entry into the United States); United States v. Pizzarusso, 388 F.2d 8 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968) (federal district court has jurisdiction under the protective principle to try a Canadian citizen for knowingly falsifying a visa application at the consulate in Montreal); Rocha v. United States, 288 F.2d 545 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961) (jurisdiction available under the protective theory to try defendants for conspiracy to gain unlawful entry into the United States).

[116] CPL § 20.20(2)(b).

[117] *Id.* § 20.10(4).

The provisions of the CPL also embody other principles of jurisdiction. For example, CPL § 20.20(1) prescribes the territorial jurisdiction of New York's criminal courts. *See* CPL § 20.20, commentary at 45 (McKinney 1971). In addition, certain subsections of CPL § 20.20(2) are premised upon the objective territorial principle of jurisdiction. Thus, New York criminal courts may prosecute extraterritorial conduct where "[t]he offense committed was a result offense and the result occurred within [New York]," *id.* § 20.20(2)(a), or where an overt act in furtherance of an out-of-state conspiracy to commit a crime in New York occurred within this State. *Id.* § 20.20(2)(d). In both of these situations an "effect" *actually* is produced within New York, as is required under the objective territorial principle. *See* note 115 *supra*.

[118] People v. Puig, 85 Misc. 2d 228, 235, 378 N.Y.S.2d 925, 935 (Sup. Ct. N.Y. County 1976). For a discussion of *Puig*, *see The Survey*, 50 ST. JOHN'S L. REV. 771, 807 (1976), wherein it was concluded that the purpose of CPL § 20.20(2)(b) is to protect New York from out-of-state offenses which tend to corrupt its governmental processes. *Id.* at 811.

In Steingut v. Gold, 54 App. Div. 2d 481, 388 N.Y.S.2d 622 (2d Dep't 1976) the Appellate Division, Second Department, had occasion to construe CPL § 20.40(2)(c), which apportions the "jurisdiction" of counties within New York State. Under CPL § 20.40(2)(c), a criminal

It is suggested that the sections of the penal law punishing assault in the third degree and harassment were not promulgated to preserve the integrity of the state and therefore are not within the class of offenses over which CPL § 20.20(2)(b) jurisdiction may be exercised.[119] Unfortunately, the *Corsino* court failed to consider whether the offenses of assault and harassment are within the ambit of section 20.20(2)(b). Instead, the court focused its analysis upon the harmful effect in New York of a *physical* act of assault committed aboard an in-flight aircraft.[120] In so doing, Judge Zelman apparently reached an incorrect decision to uphold jurisdiction over Corsino's allegedly criminal conduct.[121]

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court of a particular county may exercise jurisdiction over conduct occurring outside the county if "[s]uch conduct had, or was likely to have, a *particular effect* upon . . . [the county in which the court is sitting] and was performed with intent that it would . . . have such *particular effect* therein." *Id.* (emphasis added). Although *Steingut* does not deal specifically with CPL § 20.20(2)(b), the case is pertinent because it interprets the term "particular effect," which is contained in § 20.20(2)(b) as well as § 20.40(2)(c). The *Steingut* court found that for conduct to have a particular effect, it "must cause a harmful impact, not on any individual or individuals, but on a whole community and the harm must be to 'governmental processes' (i.e., the executive, legislative and judicial branches of government) or to the welfare of an entire community." 54 App. Div. 2d at 488, 388 N.Y.S.2d at 627. The court stressed that the impact must be "definable and important." *Id.*

Thus, under both the *Steingut* and *Puig* readings of the words "particular effect," there is no jurisdiction over out-of-state conduct under CPL § 20.20(2)(b) unless such conduct violates a statute intended to protect the integrity of the state. This view is in accord with the legislative history of CPL § 20.20(2)(b), which indicates that the section was intended to protect the governmental processes of the state. *See* TEMPORARY COMM'N ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, PROPOSED NEW YORK CRIMINAL PROCEDURE LAW § 10.20(3), Staff Comment at 41 (1967), wherein it was stated: "The kinds of offenses contemplated by [the section] are exemplified by bribery and perjury, the 'effects' of which are confined to corruption of New York's governmental and judicial processes."

[119] *See* People v. Puig, 85 Misc. 2d 228, 378 N.Y.S.2d 925 (Sup. Ct. N.Y. County 1976), wherein the court held that § 20.20(2)(b) jurisdiction does not extend to extraterritorial conduct violative of the controlled substance sections of the penal law; CPL § 20.20(2)(b), commentary at 48 (McKinney 1971); note 118 *supra.*

[120] *See* 91 Misc. 2d at 48, 397 N.Y.S.2d at 344. The court in People v. Puig, 85 Misc. 2d 228, 378 N.Y.S.2d 925 (Sup. Ct. N.Y. County 1976), warned against this improper application of § 20.20(2)(b) when it stated that "[t]he [subsection] does not speak . . . in terms of the possible impact of the out-of-State conduct alleged in the indictment, but rather in terms of the *design or intent* of the statute defining the offense." 85 Misc. 2d at 233, 378 N.Y.S.2d at 934 (emphasis added).

[121] There exists another reason for questioning the *Corsino* result. A second requirement for § 20.20(2)(b) jurisdiction is that defendant have an intent to bring about a particular effect in New York. CPL § 20.20(2)(b). *See* CPL § 20.20(2)(b), commentary at 48 (McKinney 1971); R. PITLER, NEW YORK CRIMINAL PRACTICE UNDER THE CPL § 1.8 (1972). No inquiry was conducted by the court, however, concerning defendant's state of mind at the time he performed the relevant conduct. It is somewhat unlikely that defendant, who was alleged to have been involved in a mid-air assault, had an intent to cause a particular effect in New York. In any event, it is submitted that the court's failure to consider this issue renders its decision suspect.

By failing to apply properly the jurisdictional predicate contained in CPL § 20.20(2)(b), it is submitted that the *Corsino* court extended New York's extraterritorial criminal jurisdiction to a situation not envisioned by the legislature[122] nor justified by the language of the statute.[123] It is hoped that future decisions will adhere to the test established by the CPL and thereby limit criminal jurisdiction to the bounds prescribed by the legislature.

FAMILY COURT ACT

Family Court Act §§ 413-414: Divorced mother must share in the financial support of her children.

As a consequence of the current focus upon equal treatment of the sexes,[124] courts have been faced with an increasingly large number of equal protection challenges directed at statutes employing sex-based classifications.[125] It is not surprising, therefore, that sections 413[126] and 414[127] of the Family Court Act, which seem to place the primary obligation for child support upon the father,[128] have

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[122] *See* note 118 *supra.*

[123] *See* notes 114-118 and accompanying text *supra.*

[124] For a general overview of the changing status of women and the effects of the women's rights movement see W. CHAFE, WOMEN AND EQUALITY (1977). *See generally* CALIFORNIA COMMISSION ON THE STATUS OF WOMEN, IMPACT ERA LIMITATIONS AND POSSIBILITIES 144-215 (1976); S. FELDMAN, THE RIGHTS OF WOMEN 31-71 (1974); I. MURPHY, PUBLIC POLICY ON THE STATUS OF WOMEN 19-100 (1973); THE WOMEN'S MOVEMENT 41-63 (H. Wortis & C. Rabinowitz eds. 1972).

[125] *See, e.g.,* Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971). New York courts also have been confronted with equal protection attacks upon various statutes. *See, e.g.,* People v. Moss, 80 Misc. 2d 633, 366 N.Y.S.2d 522 (Sup. Ct. Kings County 1975); *In re* Louise B., 68 Misc. 2d 95, 326 N.Y.S.2d 702 (Family Ct. Monroe County 1971). Moreover, passage of the New York Human Rights Law, codified in N.Y. EXEC. LAW §§ 290-301 (McKinney 1972 & Supp. 1976-1977), has led to the invalidation of several statutory distinctions based upon sex. *See, e.g.,* Board of Ed. v. State Div. of Human Rights, 42 App. Div. 2d 49, 345 N.Y.S.2d 93 (2d Dep't 1973), *aff'd mem.*, 35 N.Y.2d 675, 319 N.E.2d 203, 360 N.Y.S.2d 887 (1974).

[126] N.Y. FAM. CT. ACT § 413 (McKinney 1975) provides in pertinent part:

> The father of a child under the age of twenty-one years is chargeable with the support of his child and, if possessed of sufficient means or able to earn such means, may be required to pay for such child's support a fair and reasonable sum according to his means, as the court may determine.

[127] *Id.* § 414 states that

> [i]f the father of a child is dead, incapable of supporting his child, or cannot be found within the state, the mother of such child is chargeable with its support where such child has not attained the age of twenty-one years and, if possessed of sufficient means or able to earn such means, may be required to pay for its support a fair and reasonable sum according to her means, as the court may determine. The court may apportion the costs of the support of the child between the parents according to their respective means and responsibilities.

[128] Prior decisions, reflecting the early common law position, found that the obligation