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Aircraft Hijacking: Criminal and Civil Aspects

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psychiatric personnel, were able to provide help and support to the mother.[94] If two physicians felt the woman could not handle her pregnancy, physically or psychically, an abortion was granted. One prerequisite for an abortion based on nonphysical reasons was that the woman must be given information on the help and support that would be available to her during pregnancy and after childbirth.[95] The important aspects of the program is that it recognizes the social, economic, or personal reasons for desiring an abortion; and it tries to solve these problems so as to motivate the woman not to abort.[96] It is a far more successful and constructive means of prevention than is punishment. Such an approach helps the mother adjust to the physiological and emotional changes that are a normal occurrence during the first months of pregnancy.

CONCLUSION

The ultimate means of preventing abortions is increased sex education, particularly in the field of contraception. But since contraceptive techniques are not completely perfected, society is faced with the abortion question. Society must then decide if, in fact, forced parenthood is within its best interests or those of the child or parents. In view of the reluctance of state legislatures to handle this question, advocates of abortion reform will now turn to the courts for protection of their constitutional rights.

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AIRCRAFT HIJACKING: CRIMINAL AND CIVIL ASPECTS

"Will I reach my destination?" Because of the increasing number of aircraft hijackings, this question is on the minds of a substantial number of those who travel by air. Luckily, to date, unlawful seizure of aircraft by persons demanding to go to Cuba has not resulted in a major aircraft tragedy. The odds that sooner or later this good fortune will cease appear probable, and the menace to the integrity of our airways will then become all too real.

For purposes of analyzing the problem of aircraft hijacking, this note discusses separately the criminal and civil aspects of the problem. The applicable criminal law, methods of preventing and detecting potential hijackers, and issues of venue and jurisdiction are discussed in Part I. Part II addresses itself primarily to the civil liability of the airline to the passengers on board a hijacked aircraft, and considers such issues as choice of law, relative international agreements, and possible theories of recovery, including applicable tariffs.

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94. D. SMITH, *supra* note 84, at 150-51.
95. *Id.* at 150.
96. *Id.* at 165.

PART I: CRIMINAL ASPECTS

Hijacking an aircraft in flight may subject the offender to criminal prosecution and conviction under both federal and state law.[1] Sanctioned conduct may be directed against the aircraft itself, the personnel, or passengers on board. Applicable state laws, the authority of the federal government to legislate, federal ancillary offenses, the need for a specific hijacking statute, and discussion of the 1961 Amendment to the Federal Aviation Act, including its proposed strengthening, are noted in Section *A*. Obtaining personal jurisdiction over hijackers by means of extradition is also briefly touched upon under this first section.

Section *B* analyzes means used in addition to criminal sanctions to meet the demands of the current hijacking crisis. The airlines have responded by according widespread publicity of the punishment received for conviction of hijacking and related offenses, studying the personality characteristics of potential offenders, and developing arms-detection devices in an effort to prevent likely hijackers from boarding their aircraft. Further discussion in this section is directed to the right to search passengers and the legal consequences incident thereto, in addition to possible solution of the problem by lifting the qualified travel ban to Cuba.

The 1961 Amendment to the Federal Aviation Act appears to extend United States jurisdiction over offenses committed on board aircraft far beyond the permissible bounds of international law. Section *C* briefly notes the issue of venue relevant to prosecuting hijackers and discusses at length the international basis upon which the United States can obtain jurisdiction pursuant to the 1961 Amendment.

A. The Criminal Consequences of Aircraft Hijacking

Florida, like its sister states, has no legislation directed toward aircraft hijacking per se.[2] Florida has laws, however, encompassing such offenses as aircraft larceny,[3] shooting at or within aircraft,[4] causing death resulting from tampering with aircraft,[5] and for numerous other offenses committed in or against aircraft while in flight or on the ground within the state boundaries.[6] In effect, the entire criminal code of Florida is applicable to offenses committed aboard aircraft so long as they occur within the territorial boundaries

1. *Accord*, Abbate v. United States, 359 U.S. 187 (1959); Frisbie v. Collins, 342 U.S. 519 (1952), *rehearing denied*, 343 U.S. 937 (1952). *See generally* Clark v. United States, 267 F.2d 99 (4th Cir. 1959). *See also* text accompanying note 3 *infra*.

2. A search of appropriate sources has revealed no specific state legislation on the matter. Bradford, *The Legal Ramifications of Hijacking Airplanes*, 48 A.B.A.J. 1034 (1962).

3. FLA. STAT. §811.021 (1967); *see* Fla. H.R. 372, Reg. Sess. (1969), making the breaking and entering of an aircraft a crime. The bill was not voted upon during the 1969 session and has been prefiled for the 1970 session.

4. FLA. STAT. §790.19 (1967).

5. FLA. STAT. §782.06 (1967).

6. FLA. STAT. §910.02 (1967); *see* Brown, *Jurisdiction of United States Courts Over Crimes in Aircraft*, 15 STAN. L. REV. 45 (1962).

of, or airspace above, the state.[7] The extraterritorial jurisdiction[8] of the state might allow prosecution of an aircraft hijacker for kidnapping[9] even if the aircraft were seized out of the state but passed through Florida's airspace enroute to the hijacker's destination. Although the hijacker's motive for seizing the plane may be nonpecuniary, he can nevertheless be prosecuted for kidnapping.[10]

The federal government derives its authority to legislate concerning the airspace above the United States from either of two sources: sovereignty and the power incident thereto, limited only by international law; and specific grants in the United States Constitution.[11] There is ample authority to support either theory,[12] and regardless of which is relied upon it is well established that the federal government shares concurrent jurisdiction in this area with each of the states.[13]

Aside from the specific offense of hijacking,[14] the hijacker subjects himself to prosecution for a variety of ancillary federal offenses that are determined by the method employed to consummate the unlawful act. Offenders have often threatened to discharge explosives in order to coerce the pilot to alter his flight plan. The offender may or may not have had the means to carry out his threats; nonetheless such utterances are a violation of the "Bomb Hoax" statute.[15] In addition, the unlawful expropriation of the aircraft for his

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7. Because federal courts have no common law criminal jurisdiction, to confer jurisdiction on federal courts federal legislation must specifically enumerate which acts are offenses aboard aircraft. Bray v. United States, 289 F. 329 (4th Cir. 1923).

8. FLA. STAT. §910.01 (1967): "When the commission of an offense committed elsewhere is consummated within the boundaries of this state, the offender shall be liable to punishment here, though he was out of the state at the commission of the offense charged, if he consummated it in this state through the intervention of an innocent or guilty agent, or by any other means proceeding directly from himself. The jurisdiction in such case, unless otherwise provided by law, shall be in the county in which the offense was consummated." *See generally* Comment, *Criminal Law: Personal Jurisdiction Obtained by Kidnapping*, 5 U. FLA. L. REV. 434 (1952).

9. FLA. STAT. §805.01 (1967).

10. United States v. Healy, 376 U.S. 75 (1964); *accord, e.g.*, Epperson v. State, 211 Ind. 237, 6 N.E.2d 538 (1937).

11. *See* Brown, note 6 *supra*; Empson, *The Application of Criminal Law to Acts Committed Outside the Jurisdiction*, 6 AM. CRIM. L.Q. 32 (1967). *See also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §16 (1965).

12. *See* Brown, note 6 *supra*; Empson, note 11 *supra*; *Convention on International Civil Aviation*, 61 Stat. 1180 (1944): Article 1, "The contracting states recognize that every state has complete and exclusive sovereignty over the airspace above its territory."; 49 U.S.C. §1508(a) (1964). "The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States . . . ." *See also* H.R. REP. No. 958, 87th Cong., 1st Sess. 7 (1961). "Nothing in this legislation is to be taken to indicate that the United States is surrendering any part of its sovereignty over the airspace above its territory." *But see* Braniff Airways v. Nebraska State Bd. of Equalization & Assessment, 347 U.S. 590, 597 (1954).

13. Braniff Airways v. Nebraska State Bd. of Equalization & Assessment, 347 U.S. 590, 597 (1954); *see* H.R. REP. No. 958, 87th CONG., 1st Sess. 4 (1961).

14. 49 U.S.C. §1472(i) (1964).

15. 18 U.S.C. §35 (1964); *see* Carlson v. United States, 296 F.2d 909 (9th Cir. 1961); *Criminal Law-Aviation-Bomb Hoax*, 30 J. AIR L. & COM. 390 (1964); *See generally* 18 U.S.C.

personal use further subjects the offender to prosecution.[16] Most apparent of the ancillary crimes that a hijacker commits is kidnapping.[17]

The need for federal legislation dealing specifically with hijacking and other criminal acts committed aboard aircraft in flight is evidenced by the difficulties of prosecution encountered under existing state law.[18] As one commentator has noted:[19]

> [T]he State above which the crime may have been committed is often not the State in which the aircraft lands. The second State has no jurisdiction over the crime and cannot even arrest the criminal when the crime was completed in the first State. If the first State is disposed to act, it has first to collect the evidence that a crime has in fact been committed within its State jurisdiction. All the evidence of this went with the aircraft to the State of the landing. The witnesses would have dispersed soon after landing. Assuming that an indictment may be returned in the first State, the question of extradition from the [landing state to the overflown state] remains. Not all crimes are extraditable: Time and expense are involved, and litigation is frequently necessary.

The Federal Aviation Act of 1958 was amended in order to solve the "jurisdictional problems involved in fixing a locus for a crime committed in transit and in arresting a deplaning passenger who may have engaged in criminal activity over the territory of a different State."[20] The amendment does not divest the states of jurisdiction; it merely seeks to establish concurrent jurisdiction, thus affording a greater likelihood of arrest and prosecution of those accused of committing offenses aboard aircraft.[21] By amending the Act Congress sought to make criminal certain acts committed aboard aircraft in flight in air commerce. These acts had formerly been federal offenses only when occurring within the special maritime and territorial

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§34 (1964); 15 U.S.C. §1281 (1964).

16. 18 U.S.C. §2312 (1964); see Stewart v. United States, 395 F.2d 484 (8th Cir. 1968) (defendant was convicted of transporting a stolen airplane in interstate commerce after leasing the aircraft in Florida and fraudulently flying it to Iowa without the permission of the lessor). *Contra*, McBoyle v. United States, 283 U.S. 25 (1931) (held airplane not included under statute that forbids interstate transportation of stolen motor vehicles). *See generally* Weaver v. United States, 374 F.2d 878 (5th Cir. 1967); 18 U.S.C. §659 (1964) (interstate or foreign shipments by carrier; state prosecutions).

17. 18 U.S.C. §1201 (1964). *See* 18 U.S.C. §3237 (1964) (offenses begun in one district and completed in another); Travis v. United States, 364 U.S. 631 (1961); Clinton v. United States, 293 F.2d 47 (10th Cir. 1961). *See generally* Loux v. United States, 389 F.2d 911 (9th Cir. 1968); 18 U.S.C.A. §3235 (1964) (venue in capital cases).

18. H.R. REP. No. 958, 87th Cong., 1st Sess. 4, 5 (1961).

19. Bradford, *supra* note 2, at 1034.

20. United States v. Healy, 376 U.S. 75, 85 (1964).

21. H.R. REP. No. 958, 87th Cong., 1st Sess. 5 (1961), repeatedly emphasizes that Congress by no means wishes to exert exclusive jurisdiction in this area, but desires simply to supplement existing state law in an effort to increase the deterrent for such offenses. Moreover, the Federal Aviation Act, 49 U.S.C. §1472(n) (1964), *as amended*, authorizes the Federal Bureau of Investigation to investigate offenses enumerated.

jurisdiction of the United States.[22] The prohibited acts are: assault,[23] maiming,[24] larceny,[25] receiving stolen goods,[26] murder,[27] manslaughter,[28] attempt to commit murder or manslaughter,[29] rape, [30] carnal knowledge of female under sixteen,[31] and robbery.[32] The 1961 Amendment also makes criminal interference with members of the flight crew or flight attendants,[33] carrying concealed weapons aboard aircraft,[34] and conveying false information con-

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22. 49 U.S.C. §1472(k)(1) (1964) provides that: "Whoever, while aboard an aircraft in flight in air commerce, commits an act which, if committed within the special maritime and territorial jurisdiction of the United States, as defined in section 7 or title 18, would be in violation of section 113, 114, 661, 662, 1111, 1112, 1113, 2031, 2032, or 2111 of such title 18 shall be punished as provided therein. (2) Whoever, while aboard an aircraft in flight in air commerce commits an act, which if committed in the District of Columbia would be in violation of section 9 of the Act entitled 'An Act for the preservation of the public peace and the protection of property within the District of Columbia,' approved July 29, 1892, as amended (D.C. Code, sec. 22-1112), shall be punished as provided therein." *See* H.R. REP. No. 958, 87th Cong., 1st Sess. 10, 11 (1961). The Senate bill was passed in lieu of the House bill after substituting for its language the text of the House bill.

23. 18 U.S.C. §113 (1964). *See generally* United States v. Rodgers, 150 U.S. 249 (1893); Nixon v. United States, 352 F.2d 601 (5th Cir. 1965); Bray v. United States, 289 F. 329 (4th Cir. 1923).

24. 18 U.S.C. §114 (1964).

25. 18 U.S.C. §661 (1964); *see* Clark v. United States, 267 F.2d 99 (4th Cir. 1959).

26. 18 U.S.C. §662 (1964).

27. 18 U.S.C. §1111 (1964). *See generally* United States v. Holmes, 18 U.S. (5 Wheat.) 412 (1820); United States v. Furlong, 18 U.S. (5 Wheat.) 184 (1820); Nixon v. United States, 352 F.2d 601 (5th Cir. 1965); Hackathron v. Decker, 243 F. Supp. 22 (N.D. Tex. 1965).

28. 18 U.S.C. §1112 (1964). *See generally* United States v. Wiltberger, 18 U.S. (5 Wheat.) 76 (1820).

29. 18 U.S.C. §1113 (1964).

30. 18 U.S.C. §2031 (1964).

31. 18 U.S.C. §2032 (1964).

32. 10 U.S.C. §2111 (1964). *See also* United States v. Palmer, 3 U.S. (3 Dall.) 610, 626, 630 (1816). (Formerly, a robbery committed upon the high seas was piracy giving the circuit courts jurisdiction thereof).

33. 49 U.S.C. §1472(j) (1964): "Whoever, while aboard an aircraft in flight in air commerce, assaults, intimidates, or threatens 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 or lessen the ability of such member or attendant to perform his duties, shall be fined not more than $10,000 or imprisoned not more than twenty years, or both. Whoever in the commission of any such act uses a deadly or dangerous weapon shall be imprisoned for any term of years or for life." In Mims v. United States, 332 F.2d 944 (10th Cir. 1964), *cert. denied*, 379 U.S. 888 (1964), defendant was convicted of interfering with the pilot of the private airplane in which he was a passenger while said pilot was attempting to land the aircraft. In confirming the conviction, the court held that the pilot was included within the definition of "flight crew" and that the indictment need not specify the "particular overt acts employed to consummate the offense." *Id.* at 946. *See also* 18 U.S.C. §1364 (1964) (interference with foreign commerce by violence).

34. 49 U.S.C. §1472(*l*) (1964): "Except for law enforcement officers of any municipal or State government, or the Federal Government, who are authorized or required to carry arms, and except for such other persons as may be so authorized under regulations issued by the Administrator, whoever, while aboard an aircraft being operated by an air carrier in air transportation, has on or about his person a concealed deadly or dangerous weapon . . .

cerning attempts or alleged attempts to commit any of the offenses enumerated in the statute.[35] Congress, in addition to the above, created and defined the separate offense of aircraft piracy:[36]

> (1) Whoever commits or attempts to commit aircraft piracy, as herein defined, shall be punished — (a) by death if the verdict of the jury shall so recommend, or, in the case of a plea of guilty, or a plea of not guilty where the defendant has waived a trial by jury, if the court in its discretion shall so order; or (b) by imprisonment for not less than twenty years, if the death penalty is not imposed.
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> (2) As used in this subsection, the term "aircraft piracy" means any seizure or exercise of control, by force or violence or threat of force or violence and with wrongful intent, of an aircraft in flight in air commerce.

Congress specifically declined to draw the analogy between the offenses of aircraft piracy and piracy on the high seas: "There is no intention . . . that the meaning and interpretation of this subsection shall be influenced in any way by precedent or interpretations relating to 'piracy on the high seas.' "[37] Congress had recently ratified the Convention on the High Seas, which identically defines maritime and aircraft piracy, but Congress apparently felt at liberty to disregard the Convention in drafting the hijacking statute because the Convention had not then become effective.[38]

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shall be fined not more than $1,000 or imprisoned not more than one year, or both." (Noteworthy is the fact that Congress exempted private planes under this subsection. This subsection alone gives jurisdiction to federal courts whether the plane is in flight or on the ground.)

35. 49 U.S.C. §1472(m), (*l*) (1964): "Whoever imparts or conveys or causes to be imparted or conveyed false information, knowing the information to be false, concerning an attempt or alleged attempt being made or to be made, to do any act which would be a crime prohibited by subsection (i), (j), (k), or (*l*) of this section, shall be fined not more than $1,000 or imprisoned not more than one year, or both. (2) Whoever willfully and maliciously, or with reckless disregard for the safety of human life, imparts or conveys or causes to be imparted or conveyed false information, knowing the information to be false, concerning an attempt or alleged attempt being made or to be made, to do any act which would be a crime prohibited by subsection (i), (j), (k), or (*l*) of this section, shall be fined not more than $5,000 or imprisoned not more than five years, or both." *See also* note 15 *supra* (the "Bomb Hoax" statute is nearly identical in wording to this subsection).

36. 49 U.S.C. §1472(i) (1964).

37. *See* H.R. REP. No. 958, 1st Sess., 87th Cong. 8, 9 (1961). The report indicates that the definition of piracy under international law was too uncertain to incorporate airplane hijacking under the present piracy statute. 18 U.S.C. §1651 (1964).

38. H.R. REP. No. 958, 1st Sess. 87th Cong. 9 (1961). *See* Convention on the High Seas formulated at the United Nations Conference on the Law of the Sea, held in Geneva in 1958, *as recorded* in 106 CONG. REC. 11177-80 (1960). Article 15: "Piracy consists of any of the following acts: (1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship/or aircraft. (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (2) Any act of voluntary participation on the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (3) Any act of inciting or of intentionally facilitating an act described in subparagraph 2 of this article."

United States v. Healy[39] is the only reported case dealing specifically with "aircraft piracy." The District Court for the Southern District of Florida dismissed the indictment charging the defendant with aircraft piracy and kidnapping. Addressing itself to the count alleging aircraft piracy, the court reasoned that the statute was limited in its application to commercial aircraft. The Supreme Court reversed and remanded with instructions, holding that "air commerce," as defined by the statute, most definitely included private aircraft.

Unfortunately, successful prosecution of aircraft offenders is rare, since most hijackers remain in Cuba beyond the sanctions of our federal and state courts. The hijacker is often in flight to avoid prosecution by either state or federal authorities.[40] By fleeing, the offender tolls the federal statute of limitations for the offense from which he flees[41] and also for the offenses committed aboard the aircraft utilized for his escape.[42] There is no statute of limitations for the offense of aircraft piracy.[43]

The need for an effective deterrent to aircraft hijacking has led to a proposed strengthening of the 1961 Amendment. A bill designed "to deter the hijacking of commercial aircraft of United States registry" has been introduced in the House of Representatives.[44] The bill is divided into three parts. The first part deals with protections to the plane and its crew and passengers during the hijacking. The proposed statute provides:[45]

> (a) that each member of the flight crew may carry a firearm. The weapon may not be taken from the flight deck during aircraft operation except with permission of the pilot (it has been suggested that armed guards should be provided, however this would not only be expensive but would invite a gunfight, which at 30,000 in a pressurized cabin is a sure route to disaster) ;
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> (b) that the flight deck door be bulletproof;

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39. 376 U.S. 75 (1964).

40. *See* 18 U.S.C. §1073 (1964). Flight to avoid prosecution in interstate or foreign commerce is a federal offense in itself punishable by a fine of $5,000 or imprisonment not more than five years, or both. *E.g.*, Hett v. United States, 353 F.2d 761 (9th Cir. 1965), *cert. denied*, 384 U.S. 905 (1966). In affirming the conviction of a Seattle attorney for aiding and abetting a robber's flight to Brazil to avoid prosecution, the court stated that one may be guilty of fleeing from prosecution in state *one*, a place from which he has already left, by moving from state *two* to state *three*. The court refused to discuss the question of how many offenses are committed under §1073 when a nonstop flight crosses several state lines. *See* United States v. Brandenburg, 144 F.2d 656 (3d Cir. 1944).

41. 18 U.S.C. §3290 (1964); McGowen v. United States, 105 F.2d 791 (D.C. Cir. 1930). Once a person becomes a fugitive from justice, the statute of limitations will no longer run so as to eventually grant him immunity. *Contra*, United States v. Parrino, 180 F.2d 613 (2d Cir. 1950).

42. *See* 18 U.S.C. §3282 (1964) (5-year statute of limitations on noncapital federal offense).

43. 18 U.S.C. §3281 (1964).

44. H.R. REP. No. 721, 91st Cong., 1st Sess. (1969) (presently before the Committee on Interstate and Foreign Commerce); *see* note 100 *infra*. The jurisdictional question concerning American registered aircraft appears reasonably settled.

45. H.R. REP. No. 721, 91st Cong., 1st Sess. 1 (1969).

(c) that the lock on the flight deck door be unlockable only from the flight deck;

(d) that the aircraft be constructed so as to permit continuous observation of the passengers from the flight deck and that there be voice communication with them;

(e) that a warning device be attached to the flight deck door indicating when someone is trying to unlock it from the outside; and

(f) that no unauthorized person shall be permitted on the flight deck while the aircraft is in operation.

The second part of the proposed legislation, more preventive in nature, would make it unlawful to carry an undeclared firearm, explosive substance, or tear gas on board the aircraft. A violation of an offense enumerated in this part would carry a maximum punishment of a 10,000 dollar fine or ten years in prison or both. Part two of the bill further provides that "it shall be unnecessary to prove intent to harm either the aircraft, its crew, or passengers therein, and the offense proscribed by this section shall be established by proof of the commission of the act prohibited, regardless of intent."[46] This part of the proposed legislation, if once passed and given widespread publicity in the form of posters at boarding sites or in air terminals, could play a significant role in deterring those individuals carrying such arms aboard and contemplating a hijacking.

The third part of this bill offers a reward of 30,000 dollars for the return "to the United States of any and each person subsequently finally convicted of the capital offense of hijacking any commercial aircraft of United States registry wherever in the world such aircraft may have been operating at the time of such offense."[47] At present the Air Transport Association and the Air Line Pilots Association are offering a reward of 25,000 dollars for information leading to the arrest and conviction of hijackers. In order to continue to insure safety in flight, the reward will *not* be available for apprehension of a hijacker in flight.[48]

The proposed strengthening of the 1961 amendment would in certain respects make convictions easier to obtain. Nevertheless, to be an effective deterrent, criminal sanctions must pose a present threat to those contemplating offenses. Without personal jurisdiction over the offender, the deterrent function of the criminal law is mitigated, if not completely abrogated. Return of hijackers by the Cuban government to the United States would give our courts the needed personal jurisdiction for prosecution. As extradition is governed exclusively by treaty in the United States,[49] it would seem expedient that such a treaty as was called for in a Senate resolution be signed with Cuba. The resolution suggested that the Organization of American States immediately begin consultations on hijacking in order:[50]

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46. *Id.* at 3.

47. *Id.* at 4.

48. Statement by Stuart G. Tipton, President, Air Transport Association of America, before the House Interstate and Foreign Commerce Comm., Feb. 6, 1969 (unpublished).

49. Factor v. Laubenheimer, 290 U.S. 276, 287 (1933).

50. S. Res. 100, 91st Cong., 1st Sess. (1969).

(1) to draw a treaty obligating all members to protect aircraft passengers and airplanes hijacked to their country, and furthermore agreeing to arrest all hijackers and arrange for their immediate return to the nation of their origin for legal prosecution, and
(2) to arrange for the submission of the treaty to Cuba.

The House of Representatives has passed a similar resolution.[51]

Extradition of the hijacker to the United States would benefit both the United States and Cuba. A review of the characteristics of the more recent hijackers shows that they are not the kind of people the Cuban government or any other government would want to keep. Furthermore, there is some indication that hijackers are not finding Cuba the haven they thought it would be; in fact, several have been mistreated and have subsequently left.[52] By extraditing the hijacker from Cuba, he is brought to justice in the jurisdiction whose laws have been primarily offended by the alleged conduct. Successful extradition would promote "both international relations and an understanding of foreign criminal objectives."[53] Until this happens, however, the emphasis must be concentrated on apprehending potential offenders prior to their disembarkment rather than increasing criminal sanctions to which an offender would be subject following his arrest.

B. Prevention and Deterrence

The high incidence of hijackings in 1968,[54] which has continued into 1969,[55] has caused not only the airlines but several federal agencies and private associations[56] as well as the United States Congress[57] to seek a way to prevent future hijackings. The following is an examination of some of the proposed preventive measures.

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51. H. Res. 218, 91st Cong., 1st Sess. (1969).

52. Dr. John Dailey, chief of the psychology staff of the Federal Aviation Administration, recently commented that there has been a sharp drop in the number of hijackings since a story concerning one of them was released. It related how the hijacker was held in solitary confinement and denied cigarettes by Cuban authorities, LIFE, April 18, 1969, at 27.

53. Comment, *Extradition: Concurrent Jurisdiction and the Uncertainty of Prosecution in the Requested Nation*, 14 WAYNE L. REV. 1181 (1968).

54. There were 28 hijackings in 1968. Department of State listing, Hijackings of Planes to Cuba and Frustrated Attempts to Hijack (Dec. 10, 1968).

55. As of June 25, 1969, there have been 19 hijackings in 1969. *See* Palm Beach Post, June 25, 1969, at 1.

56. The Federal Aviation Administration, the International Air Transport Association, the Air Transport Association, the International Federation of Airline Pilots Associations, and the AFL-CIO Executive Council have all issued statements suggesting possible solutions.

57. *See* S. Res. 100, 91st Cong., 1st Sess. (1969). "The provisions of this legislation [1961 Amendment] it will be noted, are based on the use of criminal sanctions as a deterrent to the commission of criminal acts. In the course of the hearings there were many references to other possible methods of dealing with the present situation, such as, for example, authorizing flight crew members to carry arms, locking cockpit doors, searching passengers for concealed firearms as they enter airplanes, and so on." H.R. REP. No. 968 87th Cong., 1st Sess. 3 (1961).

Most airlines have begun displaying at their boarding gates posters appraising the public that aircraft piracy is a federal crime, for which an offender can receive the death penalty or a mandatory twenty-year prison sentence.[58] The Federal Aviation Administration (FAA) believes knowledge of the severe penalties will deter some of those considering a hijacking or related offense. To achieve public awareness, the FAA is adopting the following measures: wide publicity of the severe penalties for both hijacking and carrying a concealed weapon on board aircraft; and the posting of signs and printed cards in all airport terminals and at boarding gates warning passengers that persons and baggage are subject to electronic or physical search for weapons.[59] This publicity may discourage some potential offenders, as many are unsure of themselves.[60]

The hijackers plaguing domestic and international carriers have been an odd lot. Many of those forcing planes to Cuba have been afflicted with mental disorders. One hijacker believed himself to be a reincarnated pirate from the Spanish Main. "Psychopaths, fugitives from justice, disturbed hippies, unbalanced political extremists, losers, ex-convicts, juvenile delinquents and mystery men fleeing from we know not what — these are the hijackers who take U. S. planes to Cuba."[61] The difficulties of using publicity to dissuade unstable persons from hijacking are overwhelming. However, an FAA task force recently announced its studies of characteristics of hijackers reveal that only one per cent of air travelers need screening.[62]

Beyond a mere poster at the boarding areas, several airlines are working on detection devices. One airline has indicated that it is working to perfect such devices, but feels for security purposes that the public should not be aware of their nature.[63] Another airline currently employs an electronic device designed to detect the presence of metallic articles on the person or in the passenger's luggage.[64] This carrier has cooperated with the FAA in testing new devices because it has been one of the most frequently plagued by hijackings. The FAA is currently evaluating various techniques for such detection. These include radar, electromagnetic detectors, X-ray photo-

58. Letter from J. William Lawder, General Attorney for United Air Lines, to Ronald Fick, April 23, 1969.

59. Letter from Jennings N. Roberts, Acting Associate General Counsel for the Federal Aviation Administration to Ronald Fick, May 6, 1969. Also under §901 of the Federal Aviation Act, 49 U.S.C. §1471 (1964), any person interfering with the flight crew or carrying a weapon aboard the aircraft is subject to a *civil penalty* not to exceed $1,000 for each such violation. *See also* N.Y. Times, Feb. 28, 1969, at 77, col. 1.

60. *See* TIME, Jan. 31, 1969, at 19; Washington Daily News, July 18, 1968, *reprinted in* CONG. REC. §9385 (daily ed. July 25, 1968).

61. Washington Daily News, July 18, 1968, *reprinted in* CONG. REC. §9385 (daily ed. July 25, 1968).

62. *See* Palm Beach Post, June 25, 1969, at 1; Dr. John Dailey, chief of the psychology staff of the Federal Aviation Administration, has just finished a six-month study of hijackers. Dailey said: "If you dig deeply enough, you find serious emotional instability in almost every case." LIFE, April 18, 1969, at 26.

63. Letter, note 58 *supra*.

64. Letter from William R. Howard, Legal and Assistant Secretary for Eastern Airlines, to Ronald Fick, April 11, 1969.

graphs, magnetometers, chemical "snifters" for analyzing the presence of explosives from emitted vapors, and scintillation counters to detect cobalt-60 seeded in the explosives.[65] All proposed procedures for searching passengers are being fully coordinated with the Department of Justice in an attempt to avoid violating the fourth amendment's prohibition against unreasonable searches and seizures. Recently the FAA announced a breakthrough in the development of a screening device designed to detect weapons carried aboard aircraft by passengers: "The device employes two aluminum pole sensors — one on each side of an airplane boarding gate — connected to a graph recorder, much like a physician's cardiograph."[66] The device is inconspicuous and has proved remarkably sensitive in detecting and discriminating between weapons and nonweapons of a metallic substance. Operation of the device appears neither to delay passengers nor to worsen the already serious problem of flight scheduling. The FAA is aware of the bodily dangers to travelers who are repeatedly screened by such devices and thus it may be presumed adequate safeguards are or will be taken to protect the health of such passengers.[67]

While only one airline is now currently employing a detection device, all of the major airlines may avail themselves of the right to refuse boarding to a prospective passenger if he refuses to permit a search of his person or baggage.[68] Tariffs, self-imposed standards approved by the Civil Aeronautics Board (CAB), govern what an individual airline may or may not do. For example, the conditions of contract between the passenger and the airline are set forth in such tariffs.[69] All of the airlines, however, do not have the same tariffs and thus far only one airline has filed a tariff giving it the right to scan passengers with a detection device.[70] However, all of the airlines have the right to refuse to carry any passenger who refuses to be searched.[71] Tariff 6 (A) reads in part: "Carrier will refuse to transport or will remove at any point, any passenger . . . who refuses to permit search of his person or property for concealed, deadly or dangerous weapon."[72] Since this tariff is only a few months old, there has been no litigation concerning its constitutionality.[73] An attendant legal question may arise with respect to the

65. Letter from Jennings N. Roberts, Acting Associate General Counsel for the Federal Aviation Administration, to Ronald Fick, May 6, 1969. *See* LOOK, April 15, 1969, at 100 (Charles T. Art has trained two German Shepherds to "sniff" out bombs, plastic explosives, dynamite, and gunpowder. The airlines are interested in using these dogs in airports).

66. Palm Beach Post, June 25, 1969, at 1.

67. *See* N.Y. Times, March 20, 1969, at 94, col. 5.

68. The letter from William R. Howard, note 64 *supra,* indicates that Eastern Airlines is allowed to file a tariff permitting such searches; it can be assumed all airlines have such a right if approved by the CAB; *see* Fla. H.R. 584 Reg. Sess. (1969), introduced but not passed, providing authority for scheduled airlines to require persons to show that they do not have in their possession any weapon, device, or thing that could be used to threaten persons or endanger aircraft.

69. Letter, from William R. Howard, note 64 *supra.*

70. *Id.*

71. Tariff 6 (A), C.T.C. (A) 44, CAB No. 117, (Oct. 27, 1968).

72. *Id.*

73. It may not meet the "reasonableness' test laid down by the Supreme Court in United States v. Rabinowitz, 339 U.S. 56 (1950).

search of a passenger or his baggage if the search reveals something other than a "hijacking tool," but which is nonetheless incriminating to the passenger. A like problem can arise with a detection device where the device is registering, (indicating a possible weapon) but other incriminating evidence is found. It is obvious with the frequency of hijackings[74] that this seemingly unlimited right to search is necessary. Airlines would do well to use it with discretion. Before searching a person or his baggage, the airline official should indicate that he had "good cause" for doing so or has a "reasonable belief" that the passenger is carrying a weapon. One airline has indicated that it feels it must have "reasonable grounds" for denying transportation to a passenger.[75] That same airline indicated that such reasonable grounds would be a positive reading on the detection device, but warned that while perhaps no legal action could be taken against the airline if a search proved fruitless, "unnecessary detention or humiliation" by a search, unless entirely justified, is not in the interest of the travelling public.[76]

As an additional preventive measure it has been suggested that all hijackings could be stopped if the United States were to lift its ban on travel to Cuba and allow people to travel freely between the two countries. The situation overlooks several factors. First, there is no absolute travel ban since authorizations for passports are granted to journalists, doctors, and some students. Second, although it must be done circuitously, citizens of the United States can fly to Havana via Mexico City. Finally, Cuba, rather than the United States, ultimately controls whom it lets into its country. The State Department has told the Cuban government that it is willing to fly "homesick" Cubans back on the twice daily shuttle flights that bring refugees from Cuba and usually return empty. The Cuban government has thus far refused the offer.[77]

C. Problems of Venue and Jurisdiction

One or more defendants alleged to have committed offenses aboard an aircraft may be tried in the federal judicial district where either one or both offenders is arrested or first brought.[78] This makes possible "one trial in one judicial district for two or more joint offenders who commit an offense outside the United States, and the one judicial district may be where any one or more of such joint offenders is arrested or is first brought into the United States."[79] Moreover, prosecution may be initiated against such of-

74. As of April 18, 1969, fifty-one men have attempted a hijacking, and thirty-eight have been successful since the first hijacking on May 1, 1961. LIFE, April 18, 1969, at 26. *See generally* TIME, Jan. 31, 1969, at 20, which states that each hijacking costs an airline about $8,500; U.S. NEWS & WORLD REPORT, Feb. 24, 1969, at 36.

75. Letter from Sidney F. Davis, Assistant to General Counsel for Delta Air Lines, to Ronald Fick, April 28, 1969.

76. *Id.*

77. CONG. REC. S9385 (daily ed. July 25, 1968).

78. 49 U.S.C. §1473 (1964).

79. H.R. REP. No. 958, 87th Cong., 1st Sess. 17 (1961); *see* 49 U.S.C. §1473 (1964). *See generally* 18 U.S.C. §3238 (1964); United States v. Bowman, 260 U.S. 94 (1922).

fenders, although they remain outside the United States, in the district of their last known residence or if no such residence is known, in the District of Columbia.[80] This procedure avoids the possibility of obtaining immunity through the running of the statute of limitations, without first proving such offender is indeed a fugitive from justice.[81] Finally, trial, inquiry, determination, and punishment are possible in "any jurisdiction in which offense was begun, continued or completed, in the same manner as if the offense had been actually and wholly committed therein."[82]

Congress intended that the 1961 Amendment extend the jurisdiction of the United States not only to American flag aircraft in flight in air commerce[83] over foreign countries, but also to foreign aircraft in flight in air commerce over foreign countries provided that such flights originate at or are destined to points within the United States.[84] Its broad application was intended to be both within constitutional limits and in accord with the law of nations and international agreements.[85]

Criminal jurisdiction can be exercised by the United States under several internationally recognized theories.[86] Jurisdiction, in this sense, refers to crimes other than those that "strike at the very root of international society,"—such as crimes of piracy, war crimes, and slavery.[87] Any country that obtains lawful custody of an international criminal is competent to prosecute, convict,

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80. 49 U.S.C. §1473 (1964).

81. *See* note 41 *supra.*

82. 49 U.S.C. §1501 (1964). Some difficulty, however, arises in establishing jurisdiction "which may exist in the case of an offense committed in only one jurisdiction. In such cases . . . the place where the crime was committed must still be determined in order to assure a trial in the State or district in which the crime was committed." H.R. REP. No. 958, 87th Cong., 1st Sess. 18 (1961).

83. 49 U.S.C. §1301 (4) (1964): "'Air Commerce' means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce."

84. *See* H.R. REP. No. 958, 87th Cong., 1st Sess. 4, 8 (1961) (Congress felt the extension of such jurisdiction to foreign flights necessary because of the large number of American citizens normally aboard.)

85. *See* H.R. REP. No. 958, 87th Cong., 1st Sess. 4 (1961). Letter from Brooks Hays, Assistant Secretary, Department of State, to Honorable Warren G. Magnuson, Chairman of the Committee on Commerce, U.S. Senate, Aug. 7, 1961. H.R. REP. No. 958, 87th Cong., 1st Sess. 27, 28 (1961). Noted therein is the fact that such a broad extension of U.S. jurisdiction to foreign aircraft flying above a foreign country or the high seas might be considered by the "foreign countries of registry to be an improper exercise of jurisdiction . . . and give rise to foreign relations difficulties." *See also* Boyle, *International Air Law*, 39 OKLA. B.J. 711 (1968) (international air law as it is applied today is derived from international conventions and treaties most of which date from the late 1940's).

86. *See Harvard Research in International Law, Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. SPECIAL SUPP. 435 (1935).

87. Bridge, *The Case for an International Court of Criminal Justice and the Formulation of International Criminal Law*, 13 INT. & COMP. L.Q. 1255, 1262 (1964) (favoring a series of international conventions to formulate international criminal law); *see* Golt, *The Necessity of an International Court of Criminal Justice*, 6 WASHBURN L.J. 13 (1966) (favoring a binding code of international criminal law).

and punish him.[88] Although the United States has specifically avoided drawing an analogy between aircraft piracy and piracy on the high seas, other signators of the Convention on the High Seas might possibly obtain custody and try aircraft hijackers as international criminals.[89]

The territorial principle of jurisdiction, under which jurisdiction is determined according to the locus of the criminal act, is universally accepted and has been significantly developed in modern times.[90] Under this theory, a country is competent to exercise criminal jurisdiction over all acts occurring within its territory.[91] "Territory" includes the airspace above a state's land area, its internal waters and their beds, and its territorial sea and the bed of the territorial sea.[92] The United States has expanded this principle to include jurisdiction over persons initiating criminal acts within the United States, but completing them abroad (the *subjective* territorial theory);[93] and to persons initiating criminal acts abroad but completing them within the United States (the *objective* territorial theory).[94] International law is incorporated into the municipal law of the United States.[95] Thus, under the territorial theory, although it is hardly suited for criminal acts aboard aircraft,[96] the United States can exercise jurisdiction over all persons who commit criminal offenses aboard any nation's aircraft while such aircraft is within the territory of the United States.

Ships and aircraft are not territory per se; nevertheless, it is recognized "that a state has with respect to such ship or aircraft jurisdiction which is

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88. *See* United States v. Holmes, 18 U.S. (5 Wheat.) 412 (1820); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §34 (1965); *Harvard Research in International Law, supra* note 86, at 564.

89. *See* Convention, note 38 *supra*, article 19: "On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith."

90. *See Harvard Research in International Law, supra* note 86, at 484.

91. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §17 (1965).

92. *See* Yenkichi Ito v. United States, 64 F.2d 73 (9th Cir. 1933), *cert. denied*, 289 U.S. 762 (1933); Smallwood v. Clifford, 286 F. Supp. 97 (D.D.C. 1968); RESTATEMENT, note 91 *supra*, §11; *Harvard Research in International Law*, note 86 *supra*.

93. Brulay v. United States, 383 F.2d 345 (9th Cir. 1967), *cert. denied*, 389 U.S. 986 (1967); *see Harvard Research in International Law, supra* note 86, at 484; RESTATEMENT, note 91 *supra*, §17.

94. Rivard v. United States, 375 F.2d 882 (5th Cir. 1967), *cert. denied*, Groleau v. United States, 38 U.S. 884 (1967); *see* United States v. Pizzarusso, 388 F.2d 8 (2d Cir. 1968); RESTATEMENT, note 91 *supra*, §18; *Harvard Research in International Law, supra* note 86, at 488.

95. Hilton v. Guyat, 159 U.S. 113 (1895).

96. *See* Brown, *Jurisdiction of United States Courts Over Crimes in Aircraft*, 15 STAN. L. REV. 45, 46 (1962). "The speed of contemporary aircraft and the ease of flight across the boundaries of national states, however, render territoriality in itself impractical and inadequate, especially in areas of the world where national states are relatively small in land area."

similar" to that which it exercises over its territory.[97] A federal district court in *United States v. Cordova*[98] stated it had: "[L]ittle doubt that had it wished to do so Congress could, under its police power, have extended federal criminal jurisdiction to acts committed on board an airplane owned by an American national, even though such acts had no effect upon national security."[99] To this end, under the 1961 Amendment, jurisdiction over crimes committed on board American registered aircraft in flight falls within the jurisdiction of the United States.[100] Prior to the 1961 Amendment, the "law of the flag" doctrine was extended to American aircraft by way of the special maritime and territorial jurisdiction of the United States.[101] Such jurisdiction was presumed not to apply while the aircraft was in flight over the land area of another country.[102] However, under the 1961 Amendment this is not the case; the United States has jurisdiction over all on-board offenses even though committed while the aircraft is in the territory of another country.[103]

The 1963 Convention on Offenses and Certain Other Acts Committed on Board Aircraft[104] seeks to achieve worldwide uniformity of air law.[105]

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97. *See* United States v. Holmes, 18 U.S. (5 Wheat.) 412 (1820); *Harvard Research in International Law, supra* note 86, at 509.

98. 89 F. Supp. 298 (E.D.N.Y. 1950).

99. *Id.* at 302.

100. *See* RESTATEMENT, note 91 *supra,* §§31, 32. *See generally* 49 U.S.C. §1301 (5) (1964). "'Aircraft' means any contrivance now known or hereafter invented, used, or designed for navigation of or flight in the air."

101. 18 U.S.C. §7 (1964). "The term 'special maritime and territorial jurisdiction of the United States,' as used in this title includes . . . . (5) Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, district or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State." (The statute was amended July 12, 1952, ch. 695, 66 Stat. 589, to read as above to include "aircraft," in a response to United States v. Cordova, 89 F. Supp. 298 (E.D.N.Y. 1950), which refused jurisdiction of an offense committed aboard an American aircraft flying above the high seas.) *See* United States v. Bowman, 260 U.S. 94 (1922); Wynne v. United States, 217 U.S. 234 (1910) (Court interpreted the phrase "out of the jurisdiction of any particular State" to refer to one of the states of the United States and not to a foreign country). *See generally* United States v. State of La., ___ U.S. ___ 89 S. Ct. 773 (1969) (the high seas are not subject to the dominion of any single nation).

102. *See* Brown, note 96 *supra. See also* United States v. Flores, 289 U.S. 137 (1933); United States v. Rodgers, 150 U.S. 249 (1893); United States v. Wiltberger, 18 U.S. (5 Wheat.) 76 (1820); Nixon v. United States, 352 F.2d 601 (5th Cir. 1965); Letter from Brooks Hays, note 85 *supra.*

103. *See* RESTATEMENT, note 91 *supra,* §31.

104. *Signed* at Tokyo, Sept. 14, 1963, and referred to the Senate Foreign Relations Comm., Sept. 25, 1968. In a message to member airlines of the International Air Transport Association, IATA Director General Knut Hammarskjold called for immediate ratification of the Tokyo Convention by governments. He stressed the need for immediate implementation of article II, Int'l Air Transport Ass'n News, Jan. 13, 1969. *See* N.Y. Times, Feb. 14, 1969, at 77, col. 5; Feb. 22, 1969, at 58, col. 8; Feb. 25, 1969, at 3, col. 5; Feb. 27, 1969, at 40, col. 3. *See also* Boyle, *Jurisdiction Over Crimes Committed in Flight; An International Convention,* 3 AM. CRIM. L.Q. 68 (1965); Pulsifer & Boyle, *The Tokyo Convention on*

"The Convention establishes as a positive rule of international law that the State in which an aircraft is registered is competent to exercise jurisdiction over offenses committed aboard that aircraft when it is in flight, or on the surface of the high seas or any other area outside the territory of any state."[106] The United States maintains that the Convention merely gives international recognition to this preexisting theory of extraterritorial jurisdiction.[107] Moreover, the Convention proposes no priority governing the order by which countries claiming concurrent jurisdiction settle the dispute; instead resolution of this problem is left to application of extradition treaties.[108] The Convention further authorizes the aircraft commander to use certain measures in coping with criminal acts on board the aircraft;[109] it enumerates the responsibilities of the contracting states in receiving those allegedly guilty of committing unlawful acts on board the aircraft,[110] and, finally, it provides specifically for the unlawful seizure of aircraft:[111]

> (1) When a person on board has unlawfully committed by force or threat thereof an act of interference, seizure, or other wrongful exercise of control of an aircraft in flight or when such an act is about to be committed, Contracting States shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft.
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> (2) In the cases contemplated in the preceding paragraph, the Contracting State in which the aircraft lands shall permit its passengers and crew to continue their journey as soon as practicable, and shall return the aircraft and its cargo to the persons lawfully entitled to possession.

Offenses and Certain Other Acts on Board Aircraft, 30 J. AIR. L. & COM. 305 (1964). *But see* Gutienez, *Should the Tokyo Convention of 1963 Be Ratified?*, 31 J. AIR. L. & COM. 1 (1965).

105. *See also* Bayitch, *Unification of Aviation Law in the Western Hemisphere*, 19 U. MIAMI L. REV. 535 (1965).

106. Letter of Submittal from Secretary of State of the United States to the President of the United States, Sept. 6, 1968, *as reported in* The Message from the President of the United States *transmitting* "The Convention on Offenses and Certain Other Acts Committed on Board Aircraft." S. Executive Letter, 90th Cong., 2d Sess., (1968); Tokyo Convention, note 104 *supra*, ch. XII — *Jurisdiction*, art. 3 (1).

107. Pulsifer & Boyle, *supra* note 104, at 334.

108. Boyle, *supra* note 104, at 72-73; Tokyo Convention note 104 *supra*, ch. XI — Jurisdiction, art. 3 (3); a recent concurrent resolution in the Senate indicated that while the adoption of the Tokyo Convention by the United States would be a step in the right direction, it will still be inadequate to cope with the problem successfully. That resolution recommended that the Administration strengthen the Tokyo Convention by adding clauses that: "call for the automatic extradition of all hijackers to the flag country of the hijacked aircraft, and the immediate release of hijacked aircraft, together with their crews and passengers; and (ii) make it mandatory for the signatory nations to terminate bilateral air transport arrangements with any country that refuses to become a party to the new international convention on hijackings." S. Con. Res. 7, 91st Cong., 1st Sess. (1969). *See also* RESTATEMENT, *supra* note 91, at 104.

109. Tokyo Convention, note 104 *supra*, ch. III — Powers of the Aircraft Commander.

110. *Id.* Chapter V — Powers and Duties of States.

111. *Id.* Chapter IV — Unlawful Seizure of Aircraft, art. 11.

Article II was included in the Convention upon the suggestion of the United States. It was felt that the piracy provision of the Convention on the High Seas[112] was too limited in its application to deal successfully with the type of aircraft piracy presently plaguing the United States.[113] Like the 1961 Amendment, the Tokyo Convention does not describe the unlawful seizure or attempt to seize aircraft in terms analogous to that of the international crime of piracy.[114] Instead, the legality of the seizure is to be determined by the law of the state in which the aircraft is registered or by the law of the country over which the seizure occurs. Undoubtedly, the seizure of American aircraft, pursuant to the "aircraft piracy" statutes would be unlawful, thus implementing article II.[115] What makes article II of limited use under the normal hijacking situation involving American aircraft and Cuba is that even if the latter were a signatory to the convention, under article 13 Cuba would have the prerogative to determine whether the hijacker should or should not be held in custody to await prosecution or extradition.[116]

The United States has long recognized that it has jurisdiction over its own nationals anywhere in the world.[117] Thus, it would appear that the 1961 Amendment extends the jurisdiction of the United States to all unlawful acts committed by its nationals on board foreign aircraft above international waters or the land area of a foreign country.[118]

The "universal" principle of jurisdiction is determined with reference to the custody of the offender.[119] It is a subsidiary source of jurisdiction and predicated upon the refusal to accept surrender of the offender by the country

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112. *See* note 38 *supra*.

113. The aircraft piracy provision of the Convention on the High Seas would apply only in situations when the aircraft was above the high seas and not within a sovereign's airspace. Further, "acts committed by the crew or passenger against person or property on the same aircraft would appear to be excluded." Pulsifer & Boyle, *supra* note 104, at 325.

114. The International Air Transport Association (IATA) has asked its member airlines to urge their respective governments to petition the United Nations to declare hijacking an international crime similar to piracy on the high seas and genocide, and to take further action designed to reveal the facts as to each incident and to provide for the punishment of the criminal. The Air Transport Association has made the same request of the United States (statement by Stuart G. Tipton, President, Air Transport Association of America, before the House Interstate and Foreign Commerce Committee, Feb. 6, 1969 (unpublished)), *See also* N.Y. Times, Jan. 28, 1969, at 85, col. 5.

115. *See* note 14 *supra*.

116. *See* note 104 supra. Tokyo Convention, article 13(2): "Upon being satisfied that the circumstances so warrant, any Contracting State shall take custody or other measures to ensure the presence of any person suspected of an act contemplated in art. 11, ¶1, and of any person of whom it has taken delivery. The custody and other measures shall be as provided in the law of that State but may only be continued for such time as is reasonably necessary to enable any criminal or extradition proceedings to be instituted."

117. United States v. Bowman, 260 U.S. 94 (1922); The Appallon, 22 U.S. (9 Wheat.) 362 (1824); United States v. Furlong, 18 U.S. (5 Wheat.) 184 (1820); *see Harvard Research in International Law, supra* note 86, at 519 (the offense of treason is most illustrative of national jurisdiction); RESTATEMENT, note 91 *supra* §30. *See generally* United States v. Chandler, 72 F. Supp. 230 (D.D. Mass. 1947).

118. *But cf.* United States v. Holmes, 18 U.S. (5 Wheat.) 412 (1820).

119. *See Harvard Research in International Law, supra* note 86, at 545, 574.

in whose territory the crime was committed. Under this principle, jurisdiction of the United States can arguably be extended pursuant to the 1961 Amendment to aliens who commit offenses on board foreign aircraft over international water or the territory of another country.[120] Such jurisdiction is essentially exercised to prevent impunity; and its application is most restrictive, giving recognition to the superior authority of the territorial principle.[121]

The United States has a legitimate interest in protecting foreign commerce.[122] However, the Supreme Court, in a civil case[123] concerning injury occurring to a foreign seaman on board a foreign vessel anchored in a foreign harbor, stated:[124]

> [I]n dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.

Contact resulting from foreign commerce is not recognized as a basis for exerting extraterritorial criminal jurisdiction. The court's reasoning in the civil context is applicable to criminal cases as well.

The main purpose of enacting the 1961 Amendment was the protection of American passengers flying at home and abroad. To this end, Congress intended federal jurisdiction to extend to criminal acts on board foreign aircraft flying outside the territory of the United States, so long as the flight was to terminate or had originated in the United States.[125] The passive personality theory determines jurisdiction by reference to the nationality of the person injured by the offense.[126] All those aboard a hijacked plane are victimized to some extent by the unlawful act. Although the United States has previously not relied upon the passive personality theory, it is apparent Congress sought its application by the broad coverage of the 1961 Amendment.[127] Jurisdiction would thus extend to offenses committed against American passengers regardless of the nationality of the offender, the aircraft, or the territory above which they travel.

Similar to the above theory, the protective theory determines jurisdiction

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120. *See* RESTATEMENT, *supra* note 91, at 97. The Restatement apparently restricts the principle of universality to those offenses of universal interest. Although air piracy, under American law, is not described in terms of an international crime, nevertheless, it is of such universal interest it probably would be interpreted to fall within the scope of the universal theory.

121. *See* United States v. Furlong, 18 U.S. (5 Wheat.) 184, 197 (1820); *Harvard Research in International Law, supra* note 86, at 572.

122. *See* United States v. Braverman, 376 F.2d 249 (2d Cir. 1967), *cert. denied*, 389 U.S. 885 (1967).

123. Lauritzen v. Larsen, 345 U.S. 571 (1953).

124. *Id.* at 582.

125. *See* note 84 *supra.*

126. *See Harvard Research in International Law, supra* note 86, at 445, 479.

127. *See* RESTATEMENT, note 91 *supra*, §30 (2).

by reference to the national interest injured by the offense.[128] Under this theory, the United States can exercise criminal jurisdiction over offenses that "interfere with the functioning of its public agencies and instrumentalities."[129] The United States has made little use of this theory, and its application in the realm of aircraft hijacking appears most limited.[130]

The basic postulate that an "act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"[131] permeates this entire field. Pursuant to the internationally recognized principles of extraterritorial jurisdiction, the 1961 Amendment can be as far-reaching as its plain words purport so long as it does not offend the law of nations. The fact that concurrent jurisdiction would at times exist with other countries is not determinative.[132]

Conclusion

The solution to the hijacking problem is academic – simply arrest, convict, and sentence offenders and the menace to air travel will disappear. Problems of personal jurisdiction, however, frustrate efforts to apply criminal sanctions, thus necessitating development of procedures to apprehend potential hijackers before they have a chance to board an aircraft.

PART II: CIVIL LAW ASPECTS

Aircraft hijacking is disappointing in a sense for one interested in the civil law implications of this psycho-political phenomenon. At first glance the area would seem fertile for civil litigation. One thinks first of the businessman who loses a contract or client because of the delay involved in an unanticipated and unwanted excursion to Cuba. There may be perishable goods aboard and the unannounced detour may mean their ruin. Passengers or personnel of the airline may attempt to capture the hijacker, and someone may be injured or killed. Mental anguish may be suffered or a mental disorder may be inflicted as a result of the incident.

Several practical factors militate against litigation resulting from these factual settings. A suit against the hijacker, while legally meritorious, would probably be futile from the standpoint of one wishing monetary redress. Thus, the hijacker is eliminated from the list of potential defendants. If the plaintiff is tortiously injured by a passenger in the course of the hijacking, although this is unlikely, there is a more realistic hope of obtaining adequate compensation. Resulting legal action would differ from that ensuing from a similar act occurring on the ground only in that cumbersome conflict and

128. *See* United States v. Bowman, 260 U.S. 94 (1922); United States v. Chandler, 72 F. Supp. 230 (D. Mass. 1947); RESTATEMENT, note 91 *supra*, §33; *Harvard Research in International Law, supra* note 86, at 543.

129. *Harvard Research in International Law, supra* note 86, at 544.

130. *See* RESTATEMENT, note 91 *supra*, §33.

131. Lauritzen v. Larsen, 345 U.S. 571, 578 (1953).

132. *Accord,* United States v. Rodgers, 150 U.S. 249 (1893); *see* RESTATEMENT note 91 *supra*, §40.

choice-of-law problems may be present. If employees of the airline are injured by acts attributable to the airline's negligence, the airline's liability is uniformly governed by workmen's compensation statutes.[133] It has been suggested that airline employees should be joined as defendants only if federal jurisdiction is sought to be avoided, since their presence in a suit eliminates an important sympathy factor favoring the plaintiff.[134] Thus, passengers and shippers are most likely to be cast as plaintiffs and airlines as defendants, the latter because of their virtually unlimited assets and impersonal countenance. For this reason discussion will focus on the legal problems inherent in a suit involving these parties and stemming from aircraft hijacking.

A. Conflicts and Choice-of-Law Problems

Consideration of the issues involved in determining liability of airlines and their employees to passengers almost necessarily includes the area of conflict of laws. If the flight is purely intrastate and there is no diversity of citizenship between the litigants, there will be no conflict-of-laws problem.[135] Yet this must surely be the exceptional case in airline flights in general, and the coincidence of these conditions is rare in flights where hijacking usually takes place. Thus, if the state where the wrongful act takes place differs from the state where the action is brought, and the action is commenced in a state court, matters of procedure may be governed by the law of the forum state, and the substantive law applied will be that of the place of wrong,[136] the place having the most significant relationship to the occurrence and the parties,[137] or perhaps a jurisdiction determined in yet another manner.[138] A contractual action may be governed by the substantive law of the state where it is made,[139] where it is to be performed,[140] where there is the most significant relationship to the transaction and the parties,[141] or possibly the law of a place determined by other criteria.[142] Unfortunately, from the standpoint of uniformity, states do not always agree on what is to be termed procedural or substantive.[143]

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133. 1 L. KREINDLER, AVIATION ACCIDENT LAW §3.14 (1963) [hereinafter cited as KREINDLER].

134. 2 KREINDLER, note 133 *supra*, §25.01 [10]. The author suggests, in §25.01 (1), that a Warsaw Convention case would present an entirely different situation. *See* text accompanying notes 162-178.

135. *See* 28 U.S.C. §1332 (1964); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806); C. WRIGHT, FEDERAL COURTS §24 (1963).

136. RESTATEMENT OF CONFLICT OF LAWS §§377-83 (1934); R. LEFLAR, AMERICAN CONFLICTS LAW §132 (1968).

137. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §145 (Proposed Final Draft 1968); R. LEFLAR, note 136 *supra*, §§135, 136, 138, 141.

138. R. LEFLAR, note 136 *supra*, §134.

139. RESTATEMENT OF CONFLICT OF LAWS §§312-31 (1934); R. LEFLAR, note 136 *supra*, §§144, 145.

140. R. LEFLAR, note 136 *supra*, §145.

141. RESTATEMENT, note 137 *supra*, §188; R. LEFLAR, note 136 *supra*, §§146, 149.

142. R. LEFLAR, note 136 *supra*, §§146, 149.

143. 1 KREINDLER, note 133 *supra*, §2.01.

If suits arising out of aircraft hijacking follow the course of general aviation accident litigation they will be brought in federal courts on the basis of diversity of citizenship.[144] The court must decide in a diversity action whether a particular matter is substantive or procedural under the aegis of *Erie R. R. v. Tompkins*[145] and its progeny.[146] If the matter is procedural, federal rules govern; if substantive, the court must look to the law of the forum state.[147] In order to determine whether a subject is procedural or substantive, the court must determine whether it is likely substantially to affect the outcome of the litigation.[148] Whether a matter is termed procedural or substantive by the forum state is irrelevant; if it is found likely to determine the outcome of the litigation, the law of the forum state, including its conflict of laws rules, will be applied.[149]

Interest in the area should not be wholly academic. The doctrine of *res ipsa loquitur* may create a presumption of negligence in the state where the damage took place, but may only give rise to a permissible inference of negligence in the forum state.[150] Since the doctrine may have a material effect on substantive rights or substantially affect the outcome of the case,[151] the plaintiff will obviously be interested in the argument that the matter is procedural under the forum state's conflicts law. If the statute of limitations of the state where the harm occurred has run in a wrongful death action but the statute in the forum state would allow the suit, a determination of the conflict of laws question settles whether a suit may be brought in the first instance.[152]

Choice-of-law problems may enter if the harm occurs on or over navigable waters or the high seas. If the airline involved is an American carrier and personal injury is sustained, determination of applicable law must be made on the basis of existing maritime law since there are no cases in an aviation setting.[153] Depending on the jurisdiction, this may be the law of the state of incorporation of the aircraft's owner, the place where the contract of carriage was made, the general law of admiralty, or the law specified in a provision of the ticket.[154] If death of a passenger results from the wrong,

144. 1 KREINDLER, note 133 *supra*, §2.02[1].

145. 304 U.S. 64 (1938).

146. *E.g.*, Hanna v. Plumer, 380 U.S. 460 (1965); Byrd v. Blue Ridge Elec. Coop., Inc., 356 U.S. 525 (1958); Guaranty Trust Co. v. York, 326 U.S. 99 (1945); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941); *See* C. WRIGHT, FEDERAL COURTS §§55-59 (1963).

147. *See, e.g.*, Guaranty Trust Co. v. York, 326 U.S. 99 (1945); Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

148. Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

149. Griffin v. McCoach, 313 U.S. 498 (1941); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941); Sampson v. Channell, 110 F.2d 754 (1st Cir. 1940), *cert. denied*, 310 U.S. 650 (1940).

150. *See, e.g.*, Lobel v. American Airlines, Inc., 192 F.2d 217 (2d Cir. 1951).

151. Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

152. *See, e.g.*, Page v. Cameron Iron Works, Inc., 259 F.2d 420 (5th Cir. 1958); Nelson v. Eckert, 231 Ark. 348, 329 S.W.2d 426 (1959).

153. 1 KREINDLER note 133 *supra*, §2.10[1][a].

154. *Id. See* Horton v. J. & J. Aircraft, Inc., 257 F. Supp. 120 (S.D. Fla. 1966); Notarian v. Trans World Airlines, Inc., 244 F. Supp. 874 (W.D. Pa. 1965).

admiralty has jurisdiction over the matter.[155] If death is caused by wrongful conduct more than a marine league from shore, the Death on the High Seas Act[156] must supply the remedy, since there could be no recovery under common law.[157] If the incident occurs within a marine league from the shore but above navigable waters, admiralty still has jurisdiction over the subject matter but the state wrongful death statute will supply the remedy.[158] If the airline involved is a foreign carrier and personal injuries occur over the high seas, the law of the place where the aircraft is registered would probably be applied.[159] If death results, admiralty will still have jurisdiction and the Death on the High Seas Act will again supply the remedy.[160] However, cases are not in agreement as to whether the Death on the High Seas Act supplies a right of action in itself when a foreign carrier is involved, or whether the law of the state of the foreign carrier is the sole source of remedial law.[161] The issue could be of crucial importance if a right of action did not exist under the law of the carrier's country or if that law left the plaintiff with an inadequate remedy.

B. International Agreements

International treaties such as the Warsaw Convention[162] may be of consequence in an aircraft hijacking situation. Most countries adhere to the Convention,[163] which creates a presumption of liability on the part of the airlines in international flights[164] but limits the amount of damages for personal injuries or wrongful death to approximately 8,300 dollars.[165] International travel is defined rather inclusively, and it is possible for the convention

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155. Weinstein v. Eastern Airlines, Inc., 316 F.2d 758 (3d. Cir. 1963); 46 U.S.C. §761 (1964).

156. 46 U.S.C. §§761-68 (1964).

157. Weinstein v. Eastern Airlines, Inc., 316 F.2d 758 (3d Cir. 1963).

158. *Id.*

159. 1 KREINDLER note 133 *supra,* §2.10[2][a]. The author expresses the following caveat: "It is well to remember, however, that, with respect to accidents occurring on foreign ships, or in foreign countries, there is no constitutional requirement that the court give full faith and credit to the foreign law. Thus, particularly where citizens of its own state are concerned, courts may be less likely to enforce alien principles."

160. Weinstein v. Eastern Airlines, Inc., 316 F.2d 758 (3d Cir. 1963); Jennings v. Goodyear Aircraft Corp., 227 F. Supp. 246 (D. Del. 1964). *Contra,* Montgomery v. Goodyear Tire & Rubber Co., 231 F. Supp. 447 (S.D.N.Y. 1964).

161. *See* Noel v. Linel Aeropostal Venezolana, 260 F. Supp. 1002 (S.D.N.Y. 1966); Noel v. Airponents, 169 F. Supp. 348 (D.N.J. 1958). *Contra,* Bergeron v. K.L.M. Royal Dutch Airlines, 188 F. Supp. 594 (S.D.N.Y. 1960).

162. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 624 (1935).

163. *See* 1 KREINDLER note 133 *supra,* §10.01[3] for a listing of these countries.

164. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, arts. 17, 20, 21, 49 Stat. 628 (1935). The carrier will not be liable if all precautionary measures are taken, and contributory negligence on the part of the injured party may partially or wholly exonerate the carrier. *Id.,* arts. 20, 21.

165. *Id.* art. 22.

to limit recovery on a purely domestic flight.[166] On a tour to South America a New Yorker whose first flight is to stop in Miami would be in international travel if the country of destination is a signatory of the convention.[167] The Hague Protocol, which doubles the limits of liability and has been signed but not ratified by the United States, is adhered to by most Convention signatories.[168]

A recent development that mitigates against the harshness of the Warsaw Convention and the Hague Protocol is the Montreal Agreement.[169] This arrangement, in which major foreign and domestic airlines concur,[170] provides for a limit of liability to each passenger for "death, wounding, or other bodily injury of $75,000 inclusive of legal fees, and, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, a limit of $58,000 exclusive of legal fees and costs."[171] The liability of the airlines is absolute unless contributory negligence, which may lessen or bar recovery, or lack of causation in fact can be affirmatively proved.[172] As under the Warsaw Convention and the Hague Protocol, willful misconduct on the part of the airlines will open the door to unlimited recovery.[173] The agreement encompasses all international flights, as defined in the Convention or the Convention as amended by the protocol, in which the United States is included as a point of origin, point of destination, or scheduled stopping place.[174] Thus, recovery for personal injury or death arising from an incident of aircraft hijacking would be quite likely if the misfortune occurred on an international flight covered by the Agreement.

The Montreal Agreement unfortunately does not affect recovery for damages from loss of property, and thus the Warsaw Convention governs. Essentially, its thrust is to limit recovery for the loss of property to 331.67 dollars for twenty kilograms of checked baggage.[175] A greater evaluation may be declared but the airline may ask compensation for the increased liability. Article 20 of the Convention absolves the carrier from liability if all necessary measures to avoid the damage have been taken and further provides that the carrier should not be liable "if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navi-

166. *Id.* art. 1; see 1 KREINDLER note 133 *supra*, §11.05[1]

167. *See* 1 KREINDLER note 133 *supra*, §11.05[1].

168. *Id.* §§12.01-.03.

169. The Montreal Agreement is set forth in 1 KREINDLER note 133 *supra*, §12A.03 (Supp. 1968). It was developed in Montreal on May 4, 1966, between representatives of the State Department of the United States, Civil Aeronautics Board, International Air Transport Association, and airline representatives.

170. Set forth in 1 KREINDLER note 133 *supra*, §12A.03 (Supp. 1968).

171. C.A.B. Order No. E-23680, 31 Fed. Reg. 7302 (1966).

172. *Id.*

173. *See* 1 KREINDLER note 133 *supra*, §12A.07 (Supp. 1968).

174. This provision is found in the tariff to be filed under the terms of the Agreement. It is set forth in 1 KREINDLER note 133 *supra*, §12A.04 (Supp. 1968).

175. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, art. 22, 49 Stat. 629 (1935); 1 KREINDLER note 133 *supra*, §11.03[2].

gation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage."[176] As in the case of personal injury under the convention, there is a presumption of liability on the part of the airline[177] and willful misconduct will remove the ceiling on recovery.[178]

C. *Carrier Liability*

Principles governing liability of carriers by other means are generally applicable to aircarriers, subject to certain distinctions.[179] Aircarriers have been defined as citizens of the United States who undertake directly or indirectly by any agreement to engage in air transportation.[180] Such carriers are classified as common or private, and a determination of the category into which the carrier falls may be important in deciding the standard of care or the application of legal principles such as *res ipsa loquitur*.[181] Several factors must be considered:[182]

> A carrier is a common carrier if it holds itself out to the public as willing to carry all passengers for hire indiscriminately. . . . The key question is whether it holds itself out, either expressly or by course of conduct, to carry for hire on a uniform tariff all persons applying, subject to existing capacity. The distinctive characteristic of a common carrier is that it undertakes as a business to carry the general public. The private carrier does not hold itself out to the public as ready to accept and carry all who offer. The private or contract carrier may refuse to contract for carriage.

The duty of common carrier airlines to their paying passengers is defined by state law and modified by standards imposed by federal legislation and administrative orders. Existing federal laws do not preclude exercise of the sovereign powers of the states,[183] and thus most states hold a common carrier airline to "the highest degree of care" to its paying passengers, although some states, such as New York, are abandoning this standard in favor of a standard of reasonable care under the circumstances.[184] New York's standard of care is similar if not identical to that which private carriers owe their

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176. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, art. 20(2), 49 Stat. 610, 629 (1935).

177. *Id.* art. 22.

178. *Id.* art. 25; 1 KREINDLER note 133 *supra*, §11.04.

179. 8 AM. JUR. 2d *Aviation* §37 (1963).

180. *Id.*

181. 1 KREINDLER note 133 *supra*, §3.01.

182. 1 KREINDLER note 133 *supra*, §3.01. *See* 49 U.S.C. §1374(b) for standards applicable to common air carriers as to discrimination, stating that no person shall be subjected to any unjust discrimination or any undue or unreasonable prejudices or disadvantages in any respect whatsoever. *See also* Wills v. Trans World Airlines, Inc., 200 F. Supp. 360 (S.D. Cal. 1961).

183. Braniff Airways, Inc. v. Nebraska State Bd. of Equalization & Assessment, 347 U.S. 590, 597 (1954).

184. 1 KREINDLER note 133 *supra*, §3.07.

passengers.[185] However, all jurisdictions rule that carriers are not insurers of the safety of their passengers.[186]

This standard of care may be applied in a variety of places and circumstances, as where the safety of a passenger is threatened by another passenger. A common carrier is bound to exercise the highest or utmost care in this respect.[187] However, the rule that the airline is not an insurer of the safety of its passengers applies and the carrier "will not be held liable for injuries to passengers caused by the improper conduct of fellow passengers, unless the carrier has notice, or in the exercise of proper care should have notice, of such conduct, and reason to anticipate that injury may result therefrom."[188] It should be noted that the employees of a carrier have the powers of police officers for protecting passengers from assault by fellow passengers, and the carrier has the duty to provide ready help to protect passengers against assaults "from such sources and under such conditions as might reasonably be expected to place the carrier on notice."[189]

There are no reported cases dealing with assault or injury by violent acts of a fellow airline passenger, but since the rules regarding carriers in general are applicable to airlines, *Miller v. Mills*[190] may offer some insight into the law that would be applicable were a hijacker to threaten the safety of passengers. This case involved an altercation between a bus driver and two intoxicated passengers who attempted to interfere with the progress of the vehicle. A young passenger was injured by a hurled whiskey bottle. In affirming a lower court decision finding liability on the part of the driver, the court noted that it might have been reasonably anticipated that objects would be thrown or even firearms discharged; thus the driver breached the duty to exercise the highest degree of practicable care in protecting and guarding passengers from violence and assault from whatever source might be reasonably anticipated under the circumstances of the case and the condition of the parties.[191] The case indicates that the bus driver should not have used force against the tort-feasor. Presumably airlines would be held liable for like conduct on the part of their personnel in a hijacking situation.[192]

Assuming that an airline met its duty of care and a passenger was nevertheless injured by violent acts of a hijacker, liability based on contract may seem to offer a remedy. It is "well recognized that a ticket constitutes a contract of carriage, and that implied in this contract is the carrier's obligation to safely transport the passenger."[193] Such a basis of recovery might also be considered if the state where the contract of carriage is made offers

185. *Id. See, e.g.*, Grain Dealers Nat'l Mut. Fire Ins. Co. v. Harrison, 190 F.2d 726, 729 (5th Cir. 1951).

186. 1 KREINDLER note 133 *supra*, §3.07.

187. 14 AM. JUR. 2d *Carriers* §1065 (1964).

188. *Id.*

189. *Id.*, §1067.

190. 257 S.W.2d 520 (Ct. App. Ky. 1953).

191. *Id.* at 522.

192. Bradford, *The Legal Ramifications of Hijacking Airplanes*, 48 A.B.A.J. 1033, 1036 (1962).

193. 1 KREINDLER note 133 *supra*, §3.02.

unlimited liability for wrongful death and the conflict law of the forum state requires application of a state wrongful death statute restricting compensation.[194] However, there is solid precedent to support the proposition that an airline's tort liability cannot be enlarged by suing for breach of its agreement to transport passengers safely, and that actions based on contract will not survive the decedent.[195] Although two causes of action may be pleaded, if the "gravamen of the cause of action is an alleged breach of a duty through negligence, the action is governed by the applicable law of torts, even though the allegations refer to a breach of a contract."[196] Thus, a bar to recovery in tort may very well influence the result of an action in contract.[197]

A passenger injured by the conduct of a hijacker may perhaps recover for breach of warranty, although only one reported case has suggested recovery against an airline (as distinguished from a manufacturer or seller) on such a basis in an aviation situation.[198] It is arguable that airlines are under a duty to furnish an airworthy ship and a competent crew, just as the owner of a vessel is under a like obligation to furnish a seaworthy ship and a competent crew.[199] The implied warranty of seaworthiness is an absolute, nondelegable duty independent of negligence.[200]

It has been suggested that implied warranty of airworthiness may have a future in aviation law,[201] and *Stiles v. National Airlines, Inc.*[202] explicitly recognizes such a remedy although in stating that "[t]he aircraft . . . was not airworthy, in that her co-pilot was incompetent within the knowledge and privity of respondent" the court apparently qualified the absolute liability that would result from transferring principles of seaworthiness to aviation.[203] Several additional factors indicate that adoption of an implied warranty of airworthiness will not simply be an adoption of admiralty principles to aircraft. Admiralty limits the doctrine of unseaworthiness to seamen or those

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194. It should be noted that New York will not apply a limitation on wrongful death recovery of another state if the action is brought in New York state courts. Kilbert v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526 (1961), 211 N.Y.S.2d 133 (1961).

195. Maynard v. Eastern Airlines, Inc., 178 F.2d 139 (2d Cir. 1949); Ness v. West Coast Airlines, Inc., 90 Idaho 111, 410 P.2d 965 (1965); Salamon v. Konomblijke Luchtvaart Maatschappij, N.v., 198 Misc. 780, 100 N.Y.S.2d 702 (Sup. Ct. 1950).

196. Pearson v. Northeast Airlines, Inc., 180 F. Supp. 97 (S.D.N.Y. 1960).

197. *See* Clancey, *Fatalities in Aircraft Crashes—A Contractual Basis for Recovery*, 27 J. AIR L. & COMM. 262-67 (1960), for a critical analysis of this rule as applied in wrongful death cases.

198. Stiles v. National Airlines, Inc., 161 F. Supp. 125 (E.D. La. 1958), *aff'd*, 268 F.2d 400 (5th Cir.), *cert. denied*, 361 U.S. 885 (1959). *See* Montgomery v. Goodyear Tire & Rubber Co., 231 F. Supp. 447 (S.D.N.Y. 1964), for interesting cases on the relationship of warranty and the Death on the High Seas Act; Jennings v. Goodyear Aircraft Corp., 227 F. Supp. 246 (D. Del. 1964).

199. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY §§6-39 to -41 (1957).

200. *Id.* §§6-42 to -44.

201. 1 KREINDLER note 133 *supra*, §303.

202. 161 F. Supp. 125 (E.D. La. 1958), *aff'd*, 268 F.2d 400 (5th Cir.), *cert. denied*, 361 U.S. 885 (1959).

203. *Id.* at 131.

performing the work of seamen.[204] Such a limitation has yet to be suggested in aviation law. Also, a seaworthiness action does not survive the death of the victim,[205] but the fact that the aviation case first mentioning airworthiness involved a suit by the passenger's estate hints that this limitation may not be transferred.[206] Thus, the field is open for development but it is difficult to predict how it will take shape.

It has been observed above that a plaintiff may not enlarge the liability of an airline through a suit in contract. Conversely, it is sometimes stated that an airline may not limit its tort liability through contract:[207]

> It is a basic principle of law that one cannot in advance of doing an act of negligence, limit his or its liability for the results which flow from the tort of negligence . . . nor prescribe conditions for recovery of damages which flow from acts of negligence, even though there be a contract of carriage by a common carrier.

While this may be true as to the substantive aspects of tort liability for personal injuries, such statements, even theoretically valid, are misleading when applied to other areas of airline liability.

Pursuant to federal legislation,[208] airlines are permitted to file tariffs with the Civil Aeronautics Board, which when approved by the Board constitute part of the contract for carriage of property or baggage.[209] These tariffs may set limits on liability for occurrences as diverse as loss of jewelry[210] and failure to operate a flight according to schedule.[211] Tariffs properly filed and approved are binding on passengers and shippers regardless of lack of knowledge or assent.[212] The limitation is effective regardless of whether the action is founded in negligence, contract, or conversion.[213] In the absence of applicable statutes and rules and tariffs approved by the Civil Aeronautics Board, common law rules of liability of carriers obtain.[214] However, the common law gives way to the broad regulatory scheme under federal law governing the contract of the parties when they conflict[215] for "the primary

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204. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY §§6-39 to -41.

205. *Id.* §6-51.

206. Stiles v. National Airlines, Inc., 161 F. Supp. 125 (E.D. La. 1958), *aff'd*, 268 F.2d 400 (5th Cir.), *cert. denied*, 361 U.S. 885 (1959).

207. Bernard v. United States Aircoach, Inc., 117 F. Supp. 138-39 (S.D. Cal. 1953).

208. 49 U.S.C. §1373 (1964).

209. Lichter v. Eastern Airlines, Inc., 189 F.2d 939 (2d Cir. 1951); *see* Twentieth Century Delivery Serv., Inc. v. St. Paul Fire & Marine Ins. Co., 242 F.2d 292 (9th Cir. 1957).

210. Lichter v. Eastern Airlines, Inc., 189 F.2d 939 (2d Cir. 1951).

211. Wittenberg v. Eastern Airlines, Inc., 126 F. Supp. 459 (E.D.S.C. 1954); Adler v. Chicago & S. Airlines, Inc., 41 F. Supp. 366 (D. Mo. 1941); *cf.* Furrow & Co. v. American Airlines, Inc., 102 F. Supp. 808 (D. Okla. 1952).

212. *See* 8 AM. JUR. 2d *Carriers by Air* §46 (1963).

213. *Id.*

214. *Id.* §45.

215. Mack v. Eastern Airlines, Inc., 87 F. Supp. 113 (D. Mass. 1949).

purpose of the Civil Aeronautics Act is to assure uniformity of rates and services to all persons using the facilities of air carriers."[216]

Tariffs, rules, and regulations approved by the Civil Aeronautics Board and "practices" of airlines are subject to the doctrine of primary jurisdiction.[217] As stated in *Adler v. Chicago & Southern Airlines,*[218] the doctrine:

> [P]rovides, in effect, that when Congress has created an administrative commission, board or other agency with jurisdiction over and power to regulate some particular field of endeavor, the courts, both state and federal, are without jurisdiction or power to grant relief to any person complaining of any act done or omitted to have been done, if the act or omission is of such a nature as to be within the sphere of regulation of the administrative agency involved, until such time as the person complaining has exhausted his remedies before such administrative body.

Hence, for example, damage resulting from delay in reaching a destination, even though caused by the airline's "negligence," will not be compensable because the airline's duty is defined in the tariff, which exempts it from liability in this situation.[219] Since there is no breach of duty there is no negligence; and the reasonableness of the tariff's duty as outside the scope of the governing statute may only be challenged before the Civil Aeronautics Board,[220] although there has been argument to the contrary.[221]

Thus, hopes of obtaining full compensation for loss of goods or baggage due to hijacking will almost certainly be frustrated by applicable tariffs filed by the airline, and recovery for such items as delay and spoilage may be frustrated completely.[222] The passenger or the shipper on airlines frequently subject to the hijacking phenomenon should be attentive of this and obtain adequate insurance coverage.

Conclusion

Passengers and carriers may find dashed their early hopes of recovering from the airline any adequate compensation resulting from aircraft hijacking. State statutes or international agreements may prevent full recovery for personal injuries or death even though ultimate liability is found on the part of the defendant. If the injured party is traveling on a flight beginning in New York and ending in Miami it will be of little solace to find that although he will not in all probability be able to recover damages if there

216. Lichter v. Eastern Airlines, Inc., 189 F.2d 939 (2d Cir. 1951).

217. Herman v. Northeast Airlines, Inc., 222 F.2d 326 (2d Cir.), *cert. denied,* 350 U.S. 843 (1955); Lichter v. Eastern Airlines, Inc., 189 F.2d 939 (2d Cir. 1951); Adler v. Chicago & S. Airlines, Inc., 41 F. Supp. 336 (D. Mo. 1941).

218. 41 F. Supp. 366 (D. Mo. 1941).

219. Wittenberg v. Eastern Airlines, Inc., 126 F. Supp. 459, 460 (E.D.S.C. 1954); 1 KREINDLER note 133 *supra,* §304.

220. *See* Lichter v. Eastern Airlines, Inc., 189 F.2d 939 (2d Cir. 1951).

221. *Id.* at 942 (dissent).

222. Furrow & Co. v. American Airlines, Inc., 102 F. Supp. 808 (W.D. Okla. 1952).

is no negligence involved, another passenger so injured on his way to the Bahamas may be compensated up to 75,000 dollars inclusive of legal fees.[223] If both are businessmen, neither will be able to obtain compensation for an opportunity missed by the delay, even though an airline employee may have promised otherwise.[224]

There can be no justification for some of these incongruous results. Limitations on recovery in state wrongful death statutes are generally indefensible,[225] and their elimination would do much to diminish unnecessary litigation in the conflict of laws area. The limitations on recovery of the Warsaw Convention and the Hague Protocol are reminiscent of the outlook of a certain Dickensian character, even considering their presumptions of liability. But the Montreal Agreement's damage limitation is more supportable as a *quid pro quo* for absolute liability. Limitations established by tariffs, while perhaps imposing an untoward result in a particular situation, serve the essential purpose of creating uniformity, certainty, and lower rates in an industry where such is highly desirable. The availability of insurance serves to reduce the need for change in the field, at least in part, by providing adequate compensation to passengers and shippers for problems they might experience on a given flight. This has been accomplished in the area of the Montreal Agreement's applicability by its requirement of a comprehensible notice to be given to each passenger advising of the limitation of liability and the availability of insurance not affected by the limitation.[226] Similar steps should be taken in other areas where airline customers are not given realistic notice of restrictions on full compensation for losses, whether the losses be occasioned by hijacking or some other misfortune.

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223. *See* text accompanying notes 162-178 *supra*.

224. Wittenberg v. Eastern Airlines, Inc., 126 F. Supp. 459 (E.D.S.C. 1954); Jones v. Northwest Airlines, Inc., 22 Wash. 2d 863, 157 P.2d 728 (1945).

225. *See* Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961); 1 KREINDLER note 133 *supra*, §13.03[2].

226. *Id.* §12A.05 (Supp. 1968).