Louisiana Law Review

Volume 39 | Number 4
Summer 1979

Drug Smuggling and the Protective Principle: A Journey Into Uncharted Waters

Edward Thomas Meyer

should not be read as an isolated example with little future significance. While its impact certainly will be felt by sentencing judges, it also may alter the entire sentencing procedure. Additionally, *Sepulvado* calls for the supreme court to reassess its position on the constitutionality of mandatory sentences.

Barry L. LaCour

DRUG SMUGGLING AND THE PROTECTIVE PRINCIPLE: A JOURNEY INTO UNCHARTED WATERS

The defendant was indicted on charges of conspiring to import marijuana,[1] possession of marijuana with intent to distribute,[2] and attempting to import marijuana.[3] He filed a motion to dismiss the indictment, alleging lack of subject matter jurisdiction, since the acts in question occured on the high seas outside of United States territory. The United States District Court in Puerto Rico *held* (1) the defendant's planned invasion of United States customs territory was a sufficient basis for the invocation of subject matter jurisdiction under the protective theory, and (2) the defendant's vessel was subject to the special maritime jurisdiction of the United States. *United States v. Keller*, 451 F. Supp. 631 (D.P.R. 1978).[4]

The protective principle is one of the six bases recognized in international law for the exercise of criminal jurisdiction by a sovereign state.[5] According to this principle, a sovereign state

1. 21 U.S.C. § 952, 963 (1970).

2. 21 U.S.C. § 841(a)(1) (1970).

3. 21 U.S.C. § 952, 963 (1970).

4. This note will focus on the use of the protective principle to establish subject matter jurisdiction.

5. Harvard Research in International Law, *Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 437, 445 (1935) [hereinafter cited as Harvard Research]. *See also* United States v. Pizzarusso, 388 F.2d 8, 10 (2d Cir. 1968); Rivard v. United States, 375 F.2d 882, 885 (5th Cir. 1967).

The other five bases of jurisdiction are set out as follows: (1) The territorial principle is based on the absolute sovereignty of a state within its boundaries; it may prosecute all who commit a crime within its territory. (2) Jurisdiction over nationals rests on the allegiance due a state by its citizens and the inherent authority which it has over them. (3) The objective territorial principle allows a state to exercise jurisdiction over those who act outside of its territory so as to intentionally cause a criminal

has jurisdiction to prosecute those who commit acts outside of its territory which have a potentially adverse effect on its security or governmental functions, even though no criminal effect actually occurs within the state.[6]

The protective principle has been used very infrequently in the United States, the territorial and nationality principles generally being relied upon to establish jurisdiction over criminal offenses.[7] The protective principle has, however, been used to establish jurisdiction over the offense of making false statements on visa applications at United States consulates.[8] In addition, the American Law Institute has recognized that, should Congress decide to proscribe the counterfeiting of United States currency outside of the United States, jurisdiction over that offense could be based on the protective principle.[9]

One reason for the scant use of the protective principle may lie in the fact that the courts have not always understood how to employ it. In *Rocha v. United States,*[10] for example, the defendant was charged with making a false statement on a visa application. Although the court seemed to recognize that the protective principle was applicable, it "still felt constrained to say that jurisdiction rested partially on the adverse effect produced as a result of the alien's entry into the United States."[11] In addition, the court evidenced its confusion regarding the basis of jurisdiction by citing two cases in which jurisdiction

---

effect within the state. (4) Universal jurisdiction is premised on the belief that certain crimes, such as piracy and slavery, constitute crimes against humanity so that every state has the right to punish those who commit them. (5) Special maritime jurisdiction is based on the right of control which a state has over its flag vessels on the high seas. Harvard Research, *supra*.

6. Harvard Research, *supra* note 5, at 543. *See also* United States v. Pizzarusso, 388 F.2d 8, 10-11 (2d Cir. 1968); United States v. Rodriguez, 182 F. Supp. 479, 489 (S.D. Cal. 1960).

7. See note 5, *supra*. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 33, note 1 (1965); Harvard Research, *supra* note 5, at 544. *See also* United States v. Flores, 289 U.S. 137, 155 (1933).

8. 18 U.S.C. § 1546 (1976). *See, e.g.*, United States v. Rodriguez, 182 F. Supp. 479 (S.D. Cal. 1960); United States v. Archer, 51 F. Supp. 708 (S.D. Cal. 1943).

9. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 33(2), illus. 1 (1965).

10. 288 F.2d 545 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961).

11. United States v. Pizzarusso, 388 F.2d 8, 11 (2d Cir. 1968).

was based on the objective territorial principle as support for its use of the protective principle.[12] In *United States v. Baker*[13] another court was faced with a factual situation similar to that in *Rocha*. The court in *Baker* held that it did not have jurisdiction over the subject matter; it incorrectly believed that the protective principle was applicable only to acts committed abroad by American citizens, and not to those committed by foreigners.[14]

Later decisions, however, have shown an increased understanding of the protective principle. *United States v. Pizzarusso,*[15] for example, also involved false statements on a visa application. There the court correctly applied the protective principle, noting that there need not be any actual effect within the United States caused by the defendant's acts, but only a potentially adverse effect. In the course of its decision, the court criticized the reasoning in *Rocha* and said that it would have upheld jurisdiction in the *Baker* case based on the protective principle.[16]

The argument could be made that the tendency of American courts to analyze jurisdiction over acts committed abroad solely in terms of the nationality or objective territorial principles indicates a limitation on the ability of the courts to employ the protective principle.[17] In view of its recognition in interna-

12. The court cited *Strassheim v. Daily,* 221 U.S. 280 (1911) and *United States v. Aluminum Co. of America,* 148 F.2d 416 (2d Cir. 1945). In *Strassheim* the defendant obtained money by false pretenses from the state of Michigan through the mail; the court in Michigan had jurisdiction because the effect occurred there. 221 U.S. at 285. In the *Aluminum* case, defendant was charged under the Sherman Act with organizing a foreign cartel with the intent to affect imports into the United States; the jurisdiction of the American court was based on the effect in the United States. 148 F.2d at 444-45.

13. 136 F. Supp. 546 (S.D.N.Y. 1955).

14. *Id.* at 547-48.

15. 388 F.2d 8 (2d Cir. 1968).

16. *Id.* at 11.

17. In *United States v. King,* 552 F.2d 833 (9th Cir. 1976), an analogous argument was made. The defendant contended that only the territorial and protective principles had been used as bases for jurisdiction by American courts and attempted to show that the case law fell within only these two jurisdictional approaches. Defendant thus argued that the court had no jurisdiction over the offenses, because they were not committed within the United States and did not fall under the protective principle. The court rejected this argument. *Id.* at 851. A similar argument could be made

tional law, however, the fact that the protective principle has been used only sparingly in the past should not be construed as barring the courts from making greater use of it today. Commenting on this history of sparse usage, the court in *United States v. Rodriguez*[18] said:

> From the body of international law, the Congress may pick and choose whatever recognized principle of international jurisdiction is necessary to accomplish the purposes sought by the legislation. The mere fact that, in the past, Congress may not have seen fit to embody in legislation the full scope of its authorized powers is not a basis for now finding that those powers are lacking.[19]

Thus, in the proper circumstances, the United States can widen the scope of its criminal jurisdiction by means of the protective principle.

In the instant case, the defendant's vessel, the *Great Mystery,* was first sighted by a United States Coast Guard helicopter on the high seas[20] thirty miles north of Arecibo, Puerto Rico, heading in a westerly direction toward the United States. Since the vessel was suspected of being used to smuggle contraband,[21] a Coast Guard cutter was sent to investigate. When questioned by the Coast Guard, a crew member stated that the *Great Mystery* was a United States vessel with an American crew and that they were bound for Port Everglades,

---

because of the very infrequent use of the protective principle in the past. See text at note 7, *supra*.

18. 182 F. Supp. 479 (S.D. Cal. 1960).

19. *Id.* at 491.

20. In order to understand what is meant by "high seas" in the technical sense, one must consider the divisions of ocean space. Waters lying landward of the baseline are termed internal waters and are subject to the absolute sovereignty of the coastal state. Territorial waters are those lying next to the coast; the coastal state has nearly absolute sovereignty over these waters. The United States claims a three mile territorial limit; customary international law probably allows a twelve mile limit. Special contiguous zones are those waters beyond the territorial sea in which the coastal state has limited, specifically defined competence, such as the exclusive right to manage fisheries located there. The high seas are the ocean space lying beyond the seaward limit of the territorial sea. H. KNIGHT, THE LAW OF THE SEA: CASES, DOCUMENTS, READINGS at xxxiv (1977).

21. The *Great Mystery* was on a list of vessels suspected of being used to violate United States' laws. The list is published weekly by the United States Coast Guard.

Florida. A routine administrative search was conducted by the Coast Guard,[22] during which approximately 1300 pounds of marijuana were discovered in the hold. The crew was placed under arrest and returned to San Juan, where they were indicted.

The defendant's motion for dismissal alleged that the court lacked subject matter jurisdiction over the offenses, since the vessel had been outside of United States territorial waters at the time of the seizure. The court agreed that all of the acts in question had taken place on the high seas, but found that the planned invasion of the United States customs territory did have a potentially adverse effect on security and governmental functions, specifically the customs law, which prohibits the importation of certain controlled substances.[23] This was sufficient, in the court's opinion, to justify the exercise of jurisdiction under the protective principle with respect to counts one and three, conspiracy to import and attempting to import marijuana.

The court found, however, that it did not have jurisdiction over count two of the indictment, possession of marijuana with intent to distribute, under the protective theory.[24] Although the basis for this decision was not stated in the opinion, the court apparently reasoned that the federal statutes proscribing conspiracy to import and attempting to import marijuana could be applied extraterritorially, but that the statute proscribing possession with intent to distribute could be applied only within the boundaries of the United States. To determine whether a statute should be given extraterritorial application, the court first had to consider whether Congress intended to proscribe the offense in question even when it is committed beyond the territory of the United States.

Federal statutes are generally presumed to apply only

22. A routine administrative search involves an inspection of the ship's papers, which requires going into the hold in order to confirm the vessel's number on the main beam, and a check for compliance with safety regulations. The Coast Guard is authorized to make such searches. 14 U.S.C. § 89(a) (1950).

23. 451 F. Supp. at 635. The court apparently believed that the attempt to import marijuana injures a governmental function, since it mentioned the customs laws. *See also* 21 U.S.C. § 963 (1970).

24. 451 F. Supp. at 635 n.8.

within the territory of the United States.[25] In order to overcome this presumption, it must be shown that Congress clearly intended the statute to have extraterritorial effect,[26] or that the purpose of the statute would be defeated unless it were given extraterritorial application.[27] In *Brulay v. United States,*[28] the court considered the extraterritorial application of the federal conspiracy statute[29] and the federal smuggling statute.[30] It noted that "[s]ince smuggling by its very nature involves foreign countries, and since the accomplishment of the crime always requires some action in a foreign country, we have no difficulty inferring that Congress did intend that the provisions of [the smuggling statute] should extend to foreign countries . . . ."[31] The high seas are not, strictly speaking, foreign territory because they are not subject to the exclusive sovereignty of any one state. Nonetheless, applying these same principles of interpretation to counts one and three, it could be seen that the federal statute proscribing conspiracy to import and attempting to import controlled substances[32] should be given extraterritorial application. To limit its application to United States territory would seriously hinder its purpose, which is preventing the importation of certain substances.[33] If the statute's applicability were limited to the United States, this would mean that the government could only act once the substances had in fact been introduced into the United States.

Count two of the indictment, however, charges a violation of a statute which proscribes the mere possession of a controlled substance with the intent to distribute.[34] As such it proscribes a crime of status, *i.e.,* one which consists of a condition and not an act.[35] The purpose of the statute, which is to

25. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 38, note 1 (1965).

26. United States v. Mitchell, 553 F.2d 996, 1002 (5th Cir. 1977).

27. *Id.*

28. 383 F.2d 345 (9th Cir.), *cert. denied,* 389 U.S. 986 (1967).

29. 18 U.S.C. § 371 (1948).

30. 18 U.S.C. § 545 (1955).

31. 383 F.2d 345, 350 (9th Cir. 1967).

32. 21 U.S.C. § 963 (1970).

33. 1970 U.S. CODE CONG. & AD. NEWS 4566, 4637-39.

34. 21 U.S.C. § 841(a)(1) (1970).

35. Lacey, *Vagrancy and Other Crimes of Personal Condition,* 66 HARV. L. REV.

limit the illegal distribution of drugs within the United States,[36] would not be hindered if the statute were held to apply only within the United States. Absent a specific indication of Congressional intent to the contrary, it will not be extended to foreign countries. Therefore, in order to uphold jurisdiction over count two, the court had to determine if the vessel was subject to the special maritime jurisdiction of the United States, in which case it would be subject to its criminal jurisdiction.

The statute defining the special maritime jurisdiction provides that a vessel which belongs in whole or in part to an American citizen is subject to this jurisdiction.[37] In determining whether this statute was applicable, the court was faced with an issue of first impression, namely the interpretation of the words "belonging to" in the phrase "any vessel belonging in whole or in part to . . . any citizen . . . [of the United States]."[38] The court interpreted this phrase to mean ownership[39] and, after considering the facts, held that the vessel was subject to the special maritime jurisdiction.[40] This being so, the court held that it had jurisdiction over count two and stated that the special maritime jurisdiction could also serve as a basis for jurisdiction over counts one and three.[41] It is important to note that the court did not have to apply the special maritime jurisdiction to counts one and three, since jurisdiction based on the protective principle alone was sufficient for these counts. If the court had been able to obtain jurisdiction by relying on a previously established judicial interpretation of the special maritime jurisdiction statute, there would have been no need to consider the applicability of the protective principle. Special maritime jurisdiction by itself would have

1203, 1203 (1953); Sherry, *Vagrants, Rogues and Vagabonds-Old Concepts in Need of Revision*, 48 CAL. L. REV. 557, 558 (1960).

36. 1970 U.S. CODE CONG. & AD. NEWS 4566, 4571-72.

37. 18 U.S.C. § 7 (1952).

38. 18 U.S.C. § 7 (1952).

39. 451 F. Supp. at 636. The court based its decision on the definition of "belonging" in Black's Law Dictionary, which includes ownership. *See* BLACK'S LAW DICTIONARY 198 (4th ed. 1968).

40. 451 F. Supp. at 637.

41. *Id.* at 635.

been sufficient for all three counts. But faced with a case of first impression, the court advanced two separate bases for its jurisdiction, apparently so that in the event its application of special maritime jurisdiction to count two were overruled, it would still have jurisdiction over counts one and three.

In this analysis of jurisdictional bases, the court was careful to distinguish the protective from the objective territorial principle of jurisdiction, correctly pointing out that the former requires only a potentially adverse effect on security or governmental functions, while the latter requires an actual effect within the state.[42] This distinction is important, for if the court had confused the protective with the objective territorial principle, it would not have had jurisdiction since no actual effect ever occurred within the United States.

By applying the protective principle of jurisdiction to conspiracies and attempts to violate the United States customs laws, the court has fashioned an effective tool for use in the effort to stop the flow of illegal drugs into the United States. Its effectiveness becomes evident in light of the Congressional grant of authority to the Coast Guard to "go on board of any vessel subject to the jurisdiction . . . of the United States, . . . and examine, inspect and search the vessel . . . ."[43] The statute is not limited on its face to United States vessels;[44] thus, if a foreign vessel on the high seas is subject to the jurisdiction of the United States by way of the protective principle, members of the Coast Guard may stop and search it if they suspect it is being used to smuggle drugs.[45]

It should be kept in mind, however, that the Coast Guard's right to board a foreign vessel is limited by the treaty obligations of the United States and by the rules of customary international law.[46] Article 22 of the 1958 Convention on the High

42. *Id.*

43. 14 U.S.C. § 89(a) (1950).

44. United States v. Cadena, 585 F.2d 1252, 1257 (5th Cir. 1978).

45. For the constitutional implications of a "stop and search" on the high seas, *see* Carmichael, *At Sea with the Fourth Amendment*, 32 U. MIAMI L. REV. 51 (1977).

46. Among the sources of international law are treaties, custom, and general principles of law derived from the major legal systems of the world. G. SCHWARZENBERGER & E. BROWN, A MANUAL OF INTERNATIONAL LAW 21-28 (6th ed. 1976). Customary international law consists of principles derived from the general practices of states which have become accepted by them as binding rules of law. *Id.* at 26.

Seas[47] greatly limits the instances in which a warship[48] of one party to the convention may board a merchant ship of another party. Boarding is permitted only if there are grounds to suspect that the merchant ship is engaged in piracy or the slave trade, or that the ship is really of the same nationality as the warship, although it is flying no flag or the flag of another nation.[49]

Although the 1958 Convention on the High Seas was an attempt to codify those rules of customary international law which were applicable to the legal regime of the oceans,[50] all such rules were not in fact codified. Professor McDougal has criticized article 22 as being misleading, noting that "[a]n examination of Article 22 does not complete the inquiry necessary to discover the measures a state may take on the high seas to enforce exclusive national regulations otherwise in conformity with international law."[51] In other words, since customary international law recognizes that coastal states may proscribe certain conduct on the high seas to protect national security interests, as well as custom, health, or sanitation laws, this right to proscribe must logically be accompanied by a right to enforce the proscription in a reasonable manner.[52] Thus, "the occasions for permissible visit and search under customary international law [extend] much beyond suspicions of piracy and slave trade . . . ."[53] They logically include those instances in which a coastal state is justfied in proscribing or authorizing certain conduct on the high seas to protect its security or economic interests.[54]

47. Convention on the High Seas, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200 (effective September 30, 1962) [hereinafter cited as 1958 Convention on the High Seas].

48. A Coast Guard vessel is considered to be a warship. *Compare* Maul v. United States, 274 U.S. 501, 515 (1927) (Brandeis, J., concurring) *with* 1958 Convention on the High Seas art. 8(2), *supra* note 47.

49. 1958 Convention on the High Seas, *supra* note 47, art. 22.

50. The preamble to the convention states that its drafters desired "to codify the rules of international law relating to the high seas . . . ." 1958 Convention on the High Seas, *supra* note 47, preamble.

51. M. McDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 893 (1962).

52. *Id.* at 885.

53. *Id.* at 889.

54. *Id.* at 885.

As a signatory to the 1958 Convention on the High Seas, the United States is limited by article 22 with respect to the instances in which a warship of the United States may stop and board a merchant vessel of another party to the convention. The terms of the convention, where applicable, supersede "prior domestic law to the contrary,"[55] which includes the Congressional grant of authority to the Coast Guard to board vessels subject to the jurisdiction of the United States. This limitation does not, however, extend to the vessels of nations which are not parties to the convention,[56] nor to stateless vessels.[57] The United States' conduct with respect to such vessels is controlled, in the absence of a treaty, by customary international law, which, as noted above, permits a right of visit and search in more instances than does article 22.[58] Because of this, the use of the Coast Guard's authority to board vessels based on jurisdiction under the protective principle can still be of assistance in the effort to stop the traffic in illegal drugs. Much of this traffic originates in Colombia,[59] and Colombian and Panamanian vessels are frequently used.[60] Since neither Panama nor Colombia are parties to the 1958 Convention, the right of the Coast Guard to stop and board them upon reasonable suspicion of drug smuggling is not curtailed by article 22 of the 1958 Convention. Nor is the right to board limited by customary international law, since under that body of law it is recognized that states may proscribe conduct on the high seas which affects its customs laws or its security, and enforce these proscriptions in a reasonable manner. Since customary international law permits a right of visit and search in more circumstances than does article 22, the United States should carefully consider the effect which a limitation such as article 22 has on American drug enforcement efforts before agreeing to similar

55. United States v. Cadena, 585 F.2d 1252, 1260 (5th Cir. 1978).

56. *Id.* at 1261.

57. United States v. Cortes, No. 78-1734, slip op. (5th Cir., January 16, 1979). A stateless vessel is one which is not legally entitled to fly the flag of any nation. *See generally* H. MEYERS, THE NATIONALITY OF SHIPS 309-23 (1967).

58. See note 46, *supra*, and accompanying text.

59. TIME, Jan. 29, 1979, at 22.

60. *Id.*

language in other treaties.[61]

The objection may be raised that the use of the protective principle to allow the Coast Guard to search foreign vessels on the high seas represents unwarranted interference with the freedom of the seas. The concept of freedom of the seas attempts to guarantee the most unrestricted use of the seas by all nations. This ideal has not, however, been embodied in a sacrosanct rule.[62] Rather, it is flexible enough to respond to changing circumstances and the often divergent needs of the individual states.

The rules of international law applicable to the seas have developed out of the resolution of the conflicting claims of states.[63] Some states, for example, want greater freedom of the seas, while others claim the right to assert greater control over portions of the seas. Professor McDougal has stated that this process involves a balancing of the conflicting claims, with due consideration given to the interests of the community of nations, in an attempt to promote the least restricted use of the seas.[64] He also states that "the public order of the oceans then protects a state only in such occasional assertions of authority and use as are determined to be *reasonable* . . . ."[65] Thus, the indiscriminate use of the protective principle to allow boarding of foreign vessels would not be tolerated, but a reasonable use would be justified. What is reasonable will, of course, vary with the circumstances. Factors to be considered in determining reasonableness include the authority claimed by the coastal state, the opposition of other states to this claimed authority,

61. The United States is currently participating in the Third United Nations Conference on the Law of the Sea, one purpose of which is the drafting of a new multilateral convention on the legal regime of the seas. Proposed article 110 of the Informal Composite Negotiating Text closely tracks the language of article 22 of the 1958 Convention. If this text is adopted by the United States and other nations, and should such a treaty enter into force, it could severely limit the Coast Guard's authority to search foreign vessels suspected of drug smuggling. *Compare* Informal Composite Negotiating Text art. 110, U.N. Doc. A/Conf. 62/WP.10 (1977) *with* 1958 Convention on the High Seas, *supra* note 47, art. 22.

62. M. McDOUGAL & W. BURKE, *supra* note 51, at 797.

63. H. KNIGHT, *supra* note 20, at xli-xlii; M. McDOUGAL & W. BURKE, *supra* note 51, at 2.

64. M. McDOUGAL & W. BURKE, *supra* note 50, at 56.

65. *Id.* at 57 (emphasis added).

and the extent and nature of the interference caused by the claimed authority.[66] Measured against these standards, it can be argued that the proposed limited use of the protective principle is reasonable.

That such a use of the protective principle is in fact reasonable becomes apparent when one considers the nature of the problem which the United States faces. Given the severity of the drug problem,[67] it might be argued that the court in *Keller* has not so much expanded the meaning of "governmental functions" to include customs laws as it has assimilated attempts to import drugs to acts directed against the security of the United States. The classification of the interest injured as either a security interest or a governmental function has no effect on the jurisdictional question, since injuries to both such interests come under the protective principle. It is, however, easier to show the reasonableness of an action taken to protect a security interest as opposed to a governmental function.

The justification for the United States' assertion of the right to stop and board foreign vessels suspected of smuggling drugs is obvious when one considers the need to prevent the importation of drugs. Provided that the proper diplomatic groundwork has been laid,[68] it is difficult to imagine that another nation would protest the boarding of one of its vessels when there is probable cause to believe that it is smuggling drugs. To do so would be to argue that the principle of the freedom of the seas allows its ships to engage in conduct which adversely affects the peace and security of the United States. If the protective principle is used in this limited fashion against such a universally recognized evil as narcotics smuggling, and

66. *Id.* at 57-63.

67. Estimates place the number of drug addicts as high as 800,000. *See* Cimino, *Narcotic Addiction in the United States: A Nationwide Survey*, 2 CONTEMP. DRUG PROB. 401, 414 (1973). The cost in terms of narcotics-related theft ranges up to two billion dollars. *See* DRUG ABUSE SURVEY PROJECT, DEALING WITH DRUG ABUSE: A REPORT TO THE FORD FOUNDATION 6 (1972).

68. Currently, the Coast Guard must request the State Department to obtain permission from the nation whose flag a foreign vessel is flying before boarding. *Coast Guard Drug Interdiction: Hearings on H.R. 10371 and H.R. 10698 Before the Subcomm. on Coast Guard and Navigation of the Comm. on Merchant Marine and Fisheries*, 95th Cong., 2d Sess. 108 (1978) (statement of Admiral Venzke).

if the necessary diplomatic steps are taken, there should be no serious protests from other nations.

Edward Thomas Meyer

IMPEACHING THE DECEASED EXCITED UTTERANCE DECLARANT

The victim, within fifteen minutes of the shooting, responded to questions asked by a witness and stated that the defendants and a third person had shot her. She also identified as one of her assailants a person against whom she had testified in connection with the slaying of her brother. The trial judge admitted these statements into evidence under the excited utterances exception to the hearsay rule. For impeachment purposes, the defendants requested the court to order the state to furnish them with any information it had concerning prior convictions of the victim.[1] The trial judge denied the request based on his belief that the out-of-court statement of the victim would not be susceptible to impeachment. The defendants also requested the court to order the prosecution to produce a police department press release issued to local newspapers which resulted in media reports that the victim, after being shown photographs, identified as one of her attackers a person then in the state penitentiary.[2] This information was also to be used to discredit the statements of the victim, but the trial court denied this request as well. The Louisiana Supreme Court *held* that because the excited utterance is effectively a testimonial statement, its introduction should render the declarant susceptible to impeachment in the same manner as other witnesses. *State v. Henderson,* 362 So. 2d 1358 (La. 1978).

One of the recognized exceptions to the hearsay rule is an

1. State v. Henderson, 362 So. 2d 1358, 1363 (La. 1978). Although it is not clear under what authority defense counsel made the request for information concerning possible prior conviction records of the victim, the court held that this was a specific and relevant request for evidence materially favorable to the accused which should have been complied with under *United States v. Agurs,* 427 U.S. 97 (1976); *State v. Harvey,* 358 So. 2d 1224 (La. 1978); and *State v. May,* 339 So. 2d 764 (La. 1976). 362 So. 2d at 1363.

2. The court again held this to be a specific and relevant request for evidence materially favorable to the accused. 362 So. 2d at 1364. See note 1, *supra.*