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Criminal Law–Kidnaping–Detention Incidental to Crime of Robbery Held Not Kidnaping (People v. Levy, 15 N.Y.2d 159 (1965))

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will be able to pay escheat claims without fear of dual liability. Furthermore, escheat revenues, by this rule, will be apportioned ratably among the various states according to the commercial activity of their residents. Finally, by adopting both an equitable and practical test, the Court has saved itself from a potential flood of original-jurisdiction suits to determine questions of fact.

However, the narrowly defined power of the states to escheat intangibles must be juxtaposed against the expansion of state power to tax intangible property. As indicated previously, any state offering benefit or protection to property could tax it. More precisely, taxation within constitutional limitations, could feasibly subvert the intent of the "last-known address" doctrine. For example, a corporation domiciled in State *A* owes monies to several creditors whose last-known addresses are in State *B*. State *B*, pursuant to the *Texas* case, statutorily escheats the monies. State *A* could, because the power of its laws makes the debt enforceable, impose a substantial tax on the *right* to escheat that property. Thus, State *A* would effectively deprive State *B* of the possible escheat revenue. Such a tax appears permissible under the wide latitude of tax jurisdiction afforded by the Supreme Court.

This hypothetical brings into sharp focus the tendencies inherent in the Court's treatment of intangible property in the areas of taxation and escheat. It also seems to necessitate the development of a unifying principle for multistate taxation of intangible property. The Supreme Court was able, in the laboratory conditions of a case of first impression, to adopt both a practical and equitable principle. However, by doing so, the Court has solved but one of a great many complex and interdependent problems.

CRIMINAL LAW — KIDNAPING — DETENTION INCIDENTAL TO CRIME OF ROBBERY HELD NOT KIDNAPING. — In a recent criminal prosecution the jury found that the defendants forced their way into the complainants' car, and while one of them drove the car, the other appropriated complainants' jewelry and case. The trip covered twenty-seven city blocks and took twenty minutes. The defendants were convicted of kidnaping, in addition to robbery and criminal possession of a pistol. In reversing the conviction on the kidnaping count, the Court of Appeals *held* that the crime committed was *essentially* robbery, reasoning that the restraint imposed upon the complainants was merely incidental to the commission of that crime and did not constitute the separate crime of kidnaping. *People v. Levy,* 15 N.Y.2d 159, 204 N.E.2d 842, 256 N.Y.S.2d 793 (1965).

At common law the crime of kidnaping was defined as the forcible stealing away of an individual from his own country to another [1] and was punishable as a misdemeanor.[2] In the United States the penal statutes of some states have modified this common-law concept.[3] Removal to a foreign jurisdiction is no longer a necessary element. However, in addition to the common-law requirement of unlawful seizure, the elements of secret confinement and extortion have generally been required to constitute kidnaping.[4] Furthermore, under the language of the modern statutes, the definition of the crime of kidnaping has been expanded.[5] Pursuant to such a statute,[6] the New York courts have designated three distinct types of conduct as susceptible of being punished as kidnaping.[7]

Given its broadest construction, the statute encompasses conduct involving merely a forcible and unlawful detention.[8] For example, in *Cowan v. Tennessee* [9] the defendant detained two girls in a car for seven hours while he unsuccessfully exhorted them to have sexual relations with him. This was found sufficient to constitute kidnaping although there was no asportation of the victims.

When the statute is construed liberally it will include instances where the victim is detained solely for the purpose of facilitating some other crime. For example, a bank robber will often tie up his victim and move him to another room. Such detention and asportation fall within the modern statutory definition of kidnaping, although by traditional definitions the conduct would clearly not be kidnaping.[10] In *People v. Florio,*[11] for example,

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[1] PERKINS, CRIMINAL LAW § 7a (1957).

[2] *Ibid.*

[3] Kidnaping is punishable as a capital offense in over half of the American jurisdictions, including New York. 26 J. CRIM. L., C. & P.S. 763 (1936); see N.Y. PEN. LAW § 1250(3).

[4] CLARK & MARSHALL, LAW OF CRIMES § 223 (4th ed. 1940). See also People v. La Marca, 3 N.Y.2d 452, 144 N.E.2d 420, 165 N.Y.S.2d 753, *cert. denied,* 355 U.S. 920 (1957).

[5] See Note, 53 COLUM. L. REV. 540, 451 nn. 8, 9 (1953).

[6] N.Y. PEN. LAW § 1250 reads: "A person who wilfully seizes, confines, inveigles, or kidnaps another, with intent to cause him without authority of law, to be confined or imprisoned within the state, or to be sent out of the state, or to be sold as a slave, or in any way held to service or kept or detained, against his will . . . is guilty of kidnaping. . . ."

[7] See generally Note, 15 ALBANY L. REV. 65, 75-77 (1951).

[8] See People v. Hope, 257 N.Y. 147, 177 N.E. 402 (1931).

[9] 208 Tenn. 512, 347 S.W.2d 37 (1961). See also State v. Jacobs, 93 Ariz. 336, 380 P.2d 998, *appeal dismissed,* 375 U.S. 46 (1963); People v. Oliver, 55 Cal. 2d 761, 361 P.2d 593 (1961).

[10] *Accord,* People v. Rosenthal, 289 N.Y. 482, 46 N.E.2d 895 (1943); People v. Koslow, 6 App. Div. 2d 713, 174 N.Y.S.2d 709 (2d Dep't 1958).

[11] 301 N.Y. 46, 92 N.E.2d 881 (1950). See also People v. Wein, 50 Cal. 2d 383, 326 P.2d 457, *cert. denied,* 358 U.S. 866 (1958); People v. Oganesoff, 81 Cal. App. 2d 709, 184 P.2d 953 (1947); People v. Dugger, 5 Cal. 2d 337, 54 P.2d 707 (1936).

the defendants inveigled a woman into their car, and transported her from Manhattan to Queens where they raped her. The New York Court of Appeals held that the defendants were properly convicted of kidnaping and rape, notwithstanding that the abduction and asportation were merely incidental to and facilitative of the rape.

The third kind of conduct punishable as kidnaping under the New York statute concerns the defendant's activity after he has *completed* a crime. Here the defendant, in attempting to safely depart, forces his victim to accompany him as a hostage.[12] For example, in *People v. Black*[13] the defendant entered the complainants' home with an intent to rob them. After taking their money, he forced one of them to become his hostage and took her to another state detaining her for a considerable time. The appellate division affirmed the convictions for kidnaping and robbery, stating that the kidnaping occurred after the robbery and, therefore, the crimes had no connection with each other "except insofar as the defendant might have believed that a hostage would give him some insurance against close pursuit."[14]

The broad language of the New York statute has thus been shown to be subject to a variety of interpretations which define conduct as kidnaping although the acts committed would not be so considered under traditional definitions.[15] In contrast to this broad construction, the United States Supreme Court, in construing the similarly phrased federal kidnaping statute,[16] felt constrained to give it limited application. Thus, in *Chatwin v. United States*,[17] the defendants were convicted under the federal statute for inveigling, decoying and transporting a child from Utah to Arizona. In reversing the conviction, the Court rejected a loose construction of the statutory language since it "conceivably could lead to the punishment of anyone who induced another to leave his surroundings and do some innocent or illegal act of benefit to the former. . . ."[18] The purpose of the act, said the Court,

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[12] See People v. Kristy, 4 Cal. 2d 504, 50 P.2d 798, *cert. denied*, 297 U.S. 712 (1935).

[13] 18 App. Div. 2d 719, 236 N.Y.S.2d 240 (2d Dep't 1962) (memorandum decision), *cert. denied*, 375 U.S. 898 (1963).

[14] *Id.* at 721, 236 N.Y.S.2d at 243.

[15] For a profitable discussion see MARKS & PAPERNO, CRIMINAL LAW IN NEW YORK §§ 116-22 (1961).

[16] 18 U.S.C. § 1201 (1958). "Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, or kidnapped, abducted or carried away and held for ransom or reward or otherwise [is guilty of kidnaping]. . . ." The statute was passed in answer to public indignation over the kidnaping and subsequent death of Charles A. Lindbergh's son. It has come to be called the "Lindbergh Law."

[17] 326 U.S. 455 (1946).

[18] *Id.* at 464.

"was to outlaw interstate kidnappings rather than general transgressions of morality involving the crossing of state lines." [19] Thus, the Court limited the application of the federal statute to acts which are similar to the conventional concept of kidnaping.[20]

In the instant case the Court of Appeals had the opportunity to reconsider the New York statute in light of *Chatwin*, as well as recent comments on the subject of kidnaping.[21] The Court stated that the statute must be limited to kidnaping in the conventional sense. Thus the Court, in contrast to prior precedent, narrowly construed the broad language of the statute, eliminating the possibility that future defendants would be convicted of kidnaping for conduct similar to that found in *Cowan* and *Florio*. The majority indicated that while the statute might literally include several other crimes, it should be applied only in situations where the *asportation* of a person under restraint and compulsion constituted a *separate* crime of kidnaping.[22] The statute, said the Court, would no longer be applicable to restraints which "have long been treated as integral parts of other crimes."[23] In applying the statute to the instant case the Court indicated that here the crime committed was essentially robbery. The detention and asportation in the automobile were merely incidental to the commission of that crime; they did not constitute the separate crime of kidnaping.

In contrast, the dissenting judges argued that the statute was designed to reduce the criminal practice of detaining victims even when the detention was an integral element of the crime.

Furthermore, the dissent expressed the fear that the practice of taking hostages might very well be encouraged as a result of the majority opinion. Ostensibly, this practice of taking hostages could present a serious police enforcement problem. However, it appears that these difficulties would be substantially resolved if the proposed revision to the New York Penal Law is adopted.[24] Proposed section 140.15 attempts to specifically define the crime of kidnaping as to what are commonly conceived to be "genuine

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[19] *Ibid.*

[20] The Court stated that "the broadness of the statutory language does not permit us to tear the words out of their context . . . [and] apply them to unattractive or immoral situations lacking the involuntariness of seizure and detention which is the very essence of the crime of kidnapping."

[21] See, *e.g.*, Note, 53 COLUM. L. REV. 540 (1953); Note, 35 So. CAL. L. REV. 212 (1962); Note, 110 U. PA. L. REV. 293 (1961); Comment, 11 STAN. L. REV. 554 (1959).

[22] People v. Levy, 15 N.Y.2d 159, 204 N.E.2d 842, 256 N.Y.S.2d 793 (1965).

[23] *Id.* at 164, 204 N.E.2d at 844, 256 N.Y.S.2d at 796.

[24] PROPOSED N.Y. PEN. LAW, S. Int. 3918; A. Int. 5376 (1964), (hereinafter cited as PROPOSED N.Y. PEN. LAW).

kidnaping" cases. Under the proposed statute,[25] a person may be convicted of kidnaping when:

(1) he unlawfully
  (a) removes another person from his place of residence or business; or
  (b) removes him a substantial distance from the vicinity where the removal commences; or
  (c) confines him for a substantial period in a place of isolation; and when
(2) his intent is
  (a) to hold such person for ransom; or
  (b) to use him as a shield or hostage; or
  (c) to inflict physical injury upon him, or to violate or abuse him sexually; or
  (d) to terrorize him or a third person; or
  (e) to interfere with the performance of any governmental or political function.

If the instant case were decided under the proposed law the outcome would be the same. However, the fear expressed by the dissenting judges that criminals will increase the practice of detaining their victims during the commission of a crime would be abrogated, because express provision is made in the proposed law for the prosecution of criminals for kidnaping if they employ their victims as shields or hostages.

While such terms in the proposed law as "substantial distance" and "substantial period" are objectionable as imprecise and hence subject to arbitrary application, they would probably be construed in light of the Court's decision in the instant case. However, although the Court expressly overruled the *Florio* decision, under the language of the proposed statute, a conviction on similar facts would probably be upheld.[26]

It is submitted that the proposed revision presents a rational solution to the problem of kidnaping. The proposed legislation would abrogate criticism of the principal case by law enforcement officers, while it would protect criminals against the arbitrary and excessive imposition of penalties.[27] By their definition of kidnaping the Revisers of the Penal Law have succeeded in specifically defining

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[25] PROPOSED N.Y. PEN. LAW § 140.15. The proposed revision has the further refinement of punishing other forms of unlawful removal under lesser offenses such as false imprisonment or custodial interference.

[26] The defendants would be convicted of kidnaping because they removed their victim a "substantial distance" with "intent" to abuse her sexually. See PROPOSED N.Y. PEN. LAW § 140.15 (2)(c).

[27] See, *e.g.*, MODEL PENAL CODE § 212.1, comment at 13-14 (Tent. Draft No. 11, 1960); *cf.* Packer, *The Case for Revision of the Penal Law*, 13 STAN. L. REV. 252 (1961).

a serious crime, as it has now come to be understood, and which, under the present law, is ill-defined and arbitrarily applied.

Until the proposed revision is adopted the holding in the instant case will have a marked effect on prior precedent. Since the Court limited the applicability of the statute to kidnaping in the conventional sense, no longer will detention alone as in *Cowan*, or detention and asportation as in *Florio*, be sufficient to constitute the wholly independent crime of kidnaping. Rather, the Court limits the statute to conduct as that found in *Black* where the restraint constituted the completely separate crime of kidnaping. However, it is difficult to predict the effect of the instant decision to other factual situations since the Court expressly indicates that whether or not the conduct will constitute the separate crime of kidnaping depends on the facts and circumstances involved. In any event, the Court has sharply curtailed the applicability of the present penal statute. No longer will an individual be convicted of kidnaping, one of our most serious crimes, when his conduct is merely incidental to the commission of another crime.

CRIMINAL PROCEDURE — CONFESSIONS — NEW PROCEDURE GOVERNING ADMISSIBILITY OF CONFESSIONS APPLIED RETROACTIVELY. — In 1960, defendant was convicted of robbery in the first degree after a trial in which, pursuant to New York procedure, the issue of the voluntariness of his confession was submitted to the same jury that determined his guilt. The appellate division affirmed the conviction and the court of appeals, denied defendant's application for leave to appeal. Subsequently, the New York procedure was declared unconstitutional by the United States Supreme Court in the case of *Jackson v. Denno*.[1] The New York Court of Appeals, after favorably reconsidering defendant's application, *held* that although defendant ordinarily could claim no further appellate relief, he was entitled to a redetermination on the admissibility of his confession. The Court stated that a coram nobis motion is the appropriate procedure for contesting such prior convictions,[2] and that the "Massachusetts procedure" would be used in future trials to determine the admissibility of allegedly coerced confessions. *People v. Huntley*, 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965).

Whether retroactive application should be given to newly declared law is a problem to which history has not supplied

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[1] 378 U.S. 368 (1964).

[2] For a detailed analysis of the coram nobis motion, see Comment, 57 Nw. U.L. Rev. 467 (1962).