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Jurisdiction--The Short-Lived Death of the Ker-Frisbie Doctrine

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RECENT DEVELOPMENTS

JURISDICTION—THE SHORT-LIVED DEATH OF THE *Ker-Frisbie* DOCTRINE

I. INTRODUCTION

For nearly ninety years the doctrine that a court may not question the manner by which a criminal defendant is brought within its territorial jurisdiction stood immutable. The Supreme Court first espoused the doctrine in *Ker v. Illinois*[1] in 1886 and reaffirmed the rule in *Frisbie v. Collins*[2] in 1952. In *United States v. Toscanino*,[3] decided in 1974, the virtually unquestioned *Ker-Frisbie* doctrine was successfully challenged for the first time. The Second Circuit Court of Appeals held that modern liberal due process standards conflict with the conservative view of due process expressed by the *Ker-Frisbie* doctrine and that *Ker-Frisbie* must yield. At its broadest, *Toscanino* held that due process vitiates personal jurisdiction of federal courts over defendants forcibly abducted from abroad by United States agents. The *Toscanino* inroad into the *Ker-Frisbie* doctrine has prompted very active litigation in the area of criminal jurisdiction gained by forcible abduction. Federal courts have interpreted, weakened, limited, and finally emasculated the *Toscanino* holding in a series of recent cases.

II. BACKGROUND

A. *The Ker-Frisbie Doctrine*

1. *Ker v. Illinois.*—The Supreme Court first proclaimed the doctrine that a court may not question the manner by which a defendant is brought into its territorial jurisdiction in *Ker v. Illinois*.[4] Defendant claimed that because of his forcible abduction from Peru by a United States agent,[5] due process barred his prose-

1. 119 U.S. 436 (1886).
2. 342 U.S. 519 (1952).
3. 500 F.2d 267 (2d Cir. 1974).
4. 119 U.S. 436 (1886).
5. The agent was a presidential messenger carrying a request for extradition. The Peruvian government was unable to receive the request owing to current military circumstances in that country. Consequently, the agent abducted Ker and brought him to California. The Governor of California had received extradition papers from Illinois before Ker's arrival, and defendant was sent almost

cution. The Court, however, reasoned that due process requirements are met when a defendant is "regularly indicted by the proper grand jury in the State Court, has a trial according to the forms and modes prescribed for such trials, and when, in that trial and proceedings, he is deprived of no rights to which he is lawfully entitled."[6] The Court speculated that some pre-trial events would be barred by the fourteenth amendment,[7] but that "mere irregularities" in the manner in which the court gained jurisdiction do not constitute grounds for denying trial when defendant has been charged in a regular indictment.[8] The Court also rejected defendant's claim that the United States extradition treaty with Peru gave him a positive right to be removed from Peru only in accordance with that treaty.[9]

2. *Frisbie v. Collins.*—The Supreme Court revitalized *Ker* in *Frisbie v. Collins*,[10] ruling that "this Court has never departed from the rule announced in *Ker v. Illinois* that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction'."[11] Petitioner, seeking a writ of habeas corpus, argued that his forcible abduction[12] into the trial court's jurisdiction and subsequent trial and conviction violated the due process clause of the fourteenth amendment and the Federal Kidnapping Act.[13] The

immediately to Illinois. 119 U.S. at 438-39. *See* Fairman, *Ker v. Illinois Revisited*, 47 AM. J. INT'L L. 678, 685 (1953).

6. 119 U.S. at 440.

7. Since *Ker* involved a state prosecution, defendant's claim rested on the fourteenth amendment. The fourteenth amendment was only twenty years old at the time, and the concept of substantive due process so new that the Court was obliged to enclose it in quotation marks: "the 'due process of law' here guaranteed is complied with . . . ." 119 U.S. at 440.

8. 119 U.S. at 440. The Court indicated that a person "may be arrested for a very heinous offense without any warrant, or without any previous complaint, and brought before a proper officer, and this may in some sense be said to be 'without due process of law'."

9. The Court reasoned that an extradition treaty regulates only the procedure by which one country makes demands on another for return of a fugitive, and that in the instant case the treaty was never invoked and thus could not be violated. 119 U.S. at 442-43.

10. 342 U.S. 519 (1952).

11. 342 U.S. at 522.

12. Petitioner had alleged that Michigan authorities forcibly seized, handcuffed, and blackjacked him in Chicago and then took him across state lines to Michigan. 342 U.S. at 520.

13. 18 U.S.C. § 1201 (1970). The statute provides in relevant part: "Whoever knowingly transports in interstate or foreign commerce, any person who has been

Court held that the added allegation of violation of the Federal Kidnapping Act did not constitute grounds for overruling the *Ker* precedent.[14]

B. *Due Process Developments Subsequent to Frisbie and Application of the Ker-Frisbie Doctrine Through 1973*

The double-standard that would confront the *Toscanino* court twenty years later began in 1952 with two seemingly inconsistent holdings. In *Rochin v. California*,[15] rendered two months prior to *Frisbie*, the Supreme Court condemned as "conduct that shocks the conscience"[16] a search conducted by forcibly extracting the contents of a suspect's stomach, and held that the subsequent conviction based on evidence from that search had been obtained by methods which violate the due process clause. Thus, in the same term the Supreme Court upheld the conservative *Ker* rule in *Frisbie*, but concurrently liberalized substantive due process standards in *Rochin*. What has been called the "due process revolution"[17] sprang directly from *Rochin* and has resulted in broad guarantees of specific pre-trial rights.[18] Concurrent with the development of modern due process the *Ker-Frisbie* doctrine stood firm and led one court to declare: "Absent a treaty or law which limits jurisdiction, a court may try a defendant for any crime for which he has been properly indicted. *And the means by which a defendant is brought before the court are immaterial* whether he was kidnapped by American agents in flagrant violation of another state's sovereignty, or handed over by foreign agents who had not

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unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away and held for ransom or reward or otherwise . . . shall be punished . . . ."

14. The Court held that the "act cannot fairly be construed so as to add to the list of sanctions detailed a sanction barring a state from prosecuting persons wrongfully brought to it by its officers." 342 U.S. at 523.

15. 342 U.S. 165 (1952).

16. 342 U.S. at 172.

17. Erwin N. Griswold expressed the opinion that during the past twenty years a constitutional revolution has occurred. The heart of the revolution, he declared, is the due process clause of the fourteenth amendment. Griswold, *The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711, 712 (1971).

18. *See* Miranda v. Arizona, 384 U.S. 436 (1966) (information obtained during course of an interview excluded where defendant held not to have made a knowing waiver of his fifth amendment right against self-incrimination; Pointer v. Texas, 380 U.S. 400 (1965) (sixth amendment confrontation clause binds states through fourteenth amendment).

complied with the extradition treaty."[19]

Violations of guaranteed specific pre-trial rights are remedied by exclusion of illegally obtained evidence—the "fruit of the poisonous tree;"[20] this exclusionary rule has been deemed the sole practical remedy for pre-trial due process violations.[21] Yet, in instances of admitted unlawful arrest by entrapment or kidnapping, when the trial itself might have been characterized as a "fruit" of government illegality, courts have ruled that the due process violation is cured by proper indictment prior to trial.[22] In *United States v. Russell*, however, the Supreme Court indicated by way of dicta, that in some instances denial of jurisdiction might be the only proper remedy to entrapment.[23]

In sum, despite *Rochin*, the *Ker-Frisbie* doctrine has been applied to both state and federal prosecutions indiscriminately[24] and to a variety of factual circumstances.[25] Although the doctrine was

19. Fiocconi v. Attorney General, 339 F. Supp. 1242, 1246-47 (S.D.N.Y. 1972) (emphasis added).

20. *See generally* Maguire, *How to Unpoison the Fruit—The Fourteenth Amendment and the Exclusionary Rule*, 55 J. CRIM. L.C. & P.S. 307 (1964); Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 CAL. L. REV. 579 (1968); Comment, *Fruit of the Poisonous Tree—A Plea for Relevant Criteria*, 115 U. PA. L. REV. 1136 (1967).

21. *See generally* Edwards, *Criminal Liability for Unreasonable Searches and Seizures*, 41 VA. L. REV. 621 (1955); Goldstein, *Police Policy Formulation: A Proposal for Improving Police Performance*, 65 MICH. L. REV. 1123 (1967).

22. Johnson v. Louisiana, 406 U.S. 356, 365 (1972) (defendant's illegal arrest irrelevant, since no evidence obtained by the fourth amendment violation was introduced at trial). *Cf.* Wong Sun v. United States, 371 U.S. 471 (1963) (connection between defendant's unlawful arrest and his statement offered as evidence so attenuated as to dissipate the taint).

23. United States v. Russell, 411 U.S. 423 (1973). "We may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction." 411 U.S. at 431-32. The Court's standard of "outrageous" conduct flows directly from *Rochin v. California*, 342 U.S. 165 (1952) ("conduct that shocks the conscience" violates due process).

24. Both *Ker* and *Frisbie* were state prosecutions, yet no distinction has been drawn between fifth amendment and fourteenth amendment due process rights in the area of forcible abduction. For example, in *United States v. Sobell*, 244 F.2d 520 (2d Cir. 1957), a federal case, the court summarily rejected defendant's claim that fifth amendment due process barred his prosecution because he had been brought to trial by way of forcible abduction from Mexico: "We think the question presented is indistinguishable from . . . *Ker* and that our decision here is controlled by that case." 242 F.2d at 525.

25. One commentator has listed the variety of federal cases that are controlled by the *Ker-Frisbie* doctrine—ranging from illegal arrest to violation by one

criticized occasionally,[26] it remained resolutely upheld through 1973.

C. *Toscanino: A Victory for Due Process*

Toscanino v. United States[27] presented the Second Circuit Court of Appeals with harsh circumstances akin to those faced by the Supreme Court in *Rochin*. Defendant alleged that he was lured from his home in Montevideo by a Uruguayan policeman in the pay of United States agents and abducted by the policeman and six associates by being knocked unconscious and thrown into the rear seat of a car. Defendant claimed he was bound, blindfolded, driven to the Brazilian border, and there taken into custody by Brazilian authorities under the direction of the United States. Toscanino further alleged that he was held incommunicado for seventeen days, and was, moreover, brutalized, tortured, and interrogated while reports from the interrogation were forwarded to the office of the United States Attorney for the Eastern District of New York. Defendant finally alleged that he was drugged and flown to New York where he was arrested aboard the plane and taken immediately to the office of the United States Attorney.[28] After conviction for narcotics violations,[29] defendant sought remand for an evidentiary hearing on whether the court below had obtained personal jurisdiction improperly. Defendant claimed his abduction violated two international treaties[30] and the laws of three sovereign

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foreign country of the sovereignty of another at the behest of the United States. Comment, 43 FORD. L. REV. 634, 635, n.7 (1975).

26. In *United States v. Edmonds*, 432 F.2d 577 (2d Cir. 1970), a case involving evidence obtained incident to an illegal arrest, the Second Circuit said that *Frisbie* and *Ker* "rested only on general considerations of due process" and speculated, "whether the Court would now adhere to them must be regarded as questionable." 432 F.2d 577, 583. *See also* United States v. Cotten, 471 F.2d 744 (9th Cir. 1973) (adhering to *Ker* and *Frisbie* in affirming lower court conviction where defendants had been forcibly abducted from Viet Nam, but questioning the vitality of the doctrine); Government of Virgin Islands v. Ortiz, 427 F.2d 1043 (3d Cir. 1970) (lower court's finding that defendant entered territorial jurisdiction voluntarily not clearly erroneous).

27. 500 F.2d 267 (2d Cir. 1974). For analysis of the case see Comments, 43 FORD. L. REV. 634 (1975); 88 HARV. L. REV. 813 (1975); 10 TULSA L.J. 479 (1975).

28. 500 F.2d at 269-70.

29. Defendant was convicted under 21 U.S.C. §§ 173-74 (1970) for conspiracy to import and distribute narcotics. Defendant did not appeal the substantive conviction.

30. The Charter of the United Nations and the Charter of the Organization

states,[31] and that due process principles barred the court from asserting jurisdiction obtained by such methods.

The Second Circuit assumed the truth of Toscanino's allegations for the purpose of appeal; reversed and remanded for an evidentiary hearing; and held that such governmental illegality and invasion of defendant's civil rights, if proved, would violate due process principles, divest the lower court of jurisdiction, and require that the defendant be returned to his *status quo ante*.[32] To reach this conclusion, the court first outlined the *Ker-Frisbie* doctrine[33] against the development of modern due process.[34] The Court reasoned that *Frisbie* had been subjected to almost immediate erosion by the Supreme Court's decision in *Rochin* just two months prior to *Frisbie*. The Court noted that *Mapp v. Ohio*[35] further weakened *Frisbie*, since it stood for greater liberalization of the due process clause.[36] The court opined that underlying the assertion of the exclusionary rule in *Mapp* was the liberal philosophy of Justice Brandeis that the government should be held to the same stan-

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of American States have both been signed by the United States and Uruguay. U.N. Charter art. 2, Para. 4 provides in part: "All members shall refrain . . . from the threat or use of force against the territorial integrity or political independence of any state . . . ."; Organization of American States Charter art. 17 provides in part: "The territory of any state is inviolable, it may not be the object, even temporarily . . . of . . . measures taken by another state directly or indirectly, on any grounds whatsoever . . . ."

31. The Federal Kidnapping Act, 18 U.S.C. § 1201 (1970), federal wiretap statutes, 18 U.S.C. § 2510, *et seq. (1970),* and similar provisions of Uruguayan and Brazilian law.

32. As to the wiretap allegation, the Court held the fourth amendment prohibits the government from conducting illegal electronic surveillance abroad and that the government is required to comply with 18 U.S.C. § 3504 (1970) when it is invoked by an alien alleging wiretap abroad (under above statute government required upon motion to admit or deny occurrence of an unlawful act in form of eavesdropping or surveillance).

33. Under *Ker-Frisbie*, the court concluded, "due process was limited to the guarantee of a constitutionally fair trial, regardless of the method by which jurisdiction was obtained over the defendant." 500 F.2d at 272.

34. The court found that due process presently stands for more than the guarantee of fair procedure at trial, that the term "has been extended to bar the government from realizing directly the fruits of its own deliberate and unnecessary lawlessness in bringing the accused to trial." 500 F.2d at 272. The court cited *United States v. Russell*, 411 U.S. 423 (1973), and *Miranda v. Arizona*, 384 U.S. 436 (1966), among others, to reach this conclusion.

35. 367 U.S. 643 (1961).

36. *Mapp* held the exclusionary rule binding on states through the fourteenth amendment. 367 U.S. at 655.

dards of conduct as individual citizens.[37] The court found that "[t]he Supreme Court's decisions in *Rochin* and *Mapp* unmistakably contradict its pronouncement in *Frisbie*."[38] The court next examined recent decisions in other circuits and found further evidence of the doctrine's weakness.[39] Faced with an irreconcilable conflict between the restricted version of due process espoused by the *Ker-Frisbie* doctrine and the unconfined reasoning of *Rochin* and *Mapp*, the court held that *Ker-Frisbie* must yield to the modern doctrine.

The court noted that the exclusionary rule generally sanctions governmental pre-trial illegality, but that the Supreme Court has indicated that absolute denial of personal jurisdiction could be an appropriate alternative in extreme circumstances.[40] Finding *Toscanino* to be such a case, the court ruled that:

> having unlawfully seized the defendant in violation of the Fourth Amendment[41] . . . the government should as a matter of fundamental fairness be obligated to return him to his *status quo ante*. . . . Accordingly, we view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights.[42]

The court reasoned that its decision conflicted with the general doctrine of *Ker-Frisbie*, but that both *Ker* and *Frisbie* were state

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37. In his dissenting opinion in *Olmstead v. United States*, 277 U.S. 438 (1928), Justice Brandeis said:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizens . . . . If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face. 277 U.S. at 485.

38. 500 F.2d at 274.

39. United States v. Cotten, 471 F.2d 744 (9th Cir. 1973); Virgin Islands v. Ortiz, 427 F.2d 1043 (3d Cir. 1970).

40. United States v. Russell, 411 U.S. 423, 431-32 (1973).

41. One commentator feels that it is unclear exactly what right was violated by the defendant's abduction from Uruguay. 88 HARV. L. REV. 814, n.9 (1975).

42. 500 F.2d at 275. The court added that its conclusion was but an extension of the federal court's power to decline to exercise civil jurisdiction when a defendant's presence had been obtained by force or fraud.

court cases, not strictly binding on review of a federal decision.[43] Finally, the court distinguished the instant decision from *Ker* and *Frisbie* on the ground that in neither of those cases had defendant alleged violation of international conventions.[44]

III. Recent Decisions

Toscanino appeared to promise a new step in the development of due process—United States agents operating abroad would be held to fourth amendment standards—but almost immediately, federal court opinions began to rapidly erode the due process rights that *Toscanino* had seemingly afforded to defendants brought within a court's territorial jurisdiction as victims of a forcible abduction by governmental agents.

A. *United States v. Miller*

The first post-*Toscanino* abduction case arose in *United States v. Miller*[45] in the Southern District of Florida, when defendant moved to dismiss his indictment on the ground that *Toscanino* was applicable. [46] Though the decision is unclear, defendant apparently alleged that he had been illegally abducted by a bondsman and returned to the United States from Jamaica. The district court interpreted *Toscanino* to hold that the federal criminal process is abused when a defendant is brought into the United States by an illegal abduction from another country, but noted that the Second Circuit's decision hinged on the illegality of method used by the

43. As a further justification the Court opined that it could use its supervisory powers to remedy abuse of the district court process. *See* Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale, and Rescue*, 47 Geo. L.J. 29 (1952). Use of this power would not have required a finding that defendant's constitutional rights had been violated. Comment, 43 Ford. L. Rev. 634, 645-46 (1975).

44. The weakness of this aspect of the *Toscanino* holding is criticized in detail in 88 Harv. L. Rev. 813, 820-23 (1975). Generally individuals lack standing to assert a breach of international law. *See, e.g.*, Sei Fuju v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952) (treaty obligation asserted held not to be self-executing and therefore not a part of United States municipal law that plaintiff could invoke). *See* Note, *The Nature and Extent of Executive Power to Espouse the International Claims of United States Nationals*, 7 Vand. J. Transnat'l L. 95, 95-6 (1973).

45. 384 F. Supp. 56 (S.D. Fla. 1974). *Miller* was handed down slightly less than six months after *Toscanino*. The federal statutes are not specified in this opinion. Since *Herrera* relies on *Toscanino* it is probably safe to assume the federal statutes allegedly violated are the Federal Kidnapping Act, 18 U.S.C. § 1201 (1970), and similar statutes under Peruvian law.

46. 384 F. Supp. at 56.

United States government to obtain jurisdiction.[47] The court found that the stipulated facts clearly showed Miller had been lawfully arrested in Jamaica and lawfully deported by Jamaican authorities. Since the method used to gain jurisdiction over Miller was legal, the court found no need to relinquish jurisdiction and denied dismissal of the indictment. The *Miller* court, however, implicitly upheld *Toscanino*.

B. *United States v. Herrera*

The Fifth Circuit Court of Appeals first faced the *Toscanino* decision in *United States v. Herrera*.[48] Defendant had escaped from federal prison and fled to Bogota, Colombia. He later was recaptured in Peru by United States and Peruvian agents. Defendant was illegally detained in Peru for five days and then put on a plane in Lima and flown to Miami. Herrera, citing *Toscanino*, argued that the district court was divested of jurisdiction[49] because his forcible abduction and delivery to Miami contravened federal statutes,[50] the United Nations Charter and the Charter of the Organization of American States, and violated due process standards. The court of appeals rejected defendant's argument and cited *Ker*, *Frisbie*, and several of its own previous holdings. The court briefly considered *Toscanino* without discussion of due process and indicated that the instant case was distinguishable since Herrera had not alleged torture or electronic surveillance at the direction of United States officials.[51] Apparently, the court would have limited *Toscanino* to the *Rochin* "conduct that shocks the conscience" rationale.

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47. 384 F. Supp. at 56.

48. 504 F.2d 859 (5th Cir. 1974). *Herrera* was handed down in December 1974 about seven months after the *Toscanino* decision.

49. 504 F.2d at 860. Defendant also argued that failure to follow the extradition process provided by the treaty between Peru and the United States should divest the district court of jurisdiction.

50. 504 F.2d at 860.

51. 504 F.2d at 860. The Fifth Circuit reiterates its position assumed in *Herrera* in two subsequent decisions. In both *United States v. Winters*, 509 F.2d 975 (5th Cir. 1975) (neither U.S. residents nor non-resident aliens may challenge district court jurisdiction on grounds that arrest by Coast Guard unlawful), and *United States v. Quesada*, 512 F.2d 1043 (5th Cir. 1975) (defendant's argument that alleged forcible abduction from Venezuela in violation of Federal Kidnapping Act, treaty between the United States and Venezuela, and the Charter of the United Nations constituted due process and fourth amendment violations lacks merit), the court rejected contentions that forcible abduction by government agents violate due process.

C. *United States ex rel. Lujan v. Gengler*

A month after *Herrera*, the Second Circuit Court of Appeals had an opportunity to review its *Toscanino* holding in *United States ex rel. Lujan v. Gengler*.[52] Lujan was lured from Argentina into Bolivia[53] and taken into custody by Bolivian police who were acting as paid agents of the United States. Bolivian police then held defendant incommunicado for five days before placing him on a plane to New York. Upon his arrival in New York City, federal agents formally arrested defendant.[54] Lujan's petition for a writ of habeas corpus was dismissed without hearing by the district court,[55] and he appealed on the basis of *Toscanino*.[56] The Second Circuit affirmed the lower court's denial of the writ and held that the government's conduct towards Lujan was not so egregious as to violate due process. In its opinion the court said that its *Toscanino* decision had merely revoked the carte blanche powers government agents had enjoyed under *Ker-Frisbie*. Its decision in *Toscanino* was said to disallow the abduction of defendants to the United States when accompanied by torture and brutality, but was not meant to imply that a "mere irregularity"[57] in the circumstances surrounding a defendant's arrival in the jurisdiction should preclude criminal proceedings.[58] The court noted that the cases on which it had relied in *Toscanino* when it carved its exception to the *Ker-Frisbie* doctrine involved shocking and outrageous government conduct, and that *Toscanino* stood for denial of jurisdiction only in cases where government conduct was outrageous. Once the court established this interpretation of *Toscanino*, it distinguished *Lujan* on the grounds that the conduct surrounding Lujan was not egregious—that, in fact, Lujan charged no deprivation greater than he would have endured through

52. 510 F.2d 62 (2d Cir. 1975).

53. Defendant, a licensed pilot, was hired by one Duran to fly him to Bolivia. Duran, employed by American agents, had told Lujan he needed to fly to Bolivia to conduct some mining business. 510 F.2d at 63.

54. 510 F.2d at 63. Defendant had never been formally charged in Bolivia. The United States had also made no request for extradition.

55. *See* 510 F.2d at 64.

56. 510 F.2d at 63.

57. The court's use of "irregularity" is reminiscent of the Supreme Court's language in *Ker* when it said that "mere irregularities" do not constitute grounds for denying prosecution of a defendant. 119 U.S. at 440.

58. 510 F.2d at 65.

59. 510 F.2d at 66.

extradition.[59] The court rejected Lujan's contention that his abduction constituted a violation of the charters of the United Nations and the Organization of American States[60] and thus found *Lujan* distinguishable from *Toscanino* on this ground also.[61]

IV. The Remnants of Toscanino

The recent decisions outlined above have again reshaped the law after the *Toscanino* decision's bold intrusion into the *Ker-Frisbie* doctrine. *Toscanino* on its face had extended due process rights to non-resident aliens and directly opposed the *Ker-Frisbie* doctrine; that relatively recent formulation has rapidly deteriorated. The district court in *Miller* implicitly accepted *Toscanino* when it interpreted *Toscanino* to mean that jurisdiction should be denied whenever a defendant has been brought into the United States by an illegal abduction from a foreign country.[62] The court implied that *any* showing of illegality of method[63] would have led the court to an opposite conclusion. Thus as first interpreted in *Miller*, *Toscanino* did not require allegations of brutality and torture.[64]

The Fifth Circuit's holding in *Herrera*, however, began the revival of *Ker-Frisbie*. Not only did the court reject outright the idea that an abducted non-resident alien had prejurisdictional due process rights,[65] but the court by way of dicta distinguished the facts of *Herrera* from those of *Toscanino* on the basis of brutality.[66] The

60. *See* note 29 *supra*.

61. The court found that Lujan had not alleged a protest by Bolivia, whereas Toscanino had alleged a protest by Uruguay. The court held allegation of a protest necessary to assert a treaty violation. In light of the fact that neither Toscanino nor Lujan had standing to raise international treaty violations, *see* note 44 *supra*, the distinction made by the court is not well-founded.

62. 384 F. Supp. at 56.

63. *I.e.* kidnap or forcible abduction.

64. These two elements may be used to distinguish *Toscanino* from most abduction cases and would severely limit the holding. Thus, since *Miller* does not require such allegations, its interpretation of *Toscanino* leaves *Toscanino* at its broadest.

65. The court adhered to the *Ker-Frisbie* doctrine and so perpetuated the notion that due process can be violated only after a defendant is within the jurisdiction of the court.

66. The Fifth Circuit distinguished *Herrera* from *Toscanino* unnecessarily since its holding rested on adherence to *Ker-Frisbie*. It distinguished *Herrera* on the grounds that Herrera had not alleged torture or electronic surveillance at the direction of United States officials. The Second Circuit subsequently made the same distinction to support its stance in *Lujan*. United States ex rel. Lujan v. Gengler, 510 F.2d 62, 66 (1975). Judge Anderson's concurring opinion in *Lujan*

failure of the Fifth Circuit Court of Appeals to give serious consideration to *Toscanino* dealt a serious blow to broad due process rights for aliens in that circuit and probably influenced the strict limitations that the Second Circuit subsequently imposed on its own holding.

In *Lujan* the Second Circuit Court of Appeals based its opinion on forced reasoning, attempted to distinguish *Toscanino*, and severely limited the due process rights enunciated in *Toscanino*. It relied on *Rochin* and *Russell* and concluded that *Toscanino* was decided on the basis of conduct which "offends those canons of decency and fairness which express the notions of justice of English speaking people," "shocks the conscience," and "offends a 'sense of justice'."[67] The court claimed that it did not intend to suggest in *Toscanino* that any "irregularity"[68] in the circumstances of a defendant's arrival should vitiate its jurisdiction. Thus, the court ignored its own explicit statement in *Toscanino* that "we view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights."[69] In deciding that due process is violated only by "outrageous and reprehensible" conduct, the *Lujan* court simply adopted the reasoning of Judge Anderson's concurring opinion in *Toscanino*. There, Judge Anderson had said: "My concurrence is so limited because this case can be disposed of on due process grounds alone. Rochin v. California . . . ."[70] In citing *Rochin* it is clear that Judge Anderson had advo-

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makes explicit reference to *Herrera*. 510 F.2d at 69.

67. 510 F.2d at 65.

68. *See* note 57 *supra*. One commentator has indicated that *Toscanino* could have been decided on this ground alone due to the brutality and torture surrounding the abduction. *"Ker* and *Frisbie* reflect a judgment not that due process is limited to the guarantee of a fair trial, but that interstate or international abduction is not misconduct sufficiently egregious to justify releasing the defendant." 88 HARV. L. REV. 813, 816 (1975). The fact remains, however, that the Second Circuit chose to oppose *Ker-Frisbie*.

69. 500 F.2d at 275. Additionally, the *Toscanino* court twice analogized its new due process position to the refusal of a court to exercise jurisdiction over civil defendant whose presence had been secured by force or fraud. 500 F.2d at 275-76.

70. 500 F.2d at 281. Judge Anderson's concurring opinion neatly allows the same outcome as that of the majority. It is clear from his lone citation to *Rochin* that he considered the governmental conduct in *Toscanino* to fall within the conscience shocking standard set by *Rochin*. Since Judge Anderson's opinion is founded upon the *Rochin* standard it is apparent that the majority's opinion was

cated an "outrageous conduct" standard rather than the broad test put forth by the majority. Despite the lack of sound reasoning in the court's secondhand interpretation of *Toscanino*,[71] *Lujan* now stands for the proposition that a court's jurisdiction is vitiated only when governmental conduct moves beyond that which is "simply illegal" into conduct that "sinks to a violation of due process" by *Rochin* standards.[72]

V. Conclusion

Why the Second Circuit Court of Appeals chose to retreat from its *Toscanino* holding is unclear. The drastic nature of the remedy[73] afforded by *Toscanino* to any defendant illegally abducted has been criticized as too inflexible.[74] On the other hand, the *Lujan* rule allows the remedy only in the limited circumstances of egre-

intended to encompass a broader standard. The *Lujan* court's claim that the *Toscanino* decision rested on the conscience shocking standard, therefore, would seem to be misplaced.

71. *See* note 61 *supra*.

72. The Second Circuit Court of Appeals reiterated *Lujan* in *United States v. Lira*, 515 F.2d 68 (2d Cir. 1975), where the court upheld the district court's evidentiary finding that, although the defendant may have been tortured after his abduction by Chilean authorities, there was no proof that agents of the United States participated in or had knowledge of such torture. The court held that *Toscanino* requires proof of egregious conduct on the part of United States agents and absent such proof *Toscanino* is inapplicable. The *Lira* decision indicates the Second Circuit would not hesitate to again release a defendant if egregious United States governmental conduct could be proven, but the burden placed upon an incarcerated defendant to prove such conduct abroad is heavy indeed.

The Ninth Circuit Court of Appeals felt *Lujan* made it clear that the Second Circuit Court of Appeals will continue to follow *Ker-Frisbie*; except where grossly cruel and unusual barbarities are demonstrated. United States v. Lovato, 520 F.2d 1270, 1271 (9th Cir. 1975) (defendant found to have been expelled and not forcibly abducted so not necessary to consider *Toscanino*).

In addition the Eastern District Court of Illinois interpreted *Toscanino* and *Lujan* in the case of *In re David*, 390 F. Supp. 521 (E.D. Ill. 1975). Defendant, prior to his extradition hearing, sought an order to compel answers to interrogatories and claimed he had been forcibly abducted into the United States. The court held that the allegations, even if true, would not divest the court of jurisdiction to determine whether the defendant should be returned to France to stand trial on a pending criminal charge. The court added as dicta that *Lujan* left no doubt that *Toscanino* applied only to situations where the defendant was the victim of egregious governmental conduct.

73. *I.e.* refusal to accept jurisdiction over the defendant.

74. *See* Comment, 43 Ford. L. Rev. at 646-47 (1975); 88 Harv. L. Rev. 813, 816-20 (1975).

gious conduct. The problem remains to determine what remedy, if any, should be available to victims who are subjected to *illegal* but not *outrageous* governmental conduct.

The government has vigorously argued that federal narcotics law enforcement depends upon the freedom of officers to abduct suspects, particularly from South American countries that apparently do not object to the practice.[75] Additionally, outdated extradition treaties do not provide for drug offenses[76] so that broad adherence to *Toscanino* would allow de facto asylum to suspected offenders. In short, the government would excuse its own unlawful acts of kidnapping on the grounds that the end result is justifiable.[77] However, this argument completely abnegates the moral and ethical considerations that underlie due process philosophy.[78] In extending due process rights to alien kidnap victims, the judiciary system does no more than support and affirm the United States claim to regional[79] and world[80] moral leadership. Principally at the insis-

75. United States Petition for Rehearing at 6, United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974). Abduction seems to be a general practice to which Latin American nations have never protested.

76. At present, it does not appear that any bilateral treaties with South American nations specifically provide for drug offenses. Recently, the United States has sought specifically to include drug offenses in its extradition treaties. A 1972 treaty with Denmark grants extradition for "an offense against the laws relating to narcotic drugs, cannabis sativa L, psychotropic drugs and chemicals." Treaty with Denmark on Extradition, June 22, 1972, T.I.A.S. No. 7864. But even a provision for extradition for drug offenses may not deter illicit methods of obtaining jurisdiction. *See*, Bassiouni, *Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition*, 7 VAND. J. TRANSNAT'L L. 25, 63-4 (1973).

77. Ironically, the United States has strongly criticized the use of such tactics by other organizations. *See The U.S. Government Response to Terrorism: A Global Approach*, 70 DEP'T STATE BULL. 274 (1974) (deploring "the virtual epidemic of kidnappings in Latin America"). Evidently, when the end (*i.e.* terrorism) is considered deplorable, the means become deplorable, too.

78. It has been argued that the wisdom of the remedy proposed in *Toscanino*, *i.e.* vitiation of jurisdiction, depends on a resolution of the practical questions of pervasiveness of the illegal conduct, whether or not the remedy will effectively promote respect for the law, and whether there are practical alternative means for deterring the governmental misconduct. 88 HARV. L. REV. 813, 818 (1975). The author concludes that the *Toscanino* remedy is not necessary in light of these considerations. 88 HARV. L. REV. 813, 817 (1975).

79. Although the United States adamantly maintains that it is the dominant moral force in the hemisphere, there are indications that less than forceful stances have been assumed by the United States in some areas. The Organization of American States created the Inter-American Commission for Human Rights in 1960 (for statute of the Commission see O.A.S. Doc. OE/Ser.L/V/11.26, Doc. 10, at 1-6 (1972), but it has so far proved ineffective. The United States has not yet

tence of the United States,[81] human rights provisions were included in the United Nations Charter,[82] and the International Declaration of Human Rights was promulgated.[83] Maintenance of a judiciary system dedicated to protection of human rights is essential to a nation whose foundation rests on respect for the individual. The remedy afforded by *Toscanino* to any victim of governmental illegality by way of forcible abduction redresses the wrong to the individual and should be retained.

C. Jedson Nau

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ratified the Inter-American Convention on Human Rights, 36 O.A.S.T.S. 1 (1969). For general discussion, see Fox, *The Protection of Human Rights in the Americas*, 7 COLUM. J. TRANSNAT'L L. 222 (1968); Cabranes, *The Protection of Human Rights by the Organization of American States*, 62 AM. J. INT'L L. 889 (1968); Scheman, *Inter-American Commission on Human Rights*, 59 AM. J. INT'L L. 335 (1965).

80. For an indication of how the United States views itself in terms of moral standing see generally *Hearing on the International Protection of Human Rights before the Subcomm. on International Organizations and Movements of the House Comm. on Foreign Affairs*, 93d Cong., 1st Sess. (1973), and the subsequent report issued by the Committee, REPORT ON HUMAN RIGHTS IN THE WORLD COMMUNITY: A CALL FOR U.S. LEADERSHIP.

81. Henkin, *The United States and the Crisis in Human Rights*, 14 VA. J. INT'L L. 653, 653-64 (1974).

82. All members of the United Nations are obligated "to take joint and separate action in cooperation with the Organization for the achievement of . . . universal respect for, and observance of, human rights and fundamental freedoms . . . ." U.N. CHARTER arts. 55, 56 ¶ c. For discussion of the human rights provisions of the United Nations Charter see Bassiouni, note 79 *supra*, at 52-4.

83. G.A. Res. 217, U.N. Doc. A/810 at 71 (1948). Article 5 provides in part: "No one shall be subjected to torture . . . ." Article 9 provides: "No one shall be subjected to arbitrary arrest . . . ." Article 12 provides: "No one shall be subjected to arbitrary interference with his privacy . . . ." To this date the United States has not become a party to the various United Nations Covenants on human rights. *See generally* Humphrey, *The Universal Declaration of Human Rights*, 4 INT'L J. 351 (1949); Lauterpacht, *The Universal Declaration of Human Rights*, 25 BRIT. Y.B. INT'L L. 354 (1948).