United States v. Toscanino: An Assault on the Ker-Frisbie Rule

Gary W. Schons

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UNITED STATES v. TOSCANINO:
AN ASSAULT ON THE KER-FRISBIE RULE

INTRODUCTION

Visions of a troop of Black Jack Pershing's cavalry frothing across the Rio Grande in hot pursuit of Mexican raiders, or a trench-coat clad American secret agent waiting in a Berlin train station to collar an enemy sympathizer are the stuff movies are made of. What these movies omit, and what our courts refuse to consider, is the manner in which these fugitives, once apprehended, are returned to the United States to stand trial for their crimes.

1. See, e.g., Chandler v. United States, 171 F.2d 921 (1st Cir. 1948); Dominguez v. State, 90 Tex. Crim. 90, 234 S.W. 79 (1921).

2. In addition, the courts of our nation refuse to review the regularity of proceedings which result in the return of a fugitive to a state from another state. See, e.g., Frisbie v. Collins, 342 U.S. 519 (1953); Eaton v. West Virginia, 91 F. 760 (4th Cir. 1898). However, due to limited time and space, this Comment will limit its examination to the problems inherent in international situations.

When accomplished pursuant to legal proceedings, the interstate surrender of fugitives is known as rendition; the surrender of fugitives between nations pursuant to a treaty is known as extradition. While the terms are sometimes used interchangeably, this Article will adhere to their proper usage. See Kopelman, Extradition and Rendition—History, Law, Recommendations, 14 B.U.L. Rev. 591 (1934); Comment, Interstate Rendition and the Fourth Amendment, 24 Rutger's L. Rev. 551 n.1 (1970). Forty-seven of the fifty states have adopted the Uniform Criminal Extradition Act, 11 Uniform Laws Ann. 51 (1974), which controls interstate rendition procedure. South Carolina and Mississippi have no provisions for the rendition...
Modern technology and trade have transformed the neighborhood rackets operator into a broad ranging and internationally-based criminal syndicate. Criminals today—trafficking in narcotics, gambling, illegal securities and stolen property—are not only interstate, but international travelers. In addition, local offenders enjoy easy access to the means of escape across national boundaries. The circumstance of finding a person wanted for domestic criminal proceedings at large in a foreign jurisdiction is today a common occurrence. Nevertheless, our courts, almost without exception, have refused to examine the regularity of the proceedings by which these fugitives, once captured, are returned to the United States for trial.

This Comment will examine the so-called Ker-Frisbie rule underlying the position of our courts' refusal to review the claims of those who challenge the personal jurisdiction of a court subsequent to an extra-legal transfer from a foreign jurisdiction. The analysis herein will reveal the basic weakness of the rule and furnish sound arguments for its abandonment. In this respect, the Article will rely heavily on the spirit and resourcefulness of the case of United States v. Toscanino, wherein the Second Circuit conducted a searching examination of the Ker-Frisbie rule and found it unsatisfactory.

Extradition from the United States to a foreign nation may only be accomplished pursuant to a treaty of extradition. Valentine v. United States ex rel. Neidecker, 290 U.S. 5, 18 (1936); Factor v. Laubenheimer, 290 U.S. 276 (1933); Holmes v. Jennison, 39 U.S. (14 Pet.) 540 (1841); Ivanecvic v. Artukovic, 211 F.2d 565 (9th Cir. 1954); 18 U.S.C. § 3181 (1948). A list of those treaties of extradition currently in force between the United States and other nations can be found at 18 U.S.C.A. § 3181 (1948).


The problem of criminals fleeing to other countries is as old as crime itself. The Bible relates that after the murder of his brother, Cain fled his own land. Genesis 4:16. In more modern times, Sir Thomas Henry noted, before the British House of Commons, the ease with which criminals could remove themselves to foreign jurisdictions. Proceedings of the Select Committee of the House of Commons on Extradition, § 331 (1868).


5. By an extra-legal transfer, it is meant that the fugitive is brought before the court by a means other than extradition under a treaty. These means may include abduction, deportation or ad hoc bilateral cooperation. I. SHEARER, EXTRADITION IN INTERNATIONAL LAW 72-80 (1971). See also Bassiouni, Disguised Extradition: The Soblen Case, 27 MOD. L. REV. 521 (1964).

6. 500 F.2d 267 (2d Cir. 1974).
factory in light of our current notions of pretrial criminal due process and international law.

BACKGROUND: The Ker-Frisbie Rule

Ker v. Illinois was clearly a case of first impression when it

7. The language in the Ker decision which has formed the basis of the rule is "... that forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for the offense ..." 119 U.S. at 444. It bears noting that the Frisbie decision did not enter into a detailed discussion of the Ker precept. The Court merely intoned the Ker rule and found it reconcilable with the due process clause of the fifth and fourteenth amendments.

[D]ue process of law is satisfied when one present before the court is convicted of crime after having been fairly apprised of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. 342 U.S. at 522. The rule has been applied by rote to bar relief to those brought before a court in derogation of rendition or extradition agreements in nearly all of the federal circuits and state courts. See Chandler v. United States, 171 F.2d 921 (1st Cir. 1948); United States ex rel. Moore v. Martin, 273 F.2d 344 (2d Cir. 1959); Government of Virgin Islands v. Ortiz, 427 F.2d 1043 (3d Cir. 1970); United States v. Herrera, 504 F.2d 859 (5th Cir. 1974); United States ex rel. Calhoun v. Twomey, 454 F.2d 326 (7th Cir. 1971); Bacon v. United States, 449 F.2d 933 (9th Cir. 1971); Hobson v. Crouse, 332 F.2d 561 (10th Cir. 1964). And see Ex parte Barker, 87 Ala. 4, 5, 6 So. 7, 8 (1889); In re Collins, 151 Cal. 340, 347, 90 P. 827, 830 (1907); Williams v. Weber, 1 Cal. App. 191, 195, 24 P. 21, 22 (1891); Hunter v. State, 174 So. 2d 415, 416 (Fla. Sup. Ct. 1965); Lascelles v. State, 90 Ga. 347, 350, 16 S.E. 945, 946 (1892); Ex parte Moyer, 12 Idaho 255, 257, 65 P. 897, 900 (1906); People v. Berardi, 332 Ill. 205, 206, 163 N.E. 668, 669 (1928); Canler v. State, 232 Ind. 209, 212, 111 N.E.2d 710, 712 (1953); Ex parte Flack, 33 Kan. 616, 628, 129 P. 541, 544 (1913); Roberts v. Commonwealth, 417 S.W.2d 234 (Ky. Sup. Ct. 1967); State v. Green, 244 La. 80, 90, 150 So. 2d 571, 574 (1963); People v. Miller, 235 Mich. 340, 341, 209 N.W. 81, 82 (1926); State v. Rigg, 250 Minn. 365, 366, 84 N.W.2d 698, 701 (1957); State v. Patterson, 116 Mo. 505, 515, 22 S.W. 696, 698 (1893); In re Petry, 47 Neb. 130, 132, 66 N.W. 308, 309 (1889); State v. Wise, 58 N.M. 164, 165, 267 P.2d 992, 992 (1955); People ex rel. Cockran v. Hyatt, 172 N.Y. 172, 176, 181, 64 N.E. 825, 826 (1902); State v. Glover, 112 N.C. 896, 897, 17 S.E. 525, 526 (1893); State v. Owen, 119 Ore. 20, 228 P. 516, 520 (1923); Commonwealth ex rel. Master v. Boldi, 166 Pa. 413, 421, 72 A.2d 150, 154 (1950); State v. Walters, 226 S.C. 44, 52, 83 S.E.2d 629, 632 (1954); Ward v. State, 102 Tenn. 724, 727, 52 S.W. 996, 997 (1899); Ex parte Baker, 43 Tex. Crim. 281, 282, 65 S.W. 91 (1901); State v. Melvern, 32 Wash. 712, 72 P. 498, 499 (1903); State v. McAninch, 95 W. Va. 363, 364, 121 S.E. 161, 162 (1924); Moletor v. Sinned, 76 Wis. 306, 313, 44 N.W. 1099, 1100 (1889); Kingin v. Kelley, 3 Wyo. 570, 577, 29 P. 36, 40 (1891). The most recent application of the Ker-Frisbie rule in California was in People v. Leary, 40 Cal. App. 3d 527, 115 Cal. Rptr. 85 (1974).

8. 119 U.S. 436 (1886).
reached the Supreme Court in 1886. The only case the Court had previously considered which bore any resemblance to the issues placed before it in Ker was The Ship Richmond v. United States.\(^9\) In The Richmond, the appellant sought to overturn a judgment of forfeiture which resulted from the ship’s violation of a non-intercourse law.\(^{10}\) The claimants argued that the seizure of the vessel within the territorial waters of a foreign power, a violation of international law, should deprive a domestic court of jurisdiction over the vessel. The Court rejected this contention, viewing the seizure

\[\text{Brief for Defendant in Error at 19-21, Ker v. Illinois, 119 U.S. 436 (1886).}\]

\[\text{When his case reached the Supreme Court, Ker's counsel did not argue that the trial court lacked jurisdiction because Ker had been brought into this country in derogation of the treaty of extradition. Rather, counsel argued that by virtue of the treaty of extradition between the United States and Peru, Ker acquired a “right of asylum” in the foreign country. Brief for Plaintiff in Error at 20, Ker v. Illinois, 119 U.S. 436 (1886). Such an argument was clearly a misconception of recognized concepts of international law and the purpose of the treaty. The Supreme Court discussed this argument, Ker v. Illinois, 119 U.S. at 442-43, and dismissed it out of hand as an absurd proposition.}\]

\[\text{Noting the narrow grounds for review of a state court's decision that the Court possessed by virtue of \(\|709\) of the Revised Statutes (the present provision is an expanded version and appears at 28 U.S.C. \(\|1257\) (1948)), Justice Miller, who authored the opinion of the Court, went on, only in dicta, to announce what has come down to us as the Ker-Frisbie rule.}\]

\[\text{For an excellent review of the facts and arguments leading up to the Court's decision, see Comment, Ker v. Illinois Revisited, 47 Am. J. Int'l L. 678-86 (1953).}\]

\[\text{9. 13 U.S. (9 Cranch) 102 (1815), cited in Ker v. Illinois, 119 U.S. at 444.}\]

\[\text{10. Act of March 1, 1809, ch. 24, and Act of June 28, 1809, ch. 9, 2 Stat. 528, 550. These two enactments mandated that United States vessels sailing for British or French ports must post bond with the United States government. The Richmond sailed from Philadelphia and proceeded to Portsmouth, England without posting bond. The ship was eventually captured by a United States gunboat while at anchor in Spanish waters off the Florida coast.}\]
as an offense against the foreign nation having no effect on the power of a domestic court to libel the ship.\textsuperscript{11} The violation of international law was something to be adjusted between the respective governments.\textsuperscript{12}

By analogy to The Richmond holding, the Court in Ker held that a defendant whose presence before the court had been obtained in violation of international law or in derogation of a treaty of extradition could not assert the irregularity as a bar to the court’s assumption of jurisdiction.\textsuperscript{13} This rationale has been stylized by some as \textit{mala captus bene detentus},\textsuperscript{14} and the best that can be said for

\begin{itemize}
\item \textsuperscript{11} 13 U.S. (9 Cranch) at 103. This was merely a precept followed by the prize-ship courts of the early nineteenth century. As Lord Stowell announced in The Purissima Conception, 6 C. Rob. 45, 47, 165 Eng. Rep. 844, 845 (1805), “the privilege of territory will not itself enure to the protection of property, unless the state from which that protection is due steps forward to assert the right.” Accord The Eliza Ann, 1 Dods. 244, 165 Eng. Rep. 1298 (1813); The Twee Gebroeders, 3 C. Rob. 162, 165 Eng. Rep. 422 (1800).
\item \textsuperscript{12} The importance of this pronouncement cannot be overstated. In numerous cases in more recent times, the courts have relied on this precise principle in denying relief to criminal defendants who challenge the jurisdiction of the court subsequent to an extra-legal transfer from a foreign jurisdiction. In United States ex rel. Lujan v. Gengler, 510 Adv. F.2d 62 (2d Cir. 1975), the court denied relief to a defendant who had been abducted from Argentina, declaring that, “the failure of Bolivia or Argentina to object to Lujan’s abduction would seem to preclude any violation of international law which might otherwise have occurred.” Accord United States v. Sobell, 142 F. Supp. 515, 523 (S.D.N.Y. 1956).
\item Whatever pragmatic justification may have been perceived for this precept during the Napoleonic Wars of the early nineteenth century, there were some English jurists who were not completely satisfied with its implications. A notable example of this minority position can be found in the court’s decision in The Anna, 5 C. Rob. 373, 385h, 165 Eng. Rep. 809, 816 (1805), a prize-ship case involving a Spanish vessel seized by an English privateer in American waters:
\begin{quote}
Looking to all the circumstances of the previous misconduct, I feel myself bound to pronounce, that there has been a violation of territory, and that as to the question of property, there was not sufficient ground for seizure; and that these acts of misconduct have been further aggravated, by bringing the vessel to England, without any necessity that can justify such a measure. In such a case it would be falling short of the justice due to the violated rights of America, and to the individuals who have sustained injury by such misconduct, if I did not follow up the restitution . . . with a decree of costs and damages. (emphasis added).
\end{quote}
\item \textsuperscript{12} 13 U.S. (9 Cranch) at 103.
\item \textsuperscript{13} 119 U.S. at 444.
\item \textsuperscript{14} This phrase simply means that a defective seizure is a good capture. See Bassionni, supra note 5, at 12; Cardozo, \textit{When Extradition Fails, Is Abduction the Solution?}, 55 Am. J. Int’l L. 127, 132 (1961).
\end{itemize}
the proposition is that it was recognized by the earliest scholars of international law. The maxim was, however, not universally regarded; the prize-ship courts of France, Germany and Italy held that the capture of a vessel in foreign waters was absolutely illegal regardless of whether the offended nation asserted a claim.

In the 1933 case of Cook v. United States, the rule announced in The Richmond and adopted by the Court in Ker was virtually nullified. Cook involved a seizure and forfeiture of the British ship Mazel Tou which had been taken by officers of the Coast Guard at a point eleven and a half miles from the United States' shoreline for violations of the Prohibition Act. The United States had previously entered into a treaty with Great Britain which permitted American authorities to stop and search British vessels within a prescribed distance from shore. The seizure had occurred beyond the treaty limit. The claimants contended that the seizure was illegal as violating the treaty and that the lower court was therefore without authority to libel the vessel. The Court agreed, viewing the treaty as a limitation not only on the power to make a seizure, but also on the jurisdiction of the lower court to adjudge the ship forfeited without regard to whether the foreign sovereignty objected.

The Court attempted to distinguish its holding in The Richmond by noting that Cook involved the violation of a treaty, while the former case merely entailed violations of customary international

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15. See generally the court's discussion in Regina v. Lopez, Dears. Bell 525, 531-538, 169 Eng. Rep. 1105, 1108-10 (1858). More recently, the maxim has come under attack by scholars of international law. See Bassouni, supra note 5, at 12; Dickinson, Jurisdiction Following Seizure or Arrest in Violation of International Law, 28 AM. J. INT'L L. 231, 240 (1934) [hereinafter cited as Dickinson].
17. 288 U.S. 102 (1933).
18. Id. at 107.
20. The distance set by the treaty was the distance the ship could cover in one hour's sailing. 288 U.S. at 112.
21. The Treaty fixes the conditions under which a "vessel may be seized and taken into a port of the United States . . . in accordance with" the applicable laws . . . . Our government, lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws. 288 U.S. at 121.

In a similar case, Ford v. United States, the Court strongly suggested that violation of a treaty regarding the seizure of vessels and arrest of crewmen for smuggling violations might well deprive the court of jurisdiction. 273 U.S. 593, 606 (1926). Such a result was reached by the United States district courts in United States v. Ferris, 19 F.2d 925, 926 (N.D. Cal. 1927), and United States v. Schouweiler, 19 F.2d 387, 387 (S.D. Cal. 1927).
law. But this distinction was clearly without merit. As Professor Dickinson noted, "seizures in violation of accepted principles of international law are certainly as thoroughly contaminated with illegality as a seizure in violation of a treaty." The Court's high regard for positive international law in Cook is remarkable in light of its earlier pronouncement in The Paquette Habana:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.

To reconcile the holding in The Richmond and the reasoning of Ker with the subsequent pronouncements and refinements in Cook and The Paquette Habana is quite difficult. Even more alarming is that the Court had the opportunity to renounce the Ker rule in Frisbie v. Collins in 1953, but chose to revitalize the assuredly outmoded concept. Still more curious than the Court's attempt to distinguish the Richmond-Ker reasoning in the Cook decision, is that Ker, in fact, presented a case where a treaty, albeit not technically violated, was ignored.

The same day the Court rejected Ker's contention, it handed down United States v. Rauscher. Rauscher, indicted by a United States grand jury for murder on the high seas, was extradited from England in full compliance with the existing treaty of extradition between the United States and Great Britain. However, once the defendant was before the court a different offense was charged against him.

Rauscher challenged the jurisdiction of the court to try him on this different offense, invoking what has come to be known as the

22. 288 U.S. at 122. The Court concluded that the violation of a treaty was "more fundamental" than a violation of the law of nations.
24. 175 U.S. 677 (1900).
25. 175 U.S. at 700. The Court directly referred to the comment of Lord Stowell, supra note 11, and found it unsatisfactory in light of more modern concepts of international law. 175 U.S. at 705.
27. 119 U.S. at 410.
doctrine of specialty. Rauscher maintained that the court's jurisdiction was limited by treaty to trying him on the offense which was set forth in the extradition request. The Court agreed with Rauscher, holding that the treaty of extradition bestowed certain personal rights on the defendant which would bar his prosecution for crimes other than those upon which he had been extradited. The Court went beyond this narrow holding, however, and in the following language described the true nature and effect the courts were bound to give a treaty of extradition.

[A]s this right of transfer, the right to demand it, the obligation to grant it, the proceedings under which it takes place, all show it is for a limited and defined purpose that the transfer is made, it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited, and of bad faith to the country which permitted his extradition. No such view of solemn treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them.

That the national courts are bound to limit their jurisdiction in accordance with the prescriptions of the treaties of extradition which bring the defendants before them is inapposite with the Ker holding that a court enjoys plenary jurisdiction when the treaty is wholly ignored. Ker and Rauscher read together leave an incongruent result that limits the jurisdiction of one court where a properly extradited defendant stands before it, yet fails to place any rein on the power of a court which has assumed jurisdiction in complete derogation of a treaty of extradition.


29. Of extreme importance is that the Court noted that treaties between nations more than regulated the rights and relations of the contracting sovereigns, and in fact granted certain personal rights to the citizens of the contracting nations. United States v. Rauscher, 119 U.S. at 418-19, quoting the following language from the Head Money Cases, 112 U.S. 580, 598 (1884):

A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it . . . . But a treaty may also contain provisions which confer certain rights upon the citizens in the territorial limits of the other . . . .

See also Sponsler, International Kidnapping, 5 INT'L LAW. 27, 33 (1971).

30. 119 U.S. at 419.

As Professor Dickinson aptly characterized the Rauscher mandate, "while it is concluded that the individual, as such, has no right of asylum in the foreign state, his objection to the jurisdiction [based on the different charge] serves as a foil to remind the court of the nation's international obligation." Dickinson, supra note 15, at 232.

31. 119 U.S. at 422.
The full impact of the *Rauscher-Ker* anomaly is highlighted when another element is considered. A fundamental principle of international law is that the sovereignty of every nation is limited by its own territorial boundaries, and any nation is therefore incompetent to act within the territorial boundaries of another sovereign without its consent.\(^3\) Then Secretary of State James Monroe wrote the following in a letter dated December 6, 1815:

> No principle is better established than that no government has a right to pursue offenders against its laws ... into the dominions of another: that such persons can be recovered by application only to the government within whose jurisdiction they take shelter, and in obedience to its laws and treaties applicable to such a case. A departure from this principle being a violation of sovereignty, seldom fails to produce disagreeable consequences.\(^3\)

This precept makes the Court's position in *Ker*, that since no treaty was invoked, no treaty was involved in the case, an unrealistic view. A treaty of extradition is an agreement permitting a sovereign to obtain a fugitive found in another's jurisdiction. As *Rauscher* explained, the treaty sets the parameters for the exercise of jurisdiction over the defendant.\(^4\) Complete disregard of the treaty seems no less a valid basis for challenging the jurisdiction of a court, than if a particular provision of a treaty is violated or ignored. A proceeding which brings the defendant before the court in derogation of the treaty should be, in view of the *Rauscher* holding, a violation of the treaty.\(^5\)

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3. Now the first and foremost restriction imposed by international law upon a State is that failing the existence of a permissive rule to the contrary, it may not exercise its power in any form in the territory of another State. In this sense, jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention. The S.S. *Lotus*, Permanent Court of International Justice, Series A, No. 10, at 18 (1927).

33. Letter from Mr. Monroe, Secretary of State, to Mr. Anthony St. John Baker, December 6, 1815, *reported in* 2 J. Moore, *International Law Digest* 382 (1908).

34. 119 U.S. at 422.

35. This premise, however, does raise a classic justiciability problem—standing. A threshold barrier to any claim for relief based on an extralegal transfer would depend on whether the defendant could raise the treaty as a bar to the exercise of jurisdiction. Some have suggested that the standing issue is dependent on whether the treaty creates certain rights inuring to the defendant. In this respect, the treaty, or a provision of the treaty, must be found to be self-executing. *See generally* Dickinson, *Are the Liquor Treaties Self-Executing?*, 20 Am. J. Int'l L. 444 (1926); Evans, *The*
The force of the Rauscher mandate clearly exposes the Ker rule to attack upon the reasoning advanced in the Cook case. As Cook found the power to seize arose under a treaty, so too did Rauscher make it clear that the ability to obtain fugitives from foreign jurisdictions arises solely by the grace of treaties of extradition. When a power granted by a treaty is exercised in a manner ignoring the restrictions of the agreement, then the sovereign is acting outside of its competent authority, and cannot assert jurisdiction based upon this action. As the Court explained in The Schooner Exchange v. McFadden, the jurisdiction of a court is "a branch of that which is possessed by the nation as a sovereign entity." "If there is no national competence, obviously there can be no competence in the courts which are only a branch of the national power.


The question of the self-executing nature of a treaty or treaty provision is one of judicial determination. Evans, supra at 18, suggests that the following criteria enter into a court's decision on this issue:

[T]he text of the treaty itself, the intent of the parties, the circumstances surrounding the conclusion of the treaty, considerations of the internal law of the parties, the climate of political opinion at the time the treaty is concluded, ratified, or submitted to judicial interpretation, and the circumstances in which the litigants seek to apply the treaty at issue . . .

Dickinson, supra at 445, also suggests that the intention of the parties is particularly relevant to this inquiry. See, e.g., the Court's discussion in United States v. Rauscher, 119 U.S. 407, 415-417 (1886).

Focusing on the intentions of the parties, it seems clear that at least one of the purposes for the execution of an extradition treaty is to regulate and formalize the manner in which fugitives are obtained out of the signatories' own jurisdiction. As noted supra note 2, a fugitive may not be removed from the United States in the absence of an extradition treaty. See Valentine v. United States ex rel. Neidecker, 290 U.S. 5, 18 (1936). The same intention has also been evidenced by foreign governments. See M. Bassiouxi, International Extradition and World Public Order 174-75 (1974). See also C. Parry, 5 British Digest of International Law, 1860-1914 480-83 (1965). In September 1974, Canadian officials demanded the return of a United States deserter who was seized by U.S. agents just fifty yards inside Canada after a hot pursuit that began in the United States.

The Rauscher Court concluded that the defendant could raise the treaty's enumeration of extraditable offenses as a bar to the court's jurisdiction in order to effect the intention of the parties. An analogous argument could be made that a treaty of extradition is self-executing to the extent that it bars the exercise of jurisdiction subsequent to an extra-legal transfer.

See 288 U.S. at 121.

37. 11 U.S. (7 Cranch) 116, 136 (1812).

As Cook and Rauscher illustrate, the competency of the court is subject to attack by the defendant notwithstanding the failure of the offended nation to lodge a protest—an action the Ker Court considered as a condition precedent to any objection to the jurisdiction of the court. The mere existence of the treaty clothes the defendant with certain rights which he may assert as a bar to the assumption of jurisdiction. Thus, a treaty if violated or disregarded should have the effect of rendering the court’s jurisdiction a nullity ab initio.

Going then to the roots of the decision in Ker v. Illinois there is little to recommend the continuing vitality of the rule. The cases cited as precedent by the Court in Ker possess slight persuasive value in light of legal theory which has developed well beyond their “prize-ship court” mentality. The anomaly is that the Ker precept has withstood the tide of progress. The result reached in Ker is clearly unsatisfactory in the wake of the high Court’s more enlightened view of the law of nations, and in practice sanctions governmental activity that violates both positive and customary international law.

39. See notes 29 & 35 supra.
40. See text accompanying note 21 supra.
41. 119 U.S. 436 (1886).
42. The Ship Richmond v. United States, 13 U.S. (9 Cranch) 102 (1815); State v. Ross and Mann, 21 Iowa 467 (1866); Dowe’s Case, 18 Pa. 37 (1851); State v. Smith, 1 Bailey, So. Car. Law, 283, 8 S.C. 131 (1829); State v. Brewster, 7 Vt. 118 (1855); Regina v. Lopez Dears. Bell 525, 169 Eng. Rep. 1105 (1858); Ex parte Scott, 9 B.C. 449, 109 Eng. Rep. 167 (1829).
43. Scholars of international law have roundly criticized the Ker holding, finding it completely incompatible with modern concepts of international law and the ordered relations among nations. See, e.g., Bassiouni, supra note 5, at 10; Dickinson, supra note 15, at 234; Garcia-Mora, Criminal Jurisdiction of a State over Fugitives Brought from a Foreign Country by Force or Fraud: A Comparative Study, 32 IND. L.J. 427, 429 (1957); I. Shearer, EXTRADITION IN INTERNATIONAL LAW 72 (1971).
44. U.N. CHARTER, art. 2, para. 4 provides: All members shall refrain in their international relations from the threat of use of force against the territorial integrity or political independence of any state. . .

The international repercussions that such extra-legal transfers of fugitives can invoke was amply illustrated in the abduction of Adolf Eichmann from Argentina by Israeli agents. See Cutler, The Eichmann Trial, 4 CAN. B.J. 352 (1961); Sponsler, International Kidnapping, 5 INT’L LAW. 27, 46 (1971).
and more recently affirmed in *Frisbie v. Collins*,\(^4\) enjoys continued vitality.\(^5\)

*United States v. Toscanino: A Broad Attack*\(^4\)

Even as the Ker-Frisbie rule lives on in the face of continued criticism by members of the international legal fraternity,\(^4\) its reign as an absolute rule of law has been, at best, a dubious one.\(^4\) Although no case has decidedly rejected the Ker holding, the rule has lately been the subject of criticism by a number of courts.

In *United States v. Edmons*\(^5\) the Second Circuit suggested what may be considered the most persuasive argument against the Ker-Frisbie rule. The court was confronted with an illustration of the more loathsome aspects of unbridled police authority.\(^6\) The appellants argued that their brutal and unwarranted arrests should deprive the court of the opportunity to proceed against them. The appellate court agreed with the claimants that the trial court "could not simply look the other way"\(^7\) in the face of such patently illegal conduct by the police. In reaching this decision the Second Circuit took this view of the Ker-Frisbie rule:

We do not find *Frisbie* . . . and its predecessors going back to *Ker v. Illinois* . . . to be a truly persuasive analogy. These cases were decided before the Fourth Amendment as such was held applicable to the states . . . and thus rested only on general considerations of due process . . . . Whether the Court would now adhere to them must be regarded as questionable.\(^8\)

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\(^4\) 342 U.S. 519 (1953).


\(^6\) 500 F.2d 267 (2d Cir. 1974).


\(^8\) In the following cases the courts were confronted with issues which were amenable to swift solution via application of the Ker pronouncement. In each case, however, the court chose to circumvent the rule and held that the case at bar was distinguishable. *Cook v. United States*, 288 U.S. 102 (1933); *Ford v. United States*, 273 U.S. 593 (1927); *United States v. Ferris*, 19 F.2d 925 (N.D. Cal. 1927); *United States v. Schouweiler*, 19 F.2d 387 (S.D. Cal. 1927).

\(^5\) 432 F.2d 577 (2d Cir. 1970).

\(^5\) The course of the arrests that led up to the Edmons case was, as the court stated, “dramatic.” *United States v. Edmons*, 432 F.2d at 579. The day after an angry mob had violently deprived four F.B.I. agents of the fruit of an arrest, fifty to sixty agents were called together to launch an assault on a Brooklyn address. The ensuing strike netted the agents five suspects all of whom were arrested for failure to have Selective Service cards in their possession. *Id.* at 580-81.

\(^5\) *United States v. Edmons*, 432 F.2d at 585.

\(^5\) *Id.* at 583 [footnote & citation omitted].

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The Edmons court thereby suggested what would become in Toscanino one of the chief bases for an attack on the Ker-Frisbie rule: the Warren era development of pretrial criminal due process under the fourth, fifth, sixth and fourteenth amendments. This development cast grave doubt upon the Frisbie pronouncement that "due process of law is satisfied when one present before the court is convicted of crime after having been fairly apprised of the charges against him and after a fair trial in accordance with constitutional procedural safeguards."55

Within a month of Edmons, the Third Circuit decided the case of Government of the Virgin Islands v. Ortiz, wherein the defendant challenged the jurisdiction of the trial court subsequent to an extra-legal transfer from the Territory of Puerto Rico. While the appellate court, citing Ker and Frisbie, inter alia, was unable to find a violation of a constitutional guarantee in the manner of Ortiz's transfer, it did note "that the validity of the Frisbie doctrine has been seriously questioned because it condones illegal police conduct."56 Finally, in United States v. Cotten the Ninth Circuit joined the ranks of those passive dissenters who criticized the rule but refused to withhold jurisdiction. In Cotten the defendants had been transported from the Republic of Vietnam to Hawaii without the benefit of a proper extradition proceeding and raised this deprivation as a bar to the district court's jurisdiction.58 Although the language of the decision evidences some agonizing on the part of its author, the court still refused to ignore the Ker-Frisbie prec-

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54. See generally Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized, 56 Calif. L. Rev. 579 (1968).
56. 427 F.2d 1043 (3d Cir. 1970).
57. Id. at 1045 n.2.
58. 471 F.2d 744 (9th Cir. 1973).
59. Id. at 748.
60. The Supreme Court has not since abandoned the Ker principle, and it has been widely reasserted, though at times critically, by the Circuits. The fact that it was state court jurisdiction that was questioned in the early cases which established the rule is unimportant. The protection sought in the cases enunciating the principle was that of the Federal Constitution. The Supreme Court found that none was afforded then; we are unable to find any now. (footnotes omitted). Id.
edent. Echoing the Ortiz court, however, the Cotten panel did state its concern over the incongruous results the Ker-Frisbie rule worked in the modern structure of criminal due process.

While the court recognizes that the vitality of the doctrine we follow may be in doubt, and that federal officers might be held to a higher standard of conduct than their state counterparts, we will not strike it down. Recent legislation and constitutional protections enunciated in the last decade provide viable alternative means of coping with undisciplined law enforcement activities.\(^{61}\)

While this evidence of discontent with the Ker-Frisbie rule may have been the harbinger of a shift to a more enlightened and defensible position, few could have predicted the massive, broad-based assault on the rule advanced in *United States v. Toscanino*.\(^{62}\) All the more ironic is that the breakthrough would occur in a case that engendered no high-pitched publicity.\(^{63}\)

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61. *Id.*

The remarkable aspect of this suggestion is that unlike the brutal and unreasonable conduct of the officers in *Edmons*, the Cotten defendants' sole challenge to the officers' activities went to their failure to abide by proper extradition procedure. The court indicated the failure to undertake proper extradition may in itself be the subject of due process scrutiny. In Toscanino the Ninth Circuit's prophecy was realized.

62. 500 F.2d 267 (2d Cir. 1974).

The three-judge panel which sat on Toscanino's appeal was composed of Circuit Judges Anderson, Mansfield and Oakes. Judge Mansfield authored the opinion of the court which was a unanimous ruling. Although concurring in the court's decision, Judge Anderson filed a separate opinion expressing his belief that the result could have been the same without calling into question the Ker-Frisbie rule. Judge Anderson felt that the irregular activities of the federal agents which led up to Toscanino's presence before the court would bar the assumption of jurisdiction citing Rochin v. California, 342 U.S. 165 (1952) and United States v. Archer, 486 F.2d 670 (2d Cir. 1973). Relying on the reasoning in United States v. Sobell, 142 F. Supp. 515 (S.D.N.Y. 1956), Judge Anderson concluded that Toscanino could not assert a treaty violation as a bar to jurisdiction since the treaty was not invoked to obtain the defendant's presence. Clearly, Judge Anderson was not prepared to rebuke the Ker-Frisbie rule. *United States v. Toscanino*, 500 F.2d at 281-82. And see *United States ex rel. Lujan v. Gengler*, 510 Adv. F.2d 62 (1975) (Anderson, J., concurring).

Ivan S. Fisher of New York City represented Toscanino on appeal. In a telephone conversation with Mr. Fisher the writer learned that Mr. Fisher was more than mildly surprised by the court's attack on the Ker-Frisbie rule. Although he argued for the rule's demise, see Brief for Appellant at 24-43, *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974), Toscanino's counsel foresaw the Rochin violation as the primary basis for challenging the jurisdiction of the district court, *id.* at 9-23.

63. The first ray of publicity enjoyed by the Toscanino case came in *Time*, December 2, 1974, at 63:

Barely one week after the toppling of Salvador Allende's regime last year, Chilean authorities set about arresting drug smugglers. During the Allende years, according to Interpol, Chile had played host to the world's largest cocaine-trafficking operation, and the U.S., which was at the receiving end of the line, was not at all happy. The new junta and American narcos quickly worked out a cozy arrangement. Five federal drug agents flew to Chile to finger
Francisco Toscanino, a native of Italy, was a resident of Montevideo, Uruguay. Toscanino was lured from his home by a paid agent of the United States Government. Once in a remote area of Montevideo, Toscanino was abducted by the agent and six other men who shuttled him across the border into Brazil where he was handed over to a group of Brazilians. Toscanino was eventually taken to Brasilia where he was held incommunicado for seventeen days. During this period Toscanino was subjected to brutal torture and interrogations, some conducted by agents of the Bureau of Narcotics and Dangerous Drugs. The United States Attorney for the Eastern District of New York received daily reports on the progress of this “investigation.” Finally, Toscanino was conducted to Rio de Janeiro where he was drugged and put on an American Airlines jet. He awoke in New York in the custody of a United States marshal.64

Toscanino was tried in the United States District Court for the Eastern District of New York together with three co-defendants. The jury returned a verdict of guilty to a charge involving conspiracy to import narcotics.65 Toscanino's motion to vacate the verdict, dismiss the indictment and return him to Uruguay was denied by the district court.66

American Courts have traditionally held that the manner in which a defendant is brought to the U.S. does not affect the court's power to try him. In the leading case on the subject, the Supreme Court in 1886 upheld the conviction of an Illinois embezzler who was grabbed and brought back from South America by a Pinkerton detective [Ker]. There has been a recent dent in that precedent, however. The U.S. Second Circuit Court of Appeals, which has a jurisdiction that includes New York, ruled last May that due process now requires a court to divest itself of jurisdiction over . . . 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 [Toscanino].

64. This entire episode was alleged by Toscanino in the district court upon his motion to dismiss the proceedings. The lower court saw no legal merit in Toscanino's claim and denied his motion without a hearing. The court of appeals therefore accepted Toscanino's allegations as true for the purpose of appeal. United States v. Toscanino, 500 F.2d at 269-71.


On appeal, the Second Circuit set the issue for decision in this manner:

[W]e face the question of... whether a federal court must assume jurisdiction over the person of a defendant who is illegally apprehended abroad and forcibly abducted by government agents to the United States for the purpose of facing criminal charges here. The answer necessitates a review and appraisal of two Supreme Court decisions, heavily relied upon by the government and by the district court, Ker v. Illinois and Frisbie v. Collins.67

The court reviewed the decisions in Ker and Frisbie and concluded that those cases stood for the proposition that "[j]urisdiction gained through an indisputably illegal act might still be exercised..."68 Alluding to the Edmons view that modern due process interpretations had expanded the scope of judicial scrutiny into the area of pretrial procedures,69 the court found that the Frisbie declaration70 could no longer be given the effect of barring an inquiry into the manner in which a defendant is brought before the court.71 If the decision had gone no farther than to declare that a court could indeed inquire into the facts leading up to its assumption of jurisdiction over the person of a criminal defendant, it would have been a landmark pronouncement.72

Toscanino also appealed upon a denial of his motion to suppress the fruits on an allegedly unlawful wiretap conducted in Uruguay. See 18 U.S.C. § 2510 (1968). The circuit court also found merit in this assignment of error.500 F.2d at 270-71. 67. 500 F.2d at 273 (citations omitted). 68. Id. 69. See Griswold, The Due Process Revolution and Confrontation, 119 U. Pa. L. Rev. 711 (1971). 70. See the discussion of Frisbie v. Collins in the text accompanying note 55 supra. 71. In this respect the court entered into a detailed analysis of Rochin v. California, 342 U.S. 165 (1952). Rochin, as the court read it, expanded the concept of due process to the extent that all government activity surrounding a criminal prosecution was subject to review to determine whether challenged government methods and activities had offended a "sense of justice" (Id. at 173). United States v. Toscanino, 500 F.2d at 274. Accord, United States v. Archer, 486 F.2d 670 (2d Cir. 1973). 72. Compare this conclusion in Toscanino with Frisbie v. Collins, 342 U.S. 519 (1953); Ker v. Illinois, 119 U.S. 436 (1886); United States v. Cotten, 471 F.2d 744 (9th Cir. 1973); United States ex rel. Moore v. Martin, 273 F.2d 344 (2d Cir. 1959); United States v. Sobell, 244 F.2d 520 (2d Cir. 1957); Gillars v. United States, 182 F.2d 862 (D.C. Cir. 1950); Chandler v. United States, 171 F.2d 921 (1st Cir. 1949); Sheehan v. Huff, 142 F.2d 81 (D.C. Cir. 1944), cert. denied, 322 U.S. 764 (1944); Fioconi v. Attorney General of the United States, 339 F. Supp. 1242 (E.D.N.Y. 1972); United States v. Insull, 8 F. Supp. 310 (E.D. Ill. 1934); Ex parte Lopez, 6 F. Supp. 342 (S.D. Tex. 1934); and United States v. Unverzagt, 299 F. 1015 (W.D. Wash. 1924), for the proposition that personal jurisdiction of a court to proceed against a defendant present before the court will not be inquired into.
Having concluded that modern concepts of due process may compel a court to examine the manner in which the defendant was brought into the jurisdiction of the tribunal, the Toscanino court considered the nature of a due process violation that might divest a court of jurisdiction. While not entirely explicit in the decision, Toscanino does suggest two separate bases upon which a due process violation could lead a court to withhold its jurisdiction.

The first ground advanced by the court was based upon the now classic Rochin edict that due process of law will not permit a court to tolerate government conduct that "shocks the conscience."73 The Toscanino court had little trouble concluding that the horror story incidents related by the defendant regarding his abduction, torture and eventual transfer to the United States were precisely the type of outrageous government behavior that would bar the prosecution from invoking the judicial process.74

The second basis proposed in the decision, suggested by United States v. Russell,75 was that due process would call for a court to withhold its jurisdiction "where it resulted from flagrantly illegal law enforcement practices."76 The court drew support for the es-

73. United States v. Toscanino, 500 F.2d at 274.
Regard for the requirements of the Due Process Clause inescapably imposes upon this Court an exercise of judgment over the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English speaking people. . . .

. . . .

Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too categorically. This is conduct that shocks the conscience. . . . 500 F.2d at 274, quoting Rochin v. California, 342 U.S. 169, 172-73 (1952).


The defendants in the Russell case were convicted in federal court for illegally manufacturing a controlled substance ("speed"). Unfortunately for the defendants, the supplier of the formula's essential ingredient was a federal narcotics agent. Justice Rehnquist, writing for the majority (including the Chief Justice and Justices Blackmun, Powell and White), did not find this conduct sufficiently reprehensible to overturn the defendant's convictions. But see the dissenting opinions of Justices Stewart and Douglas, 411 U.S. at 434.

76. 500 F.2d at 274.
tablishment of this test by referring to United States v. Edmons and Government of the Virgin Islands v. Ortiz.

This second basis was reached by the Toscanino court upon an analysis of outstanding international law and our courts' interpretation of that law. The court turned to the law of nations to find support for the appellant's contention that his presence before the court had in fact been the result of flagrantly illegal law enforcement practices. Citing to the charters of the United Nations and the Organization of American States, the Toscanino court concluded that the defendant's presence had been obtained as a result of illegal activity in violation of international law. This conduct was found to be flagrant and unreasonable in that,

Here, in contrast, not only were several laws allegedly broken and crimes committed at the behest of government agents but the conduct was apparently unnecessary, as the extradition treaty between the United States and Uruguay does not specifically ex-

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77. 432 F.2d 577 (2d Cir. 1970).
78. 457 F.2d 1043 (3d Cir. 1970). See text accompanying notes 50 & 56 supra.
79. See text accompanying notes 17-40 supra.
80. Brief for Appellant at 24-43, United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974).
81. It is fairly clear that the court intended to distinguish between the Rochin ("shocking to the conscience") and Russell ("flagrantly illegal law enforcement") criteria for finding a due process violation. While the Rochin standard invokes an appeal to human sensibilities, the Russell test suggests that strictly legal shortcomings in the pretrial procedures may be the basis for dismissal. This distinction is crucial because many cases will involve no opprobrious conduct within the contemplation of Rochin, but the record may be rife with illegal or extra-legal activity which resulted in the court obtaining jurisdiction. Compare the factual background of Toscanino, as an example of a Rochin violation, with the facts in Ker v. Illinois, 119 U.S. 435 (1886), see note 8 supra, as an example of a Russell violation.
82. 500 F.2d at 276-77.
83. U.N. CHART, art. 2, para. 4 provides:
   All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.
84. 500 F.2d at 276. O.A.S. CHARTER, art. 5, para. 1 provides:
   The American states reaffirm the following principles:
   a) International law is the standard of conduct of States in their reciprocal relations;
   b) International order consists essentially of respect for the personality, sovereignty and independence of States, and the faithful fulfillment of obligations derived from treaties.
85. 500 F.2d at 276.
86. Deliberate misconduct on the part of United States agents, in violation not only of constitutional prohibitions [suggesting, perhaps, the Rochin violation], but also of two international treaties obligating the United States government to respect the territorial sovereignty of Uruguay is charged. The conduct alleged here satisfies those tests articulated by the Supreme Court in United States v. Russell (citation omitted). Id.
clude narcotics violations so that a representative of our government might have been able to conclude with Uruguay a special arrangement for Toscanino's extradition. 85

Although the court was unable to find that Toscanino's transfer without proper extradition proceedings 86 did not, in and of itself, violate international law as suggested by the Rauscher decision, 87 the court did give a "back door" effect to the treaty in finding that the governmental activity completely disregarding the treaty was so unreasonable as to amount to a due process violation that would call for the court to withhold the exercise of jurisdiction. 88 In regard to the violation of international law, the court summarized its stand as follows:

[W]e think a federal court's criminal process is abused or degraded where it is executed against a defendant who has been brought into the territory of the United States by the methods alleged here. We could not tolerate such an abuse without debasing 'the processes of justice.' 89

85. 500 F.2d at 276 (citation omitted).
86. As previously noted, an international transfer without proper extradition proceedings is an extra-legal action. See note 5 supra.
87. See text accompanying notes 34 & 35 supra.
88. The court stated its conclusion as follows:
Faced with a conflict between the two concepts of due process, the one being the restricted version found in Ker-Frisbie and the other the expanded and enlightened interpretation expressed in more recent decisions of the Supreme Court, we are persuaded that to the extent that the two are in conflict, the Ker-Frisbie version must yield. 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. United States v. Toscanino, 500 F.2d at 275.

Although the court phrased the defect in the district court's proceedings in terms of personal jurisdiction, there was no suggestion in the decision that the court had accepted Professor Dickinson's argument that the court's jurisdiction was defective because there was no national competence in the United States Government to assert its jurisdiction over Toscanino. See Dickinson, supra note 15, at 244. This alternative was nevertheless presented to the court. See Brief for Appellant at 28, United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974). Accord Cook v. United States, 288 U.S. 102 (1933).
89. 500 F.2d at 276 (citation & footnote omitted).

At the conclusion of the language quoted in the text, the court included a footnote and therein cited to United States v. Cotten, 471 F.2d 744 (9th Cir. 1973). The court noted Cotten's adherence to the Ker-Frisbie rule, but distinguished Cotten on the basis that no treaty existed in the case, and in that case, the defendants had been voluntarily handed over to U.S. officials by the Vietnamese Government. Id. at 276-77 n.6.
In concluding that an unnecessary violation of international law might be a basis for a court to divest itself of jurisdiction, the Toscanino decision finally answered those critics who had for years decried the Ker-Frisbie rule. Nevertheless, this pronouncement was short-lived. On January 8, 1975, the decision in United States ex rel. Lujan v. Gengler was handed down within the Second Circuit. The panel which sat on Lujan's appeal was composed of Circuit Judges Anderson and Oakes, who sat on the Toscanino panel, and Chief Judge Irving Kaufman, who nearly nine years earlier, authored the opinion in United States v. Sobell while serving as a federal district court judge. The only essential difference between Lujan's case and Toscanino's was that Lujan had suffered none of the torture and brutality that Toscanino had undergone subsequent to his abduction.

Chief Judge Kaufman, who authored the opinion of the court, concurred in the Toscanino holding that modern conceptions of pretrial criminal due process no longer permitted a court to blind itself to the facts surrounding the manner in which the court obtains jurisdiction over a criminal defendant.

Yet in recognizing that Ker and Frisbie no longer provided a carte blanche to government agents bringing defendants from abroad to the United States by the use of torture, brutality and other such outrageous conduct, we did not intend to suggest that any irregularity in the circumstances of a defendant's arrival in the jurisdiction would vitiate the proceedings of the criminal court. In holding that Ker and Frisbie must yield to the extent they are inconsistent with the Supreme Court's more recent pronouncements, we scarcely could have meant to eviscerate the Ker-Frisbie rule, which the Supreme Court has never felt impelled to disavow.


In a lengthy decision, Judge Kaufman rejected a challenge to his own court's jurisdiction by a defendant who had been abducted from Mexico. Kaufman hinged his decision on Ker and Frisbie. His honor's opinion regarding the merit of Sobell's claim is perhaps best reflected in this passage:

... justice... is due also to the Court which in its role of defender of justice must conscientiously wade through voluminous briefs, affidavits and cited materials seeking merit in a contention so devoid in legal basis as to make its presentation tantamount to an abuse of process. Id. at 522.

93. The defendant, Lujan, was allegedly involved in the same narcotics smuggling conspiracy that had brought Toscanino before the district court. Lujan, a resident of Argentina and a licensed pilot, was hired by a paid operative of the Federal Bureau of Narcotics and Dangerous Drugs operating in South America to fly him to Bolivia. Upon landing in that country, Bolivian police, acting solely as paid agents of the U.S. officers, took Lujan into custody. The following day, these Bolivian police placed Lujan on board a plane destined for New York where he was arrested. Lujan was tried and convicted in the district court that passed judgment on Toscanino.

The *Lujan* opinion concluded that *Toscanino* was based solely on the cruel and outrageous behavior of United States officers and their agents during the seventeen days that Toscanino was held in Brasilia. The court reasoned that this *Rochin* violation was the only conceivable basis upon which to justify the outcome of the *Toscanino* court in ordering that the defendant's case be dismissed for lack of personal jurisdiction. However, this conclusion is not supported by a reading of the *Toscanino* decision. Specifically, the *Toscanino* court noted the substantially different outlook taken by the various courts in the *Cook*, *Ford*, *Ferris* and *Schouwelier* cases96 and concluded that "*Ker* does not apply where a defendant has been brought into the district court's jurisdiction by forcible abduction in violation of a treaty."96

Clearly, *Toscanino* was decided on more than the *Rochin* violation. The court discussed at length the implications of both positive and customary international law on a court's jurisdiction when a criminal defendant's presence is secured in violation of those laws. Further, the *Lujan* explanation that *Toscanino* was decided solely on the basis of the brutality of the defendant's incarceration in Brazil, ignores a large measure of the earlier decision. The concern of the *Toscanino* court went to the entire process by which the defendant came to stand before the district court. In fact, Toscanino's detention in Brazil was merely a stopover on his way to the United States, and the court of appeals most definitely was addressing itself to the total lack of regularity in the manner of the defendant's transfer to the court; what the court characterized as the "flagrantly illegal law enforcement practices."97

95. *See* cases cited note 46 *supra*. In each of these cases, the court ruled that the violation of a treaty, which resulted in the presence of the defendant before the tribunal, would call for the court to withhold the exercise of jurisdiction.

96. 500 F.2d at 278.

To insure that it had not announced a rule without prescribing a remedy, the court found that:

["The *Ker-Frisbie* rule cannot be reconciled with the Supreme Court's expansion of the concept of due process, which now protects the accused against pretrial illegality by denying to the government the fruits of its own exploitation of any deliberate and unnecessary lawlessness on its part."

Accordingly we view due process as now requiring a court to divest itself of jurisdiction. . . . *Id.* at 275.

97. *See* text accompanying note 76 *supra*. 

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Quite clearly the *Lujan* decision was intended to narrow the applicable scope of the *Toscanino* opinion to those cases where brutal and outrageous police behavior resulted in the court obtaining jurisdiction. However, *Lujan* is no better reasoned than those decisions that have applied *Ker-Frisbie* by rote, and ignored the *Cook-Rauscher* line of cases as well as modern notions of criminal due process and international law. To that extent, *Lujan* is an unfortunate limitation on a truly enlightened and progressive decision.

In the wake of *Toscanino* and *Lujan* there can be no doubt that the *Ker-Frisbie* holding, that due process does not require a court to examine the manner in which jurisdiction is obtained over a criminal defendant, is no longer a tenable position. While *Lujan* would suggest that only brutal and outrageous conduct by law enforcement officials will result in the denial of jurisdiction, *Toscanino* has at least offered a sound argument for denying the prosecution a forum when jurisdiction is obtained pursuant to a demonstrably unnecessary extra-legal transfer. The progress of our

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98. The decision in *Toscanino* that the trial court should withhold the exercise of jurisdiction is not to be read as a permanent bar to the proceedings against the defendant. Rather, the illegality could be cured by restoring the *status quo ante*, which could be accomplished by returning the defendant to the country from which he was abducted. This is precisely the remedy fashioned by the Court in the *Rauscher* case:

> [H]e shall not be arrested or tried for any other offense than that which he was charged in those proceedings, until he shall have had a reasonable time to return unmolested to the country from which he was brought. United States v. Rauscher, 119 U.S. at 424.

This is the remedy which the courts effected in *Ford v. United States*, 273 U.S. 593 (1927); *United States v. Schouweiler*, 19 F.2d 387 (S.D. Cal. 1927); *United States v. Ferris*, 19 F.2d 925 (N.D. Cal. 1927) and *Dominguez v. State*, 90 Tex. Crim. 90, 234 S.W. 79 (1921). Once the defendant is returned to the “asylum” country, an orderly and lawful extradition process can be initiated. This should not be viewed as a mere token process. Once in his own country, the defendant normally has the right to oppose extradition in his own domestic courts. See S. *BEDI, EXTRADITION IN INTERNATIONAL LAW AND PRACTICE* 139 (1966).

If the defendant is a resident alien or on visa in the “asylum” country, as was Toscanino, he may be denied re-entry and should therefore be permitted to return to his homeland.

A more perplexing situation is presented when the defendant is an American citizen. See, e.g., *Chandler v. United States*, 171 F.2d 921 (1st Cir. 1948). In such a case there is little chance that the foreign government would permit the party’s return. If the foreign government refuses re-entry, the defendant should be granted a reasonable opportunity to relocate himself. Although this remedy may not be as effective as that applied to foreign nationals, it bears noting that the American citizen did not originally enjoy a right of asylum in the foreign nation. *Ker v. Illinois*, 119 U.S. at 442.

99. It is a well-established precept of international law that an extraordinary or extra-legal process will not be valid unless all ordinary procedures are first exhausted. See *The Interhandel Case*, [1959] I.C.J. 6.
laws and the advancement of the international legal community argues persuasively for a concept of due process of law that extends beyond national boundaries. To the extent that Toscanino evidences this enlightened view, its holding warrants further consideration.

CONCLUSION

It is difficult to reconcile the sensitivity of our courts in the face of abduction of United States citizens and foreign nationals found within this country with the callous attitude our courts take toward those criminal defendants who are abducted from foreign sovereignties and brought here against their will. In this respect, Justice Brandeis’ grim warning in Olmstead v. United States that “[o]ur government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example,” takes on international implications when our courts sanction governmental activity that violates the common law shared by all men and all nations.

As a matter of law, the Ker-Frisbie rule is difficult to square with the development of both our own law and the law of nations. As a matter of justice, the rule is simply inexcusable; as a matter of practicality, the rule is senseless. The United States has treaties of extradition with almost every sovereign country on the globe and there is no reason why such treaties cannot serve as the means for returning wanted fugitives to justice. In an age of international terrorism, such governmental lawlessness is deplorable.

United States v. Toscanino took a deep, learned look at the rule and its broad implications in the modern system of criminal justice and international law; in light of these considerations the

100. See generally Reid v. Covert, 354 U.S. 1 (1957).
101. The criticism of the rule by the Third Circuit in Government of the Virgin Islands v. Ortiz, 427 F.2d 1043 (3d Cir. 1970) and the Ninth Circuit in United States v. Cotten, 471 F.2d 744 (9th Cir. 1973), see text accompanying notes 56 & 58 supra, suggests that the Toscanino decision may be revitalized within these circuits. See Sanders v. Conine, 506 F.2d 530 (1974).
102. See The Cantu Case (1914), reported in II. G. Hackworth, Digest of International Law 310 (1941); and see The Case of Blatt and Converse (1911), id. at 309.
103. 277 U.S. 438, 485 (1928).
104. 500 F.2d 267 (2d Cir. 1974).
rule was simply found untenable. *Toscanino* makes it clear that our courts can no longer sanction illegal government conduct, regardless of where in the world it takes place, and irrespective of the costs to the system when the law is not followed. It is submitted that the decision in *Toscanino* exemplifies the most enlightened view of the role and power of a court in the modern world.

GARY W. SCHONS