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Combatting Torture: Revitalizing the Toscanino Exception to the Ker-Frisbie Doctrine

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NOTES AND COMMENTS

Combatting Torture: Revitalizing the *Toscanino* Exception to the *Ker-Frisbie* Doctrine

I. INTRODUCTION

The abduction of individuals from other nations to face justice in United States courts has increased at an alarming rate in recent years.[1] The number of district court cases in which abducted defendants have alleged acts of torture and brutality by United States law enforcement officials has also increased.[2] The United States judiciary has tolerated this alleged police misconduct by applying the long-standing rule commonly known as the *Ker-Frisbie* doctrine, which broadly holds that the manner in which a defendant is brought to trial does not affect the court's ability to try the case.[3]

This Comment will examine the *Ker* and *Frisbie* decisions in which the United States Supreme Court held that pretrial police misconduct is irrelevant to court processes because "due process of law is satisfied when one present in court is convicted of a crime after having been fairly apprised of the charges against him and after a fair trial in accordance with constitutional procedural safeguards."[4] This Comment then discusses the exception to the *Ker-Frisbie* doctrine set forth by the Second Circuit in *United States v. Toscanino*.[5] In *Toscanino*, the court held that due process of law requires United States courts to divest themselves of jurisdiction where the defendant's presence at trial has been acquired as a result of the government's "deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights."[6] The exact legal basis for the *Toscanino* exception was ini-

1. Moss, *Official Kidnapping*, 1991 A.B.A. J. 24; Abramovsky & Eagle, *U.S. Policy in Approaching Alleged Offenders Abroad: Extradition, Abduction or Irregular Rendition*, 57 OR. L. REV. 51, 84-85 (1977).

2. Moss, *supra* note 1, at 24; Abramovsky & Eagle, *supra* note 1, at 84-85.

3. The *Ker-Frisbie* doctrine is based on Ker v. Illinois, 119 U.S. 436 (1886) and Frisbie v. Collins, 342 U.S. 519 (1952).

4. *Frisbie*, 342 U.S. at 522.

5. 500 F.2d 267 (2d Cir. 1974).

6. *Id.* at 275.

tially unclear. On its face, it required United States courts to exclude the body of the defendant when his presence in court was the product of an illegal arrest.[7]

Shortly after *Toscanino*, the Second Circuit clarified and severely limited the scope of the exception in *Lujan v. Gengler*[8] and *United States v. Lira*.[9] These cases limited the divestiture of jurisdiction to cases where United States law enforcement officials or their agents[10] directly participated in "cruel, inhuman, and outrageous treatment" of detainees.[11] Accordingly, mere illegal arrest, absent cruel and outrageous treatment, remains proper under the *Ker-Frisbie* doctrine.

This Comment discusses the line of cases following *Lujan* and *Lira* which further narrow the *Toscanino* exception as it applies to outrageous treatment and torture. These cases require an extremely high level of police brutality to invoke the *Toscanino* exclusionary rule. In fact, the United States judiciary has interpreted the standard of brutality in such a way as to render the *Toscanino* exception virtually ineffective in deterring even the most heinous police misconduct. In the sixteen years since *Toscanino*, not a single defendant has succeeded in proving police misconduct sufficient to divest the court of jurisdiction. Even more disconcerting is the recent willingness of the Seventh Circuit to countenance almost any form of pretrial mistreatment by holding that the *Toscanino* exception is no longer viable at all, at least as far as it creates an exclusionary remedy.[12]

In contrast to this judicial acquiescence to official brutality, the United States Senate recently ratified the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("United Nations Convention Against Torture").[13] The Convention requires member states to "take effective legislative, administrative, judicial or other measures to prevent acts of torture."[14]

This Comment will show that a well-defined *Toscanino* exception

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7. *Id.*
8. 510 F.2d 62 (2d Cir. 1975).
9. 515 F.2d 68 (2d Cir. 1975).
10. *Id.* at 70.
11. *Lujan*, 510 F.2d at 65.
12. Matta-Ballesteros v. Henman, 896 F.2d 255 (7th Cir.), *cert. denied*, 111 S. Ct. 209 (1990).
13. 136 CONG. REC. S17486-92 (Oct. 27, 1990).
14. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2(1), G.A. Res. 46, 23 U.N. GAOR Supp. (No. 39) at 395, U.N. Doc. A/51 (1984) [hereinafter United Nations Convention Against Torture].

utilizing an exclusionary remedy is the only effective means of deterring police misconduct and satisfying the United States' obligations under the United Nations Convention Against Torture. In fact, the failure of United States courts to apply *Toscanino* has insidiously encouraged United States law enforcement to engage in, acquiesce to, and accept the benefits of the brutalization of pretrial detainees.

This Comment proposes that the United States Supreme Court confirm the *Toscanino* exception as it applies to torture and brutality by United States police.[15] The revitalized *Toscanino* exception should either be based directly on the provisions of the United Nations Convention Against Torture or on a traditional due process analysis. This Comment suggests that the most practical and effective bases for the *Toscanino* exception are the due process clauses of the fifth and fourteenth amendments. Moreover, United States courts should incorporate into the due process analysis the standard of outrageous police misconduct recognized in international law and defined in the United Nations Convention Against Torture.[16] This Comment also proposes specific evidentiary procedures to effectively determine when police

15. This Comment focuses on revitalizing the narrow *Toscanino* exception as it applies to torture. Many commentators have argued that courts should prohibit all abductions as violations of the fourth amendment or customary international law. I.A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 75 (1971); Abramovsky & Eagle, *supra* note 1, at 52-55; M.C. BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 190 (1987). However, abduction is firmly entrenched in United States law enforcement policy as an acceptable alternative to formal extradition processes. This is attributable to the impracticability or unavailability of extradition due to "the unwillingness of asylum states to abide by the provisions of extradition treaties; the inapplicability of extradition treaties to either the offense or the offender; or the need for immediate apprehension which cannot be accommodated by the often lengthy and complicated procedures contained in bilateral extradition treaties." Abramovsky & Eagle, *supra* note 1, at 92.

16. Torture is one of humankind's most abhorrent crimes and is almost universally condemned. Moor & Nichols, *Combatting Torture in the '90s*, 17 HUM. RTS. 1, 28 (1990). Many international agreements condemn torture, including the following: Universal Declaration of Human Rights, art. 5, G.A. Res. 217 A (III) at 71, U.N. Doc. A/810 (1948), *reprinted in* R. LILLICH, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 440.1 (1986) (no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment); African Charter on Human and Peoples' Rights, Organization of African Unity, art. 5, (1981), *reprinted in* 21 I.L.M. 58 (1982) (every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman, or degrading punishment and treatment shall be prohibited); Universal Islamic Declaration of Human Rights, art. 7 (1981) (no person shall be subjected to torture in mind or body, or degraded, or threatened with injury either to himself or to anyone related to or held dear by him); International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 7, 999 U.N.T.S. 171; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 221; American Convention on Human Rights, art. 5, para. 2, O.A.S.T.S. No. 36, at

mistreatment of pretrial detainees violates due process. For example, when a defendant makes a prima facie showing that he or she was subjected to torture or outrageous brutality, the burden of proof should shift to the prosecution to show that United States agents did not knowingly participate or acquiesce in the misconduct.

The United States has been a leader in condemning torture and illegal abduction and is a party to many international human rights instruments denouncing these acts.[17] However, the much publicized

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1, O.A.S. off. Rec. OEA/ser.L/V/II.23, doc. 21, rev. 2 (1969), *reprinted in* R. LILLICH, *supra*, at 190.1.

17. Over the last 20 years, the United States government has made great efforts to curb torture around the world. *See* Moor & Nichols, *supra* note 16, at 28. In the 1970s, the legislative and executive branches of the United States government took steps to ensure that economic aid would only go to countries that respect fundamental human rights. Between 1976 and 1979, Congress passed 25 bills linking the human rights practices of nations to United States foreign policies. For example, in 1975, Congress amended section 102 of the Foreign Assistance Act of 1961 to state:

> No assistance may be provided . . . to the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including torture or cruel, inhuman, or degrading treatment or denial of the right to life, liberty, and the security of person, unless such assistance will directly benefit the needy people in such country.

22 U.S.C. § 2151n(a) (Supp. V. 1975) (amending 22 U.S.C. § 2151 (1970)).

In 1976, Congress also amended section 502B of the Foreign Assistance Act of 1961 pertaining to the discretion of the President of the United States to conduct international security assistance programs. The amendment stated: "Except under circumstances specified in this section, no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights." 22 U.S.C.A. § 2304 (Supp. III 1976) (amending 22 U.S.C. § 2304 (Supp. IV 1974)).

In 1984, a Joint Resolution of Congress expressed support for the involvement of the United States government in the formulation of international standards and effective implementation mechanisms against torture, particularly through the United Nations Convention Against Torture. *See* United Nations Convention Against Torture, *supra* note 14. The Convention was opened for signature on December 10, 1984 and entered into force June 26, 1987.

The United States Departments of State, Justice, and Defense recommended various declarations and reservations that were instrumental in formulating the official definition of torture in the United Nations Convention Against Torture. J.H. BURGERS & H. DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 41-42 (1988).

The United States government endorsed defining torture as:

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . when such pain or suffering is *inflicted by* or *at the instigation of* or *with the consent or acquiescence* of a public official or other person acting in an official capacity.

Id. at 44. *See also* Bassiouni & Derby, *The Crime of Torture*, *in* 1 M.C. BASSIOUNI, INTERNATIONAL CRIMINAL LAW: CRIMES 363 (1986); Boulesbaa, *An Analysis of the 1984 Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 4 DICK. J. INT'L L. 185 (1986).

"war on drugs"[18] has prompted United States law enforcement agencies to increase their use of abduction and other illegal means of apprehending and interrogating suspects outside of the United States' borders.[19] Judicial acquiescence to acts of brutality and torture committed by United States agents cannot be reconciled with the basic tenets of the Bill of Rights. Only by maintaining consistency and congruity between international policy on torture, and judicial condemnation of brutality by United States law enforcement, can the United States maintain judicial integrity, respect for its criminal justice system, and credibility in its condemnation of such egregious acts. Revitalizing the *Toscanino* exception, at least as far as it applies to brutality and torture, is an essential first step in this process.

II. THE *KER-FRISBIE* DOCTRINE

For more than one hundred years, United States courts have implicitly sanctioned lawlessness by assuming *in personam* jurisdiction over criminal defendants whom law enforcement officials have illegally apprehended and forcibly brought into the courts' jurisdiction.[20] This implied sanction is embodied in the well-established rule of law that the power of United States courts to try a person for a crime is not impaired by the manner in which he is brought within a court's jurisdiction. This rule, known as the *Ker-Frisbie* doctrine,[21] was first enunciated by the Supreme Court in 1886 in *Ker v. Illinois*.[22]

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18. Anderson, *Fighting the International Drug War*, A.B.A. J., Jan. 1991, at 24-25.

19. Moss, *supra* note 1, at 24. "With few court decisions standing in the way of U.S. seizures of foreign criminal suspects, public officials are encouraged to become 'officially licensed kidnappers.' " *Id.* (quoting DePaul College of Law Professor, M. Cherif Bassiouni). There is also an increasing number of published opinions by federal district courts on such abductions. *Id.*; *see also* Abramovsky & Eagle, *supra* note 1, at 52-55. For published opinions, see *infra* notes 110-12.

20. *See* Ker v. Illinois, 119 U.S. 436 (1886).

21. *Id.*; Frisbie v. Collins, 342 U.S. 519 (1952). The *Ker-Frisbie* doctrine is based on the maxim *mala captus bene detentus* which allows national courts to "assert *in personam* jurisdiction without inquiring into the means by which the presence of the defendant was secured." M.C. BASSIOUNI, *supra* note 15, at 190.

22. 119 U.S. 436 (1886). The *Ker* decision can be traced to two English cases: Regina v. Sattler, 169 Eng. Rep. 111 (1858) (where the court held that offenses committed by foreigners on British vessels on the high seas may be tried by any court within whose jurisdiction the offender is found, and it did not have to decide on the illegality of the original arrest); and *Ex parte* Susannah Scott, 109 Eng. Rep. 166 (1829) (where the accused was arrested in Brussels by a British police officer and forcibly returned to stand trial in England, and the court held that it could not inquire into the circumstances of the arrest or the accused's return to the English jurisdiction).

Ker is the seminal case in this area of the law, and is cited internationally for upholding

In *Ker*, a resident of Peru was indicted by an Illinois grand jury on charges of larceny and embezzlement.[23] The Governor of Illinois requested the United States President to invoke the extradition treaty between the United States and Peru.[24] In accordance with the request, a warrant was issued authorizing a Pinkerton agent to assume custody of Ker in Peru. Rather than serving the warrant, or requesting custody from the Peruvian authorities, the agent forcibly abducted Ker and placed him aboard an American vessel bound for the United States.[25] Ker was then taken to Illinois where he was tried and convicted.[26] On appeal, the United States Supreme Court held that Ker could be tried regardless of the methods by which personal jurisdiction had been obtained over him.[27] The Court went on to explain that "due process of law . . . is complied with when the party is regularly indicted[,] . . . 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."[28]

The Supreme Court again addressed this issue in 1952, in *Frisbie v. Collins*.[29] In *Frisbie*, a Michigan state prisoner filed a petition for habeas corpus alleging that police officers had forcibly abducted him from Illinois and taken him to Michigan.[30] The prisoner claimed that his trial and subsequent conviction in Michigan was void on due process grounds because he had been illegally kidnapped, handcuffed,

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the exercise of jurisdiction over defendants who have been illegally abducted or irregularly rendered in other jurisdictions. *See* United States v. Cordero, 668 F.2d 32, 36 (5th Cir. 1981) (citing *Ex parte* Elliot, 1 All E.R. 373 (K.B. 1949) (Eng.)); Geldof v. Muelemeester and Steffen, 31 I.L.R. 385 (*cour de cassation* 1961) (Belg.); Attorney General v. Eichmann, 36 I.L.R. 5 (Dist. Jerusalem 1961), *aff'd* 36 J.L.R. 277 (S. Ct. 1962 Isr.). *But see* Case of Nollet, 18 *Journal Du Droit International* 1188 (*cour d'appel de Douri* 1891) and *In re* Jolis, Ann. Dig. 191 (No. 77) (*Tribunal correctionnel d'avesnes* 1933) (Fr.). *Ker* arose out of a traditional extradition where the United States' attempt to comply with normal extradition processes was frustrated by political unrest in Peru which made the proper service of the extradition warrant impossible. Faced with this obstruction of their efforts, the United States agents resorted to an illegal abduction.

23. 119 U.S. at 437.

24. *Id.* at 438.

25. *Id.* Ker made no claim and presented no evidence that he had been tortured by either United States or Peruvian law enforcement officials. *Id.*

26. *Id.* at 437, 439.

27. *Id.* at 443-44.

28. *Ker*, 119 U.S. at 440. At the time *Ker* was decided, the fourteenth amendment was less than 20 years old. U.S. CONST. amend. XIV.

29. 342 U.S. at 519.

30. *Id.* at 520.

and blackjacked[31] in Illinois by Michigan law enforcement officers.[32] The Supreme Court rejected his claim by reaffirming the *Ker* holding. The Court reasoned that the power of a court to try a person for a crime is not diminished because the person was brought within the court's jurisdiction by a forcible abduction.[33] Justice Black, writing for the Court, stated: "[D]ue process of law is satisfied when one present in 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."[34]

Thus, the *Ker-Frisbie* doctrine allows law enforcement officers to obtain jurisdiction through indisputably illegal acts even though it may "reward police brutality and lawlessness in some cases."[35] For many years, the doctrine has been cited as authorizing law enforcement misconduct as long as the defendant receives a fair trial upon his return to the United States.[36]

III. THE *TOSCANINO* EXCEPTION TO THE *KER-FRISBIE* DOCTRINE

In *United States v. Toscanino*,[37] the Second Circuit acknowledged the *Ker-Frisbie* doctrine's potential to countenance brutal police misconduct during abduction and carved out an exception to the rule. The court held that recently expanded concepts of due process require a court to divest itself of jurisdiction over the defendant where jurisdiction has been acquired as the result of the government's improper deprivation of the accused's constitutional rights.[38]

In *Toscanino*, the court was faced with an extreme example of governmental misconduct. Francisco Toscanino, an Italian citizen, was convicted of conspiracy to import and distribute narcotics.[39] Toscanino argued that the district court proceedings against him were void because personal jurisdiction over him had been unlawfully ac-

31. "Blackjacked" is defined as being beaten with a short, leather-covered club. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 154 (1973).

32. *Frisbie*, 342 U.S. at 520.

33. *Id.* at 522.

34. *Id.*

35. United States v. Toscanino, 500 F.2d 267, 272 (2d Cir. 1974).

36. *See* M.C. BASSIOUNI, *supra* note 15, at 204-05.

37. 500 F.2d 267 (2d Cir. 1974).

38. *Id.* at 275. The court stated that this conclusion was merely "an extension of the well-recognized power of federal courts in the civil context to decline to exercise jurisdiction over a defendant whose presence has been secured by force or fraud." *Id.*

39. *Id.* at 268-69.

quired.[40] He claimed he was lured from his home in Montevideo, Uruguay by a phone call from a Montevideo police officer allegedly acting as a paid agent of the United States government.[41] When Toscanino and his pregnant wife went to the place designated in the phone call, seven men attacked him, knocked him unconscious with a gun, and threw him into a car.[42] Bound and blindfolded, Toscanino was driven to the Uruguay-Brazil border where a group of Brazilians, acting on behalf of United States agents, took him into custody. The Brazilians transported Toscanino to Porto Alegre where he was held incommunicado for eleven hours and deprived of all food and water.[43]

Toscanino was then taken to Brasilia where he was incessantly tortured and interrogated for seventeen days with the participation of a United States Bureau of Narcotics agent.[44] During this period, Toscanino was given intravenous nourishment in amounts sufficient only to keep him alive. Toscanino claimed he was forced to walk up and down a hallway for seven or eight hours at a time. He was kicked, beaten, and pinched with metal pliers. Agents flushed alcohol into his eyes and nose, and forced other fluids into his anal passage. The abductors administered electric shocks by attaching electrodes to Toscanino's earlobes, toes, and genitals.[45] All of the alleged torture was administered in a sadistic manner, but in a way that would avoid scarring.[46] After nineteen days of interrogation, Toscanino awoke in the United States where he was arrested and brought to a United States Attorney.[47] The United States government neither confirmed nor denied the allegations. Instead, the government contended that the allegations were immaterial to the district court's power to proceed under the *Ker-Frisbie* doctrine.[48]

On appeal, the Second Circuit questioned the continuing validity of the *Ker-Frisbie* doctrine, and held that the district court should have given Toscanino an opportunity to substantiate his allegations at an evidentiary hearing.[49] If Toscanino could prove the allegations of

40. *Id.*
41. *Id.* at 269.
42. *Toscanino,* 500 F.2d at 269.
43. *Id.* at 270.
44. *Id.*
45. *Id.*
46. *Id.* Any of the allegations standing alone would constitute torture under customary international law.
47. *Toscanino,* 500 F.2d at 270.
48. *Id.*
49. *Id.* at 281.

torture, the Constitution would require the court to divest itself of jurisdiction.[50] The court based its deviation from the established *Ker-Frisbie* doctrine on the "Constitutional Revolution,"[51] which substantially expanded the notion of due process since the Supreme Court's decision in *Frisbie*.[52]

The court also cited widespread judicial and academic criticisms of the *Ker-Frisbie* rule.[53] The court held that the rule "cannot be reconciled with the Supreme Court's expansion of the concept of due process,"[54] and that "due process . . . now require[s] 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."[55]

However, the majority and concurring opinions disagreed on the constitutional basis for the decision.[56] Judge Mansfield grounded his majority opinion on an extension of the fourth amendment's exclusionary rule. He reasoned that *Ker* and *Frisbie* no longer controlled because they were inconsistent with recent judicial censure of government illegality in law enforcement.[57] Rather, due process extends beyond the guarantee of a fair trial—it encompasses the pretrial treatment of the defendant in order to deter police misconduct and deny the government the fruits of its lawlessness. Judge Mansfield wrote:

> [W]e must be guided by the underlying principle that the government should be denied the right to exploit its own illegal conduct, . . . and when an accused is kidnapped and forcibly brought within

50. *Id.* For the procedural mechanisms to prove allegations of abduction and torture, see *infra* text accompanying notes 296-321.

51. *See* Griswold, *The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711 (1971).

52. *Toscanino*, 500 F.2d at 272 (citing United States v. Russell, 441 U.S. 418, 430-31 (1973); Mapp v. Ohio, 367 U.S. 643 (1961); Miranda v. Arizona, 384 U.S. 436 (1966); Wong Sun v. United States, 371 U.S. 471 (1963); Silverman v. United States, 365 U.S. 505 (1961)).

53. For academic criticism, the court cited Pitler, *"The Fruit of the Poisonous Tree," Revisited and Shepardized*, 56 CAL. L. REV. 579, 600 (1968); Scott, *Criminal Jurisdiction of a State Over a Defendant Based Upon Presence Secured by Force or Fraud*, 37 MINN. L. REV. 91, 102, 107 (1953); Allen, *Due Process and State Criminal Procedure: Another Look*, 48 NW. U.L. REV. 16, 27-28 (1953). For judicial criticism, see United States v. Edmons, 432 F.2d 577, 583 (2d Cir. 1970); Virgin Islands v. Ortiz, 427 F.2d 1043, 1045 n.2 (3d Cir. 1970).

54. *Toscanino*, 500 F.2d at 275.

55. *Id.*

56. The three judges who sat for the Second Circuit on Toscanino's appeal were Circuit Judges Mansfield, Anderson, and Oakes. Judge Mansfield wrote the majority opinion and Judge Anderson wrote a concurring opinion. *Id.* at 268.

57. *Id.* at 275; *see supra* note 52 and accompanying text.

> the jurisdiction, the court's acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct. Having unlawfully seized the defendant in violation of the Fourth Amendment, . . . the government should as a matter of fundamental fairness be obligated to return him to his *status quo ante*. 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 should yield.[58]

The majority in *Toscanino* also relied on the Supreme Court's fifth amendment substantive due process analysis in *Rochin v. California*,[59] in which the Supreme Court set aside a state court conviction based on evidence obtained through police misconduct. In *Rochin*, police officers illegally entered the home of a suspected narcotics dealer.[60] The defendant swallowed two capsules of morphine despite the officers' attempts to extract the capsules by force.[61] The officers then handcuffed the defendant and took him to a hospital where they directed a doctor to force "an emetic solution through a tube into [the defendant's] stomach against his will."[62] The solution induced vomiting and the officers seized the morphine. The Supreme Court reversed the resulting conviction, holding that forcing the defendant to vomit to obtain evidence against him was undeniably pretrial misconduct that offended the "canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."[63] The *Toscanino* court held that the alleged treatment of Toscanino by United States Marshals constituted this type of conduct which is repulsive to human dignity and denies the fundamental fairness insured by due process of law.[64]

Judge Anderson wrote a concurring opinion stating that the deci-

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58. *Toscanino*, 500 F.2d at 275. Judge Mansfield further stated, "Society is the ultimate loser when, in order to convict the guilty, it uses methods that lead to decreased respect for the law." *Id.* at 274.

59. 342 U.S. 165 (1952).

60. *Id.* at 166.

61. *Id.*

62. *Id.*

63. *Id.* at 169.

64. *Toscanino*, 500 F.2d at 267. Judge Mansfield also noted that the court could have reached the same result through an exercise of the court's supervisory power. *Id.* at 276. This power could be invoked by the circuit court "to prevent the district courts from themselves becoming 'accomplices in the willful disobedience of the law.' " *Id.* (citing McNabb v. United

sion could have been decided on due process grounds alone, and without calling into question the *Ker-Frisbie* doctrine.[65] He stated that "[t]he courts of this country . . . no longer completely disregard the behavior of our police agents when they are operating outside the national boundaries."[66] In this way, the court could have distinguished *Toscanino* from other illegal abduction cases, based on the extreme nature of the torture directly perpetrated by United States officers. Within months of the *Toscanino* decision, Judge Anderson's analysis was adopted as the law of the Second Circuit.

IV. NARROWING OF THE *TOSCANINO* EXCEPTION TO EGREGIOUS MISCONDUCT BY UNITED STATES LAW ENFORCEMENT

Toscanino's prohibition of all illegality in international arrest and detention raised many questions about the breadth and application of these new constitutional standards.[67] Read broadly, *Toscanino* divested courts of jurisdiction over defendants where there was *any* unnecessary and deliberate violation of an arrestee's constitutional rights.[68] Shortly after *Toscanino*, the Second Circuit clarified its holding, and limited the exception to acts of brutality that shock the conscience.

A. Lujan *Limits the* Toscanino *Exception to Acts of Extreme Brutality*

Only six months after the decision in *Toscanino*, the Second Circuit reexamined the issue of police illegality during pretrial detention

States, 318 U.S. 332, 345 (1943)). For a discussion of supervisory powers, see *infra* notes 180-200 and accompanying text.

Judge Mansfield held alternatively that in abducting Toscanino, the United States government violated its obligations under the United Nations Charter and the Charter of the Organization of American States by encroaching upon the sovereignty or territorial integrity of Uruguay. *Toscanino*, 500 F.2d at 277. For a discussion on enforcing international agreements in United States courts, see *infra* notes 201-35 and accompanying text.

65. *Toscanino*, 500 F.2d at 281 (Anderson J., concurring).

66. *Id.*

67. *See generally* Note, *Constitutional Law-Criminal Law-A Federal Court Lacks Jurisdiction Over a Criminal Defendant Brought Into the District by Forceable Abduction: The Fourth Amendment Protects an Alien Residing Abroad Against Unreasonable Searches and Seizures Conducted by American Agents*-United States v. Toscanino, *500 F.2d 267 (2d Cir. 1974)*, 86 HARV. L. REV. 813 (1975); Evans, *Jurisdiction-Forcible Abduction*-Ker-Frisbee *Rule-Treaties-Extradition-United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974)*, 69 AM. J. INT'L L. 406 (1975); Note, *Criminal Law-Apprehension Abroad of Alien Criminal Defendant in Violation of Fourth Amendment Ousts Trial Court of Jurisdiction to Hear Charges-Second Circuit Restricts* Ker-Frisbie *Rule*, 43 FORDHAM L. REV. 634 (1975).

68. United States v. Toscanino, 500 F.2d 267, 275 (2d Cir. 1974).

or arrest, in *Ex rel. Lujan v. Gengler.*[69] In that case, the United States government procured an indictment against Lujan, a citizen of Argentina, for conspiracy to import and distribute heroin.[70] A magistrate issued an arrest warrant directing the Drug Enforcement Administration ("DEA") or the United States Marshal to bring him before the district court for the Eastern District of New York.[71] Lujan claimed he was lured into Bolivia from Argentina by a United States agent who hired him to fly the agent to Bolivia. Upon their arrival in Bolivia, local police arrested Lujan, allegedly acting as paid agents of the United States.[72] Lujan asserted that he was held incommunicado for six days, placed on a plane bound for the United States, and immediately arrested upon his arrival in New York.[73]

Although Lujan claimed the government had forcibly removed him from a foreign country without filing charges in that country and without going through formal extradition procedures,[74] he did not claim that he had been subjected to any physical torture like that alleged in the *Toscanino* case.[75] Writing for the court, Judge Kaufmann explained that *Toscanino* did not proscribe all illegal abductions abroad. He stated:

> [I]n 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 similar outrageous conduct, [in *Toscanino*] 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. . . . It requires little argument to show that the government conduct of which [Lujan] complains pales by comparison with that alleged by Toscanino. Lacking from Lujan's petition is any allegation of that complex of shocking governmental conduct sufficient to convert an abduction which is simply illegal into one which sinks to a viola-

69. 510 F.2d 62 (2d Cir. 1975). Judges Oakes and Anderson who participated in the *Toscanino* decision, were joined on the Second Circuit panel by Chief Judge Kaufman. *Id.* at 63 n.1.

70. *Id.* at 63. Lujan was allegedly involved in the same conspiracy to import narcotics as Toscanino.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Lujan,* 510 F.2d at 63. At the time of this case, the United States and Bolivia were signatories to an extradition treaty. Treaty of Extradition, Apr. 21, 1900, United States-Bolivia, 32 Stat. 1857, T.S. No. 399, 5 Bevan 735 (entered into force Jan. 22, 1902).

75. *Lujan,* 510 F.2d at 66.

tion of due process.[76]

Judge Anderson, who had based his concurrence in *Toscanino* on the due process standard of *Rochin*, concurred again in *Lujan*, explaining that *Toscanino* "rest[ed] solely and exclusively upon the use of torture and other cruel and inhuman treatment."[77] Judge Anderson stated that the majority of the court "rejected the proposition that a kidnapping of a foreign national from his own or another nation and his forcible delivery into the United States against his will, but without torture, would itself violate due process."[78]

The holding in *Lujan* suggests that kidnapping or abduction is permissible if there is no extreme physical or mental abuse of the defendant that "shocks the conscience." However, this holding necessitates a judicial interpretation in each case of the quantum of physical or mental abuse that distinguishes constitutionally proper abductions from those that violate the Constitution because of their unacceptably cruel and inhumane treatment of the defendant. This effectively foreclosed Judge Mansfield's fourth amendment-based analysis which required the exclusion of the person of the illegally abducted defendant as the fruit of an illegal arrest.[79]

B. Lira *Further Limits the* Toscanino *Exception to Egregious Torture Directly Perpetrated by the United States Government*

Shortly after the decision in *Lujan*, the Second Circuit confronted another abduction case. In *United States v. Lira*,[80] the Chilean Police, at the request of the DEA, arrested Rafael Lira,[81] a Chilean citizen.[82] The Chilean authorities questioned Lira regarding the whereabouts of a co-conspirator, and brutally tortured him over a period of several weeks.[83] Lira testified that he was blindfolded,

76. *Id.* at 65-66.

77. *Id.* at 69 (Anderson, J., concurring).

78. *Id.* In addition, *Lujan* clarified the Second Circuit's position on violations of international law implied in *Toscanino*. *Lujan* held that an abducted individual has no right to contest the legality of the abduction absent an official protest by the government of the country from which the individual was obtained. *Id.* at 68.

79. *See Toscanino*, 500 F.2d at 275.

80. 515 F.2d 68 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975).

81. Lira's true name is Rafael Mellafe. *Id.* at 69.

82. *Id.*

83. *Id.* at 69-70. Lira alleged that the Chilean Police had arrested him at the home of his common law wife in Santiago, and had taken him to a local police station where he was tortured and interrogated. After four days at the police station, the police took him to the Chil-

beaten, strapped nude to a box-spring, and tortured with electric shocks.[84] Lira claimed that during this ordeal he heard someone speaking English, but was unable to identify the speaker.[85] The captors photographed Lira and told him that "some Americans were waiting for his photograph."[86] Lira allegedly saw two United States DEA agents in the hallway of the Chilean prosecutor's office, who were identified to him as agents Cecil and Frangulis.[87] The Chileans eventually placed him on a plane to New York, accompanied by eight Chilean Police officers and DEA agent Cecil.[88]

Although Lira's story of torture and physical abuse sounded very much like Toscanino's, the court held that, because the defendant could not prove overt United States participation in Lira's ordeal, the district court could properly retain jurisdiction over him.[89] Judge Mansfield stated, "[T]he record fails to reveal any substantial evidence that Chilean police were acting as agents of the United States in arresting or mistreating [Lira] or that United States representatives were aware of such misconduct."[90]

Counsel for Lira argued that the United States should be held vicariously liable for the misconduct, since the DEA set the arrest procedures in motion by its request to the Chilean officials.[91] The court rejected the argument, stating:

> Unlike *Toscanino*, where the defendant was kidnapped from Uruguay in defiance of the laws of the country, here the Government merely asked the Chilean Government to arrest and expel [Lira] in accord with its own procedures. . . . The DEA can hardly be ex-

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ean Naval Prison, where he was tortured further and beaten. Approximately two months after his arrest, the authorities forced him to sign a decree expelling him from Chile, and sent him on a plane to New York. *Id.*

84. *Id.* at 69.

85. *Lira*, 515 F.2d at 69.

86. *Id.*

87. *Id.* The two men were later identified as Special Agents Charles Cecil and George Frangulis of the DEA. *Id.*

88. *Id.* at 70.

89. *Id.* at 70-71. The court acknowledged that DEA agents were linked to the defendant's arrest and torture in several ways: 1) the DEA agents initially requested Lira's arrest and return to the United States; 2) during his torture in Santiago, Lira heard English being spoken, but could not identify the speakers; 3) when photographed in Chile, Lira was told that United States agents were awaiting prints of his photograph; and 4) while he was being interrogated, Lira saw two United States agents in the hallway outside of the Chilean prosecutor's office, one of whom later accompanied him on his flight to New York. When later questioned, DEA agent Cecil denied ever having been at the Chilean prosecutor's office. *Id.* at 71.

90. *Lira*, 515 F.2d at 70-71.

91. *Id.* at 71.

> pected to monitor the conduct of representatives of each foreign government to assure that a request for extradition or expulsion is carried out in accordance with American constitutional standards. . . . Since our Government has no control over the foreign police, extension of *Toscanino* to the present case would serve no purpose.[92]

The court of appeals noted that it has long been recognized that foreign authorities are not judged by standards of the United States Constitution.[93] Furthermore, an exclusionary remedy would not serve its stated purpose if it was used to conform the conduct of foreign agents.[94]

Taking *Lujan* and *Lira* together, a kidnapping orchestrated by United States agents without torture is proper, and a kidnapping with torture, absent proof of a direct United States role in the torture, is also acceptable. Thus, the broad prohibition of illegal abduction proposed by Judge Mansfield in *Toscanino* has been completely rejected. Although this prohibition of illegal arrest was based on sound extensions of established constitutional doctrine, adoption of the exclusionary remedy for all technically illegal arrests was not acceptable to most circuit courts. Courts and commentators claim that such a policy would unnecessarily frustrate law enforcement activities, especially given the slow and cumbersome extradition process.[95]

Despite this significant narrowing, *Toscanino* was a triumph of United States jurisprudence. *Toscanino* endowed the courts with the

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92. *Id.* The evidence in *Lira* created a strong inference that United States agents were at least aware that Lira had been physically abused. The United States withholds economic aid from countries that fail to observe international principles of human rights. Nevertheless, the *Lira* court countenanced United States acquiescence to such behavior by allowing the government to benefit from the heinous interrogation of Lira by Chilean authorities. Such contradictory policies destroy the credibility of the United States' resolve to abolish torture.

93. *Id.*; *see* Stonehill v. United States, 405 F.2d 738, 743 (9th Cir. 1968); *cf.* Cooley v. Weinberger, 518 F.2d 1151, 1154-55 (10th Cir. 1975). Judge Oakes, who sat on all three cases in the Second Circuit's abduction trilogy—*Toscanino*, *Lujan*, and *Lira*—preserved the court's option to utilize its supervisory powers to divest itself of jurisdiction for extreme misconduct by law enforcement officials. He stated:

> [R]egardless of the abstract doctrine *Ker* and *Frisbie* are said to stand for, we can reach a time when in the interest "of establishing and maintaining civilized standards of procedure and evidence," we may wish to bar jurisdiction in an abduction case as a matter not of constitutional law but in the exercise of our supervisory power. . . . To my mind the Government in the laudable interest of stopping the international drug traffic is by these repeated abductions inviting exercise of that supervisory power in the interests of the greater good of preserving respect for law.

Lira, 515 F.2d at 72-73 (Oakes, J., concurring).

94. *Lira*, 515 F.2d at 71.

95. *See* Abramovsky & Eagle, *supra* note 1.

means to inquire into allegations of police misconduct and differentiate between a mere technically illegal arrest, which *Ker-Frisbie* tolerated, and brutal and inhuman mistreatment by police officers, which neither *Ker* nor *Frisbie* addressed.[96]

C. *Affirmation of* Ker-Frisbie *for Abduction and Further Decline of the* Toscanino *Exception for Outrageous Conduct*

Lujan and *Lira* limited the *Toscanino* exception to cases where defendants alleged that United States agents were *directly involved* with the *outrageous and shocking mistreatment* of pretrial detainees.[97] The majority of circuit courts adopted this abridgement of *Toscanino*'s fourth amendment analysis, limiting the exception to the due process prohibition of torture, brutality, and outrageous conduct.[98] Moreover, subsequent Supreme Court decisions seem to be in accord with this limitation and have retained the *Ker-Frisbie* rule in cases of illegal arrest without torture. In *United States v. Crews*,[99] the Supreme Court rejected the defendant's claim of immunity from prosecution based on his illegal arrest.[100] The Court stated, "An illegal arrest without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction."[101] Similarly, in

96. Arguably, neither *Ker* nor *Frisbie* authorized courts to overlook the torture of an abductee abroad, despite the fact that the doctrine is widely cited as authorizing any pretrial misconduct so long as the defendant receives a fair trial. M.C. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 125 (1974). In *Ker*, no torture or brutality was alleged by the defendant. Ker v. Illinois, 119 U.S. 436 (1886). Likewise, *Frisbie* was not an international case and the Court did not discuss whether the defendant's blackjacking was necessary for his capture or detainment. Frisbie v. Collins, 342 U.S. 519 (1952).

The *Ker-Frisbie* doctrine may be appropriate for illegal abduction absent any physical or mental abuse. Even though it may erode voluntary observance of international law, this rule is expedient for nations, especially when formal channels of extradition are unavailable or intolerably delayed. However, extreme physical or mental abuse during abduction or detention is void of any reasonable justification.

97. *Lira*, 515 F.2d at 71; *Lujan*, 510 F.2d at 65.

98. *See infra* notes 110-12.

99. 445 U.S. 463 (1980).

100. *Id.* at 547.

101. *Id.* (citing Gerstein v. Pugh, 420 U.S. 103, 119 (1975)). However, in *Crews*, the defendant was not subjected to brutality or physical abuse by law enforcement. Moreover, the persuasive authority of *Crews*, as confirming the *Ker-Frisbie* doctrine, is questionable. In *Crews*, the defendant claimed that an in-court identification was inadmissible because his presence in the courtroom was the product of an illegal arrest. Because his person constituted the identification evidence in court, he argued that his presence in court should be suppressed. The court avoided addressing this unusual situation by saying that a prior pretrial identification was sufficient for conviction. Thus, *Crews* presented a distinguishable set of facts and does not support a broad application of the *Ker-Frisbie* doctrine to abduction and torture.

Gerstein v. Pugh,[102] the Court stated, "[N]or do we retreat from the established [*Ker-Frisbie*] rule that illegal arrest or detention does not void a subsequent conviction."[103]

Given judicial deference to extra-legal means of arrest, the abduction of aliens from abroad by United States law enforcement officers has proliferated and become commonplace.[104] Professor Bassiouni estimates that "as many as one or two persons daily" are forcibly abducted and brought to the United States across the Mexican border to face criminal charges.[105] The circumvention of formal extradition procedures has become a matter of course in many situations.[106] In June 1989, the office of the Legal Counsel of the United States Justice Department issued a confidential opinion authorizing the abduction of persons abroad to face criminal charges in the United States.[107] This policy statement indicates a new willingness by the executive branch to endorse abduction as an acceptable procedure for law enforcement.[108] However, this increased tolerance for the use

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102. 420 U.S. 103, 119 (1975).

103. *Id.* Circuit courts have also cited the following Supreme Court cases generally affirming the *Ker-Frisbie* doctrine: I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1039-40 (1984) and Stone v. Powell, 428 U.S. 465, 485 (1976), *cited in* Matta-Ballasteros v. Henman, 896 F.2d 255, 260 (7th Cir. 1990).

104. "That United States law enforcement officers roam around the world (particularly the Third World) making or assisting in arrests and other forms of seizure going beyond intelligence gathering is apparent." Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L L. 481 (1990).

105. *See* Moss, *supra* note 1.

106. A detrimental side-effect of this reliance on abduction is that it relieves the pressures on government to streamline extradition laws and procedures. A number of extradition reform bills have been introduced before the Senate and House of Representatives since 1981. M.C. BASSIOUNI, *supra* note 15, at 43. The Extradition Reform Act was introduced to "modernize the statutory provisions relating to international extradition." S. 1639, 97th Cong., 1st Sess., 127 CONG. REC. S10,032 (daily ed. Sept. 18, 1981). The Senate bill was originally introduced as part of proposed legislation to amend the federal criminal code. *See* S. 1630, 97th Cong., 1st Sess., 127 CONG. REC. S9916 (daily ed. Sept. 17, 1981). The House of Representatives also considered an act to revise United States extradition law and procedure, in the Extradition Reform Act of 1981. For a thorough discussion of proposed legislative reform, see Bassiouni, *Extradition Reform Legislation in the United States: 1981-1983*, 17 AKRON L. REV. 495 (1984).

Today, "the [Bush] administration seems to be intent on pursuing bilateral treaties embodying whatever provisions [can] be negotiated that would supplement or alter existing statutory provisions." M.C. BASSIOUNI, *supra* note 15, at 54. However, this policy leads to neither uniformity nor consistency in the extradition law and practice of the United States. *Id.*

107. The opinion was entitled "Authority of the FBI to Override Customary or Other International Law in the Course of Extraterritorial Law Enforcement Activities." *See* Lowenfeld, *supra* note 104, at 484 n.207. The opinion was never released to the public. *Id.* at 484-85.

108. The 1989 Department of Justice opinion superseded a 1980 opinion authored by John

of abductions undermines respect for the sovereignty of nations and world order.[109]

In theory, the *Toscanino* exception still prescribes the exclusionary remedy for incidents of police brutality and outrageous conduct based on violations of the fifth amendment's due process clause. However, courts have imposed an extremely high threshold of outrageous conduct necessary to invoke the exclusionary remedy. Furthermore, courts have refused to apply the exclusionary rule unless United States police officers or agents played a substantial role or participated in the torture. Consequently, few courts have granted evidentiary hearings to consider police misconduct.[110]

Even where defendants have secured hearings on pretrial brutality, courts have rejected their claims and retained jurisdiction. In cases where defendants were successful in substantiating torture offensive to due process, courts have held, without exception, that there was insufficient United States involvement in the misconduct to invoke constitutional protections.[111] On the other hand, where United States involvement was obvious and unquestionable, courts have consistently held that the police misconduct did not rise to a sufficiently

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Harmon. Extraterritorial Apprehension by the FBI, 4 Op. Off. Legal Counsel 543 (1980). Assistant Attorney General William P. Barr claimed the 1980 opinion had expressed the view that the United States, as a sovereign, had no authority under its own laws to conduct law enforcement in another country without that country's consent. Lowenfeld, *supra* note 104, at 485.

> Under our constitutional system, the executive and legislative branches, acting within the scope of their respective authority, may take or direct actions which depart from customary international law. At least as respects our domestic law, such actions constitute "controlling executive or legislative act[s]" that supplant legal norms otherwise furnished by customary international law.

The Legality as a Matter of Domestic Law of Extraterritorial Law Enforcement Activities that Depart from International Law: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 107th Cong., 3d Sess. 4-5 (1989) (statement of Barr).

109. Bassiouni, *Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition*, VAND. J. TRANSNAT'L LAW, 28, 29, 64-65 (1973). The executive branch has yet to openly endorse brutality as a means of obtaining fugitives or obtaining information from them. As remote as such a possibility seemed only a decade ago, such a pronouncement could be forthcoming, given the current makeup of the Supreme Court and the continuing escalation of the war on drugs. Consider the recent case of Arizona v. Fulminante, 111 S. Ct. 1246 (1991), which held that the admission of a coerced confession was harmless error.

110. United States v. Cordero, 668 F.2d 32 (1st Cir. 1981); United States v. Orsini, 424 F. Supp. 229 (E.D.N.Y. 1976); United States v. Degollado, 696 F. Supp. 1136 (S.D.Tex. 1988).

111. *See* Lowenfeld, *supra* note 104, at 489; United States v. Lira, 515 F.2d 68 (2d Cir. 1975); United States v. Lopez, 542 F.2d 283 (5th Cir. 1976); United States v. Lara, 539 F.2d 495 (5th Cir. 1976); United States v. Marzano, 537 F.2d 257 (7th Cir. 1976); United States v. Degollado, 696 F. Supp. 1136 (S.D. Tex. 1988).

outrageous level to warrant divestiture of jurisdiction.[112] "The reading of [these] decisions gives the unescapable feeling that courts reach a judgment on the criminality of the accused and then decide as to how to avoid applying a legal rule that would negate criminal jurisdiction and thus allow the [abductee] to go free."[113] For all practical purposes, the judiciary has almost completely retreated from the *Toscanino* exception, even with respect to heinous acts of torture.

D. The Seventh Circuit Has Rejected the Toscanino *Exception Altogether*

Several circuit courts have questioned the continued validity of the *Toscanino* exception altogether.[114] For example, in the recent case *Matta-Ballesteros ex rel. Stolar v. Henman*,[115] four United States Marshals allegedly kidnapped Juan Ramon Matta-Ballesteros from his home in Tegulcigalpa, Honduras.[116] The Marshals placed Matta into a car with a hood over his head and drove to an air base.[117] During the hour-and-a-half ride, the Marshals allegedly beat and burned Matta with a stun gun.[118] Upon arriving at the air base, his captors placed him on a jet bound for the United States. Throughout the flight, the Marshals beat and shocked Matta on his testicles and feet.[119] Upon arrival in the United States, Matta was immediately

112. *Lujan*, 510 F.2d at 62; United States v. Cordero, 668 F.2d 32 (1st Cir. 1981); United States v. Reed, 639 F.2d 896 (2d Cir. 1981); United States v. Romano, 706 F.2d 370 (2d Cir. 1983); United States v. Herrera, 504 F.2d 859 (5th Cir. 1974); United States v. Postal, 589 F.2d 862, 874 n.17 (5th Cir. 1979); United States v. Valot, 625 F.2d 308 (9th Cir. 1980); United States v. Darby, 744 F.2d 1508 (11th Cir. 1984); United States v. Rosenthal, 793 F.2d 1214 (11th Cir. 1986); United States v. Orsini, 424 F. Supp. 229 (E.D.N.Y. 1976); United States v. Yunis, 681 F. Supp. 909 (D.D.C. 1988); United States v. Noriega, 746 F. Supp. 1506 (S.D. Fla. 1990); United States v. Caro-Quintero, 745 F. Supp. 599 (C.D. Cal. 1990).

113. *See* M.C. Bassiouni, *supra* note 15, at 212.

114. United States v. D'Antoni, 874 F.2d 1214, 1219 (7th Cir. 1989); United States v. Bontkowski, 865 F.2d 129, 131-32 (7th Cir. 1989); United States v. Miller, 891 F.2d 1265, 1271 (7th Cir. 1989) (Easterbrook, J., concurring).

115. 697 F. Supp. 1040 (S.D. Ill. 1988), *aff'd*, 896 F.2d 255 (7th Cir.), *cert. denied*, 111 S. Ct. 209 (1990).

116. *Id.* at 1042. Matta was a citizen of Honduras. The four United States Marshals were accompanied by armed members of the Honduran Special Troops called "Cobras." *Id.*

117. *Id.*

118. *Id.* "The stun gun or 'Taser' is a non-lethal device commonly used to subdue individuals resisting arrest. It sends an electric pulse through the body of the victim causing immobilization, disorientation, loss of balance, and weakness." Matta-Ballesteros v. Henman, 896 F.2d 255, 256 n.2 (7th Cir.), *cert. denied*, 111 S. Ct. 209 (1990) (citing Thomas v. City of Zion, 665 F. Supp. 642, 644 (N.D. Ill. 1987)). The stun gun leaves little or no marks on the body of the victim. *Id.*

119. *Matta-Ballesteros*, 697 F. Supp. at 1042-43.

transferred to Marion Penitentiary where a physician examined him.[120] The examination revealed abrasions on Matta's head, face, scalp, neck, arms, feet, and penis, and blistering on his back.[121]

On habeas review of his conviction, Matta claimed that his forcible abduction and torture violated due process of law and that he was entitled to an evidentiary hearing to substantiate his allegations of torture.[122] Further, Matta contended that the district court would be obligated to divest itself of jurisdiction over his person upon a proper evidentiary showing of torture.[123] Relying on the *Ker-Frisbie* doctrine, the court held that despite the egregious conduct of the United States Marshals, Matta could not challenge jurisdiction as a matter of law, and therefore was not entitled to a hearing at which he might establish such a constitutional violation.[124]

On appeal,[125] the Seventh Circuit rejected *Toscanino* altogether, claiming it had previously been abandoned by the Fifth Circuit in *United States v. Winter*,[126] and by the Eleventh Circuit in *United States v. Darby*.[127] However, the court's claim that these cases abandoned *Toscanino* was inaccurate. In *Winter*, the Fifth Circuit held that *Toscanino* does not deprive United States courts of jurisdiction over a defendant merely because his or her arrest was executed illegally beyond the territorial jurisdiction of the arresting agency.[128] However, in that case, the defendants did not allege any brutality or torture and the court did not address the issue.[129] The court simply

120. *Id.* at 1042.

121. *Id.* "According to the examining physician, these injuries were consistent with those which could have been caused by a stun gun." *Matta-Ballesteros*, 896 F.2d at 256.

122. *Matta-Ballesteros*, 697 F. Supp. at 1041.

123. *Id.*

124. *Id.* at 1046.

125. *Matta-Ballesteros*, 896 F.2d at 263.

126. 509 F.2d 975, 986-88 (5th Cir.), *cert. denied*, 423 U.S. 825 (1975).

127. 744 F.2d 1508, 1531 (11th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985).

128. *Winter*, 509 F.2d at 983-88. In *Winter*, the defendant was arrested by United States Coast Guard officers for conspiracy to import marijuana on a boat located on the high seas approximately 35 miles from the coast of Florida and 11.9 miles from the nearest island of the Bahamas. *Id.* at 977.

129. *Id.* at 983-88. The *Matta-Ballesteros* court misinterpreted a single sentence in the Fifth Circuit's opinion to make the wild claim that the *Winter* court completely rejected *Toscanino*. The *Winter* court stated that

> although *Ker-Frisbie* has been severely criticized, and the Second Circuit, in an extreme case of outrageous governmental conduct of physical and emotional brutality and indignity, has held, on the basis of post-1960 Due Process decisions, that *Ker-Frisbie* bends, in such situations the Supreme Court has not receded from *Ker* or *Frisbie*, and neither has this court.

Winter, 509 F.2d at 986-87. Given that *Winter* involved a technically illegal arrest and no

held that "mere errors or the exertion of action by agents beyond the strict territorial limit does not make the conduct so outrageous as to invoke these more drastic [*Toscanino*] remedies."[130] Subsequent Fifth Circuit decisions have not addressed the continuing vitality of *Toscanino* as it pertains to torture.[131]

Similarly, in *Darby*,[132] the validity of the *Toscanino* exception with respect to torture was not before the Eleventh Circuit.[133] In that case, the court rejected the defendant's contention that jurisdiction should be divested because his mere abduction without torture violated due process. The court stated that it declined to reverse on the authority of *Toscanino*, "since the defendant [did] not allege the sort of 'cruel, inhuman and outrageous treatment allegedly suffered by Toscanino.' "[134] However, the court did not "rule[] out the possibility of a narrow exception to the *Ker-Frisbie* doctrine for extreme cases."[135]

After erroneously disregarding the *Toscanino* exception for brutal and extreme police misconduct, the *Matta-Ballesteros* court proceeded to distort established fifth amendment doctrine. The court properly stated that the due process clause "protect[s] a pre-trial detainee from excessive force that amounts to punishment."[136] However, the court then created the fiction that Matta's torture took place during his arrest and not during pre-trial detention.[137] Consequently, the court addressed the illegality of Matta's arrest under the broad fourth amendment application of *Toscanino*, which was decisively re-

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torture, this quote simply states that no court has yet to find a set of *Toscanino* facts sufficient to invoke the due process clause.

130. *Winter*, 509 F.2d at 988. The *Winter* court relied on previous Fifth Circuit cases, including United States v. Herrera, 504 F.2d 859 (5th Cir. 1974), and United States v. Herrera, 507 F.2d 143 (5th Cir. 1975). These cases involved challenges to United States jurisdiction "by reason of the failure of the United States to follow the orderly processes of extradition under the treaty between the United States and Peru." *Winter*, 509 F.2d at 987.

131. *See, e.g.*, United States v. Postal, 589 F.2d 862, 874 n.17 (5th Cir. 1979). "We need not explore the issue of *Toscanino's* continuing validity here because the record is devoid of even the slightest evidence of abuse on the part of the Coast Guard." *Id.*

132. 744 F.2d at 1508.

133. *Id.* at 1531.

134. *Id.*

135. *Id.* In United States v. Rosenthal, 793 F.2d 1214, 1232 (11th Cir. 1986), the court cited *Darby*, stating, "This court has declined to adopt the *Toscanino* approach." This statement was mere dicta because Rosenthal had presented no "evidence of conduct which shocks the conscience." *Id.*

136. *Matta-Ballesteros*, 896 F.2d at 261 (citing Graham v. Connor, 490 U.S. 386 (1989); Bell v. Wolfish, 441 U.S. 520, 535-39 (1979)).

137. *Id.*

jected in prior decisions.[138] In his concurring opinion, Judge Will assailed this blatant fiction, stating that Matta's arrest occurred when he was initially kidnapped in Tegulcigalpa, Honduras.[139] The majority responded in a footnote, stating that if Matta's torture had occurred during his pre-trial detention, the due process clause would prohibit the outrageous conduct of law enforcement.[140] However, the court stated that "[t]he remedy . . . for such violations of the due process clause during pre-trial detention is not the divestiture of jurisdiction, but rather an injunction or money damages."[141] Therefore, the court held that *Toscanino* no longer retains vitality in the Seventh Circuit, "at least as far as it creates an exclusionary rule."[142] Thus, the Seventh Circuit became the first circuit to expressly reject the *Toscanino* exception as it applies to torture.

V. THE IMPORTANCE OF *TOSCANINO'S* EXCLUSIONARY REMEDY

The exclusionary remedy is essential to give effect to *Toscanino*'s prohibition of torture. The primary purpose of the exclusionary rule is "to compel respect for . . . constitutional guarant[ees] in the only effective way—by removing the incentive to disregard it."[143] In cases of abduction and torture, there often is no coerced confession or tainted evidence which can be suppressed in order to punish and deter

138. *Id.* After framing the issue in a fourth amendment context, the court rejected *Toscanino*'s exclusionary remedy, based on *Lujan* and *Lira*. *Id.* at 262-63.

139. Judge Will pointed out that the majority's assumption that Matta's torture occurred during arrest was erroneous. "An arrest occurs when a reasonable person, in view of all the circumstances, would believe himself to be under arrest." *Matta-Ballesteros*, 896 F.2d at 264 (Will, J., concurring) (citing United States v. Boden, 854 F.2d 983, 991-93 (7th Cir. 1988)).

140. *Id.* at 261 n.7.

141. *Id.*

142. *Id.* at 263.

143. Elkins v. United States, 364 U.S. 206, 217 (1960). The purposes of exclusionary remedies are to deter illegal police misconduct and, to a lesser extent, to maintain the integrity of judicial processes. *See* Pitler, *supra* note 53; Comment, *Jurisdiction Following Illegal Extraterritorial Seizure: International Human Rights Obligation as an Alternative to Constitutional Stalemate*, 54 TEX. L. REV. 1438, 1454 (1976).

> The court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination. . . . The exclusionary rule has nothing to do with the fair determination of the guilt or innocence of the accused. It represents a judicially-created device designed to deter disregard for constitutional prohibitions and give substance to constitutional rights.

Mapp v. Ohio, 367 U.S. 643, 646 (1961).

police misconduct. Therefore, the "sole effective remedy"[144] for outrageous pretrial treatment that violates due process is to invoke the *Toscanino* exception and return the defendant to his or her "*status quo ante.*"[145]

Although this deterrent is still theoretically available in most circuits, no United States court has ever exercised the exclusionary remedy and divested itself of jurisdiction based on the egregious pretrial misconduct of United States law enforcement.[146] This reluctance to exercise the *Toscanino* exception is partially due to the perception that the remedy of divesting *in personam* jurisdiction over a criminal defendant is disproportionate to the benefit derived from deterring illegal conduct by law enforcement officials. For example, in *Matta*, the Seventh Circuit found that the use of the exclusionary rule for extreme misconduct during arrest was unwarranted.[147] From the *Matta* court's view, "So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book."[148]

The United States Supreme Court has fostered this apprehension toward applying exclusionary remedies, noting in dicta that it does not retreat from the *Ker-Frisbie* doctrine.[149] One court stated, "[T]he [exclusionary] rule is a needed, but grudgingly taken, medicament; no more should be swallowed than is needed to combat the disease."[150] However, without the exclusionary remedy for violations of due process, courts could extend the *Ker-Frisbie* doctrine to its logical extreme and not inquire at all into the pre-trial conduct of law

144. *Ex rel.* Lujan v. Gengler, 510 F.2d 62, 66 (2d Cir. 1975).

145. United States v. Toscanino, 500 F.2d 267, 275 (2d Cir. 1974).

146. Matta-Ballesteros *ex rel.* Stolar v. Henman, 896 F.2d 255, 261 (7th Cir.), *cert. denied*, 111 S. Ct. 209 (1990).

147. *Id.* at 263. *Matta-Ballesteros* was an unusual case because the defendant was an escaped federal prisoner. Return to his *status quo ante* would require courts to give up jurisdiction over an individual whose official *status quo ante* was a prisoner in a federal penitentiary. Thus, release of Matta even upon the finding of *Toscanino* facts would have been problematic. *See id.* at 261 (Will J., concurring).

148. *Id.* at 262.

149. In Gerstein v. Pugh, 420 U.S. 103, 119 (1975), the Court stated, "[W]e do not retreat from the established rule that illegal arrest or detention does not void a subsequent conviction." In Stone v. Powell, 428 U.S. 465, 485 (1976), Chief Justice Burger referred to his dissent in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 411 (1971) in which he expressed grave concerns about the exclusionary rule and proposed an alternative legislative remedy. *Id.* at 485.

150. United States v. Edmons, 432 F.2d 577, 587 (2d Cir. 1970) (Hays J., dissenting).

enforcement officials. A complete rejection of the exclusionary rule for violations of due process ignores the Supreme Court's explicit sanction of the remedy for outrageous conduct enunciated in *Rochin v. California*[151] and *United States v. Russell*.[152] Moreover, alternative remedies, such as injunctive relief and civil damages, are wholly ineffective in deterring egregious misconduct by United States agents.

A. Alternative Remedies are Ineffective to Deter Torture

Alternative remedies are available to victims tortured during pretrial detention. For example, United States citizens may bring civil actions in tort against the United States government for acts of physical violence committed against them.[153] Additionally, aliens may seek damages for torture committed abroad by United States law enforcement agents, by bringing suit in United States courts under the Alien Tort Claims Act.[154] This Act provides civil redress for aliens injured by torts committed in violation of international law.[155]

However, financial compensation for torture "is certainly not as effective as the exclusion of jurisdiction" in deterring police misconduct.[156] As a practical matter, the ability of defendants, especially aliens, to recover damages from the United States government or its agents abroad is remote.[157] In addition, proving torture abroad is inherently difficult. More important, however, is the fact that monetary damages, without an exclusionary remedy, will not compel law enforcement officials to consider moral and constitutional imperatives or to refrain from unnecessary and excessively brutal conduct. The threat of civil remedies merely requires law enforcement policy-makers to weigh the risks of paying damage awards against the investigatory advantages of torture and physical coercion.[158] Such a cynical

151. 342 U.S. 165 (1952).

152. 411 U.S. 423, 431-32 (1973).

153. The United States enjoys sovereign immunity and cannot be sued in United States courts without its consent. However, by enacting the Federal Tort Claims Act, Congress expressly waived the federal government's sovereign immunity in limited circumstances. 28 U.S.C. § 1346 (1982).

154. 28 U.S.C. § 1350 (1988).

155. *See* M.C. BASSIOUNI, *supra* note 15, at 245. In Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), the Second Circuit held that torture violated international law, and awarded a Paraguayan torture victim $10 million in damages. *Id.* at 879.

156. *See* M.C. BASSIOUNI, *supra* note 15, at 236.

157. Comment, *Jurisdiction Obtained by Forcible Abduction: Reach Exceeds Due Process Grasp*, 67 J. CRIM. L. & CRIMINOLOGY 181, 191 (1976).

158. Such advantages may include expediency in obtaining confessions, the ability to obtain information about other fugitives, and the ability to locate and seize evidence.

calculation is repulsive to the United States Constitution and cannot be reconciled with principles of due process of law.

Moreover, individuals responsible for formulating police procedures are largely immune to civil redress. Although individual agents may be held personally liable for acts of torture, most damage awards are paid by the United States government. As a result, civil remedies simply do not discourage policy-makers from utilizing all of the tools available to them to achieve their objectives, even if those tools directly or indirectly promote torture.

Other potential remedial deterrents include: prosecution in foreign courts or international tribunals for the offense of torture;[159] criminal sanctions against law enforcement officers; charges of prosecutorial misconduct; and termination from employment.[160] Arguably, the increase in cases involving allegations of torture suggests that these alternative remedies have not been effective in deterring police misconduct.

The Bush administration has made an affirmative policy choice to expand the powers of law enforcement in the war on drugs. Some commentators claim that "[w]e are reaching the point . . . at which the activities and threats of some drug trafficker may be so serious and damaging as to give rise to the right to resort to self-defense."[161]

Although some forms of abduction may be justified in light of the government's substantial interest in fighting drug trafficking, torture most certainly cannot be justified. For torture, man's most egregious crime, exercising the most severe sanction of divesting jurisdiction is compelling.[162] This argument is particularly persuasive when torture is perpetrated under the color of law by United States officers. Moreover, barring United States police officers from using improper methods for securing information and evidence creates an incentive for using intelligence and imagination in the detection and prosecution of crimes.[163]

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159. *See* Lowenfeld, *supra* note 104, at 487.

160. *See* M.C. BASSIOUNI, *supra* note 15, at 263.

161. *The International Law and Foreign Policy Implications of Nonconsensual Extraterritorial Law Enforcement Activities: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 107th Cong., 3d Sess. 12 (1989) (statement of Sofaer) [hereinafter Sofaer Statement].

162. "The torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind." *Filartiga*, 630 F.2d at 890.

163. United States v. Lira, 515 F.2d 68, 72 (1975) (Oakes, J., concurring).

VI. LEGAL BASES FOR REVITALIZING THE *TOSCANINO* EXCEPTION

Toscanino was based on several alternative and ambiguous legal doctrines.[164] Courts seeking to expand the reach of the *Ker-Frisbie* doctrine have seized upon this ambiguity to discredit *Toscanino*.[165] Thus, it is important to review the legal bases for *Toscanino* and discuss the potential of each basis for revitalizing its sanction of exclusion for police brutality.

Included within *Toscanino*'s majority and concurring opinions and their progeny are no less than four alternative legal bases for divesting courts of jurisdiction for police misconduct. These include: 1) the fourth amendment exclusionary rule utilized by Judge Mansfield in *Toscanino*; 2) the courts' supervisory powers as reserved by Judge Anderson in *Toscanino* and Judge Oakes in *Lira*; 3) the violation of international agreements or international law; and 4) the fifth amendment due process clause.[166] The present viability and practicality of the first three rationales will be discussed briefly. The due process basis will be addressed separately, as part of a proposal for reform.

A. The Fourth Amendment as the Basis for the Toscanino *Exception*

Judge Mansfield's majority opinion in *Toscanino* relied upon the application of the fourth amendment's exclusionary rule, as set forth in *Mapp v. Ohio*.[167] He wrote:

> [W]hen an accused is kidnapped and forcibly brought within the jurisdiction, the court's acquisition of power over [the] person represents the fruits of the government's exploitation of its own misconduct. Having unlawfully seized the defendant in violation of the Fourth Amendment, which guarantees "the right of the people

164. The *Toscanino* opinion "has been described as 'vague,' 'enigmatic,' 'overbroad,' and 'inadequate' in analysis." Feinrider, *Extraterritorial Abductions: A Newly Developing International Standard*, 14 AKRON L. REV. 27, 32 (1980).

165. For example, in Matta-Ballesteros v. Henman, 896 F.2d 255 (7th Cir. 1990), the court stated, "We initially note that *Toscanino* is of ambiguous constitutional origins. On its face, *Toscanino* purports to rely on the due process clause (of either the fifth amendment or the fourteenth amendment). Yet the Second Circuit relied for support on *Mapp v. Ohio*, a fourth amendment case." *Id.* at 261.

166. Another possible contention is that torture may constitute pre-trial punishment prohibited by the eighth amendment. Bell v. Wolfish, 441 U.S. 520 (1979). This argument was proposed by the court in *Matta-Ballesteros*, 896 F.2d at 261.

167. 367 U.S. 643 (1961).

> to be secure in their persons . . . against unreasonable . . . seizures," the government should as a matter of fundamental fairness be obligated to return him to his *status quo ante*.[168]

The circuit courts, relying on Supreme Court dicta, have used two approaches to preclude application of the fourth amendment to illegal abductions abroad. First, in *Lujan*, the Second Circuit found the fourth amendment's "unreasonable search or seizure" standard of illegality far too broad because it would require the defendant's exclusion in all illegal abductions.[169] Judge Kaufman, writing for the *Lujan* majority, opined that although *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 similar outrageous conduct, we did not intend to suggest that *any* irregularity in the circumstance of a defendant's arrival in the jurisdiction would vitiate the proceedings of the criminal court. [170]

Although abandoning *Toscanino's* application of the fourth amendment and the corresponding re-entrenchment of the *Ker-Frisbie* doctrine for mere illegal arrests countenances some forms of police misconduct, a rational policy decision seems to exist behind this result. Extralegal means of arrest are more expedient than formal channels of extradition,[171] and are especially attractive given the perceived threat that drug traffickers pose to the United States.[172] Proponents of abduction argue that applying the fourth amendment to all seizures of persons abroad would severely frustrate the United States law enforcement objective of capturing fugitives. Consequently, abduction has taken on greater importance in international law enforcement.

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168. United States v. Toscanino, 500 F.2d 267, 275 (2d Cir. 1974). "An illegal arrest constitutes a seizure of the person in violation of the Fourth Amendment." *See* Henry v. United States, 361 U.S. 98, 100-101 (1959); Giordenello v. United States, 357 U.S. 480, 485-88 (1958); Frankel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361 (1921).

169. *Ex rel.* Lujan v. Gengler, 510 F.2d 62 (2d Cir. 1975).

170. *Id.* at 65. Judge Kaufmann was referring to the Second Circuit's previous holding in *Toscanino*.

171. *See generally* Sakeller, *Acquisition of Jurisdiction Over Criminal Defendants by Forcible Abduction: Strict Adherence to* Ker-Frisbie *Frustrates U.S. Foreign Policy and Obligations*, 2 A.S.I.L.S. INT'L L.J. 1 (1978). *But see* Cardozo, *When Extradition Fails, is Abduction the Solution?*, 55 AM. J. INT'L L. 127 (1961). Professor Bassiouni stated that the appropriate remedy for ineffective extradition procedures "is to make extradition more efficient, not to subvert it by resorting to unlawful or legally questionable means." *See* M.C. BASSIOUNI, *supra* note 15, at 190.

172. Sofaer Statement, *supra* note 161.

Thus, most courts have declined to apply the broad strictures of the fourth amendment to illegal arrests abroad.

A second fatal blow to the broad application of the fourth amendment to the illegal arrest of aliens abroad is the recent Supreme Court holding that the fourth amendment does not apply to searches and seizures of aliens abroad.[173] The *Toscanino* court held that aliens may invoke fourth amendment protection against the conduct of United States law enforcement officials abroad[174] based on the assumption that the United States Constitution is in force whenever and wherever its agents act with the authority of the sovereign.[175] However, in *United States v. Verdugo-Urquidez*,[176] a plurality of the Supreme Court held that aliens are not part of the community of "people" to be protected under the fourth amendment.[177] According to the Court, "[S]ome measure of allegience to the United States . . . as evidenced by citizenship or residency, is the quid pro quo for receiving the privilege of invoking our Bill of Rights as a check on the extraterritorial actions of United States officials."[178] Thus, illegally abducted and tortured aliens will be afforded fourth amendment protections only when they have sufficient contacts with the United States to be considered a part of the national community.[179]

B. The Supervisory Powers as the Basis for the Toscanino *Exception*

The *Toscanino* court alternatively held that the same result could have been reached through the exercise of its inherent supervisory power.[180] The use of federal court supervisory power to divest lower federal courts of jurisdiction was first defined in *United States v. McNabb*,[181] a case in which the defendants were arrested for suspicion of murder and held incommunicado for two days.[182] During their detention, the defendants were interrogated without the aid of counsel, and made incriminating statements to the police. There was no find-

173. *See* United States v. Verdugo-Urquidez, 110 S. Ct. 1056 (1990).
174. *Toscanino*, 500 F.2d at 280.
175. *Id.*
176. 110 S. Ct. 1056 (1990).
177. *Id.* at 1061-62.
178. 856 F.2d at 1236 (Wallace, J., dissenting).
179. *Verdugo-Urquidez*, 110 S. Ct. at 1064.
180. *Toscanino*, 500 F.2d at 276.
181. 318 U.S. 332 (1942). The supervisory powers doctrine was previously suggested by the Supreme Court in United States v. Weeks, 232 U.S. 383 (1914).
182. *McNabb*, 318 U.S. at 344-45.

ing that the confessions were involuntary, which would constitute a violation of the fifth amendment.[183] Nevertheless, the Supreme Court ruled that its powers were not limited to determining the constitutionality of the conviction under the due process clause.[184] Instead, the defendants' confessions were inadmissible because they were obtained in violation of a federal law requiring prompt arraignment.[185] The Court grounded its ruling on the federal court's supervisory duty to "establish and maintain civilized standards of procedure and evidence."[186] This doctrine empowers the Court to set standards that extend beyond the minimal constitutional requirements of due process. The Court stated that "[t]he admission of defendant's statements would have undermined the 'integrity of the criminal proceeding' and made the courts 'accomplices in willful disobedience of law.' "[187]

The *Toscanino* court was the first to suggest that its supervisory powers could be applied to reverse the conviction of an alien defendant illegally abducted and physically abused by United States agents abroad.[188] The court stated, "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."[189] In practice, no court has divested itself of jurisdiction over a tortured alien based on the supervisory powers doctrine.

Nevertheless, the doctrine remains a potential tool for deterring torture by United States law enforcement, and is more likely to be invoked upon a showing of repeated abuse of the federal court system.[190] Given the expanding number of cases involving allegations of torture at the hands of foreign agents working in joint venture law enforcement activities with the United States, the courts may someday use the supervisory powers to reverse a criminal conviction.

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183. *Id.* at 346-47.

184. *Id.* at 340.

185. *Id.* at 332.

186. *Id.* at 340.

187. *McNabb*, 318 U.S. at 345. The supervisory powers doctrine has subsequently been invoked to prevent evidence illegally obtained by federal officers from being admitted in state proceedings, and to prevent the use of evidence illegally obtained by non-federal agents in federal proceedings. Comment, *Jurisdiction Following Illegal Extraterritorial Seizure: International Human Rights Obligation as an Alternative to Constitutional Stalemate*, 54 TEX. L. REV. 1439, 1461 (1976) (citing Rea v. United States, 350 U.S. 214 (1956) and Elkins v. United States, 364 U.S. 206, 223 (1960)).

188. *Toscanino*, 500 F.2d at 276.

189. *Id.*

190. United States v. Reed, 639 F.2d 896, 903 (2d Cir. 1981).

There are several advantages to basing *Toscanino* on the supervisory powers doctrine. For example, the remedies available to the court are not limited to the exclusion of evidence in the fourth amendment context. Rather, they may be "exercised in any manner necessary to remedy abuses of a district court's process," including the divestiture of *in personam* jurisdiction over the defendant.[191] Therefore, the doctrine may conceivably be used in cases of mere abduction without torture, if the circumstances of the abduction abuse or degrade the federal court. Moreover, since the doctrine may be invoked by anyone who is brought before a federal court, the supervisory powers are not subject to the territorial or standing limitations that have recently been placed upon the fourth amendment by the Supreme Court in *Verdugo*.[192]

On the other hand, there are drawbacks to the use of supervisory powers to deter extreme physical brutality by United States law enforcement. First, the standard for applying supervisory powers is inherently subjective, and the defendant bears the "heavy burden of dissuading a court from enforcing a criminal law."[193] Furthermore, it is subject to inconsistencies dependent upon foreign policy imperatives, rather than principled norms of constitutional and international law. Courts are likely to engage in a de facto balancing test, gauging the egregiousness of the police conduct against the heinousness of the criminal and the danger to society of divesting jurisdiction over him.[194] For example, the acceptable level of brutality for a major drug trafficker may be very different than that for a petty criminal. This subjective application of the exclusionary remedy would promote inconsistency and disrespect for the judiciary.

Second, the supervisory powers do not ban state prosecutions of individuals illegally seized and brutalized by state officers.[195] Some international abductions and torture have been perpetrated by state officers,[196] although the majority probably have been executed by federal agents.[197]

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191. *Toscanino*, 500 F.2d 276; *cf.* Rea v. United States, 350 U.S. 214 (1955).

192. *See generally* Comment, *International Abduction of Criminal Defendants: Overreaching by the Long Arm of the Law*, 14 COLO. L. REV. 504-08 (1976).

193. *Id.* at 515.

194. *See* Comment, *supra* note 187, at 1456.

195. *Id.* at 1462.

196. Lawshe v. State, 57 Tex. Crim. 32, 121 S.W. 865 (1909).

197. Federal agents conduct the majority of international abductions due to "the obvious financial and logistical resources required." *See* Comment, *supra* note 187, at 1462.

Finally, some commentators question the constitutionality of using the supervisory powers doctrine to divest courts of jurisdiction for the misconduct of law enforcement officials abroad.[198] The supervisory powers doctrine is based on the federal courts' power to adopt rules of judicial procedure and evidence to promote the quality of the judicial process.[199] When the power is not used to improve judicial procedure, but merely to conform the conduct of the executive branch, its exercise may be unconstitutional, as an infringement of the doctrine of separation of powers.[200] Nevertheless, the supervisory powers rationale for an exclusionary remedy has some continuing viability, especially if the due process proscriptions are further limited and the executive branch continues to expand the scope and intensity of its war on drugs.

C. International Law as a Basis for the Toscanino *Exception*

Perhaps the broadest method of revitalizing the *Toscanino* exception is to enforce the terms of international agreements in United States courts. In *Toscanino*, the Second Circuit held that the alleged abduction and torture of the defendant violated the charters of the United Nations and the Organization of American States ("OAS").[201] These charters require their signatories to respect the territorial sovereignties of all member nations.[202] The court stated that it is "a long-standing principle of international law that abductions by one state of persons located within the territory of another violate the territorial sovereignty of the second state and are redressable usually by the return of the person kidnapped."[203]

The *Toscanino* court stated that the United States lacked the power to seize Toscanino in Uruguay because it had voluntarily imposed, by agreement, a territorial limitation on its own authority.[204] Thus, the *Ker-Frisbie* doctrine does not apply where a "defendant has been brought into the district court's jurisdiction by forcible abduction in violation of a treaty."[205] The *Toscanino* court relied on *Cook v.*

198. Comment, *supra* note 192, at 505-06.

199. *Id.*; *see also McNabb*, 318 U.S. at 340-41.

200. Comment, *supra* note 192, at 505-06; *see also* Jill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181, 214 (1969).

201. *Toscanino*, 500 F.2d at 277.

202. Both the United States and Uruguay are signatory members of the United Nations and the Organization of American States.

203. *Toscanino*, 500 F.2d at 278.

204. *Id.*

205. *Id.*

United States,[206] stating that "the construction of treaties is judicial in its nature, and courts when called upon to act should be careful to see that international engagements are faithfully kept and observed . . ., [and] that the Executive lives up to our international obligations."[207]

However, traditional international agreements do not afford individuals protection against abduction, because individuals have no rights under these agreements unless they are self-executing.[208] Most international agreements are created by and exist for the benefit of the sovereign. Absent any objection by the offended state, an individual has no standing to object to abduction or mistreatment.[209] The *Toscanino* court did not refer to any protest by the Uruguayan government. Nor did it state how Toscanino obtained standing to challenge his abduction under international law.[210] Allowing Toscanino to challenge his abduction without an official protest inferred that the court believed that the United Nations and the OAS charters conferred rights on individuals to raise violations of the agreements as a defense to criminal prosecution.[211]

In *Lujan*,[212] the Second Circuit clarified *Toscanino* with respect to an individual's ability to invoke international treaties and agreements in United States courts.[213] Like Toscanino, Lujan claimed that his conviction on drug charges should be reversed because his abduction from Argentina through Bolivia violated the United Nations and OAS charters.[214] The court distinguished *Toscanino*, claiming that, while the Uruguayan government had protested Toscanino's abduction,[215] neither Argentina nor Bolivia had protested the abduction of

206. 288 U.S. 102 (1932).

207. *Toscanino*, 500 F.2d at 279; *see also* Shapiro v. Ferrandina, 478 F.2d 894, 906 n.10 (2d Cir. 1973).

208. *See* Feinrider, *supra* note 164, at 34.

209. *Id.*

210. *Toscanino*, 500 F.2d at 267; *see also* Feinrider, *supra* note 164, at 33.

211. *See* Feinrider, *supra* note 164, at 34. International treaties and agreements are self-executing if they have sufficiently precise rules for the rights and duties they create to be enforced without subsequent legislative enactments. Davis v. Burke, 179 U.S. 399, 403 (1900); *see also* Comment, *supra* note 192, at 510. For a general discussion on the criteria for determining whether a treaty is self-executing, see United States v. Postal, 589 F.2d 862 (5th Cir. 1979). When an international agreement is self-executing, it is the equivalent of an act of Congress, and may be invoked by individuals in United States courts just like domestic law. Asakura v. Seattle, 265 U.S. 332 (1924); *see generally* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 154 (1965).

212. 510 F.2d 62 (2d Cir. 1975).

213. *Id.*

214. *Id.* at 66.

215. *Id.* at 67. Toscanino alleged that "the Uruguayan government claims that it had no

Lujan.[216] The court found that the provisions proscribing abduction in those agreements were intended to protect the sovereignty of signatory states, not individual defendants. Therefore, in the absence of an official protest by the asylum country, no international agreement is violated and the signatory country is deemed to have consented to the abduction and waived its sovereign rights:[217] "[E]ven where a treaty provides certain benefits for nationals of a particular state . . . it is traditionally held that 'any rights arising out of such provisions are, under international law, those of the states and . . . individual rights are only derivative through the states.' "[218]

Lujan gave foreign nations the discretion to decide when they will protect their citizens by invoking international agreements or treaties.[219] This type of "conditional self-executing treaty" is extremely arbitrary and effectively negates *Toscanino* protections because foreign agents often participate in abductions and torture along with United States officials. In the end, this policy of United States courts "can only encourage disregard for extradition procedures, the resort to extrajudicial proceedings and abuses by law enforcement officials."[220]

United States courts have almost universally accepted the Second Circuit's holding in *Lujan* that an individual's standing to object to his or her abduction is derivative of the sovereign rights of the nation from which the individual was taken.[221] Thus, invoking international

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prior knowledge of the kidnapping nor did it consent thereto and had indeed condemned this kind of apprehension as alien to its laws." *Toscanino*, 500 F.2d at 270.

216. *Lujan*, 510 F.2d at 67. The *Lujan* court held that the objection by the asylum state must be in the form of an official protest with the United States Department of State. *Id.* at 67 n.8.

217. *Id.* at 67. It may be argued that when a nation agrees to respect the sovereignty of another nation, and then proceeds to engage in clandestine efforts to abduct that nation's citizens, it has breached its agreement, whether or not that nation officially objects to the abduction. *See* 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 (1957); Preuss, *Kidnapping of Fugitives from Justice on Foreign Territory*, 29 AM. J. INT'L L. 502 (1935).

218. *Lujan*, 510 F.2d at 67 (quoting RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115, comment e (1965)).

219. Feinrider, *supra* note 164, at 35.

220. BASSIOUNI, *supra* note 15, at 211.

221. United States v. Cordero, 668 F.2d 32, 37-38 (1st Cir. 1981) (arrest in Panama and subsequent return to Puerto Rico through Venezuela did not violate the extradition treaties between the United States and those countries, where neither Panama nor Venezuela objected to the arrest); United States v. Reed, 639 F.2d 896, 902 (2d Cir. 1981) ("absent protest or objection by offended sovereign, . . . person abducted has . . . no standing to raise violation of international law"); Waits v. McGowan, 516 F.2d 203, 208 (3d Cir. 1975) ("[t]he protections and rights which accrue to the extradited person primarily exist for the benefit of the asylum

agreements to divest United States courts of jurisdiction appears to be foreclosed as a viable basis for avoiding the *Ker-Frisbie* doctrine, absent an official protest from the asylum state.

1. Customary International Law

While *Toscanino* and *Lujan* addressed abduction as a violation of the United Nations and OAS charters, they did not address torture as a violation of international norms of human rights rising to the level of customary international law.[222] Human rights obligations prohibiting torture, even if considered non-binding because of insufficient implementing legislation, may rise to the level of customary international law.[223] Individuals harmed in violation of customary international law have standing to challenge the misconduct in United States courts.[224]

Arguably, torture violates international customary law. All nations condemn torture.[225] Thus, individuals abducted by United States agents may still be able to raise a *Toscanino*-type defense based on customary international law in United States courts. However,

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nation"); United States v. Winter, 509 F.2d 975, 987 (5th Cir. 1975) (personal jurisdiction is not divested by the "failure of the United States to follow the orderly processes of extradition under the treaty between the United States and Peru"); United States v. Postal, 589 F.2d 862, 873 (5th Cir. 1979) (article 6 of the High Seas Convention is not self-executing and therefore the defendant cannot rely upon a violation of this international law as a defense to the United States courts' jurisdiction); United States v. Cadena, 585 F.2d 1252, 1261 (5th Cir. 1978) ("even if individuals have standing to raise treaty violations, their personal rights are derived from the rights of a signatory state"); United States v. Herrera, 504 F.2d 859, 860 (5th Cir. 1974) (forcible abduction which allegedly "violated the territorial integrity of Peru contrary to the United Nations Charter and the Charter of the Organization of American States" does not divest United States courts of jurisdiction); United States v. Quesada, 512 F.2d 1043, 1045 (5th Cir. 1975) (illegal arrest not in conformance with the processes of extradition under the treaty between the United States and Peru did not divest the district court of jurisdiction); Matta-Ballasteros v. Henman, 896 F.2d 255, 259-60 (7th Cir.), *cert. denied*, 111 S. Ct. 209 (1990) (arrestee had no standing to challenge violations of treaty in connection with his arrest in Honduras and transfer to the United States where the government of Honduras did not make an official protest); United States v. Valot, 625 F.2d 308, 310 (9th Cir. 1980) (where the United States does not demand extradition and the defendant is deported by authorities of another country which is a party to an extradition treaty, no extradition has occurred and the failure to comply with the treaty does not bar prosecution).

222. Customary international law consists of norms that are universally accepted in practice by the nations of the world.

223. Zschernig v. Miller, 389 U.S. 429 (1968); Kolovrat v. Oregon, 366 U.S. 187 (1961).

224. The Paquette Habana, 175 U.S. 677 (1900). Furthermore, the continual overlooking of torturous conduct may constitute a " 'consistent pattern of gross . . . violations of human rights' sufficient to enable the individual to complain to the United Nations Human Rights Commission." Comment, *supra* note 187, at 1469.

225. *See* BURGERS & DANELIUS, *supra* note 17, at 1.

courts may be reluctant to exercise the exclusionary rule based on customary international law, especially in high profile cases against alleged drug traffickers. Nevertheless, strong policy considerations are implicated when United States officers participate or acquiesce in the torture of detainees in violation of international law. The United States cannot protect the rights of its people internationally if the United States itself refuses to respect such rights.[226]

2. The United Nations Convention Against Torture

In November 1990, the United States ratified the United Nations Convention Against Torture. The Senate ratification makes the Convention the "supreme law of the land."[227] Arguably, victims of torture now have standing in United States courts to challenge the conduct of United States law enforcement that violates the terms of the Convention, regardless of whether their sovereign objects or not.[228] Article 2 of the United Nations Convention Against Torture requires that member states "take effective legislative, administrative, judicial or other measures to prevent acts of torture."[229] The exact nature of this obligation is unclear. United States courts will be called upon to interpret the nature and scope of this obligation and concomitant remedies for its breach.

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226. United States v. Lira, 515 F.2d 68, 73 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975) (Oakes, J., concurring); *see also* Garcia Mora, *supra* note 217. Moreover, the Bush administration claims to have the power to go beyond international law. Lowenfeld, *supra* note 104. Nevertheless, the executive's actions are circumscribed by provisions of the United States Constitution.

227. Article VI of the United States Constitution declares that treaties made under the authority of the United States are "the Supreme Law of the Land." Most human rights agreements that the United States has signed are neither self-executing nor ratified by the Senate. Thus, they are not mandatory, but merely instructive upon the courts in the United States. Boulesbaa, *supra* note 17, at 189.

228. Boulesbaa, *supra* note 17, at 189. This is not surprising since United States courts are open to suits by aliens for torture committed by aliens. The United Nations Convention Against Torture does not confer individual rights to challenge mere abduction without torture.

229. United Nations Convention Against Torture, *supra* note 14, art. 2. In addition, article 10 requires:

> Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

Id. art. 10.

In Case Relative to the Exchange of Greek and Turkish Populations, 1925 P.C.I.J. (ser. B) No. 10, at 6, the Permanent Court of International Justice held that "a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations undertaken." *Id.* at 20.

United States courts should adopt a *Toscanino*-type exclusionary rule for tortured detainees as a necessary method of implementing the United States obligation under the United Nations Convention Against Torture. "[W]hether looked at from the point of view of jurisdiction, or standing, or remedy, . . . the technique developed under the United States Constitution of deterring official misconduct by voiding an arrest or conviction has no counterpart (dare one say 'as yet') in international law or state practice."[230] Although the Convention allows legislative, administrative, and judicial measures to prevent torture, experience reveals that judicial exclusion is the only truly effective means of deterring covert acts of torture and acquiescence to torture. Exclusion is necessary to "take effective measures to prevent torture."[231]

United States Senate ratification included a "sovereignty reservation," which states that the United States is obligated under the United Nations Convention Against Torture only insofar as its terms are consistent with the Constitution.[232] This was primarily included to insure that capital punishment will not be construed as torture under the Convention's definition.[233] However, it also makes clear that any laws or remedies, including an exclusionary rule, must be consistent with the Constitution as interpreted by United States courts.

International agreements and customary international law are excellent bases for revitalizing the principles set forth in *Toscanino* and its progeny. Ratification of the United Nations Convention Against Torture gives United States courts and legislatures an opportunity to focus on torture, and to reconsider the application of the

230. *See* Lowenfeld, *supra* note 104, at 477.

231. Article 15 of the United Nations Convention Against Torture requires the exclusionary rule for confessions resulting from torture: "Each state party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceeding, except against a person accused of torture as evidence that the statement was made." *See* United Nations Convention Against Torture, *supra* note 14, art. 15.

232. Senator Helms sponsored the reservation which stated, in part, "[N]othing in this Convention requires or authorizes legislation or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." Amendment No. 3203, CONG. REC. 17,488 (1990) (statement of Sen. Helms). In addition,

> [T]he United States considers itself bound by the obligation under Article 16 to prevent "cruel, inhuman or degrading treatment or punishment," only insofar as the term "cruel, inhuman or degrading treatment or furnishment" [sic] means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eight, and/or Fourteenth Amendments to the Constitution of the United States.

Id. at 17,486.

233. N.Y. Times, Nov. 19, 1990, § A, at 18, col. 1.

Toscanino principles for egregious police misconduct.[234] However, courts may be reluctant to extend protection to tortured individuals based on international agreements, as it may prove to be extremely expansive.[235] Alternatively, courts may prefer to integrate the United Nations' standards into the established due process analysis under the *Toscanino* exception.

VII. Applying the Fifth Amendment Due Process Standard to Revitalize *Toscanino*—A Proposal For Reform

Given the consequences of the lack of a strong deterrent for torture, and the uncertainty of the scope of the United States obligations under the United Nations Convention Against Torture, United States courts should focus on the fifth amendment due process clause to strengthen *Toscanino*'s prohibition of police misconduct. Due process is the most practical foundation for revitalizing the *Toscanino* exception. While the application of the fourth amendment to the search and seizure of aliens abroad was questioned in the *Verdugo* case, substantive due process of the fifth amendment clearly applies to all persons, including aliens who are subjected to misconduct that "shocks the conscience" at the hands of United States law enforcement and their agents.[236] In other words, while aliens abroad may not be entitled to fourth amendment protection, substantive due process acts as a limitation upon law enforcement itself.

Moreover, two Supreme Court cases addressing police misconduct in violation of substantive due process provide a solid constitutional foundation for the *Toscanino* exception.[237] In *Rochin*,[238] the police obtained evidence used to convict the defendant by forcing an emetic solution down the defendant's throat, which induced him to vomit contraband. The contraband evidence was excluded because

234. Recent events, including the beating of Rodney King in Los Angeles, have focused attention on incidents of brutality by law enforcement officials.

235. The ratification of the United Nations Convention Against Torture may alter the traditional role of non-inquiry into the treatment of prisoners upon extradition. *See generally* Bassiouni, *supra* note 15, ch. VII § 6, ch. IX § 8.3.

236. *See* United States v. Verdugo-Urquidez, 110 S. Ct. 1056, 1060 (1990); Malloy v. Hogan, 378 U.S. 1 (1964).

237. "[T]he twin pillars of our holding [in *Toscanino*] were Rochin v. California . . . and dictum in United States v. Russell . . . both of which dealt with government conduct of a most shocking and outrageous character." *Ex rel.* Lujan v. Gengler, 510 F.2d 62, 65 (2d Cir. 1975) (citations omitted).

238. Rochin v. California, 342 U.S. 165 (1952).

the manner in which it was obtained shocked the conscience.[239] In *Russell,*[240] the Supreme Court held that police entrapment activities involving a narcotics manufacturing scheme did not so shock the conscience as to violate the Constitution.[241] However, Justice Rehnquist stated that "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 processes to obtain a conviction."[242]

Most circuit courts have retained the possibility of using the fifth amendment due process clause when police misconduct reaches an unacceptable level of egregiousness. Thus, due process constitutes the most viable justification for an exclusionary rule in cases of extraterritorial police misconduct. However, the standard of conduct required to invoke due process protection must be defined in order to give police agencies a standard by which they can formulate their policy and training.[243]

A. Defining an Appropriate Standard for Police Misconduct that Violates Due Process of Law

The *Toscanino* court stated that the extremely egregious conduct

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239. *Id.* at 172.

240. United States v. Russell, 411 U.S. 423 (1973).

241. *Id.* at 432.

242. *Id.* at 431-32. Justice Rehnquist held that the governmental participation in the creation of a drug laboratory was not sufficiently egregious as to violate "fundamental fairness" or shock the universal sense of justice. *Id.*

For a case in which government misconduct did shock the conscience, see United States v. Twigg, 588 F.2d 373 (3d Cir. 1978), where the court held that police misconduct in helping the defendant create a laboratory to produce an illegal narcotic was so overreaching that it violated the due process clause of the fifth amendment. In *Twigg*, a DEA agent solicited a third party and the defendant to join him in establishing a methamphetamine ("speed") laboratory. The government supplied the necessary ingredients, tools, building, and almost all the supplies. The defendant had no personal knowledge about how to manufacture speed. The district court held that the defendant could not use the entrapment defense because he had been brought into the scheme by a third party and not by the police. The Third Circuit reversed the conviction, stating that the government involvement in the criminal activities reached a "demonstrable level of outrageousness" so as to divest the court of jurisdiction. *Id.* at 380. "This court cannot 'shirk the responsibility that is necessarily in its keeping . . . to accommodate the dangers of overzealous law enforcement and civilized methods adequate to counter the ingenuity of modern criminals.'" *Id.* If these facts constitute outrageous conduct, surely torture would be proscribed by due process.

243. "Courts need to identify with greater precision those areas where constitutional safeguards properly should exist; [otherwise], the government [will] be free to rely on its judgment without threat of judicial interference." Stephan, *Constitutional Limits on International Rendition of Criminal Suspects,* 20 VA. J. INT'L L. 777, 800 (1980).

alleged by Toscanino was precisely the type of conduct that violated due process, as referred to by Justice Rehnquist in *Russell*.[244] However, the exact measure of police misconduct or brutality against abducted individuals that violates due process has not been clearly defined. In practice, the courts have been very permissive of police misconduct abroad.[245] One court cited the *Toscanino* standard as being " 'discretionary' . . . in the sense that there is 'no law to apply'—i.e., no standards to guide the trial court's decision."[246]

Recently, some courts have considered the "set of incidents"[247] alleged in *Toscanino* as a threshold of misconduct necessary to invoke substantive due process.[248] Considering the *Toscanino* facts as a set of incidents makes the due process hurdle even more difficult for defendants to overcome. Requiring a specific series of outrageous acts suggests that no single allegation of torture, such as electrically shocking genitals or forcing fluids in anal cavities, will rise to the level of egregiousness sufficient to divest the court of jurisdiction. In this way, courts can justify their acquiescence to a single act of brutality, on the basis that the entirety of the torturous episode did not rise to the egregiousness of *Toscanino*.

For example, in *Matta-Ballesteros*,[249] the defendant alleged that he had been kidnapped, beaten, and shocked with a stun gun on his

244. Toscanino, 500 F.2d at 276.

245. Where less outrageous conduct is at issue, courts have applied *Ker-Frisbie* rather than the *Toscanino* exception. *See, e.g.*, United States v. Reed, 639 F.2d 896 (2d Cir. 1981) (defendant was forced to lie on the floor of a small plane for thirty minutes with a gun cocked at his head. Upon deplaning, his arm was twisted as officers walked him to the airport. This conduct was not like the "cruel, inhumane and outrageous treatment allegedly suffered by Toscanino."); United States v. Sorren, 605 F.2d 1211 (1st Cir. 1979) (officials insulted, pushed, and slapped defendant during his arrest, as well as forced him to sleep on the floor in the corner of the jail to avoid having urine splashed on him. The court held that this conduct did not rise to the level of outrageousness to invoke due process); United States v. Lara, 539 F.2d 495 (5th Cir. 1976) (forcible abduction without torture is insufficient); *Lujan*, 510 F.2d at 62 (defendant did not allege any misconduct that was present in *Toscanino* but merely that his arrest was illegal).

246. Nalls v. Rolls-Royce, Ltd., 702 F.2d 255, 259 (D.C. Cir. 1983).

247. In United States v. Yunis, 681 F. Supp. 909, 919 (D.D.C. 1988) and Matta-Ballesteros *ex rel.* Stolar v. Henman, 697 F. Supp. 1040, 1047 (S.D. Ill. 1988), *aff'd*, 396 F.2d 255 (7th Cir.), *cert. denied*, 111 S. Ct. 209 (1990), the courts characterized the facts alleged in *Toscanino* as a threshold "set of incidents" to implicate the due process clause of the fifth amendment.

248. In *Yunis*, the court directly referred to *Toscanino* as the standard when it stated, "The extensive torture suffered by the defendant in *Toscanino* is worthy of recitation to illustrate the benchmark for the type of outrageous conduct necessary to invoke the exception to *Ker-Frisbie* and warrant the radical remedy of dismissal." *Yunis*, 681 F. Supp. at 919.

249. 697 F. Supp. at 1040.

genitals and feet by United States Marshals.[250] Matta supported his claim by providing a physician's report of the medical examination he received at Marion Penitentiary, which revealed that he had suffered abrasions on his head, face, scalp, neck, arms, feet, and penis, and blistering on his back.[251] The district court stated, "[E]ven if the *Toscanino* exception were to be applied in the Seventh Circuit, the Court finds that, as a matter of law, the allegations of [Matta] do not rise to the threshold standard of *Toscanino*."[252] Therefore, "as a matter of law, . . . [t]he allegations of torture do not meet the required level of outrageousness, nor do they shock the conscience to the extent that they would require the court to . . . [divest] . . . jurisdiction over him."[253]

The court went on to say that by Matta's own admission, his interrogation lasted "little more than 24 hours."[254] Amazingly, the court implied that twenty-four hours of physical abuse did not meet the "threshold standard" of seventeen days of interrogation endured by Toscanino.[255] A due process standard that fails to condemn such conduct by United States law enforcement with the most effective sanction mocks the ideals of liberty and justice embodied in the United States Constitution.

1. Adopting an International Standard

By applying the *Toscanino* set of incidents as the due process standard, United States courts tolerate severe brutality by law enforcement agents. Given the United States' obligations under the United Nations Convention Against Torture and the universal condemnation of this type of conduct, United States courts should adopt the definition of torture formulated by the United Nations Convention Against Torture for the *Toscanino* due process analysis.[256] Article 1 of the Convention defines torture as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public

250. *Id.* at 1042.
251. *Id.*
252. *Id.* at 1047.
253. *Id.* On appeal, the Seventh Circuit rejected the *Toscanino* exception altogether. *Matta-Ballesteros*, 896 F.2d at 263.
254. *Matta-Ballesteros*, 697 F. Supp. at 1047.
255. *Id.* It is absurd to even imply that torture sufficient to violate due process is any less likely to be perpetrated in twenty-four hours than in seventeen days.
256. United Nations Convention Against Torture, *supra* note 14.

> official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.[257]

The definition acknowledges that these types of practices are universally prohibited by customary international law.[258] In *Filartiga v. Pena-Irala*, the Second Circuit recognized the United Nations Convention Against Torture definition as the consensus standard of customary international law. It stated that the significance of the Convention is that it "specif[ies] with great precision the obligations of member nations under the charter."[259] As a constitutional standard, the definition solidifies the shocking the conscience standard of *Rochin* and *Russell*. It defines police misconduct with sufficient particularity so that police officials may know what limits to place on interrogation policies. At the same time, the definition allows the courts to develop a body of law that defines police misconduct with greater specificity. More importantly, it applies to any action by United States law enforcement, regardless of the heinousness of the criminal, and is not the unattainable set of incidents described in *Toscanino*. Under the United Nations Convention Against Torture standard, the alleged conduct of United States law enforcement officials in *Matta-Ballesteros* would be clearly unconstitutional.

2. Defining the Degree of United States Involvement in the Outrageous Conduct to Implicate *Toscanino*

In various cases, circuit courts have stated that facts existed that rose to the set of incidents sufficient to invoke *Toscanino*. However, in each of these cases, the court avoided exercising the *Toscanino* exception by finding United States agents were not directly involved with

257. The Standard Minimum Rules for the Treatment of Prisoners were adopted August 30, 1955. First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Annex 1 (A), U.N. Doc. A/CONF.6 (1956). Article 31 states that "corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences." *Id.* art. 31. Article 32 states that no punishment shall be inflicted that "may be prejudicial to the physical or mental health of a prisoner." *Id.* art. 32, para. 2.

258. *See* BURGERS & DANELIUS, *supra* note 17, at 1.

259. Filartiga v. Pena-Irala, 630 F.2d 876, 883 (2d Cir. 1980).

the torture of the defendant.[260]

In *Lira*,[261] the court stated that the due process clause of the fifth amendment is invoked only when the allegedly improper conduct is taken "*by or at the direction of* United States officials."[262] Torture perpetrated solely by foreign agents is not subject to due process review, and cannot be the basis for divestiture of jurisdiction under *Toscanino*.[263] However, more difficult questions arise when United States agents do not expressly direct or actively engage in the illegal actions, but merely encourage, consent, acquiesce to, or set in motion the commission of torture by foreign agents.

For example, in *Lira*, the defendant was arrested by Chilean police at the request of United States DEA agents.[264] During his detention, Lira allegedly was brutally tortured in a manner similar to that of Toscanino. During the torture, Lira heard English being spoken softly, and saw two DEA agents in the Chilean prosecutor's office.[265] Lira was finally placed on a plane accompanied by one of the DEA agents.[266] Despite the obvious inference that DEA agents were present during his interrogation and were at least aware of his ordeal, the court stated that Lira's evidentiary hearing "produced no proof that representatives of the United States *participated or acquiesced* in the alleged misconduct of the Chilean officials."[267] At the conclusion of its analysis, the court used slightly different words to define the standard of involvement sufficient to invoke due process restrictions. The court stated that "where the United States Government plays no *direct or substantial role* in the misconduct," a judicial penalty should not be levied against the government.[268]

In *United States v. Marzano*,[269] the Seventh Circuit held that, in order to determine whether United States government participation rendered a search "government action," all facts surrounding the

260. *See supra* note 111. "A large number of cases have turned on the assertion by the U.S. Government as prosecutor, that the really brutal acts were committed (if at all) by the foreign state . . . but not by officers of the DEA or FBI." Lowenfeld, *supra* note 104, at 489.

261. United States v. Lira, 515 F.2d 68 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975).

262. *Id.* at 70 (quoting *Toscanino*, 500 F.2d at 281 (emphasis added)).

263. *Id.* at 71.

264. *Id.* at 69.

265. *Id.*

266. *Lira*, 515 F.2d at 70.

267. *Id.* (emphasis added).

268. *Id.* at 71.

269. 537 F.2d 257 (7th Cir. 1978).

search must be examined.[270] In that case, United States agents requested Marzano's arrest and gave information to Cayman Islands officials which led directly to his arrest. The United States agents were present during Marzano's interrogation, but were not allowed to carry weapons or participate in the questioning.[271] In addition, the agents offered to pay for Marzano's flight back to Miami.[272] Marzano claimed that the United States' presence during his abduction and interrogation made his arrest and detention the product of a joint venture for which the United States was responsible.[273] The court disagreed, and held that merely providing information and being present at the interrogation was insufficient to hold the United States officers liable as participants.[274]

In his dissenting opinion, Judge Swygert maintained that the United States' involvement was sufficient to invoke constitutional restrictions.[275] He noted that the Federal Bureau of Investigations ("FBI") actively involved itself in the process which returned Marzano to the United States. Judge Swygert wrote, "The defendant is correct in arguing: But for the instigation of the FBI, the defendant would never have been arrested and searched on the Grand Cayman Island. But for the aid of the FBI in supplying the Grand Cayman agent with the defendant's photograph, no arrest could have been made."[276] And, more importantly, "but for" their involvement, Marzano would not have been arrested and brought to justice in the United States.[277] Accordingly, "[I]f the federal officials 'had a hand' in the search, 'before the object of the search was completely accomplished,' it becomes a joint operation, and the federal officials must be deemed to have participated in it."[278] United States law enforcement agencies often provide information and resources to help foreign agents locate and detain fugitives sought by the United States. When this assistance is an essential element in capturing fugitives, it is difficult to argue that the United States government is not a participant.[279]

270. *Id.* at 270 (citing United States v. Newton, 510 F.2d 1149, 1153 (7th Cir. 1975)).
271. *Id.*
272. *Id.*
273. *Id.*
274. *Marzano*, 537 F.2d at 270.
275. *Id.* at 276 (Swygert J., dissenting).
276. *Id.* at 279-80.
277. *Id.* at 280.
278. *Id.* at 281.
279. Judge Swygert posited this argument in his dissenting opinion in *Marzano*, 537 F.2d at 276.

In *United States v. Degallado*,[280] the court stated that the degree of United States involvement sufficient to invoke *Toscanino* "is not entirely clear."[281] In that case, DEA agents solicited the assistance of the Mexican federal judicial police to arrest Degallado in Mexico and deliver him to the DEA.[282] Degallado was subsequently detained in a hotel room by Mexican officers, two DEA agents, and two others from the Texas Department of Public Safety.[283] Degallado was held down on a bed by Mexican officers, with his hands bound behind him. The Mexican officers interrogated him, and periodically sprayed seltzer water in his nose.[284] Degallado claimed that after forty-five minutes he was blindfolded and subjected to approximately four hours of torture by electric prod—all of this in the presence of the four United States officers.[285]

At Degallado's *Toscanino* hearing, the DEA agents admitted to being present in the hotel room during the first forty-five minutes of Degallado's ordeal. The agents claimed that they observed the seltzer being sprayed in Degallado's nose, but neither participated in the activity nor did anything to stop it. In fact, the DEA agents claimed that the abusive treatment of Degallado is what prompted them to leave the hotel. One agent stated, "It was getting plenty rough. It was something that I was not accustomed to. It scared the fire out of me and we left."[286] The court stated that "while this conduct may not have been heroic, it is not tantamount to deliberately participating in the activities of the Mexican police."[287] This may be true, but clearly the United States agents knowingly acquiesced in the torture of Degallado, and subsequently obtained custody of him through the officers who tortured him.

As these cases illustrate, the proper standard for establishing government participation in the mistreatment of pretrial detainees is extremely elusive. Moreover, United States courts have applied this vague standard in an inconsistent, result-oriented manner to avoid ap-

280. 696 F. Supp. 1136 (S.D. Tex. 1988).

281. *Id.* at 1137.

282. *Id.* at 1138.

283. *Id.*

284. *Id.* This is a form of torture designed to inflict severe head pain.

285. Further, Degallado claimed that at some point his interrogators switched to a more powerful electrical device, which he was told had been furnished by the United States agents. *Degallado*, 696 F. Supp. at 1138.

286. *Id.* at 1139.

287. *Id.*

plying the exclusionary remedy.[288] The lack of a definitive standard for the degree of United States involvement necessary to create constitutional responsibility for the torturous acts of foreign agents has significantly contributed to the decline of *Toscanino*'s protection. Consequently, the *Ker-Frisbie* doctrine has been effectively expanded to countenance numerous forms of torture and brutality perpetrated by foreign agents in conjunction with United States officials.

What is the appropriate degree of involvement to hold United States law enforcement officials responsible for torture conducted by foreign officials? The United States government itself proposed a standard for official involvement, during the drafting of the United Nations Convention Against Torture.[289] The United States suggested that article 1 read: "For the purpose of the present Convention, the offence of torture includes any act by which extremely severe pain or suffering, whether physical or mental, is deliberately and maliciously inflicted on a person by or with the consent or acquiescence of a public official."[290]

"Public official" is defined as follows:

1. A public official is any person vested with exercise of some official power of the state, either civil or military.
2. Any public official who (a) *consents* to an act of torture,

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288. For example, United States courts have declined to follow *Toscanino* where there was insufficient United States involvement to implicate due process under the *Lira* analysis. *See, e.g.*, United States v. Sorren, 668 F.2d 32, 37 (1st Cir. 1981) (a United States DEA agent set up a narcotics purchase in Panama. Sorren was arrested during the purchase by Panamanian officials, jailed, and physically abused, although apparently not to the *Toscanino* level. Sorren saw the United States agent one time while he was in the custody of Panamanian officials. This was held to be insufficient United States involvement); United States v. Lara, 539 F.2d 495 (5th Cir. 1976) (at an evidentiary hearing, the court assumed torture had been administered by Panamanian authorities, but found that United States agents played no "direct role" in it); United States v. Lopez, 542 F.2d 283, 284 (5th Cir. 1976) (defendant alleged torture for eight days by Dominican Republic authorities at the instigation of the United States. Following his interrogation, the defendant was flown back to the United States in the custody of an FBI agent. The court held there was no direct United States involvement with the interrogation by foreign officials).

Conversely, where United States agents clearly participated in or directed detention and interrogation, courts have held, without exception, that the severity of the illegal conduct was insufficient to rise to the level of the set of incidents in *Toscanino*. *See supra* note 112.

289. *See* BURGERS & DANELIUS, *supra* note 17, at 41. In December 1977, the United Nations General Assembly requested the Commission on Human Rights to create a draft Convention Against Torture. In January 1978, Sweden completed this preliminary draft. From 1980 through 1984, the draft was elaborated by a working group of delegations from the 43 State members of the Commission as of 1980. *Id.* at 32 n.1. The United States was one of the Commission member States. *Id.* at 41.

290. *Id.*

> (b) *assists, incites, solicits, commands, or conspires with others* to commit torture, or (c) *fails to take appropriate measures to prevent or suppress torture when such person has knowledge or should have knowledge that torture has or is being committed and has the authority or is in a position to take such measures*, also commits the offence of torture within the meaning of this Convention.[291]

This definition suggests that United States law enforcement officials must not only refuse to participate in torture, but must also take affirmative measures to ensure that they do not acquiesce in such actions.[292] United States courts should adopt this standard of involvement for applying the *Toscanino* exception in order to fulfill the United States' obligations under the ratified United Nations Convention Against Torture. Applying the exclusionary rule under this standard would force the United States to insure that its law enforcement activities are free from coercion and brutality, even if those activities are in conjunction with agents from other nations. Moreover, given that the United States usually initiates joint operations, bears their expense, and prosecutes the accuseds, the collaborations described in *Lira*, *Marzano*, and *Degallado* would clearly violate this United Nations due process standard.[293]

It has been asserted that the ultimate question in defining the degree of United States involvement sufficient to make the actions of foreign agents those of the United States is whether the purposes of the exclusionary remedy, particularly the deterrence of torture, would be furthered by applying the United Nations definition.[294] By conducting joint venture law enforcement activities with nations that engage in inhuman conduct, the United States knowingly acquiesces in conduct that violates its obligations under the United Nations Convention Against Torture and the due process clause. United States law enforcement agencies dealing with foreign agents are generally aware of the policies and activities of their foreign counterparts. By

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291. *Id.* at 42 (emphasis added).

292. Such affirmative measures are not uncommon to international agreements. The Inter-American Convention on Human Rights, O.A.S. Off. Rec. DEA/ser.K/XVI/1.1, doc. 65, rev.1, corr. 1 (1970), makes its member States insurers of human rights:

> An illegal act which violates human rights and which is initially not directly imputable to a state (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as the Convention requires.

Id. art. 2.

293. Lowenfeld, *supra* note 104, at 489.

294. *Coolidge v. New Hampshire*, 403 U.S. 442, 488-89 (1971).

acquiescing in torture and benefitting from information obtained during torture, these United States law enforcement agencies impliedly condone such activities.

Moreover, allowing United States law enforcement agents to profit from foreign agents' misconduct stimulates a demand for the use of brutal interrogation techniques by foreign law enforcement. United States agents may prefer allowing foreign agents to capture and interrogate fugitives, since such agents are currently unhampered by constitutional restraints against torture.[295] Divesting United States courts of jurisdiction for merely consenting or acquiescing to brutal conduct of foreign officials would not only deter torture directly perpetrated by United States agents, but would also deter the misconduct of foreign agents. The strict United Nations participation standard creates an incentive for United States officials to warn foreign agents against unconstitutional misconduct, and encourages them to respect the principles against torture that the United States professes.

B. Effective Procedures for Analyzing Claims of Torture Under the Due Process Clause

The need to place an affirmative duty on United States law enforcement officials to prevent torture, as defined by the United Nations Convention Against Torture, is accentuated by the fact that torture is often executed covertly. Concrete standards alone are insufficient to preserve the deterrent effect of the *Toscanino* exception, because it is invariably difficult for victims to substantiate their allegations at evidentiary hearings. Therefore, procedural mechanisms must be devised to elicit information about arrests and interrogations from government agencies that have access to such information.

Toscanino set forth the procedure for challenging United States district court jurisdiction based on patent violations of due process.[296] The *Toscanino* court stated that a defendant is entitled to "an evidentiary hearing with respect to . . . allegations of forcible abduction only if, in response to the government's denial, he [or she] offers some credible supporting evidence, including specifically evidence that the ac-

295. Foreign law enforcement agencies may have limited financial resources and therefore use torture and other shortcut methods of investigation as routine, cost-efficient methods of fighting crime. However, when the United States is involved, cost factors are no justification for subverting constitutional proscriptions.

296. *Toscanino*, 500 F.2d at 281; United States v. Orsini, 402 F. Supp. 1218, 1219 (E.D.N.Y. 1975).

tion was taken by or at the direction of United States officials."[297] The district court may review the evidence produced by a defendant and grant or deny hearings at its discretion.[298] Once a defendant has met this burden of producing evidence, he or she is granted a *Toscanino* hearing.[299] At the hearing, a defendant must prove that he or she had been subjected to "conduct of the most outrageous and reprehensible kind . . . perpetrated by representatives of the United States government."[300]

The initial evidentiary burden to obtain a *Toscanino* hearing is difficult to satisfy. Even Toscanino was unable to produce sufficient evidence to warrant an evidentiary hearing.[301] In the seventeen years since *Toscanino*, very few defendants have met the burden of producing evidence of torture necessary to obtain a *Toscanino* hearing.[302] Those who did obtain hearings failed to carry their burden of proof to divest the court of jurisdiction.[303]

Torture victims fail to carry their burden of proof for a variety of reasons, most of which are unrelated to questions of whether they were actually tortured. Victims often cannot identify their abductors, which makes it all but impossible to prove the degree of United States involvement.[304] In addition, the methods of torture routinely used are insidiously designed to leave little or no physical evidence of the degree of abuse.[305] Moreover, there may be reciprocal agreements or understandings between foreign and United States officials for the

297. *Toscanino*, 500 F.2d at 281; *see also* United States v. Reed, 639 F.2d 896, 901 (2d Cir. 1981) (defendant entitled to an evidentiary hearing if he offered some credible proof that the actions against him were taken by or at the direction of United States officials).

298. *Toscanino*, 500 F.2d at 281. "The *Toscanino* issue exemplifies the case in which the district court exercises discretion because there is no law to apply; as to the circumstances in which the trial court enjoyed discretion as to whether to hold a hearing, the court's remand was essentially standardless." Nalls v. Rolls-Royce, Ltd., 702 F.2d 255, 259-60 (D.C. Cir. 1983). *See also* Midway Mfg. Co. v. Omni Video Games, Inc., 668 F.2d 70, 72 (1st Cir. 1981) (no statutory standards at all governing the decision that the court declined to review).

299. *Toscanino*, 500 F.2d at 281. In *Matta-Ballesteros*, the Seventh Circuit held that the defendant had not carried his burden of producing evidence to obtain a *Toscanino* hearing despite a physician's report from Marion Penitentiary showing severe injuries sustained during his 24-hour interrogation. *Matta-Ballesteros*, 896 F.2d at 256, 258.

300. *Lujan*, 510 F.2d at 65.

301. *Toscanino*, 398 F. Supp. at 916.

302. *See supra* note 110 and accompanying text.

303. *Id.*

304. *See supra* notes 111-12.

305. *Toscanino*, 500 F.2d at 270. "[A]gents of the United States government attached electrodes to Toscanino's earlobes, toes, and genitals. Jarring jolts of electricity were shot through his body, rendering him unconscious for indeterminate periods of time but again leaving no physical scars." *Id.*

covert abduction and interrogation of individuals abroad.[306]

Because of this severe evidentiary handicap, United States courts should shift the evidentiary burdens to strengthen the deterrent effect of the *Toscanino* exception. First, a defendant should be granted a *Toscanino* hearing upon a prima facie showing that he or she was tortured as defined by the United Nations standard, regardless of whether he or she can substantiate United States involvement.[307] This would create a presumption of United States involvement, based on the fact that the defendant's abduction and interrogation resulted in his or her custody by United States officials. At the hearing, the burden of proof should shift to the prosecution to show that United States agents were not involved with the alleged torture of the defendant. This is a proper allocation of burdens, because the United States government, having obtained custody of the defendant, is more able to access information regarding the defendant's arrest and pretrial detention.[308]

If the prosecution fails to carry the burden of showing no United States involvement, the prosecution should then bear the burden of proving that the pretrial treatment of the defendant did not constitute torture, as defined by the United Nations Convention Against Torture. The government could meet this burden by producing verifiable evidence that the defendant's injuries were inflicted prior to arrest, or resulted from reasonable force during arrest or restraint during detention.[309] This burden shifting is appropriate, because the government has more effective control of the relevant evidence than does the defendant.[310] As one commentator noted:

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306. United States v. Orsini, 424 F. Supp. 229, 230 (E.D.N.Y. 1976); NEWSWEEK, Aug. 16, 1976.

307. Conduct rising to the United Nation's definition of torture may be established by the submission of sworn affidavits. Article 13 of the Convention states, "Each state Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by competent authorities." United Nations Convention Against Torture, *supra* note 14, art. 13.

308. For example, in *Lira*, the defendant claimed he heard English spoken while he was being tortured in Chile. *Lira*, 515 F.2d at 69. He also saw two DEA agents at the Chilean Prosecutor's office, and was accompanied by one of the agents on his return to the United States. *Id.* at 70. Shifting the burden to the prosecution to show the extent of United States involvement with Chilean authorities would elicit the truth and deter torture by both the United States and foreign officials.

309. The government might also show that the treatment of the defendant was a lawful sanction, consistent with the Standard Minimum Rules for Treatment of Prisoners.

310. Interrogation records, photographs, and medical reports are usually kept in the custody of law enforcement agencies. Incident to the shifting of evidentiary burdens is the need to

> [E]vidence and witnesses are located in a foreign jurisdiction which is often thousands of miles away, and the apprehending government is not likely to admit to its illegal behavior. This problem is particularly acute in cases in which the government defends itself by claiming that the defendant was delivered to it by agents of the asylum state.[311]

The Inter-American Court on Human Rights utilized a similar type of burden shifting in *Velasquez-Rodriguez*.[312] In that case, Manfredo Velasquez was violently detained without a warrant by agents of the National Office of Investigation and the Honduran Armed Forces.[313] Velasquez was charged with political crimes, and subjected to harsh interrogation and cruel torture.[314] Five days later, Velasquez was allegedly moved to a military installation where his interrogation continued.[315]

Four weeks after Velasquez's abduction, the Inter-American Commission on Human Rights ("Commission") sent a petition to the government of Honduras, requesting information about Velasquez's whereabouts.[316] When the government failed to reply, the Commission issued Resolution 30/83, applying article 42 of its regulations.[317] Article 42 shifted the burden of proof to the Honduran government by presuming as true all of the allegations in the petition concerning

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allow broad discovery for the defendant to obtain information from government agencies. See *Orsini*, where the court granted the prosecution's motion to quash the defendant's *subpoena duces tecum* which allegedly sought information pertaining to his unlawful arrest and mistreatment. *Orsini*, 424 F. Supp. at 229.

311. *See* Feinrider, *supra* note 164, at 36.

312. INTER-AM. C.H.R. 76, OEA/ser. I./R./19.23, doc. 25 rev. 3 61 (1988) (Velasquez-Rodriguez case, Judgment of July 29, 1988) (cited in CENTRAL AMERICAN REFUGEE CENTER, INTERNATIONAL HUMAN RIGHTS TRAINING MANUAL 76 (1990)).

313. CENTRAL AMERICAN REFUGEE CENTER, INTERNATIONAL HUMAN RIGHTS TRAINING MANUAL 76 (1990).

314. *Id.* at 77. The exact nature of Velasquez's torture may never be known. The Inter-American Commission on Human Rights submitted the petition to the Inter-American Court of Human Rights. The allegations contained in the petition were taken from eyewitnesses who said they had seen Velasquez abducted and taken to Public Security Forces Station No. 2, located in the Barrio El Manchen of Tegulcigalpa, Honduras. *Id.*

315. *Id.*

316. *Id.*

317. *Id.* Article 42 states:

> The facts reported in the petition whose pertinent parts have been transmitted to the government of the State in reference shall be presumed to be true if, during the maximum period set by the Commission under the provisions of Article 34 paragraph 5, the government has not provided the pertinent information, as long as other evidence does not lead to a different conclusion.

Id. at 102-03.

Velasquez's detention and disappearance.[318] Five years later, the Commission issued Resolution 22/86, stating, "Velasquez is still missing and . . . the Government of Honduras . . . has not offered convincing proof that would allow the Commission to determine that the allegations are not true."[319]

The Commission brought the case before the Inter-American Court on April 24, 1986. The court approved the shifting of burdens, stating that "presumptive evidence is especially important in allegations of disappearances, because this type of repression is characterized by its attempt to suppress any information about the kidnapping or the whereabouts and fate of the victim."[320] The court also emphasized that "[i]n proceedings to determine human rights violations the State cannot rely on the defense that the complainant has failed to present evidence when such cannot be obtained without the State's cooperation."[321]

This rationale for shifting the burden of proof applies with equal force to cases involving the United States' involvement with the torture of pretrial detainees. Government agencies involved in abduction and interrogation control the information needed to verify the misconduct of their agents. A rebuttable presumption compels disclosure of important information that may implicate executive actions and policies encouraging or acquiescing in improper conduct. In short, shifting the burden of proof is the most effective way of ensuring that *Toscanino*'s prophylactic rule is effective in practice.

VIII. CONCLUSION

A strong correlation exists between constitutional restrictions on police procedures and incidents of police misconduct. United States policies on the jurisdiction of its courts, the constitutional restraints on United States law enforcement, and government-directed abduction and brutality abroad are necessarily interrelated.[322] Law enforcement officials will tend to zealously pursue their goals and extend their powers until they are restrained by the legislature, civil actions, public perception of police activities, and, most importantly, judicially-created deterrents based on the Bill of Rights. Judicial toler-

318. *Id.* at 77. The court stated that "such acts are most serious violations of the right to life (art. 4) and the right to personal liberty (art. 7) of the American Convention." *Id.* at 77.

319. *Id.* at 78.

320. *Id.* at 101-02.

321. *Id.* at 102.

322. *See* Lowenfeld, *supra* note 104, at 489.

ance of torture incident to abduction and detention of aliens allows law enforcement to operate abroad free from constitutional limitations. Narrowing and restricting the *Toscanino* exception to the *Ker-Frisbie* doctrine has corresponded with the expansion and acceptance of these types of covert activities. With the advent of the war on drugs, it is likely that the number of abductions of aliens abroad will continue to rise and law enforcement interrogation techniques will expand.[323] The judiciary should act now to strengthen and enforce constitutional limitations on police handling of pre-trial detainees.

Fifteen years after writing the majority opinion in *Lujan*, Judge Kaufman responded to a letter to the editor of the *New York Times* which criticized protections of criminal defendants in the war on drugs. Judge Kaufman wrote, "[E]ven in 'war,' there are rules—as formulated in the Constitution. Blind efficiency should never become the ultimate goal of a constitutional democracy. . . . While it is nice to have the trains run on time, it is equally important that national policy goals be implemented constitutionally."[324]

Toscanino created an exception to the general rule that pretrial police misconduct does not affect the court's power to try and convict a defendant. *Toscanino* held that a court should divest itself of jurisdiction over a criminal defendant when the government engages in offensive pretrial conduct, such as torture. The *Toscanino* exception has been rejected by at least one circuit, and severely limited in most others. The proposals contained in this Comment constitute a practical method of revitalizing the *Toscanino* exception within a constitutional framework that takes into account the practical needs of law enforcement.

The proposals include borrowing the definitions of torture and state responsibility from the United Nations Convention Against Torture, and applying these definitions in the fifth amendment due process context. To make these standards effective, the evidentiary burdens at *Toscanino* hearings should be shifted to the prosecution to flush out the truth and give the defendant an opportunity to prove allegations of torture. If a defendant can make a prima facie showing of torture, and if the prosecution fails to show that United States agents were not involved, the court should shift the burden to the

323. Moveover, "the 'war on drugs' is a metaphor. Real war permits—sometimes requires—relaxation of restraints on governmental action: law enforcement—investigation, arrest, trial, sentence, punishment—is law, not war, and therefore a reflection of our values—our peacetime abiding values." *Id.* at 491.

324. N.Y. Times, Dec. 11, 1989, at A22, col. 4.

prosecution to show that the alleged conduct did not rise to the level of torture defined in the United Nations Convention Against Torture.

This procedure comports with the Supreme Court's endorsement of *Ker-Frisbie* and the narrowed interpretation of the *Toscanino* exception which proscribes torture but allows mere abduction. It permits law enforcement to continue its common, and apparently necessary, practice of abducting fugitives abroad, at least until efficient and effective methods of obtaining fugitives abroad can be promulgated. However, this procedure clearly limits the expanding *Ker-Frisbie* doctrine by drawing a bright line on torture and providing an effective disincentive for police to engage or acquiesce in torture. It creates guidelines by which law enforcement needs can be squared with due process, thereby maintaining the respect and credibility of the law. As Justice Brandeis wrote in *Olmstead v. United States*:[325]

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. 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.[326]

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325. Olmstead v. United States, 277 U.S. 438, 485 (1928).

326. *Id.*

* Thanks to Charles and Betty Bolstad who showed me the value of standing in the shoes of others.