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*by Grady Nye**

In 1883, a Chicago bank clerk named Frederick Ker embezzled $35,000 in U.S. bonds and $21,000 in cash belonging to his employers. After escaping the United States and taking refuge in Lima, Peru, Ker probably thought he was beyond the reach of his former employers. His dishonestly funded vacation ended, however, when Pinkerton detective Henry Julian pursued and captured him, sending him back to the United States to be arrested by proper authorities.[1] Upon his arrival in the state of Illinois, Ker was convicted of larceny by a state court, and an appeal of the trial court's decision was subsequently upheld by the Illinois Supreme Court. In 1886, Ker appealed his case to the U.S. Supreme Court. Since he had been kidnapped and forcibly returned to the United States, he claimed that the Illinois court abused its power by placing him on trial.

In *Ker v. Illinois*, the Supreme Court concluded that the illegal abduction of a criminal suspect does not prevent him or her from responding to charges once in the jurisdiction of the court,[2] nor does it provide grounds for reversing a conviction resulting from a trial conducted according to proper procedure.[3] Known generally as the Ker-Frisbie rule, this precedent generates criticism from those who view

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1 *See* Charles Fairman, *Ker v. Illinois Revisited*, 47 Am. J. Int'l L. 678, 684-85 (1953) (quoting a brief by Illinois Att'y Gen. George Hunt).

2 Ker v. Illinois, 119 U.S. 436, 444 (1886).

3 Frisbie v. Collins, 342 U.S. 519, 522 (1951).

it as an antiquated legal standard inconsistent with modern norms of due process.[4] Notwithstanding these objections, the Supreme Court has never revoked the rule and specifically reaffirmed it as recently as 1992.[5]

In a nation that proclaims a "government of laws, and not of men,"[6] any misuse of government authority by law enforcement officials ought to be a matter for public concern. Despite the importance of this issue, however, an effective remedy for illegal conduct by police officers has been difficult to find. Over the last century, American courts have generally relied on the exclusionary rule to deter police officers from seizing evidence illegally, declaring such evidence to be inadmissible in court.[7] The trial of Frederick Ker predated the establishment of an exclusionary rule by federal courts, but, even if the exclusionary rule had been in place, it is possible that the Court would not have considered the abduction of a suspect analogous to an illegal seizure of evidence.

The precedent from *Ker* can probably be explained as a historical accident that has been perpetuated by *stare decisis*. However, in light of the controversy surrounding the decision in *Ker*, this paper will suggest counterpoints to common criticisms of the Ker-Frisbie rule and accordingly draw attention to complex issues surrounding the fair administration of justice. Part I suggests an alternative view to the argument that the Ker-Frisbie rule violates defendants' right to due process. Part II counters the argument that the rule removes critical barriers against police misconduct. Part III addresses the argument that the rule flouts international law. Part IV will expose flaws

4 United States v. Toscanino, 500 F.2d 267, 275 (2d Cir. 1974). *See also* Louise Arbour, *In Our Name and On Our Behalf*, 55 INT'L & COMP. L.Q. 511, 512-13 (2006) (describing the Ker-Frisbie doctrine as part of the "old normal").

5 United States v. Alvarez-Machain, 504 U.S. 655, 662 (1992).

6 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

7 The exclusionary rule in federal courts originated from the need to give substance to the Fourth Amendment's guarantee against unreasonable searches and seizures. *See* Weeks v. U.S., 232 U.S. 383 (1914). *See also* Francis A. Allen, *The Exclusionary Rule in the American Law of Search and Seizure*, 52 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 246 (1961).

in the broader presumption that this judicial doctrine is inconsistent with notions of justice generally accepted by society. The concluding section will explain the relevance of the Ker-Frisbie rule to current political and jurisprudential issues by suggesting scenarios where the rule is likely to appear in the future.

I. Concerns about Due Process

One significant criticism of the Ker-Frisbie rule was voiced in a majority decision handed down by the U.S. Second Circuit Court of Appeals, which argued that when a court upholds a conviction achieved by illegal police conduct, it violates a defendant's right to due process.[8] According to the Fifth and Fourteenth Amendments, American citizens have a right not to be "deprived of life, liberty, or property, without due process of law."[9] In *Frisbie v. Collins* (1951), which became the second half of the Ker-Frisbie rule, the Supreme Court ruled that due process is fulfilled "when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards."[10] However, in the majority opinion in *United States v. Toscanino* (1974), Judge Mansfield of the Second Circuit rejected this view. Mansfield argued that due process requires the court to divest itself of jurisdiction over a defendant where his or her presence in court has been secured "as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights."[11] Asserting that illegal abduction is a violation of a citizen's constitutional rights, Mansfield contended that the Ker-Frisbie rule is therefore inconsistent with due process.

The Second Circuit's ruling in *Toscanino* can be explained in part by the fact that the defendant received brutal treatment at the hands of the Uruguayan authorities that arrested him. The court later qualified its rejection of the Ker-Frisbie rule by claiming instead the

8 *Toscanino*, 500 F.2d 267.

9 U.S. Const. amend. V; U.S. Const. amend. XIV, § 1.

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

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

power to scrutinize "the most outrageous and reprehensible" type of conduct by government agents, including "torture, brutality, and similar outrageous conduct."[12] Other federal courts have taken varying approaches to the ruling in *Toscanino*: the Fifth and Ninth Circuits have followed the Second Circuit's exception to *Ker*, ruling that a court can dismiss an indictment based on supervisory powers; the Eleventh and D.C. Circuits have declined to rule on the *Toscanino* exception; and the Seventh Circuit has declined to accept the Second Circuit's position.[13]

In contrast to the Second Circuit's argument against the Ker-Frisbie rule, the Seventh Circuit's ruling in *Matta-Ballesteros v. Henman* (1990) claimed that the rule is not a violation of due process. Judge Flaum, who wrote the opinion, countered Mansfield's characterization of *Ker*, explaining that such a rationale entails an unreasonable expansion of the exclusionary rule to the body of a defendant, as opposed to evidence secured for use in trial.[14] Flaum cited *United States v. Crews* (1980), where the Supreme Court rejected this extension of the exclusionary rule. In *Crews*, the Supreme Court explained that while illegally seized evidence may be suppressed, the presence of a person in court is not "a suppressible 'fruit,' and the illegality of his detention cannot deprive the [g]overnment of the opportunity to prove guilt through the introduction of evidence wholly untainted by the police misconduct."[15]

This argument from *Crews* stems from earlier statements made by the Supreme Court noting that the purpose of the exclusionary rule is to deter police misconduct;[16] the exclusionary rule itself is not a constitutional requirement. In *United States v. Blue* (1966), the Supreme Court concluded that applying the exclusionary rule to the body of the defendant is not warranted by the goal of deterrence; to

12 United States ex rel. Lujan v. Gengler, 510 F.2d 62, 65 (2d Cir. 1975).

13 Roberto Iraola, *A Primer on Legal Issues Surrounding the Extraterritorial Apprehension of Criminals*, 29 AM. J. CRIM. L. 1, 8 (2001).

14 Matta-Ballesteros v. Henman, 896 F.2d 255, 262 (7th Cir. 1990).

15 United States v. Crews, 445 U.S. 463, 474 (1980).

16 Elkins v. United States, 364 U.S. 206, 217 (1960).

do so would "increase to an intolerable degree interference with the public interest in having the guilty brought to book."[17] This argument does not minimize the courts' responsibility to secure convictions based on legally obtained evidence. By fulfilling this responsibility, the courts still give substantive meaning to the right to due process.

While it initially seems unfair to prosecute someone who has been illegally abducted, it can be convincingly argued that such a trial does not violate the defendant's right to due process. Instead, the debate about due process turns on a value judgment about whether or not the goal of deterring illegal police conduct outweighs the goal of punishing duly convicted criminals. In *Blue*, the Supreme Court made a value judgment in favor of punishing law-breakers. A more thorough appraisal of the issues behind this judgment follows in the next section.[18]

II. CONCERNS ABOUT ILLEGAL POLICE CONDUCT

A critic of the Ker-Frisbie rule could reasonably assert that it removes a critical barrier to illegal police conduct, leaving citizens with little protection against unlawful arrest. Indeed, the wording of the majority opinion in the *Ker* case seems altogether too dismissive of this issue, concluding that "mere irregularities" during an arrest do not preclude the accused from being tried for the crimes committed.[19] It is clearly an understatement to describe illegal abduction as simply an irregularity in the process of an arrest. A similar disregard for the problem of police misconduct might be imputed to the opinion of Justice Black in *Frisbie v. Collins*, where he wrote that "[t]here is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought

17 United States v. Blue, 384 U.S. 251, 255 (1966).

18 The discussion about torture in Toscanino has not been concluded. In *Matta-Ballesteros*, the Seventh Circuit noted that no court has ever found circumstances of torture severe enough to divest the United States of jurisdiction. *See Matta-Ballesteros*, 896 F.2d at 261. However, it is unclear how the Supreme Court would rule should such a circumstance arise.

19 *Ker*, 119 U.S. at 440.

to trial against his will."[20] A critic might fairly point out that a person's unwillingness to submit to arrest does not excuse violations of proper police procedure.

However, it is also worth observing that the Ker-Frisbie rule does not remove all barriers to police misconduct. In 1971, the Supreme Court ruled in *Bivens v. Six Unknown Fed. Narcotics Agents* that citizens can bring tort actions against federal officers for the violation of their rights under the Fourth Amendment, which includes protection against unreasonable searches and seizures.[21] Although the scope of Bivens actions has been limited in some ways since 1971, the Court has also extended this remedy to violations of Fifth Amendment rights[22] and Eighth Amendment rights.[23] Defendants may also resort to prosecutorial misconduct as a procedural defense.[24]

Historically, the exclusionary rule has been the primary judicial tool for deterring police misconduct. In *Elkins v. United States*, the Court explained that the purpose of the exclusionary rule is "to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[25] As noted in Part I, the Supreme Court has distinguished between the suppression of evidence and the exclusion of the body of the defendant, but the argument that there is an analogy between the two merits some consideration. If eliminating the Ker-Frisbie rule would substantially increase the deterrence of illegal arrests, then there might be good reason for the Supreme Court to alter its ruling.

Empirically evaluating the deterrence effect of the exclusionary rule presents challenges that are beyond the scope of this paper. However, Oaks has questioned the effectiveness of the exclusionary

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

21 Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).

22 Davis v. Passman, 442 U.S. 228 (1979).

23 Carlson v. Green, 446 U.S. 14 (1980).

24 *Matta-Ballesteros*, 896 F.2d at 262.

25 *Elkins*, 364 U.S. at 217.

rule in achieving its stated goal,[26] and Heffernan and Lovely admit that at best it "imposes only an indirect sanction on police officers."[27] Excluding unlawfully seized evidence or releasing an illegally abducted suspect most directly affects the government prosecutor, not the offending police officers; and while Canadian prosecutors have the authority to correct police search and seizure practices, most American prosecutors do not.[28] Although evidence conclusively supporting or undermining the deterrent effect of exclusion may be difficult to come by, the theoretical analysis of incentives involved in exclusion weakens the commonly accepted claim that it controls the behavior of police officers.

An effective tort measure might have a more direct deterrent effect because it imposes a sanction on offending police officers that is independent of any desire to prosecute criminals. In contrast to exclusion, effective civil action against police officers or federal agents provides a direct consequence for official misconduct that affects both their pocket books and their professional standing, separating the punishment from all considerations of what happens to the defendant. Overall, in the case of illegal abductions, it is reasonable to conclude that the incentive structure of tort action will more effectively deter illegal police conduct than relying on the indirect effects of an exclusionary principle.

Furthermore, if the Court refuses to convict an improperly arrested defendant, there is some concern that police forces may engage in harassment or other forms of extra-judicial punishment in order to maintain the presence of law where arrests are needed but difficult to obtain. Less scrupulous police officers with criminal connections may intentionally arrest someone illegally in order to secure their immunity from prosecution.[29] All of these concerns are

26 Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970).

27 William C. Heffernan and Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. Mich. J. L. Reform 311, 324 (1991).

28 *Id.* at 319 n.39.

29 Oaks, *supra* note 26, at 749.

important to consider before advocating the elimination of the Ker rule. While illegal police behavior cannot be tolerated in a society of law and order, prudence demands a thorough examination of the methods employed to deter such behavior before one method is adopted over another.

III. CONCERNS ABOUT INTERNATIONAL LAW

Critics of the Ker-Frisbie rule also point out that it frequently pits American courts against norms of international law. For example, Abramovsky claims that Ker-Frisbie reinforces officially sanctioned violations of state sovereignty; he claims that the rule is eventually bound to backfire on the United States because of international criticism.[30] Dickinson argues that the Ker-Frisbie rule is an illegitimate extension of national power and that the courts have no competence to try an illegally abducted defendant.[31] Loan proposes that individuals have a right under customary international law to be free from extraterritorial abduction.[32]

While these critics appropriately voice concern for the integrity of international law, it is also reasonable to argue that international law should only influence the decisions of U.S. courts as it is specifically embodied in a treaty. It seems evident from the opinion of Chief Justice Rehnquist in *United States v. Alvarez-Machain* that the Ker-Frisbie rule would not apply if an extradition treaty specifically prohibited jurisdiction over a forcibly abducted defendant.[33] On the other hand, if no such prohibition is specified, the decision of wheth-

30 Abraham Abramovsky, *Extraterritorial Abductions: America's Catch and Snatch Policy Run Amok*, 31 VA. J. INT'L L. 151 (1990-1991).

31 Edwin D. Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, 28 AM. J. INT'L L. 231 (1934).

32 Jeffrey Loan, Sosa v. Alvarez-Machain*: Extraterritorial Abduction and the Rights of Individuals under International Law*, 12 ILSA J. INT'L & COMP. L. 253, 285-87 (2005-2006).

33 *Alvarez-Machain*, 504 U.S. at 669-70 (discussing whether or not general principles of international law against abduction could be inferred in the terms of the extradition treaty between the United States and Mexico).

er to release the defendant to a protesting country is a matter for the executive branch, not the courts.[34] If the courts were to liberally engage in speculation about the implications of general principles of international law, they would overstep their constitutional bounds and tie the hands of the executive branch in its efforts to direct the nation's diplomatic efforts.

The most commonly recognized problem of international law is that it has no central enforcing authority. Even state sovereignty, which provides the basic foundation for international law, rests on each individual state's ability to defend itself and secure its own borders. This is becoming increasingly difficult with the globalization that has resulted from advances in technology and transportation.

As a practical issue, there may be cases where a high-priority criminal suspect has left the borders of the United States, and extraterritorial abduction may be the only viable recourse for returning the fugitive to the jurisdiction of U.S. courts. Countries with weak governments become havens for criminals who can get across their borders, providing those criminals with a safe landing place and often a launching pad for future law-breaking activities. If the U.S. government has a high-level target in one of those countries, the executive branch is responsible for determining how to achieve custody of that fugitive. Whether the suspect is acquired with or without the cooperation or permission of the harboring nation is a matter of executive concern, just as the negotiation of treaties is an executive prerogative. The role of the court is to fulfill its constitutional responsibility by administering a fair trial once the accused is within its jurisdiction. Admittedly, international law can be at odds with the Ker-Frisbie rule; however, this is partly the natural consequence of an international system that tolerates the tensions created by state sovereignty.

IV. CONCERNS ABOUT JUSTICE

Despite any and all arguments in its favor, critics of the Ker-Frisbie rule might not be able to escape the feeling that it contradicts

34 *Id.* at 669.

our society's long-held commitment to justice and rule of law. Judge Mansfield gave voice to this feeling when he wrote the opinion in *Toscanino*, arguing that "society is the ultimate loser when, in order to convict the guilty, it uses methods that lead to decreased respect for the law."[35] In his dissenting opinion in Olmstead v. United States, Justice Brandeis wrote, "If the Government becomes a law-breaker, it breeds contempt for the law . . ."[36] It is reasonable for the government and citizens to be equally obligated to respect and obey the law.

However, a closer scrutiny of these statements brings to light other considerations that significantly complicate their application to the Ker-Frisbie rule. For example, if both private individuals and public officials are required to obey the law, then there are two wrongs to be established and remedied by the court in a Ker-Frisbie case: the crime committed by the defendant and the malfeasance of the police officer. If criminals are released because of illegal behavior by police, two crimes are being left unpunished, and respect for the law is no better served. Oaks writes, "Only a system with limitless patience with irrationality could tolerate the fact that where there has been one wrong, the defendant's, he will be punished, but where there have been two wrongs, the defendant's and the officer's, both will go free."[37] Furthermore, in cases where the abducted suspects are innocent, abolishing the Ker-Frisbie rule would do nothing to repay them for the extreme inconveniences imposed on them.

Eliminating the Ker-Frisbie doctrine might ease the consciences of judges, but on the whole it would do justice a disservice. Divesting the court of jurisdiction over properly convicted defendants in order to punish police officers essentially sacrifices respect for one law in a misguided effort to appease another. Two wrongs do not make a right, regardless of the relationship between the wrong acts or their perpetrators. Oaks continues that perhaps "this would not be an excessive cost for an effective remedy against police misconduct, but it

35 *Toscanino*, 500 F.2d at 274.

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

37 Oaks, *supra* note 26, at 755 (giving a polemic argument for abolishing the exclusionary rule).

is a prohibitive price to pay for an illusory one."[38] While the goal of Mansfield and Brandeis's statements is unquestionably worth pursuing, opponents of the Ker-Frisbie doctrine are mistaken to believe that its elimination would promote justice more than its preservation.

V. Conclusion

The Ker-Frisbie doctrine will likely remain a relevant issue in American jurisprudence. In a world where borders are increasingly fluid, international crimes are becoming a significant issue. Among those most relevant to the United States, drug trafficking and terrorism are of particular concern, often leading our pursuit of suspects outside American borders.[39] Given the present political trend to try terrorists as criminals in U.S. courts as opposed to military tribunals, it is probable that the Ker-Frisbie doctrine will resurface as a justification for the conviction of criminals where the circumstances of their arrests are irregular or contrary to general principles of international law. Whether or not people agree about the justice of the precedent from *Ker*, it will likely stand as a practical response to the unusual judicial predicament of trying an illegally abducted defendant. As the United States pursues its war on terror and faces increased violence on the border with Mexico, it is likely that the Ker-Frisbie rule will resurface in the near future.

38 *Id.*

39 *See* Peter S. McCarthy, United States v. Verdugo-Urquidez*: Extending the Ker-Frisbie Doctrine to Meet the Modern Challenges Posed by the International Drug Trade*, 27 New Eng. L. Rev. 1067 (1993). *See also* Andrew J. Calica, *Self-Help is the Best Kind: The Efficient Breach Justification for Forcible Abduction of Terrorists*, 37 Cornell Int'l L.J. 389 (2004).