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CRIMINAL JURISDICTION OF A STATE OVER A DEFENDANT BASED UPON PRESENCE SECURED BY FORCE OR FRAUD

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ONE old-fashioned type of lawlessness in law enforcement which seems to be flourishing with some vigor today¹ is the police practice of out-of-state kidnapping of a person accused of crime, followed by the abduction of the accused against his will into the state whose criminal laws were violated for trial.² These strenuous measures may be undertaken by the police officers of the state whose laws were violated, or by other persons at the instigation of those officers. Sometimes the kidnapping is accomplished not in another state of the United States but in a foreign country, whence the victim is imported into the state for trial.³

This illegal practice is, of course, the outgrowth of the rule of criminal jurisdiction that only the state whose criminal law is violated has jurisdiction to try the violator for the crime.⁴ Thus the accused person who is in another state or country must somehow be brought into the state which is to try him. There is a lawful, peaceful way of accomplishing this in most cases—by extradi-

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1. The basis for this statement is the number of cases in the reports of appellate courts in which the claim is made that this type of lawlessness occurred. The cases are collected in the American Digest System, Criminal Law, key No. 99, and appear throughout this article.

2. This type of lawless law enforcement was not mentioned in the Wickersham Report, National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement (1931), which concentrated its attention on the "third degree" and various kinds of unfairness of trial courts and prosecutors in the prosecution of criminal cases.

3. In practice, a less common method than kidnapping, but so nearly alike as to be governed by the same principles, is police enticement of the accused person into the state by fraud, deception, trickery, rather than by force. In spite of the absence of reported cases, this method will thus be considered within the scope of this article.

4. Restatement, Conflict of Laws § 427 (1934). There is no similar limitation in civil procedure, except perhaps as to civil actions which are not transitory.

tion of the accused.⁵ Sometimes, however, this may not be a very effective method. It is often slow and cumbersome.⁶ Sometimes the offense is not extraditable, because the accused did not "flee from justice" within the meaning of the United States Constitution and extradition statute.⁷ Sometimes too the governor of the asylum state refuses to surrender the accused on the demand of the authorities of the demanding state.⁸ Dissatisfaction with extradition procedure has tempted law enforcement officials to use a short-cut—that is, to secure the presence of the accused by the illegal use of

5. U. S. Const. Art. IV, § 2, cl. 2, provides: "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." This not being self-executing, Congress in 1793 enacted 1 Stat. 302 (1793), 18 U. S. C. § 3182 (1948), to enforce the Constitutional provision: "Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District, or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of arrest, the prisoner may be discharged."

6. See Waite, *Criminal Law and its Enforcement* 718-21 (3d ed. 1947) on practical difficulties involved in extradition procedure.

7. It is perfectly possible to commit a crime in a state without ever being present in that state, e.g. by shooting the victim by firing across the state line, *State v. Hall*, 114 N. C. 909, 19 S. E. 602 (1894), 115 N. C. 811, 20 S. E. 729 (1894); by abandoning a child, leaving the state before the child's birth, *Ex parte Mo*, 62 Mont. 137, 204 Pac. 175 (1921); by non-support of the family, where the failure to support begins only after the accused has left the state, *Wigchert v. Lockhart*, 114 Colo. 485, 166 P. 2d 988 (1946); by defrauding the victim by use of the mails; or by sending poison food or drink through the mails; or, as principal, by hiring an agent to commit a crime. In each of the cases cited *supra* the offense was held to be not extraditable, because the defendant did not "flee from justice" and there was no state statute in the asylum state authorizing extradition in the case of a non-fugitive.

This large loop-hole in the criminal law has been to a great extent plugged by the adoption by 34 states of the Uniform Criminal Extradition Act, § 6 of which provides for the extradition of non-fugitives as well as fugitives. This provision has been held constitutional. Although it goes further than the United States Constitution and extradition statute, note 5 *supra*, it does not conflict with them, but rather regulates in an area not covered by them and so within the states' reserved powers. *State v. Kriss*, 62 A. 2d 568 (Md. 1948); *People v. Herberich*, 276 App. Div. 852, 93 N. Y. S. 2d 272 (1949) *aff'd mem.*, 301 N. Y. 614, 93 N. E. 2d 913 (1950); *English v. Matowitz*, 148 Ohio St. 39, 72 N. E. 2d 898 (1947).

8. *Kentucky v. Dennison*, 24 How. 66 (U.S. 1861), held that in spite of the Constitution and statute, note 5 *supra*, there is no power in the federal government to make the governor of the asylum state surrender the accused.

force, either with or without the active help or passive acquiescence of the police officials of the asylum state.

The person who is thus kidnapped and brought for trial into the state having jurisdiction over the subject matter of the crime may urge that the court has no jurisdiction over the person of the defendant (or, if it has jurisdiction, that it should not exercise this jurisdiction) in view of the illegal manner in which his presence in the state was obtained. In the reported cases he usually raises this issue of jurisdiction over the person either in the trial court by a plea to the jurisdiction, or by applying after the abduction for a writ of habeas corpus in a state or federal court.⁹

As to whether the state has, or ought to exercise, jurisdiction over the person of the kidnapped accused, there are two principal problems to be considered: (1) Does the United States Constitution, or do any federal statutes, forbid a state to try such a defendant? (2) If not—so that the issue is simply a matter for state law to decide—does the state law forbid trial of such a defendant?

There have arisen several related problems not within the scope of this article except to the extent that their solutions may be useful by way of analogy in deciding the problems raised by the kidnapping cases. One is the problem of the effect on a state's jurisdiction of an illegal arrest *within* (not *outside*) the state.¹⁰ Another is the problem of the effect on a state's jurisdiction of the fact that the accused was brought into the state for purposes of trial by federal officials who properly had him in custody for a federal offense.¹¹ Still another is the problem of irregularity in the extra-

9. Under the Federal Rules of Criminal Procedure, rule 12(b)(2), it has been held that a kidnapped defendant must challenge personal jurisdiction by a pre-trial motion; it is too late to raise the issue by a motion in arrest of judgment after verdict. *United States v. Rosenberg*, 195 F. 2d 583 (2d Cir. 1952). Failure to raise the point early constitutes a waiver. *Id.*

10. The arrest may be without a warrant where a warrant is required; or, if pursuant to a warrant, there may be some defect in the warrant. It is generally held that the court nevertheless has jurisdiction to try him. See Note, 96 A.L.R. 982 (1935). It has been pointed out that this kind of misconduct is not very serious in its consequences to the defendant, since the law provides that the arrested person be taken before a magistrate to determine whether there is sufficient cause to hold him for trial, which is the same question which is to be decided when an application for a warrant is made. Plumb, *Illegal Enforcement of the Law*, 24 Cornell L. Q. 337, 349 (1939). Thus decisions which hold that this type of misconduct does not deprive the court of jurisdiction are not applicable to cases of kidnapping and abduction, involving more serious misconduct and more drastic consequences to the accused.

11. It is generally held that this activity is not misconduct at all, so that of course the state has jurisdiction to try the accused. *Ponzi v. Fessenden*, 258 U. S. 254 (1922), is the leading case.

dition proceedings, such as where the asylum state surrenders the accused to the demanding state although the extradition laws of the asylum state do not provide for the extradition of such a person.¹² Lastly, there is the problem of the jurisdiction of *federal* (not *state*) courts over a defendant kidnapped and imported from a foreign country.¹³

A. FEDERAL CONTROL OVER THE STATES

Is there anything in the United States Constitution or statutes forbidding a state to try a defendant who was kidnapped from another state or country? The provisions to be considered are: (1) The extradition clause of the Constitution (and the federal extradition statute enforcing the Constitutional clause);¹⁴ (2) the federal kidnapping statute;¹⁵ and (3) the due process clause of the Fourteenth Amendment to the Constitution.¹⁶

The provisions of the United States Constitution and statute relating to extradition¹⁷ do not on their face purport to deal with the effect on jurisdiction of failure properly to extradite; there is certainly no express provision that failure of a state to extradite peacefully will cause that state to lose jurisdiction. The Supreme Court has held that there is nothing in these provisions which would be violated by trial by a state of a defendant whose presence in

12. One type of case of this sort is the extradition of a person, even though he is a non-fugitive, see note 7 *supra*, and even though the asylum state's extradition law does not provide for extradition of non-fugitives. Compare Uniform Criminal Extradition Act § 6, note 7 *supra*. Another is extradition procured by false affidavits or testimony. The cases generally hold that the state which secures his presence through irregular extradition has jurisdiction in spite of this irregularity. See Note, 165 A.L.R. 947, 962-965 (1946).

13. The United States Supreme Court has not decided this problem. The lower federal courts have held that there is jurisdiction, *United States v. Unverzagt*, 299 Fed. 1015 (W.D. Wash. 1924), *aff'd*, 5 F. 2d 492 (9th Cir. 1925), *cert. denied*, 269 U. S. 566 (1925); *United States v. Insull*, 8 F. Supp. 311 (N.D. Ill. 1934); *Ex parte Lopez*, 6 F. Supp. 342 (S.D. Texas 1934). See *Chandler v. United States*, 171 F. 2d 921, 934 (1st Cir. 1948), *cert. denied*, 336 U. S. 918 (1949); *Gillars v. United States*, 182 F. 2d 962, 972 (Munic. Ct. App. D.C. 1950).

14. See note 5 *supra*.

15. 47 Stat. 326 (1932), as amended, 48 Stat. 781 (1934), 18 U. S. C. § 1201 (1948). This statute, known as the "Lindbergh Law," provides severe criminal penalties for one who "knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away and held for ransom or reward or otherwise . . ."

16. No state "shall deprive any person of life, liberty, or property, without due process of law." U. S. Const. Amend. XIV.

17. See note 5 *supra*.

the state was obtained by kidnapping,¹⁸ and, as a matter of interpretation of language, this seems clearly correct.

The federal kidnapping statute, commonly called the "Lindbergh Law,"¹⁹ is probably broad enough to send to jail the law enforcement official who uses kidnapping and abduction as a shortcut to avoid extradition.²⁰ But does it provide that a state which has obtained the presence of an accused person in violation of its provisions lacks jurisdiction to try him? The Supreme Court recently held no in *Frisbie v. Collins*.²¹ This seems sound. There is nothing on the face of the statute which purports to deal with the matter of jurisdiction at all. A careful perusal of the legislative history of the statute reveals not a whisper of anything on the jurisdiction problem,²² which obviously was not even considered by Congress.²³

Turning to the due process clause, the problem of federal control, under this clause, over a state's right to try a person forcibly kidnapped and imported from another state is but one aspect of the broad problem of federal control over state criminal procedure in general—a matter to which the Supreme Court has devoted much

18. *Mahon v. Justice*, 127 U. S. 700 (1888). Two justices dissented on the ground that the Constitution "clearly implies that there shall be no resort to force" (*Id.* at 716). See *Ker v. Illinois*, 119 U. S. 436 (1886), where the accused was kidnapped and abducted, by a representative of a state, from a foreign country, holding that there was nothing in the extradition treaty between the United States and that country (providing for peaceful extradition) violated by trial of the kidnapped person.

The most recent case on federal control over state jurisdiction over a defendant abducted from another state, *Frisbie v. Collins*, 342 U. S. 519 (1952), did not mention the extradition provisions of the Constitution or statutes.

19. See note 15 *supra*.

20. Note that under the statute the purpose of seizing is not limited to ransom and reward.

21. 342 U. S. 519 (1952).

22. H. R. Rep. No. 1493, 72d Cong., 1st Sess. (1932); Sen. Rep. No. 765, 72d Cong., 1st Sess. (1932); H. R. Rep. No. 1457, 73d Cong., 2d Sess. (1934); Sen. Rep. No. 534, 73d Cong., 2d Sess. (1934); 75 Cong. Rec. 13280-90 (1932).

23. Very likely Congress could, under the commerce clause of the Constitution, U. S. Const. Art. I, § 8, constitutionally deprive a state of jurisdiction to try a defendant whose presence in the state was secured through a violation of the federal kidnapping statute. The commerce clause has been construed broadly enough in analogous cases to warrant the conclusion that such a provision would be valid and not an invasion of the powers reserved to the states. *E.g.* *United States v. Sullivan*, 332 U. S. 689 (1948) (Federal Food, Drug, and Cosmetic Act held constitutional as applied to a sale without required labels at retail six months after importation into state by wholesaler and subsequent sale by wholesaler to retailer); *McDermott v. Wisconsin*, 228 U. S. 115 (1913) (Federal Food and Drugs Act held constitutional as applied to rather similar circumstances).

attention, especially in recent years.²⁴ The due process clause, providing that no state "shall deprive any person of life, liberty, or property, without due process of law", does not specifically mention criminal procedure at all, much less that particular aspect of criminal procedure which is considered in this article; yet it is the principal basis of federal control over procedure in state criminal cases. The due process clause, as applied to state criminal procedure, has been said to embrace "principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental";²⁵ it requires all that is "implicit in the concept of ordered liberty";²⁶ and, as applied to state criminal procedure, "denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice."²⁷

Applying this admittedly somewhat indefinite standard²⁸ to the

24. See generally Boskey & Pickering, *Federal Restrictions on State Criminal Procedure*, 13 U. of Chi. L. Rev. 266 (1946). Thus a number of cases have dealt with composition of juries in state criminal cases. See Scott, *The Supreme Court's Control over State and Federal Criminal Juries*, 34 Iowa L. Rev. 577 (1949). A number have dealt with the right of an accused in a state trial to the assistance of counsel, e.g. *Uveges v. Pennsylvania* 335 U. S. 437 (1948); *Palmer v. Ashe*, 342 U. S. 134 (1951). Others concern the use in state criminal trials of coerced confessions, e.g., *Watts v. Indiana*, 338 U. S. 49 (1949) (psychological torture) and companion cases. A recent case considered the applicability of the *McNabb* rule of federal procedure (voluntary confessions during illegal detention), *McNabb v. United States*, 318 U. S. 332 (1943), to state criminal cases. *Gallegos v. Nebraska*, 342 U. S. 55 (1951). The use in state trials of evidence obtained by illegal search and seizure was considered in *Wolf v. Colorado*, 338 U. S. 25 (1949), *Stefanelli v. Minard*, 342 U. S. 117 (1951) and *Rochin v. California*, 342 U. S. 165 (1952). Due process has been applied to a variety of other aspects of state criminal procedure: use by state prosecutor of perjured testimony: see Boskey & Pickering, *supra*, at 295-97; prosecution by information rather than indictment: *Hurtado v. California*, 110 U. S. 516 (1884); the right of the defendant to the privilege against self-incrimination: *Adamson v. California*, 332 U. S. 46 (1947); *Twining v. New Jersey*, 211 U. S. 78 (1908); his right not to be put twice in jeopardy for the same offense: *Palko v. Connecticut*, 302 U. S. 319 (1937); his right to an impartial judge: *Tumey v. Ohio*, 273 U. S. 510 (1927); his right to a trial free from domination by a mob: *Moore v. Dempsey*, 261 U. S. 86 (1923); *Frank v. Mangum*, 237 U. S. 309 (1915); his right to a public trial: *In re Oliver*, 333 U. S. 257 (1948); his right not to be convicted of a crime other than the crime charged: *Cole v. Arkansas*, 333 U. S. 196 (1948).

25. Cardozo, J., in *Snyder v. Massachusetts*, 291 U. S. 97, 105 (1935).

26. Cardozo, J., in *Palko v. Connecticut*, 302 U. S. 319, 325 (1937).

27. Roberts, J., in *Lisenba v. California*, 314 U. S. 219, 236 (1941).

28. The Supreme Court has repeatedly stated that due process cannot be reduced to a mathematical formula. The most recent expression of this thought appears in *Rochin v. California*, 342 U. S. 165 (1952). A minority on the Court in recent years has sought to make the due process concept more definite by incorporating by reference into the Fourteenth Amendment all the provisions of the Bill of Rights (first eight amendments), including those relating to criminal procedure. See *Adamson v. California*, 332 U. S. 46 (1947) (Justices Black, Douglas, Murphy and Rutledge dissenting). The deaths of Murphy and Rutledge have left only Black and Douglas to uphold

problem of this article, is there a violation of due process in the trial by a state of a person whose presence in the state was obtained by kidnapping from another state or country? The Supreme Court itself squarely held long ago that under these circumstances there is no violation of due process.²⁹ In the recent case of *Frisbie v. Collins*,³⁰ the Court unanimously reaffirmed its earlier decisions. The Court stated that the prior decisions "rest on the sound basis that due 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. There is nothing in the Constitution that requires a [state] court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will."³¹

The pre-trial police misconduct considered in this article has no tendency to convict an innocent person, so long as he is properly notified of the charge against him and given a fair trial. And it is true that most of the Supreme Court decisions condemning certain aspects of state criminal procedure as violations of due process have involved situations where there is such a danger.³² In the absence of situations creating such a danger, the Court has generally held that pre-trial misconduct by state officials does not violate due process.³³

On the other hand, a recent Supreme Court decision by a unani-

this view, which they are still vigorously but vainly urging on their colleagues. See Justices Black and Douglas concurring in *Rochin v. California*, *supra*.

29. *Ker v. Illinois*, 119 U. S. 436 (1886) (accused kidnapped in Peru and abducted into Illinois by an Illinois agent for trial); *Mahon v. Justice*, 127 U. S. 700 (1888) (accused kidnapped in West Virginia by Kentucky agents and abducted into Kentucky for trial). See *Cook v. Hart*, 146 U. S. 183, 190-92 (1892); *Lascelles v. Georgia*, 148 U. S. 537, 543 (1893); *In re Johnson*, 167 U. S. 120, 126 (1896); *Adams v. New York*, 192 U. S. 585, 596 (1904); *Pettibone v. Nichols*, 203 U. S. 192, 207-13 (1906).

30. 342 U. S. 519 (1952).

31. *Id.* at 522.

32. Thus with a trial conducted under mob domination, a trial into which the accused was rushed unprepared, a trial before a biased jury or judge, a trial of an inexperienced defendant unrepresented by counsel, a trial involving the intentional use by the prosecutor of perjured testimony or of a coerced confession, or a trial at which evidence favorable to the defendant is suppressed by the prosecutor—with trials conducted under these circumstances it is easy to appreciate the danger of convicting an innocent person; therefore such situations surely deserve to be held violations of due process; and the Supreme Court has so held. See note 24 *supra*.

33. Thus it is not a violation of due process for a state at a trial to receive in evidence matter which has been obtained through pre-trial unlawful search and seizure by the state's police officers, unlawful though such conduct may be. *Wolf v. Colorado*, 338 U. S. 25 (1949). Similarly, it is not

mous court, decided two months before *Frisbie v. Collins*, held that an analogous type of pre-trial misconduct constituted a violation of due process even though it could have no tendency to convict an innocent person. In *Rochin v. California*,³⁴ three local police officers, suspecting that Rochin had possession of narcotics, saw him swallow two capsules. Immediately they seized him and attempted by force to extract the capsules from his mouth. This proving unavailing, Rochin was taken to a hospital, where a doctor forced a tube into his throat. An emetic solution was then poured into Rochin's stomach, and he vomited the two capsules. At Rochin's trial for illegal possession of narcotics, the capsules were admitted into evidence by a California court over his objections, and he was convicted. On certiorari the United States Supreme Court held unanimously that the conviction must be reversed because obtained by methods which offend due process. The Court thus used the due process clause to strike down a phase of state law enforcement procedure which created no danger of wrongful conviction;³⁵ it was done simply as a means of deterring local police from using methods so brutal and uncivilized and offensive to "the community's sense of fair play and decency." The brutality involved in kidnapping is not far removed in degree from the brutality of the stomach pump. At all events, it is surprising that, in view of the *Rochin* case, all of the members of the Supreme Court so readily concluded that due process was not violated in *Frisbie v. Collins*.

The Supreme Court was doubtless reluctant to declare to be a violation of due process state procedure which a large number of the states have approved;³⁶ and, as will be demonstrated below, the

a violation of due process for a state to use evidence secured by its police by wire tapping, another type of reprehensible pre-trial conduct. *People v. Stemmer*, 298 N. Y. 728, 83 N. E. 2d 141 (1948), *aff'd per curiam*, 336 U. S. 963 (1949). The question will probably arise again. *Schwartz v. State*, 246 S. W. 2d 174 (Tex. Cr. App. 1951), *aff'd* 21 U. S. L. Week 4055 (U. S. 1952). Similarly, as to use of evidence obtained by eavesdropping or by use of detectaphones, see Scott, *Federal Restrictions on Evidence in State Criminal Cases*, 34 Minn. L. Rev. 489 (1950). So too a voluntary confession obtained during a period of unlawful detention by police (who thus violate their duty to take the arrested person without unnecessary delay before a magistrate for preliminary examination) is admissible in a state criminal case in spite of the pre-trial unlawfulness of the conduct of the police officers. *Gallegos v. Nebraska*, 342 U. S. 55 (1951).

34. 342 U. S. 165 (1952).

35. The Court pointed out that a state court which admits in evidence coerced confessions violates due process, not only because of the danger of their "unreliability," but also because they "offend the community's sense of fair play and decency." *Id.* at 173.

36. Thus when dealing with the problem of whether the admission by a

many states which have considered the right of the state to try a kidnapped defendant have unanimously held that there is such a right. Furthermore, it should be noted that the right, which of course even a criminal possesses, to be protected from kidnapping is not completely worthless even if the indirect method of protection, by refusal to allow prosecution of a person so apprehended, is denied. The official who behaves in this manner is liable criminally for kidnapping, a serious crime in all states, and for violation of the federal kidnapping statute; he is also liable civilly to the victim for false imprisonment or assault and battery.³⁷ While it is arguable that this sort of protection is not worth much, because the states hesitate to prosecute their over-zealous officers criminally, and policemen are usually not wealthy enough to warrant civil actions against them, yet the argument as to the worthlessness of civil and criminal remedies against law enforcement officials who conduct illegal searches and seizures did not persuade the Supreme Court to hold that the due process clause must strike down the use in state courts of evidence thus obtained as the only possible effective remedy to deter such wrongdoing.³⁸

B. STATE LAW UNRESTRICTED BY FEDERAL CONTROL

The Supreme Court having settled that the trial by a state of a defendant who has been kidnapped and imported from another state or country does not constitute a violation of any federal right secured to the defendant by any provision of the United States Constitution or of federal legislation, the question remains: how should the state itself decide the question of whether it is proper to try such a defendant? About half of the states have considered the problem, and they unanimously agree that the state has juris-

state of evidence obtained by illegal search and seizure violates due process, the Supreme Court, in deciding that there was no such violation, took note of the fact that most states allow such evidence. *Wolf v. Colorado*, 338 U. S. 25, 29 (1949). The holdings of the various states on state criminal procedure are not perhaps entitled to great weight in the Supreme Court if the question before the Court concerns a matter of *federal* procedure; thus the state rules allowing the use of illegally obtained evidence did not convince the Court in *Weeks v. United States*, 232 U.S. 383 (1914). But where due process is involved, state conclusions are highly relevant.

37. *See, e.g.*, *Ker v. Illinois*, 119 U. S. 436, 444 (1886), emphasizing that in view of these protections, it was not necessary to condemn the trial under the due process clause. It has been held that federal law enforcement officers were guilty of kidnapping when they seized and abducted criminals from another country. *Collier v. Vacaro*, 51 F. 2d 17 (4th Cir. 1931); *Villareal v. Hammond*, 74 F. 2d 503 (5th Cir. 1934).

38. *Wolf v. Colorado*, 338 U. S. 25 (1949). The inadequacy of alternative remedies is more apt to be decisive with the Supreme Court if the problem is not one of due process but of proper federal procedure, as in *Weeks v. United States*, 232 U. S. 383 (1914).

diction and ought to exercise it.³⁹ Even the federal courts (in the absence of any decision by the United States Supreme Court) have held in the corresponding situation that the federal courts have jurisdiction to try a defendant abducted from a foreign country.⁴⁰ At one time two states, Kansas and Nebraska, took the view that it would be against public policy for the state to sanction such unlawful police behavior by permitting the trial of a defendant whose presence was procured by kidnapping.⁴¹ Both these states have since overruled their former decisions.⁴²

39. See cases collected in Note, 165 A.L.R. 947, 958-61 (1946). Cases cited are from 17 states: Alabama, Arkansas, California, Illinois, Iowa, Maryland, Minnesota, Mississippi, Nebraska, New York, Oklahoma, Pennsylvania, Texas, Vermont, West Virginia, Wisconsin and Wyoming; as well as those of federal courts (including the District of Columbia) and cases from England and Canada. More recent state cases, adding four jurisdictions to the total, are *State v. Moore*, 50 A. 2d 791 (Del. Gen. Sess. 1946); *Foster v. Hudspeth*, 170 Kan. 338, 224 P. 2d 987 (1950), *cert. dismissed*, 340 U. S. 940 (1951); *People v. Mahler*, 329 Mich. 155, 45 N. W. 2d 14 (1950), *cert. denied*, 340 U. S. 949 (1951); *Wise v. State*, 96 N. E. 2d 786 (Ohio App. 1950); *Commonwealth ex rel. Master v. Baldi*, 166 Pa. Super. 413, 72 A. 2d 150 (1950), *cert. denied*, 340 U. S. 866 (1951); *In re Greenough*, 75 A. 2d 569 (Vt. 1950).

40. See cases collected note 13 *supra*. This result is somewhat surprising (and will doubtless be overruled when the Supreme Court considers the problem) in view of the high standards required by the Court of federal law enforcement officers in other areas of law enforcement. *E.g.* *Weeks v. United States*, 232 U. S. 338 (1914) (evidence secured by illegal search and seizure); and *McNabb v. United States*, 318 U. S. 332 (1943) (voluntary confessions during illegal detention). See *United States v. Rosenberg*, 195 F. 2d 583, 602-3 (2d Cir. 1952), suggesting the analogy of the *McNabb* rule to federal defendants kidnapped from foreign countries at the instigation of federal officers. The Supreme Court is not as strict in similar cases concerning state law enforcement officers. *E.g.*, *Wolf v. Colorado*, 338 U. S. 25 (1949) (evidence obtained by illegal search and seizure); *Gallegos v. Nebraska*, 342 U. S. 55 (1951) (voluntary confession during illegal detention).

41. *State v. Simmons*, 39 Kan. 262, 18 Pac. 177 (1888), where the court stated: "It would not be proper for the courts of this state to favor, or even to tolerate, breaches of the peace committed by their own officers, in a sister state . . . [Jurisdiction should not be sustained when obtained only] in violation of some well-recognized rule of honesty or fair dealing, as by force or fraud . . . [Such jurisdiction] would not only be a special wrong against the individual . . . but it would also be a general wrong against society itself—a violation of those fundamental principles of mutual trust and confidence which lie at the very foundation of all organized society, and which are necessary in the very nature of things to hold society together" (18 Pac. at 178-9). *In re Robinson*, 29 Neb. 135, 45 N. W. 267, 8 L. R. A. 398 (1890), where the court said: "We cannot sanction the method adopted to bring the petitioner into the jurisdiction of this state . . . the district court, therefore, did not acquire jurisdiction of the person of the petitioner." (45 N.W. at 268).

42. *Foster v. Hudspeth*, 170 Kan. 338, 224 P. 2d 987 (1950), *cert. dismissed*, 340 U. S. 940 (1951) (not mentioning the *Simmons* case but, it would seem, overruling it by implication); *Jackson v. Olson*, 146 Neb. 885, 22 N. W. 2d 124, 165 A. L. R. 932 (1946) (expressly overruling the *Robinson* case).

Are these unanimous decisions correct on principle? There can be no one answer which is demonstratively true. The answer depends upon the weight to be given to two sometimes conflicting policies: the policy that criminals should be punished; and the frequently opposing policy that government officials must observe the rules of fair play, even when dealing with criminals. It may well be that, as a result of lawlessness in law enforcement, the benefits from jailing criminals are more than offset by the loss of respect for law by society in general.⁴³

It is submitted that, while it is not surprising that some states conclude that it is more important to imprison criminals than to deter police from kidnapping by refusal to use their courts for the trial of kidnapped individuals—yet it is surprising that they are unanimous in this conclusion. This is particularly true in view of the fact that some of these same states do refuse to accept the results of police misconduct in closely analogous situations.

Thus as to the admissibility of evidence secured by illegal searches and seizures, one-third of the states follow the federal rule and exclude such evidence.⁴⁴ The theory of these states is that the threat of possible criminal and civil actions against police officials is not sufficient by itself to restrain the police from such misconduct; so that it is necessary, in order to give suitable protection to the right to privacy, to tell the police, "You cannot make use in court of any evidence you find in this way." It would seem that the existence of the remedies of civil and criminal actions against policemen who kidnap and abduct are equally inadequate,⁴⁵ and that the right to be free from unlawful bodily interference by police officers is at least as important as the right to be free from

43. "Respect for law, which is the fundamental prerequisite of law observance, hardly can be expected of people in general if the officers charged with enforcement of the law do not set the example of obedience to its precepts." National Commission on Law Observance and Enforcement, *op. cit. supra* note 2, at 1. Holmes, J., dissenting in *Olmstead v. United States*, 277 U. S. 438, 470 (1928) (evidence obtained by wire tapping held admissible in federal trials), thought it "less evil that some criminals should escape than that the Government should play an ignoble part." On the other hand, the majority in that case thought that a certain amount of "dirty business"—*e.g.* the use of decoys—was necessary in dealing with the criminal classes.

44. See cases collected in appendix to *Wolf v. Colorado*, 338 U. S. 25, 33-39 (1949). States there listed as adopting the federal rule of exclusion are: Florida, Idaho, Illinois, Indiana, Iowa, Kentucky, Michigan, Mississippi, Missouri, Montana, Oklahoma, South Dakota, Tennessee, Washington, West Virginia, Wisconsin and Wyoming. Delaware has recently joined this list, overruling its previous holdings. *Rickards v. State*, 77 A. 2d 199 (Del. 1950).

45. See notes 37 and 38 *supra* and text thereto.

unlawful search and seizure of property by them;⁴⁶ so that the only effective way to deter police from such lawlessness is to say to them, "We will not try a criminal whose presence in the state has been thus secured."

It used to be practically a universal rule that a court did not care about the illegal manner in which evidence was obtained, so long as the evidence was relevant and otherwise admissible; but, as the illegal search and seizure cases show, this rule, under federal influence, is no longer altogether true in many states. It seems not unlikely that the practically universal rule of today—that a court which has a defendant before it will not bother itself with how he came to be there—will in the future similarly be revised, in some states at least.

All states exclude (indeed, the Supreme Court has said they must exclude) from evidence in a state criminal trial confessions obtained by police coercion, whether the coercion is physical or psychological.⁴⁷ There has been a good deal of debate as to the rationale of this exclusionary rule,⁴⁸ but the Supreme Court very recently stated that at least in part the basis of the rule is to deter law enforcement officers from this sort of misconduct.⁴⁹ If exclusion of coerced confessions is desirable in order to prevent "third degree" practices, it would seem that refusal to allow prosecution might be a desirable device for preventing police kidnapping, a callous practice not far removed in obnoxiousness from the "third degree."

It is a uniform rule of both federal and state courts that where the police lure a person into committing a crime by planting the intent to commit the crime in his mind, done so that he may be

46. In fact, the right to be free from bodily harm would seem the more important. The Supreme Court apparently recognizes this when it holds that a state does not violate due process when it admits evidence secured by an illegal police search and seizure of defendant's premises, *Wolf v. Colorado*, 338 U. S. 25 (1949), while at the same time it holds that a state does violate due process if the evidence is obtained from the body by police use of the stomach pump, *Rochin v. California*, 342 U. S. 165 (1952).

47. See note 24 *supra*.

48. Dean Wigmore believed the proper reason for exclusion is the unreliable and untrustworthy nature of such evidence, 3 Wigmore, *Evidence* § 822 (3d ed. 1940); Prof. Morgan that a coerced confession violates the privilege against self-incrimination, Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1, 27-30 (1949); and Dean McCormick that the confession must be excluded in order to restrain police investigators from practicing the "third degree," McCormick, *The Scope of Privilege in the Law of Evidence*, 16 Tex. L. Rev. 447, 452-7 (1938).

49. See *Rochin v. California*, 342 U. S. 165, 173 (1952), pointing out that a coerced confession is excluded even if statements contained in the confession are independently established as true.

prosecuted for the crime, he has the defense of entrapment.⁵⁰ The rationale of this defense is not altogether clear. In the leading case on entrapment the Supreme Court justices differed, five believing that entrapment negated the commission of the crime; three that, although the defendant was guilty of the crime, "the courts must be closed to the trial of a crime instigated by the government's own agents . . . (as an) overruling principle of public policy."⁵¹ If this latter theory is, as many believe, the true basis of the defense of entrapment, it would seem that states which allow the defense might well be equally reluctant to open their courts to the trial of persons kidnapped by its agents from other states or foreign countries.

There are two other analogies in the field of criminal procedure—evidence secured by wire tapping and confessions obtained during illegal detention—which, however, tend to point the other way, because of the reluctance of the states to exclude such evidence.⁵² It may well be argued, however, that the evils attendant upon police wire tapping and police detention (unaccompanied by coercion) are less dangerous than those involved in violent and forcible kidnapping by police officers; so that a state which refuses to restrain police from doing the former (by the indirect method of exclusion of evidence) might not inconsistently deter police from

50. The leading case is *Sorrells v. United States*, 287 U. S. 430 (1932). For a collection of cases, see *Notes*, 18 A. L. R. 146 (1922); 66 A. L. R. 478 (1930); 86 A. L. R. 263 (1933).

51. *Sorrells v. United States*, *supra* note 50, at 459, per Roberts, J., Brandeis and Stone JJ. concurring with Roberts, J.

52. Thus the states which have dealt with the matter have generally held that evidence secured by wire tapping is not to be excluded because of police misconduct in obtaining it; and also that the Federal Communications Act § 605, 48 Stat. 1103 (1934), 47 U. S. C. § 605 (1946), does not forbid the use in state courts of wire-tapped evidence. See Scott, *Federal Restrictions on Evidence in State Criminal Cases*, 34 Minn. L. Rev. 489, 506-8 (1950). But four Supreme Court justices, led by Holmes and Brandeis, thought that federal courts should not (even without § 605 of the Federal Communications Act, not enacted until later) admit evidence secured by illegal wire tapping, a "dirty business"; the police should be deterred by an exclusionary rule. *Olmstead v. United States*, 277 U. S. 438 (1928).

The *McNabb* rule of federal procedure excluding from federal courts voluntary confessions obtained during a period of illegal detention, *McNabb v. United States*, 318 U. S. 332 (1943), is designed to deter police from neglecting their duty to take an arrested person before a commissioner for preliminary examination without unnecessary delay. See *United States v. Carignan*, 342 U. S. 36, 44-45 (1951), saying that "the reason for the [*McNabb*] rule" is "to abolish unlawful detention." But although all the states impose a similar statutory or common law duty on the police, the states have consistently refused to follow the *McNabb* lead. Inbau, *Lie Detection and Criminal Interrogation* 168-9 (2d ed. 1948). The most recent cases are *State v. Pierce*, 4 N. J. 252, 72 A. 2d 305 (1950); *Henderson v. State*, 229 P. 2d 196 (Okla. Crim. 1951); *State v. Gardner*, 230 P. 2d 559 (Utah 1951); *State v. Winters*, 236 P. 2d 1038 (Wash. 1951).

doing the latter by closing its courts to the trial of an individual so mistreated by the police.

It may also be noted that in one unusual state case⁵³ it was held that testimony of police officers who physically beat a prisoner in their care should be rejected at the trial because of their abuse of the prisoner. The court reached this result by analogy to the rule of exclusion of evidence obtained by illegal search and seizure, holding it better that the guilty escape than that the officers be permitted to give testimony procured by violation of the law. Here then is another example of the use of an indirect method to deter police lawlessness.

Leaving now analogies in the field of *criminal* procedure and turning to those in the field of *civil* procedure, we find these to be well-settled rules as to civil jurisdiction: where a non-resident person is lured into the state by the fraud of the plaintiff, the state will not exercise jurisdiction over him; similarly, "a state does not in civil cases exercise jurisdiction over a non-resident brought into a state by unlawful force."⁵⁴ It would seem that if a court will not exercise civil jurisdiction over a non-resident defendant brought into a state by the unlawful fraud or force of the plaintiff, it ought not to exercise jurisdiction in a criminal case over an out-of-state defendant who is brought into the state by the unlawful fraud or force of the state's law enforcement agents.

Some of the state cases holding that the states have criminal jurisdiction in the kidnapping situation⁵⁵ did consider the analogy to civil jurisdiction but decided the analogy to be inappropriate.⁵⁶ The theory of these cases was that in the civil case the plaintiff who uses fraud or force is himself guilty of a wrong; but not so the state itself when the state's police commit the wrong.⁵⁷

53. *Churn v. State*, 184 Tenn. 646, 202 S. W. 2d 345 (1947).

54. Restatement, Conflict of Laws § 78 (1934); 1 Beale, Conflict of Laws §§ 78.3, 78.4 (1935); Goodrich, Conflict of Laws 189 (3d ed. 1949); Note, *Jurisdiction over Persons Brought into a State by Force or Fraud*, 39 Yale L. J. 889 (1930); Note, 1916C Ann. Cas. 612, 615-16; *Ex parte Edwards*, 99 Cal. App. 541, 278 Pac. 910, 290 Pac. 591 (1929) (brought into state by unlawful force).

The view of the writers *supra* is that the court probably *has* jurisdiction but will not *exercise* its jurisdiction. Thus where the fraud (or force) is that of third parties, not that of the plaintiff or someone in privity with him, the court has and will exercise jurisdiction, e.g., *Ex parte Taylor*, 29 R. I. 129, 69 Atl. 553 (1908); Note, 20 A. L. R. 2d 163, 186 (1951).

55. See note 39 *supra*.

56. *State v. Moore*, 50 A. 2d 791 (Del. Ct. Gen. Sess. 1946); *State v. Ross*, 21 Iowa 467 (1866). See *In re Johnson*, 167 U. S. 120, 126 (1897). *Contra*: *State v. Simmons*, 39 Kan. 262, 18 Pac. 177 (1888), discussed at note 41 *supra* and text thereto.

57. E.g., *State v. Ross*, *supra* note 56, at 471: "There is no fair analogy

It is submitted that the better view is that the state is a single entity, whether represented by the prosecutor, the court, or the police, rather than several separate entities.⁵⁸ What the police do in line of duty should be deemed done by the state as well as for the state. This view is, of course, the basis of the many state decisions which exclude evidence secured by illegal searches and seizures,⁵⁹ or which exclude coerced confessions (insofar as they are excluded on the theory that exclusion is necessary to deter police from "third degree" practices),⁶⁰ or which close their courts to the prosecution of persons who have been "entrapped" into committing a crime by police officers.⁶¹ The federal courts recognize that the government as law-enforcer is the same entity as the government as prosecutor and judge when they apply the *McNabb* rule excluding in federal courts even voluntary confessions when made during unlawful police detention.⁶²

It would appear, then, that the civil jurisdiction analogy is apt, and that a state which closes its courts to a plaintiff who obtained service of process on a non-resident defendant whom he lured into the state by fraud or imported therein by unlawful force should also refuse to open its courts to the criminal prosecution of an out-of-state defendant whose presence was obtained by that state's police in a comparable fashion.

One more consideration ought to induce at least some of the states to refuse to sanction the trial of criminals whose presence in the state is obtained in direct violation of federal and state kidnapping and extradition laws. It may be true that none of these provisions can by any process of statutory interpretation be construed so broadly as to prohibit a state's trial of an individual who has been subjected to a lawless violation of these provisions by police officials. In the absence of any legislation, the answer must be found in the common law. But upon what, after all, do common

between civil and criminal cases in this respect. In the one (civil) the party invoking the aid of the court is guilty of fraud or violence in bringing the defendant . . . within the jurisdiction of the court. In the other (criminal) the people, the state, is guilty of no wrong."

58. See Holmes, J., dissenting in *Olmstead v. United States*, 277 U. S. 438, 470 (1928), linking together the federal prosecutor and the federal court in a case involving admissibility of evidence secured by unlawful wire tapping: ". . . no distinction can be taken between the Government as prosecutor and the Government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business, it does not permit the judge to allow such iniquities to succeed."

59. See note 44 *supra* and text thereto.

60. See note 48 *supra* and text thereto.

61. See note 50 *supra* and text thereto.

62. See note 52 *supra*.

law rules depend? They depend upon principle, upon policy. And how is that policy to be discovered? At least in part it is to be discovered in legislation, which often reflects a policy broader than the actual coverage of the statutes themselves. The state and federal extradition statutes and kidnapping laws are all expressive of a policy strongly opposed to the police practices considered in this article. In order further to effectuate this policy, and to discourage these practices, the courts should rule as a matter of common law that they will not exercise jurisdiction over individuals whose presence was obtained in violation of these statutes.⁶³

If a state should decide that its policy forbids the trial of a person kidnapped and imported from another state, it may then have to draw some lines. Assuming that the state should hold there is no jurisdiction to try the defendant if the state's own officers do the kidnapping on their own initiative, what if the kidnapping is done by the same officers but with the blessing of the police of the asylum state? Or what if the latter themselves obligingly seize him and dump him over the state border? Or suppose that private persons, rather than the police, perform the abduction. Perhaps there is an analogy in the cases involving illegal searches and seizures in those jurisdictions which adopt the federal rule of exclusion: evidence obtained by the officers of the prosecuting government or by others cooperating with or instigated by them is excluded;⁶⁴ but not so evidence handed over by other governments or by private parties acting on their own initiative.⁶⁵

CONCLUSIONS

The United States Supreme Court has definitely settled that the trial by a state of an individual whose presence in the state was procured by his unlawful kidnapping and abduction by the police of that state is not a violation of the federal kidnapping statute, of the extradition provisions of the federal Constitution or statute or of the due process clause.

As to how the states, if unrestrained by federal control, should decide, it is surprising to find that all the states which have considered the problem permit the trial of persons who are in the

63. See for specific instances of this line of reasoning Dowling, Patterson and Powell, *Materials for Legal Method*, c. 7 (2d ed. 1952), entitled "Coordination of Judge-Made and Statute Law."

64. *E.g.*, *Byars v. United States*, 273 U. S. 28 (1927).

65. *E.g.*, *Burdeau v. McDowell*, 256 U. S. 465 (1921). See cases cited in Plumb, *Illegal Enforcement of the Law*, 24 Cornell L. Q. 337, 353 n. 68-72 (1939).

state by virtue of this sort of police lawlessness. This is inconsistent with the views of at least some of these states as to analogous situations in the fields of criminal and civil procedure. There are strong reasons for deterring police from this type of lawless law enforcement, and these reasons of policy are embodied in the legislation of all the states and of the United States Government.

It seems that the courts have simply fallen into the habit of repeating, parrot-like, that a court does not care how a defendant comes before the court, without thinking whether such a rule is sound on principle. In these days of low moral standards among public officials, both law enforcement officers and others, it is especially important to re-establish public respect for law. This simply cannot be done if the very people who enforce the law are themselves guilty of serious violations of law. A rule of procedure which would forbid courts to try accused persons who have been subjected to the type of lawless treatment covered in this article would help to resurrect something we seem to have lost and which we badly need to find—a spirit of respect for law and order.