right to exact any conditions it sees fit, seems preferable. If the United States were exempt from the rules of contract, considerations in support of or opposition to a claimed concession would become irrelevant. Conversely, such considerations are determinative of controversies resolved under existing contract law. Blanket endorsement of such an exemption would invite extreme business practices with ramifications affecting a sizeable percentage of commercial transactions. Such a license, manifestly impinging upon the security of government contractors, should be vindicated only upon a showing of positive necessity. Contractors' familiarity with existing commercial practice and aversion to uncertain change might necessitate a substitute for security in the form of increased cost of goods and services to Government. It should not be prematurely assumed that contract doctrine lacks the flexibility to adapt itself to the changing position of Government in our economy.

The delicate reconciliation of interests required can best be accomplished by adherence to existing contract doctrine whenever possible, by intelligent legislative or judicial adaptation of existing principles to new situations where necessary, and above all, by a method of judicial decision which clearly presents the competing factors in a controversy.

EFFECT OF ILLEGAL ABDUCTION INTO THE JURISDICTION ON A SUBSEQUENT CONVICTION

As prerequisites to a valid criminal conviction the accused must be present at all proceedings of the court[1] and must be tried in the state in which the alleged crime was committed.[2] While these requirements cause little difficulty when the accused is apprehended within the jurisdiction in which the crime occurred, frequently the individual has fled the jurisdiction of the accusing state. In contemplation of this possibility, the Constitution expressly permits rendition of prisoners from one state to another.[3] The procedures established to implement the Constitutional provision[4] are comparatively simple,[5] and rendition ordinarily will be granted,[6] usually as a matter of course. Nevertheless, at times overzealous police officers remove the accused from another jurisdiction with-

1. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 413 *et seq.* (1947).
2. See Note, 15 L.R.A. 722 (1892).
3. U.S. CONST. Art. IV, § 2.
4. 18 U.S.C. § 3182 (Supp. 1951).
5. See Note, 135 A.L.R. 973 (1941).
6. Plumb, *Illegal Enforcement of the Law,* 24 CORNELL L.Q. 337, 349 (1939)

out resorting to the available legal machinery. Frequently, this may be accomplished without explanation to the prisoner of his right to demand rendition and against his active resistance.[7]

Attempts by abducted prisoners to contest the jurisdiction of the trial court either during the trial or by post-conviction remedies, have, with rare exceptions, failed in the state courts. As a general rule, the right of a court to try a person will not be questioned when he is found within its territorial jurisdiction and detained under a legally issued process.[8] It is immaterial whether the prisoner was brought before the court by irregular rendition or extradition, illegal arrest, or even kidnapping.

Judicial justification of this principle is based on the theory that illegality of antecedent events, although an infringement of individual rights, should not render detention invalid and excuse the prisoner from answering to the state whose laws he has violated.[9] The illegal arrest and removal from another state do not effect the merits of the criminal charge.[10] Further, the defendant may not invoke the theory of comity, even though indignities have been committed against the country or state

7. This is but a segment of the broader problem of illegal law enforcement practices. See POUND, CRIMINAL JUSTICE IN AMERICA 186 (1930); NATIONAL COMMITTEE ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1930); Plumb, *supra* note 6.

8. See Note, 195 A.L.R. 947 (1946) and cases collected therein, and cases cited in Plumb, *supra* note 6, at 340. Kansas is the only state which may be said to deviate from the general rule. State v. Garrett, 57 Kan. 132, 45 Pac. 177 (1896); State v. Simmons, 39 Kan. 262, 18 Pac. 177 (1888). However, the holding in these cases might well be abrogated by State v. Wellman, 102 Kan. 503, 170 Pac. 1052 (1918), where it was stated that the jurisdiction of the district court to try a person does not depend upon the manner in which he came within the state, although in a particular case there may be such oppression as to justify a dismissal. See also, Foster v. Hudspeth, 170 Kan. 338, 224 P.2d 987 (1950), where a federal parolee was forcibly returned to the state without extradition proceedings, it was held that the state court had jurisdiction to try the case for the crime committed in that state. The court cited with approval the *Wellman* case and the Note in 165 A.L.R. 948, which states the generally accepted view.

It would appear that the Texas courts hold to the general rule with respect to interstate abduction, *Ex parte* Davis, 51 Tex. Crim. Rep. 608, 103 S.W. 891 (1907), but this is probably not true where the abduction takes place in a foreigu country and is carried out by American officers acting under governmental authority. *Ex parte* Wilson, 63 Tex. Crim. Rep. 281, 140 S.W. 98 (1911); Benavidez v. State, 143 Tex. Crim. Rep. 481, 154 S.W.2d 260 (1941), *cert denied*, 315 U.S. 811 (1942).

Nebraska, which formerly followed the minority view, *In re* Robinson, 29 Neb. 135, 45 N.W. 267 (1890), now holds with the majority. Jackson v. Olson, 146 Neb. 885, 22 N.W.2d 124 (1946), overruling the *Robinson* case.

9. See Lascelles v. Georgia, 148 U.S. 537 (1893); Cook v. Hart, 146 U.S. 183 (1892); Mahon v. Justice, 127 U.S. 700 (1888); Ker v. Illinois, 119 U.S. 436 (1886); United States *ex. rel.* Voight v. Tombs, 67 F.2d 744 (5th Cir. 1933); Pebley v. Knotts, 95 F. Supp. 283 (N.D. W.Va. 1951); People v. Pratt, 78 Cal. 345, 20 Pac. 731 (1889).

10. Pettibone v. Nichols, 203 U.S. 192 (1906); *Ex parte* Moyer, 12 Idaho 250, 85 Pac. 897 (1906).

from which he was taken.[11] And, as has been pointed out, there is no established process or authority by which the prisoner may be returned to the state from which he was abducted.[12]

For many years, the refusal of the state courts to release a prisoner illegally brought into the jurisdiction has been sustained against attacks based on the extradition clause of the Constitution,[13] the Federal Removal Statute,[14] and the due process clause of the Fourteenth Amendment. *Ker v. Illinois,*[15] decided in 1886, first held that there was no violation of a constitutional right in convicting a prisoner subsequent to abduction into the state from a foreign country, in the absence of an extradition treaty.[16] The holding of the *Ker* case later was extended, in *Mahon v. Justice,*[17] to the situation involving prisoners kidnapped by police officers from sister states;[18] and it has been consistently applied in subsequent Supreme Court cases, and in numerous lower court decisions.[19]

Despite this long accepted rule, a recent decision of the Sixth Circuit, *Collins v. Frisbie,*[20] granted relief to a state prisoner on a petition for federal habeas corpus alleging seizure and forcible abduction into the

11. Pettibone v. Nichols, 203 U.S. 192 (1906); Lascelles v. Georgia, 148 U.S. 537, (1893); Cook v. Hart, 146 U.S. 183 (1892); Mahon v. Justice, 127 U.S. 700 (1888); United States *ex. rel.* Voight v. Toombs, 67 F.2d 744 (5th Cir. 1933); United States v. Insull, 8 F. Supp. 310 (N.D. Ill. 1934); *Ex parte* Moyer, 12 Idaho 250, 85 Pac. 897 (1906).

12. Pettibone v. Nichols, 203 U.S. 192 (1906); Mahon v. Justice, 127 U.S. 700 (1888); Pebley v. Knotts, 95 F. Supp. 283 (N.D. W.Va. 1951); *Ex parte* Moyer, 12 Idaho 250, 85 Pac. 897 (1906).

13. U.S. CONST. Art. IV, § 2.

14. 18 U.S.C. § 3182 (Supp. 1951). The first statute passed to implement interstate rendition was enacted in 1793.

15. 119 U.S. 436 (1886).

16. United States v. Rauscher, 119 U.S. 407 (1886), was decided the same day, and should be considered with the *Ker* case. The *Rauscher* case held that when a fugitive was legally returned from a foreign country under an extradition treaty but was tried for a crime other than that for which he was extradited, his surrender under the treaty was conditional and for a special purpose. Hence, he could be tried for no other crime without first being given the opportunity to return. In Lascelles v. Georgia, 148 U.S. 537 (1893), it was held that in instances of interstate rendition a prisoner *may* be tried for any offense, not merely the one specified in the rendition proceedings.

17. 127 U.S. 700 (1888).

18. The rule was held to apply, even though the state demanded the return of the person kidnapped from within its borders, although early cases indicated an opposite result; *e.g.,* Dow's Case, 18 Pa. 37 (1851). The general rule also applies if the state itself becomes the kidnapper, rather than merely taking advantage of an officers unauthorized action. See, Pettibone v. Nichols, 203 U.S. 192 (1906).

19. See Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950); Chandler v. United States, 171 F.2d 921 (1st Cir. 1948); former two cases involve individuals brought forcibly from Germany into the District of Columbia; Hatfield v. Warden of State Prison of Southern Michigan, 88 F. Supp. 690 (E.D. Mich. 1950); Pebley v. Knotts, 95 F. Supp. 283 (N.D. W.Va. 1951); People v. Mahler, 45 N.W.2d 14 (Mich. 1950); People v. Yonders, 96 Cal.App.2d 562, 215 P.2d 743 (1950); Wise v. State, 96 N.E.2d 786 (Ohio 1950).

20. 189 F.2d 464 (6th Cir. 1951).

convicting state by police officers acting beyond their territorial jurisdiction. The acts of the state officials were held to be a violation of the Federal Kidnapping Act.[21] The early Supreme Court cases establishing the contrary rule were distinguished on the ground that they antedated the enactment of the kidnapping statute.[22]

Illegal methods indulged in by law enforcement officials are without doubt reprehensible. However, direct methods of preventing such practices have proved, in large measure, illusory. Sheer physical resistance can hardly be considered effective.[23] The necessity of prompt decision and possible adverse consequences render it a course of conduct not seriously to be suggested. Civil remedies, also, are likely to be unavailing. While liability may be asserted against the officers concerned, their lack of affluence and the restrictions on garnishment in most instances prevent recovery.[24] Furthermore, there is no liability in the offending state or municipality, where financial responsibility is certain to exist.[25] Criminal penalties against the offending officers often are available, and usually are severe, but unfortunately, they are seldom availed of. Prosecutors seem loath to proceed against officers who have assisted them in bringing an individual to trial.[26]

The lack of effective direct remedies to halt the practice of bringing an accused into the jurisdiction illegally gives rise to the question suggested by *Collins v. Frisbie, i.e.,* whether such law enforcement methods should be discouraged by the imposition of a so-called indirect remedy. Perhaps the injury to the individual should be redressed, and future illegal abductions by police officers curtailed, by denying to the state the

21. 18 U.S.C. § 1201 (Supp. 1951), also known as the Lindbergh Act. It is interesting to note that the case which tested the constitutionality of this act also involved kidnapping into the jurisdiction to be tried for the crime. Robinson v. United States, 324 U.S. 282 (1945).

22. The Supreme Court has accepted certiorari on the case, 20 U.S.L. WEEK 3116 (U.S. Nov. 6, 1951). The substantive problem of bringing into the jurisdiction illegally should be considered. However, the procedural difficulties might well prevent the Court from considering the merits, since state remedies have not been exhausted under the doctrine of Darr v. Burford, 339 U.S. 200 (1950). On this point see Note, 26 IND. L.J. 552 (1951).

23. See Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures,* 25 COL. L. REV. 11, 22 (1925).

24. See ORFIELD, CRIMINAL PROCEDURES FROM ARREST TO APPEAL 28 (1947); Hall, *The Law of Arrest in Relation to Contemporary Social Problems,* 3 U. OF CHI. L. REV. 345 (1936).

25. A significant attempt has been made to improve the situation by legislation requiring the filing of an official bond. Unfortunately, however, these statutes cover only village constables and county sheriffs, those least likely to engage in the act of kidnapping. Furthermore, the efficacy of such bonds is limited by the law of suretyship. See ORFIELD, *op cit. supra* note 24, at 29; 6 MCQUILLAN, THE LAW OF MUNICIPAL CORPORATIONS § 2591 (2d ed. 1928).

26. See Plumb, *Illegal Enforcement of the Law,* 24 CORNELL L.Q. 388 (1939).

fruit of the illegal activities. This question resolves itself into a consideration of whether the social interest is best served by permitting a criminal to be freed because law officers employed illegal means to bring him before the court. Generally, those advocating the employment of indirect remedies[27] place great stress on the contention that in freeing individuals dealt with illegally, public respect for the law is encouraged. Accented is the importance of respect for the law as a potent element in law enforcement. Balanced against this is the principle that the guilty should be punished, and the belief that public confidence also is betrayed when an obviously guilty criminal escapes punishment.[28] However, the Anglo-Saxon mind is imbued with ideas which often impede the operation of the canon that the guilty should be punished.[29] These ideas may, when the illegal practices shock the court's sense of decency and fair play, fairly outweigh the cannon entirely.

In the past, the question of whether these considerations warrant the use of an indirect remedy has chiefly concerned the legality of introducing evidence obtained by illegal search and seizure[30] and by wiretapping.[31] In these two areas of illegal law enforcement, which involve principles somewhat analogous to the abduction problem, the Supreme Court has applied indirect remedies to deter illegal activities by federal officers, either by constitutional interpretation[32] or by statutory construction.[33] In neither instance, however, has the Court required application of the indirect remedy in cases arising in the state courts.

The Supreme Court's decision in *Wolf v. Colorado*,[34] while stating that illegal search and seizure violates the "concept of ordered liberty" and thus due process under the *Palko*[35] dichotomy, held that this does not preclude the admission of evidence so obtained in a state criminal prosecu-

27. See the dissents of Justices Holmes and Brandeis in Olmstead v. United States, 227 U.S. 438 (1928); Conner Hall, *Evidence and the Fourth Amendment*, 8 A.B.A.J. 646 (1922).

28. See the opinion of Mr. Justice Cardozo (then judge on the New York Court of Appeals) in People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926), and Professor Wigmore's attack on indirect remedies in *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A.J. 479 (1922).

29. Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 COL. L. REV. 11, 18 (1925).

30. See Atkinson, *supra* note 29; Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361 (1920); Fraenkel, *Recent Developments in the Law of Searches and Seizures*, 13 MINN. L. REV. 1 (1928); Comment, 36 YALE L.J. 988 (1927).

31. See Note, 53 HARV. L. REV. 863 (1940).

32. See Weeks v. United States, 232 U.S. 383 (1914).

33. See Nardone v. United States, 302 U.S. 379 (1937).

34. 338 U.S. 25 (1948).

35. Palko v. Connecticut, 302 U.S. 319 (1937).

tion.[36] Therefore, for the Supreme Court to free a defendant because he was improperly brought into the jurisdiction of the convicting court compels the satisfaction of a two-fold requisite: first, that such procedure does violence to that which is "implicit in the concept of well ordered liberty,"[37] and further, that failure to comply with this standard requires that the individual be released.

There is little likelihood that the Court will reverse the long line of cases holding that illegal bringing into the jurisdiction for criminal trial is compatible with the requirements of due process, even under the modern interpretation of that clause. The criminal procedure of the states is not held to the high standard which the Fifth and Sixth Amendments impose on the federal courts.[38] And it has been held that an accused can be constitutionally convicted in the federal courts even though he has been spirited into the jurisdiction by federal officers.[39]

Should the Court determine that the right to be protected from abduction into the jurisdiction is so basic to a free society that the practice violates due process, it is even more improbable that it will take the second step under the *Wolf* approach and hold that the prisoner must be freed. The fact that thirty states admitted evidence obtained by illegal search and seizure, depending upon direct sanctions to prevent such illegal methods, was sufficient to convince the Court that the admission of such evidence did not violate the minimal standards assured by the due process clause.[40] The direct remedies available to redress an illegal search and seizure are much the same, and equally as ineffective as those available to an accused kidnapped into the jurisdiction. Furthermore, at least forty-six states uphold the jurisdiction of the court over a person illegally abducted from another state.

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36. In a dissenting opinion in Wolf v. Colorado, 338 U.S. 25 (1948), Mr. Justice Murphy raised the argument most frequently asserted by the advocates of an indirect remedy—that all direct remedies are illusionary. *Id.* at 41. See Reynard, *Freedom from Unreasonable Search and Seizure—A Second Class Constitutional Right?* 25 IND. L.J. 259 (1950); Comment, 38 CALIF. L. REV. 498 (1950); Note, 25 TULANE L. REV. 410 (1951).

37. Palko v. Connecticut, 302 U.S. 319 (1937). See *e.g.*, Adamson v. California, 332 U.S. 46 (1946) (judicial comment on failure to testify not violation of due process); Brown v. Missisippi, 297 U.S. 278 (1936) (coerced confessions violative of due process clause); Twining v. New Jersey, 211 U.S. 78 (1908) (compulsory self-incrimination not violation of due process); Hurtado v. California, 110 U.S. 516 (1884) (indictment by grand jury not essential to due process).

38. See CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 188 (10th ed. 1948).

39. See Robinson v. United States, 144 F.2d 393 (6th Cir. 1944), *aff'd*, 324 U.S. 282 (1945); United States *ex rel.* Voight v. Toombs, 67 F.2d 744 (5th Cir. 1933); Whitney v. Zerbst, 62 F.2d 970 (10th Cir. 1933); *Ex parte* Lamar, 274 Fed. 160 (2d Cir. 1921); Chapman v. Scott, 10 F.2d 156 (D. Conn. 1925); Snedeker v. United States, 54 F. Supp. 539 (M.D. Pa. 1944).

40. Wolf v. Colorado, 338 U.S. 25, 33 (1948).

Although the dissenting opinion in *Mahon v. Justice*[41] insisted that a federal question was raised due to a violation of the extradition clause of the Constitution, the federal courts have uniformly held otherwise.[42] It is not contemplated that these decisions will be overturned. The section has been so narrowly construed, since the decision in *Kentucky v. Denison,*[43] that it has been necessary to resort to uniform state legislation, compacts among the states, and federal commerce clause legislation to overcome the weaknesses of the constitutional provision.

The solution suggested in *Collins v. Frisbie,*[44] that of founding the indirect remedy on a federal statute, is at once appealing for its simplicity and uniqueness. It avoids the necessity of basing the remedy on the Constitution, which would seem to be foreclosed. And the Supreme Court has held, in the *Nardone*[45] cases, that obtaining evidence by wiretapping violates the Federal Communications Act,[46] construing the Act to render evidence so obtained inadmissible in the federal courts. However, this principle has not been applied to cases originating in the state courts.

It has been contended that the *Nardone* rule could not constitutionally govern the state courts, apparently on the ground that Congress is without power to regulate state procedure.[47] However, the voice of the Federal Government is supreme throughout its sphere of action; thus, the component parts necessarily must be subject to federal control.[48] The crime in this instance, interstate kidnapping, is a proper subject for federal legislation. Further, the supremacy clause[49] assures adherence by the judges of every state to federal law enacted pursuant to the Constitution. Accordingly, it is possible for Congress to adopt statutes which impose on all courts a duty to free those who have been brought into their jurisdiction illegally. Examples of federal statutory regulation of state

41. 127 U.S. 700 (1888).

42. Mahon v. Justice, 127 U.S. 700 (1888); Ker v. Illinois, 119 U.S. 436 (1886); United States v. Insull, 8 F. Supp. 318 (N.D. Ill. 1934); *Ex parte* Moyer, 12 Idaho 250, 85 Pac. 897 (1906).

43. 24 How. 66 (U.S. 1861). See CORWIN, *op. cit. supra* note 38, at 138.

44. 189 F.2d 464 (6th Cir. 1951).

45. Nardone v. United States, 302 U.S. 379 (1937). In the second *Nardone* case, 308 U.S. 338 (1939), the rule was clarified and extended by rendering inadmissible evidence acquired in an indirect manner from illegally intercepted messages, as well as the original messages themselves. See Comment, 3 MIAMI L.Q. 604 (1949).

46. 48 STAT. 1064 (1934), 47 U.S.C. § 605 (Supp. 1951).

47. For a discussion of this possibility, see Comment, 3 MIAMI L.Q. 604, 611 (1949). The Maryland courts have refused to follow the mandate of the Federal Communications Act. Hubin v. State, 180 Md. 279, 23 A.2d 706 (1942); Rowan v. State, 175 Md. 547, 3 A.2d 753 (1939); Hitzelberger v. State, 174 Md. 152, 197 Atl. 605 (1938). See Note, 134 A.L.R. 614 (1941).

48. M'Culloch v. Maryland, 4 Wheat. 316 (U.S. 1819).

49. U.S. CONST. Art. VI, § 2.

court procedure may be found in the Bankruptcy Act[50] and in the Federal Employers Liability Act.[51]

However, accepting Congressional competence to prohibit trial and conviction of an accused illegally brought into the jurisdiction, there are no indications that the Kidnapping Act was so intended.[52] Moreover, its distortion to connote this intention, the approach followed in the *Nardone* interpretations[53] of the Federal Communications Act, would not be justified. Freeing a prisoner because of irregularities connected with his apprehension and conviction is warranted only when there is a close causal connection between the illegal act and the conviction of the individual for the crime charged. Efficient administration of the criminal processes would be impossible if every irregularity, however slight, were sufficient to annul a conviction.[54] Ouly when the aberrations impede a fair trial and shock the sense of justice should they be remedied by indirect means.

The only loss to the defendant from an illegal abduction is, essentially, the Governor's hearing in the rendition proceedings. However, this hearing does not in the least inquire into the merits of the charge, but merely establishes that the person sought to be removed is the one accused, and that he has fled the demanding state. Hence, the relationship between the abduction and the subsequent conviction seems too slight to warrant redressing any harm to the prisoner by setting aside the conviction. There is not the direct bearing on a finding of guilt or innocence present in other areas of illegal law enforcement such as coerced confessions, use of evidence obtained by illegal search and seizure, and denial of the right to counsel.

Failure by law enforcement officials to comply with the legal machinery provided for transporting an accused into the jurisdiction for trial unquestionably should be condemned. The solution most desired,

50. See People v. Lay, 193 Mich. 17, 159 N.W. 299 (1916), holding that the Bankruptcy Act, which prohibits the use of information disclosed in bankruptcy proceedings, also excludes the use of such evidence in the state courts.

51. See Minnesota, St. P. & S. St. M. Ry. v. Moquin, 283 U.S. 570 (1930), and Mondon v. New York, N.H. & H. Ry., 223 U.S. 1 (1911), in which the procedure of the state courts was held to be regulated by the Act.

52. The purpose of the section was to outlaw interstate kidnapping, rather than general transgressions of morality involving the crossing of state lines. Chatwin v. United States, 326 U.S. 455 (1946).

53. See Note, 53 HARV. L. REV. 863, 865 (1940).

54. In Hatfield v. Warden of State Prison of Southern Michigan, 88 F. Supp. 690 (E.D. Mich. 1950), the court followed the general rule. The opinion points out the fact that many of the petitions for habeas corpus, which allege kidnapping into the jurisdiction of the convicting state, are by petitioners convicted many years in the past. Hence, the allegation of kidnapping is merely a currently popular grounds for petitioning by prisoners with very little showing of exceptional circumstances of peculiar urgency or exhaustion of state remedies. See also, Speck, *Statistics on Federal Habeas Corpus,* 10 OHIO ST. L.J. 337 (1949).

but presently least effective, is resort to a direct remedy, rigorously enforced. There is little justification for employing the sanction of an annulled conviction, when the finding of guilt is not causally related to the officers' illegal act. There is even less warrant for the approach taken in *Collins v. Frisbie*, unreasonably construing a federal statute to find this sanction commanded.