Vanderbilt Journal of Transnational Law

Volume 24
Issue 3 *Issue 3 - 1991*

Article 1

1991

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Vanderbilt Journal of Transnational Law

VOLUME 24 1991 NUMBER 3

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ABSTRACT

This Article discusses the viability of United States Transfer of Penal Sanctions Treaties, focusing primarily on the Mexican-United States Treaty. The author argues that these treaties are effective and enforceable, but have been undermined by resort to unilateral abductions by the United States.

Part I of the Article examines the history and rationales leading to the promulgation of various penal sanctions treaties. The United States has entered these treaties largely because of the rising number of United States citizens incarcerated aboard, because of the substandard treatment afforded such prisoners, and because of the idea that offenders' rehabiliation will be eased if they are in their home states during incarceration.

Part II examines the actual treaties and their effects. The author discusses several relevant provisions of the treaties, including those concerning the offender, the crime committed, and the required procedures to complete a transfer. Specific procedural requirements must be met regarding consent, notification, initiation, and location. The author also reviews guidelines for post-transfer procedures and treatment of the transferee.

Part III addresses the continued use of abductions abroad by the

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United States. The author suggests that the reason for the increased use of extraterritorial apprehensions is the failure of the extradition process amid pervasive concern over problems such as drug trafficking and terrorism. While reviewing United States judicial decisions concerning these abductions, the author emphasizes that the focus should not be on these decisions, but on the tendency that these abductions will have towards undermining cooperative international relations.

Part IV addresses various concerns arising under Transfer of Penal Sanctions Treaties and suggests practical ways to refine these treaties to improve their effectiveness. The problems the author addresses include the potential for use of the treaties to evade constitutional requirements, the effect of the federal sentencing guidelines on parole under the treaties, and the increased use of passive personality jurisdiction to prosecute crimes against nationals.

The author concludes by stating that the Transfer of Penal Sanctions Treaties can and do work. Continued unilateral abductions by the United States, however, will harm both the general level of international cooperation and the individual United States citizens imprisoned abroad.

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I. INTRODUCTION

During the past twenty-five years, the United States and Mexico have entered into a multitude of bilateral agreements aimed at combatting the insistent and ever-growing problem of narcotics trafficking. For example, in 1969, the governments of Mexico and the United States entered into "Operation Intercept." Pursuant to this operation, customs agents of the United States thoroughly searched every person and automobile entering the United States from Mexico during one ten-day period at the United States-Mexico border.[1] Shortly thereafter, the two states entered into "Operation Cooperation," whereby Mexico gave the United States fourteen million dollars in aid.[2] Other agreements and arrangements have been entered into between the two states through the years in an attempt to combat the problem.[3]

Concomitant with the efforts to combat the problem on a law enforcement level, the two states, faced with an increasing number of the other's nationals in their prisons and a rising swell of complaints from the families of those detained, sought to enter into a treaty that would improve the conditions of the offenders' confinements, as well as enhance their rehabilitation. As a result, in 1976 the United States and Mexico entered into a Transfer of Penal Sanctions Treaty, whereby prisoners could and

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1. *See U.S. Citizens Imprisoned in Mexico: Hearings Before the Subcomm. on International Political and Military Affairs of the House Comm. on International Relations*, 94th Cong., 1st and 2d Sess., pt. 2, at 76 (1975-76) [hereinafter *House Hearings*] (statement of Loren Lawrence, Dep. Administrator, Bureau of Security and Consular Affairs, Dep't of State); *id.* (pt. I) app., at 91 (reprinting Stanley Meisler, *War on Drugs: Mexico No Place to Get Caught*, L.A. TIMES, Dec. 9, 1974). The purpose of this plan was to pressure the Mexican government into aiding United States officials in their antidrug efforts. The delays caused by these intensified searches, however, had adverse effects on both the flow of commerce between the countries and the tourist trade on which Mexico heavily depends. *Id.*; *see* Abraham Abramovsky & Steven J. Eagle, *A Critical Evaluation of the Mexican-American Transfer of Penal Sanctions Treaty*, 64 IOWA L. REV. 275, 276 n.8 (1979); *see also* EDWARD M. BRECHER & THE EDITORS OF CONSUMER REPORTS, LICIT AND ILLICIT DRUGS 434-50 (1972).

2. In addition, the United States trained 276 Mexican federal police officers and 52 customs agents in modern narcotic investigative techniques. *House Hearings, supra* note 1, pt. I app., at 91 (reprinting Meisler, *War on Drugs: Mexico No Place to Get Caught*, L.A. Times, Dec. 9, 1974). For a discussion of the various narcotics finding their ways to the United States shores in the early 1970s, see *id.* (pt. I), at 65 (statement of John T. Cusack, Chief, Int'l Operations Div., Drug Enforcement Administration, U.S. Dep't of Justice); *id.* (pt. II), at 42 (statement of Hon. Benjamin A. Gilman, Rep. N.Y.).

3. *See infra* notes 4-8 and accompanying text.

would be returned to their home states to complete sentences of incarceration.[4] By and large, the treaty has been effective; since 1977, its utilization has resulted in the return of approximately 968 United States citizens and 577 Mexicans to their home states.[5]

More recently, in a further effort to enhance this cooperation, the two states concluded a Mutual Legal Assistance Treaty[6] in 1987 and signed an agreement for Cooperation and Combatting Narcotics Trafficking and Drug Dependency in February 1989.[7] The latter agreement addressed such areas as the prevention and reduction of the demand for narcotics, control of drug supply, and the rehabilitation and treatment of drug addicts.[8]

In the aggregate, these agreements represent a comprehensive strategy by both states in an attempt to eliminate narcotics trafficking. They signify the recognition by both governments that a mutual effort must be mounted to interdict the flow of narcotics successfully and effectively, to enhance the abilities of both nations to prosecute the offenders, and to provide novel methods to enhance their incarceration and rehabilitation upon conviction.

Unfortunately, these agreements have been jeopardized by the recent insistence of the United States to engage in a unilateral policy of abduction. Perhaps even more disturbing was the unwillingness of the United States to return an abducted offender even though Mexico repeatedly and vociferously protested his capture. At the present time, more than thirty-six extradition requests by Mexican authorities have gone unheeded.[9]

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4. Treaty on the Execution of Penal Sentences, Nov. 25, 1976, U.S.-Mexico, 28 U.S.T. 7399 [hereinafter Treaty with Mexico]. The enabling legislation was Act of Oct. 28, 1977, Pub. L. No. 95-144, 91 Stat. 1212; 10 U.S.C. 955; 18 U.S.C. 3244, 4100-15.

5. Telephone interview with Helen Butler, Public Affairs Specialist of the Federal Bureau of Prisons, Department of Justice, Washington, D.C. (Aug. 19, 1991).

6. The treaty provides for mutual assistance in the taking of testimony and statements of witnesses; provision of documents, records, and evidence; the execution of requests for searches and seizures; the serving of documents; and the provision of assistance in procedures regarding the immobilization, security, and forfeiture of the proceeds, fruits, and instrumentalities of crime. *See* Letter of Transmittal from President Reagan to Senate, Feb. 16, 1988, S. TREATY DOC. No. 100-13, 100th Cong., 2d Sess. III (1988).

7. Bruce Zagaris, *Mexico and U.S. Conclude Narcotics Cooperation Agreement*, 5 INT'L ENFORCEMENT L. REP. 87, 87 (1989).

8. In addition, this agreement requires that authorities from both the United States and Mexico form a commission that meets at four-month intervals to form recommendations to both governments with respect to the coordination of their law enforcement branches. *Id.* at 88.

9. Interview with Prado Nanez, Legal Attache to the Mexican Consulate, in New

This Article's thesis is that resort to unilateral abductions will impair severely the cooperative efforts between the two states in general and will imperil the viability of the Transfer of Penal Sanctions Treaty in particular. While this Article focuses primarily on the viability of the Mexican-United States Transfer of Penal Sanctions Treaty, many of the issues discussed could be extrapolated to the relations with, and the viability of, similar Transfer of Penal Sanctions Treaties between the United States and other nations. These states include Canada,[10] Turkey,[11] Panama,[12] Peru,[13] Bolivia,[14] Thailand,[15] and France.[16] Moreover, the governments of the United States and Canada serve as observers to a similar treaty by the member states of the Council of Europe.[17]

Part I of the Article examines the history and rationales leading to the promulgation of the various penal sanctions treaties. Part II looks to the effect of these treaties, including provisions of the treaties themselves and the processes that must be followed for a transfer to be completed. Part III considers the continued use by the United States of extraordinary apprehensions, and the damaging effect that these apprehensions can have on international relations in general. Part IV provides an attempt to refine these treaties in order to make them more feasible and more productive. Finally, this Article concludes that the United States, by resorting to *ad hoc* abductions, will undermine severely the efficacy of the Transfer of Penal Sanctions Treaty concept. Ironically, this would not only have adverse effects on those imprisoned abroad, but it would decrease substantially the mutual efforts of treaties such as the Mutual Legal Assistance Treaties to combat on an international level the flow of

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York, N.Y. (Mar. 1990).

10. Treaty on the Execution of Penal Sentences, Mar. 2, 1977, U.S.-Can., 30 U.S.T. 6263 [hereinafter Treaty with Canada].

11. Treaty on the Enforcement of Penal Judgments, June 7, 1979, U.S.-Turk., 32 U.S.T. 3187 [hereinafter Treaty with Turkey].

12. Treaty on the Execution of Penal Sentences, Jan. 11, 1979, U.S.-Pan., 32 U.S.T. 1565 [hereinafter Treaty with Panama].

13. Treaty on the Execution of Penal Sentences, July 6, 1979, U.S.-Peru, 32 U.S.T. 1471 [hereinafter Treaty with Peru].

14. Treaty on the Execution of Penal Sentences, Feb. 10, 1978, U.S.-Bol., 30 U.S.T. 796 [hereinafter Treaty with Bolivia].

15. Treaty on Cooperation in the Execution of Penal Sentences, Oct. 29, 1982, U.S.-Thail., SEN. TREATY DOC. No. 98-8, 98th Cong., 1st Sess. 1 (1983) [hereinafter Treaty with Thailand].

16. Convention on the Transfer of Sentenced Persons, Jan. 28, 1983, U.S.-Fr., T.I.A.S. No. 10823 [hereinafter Treaty with France].

17. Convention on the Transfer of Sentenced Persons, Mar. 21, 1983, T.I.A.S. No. 10,824, Europ. T.S. No. 112 [hereinafter Treaty of Council of Europe].

narcotics into the United States and attendant problems, including money laundering that results in vast amounts of currency leaving the United States.

II. THE HISTORY AND REASONS FOR PROMULGATING TRANSFER OF PENAL SANCTIONS TREATIES

Transfer of Penal Sanctions Treaties have been signed by the United States largely in response to the rising number of United States citizens incarcerated abroad.[18] In 1969, there were approximately one hundred United States citizens in Mexican jails. By October 1977, because of the increase in both narcotics trafficking and consumption, that number had swelled to six hundred.[19] At the same time, conditions in the Mexican Penal System fell far below what would be considered adequate in the United States. For example, United States citizens imprisoned in Mexico frequently alleged that their captors tortured them, and an investigation

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18. Transfer of Penal Sanctions Treaties are not the first instruments to permit foreign prisoners to be transferred to their home state for the duration of their sentences. Between 1947 and 1966, in response to the possibility of United States troops stationed abroad being subject to foreign penal laws, the United States entered into several Status of Forces Agreements that allowed for such transfers. *See* Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67; Protocol to Amend Article XVII of the Administrative Agreement Under Article III of the Security Treaty, Sept. 29, 1953, U.S.-Japan, 4 U.S.T. 1846; Agreement Concerning Military Bases, Mar. 14, 1947, U.S.-Phil., art. XIII, 61 Stat. 4019; Agreement Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, July 9, 1966, U.S.-Korea, 17 U.S.T. 1677 [hereinafter Korean SOFA]; *see also* Abramovsky & Eagle, *supra* note 1, at 317 n.223. The Status of Forces Agreements differed from the Transfer of Penal Sanctions Treaties in that they provided protection during the trial procedure itself, such as the furnishing of an interpreter upon request and the ability to have a United States representative present at the trial. *See id.* at 319; Korean SOFA, *supra*, art. XXII, § 9(f)-(g). In contrast, parties will consider the Transfer of Penal Sanctions Treaties only following an individual's incarceration.

19. Of the 600 United States citizens incarcerated in Mexico in 1976, approximately 70% had been charged with possession of marijuana or cocaine. *House Hearings, supra* note 1, pt. I, at 17 (statement of Leonard F. Walentynowicz, Administrator, Bureau of Security and Consular Affairs, U.S. Dep't of State). Soon after the treaty was signed, however, the Mexican government announced that prosecutions of minor possessors would be toned down. Marlise Simons, *Mexicans Dropping Drug Cases Against Small-Use Tourists*, WASH. POST, Apr. 17, 1977, at A13, col. 1. It was revealed in hearings before the House of Representatives that as of 1976 there were approximately 1000 U.S. citizens imprisoned in foreign lands. In addition to the approximately 600 U.S. citizens in Mexico, there were 114 imprisoned in Germany, 92 in Colombia, and 55 in Spain. *House Hearings, supra* note 1, pt. II, at 76 (statement of Loren Lawrence).

by the United States Department of State uncovered no less than sixty-one cases of physical abuse administered over the first six months of 1976.[20] In addition, officials gave prisoners benefits and amenities based on the amount of money that they could pay for these comforts.[21] Attempts to modernize the Mexican penal system were somewhat successful, but "[f]undamental reform . . . remained out of reach primarily due to the enormous cost of providing a penal system meeting American standards out of a Mexican budget that can afford only limited benefits even to the honest poor."[22]

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20. *See generally House Hearings, supra* note 1, pt. I, at 13 (statement of David S. Julyan); *id.* (pt. III), at 9 (statement of Leonard Walentynowicz, Administrator, Bureau of Security and Consular Affairs, United States Dep't of State), N.Y. TIMES, May 1, 1977, § 6 (Magazine), at 54, col. 4. Relatives and friends of United States citizens incarcerated in Mexico turned to the media to help gain attention to the substandard conditions in those jails. *See* Gregory Gelfand, *International Penal Transfer Treaties: The Case For an Unrestricted Multilateral Treaty*, 64 B.U.L. REV. 563, 565 n.8 (1984) (stating that "[p]articularly before the first treaty with Mexico, there was an increasing number of reports as many United States citizens began to turn to the press and other media in an effort to help their friends and relatives").

21. *See House Hearings, supra* note 1, pt. II, at 39-41 (statement of Hon. Benjamin A. Gilman, Rep. N.Y.). Mr. Gilman testified that:

> With only the basics for a crude existence being provided by the Government, all additional necessities for a mentally and physically healthy life have to be purchased by the inmate. Protection from harassment, adequate clothing, a clean cell, and even a decent meal rested entirely upon the ability of the inmates to purchase those items from the administrators, from the guards, and from other inmates. For those who could afford it, there were even television[s], stereos, and inmate servants.
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> To the 68 Americans, this means their family and friends must support them throughout their entire prison term at great expense and inconvenience. Initially, a substantial protection fee is extracted from each prisoner, and the prisoner then "buys his cell" similar to a condominium arrangement; the "purchase price" ranging from $800 to $1,000 for a preferable cell. On the average, a prisoner must spend about $50 a week to survive in Lecumberri [the oldest Mexican federal prison at the time, located on the outskirts of Mexico City]. . . .
>
> . . . There were stories of payments to send a letter, to see the administrators, and even to visit the doctor.
>
> It is obvious that one part of this system, leading to earned good time for work performed, is the center of corruption. For every 2 days working on a job, 1 day of your sentence is subtracted. This important aspect of this prison system has lead [sic] to the wholesale selling of prison jobs through payment, averaging about $1,500 apiece, and something, incidentally, that was not available to the American prisoners. None of them had the benefit of being able to purchase good time.

Id. at 39-40. The possibility of conjugal visits is one additional benefit available to prisoners in Mexican jails that is not permitted in the United States penal system.

22. Detlev F. Vagts, *A Reply to "A Critical Evaluation of the Mexican American*

Embarrassed by reports of substandard treatment, Mexico sought to remedy the situation. An integral part of the remedy was the proposal that a treaty be promulgated between the United States and Mexico to afford United States citizens the opportunity to serve their sentences in the United States if they met certain conditions. Likewise, Mexican nationals would be given the same opportunity to return to their home state.[23] Because Mexican authorities sought to effect this treaty in the wake of United States complaints, Mexicans opposed to the treaty at its inception could have argued that the treaty was "merely an effort to mollify United States authorities by surrendering jurisdiction over United States nationals who have violated Mexican law" and "conced[ed] to the United States extraterritorial jurisdiction over United States nationals who violate Mexican domestic penal laws."[24]

Each of the treaties enumerates the underlying reasons for the states' entrance into the treaty. The common denominator in each of the treaties is that being in one's home state during and immediately following incarceration will further the offender's social rehabilitation.[25] For exam-

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Transfer of Penal Sanctions Treaty", 64 IOWA L. REV. 325, 327 (1979).

23. *House Hearings, supra* note 1, pt. III, at 1 (statement of Hon. Dante B. Fascell, Chairman of the Subcommittee on International, Political, and Military Affairs, House Internat'l Relations Comm.). There is evidence, however, that the United States provided the impetus and the pressure for the countries to enter into a Transfer of Penal Sanctions Agreement. *See Penal Treaties with Mexico and Canada: Hearings before the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. 2 (1977) [hereinafter *Senate Hearings*] (statement of Sen. John Sparkman).

According to one article, the United States Department of State sought to sign the first Transfer of Penal Sanctions treaty with Canada to "minimize the possibility that such treaties would meet with resistance in the United States." Gelfand, *supra* note 20, at 573. This author stated:

> The hope of the Department was that, due to respect in the United States for the Canadian system of justice, a penal transfer treaty with Canada would withstand attack. Success of the treaty with Canada would thus create a domestic atmosphere favorable to the negotiation of such treaties with other countries whose judicial systems were more suspect. Circumstances interfered, however, and the United States had to enter a treaty with Mexico without having had the opportunity to lay the desired groundwork. Prison conditions in Mexico continued to attract publicity and in 1974 and again in 1976, United States prisoners in Mexico staged a hunger strike to dramatize their extreme plight. In response, the State Department turned its attention directly to Mexico.

Id. (citations omitted).

24. Abramovsky & Eagle, *supra* note 1, at 292-93. For further discussion on recognized extraterritorial bases of jurisdiction, see *infra* notes 130-31 and accompanying text.

25. *See* Treaty with Mexico, *supra* note 4, at 7401; Treaty with Canada, *supra* note 10, at 6265; Treaty with Turkey, *supra* note 11, at 3189; Treaty with Panama, *supra* note 12, at 1567; Treaty with Peru, *supra* note 13, at 1473; Treaty with Bolivia, *supra*

ple, the treaty with Turkey addresses this concern in both its introduction and body, specifically stating that "[t]he requesting state may request the other state to enforce the judgment only if . . . [t]he enforcement of the judgment in the requested state is likely to improve the prospects for the social rehabilitation of the sentenced person."[26] Benefits that inure to prisoners transferred in this manner to their home state include easier access to family, friends, and counsel, in addition to better and faster employment opportunities upon release.

Moreover, several of the treaties specifically refer to aiding the development of friendly relations between the nations involved.[27] Another common theme is the signing parties' desire to "render mutual assistance in combating crime insofar as the effects of such crime extend beyond their borders. . . ."[28]

III. THE TREATIES THEMSELVES—RELEVANT PROVISIONS

The Transfer of Penal Sanctions Treaties are substantially alike, and each has certain limiting conditions that must be complied with to effect a transfer. While certain provisions of the treaties pertain to the status of the offender, others concentrate on the nature of the crime committed, and others focus on the procedure that must be followed for a prisoner to receive a transfer and the conditions that must be complied with following this transfer.

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note 14, at 798; Treaty with Thailand, *supra* note 15, at 1; Treaty with France, *supra* note 16, at 2; Treaty of Council of Europe, *supra* note 17, at 1. These treaties may be distinguished immediately from the extradition process by showing concern for the individual; the extradition process focuses only on the states involved and provides no concern for the individual being extradited. *See infra* note 66 and accompanying text (discussing extradition).

26. Treaty with Turkey, *supra* note 11, at art. IV(e).

27. *See* Treaty with Turkey, *supra* note 11, at 3189; Treaty with Thailand, *supra* note 15, at 1; Treaty with France, *supra* note 16, at 2; Treaty of Council of Europe, *supra* note 17, at 1, T.I.A.S. 10,824 at 4 (referring to "greater unity between its members").

28. Treaty with Mexico, *supra* note 4, at 7401. *See* Treaty with Turkey, *supra* note 11, at 3189; Treaty with Panama, *supra* note 12, at 1567; Treaty with Peru, *supra* note 13, at 1473; Treaty with Bolivia, *supra* note 14, at 798; Treaty with Thailand, *supra* note 15, at 1; *see also* Treaty of Council of Europe, *supra* note 17, at 1, T.I.A.S. 10,824 at 4 (stating that Council of Europe member states are "[d]esirous of further developing international cooperation in the field of criminal law").

A. *The Offender*

All of the treaties, with the exception of the treaty between the United States and Canada, mandate that the offender must be a national of the receiving state in order to be transferred.[29] The Canadian treaty requires that the offender be a citizen of the receiving state, but the term "citizen" is deemed to include dual nationals and, when the offender is to be transferred to the United States, a United States national.[30] With respect to persons seeking transfer to the United States, the differentiation between citizen and national is of no consequence, and the treaty does not differ from the others.

Several of the treaties include additional restrictions on offenders seeking to return to their home states. In both the Mexican and Turkish treaties, for example, the offender cannot be a domiciliary of the transferring state.[31] Similarly, the treaty with Thailand provides that a transfer may be refused if the offender is a national of both the transferring and receiving states.[32]

Several of the treaties, excluding the treaty between the United States and France, also specifically provide that minors may be transferred. In addition, some provide that parties to the treaty could later determine the type of treatment to be accorded a youthful offender.[33] Also encompassed in the treaties are provisions concerning the transfer of mentally incapacitated offenders.[34]

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29. *See* Treaty with Mexico, *supra* note 4, at art. II(2); Treaty with Turkey, *supra* note 11, at art. IV(b); Treaty with Panama, *supra* note 12, at art. III(2); Treaty with Peru, *supra* note 13, at art. III(2); Treaty with Bolivia, *supra* note 14, at art. III(2); Treaty with Thailand, *supra* note 15, at art. II(2); Treaty with France, *supra* note 16, at art. 2(b); Treaty of Council of Europe, *supra* note 17, at art. 3(1)(a). The term "national," according to the Treaty of the Council of Europe, may be defined by any state by declaration addressed to the Secretary General of the Council of Europe. Treaty of Council of Europe, *supra* note 17, at art. 3(4).

30. Treaty with Canada, *supra* note 10, at art. I(d).

31. Treaty with Mexico, *supra* note 4, at art. II(3); Treaty with Turkey, *supra* note 11, at art. IV(c).

32. Treaty with Thailand, *supra* note 15, at art. II(7)(b). The treaty with Turkey is the only treaty that specifically sets forth the requirement that the sentenced person be within the territory of either state, a requirement that seems implicit in the remaining treaties because presence is essential to effecting a transfer. Treaty with Turkey, *supra* note 11, at art. IV(a).

33. Treaty with Mexico, *supra* note 4, at art. VIII(1); Treaty with Canada, *supra* note 10, at art. IV(2); Treaty with Panama, *supra* note 12, at art. VIII(1); Treaty with Peru, *supra* note 13, at art. VIII(1); Treaty with Bolivia, *supra* note 14, at art. VIII(1); Treaty with Thailand, *supra* note 15, at art. V(2).

34. These provisions state that mentally incapacitated offenders can be transferred

B. *The Crime Committed*

One of the most important requirements that must be met for an offender to be transferred is that of "double criminality." This means that the act committed constitutes an offense under the penal laws of both the transferring and receiving states.[35] The treaties, however, do not mandate that the two states' relevant penal codes mirror each other, but rather that the same basic conduct would be punishable under both penal systems.[36]

Moreover, certain crimes are excepted from transfer. For example, pursuant to the Mexican treaty, transfer will be denied if the crime committed is a "political offense," as defined in the extradition treaty between the parties, or if it constitutes an offense under either the immigration or military laws of either party.[37] The treaty with Canada contains restraints when the criminal act violates either the immigration or military laws of a party.[38] The Turkish treaty bans transfer either when the crime is a political offense, is connected to one, or is a purely military offense,[39] and several of the remaining treaties prohibit transfer when the military laws of one party have been infringed.[40] The treaty

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under special arrangements so that they can be treated in mental institutions in their home state. *See* Treaty with Mexico, *supra* note 4, at art. VIII(2); Treaty with Panama, *supra* note 12, at art. IX; Treaty with Peru, *supra* note 13, at art. IX; Treaty with Bolivia, *supra* note 14, at art. IX.

35. "Double Criminality" is defined as follows:

> [A]t the time of transfer of an offender the offense for which he has been sentenced is still an offense in the transferring country and is also an offense in the receiving country. With regard to a country which has a federal form of government, an act shall be deemed to be an offense in that country if it is an offense under the federal laws or the laws of the state or province therof.

18 U.S.C. § 4101(a) (1988).

36. *See* Treaty with Mexico, *supra* note 4, at art. II(l); Treaty with Canada, *supra* note 10, at art. II(a); Treaty with Turkey, *supra* note 11, at art. III(l); Treaty with Panama, *supra* note 12, at art. III(l); Treaty with Peru, *supra* note 13, at art. III(l); Treaty with Bolivia, *supra* note 14, at art. III(l); Treaty with Thailand, *supra* note 15, at art. II(l); Treaty with France, *supra* note 16, at art 2(a); Treaty of Council of Europe, *supra* note 17, at art. 3(1)(e).

37. Treaty with Mexico, *supra* note 4, at art. II(4). This provision also appears to abandon the requirement of double criminality in referring to offenses against the military laws of either party. *Id.*

38. Treaty with Canada, *supra* note 10, at art. II(c).

39. Treaty with Turkey, *supra* note 11, at art. V(b).

40. Treaty with Panama, *supra* note 12, at art. III(3); Treaty with Peru, *supra* note 13, at art. III(3); Treaty with Bolivia, *supra* note 14, at art. III(3); Treaty with France, *supra* note 16, at art. 3. These provisions of the treaties with Panama, Peru, and Bolivia also require that the offender has not been sentenced to the death penalty.

with Thailand differs in that it requires that the act not be "against the internal or external security of the State; against the Head of State of the Transferring State or a member of his family; or against legislation protecting national art treasures."[41]

For a prisoner to be transferred, each of the treaties, except the one between the United States and Turkey, requires a final judgment and no pending appeals at the time of the application for transfer.[42] Similarly, all of the treaties give the transferring state sole power to handle challenges to both the offender's conviction and sentence.[43] Likewise, all of the treaties provide that a specified time period, usually six months or one year, remain on the prisoner's sentence at the time of the petition for transfer.[44] The treaty with Thailand contains the additional requirement that the offender must have served the minimum time in prison stipulated by the law of the transferring state.[45] The treaties with Mexico, Canada, and Thailand state that the sentence must be for a specified duration or for life.[46]

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41. Treaty with Thailand, *supra* note 15, at art. II(3).

42. *See* Treaty with Mexico, *supra* note 4, at art. II(6) (stating that "no proceeding by way of appeal or of collateral attack upon the offender's conviction or sentence be pending in the Transferring State and that the prescribed time for appeal of the offender's conviction or sentence has expired" in order for a transfer to be completed); *see also* Treaty with Canada, *supra* note 10, at art. II(e); Treaty with Panama, *supra* note 12, at art. III(5); Treaty with Peru, *supra* note 13, at art. III(5); Treaty with Bolivia, *supra* note 14, at art. III(5); Treaty with Thailand, *supra note* 15, at art. II(5); Treaty with France, *supra* note 16, at art. 2(d); Treaty of Council of Europe, *supra* note 17, at art. 3(1)(b).

43. Treaty with Mexico, *supra* note 4, at art. VI; Treaty with Canada, *supra* note 10, at art. V; Treaty with Turkey, *supra* note 11, at art. IX(l); Treaty with Panama, *supra* note 12, at art. VII; Treaty with Peru, *supra* note 13, at art. VII; Treaty with Bolivia, *supra* note 14, at art. VII; Treaty with Thailand, *supra* note 15, at art. IV; Treaty with France, *supra* note 16, at art. 7; Treaty of Council of Europe, *supra* note 17, at art. 13.

44. *Compare* Treaty with Mexico, *supra* note 4, at art. II(5); Treaty with Canada, *supra* note 10, at art. II(d); Treaty with Turkey, *supra* note 11, at art. IV(d); Treaty with Panama, *supra* note 12, at art. III(4); Treaty with Peru, *supra* note 13, at art. III(4); Treaty with Bolivia, *supra* note 14, at art. III(4); Treaty of Council of Europe, *supra* note 17, at art. 3(1)(c) (all stating that six months must be remaining on the prisoner's sentence when request for transfer occurs) *with* Treaty with Thailand, *supra* note 15, at art. II(4); Treaty with France, *supra* note 16, at art. 2(e) (both requiring that one year remain on the sentence in order for transfer to be approved). The Treaty of the Council of Europe provides, however, that "[i]n exceptional cases, Parties may agree to a transfer even if the time to be served by the sentenced person is less than" six months. Treaty of Council of Europe, *supra* note 17, at art. 3(2).

45. Treaty with Thailand, *supra* note 15, at art. II(6).

46. Treaty with Mexico, *supra* note 4, at art. IV(6) (specified duration); Treaty

C. *The Transfer Procedure*

The procedure governing the transfer of a prisoner is set forth precisely in the treaties. All of the treaties mandate that the offender consent to a transfer, and several additionally provide that the receiving state may inquire whether the prisoner actually consented.[47] One reason for

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with Canada, *supra* note 10, at art. III(7) (life imprisonment or with a definite termination date); Treaty with Thailand, *supra* note 15, at art. III(4) (life imprisonment or with a definite termination date).

47. Treaty with Mexico, *supra* note 4, at art. IV(2); *id.* at art. V; Treaty with Canada, *supra* note 10, at art. III(3); *id.* at art. III(10); Treaty with Turkey, *supra* note 11, at art. IV(f); *id.* at art. XIV(d); Treaty with Panama, *supra* note 12, at art. III(6); Treaty with Peru, *supra* note 13, at art. V(9); Treaty with Bolivia, *supra* note 14, at art. V(3); *id.* at art. V(10); Treaty with Thailand, *supra* note 15, at art. III(7); Treaty with France, *supra* note 16, at art. 2(c); Treaty of Council of Europe, *supra* note 17, at art. 3(1)(d); *id.* at art. 7. 18 U.S.C. § 4108 provides legislative guidelines for verifying if the offender voluntary consented to transfer to the United States. It states:

> (a) Prior to the transfer of an offender to the United States, the fact that the offender consents to such transfer and that such consent is voluntary and with full knowledge of the consequences thereof, shall be verified in the country in which the sentence was imposed by a United States magistrate, or by a citizen specifically designated by a judge of the United States . . . .
>
> (b) The verifying officer shall inquire of the offender whether he understands and agrees that the transfer will be subject to the following conditions:
>
> (1) only the country in which he was convicted and sentenced can modify or set aside the conviction or sentence, and any proceedings seeking such action may only be brought in that country;
>
> (2) the sentence shall be carried out according to the laws of the United States and that those laws are subject to change;
>
> (3) if a United States court should determine upon a proceeding initiated by him or on his behalf that his transfer was not accomplished in accordance with the treaty or laws of the United States, he may be returned to the country which imposed the sentence for the purpose of completing the sentence if that country requests his return; and
>
> (4) his consent to transfer, once verified by the verifying officer, is irrevocable.
>
> (c) The verifying officer, before determining that an offender's consent is voluntary and given with full knowledge of the consequences, shall advise the offender of his right to consult with counsel as provided by this chapter. If the offender wishes to consult with counsel before giving his consent, he shall be advised that the proceeding will be continued until he has had an opportunity to consult with counsel.
>
> (d) The verifying officer shall make the necessary inquiries to determine that the offender's consent is voluntary and not the result of any promises, threats, or other improper inducements, and that the offender accepts the transfer subject to the conditions set forth in subsection (b). The consent and acceptance shall be on an appropriate form prescribed by the Attorney General.
>
> (e) The proceedings shall be taken down by a reporter or recorded by suitable sound recording equipment. The Attorney General shall maintain custody of the

this requirement, at least as far as the United States is concerned, is to avoid constitutional challenges to the validity of these pacts.

Several of the treaties specifically address whether either state must notify the offender of eligibility to obtain a transfer. The treaty with Canada mandates that both parties must inform the offender of the "substance of the Treaty,"[48] while the treaty with Thailand specifies that either party may inform the offender of this transfer possibility.[49] The French and Council of Europe treaties place the duty of informing the offender on the sentencing state.[50]

The treaties also address which party may initiate the transfer. Some of the treaties require that the transferring state initiate proceedings, and many provide that the offender may "submit[] a request to the Transferring State for consideration of his transfer."[51] Other treaties state that the transfer must be initiated by the embassy of the receiving state located within the transferring state.[52] In contrast, the treaties with both France and the Council of Europe provide that either the state or the offender may initiate the transfer.[53]

In general, the treaties also delineate the location of prisoner transfers and the allocation of the costs of the transfer. Five of the treaties provide that the delivery of the prisoner will take place at a site agreed upon by both parties.[54] The treaty with Bolivia states more specifically that the transfer should occur in either the embassy of the receiving state or in the nearest consulate if the offender is incarcerated at a site some distance from the embassy.[55] Furthermore, pursuant to most of the treaties, the cost of transporting the prisoner will be borne by the receiving

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records.

18 U.S.C. § 4108 (1988).

48. Treaty with Canada, *supra* note 10, at art. III(2).

49. Treaty with Thailand, *supra* note 15, at art. III(l).

50. Treaty with France, *supra* note 16, at art. 8; Treaty of Council of Europe, *supra* note 17, at art. 4(1).

51. Treaty with Mexico, *supra* note 4, at art. IV(l). *See* Treaty with Canada, *supra* note 10, at art. III(3); Treaty with Turkey, *supra* note 11, at art. XII.

52. Treaty with Panama, *supra* note 12, at art. V(1-2); Treaty with Peru, *supra* note 13, at art. V(1-2); Treaty with Bolivia, *supra* note 14, at art. V(1-2); Treaty with Thailand, *supra* note 15, at art. III(2).

53. Treaty with France, *supra* note 16, at art. 11; Treaty of Council of Europe, *supra* note 17, at art. 2(2-3).

54. Treaty with Mexico, *supra* note 4, at art. V; Treaty with Canada, *supra* note 10, at art. III(10); Treaty with Panama, *supra* note 12, at art. V(5); Treaty with Peru, *supra* note 13, at art. V(4); Treaty with Thailand, *supra* note 15, at art. III(7) (the place, however, must be within the transferring state).

55. Treaty with Bolivia, *supra* note 14, at art. V(3-4).

state.[56]

Even if all of the above factors are met, however, a state may refuse to transfer a prisoner. All of the Transfer of Penal Sanctions Treaties to which the United States is a party set forth specific criteria that both the transferring and receiving states should consider before granting transfers. For example, the treaty between the United States and Mexico provides that the authorities of both states should consider factors "bearing upon the probability that the transfer will contribute to the social rehabilitation of the offender, including the nature and severity of his offenses and his previous criminal record, if any, his medical condition, the strength of his connections by residence, presence in the territory, family relations and otherwise" and how the transfer would impact the social life of each state.[57]

In contrast, the treaty between the United States and Canada provides simply that the authorities of the parties "shall bear in mind all factors bearing upon the probability that transfer will be in the best interests of the Offender."[58] The treaty with Thailand sets forth two specific criteria that may be addressed: the prisoner's best interests and the nature of the offense committed.[59] The treaty with France sets forth the most impersonal criteria of any treaty, providing that transfer may be refused "if the transfer is considered by the Sentencing State or the Administering State to be such as to jeopardize its sovereignty, its security, its public policy, the basic principles relating to the organization of criminal juris-

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56. Treaty with Canada, *supra* note 10, at art. III(4); Treaty with Turkey, *supra* note 11, at art. X; Treaty with Panama, *supra* note 12, at art. V(10); Treaty with Peru, *supra* note 13, at art. V(10); Treaty with Bolivia, *supra* note 14, at art. V(ll); Treaty with Thailand, *supra* note 15, at art. V(4); Treaty with France, *supra* note 16, at art. 10; Treaty of Council of Europe, *supra* note 17, at art. 17(5).

57. Treaty with Mexico, *supra* note 4, at art. IV(4). Similarly, the treaties with Panama, Peru, and Bolivia all declare that authorities of each state should consider "among other factors, the seriousness of the crime, previous criminal record, if any, health status, and the ties that the offender may have" in each state. Treaty with Panama, *supra* note 12, at art. V(6); Treaty with Peru, *supra* note 13, at art. V(5); Treaty with Bolivia, *supra* note 14, at art. V(6).

58. Treaty with Canada, *supra* note 10, at art. III(6).

59. Article III(3) of the treaty with Thailand states that:

> [i]n deciding upon the transfer of an offender, each Party shall consider the following factors:
>
> (a) The probability that transfer of the offender will contribute to his social rehabilitation or otherwise be in his best interests; and
>
> (b) The nature and severity of the offense, including the effects of the offense within the Transferring and Receiving States and any mitigating or aggravating circumstances.

Treaty with Thailand, *supra* note 15, at art. III(3).

diction under its legal system or any other of its essential interests."[60]

While at first glance these treaties are specific and appear to urge uniform consideration, a great deal of arbitrariness inherently exists in each transfer decision. In the United States, the Attorney General must consent to prisoner transfers. Because no specific guidelines exist to aid in these determinations, the decision of which transfers will be granted is purely discretionary.[61] The same is true in the other states party to these treaties. In the absence of specific criteria, transfer decisions may be uncertain and arbitrary because one person is the ultimate decision-maker.

D. *Post-Transfer*

The treaties also govern post-transfer procedures and treatment of the transferee. The transferring state possesses the right to pardon the offender or grant amnesty. Once the receiving state is advised that such action has been taken, it must release the prisoner according to the wishes of the transferring state. The only power that the receiving state assumes pursuant to transfer is the right to either parole the offender or grant conditional release according to its own laws.[62] The exception to this rule is the Council of Europe Treaty, under which both the trans-

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60. Treaty with France, *supra* note 16, at art. 5(a).

61. The House Judiciary Committee, obviously aware of the tremendous amount of discretion left to the Attorney General, noted that, except for in unusual situations, "[t]he Committee [is] concerned that the Attorney General exercise his discretion to consent with care. In most cases, and possibly almost all cases, he should agree to any receipt or transfer, if the offender requests or voluntarily consents to such transfer." *House Hearings, supra* note 1, pt. 1, at 32.

62. *See, e.g.*, Treaty with Mexico, *supra* note 4, at art. V(2); Treaty with Canada, *supra* note 10, at art. IV(l); Treaty with Turkey, *supra* note 11, at art. IX(1-2); Treaty with Panama, *supra* note 12, at art. VII; Treaty with Peru, *supra* note 13, at art. VII; Treaty with Bolivia, *supra* note 14, at art. VI(2); *id.* art. VII; Treaty with Thailand, *supra* note 15, at art. V(l); Treaty with France, *supra* note 16, at art. 9. The receiving state, for example, cannot extend the duration of the offender's sentence. Treaty with Mexico, *supra* note 4, at art. V(3); Treaty with Canada, *supra* note 10, at art. IV(3); Treaty with Turkey, *supra* note 11, at art. XX(2)(a); Treaty with Thailand, *supra* note 15, at art. V(6); Treaty with France, *supra* note 16, at art. 9(3); Treaty of Council of Europe, *supra* note 17, at art. 10.

The initial group of United States citizens returned from Mexican prisons on December 9, 1977 included a total of 61 prisoners. Of these, almost one-third were eligible immediately for parole upon returning to the United States. *See Hearings on Treaty with Bolivia on the Execution of Penal Sentences Before the Senate Committee on Foreign Relations*, S. Exec. Rep. No. 22, 95th Cong., 2d Sess. 18 (1978) (statement of Michael Abbell, Special Ass't to the Ass't Att'y Gen., Crim. Div., U.S. Dep't of Justice, and Director of Prisoner Transfer Program); *see also* Gelfand, *supra* note 20, at 577.

ferring and receiving states have the right to pardon.[63] Like the costs of transfer, the receiving party bears the costs of the prisoner's continued incarceration.[64]

As a general rule, most of the treaties prohibit the receiving state from prosecuting the prisoner for the same offense after the transfer.[65] At the same time, however, a transferee may be tried for crimes other than the one leading to the present incarceration. This is the direct opposite of the extradition process,[66] in which a person may be tried only for the offenses specified in the extradition request.[67]

Since the primary goal of these treaties is the rehabilitation of the offender, they also provide that information concerning continued incarceration be provided to the transferring state. Two of the treaties specify that status reports must be given periodically by each party. These reports are to include, among other information, news of the parole or release of any offender transferred.[68] Each treaty to which the United States is a party provides that such status reports should be given at the request of the other party.[69]

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63. Treaty of Council of Europe, *supra* note 17, at art. 12.

64. *See supra* note 56 and accompanying text; *see also* Treaty with Mexico, *supra* note 4, at art. V(4); Treaty with Canada, *supra* note 10, at art. IV(4).

65. Treaty with Mexico, *supra* note 4, at art. VII; Treaty with Canada, *supra* note 10, at art. VI; Treaty with Turkey, *supra* note 11, at art. VI(l); Treaty with Panama, *supra* note 12, at art VI(l); Treaty with Peru, *supra* note 13, at art. VI(l); Treaty with Bolivia, *supra* note 14, at art. VI(l). The treaty with Turkey, however, specifies instances in which prosecution will be permitted, such as when consent has been given by the transferring state. Treaty with Turkey, *supra* note 11, at art. VI(l)(b).

66. Extradition is the "process by which persons charged with or convicted of crime against the law of the State and found in a foreign State are returned by the latter to the former for trial or punishment." 6 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 727 (1968). Extradition is an institutional practice, created for the benefit of the prosecuting state, with no regard being afforded to the individuals transported. M. CHERIF BASSIOUNI, 2 INTERNATIONAL UNITED STATES LAW AND PRACTICE 629 (1987). Because there is no absolute duty on a state to comply with an extradition request, however, such requests are not always fulfilled.

67. This is known as the doctrine of "specialty." *See* United States v. Rauscher, 119 U.S. 407 (1886).

68. Treaty with Mexico, *supra* note 4, at art. V(5) (every six months); Treaty with Turkey, *supra* note 11, at art. XVII(3) (periodically).

69. *See supra* note 68; *see also* Treaty with Canada, *supra* note 10, at art. IV(5); Treaty with Panama, *supra* note 12, at art. VI(3); Treaty with Peru, *supra* note 13, at art. VI(3); Treaty with Bolivia, *supra* note 14, at art. VI(3); Treaty with Thailand, *supra* note 15, at art. V(5); Treaty with France, *supra* note 16, at art. 16.

E. *Interpretations of Transfer of Penal Sanctions Treaties by United States Courts*

The Transfer of Penal Sanctions Treaty between the United States and Mexico (the United States-Mexico Treaty) has produced relatively little litigation.[70] In *Pfeifer v. United States Bureau of Prisons*,[71] the Court of Appeals for the Ninth Circuit held that a Transfer of Penal Sanctions Treaty does not permit a transferee to appeal a foreign conviction in a United States court. Rather, the court stated that the sole purpose of the United States-Mexico Treaty was to afford prisoners the chance to serve their sentences in their home states.[72]

In *Pfeifer*, a Mexican court found the defendant guilty of importing cocaine and possessing counterfeit money and sentenced him to twelve years in prison.[73] Subsequently, Pfeifer consented to be transferred to the United States.[74] Upon being delivered to the United States, he immediately filed a writ of habeas corpus, "contend[ing] that those portions of the Treaty and its implementing legislation that deny transferred prisoners the right to challenge the constitutionality of their foreign convictions in United States courts are unconstitutional."[75]

The Ninth Circuit rejected Pfeifer's arguments, finding that the "constitutionality of the conviction which led to the foreign incarceration is not before us"[76] because the treaties do not vest in the judiciary of the receiving state the capacity to review a sentence imposed by the transferring state. Furthermore, an offender must consent to the treaty's provisions in order to gain transfer, and in so doing, the offender waives any constitutional rights with respect to the foreign conviction. The court

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70. As previously stated, almost 1500 offenders have been transferred under the United States-Mexico Treaty. *See supra* note 5. In contrast, there have been few reported United States cases dealing with this treaty. *See infra* notes 71-79 and accompanying text (describing United States case law on United States-Mexico Treaty).

71. 615 F.2d 873 (9th Cir.), *cert. denied*, 447 U.S. 908 (1980).

72. *Id.* at 876. *See supra* note 43 and accompanying text (stating that the sentencing state is the sole party that can review a prisoner's conviction and sentence).

73. *Id.* Pfeifer was arrested in 1977 at the Mexico City airport when Mexican officials discovered cocaine in his suitcase and "three apparently counterfeit $100 bills on his person." *Id.* Pfeifer alleged a series of due process violations by the Mexican officials, including that he was forced to sign a confession by torture, that he was denied effective counsel during the entire process, and that he was denied the right to an appeal. *Id.*

74. The defendant, as mandated by 18 U.S.C. § 4108, was afforded a hearing in Tijuana, Mexico before a United States Magistrate. At this hearing, he consented to be transferred to the United States. *Id.*

75. *Id.*

76. *Id.* at 876.

held that it had jurisdiction to determine whether the consent obtained from the defendant for the transfer was taken within the contours of the United States Constitution.[77]

The court opined that requiring a transferee to waive the right to protest a conviction in the United States did not violate the Constitution because the transferee was not required to relinquish "a *vested* right as a condition for obtaining a benefit."[78] United States citizens incarcerated in Mexican prisons have no right to protest their convictions in a United States court. Therefore, the prisoner loses no right or benefit by agreeing not to protest once he is transferred back to the United States. In two decisions rendered seven years apart, both the Courts of Appeals for the Second and District of Columbia Circuits have concurred with the Ninth Circuit's decision.[79]

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77. The court detailed the requirement of a valid waiver as follows:

> A valid waiver of constitutional rights must be voluntarily and knowingly made. McCarthy v. United States, 349 U.S. 459 (1969). The accused must have access to competent counsel. *See* Tollett v. Henderson, 411 U.S. 258 (1973). The validity of the waiver should be determined by a court and an affirmative showing that the waiver was intelligent and voluntary must appear in the record. Boykin v. Alabama, 395 U.S. 238 (1969) (citations omitted).

Id. The court also detailed the hearing process mandated under a Transfer of Penal Sanctions Treaty as follows:

> The statute implementing the Treaty provides that a United States magistrate shall verify, at a hearing held in the transferring country, that the offender consents to the transfer voluntarily and with full knowledge of the consequences. 18 U.S.C. § 4108. It provides that the offender be advised of his or her right to counsel, that certain specific questions be asked concerning the consequences of transferring, and that a record be made of the verification proceedings. *Id.* Counsel will be appointed for an offender who is financially unable to obtain his or her own. 18 U.S.C. § 4109. An offender's consent to be transferred pursuant to the Treaty is a constitutionally valid waiver of any constitutional rights he or she might have regarding his or her conviction.

Id.

78. *Id.* (citing United States v. Jackson, 390 U.S. 570 (1968); Sherbert v. Verner, 374 U.S. 398 (1963); Smartt v. Avery, 370 F.2d 788 (6th Cir. 1967)).

79. *See* Rosado v. Civiletti, 621 F.2d 1179 (2d Cir.), *cert. denied*, 449 U.S. 856 (1980) (finding no constitutional violation based on prisoner's waiving rights to challenge validity of Mexican convictions in United States courts); *see also* Beckett v. United Mexican States, 812 F.2d 746 (D.C. Cir. 1987) (finding that issues presented by challenge to constitutionality of transfer under Transfer of Penal Sanctions Treaty did not even require a need for a published opinion).

IV. ABDUCTIONS OF SUSPECTS ABROAD: NOT A NOVEL CONCEPT

Between 1986 and 1990, United States agents acting on behalf of the United States ignored the Mexican Transfer of Penal Sanctions Treaty, as well as all other maxims of international cooperation, by capturing three Mexican nationals. The United States accused all of the men captured of taking part in the 1985 torture and murder of Drug Enforcement Agency (DEA) agent Enrique Camarena. Two of the apprehensions, those of Rene Martin Verdugo-Urquidez[80] and Juan Ramon Matta-Ballesteros,[81] were carried out with the aid of authorities, but United States agents abducted Humberto Alvarez Machain unilaterally.[82]

By no means were the apprehensions of Verdugo-Urquidez, Matta-Ballesteros, and Machain unprecedented actions by United States enforcement agents. Since 1886, United States courts have permitted abductions abroad of suspects later brought to trial. Only in the Machain case has a court dismissed an action when United States agents lured or captured the defendant.[83]

Ker v. Illinois[84] is the landmark case setting forth the idea that a forcible abduction abroad will not affect the ability of a United States court to try a suspect brought within its jurisdiction. Ker, indicted in

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80. See United States v. Verdugo-Urquidez, ___ U.S. ___, 110 S.Ct. 1056, *reh'g denied*, ___ U.S. ___, 110 S. Ct. 1839 (1990). The defendant was apprehended by six Mexican police officers in January 1986. Mexican law enforcement officers had made an agreement with the United States Marshals Service to secure custody of the defendant. *Id.* at ___, 110 S. Ct. at 1059. No consent was given, however, by prosecutorial authorities and Verdugo's abductors were indicted later. United States v. Verdugo-Urquidez, 856 F.2d 1214, 1216 n.1 (9th Cir. 1988), *rev'd*, ___ U.S. ___, 110 S.Ct. 1056, *reh'g denied*, ___ U.S. ___, 110 S. Ct. 1839 (1990).

81. The Honduran military captured Matta-Ballesteros at his home in Honduras in 1988, 17 years after escaping from a United States federal prison camp. This was two years after United States officials issued a warrant for his arrest. United States v. Matta-Ballesteros, 700 F. Supp. 528, 529 (N.D. Fla. 1988). He was flown to New York City, where officials arrested him and transported him to the maximum security federal penitentiary in Marion, Illinois. *Id.*; *see* Matta-Ballesteros *ex rel.* Stolar v. Henman, 697 F. Supp. 1040, 1042 (S.D. Ill. 1988), *aff'd*, 896 F.2d 255 (7th Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 209 (1990).

82. Bounty hunters, acting upon request of the DEA and with the approval of the United States Department of Justice, unilaterally abducted Machain at his Guadalajara office in April 1990 and delivered him to DEA agents in El Paso, Texas. United States v. Caro-Quintero, 745 F. Supp. 599, 603 (C.D. Cal. 1990).

83. *See infra* notes 109-16 and accompanying text (describing the California court's decision to release Machain).

84. 119 U.S. 436 (1886).

Illinois for embezzlement and larceny, fled to Peru to avoid imprisonment. United States officials, seeking his extradition from Peru, sent a private investigator to Peru to retrieve him. Instead, the investigator abducted Ker and returned him to the United States without utilizing the extradition process.[85]

Ker protested his abduction, but the United States Supreme Court refused his request for release. The Court held that mere irregularities in the manner of his arrest should not bar his prosecution, stating:

> [t]here are authorities of the highest respectability which hold that such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offense, and presents no valid objection to his trial in such court.[86]

Courts unquestioningly followed this maxim[87] until 1974, when the United States Court of Appeals for the Second Circuit diverged from a strict interpretation of this rule and imposed on the court a duty to inquire.

The Uruguayan police kidnapped the defendant in *United States v. Toscanino* from his home, knocked him unconscious, and drove him to Brazil. He alleged that United States law enforcement authorities directed these actions.[88] During his prosecution in the United States, the

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85. *Id.* at 437-38. The investigator could not gain access to the Peruvian capital city and deliver the extradition request to the proper authorities because Chilean forces occupied the city. *Caro-Quintero*, 745 F. Supp at 610; Abraham Abramovsky & Steven J. Eagle, *U.S. Policy in Apprehending Alleged Offenders Abroad: Extradition, Abduction or Irregular Rendition?*, 57 OR. L. REV. 51, 54 n.10 (1977).

86. *Ker*, 119 U.S. at 444. The Supreme Court reaffirmed this holding in the 1952 case *Frisbie v. Collins*, 342 U.S. 519 (1952). In *Frisbie*, the defendant protested his abduction from Illinois to face trial in Michigan. Although this involved interstate rather than international abduction, the Court relied on *Ker*'s rationale to uphold the Michigan court's jurisdiction over Frisbie. In its decision, the Court stated that "the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'" *Id.* at 522 (footnote omitted). This theory has come to be known as the *Ker-Frisbie* doctrine, and its basis has been upheld several times by the Supreme Court. *See* Immigration and Nationalization Service v. Lopez-Mendoza, 468 U.S. 1032, 1039-40 (1984); United States v. Crews, 445 U.S. 463, 474 (1980); Gerstein v. Pugh, 420 U.S. 103, 119 (1975).

87. *See, e.g.*, United States v. Vicars, 467 F.2d 452, 455-56 (5th Cir. 1972), *cert. denied*, 410 U.S. 967 (1973); United States v. Caramian, 468 F.2d 1370, 1371 (5th Cir. 1972) (affirming jurisdiction over abducted defendants by citing to the Supreme Court's decisions in *Ker* and *Frisbie*).

88. United States v. Toscanino, 500 F.2d 267, 268 (2d Cir.), *reh'g denied*, 504 F.2d 1380 (2d Cir. 1974).

defendant averred that Brazilian officials tortured him over a seventeen day period, and, more shockingly, that United States officials knew of the atrocities committed.[89]

The Second Circuit ruled that when the defendant alleges torture, a court may be forced to divest itself of jurisdiction over the defendant if the conduct of the arresting or detaining officers is outrageous or egregious enough to "shock the conscience." The court stated that "when an accused is kidnapped and forcibly brought within the jurisdiction, the court's acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct."[90] It based its opinion on the Supreme Court's post-*Ker* expansion of constitutional due process protection.[91]

Despite the apparently strong stance taken by the Second Circuit, later cases failed to evince the constitutional concern that *Toscanino* addressed. First, the District Court for the Eastern District of New York refused to divest itself of jurisdiction over Toscanino on remand, finding that he did not prove adequately his allegations of torture.[92] The Second Circuit then proceeded to narrow "the *Toscanino* exception" in a series of cases between 1975 and 1981.[93]

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89. *Id.* at 269-70. Toscanino testified that:

> he was kicked and beaten but all in a manner contrived to punish without scarring. When he would not answer, his fingers were pinched with metal pliers. Alcohol was flushed into his eyes and nose and other fluids . . . were forced up his anal passage. Incredibly, these agents of the United States Government attached electrodes to Toscanino's earlobes, toes, and genitals. Jarring jolts of electricity were shot throughout his body, rendering him unconscious for indeterminate periods of time but again leaving no physical scars.

Id. at 270 (alteration in original). United States officials were admittedly in contact with the Brazilian authorities throughout his confinement, lending some credence to the view that they were aware of his torture.

90. *Id.* at 275. The "shocking the conscience" standard was taken from *Rochin v. California*, 342 U.S. 165 (1952), in which the Supreme Court ruled that evidence of drug use obtained by police through pumping the defendant's stomach would not be allowed at trial because this conduct "shocked the conscience." *Id.* at 172.

91. *Toscanino*, 500 F.2d at 272. The court stated that later Supreme Court cases expanded the theory of "due process of law" to cover entire legal proceedings, not just the actual trial itself. *Id.* (citing United States v. Russell, 411 U.S. 423 (1973); Mapp v. Ohio, 367 U.S. 643 (1961); Miranda v. Arizona, 384 U.S. 436 (1966)). The court also opined that Toscanino's forcible abduction violated article 2, paragraph 4 of the United Nations Charter and article 17 of the Organization of American States (OAS) Charter, both of which protect territorial integrity of signatory states. *Toscanino*, 500 F.2d at 277.

92. United States v. Toscanino, 398 F. Supp. 916 (E.D.N.Y. 1975).

93. *See* United States v. Reed, 639 F.2d 896, 902-03 (2d Cir. 1981) (stating that

Several circuit courts have applied the *Toscanino* inquiry and considered the circumstances of an individual's capture. These courts have refused to release the defendant in all of the cases, however, even where torture is alleged.[94] The court in *United States v. Yunis* stated that "[a]lthough most circuits have acknowledged the exception carved out by *Toscanino*, it is highly significant that *no* court has ever applied it to dismiss an indictment."[95]

Other circuit courts, however, adhere to the *Ker-Frisbie* rule and refuse to inquire into the circumstances behind a suspect's apprehension. These courts either dismiss the *Toscanino* inquiry as invalid or simply do not recognize its existence.[96]

Toscanino inquiry only applies when the apprehended suspect is captured initially by illegal means, not when a fugitive is captured); United States v. Lira, 515 F.2d 68, 70-71 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975) (stating that a tortured defendant would not be released because he could not prove that Chilean police were acting as agents of United States government or United States representatives were aware of such conduct); United States *ex rel.* Lujan v. Gengler, 510 F.2d 62, 68 (2d Cir.), *cert. denied,* 421 U.S. 1001 (1975) (stating that mere abduction will not overturn conviction in absence of torture allegations).

94. *See, e.g.*, United States v. Yunis, 681 F.Supp. 909 (D.D.C.), *rev'd on other grounds*, 859 F.2d 953 (D.C. Cir. 1988), *aff'd*, 924 F.2d 1086 (D.C. Cir. 1991); United States v. Wilson, 732 F.2d 404 (5th Cir.), *cert. denied*, 469 U.S. 1099 (1984); United States v. Cordero, 668 F.2d 32 (1st Cir. 1981); *see also* United States v. Degollado, 696 F. Supp. 1136 (S.D. Tex. 1988); Day v. State, 763 S.W.2d 535 (Tex. Ct. App. 1988); Quintero v. State, 761 S.W.2d 438 (Tex. Ct. App. 1988), *cert. denied*, ____ U.S. ____, 110 S.Ct. 90 (1989); Richard P. Shafer, Annotation, *District Court Jurisdiction Over Criminal Suspect Who Was Abducted in Foreign Country and Returned to United States for Trial or Sentencing*, 64 A.L.R. FED 292, 295 (1983 & Supp. 1989) (stating that "[c]ases decided in other circuits appear to give credence to the Second Circuit's views").

95. *Yunis*, 681 F. Supp. at 919. The court in *Yunis*, for example, concluded that "defendant has failed either to allege or to show any actions committed by these officers that meet the standard of outrageousness established by *Toscanino* and its progeny requiring this Court to divest itself of jurisdiction." *Id.* at 920.

96. The United States Court of Appeals for the Ninth Circuit rejected the *Toscanino* inquiry for two reasons in *United States v. Vergugo-Urquidez*. 856 F.2d 1214 (9th Cir. 1988), *rev'd*, ____ U.S. ____, 110 S.Ct. 1056, *reh'g denied* ____ U.S. ____, 110 S.Ct. 1839 (1990). The court stated that "[t]he majority in *Toscanino* cited no authority, nor did it provide any sound reasoning, for its expansive holding," and that the rationale in *Toscanino* "has been substantially undermined by subsequent Supreme Court decisions that have wholeheartedly and repeatedly reaffirmed the *Ker-Frisbie* rule." 856 F.2d at 1243, 1245. *See* United States v. Darby, 744 F.2d 1508, 1531 (11th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985) (stating that "the continuing validity of the *Toscanino* approach is questionable after the intervening decision in *Gerstein v. Pugh*, 420 U.S. 103 (1975), in which the Supreme Court refused to 'retreat from the established rule that illegal arrest or detention does not void a subsequent conviction' ") (citation omitted); *see*

One reason for refusing to divest jurisdiction is that an individual lacks standing to protest an abduction. Because the abduction of an individual is treated as a violation of the territorial sovereignty of the nation from which the suspect was taken, that state must first complain before the individual will be permitted to file a similar action.[97] The notion of standing underscores the lack of importance placed on the individual in international law, and highlights the unique nature, via the paramount concern for the prisoner, of Transfer of Penal Sanctions Treaties.

The main reason for the increased use of extraterritorial apprehensions is that the extradition process has failed amid global concern over problems such as drug trafficking and terrorism.[98] Most of the abductions noted above involved prisoners taken from states with which the United States does not have extradition or other cooperative treaties, but the apprehensions of Verdugo-Urquidez, Matta-Ballesteros, and Machain are troubling because of that very fact. In the majority of those abductions, the host state did not object to the forcible entry by the United States into its territory. One could argue that the three Mexican apprehensions should be considered separate from the treaty because the actions of the three men contributed to the torture and murder of a United States drug enforcement agent.[99] Evidence that the Mexican gov-

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also United States v. Rosenthal, 793 F.2d 1214 (11th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987); United States v. Marzano, 537 F.2d 257 (7th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); Matta-Ballesteros *ex rel.* Stolar v. Henman, 697 F. Supp. 1040 (S.D. Ill. 1988), *aff'd*, 896 F.2d 255 (7th Cir. 1990).

97. *See* Abramovsky & Eagle, *supra* note 85, at 70. Standing requires that "the individual possess a right which allegedly has been infringed. . . . American courts consistently have denied the individual the right to contest the legality of an extraordinary apprehension abroad. Standing in these instances has been restricted to the asylum state." *Id.* This restriction "has been premised upon the rationale that provisions such as Article 2:4 of the U.N. Charter and Article 17 of the O.A.S. Charter were designed to protect the sovereignty and territorial integrity of states," not individuals. *Id.* at 70 n.67.

98. *See* Andrew M. Wolfenson, Note, *The U.S. Courts and the Treatment of Suspects Abducted Abroad Under International Law*, 13 FORDHAM INT'L L. J. 705, 744-45 (1989-1990); *see also* Peterzell, *The Life and Crimes of a Middle East Terrorist*, TIME, Jan. 14, 1991, at 28-30 (discussing Greece's refusal to extradite terrorist responsible for 1982 bombing of Pan Am airliner to the United States despite repeated efforts by the United States to obtain his extradition).

99. The murder of Enrique Camarena has been publicized greatly in the United States and has been the subject of many books and the NBC mini series, *Drug Wars: The Camarena Story*, which aired for three nights on January 7-9, 1990. United States officials could point to the great public outcry against his murderers and conclude that the resulting pressure on United States agents to capture these men was great. For example, the political nature of the mini-series was so powerful that tension resulted between Mexico and the United States. United States v. Caro-Quintero, 745 F. Supp. 599, 602-

ernment met these abductions with diplomatic protests demonstrates the strained relations between the two neighboring states.[100]

Much like abductions, however, these protests are not novel. A host state rarely will protest the abduction of one of its citizens or residents. Once a state lodges a protest, however, they have been treated seriously by the offending nation. The 1960 Israeli capture of suspected Nazi war criminal Adolf Eichmann was completed without the cooperation of his home state Argentina, and the Argentine government lodged a formal protest with the United Nations. This was dismissed after private discussions between Israel and Argentina and the issuance of a joint communique resolving the issue.[101]

On September 23, 1981, United States bounty hunters abducted businessman Sidney Jaffe as he jogged near his home in Toronto, Canada. Florida charged Jaffe, a United States national, with twenty-eight counts of unlawful land sale practices, and he fled to Canada after posting a 137,500 dollar bail bond.[102] The bond company, facing the loss of this sum, hired bounty hunters to bring Jaffe back to the United States.[103]

Canada immediately protested his abduction, and then-Secretary of

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03 (C.D. Cal. 1990).

100. *See infra* notes 112-13 and accompanying text (describing diplomatic protests filed by Mexico). Moreover, Mexico clearly indicated that it would prosecute Verdugo-Urquidez, Matta-Ballesteros, Machain, and any other person suspected of taking part in the Camarena torture.

101. *See* Attorney-General v. Eichmann, 36 I.L.R. 5, 59 (D. Jerusalem 1961), *aff'd*, 36 I.L.R. 277 (S. Ct. Isr. 1962).

102. Jaffe, a United States native, moved to Canada in 1966 and became a Canadian citizen in 1981, shortly after fleeing the United States. *See* Mary Thornton, *To Catch a Canadian; Neighbor to North Livid Over Grab in Toronto By U.S. Bounty Hunters*, WASH. POST, Apr. 24, 1982, at A2, col. 1.

103. Jaffe v. Smith, 825 F.2d 304 (11th Cir. 1987). Jaffe obtained the bail bond from the Accredited Surety & Casualty Company. *Id.* Jaffe was living in Canada when his case came to trial, and he failed to appear in court. His attorney blamed his absence on health reasons. Accredited's bond was forfeited, and the judge issued a warrant for Jaffe's arrest and instructed prosecutors to begin extradition proceedings with Canada. *See* Jaffe v. Boyles, 616 F. Supp. 1371, 1373 (W.D.N.Y. 1985). Several applications for his extradition were rejected by the Office of the Governor of Florida, at which point Accredited ordered bounty hunters Daniel Kear and Timm Johnsen to bring Jaffe to Florida. *Id.* Kear was "a licensed bondsman and an agent of the surety," and Johnsen a "professional skip-chaser or bounty hunter." Kear v. Hilton, 699 F.2d 181, 182 (4th Cir. 1983). The two men kidnapped Jaffe, brought him across the United States-Canadian border around Niagara Falls, New York, and then transported him to Florida. *Id.* According to Jaffe, Johnsen was carrying "certified copies of the bail bonds, a specially drawn Florida bench warrant, and papers indicating that he was acting pursuant to Florida authority." *Jaffe*, 616 F. Supp. at 1373.

State George Schultz urged Florida officials to release Jaffe in order to ease the resulting United States-Canadian tensions.[104] Officials, in response, released Jaffe in 1983. Canada then sought to have the bounty hunters face kidnapping charges in Canada. The men sought a writ of habeas corpus to prevent extradition, but the United States Court of Appeals for the Fourth Circuit denied the petition.[105] The United States extradited the two to Canada, and Canada sentenced them to prison in 1986 for Jaffe's abduction.[106]

Jaffe's abduction was not an isolated incident.[107] In 1988, the United States and Canada, seeking to eliminate transborder abductions by bounty hunters, signed a protocol that amended the extradition treaty between the two states. A letter from Schultz to Joe Clark, the Canadian Secretary of State for External Affairs, stated that both states "recognize that the transborder abduction of persons found in Canada to the United States of America by civilian agents of bail bonding companies, so-called 'bounty hunters,' is an extraditable offense under the United States-Canada Extradition Treaty."[108]

The one instance in which a United States court found a violation of an extradition treaty and ordered the release of the abducted prisoner occurred last year, when the United States District Court for the Central District of California ruled that Machain had been abducted in contravention of the United States-Mexico Extradition Treaty.[109] In this case,

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104. Canada filed several diplomatic protests and also filed suit in an United States District Court in Florida. *Jaffe*, 616 F. Supp. at 1374. Jaffe was eventually sentenced to consecutive jail terms that totalled 145 years. He protested his abduction as being a violation of the extradition treaty between the United States and Canada, 27 U.S.T. 983, but his protest was denied due to lack of standing. According to the United States District Court for the Western District of New York, "[t]he power to enforce the treaty as a whole remains with the signers, Canada and the United States." *Jaffe*, 616 F. Supp. at 1374; *see supra* note 97 and accompanying text (describing individual's lack of standing to protest abductions).

105. The court, stating that "two wrongs do not make a right," found that there was "not a proper basis for frustrating extradition." *Kear*, 699 F.2d at 181, 185.

106. *See* Kristofer R. Schleicher, Update, *Transborder Abductions by American Bounty Hunters—The Jaffe Case and a New Understanding Between the United States and Canada*, 20 GA. J. INT'L & COMP. L. 489, 497 (1990).

107. *See* Howard Kurtz, *For U.S. Bounty Hunters, National Boundaries Are Little or No Restraint*, WASH. POST, May 15, 1987, at A23, col. 1; Schleicher, *supra* note 106, at 497 n.52.

108. Schleicher, *supra* note 106, at 490, n.7.

109. United States v. Caro-Quintero, 745 F. Supp. 599 (C.D. Cal. 1990). The court stated that the United States violated the extradition treaty by "unilaterally abduct[ing]" the defendant, and "[u]nder these circumstances, the Court lacks jurisdiction to try this defendant. Accordingly, the defendant is ordered discharged and the government is or-

much like Jaffe's, the home state protested vociferously to the invasion of its soil by paid agents of the United States. Agents captured Machain in his Guadalajara office and flew him to El Paso, Texas. He later alleged mistreatment by his captors.[110] Meanwhile, little debate occured about whether his abductors were paid agents of United States law enforcement officials.[111]

The Embassy of Mexico presented a diplomatic note protesting this abduction to the United States Department of State two weeks later. In this note, the Mexican government requested "a detailed report on possible U.S. participation in the abduction" of the defendant, stating also that "it was making 'a scrupulous investigation [of] this case.' "[112] This was followed by a second diplomatic note, presented on May 16, 1990, which demanded Machain's return to Mexico. The Mexican government

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dered to repatriate the defendant to Mexico forthwith." *Id.* at 601.

110. *Id.* at 603. The defendant claimed he was tortured by his captors at his home in Guadalajara:

> One of the men hit him in the stomach as he exited the car at their request. In the house, he was forced to lay on the floor face down for two to three hours. Dr. Machain testified that he was shocked six or seven times through the soles of his shoes with "an electric shock apparatus." He says that he was injected twice with a substance that made him feel "light-headed and dizzy."

Id. He complained of chest pains shortly after arriving in El Paso and received prompt medical attention. At this point, he did not mention any mistreatment or abuse, and the examining doctor found no signs of mistreatment. Several other medical personnel tended to the defendant during his incarceration in El Paso, but he made no mention of torture to any of them. *Id.* at 604.

111. *See* Stephen J. Hedges & Gordon Witkin, *Kidnapping Drug Lords*, U.S. NEWS & WORLD REP., May 14, 1990, at 28. Antonio Garate Bustamente, "a former Mexican police officer and DEA informant, told the *Los Angeles Times* . . . that he arranged the April 2 abduction, with the approval of a Los Angeles DEA agent, and carried out the plan with 10 Mexicans, including several federal policemen, who were promised $100,000." *Id.* at 30. According to Judge Edward Rafeedie's decision in *United States v. Caro-Quintero*, the DEA had made a "partial reward payment" of at least $20,000 to Machain's abductors as of May 25, 1990. *Caro-Quintero*, 745 F. Supp. at 603. Seven of the abductors and their families were brought to the United States, with the DEA continuing to pay approximately $6,000 of weekly living expenses. The abductors who remained behind in Mexico allegedly were arrested and beaten by Mexican police. *Id.* at 604. Obtaining jurisdiction over Machain could not be done without taking such measures, as "[t]he U.S. probe of Camarena's murder ha[d] been stymied by resistance from the Mexican government." Elaine Shannon, *Snatching "Dr. Mengele"*, TIME, Apr. 23, 1990, at 27.

112. *Caro-Ouintero*, 745 F. Supp. at 604. The Mexican government also wrote that " 'if it is proven that these actions were performed with the illegal participation of the U.S. authorities, the binational cooperation in the fight against drug trafficking will be endangered.' " *Id.*

gave a third note two months later, requesting the extradition of two men for prosecution in Mexico of crimes relating to Machain's abduction.[113]

The court found that Machain's abductors were paid agents of the United States government, but stated that the alleged mistreatment, "if taken as true," did not "constitute acts of such barbarism as to warrant dismissal of the indictment under the case law."[114] The court stated, however, that Machain had "derivative standing" to protest his abduction as a violation of the extradition treaty between the United States and Mexico, because Mexico had "adequately protested and raised any rights it has under the extradition treaty in force."[115] The United States government contended that its actions did not violate the treaty, but the court found this argument "absurd" and ruled that because the United States violated the treaty, Machain should be returned to Mexico.[116]

This decision represents a step toward potential court-enforced regulation of United States law enforcement activities. The questions raised by such captures, however, should not focus on courts' reactions to abductions, but rather on the extent to which abductions by United States agents will undermine the cooperative spirit required for Transfer of Penal Sanctions Treaties.

V. TREATY REFINEMENT: CAN THEY BE MADE MORE PRODUCTIVE?

While the Alvarez Machain decision may be seen as paving the way for more judicial enforcement on extraterritorial apprehensions, the recent Supreme Court decision in *United States v. Verduqo-Urquidez*[117] indicates otherwise. After United States agents captured Verdugo-Ur-

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113. *Id.*

114. *Id.* at 605. The court refused to credit Machain's testimony, noting that a doctor "trained in trauma care" would not have failed to notify his attending physicians that he had been repeatedly shocked the day before his chest pains occurred. The court stated that "[u]nder these circumstances, Dr. Machain's recent allegations of abuse are simply not credible." *Id.* at 606.

115. *Id.* at 608. *See supra* notes 112-13 and accompanying text (detailing Mexican protest measures taken in response to abduction of Machain).

116. The court stated that "[i]t is axiomatic that the United States or Mexico violates its contracting partner's sovereignty, and the extradition treaty, when it unilaterally abducts a person from the territory of its contracting partner without the participation of or authorization from the contracting partner where the offended state registers an official protest." *Id.* at 610. It also held that "[t]he remedy in the present case is the immediate return of Dr. Machain to the territory of Mexico." *Id.* at 614.

117. _____ U.S. _____, 110 S.Ct. 1056 (1990).

quidez, they searched his home in Mexico without first obtaining a search warrant. He contested this search, claiming that his Fourth Amendment rights had been violated.[118]

The Court, led by Chief Justice Rehnquist, held that this search violated no constitutional rights. The "social compact" theory espoused by Rehnquist looks to the language of the Constitution. Those amendments, like the Fourth, that use the words "the people," should apply only to United States citizens and residents; those who abide by the Constitution and expect its protection.[119] Thus, Verdugo-Urquidez, a nonresident alien, could not assert a Fourth Amendment privilege against a warrantless search of his home outside the United States.

The United States government urged the Court to include both Fifth and Sixth Amendment rights as excluding nonresident aliens, but the Court stopped short of doing so. How the rights of nonresident aliens will be restricted in the future, however, is unknown. The same is true for resident aliens and United States citizens living outside of the United States. In sum, anyone who is not one of "the people" or who lives outside the reach of the Constitution within United States borders is in jeopardy. This, like the specter of unilateral abductions, could lead to situations that run contrary to the stated purposes of Transfer of Penal Sanctions and other bilateral treaties.

A. *Intentional Lawlessness Masked by Use of Transfer Treaties?*

Certain pre-trial rights mandated by the United States Constitution do not exist in Mexico. For example, the exclusionary rule[120] has no place in the Mexican penal system; evidence illegally obtained may be used in a Mexican trial. Variations between penal systems of nations that can transfer prisoners and sentences are troubling because these variations

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118. *Id.* at _____, 110 S. Ct. at 1059. It was conceded that a search warrant signed by a United States judge would not be valid in Mexico, but it was argued that some form of official warrant should have been obtained by the agents before they entered and searched the house. *Id.* at _____, 110 S. Ct. at 1060.

119. *Id.* at _____, 110 S. Ct. at 1060-61.

120. The exclusionary rule is a judicially-imposed check placed on police, forcing them to refrain from obtaining evidence by methods that contravene the United States Constitution and Bill of Rights. Evidence that has been obtained in violation of the Fourth, Fifth, or Sixth Amendment may not be used at trial. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 492 (1966); Massiah v. United States, 377 U.S. 201, 206 (1964); Mapp v. Ohio, 367 U.S. 643, 658-60 (1961). There is no comparable rule in Mexico: "Except for matters of privilege and of personal incompetence to testify . . . civilian codes contain *no exclusionary rules of evidence.*" RUDOLF B. SCHLESINGER, COMPARATIVE LAW 397 (4th ed. 1980).

can lead to covert arrangements whereby a person is arrested and prosecuted in a foreign state under circumstances not possible in the person's home state.

Suppose, for example, residents of Texas operate a narcotics operation near the United States-Mexican border. Unfortunately, United States law enforcement agents have been unable to acquire proof of the activities and have been unable to amass enough evidence to constitute the probable cause needed to obtain a search warrant of the premises. United States authorities are thus powerless to arrest these individuals.

Officials know, however, that the suspects have a house just seven miles over the border in Mexico. The suspects travel to this Mexican house at least once a week, fueling speculation that they carry on business there as well. The authorities believe that if they can search this house, they will uncover incriminating evidence. They call Mexican officials, requesting that they arrest the suspects on narcotics charges and search the house for evidence. Mexican police arrive at the door without first obtaining a warrant and arrest the dealers. They also remove several ledgers and notebooks from the house.

When the government brings the suspects to trial in Mexico, they introduce these notebooks and ledgers as evidence of narcotics transactions for the past several years. The defendants claim that the government obtained the evidence illegally, but the court admits it over objections. These ledgers provide the best, if not the only, evidence against them, and they are convicted of narcotics trafficking and given a substantial jail sentence. Mexican officials contact United States authorities regarding transfers to the United States, and it is determined that they have consented to be transferred in this manner. The Mexican government delivers them to a United States federal penitentiary, where they must serve the remainder of their sentence.

In this scenario, the United States has placed individuals behind bars despite the lack of power to do so directly. By having Mexican police undertake the actual arrest and trial, the United States merely masks this illegal arrest, including the deprivation of a United States citizen's constitutional rights, under the auspices of a Transfer of Penal Sanctions Treaty. Because the offender is unable to protest or appeal a Mexican sentence once transfer to the United States occurs, due process and other constitutional rights have been abridged without redress.

This hypothetical case, like abduction cases, undermines both the purposes and validity of these treaties. Of course, if the Constitution's applicability to United States citizens abroad is restricted in a manner similar to that of nonresident aliens in *Verdugo-Urquidez*, this argument is moot, for then United States enforcement agents will be permitted to

enter and search a citizen's Mexican home at will.

The "joint venture" doctrine is raised frequently both in cases involving the abduction of an individual from another state and in cases in which an offender is moved under a Transfer of Penal Sanctions Treaty.[121] The joint venture doctrine is based on the premise that "evidence obtained through activities of foreign officials, in which federal agents substantially participated and which violated the accused's . . . rights, must be suppressed in a subsequent trial in the United States."[122] This does not apply to cases in which a United States citizen is tried in a foreign state and later transferred to the United States, because the trial of the individual is not being held within the United States.[123] The United States Court of Appeals for the Ninth Circuit has ruled that United States enforcement of a sentence given by a foreign court will not be a form of participation sufficient to invoke the joint venture doctrine.[124]

Also troubling is the possibility that authorities will pursue an arrest less vigorously if they know the offender will be travelling abroad. In the scenario detailed above, suppose that United States officials possess enough evidence to try to convict the drug dealer. The trial, however, will be time consuming and will require a great deal of resources. In-

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121. *See, e.g.*, Pfeifer v. United States Bureau of Prisons, 615 F.2d 873, 876 (9th Cir.), *cert. denied*, 447 U.S. 908 (1980); Unites States v. Caro-Quintero, 745 F. Supp. 599, 611-14 (C.D. Cal. 1990).

122. *Pfeifer*, 615 F.2d at 877. For the basic test applied to determine if in fact a joint venture has been undertaken, see Stonehill v. United States, 405 F.2d 738, 743-44 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969).

123. *See Stonehill*, 405 F.2d 738.

124. Pfeifer, 615 F.2d at 877. Despite *Stonehill*'s requirement of substantial participation by United States agents, the contours of the joint venture doctrine still are undefined. Prior to the Ninth Circuit's decision, I had argued in a previous article that United States authorities should be held liable under the joint venture doctrine, even if their only participation in the proceedings was to incarcerate the transferred offender who has been tortured or deprived of his due process rights abroad, and, in so doing, ratifying the unlawful conviction handed down by a foreign penal system. Abramovsky & Eagle, *supra* note 1, at 305.

I noted, however, that some forms of aid were clearly not enough to invoke a "joint venture." For instance, "American assistance in the training of Mexican law enforcement agents and in the financing of Mexican drug enforcement programs, although in practice a significant factor in apprehending offenders, is not sufficient to be held a joint venture." *Id.* at 304. Aiding Mexican police in questioning an English-speaking defendant will also not create a joint venture between the United States and Mexico. *Id.* at 305. The *Pfeifer* court stated that the presence of a DEA agent when the defendant was interrogated by Mexican officials will not be considered "participation," and thus no joint venture resulted. *Pfeifer*, 615 F.2d at 877.

stead of using these resources, officials decide that it would be better for the Mexican government to bring charges and, therefore, decide not to pursue the suspect vigorously.

If the Mexican government does not try the dealer, a suspected felon remains unprosecuted. Alternatively, if the dealer is tried in Mexico, a prosecution with the help of illegally obtained evidence may result.[125] Cooperation in these cases between agents of Mexico and the United States could extend beyond those detailed in Part I of this Article.[126] As in the hypothetical situation above, a transfer to the United States would result in United States authorities enforcing a foreign judgment against a United States citizen that did not conform to due process standards. Furthermore, the citizen could have been tried in the United States and received constitutional protections.

B. *Parole and the Effect of the Federal Sentencing Guidelines*

One of the primary benefits gained by prisoners transferred to the United States under a Transfer of Penal Sanctions Treaty is the possibility of immediate parole.[127] If a specific amount of time had been served already in the foreign prison, release could be granted soon after reaching the United States. Concern for the prisoner's welfare, however, actually could have been a secondary motive in some cases in which parole occurred.

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125. United States law enforcement authorities also possibly could give evidence to Mexican officials that could not be used at trial in the United States due to the exclusionary rule. In this manner, United States officials would be directly aiding in a trial, and possibly the conviction, in violation of the Constitution, but with no redress available to the prisoner.

Furthermore, "varying amounts of American cooperation could be utilized [by Mexican officials], including identification of suspects, . . . active participation by American law enforcement officers in the investigation and apprehension of suspects," and "provision of technical assistance," such as fingerprint or chemical analysis, as well as wiretapping. Abramovsky & Eagle, *supra* note 1, at 290 (footnotes omitted). The DEA has admitted in the past to extensive involvement in Mexican investigations, precluding the United States prosecution of the individuals being investigated, but posing no bar to conviction in Mexico and subsequent transfer to the United States. *Id.* at 305.

126. *See supra* note 18.

127. Before the enactment of the Federal Sentencing Guidelines, United States prisoners generally were eligible for parole after serving one-third of their sentences (or ten years if a life sentence was given). 18 U.S.C. § 4205(a) (1988); 28 C.F.R. 2.2(a) (1990). If a sentence range was imposed, the prisoner would be eligible for parole after serving the minimum number of years, or one-third of the maximum, whichever is less. 18 U.S.C. § 4205(b)(1) (1988); 28 C.F.R. 2.2(b) (1990). *See* Abramovsky & Eagle, *supra* note 1, at 289 n.72.

United States officials could use transferees as pawns against each other, unindicted co-conspirators, and associates. Once in the United States, a transferee is subject to United States laws, including the laws governing parole.[128] Officials could base the offender's parole on the amount of cooperation with investigatory agencies following the transfer. The level of cooperation could be considered by United States authorities, in addition to the factors delineated in the treaties themselves, and the offender's level of cooperation could possibly be the sole determinant in parole decisions.

Under the Federal Sentencing Guidelines adopted in 1984, sentencing for crimes in the United States federal system has undergone massive change. Whereas judges had a great deal of latitude and discretion in determining sentences prior to the enactment of these guidelines, the sentencing process has become much more rigid. One other major effect of the guidelines is the virtual abolition of parole, which greatly impacts the theories and practices underlying Transfer of Penal Sanctions Treaties.

A sample sentence under the old sentencing rules might have been two to six years, with parole possible after the second year. Under these rules, many prisoners transferred to the United States under the treaties immediately were eligible for parole. For example, if their sentence in Mexico was for ten years, and they were transferred after serving four, it would be treated as a three and one-third to ten year sentence, meaning that they would be eligible for release since four years had been served already.

Under the sentencing guidelines, however, a different scenario emerges. Now, the court factors into the defendant's sentence the defendant's criminal history, as well as the amount of narcotics involved or money stolen. The resulting formula leaves a six month gap between the possible minimum and maximum sentences, drastically limiting the judge's degree of discretion. Judges may depart from these ranges when pronouncing sentences, but they usually follow them. Congress created the guidelines to make sentences uniform, and Congress reportedly determined the ranges to conform with time actually served under the old sentencing system, with allowances for parole.

The United States signed each Transfer of Penal Sanctions Treaty prior to the enactment of the Federal Sentencing Guidelines,[129] and thus all offenders transferred to the United States initially had the potential for early parole. The United States penal system's parole rules likely

128. *See supra* note 62 and accompanying text.

129. *See supra* notes 4, 10-17 and accompanying text (describing various Transfer of Penal Sanctions Treaties and dates they were signed).

affected the way that states negotiated, constructed, and, as stated above, carried out the treaties. Even if the foreign sentences appeared unduly harsh, early parole could lower the sentence to normal levels. Now, a United States citizen sentenced to ten years in Mexico must spend the full amount of time in jail, even if transferred to the United States; the defendant serves the same sentence in Mexico, but then serves a great deal more time in prison at home than would have been required prior to the guidelines. Therefore, the alteration in sentencing policy also mandates a change in these treaties to conform with United States sentencing practices.

C. *Are These Treaties Productive Even When the Passive Personality Theory is Available to Gain Jurisdiction?*

One other factor operating to obviate the effectiveness of Transfer of Penal Sanctions Treaties is increased statutory use of passive personality jurisdiction. There are five traditional bases of jurisdiction: territorial, national, protective, universal, and passive personality.[130] The theory of passive personality focuses on the nationality of the crime victim and holds that a state has the ability to protect its own nationals from criminal conduct, even if that conduct occurs overseas or is committed by a foreign national.[131]

Recently enacted statutes permit the United States to prosecute an individual who has never set foot on United States soil. Congress intended these laws primarily to combat hostage-taking and other terrorist acts and to ensure that a United States court will have jurisdiction over the

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130. Territorial jurisdiction depends on the place in which the offense is committed, national on the nationality of the offender, protective on whether the national security of the state is in danger, and universal on whether the offense can be considered harmful to humanity as a whole. *See Harvard Research on International Law, Draft Convention on Jurisdiction With Respect to Crime*, 29 AM. J. INT'L L. 439, 439-440 (Supp. 1935) [hereinafter *Harvard Research Draft*]; *see also* Abraham Abramovsky, *Extraterritorial Jurisdiction: The United States Unwarranted Attempt to Alter International Law in* United States v. Yunis, 15 YALE J. INT'L L. 121, 123 (1990).

131. *See* Harvard Research, *supra* note 130, at 578-80. The notion of passive personality jurisdiction has been rejected consistently in the past. *See* Gerald P. McGinley, *The Achille Lauro Affair—Implications for International Law*, 52 Tenn. L. Rev. 691, 711-12 (1985); Christopher L. Blakesley, *Jurisdiction as Legal Protection Against Terrorism*, 19 CONN. L. REV. 895, 908 (1987). The Restatement (Third) of Foreign Relations Law of the United States, however, has accepted this form of jurisdiction under certain circumstances, noting that it has been "increasingly accepted as applied to terrorist and other organized attacks on a state's nationals by reason of their nationality . . . ." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402, cmt. g (1987); *see generally,* Wolfenson, *supra* note 98, at 732 n.153 .

offender if a United States citizen is the victim of these acts.[132] Therefore, it is possible that United States officials may secure jurisdiction over foreign-born terrorists without the aid of their home state and may resort, as they have several times in the recent past, to unilateral abduction of these individuals.

United States courts uniformly have rejected complaints arising from abductions by either following the *Ker-Frisbie* rule or failing to find egregious conduct to divest under the *Toscanino* inquiry.[133] If officials continue to utilize such apprehensions, the need for Transfer of Penal Sanctions Treaties, extradition treaties, and other forms of international cooperation may be obviated. International cooperation, however, is necessary to the maintenance of positive relations between states.

In undertaking such apprehensions, the United States only alienates itself from other members of the international community; the protests by Mexico in the Alvarez Machain case and by Canada after Jaffe's abduction demonstrate the strained relations. By undermining the cooperative spirit embodied in the recently-promulgated treaties with Mexico and other states, the United States risks tainting, if not destroying, the efficacy of such treaties. The possibility of reciprocal action also looms as an impetus to comply with international standards and treaties.[134]

D. *Ignoring the Expanding Nature of Due Process?*

One other problem surrounding Transfer of Penal Sanctions Treaties is that they only address the offender's incarceration; no attention is given to the trial or pre-trial proceedings. Furthermore, the treaties provide that only the sentencing state has the ability to hear appeals.[135] The United States courts, therefore, in effect may be sanctioning due process violations committed by other parties. Moreover, because the transferee need not be told of the possibility of trial in the transferee's home state for other crimes, informed consent might not exist.[136]

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132. *See, e.g.,* Hostage Taking Act, 8 U.S.C. § 1203 (1988); Omnibus Diplomatic Security and Antiterrorism Act, 18 U.S.C. § 2331 (1988). The *Yunis* case, *supra* notes 94-95, concerned a Lebanese national prosecuted under the Hostage Taking statute for the hijacking of a Jordanian airliner in 1985. Three United States citizens were aboard the plane, providing United States authorities with the nexus required to prosecute Yunis under the statute. *United States v. Yunis*, 681 F. Supp. 909, 912 (D.D.C.), *rev'd on other grounds*, 859 F.2d 953 (D.C. Cir. 1988), *aff'd*, 924 F.2d 1086 (D.C. Cir. 1991).

133. *See supra* notes 93-96 and accompanying text.

134. *See* Abramovsky, *supra* note 130, at 138-47.

135. *See supra* notes 62-69 and accompanying text (setting forth rights of sentencing and receiving states).

136. Transferred prisoners are also subject to police interrogation, but refusal to co-

United States courts ordinarily will not enforce the penal laws of another state.[137] Under certain circumstances, United States courts have recognized and enforced foreign penal judgments, but only after inquiring into whether the defendant's arrest and conviction conformed with due process standards.[138] Transfer of Penal Sanctions Treaties should require that United States citizens tried abroad be afforded due process. If the transferee's rights were abridged, the transferring state should be sanctioned.

The difference between affording the offender true due process and the process currently afforded to them under these treaties is analogous to the differing views presented by the *Ker* and *Toscanino* courts. In *Ker*, the Supreme Court held that informing a defendant of the pending charges satisfies due process.[139] The manner in which the offender was brought to trial, consequently, was of no consequence. The Court adhered to this maxim despite other decisions that expanded the scope of due process. The *Toscanino* court noted that due process standards had been expanded to include pretrial proceedings, in addition to the trial

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operate in the past might have led to denial of parole. *See supra* notes 127-29 and accompanying text (discussing use of parole as bargaining tool by officials seeking prisoner cooperation).

137. *See* The Antelope Case, 23 U.S. (10 Wheat.) 66 (1825). In this decision, Chief Justice Marshall stated that "[t]he courts of no country execute the penal laws of another." *Id.* at 123. *See* Gelfand, *supra* note 20, at 567 n.16 (stating that while the United States has legislation giving effect to foreign penal judgments, these do not involve enforcement of the original sanction).

138. *See* United States *ex rel.* LaNear v. LaVelle, 306 F.2d 417, 420 (2d Cir. 1962); People v. Kearney, 258 N.Y.S.2d 769, 772 (N.Y. Sup. Ct. 1965). If the court determines that minimal due process has not been satisfied, the foreign judgment will not be recognized. In *Kearney*, for example, a New York court did not recognize a prior Canadian conviction because the defendant was not represented by counsel, had not knowingly and voluntarily waived his right to assistance by counsel, and thus was not given due process. 258 N.Y.S.2d at 775; *see also* United States *ex rel.* Foreman v. Fay, 184 F. Supp. 535 (S.D.N.Y. 1960); United States *ex rel.* Dennis v. Murphy, 184 F. Supp. 384 (N.D.N.Y. 1959).

Administrative law judges in immigration adjudications, by contrast, frequently recognize foreign penal judgments without making any inquiry into the underlying circumstances of that judgment. Abramovsky & Eagle, *supra* note 1, at 311. An administrative law judge, however, may refuse to recognize the foreign sentence after concluding that the defendant was not provided with a fair trial. *See* Cooley v. Weinberger, 518 F.2d 1151, 1155 (10th Cir. 1975) (stating that " '[i]t is not the duty or place of the Administrative Law Judge to become the judge and jury in a foreign land and re-try the criminal case. . . however, if the facts revealed that the procedural steps followed in the foreign legal, system were bizarre, arbitrary, or capricious, and lacking in continuity, then the case might be different.' ") (quoting the decision of the administrative law judge).

139. Ker v. Illinois, 119 U.S. 436, 440 (1886).

itself.[140] Therefore, the method of extraterritorial apprehension could be examined by the court; if the offender's capture violated due process, the offender could be released from custody.[141]

Requiring a foreign sovereign to afford United States citizens more trial rights than its own nationals would be difficult,[142] but United States courts conceivably could inquire into the methods by which other states try United States citizens. If United States notions of due process are offended, action should be taken to prevent this from recurring when United States citizens are involved.

One may also consider the place of incarceration as being part of an offender's conviction. In *Sweet v. Taylor*,[143] the United States District Court for the District of Kansas stated: "Judgment and sentence are component parts of the same judicial function. In fact, the terms are used interchangeably. . . . [T]he place of confinement is as much a part of the sentence, where different places of confinement may be adjudged, as is the number of years required to be served."[144]

If this is true, the United States should inquire into the circumstances surrounding the offender's arrest. Only the sentencing state may handle appeals of the offender's sentence.[145] If the United States theoretically aids in establishing the foreign judgments, as the previous paragraph concludes, then United States courts can examine whether other states complied with constitutional standards throughout the entire process.

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140. *See supra* note 91 and accompanying text (describing the Second Circuit's recognition of increasing due process scope and citing relevant cases).

141. *See supra* notes 90-91 and accompanying text (setting forth "shocking the conscience" standard).

142. *See* Neely v. Henkel, 180 U.S. 109 (1901). In this case, the United States Supreme Court held that:

> [w]hen an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States.

Id. at 123. Essentially, a United States citizen is to be guaranteed "a trial according to the modes established in the country where the crime was committed." *Id.*

143. 178 F. Supp. 456 (D. Kan. 1959).

144. *Id.* at 459. Twelve years ago I wrote that "[b]y enforcing sanctions pursuant to a foreign judgment, the United States is not merely accommodating an American offender by enhancing rehabilitation, but is actually establishing the judgments." Abramovsky & Eagle, *supra* note 1, at 307.

145. *See supra* note 43 and accompanying text.

VI. CONCLUSION

United States and Mexico have entered into several treaties over the past twenty-five years, each time reaffirming their joint commitment to eradicating the problem of narcotics trafficking between the two states. The spirit of cooperation embodied in these treaties led to the transfer of millions of dollars and resources under "Operation Intercept" and "Operation Cooperation," and, most importantly for citizens imprisoned in a foreign land, to a Transfer of Penal Sanctions Treaty.

Twelve years ago, I wrote an article detailing what I believed were flaws in the United States-Mexican Transfer of Penal Sanctions Treaty. The treaty itself, however, has proven to be productive. Under the Mexican treaty alone, almost 1500 United States and Mexican citizens have been returned to serve sentences in their home state. The United States has entered into seven other Transfer of Penal Sanctions Treaties and also oversees a similar treaty among the states of the Council of Europe.

The cooperative spirit underlying Transfer of Penal Sanctions Treaties, however, has been undermined by the United States government's continued use of unilateral abductions. United States law enforcement officials now have power to act under statutes permitting the use of passive personality jurisdiction, and the United States Supreme Court has limited the constitutional rights of non-resident aliens. The Machain case, however, underscores how a violation of territorial sovereignty can strain international relations and upset the delicate balance that exists between states like the United States and Mexico that seek to work together toward a common goal, while at the same time not fully trusting each other.

If United States law enforcement agents continue to abduct persons abroad unilaterally, the level of international cooperation suffers. Those damaged the most if Transfer of Penal Sanctions Treaties fail are those United States citizens imprisoned abroad, for they will lose the opportunity to gain transfer to serve their sentences under the more humane conditions of the United States penal system. My previous Article noted flaws in the treaty, some of which this Article reiterated above. The treaty, however, has worked and can continue to provide a mechanism for prisoner transfer if the United States government ceases to resort to unilateral, ad hoc, and often unwarranted abductions.