Vanderbilt Journal of Transnational Law

Volume 23
Issue 2 *Issue 2 - 1990*

Article 5

1990

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Andrew B. Campbell

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Recommended Citation
Andrew B. Campbell, The Ker-Frisbie Doctrine: A Jurisdictional Weapon in the War on Drugs, 23 *Vanderbilt Law Review* 385 (2021)
Available at: https://scholarship.law.vanderbilt.edu/vjtl/vol23/iss2/5

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The *Ker-Frisbie* Doctrine: A Jurisdictional Weapon in the War on Drugs

Abstract

This Note addresses the ongoing use of extralegal apprehension, as applied under Ker v. Illinois *and* Frisbie v. Collins, *as a viable alternative to extradition in obtaining custody over those accused of exporting drugs to the United States. The author outlines the cultural and political reasons for the production of illicit drugs, examines the purposes and structures of formal extradition treaties and their effectiveness in bringing drug traffickers to trial, and considers the alternatives to formal extradition. The author concludes that extralegal apprehension, in both of its two forms—abduction and irregular rendition—should remain an alternative means of securing custody of a drug trafficker in certain exceptional cases of narcotics enforcement. This Note recognizes the significant risks inherent in such a policy; the author argues, however, that United States law enforcement agencies should resort to extralegal apprehension only when formal extradition fails. In such cases, law enforcement agencies should opt primarily for irregular rendition of the drug trafficker by way of ad hoc, clandestine arrangements with the host state. Abduction, the author argues, should be used only in cases in which the host state has provided aid or sanctuary to the wanted drug trafficker.*

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I. INTRODUCTION

On 3 April 1990, four men in civilian clothes, who identified themselves only as "security agents," apprehended Dr. Humberto Alvarez Machain, a Mexican national wanted in connection with the murder of United States Drug Enforcement Administration (DEA) agent Enrique Camarena-Salazar.[1] Dr. Alvarez was taken from his medical office in Guadalajara, Mexico and flown to El Paso, Texas where DEA agents placed him under arrest and flew him to Los Angeles.[2] Nicknamed "Dr. Mengele" by DEA agents, referring to the infamous Nazi physician, Dr. Alvarez is accused of injecting Camarena with the stimulant lidocaine to prevent Camarena's heart from failing during his 1985 interrogation, torture, and murder at the hands of Mexican drug traffickers, police, and military officials.[3]

The apprehension was allegedly the plot of Antonio Garate Bustamonte, a fifty-one year old former Mexican police officer and current free-lance operative of the DEA.[4] According to Garate, his plans for the venture were approved by Hector Berellez, a Los Angeles DEA agent and head of Operation Leyenda, a nine member unit investigating the murder of Camarena.[5] Law enforcement sources in the United States confirmed that Los Angeles DEA agents played a key role in arranging the operation by promising a bounty, in an amount between $50,000 and $100,000, for the capture of Alvarez.[6]

Reaction to the method of the Alvarez capture was swift. In an apparent act of reprisal, a major Mexican news magazine, *Proceso,* published

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1. *See* Branigin, *Kidnapping of Doctor Riles Mexico,* Wash. Post, Apr. 18, 1990, at A29. Antonio Garate Bustamonte, the alleged mastermind of the operation, stated that ten Mexicans, including Mexican federal policemen, participated in the apprehension. *See* Weinstein, *DEA Operative Details His Role in Kidnapping,* L.A. Times, Apr. 28, 1990, at A1, col. 1.

2. Branigin, *supra* note 1. Dr. Alvarez alleges that one of his abductors identified himself as a DEA agent. Miller, *Mexico to Confront U.S. on Camarena Case Abduction,* L.A. Times, Apr. 18, 1990, at A1, col. 5. United States Attorney General Dick Thornburgh, however, stated that the DEA had established that none of its agents were present when Alvarez was taken from his medical office. Lauter, *Mexico Leader Scolds Quayle over Abduction,* L.A. Times, Apr. 27, 1990, at A1, col. 3. Garate confirms that no DEA agent set foot in Mexico to assist in the kidnapping. Weinstein, *supra* note 1.

3. Shannon, *Snatching "Dr. Mengele",* TIME, Apr. 23, 1990, at 27.

4. Weinstein, *supra* note 1.

5. *Id.*

6. Miller, *supra* note 2. United States Vice President Dan Quayle, while visiting Mexico after the incident, asserted that "no DEA agents in Mexico were involved in this particular situation," thus carefully side-stepping the issue of whether DEA agents based in the United States participated in the capture. Lauter, *supra* note 2.

the names of forty-nine United States DEA agents currently operating in Mexico.[7]

With relations between the United States and Mexico already strained over the past five years because of Mexico's failure to turn over high-ranking former officials wanted for Camarena's murder,[8] Mexican President Carlos Salinas de Gortari expressed his extreme displeasure regarding the incident to United States Vice President Dan Quayle and demanded "new rules" to control joint United States-Mexican anti-drug efforts.[9]

Further, Mexican Attorney General Enrique Alvarez del Castillo announced the arrests of six Mexican nationals, including two senior officers of the Guanajunato state police, for their role in "illegally depriving Dr. Alvarez of his liberty,"[10] and called for the extradition of Antonio Garate Bustamonte and other United States citizens and Mexican citizens residing in the United States for trial in Mexico.[11] Castillo

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7. Shenon, *U.S. Agents in Mexico, Listed, Are on Alert,* N.Y. Times, Apr. 24, 1990, at A5, col 1. The DEA, in a prepared statement, denounced *Proceso,* calling its publication "an irresponsible act that could potentially threaten the safety of our dedicated agents." *Id.* When asked for an explanation for printing the list, Carlos Puig, a Washington correspondent of *Proceso,* answered, "We don't need the explanation . . . . The list is news." *Id.*

8. On the ongoing reluctance of the Mexican Government to extradite its citizens to the United States for drug prosecution despite the existence of a 1978 United States-Mexico extradition treaty, see Isikoff, *Mexican Doctor's Arrest Triggers "Kidnap" Charges,* Wash. Post. Apr. 17, 1990, at A14; Murphy, *Extradition From Mexico: It's Tricky Going,* L.A. Times, Apr. 20, 1989, § 1, at 3, col. 1; Rohter, *Mexico Arrests 6 in Abduction Case,* N.Y. Times, Apr. 29, 1990, § 1, at A9, col. 3

9. Lauter, *supra* note 2. President Salinas also told Vice President Quayle that he was under heavy domestic political pressure regarding cooperation with the United States in drug control. *Id.* Responding to Salinas' displeasure, Garate claimed that Mexican officials brought the kidnapping on themselves by failing to punish all who participated in Camarena's murder. *See* Weinstein, *supra* note 1.

10. Rohter, *supra* note 8. The *New York Times* notes the

> speed and thoroughness with which the Mexican Government has moved to identify and apprehend Dr. Alvarez's kidnappers comes in sharp contrast to its handling of the original investigation into the murder of Mr. Camarena. It was only after months of prodding by American officials . . . that Mr. Camarena's murderers, torturers and kidnappers, including several policemen working in the state of Jalisco, were arrested.

Id.

11. *See* Branigin, *Mexico to Seek Extradition of Alleged Kidnap Leader,* Wash. Post, Apr. 29, 1990, at A21; Miller, *Mexico to Seek Warrants in Suspect's Kidnaping,* L.A. Times, Apr. 29, 1990, at A7, col. 1. The bulletin from the Mexican Foreign Ministry stated, "The Mexican government will immediately initiate proceedings to request the extradition of people, be they nationals or foreigners, who have participated in the

said, "[n]othing and nobody can justify the illicit manner in which [Alvarez] was not only detained, but kidnapped and transported to a foreign country."[12]

Historically, conduct such as the abduction of Dr. Alvarez has been justified, both in the United States and abroad. The purpose of this Note is to examine the issue of this type of "extralegal apprehension" in light of the problems and circumstances unique to the fight to eradicate drug trafficking. In this connection, emphasis is placed on the legal foundations of this activity and the risks a state assumes by following this course of action.

The practices of abduction and irregular rendition[13] are not new to the United States or to the international community at large. Part II of this Note details recent occurrences of these extralegal activities and then outlines the nature of the international drug problem, including its cultural foundations and impact on the governments of drug producing states. Part III discusses the structure of formal extradition and notes its shortcomings in apprehending drug traffickers. Part IV addresses the alternatives to formal extradition—abduction and irregular rendition—focusing on United States case law and legislative developments. Part V concludes that the practices of abduction and irregular rendition are viable alternatives to extradition when extradition fails.

II. A FOREBODING BACKDROP

A. *The Camarena Murder*

On 7 February 1985, Enrique Camarena-Salazar, an undercover agent of the DEA, and his pilot were kidnapped in front of the United States Consulate in Guadalajara, Mexico[14] and driven to the home of a Mexican drug smuggler. There, both men were interrogated, tortured, and killed.[15] Their bodies were found one month later.[16] On 24 January

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execution, planning or organization of the kidnaping." *Id.* Mexican Attorney General Castillo, however, did not place blame on the DEA for the kidnapping and it is not certain whether Mexico would request the extradition of any DEA agents. *Id.*

12. Rohter, *supra* note 8.

13. For the purpose of discussing these two different methods of extralegal apprehension, this Note utilizes the terms put forth in Abramovsky & Eagle, *U.S. Policy in Apprehending Alleged Offenders Abroad: Extradition, Abduction, or Irregular Rendition?*, 57 OR. L. REV. 51 (1977).

14. L.A. Times, Sept. 17, 1986, § 1, at 2, col. 6.

15. Although drug traffickers devised the plot against Camarena, Mexican police officers actually murdered him. *See* J. INCIARDI, THE WAR ON DRUGS: HEROIN, COCAINE, CRIME, AND PUBLIC POLICY 188 (1986); *See infra* note 50.

1986, six Mexican police officers[17] apprehended Rene Martin Verdugo-Urquidez while he was driving his car in San Felipe, Mexico. The Mexican police blindfolded, handcuffed, and placed Verdugo face down in the back seat of the unmarked police car, and drove him to the Mexican-United States border at Calexico, California.[18] After the Mexican police pushed Verdugo into the waiting arms of United States marshals, the marshals placed him under arrest for narcotics trafficking and murder.[19] Verdugo is one of the nineteen individuals charged with the abduction and murder of Camarena and his pilot.[20]

On 5 April 1988, one hundred special Honduran police officers arrested Juan Ramon Matta-Ballesteros, another major drug trafficker, outside his mansion in Tegucigalpa, Honduras, and flew him to the Dominican Republic.[21] After Dominican officials placed Matta on a New York-bound jet, United States marshals arrested him on board the plane.[22] As they did with Verdugo, federal officials charged Matta with

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In 1986, Mexican police abducted and tortured another DEA agent, Victor Cortez, Jr. Cortez was beaten and shocked with electric cattle prods for six hours. L.A. Times, Aug. 19, 1986, § 1, at 5, col. 1.

16. L.A. Times, Sept. 17, 1986, § 1, at 2, col. 6.

17. There is some question whether the six individuals were in fact police officers. Mexican officials claim that only four of the men were State Judicial Police officers and that the other two were civilians. Mexican police authorities state that the four officers were dismissed on 15 January 1986, nine days before Verdugo's apprehension. Reza, *$32,000 Was Paid to Mexicans Who Seized Key Drug Figure*, L.A. Times, Mar. 13, 1986, § 2, at 2, col. 1. At the time of Verdugo's apprehension, however, at least one of the six men showed Verdugo a badge. United States v. Verdugo-Urquidez, 856 F.2d 1214, 1216 (9th Cir. 1988), *rev'd*, 1990 U.S. LEXIS 1175.

18. *Verdugo*, 856 F.2d at 1216.

19. *Id.*; *see* Murphy, *Mexico Hits Arrest in Killing of U.S. Drug Agent*, L.A. Times, June 22, 1988, § 2, at 3, col. 1.

20. Branigin, *supra* note 1.

21. N.Y. Times, Apr. 8, 1988, at A1, col. 1; *see* United States v. Matta-Ballesteros, 700 F. Supp. 528, 529 (N.D. Fla. 1988); Matta-Ballesteros *ex rel.* Stolar v. Henman, 697 F. Supp. 1036, 1041-42 (S.D. Ill. 1988). Matta previously avoided detention in Colombia in March 1985 by bribing his way out of a Bogota prison. Mathews, *Bolivia's Coca Output Restored, Officials Say*, Wash. Post, Feb. 6, 1987, at A14, col. 4. He purportedly paid the prison guards approximately $2 million. *See* Riding, *Cocaine Billionaire: The Men Who Hold Colombia Hostage*, N.Y. Times, Mar. 8, 1987, § 6 (Magazine), at 27, 32.

Matta was not the first individual apprehended extralegally by Honduran authorities. *See, e.g.*, United States v. Darby, 744 F.2d 1508 (11th Cir. 1984) (jurisdiction upheld over defendant Yamanis who was apprehended by a United States agent with the assistance of Honduran officials).

22. N.Y. Times, Apr. 8, 1988, at A1, col. 1.

narcotics trafficking and the murder of DEA agent Camarena.[23] Matta now awaits trial for the murder of Camerena in a maximum security federal prison in Marion, Illinois.[24]

B. *The Invasion of Panama*

On 20 December 1989, approximately 24,000 United States troops[25] took control of the Republic of Panama, "decapitating"[26] the regime of General Manuel Noriega and installing the elected government of President Guillermo Endara.[27] Officials of the Administration of United States President George Bush claimed that the invasion was a measure of "self-defense"[28] and stated four objectives for the military operation: (1) to protect the lives of United States citizens in Panama; (2) to assure the security of the Panama Canal and the integrity of the Canal

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23. Graham, *Impact of Colombian Traffickers Spreads*, Wash. Post, Feb. 24, 1988, at A1, A22.

24. N.Y. Times, Apr. 9, 1988, at A1, col. 6. A third man, Manuel Ibarra Herrera, a commander of the Mexican Federal Judicial Police, was also arrested in connection with the Camarena murder. *See* Molotsky, *Physician from Mexico Arrested in '85 Slaying of U.S. Drug Agent*, N.Y. Times, Apr. 16, 1990, at A2, col. 3.

25. The United States had approximately 12,000 troops already stationed in Panama, and the invasion force exceeded 10,000. Rosenthal, *U.S. Forces Gain Wide Control in Panama; New Leaders in but Noriega Gets Away*, N.Y. Times, Dec. 21, 1989, at A1, col. 6, A8, col. 1. This was the largest United States military operation since the Vietnam War. *Id.* at A1, col. 6.

26. *See id.* at A8, col. 1 (statement of General Colin L. Powell, Chairman of the Joint Chiefs of Staff).

27. *Id.* President Endara and Vice Presidents Ricardo Arias Calderón and Guillermo Ford were sworn in at a United States military base just before the attack began. *Id.*

28. *See* N.Y. Times, Dec. 21, 1989, at A9, col. 3 (statement of Secretary of State, James A. Baker, III). Secretary Baker invoked the inherent right of self-defense, as recognized in article 51 of the United Nations Charter and article 21 of the Charter of the Organization of American States (O.A.S.), and the duty of the United States to protect the Panama Canal under article 4 of the Panama Canal Treaty. *Id.*

Article 51 of the U.N. Charter reads in part:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations . . . .

U.N. CHARTER art. 51.

Article 21 of the O.A.S. Charter provides:

> The American States bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defense in accordance with existing treaties or in fulfillment thereof.

Charter of the Organization of American States, *signed* Apr. 30, 1948, art. 21, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3.

Treaty;[29] (3) to restore democracy to Panama; and (4) to capture General Manuel Noriega for trial in the United States.[30] The invasion occurred five days after the Panamanian legislature declared a "state of war" with the United States and appointed General Noriega as chief executive officer.[31]

On 3 January 1990, after seeking refuge for eleven days in the Vatican Embassy of Panama, General Noriega surrendered to United States authorities.[32] On the following day, Noriega was arraigned on drug trafficking charges at the federal courthouse in Miami, Florida, and entered a plea of not guilty.[33] If convicted, Noriega could receive a maximum penalty of 145 years in prison and approximately $1.1 million in fines.[34]

Verdugo, Matta, Alvarez, and Noriega were not the subject of formal United States extradition proceedings.[35] Rather, all four face criminal

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29. Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, *done* Oct. 1, 1979, 33 U.S.T. 1, T.I.A.S. No. 10029, — U.N.T.S. —.

30. Johnston, *U.S. Aide Hints at a Deal If the General Tells All*, N.Y. Times, Jan. 5, 1990, at A8, col. 1

31. N.Y. Times, Jan. 5, 1990, at A7, col. 1.

32. Barke, *Noriega Arraigned in Miami in a Drug-Trafficking Case; He Refuses to Enter a Plea*, N.Y. Times, Jan. 5, 1990, at A1, col. 6.

33. *Id.*

34. *Id.* The Miami indictment charges Noriega with receiving over $4.6 million from Medellín drug traffickers to protect cocaine shipments from Colombia, through Panama, to the United States; *Id. See infra* note 69.

Specifically, Noriega is charged with violating 18 U.S.C. § 1961(4) (1988), by "exploit[ing] his positions to obtain substantial personal profit by offering narcotics traffickers the safe use of the Republic of Panama as a location for transshipment of multi-hundred kilogram loads of cocaine destined for the United States." Indictment at 1-2, United States v. Noriega, No. 88-0079CR (S.D. Fla. 1990), 1990 U.S. Dist. LEXIS 1 [hereinafter Noriega Indictment].

In addition, Noriega allegedly

> agreed to permit the [Medellín] Cartel to establish and supply a cocaine laboratory in Darien Province, Panama . . . .
>
> . . . .
>
> In the Spring of 1984, members of the Cartel and other cocaine traffickers fled Colombia as a result of increased law enforcement activities in that country. [Noriega] agreed to permit members of the Cartel and others to continue their narcotics business within the borders of Panama and to notify them if and when any law enforcement action was to be taken against them.

Id. at 8.

35. In the case of Matta, however, no extradition proceedings took place because Honduras has no extradition treaty with the United States; the Honduran Constitution forbids extradition of its nationals. *See* N.Y. Times, Apr. 9, 1988, at 1, col. 6.

Regarding Verdugo, although the United States has an extradition treaty with Mexico, DEA officials relied on representations of Mexican law enforcement officers that

prosecution in the United States by virtue of extralegal apprehension from a foreign state.[36]

C. *The Drug Problem*

The problem of drug trafficking and drug use is apparent to people of the United States. The drug problem permeates the societies of most states around the world, making enforcement of drug laws a multi-billion dollar task.[37] After examining the history of drug control efforts, the United States Congress concluded that "there are no easy answers to the international problem of narcotics production, trafficking, and abuse."[38] In fact, Congress found that

> U.S. efforts to persuade other countries to increase their antinarcotics efforts are ultimately limited by the difficulty of dealing with sovereign

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Verdugo could be arrested by Mexican police if there were an outstanding United States warrant for his arrest. United States v. Verdugo-Urquidez, 856 F.2d at 1216 (9th Cir. 1988), *rev'd*, 1990 U.S. LEXIS 1175. Such a warrant was issued after Verdugo was indicted on 3 August 1985 for marijuana smuggling. *See* L.A. Times, Mar. 13, 1986, § 2, at 2, col. 1. Almost two and a half years after his apprehension, the Mexican Government issued a formal protest against the arrest of Verdugo, claiming that the apprehension and arrest violated Mexican and international law. *See* Murphy, *supra* note 19. Further, a Mexican prosecutor filed formal kidnapping charges against the six Mexican police officers. *Verdugo*, 856 F.2d at 1216 n.1. These police officers, who were paid $32,000 by the United States Government for Verdugo's apprehension, were allowed to emigrate to the United States after threats were made on their lives and the lives of their families. *See* Murphy, *supra* note 19; *see also Verdugo*, 856 F.2d at 1216 n.1.

36. *See generally Verdugo*, 856 F.2d 1214; United States v. Matta-Ballesteros, 700 F. Supp. 528 (N.D. Fla. 1988); Matta-Ballesteros *ex rel.* Stolar v. Henman, 697 F. Supp. 1036 (S.D. Ill. 1988); Noriega Indictment, *supra* note 34.

On 26 September 1988, after an eight week trial, Verdugo was convicted for his part in the torture and murder of Enrique Camarena. Murphy, *Mexican Drug Figure Found Guilty in Death of U.S. Agent*, L.A. Times, Sept. 27, 1988, § 1, at 3, col. 6. In October, 1988, Verdugo received a sentence of 240 years, with eligibility for parole after the first sixty years. L.A. Times, Oct. 29, 1988, § 2, at 1, col. 1; *see infra* note 310.

On 4 May 1989, Juan Matta was arraigned on drug charges. Murder charges have not yet been brought against Matta even though he is a key suspect in the Camarena murder. Murphy, *Reported Drug Ring Kingpin Arraigned*, L.A. Times, May 5, 1989, § 1, at 3, col. 6. Matta was convicted of cocaine smuggling on 6 September 1989. Chicago Trib., Sept. 7, 1989, at 13. He was later sentenced to life without parole. Weinstein, *Matta Gets Life Term for Running Drug Syndicate*, L.A. Times, Jan. 17, 1990, § 1, at 3, col. 4.

37. In 1988, the United States Congress estimated that the value of illegal drug trade worldwide was approximately $500 billion and that the United States illegal drug trade produced between $50 and $100 billion annually at the retail level. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 4102(a)(2), (6), 102 Stat. 4818, 4265.

38. H.R. REP. NO. 798, 99th Cong., 2d Sess. 2 (1986).

> countries, the boundaries of U.S. leverage, the competition of other U.S. national security interests, and by the lack of a persuasive U.S. domestic commitment and effort. Experience has demonstrated that politically attractive solutions such as "cutting off foreign aid" or vastly increased funding for international narcotics activities will contribute only marginally to combatting this problem.[39]

The problems of controlling narcotics production and importation begin with the cultures of the people from the drug producing states, where the cultivation of cannabis, poppy, and coca has been a way of life for generations. The practice of chewing the coca leaf, for example, goes back over three thousand years to the religion of the Incas.[40] Today, the Indian peasants in the Andes Mountains of South America still chew coca for the stimulating effects that enable them to work twelve to fourteen hour days in the region's mineral mines and fields.[41] Both the Bolivian and Peruvian Governments allow controlled production of coca for domestic consumption.[42]

On the other side of the world, the production of opium and heroin[43] involves millions of peasant farmers in the two principal production areas of these drugs, known as the Golden Triangle and the Golden Crescent.[44] The Golden Triangle, a rugged area in Southeast Asia encompassing Burma, Laos, and Thailand, produced an estimated 734 metric tons of opium in 1986, 560 metric tons in 1985, and 575 metric tons in 1984.[45] The Golden Crescent, encompassing Pakistan, Iran, and Afghanistan, produced approximately 850 metric tons of opium each year from 1984 to 1986.[46] In both regions, peasant hill-farmers make their living by harvesting raw opium and selling it to local refineries which change the substance into a morphine base.[47] Refineries then sell

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39. *Id.* at 2-3.

40. *See* J. INCIARDI, *supra* note 15, at 1; Note, *Extradition Treaty Improvements to Combat Drug Trafficking*, 15 GA. J. INT'L & COMP. L. 285, 296 n.87 (1985).

41. *See* J. INCIARDI, *supra* note 15, at 6-9; Note, *supra* note 40, at 296 n.87.

42. J. INCIARDI, *supra* note 15, at 177-78. Inciardi reports that Bolivia allows production of approximately 12,000 kilograms per year and Peru allows production of approximately 14,000 kilograms per year. *Id.*

43. The word heroin was first coined by Bayer and Company at the turn of the twentieth century as a trade name for the morphine-based compound, diacetylmorphine. Named from the German *heroisch*, meaning heroic and powerful, Bayer's heroin was sold as a remedy for morphine addiction and coughs. *See id.* at 9.

44. *Id.* at 52.

45. *Id.* at 53 (citing a report by the United States Department of State).

46. *Id.*

47. *Id.* at 55.

this base to a laboratory where it is transformed into pure heroin.[48]

The cultural permissiveness of this activity lead one commentator to write:

> Viewed from the perspective of a foreign country such as Pakistan . . . United States antidrug policies are simply arrogant. In many places, local peasant families have grown marijuana, coca, or opium for hundreds of years. Suddenly they are ordered not to grow what they have always grown. Americans would never accede to such a request. Suppose some foreign government asked us to suppress tobacco farmers (perhaps burn their fields) to improve public health?[49]

The media in a number of drug-producing states echo these sentiments against United States drug policies. Professor James Inciardi[50] reports that a Bolivian media representative stated, "[D]rug abuse is a North American problem, a U.S. vice that Bolivia has no responsibility for. Therefore, Bolivia has no responsibility for drug control. There is no drug problem here. It is in the United States. Why, then, does your DEA come down here?"[51] Similarly, a Colombian newspaper attacked the United States drug policy by asking, "Why is the Drug Enforcement Administration aiming its guns outside the United States, after production? Why not go inside the United States, after consumption?"[52]

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48. Note, *International Narcotics Control: A Proposal to Eradicate an International Menace*, 14 CAL. W. INT'L L.J. 530, 534 n.39 (1984). The author further notes that the farmer "is paid between $350.00 and $1,000.00 for 10 kilograms of raw opium [which yields] one kilogram of heroin, which is sold to users for $2.23 million." *Id.*

49. Thurow, *U.S. Drug Policy: Colossal Ignorance*, N.Y. Times, May 8, 1988, at D20, col. 1.

The analogy drawn between tobacco farmers and poppy, coca, and marijuana growers is appropriate. Experts note that opium crops often support entire local communities. *See* Fisher, *Trends in Extraterritorial Narcotics Control: Slamming the Stable Door After the Horse Has Bolted*, 16 N.Y.U.J. INT'L L. & POL. 353, 354 (1984). The Governments of Thailand, Jamaica, Peru, and Colombia are reluctant to destroy such crops "because so many farmers depend upon these crops for their livelihood." It was estimated that marijuana field workers earn approximately $7.50 per hour as compared to $3.50 per hour in conventional farm work. Note, *supra* note 40, at 296. Because profit margins are so inflated, farmers substitute marijuana and coca crops in place of necessary foodstuffs. These practices only compound the problems of underdeveloped states whose populations are already starving. *See* Note, *supra* note 48, at 533.

50. Inciardi is a Professor and the Director of the Division of Criminal Justice at the University of Delaware.

51. J. INCIARDI, *supra* note 15, at 175-76.

52. *Id.* at 176. Colombian Foreign Minister Julio Londono voiced similar sentiments, claiming that the insatiable drug consumption in the United States has grown unchecked and poses the single greatest threat to democracy in Latin America. Londono asserted that the attempt "to eradicate supply alone while the demand grows defies the

A partial answer to this question is that United States law enforcement does attack the demand side of the drug economy. With his declaration of "War on Drugs" at the beginning of his first term, United States President Ronald Reagan and First Lady Nancy Reagan began a campaign of legislation and political rhetoric[53] designed to discourage domestic drug sales and to elevate public awareness of drug use.[54] Domestic, demand side law enforcement, however, is only half the solution. If the United States is fighting a war against illicit drugs, the United States, with several thousand miles of land border and coastline and many internal ports of entry, is an almost indefensible territory against the invading enemy. The other half of the war, therefore, must be offensive, supply side law enforcement.

Attacking the drug supplier presents a second problem. Because the cultivation and manufacture of illicit drugs is often firmly rooted in the culture of a foreign state,[55] the drug supplier exploits the culture. In South America, "narco-trafficantes" are considered local heroes.[56] For example, two days after the arrest of Juan Matta, a crowd of 1,500 protestors firebombed the United States Consulate in Tegucigalpa, Honduras.[57] Shouting, "Matta yes! Gringos no!," the protestors voiced their anger toward Honduran President Jose Azcona Hoyo and chanted, "Azcona, if Matta doesn't come back, we want your head."[58] Five people died in the protest, and Azcona declared a state of emergency in two major cities.[59]

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laws of economic gravity." Reichertz, *Colombia Criticizes Insatiable Drug Consumption of Americans*, Reuters, June 8, 1988 (LEXIS, NEXIS Library, REUTER File). Londono expressed the hope that "the government of the United States will achieve victories against drug consumption in the streets of the cities of the United States." *Id.*

53. The success of President Reagan's War on Drugs is debated. The anti-drug legislation enacted during the Reagan Administration lead one commentator to conclude that the first victim of the War on Drugs has been the Bill of Rights. *See* Wistosky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L. J. 889.

54. This is not to say that the public was previously wholly unaware of the domestic drug problem. By 1982, approximately three thousand parents groups combined themselves into the National Federation of Parents for Drug Free Youth. *See id.* at 891.

55. *See supra* notes 40-49 and accompanying text.

56. *See generally* J. INCIARDI, *supra* note 15, at 177-85.

57. N.Y. Times, Apr. 8, 1988, at A1, col. 1.

58. *Id.*

59. N.Y. Times, Apr. 9, 1988, at A1, col. 6. This is not an isolated incident. In November 1982, after a team of Bolivian narcotics agents confiscated sixty kilos of coca paste in the Chapare growing region, approximately two hundred peasants tortured and killed the agents that same evening. *See* J. INCIARDI, *supra* note 15, at 187.

The drug lords also protect their livelihood with effective, brutal, terrorist techniques. In the last six years, Colombian cocaine traffickers have dealt with their state's extradition policy in a lethal fashion. In 1984, motorcycle-riding gunmen paid by drug traffickers killed Colombian Justice Minister Rodrigo Lara.[60] On 12 November, 1985, members of a narco-terrorist group, known as the April 19 Movement or M-19, opened fire and seized the Palace of Justice in Bogota, Columbia. Colombian government officials stated that the objective of the guerrillas was to destroy the records of United States extradition requests against drug traffickers.[61] When the Colombian Army counterattacked, eleven of the state's twenty-four Supreme Court Justices were killed.[62] These Justices had rejected every legal motion attacking a 1979 Colombian-United States extradition treaty.[63] On 31 July 1986, another motorcyle-riding assassin executed Hernando Baquero Borda, a Colombian Supreme Court Justice who had served on a panel that reviewed extradition requests.[64] On 13 January 1987, Justice Minister Enrique Parejo Gonzalez was shot by a group calling itself the Hernan Botero Moreno Command—named after one of twelve Colombians extradited to the United States with Parejo's help.[65] Parejo survived.[66] Also in January 1987, two Chief Justices resigned from the Court amid death threats from drug traffickers.[67]

Despite such pressure by narco-terrorists, Colombia successfully extradited to the United States for trial one of the three top cocaine traf-

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60. Graham, *Colombian Supreme Court Overturns Extradition Pact with U.S.*, Wash. Post, June 27, 1987, at A16, col. 1.

61. Graham, *27 Hours That Shook Bogota*, Wash. Post, Nov. 13, 1985, at Al, col. 4. United States officials later confirmed that all United States extradition requests were destroyed. *See* Riding, *supra* note 21, at 32.

62. Riding, *supra* note 21, at 32.

63. Graham, *supra* note 60; *see also* Treaty on Extradition, *done* Sept. 14, 1979, United States-Colombia, — U.S.T. —, T.I.A.S. No. — (entered into force March 4, 1982) [hereinafter Colombia Extradition Treaty], *reprinted in* 1 I. KAVASS & A. SPRUDZS, EXTRADITION LAWS AND TREATIES: UNITED STATES 140.1 (1980 & 1989 Supp.). Article 8 of this treaty provides, "Neither Contracting Party shall be bound to deliver up its own nationals, but the Executive Authority of the Requested State shall have the power to deliver them up if, in its discretion it be deemed proper to do so." *Id.* art. 8.

64. N.Y. Times, Aug. 1, 1986, at A3, col. 2.

65. N.Y. Times, Jan. 18, 1987, at D2, col. 2; *see also* Riding, *supra* note 21, at 28.

66. Riding, *supra* note 21, at 28.

67. Wash. Post, Jan. 22, 1987, at A25, col. 5. The First Chief Justice, Fernando Uribe Restrepo, resigned and moved to Ecuador. His successor, Nemesio Camacho Rodriguez, stated upon taking the position, "We're all intimidated, but I don't feel fear." He resigned five days later. *See* Riding, *supra* note 21, at 32.

fickers in the world.[68] On 4 February 1987, Colombian police arrested Carlos Lehder Rivas, a leader of the notorious Medellín cartel,[69] and formally extradited him to the United States[70] under the 1979 treaty with Colombia.[71] In reprisal to Lehder's extradition, drug traffickers implemented a rash of killings of judges, journalists, and government officials.[72]

Finally, on 26 June 1987, the Colombia Supreme Court declared unconstitutional a Presidential law ratifying the Colombian-United States extradition treaty.[73] The Supreme Court, reestablished after the 1985 attack on the Palace of Justice, found itself in a 12-12 deadlock on the issue one month prior to this decision.[74] To break the tie, the Court sought a twenty-fifth judge.[75] Three persons refused the appointment and the fourth person attempted to beg his way out of the position before he finally accepted.[76] On 26 June 1987, the last judge voted to strike down the law.[77] Thus, through a campaign of murder and fear, the Colombian drug traffickers intimidated their state's highest court[78] and left

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68. Thornton, *Reported Top Cocaine Trafficker Arrested in Colombia, Faces U.S. Trial*, Wash. Post, Feb. 5, 1987, at A18, col. 3.

69. The Medellín cartel is named after the Colombian city of Medellín, the center of cocaine trafficking in South America.

70. *See* Thornton, *supra* note 68. Rivas gained notoriety in 1985 by placing a $350,000 bounty on the chief of the DEA. *Id.*

71. *See supra* note 63.

72. Graham, *Drug Killings Cow Colombians*, Wash. Post, Feb. 6, 1987, at A14, col. 4. Between 1982 and 1987, fifty-seven judges, thirty-six from lower courts, were killed at the hands of the drug traffickers. *See* Riding, *supra* note 21, at 32.

73. Graham, *supra* note 60. The Columbia Supreme Court previously held the extradition treaty unconstitutional on a technicality: the treaty had been improperly signed into law by a government minister instead of then-President Belisario Betancur. *See id.*; Riding, *supra* note 21, at 28, 36. After that ruling, the current President, Virgilio Barco, signed the treaty back into law. Three days later, Guillermo Cano, publisher of Bogota's second largest paper, was murdered. *See* Riding, *supra* note 21, at 28-29; Graham, *supra* note 60. It is Barco's action that the Supreme Court overturned.

74. Graham, *supra* note 60.

75. *Id.*

76. *Id.*

77. *Id.*

78. One month before the Colombia Supreme Court decision, Ms. Ann Wrobleski, Assistant United States Secretary of State for International Narcotics Matters, asserted before the United States House Select Committee on Narcotics Abuse and Control that "[i]t is not a mere coincidence that in Colombia, the country where the government has done the most of any nation in South America to control narcotics trafficking, that men and women risk their lives just by attempting to do their jobs." *Colombian Drug Trafficking and Control: Hearing Before the House Select Comm. on Narcotics Abuse and Control*, 100th Cong., 1st Sess. 3 (1987). Labelling the problem "a question of our na-

the state's political and legal system in pieces.[79]

The atmosphere of lawlessness became especially acute on 18 August 1989, when the Medellín Cartel assassinated Luis Carlos Galán, a Colombian Senator and leading Presidential candidate.[80] After the attack, President Virgilio Barco, pursuant to the Colombian Constitution, declared a "state of siege" in Colombia on 18 August 1989.[81] This declaration empowered President Barco to extradite drug traffickers by executive decree on the recommendation of a special narcotics council consisting of five cabinet ministers.[82] The Colombian Supreme Court upheld President Barco's decree on 3 October 1989.[83] The Colombian Government is currently struggling to restore order to the state.[84]

Colombia does not appear to be an isolated case. Although no other foreign government appears victimized to the extent of the Colombian government, bribery, terrorism, and corruption at the hands of drug traffickers also influence the governments of Mexico, the Bahamas, Honduras, Panama, Peru, and Bolivia.[85]

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tional security," Chairman Charles Rangel further noted that "Colombia is being held hostage by drug traffickers, because of their inability to enforce the law." *Id.* at 4.

79. *See* Riding, *Intimidated Colombian Courts Yield to Drug Barons*, N.Y. Times, Jan. 11, 1988, at A3, col. 3. One Colombian official claimed, "It's not an exaggeration to say that the legal system as we once knew it has broken down. . . . Even where there are honest judges, they are too scared to act." *Id.*

In what may be the ultimate irony, the Medellín Cartel has purportedly hired, among a host of top lawyers, two former Colombia Supreme Court Justices to "provide terrorized or corrupt judges with legal justifications for their decisions." *Id.*

80. N.Y. Times, Aug. 19, 1989, at A3, col. 1. Colombian police stated that the Medellín Cartel offered $500,000 for the death of Mr. Galán, who escaped a prior assassination attempt on 5 August 1989 in Medellín. *Id.*

81. Decree No. 1860 of Colombian President Virgilio Barco (Aug. 18, 1989).

82. *Id.* art. 5. The council is called the *Consejo Nacional de Estupelacientes*, or National Council of Narcotics.

83. Sentencia No. 68, Corte Suprema de Justicia, Sala Plena (Oct. 3, 1989).

84. The Colombian Government has had recent success against the Medellín Cartel. On 15 December 1989, Jose Gonzalo Rodriguez Gacha, one of the leaders of the Cartel and mastermind of the Galán assassination, was killed in a shootout with Colombian security forces. Treaster, *A Top Medellín Drug Trafficker Dies in a Shootout in Colombia*, N.Y. Times, Dec. 16, 1989, at A1, col. 1. The gunfight was the result of a trap laid by Colombian police, in which Gacha's son was abruptly released from jail and tailed to the drug lord. *Id.* at A10, col. 1.

85. *See generally infra* note 122 and accompanying text. At the trial of Carlos Lehder Rivas, a leader of the Medellín Cartel, a government witness stated that Rivas paid between $3 and $5 million to Bahamian Prime Minister Lynden Pindling between 1978 and 1981 for protection of drug smuggling boats. Graham, *Impact of Drug Traffickers Spreads*, Wash. Post, Feb. 24, 1988, at A22, col. 2.

Also, Ramon Milian Rodriguez, former chief financier for the Medellín cartel, told a

III. FORMAL EXTRADITION

Unlike extralegal apprehension,[86] which operates outside any formal processes, extradition is a formal legal process between states. The roots of international extradition run back as far as ancient Egypt.[87] Although renditions of individuals were usually the result of some form of agreement between states, the practice also grew from reciprocity and comity.[88] Extradition was as much a gesture of mutual regard and friendship between states as it was a legal process.[89]

As the practice of extradition evolved into a more formal system of bilateral and multilateral treaties between foreign states, legal scholars began to debate whether there exists a legal duty to extradite or merely a moral obligation to do so. In the seventeenth century, Hugo Grotius maintained that the holding state has the inherent legal duty to deliver the accused into the hands of the requesting state or to punish the accused under its own law.[90] The rule of conduct became expressed as "*aut dedere aut punire*,"[91] which translates, "either surrender or punish." Conversely, commentators maintain that extradition is merely an imperfect obligation that gains validity under international law only when embodied in a particular treaty between states.[92] A sovereign state presumably has control over its constituents, and separate states are sanctuaries to which individuals may run, seeking safe haven from another state.[93] Without some specialized compact between the states,

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Senate investigatory committee that the Cartel paid General Manuel Noriega approximately $320 million between 1979 and 1983 for the use of Panamanian airports and banks and for information regarding identities of United States drug agents and military surveillance vessels. *Id.*

86. *See infra* part IV, section A.

87. I. SHEARER, EXTRADITION IN INTERNATIONAL LAW 5 (1971). The oldest document in diplomatic history pertaining to extradition is a treaty between Rameses II of Egypt and Hattusili III of the Hittites, which dates from 1280 B.C. *Id.*

88. 1 M. BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 5 (1987).

89. *Id.*; *see* I. SHEARER, *supra* note 87, at 6 n.3. The treaty between Rameses II and Hattusili III was, in effect, a peace treaty to end the Syrian war. The treaty provided for eternal peace, alliance against common enemies, trade protection, and emigration, as well as extradition of criminals. *Id.*

90. H. GROTIUS, DE JURE BELLI AC PACIS, bk. II, ch. 21, paras. 3-4 (1624), *cited in* I. SHEARER, *supra* note 87, at 24 *and in* 1 M. BASSIOUNI, *supra* note 88, at 10.

91. 1 M. BASSIOUNI, *supra* note 88, at 10.

92. S. PUFFENDORF, THE ELEMENTS OF UNIVERSAL JURISPRUDENCE, bk. VIII, ch. 3, §§ 23-24, *cited in* I. SHEARER, *supra* note 87, at 24 *and in* 1 M. BASSIOUNI, *supra* note 88, at 10.

93. *See* S. BEDI, EXTRADITION IN INTERNATIONAL LAW AND PRACTICE 29-30

which by nature must outline specific situations or offenses that warrant extradition, the holding state need not deliver the individual to the requested state.[94]

In 1840, with the United States Supreme Court decision in *Holmes v. Jennison*,[95] United States jurisprudence sided with the imperfect obligation theory of extradition, holding that, absent a specific treaty requirement, the United States has no obligation to extradite under international law. This view still exists today.[96]

As a natural consequence of embracing the "imperfect obligation" theory of extradition, the United States system of extradition adopted certain procedural hoops, which international law had already established, through which the requesting state must jump. One commentator listed these requirements: (1) the crime that the accused has allegedly committed must be a recognized crime by both states; (2) a requisite amount of evidence must be supplied to show that the accused actually committed the offense; (3) an accused may not be tried for the same act twice; (4) extradition of nationals is at the option of the host state; (5) extradition for a political offense is at the option of the host state.[97] Unfortunately, this procedural recipe renders traditional extradition inadequate for narcotics enforcement.[98]

Beginning with the Shanghai Opium Commission of 1909,[99] the international community has recognized drug-trafficking as a problem. Since that meeting, the United States has participated in several major conventions relating to the prevention and criminalization of drug production and to the transportation and extradition of offenders.[100] Though noble

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(1968) (quoting Puffendorf and Lord Coke).

94. "[T]he liability to war which a state incurs when it receives and protects fugitive criminals arises rather from special compact than from any general obligation." *Id.* at 29 (quoting Puffendorf); *see also* I. SHEARER, *supra* note 87, at 24.

95. 39 U.S. (14 Pet.) 540 (1840).

96. *See* Factor v. Laubenheimer, 290 U.S. 276 (1933); Ivancevic v. Artukovic, 211 F.2d 565 (9th Cir. 1954).

97. *See* Findlay, *Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law*, 23 TEX. INT'L L.J. 1, 6 (1988).

98. *See, e.g.*, Murphy, *supra* note 8 (describing the reluctance of the Mexican Government to extradite its citizens to the United States for drug prosecution despite the existence of a 1978 United States-Mexico extradition treaty).

99. Thirteen states met in Shanghai on 1 February 1908 to discuss the growing international problem of opium trafficking and use. *See* Wright, *The International Opium Commission* (pt. 1), 3 A.J.I.L. 648 (1909).

100. International Opium Convention, *done* Jan. 23, 1912, 38 Stat. 1912, T.S. No. 612, 8 L.N.T.S. 187; Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, *done* July 13, 1931, 48 Stat. 1543, T.S. No. 863, 139

in design, commentators criticize these agreements for including denunciation and escape clauses and for lacking any concrete enforcement mechanisms.[101]

The Single Convention on Narcotic Drugs, for example, was adopted by over 140 states—including the United States—to simplify and codify a comprehensive agreement with respect to narcotics control.[102] Of the fifty-one articles of the Convention, however, only articles 35 and 36 address the problem of illicit drugs. Article 36, while delineating specific punishable offenses, also contains an escape clause, which provides that any party "shall have the right to refuse to effect the [arrest or] grant the extradition in cases where the competent authorities consider that the offence is not sufficiently serious."[103] Article 36 also permits the signatory parties to define, prosecute, and punish offenses in accordance with their own law.[104] The denunciation clause, article 46, allows any party to denounce any or all of the current treaties.[105]

Similar problems confront the United States in its bilateral extradition efforts. Because the United States recognizes the power to extradite pursuant only to a treaty, courts tend to treat such agreements less as mandates of international law and more as self-contained contracts between

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L.N.T.S. 301; Single Convention on Narcotic Drugs, *done* Mar. 30 1961, 18 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 204; Convention on Psychotropic Substances, *done* Feb. 21, 1971, 32 U.S.T. 543, T.I.A.S. No. 9725, 1019 U.N.T.S. 175; Protocol Amending the 1961 Single Convention on Narcotic Drugs, *done* Mar. 25, 1972, 26 U.S.T. 1439, T.I.A.S. No. 8118, 976 U.N.T.S. 3.

The United States is not party to a number of related conventions. *See, e.g.*, Agreement Concerning the Suppression of Opium Smoking, *done* Nov. 27, 1931, 177 L.N.T.S. 373; Convention for the Suppression of Illicit Traffic in Dangerous Drugs, *done* June 26, 1936, 198 L.N.T.S. 299; Agreement Concerning the Suppression of the Manufacture of Internal Trade in and Use of, Prepared Opium, *done* Feb. 11, 1925, 51 L.N.T.S. 337; Convention Relating to Dangerous Drugs, *done* Feb. 19 1925, 81 L.N.T.S. 317.

101. For an extended discussion on the shortcomings and weaknesses of these agreements, specifically the 1961 Single Convention on Narcotic Drugs, see Note, *supra* note 48, at 544-50; *see also infra* notes 103, 141 and accompanying text (examples of escape clauses); note 105 and accompanying text (discussing the Convention's denunciation clause).

102. 1989 TREATIES IN FORCE 342-43 (U.S. Dep't of State, No. 9433); Note, *supra* note 48, at 544-47.

103. Single Convention on Narcotic Drugs, *supra* note 100, art. 36.

104. *Id.* art. 36(4).

105. *Id.* art. 46. One commentator suggests that these three provisions were included to gain additional signatories, but the unfortunate result is an agreement wholly "non-obligatory" which may be "followed or ignored by any party at its discretion." Note, *supra* note 48, at 548-49.

the party states.[106] Generally speaking, the power to extradite or to request extradition is captured solely within the four corners of each treaty.[107] Most extradition treaties with the United States, unfortunately, are under-inclusive and out of date vis-à-vis the growing need for narcotics control.[108]

Three factors account for the deficiencies in the international extradition system which undermine United States efforts to apprehend drug traffickers. First, there exists under international law a well-established doctrine of speciality.[109] Under this rule, the requesting state may prosecute the extradited offender only for an offense described in the treaty under which he was requested and surrendered.[110] In recognition of states' traditional competence to provide sanctuary,[111] the doctrine of speciality evolved to protect the right of a sovereign state to refuse to deliver a requested political refugee for a common criminal offense when once inside the requesting state the refugee would be tried for political offenses.[112]

The doctrine of speciality creates a large problem for the extradition of drug traffickers. In the historical evolution of narcotics, newer, more potent, and unique drugs develop faster than extradition treaties can account for them. This problem is especially acute today with the continued experimentation in so-called designer drugs—drugs created by

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106. *See, e.g.*, United States v. Cordero, 668 F.2d 32, 38 (1st Cir. 1981) ("[U]nder international law, it is the contracting foreign government . . . that would have the right to complain about a [treaty] violation."); *see also* United States *ex rel.* Lujan v. Gengler, 510 F.2d 62, 67 (2d Cir. 1975) ("The provisions [of a treaty] are designed to protect the sovereignty of states, and it is plainly the offended states which must in the first instance determine whether a violation of sovereignty [has] occurred . . . .").

107. This is not to say that the United States Government cannot request extradition for a nondelineated offense. In Fiocconi v. Attorney General, 462 F.2d 475 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972), the United States Court of Appeals for the Second Circuit held that because no provision for narcotic offenses existed in an 1868 extradition treaty with Italy, the extradition of the defendants for conspiring to import heroin was an act of comity on the part of the Italian Government. *Fiocconi*, 462 F.2d at 481-82.

108. *See* I. SHEARER, *supra* note 87, at 41, 132; *see also* Note, *supra* note 40, at 300.

109. *See infra* notes 110-12 and accompanying text (describing the doctrine of speciality).

110. *See* 1 M. BASSIOUNI, *supra* note 88, at 359-60; I. SHEARER, *supra* note 87, at 146.

111. *See supra* note 93 and accompanying text.

112. *See* Sakellar, *Acquisition of Jurisdiction over Criminal Defendants by Forcible Abduction: Strict Adherence to* Ker-Frisbie *Frustrates United States Foreign Policy and Obligations*, 2 A.S.I.L.S. INT'L L.J. 1, 6 (1978).

changing the chemical composition of other illicit substances.[113] Drug manufacturers, for example, can process *epadu*, a coca-like alkaloid derived from a small tree found in Colombian forests, into a drug that is forty percent less potent than cocaine and sixty percent less in price.[114] Manufacturers can also process black tar heroin, a newer form of heroin with a greater purity, from Mexican poppies at a lower cost than other forms of heroin.[115] The 1990s have already seen the introduction of ice, a synthetic, smokable form of crystal methamphetamine that law enforcement officials say will replace crack, heroin, and PCP.[116] Drug producers can manufacture designer drugs, including ice, with easily purchased medical ingredients.[117] United States drug enforcement officials already have intercepted shipments from Taiwan, Hong Kong, Thailand, the Philippines, and Korea.[118]

The closely related doctrine of double criminality is a second factor lending to the weaknesses in the international extradition system. For an individual to be extradited for a specifically delineated criminal act, both states must recognize the offense and punish violators with roughly the same penalties.[119] This doctrine serves to further reciprocity between states.[120]

Problems arise from this doctrine for two reasons: first, the laws and institutions of states vary on the penalties assessed for similar crimes; and second, one state does not always consider a crime to be of the same severity as does another state.[121] In the context of drug enforcement, many nations do not recognize drug production and sales as crimes in a fashion similar to that of the United States. Even if such activities are recognized as crimes, bribery, corruption, and outright terrorism make enforcement lax. On this score, Professor Inciardi writes:

> Perhaps the most pervasive problem in the political arena is the wholesale corruption of individuals and institutions. In some trafficking areas, corruption is so widespread in the justice system, banking, the legal profession, military, the diplomatic corps, customs, and general government that it is often viewed as part of the natural order of things. . . .

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113. *See* J. INCIARDI, *supra* note 15, at 69.
114. *Id.* at 214.
115. *Id.*
116. *See* Sager, *The Ice Age*, ROLLING STONE, Feb. 8, 1990, at 53, 57.
117. *Id.*
118. *Id.*
119. *See* I. SHEARER, *supra* note 87, at 137; *see also* Note, *supra* note 40, at 300.
120. *See* 1 M. BASSIOUNI, *supra* note 88, at 324; I. SHEARER, *supra* note 87, at 137-38.
121. *See* S. BEDI, *supra* note 93, at 70.

> In Latin America, enforcement of the drug laws is so limited that U.S. officials have charged that Cuban President Fidel Castro and officials of neighboring countries actually encourage drug sales as a revenue source. In Colombia, as an outgrowth of President Belisario Betancur's efforts against drug syndicates, it was found that no less than 400 judges had been corrupted by drug-related bribe money. . . . Similarly, it would appear that drug-related corruption permeated the governments of the Bahamas, Belize, and the Caribbean Turks and Caicos Islands. For Peru, coca is the single largest export, pumping almost $1 billion into the fragile economy—made possible by corruption in government and the military.[122]

The last problem with formal extradition confronting the United States concerns extradition of nationals from a sovereign state. Most extradition treaties contain no obligation on the part of the host state to extradite its own nationals.[123] Typically, either the treaty absolutely bars the surrender of nationals, or it leaves the matter to the discretion of the requested state; the requested state "shall be under no obligation" to deliver up its own nationals.[124] The lack of a mandatory requirement on home states to extradite their nationals possibly presents the biggest hurdle to United States narcotics enforcement because many of the major drug traffickers are nationals of drug producing states.[125]

The United States has made some inroads in its extradition treaties.[126] The United States Senate ratified new extradition treaties with Thailand,[127] Costa Rica,[128] Jamaica,[129] and Italy[130] on 28 June 1984. One year earlier, the Senate ratified a similar extradition treaty with

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122. J. INCIARDI, *supra* note 15, at 194-95 (footnotes omitted).

123. *See infra* notes 132-33, 142 and accompanying text.

124. *See* I. SHEARER, *supra* note 87, at 94; 1 M. BASSIOUNI, *supra* note 88, at 457.

125. The Medellín cartel of Colombia provides a good example. *See generally infra* notes 60-84 and accompanying text.

126. *See generally* Note, *supra* note 40, at 300.

127. Treaty on Extradition, *done* Dec. 14, 1983, United States-Thailand, S. TREATY DOC. No. 16, 98th Cong., 2d Sess. (1984) [hereinafter Thailand Extradition Treaty], *reprinted in* 2 I. KAVASS & A. SPRUDZS, *supra* note 63, at 880.3.

128. Treaty on Extradition, *done* Dec. 4, 1982, United States-Costa Rica, S. TREATY DOC. No. 17, 98th Cong., 2d Sess. (1984) (not yet in force) [hereinafter Costa Rica Extradition Treaty], *reprinted in* 1 I. KAVASS & A. SPRUDZS, *supra* note 63, at 160.1.

129. Treaty on Extradition, *done* June 14, 1983, United States-Jamaica, S. TREATY DOC. No. 18, 98th Cong., 2d Sess. (1984) [hereinafter Jamaica Extradition Treaty], *reprinted in* 1 I. KAVASS & A. SPRUDZS, *supra* note 63, at 460.3.

130. Treaty on Extradition, *done* Oct. 12, 1983, United States-Italy, — U.S.T. —, T.I.A.S. No. 10837 (entered into force Sept. 24, 1984) [hereinafter Italy Extradition Treaty].

Colombia.[131]

The Italian treaty is the only one of the five new treaties that includes an absolute mandate to extradite nationals;[132] the other four leave extradition of nationals to the discretion of the requested state.[133] Only the Colombian treaty specifically includes narcotics offenses as extraditable crimes;[134] the other four do not list offenses but rely on the doctrine of double criminality to define extraditable acts.[135] The Italian treaty is the only one of these five treaties currently in force; the treaties with Thailand, Costa Rica, and Jamaica have yet to enter into force.[136] The Colombia Supreme Court recently declared unconstitutional the Colombian treaty.[137]

The remainder of the extradition treaties between the United States and other drug producing states is an out-of-date patchwork of agreements, some dating back to the turn of the twentieth century.[138] A num-

131. *See* Colombia Extradition Treaty, *supra* note 63.

132. *See* Italy Extradition Treaty, *supra* note 130, art. IV.

133. *See* Thailand Extradition Treaty, *supra* note 127, art. VIII(1); Costa Rica Extradition Treaty, *supra* note 128, art. VIII(1); Jamaica Extradition Treaty, *supra* note 129, art. VII(1); Colombia Extradition Treaty, *supra* note 63, art. VIII(1).

134. *See* Colombia Extradition Treaty, *supra* note 63, art. II(1), app. para. 21. The schedule of offenses set forth in the appendix is a nonexclusive list, and the treaty relies on the doctrine of double criminality to define additional offenses not included in the schedule. *Id.* art. II(1)(b).

135. The treaties with Italy, Thailand, Costa Rica, and Jamaica all define an extraditable offense as an act punishable under the laws of both contracting parties by imprisonment or deprivation of liberty for a maximum period of one year or more. Also included as extraditable offenses are conspiracies or attempts to commit the above acts. These treaties hold as irrelevant different categorization or different terminology of an alleged act between the contracting parties. *See* Italy Extradition Treaty, *supra* note 130, art. II; Thailand Extradition Treaty, *supra* note 127, art. II; Costa Rica Extradition Treaty, *supra* note 128, art. II; Jamaica Extradition Treaty, *supra* note 129, art. II.

136. Thailand has delayed ratification of its treaty, although no explanation has been provided. *See* 2 I. KAVASS & A. SPRUDZS, *supra* note 63, at 880.1. Ratification by the Costa Rican Government has been delayed by further negotiations. *See* 1 *id.* at 160.1. Ratification is also pending in Jamaica. *Id.* at 460.1.

137. *See supra* notes 73-77 and accompanying text.

138. *See, e.g.*, Treaty on Extradition, *done* Apr. 21, 1900, United States-Bolivia, 32 Stat. 1857, T.S. No. 399; Treaty Providing for the Mutual Extradition of Fugitives from Justice, *done* Apr. 6, 1904, United States-Cuba, 33 Stat. 2265, T.S. No. 440; Protocol Amending Spanish Text, *done* Dec. 6, 1904, United States-Cuba, 33 Stat. 2273, T.S. No. 441; Additional Treaty on Extradition, *done* Jan. 14, 1926, United States-Cuba, 44 Stat. 2392, T.S. No. 737 (supplementing treaty of Apr. 6, 1904); Treaty for the Mutual Extradition of Fugitives from Justice, *done* Aug. 9, 1904, United States-Haiti, 34 Stat. 2858, T.S. No. 447; Treaty for the Mutual Extradition of Fugitives from Justice, *done* Jan. 15, 1909, United States-Honduras, 37 Stat. 1616, T.S. No. 569; Supplementary

ber of these older treaties include activity in narcotics in their list of extraditable offenses.[139] The agreements with the Bahamas, Barbados, Burma, Pakistan, Brazil, Cuba, and Honduras, however, define narcotics activities in such a broad way as to render the treaties ineffective.[140] Other treaties contain escape clauses whereby the requested state has the option either to extradite or prosecute the accused itself or the requested state has the option to implement its own or the requesting state's statute of limitations to bar extradition of the accused for narcotics offenses.[141]

Extradition Convention, *done* Feb. 21, 1927, 45 Stat. 2489, T.S. No. 761; Treaty Providing for the Extradition of Criminals, *done* May 25, 1904, United States-Panama, 34 Stat. 2851, T.S. No. 445; Treaty on Extradition, *done* Nov. 28, 1899, United States-Peru, 31 Stat. 1921, T.S. No. 288.

139. *See* Treaty on Extradition, *done* Dec. 22, 1931, United States-United Kingdom, art. III(2), 47 Stat. 2122, T.S. No. 849, 163 L.N.T.S. 59 (effective in Bahamas, Barbados, Burma, and Pakistan by operation of state succession); Treaty on Extradition, *done* June 8, 1972, United States-United Kingdom, app. para. 12, 28 U.S.T. 227, T.I.A.S. No. 8468 (effective in Belize by operation of state succession); Treaty of Extradition, *done* Jan. 13, 1961, United States-Brazil, art. II(27), 15 U.S.T. 2093, T.I.A.S. No. 5691; Additional Protocol, *done* June 18, 1962, United States-Brazil, 15 U.S.T. 2112, T.I.A.S. No. 5961; Treaty Providing for the Mutual Extradition of Fugitives from Justice, *done* Apr. 6, 1904, United States-Cuba, 33 Stat. 2265, T.S. No. 440, *as amended by* Protocol Amending Spanish Text, *done* Dec. 6, 1904, United States-Cuba, 33 Stat. 2273, T.S. No. 441, *and by* Additional Treaty on Extradition, *done* Jan. 14, 1926, United States-Cuba, art. II(21), 44 Stat. 2392, T.S. No. 737; Treaty for the Mutual Extradition of Fugitives from Justice, *done* Jan. 15, 1909, United States-Honduras, 37 Stat. 1616, T.S. No. 569, *as amended by* Supplementary Extradition Convention, *done* Feb. 21, 1927, art. I(21), 45 Stat. 2489, T.S. No. 761; Treaty on Extradition, *done* May 4, 1978, United States-Mexico, app. para. 14, 31 U.S.T. 5061, T.I.A.S. No. 9656; Treaty on Extradition, *done* May 24, 1973, United States-Paraguay, art. II(17), 25 U.S.T. 967, T.I.A.S. No. 7838.

140. *See, e.g,* Treaty on Extradition, *done* Dec. 22, 1931, United States-United Kingdom, art. III(2), 47 Stat. 2122, T.S. No. 849 (effective in Bahamas, Barbados, Burma, and Pakistan by operation of state succession) ("Crimes or offenses or attempted crimes or offenses in connection with the traffic in dangerous drugs."); Treaty of Extradition, *done* Jan. 13, 1961, United States-Brazil, art. II(27), 15 U.S.T. 2093, T.I.A.S. No. 5691 ("Crimes or offenses against the laws relating to traffic in, use of, or production and manufacture of, narcotic drugs or cannabis."); Additional Treaty on Extradition, *done* Jan. 14, 1926, United States-Cuba, art. II(21), 44 Stat. 2392, T.S. No. 737 ("Crimes against the laws for the suppression of the traffic in narcotic products."); Treaty for the Mutual Extradition of Fugitives from Justice, *done* Jan. 15, 1909, United States-Honduras, 37 Stat. 1616, T.S. No. 569, *as amended by* Supplementary Extradition Convention, *done* Feb. 21, 1927, art. I(21), 45 Stat. 2489, T.S. No. 761 ("Crimes against the laws for the suppression of the traffic in narcotic products.").

141. *See, e.g.*, Treaty of Extradition, *done* Jan. 13, 1961, United States-Brazil, art V(1), 15 U.S.T. 2093, T.I.A.S. No. 5691 ("Extradition shall not be granted in any of the following circumstances: 1) When the requested State is competent, according to its

Nearly all of these treaties leave extradition of nationals to the discretion of the requested state.[142] The existing treaties with Bolivia, Haiti, Panama, and Peru all fail to include narcotics offenses outright within their lists of extraditable acts.[143] Additionally, as of this writing, the United States has not negotiated extradition treaties with the drug-producing states of Afghanistan, Laos, and Iran.

IV. THE ALTERNATIVES: ABDUCTION AND IRREGULAR RENDITION

A. *Abduction versus Irregular Rendition*

The practice of extralegal apprehension in lieu of extradition is neither new nor unfamiliar in the international community. In the twentieth century alone, a number of states, including Great Britain and Israel utilized the practice. In the *Savarkar* arbitration,[144] a British sub-

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laws, to prosecute the person whose surrender is sought for the crime or offense for which that person's extradition is requested and the requested State intends to exercise its jurisdiction."); Treaty on Extradition, *done* May 24, 1973, United States-Paraguay, art. V(1), (3), 25 U.S.T. 967, T.I.A.S. No. 7838 (Extradition shall not be granted "[w]hen the person whose surrender is sought is being proceeded against or has been tried and discharged or punished in the territory of the Requested Party for the offense for which his extradition is requested . . . [or] . . . [w]hen the prosecution or the enforcement of the penalty for the offense has become barred by lapse of time according to the laws of either of the Contracting Parties.").

142. *See, e.g.*, Treaty on Extradition, *done* Apr. 21, 1900, United States-Bolivia, art. V, 32 Stat. 1857, T.S. No. 399; Treaty of Extradition, *done* Jan. 13, 1961, United States-Brazil, art. VII, 15 U.S.T. 2093, T.I.A.S. No. 5691; Additional Protocol, *done* June 18, 1962, United States-Brazil, art. I, 15 U.S.T. 2112, T.I.A.S. No. 5961; Treaty Providing for the Mutual Extradition of Fugitives from Justice, *done* Apr. 6, 1904, United States-Cuba, art. V, 33 Stat. 2265, T.S. No. 440; Treaty for the Mutual Extradition of Fugitives from Justice, *done* Aug. 9, 1904, United States-Haiti, art. IV, 34 Stat. 2858, T.S. No. 447; Treaty for the Mutual Extradition of Fugitives from Justice, *done* Jan. 15, 1909, United States-Honduras, art. VIII, 37 Stat. 1616, T.S. No. 569; Treaty on Extradition, *done* May 4, 1978, United States-Mexico, art. IX, 31 U.S.T. 5061, T.I.A.S. No. 9656; Treaty Providing for the Extradition of Criminals, *done* May 25, 1904, United States-Panama, art. V, 34 Stat. 2851, T.S. No. 445; Treaty on Extradition, *done* May 24, 1973, United States-Paraguay, art. IV, 25 U.S.T. 967, T.I.A.S. No. 7838; Treaty on Extradition, *done* Nov. 28, 1899, United States-Peru, art. V, 31 Stat. 1921, T.S. No. 288.

143. *See* Treaty on Extradition, *done* Apr. 21, 1900, United States-Bolivia, art. II, 32 Stat. 1857, T.S. No. 399; Treaty for the Mutual Extradition of Fugitives from Justice, *done* Aug. 9, 1904, United States-Haiti, art. II, 34 Stat. 2858, T.S. No. 447; Treaty Providing for the Extradition of Criminals, *done* May 25, 1904, United States-Panama, art. II, 34 Stat. 2851, T.S. No. 445; Treaty on Extradition, *done* Nov. 28, 1899, United States-Peru, art. II, 31 Stat. 1921, T.S. No. 288.

144. Savarkar Case (Fr. v. Gr. Brit.) Hague Ct. Rep. (Scott) 775 (Perm. Ct. Arb.

ject being extradited from Great Britain to India escaped from the British delivery ship while in Marseille, France. The Permanent Court of Arbitration considered whether the British Government, after recapturing the subject, had to return him to France. Noting that French police actually assisted in Savarkar's reapprehension, the Court determined that there was no rule of international law mandating the return of an individual captured in such a manner.[145]

More remarkable is the case of *Attorney General of Israel v. Eichmann*,[146] in which Israeli agents traveled to Argentina and abducted accused Nazi war criminal Adolf Eichmann. At trial, Eichmann made several challenges to the jurisdiction of the Israeli court.[147] One claim attacked the method of apprehension used to secure his custody within Israel. Eichman contended that the extralegal apprehension violated international law and thus deprived the Israeli court of jurisdiction.[148] The District Court of Jerusalem answered that "[i]t is an established rule of law that a person being tried for an offence against the laws of a State may not oppose his trial by reason of the illegality of his arrest or of the means whereby he was brought within the jurisdiction of that State."[149]

Israel was implicated in two other notable acts of extralegal apprehension in the 1980s. In 1984, Great Britain charged three Israelis and a Nigerian diplomat with the attempted kidnapping of former Nigerian official Umaru Dikko.[150] The drugged Dikko was found at an airport

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1911); *see* I. SHEARER, *supra* note 87, at 72-73.

145. *See* I. SHEARER, *supra* note 87, at 73.

146. 45 Pesakim Mehoziim 3 (Dist. Ct. Jerusalem 1965), *reprinted in* 36 I.L.R. 5 (1968) (translation).

147. Among his challenges, Eichmann claimed that the Nazi and Nazi Collaborators (Punishment) Law could not, by operation of international law, apply to a citizen of a foreign state because the law prohibited—ex post facto—offenses committed before the establishment of the state of Israel. 36 I.L.R. at 10 (summary of judgment). Eichmann also claimed that his actions constituted acts of state and thus were immune to adjudication by the Israeli court. *Id.*

The court responded to the challenge that the law was ex post facto and held that, because Eichmann's crimes were universal in character and specifically intended to exterminate the Jewish people, Israel could assume jurisdiction under the universality, the passive personality, and the protective principles of international law. *Id.* The court defeated Eichmann's act of state claim by relying on the repudiation of the doctrine by the International Military Tribunal, by the United States Military Tribunal, and in the formulation of the Nuremburg Principles by the International Law Commission. *Id.* at 12.

148. *Id.* at 10.

149. *Id.* at 59.

150. Thomas, *Britain Charges Three Israelis and Nigerian in Kidnapping of Exile*, N.Y. Times, July 11, 1984, at A4, col. 3. Both the Israeli and Nigerian Governments

outside London in a crate labeled "diplomatic baggage" and addressed to a government minister in Lagos.[151] Two years later, another Israeli, Mordechai Vanunu, divulged information to the London *Times* proving that, contrary to the Israeli Government's constant denial, Israel had stockpiled the sixth largest nuclear arsenal in the world.[152] Prior to the publication of the story on 5 October 1986, Vanunu vanished from London. Vanunu reappeared shortly thereafter in Israeli custody, claiming that Israeli authorities kidnapped him.[153] At Vanunu's trial on charges of espionage and treason, the Israeli court promptly dismissed Vanunu's jurisdictional challenge.[154]

The extralegal apprehension typically takes one of two forms: abduction or irregular rendition.[155] The responsibilities and conduct of the apprehending and holding states distinguish the two forms. Abduction occurs when agents of the apprehending state, acting under color of law, seize the alleged offender without the cooperation or acquiescence of the holding state.[156] The apprehension of Eichmann and Vanunu, and possibly that of Verdugo, illustrate the concept of abduction.[157] Irregular rendition involves informal, ad hoc agreements between the apprehending and holding states, outside the extradition process, to secure rendition of the alleged offender by the assistance or acquiescence of the holding state.[158] The seizure of Juan Matta, the rendition described in the case of *United States v. Lira*,[159] and, arguably, the apprehension of Verdugo are examples of irregular rendition.

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denied any involvement in the kidnapping. *Id.*

151. *Id.*

152. *See* 1 M. BASSIOUNI, *supra* note 88, at 199.

153. *Id.*

154. *Id.*

155. *See supra* note 13. These terms are not universal. Abduction is sometimes called kidnapping. *See, e.g.*, Sakellar, *supra* note 112. Professor Bassiouni calls irregular rendition "unlawful seizure." *See* 1 M. BASSIOUNI, *supra* note 88, at 189-246.

156. *See* 1 M. BASSIOUNI, *supra* note 88, at 191-95; I. SHEARER, *supra* note 87, at 72.

157. Because the United States Government admitted to paying $32,000 to Verdugo's six arresting officers, and because the Mexican Government claimed that the officers were fired five days prior to the arrest, it can be argued that the officers became agents of the United States. A converse argument would be that it was not the intent of the United States to hire these agents, but that the United States relied on the officers' representations that they were still bona fide foreign law enforcement personnel.

158. *See* 1 M. BASSIOUNI, *supra* note 88, at 196.

159. 515 F.2d 68 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975).

B. *United States Case Law and the* Ker-Frisbie *Doctrine*

The fourth amendment of the United States Constitution provides that "[t]he right of the people to be secure in their persons . . . against unreasonable . . . *seizures* shall not be violated.[160] Similarly, the fifth amendment guarantees that "[n]o *person* shall be . . . deprived of . . . liberty . . . without due process of law."[161] Yet, for over one hundred years, the United States has adhered to the doctrine of *mala captus bene detentus*.[162] The doctrine generally means that an illegal apprehension does not preclude jurisdiction and, thus, courts assert in personam jurisdiction over the accused without regard to the method of apprehension. Following the holding of the United States Supreme Court in *Ker v. Illinois* in 1886,[163] reaffirmed in 1952 by the Court in *Frisbie v. Collins*,[164] United States courts have generally upheld in personam jurisdiction over defendants brought to trial by means of extralegal apprehension, either in the form of abduction or irregular rendition.[165]

A substantial body of scholarly commentary opposes the practices embodied in the *Ker-Frisbie* doctrine and the application of *mala captus bene detentus*.[166] Arguably, the facts of *Ker* suggest that courts have applied the decision too broadly in support of jurisdiction in subsequent cases.[167]

Ker v. Illinois involved the exercise of jurisdiction by an Illinois court over a United States citizen, Fredrick M. Ker, who lived abroad. Illinois indicted Ker on charges of larceny and embezzlement while Ker was residing in Peru.[168] The Governor of Illinois petitioned the United States Secretary of State for a warrant for the extradition of the defendant

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160. U.S. CONST. amend. IV (emphasis added).

161. *Id.* amend. V (emphasis added).

162. *See* 1 M. BASSIOUNI, *supra* note 88, at 213.

163. 119 U.S. 436 (1886).

164. 342 U.S. 519 (1952).

165. The exception to the *Ker-Frisbie* rule is *United States v. Toscanino*, discussed *infra* at text accompanying notes 185-206.

166. *See* 1 M. BASSIOUNI, *supra* note 88, at 195.

167. *Ker*, for example, addressed the abduction of a United States citizen from a foreign state. *See infra* note 168 and accompanying text. The abductor had extradition documents in his possession, but could not locate the appropriate Peruvian officials to serve them. *See infra* notes 170-72 and accompanying text.

Contrast this situation with *United States v. Toscanino,* in which Toscanino, a foreign national, was apprehended by United States law enforcement agents without any extradition documents. *See infra* notes 185-197 and accompanying text. See also the facts of Rene Verdugo's apprehension, *supra* notes 17-19 and accompanying text, and Juan Matta's apprehension, *supra* notes 21-22 and accompanying text.

168. *Ker*, 119 U.S. at 437-38.

under the then-existing treaty between the United States and Peru.[169] On 1 March 1883, the United States President issued a warrant and sent Henry Julian, a Pinkerton agent, to Peru to serve the document and receive Ker from the Peruvian authorities.[170] When Julian arrived in Peru, however, Peru was in a state of war with neighboring Chile, and Chilean forces occupied the capital of Peru.[171] Although Julian was unable to locate the appropriate governmental authorities, he nevertheless "forcibly and with violence" arrested Ker and brought him back to Illinois.[172] Once in Illinois, the state court convicted Ker of larceny.[173]

Ker appealed his conviction to the United States Supreme Court on the ground that his arrest violated the extradition treaty between the United States and Peru and thus was not in accordance with due process under the fourteenth amendment of the United States Constitution.[174] The Supreme Court held against Ker and stated one of the most frequently cited passages used to support the doctrine *mala captus bene detentus*:

> The "due process of law" here guaranteed is complied with when the party is regularly indicted by the proper grand jury in the State court, has a trial according to the forms and modes prescribed for such trials, and when, in that trial and proceedings, he is deprived of no rights to which he is lawfully entitled. . . . [F]or mere irregularities in the manner in which he may be brought into the custody of the law, we do not think he is entitled to say that he should not be tried at all for the crime with which he is charged in a regular indictment.[175]

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169. *Id.* at 438.

170. *Id.* The Pinkertons were a national detective agency that ultimately became known as the Secret Service. *See generally* J. HORAN, THE PINKERTONS (1967).

171. *See* 1 M. BASSIOUNI, *supra* note 88, at 197.

172. *Ker*, 119 U.S. at 438.

173. *Id.* at 437.

174. *Id.* at 439-40. The fourteenth amendment of the United States Constitution guarantees that a state shall not "deprive any person of . . . liberty . . ., without due process of law." U.S. CONST. amend. XIV, § 1. Because the fourteenth amendment was less than twenty years old in 1886, the *Ker* interpretation of United States due process was early in the evolution of the doctrine as it is understood today. Further, it is unclear from the opinion whether the Court intended its analysis to apply to the fourth or fifth amendments of the Constitution in federal cases. The United States Court of Appeals for the Second Circuit in *United States v. Toscanino* interpreted *Ker v. Illinois* as a fourth amendment case. *See infra* notes 202, 205 and accompanying text. In its opinion, however, the *Toscanino* court repeatedly used the phrase due process—a phrase that does not appear anywhere in the fourth amendment. *See infra* notes 201, 203 and accompanying text.

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

Although this case involved an abduction without the cooperation of the foreign government, the Court commented on irregular rendition in dicta when it addressed Ker's claim of right of asylum in Peru. "Nor can it be doubted that the government of Peru could, of its own accord, and without demand from the United States, have surrendered Ker to an agent of the state of Illinois, and that such surrender would have been valid within the dominions of Peru."[176]

In response to Ker's claim that the United States violated its extradition treaty with Peru, the Court held that this "was a clear case of kidnapping," and the treaty "was not called into operation, was not relied upon, [and] was not made the pretext of the arrest," even though Julian possessed the requisite documents to do so.[177] Because the "papers remained in his pocket, and were never brought to light in Peru," the treaty was never invoked and therefore was not violated.[178] The Court said that Ker was "clothed with no rights which a proceeding under the treaty could have given him."[179]

The Court's decision rested on at least two grounds. First, no reason existed to dismiss the conviction since Ker's abduction did nothing illegally to enhance the state's case at trial. This abduction at least would not enhance the state's case as would illegally seized evidence. Second, Ker could not assert a due process violation on the grounds of the extradition treaty because (1) the treaty was never invoked, and (2) the foreign sovereign never protested the abduction.[180]

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176. *Id.* at 442.

177. *Id.* at 442-43.

178. *Id.* The Court compared this case with United States v. Rauscher, 119 U.S. 407 (1886), which was decided the same day. In *Rauscher*, the Court held that "when a party was duly surrendered, by proper proceedings, under the treaty of 1842 with Great Britain, he came to this country clothed with the protection which the nature of such proceedings and the true construction of the treaty gave him." *Ker*, 119 U.S. at 443. Thus, a defendant could not be prosecuted for a crime other than that for which the foreign government had surrendered him.

The United States Court of Appeals for the Second Circuit in United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974), took this language one step further. *See infra* notes 185-206 and accompanying text (discussing *Toscanino*).

179. *Ker*, 119 U.S. at 443. The Court did state, however, that Ker was not without other recourse for his abduction, and suggested that Ker could sue Julian in an action for trespass and false imprisonment. The Court noted further that the Government of Peru could demand extradition of Julian to be tried for the crime of kidnapping. *See id.* at 444.

180. Traditionally, United States law holds that if a treaty provides certain benefits to citizens of particular states, "any rights arising out of such provisions are, under international law, those of the states and . . . individual rights are only derivative through the states." RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 115, comment e (1987).

Sixty-six years later, *Ker* was reaffirmed by the United States Supreme Court in *Frisbie v. Collins*.[181] Interestingly, the case involved no concerns of international law, but instead focused on the allegedly illegal rendition of the defendant from one United States state to another. Defendant Collins claimed that while living in Chicago, Michigan police officers forcibly abducted him and took him across the Illinois state line without utilizing proper interstate extradition procedures, in violation of the Federal Kidnapping Act.[182] The Court held that it had "never departed from the rule announced in *Ker v. Illinois* 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.' "[183] Thus, under the *Ker-Frisbie* doctrine, "due process of law is satisfied when one present in court is convicted of crime after having been fairly apprised of the charges against him and after a fair trial in accordance with constitutional procedural safeguards."[184]

The United States Court of Appeals for the Second Circuit brought the first major attack on *Ker-Frisbie* in *United States v. Toscanino*.[185] There, the court held that the restrictive *Ker-Frisbie* concept of due process must yield to the more "expanded and enlightened [due process] interpretation expressed in more recent decisions of the Supreme Court."[186]

Toscanino involved a conspiracy between the defendant, Francisco Toscanino, and four others to import narcotics into the United States.[187]

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181. 342 U.S. 519 (1952).

182. Ch. 271, 47 Stat. 326 (1972) (codified as amended at 18 U.S.C. § 1201 (1988)).

183. *Frisbie*, 342 U.S. at 522 (citations omitted).

184. *Id.*

185. 500 F.2d 267 (2d Cir.), *reh'g denied*, 504 F.2d 1380 (2d Cir. 1974), *on remand*, 398 F. Supp. 916 (E.D.N.Y. 1975).

186. *Id.* at 275.

187. *Id.* at 268. Interestingly, unlike as in *Ker* and *Frisbie*, the defendant in this case was not a United States national, but a citizen of Italy. Yet, the Second Circuit did not rely on this fact to distinguish the case from the *Ker-Frisbie* rule and hold that the rule applies only to the apprehension of United States citizens abroad. The court addressed Toscanino's citizenship only when ruling on the seizure of evidence through an allegedly illegal wiretap. Presumably, if the other distinctions noted by the court had not existed, the Second Circuit would have upheld jurisdiction. This was the position taken by the Second Circuit in its subsequent decision in United States *ex rel.* Lujan v. Gengler, 501 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975); *see infra* notes 207-09 and accompanying text. The apparent conflict between the application of due process in the context of the seizure of a person as against the seizure of evidence will be examined further with a discussion of the holding in United States v. Verdugo-Urquidez, 856 F.2d 1214 (9th Cir. 1988), *rev'd*, 1990 U.S. LEXIS 1175. *See infra* note 310.

On appeal from his conviction, Toscanino did not challenge the sufficiency of the evidence or adequacy of the proceedings in the trial court,[188] but claimed that the jurisdiction of the trial court was unlawfully obtained "through the conduct of American agents who kidnapped him in Uruguay, used illegal electronic surveillance, tortured him and abducted him to the United States."[189]

Toscanino offered to prove that he was lured from his home in Montevideo, Uruguay by a phone call from a member of the Montevideo police.[190] Once in a deserted area, the police knocked Toscanino unconscious, bound him, blindfolded him, threw him into a car, and drove him to the Uruguayan-Brazilian border.[191] By arrangement with the United States, Brazilians met the car and took Toscanino into custody.[192]

Toscanino claimed that he was tortured and interrogated for seventeen days after the Brazilians took him into custody.[193] The alleged interrogation methods included denial of food and water, beatings, alcohol forced into Toscanino's eyes and nose, and electric shock to his ears, toes, and genitals.[194] During this seventeen day period, the United States Government and the United States Attorney for the Eastern District of New York allegedly received progress reports on the interrogation.[195] Toscanino further claimed that a member of the United States Department of Justice actually participated in some portions of the interrogation.[196] Finally, Toscanino was placed on a flight to the United States and arrested on arrival.[197]

The facts alleged by Toscanino proved too shocking for the United States Court of Appeals for the Second Circuit to ignore. In what appeared to be two alternative holdings, the court remanded the case to the district court with instructions that the district court divest itself of jurisdiction if Toscanino proved the alleged conduct of the United States

188. *Toscanino*, 500 F.2d at 269.

189. *Id.* at 268.

190. Toscanino offered this evidence to prove that the police were acting ultra vires, without the knowledge of the Uruguayan officials, and were in fact paid agents of the United States. *Id.* at 269. In *Verdugo*, 856 F.2d at 1216, Verdugo also proffered evidence that the Mexican police were acting under the auspices of the United States. *See supra* notes 17-19 and accompanying text; *infra* note 310 and accompanying text (discussing *Verdugo*).

191. *Toscanino*, 500 F.2d at 269.

192. *Id.* at 269-70.

193. *Id.* at 270.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

agents.[198]

The United States Court of Appeals for the Second Circuit appeared ready to challenge the *Ker-Frisbie* rule head on and framed the issue as "whether a federal court must assume jurisdiction over the person of a defendant who [was] illegally apprehended abroad and forcibly abducted by government agents to the United States for the purpose of facing criminal charges here."[199] Judge Mansfield, writing for the court, noted a gradual "erosion of *Frisbie*"[200] by beginning his opinion with citations to post-*Frisbie* United States Supreme Court decisions that "expanded the interpretation of 'due process.' "[201] He wrote:

> No longer is [due process] limited to the guarantee of "fair" procedure at trial. In an effort to deter police misconduct, the term has been extended to bar the government from realizing directly the fruits of its own deliberate and unnecessary lawlessness in bringing the accused to trial. . . . Concurrent with these decisions the Ker-Frisbie rule has been criticized and its continued validity repeatedly questioned.[202]

Accordingly, the court found that

> the "Ker-Frisbie" rule cannot be reconciled with the Supreme Court's expansion of the concept of due process . . . .
>
> Faced with a conflict between the two concepts of due process, the one being the restricted version found in *Ker-Frisbie* and the other the expanded and enlightened interpretation expressed in more recent decisions of the Supreme Court, we are persuaded that to the extent that the two are in conflict, the *Ker-Frisbie* version must yield.[203]

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198. On remand, Toscanino was unable to prove his allegations. The court therefore refused to divest itself of jurisdiction and upheld Toscanino's conviction. United States v. Toscanino, 398 F. Supp. 916 (E.D.N.Y. 1975).

199. *Toscanino*, 500 F.2d at 271.

200. *Id.* at 273.

201. *Id.* at 272.

202. *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); Wong Sun v. United States, 371 U.S. 471 (1963); Silverman v. United States, 365 U.S. 505 (1961)).

Judge Mansfield also cited Rochin v. California, 342 U.S. 165 (1952), decided the same term as *Frisbie*, which set aside a state court conviction resting on evidence procured by police brutality. In *Rochin*, police recovered two morphine capsules, which were swallowed by the defendant, by forcing "an emetic solution through a tube into [the defendant's] stomach against his will." *Id.* at 166, *quoted in Toscanino*, 500 F.2d at 273.

203. *Toscanino*, 500 F.2d at 275. Some commentators interpret this language as dicta. *See, e.g.*, 1 M. BASSIOUNI, *supra* note 88, at 202. Others find this language controlling. *See, e.g.*, Findlay, *supra* note 97, at 48-49.

In a secondary holding, the court distinguished *Ker* and *Frisbie* on the basis that, although the abduction of Toscanino from Uruguay did not violate the extradition treaty between the United States and Uruguay, the kidnapping violated two other international treaties—the United Nations Charter and the Organization of American States Charter—which require the United States to respect the territorial sovereignty of Uruguay.[204]

Although the United States Court of Appeals for the Second Circuit appeared to lay a broad foundation for its holding,[205] its test was comparatively narrow. The court held that on remand the district court must divest itself of jurisdiction "where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights."[206]

Although the Second Circuit failed to define what constitutes an invasion of a defendant's rights, it provided that definition one year later in *United States ex rel. Lujan v. Gengler*.[207] After the *Toscanino* decision,[208] a slightly different panel of the Second Circuit substantially

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204. *Toscanino*, 500 F.2d at 276-77. "Since the United States thus agreed not to seize persons residing within the territorial limits of Uruguay, appellant's allegations in this case are governed not by *Ker*, but by . . . Cook v. United States." *Id.* at 278 (citation omitted). On this point, Judge Anderson disagreed, finding that the case could be "disposed of on due process grounds alone." *Id.* at 281 (Anderson, J. concurring). Echoing the opinion of *Ker*, Anderson claimed that Toscanino "did not enter this country pursuant to any treaty; he is, therefore, not 'clothed' in any treaty rights and cannot invoke the extradition treaty or the charters of the Organization of American States and the United Nations as personal defenses." *Id.* (citation omitted).

205. The United States Court of Appeals for the Second Circuit held that the Government "unlawfully seized the defendant in violation of the Fourth Amendment." *Id.* at 275. Because the conviction was the illegal "fruit" of Toscanino's apprehension, "the government should be denied the right to exploit its own illegal conduct." *Id.*; *see also* United States *ex rel.* Lujan v. Gengler, 510 F.2d 62, 66 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975).

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

207. 510 F.2d 62.

208. An en banc hearing was denied four months after the decision. In a dissenting opinion, Judge Mulligan criticized the majority opinion as a decision "without any discernible authority." United States v. Toscanino, 504 F.2d 1380, 1381 (2d Cir. 1974) (Mulligan, J., dissenting). On the holding that the court should divest itself of jurisdiction if such jurisdiction were acquired as a result of a kidnapping by United States agents, Judge Mulligan found that the majority decision "controverts the holding of the Supreme Court in Frisbie v. Collins." *Id.* (citation omitted). Judge Mulligan sided with Judge Anderson's earlier concurring opinion and declared "unprecedented" the decision to allow Toscanino personally to avail himself of the protections of the charters of the United Nations and the Organization of American States. *Id.*

limited *Toscanino* in *Lujan*.[209] With facts described as "a grade-B film scenario,"[210] the case involved the extralegal apprehension of Julio Juventino Lujan, an Argentine citizen. Lujan was indicted for his part in an organized underworld conspiracy to import heroin into the United States.[211] Lujan, a pilot, was hired by an undercover United States agent to fly to Bolivia. Once there, Lujan was arrested by Bolivian police, acting ultra vires as paid agents of the United States.[212] Six days later, he was placed on a plane for New York by Bolivian and United States authorities and arrested by United States agents upon his arrival.[213] In an action under a writ of habeas corpus, Lujan argued in the United States Court of Appeals for the Second Circuit for release on the basis of *Toscanino*.[214]

The Second Circuit refused to release Lujan.[215] Limiting *Toscanino* to its facts, Judge Kaufman recognized that the *Ker-Frisbie* doctrine "no longer provide[s] a carte blanche to government agents bringing defendants from abroad to the United States by the use of torture, brutality and similar outrageous conduct."[216] The court, however, did conclude:

> [W]e did not intend to suggest that *any* irregularity in the circumstances of a defendant's arrival in the jurisdiction would vitiate the proceedings of the criminal court. In holding that *Ker* and *Frisbie* must yield to the extent they were inconsistent with the Supreme Court's more recent pronouncements we scarcely could have meant to eviscerate the *Ker-Frisbie* rule, which the Supreme Court has never felt impelled to disavow.[217]

The *Lujan* court limited the applicability of *Toscanino* to circumstances of "government conduct of a most shocking and outrageous char-

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209. 510 F.2d 62. The panel consisted of Judges Anderson and Oakes, who participated in *Toscanino*, and Chief Judge Kaufman, who wrote the majority opinion in place of Judge Mansfield.

210. *Id.* at 63.

211. Toscanino was apparently part of this conspiracy also. By the time arrest warrants were issued for this indictment, however, Toscanino had already been tried on another conspiracy. *See id.*

212. Similar to those involved in Verdugo's apprehension, *see supra* notes 17-19 and accompanying text, the agents in Lujan's apprehension were "Bolivian police who were not acting at the direction of their own superiors or government, but as paid agents of the United States." *Id.*

213. *Id.*

214. *Id.* at 63-64.

215. *Id.* at 68.

216. *Id.* at 65.

217. *Id.* (emphasis in original).

acter."[218] Because Lujan disclaimed any act of torture or interrogation on the part of United States or Bolivian personnel, he was not entitled to relief under *Toscanino*.[219]

Unlike Toscanino, Lujan could not rely on the charters of the United Nations and the Organization of American States. Although the court recognized that the "provisions [of the charters] in question are designed to protect the sovereignty of states," the court found it significant that Lujan failed "to allege that either Argentina or Bolivia in any way protested or even objected to his abduction."[220] The court found this omission "fatal"[221] because Lujan was not personally clothed with the rights described in the charters.[222] The *Lujan* court, therefore, read in another requirement to the *Toscanino* exception: formal protest of the sovereign whose boundaries have been violated. This requirement is now the con-

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218. *Id.* The Reporters of the *Restatement Third of Foreign Relations* adopted this approach to the *Ker-Frisbie* doctrine: "A person apprehended in a foreign state, whether by foreign or by United States officials, and delivered to the United States, may be prosecuted in the United States unless his apprehension or delivery was carried out in such reprehensible manner as to shock the conscience of civilized society." RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 433(2) (1987).

219. *See Lujan*, 510 F.2d at 66 ("[W]e are forced to recognize that, absent a set of incidents like that in *Toscanino*, not every violation by prosecution or police is so egregious that [it] requires nullification of the indictment.").

220. *Id.* at 67. This distinction appears to stretch the holding of *Toscanino*. The *Toscanino* court only noted that "the Uruguayan government claims that it had no prior knowledge of the kidnapping nor did it consent thereto and had indeed condemned this kind of apprehension as alien to its laws." *Toscanino*, 500 F.2d at 270. The claims of the Uruguayan Government, however, could have been a public disclaimer of a covert arrangement with the United States. In any event, Toscanino did not allege that Uruguay filed a formal protest, and it does not appear that the *Toscanino* court relied on such a protest for its alternative holding.

The *Lujan* court wrote, "We believe that to support this claim [of protest], Toscanino would have to prove that the Uruguayan government registered an official protest with the United States Department of State." *Lujan*, 510 F.2d at 67 n.8.

221. *Lujan*, 510 F.2d at 67.

222. Judge Anderson, concurring as he did in *Toscanino* on due process grounds, agreed with this interpretation. Anderson cited the denial of the en banc hearing of *Toscanino* and was of the opinion that

> [i]n so doing the majority obviously interpreted the decision in *Toscanino* as resting solely and exclusively upon the use of torture and other cruel and inhumane treatment of Toscanino in effecting his kidnapping and it rejected the proposition that a kidnapping of a foreign national from his own or another nation and his forcible delivery into the United States against his will, but without torture, would itself violate due process. This interpretation of *Toscanino* has become the law of this Circuit.

Id. at 69 (Anderson, J., concurring) (citation omitted).

trolling factor on the issue of jurisdiction.[223]

The vitality of the *Toscanino* exception is suspect. Shortly after *Lujan*, the United States Supreme Court, in *Gerstein v. Pugh*,[224] refused to "retreat from the established rule that illegal arrest or detention does not void a subsequent conviction."[225] Lower courts either distinguish *Toscanino* along the lines of *Lujan*,[226] or reject *Toscanino* outright.[227]

United States v. Cordero[228] further constricted the definition of treatment that would "shock the conscience of the court." During a United States Drug Enforcement Agency operation, Panamanian authorities arrested appellants Josephine Cordero and William Sorren and two others in Panama.[229] From Panama, the appellants were sent to Venezuela and then to Puerto Rico, where United States officials arrested them.[230] After Cordero and Sorren were convicted for conspiring to import cocaine into the customs territory of the United States, they challenged the district

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223. *See, e.g., Zabaneh*, 837 F.2d 1249, 1261 ("Treaties are contracts between or among independent nations. The treaty provisions in question were designed to protect the sovereign interests of nations, and it is up to the offended nations to determine whether a violation of sovereign interests occurred and requires redress."); United States v. Cordero, 668 F.2d 32, 38 (1st Cir. 1981) ("[U]nder international law, it is the contracting foreign government, not the defendant, that would have the right to complain about a [treaty] violation."). The Reporters of the *Restatement* also note that "[u]nder prevailing practice . . . states ordinarily refrain from trying persons illegally brought from another state only if that state demands the person's return." RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 432 n.3 (1987).

224. 420 U.S. 103 (1975).

225. *Id.* at 119; *see also* United States v. Crews, 445 U.S. 463, 474 (1980).

226. *See, e.g.*, United States v. Zabaneh, 837 F.2d 1249 (5th Cir. 1988); David v. Attorney General, 699 F.2d 411 (7th Cir. 1983); Letterman v. Rushen, 704 F.2d 442 (9th Cir. 1983); United States v. Cordero, 668 F.2d 32 (1st Cir. 1981); United States v. Fielding, 645 F.2d 719 (9th Cir. 1981); Davis v. Muellar, 643 F.2d 521 (8th Cir. 1981); Weddell v. Meierhenry, 636 F.2d 211 (8th Cir. 1980); United States v. Valot, 625 F.2d 308 (9th Cir. 1980).

227. *See, e.g.*, United States v. Rosenthal, 793 F.2d 1214 (11th Cir. 1986); United States v. Darby, 744 F.2d 1508 (11th Cir. 1984); United States v. Wilson, 732 F.2d 404 (5th Cir. 1984); United States v. Postal, 589 F.2d 862 (5th Cir. 1979); United States v. Winter, 509 F.2d 975 (5th Cir.), *cert. denied*, 423 U.S. 825 (1975); United States v. Herrera, 504 F.2d 859 (5th Cir. 1974).

228. 668 F.2d 32 (1st Cir. 1981).

229. *Id.* at 35. Unlike *Toscanino* and *Lujan*, in which it was debatable whether the apprehensions at issue were accurately labeled abductions or irregular renditions, this case offers a clear instance of irregular rendition, because the officers of both involved states were acting at the behest of their respective governments, not as paid agents of the United States. *Id.*

230. *Id.* at 35-36.

court's jurisdiction on the basis of *Toscanino*.[231] The United States Court of Appeals for the First Circuit declined to apply the *Toscanino* exception. The court stated:

> [T]he record does not show the outrageous conduct involved in *Toscanino*. At worst, it shows poor treatment by the *Panamanian* authorities and poor conditions in *Panamanian* jails. When Panamanian officials arrested Sorren they insulted him, pushed him and slapped him. In jail, Sorren was poorly fed, he had to sleep on the floor and had to "huddle up in a corner" to avoid the splashing of urine coming from prisoners in other cells. The Panamanian arresting officers insulted Cordero. They also fed her badly while she was in jail. She had to sleep on the floor or in a chair. These conditions may be poor, unfortunate, hardly decent, but they are a far cry from deliberate torture, *and they are beyond the control of American law enforcement authorities and American courts.* Were American courts to seek to improve conditions in foreign jails by refusing to try those who are temporarily held there, the result would not be better jails, but the creation of safe havens in foreign lands for those fleeing the reach of American justice.[232]

Nor did the court find convincing the appellants' argument that their apprehension violated the procedures outlined in existing extradition treaties with Panama and Venezuela. The court recognized that "extradition treaties are made for the benefit of the governments concerned,"[233] and stated, "[t]o hold that extradition treaties forbid foreign nations to return criminal defendants except in accordance with the formal procedures they contain, would insofar as we are aware, represent a novel interpretation of those treaties."[234] The First Circuit, like other courts, therefore, refused to apply *Toscanino* absent a showing of United States involvement in deliberate torture.[235]

Recent cases clearly demonstrate the continued application of the *Ker-Frisbie* doctrine. In upholding jurisdiction, United States federal district and appellate courts cite the *Ker-Frisbie* doctrine without hesitation,

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231. *Id.* at 36.

232. *Id.* at 37 (emphasis added).

233. *Id.*

234. *Id.* at 38.

235. *Id.* at 36 (citing United States v. Lopez, 542 F.2d 283 (5th Cir. 1976) (abduction at instigation of United States but absent direct United States involvement in torture insufficient to divest court of jurisdiction); United States v. Lara, 539 F.2d 495 (5th Cir. 1976) (no *Toscanino* violation where defendant failed to show direct United States involvement in torture; forcible abduction without more insufficient); United States v. Lira, 515 F.2d 68 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975) (no *Toscanino* violation without showing direct United States involvement)).

while usually distinguishing *Toscanino* on its facts.[236] In 1988, one defendant, convicted on seven counts of possession and distribution of marijuana, actually acknowledged "that even though American officials kidnap a criminal defendant from a foreign jurisdiction, a federal district court has jurisdiction to try him . . . unless governmental conduct is so 'outrageous' or 'shocking to the conscience' as to constitute a deprivation of the defendant's Fifth Amendment due process rights."[237] In that case, the United States Court of Appeals for the Fifth Circuit disposed of the jurisdiction issue on the basis of *Ker-Frisbie* in three paragraphs of the court's opinion.[238] In *United States v. Verdugo-Urquidez*, defendant Verdugo, after losing on the jurisdiction issue in the lower court, did not bother to challenge the ruling on appeal.[239]

As to the recent trend toward findings of jurisdiction absent extreme brutality at the hands of United States officials during abduction, Professor Bassiouni laments that

> for all practical purposes, the judiciary has largely abandoned any concerns for the integrity of the judicial process in the face of practical exigencies which facilitate the work of this government in its prosecutorial function, as well as that of other governments' law enforcement agencies working together to apprehend wanted offenders or alleged offenders. The reading of decisions gives the inescapable feeling that courts reach a judgment on the criminality of the accused and then decide as to how to avoid applying a legal rule that would negate criminal jurisdiction and thus allow the relator to go free. The resulting signals to U.S. law enforcement officers are encouraging and lead to more of that practice.[240]

In 1977, Professors Abramovsky and Eagle criticized the continued application of the *Ker-Frisbie* doctrine on the ground that it cuts against the landmark *Paquete Habana* case[241] that integrated international law

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236. *See, e.g.*, David v. Attorney General, 699 F.2d 411 (7th Cir. 1983).

237. United States v. Zabaneh, 837 F.2d 1249, 1261 (5th Cir. 1988). The United States Court of Appeals for the Fifth Circuit accepted the appellant's characterization of the *Ker-Frisbie* doctrine as a fifth amendment issue. Contrast this case with *United States v. Toscanino*, in which the Second Circuit interpreted *Ker-Frisbie* as a fourth amendment issue. *See supra* note 205.

It is possible that the Fifth Circuit in *Zabaneh* was referring implicitly to the fifth amendment's prohibition of illegally coerced confessions, an issue that was also before the Second Circuit in *Toscanino*. The *Zabaneh* court may have been saying that *Toscanino* would only apply in cases of illegally coerced confessions.

238. *Zabaneh*, 837 F.2d at 1261.

239. 856 F.2d 1214, 1215 (9th Cir. 1988), *rev'd*, 1990 U.S. LEXIS 1175.

240. 1 M. BASSIOUNI, *supra* note 88, at 212.

241. 175 U.S. 677 (1900), *discussed in* Abramovsky & Eagle, *supra* note 13, at 64.

as part of United States law.[242] Citing *Paquete Habana*, these commentators reason that "where a federal statute does not provide to the contrary, customary international law governs."[243] Furthermore, " 'unless it unmistakably appears that a congressional act was intended to be in disregard of a principle of international comity, the presumption is that it was intended to be in conformity with it.' At present no federal statute exists which either permits or sanctions abduction."[244] When Abramovsky and Eagle criticized the continued application of the *Ker-Frisbie* doctrine, however, a federal statute on this issue was just beginning to evolve.[245]

C. *Federal Legislation and the Evolution of the Mansfield Amendment*

As part of the International Security Assistance and Arms Export Control Act of 1976,[246] the United States Congress enacted the Mansfield Amendment[247] to the Foreign Assistance Act of 1961 in direct response to *Toscanino*. As originally written, the Mansfield Amendment expressly barred United States civilian personnel from "engaging or participating in direct police arrest actions in any foreign country in connection with narcotics control efforts."[248] The purpose of the provision was to "insure that U.S. narcotics control efforts abroad are conducted in such a manner as to avoid involvement by U.S. personnel in foreign police operations where violence or the use of force could reasonably be anticipated."[249] The Mansfield Amendment was the first congressional attempt to legislate away the practice of abduction by United States law enforcement officials abroad.

The enactment of the International Security Assistance Act of 1978

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242. The Supreme Court held:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . .

Paquete Habana, 175 U.S. at 700.

243. Abramovsky & Eagle, *supra* note 13, at 64.

244. *Id.* (quoting Over the Top, 5 F.2d 838, 842 (D. Conn. 1925)).

245. *See infra* part IV, section C (discussing the Mansfield Amendment).

246. Pub. L. No. 94-329, 90 Stat. 729.

247. 22 U.S.C. § 2291(c) (1988).

248. H.R. REP. No. 1144, 94th Cong., 2d Sess. 54 (1976), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 1378, 1430.

249. *Id.* at 55, 1976 U.S. CODE CONG. & ADMIN. NEWS at 1431.

expanded the Mansfield Amendment.[250] Without expressly mentioning *Toscanino*, a decision by then four years old, Congress prohibited "any agent or employee . . . from interrogating, or from being present at the interrogation of, any U.S. person arrested in any foreign country in the absence of the written consent of the person arrested."[251] By including this provision, the Senate Committee on Foreign Affairs noted a number of "reports that agents of the Drug Enforcement Administration in their overseas work may have violated the Mansfield Amendment."[252] The Committee decided to "further limit DEA's activities" because it felt that "DEA's primary emphasis overseas should be on intelligence gathering . . . related to organizations involved in major drug trafficking."[253] The Senate Committee may have gone too far with this provision. Although these original Mansfield Amendment prohibitions survive today,[254] they came under attack just seven years after their enactment.

In early 1985, at the start of the second term of the Administration of United States President Ronald Reagan, the United States Senate attempted to repeal the Mansfield Amendment.[255] The Senate wished to allow the heads of departments and agencies to develop their own regulations regarding the conduct of their employees in antinarcotics activities or interrogations overseas.[256] Such a provision would have relaxed significantly the constraints on the United States Drug Enforcement Agency and would have provided a broader scope of authority lawfully to arrest suspected drug traffickers in light of *Ker-Frisbie*. The attempt of the Senate failed, however, in the face of a simultaneous bill of the United States House of Representatives.

During the time that the Senate planned to repeal the Mansfield Amendment, the House Committee on Foreign Affairs recognized that "[t]he practical effect of [the Amendment's] prohibition on participation in narcotics police actions has been to deny U.S. personnel the opportunity to monitor and assist host country personnel in such actions."[257] Congress, therefore, carved out an exception to the Mansfield Amendment in the International Security and Development Cooperation Act of

250. Pub. L. No. 95-384, § 3, 92 Stat. 730.

251. S. REP. No. 841, 95th Cong., 2d Sess. 13 (1978), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 1833, 1845.

252. *Id.*

253. *Id.*

254. *See* 22 U.S.C. § 2291(c)(1), (5).

255. *See* S. REP. No. 960, 99th Cong., 1st Sess. 130, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 158, 239.

256. *Id.*

257. H.R. REP. No. 39, 99th Cong., 1st Sess. 54 (1985).

1985.[258] Although Congress retained the ban on direct arrest and interrogation without consent, the Mansfield Amendment no longer "prohibit[ed] officers and employees of the United States *from being present* during direct police arrest actions with respect to narcotic control efforts in a foreign country *to the extent that the Secretary of State and the government of that country agree to such an exemption.*"[259] This provision enabled the United States Secretary of State and the host state to decide when to apply the Mansfield Amendment and gave United States civilian law enforcement officials a wider range of authority abroad by opening the door to legalizing irregular rendition.

This attempt to limit the Mansfield Amendment, however, proved impracticable. One year after the provision was enacted, the House Committee on Foreign Affairs found it "unworkable, since most countries refuse for reasons of national sovereignty to enter into such agreements *publicly.* In addition, some governments are willing to permit such activities only on a case-by-case basis."[260] Arguably, one of the concerns for a foreign head of state is the possibility of domestic unrest resulting from such public agreements with the United States.[261]

Because the House Committee on Foreign Affairs continued to believe that "the Mansfield Amendment inhibit[ed] the ability of U.S. officials, particularly DEA agents, to carry out their duties overseas,"[262] a new alteration found its way into the House draft of the International Narcotics Control Act of 1986.[263] Later subsumed into the omnibus Anti-Drug Abuse Act of 1986,[264] the alteration eliminated the mandate for any agreement between the Secretary of State and the host state. While retaining the prohibition against direct arrests by United States personnel,[265] the Act prohibited any officer or employee of the United States Government from engaging or participating in any direct antinarcotics police arrest action in a foreign state, unless the United States Secretary of State determined that such a prohibition "would be harmful to the

258. Pub. L. No. 99-83, 99 Stat. 190 (codified as amended in scattered sections of 22 U.S.C.).

259. Pub. L. No. 99-83, § 605, 99 Stat. 228, 229 (emphasis added).

260. H.R. REP. No. 798, 99th Cong., 2d Sess. 10 (1986) (emphasis added).

261. *See supra* notes 57-83 and accompanying text.

262. H.R. REP. No. 798, at 10.

263. H.R. 5352, 99th Cong., 2d Sess. § 203 (1986).

264. Pub. L. No. 99-570, § 2009, 100 Stat. 3207, 3264 (codified as amended at 22 U.S.C. § 2291(c) (1988)).

265. *See* H.R. REP. No. 798, at 9; Pub. L. No. 99-570, § 2009, 100 Stat. 3207, 3264.

national interests of the United States."[266] Legislative history reveals that the House Committee on Foreign Relations intended to allow waiver of the Mansfield Amendment prohibition "where the Secretary of State determines that it would be in the U.S. national interest, and would not be harmful to U.S. relations with that country."[267] The Committee further hoped that the United States Secretary of State's authority would "be delegated to the U.S. Ambassador in each country, who should have control over activities carried out by U.S. personnel assigned to the U.S. Embassy."[268] Congress, by enacting this exception to the Mansfield Amendment further opened the door to irregular rendition, permitting ad hoc, private agreements on a case-by-case basis between the United States and host states regarding the apprehension of drug traffickers.

This revision of the Mansfield Amendment may have prompted the United States Justice Department to issue a legal opinion, advising the United States Federal Bureau of Investigation that it may legally seize United States fugitives[269] in foreign states without the consent of foreign

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266. H.R. REP. No. 798, at 9.

267. *Id.* at 10.

268. *Id.*

269. The exact meaning of the term "United States fugitives" is not known; the actual opinion is not public because the Justice Department labeled the opinion "confidential." Chicago Trib., Nov. 9, 1989, at 8. The term might refer only to individuals who escaped from United States prisons or some other form of custody, rather than individuals who were at large and are initially obtained by extralegal apprehension. This distinction was made by the United States District Court for the Northern District of Florida. United States v. Matta-Ballesteros, 700 F. Supp. 528, 531 (N.D. Fla. 1988). In this case, Matta—who escaped from a federal prison camp at Eglin Air Force Base in 1971—was called a fugitive from justice and a fugitive escapee. The United States District Court for the Southern District of Illinois also adopted this interpretation of a United States fugitive. Matta-Ballesteros *ex. rel* Stolar v. Henman, 697 F. Supp. 1036, 1047 (S.D. Ill. 1988).

Some evidence suggests that the Justice Department intends a broader meaning of the term. At later congressional hearings, Assistant Attorney General William P. Barr asserted, as partial justification of a broad construction, "We are facing an increasing menace in the area of terrorism and narco-terrorism . . . . There are still lawless countries in the world that sponsor terrorism directed at the United States." Ostrow, *Rulings on FBI Seizures Defended in Congress*, L.A. Times, Nov. 9, 1989, at A18, col. 1 [hereinafter Ostrow, *Rulings*]. Further, a government source of the *Los Angeles Times* claimed that beginning in 1984, the FBI "was given additional extraterritorial investigative jurisdiction over certain violations of federal law, primarily in areas of homicide, hijacking and hostage-taking affecting American citizens. Currently, a number of individuals facing charges in U.S. courts remain at large outside this country." Ostrow, *Baker Vows Full Talks before FBI Uses Foreign Arrest Powers*, L.A. Times, Oct. 14, 1989, at A16, col. 4 [hereinafter Ostrow, *Baker*].

governments,[270] thus enlarging United States law enforcement arrest authority to include abduction as well as irregular rendition.[271] United States Secretary of State James Baker stated that the opinion, requested by the Federal Bureau of Investigation, was "very narrow [and] based on consideration only of domestic United States law."[272] A statement from the Administration of United States President George Bush also added that "[a]n interagency process exists to insure that the President takes into account the full range of foreign policy and international law considerations as well as the domestic law enforcement issues raised by any specific case. There will be no arrests abroad that have not been considered through that interagency process."[273]

This Justice Department opinion, issued on 21 June 1989, reversed a nine year old policy maintained under the Administration of United States President Jimmy Carter, and is the farthest reaching pronouncement of the scope of United States civilian law enforcement authority to foreign states.[274] This pronouncement may be short-lived, however, for six months after the opinion was drafted, the United States Congress revised the Mansfield Amendment once again in the International Narcotics Control Act of 1989.[275]

As a matter of statutory construction, the changes to the Mansfield

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270. *See* Ostrow, *Baker*, supra note 269; Wines, *U.S. Cites Rights to Seize Fugitives Abroad*, N.Y. Times, Oct. 14, 1989, at A6, col. 4. Both President Bush and Secretary of State Baker were unaware of the policy change until it was disclosed by the Los Angeles Times on October 14, 1989. *See* Ostrow, *Baker*, *supra* note 269; Wines, *supra*.

271. The *New York Times* implicitly noted this distinction when it reviewed the apprehensions of both Juan Matta, in which the Honduran Government cooperated, and Rene Verdugo, which the Mexican Government protested. Wines, *supra* 270.

272. *Id.* At later House Judiciary Subcommittee hearings regarding the opinion, Representative Don Edwards (D-Cal.), apparently unfamiliar with the discretionary language that existed in 22 U.S.C. § 2291(c)(2) and of the Supreme Court's interpretation of due process through the *Ker-Frisbie* rule, said, "I can think of no law passed by the Congress or any provision of the Constitution that licenses the United States to be an international outlaw." Ostrow, *Rulings*, *supra* note 269.

273. Wines, *supra* note 270.

274. *See id.*; Ostrow, *Baker*, *supra* note 269. Some speculate that this opinion was directly related to efforts to apprehend General Noriega. *See*, *e.g.*, Wines, *supra* note 270; Ostrow, *Baker*, *supra* note 269; Ostrow, *Rulings*, *supra* note 269. The opinion, however, was requested by the Federal Bureau of Investigation, a civilian law enforcement agency, and was based on United States law. The Mansfield Amendment, presumably part of the United States law considered, does not cover activities of the United States military. *See* 22 U.S.C. § 2291(c)(6) (1988).

275. *See* Pub. L. No. 101-231, 103 Stat. 1954. The bill became law on 13 December 1989.

Amendment by the Anti-Drug Abuse Act of 1986[276] left some ambiguity in the law regarding the scope of authority of United States officials to participate in extralegal apprehensions. As already noted, section 2009 of the 1986 Act retained the original prohibition against "directly effect[ing] an arrest in any foreign country as part of any foreign police abduction with respect to narcotics control efforts."[277] Yet, the following paragraph of section 2009, with its prohibition against "engag[ing] or participat[ing] in any direct police action in a foreign country with respect to narcotics control efforts,"[278] essentially paraphrases the original prohibition and then adds the exception at the discretion of the United States Secretary of State.[279]

After the release of the Justice Department opinion in 1989, the House Committee on Foreign Affairs noted the ambiguity left by the 1986 Act, observing that "a lack of clarity in the wording of the law led to considerable confusion among DEA agents overseas as to what actions were permissible under what circumstances."[280] Thus, in the International Narcotics Control Act of 1989, Congress struck out subsection (c)(2) of 22 U.S.C. § 2291, which contained the exception at the discretion of the Secretary of State, and redesignated paragraph (c)(1), which contained the original prohibition against direct arrests by United States personnel, as subsections (c)(1) and (c)(2).[281]

According to the House Committee on Foreign Affairs, the 1989 Act revised the Mansfield Amendment to reflect

> what has long been U.S. policy and is contained in DEA regulations: that DEA agents (and other U.S. officials) cannot arrest foreign nationals, that they may be present and assist arrests carried out by their foreign counterparts if the U.S. Ambassador approves, and that they may take action to protect life and safety if emergency situations arise.[282]

Although this new law contains significant textual alterations, DEA agents may still be present at, and assist in, arrests made by foreign law enforcement officials, if permission is granted by the United States chief of mission.[283] Congress therefore continues to leave the door open for

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276. Pub. L. No. 99-570, § 2009, 100 Stat. 3207, 3264.
277. *Id.* (amending 22 U.S.C. § 2291(c)(1)).
278. *Id.* (amending 22 U.S.C. § 2291(c)(2)).
279. *Id.*
280. H.R. REP. No. 342, 101st Cong., 1st Sess. 23.
281. *See* Pub. L. No. 101-231, § 15, 103 Stat. 1963; *see also* 22 U.S.C. § 2291(c)(1)-(2).
282. H.R. REP. No. 342, 101st Cong., 1st Sess. 23.
283. *See* 22 U.S.C. § 2291(c)(2).

irregular rendition of fugitives captured abroad.

V. CONCLUSION—KER-FRISBIE: A LOOK FORWARD

An editorial from the Brazilian newspaper *O Estado de Sao Paulo* recently proclaimed:

> The latest developments in the dirty war waged by drug traffickers in Colombia against the institutions of that country confirm that the audacity of criminals knows no bounds. It suggests, too, that drug merchants will not hesitate to extend the range of their victims—up to now limited to authorities and journalists who dare combat them—in their effort to bring the Colombian government to its knees and oblige it to stop enforcing the law.
>
> . . . .
>
> The drug traffickers' ultimate aim is to neutralize the state—by seizing power or making government officials their cohorts, as in Panama—to thwart reaction by the healthy part of society. Following the somber examples set by their likes in Medellin and Cali, who act against a background of omission or impotence on the part of the Colombian government, gangs of murderers in other nations will feel tempted to copy their methods. That is why it is vital to immediately halt the advance of the cartels.[284]

Implicit in this editorial is the recognition that unique legal problems exist for fighting drug trafficking because of the high level of organization of the drug cartels. These drug cartels are more like terrorist organizations than a group of disunified outlaws. They have an identifiable political aim "to neutralize the state." Yet unlike the Palestinian Liberation Organization—which seeks the establishment of an independent Palestinian state—or the Irish Republican Army—which seeks the independence of Northern Ireland,[285]—the Medellín cartel has no such political agenda; it merely seeks "to thwart reaction by the healthy part of society" in order to advance its own criminal activity.[286]

To facilitate this goal, drug traffickers attempt to manipulate or intim-

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284. Nunez, *Murderous Drug Cartels Endanger the Continent, reprinted in* L.A. Times, Oct. 13, 1989, at B9, col. 1. This excerpt is from an editorial by August Nunez, managing editor of the Brazilian newspaper *O Estado de Sao Paulo*, in response to the murder of two staff members of the Colombian newspaper *El Espectador* and to the threat by the drug cartel literally to blow up the city of Medellín, Colombia.

285. One commentator noted, "Many terrorists are by their nature ideologically motivated offenders who are willing to give their lives for the causes they serve. Indeed, many may aspire to martyrdom or hope for well-publicized trials to explain their motivation." Findlay, *supra* note 97, at 49-50.

286. Nunez, *supra* note 284.

idate governments of drug producing states by a combination of bribery,[287] kidnapping,[288] and murder,[289] thereby compromising the integrity and infrastructure of those governments.[290] The drug lords claim their territories as inviolate, and successfully oppose many efforts to bring them to justice by traditional means.

Because cartels are highly efficiently organized and manipulate foreign governments, United States law enforcement agencies must continue the practice of extralegal apprehension in both of its forms—abduction and irregular rendition.

Professor Bassiouni states that the United States courts and foreign courts misapply the doctrine of *mala captus bene detentus.*[291] This maxim is subordinate to two other principles of Roman law: *nunquam decurritur ad extraordinarium sed ubi deficit ordinarium*—never resort to the extraordinary until the ordinary fails—and *ex injuria ius non oritur*—the Roman law counterpart to the contemporary United States exclusionary rule.[292] Bassiouni is not alone in his criticism of the doctrine and its application in United States law. Shearer describes abduction as "a manifestly extra-legal act, and in practice so hazardous and uncertain, that it is unworthy of serious consideration as an alternative method to extradition."[293] Bedi states that all methods of extralegal rendition are "*prima facie* a breach of international law for which the seizing state is liable to the state of refuge."[294] Indeed, the international legal

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287. For instance, on 2 January 1990, the Office of the Attorney General of Colombia announced that it is investigating allegations of illicit enrichment made against General José Guillermo Medina Sanchez, the former director of the Colombian national police. Despite a monthly salary of $1700, Medina lives in a house worth half a million dollars. N.Y. Times, Jan. 5, 1990, at A9, col. 1; *see also* Noreiga Indictment, *supra* note 34; Note, *supra* note 40, at 291 (discussing evidence linking former Bolivian President General Luis Garcia Mega to millions of dollars in bribes).

288. In January 1990, the son of Germán Montoya, the Secretary General of Colombian President Barco, was kidnapped by the Medellín Cartel. N.Y. Times, Jan. 5, 1990, at 9, col. 1.

289. *See supra* notes 60-66, 72, 80 and accompanying text.

290. One commentator notes, at least in regard to bribery, that the tactics of the drug cartels "threaten to destroy the moral, ethical, and legal responsibilities that are the foundations of law enforcement." Note, *supra* note 40, at 291.

291. 1 M. BASSIOUNI, *supra* note 88, at 213.

292. *See id.* Professor Bassiouni, a staunch opponent to extralegal apprehension, finds three distinct violations in resorting to abduction: "a) disruption of world public order; b) infringement on the sovereignty and territorial integrity of another state; and c) violation of the human rights of the individual unlawfully seized." *Id.* at 191.

293. I. SHEARER, *supra* note 87, at 75.

294. S. BEDI, *supra* note 93, at 21.

community strongly denounces the Roman maxim and *Ker-Frisbie* doctrine.[295]

These commentators' powerful arguments against extralegal apprehension, coupled with the continued implementation of such a system by the United States and other states, illustrate the dichotomy between the way things should be and the way things are. In its War on Drugs, the United States deals with states that are either unable or simply unwilling to assist in the apprehension of known drug merchants.

It is entirely possible, therefore, that the United States has reached Professor Bassiouni's stage of *nunquam decurritur ad extraordinarium sed ubi deficit ordinarium*; that is, by manipulating the infrastructure of host governments, the drug traffickers undermine the procedure for traditional extradition.[296] Now, more than ever, is the time for the extraordinary.

Professors Abramovsky and Eagle see a need in exceptional cases for both abduction and irregular rendition, and they articulate conditions when both modes are appropriate.[297] Governments should resort to abduction only when "the asylum state has systematically aided and abetted the perpetration of offenses or has constituted a sanctuary to alleged offenders."[298] Many drug producing states already discussed fit this mold. The clearest example is the Panamanian Government under the rule of Manuel Noriega.[299]

The practice of irregular rendition "may well be in conformity with international law [constituting] ad hoc comity agreements between two nations to effectuate the adjudication of alleged offenders."[300] In such an extreme area as narcotics enforcement, in which the problem is so broad and corruption reaches the highest levels of government, ad hoc, clandestine arrangements for the apprehension of these drug lords are literally a

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295. *See, e.g.*, O'Higgins, *Unlawful Seizure and Irregular Extradition*, 36 BRIT. Y.B. INT'L L. 279 (1960); Sakellar, *supra* note 112; Note, *When Extradition Fails, Is Abduction the Solution?*, 55 A.J.I.L. 127 (1961).

296. *See supra* notes 61-83 and accompanying text (discussing the history of the United States-Colombia extradition treaty and the declaration by President Barco of a state of siege); note 98 (discussing Mexican reluctance to enforce the United States-Mexico extradition treaty).

297. *See* Abramovsky & Eagle, *supra* note 13, at 92.

298. *Id.*

299. *See supra* note 98 (discussing Mexican reluctance to enforce the United States-Mexico extradition treaty); *see also* Note, *supra* note 40, at 291 (discussing evidence linking former Bolivian president General Luis Garcia Mega to millions of dollars in bribe money).

300. *Id.*

way of life. Such agreements benefit both states and do not violate the territorial sovereignty of either.[301]

A close examination of the cases of Rene Verdugo, Manuel Noriega, and Juan Matta, combined with the continuing interaction between the United States and Colombia, illustrate that the United States policy of extralegal apprehension fits within the model outlined by Professors Abramovsky and Eagle. Both Verdugo and Noriega were abducted from their states—Mexico and Panama, respectively—at a time when those states aided and provided sanctuary to drug traffickers.[302] Matta was apprehended, however, with the assistance of the Honduran Government, a state with which the United States has no extradition treaty and whose constitution forbids extradition of its nationals.[303] Last, with the declaration of a state of siege in Colombia by President Barco, the United States has initiated no extralegal apprehensions; only formal extraditions from that state currently occur.[304]

The Abramovsky and Eagle model provides a workable construct for evaluating when extralegal apprehensions are appropriate. Certainly the United States Government must first seek custody of drug traffickers by the process of formal extradition.[305] When that process fails—that is, when extraordinary situations arise—extralegal apprehension should remain a viable alternative. United States law enforcement agencies should first attempt irregular rendition by means of private, ad hoc agreements with drug producing states, and resort to abduction only in cases in

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301. Such ad hoc private agreements may protect the political image, or, in some cases, the very life of a foreign official. Significantly, in 1985, the House Committee on Foreign Affairs found that most foreign states refused to enter publicly into agreements permitting irregular rendition. *See supra* note 260 and accompanying text.

Abramovsky and Eagle recognize such ad hoc agreements as technically lawful because they constitute agreements of comity, and thus protect the sovereignty of each state. These agreements, however, "often have been perceived as having an aura of illegality . . . because irregular renditions fall outside the traditional extradition process." Abramovsky & Eagle, *supra* note 13, at 92.

302. *See supra* note 15 (discussing involvement of the Mexican police in the kidnapping of United States Drug Enforcement Agency agents Camarena and Cortez); *see also supra* note 98 (discussing continued reluctance by the Mexican Government to honor the United States-Mexico extradition treaty); note 34 (discussing the charges pending against Manuel Noriega).

303. *See supra* notes 21, 35 and accompanying text.

304. *See supra* notes 81-84 and accompanying text.

305. The United States Congress recently directed the United States Secretary of State "to place greater emphasis on updating extradition treaties, and on negotiating mutual legal assistance treaties, with major illicit drug producing countries and major drug-transit countries." Pub. L. No. 100-690, § 4605(b), 102 Stat. 4181, 4290 (codified as amended in 18 U.S.C. § 3181 (1988)).

which the host state provides aid or sanctuary to drug traffickers. United States law enforcement agents, in affecting an arrest in a foreign state, must avoid conduct that would shock the conscience of a court and thus raise a *Toscanino* objection.

In order for United States law enforcement agents directly to arrest a drug smuggler in a state that has provided aid or sanctuary, however, the Mansfield Amendment must be revised again. Such a change in the law obviously presents certain risks. It would create international friction between the United States and foreign states, with the possibility that foreign states will retaliate by abducting United States citizens.[306] To lessen these risks, Professors Abramovsky and Eagle propose the formulation of specific congressional guidelines that balance the need for extralegal apprehension against the possible negative effects and which involve input from all three branches of the United States Government.[307] Such considerations of foreign policy, however, are best left in the hands of the United States President, the Secretary of State, the Attorney General, and the Ambassador to the host state. This insulated structure is necessary, for even as Professors Abramovsky and Eagle concede, "[t]he impetus for the utilization of irregular rendition by the United States and various asylum states has been its circumvention of formalities, the need for quick action, and often the need to obscure who actually conducted the negotiations and formulated the agreement."[308]

With the recent opinion of the Justice Department, and the use of the military to apprehend Manuel Noriega, the approach outlined above appears to be the course that the Executive Branch of the United States government is taking.[309] Although this policy carries risks, it comes at a time when the greatest risk is inaction. On balance, extralegal apprehension constitutes a viable and effective means of apprehending drug traf-

306. *See* Abramovsky & Eagle, *supra* note 13, at 93.

307. *Id.*

308. *Id.*

309. In the case of Manuel Noriega, Professor Yale Kamisar and Noriega defense attorney Ray Takiff agree that there is little constitutional room to challenge Noriega's apprehension under the principle of *mala captus bene detentus. See* Salholz, *No Sympathy for the Devil*, NEWSWEEK, Jan. 1, 1990, at 19.

fickers and curtailing the world's epidemic drug problem.[310]

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310. On 28 February 1990, the United States Supreme Court reversed a ruling by the United States Court of Appeals for the Ninth Circuit and held that the fourth amendment of the United States Constitution does not apply to the search and seizure by United States agents of property owned by a nonresident alien located in a foreign state. United States v. Verdugo-Urquidez, 1990 U.S. LEXIS 1175, at 5.

Although Verdugo lost in the United States District Court for the Southern District of California on the matter of proper jurisdiction under *Ker-Frisbie*, the Ninth Circuit affirmed an order suppressing evidence obtained pursuant to a search of Verdugo's home in Mexico the day after his capture. *See* United States v. Verdugo-Urquidez, 856 F.2d 1214 (9th Cir. 1988). The Court of Appeals ruled that DEA officials should have secured a search warrant, yet acknowledged that "[i]n the present case . . . a warrant issued by an American magistrate would be a dead letter in Mexico." *Verdugo*, 856 F.2d at 1229. In doing so, the Ninth Circuit reached a seemingly untenable position: although constitutional rights of the accused are not compromised by the seizure of the person of the accused under the *Ker-Frisbie* doctrine—an issue not appealed from the district court—due process prohibits the seizure of evidence abroad without a warrant.

The United States Supreme Court began its opinion by distinguishing the fourth and fifth amendments. *Verdugo*, 1990 U.S. LEXIS, at 9-10. Treating *Verdugo* as a fourth amendment case, the Supreme Court held:

> The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial. The Fourth Amendment functions differently. It prohibits "unreasonable searches and seizures" whether or not the evidence is sought to be used in a criminal trial, and a violation of the Amendment is "fully accomplished" at the time of an unreasonable governmental intrusion.

Id. at 10-11 (citations omitted).

The Court further held that the text of the fourth amendment, unlike that of the fifth amendment, extends its guarantees only to "the people," which the Court found to be "a term of art employed in select parts of the Constitution" and refers to "the People of the United States." *Id.* at 12. Because Verdugo is not a United States citizen or an illegal alien residing in the United States, the guarantees of the fourth amendment do not apply to him.

The Supreme Court's decision is particularly important insofar as it relates to the *Ker-Frisbie* doctrine. On the one hand, the decision seems to clear up the ambiguity left by the Ninth Circuit. Now, persons and property may be obtained without observance of formal procedures, such as formal extradition and search warrants. It is interesting to note that the Supreme Court described Verdugo's presence in the United States as "lawful but involuntary," but did not cite either *Ker v. Illinois* or *Frisbie v. Collins*. *Id.* at 23.

On the other hand, one of the justifications of the *Ker-Frisbie* rule seemed to be that the abduction of the accused did nothing illegally to enhance the Government's case at trial. *See supra* notes 180, 183 and accompanying text. This justification is undercut by the Supreme Court's *Verdugo* decision because the Government may now enhance its case with evidence seized abroad without a search warrant. As Justice Kennedy argued in his concurring opinion, "[i]f the search had occurred in a residence within the United States, I have little doubt that the full protections of the Fourth Amendment would apply." *Verdugo*, 1990 U.S. LEXIS, at 34 (Kennedy, J., concurring).

* The author thanks the following for their assistance in the completion of this Note: Ms. Meghan Scanlan of United States Senator Albert Gore's office; Mr. Roger W. Haines, Assistant United States Attorney, San Diego; Ms. Sandi Murphy, of the *Vanderbilt Law Review*; and Professor Igor Kavass, Vanderbilt Law School. The author also extends special thanks to Ms. Mary Demopoulos for her continued support, enthusiasm, and helpful criticism in the completion of this Note.