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# TRAFFIC CIRCLES: THE LEGAL LOGIC OF DRUG EXTRADITIONS

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ABSTRACT

This Article examines nationality, transjudicialism, and the "war on drugs" as they have played out in extradition proceedings around the world. The judicial decisions explored here are from the Privy Council (on appeal from the English-speaking Caribbean), the Israeli Supreme Court, and the Supreme Court of Canada. All of the judgments cite the same sources, engage in the same analytic process, and are under the same legal influence: a common language that talks about constitutional rights and then circles back to a starting point in international relations that augments rather than restricts state power. They also share a similar approach to the subject of drug policy and extradition law, in that all three national courts are located in states that have embraced U.S.-sponsored law enforcement while they at the same time have eschewed U.S. jurisprudence as a legal source. As the Article's title suggests, the theory presented here is that the anti-drug campaign, with its non-American legal sources harnessed in support of American policy, has produced a self-referential legal world built on a peculiar form of logic whose circularity is hard to escape.

## 1. THE WAR ON LOGIC

This Article examines nationality,[1] transjudicialism,[2] and the "war on drugs"[3] as they have played out in extradition

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[1] The word "nationality" is generally used here in its international law sense and "citizenship" in its domestic law sense. *See* 7 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL, § 1111b (2009) ("While most people and countries use the terms 'citizenship' and 'nationality' interchangeably, U.S. law differentiates between the two. Under current law all U.S. citizens are also U.S. nationals, but not all U.S. nationals are U.S. citizens.").



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proceedings around the world. As its title suggests, the theory presented here is that the anti-drug campaign has produced a self-referential legal world built on a peculiar form of logic. The judicial decisions explored in this Article are from an assortment of national courts,[4] but all cite the same sources, engage in the same process, and are under the influence of the same substance:[5] a common language that talks about constitutional rights and then circles back to a starting point in international relations that augments rather than restricts state power.

In a pattern that spans three continents,[6] extradition, as opposed to domestic prosecution, has become the law enforcement

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[2] For early use of the term as shorthand for the judicial borrowing of foreign sources, see Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 118 (1994). *See also* Hanna Buxbaum, *From Empire to Globalization . . . and Back? A Post-Colonial View of Transjudicialism*, 11 IND. J. GLOBAL LEG. STUD. 183 (2004); Julian Hermida, *A New Model of International Law in National Courts: A Transjudicial Vision*, 23 WAIKATO L. REV. 3 (2003); Reem Bahdi, *Globalization of Judgment: Transjudicialism and the Five Faces of International law in Domestic Courts*, 34 GEO. WASH. INT'L L. REV. 555 (2002); Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT'L L. & POL. 501, 505 (2000).

[3] The phrase was initially coined by President Richard M. Nixon in a political speech in June 1971, identifying drug abuse as "public enemy no. 1" and calling for a "war on drugs." *See* Nat'l Pub. Radio, Timeline: America's War on Drugs (Apr. 2, 2007), http://www.npr.org/templates/story/story.php?storyId = 9252490.

[4] The cases are from the Privy Council on appeal from the Bahamas, the Israeli Supreme Court, and the Supreme Court of Canada. *See infra* notes 17–19 and accompanying text.

[5] On the categories of Sources, Process, and Substance as representing the doctrinal structure of modern international law, see David Kennedy, *Tom Franck and the Manhattan School*, 35 N.Y.U. J. INT'L L. & POL. 397, 402 (2003) (demonstrating a way to organize institutional and doctrinal developments); DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES (1987); Ed Morgan, *International Law in a Post-Modern Hall of Mirrors*, 26 OSGOODE HALL L.J. 207, 210–11 (1988) (commenting on Kennedy's division of three distinct doctrines of process, sources, and substance).

[6] *See* Press Release, U.S. Drug Enforcement Admin., 3 Defendants Extradited from Israel to Stand Trial for Conspiring to Distribute Hundreds of Thousands of Ecstasy Pills (Nov. 3, 2003), *available at* http://www.usdoj.gov/dea/pubs/states/newsrel/2003/nyc110303.html (explaining that prosecution in United States is preferred route for Israeli authorities in combating drug trade); Juan Forero, *Surge in Extradition of Colombia Drug Suspects to U.S.*, N.Y. TIMES, Dec. 6, 2004, at A3 (noting that the United States is the destination for South American narcotics traffickers); Lloyd Williams, *Jamaica, U.S. and Extradition*, JAMAICA GLEANER, Apr. 8, 2004, *available at* http://www.jamaica-gleaner.com/gleaner/20040408/news/news1.html (finding that the West Indies and the Privy Council facilitate drug extraditions to United States).

vehicle of choice for governments willing to engage with the United States in the anti-drug campaign.[7] When it comes to legal authority, however, it is not U.S. courts that are looked to for guidance, despite the self-image of American courts as being "studied with as much in New Delhi or Strasbourg as they are in Washington, D.C., or the State of Washington. . . ."[8] Instead, the courts of countries whose governments have moved toward the American view of drug law enforcement[9] have eschewed U.S. case law and placed others—especially Canadian court decisions[10]—at the forefront of what is sometimes called the transjudicial conversation.[11]

Why use Canadian jurisprudence in support of American policy? Extradition generally straddles international law and constitutional doctrine, and the type of comparative analysis described here is often seen as "relevant to the task of interpreting

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[7] Extradition to the United States has become the next logical step in the foreign policy orientation of drug enforcement. *See* WILLIAM B. MCALLISTER, DRUG DIPLOMACY IN THE TWENTIETH CENTURY; AN INTERNATIONAL HISTORY 254 (2000) ("[I]n the late twentieth century the United States promoted adoption of American-style drug control laws in other countries as vigorously as any commercial export. . . .").

[8] Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 541 (1988).

[9] For discussion of drug policy as cultural phenomenon, see WILLIAM O. WALKER III, DRUG CONTROL IN THE AMERICAS, 1 (1989) (explaining that drug use has often had ritualistic or religious importance in the social history of America); DRUG PROBLEMS IN THE SOCIOCULTURAL CONTEXT: A BASIS FOR POLICIES AND PROGRAMME PLANNING (Griffith Edwards & Awni Arif eds., World Health Org. 1980); William O. Walker III, *Introduction: Culture, drugs, and Politics in the Americas*, *in* DRUGS IN THE WESTERN HEMISPHERE: AN ODYSSEY OF CULTURES IN CONFLICT xv–xxiv (William o. Walker III ed., 1996) (describing how "clashes between drug cultures and proponents of drug control traditionally have occurred within states").

[10] *See* Adam Liptak, *U.S. Court, a Longtime Beacon, Is Now Guiding Fewer Decisions*, N.Y. TIMES, Sept. 18, 2008, at A1 (describing the waning of American legal influence in the Canadian Supreme Court).

[11] For an authoritative expression of the aspiration to be at the vanguard of the "internationalization of judicial relations," see Sandra Day O'Connor, Assoc. J., U.S. Sup. Ct., Remarks at the Southern Center for International Studies 1, 2, *available at* http://www.southerncenter.org/oconnor_transcript.pdf (Oct. 28, 2003) ("But conclusions reached by other countries and by the international community, although not formally binding upon our decisions, should at times constitute persuasive authority in American courts—what is sometimes called 'transjudicialism.'"); *see also* Slaughter, *supra* note 2, at 112 (defining direct judicial dialogue as "communication between two courts that is effectively initiated by one and responded to by the other").

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constitutions and enforcing human rights."[12] The United States Supreme Court, on the other hand, has expressed a well-known and much debated antagonism to foreign and comparative law in recent years,[13] making U.S. judicial pronouncements less popular for others as a source of legal ideas. More than that, it is possible that the Supreme Court of Canada has a special place in the pantheon of national constitutional courts, in that "Canada, unlike the United States, is seen as reflecting an emerging international consensus rather than existing as an outlier."[14] This Article aims to explore the phenomenon of foreign sources as it has developed among countries with a legal affinity to the United States,[15] and which have actively engaged in the U.S.-led enforcement efforts in the war on drugs,[16] but have nevertheless chosen to ignore U.S. sources of law.

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[12] Ruth Bader Ginsburg & Deborah Hones Merritt, *Fifty-First Cardozo Memorial Lecture: Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 282 (1999); *see also* Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up Conversation on "Proportionality," Rights, and Federalism*, 1 U. PA. J. CONST. L. 583, 639 (1999) (describing Associate Justice Sandra Day O'Connor's opinion that comparativism teaches "the civilizing functions of constitutional law").

[13] For a prominent judicial debate about the use of foreign law, see the different perspectives expressed by Justices Kennedy, O'Connor, and Scalia, respectively, in *Roper v. Simmons*, 543 U.S. 551, 551, 556, 1206 (2005). For a review of the debate over foreign law more generally, see Daniel Bodansky, *The Use of International Sources in Constitutional Opinion*, 32 GA. J. INT'L & COMP. L 421, 423 (2004) (arguing that there are "strong pragmatic justifications" for taking international law into consideration); Joan L. Larsen, *Importing Constitutional Norms from a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283 (2004) (arguing there is no adequate theoretical foundation for use of foreign and internationl law in domestic law); Gerald L. Neuman, *Agora: The United States Constitution and International Law: The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82 (2004) (addressing the relevance of international law in constitutional interpretation in the past and in the future); Michael D. Ramsey, *Agora: The United States Constitution and International Law: International Materials and Domestic Rights: Reflections on* Atkins *and* Lawrence, 98 AM. J. INT'L L. 69 (2004) (discussing how a "serious" undertaking of utilizing international legal materials in constitutional interpretation might operate).

[14] Frederick Schauer, *The Politics and Incentives of Legal Transplantation*, *in* GOVERNANCE IN A GLOBALIZING WORLD 253, 292 (Joseph S. Nye & John D. Donahue eds., 2000).

[15] *See infra*, note 163 and accompanying text.

[16] *See* MCALLISTER, *supra* note 7, at 254 ("The dynamic of drug diplomacy itself also represents a national security concern entwined with political, economic, social, and cultural implications."); *see also* William O. Walker III, *International Collaboration in Historical Perspective*, *in* DRUG POLICY IN THE AMERICAS

To that end, this Article examines three prominent international drug trafficking cases from three regions or countries participating in the anti-narcotics legal campaign: *Knowles*[17] (the English-speaking Caribbean), *Rosenstein*[18] (Israel), and *Lake*[19] (Canada). While these cases are factually unrelated, all three involve extraditions to the United States in furtherance of a cooperative narcotics enforcement effort, and all three raise constitutional issues about the forcible removal of citizens from their country of origin to face trial elsewhere. In addition, all three cases, including the *Lake* decision by the Supreme Court of Canada,[20] look not to U.S. courts but to Canadian legal sources in interpreting and applying the relevant constitutional norms.

The other unifying feature of the three otherwise disparate cases is that they all—including *Lake*—seem to misapply or misconstrue the Canadian case law from which they draw.[21] Each decision reverses the usual relationship between citizen and state that prior Canadian cases had established: the Privy Council refuses to apply due process analysis to extraditions; the Israeli Supreme Court uses international law enforcement as a trump card for due process and citizenship rights; and the Supreme Court of Canada defers to the executive as the authoritative decision-maker over the mobility rights of citizens. The logic deployed by the

265 (Peter H. Smith ed., 1992) (describing four respects in which the Cartagena summit between the United States and the presidents of Colombia, Peru, and Bolivia offer hope); Chaim Even-Zohar, *Drugs in Israel: A Study of Political Implications for Society and Foreign Policy*, *in* DRUGS, POLITICS, AND DIPLOMACY: THE INTERNATIONAL CONNECTION 186 (Luiz R.S. Simmons & Abdul A. Said eds., 1974).

17 Knowles v. United States, [2006] UKPC 38 (P.C.) (appeal taken from Bah.) (detailing the issue of two extradition requests by the United States to extradite Knowles on drug charges).

18 CrimA 4596/05 Rosenstein v. Israel, [2005] 2 IsrSC 232, para. 1 (involving question of extradition to the United States with regard to an Israeli national wanted in the United States for conspiracy to import and distribute narcotics in the United States).

19 Lake v. Canada (Minister of Justice), [2008] 1 S.C.R. 761, para. 2 (Can.) (involving question of extradition to the United States with regard to Canadian national convicted of trafficking and sale of crack cocaine in Canada).

20 *Id*. para. 49 (dismissing appeal for judicial review of a surrender order issued by the Minister of Justice of Canada and upheld by the Ontario Court of Appeal in United States v. Lake, [2006] 212 C.C.C. (3d) 51 (Ont. C.A.) (Can.)).

21 French political theorist Ernst Renan wrote in the 1930s that one essential ingredient in the making of a nation is "to get one's history wrong." Ernst Renan, *What Is A Nation?*, *in* MODERN POLITICAL DOCTRINES 186, 190 (Alfred Zimmern ed., 1939). It is equally possible that an essential ingredient in the making of an international jurisprudence is to get one's legal sources wrong.

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three courts seems at war with linear thinking, with each expression of the citizen's rights folding back on the interests of the nation, and each discussion of state power folding back on the place of the national in international society.

The result of all this is an unlikely alliance between, on one hand, a jurisprudence that is often considered too interventionist for use by American courts,[22] and, on the other, long arm U.S. law enforcement. In seemingly climbing aboard what has become a policy obsession for the United States,[23] foreign courts have pulled a contorted Canadian mask over their legal face. Consequently, international relations is disguised as constitutional law,[24] or interstate cooperation disguised as rights protection.[25] Instead of

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[22] *See* James Allan et al., *The Citation of Overseas Authority in Rights Litigation in New Zealand: How Much Bark? How Much Bite?*, 11 OTAGO L. REV. 433, 437 (2007) ("As Canada's judges are, by most accounts, the most judicially activist in the common law world—the most willing to second-guess the decisions of the elected legislatures—reliance on Canadian precedents will worry some and delight others."). One scholar notes the increase in judicial activism in countries outside the United States:

> The trend abroad, moreover, is toward decisions of a distinctly liberal sort in areas like the death penalty and gay rights. "What we have had in the last 20 or 30 years," Professor Fried said, "is an enormous coup d'état on the part of judiciaries everywhere – the European Court of Human Rights, Canada, South Africa, Israel." In terms of judicial activism, he said, "they've lapped us."

Liptak, *supra* note 10, at A30 (quoting Harvard Law School Professor Charles Fried).

[23] *See* DAVID WAGNER, THE NEW TEMPERANCE: THE AMERICAN OBSESSION WITH SIN AND VICE 213 (1997) (citing the war on drugs as an integral part of American obsessions with personal behavior). *See also* STUART A. SCHEINGOLD, THE POLITICS OF STREET CRIME: CRIMINAL PROCESS AND CULTURAL OBSESSION 173 (1991) (noting the prohibition of illicit drugs as part of the obsessive culture wars in the United States).

[24] *See, e.g.*, Jean-Gabriel Castel & Sharon A. Williams, *The Extradition of Canadian Citizens and Sections I and 6(I) of the Canadian Charter of Rights and Freedoms*, 25 CAN. Y.B. INT'L L. 263, 268-69 (1987) (discussing the necessary tensions between extradition as a form of progressive cooperation and the influence a nation's constitutional rights project as a form of retrogressive parochialism).

[25] For a description of international cooperation in law enforcement as a genre of progressive rights protection, albeit in the different context of illegal weapons, see Condoleeza Rice, Op.-Ed., *Why We Know Iraq is Lying*, N.Y TIMES, Jan. 23, 2003, at A25.

normative concerns shaping policy,[26] the foreign policy of cooperative drug enforcement has come to shape legal rights.[27]

To understand how this could happen in the transparent world of appellate courts, this Article first takes a detour into international law and the place of nationals in the discourse of state sovereignty. It then examines citizenship issues with respect to constitutional law generally and drug extraditions in particular, before delving into the three decisions at hand. This Article posits that by exploring these underpinnings it is possible to come to grips with an otherwise perplexing legal phenomenon: the apparent misapplication of Canadian constitutional law in pursuit of American international law enforcement.

### 2. NATIONALITY RULES IN INTERNATIONAL LAW

Despite the plethora of U.N.-sponsored, multilateral conventions relating to narcotics trafficking,[28] drugs have not been the focus of much adjudication by international judicial organs. The negotiations culminating in the Statute of the International

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[26] For the now iconic statement of normative principles preceding government policy, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 107 (1977) (explaining that a legal decision-maker must "develop a theory of the constitution, in the shape of a complex set of principles and policies that justify that scheme of government . . .").

[27] *See* PETER ANDREAS & ETHAN A. NADELMANN, POLICING THE GLOBE: CRIMINALIZATION AND CRIME CONTROL IN INTERNATIONAL RELATIONS (2006) (examining the development of international crime controls as a product of Western powers' domestic systems); Jacob Sullum, *Mind Alteration: Drug Policy Scholar Ethan Nadelmann on Turning People Against Drug Prohibition*, REASON, July 1, 1994, *available at* http://www.thefreelibrary.com/_/print/PrintArticle.aspx?id=16075326 (observing that "[t]he roles that communism and drugs have played in American politics are quite similar").

[28] *See* U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *opened for signature* Dec. 20, 1988, 28 I.L.M. 497 (entered into force Nov. 11, 1990) (creating uniform prohibitions against the illicit trafficking of narcotic and psychotropic drugs within the international community); Convention on Psychotropic Substances, *opened for signature* Feb. 21, 1971, 10 I.L.M. 261 (entered into force Aug. 16, 1976) (discussing standards for use, trade, and research of psychotropic substances in the international community); Single Convention on Narcotic Drugs, *opened for signature* Mar. 30, 1961, 976 U.N.T.S. 3 [hereinafter *Single Convention*] (entered into force Dec. 13, 1964) (as amended by Protocol Amending the Single Convention on Narcotic Drugs, 1961, Mar. 5, 1972, 976 U.N.T.S. 3, 11 I.L.M. 804) (aiming to control production of raw materials of narcotic drugs within the international community).

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Criminal Court[29] raised the possibility of categorizing drug trafficking as an international offense; however, the sessions concluded only with a resolution that the state parties consider including it at a future review conference.[30] Although drug policy plays a central role in international legal discourse[31] and the United Nations monitors narcotics treaty implementation by its member states,[32] actual enforcement and prosecution has been left to the unilateral and coordinated actions of domestic legal systems.

By contrast, the concept of nationality—a central ingredient in the drug trafficking cases and in legal modernism generally[33]—has been the subject of much international deliberation.[34] Traditional

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[29] *See* Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.138/9, 1998, 37 I.L.M. 999 (July 1, 2002) (establishing the International Criminal Court by agreement among countries party to the U.N.).

[30] *See generally* U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/13 (July 17, 1998) (providing background information on the Rome Statute of the International Criminal Court, including the statute itself, relevant General Assembly resolutions, summary of meetings, reports, documents of the plenary, etc.).

[31] *See* U.N. Office on Drugs and Crime [UNODC], *Evolution of International Drug Control*, 51 BULL. NARCOTICS 1, 1–2 (1999) (*prepared by* I. Bayer & H. Ghodse) (discussing the historical evolution of drug abuse as a global problem and the subsequent international responses). *See also* LYAL S. SUNGA, THE EMERGING SYSTEM OF INTERNATIONAL CRIMINAL LAW: DEVELOPMENTS IN CODIFICATION AND IMPLEMENTATION 216 (1997) ("[T]he proliferation of international agreements designed to suppress trafficking in illicit drugs indicates that the international community has recognized the need for international rather than purely domestic solutions to the drug problem.").

[32] *See* International Narcotics Control Board, Mandate and Functions, http://www.incb.org/incb/mandate.html (last visited Dec. 5, 2009) (explaining that one of the functions of the Board is to identify "weaknesses in national and international control systems [for illicit drugs] and contributes to correcting such situations").

[33] On the liberal value base of modern international law, see David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT'L L. & POL. 335 (2000) (presenting international law as the product of professional vocabulary and performances, rather than the product of doctrines and institutions); Mary Ellen O'Connell, *New International Legal Process*, 93 AM. J. INT'L L. 334 (1999) (discussing policy-oriented jurisprudence and its global values and social aspirations); Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993) (analyzing the evolution of international law and the resulting institutionalist and liberal agendas that shape international law today). On the liberal structure of international law generally, see David Kennedy, *Theses About International Law Discourse*, 23 GERMAN Y.B. INT'L L. 353 (1980).

[34] For a recent example, see Press Release, Grassley Targets International Drug Traffickers, (July 29, 2008), *available at* http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=15740 (discussing the introduction by

international thinking held, as the title of this part of the Article suggests, that nationality rules,[35] so that only the parent sovereign could make a claim of right on behalf of its individual nationals.[36] Of course, states have always been considered competent to confer rights on persons within their scope,[37] but the classical perception of individuals by international lawyers has been that the citizenry is a medium for, not a restraint on, state power.[38] Thus, for example, the extra-territorial protection of one's own citizens has been considered within a sovereign's jurisdictional capacity rather than an incursion into a foreign state.[39] Likewise, a state could claim breach of its international rights where another has mistreated its national,[40] even where the identical acts aimed at the

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Senators Chuck Grassley, Joe Biden and Dianne Feinstein of Drug Trafficking Interdiction Assistance Act, S. 3351, addressing the issue of maritime drug trafficking by persons and vessels not identified by nationality).

[35] *See* Louis Henkin, *Human Rights and State "Sovereignty"*, 25 GA. J. INT'L & COMP. L. 31, 37-38 (1995) (ruling out both convention and custom as traditional sources for contemporary human rights law); Anthony D'Amato, *Human Rights as Part of Customary International Law: A Plea for a Change of Paradigms*, 25 GA. J. INT'L & COMP. L. 47, 47 (1995) (noting that "[p]rior to 1945 a government would not be deemed to have violated international law by the mass murder of its own citizens in its own territory.").

[36] *See* U.N. Charter Statute of the International Court of Justice art. 34, para. 1, 59 Stat. 1031, T.S. No. 993 (1945) ("Only states may be parties in cases before the Court"); Barcelona Traction, Light and Power Co. (Belg. v. Spain), 1970 I.C.J. 4, 39 (Feb. 5) (noting only a state in which a corporate entity is registered has standing to assert a claim on that corporation's behalf). The theme of international law and nationality rules is discussed more thoroughly in: Edward Morgan & Ofer Attias, *Rabbi Kahane, International Law, and the Courts: Democracy Stands on its Head,* 4 TEMP. INT'L & COMP. L.J. 185 (1990).

[37] *See* HERSCH LAUTERPACHT, INTERNATIONAL LAW: THE COLLECTED PAPERS 469-71 (Elihu Lauterpacht ed., 1970) (explaining that individuals hold international legal rights solely by virtue of the intention of state parties through conventions or by incorporating international law into domestic law).

[38] Much as when the individual is associated not with a state but with the United Nations, the "citizen" becomes a medium of institutional rights and power. *See* Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11).

[39] *See, e.g.*, S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (holding that Turkish jurisdiction on behalf of its nationals justifies jurisdictional incursion into French ship); United States v. Yunis, 859 F.2d 953 (D.C. Cir. 1988) (holding that international law allows for passive personality criminal jurisdiction).

[40] Mavrommatis Palestine Concessions (Greece v. Gr. Brit.), 1924 P.C.I.J. (ser. A) No. 2 (holding that injury to an alien national is an injury to the alien's parent state).

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foreign state's own citizen would offend no domestic norm.[41] The idea was that through their nationals, states could create and expand their presence,[42] and were empowered and endowed with rights in a world of nations.[43]

On the other side of the coin, the concept of nationality has also played an important role in restraining state power. While a state may gain rights through its nationals, it delineates the borders of its own legal rights by logical extension.[44] Thus, for example, a state's inherent legal jurisdiction has always fallen short of governing the nationals of a foreign state located within their own state,[45] notwithstanding the possibility of extraterritorial legislation.[46] Through nationality, states define and enforce their

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[41] *See* B. E. Chattin (U.S.) v. United Mexican States (U.S. v. Mex.), 4 R. Int'l Arb. Awards 282 (Gen. Cl. Comm'n 1927) (reporting that the United States claimed denial of due process by Mexican authorities towards American citizen arrested in Mexico even though due process was not recognized under Mexican law); Editorial Comment on *Report Presented by the Commission of Jurists on Interpretations of the League of Nations Covenant and Points of General International Law of Unusual Interest*, League of Nations (1934), *reprinted in* Quincy Wright, *Opinion of Commission of Jurists on Janina-Corfu Affair*, 18 AM. J. INT'L L. 536, 543 (1924) ("The recognized public character of a foreigner and the circumstances in which he is present in its territory entail upon the State a corresponding duty of special vigilance on his behalf.").

[42] *See* Bob-Lo Excursion Co. v. Mich., 333 U.S. 28 (1948) (holding that the presence of U.S. nationals gives state jurisdiction over events in foreign territory).

[43] *See* In the Matter of a Reference as to Whether Members of the Military or Naval Forces of the United States of America are Exempt From Criminal Proceedings in Canadian Criminal Courts, [1943] S.C.R. 483 (Can.) (holding that the U.S. had criminal jurisdiction over troops stationed on base in Canadian territory).

[44] *See* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 51 (May 24) (holding that Iranian authority ends where U.S. authority begins).

[45] In the United States, this notion was reversed with the rediscovery of the Alien Tort Claims Act, 28 U.S.C. § 1350. *See* Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) (allowing jurisdiction over an alien tort claim brought by an alleged Paraguayan torture victim of the Paraguayan Inspector-General of the police).

[46] *See, e.g.*, Vanity Fair Mills, Inc. v. T. Eaton Co., Ltd., 234 F.2d 633 (2d Cir. 1956) (holding that the Lanham Trade-Mark Act does not apply to trademark infringement by a Canadian corporation in Canada despite its potentially extraterritorial application to United States companies).

collective differences;[47] and these differences effectively restrain the acts of other states.[48]

One implication of the empowering and restraining effect of nationality in international discourse is that while states cannot wrongly impinge on the nationals of another, they have been at liberty as sovereigns to define the scope of their own citizenry. The seminal statement of this principle was in the *Nationality Decrees* case.[49] The British government objected to French nationality decrees in its North African colonies on persons who, under English law, were British subjects. The Permanent Court of International Justice's answer was that international relations required states to be at liberty to fashion their own nationality rules.[50] Thus, the court supported unrestrained sovereignty with respect to French nationality laws,[51] while it admonished France for having violated a treaty obligation toward Britain to respect British interests in the region.[52]

In sum, *Nationality Decrees* demonstrates that the concept can point to either state empowerment or state restraint. The jurisprudence of international tribunals seems to invoke both positions.[53] Perhaps the starkest illustration of this rhetorical

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[47] *See, e.g.,* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (holding that a Mexican national arrested and brought to the United States for trial lacks constitutional rights against wrongful arrest since "the people" as used in Fourth Amendment of the U.S. Constitution refers to people of the United States).

[48] *See*, *e.g.,* Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812) (upholding the absolute theory of sovereign immunity by holding that the host state's interference with the foreign public armed ship cannot occur without affecting its power and dignity; thus, the ship enjoys exemption from host sovereign's jurisdiction while within host territory).

[49] *See* Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4 (Feb. 7) (articulating the idea that states are free to define its citizenry).

[50] The court reasoned that questions of domestic jurisdiction pose "an essentially relative question; it depends upon the development of international relations." *Id.* at 24.

[51] *Id.*

[52] In the court's view, the generally applicable international legal principle is one of the sovereign freedom, while the particular legal policy to which France is bound is one of restraint vis-à-vis Britain as its treaty partner. "For the purpose of the present opinion, it is enough to observe that it may well happen that, in a matter which, like that of nationality, is not, in principle, regulated by international law, the right of a State to use its direction is nevertheless restricted by obligations which it may have undertaken towards other States." *Id.*

[53] In a theme that harks back to the interplay between naturalist and positivist theories of law seen in *Paquete Habana*, the nationality cases highlight

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phenomenon is provided by the International Court of Justice's decision in the *Nottebohm Case*,[54] in which Liechtenstein alleged mistreatment of one of its nationals by the authorities of his country of residence, Guatemala.[55] Guatemala successfully challenged "the admissibility of the claim related to the nationality of the person for whose protection Liechtenstein had seised the Court. . . ."[56] The legal focus in *Nottebohm* effectively shifted from Guatemala's treatment of the individual to Liechtenstein's connection to its citizen. Guatemala attacked the relatively lax Liechtensteinian laws under which Nottebohm had acquired citizenship.[57] On the theoretical plane, the pattern of legal arguments all but revealed the dual nature of nationality norms and international legality: the substantive rights and wrongs of international law were inextricably tied to the process of state participation in international matters. It was difficult for the court to judge sovereign actions without speculating as to the nature of the relationships between state actors operating within a legally sovereign system.[58]

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international law's need to cast what might appear to be a natural restraint on sovereign states in positive law terms. *See* Paquete Habana, 175 U.S. 677 (1900). Thus, sovereigns are limited in their actions in a way, which accentuates every sovereign's unlimited ability to consent to international limitations. *See supra* notes 34–37 and accompanying text; Edward Morgan, *Criminal Process, International Law and Extraterritorial Crime*, 38 U. TORONTO L.J. 245, 253 (1988) (stating that international case law is "permeated by various rhetorical techniques in which states are told what they should be doing simply by being told what they actually do.").

[54] Nottebohm (Liech. v. Guat.), 1955 I.C.J. 4 (Apr. 6).

[55] Liechtenstein's request to the International Court of Justice was for the international body to adjudge and declare that "[t]he Government of Guatemala in arresting, detaining, expelling and refusing to readmit Mr. Nottebohm and in seizing and retaining his property without compensation acted in breach of their obligations under international law." *Id.* at 6–7.

[56] *Id.* at 12.

[57] The court summarized the Liechtensteinian law regarding the naturalization of foreigners (under which Mr. Nottebohm had acquired Liechtensteinian nationality) as one which allowed most of the typical residency and other requirements to "be dispensed with in circumstances deserving special consideration and by way of exception." *Id.* at 14. Thus, the only mandatory criterion to which the non-resident candidate for naturalization had to conform was the submission of "proof that he has concluded an agreement with the Revenue authorities . . . [and] the payment by the applicant of a naturalization fee." *Id.*

[58] For a thorough discussion of the curiously separate yet connected categories of international substance and process, see DAVID KENNEDY,

The ruling in *Nottebohm* contained an interesting double edge. It managed to uphold Liechtenstein's citizenship law and to undermine Liechtenstein's standing to bring the claim. In its central passage, the judgment reasserted the fundamental rule of freedom that had been the starting point of the *Nationality Decrees* case: "It is for . . . every sovereign State to settle by its own legislation the rules relating to the acquisition of its nationality. . . ."[59] In the first instance, the court was prompted by a desire to assert even the nonconforming state's sovereign power to define its own nationality.[60] Immediately following this, however, the court asserted that "the issue which the Court must decide is not one which pertains to the legal system of Liechtenstein. . . . It is international law which determines whether a State is entitled to exercise protection and to seise the Court."[61] Thus, the court simultaneously championed the cause of international legality over the domestic laws of the deviant state.

Given the generally defensive tone of classical international pronouncements, the court's assertion of its own process rules over the laws of Liechtenstein represents an assertive moment for international jurisprudence.[62] On the other hand, it did little more than to reintroduce, with a twist, the traditional international law ambivalence. In *Nottebohm*, international law seemed to actively override state power in its assessment of Liechtenstein's standing, and to remain passive in its non-assessment of Guatemala's treatment of its resident. If the result restricted sovereignty, it did so in a way which repeated the theme of the *Nationality Decrees*

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INTERNATIONAL LEGAL STRUCTURES (1987) (describing the discursive structure of public international law).

[59] *Nottebohm*, 1955 I.C.J. at 20.

[60] The customary law on point was described as follows: "According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties." *Id.* at 23. Evidently, Mr. Nottebohm's connection with Liechtenstein was perceived as lacking the requisite level of intimacy.

[61] *Id.* at 20–21.

[62] The court stated emphatically that "[i]t does not depend on the law or on the decision of Liechtenstein whether that State is entitled to exercise its protection [in international adjudication]." *Id.* at 20. As if to tone down its assertiveness, the court then re-characterized its own decision as a matter of mere factual assessment. The decision, therefore, holds that in cases of disputed citizenship, "the real and effective nationality [is preferred], that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved." *Id.* at 22.

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judgment—the denial of one nation's standing effectively empowering another nation (and all nations).

The lesson of international law's nationality cases, therefore, is that sovereigns may appear to be restrained in the name of individuals and a superior normative force, but the cases are equally explicable as articulating sovereign restraint only in the name of sovereignty itself. Notwithstanding that nationality questions frequently have arisen in contexts which pose questions of aliens' rights, the theme of individuals against state power is typically discernible only as a partial and subordinate aspect of these controversies. The primary emphasis has traditionally been one which allows sovereigns to assert their powers in delineating their own constituencies up until the point where they impinge the legal personality of another equal sovereign.[63]

For illustration of the point that nationality stands as much with sovereignty as against it, one need only examine the historic cases raising questions of alien's rights. In the famous *Roberts Claim*,[64] the United States sought damages against Mexico for the inhumane conditions which Roberts, a United States citizen, suffered during his eighteen months awaiting trial in a Mexican prison. The fundamental question, which seems at first to distinguish this adjudication from other international controversies of the era, was whether the treatment of Roberts violated an international norm with respect to aliens despite Mexico's having acted within its rightful domestic jurisdiction.[65]

The tribunal's opinion started out sounding like a precursor to the fully developed human rights law of a later era, asserting that

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[63] *See* Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812) (recognizing that the world is "composed of distinct sovereignties possessing equal rights and equal independence").

[64] Harry Roberts (U.S. v. Mex.) 4 R. INT'L ARB AWARDS 77 (1926), *reprinted in* 21 AM. J. INT'L L. 357 (1927) [hereinafter *Roberts*]. *See also* J. W. Garner, *Decisions of the American-Mexican Mixed Claims Commissions*, 8 BRIT. Y.B. INT'L L. 179, 184 (1927) (summarizing the case of Roberts).

[65] The case was adjudicated by the U.S.-Mexico General Claims Commission, established under the Convention for Reciprocal Settlement of Claims, U.S.-Mex., Sept. 8, 1923, 43 Stat. 1730, T.S. No. 678. Regarding the initial arrest, the Commission indicated that "[i]n the light of the evidence presented in the case the Commission is of the opinion that the Mexican authorities had ample grounds to suspect that Harry Roberts had committed a crime and to proceed against him as they did." *Roberts*, *supra* note 64, at 359.

Roberts enjoyed a right to humane prison conditions.[66] Nevertheless, the question of whether this right was attributable to, or stood against, state sovereignty was subtly answered with a "yes" and a "no." The Commission characterized the conditions of Roberts' captivity as depressingly substandard and articulated a universal test of "whether aliens are treated in accordance with ordinary standards of civilization."[67] The judgment seemed to imply, almost anachronistically, that Roberts' prison conditions were inhumane regardless of his nationality. In this view, the individual claimant was attributed rights against any state, foreign or domestic, which so degrades his humanity.

That said, the tribunal proceeded to describe the Mexican offense in a way that distinguished the foreigner from his cell-mates. The tribunal stressed that Roberts was made to share a toilet and prison cell only "thirty-five feet long and twenty feet wide" with, at times, "thirty or forty [Mexican] men."[68] The crucial point, of course, was that Roberts and his cell-mates were normatively unequal. The holder of international rights was, in classic international law style, identified on the basis of his representative capacity as a member of a foreign nation. The domestic prisoners belonged to the imprisoning nation, and therefore had to find their rights, if any, in Mexican law; contrarily, the alien prisoner belonged, by definition, to a foreign nation with international legal rights of its own.

While the upshot of the case law is that citizenship and alienage can protect persons against the acts of nations,[69] the thematic undercurrent is that nationality represents a sense of belonging to a given nation.[70] Aliens and nationals can be significant in international law as persons,[71] but their significance derives primarily from the fact that they have been perceived as

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[66] In the Commission's words, "We do not hesitate to say that the treatment of Roberts was such as to warrant an indemnity on the ground of cruel and inhumane imprisonment." *Roberts*, *supra* note 64, at 361.

[67] *Id.*

[68] *Id.* at 360.

[69] For a classic statement, see HANS KELSEN, GENERAL THEORY OF LAW AND STATE 234–35 (Transaction Publishers 2006) (1945).

[70] *See* EUROPEAN OPINION RESEARCH GROUP, CITIZENSHIP AND SENSE OF BELONGING (2004), *available at* http://ec.europa.eu/public_opinion/archives/ebs/ebs_199.pdf.

[71] *See, e.g.*, Paquete Habana, 175 U.S. 677 (1900) (holding that Spanish fishing vessels are exempt from capture as prize of war).

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individual appendages of their parent nations.[72] Correspondingly, states are both empowered in the delineation and treatment of their nationals,[73] and restrained in their impact on alien nationals.[74] Nationals are linked to their sovereign state, the point of their rights being in the first instance that they are not linked to some other sovereign state with nationals of its own.[75]

### 3. CITIZENSHIP RULES IN CONSTITUTIONAL LAW

Nationality plays a similarly ambiguous role in the domestic legal system,[76] although in modern constitutional law it may be said—again, as the title of this part of the Article suggests—that citizenship rules.[77] As in international discourse, domestic contests

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[72] This is as true for corporate citizens as for natural ones. *See generally* Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 4 (Feb. 5) (noting only a state in which a corporate entity is registered has standing to assert a claim on that corporation's behalf); Rosalyn Higgins, *Aspects of the Case Concerning the Barcelona Traction, Light and Power Company, Ltd.*, 11 VA. J. INT. L. 327 (1971) (contemplating who or what has a cause of action with respect to damages sustained by shareholders, resulting from unlawful treatment of the company); Herbert W. Briggs, *Barcelona Traction: The* Jus Standi *of Belgium*, 65 AM. J. INT'L. L. 327 (1971) (commenting on the *jus standi* of Beldium); Brian Flemming, Note, *Case Concerning the Barcelona Traction, Light and Power Company Limited, Preliminary Objections,* 3 CAN. Y.B. INT'L L. 306 (1965) (analyzing the preliminary objections put forward by Spain).

[73] For a full discussion, see Peter J. Spiro, *Mandated Membership, Diluted Identity: Citizenship, Globalization, and International Law*, *in* PEOPLE OUT OF PLACE: GLOBALIZATION, HUMAN RIGHTS, AND THE CITIZENSHIP GAP 87 (Alison Brysk & Gershon Shafir eds., 2004).

[74] *See, e.g.*, S.S. Lotus, 1927 P.C.I.J. (ser. A) No. 10, at 4 (holding that Turkey free to try ship captain for injury to Turkish sailors by acts done on board French ship).

[75] The issue comes to the fore with respect to dual nationals. *See generally*, MOHSEN AGHAHOSSEINI, CLAIMS OF DUAL NATIONALS AND THE DEVELOPMENT OF CUSTOMARY INTERNATIONAL LAW (2007) (discussing the controversy surrounding the question of whether a dual national may state a claim against one of her States of nationality); Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1411 (1997) (tracing the evolution of the discourse surrounding dual nationality).

[76] For a review of the ambiguity of nationality and alienage in legal discourse, see Edward M. Morgan, *Aliens and Process Rights: The Open and Shut Case of Legal Sovereignty*, 7 WIS. INT'L L.J. 107 (1989). On some distinctions between nationality and citizenship, see Mohammed Saif-Alden Wattad, *Resurrecting* "Romantics at War*:" International Self-Defense in the Shadow of the Law of War—Where Are the Borders?*, 13 ILSA J. INT'L & COMP. L. 205 (2006).

[77] *See* British Nationality Act, 1981, c. 61, § 1 (U.K.) (modifying territorial basis for birthright citizenship by including parentage qualifications); United States v. Wong Kim Ark, 169 U.S. 649 (1898) (stating that the Fourteenth

over nationality commence with an understanding that citizenship is a badge of inclusion in the polity. Accordingly, most disputes over citizenship entail questions about its relinquishment.[78] In particular, courts in the United States have focused their attention on the naturalization process,[79] and have asked the question of whether the citizen has either voluntarily or implicitly "expatriated" herself.[80]

The United States inherited its attitudes towards citizenship from the English common law, which held nationality to be an

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Amendment conveys constitutional right of citizenship to all persons born in territorial United States); Calvin's Case, (1608) 77 Eng. Rep. 377 (K.B.) (outlining the basis for birthright citizenship in U.K. under English common law); Jonathan C. Drimmer, *The Nephews of Uncle Sam: The History, Evolution, and Application of Birthright Citizenship in the United States*, 9 GEO. IMMIGR. L.J. 667, 671 (1995) (noting the legal status of children of illegal immigrants born in the U.S. is "uncertain"); *see also* Dan Stein & John Bauer, *Interpreting the 14th Amendment: Automatic Citizenship for Children of Illegal Immigrants?*, 7 STAN. L. & POL'Y REV. 127, 128 (1996) (noting neither the U.S. Supreme Court nor the U.S. Constitution has directly addressed the question whether children of illegal immigrants are citizens). Modern constitutional law analysis shows citizenship is given priority over territorial-based nationality in the domestic legal system. *See generally* Michael Robert W. Houston, Note, *Birthright Citizenship in the United Kingdom and the United States: A Comparative Analysis of the Common Law Basis for Granting Citizenship to Children Born of Illegal Immigrants*, 33 VAND. J. TRANSNAT'L L. 693 (2000) (discussing the common law concept of territorial birthright citizenship and the shift in contemporary discourse from its common law basis to whether citizenship ought to inhere in children born to illegal immigrants); Andrew Grossman, *Birthright Citizenship as Nationality of Convenience*, *in* PROCEEDINGS, COUNCIL OF EUROPE, THIRD CONF. ON NATIONALITY, STRASBOURG, at 109–21 (2004). For the relevant European jurisprudence on birthright citizenship, see Case C-200/02, Kunqia Catherine Zhu & Man Lavette Chen v. Sec'y of State for Home Dep't, 2004 E.C.R. I-09925. *See also* Citizenship Amendment Act 2005, 2005 S.R. No. 43 (N.Z.) (establishing that birthright citizenship is attained where one parent is a New Zealand citizen); Citizenship Act, R.S.C., ch. C-29, § 3(1)(a) (1985) (Can.) (outlining birthright citizenship for persons born in Canada).

[78] For a general discussion of the ways in which U.S. citizenship can be lost, see GLADSON I. NWANNA, AMERICANS LIVING ABROAD: WHAT YOU SHOULD KNOW WHILE YOU ARE THERE 79 (2004) (discussing citizenship and nationality issues for expatriates). For an official Canadian publication, see CITIZENSHIP AND IMMIGRATION CANADA, ACQUISITION AND LOSS OF CANADIAN CITIZENSHIP (2009), *available at* http://www.cic.gc.ca/EnGLish/resources/manuals/cp/cp09-eng.pdf.

[79] For a general history of the nationalization process in U.S. law, see J.P Jones, Comment, *Limiting Congressional Denationalization After* Afroyim, 17 SAN DIEGO L. REV. 121 (1979).

[80] *See* Richard R. Gray, Comment, *Expatriation – A Concept in Need of Clarification*, 8 U.C. DAVIS L. REV. 375, 379–87 (1975) (analyzing the confusing expatriation law in the U.S. by exploring its historical sources, its present manifestations, and a conceptual approach that could eliminate it).

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immutable feature of human nature.[81] This sentiment found expression in the U.S. Declaration of Independence and the early Federalists argued for governmental confirmation of this entrenched right.[82] The notion of U.S. citizenship as a right was then supplemented in the mid-nineteenth century by a statutory guarantee to U.S. citizens of the right to expatriate themselves.[83] It was not until the early twentieth century that American federal legislation identified acts that could result in the involuntary relinquishment of citizenship.[84] This method of denationalization by implied expatriation has been the governing norm of American law since that time.[85]

Citizenship as a legal badge of national inclusion was a continuous feature of U.S. enactments until at least the 1950s,[86] reaching its high point in the Expatriation Act of 1954.[87] Under that legislation, a U.S. national could lose her status by serving in the armed forces of a foreign sovereign state,[88] voting in a foreign state's election,[89] taking employment or holding public office in a

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[81] 1 WILLIAM BLACKSTONE, COMMENTARIES *370 (noting that no person is "able at pleasure to unloose those bonds, by which he is connected to his natural prince").

[82] *See generally* CHARLES GORDON & HARRY N. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE (1959).

[83] *See generally* Expatriation Act of 1868, ch. 249, 15 Stat. 223 ("Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness . . . any declaration, instruction, opinion, order, or decision of any officers of the this government which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government.").

[84] *See generally* Expatriation Act of 1907, ch. 2534, 34 Stat. 1228 (stating that any American citizen has expatriated himself when he has been naturalized in any foreign state or taken an oath of allegiance to any foreign state, while any naturalized citizen expatriates himself if he has "resided for two years in the foreign state from which he came, or for five years in any other foreign state.").

[85] *See generally* Nationality Act of 1940, ch. 876, § 401, 54 Stat. 1137, 1168 (re-enacted as Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163, 267, § 349 (codified at 8 U.S.C. § 1481 (1982)).

[86] *See* Expatriation Act of 1907, ch. 2534, 34 Stat. 1228, § 3 (providing as an example of early gender discriminatory ground for expatriation, an American woman marrying a foreign man as grounds for losing U.S. citizenship).

[87] *See* Expatriation Act of 1954, Pub. L. No. 772, ch. 1256, 68 Stat. 808 (amending Immigration and Nationality Act of 1952, codified at 8 U.S.C. § 1481(a) (1982)).

[88] 8 U.S.C. § 1481(a)(3).

[89] *Id.* § 1481(a)(5).

foreign government,[90] becoming a naturalized citizen of a foreign state,[91] or even residing for three years in a country in which she holds dual citizenship by birth.[92] Various other voluntary acts, which while falling short of explicit renunciation of citizenship[93] were nevertheless deemed contrary to the duties of citizenship, could likewise result in the revocation of U.S. citizenship. These voluntary acts included desertion from the U.S. military,[94] avoiding compulsory military service,[95] or committing acts of treason against the United States.[96] Formally, it was the Congressional power to regulate foreign affairs that grounded the legislatively defined expatriations,[97] but the normative thrust of the citizenship policy was inward rather than outward looking. The idea behind defining specific acts of self-exclusion was to give practical meaning to citizenship as a symbol of inclusion.

The power to enact expatriation rules and to thereby define the American polity was initially upheld as an extension of Congressional authority over foreign affairs rather than over any area of domestic policy.[98] In *Perez v. Brownell*, the Supreme Court overrode the dissenting objections voiced by Chief Justice Warren,[99] and found an identifiable link between prohibiting U.S. citizens from voting in foreign elections and avoiding any embarrassment of the U.S. government or conflict with foreign nations.[100] At the same time, the Court put restrictions on this

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[90] *Id.* § 1481(a)(4).

[91] *Id.* § 1481(a)(1). Becoming a dual national may or may not include the alternative grounds for expatriation for swearing allegiance to a foreign sovereign. *Id.* at § 1481(a)(2).

[92] *Id.* § 1481.

[93] *Id.* § 1481(a)(6) (addressing formal renunciation of citizenship).

[94] *Id.* § 1481(a)(9).

[95] *Id.* § 1481(a)(10).

[96] *Id.* § 1481(a)(8).

[97] *See* Perez v. Brownell, 356 U.S. 44 (1958) (addressing expatriation due to avoiding the draft and voting in foreign election).

[98] *Id.* at 57 (discussing the expatriation resulting from U.S. citizens voting in a foreign election).

[99] *Id.* at 66 (Warren, C.J., dissenting) ("Under our form of government, as established by the Constitution, the citizenship of the lawfully naturalized and the native-born cannot be taken from them.").

[100] *Id.*

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power, opining in *Trop v. Dulles*[101] that a deserter from the U.S. military could not be stripped of his citizenship, because using denaturalization as a criminal sanction was considered "cruel and unusual punishment" and contrary to the Eighth Amendment.[102]

Congressional and executive authority over expatriation was further eroded in *Nishikawa v. Dulles*,[103] where the Court made it clear that any doubt about the voluntariness of the expatriating act must fall to the benefit of the citizen wishing to maintain his status.[104] The 1950s therefore ended with a weakened, but nevertheless intact notion that citizenship—and the corresponding congressional authority to define the terms on which naturalization and denaturalization occur—is congruent with the inclusive meaning attached to nationality by the International Court of Justice in the *Nottebohm Case*.[105] In determining the actual import of congressionally defined expatriating acts, the U.S. courts continued to give practical application to the international requirement to determine "real and effective nationality."[106]

A separation of U.S. thinking from international opinion on nationality as a legal concept came toward the end of the 1960s in *Afroyim v. Rusk*.[107] Revisiting a factual scenario almost identical to the one in *Perez*, the Supreme Court concluded that the act of voting in a foreign election could not form the basis of denationalization absent some evidence of the U.S. citizen's consent to the expatriation.[108] This time around, the majority

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[101] Trop v. Dulles, 356 U.S. 86 (1958) (deciding that stripping military deserters of their citizenship was unconstitutional). The decision in *Trop* was rendered the same day as the decision in *Perez*.

[102] *Id.* at 99–101.

[103] Nishikawa v. Dulles, 356 U.S. 129 (1958) (reinstating citizenship for U.S.-born dual citizens who were involuntarily inducted into the Japanese army during the Second World War).

[104] *Id.* at 136. For an earlier version of a similar analysis, see Perkins v. Elg, 307 U.S. 325, 337 (1939) (opining that the "[r]ights of citizenship are not to be destroyed by an ambiguity").

[105] Nottebohm (Liech. v. Guat.), 1955 I.C.J. 4 (Apr. 6) (deciding that nationality depends on the strength of an individual's ties to the nation of which he is claiming nationality).

[106] *Id.* at 22.

[107] Afroyim v. Rusk, 387 U.S. 253 (1967) (deciding that unless a U.S. citizen consented to expatriation, citizenship could not be revoked as a consequence of voting in a foreign election).

[108] *Id.* at 255 (describing how Afroyim was a dual U.S.-Israeli national whose U.S. citizenship had been revoked when he voted in an Israeli election).

picked up a strand that had been expressed by Chief Justice Warren in the minority a decade earlier; the Fourteenth Amendment's expression of birthright nationality has the effect of "defining a citizenship which a citizen keeps unless he voluntarily relinquishes it."[109] The thrust of the *Afroyim* decision, therefore, was to convert nationality discourse into rights discourse, making what had been a badge of inclusion in the polity into a legal bulwark against the polity's excesses.[110] In the Supreme Court's words, each citizen has a "constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship."[111]

Following *Afroyim*, Congress amended the governing legislation to eliminate those expatriating acts—foreign voting, desertion, and evasion of military service[112]—that had been declared unconstitutional. Thus, by the end of the 1960s, the Act provided that the taking of an oath of allegiance to a foreign sovereign government, joining a foreign armed forces or holding office in a foreign state were virtually the only ways, short of a formal renouncing of citizenship, that denationalization of an American-born citizen could occur.[113] The one legislative question that *Afroyim* left unanswered,[114] and the one power that Congress continued to wield against those it deemed wayward citizens, was the ability to infer from the expatriating act that the citizen had consented to the loss of nationality, albeit without saying so.[115] The

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[109] *Id.* at 262.

[110] *See, e.g.*, Mackenzie v. Hare, 239 U.S. 299 (1915) (highlighting how in the early part of the twentieth century, subjective intent, or personal choice, was not necessary for denationalization to occur).

[111] *Afroyim*, 387 U.S. at 268. *But see* Rogers v. Bellei, 401 U.S. 815 (1971) (rejecting the notion of a constitutional right for American citizens born abroad to remain a citizen unless voluntarily relinquishing citizenship).

[112] *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) (holding that it was unconstitutional for a statute to divest an American of his citizenship for evading military service by leaving or remaining outside U.S. territory during wartime).

[113] 8 U.S.C. § 1481(a) (1952) (referencing the loss of nationality by native-born or naturalized citizens through voluntary action, the burden of proof required and presumptions).

[114] *See, e.g.*, Lawrence Abramson, *United States Loss of Citizenship Law After* Terrazas*: Decisions of the Board of Appellate Review*, 16 N.Y.U. J. INT'L. L. & POL. 829, 835 (1984) (describing how at the time of *Afroyim*, the law on inferred consent to denationalization "seemed to be in a state of flux").

[115] For an exploration of this caveat to the *Afroyim* ruling, see J.P. Jones, Comment, *Limiting Congressional Denationalization After* Afroyim, 17 SAN DIEGO L.

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deemed intent power was, in effect, the last defense of the position that it is the government as institutional embodiment of the society, and not the citizen as an individual member of that society, that ultimately demarcates who falls inside or outside of the nation.

The issue came to a head in *Vance v. Terrazas*,[116] where a dual U.S.-Mexican national swore an oath of allegiance to Mexico and consequently found his American citizenship revoked.[117] In an effort to clarify once and for all the issue of voluntariness, the Supreme Court declared that the government bears the "burden of proof that the expatriating act was performed with the necessary intent to relinquish citizenship."[118] Within a few years of this ruling, the administrative tribunals and federal courts implementing the expatriating rules looked only for criteria that "would render it impossible for [the citizen] to perform the obligations of U.S. citizenship."[119] Thus, Rabbi Meir Kahane was found not to have intended his own expatriation when he ran for election and took an oath of office as a member of the Israeli Knesset.[120] Likewise, Laurence Terrazas himself was found not to have undertaken a voluntary expatriation, despite having sworn an oath containing an express denunciation of his U.S. citizenship.[121]

As a result, a citizen can engage in self-contradiction and even blatant hypocrisy and still remain a citizen.[122] The U.S. case law on

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REV. 121, 138 (1980). *But see* United States v. Matheson, 532 F.2d 809 (1976) (asserting that *Afroyim* required the government to provide proof of the citizen's specific intent).

116 Vance v. Terrazas, 444 U.S. 252 (1980) (deciding that the burden to prove a relinquishing of citizenship fell on the government).

117 *Id.* at 255–256 n.2 (translating into English the full Mexican oath of allegiance).

118 *Id.* at 270.

119 In Re P.A.B., Bd. App. Rev. 6 (Sept. 29, 1982); Abramson, *supra* note 114, at 878.

120 Kahane v. Schultz, 653 F. Supp. 1486 (S.D.N.Y. 1987) (deciding that taking a seat on the Israeli legislature and declaring allegiance to Israel did not indicate a voluntary abandonment of U.S. citizenship).

121 *Vance*, 444 U.S. at 255–56 ("I therefore hereby expressly renounce [United States] citizenship, as well as any submission, obedience, and loyalty to any foreign government. . . .").

122 *Kahane*, 653 F. Supp. at 1494 ("The government's burden is to prove that Kahane intended to relinquish American citizenship. The most it can prove, instead, is that Kahane is a hypocrite, for telling people that they should do as he says and not as he does.").

citizenship and expatriation has effectively transformed the legal vision. Focus is redirected from the sovereign nation and its demographic self-identity to the inviolable individual and his self-interested legal status. The Constitution's preferred theme of personal liberty has come to prevail over international law's preferred theme of nationhood.[123] While nationality in the international law arena has come to establish the legal integration of persons within sovereign nations, citizenship in the constitutional law arena establishes the legal protection of persons from the acts of their government. The law thus embraces two distinct possibilities when it comes to the meaning of citizenship: the nation as a collective whole needing legal definition as a single entity, and the state as an aggregate of individuals each needing protection against the society at large.[124]

### 4. NATION AND CITIZEN IN EXTRADITION LAW

The vision of nationals as a cog in the societal wheel and that of the citizen as a self-standing force in opposition to state action have met directly, and clashed, in the law of extradition. As a starting point, international theorists have long perceived the community of nations to operate under a natural duty to extradite offenders from neighboring states.[125] This duty is most frequently translated into an interstate obligation to ensure that no one jurisdiction stands as a safe haven or refuge for serious offenders fleeing another jurisdiction.[126] Some early theorists limited the sphere of operation of extradition only to those international relations

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[123] *See* Morgan & Attias, *supra* note 36, at 204–06 (discussing the interconnection between these two apparently contradictory themes).

[124] *Id.* at 206.

[125] *See, e.g.*, 3 EMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW, ch. 6, *reprinted in* CLASSICS OF INTERNATIONAL LAW 136–37 (Charles G. Fenwick trans., Carnegie Inst. 1916) (1758) ("[T]he sovereign should not permit his subjects to trouble or injure the subjects of another State . . . [the sovereign] should . . . deliver [the offender] up to the injured State, so that it may inflict due punishment upon him.")

[126] *See* M. CHERIF BASSIOUNI & EDWARD M.WISE, AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW 23 (1995) (discussing extradition as a moral, not legal duty, unless written into an extradition treaty). *See also* Jann K. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 J. INT'L CRIM. JUST. 86 (2003) (discussing whether extradition is a state duty or a state right).

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backed by an enforceable treaty.[127] However, Grotius' maxim: "extradite or prosecute,"[128] has long placed the international exchange of fugitives between nations at the epicenter of the contest between the national as owing duties and allegiance to the state community of which he is a member, and the citizen as holding rights to be asserted against any combination of sovereign states.[129]

The compromise followed by most civil law jurisdictions, and a number of common law countries, has been to extradite only third-party nationals, protecting citizens of the requested state from being the subject of an international exchange.[130] In contrast, the United States has, since its first extradition agreements with England, France, and Switzerland, been prepared to extradite its own citizens on the same basis as nationals of the treaty partners or of third countries.[131] While it is possible for a treaty to preclude the extradition of nationals,[132] U.S. policy has generally been antagonistic to the idea.[133] In fact, in 1913, the Supreme Court ruled that reciprocity is not a necessary ingredient to extradition treaty enforcement, and American fugitives can be sent by the

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[127] *See* 7 SAMUEL PUFENDORF, THE ELEMENTS OF UNIVERSAL JURISPRUDENCE, ch. 3, §§ 23–24 (William A. Oldfather trans., 1931) (1672) (supporting the view that extradition must be codified in a treaty); Edward M. Wise, *Some Problems of Extradition*, 15 WAYNE L. REV. 709, 720–23 (1968) (discussing some offenses traditionally excluded from extradition, including those political, military, and fiscal in nature). *See also* 18 U.S.C. § 3184 (1994) (stating the modern requirement in America that a treaty be in force for extradition); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 475, cmt. a (1987).

[128] 2 HUGO GROTIUS, DE JURE BELLI AC PACIS, ch. XXI, §§ 3, 4, 5(1), 5(3) (Francis W. Kelsey trans. 1925) (1642), *referenced and discussed in* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 218 n.135 (2d ed. 1999).

[129] *See* Edward M. Wise, *Extradition: The Hypothesis of a* Civitas Maxima *and the Maxim* Aut Dedere Aut Judicare, 62 REV. INT'L DE DROIT PÉNAL 109 (1991).

[130] *See* Robert W. Rafuse, *The Extradition of Nationals*, 24 ILL. STUD. SOC. SCI. 75 (1939) (providing an early review of these policies).

[131] IVAN ANTHONY SHEARER, EXTRADITION LAW IN INTERNATIONAL LAW 97–98 (1971).

[132] *See* Valentine v. United States *ex rel*. Neidecker, 299 U.S. 5 (1936) (holding that the United States will not extradite without a treaty); ETHAN A. NADELMANN, COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIME ENFORCEMENT 429–30 (1993) (discussing what came to be dubbed the "*Valentine* infirmity").

[133] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 475 n.4 (1987) (describing the U.S. opposition to limitations on extraditions based on accused's nationality).

United States to countries which refuse to send their own nationals in return.[134]

While the blanket exemption of nationals from the extradition process has been condemned as a matter of international law theory,[135] several prominent civil law countries in Western Europe continue to refuse extradition of their own citizens.[136] Among Latin American countries, the practice has also tended to exempt nationals, despite substantial American pressure to change policies to accommodate the war on drugs. Thus, for example, Colombia agreed in 1982 in a revised extradition treaty to send fugitive citizens to the United States, but the treaty was declared unenforceable by the Colombia Supreme Court in 1986 in a decision widely perceived to be a capitulation to the power of narcotics cartels.[137] Extraditions were reinstated for Colombians, without judicial review, by executive order of the President in 1989,[138] but were permanently eliminated in 1991 when extradition

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134 *See* Charlton v. Kelly, 229 U.S. 447, 451 (1913) (granting an order for extradition to Italy of a U.S. citizen who murdered his wife in Italy).

135 *See Draft Convention on Extradition*, 29 AM J. INT. L. Supp. 123–36 (1935) (discussing how a requested state will not decline to extradite an individual on the grounds that he is a national of that state); Yoram Dinstein, *Major Contemporary Issues in Extradition Law*, 84 AM. SOC'Y INT'L PROC. 389, 404 (1990). *But see* Model Treaty on Extradition, G.A. Res. 116, art. 4(a), U.N. Doc. A/RES/45/116 (stating that the General Assembly has resolved that the refusal to extradite nationals is reasonable if there is a domestic prosecution is offered in the alternative).

136 Switzerland, Germany, and France are the most prominent of these. Italy changed its policy to permit extradition of Italian nationals in 1946. *See* SHEARER, *supra* note 131, at 102–10 (discussing the relevance of the nationality of a fugitive in international extradition law). The Netherlands is one notable exception to this rule among European civil law countries. *See* Extradition Treaty, U.S.-Neth., art. 1, June 24, 1980, 35 U.S.T. 1334 (allowing extradition in art. 1); NADELMANN, *supra* note 132, at 431 (discussing how the U.S.-Netherlands extradition treaty permits extradition as long as a prisoner transfer treaty binds both the United States and the Netherlands).

137 *See* Decision on Extradition, Case File No. 1558, June 25, 1987 (S. Ct.) (Colom.), *reprinted in* 27 I.L.M. 492 (1988) (holding unanimously that the law was unconstitutional because the President had not signed it). *See also* Mark A. Sherman, *United States International Drug Control Policy, Extradition, and the Rule of Law in Colombia*, 15 NOVA L. REV. 661, 687 (1991) (discussing the case).

138 *See* Bruce Michael Bagley, *Dateline Drug Wars: Colombia: The Wrong Strategy*, FOR. POL'Y, Winter 1989–90, at 154, 155 (describing President Barco's declaration of "all-out war on Colombia's drug cartels"); NADELMANN, *supra* note 132, at 433 (explaining how President Barco renewed extradition without judicial review for Colombian drug traffickers after the assassination of the leading candidate in the upcoming presidential election).

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of citizens was rendered unconstitutional by means of a specific constitutional amendment.[139]

The extradition treaty between the United States and Mexico has likewise proved to be a highly contentious instrument in terms of the two-way flow of nationals. In the first place, although the treaty was negotiated in terms meant to grant each of the signing governments the discretionary power to extradite its own nationals,[140] the governing clause is stated in the negative: "[n]either [c]ontracting [p]arties shall be bound to deliver up its own nationals. . . ."[141] For its part, the United States government has been willing to extradite U.S. citizens even in the face of a credible claim that the evidence supporting the Mexican allegations were obtained through torture.[142] Moreover, the Courts of Appeals have specifically rejected the argument that the United States should put a moratorium on extraditions of U.S. citizens to Mexico until such time as Mexico determines that it will extradite its nationals for trial in the United States.[143]

By contrast, the Mexican legal system has traditionally barred extradition of citizens,[144] although it has reserved for the executive branch the discretion to determine case by case whether exceptional circumstances warranting extradition of a Mexican citizen exist.[145] This has typically been justified on the ground that the Mexican courts have inherent jurisdiction over and are competent to try all crimes, wherever committed, that are

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[139] *See* Mark A. Sherman, *Colombian Constitutional Assembly Endorses Ban on Extradition of Nationals*, 7 INT. ENF. LAW REP. 174 (1991).

[140] *See* Joshua S. Spector, *Extraditing Mexican Nationals in the Fight Against International Narcotics Crimes,* 31 U. MICH. J.L. REFORM 1007, 1020 (1998) ("Some extradition treaties, such as the treaty between Mexico and the United States, give the executive discretionary power to determine whether to extradite a national."); *see also*, M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 589 (3d ed. 1996).

[141] Extradition Treaty art. 9(1), U.S.-Mex., May 4, 1978, 31 U.S.T. 5059.

[142] *See, e.g.*, Mainero v. Gregg, 164 F.3d 1199 (9th Cir. 1999) (declining to overturn an extradition order based on the facts of the case because of the rule of non-inquiry and minimal grounds for creation of a humanitarian exception).

[143] *See* Escobedo v. United States, 623 F.2d 1098, 1107 (5th Cir. 1980) (holding that whether the United States should deny extradition to Mexico until Mexico reciprocates is a question for the executive branch and not the judicial branch).

[144] *See* Alan D. Bersin, *El Tercer Pals: Reinventing the U.S./Mexico Border*, 48 STAN. L. REV. 1413, 1419 (1996) (explaining that Mexico refuses to extradite its nationals as a matter of national policy).

[145] *See* Spector, *supra* note 140, at 1008 n.15 (describing how, in contrast, Mexican law is interpreted by its executive to de facto prohibit extradition).

perpetrated by Mexican nationals.[146] Despite assurances to the contrary,[147] through most of the twentieth century Mexican officials so rarely acted on extradition warrants aimed at their citizens that the U.S. Drug Enforcement Agency developed a practice of bypassing the extradition process altogether by kidnapping fugitives and smuggling them into U.S. territory for trial.[148] In recent years, in response to increased pressure to follow U.S. law enforcement policies,[149] Mexico has been more willing to deem drug traffickers as falling under the "exceptional circumstances" category denying selected Mexican nationals from the exemption otherwise applicable to all Mexican nationals.[150] That said, the Mexican policy has been enforced inconsistently, with protection from extradition frequently applied even to fugitives accused of crimes of extreme violence.[151]

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[146] *See* 6 WHITEMAN DIGEST OF INTERNATIONAL LAW 866, 877 (1968); Spector, *supra* note 140, at 1023.

[147] The U.S. Secretary of State was apparently assured by his Mexican counterpart as early as 1928 that Mexico has no firm policy of exempting its nationals from extradition. *See* Bruce Zagaris & Julia Padierna Peralta, *Mexico–United States Extradition and Alternatives: From Fugitive Slaves to Drug Traffickers–150 Years and Beyond the Rio Grande's Winding Course*, 12 AM. U. J. INT'L L. & POL. 519, 530 (1997) (describing how Mexico's Foreign Affairs Minister assured the United States ambassador that Mexico "considered each case only after a careful study of the circumstances").

[148] *See* United States v. Alvarez-Machain, 504 U.S. 655, 656 (1992) (holding that being forcibly abducted did not prevent Alvarez-Machain's trial in the United States for violation of U.S. law). On the fallout of the reciprocal Mexican and American policies toward extradition and kidnapping, see Aimee Lee, Comment, United States v. Alvarez-Machain: *The Deleterious Ramifications of Illegal Abductions*, 17 FORDHAM INT'L L.J. 126, 128 (1993) (arguing that the United States "should make every effort to refrain from abductions in order to avoid consequences ranging from international censure to retaliatory measures").

[149] *See* Maria Celia Toro, *The Internationalization of Police: The DEA in Mexico*, 86 J. AM. HIST. 623, 637 (1999) ("All major 'wars on drugs' undertaken by the Mexican government have had an important outward orientation.").

[150] *See, e.g.*, Press Release, Office of the U.S. Attorney, Dist. of Ariz., Two Mexican Nationals Extradited from Mexico Found Guilty in Naco, Ariz. Drug Tunnel Case (Nov. 1, 2007), *available at* http://phoenix.fbi.gov/dojpressrel/2007/px110107.htm (describing how two men who were extradited to the United States to stand trial for cocaine trafficking were found guilty by a jury in federal court).

[151] *See* Kate O'Beirne, *Like a Good Neighbor? Mexico and its Refusal to Extradite*, NAT'L REV., Feb. 9, 2004, at 26 (discussing how a deputy sheriff's killer who fled to Mexico was unlikely to face imprisonment because Mexican policy forbids extradition of its nationals).

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The controversy over extraditing nationals strikes the dual chords of which the international and constitutional norms surrounding nationality and citizenship are composed. On one hand, the image of citizens as non-extraditable parts of the nation stands opposite that of citizens as rights holder as against her nation,[152] although both lead to the same result. By contrast, the image of fugitives as extraditable individuals imbued with personal stature and responsibility stands opposite that of accused persons wedded to the society and locale in which their crime was committed,[153] although again both lead to the same result. Whether the state in question chooses to extradite its nationals or to keep them at home, the dual strands of nationality law are inevitably in play. Persons are both part of society and apart from it, and their citizenship can potentially stand for both positions.

*4.1. Law and Politics of Drug Extraditions*

Among U.S. policymakers and critics, it has often been debated whether the anti-narcotics campaign of the past several decades is a product of law enforcement necessity[154] or cynical politics;[155] likewise, it has been debated whether the global drug prohibition has been a winning[156] or a losing endeavor.[157] Additionally, in U.S.

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[152] As Kelsen has said, these approaches are wrapped up in the notion of "a citizen's right to be 'protected' by his state as the counterpart of his allegiance." KELSEN, *supra* note 69, at 237.

[153] As the Privy Council has said, these approaches are wrapped up in the aphorism, "all crime is local." Mcleod v. Attorney-General, [1891] A.C. 455 (P.C.) (appeal taken from Austl.).

[154] *See, e.g.*, Michele Leonhart, U.S. Drug Enforcement Agency Acting Administrator, Video Introduction at the California Science Center: Target America: Opening Eyes to the Damage Drugs Cause (October 2008), *transcript available at* http://www.justice.gov/dea/speeches/s100208.html (urging visitors to the exhibition to end the cycle of drug addiction and drug abuse).

[155] *See, e.g.*, Fintan O'Toole, *Drug War Invented By Nixon to Extend His Power*, IRISH TIMES, Aug. 13, 1999, *available at* http://www.druglibrary.org/think/~jnr/nixon.htm (explaining that the drug war began with the Nixon administration's cynical politics).

[156] *See, e.g.*, Mitchell S. Rosenthal, *Consultant Paper: Winning the War on Drugs*, Oct. 1, 1985, *available at* http://www.druglibrary.org/schaffer/govpubs/amhab/amhabc9d.htm (expressing that the government cannot win the war on drugs until there is a "positive consensus on the strict enforcement of drug laws," but that this increased pressure will eventually erode drug use and the drug market).

[157] *See, e.g.*, Ben Wallace-Wells, *How America Lost the War on Drugs*, ROLLING STONE, Dec. 13, 2007, at 2, *available at* http://www.rollingstone.com/politics/story/17438347/how_america_lost_the_war_on_drugs/print (discussing why the United States lost the "War on Drugs" in the post-Escobar era).

legal commentary, it has frequently been debated whether the Constitution supports the fight against drug use and trafficking[158] or is contrary to the "war" effort.[159] Whatever side one prefers in these debates, it is clear from the U.S. interventions in the Colombian and Mexican drug wars that international politics cannot be factored out of the debates over extraditing nationals.[160]

Running parallel with the explicit linkage of drug law enforcement to foreign policy goals,[161] are the judicial politics that underscore recent judgments. The dual nature of nationality, as an identity marker that affiliates persons with sovereign states and as a rights emblem that sets persons apart from state power, has given rise to a set of cases that reflect a confusion of ideological motifs. The nationality cases in extradition law bring to the surface the fact that courts appear unable to determine whether due process is owed by states to persons or to each other. This dilemma, in turn, has led adjudicators to confuse the civil libertarianism of criminal law with state self-interest, and the authoritarianism of law enforcement with international cooperation.

Three contemporary extradition cases,[162] each sending a suspected drug fugitive to the United States, will illustrate the

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158 *See* Radley Balko, *War on Drugs – and the Bill of Rights*, CATO INST., Jan. 31, 2005, http://www.cato.org/pub_display.php?pub_id=3659 ("Since one can't have property rights for illicit drugs, a search can't violate the Fourth Amendment.").

159 *See* Ethan A. Nadelmann, *The War on Drugs is Lost*, NAT'L REV., Feb. 12, 1996, at 38, 38 (1996), ("The 'war on drugs' has failed to accomplish its stated objectives, and it cannot succeed so long as we remain a free society, bound by our Constitution.").

160 *See Feature: In Mexico, Now It's Calderon's Drug War*, DRUG WAR CHRON., Jan. 26, 2007, *available at* http://stopthedrugwar.org/chronicle/470/fulltext#2. For a more thorough exploration of the relationship between the drug wars on U.S. foreign policy, see ANDREAS & NADELMANN, *supra* note 27, at 153 (illustrating how political turmoil in Colombia led the Colombian government to flip-flop between implementation and refusal to implement its extradition treaty with the United States).

161 *See U.S.-Colombia Relations: Hearing Before the Subcomm. on the Western Hemisphere of the H. Comm. of Foreign Affairs*, 110th Cong. 1, 2 (2007) (statement of Hon. Rep. Hastert) ("The illicit drug trade is a high priority and a national security issue we must continue to deal with and defeat. It is a part of the war on terrorism. . . .").

162 *See* Knowles v. United States, [2006] UKPC 38 (P.C.) (appeal taken from Bah.); CrimA 4596/05 Rosenstein v. Israel, [2005] 2 IsrSC 232, para. 44 (discussing with approval the "center of gravity" approach as the preferred rule in extradition law in Canada); Lake v. Canada (Minister of Just.), [2008] 1 S.C.R. 761 (Can.)

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phenomenon. Although all three of the judgments discussed below are from legal systems with much in common with the United States,[163] the judiciary in each case draws not on U.S. constitutional law as a source of authority but on the nearest thing: Canadian constitutional law. The geographic proximity to the ultimate enforcement jurisdiction, however, is not as important as the normative proximity of Canadian jurisprudence to both U.S.-style constitutional law[164] and international law.[165] Of course, to say that Canadian extradition law includes constitutional and international legal norms is to express an ambiguity; as has been seen, nationality and citizenship rules are capable of pointing in both a state-oriented and a rights-oriented direction.

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(dismissing an appeal for extradition to the United States after pleading guilty to charges including conspiracy to traffic crack cocaine). *See also supra* notes 17–19 and accompanying text.

[163] *See, e.g.*, Erie Railroad Co. v. Tompkins, 304 U.S. 64, 71 (1938) (exhibiting the English common law origins of U.S. state common law systems as reflected in the long-standing influence of *Swift v. Tyson*); *Canada's Legal System*, THE CANADA E-BOOK, Jan. 15, 2004, at 1, *available at* http://www43.statcan.ca/04/04b/04b_005_e.htm (describing how outside Quebec, which utilizes a civil law system, the Canadian legal system is based on common law); Shlomo Guberman, *The Development of the Law in Israel: The First 50 Years*, Ministry of Foreign Affairs, Former Deputy Attorney General (Legislation), Sept. 25, 2000, https//www.mfa.gov.il/MFA/History/Modern+History/Israel+at+50/Development+of+the+Law+in+Israel-+The+First+50+Yea.htm (discussing how the Israeli system incorporated British Mandate law upon independence); Permanent Mission of the Commonwealth of the Bahamas to the United Nations, Bahamas Government Information, http://www.un.int/bahamas/Bahamas_Government_Info.htm (last visited Dec. 4, 2009) (illustrating that the English common law was a basis for Bahamian legal system and recognizing Queen Elizabeth II as the Bahamian head of state).

[164] *See* Beverley McLaghlin, P.C., Chief Justice of Canada, Remarks at the Supreme Court of Canada: Protecting Constitutional Rights: A Comparative View of the United States and Canada, Apr. 5, 2004, *transcript available at* http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm04-04-05-eng.asp ("Canada, like the United States, is a federal democracy. We vote for our politicians at federal and state (we call them provincial) elections and if we don't like what they do, we vote them out the next time. Canada, like the United States, has a constitution that guarantees the fundamental rights and freedoms of every person in the country.").

[165] Baker v. Canada, [1999] 2 S.C.R. 817, para. 70 (Can.) (incorporating humanitarian norms contained in U.N. Convention on Rights of the Child into interpretation of Canadian constitutional rights of deportee); R. v. Keegstra, [1990] 3 S.C.R. 697 (incorporating International Covenant on Civil and Political Rights into Canadian Charter of Rights interpretation of freedom of expression); Slaight Commc'ns, Inc. v. Davidson, [1989] 1 S.C.R. 1038 (incorporating International Covenant on Economic, Social and Cultural Rights into interpretation of workers' rights in Canada).

*4.1.1. Knowles: 'Ninety' Percent Wrong*

In December of 2000, a federal grand jury in Florida indicted Samuel "Ninety" Knowles—a colorful Bahamian national who, as reported by the local press, "got his nickname by blowing $90,000 in one day"[166]—on several counts of conspiracy to possess, distribute, and import cocaine and marijuana into the United States.[167] The indictment formed the basis of an extradition request from the U.S. government to the Republic of Bahamas,[168] which was in turn challenged in habeus corpus proceedings on the grounds that the statutory conditions for extradition had not been met.[169] During the course of lengthy appeal and review proceedings, and well before the signing of an extradition order by the Bahamian Foreign Minister,[170] the President of the United States exercised his statutory authority to designate Knowles as a foreign drug "kingpin,"[171] thereby seizing his U.S. assets and barring him from using the U.S. financial system prior to any judicial finding of guilt.[172]

In one of his two trips to the Privy Council, Knowles challenged the extradition to the United States on the grounds that the "kingpin" designation was widely published, notorious, and tantamount to a public declaration of his guilt.[173] As the defense

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166 Macushla N. Pinder, *U.S. Wants Ninety's Money*, BAHAMA JOURNAL, Sept. 8, 2006, *available at* http://www.jonesbahamas.com/?c=45&a=9926.

167 Knowles v. United States (Knowles II), [2007] W.L.R. 47, para. 2.

168 Knowles v. United States (Knowles I), [2004] UKPC 10, para. 3 (P.C.) (appeal taken from Bah.).

169 *See* Extradition Act, 1994, § 7(1) (Bah.) (restrictions on extradition); *id.* § 11(3) (Bah.) (court's power to discharge extradition request).

170 Rupert Missick, *Ninety Knowles U.S. Extradition Order is Signed,* TRIBUNE (Bah.), Apr. 13, 2004, *available at* http://www.bahamasb2b.com/news/wmview.php?ArtID=3534.

171 Foreign Narcotics Kingpin Designation Act, 21 U.S.C. §§ 1901–08; 8 U.S.C. §1182(a)(2)(C); Exec. Order No. 12,978, 60 C.F.R. 205 (Oct. 21, 1995). Knowles was designated on May 31, 2002.

172 *See* Peter L. Fitzgerald, *Drug Kingpins and Blacklists: Compliance Issues with U.S. Economic Sanctions: Part 3*, 5 J. MONEY LAUNDERING CONTROL 162 (2001) (discussing the consequences of a "kingpin" designation).

173 The challenge to a fair trial in the face of a "kingpin" designation was successful in a Bahamian motions court on June 23, 2004, and inspired a number of similar challenges in other Caribbean jurisdictions. *See* Lloyd Williams, *Full Court to Determine Whether 'Drug Kingpin' Accused Can Get Fair Trial in US*, JAMAICA OBSERVER, Oct. 3, 2005, *available at* http://www.jamaicaobserver.com/news/html/20051003T000000-0500_89659_OBS_FULL_COURT_TO

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put it, once in the United States, "the jurors at his trial might well know or learn of his designation . . . [and] his trial would not be fair if a juror were prejudiced by such knowledge."[174] Moreover, the U.S. statute triggered a citizenship issue, the other half of Knowles' challenge being that the prejudice against his fair trial "derived from his nationality, since the [Foreign Narcotics Kingpin Designation] Act did not apply to U.S. citizens."[175] Thus, although the terms of the U.S.-Bahamas Extradition Treaty specify that "extradition shall not be refused on the grounds that the fugitive is a citizen or national of the Requested State",[176] the citizenship question played a central role in the fairness/discrimination argument both in court and in the public discourse that accompanied the Bahamian proceedings.[177]

The "kingpin" issue barely got off the ground when "Ninety" was sent fifty miles across the Gulf Stream to face the federal charges in Miami.[178] Indeed, the Bahamas Court of Appeal ruled after his departure that the government had acted prematurely in sending him to stand trial.[179] The identical question of prejudice to foreign extraditees, however, had in the meantime been considered by the Privy Council in yet another drug extradition from yet another Caribbean jurisdiction, the islands of St. Kitts and Nevis.[180] Two cocaine co-conspirators, Noel Heath and Glenroy Mathews, had been designated as foreign drug "kingpins" on June 1, 2000,[181]

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_DETERMINE_WHETHER__DRUG_KINGPIN__ACCUSED_CAN_GET_FAIR _TRIAL_IN_US.asp (last visited Nov. 11, 2009).

174 *Knowles II*, [2007] W.L.R., para. 4.

175 *Id.*

176 Extradition Treaty, U.S.-Bah., art. 4, Mar. 9, 1990, S. Treaty Doc. No. 102–17 (1994).

177 *See* Candia Dames, *U.S. Ambassador Says Ninety Will Get Fair Trial*, BAHAMA J., Sept. 4, 2006, *available at* http://www.jonesbahamas.com/?c=45&a=9885 (explaining U.S. Ambassador Rood's belief that the larger jury pool and anonymity available in the U.S. would guarantee a fair trial).

178 *See* Raymond Kongwa, *Ninety's Lawyers Retaliate*, NASSAU GUARDIAN, Aug. 30, 2006, at A1 (noting that Knowles was extradited after a date had been set for a further Bahamian court hearing).

179 *See* Tosheena Robinson-Blair, *Ninety's Extradition Wrong*, BAHAMA J., Sept. 14, 2007, *available at* http://www.jonesbahamas.com/?c=45&a=14145 (suggesting procedural negligence on the part of the Bahamian Courts resulted in wrongful extradition of Ninety).

180 Heath and Matthew v. United States, [2005] U.K.P.C. 45 (P.C.) (appeal taken from St. Kitts and Nevis).

181 *See* OFFICE OF FOREIGN ASSET CONTROL, U.S. DEPT. OF THE TREASURY, WHAT YOU NEED TO KNOW ABOUT SANCTIONS AGAINST DRUG TRAFFICKERS, AN OVERVIEW

and, according to the Privy Council, had been announced as such on a U.S. government website despite provisions in the legislation for non-disclosure of the designee's name if such disclosure could jeopardize the integrity of the ongoing criminal trial.[182]

In a relatively brief judgment, Lord Brown of Eaton-under-Heywood gave the kingpin argument relatively short shrift. Analogizing the problem to one of ordinary domestic publicity,[183] the law lords were willing to leave it to the ultimate trial judge to determine an appropriate remedy.[184] Turning to the particular problem of foreign proceedings, and the fact that the domestic extradition court cannot predict the remedies that a foreign trial court will invoke, the court fell back on a presumption of judicial innocence.[185] Lord Brown cited the 1987 judgment of the Supreme Court of Canada in *Argentina v. Mellino*[186] in order to invoke what he found to be the commonplace principle that "[o]ur courts must assume that [the defendant] will be given a fair trial in the foreign country."[187]

While the presumption may sound uncontentious on the surface, a closer reading of the Canadian jurisprudence reveals the logical platform on which it rests to be a platform in motion. In the first place, Lord Brown credited Justice Lamer with the persuasive quote,[188] although it was Justice La Forest's majority judgment in which the relevant passage appeared,[189] and not Justice Lamer's dissent which came to the directly opposite conclusion.[190] That error, however, was only the tip of the iceberg. More significantly,

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OF THE FOREIGN NARCOTICS KINGPIN DESIGNATION ACT 1, *available at* http://www.ustreas.gov/offices/enforcement/ofac/programs/narco/drugs.pdf.

182 *See Heath*, [2005] UKPC, para. 24 (noting legislative provisions for non-disclosure of a person's name if such disclosure would compromise an ongoing criminal prosecution).

183 *See id.* para. 25 (explaining the trial court, rather than the appellate court, is the appropriate forum for such challenges on the basis of publicity concerns).

184 *See* Boodram v. Attorney General, [1996] A.C. 842 (P.C.) (appeal taken from Jam.).

185 *See Heath*, [2005] UKPC, para. 26 (stating fugitives must be "at risk of suffering a flagrant denial of justice").

186 Argentina v. Mellino, [1987] 1 S.C.R. 536 (Can.).

187 *Id.* para. 36.

188 *See Heath*, [2005] UKPC, para. 26 ("A convenient statement of that principle in the specific context of extradition is to be found in Lamer J.'s judgment . . . .").

189 *Mellino*, [1987] 1 S.C.R., para. 36.

190 *Id.* paras. 40–43 (Lamer, J., dissenting).

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Justice La Forest himself appears to have been flowing against the tide of the Canadian Charter of Rights and Freedoms[191] in his *Mellino* judgment, opining that "the Charter has no application to extradition hearings,"[192] and likening the proceeding to a preliminary inquiry.[193] As Justice Lamer pointed out in dissent, this pronouncement replayed a debate in which that same court had engaged earlier that very year in *Canada v. Schmidt*.[194] There, the court had reasoned that, "[t]here can be no doubt that the actions undertaken by the Government of Canada in extradition as in other matters are subject to scrutiny under the Charter (s. 32)."[195] The novel task for the court in *Mellino* was not assessing the legal question of the Charter's application,[196] but determining the factual question of whose actions caused the violation of procedural rights since the Canadian Charter would not ordinarily apply to the acts of a foreign legal system alone.[197]

The crucial sentence in Justice La Forest's judgment in *Mellino* is his assertion that, "extradition proceedings must be approached with a view to conform with Canada's international obligations."[198] The application of constitutional rights to the extradition context was perceived as contrary to international norms. Indeed, the judgment goes out of its way to characterize the entire constitutional challenge as an attempt to have Canadian courts assume responsibility for supervising what is essentially diplomatic activity; this, La Forest opines, "strikes me as being in fundamental conflict with the principle of comity on which extradition is based."[199] Harking back to a point he had made in *Schmidt*, La Forest perceives extradition process not as part and

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191 Constitution Act, 1982, pt. I (Canadian Charter of Rights and Freedoms), Schedule B to the Canada Act, 1982, ch. 11 (U.K.).

192 *Mellino*, [1987] 1 S.C.R., para. 16.

193 *See id.* para. 10 (explaining the Court's review of the executive's decision to extradite is limited to specific circumstances and highly deferential).

194 *Id.* para. 41 (Lamer, J., dissenting).

195 Canada v. Schmidt, [1987] 1 S.C.R. 500, para. 35 (Can.).

196 The Canadian Charter of Rights and Freedoms, by the express terms of section 24(1), is enforceable by any superior court judge, which would generally be the presiding judge at an extradition hearing. *Mellino*, 1 S.C.R., para. 49 (Wilson, J., concurring).

197 *See* Spencer v. The Queen, [1985] 2 S.C.R. 278, para. 5 (Can.) (holding that the Canadian Charter did not apply to the operation of Bahamian law in the Bahamas).

198 *Mellino*, [1987] 1 S.C.R., para. 23.

199 *Id.* para. 24.

parcel of criminal law—which is characterized as having a labyrinth of "requirements and technicalities . . . [which] apply only to a limited extent in extradition proceedings"[200]—but as a process engaged "pursuant to a treaty or other arrangement between these states acting in their sovereign capacity and obviously engages their honour and good faith."[201]

The fundamental legal relationship, in other words, is portrayed as an international one, with matters of due process taking a back seat to comity among nations.[202] Thus, the *Mellino* judgment, on which the Privy Council relied in assessing the prejudicial "kingpin" designation, portrays the contest in an extradition case as not so much between the prosecution and the defense, but rather between the sovereign treaty partners.[203] For this reason, procedural concerns can be all but ignored by the judicial branch, leaving the matter to the presumably more diplomatically sensitive judgment of the executive.[204] It is a paradigmatically internationalist vision, where the legal identity of the defendant/fugitive is submerged to that of the nations he offended and to which he belongs. The point is more than a practical one designed to ease the burdens of law enforcement, a frequently stated position in the discursive world of transnational crime and

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[200] *Id* para. 23.

[201] *Schmidt*, [1987] 1 S.C.R., para. 26.

[202] Justice La Forest emphasized the concern of comity among nations in making decisions that necessarily involve extradition issues:

> Matters of due process generally are to be left for the courts to determine at the trial there as they would be if he were to be tried here. Attempts to pre-empt decisions on such matters, whether arising through delay or otherwise, would directly conflict with the principles of comity on which extradition is based. . . .

*Mellino*, [1987] 1 S.C.R., para. 36

[203] This tendency was reinforced in the 1999 amendments to Canada's Extradition Act, S.C. 1999, c. 18. Commenting on the pattern initiated by her father in his judicial capacity, Professor Anne LaForest has observed:

> [I]n enacting the 1999 Act, Canada did not merely follow and respond to an international movement that led it to alter the balance between comity and liberty in extradition hearings. The reality is that Canada has gone further than virtually any other country in facilitating extradition.

Anne Warner LaForest, *The Balance between Liberty and Comity in the Evidentiary Requirements Applicable to Extradition Proceedings*, 28 QUEEN'S L.J. 95, 140 (2002).

[204] *See Mellino*, [1987] 1 S.C.R., para. 36 (citing the U.K. practice of executive discretion in extradition matters in Royal Government of Greece v. Brixton Prison Governor, [1969] 3 All E.R. 1337 (H.L.)).

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punishment.[205] Rather, it is a deeply structured alternative vision of the nature of legal relations, perceiving the interstate mutuality of rights and obligations as the keynote to legality in an interdependent world.[206]

What went unmentioned by the Privy Council in considering the arguments of the various Caribbean defendants is that the *Mellino* judgment—or at least "Ninety" percent of it—had been more recently set aside by the Supreme Court of Canada in *United States v. Cobb*.[207] In that judgment, rendered some four years after Justice La Forest's retirement from the Court,[208] Justice Arbour declared that "the Charter applies to extradition proceedings in the sense that the treaty, the extradition hearing in Canada and the exercise of the executive discretion to surrender the fugitive all have to conform to the requirements of the Charter."[209] The problem, of course, is more than that the Privy Council couldn't see the Arbour for La Forest. It revitalized the vision of legal relations that had been suppressed in *Mellino*.

In coming to her conclusion in *Cobb*, Justice Arbour set out the fugitive's basic legal point, which in the circumstances was remarkably close to that argued by Knowles, Heath and Matthew in the Privy Council: "[t]he respondent argues that any concern that the appellants may face unfair proceedings in the United States is a matter for the Minister, not for the extradition judge."[210] At the same time, she indicated that a full answer to this contention has already been provided: "both the extradition hearing and the exercise of the executive discretion to surrender a fugitive must conform with the requirements of the Charter, including the

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[205] *See, e.g.*, Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A), para. 89 (1989) ("As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interests of all nations that suspected offenders that flee abroad should be brought to justice.").

[206] *See* Sharon A. Williams, *Human Rights Safeguards and International Cooperation in Extradition: Striking the Balance*, 3 CRIM. L.F. 191 (1992) ("This view of extradition law and process is one of mutual assistance in criminal matters between states. Reciprocity is the keynote, with states having a mutuality of obligations.").

[207] United States v. Cobb [2001] 1 S.C.R. 587 (Can.).

[208] *See* Justice Gerard V. La Forest's Biography, Gerard V. La Forest Law Library, University of New Brunswick, http://lawlibrary.unbf.ca/G.V.LaForest.php (last visited Dec. 6, 2009).

[209] *Cobb*, [2001] 1 S.C.R., para. 24.

[210] *Id.* para. 33.

principles of fundamental justice."[211] In fact, the Supreme Court's embrace of individual liberty over interstate cooperation in law enforcement had, after the La Forest era, become so powerful that it prompted legislative reform in order to tip the balance back.[212] As the parliamentary secretary to the Minister of Justice commented on introducing the Bill, "[e]ven with countries with a similar legal tradition such as the United States, we have heard on numerous occasions how difficult it is to obtain extradition from Canada."[213]

What the Privy Council's confusion demonstrates is more than weak research; it is that the competing visions of the individual citizen in international law are all equally cogent. Canada has swung from a regime under *Mellino* in which the constitution did not apply at all to interstate extraditions, to a regime under *Cobb* in which the Charter trumped all treaty powers, to its current regime under revised legislation and a new treaty[214] which analysts claim "rival[s] in stark efficiency interstate rendition between individual states of the United States."[215] In other words, the citizen is elevated above the state or submerged within it, seemingly on an equally alternate footing. The sovereignty of the constitution in protecting individual rights and the sovereignty of the state in facilitating cooperative law enforcement are easily flipped around, as they represent the two halves of the citizenship coin in international legal discourse. One can turn 180 degrees with the case law and bar extradition that is prejudicial to citizens, or one can make a half turn and bid Ninety goodbye.

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[211] *Id.* para. 30.

[212] For a review of the policy concerns leading up to the 2002 amendments to the Extradition Act, see Gary Botting, *The Confluence of Extradition Practice in Canada and the United States*, *available at* http://www.law.utoronto.ca/documents/zcalt04/bottling.doc (last visited Dec. 6, 2009).

[213] House of Commons Debates, Oct. 8, 1998, 1st Sess. 36th Parliament, v. 135, at 9004 (Can.).

[214] Second Protocol Amending the Treaty on Extradition between the Government of Canada and the Government of the United States of America, 1853 U.N.T.S. 407 (2001).

[215] Botting, *supra* note 212, at 43.

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*4.1.2. Rosenstein: Thin Reasoning*

In September of 2004, a grand jury in southern Florida indicted Ze'ev Rosenstein[216]—a stocky, domineering figure in the Tel Aviv underworld referred to as "The Fat Man" by undercover U.S. investigators in taped telephone conversations[217]—on charges of heading an international conspiracy to traffic in the drug methylenedioxy-methamphetamine ("MDMA," more generally known as "ecstasy").[218] The indictment formed the basis of an extradition request from the government of the United States to the State of Israel.[219] That request, in turn, prompted a challenge by the defense in the Jerusalem District Court on the grounds that extradition would violate Israeli constitutional safeguards.[220]

In his appeal to Israel's Supreme Court, Rosenstein presented a long list of legal arguments, the crux of which contended that since he is "an Israeli citizen and resident, and the alleged offense was committed entirely in Israel, extradition to another country deviates from the balance required by Basic Law: Human Dignity and Freedom, and by fundamental principles of penal law."[221] Although by the time of his arrest Israel had revised its law to permit the extradition of Israeli citizens under certain circumstances,[222] the defense argued that for a person whose center

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[216] CrimA 4596/05 Rosenstein v. Israel, [2005] 2 IsrSC 232, para. 1 ("[T]he United States Government relayed a request to the Government of the State of Israel, for the extradiction of [] Ze'ev Rosenstein. . . .").

[217] Tamara Lush, *Al Capone of Israel Now Facing U.S. Courts*, ST. PETERSBURG TIMES, Mar. 8, 2006, *available at* http://www.sptimes.com/2006/03/08/Worldandnation/_Al_Capone_of_Israel_.shtml.

[218] *See* 21 U.S.C. § 841(a)(1) (making it illegal to knowingly or intentionally "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance"), § 841(b)(1)(C) (laying out the sentences for different drug offenses), § 846 (punishing attempt and conspiracy to commit any of the offenses defined in this subchapter the same as committing the actual offense), § 952(a) (prohibiting imports into the U.S. any controlled substance specified in the statute except where the "Attorney General finds it necessary to provide for medical, scientific, or other legitimate purposes"), § 960(b)(3) (defining the penalties for violating 21. U.S.C. §§ 952, 953, 955, 957, 959) .

[219] *Rosenstein*, [2005] 2 IsrSC, para. 5.

[220] Roni Singer, *Underworld Kingpin Rosenstein to Appeal Against Extradition*, HA'ARETZ, May 6, 2005, *available at* http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=584295.

[221] *Rosenstein*, [2005] 2 IsrSC, para. 7.

[222] For a history of Israel's citizenship bar to extradition, see Abraham Abramovsky & Jonathan I. Edelstein, *The Post-Sheinbein Israeli Extradition Law: Has it Solved the Extradition Problems Between Israel and the United States or Has it Merely*

of life is in the territory of the State, "the prosecution's policy on drug offenses has long been to conduct trials in Israel, even if the act was committed outside of Israel."[223] Under the circumstances, the due process demanded by the alleged ecstasy financier was presented as a counterweight to the lead prosecutor's assertion that extradition "is good for the country and good for the cooperation between countries against international crime."[224]

In rejecting the defendant's challenges and arriving at its conclusion that Rosenstein can be sent to the United States, the court relied heavily on American investigatory evidence.[225] While this appears to be part of an ongoing law enforcement strategy by Israeli authorities to contract large drug prosecutions out to the United States,[226] the Israel Supreme Court relied not on American precedent but on Canadian constitutional law. Two cases in particular, *Libman*[227] and *Cotroni*,[228] drew heavy attention. Both decisions were authored by Justice La Forest in the 1980s and have become mainstays of Canadian legal thinking on international crime. Each, however, imports as many problems into the *Rosenstein* analysis as it resolves, and each should be examined in the context in which the Israeli court deployed them.

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*Shifted the Battleground?*, 35 VAND. J. TRANSNAT'L L. 1 (2002); Oren M. Chaplin, *American Justice Across the Ocean? The Case of Samuel Sheinbein*, 35 NEW ENG. L. REV. 967 (2001); Jesse Hallee, *The Sheinbein Legacy: Israel's Refusal to Grant Extradition as a Model of Complexity*, 15 AM. U. INT'L L. REV. 667 (2000); Dina Maslow, *Extradition From Israel: The Samuel Sheinbein Case*, 7 CARDOZO J. INT'L & COMP. L. 387 (1999).

223 *Rosenstein*, [2005] 2 IsrSC, para. 7.

224 Laurie Copans, *Court Says Israel Can Extradite to U.S.*, GUARDIAN, Nov. 30, 2005, *available at* http://www.guardian.co.uk/worldlatest/story/0,1280,-5447095,00.html.

225 Attorney General Alberto R. Gonzales, Remarks at Tel Aviv University (June 27, 2006) (transcript available at http://www.usdoj.gov/archive/ag/speeches/2006/ag_speech_060627.html) ("The Rosenstein case highlights one of the most important ways in which we cooperate with our international law enforcement partners: our strong network of extradition treaties and mutual legal assistance treaties. These agreements allow the United States to share and receive assistance in obtaining evidence and bringing fugitives to justice around the world.").

226 *See* Marc Perelman, *Israel Seeks U.S. Help to Fight Mob Crime Wave*, JEWISH DAILY FORWARD, Oct. 16, 2008, *available at* http://www.forward.com/articles/14402/ ("Faced with a recent surge of mob-related murders, Israel appears to be reaching out to the United States for help in bringing its leading underworld figures to justice.").

227 Libman v. The Queen, [1985] 2 S.C.R. 178 (Can.).

228 Cotroni v. United States, [1989] 1 S.C.R. 1469 (Can.).

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Turning first to *Libman*, the Israeli court had an ear for sound bites, making reference to the most memorable line of Justice La Forest's judgment declaring that, "In a shrinking world we are all our brother's keepers."[229] The poetic language and sentiment was deployed in support of the portion of the *Rosenstein* judgment that dealt with "Cooperation in the Fight Against Crime."[230] It was quoted in support of the message that in a world of globalized crime the Israeli legal system must cooperate with U.S. law enforcement in sending an Israeli citizen to face justice in an American court rather than insisting, as the defendant requested, on a trial at home in Israel.[231] The deep irony is that *Libman*, which involved a Canadian defendant who defrauded American customers in a mostly United States-based securities scam,[232] endorsed the trial at home of a Canadian who could have, and arguably should have, been sent for prosecution in the United States.[233] In other words, the *Libman* judgment stood for an approach to transnational crime—prosecution at home[234]—that was the exact opposite of what the *Rosenstein* court used it to support.[235]

The transformation from *Libman*'s "brother's keepers" to *Rosenstein*'s 'brother's senders' stood the comity of nations on its head. Having performed this summersault, the Israeli court then turned its attention to *Cotroni*, the Supreme Court of Canada's leading case on extradition and the constitutional rights of

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229 *Rosenstein*, [2005] 2 IsrSC, para. 39 (quoting *Libman* [1985] 2 S.C.R. at 214.).

230 *Id.*

231 *Id.* ("The first and central purpose of extradition law is the creation of an effective instrument for international cooperation in the fight against crime, particularly transnational crime.").

232 For the factual background, see *Libman*, 2 S.C.R., paras. 2–5.

233 For my exploration of the international criminal law themes in *Libman* and related Canadian judgments in transnational criminal matters, see Edward M. Morgan, *Criminal Process, International Law and Extra-Territorial Crime*, 38 U. TORONTO L.J. 245 (1988).

234 *Libman*, [1985] 2 S.C.R. 178, para. 78 ("I have no difficulty in holding . . . that the counts of fraud with which the appellant is charged may properly be prosecuted in Canada, and I see nothing in the requirements of international comity that would dictate that this country refrain from exercising its jurisdiction.").

235 *Rosenstein*, [2005] 2 IsrSC, para. 39 ("[It is] inappropriate for a state, as a society in the community of civilized nations, to seclude itself within the narrow boundaries of its sovereignty. . . .").

citizens.[236] Unlike its reverse use of *Libman*, the *Rosenstein* court's use of *Cotroni* was the same as the original Canadian court's use of the case—i.e. in support of the idea that "it is often better that a crime be prosecuted where its harmful impact is felt and where the witnesses and the persons most interested in bringing the criminal to justice reside. . . ."[237] The problem the court encountered was that the *Cotroni* logic, which was far from generous in its characterization of the Charter of Rights, was deployed in a judgment that otherwise endorsed a liberal view of constitutional safeguards based on the "human dignity" of persons coming before the Israeli courts.[238] Moreover, the special protections for Israeli citizens,[239] which parallel those at the heart of the *Cotroni* case for Canadian citizens,[240] were interpreted in exactly the same way as the Canadian ones even though the policy implications of the two arguably pointed moved in opposite directions.

In a factual situation parallel to that of *Rosenstein*,[241] Cotroni was a Canadian citizen wanted for extradition to the United States for criminal conduct which took place entirely in the confines of his

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[236] For a discussion of the *Cotroni* case and its place in Canadian constitutional jurisprudence, see Joanna Harrington, *The Role for Human Rights Obligations in Canadian Extradition Law*, 43 CAN. Y.B. INT'L L. 45 (2005). *See also*, Ed Morgan, *In the Penal Colony: Internationalism and the Canadian Constitution*, 49 U. TORONTO L.J. 447 (1999) (addressing the intersection of Canadian constitutionalism and internationalism in the context of criminal law).

[237] *Rosenstein*, [2005] 2 IsrSC, para. 46 (quoting Cotroni v. United States, [1989] 1 S.C.R. 1469 (Can.)).

[238] *See Rosenstein*, [2005] 2 IsrSC, para. 53 (citation omitted):

> The right of a person accused of a criminal offense to due process is a constitutional basic right. It stems from the right of the individual to freedom and dignity. Dorner J. discussed this point:
>
> > Basic Law: Human Dignity and Freedom . . . granted the status of constitutional basic right to a person's right to criminal due process, especially pursuant to Article 5 of the basic law, which determines the right to freedom, and pursuant to Articles 2 & 4, which determine the right to human dignity.

[239] Extradition Law, 1999, S.H. 1708, amend. 6 (Isr.).

[240] Section 6(1) of the Canadian Charter of Rights and Freedoms ("Mobility Rights") provides: "Every citizen of Canada has the right to enter, remain in and leave Canada." Constitution Act, 1982, Schedule B, Canada Act 1982, Ch. 11 (U.K.).

[241] *Rosenstein*, [2005] 2 IsrSC, para. 61 ("True, appellant is Israeli. The conspiracy was made in Israel.").

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Montreal home.[242] As made clear in the Parliamentary committee in which section 6(1) of the Charter was originally debated,[243] and as can be discerned by comparison to other human rights instruments which provide for a more circumscribed right of mobility,[244] and as articulated in the relatively limited prior case law,[245] the right to remain as an subset of mobility rights generally rests on "[t]he intimate relationship between a citizen and his country."[246] Indeed, it was this national bond that was stressed by Justice Wilson in her dissent, indicating that not only had the fugitive never voluntarily left his country of citizenship but that the very accusations at issue in the extradition hearing represented an exercise in extraterritorial law enforcement by the United States.[247]

For Justice La Forest, the object of the *Cotroni* exercise appears to have been to send the citizen away, but to do so in a rhetorically more generous way than one might otherwise expect. He therefore paid considerable lip service to prior Supreme Court pronouncements that Charter rights are to be subjected to "a generous rather than a legalistic" interpretation.[248] Furthermore, he advocated interpretive flexibility[249] in order to overcome any perceived formulaic rigidity of Charter tests such as that set out in

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[242] For a description of the background facts, see *Cotroni*, [1989] 1 S.C.R., paras. 2–11.

[243] *See* Debates of the House of Commons, Jan. 1981, Parl. Deb, H.C. (1981) 41–118 (Can.).

[244] *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, May, 3, 2002, protocol no. 4, art. 3(1), Europ. T.S. No. 005 ("No one shall be expelled, by means either of an individual or of a collective measure, from territory of the State of which he is a national."); International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 12 (granting the right leave any country, enter one's own country, and move about in a country where one has legally entered); Canadian Bill of Rights, R.S.C. 1970, Appendix III, § 2 ("No law of Canada shall be construed or applied as to (a) authorize or effect the arbitrary . . . exile of any person.").

[245] *See* Skapinker v. Law Soc'y of Upper Can., [1984] 1 S.C.R. 357, 382 (Can.) (holding that the right to work is not separate and distinct from the mobility provisions in which this right is discussed).

[246] *Cotroni*, [1989] 1 S.C.R., para 16.

[247] *Id.* paras. 66–100.

[248] *Id.* para. 36 (citing R. v. Jones, [1986] 2 S.C.R. 284, 300 (Can.)).

[249] *Id.* para. 37 (citing R. v. Edwards Books & Art Ltd., [1986] 2 S.C.R. 713, 768 (Can.) (accepting a flexible approach to the proportionality test)).

*R. v. Oakes*.[250] This interpretive approach, in turn, had an ideological gloss that took as its starting point a view reminiscent of Justice La Forest's opinion in *Schmidt*. That is, that international cooperation in law enforcement, of which extradition is the prime example, is the modern antidote to the historic problem of legal parochialism. In this rendition of international law, quite ironically, Charter protections are a retrograde force, "confin[ing] [Canadian society] to parochial and nationalistic concepts of community,"[251] in the face of "an emerging world community from which not only benefits but responsibilities flow."[252] Quoting approvingly from those international law scholars most closely associated with this view, Justice La Forest indicated that, "[t]his attitude of lack of faith and actual distrust,"[253] so typical of constitutional rights,[254] "is not in keeping with the spirit behind extradition treaties."[255]

The great irony of the *Cotroni* judgment is that this espousal of international progressivism as a bulwark against the perceived regressivism of constitutional rights is premised on a view of the traditional place of extradition in the legal lexicon. "For well over 100 years," Justice La Forest noted, "extradition has been a part of the fabric of our law."[256] This placing of the extradition issue, along with the Charter itself, in historical context,[257] had its own

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[250] *See* R. v. Oakes, [1986] 1 S.C.R. 103, 114 (Can.) (establishing a two-step test that involves asking (1) if a specific Act violates the Charter and then (2) if there is a violation, whether the Act is "a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society . . .").

[251] *Cotroni*, [1989] 1 S.C.R., para. 29.

[252] *Id.*

[253] *Id.* para. 52 (citing Jean-Gabriel Castel & Sharon A. Williams, *The Extradition of Canadian Citizens and Sections 1 and 6(1) of the Canadian Charter of Rights and Freedoms*, 25 CANADIAN Y.B. INT'L L. 268–9 (1987) [hereinafter *Extradition of Canadian Citizens*].

[254] Whether intentionally or coincidentally, this formulation of the attitude underlying constitutional rights reflects a view expressed by constitutional theorists who come at constitutional law from the opposite ideological point of view from those expressed in Justice La Forest's judgment or in the Castel and Williams piece from which he quotes. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (discussing the various versions of representation-reinforcing theory of judicial review).

[255] *Cotroni*, [1989] 1 S.C.R., para. 52 (citing *Extradition of Canadian Citizens* at 268–69).

[256] *Id.* para. 40.

[257] *Id.* para. 40 (citing Re Federal Republic of Germany and Rauca, [1983] 4 C.C.C.3d 385, 404 (Ont. C.A.) (Can.)) ("The Charter was not enacted in a vacuum

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interesting spin. In effect, Justice La Forest succeeded in anchoring the un-anchorable. He did so by supporting change on tradition and erecting the imagined future on the discernable past. In one intricate set of reasons, Canada managed to look simultaneously forward and backward, ostensibly freeing itself from its nationalist past while realizing its time honored internationalist traditions.

Thus, *Rosenstein* cited a Canadian judgment that belittled constitutionalism and elevated law enforcement, in support of the proposition that the constitutionalized Basic Laws[258] require the court "to balance the unequal power relations between the accused and the prosecution, which usually enjoys an advantageous procedural status and additional advantages, and to ensure that the accused is given a full opportunity to make a case for his innocence. . . ."[259] Likewise, the *Rosenstein* judgment cited a case that characterized sovereignty of the state as "parochial and nationalistic,"[260] in support of a pronouncement that "international cooperation in the fight against crime"[261] and "reinforces the principle of state sovereignty."[262]

The use of prominent Canadian cases in the *Rosenstein* judgment demonstrates that the state and the subjects of state power are reversible at will. *Libman* was exploited for its rhetorical power in favor of international cooperation in a way that allowed its actual application of domestic unilateralism to go unnoticed. *Cotroni* was utilized for its result in favor of extradition in a way that allowed for its normative position downgrading constitutionalism and sovereignty to remain submerged. In other words, the case of the Fat Man became a perfect laboratory for exploiting the thematic underbelly of Canadian constitutional law.

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and the rights set out therein must be interpreted rationally having regard to the then existing laws and, in the instant case, to the position which Canada occupies in the world and the effective history of the multitude of extradition treaties it has had with other nations."). *Rauca* is also cited in *Rosenstein*. *See Rosenstein*, [2005] 2 IsrSC, para 46.

258 For an explanation of the constitutional status of Israel's Basic Laws, see David Kretzmer, *The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?* 26 ISRAEL L. REV. 238 (1992). For a comparison to Canadian constitutional law, see Lorraine Weinrib, *The Canadian* Charter *of Rights as a Model for Israel's Basic Laws*, 4 CONST. FORUM 85 (1993).

259 *Rosenstein*, [2005] 2 IsrSC, paras. 51–52.

260 *Cotroni*, [1989] 1 S.C.R., para. 29.

261 *Rosenstein*, [2005] 2 IsrSC, para 39.

262 *Id.* para. 57 (observing that the decision not to apply local law in certain circumstances may also serve to reinforce state sovereignty).

The citizen, as answerable to any state and as protected by his own state, seems to go hand-in-hand with the Israeli court's reversals of Canadian jurisprudence. The reasoning may have been thin, but *Rosenstein* provides a stout platform for speculating about the relationship between international and constitutional theory. In a close parallel to international pronouncements about citizenship rights,[263] the Israeli court portrayed the state as subject to the sovereignty of an overarching legal regime while simultaneously being a sovereign master of its own house.[264]

*4.1.3. Canada Jumps into Lake*

If there is any jurisdiction that can be counted on to properly rely on the jurisprudence of the Supreme Court of Canada, one would think it would be Canada itself. However, that assumption has now been tested and undermined in *Lake v. Canada (Minister of Justice)*.[265] Talib Steven Lake was caught selling roughly 100 grams of crack cocaine in a series of transactions in Windsor, Ontario, and across the bridge in Detroit, Michigan, with an undercover officer of the Ontario Provincial Police.[266] He was tried and convicted for the Canadian transactions. After serving a relatively light sentence of three years in prison,[267] he was processed for extradition to the United States where an indictment had been issued in the U.S. District Court for the Eastern District of Michigan relating to the Detroit transaction. Upon losing his committal battle in the Ontario courts, Lake requested that the Minister of Justice exercise his discretion not to order him extradited, but the Minister decided against him and ordered him sent back to Michigan in February 2005.[268]

The Minister incorrectly determined that Canada had no jurisdiction to try Lake on the Michigan charge,[269] and thus, the

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[263] See the discussion of *Nottebohm*, *supra* notes 41–50, and accompanying text.

[264] *Rosenstein*, [2005] 2 IsrSC, paras 54–57.

[265] Lake v. Canada (Minister of Just.), [2008] 1 S.C.R. 761 (Can.).

[266] *Id.* paras. 5–7.

[267] *Id.* para. 9 (noting that "[A]t the sentencing hearing before Ouellette J. of the Ontario Court (General Division) . . . Crown counsel indicated that . . . a three-year sentence . . . [is] on the low end of the range with respect to these types of offenses").

[268] *Id.* paras. 9–11.

[269] The Minister was found to be wrong, but not unreasonably wrong, by the Ontario Court of Appeal. *See* United States v. Lake, [2006] 212 C.C.C. (3d) 51 (Ont.

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extradition did not infringe his mobility rights under the Charter. The Minister also considered the prospect of Lake facing a mandatory minimum sentence of ten years under U.S. law—a far more severe punishment than would be meted out by the Canadian judicial system. However, the Minister rejected Lake's potential punishment under U.S. law as grounds for exercising his discretion in the fugitive's favor because the minimum incarceration term was not seen to shock the conscience of Canadians.[270] Lake sought judicial review of the Minister's discretionary decision, and on appeal the Supreme Court of Canada determined that, whatever its failings, the ministerial decision deserved a level of deference with which the court should not interfere.[271] Although he argued heatedly that "[t]he Minister is required to respect a fugitive's constitutional rights in deciding whether to exercise his or her discretion . . .,"[272] the court effectively threw cold water on Lake.

The crux of the *Lake* decision is that "deference is owed to the Minister's decision whether to order surrender once a fugitive has been committed for extradition."[273] Insisting that such decisions "will not be interfered with absent evidence of improper or arbitrary motives,"[274] *Lake* analogized ministerial discretion in extradition to prosecutorial discretion in indictments.[275] Since one or more of the "*Cotroni* factors"[276] could be invoked to ground a

C.A.) (Can.) (dismissing application for judicial review from a surrender order made by the Minister of Justice).

[270] For the "shock the conscience" standard as a bar to extradition, see Minister of Justice v. Schmidt, [1987] 1 S.C.R. 500, 522 (Can.). For the same standard expressed as "simply unacceptable," see United States v. Allard, [1987] 1 S.C.R. 564, 572 (Can.). For an expression of the standard as "unjust" or "oppressive," see Extradition Act, S.C. 1999, c. 18, § 44(1)(a).

[271] For the Supreme Court of Canada's views on the standards of correctness and reasonableness in judicial review of administrative or executive decision-making, see Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190 (Can.).

[272] Lake v. Canada (Minister of Justice), [2008] 1 S.C.R. 761, para. 35 (Can.), *quoting* United States v. Kwok, [2001] 1 S.C.R. 532, para. 80 (Can.).

[273] *Id.* para. 34.

[274] *Lake*, [2008] 1 S.C.R., para. 29.

[275] *See generally* R. v. Lyons, [1987] 2 S.C.R. 309 (Can.) (holding prosecutorial discretion is consistent with the Chater); R. v. Beare, [1988] 2 S.C.R. 387 (Can.) (determining article 2 of Law on the Identification of Criminals is consistent with the Canadian Charter of Rights and Freedoms).

[276] The court identified the relevant factors as: a) where the impact of offense was felt or likely to be felt; b) jurisdiction with greatest interest in prosecuting; c) police force that played the major role; d) jurisdiction to first lay charges; e)

U.S.-based prosecution, and the Minister could not "point to any public purpose that would be served by the [non-] extradition,"[277] the Minister's decision to override the fugitive's rights under section 6(1) of the Charter need not be reviewed. Expressing the sentiment that contemporary law enforcement "cannot realistically be confined within national boundaries,"[278] the court allowed the Minister—the very official whose actions are limited by the Charter[279]—to be the sole arbiter of the citizen's fate under the Charter.

In taking this deferential approach, the Supreme Court of Canada effectively reversed its own interpretive guidelines. Charter jurisprudence in Canada has taken a cue from early American expressions of popular sovereignty—government is seen to be "'ordained and established' in the name of the people."[280] It likewise has drawn inspiration from British constitutionalism, conferring "a generous interpretation . . . suitable to give individuals the full measure of the fundamental rights and freedoms. . . ."[281] This synthesis has led to an original approach to the application and interpretation of the Charter that is oriented not toward the state power in issue,[282] but toward the individual rights holder. From its inception, the Charter has been called a "purposive document,"[283] whose purpose is to "constrain governmental action . . . and not simply [to assess] its rationality in furthering some valid government objective."[284] Thus, Constitutional interpretation has proceeded as an "affirmation of

jurisdiction ready to proceed to trial; f) place where evidence located; f) whether evidence is mobile; g) number and location of the accused; h) place of most of the criminal acts; i) nationality and residence of accused; j) severity of sentencing in each jurisdiction. *Lake*, [2008] 1 S.C.R. para. 29.

277 United States v. Burns, [2001] 1 S.C.R. 283, 354 (Can.).

278 Cotroni v. United States, [1989] 1 S.C.R. 1469, para. 27 (Can.).

279 Constitution Act of 1982, § 32(1)(a) (1992) ("This Charter applies to the Parliament and government of Canada in respect of all matters within the authority of Parliament. . . .").

280 McCulloch v. Maryland, 17 U.S. 316, 403 (1819).

281 Minister of Home Affairs v. Fisher, [1980] A.C. 319, 328 (P.C.) (interpreting Bermuda's constitution).

282 *See* Hunter v. Southam, Inc., [1984] 2 S.C.R. 145, 156 (Can.) (noting that "[The Charter] is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action").

283 *Id.*

284 *Id.* at 156–57.

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rights and freedoms and of judicial power and responsibility in relation to their protection,"[285] and not as an affirmation of government authority.

Twenty-five years into the Charter era, the Supreme Court of Canada has taken its original conception of citizen as rights holder,[286] and thrown it into the *Lake*. What has emerged is a deference-soaked jurisprudence, where the dominant consideration is not the judicial expertise in protecting rights but "the Minister's superior expertise in relation to Canada's international obligations and foreign affairs."[287] In characterizing the ministerial decision to extradite a citizen as parallel to the ministerial decision to deport a non-citizen,[288] and in characterizing both processes as possessing "a negligible legal dimension,"[289] the court drowned its own prior case law. In the process, it engineered a complete international law reversal. What surfaced in *Lake* was a Loch Ness monster of international relations and constitutional rights—not the sovereign law enforcing the rights of the national, but rather the sovereign state enforcing the interests of the nation. The law may not be cut-and-dry enough to say that this, or any such decision, is wrong, but the cases demonstrate that the legal logic of any one strand of the case law is necessarily all wet.

### *4.2. Trafficking in Circles*

The case law reveals that when the United States calls for drug extraditions, the fugitives tend to come; or, more accurately, tend to be sent. Nowhere is this better illustrated than in the facts of the *Cotroni* case itself. As recounted by Justice La Forest, Frank Cotroni was a Canadian citizen, all of whose alleged criminal conduct took place without his ever having left Montreal.[290] As

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[285] R. v. Therens, [1985] 1 S.C.R. 613, 638 (Can.) (Le Dain, J., dissenting).

[286] In early Charter jurisprudence, rights holders encompassed an expanded class of citizens, immigrants, and prospective immigrants who encounter state power. *See* Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 (Can.) (discussing the rights of residents); Re Singh and Minister of Employment and Immigration, [1985] 1 S.C.R. 177 (Can.) (discussing the rights of refugee claimants).

[287] *Lake*, [2008] 1 S.C.R. 761, para. 36.

[288] *Id*. para. 38 (comparing extradition of citizens to deportation of refugees).

[289] *See* Suresh v. Minister of Citizenship and Immigration, [2002] 1 S.C.R. 3, para. 39 (Can.).

[290] For a description of the background facts, see *Cotroni*, [1989] 1 S.C.R., paras. 2–11. On Frank Cotroni's life and times, see *Reputed Montreal Crime Boss*

already indicated, the crux of the defense surrounded the assertion that this factual link to Canada reflected the concrete legal link "between a citizen and his country."[291] This constitutional bond of citizen to state found favor in Justice Wilson's dissent in *Cotroni*, where it was suggested that the entire affair be dismissed as a product of the excessively long reach of U.S. law enforcement.[292]

On the other hand, the second sentence of Justice La Forest's recitation of the facts, which stressed that the fugitive was sought by the United States "on a charge in that country of conspiracy to possess and distribute heroin,"[293] went a long way toward terminating the asserted right to remain in Canada. There was something about identifying the substantive issue as a drug extradition that placed the fugitive in a category of near statelessness.[294] Since the early 1970s, with the House of Lords' specific assertion that "crime is an international problem—perhaps not least crimes connected with the illicit drug traffic,"[295] narcotics offenses have taken on a character that overrides other domestic legal concerns. While in the ordinary course criminal law may be grounded in the local community vindicating itself through prosecution of the crime,[296] drug trafficking has detached itself from any such local roots to become a universal legal issue.[297] The "interests of society", reasoned Justice La Forest, are found in cases such as *Cotroni* insofar as they aspire to the most universal of legal

*Cotroni Dead*, CBC NEWS, Apr. 17, 2004, *available at* http://www.cbc.ca/canada/story/2004/08/17/cotroni_montreal040817.html (discussing the life and death of Frank Cotroni).

[291] *See Cotroni*, [1989] 1 S.C.R., para. 16.

[292] *Id.* para. 68 (holding that the defendant could have been prosecuted under Canadian criminal laws).

[293] *Id.* para. 67.

[294] For a description to the literal statelessness of international drug traffickers, see United States v. Caicedo, 47 F.3d 370, 372–73 (9th Cir. 1995) (resulting in an arrest for traffickers on high seas in flagless ship).

[295] *See* Dir. of Pub. Prosecutions v. Doot, [1973] A.C. 807, 834 (H.L.).

[296] *See* Bd. of Trade v. Owen, [1957] A.C. 602, 611 (explaining that conspiracy in England to commit offense abroad is not subject to English prosecutorial jurisdiction); Treacy v. Dir. of Pub. Prosecutions, [1971] A.C. 537, 540 (explaining how jurors are drawn from county in which alleged offense occurred).

[297] *See* Liangsiriprasert v. United States, [1991] 92 Cr. App. R. 77, 78 (P.C.) (explaining that an agreement abroad to traffic in heroin is triable in England if the parties were intended to result in criminal acts in England). *See also Doot*, [1973] A.C., at 831 (describing how drug trafficking triable in England despite the fact that offence is "more likely to ruin young lives in the United States of America than in this country . . .").

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ideals: "to discover the truth in respect of the charges brought against the accused."[298]

Drugs have reintroduced the national to the sovereign nation, removing the protections afforded by a sovereign law. The American insistence on policing the worlds of narcotics trade,[299] and the changes wrought by that insistence on the character of global society,[300] has had this transformative effect on extradition policy around the world.[301] Although the "war on drugs" has been a failure if measured by the goal of eradication it has set for itself,[302] it has had remarkable impact on judicial opinions among neighbors and allies of the United States. In particular, the Supreme Court of Canada's interpretation of the Charter of Rights, which has become the role model of choice, [303] has been influenced in a way which seems diametrically opposed to its own interpretive tradition.[304]

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298 *Cotroni*, [1989] 1 S.C.R., para. 30.

299 *See* Ethan Nadelmann, *Commonsense Drug Policy*, 77 FOREIGN AFF. 111, 112 (1998) (describing drug policy as an aspect of U.S. foreign policy).

300 *See* Ethan Nadelmann, *Challenging the Global Prohibition Regime*, 9 INT'L J. DRUG POL'Y 85, 93 (1998) (observing that developments in drug policy impact global society).

301 The transformative effect, of course, could be perceived as either positive or negative. *Compare* Ethan Nadelmann, *Ending the War on Drugs*, LAPIS MAG. (2001), *available at* http://www.drugpolicy.org/library/nadelmann_lapis2.cfm (labeling the war on drugs an "international disgrace"), *with* Lori Scott Fogelman, *DEA Director Discusses War on Drugs, Public Service Careers*, BAYLOR U. NEWS, Sept. 17, 2002, http://www.baylor.edu/pr/news.php?action=story&story=4196 ("There is some pleasant news. On the demand side, we've reduced casual use, chronic use and prevented others from even starting.").

302 *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (resolving to prevent the use, manufacturing, and distribution of illegal drugs). For President Ronald Reagan's remarks on signing the Bill into law, see President Ronald Reagan, Remarks on Signing the Anti-Drug Abuse Act of 1988, (Nov. 18, 1988), (transcript available at http://www.reagan.utexas.edu/archives/speeches/1988/111888c.htm). *See also* Proclamation No. 6053, 25 Weekly Comp. Pres. Doc. 1594, (Oct. 24, 1989), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=1771 (President George H.W. Bush's proclamation establishing Red Ribbon Week).

303 Weinrib, *supra* note 258, at 85 ("[t]he Canadian *Charter* offers a more attractive system of rights protection than, for example, its American counterpart."). The phenomenon is new for courts, but not necessarily for legal scholars. *See, e.g.*, W. Ivor Jennings, Note, *Constitutional Interpretation: The Experience of Canada*, 51 HARV. L. REV. 1, 39 (1937) (arguing that "judges can interpret a fairly closely-defined Constitution according to the principles of Anglo-Saxon jurisprudence.").

304 *See* Christopher Bird, Lake v. Canada *(Minister of Justice) – Reaffirming Judicial Deference to Cabinet Decisionmaking*, THE COURT, May 22, 2008, *available at*

As a product of international law thinking,[305] however, the Canadian Charter was already prone to the reversals that the drug extradition cases have brought out. Although it is most often thought that the introduction of international legal ideas helped the constitutional rights holder put a break on state power,[306] it is also international law, incorporated into the Constitution, that historically declared the sovereign government to have "plenary powers of legislation"[307] and unrestrained authority.[308] Accordingly, the *Knowles* court wondered into *Mellino*'s holding that the Constitution doesn't apply to foreign relations and extraditions, the *Rosenstein* court discovered *Cotroni*'s "progressive" vision of cooperative law enforcement as a constitutional norm, and the *Lake* court stumbled into the idea of government itself as constitutional decision-maker, all without

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http://www.thecourt.ca/2008/05/22/lake-v-canada-minister-of-justice-reaffirming-judicial-deference-to-federal-decisionmaking/ (describing the precedent set by *Lake* for the appropriate standard of care required of the Minister of Justice in an extradition case).

305 *See generally* ANNE F. BAYEFSKY, INTERNATIONAL HUMAN RIGHTS LAW: USE IN CANADIAN CHARTER OF RIGHTS AND FREEDOMS LITIGATION 5 (1992) (addressing how "rules governing the relationship of international law to domestic or municipal law are attempts to reconcile a variety of policies . . ."); WILLIAM A. SCHABAS, INTERNATIONAL HUMAN RIGHTS LAW AND THE CANADIAN CHARTER: A MANUAL FOR THE PRACTITIONER 11 (1991) ("The rich influence of international sources in the final version of the *Canadian Charter* is uncontested.") (citation omitted).

306 *See* Lorraine Weinrib, *A Primer on International Law and the* Canadian Charter, 21 NAT'L J. CONST. L., 313 (2007).

307 Croft v. Dunphy, [1932] 59 C.C.C. 141, 144 (P.C.); Statute of Westminster, 1931, 22 Geo. 5, c. 4, § 4 (Eng.) (discussing the extra-territorial operation of Dominion laws); *see also* Reference re Resolution to Amend the Constitution (Patriation Reference), [1981] 1 S.C.R. 753, 831 ("The history of constitutional amendments also parallels the development of Canadian sovereignty."). For a contemporary restatement of this proposition and a review of the sources on which it is based, see R. (Bancoult) v. Secretary of State, [2008] UKHL 61 (U.K.) (stating that "international law, forming no part of domestic law, could not support any argument for the invalidity of a purely domestic law . . . .").

308 *See* A.-G. N.S. v. A.-G. Can. (Nova Scotia Interdelegation Case), [1950] 4 D.L.R. 369, 371 (S.C.C.) ("The Parliament of Canada and the Legislatures of the several Provinces are sovereign within their sphere defined by the *BNA Act*. . . ."). *See also* VERNON BOGDANOR, POLITICS AND THE CONSTITUTION: ESSAYS ON BRITISH GOVERNMENT 5 (1996) ("What the Queen in Parliament enacts is law."). For British dominions more generally, see JEFFREY GOLDSWORTHY, THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY 1 (1999) ("[W]hen the Imperial Parliament granted power to colonial legislatures to make laws for the 'peace, welfare and good government' of their colonies, it granted them power of the same nature, as plenary and absolute, as its own power.") (citation omitted).

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straying far from a well worn path. Surprising as they may seem, each holding is also par for the circuitous course.

The citizen as subject of the nation and the nation as subject of the law have always shared international legal space as alternative realities. Judicial perspective may be such that each has frequently been hidden from the other,[309] but both visions co-exist in the legal system. It is this co-existence of incompatible ideas that has allowed rights talk to fall back on law enforcement, and the Constitution to merge with international relations.[310]

The basic norm of the constitutional order can be seen as either the restricted state or the empowered state,[311] while the basic norm of the international order can be seen as either the unrestrained sovereign or the submerged sovereign within a system larger than itself.[312] Either way, where the two come together, as in extradition law, the basic norms are relative and dependent on perspective.[313]

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[309] *See* PAUL DE MAN, BLINDNESS AND INSIGHT 103 (1971) (discussing contradictions in literary language and how "the one always lay hidden within the other as the sun lies hidden within a shadow, or truth within error.").

[310] For a general theoretical explanation of this possibility and its relationship to linear logic, see Hector C. Sabelli, et. al., *Anger, Fear, Depression, and Crime: Physiological and Psychological Studies Using the Process Method*, *in* ROBIN ROBERTSON & ALLAN COMBS, CHAOS THEORY IN PSYCHOLOGY AND THE LIFE SCIENCES 65, 67 (1995) ("Opposite actions, each asymmetric, complement each other to create partial symmetries, such as cycles, folds, and structures, rather than neutralizing each other in formless equilibrium.").

[311] This harks back to Chief Justice Marshall's view of popular sovereignty, whereby constitutional power flows up from the founders of the Constitution who define the specific powers of government. *See* McCulloch v. Maryland, 17 U.S. 316, 326 (1819) (trumpeting sovereignty of the people in constitutional assembly over sovereignty of the several states). For the relationship of Marshall's take on popular sovereignty to international law, see Edward M. Morgan, *Internalization of Customary International Law: An Historical Perspective*, 12 YALE J. INT'L L. 63, 65 (1987), discussing Chief Justice Marshall's assertion of the power of the judiciary over the executive for purposes of internalization.

[312] This harks back to Lord Atkin's view of state sovereignty, whereby constitutional power flows down from the Crown at the pinnacle of the constitutional order. *See* A.-G. Can. v. A.-G. Ontario (Labour Conventions Case), [1937] A.C. 326 (P.C.) (discussing the ratification of treaty in British and Canadian constitutional law entails executive act or Royal assent). For the relationship of the Privy Council's take on state sovereignty to international law, see Edward M. Morgan, *Criminal Process, International Law, and Extraterritorial Crime*, 38 U. TORONTO L. J. 245, 249 (1988), explaining that the Privy Council believed international law derived from state sovereignty because states consented to restrictions on their freedoms.

[313] *See* KELSEN, *supra* note 69, at 368 (stating that basic norms of state formation are a matter of perspective and can be judged only in a relative sense from either constitutional law or international law).

One is almost tempted to say that "subjects which in one aspect and for one purpose fall within [individual rights], may in another aspect and for another purpose fall within [international cooperation]."[314] American pressure to traffic in fugitive traffickers may have pushed for a change in legal direction,[315] but the circular road the law travels *en route* to its drug extraditions was already in place.

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[314] *See* Hodge v. The Queen, [1883] 9 A.C. 117, 130 (P.C.) (addressing the double aspect doctrine for interpreting the British North America Act, 1867, 30 & 31 Vict., c. 3 (U.K.): "[s]ubjects which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 91").

[315] On the tilt toward law enforcement objectives generally spawned by the international "war on drugs," see Ethan A. Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 INT'L ORG. 479, 526 (1990) (discussing how developments in drug testing and the drugs themselves will change the drug enforcement regime). On the link to foreign policy and international security, see David Bewley-Taylor and Martin Jelsma, *The Internalization of the War on Drugs: Illicit Drugs as Moral Evil and Useful Enemy*, *in* SELLING US WARS 270 (2007), examining the war on drugs and its damaging impact on U.S. relations with many other countries in the world.

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