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Aaron Schwabach

S. A. Patchett

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ARTICLE

DOCTRINE OR DICTUM: THE *KER-FRISBIE* DOCTRINE AND OFFICIAL ABDUCTIONS WHICH BREACH INTERNATIONAL LAW

AARON SCHWABACH* AND S.A. PATCHETT**

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* J.D., University of California at Berkeley, 1989; B.A., Antioch College, 1985; Instructor at Gonzaga University Law School.

** J.D., *cum laude*, University of Miami School of Law, 1993.

> If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.[1]

I. INTRODUCTION

On April 2, 1990, Humberto Álvarez-Machain, a Mexican medical doctor, barely had time to realize that the men who entered his office were not seeking his professional services. Immediately after entering, one of them placed a gun to his head and forced him to take his first steps toward a criminal trial in the United States.[2] Despite official Mexican protests,[3] the United States Supreme Court rejected his argument that U.S. courts lacked personal jurisdiction.[4] Specifically, he argued that his presence before them violated Mexico's extradition treaty with the United States.[5] The Supreme Court held that the extradition treaty[6] did not prohibit abductions.[7] Therefore, the Court reasoned, it did not provide Dr. Álvarez-Machain with a defense to the jurisdiction of U.S. courts which tried him for violations of U.S. criminal laws.[8] Though it acknowledged that the abduction may have violated "general inter-

1. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

2. United States v. Caro-Quintero, 745 F. Supp. 599, 603 (C.D. Cal. 1990), *aff'd sub nom. per curiam*, United States v. Álvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 112 S. Ct. 2188 (1992).

3. United States v. Álvarez-Machain, 112 S. Ct. 2188, 2197 n.1 (1992) (Stevens, J., dissenting); *see also* Joint Appendix to the Parties' Briefs at 33, 35, 39, 53, United States v. Álvarez-Machain, 112 S. Ct. 2188 (1992) (No. 91-712).

4. *Álvarez-Machain*, 112 S. Ct. at 2190.

5. *Id.*

6. Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059.

7. *Álvarez-Machain*, 112 S. Ct. at 2195-96.

8. *Id.* at 2190.

national law principles,"[9] the Court still held that U.S. courts had jurisdiction.[10]

The extension of the *Ker-Frisbie* doctrine was essential to the Court's reasoning. That doctrine posits that a forcible abduction of a defendant does not deprive the court of jurisdiction.[11] Yet, for at least three reasons, the *Ker-Frisbie* doctrine does not apply, as the Supreme Court suggested in *United States v. Álvarez-Machain*,[12] to cases of unilateral U.S. abductions which violate international law when the injured state protests and demands the return of the abducted person.

The first reason, explored in Part II, is the lack of any doctrinal basis in the *Ker* decision itself, the common law precedents upon which that decision relies, or subsequent Supreme Court cases for the doctrine's extension to breaches of international law. The second reason, discussed in Part III, is that customary international law prohibits unilateral abductions by nations and requires the abducted person's restitution upon the injured nation's demand. The third argument, examined in Part IV, is a principle of statutory construction, much weightier than the *Ker* dictum and its progeny. Relying on the *Charming Betsy* principle, courts should construe U.S. law to avoid international law violations whenever possible.

II. *KER-FRISBIE* AND ABDUCTIONS IN VIOLATION OF INTERNATIONAL LAW: DOCTRINE OR DICTUM?

The *Ker-Frisbie* doctrine is this country's version of *male captus, bene detentus*, the theory that a court's personal jurisdiction is unaffected by the manner in which a criminal defendant comes before it.[13] The Supreme Court has invoked the doctrine to

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9. *Id.* at 2196.

10. *Id.* at 2197.

11. The Court first broached the idea in Ker v. Illinois, 119 U.S. 436, 444 (1886) and endorsed it in Frisbie v. Collins, 342 U.S. 519, 522 (1952). In *Álvarez-Machain* the Court stated "[i]f we conclude that the Treaty does not prohibit respondent's abduction, the rule in *Ker* applies, and the court need not inquire as to how respondent came before it." *Álvarez-Machain*, 112 S. Ct. at 2193.

12. *See* United States v. Álvarez-Machain, 112 S. Ct. 2188, 2193, 2197 (1992).

13. *See generally* M. Cherif Bassiouni, *Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition*, 7 VAND. J. TRANSNAT'L L. 25, 27 (1973); John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1449 (1988) ("If a judge or practitioner knows nothing else about extradition, he is likely to recall . . . the notion that it matters not how a defendant comes before a court: once he is there, the court

counter criminal defendant's constitutional challenges to personal jurisdiction.[14] Until *Álvarez-Machain*, the Court never used *Ker-Frisbie* to defeat a challenge based on a violation of international law.[15]

This Part examines the doctrine's common law precursors, the U.S. Supreme Court's holdings in *Ker v. Illinois*[16] and *Frisbie v. Collins*,[17] and *Ker-Frisbie*'s progeny. It concludes that these decisions, as well as lower federal court decisions, provide little foundation for the doctrine's extension to breaches of international law.[18]

A. Ker*'s Precursors: The Common Law's Treatment of Extraterritorial Abduction as a Bar to Jurisdiction in Criminal Trials Before 1886*

In *Ker v. Illinois*,[19] Justice Miller expressly declined to address the issue of whether a criminal defendant's abduction abroad and enforced return to this country might deprive a state court of personal jurisdiction. However, he observed that "authorities of the highest respectability"[20] held that such a forcible abduction would not bar the defendant's trial in a court before which he was otherwise properly present.[21] The *Ker-Frisbie* doctrine grew from this dictum.[22] Thus, Justice Miller's authorities are essential to the

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doesn't care how, won't ask, and has full authority to try, convict, and send him to jail."); Manuel R. Garcia-Mora, *Criminal Jurisdiction of a State over Fugitives Brought from a Foreign Country by Force or Fraud: A Comparative Study*, 32 IND. L.J. 427, 435 (1957) (The *Ker-Frisbie* doctrine "has been extended to include every conceivable situation lying outside the provisions of an extradition treaty."); Jacques Semmelman, *Due Process, International Law, and Jurisdiction Over Criminal Defendants Abducted Extraterritorially: The* Ker-Frisbie *Doctrine Reexamined*, 30 COLUM. J. TRANSNAT'L L. 513 (1992); Herbert B. Chermside, Jr., Annotation, *Jurisdiction of Federal Court to Try Criminal Defendant Who Alleges That He Was Brought Within United States Jurisdiction Illegally or as Result of Fraud or Mistake*, 28 A.L.R. FED. 685, 687 (1976).

14. *See infra* text accompanying notes 110-88.

15. *See infra* text accompanying notes 110-88.

16. 119 U.S. 436 (1886).

17. 342 U.S. 519 (1952).

18. A measure of the doctrine's wide scope is that commentators call situations identified by courts as beyond its reach "exceptions." *See* Chermside Jr., *supra* note 13, at 690; Semmelman, *supra* note 13, at 551 (proposing an "international law exception").

19. 119 U.S. 436 (1886). For the facts of *Ker*, see *infra* note 82.

20. *Ker*, 119 U.S. at 444.

21. *Id.*

22. *See, e.g.*, Frisbie v. Collins, 342 U.S. 519 (1952). "This Court has never departed from the rule announced in *Ker v. Illinois*, 119 U.S. 436, 444, that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'" *Id.* at 522.

support of the doctrine's broad reading.

Ex parte Scott[23] is the first of these seven authorities. In that 1829 case, an English police officer brought an English woman from Brussels to England, against her will, for trial on a perjury charge.[24] She procured a writ of *habeas corpus* while awaiting trial in prison.[25] Lord Tenterden, C.J., rejected her argument that the court should dismiss the case because her apprehension in a foreign country violated that foreign country's law.[26] The court held that inquiry into the circumstances of her presence before the court was unnecessary.[27] Even if her arrest by an English policeman in a foreign country violated its law and gave her a right of action, the court reasoned that the foreign country, not England, was the appropriate forum for such an action.[28]

Yet, as commentators have noted, the court made no mention of any international law violation.[29] Thus, while the case is authority for Justice Miller's dictum, it hardly supports extension of that dictum to cases involving protested abductions which expressly violate international law.

R. v. Sattler,[30] the second of Justice Miller's dictum authorities, involved an English thief who fled to Hamburg.[31] An English detective located him with the help of the Hamburg police, but arrested him without a warrant and embarked with him to England.[32] The prisoner shot the detective while their ship was on the high seas, and the English Central Criminal Court convicted him of murder.[33]

On appeal, Sattler argued that the court lacked jurisdiction to try him for murder because both his arrest and forced return were illegal.[34] Lord Campbell, C.J., held that the question was immaterial.[35] He reasoned that Sattler's act of murder on an English ves-

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23. 109 Eng. Rep. 166 (K.B. 1829).
24. *Id.*
25. *Id.*
26. *Id.* at 167.
27. *Id.*
28. *Id.*
29. *See* GEOFF GILBERT, ASPECTS OF EXTRADITION LAW 185-86 (1991); Paul O'Higgins, *Unlawful Seizure and Irregular Extradition*, 36 BRIT. Y.B. INT'L L. 279, 282-83 (1960).
30. 169 Eng. Rep. 1111 (Q.B. 1858).
31. *Id.*
32. *Id.* at 1114.
33. *Id.*
34. *Id.*
35. *Id.*

sel constituted revenge against the detective, not an act to obtain his freedom, and an English statute gave the court jurisdiction to try any person committing murder on an English ship.[36]

The issue that the court addressed, however, was jurisdiction to try Sattler for the murder after his arrest, rather than his original felony.[37] Breach of international law arising from his arrest at Hamburg was not an issue in that case because the Hamburg police assisted with his apprehension.[38] Therefore, *R. v. Sattler* does not support the extension of *Ker* to international law violations.

State v. Smith,[39] the third of Justice Miller's authorities, involved the defendant's 1829 forcible abduction from North Carolina to stand trial in South Carolina. Charging that by visiting South Carolina, he had violated the terms of an earlier pardon,[40] the State brought Smith before the South Carolina Court of Appeals to show cause why his original sentence of death should not be carried out. Smith argued that his seizure in North Carolina by private persons hoping to earn the South Carolina Governor's reward was illegal and violated North Carolina's sovereignty.[41] While admitting the illegality of Smith's seizure, the court decided that any reparation due North Carolina was a political matter for the Governor.[42] The South Carolina court refused Smith's motion to dismiss.[43]

Unlike *Smith*, *State v. Brewster*,[44] the fourth of Justice Miller's authorities, involved an international abduction.[45] A party of Vermonters forcibly removed Brewster from his home in Canada and delivered him for trial before a Vermont court on charges of burglary and stealing.[46] Convicted of stealing, Brewster argued before the Vermont Supreme Court that his forced removal from Canada barred the Vermont court's exercise of personal

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36. *Id.*

37. *See id.*; O'Higgins *supra*, note 29, at 284.

38. *See* O'Higgins, *supra* note 29, at 284.

39. 8 S.C. (1 Bail.) 131 (S.C. Ct. App. 1829).

40. *Id.* at 131. A court, in 1821, had sentenced Smith to death for stealing a slave, but the Governor pardoned him on the condition that he never return to South Carolina. *Id.*

41. *Id.* at 134.

42. *Id.*

43. *Id.* The court stated that "[t]he prisoner is an offender against our laws, and to them he owes atonement." *Id.*

44. 7 Vt. 117 (1835).

45. *Id.*

46. *Id.*

jurisdiction.[47]

First, the court noted that the record failed to show whether Canadian authorities had assented to Brewster's removal.[48] The court decided that Vermont's courts could, nevertheless, try Brewster for a violation of Vermont law, since he committed the violation in Vermont and "his escape into Canada did not purge the offence, nor oust our jurisdiction."[49]

Second, even if there were any illegality in his forced removal from Canada, the court reasoned, Canada's complaint of violation of its sovereignty would be "a subject not within the constitutional powers of this court."[50] In short, complaints rooted in a foreign government's sovereignty would not protect Brewster from a Vermont court's exercise of jurisdiction.[51]

The *Brewster* court's reasoning, however, was *obiter dictum.* Brewster's abductors were private persons acting without any official authorization, and Canada had not protested.

Pennsylvania's Chief Justice Gibson cited *Brewster* in *Dow's Case*,[52] the fifth of Justice Miller's authorities. In *Dow*, the defendant boarded a steamboat in Detroit. Subsequently, the steamboat's officers arrested him without a warrant.[53] The officers delivered the defendant to the sheriff at Erie, Pennsylvania.[54] The court held that the defendant's arrest without a warrant in Michigan and subsequent transport to Pennsylvania did not bar his criminal trial.[55] The court noted that Michigan's governor had not demanded Dow's release, but that, if he had, Pennsylvania would have complied.[56]

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47. *See id.* at 120.

48. *Id.* at 120.

49. State v. Brewster, 7 Vt. 117, 120 (1835).

50. *Id.*

51. *Id.*

52. 18 Pa. 37 (1851).

53. *Id.* at 40.

54. *Id.*

55. *Id.* at 40. Dow had fled Pennsylvania under indictment, and after that state's Governor requested his extradition from Michigan, the Governor issued a warrant for his arrest and surrender to Pennsylvania officials. *Id.* at 37. Though the reporter's statement of facts does not actually say so, it seems probable that Dow once more was fleeing arrest when he boarded the steamboat in Detroit. *See id.*

56. Chief Justice Gibson wrote:

> [t]he sovereignty of the state, therefore, was not outraged, unless it resided in the prisoner's person. A sovereign state is doubtless bound to fight the battle of its citizen, when he has his quarrel just; but it is not bound to maintain him against demands of foreign justice from which he has fled. It may, or it may not,

If *Dow's Case* provides any authority for Justice Miller's statement, it certainly provides no basis for sweeping assertions of personal jurisdiction over criminal defendants, irrespective of their mode of arrival before a court.

State v. Ross[57] supported Justice Miller even less. There, two horse thieves appealed an Iowa court conviction. They argued that their arrest in Missouri and forced return to Iowa by private individuals, acting without state authorization, precluded the "rightful exercise of jurisdiction"[58] by the trial court.[59] The Iowa Supreme Court disagreed. "The offense being committed in Iowa, it was punishable here, and an indictment could have been found without reference to the arrest."[60]

The court reasoned that criminal and civil cases were distinguishable in their treatment of defendants illegally brought before the courts.[61] In a civil case, the plaintiff who produced a defendant through violence or fraud could not invoke the jurisdiction of the court. No such action stained the court's jurisdiction when a criminal defendant was brought before a court by the illegal efforts of volunteers.[62] In dicta, the court stated that if the defendants' illegal procurement had been from another country, rather than a state "the violation of the law of the other sovereignty, so far as entitled to weight, would be the same in principle . . . ."[63] The court's extension of its analysis to international abductions was dicta because the case involved a domestic abduction.

The Ship Richmond[64] was the last of Justice Miller's authorities. There, a majority of the Supreme Court affirmed a district court's condemnation of a ship for violating the Nonintercourse Act of 1809.[65] A U.S. gunboat had seized *The Richmond* in the waters of Spanish Florida, and this act, her owners claimed, made

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> interpose its shield at discretion; but the exercise of this discretion will be directed, not by any claim he may be supposed to have on it, but by a consideration of the consequences to the general weal.

Id. at 39.

57. 21 Iowa 467 (1866).
58. *Id.* at 470.
59. *Id.*
60. *Id.* at 471.
61. *Id.*
62. *Id.*
63. State v. Ross, 21 Iowa 467, 471-72 (1866).
64. 13 U.S. (9 Cranch) 102 (1815).
65. 2 Stat. 528 (1809).

subsequent condemnation proceedings void.[66] The civil seizure of the vessel in another country's jurisdiction was no doubt an offense, wrote Chief Justice Marshall, but one requiring adjustment by the two states.[67] Thus, he concluded that the trespass did not annul the proceedings against the vessel.[68]

This case supports Justice Miller's dictum only if one accepts the analogy between a civil seizure, in breach of international law, and the abduction of a person in another state by U.S. officials in breach of international law. Had Chief Justice Marshall explained *why* trespass against another nation's territorial jurisdiction lacked any connection with the subsequent civil seizure under the district court's process,[69] *The Ship Richmond* would be much stronger support for Justice Miller's dictum.

Of the seven authorities on which Justice Miller's proposition relies, few are factually similar and all apply only after strained interpretations. For example, only two, *State v. Brewster* and *The Ship Richmond*, concerned abductions or seizures breaching international law. *Brewster* involved an unofficial cross-border apprehension without any Canadian demand for his return. Thus, the court's remarks on its retention of personal jurisdiction were purely dicta. *The Ship Richmond*, in contrast, presented no *ratio decidendi* whatsoever for its holding. *Dow's Case* did not involve an international abduction. It did, however, suggest that, were a criminal defendant abducted and that defendant's state were to demand his release, the court trying such a defendant would have to release him. In short, the common law before 1886 was, at best, a weak foundation for the *Ker-Frisbie* doctrine.

B. United States v. Rauscher *and* Ker v. Illinois*: Extradition Treaties and Personal Jurisdiction*

On December 6, 1886, the U.S. Supreme Court decided two cases concerning extradition treaties, *United States v. Rauscher*[70] and *Ker v. Illinois*.[71] Each addressed a different question about

66. 13 U.S. (9 Cranch) at 103.

67. *Id.* at 104.

68. *Id.*

69. For criticism of this decision on other grounds see Edwin D. Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, 28 AM. J. INT'L L. 231, 240-41 (1934).

70. 119 U.S. 407 (1886).

71. 119 U.S. 436 (1886).

these treaties' protections for criminal defendants.

Rauscher addressed the question of whether a suspected murderer, surrendered by Britain at the United States' request under the extradition article of the Webster-Ashburton Treaty of 1842,[72] had a right not to be tried in a U.S. court on a charge not in the extradition request.[73] Justice Miller began by noting that commentators had argued that a requesting country could only try an extradited defendant for the charge in the extradition request.[74] He argued that treaties are U.S. law, and courts must enforce individual rights arising from those treaties.[75] In light of the treaty's purpose, Justice Miller concluded that an extradited defendant must be allowed the right to "be tried only for the offence with which he is charged in the extradition proceedings."[76] He also held that the defendant must have reasonable time to leave the country before his prosecution on other charges.[77]

The *Rauscher* Court effectively found an implied term (the doctrine of specialty)[78] in that treaty. The Court held that, when an extradition treaty is in place, an individual "can only be taken under a very limited form of procedure."[79]

In *Ker*, a private agent kidnapped a criminal defendant from the territory of a country which had an extradition treaty with the United States.[80] Notably, the private agent presented no extradition request to that territory.[81] The Court addressed the question of whether Ker could plea in abatement to a state court's jurisdiction because the kidnapping denied him due process of law and contravened a right of asylum granted him by the extradition treaty.[82]

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72. Webster-Ashburton Treaty, Aug. 9, 1842, U.S.-U.K., art. X, 8 Stat. 572, 576 (1848).

73. United States v. Rauscher, 119 U.S. 407, 409-10 (1886).

74. *Id.* at 416-17.

75. *Id.* at 419.

76. *Id.* at 424.

77. *Id.* at 419-24.

78. *See generally* Christopher J. Morvillo, Note, *Individual Rights and the Doctrine of Specialty: The Deterioration of* United States v. Rauscher, 14 FORDHAM INT'L L.J. 987 (1991).

79. United States v. Rauscher, 119 U.S. 407, 421 (1886).

80. Ker v. Illinois, 119 U.S. 436, 439-41 (1886).

81. *Id.*

82. *See id.* The facts in the case were bizarre. For a fuller version than given in the opinion, see Charles Fairman, Editorial Comment, Ker v. Illinois *Revisited*, 47 AM. J. INT'L L. 678 (1953).

Frederick M. Ker fled from charges of embezzlement and larceny in Illinois to the safety of Lima, Peru. *Ker*, 119 U.S. at 437-38. That city was then in the hands of a Chilean

Previously, Ker had appealed his criminal conviction to the Illinois Supreme Court. He claimed that the trial court lacked personal jurisdiction because he had not been brought before the court by due process of law.[83]

Ker maintained that, when the United States had an extradition treaty with another country, the treaty secured " 'due process of law' for getting jurisdiction"[84] over criminal defendants named in the treaty.[85] Second, removal by force from its treaty partner's territory, rather than by extradition request, of a fugitive accused of a crime in the United States violated the treaty.[86] Third, it also deprived the fugitive, without due process of law, of his right to asylum under the treaty.[87]

The Illinois Supreme Court held, first, that Ker had no right of asylum in Peru under the extradition treaty.[88] Second, it held that, even if there were a right of asylum as to crimes not named in an extradition treaty, Ker could not have invoked asylum because larceny was a crime specifically named in the U.S. extradition treaty with Peru.[89] The court stated:

> The accused was subject to extradition at any time under the treaty, and what difference can it make, in law, as to the right of a State court to try defendant for an extraditable crime, whether the existing treaty was, in fact, observed in all its forms? That which was done, if wrong, was in violation of international law, and if the government of Peru does not complain of the arrest of defendant within its jurisdiction, as an infringement of international law, it does not lie in the mouth of defendant to make complaint on its behalf. Questions arising under international law concern principally the nations involved, and their settle-

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expedition, a result of war between Chile and Peru. Fairman, *supra*, at 685. The Peruvian government had withdrawn to Arequipa. *Id.* The Pinkerton agent, who had trailed Ker to Lima on behalf of his former employers, had a U.S. request to Peru for Ker's extradition. *Id.* The agent asked the Chilean commander for permission to proceed to Arequipa to deliver it. *Id.* The commander, Admiral Lynch, instead sent one of his officers with the Pinkerton Agent to apprehend Ker and place him, against his will, aboard a U.S. ship lying in Callao harbor. *Id.* From there his captor and Ker proceeded, via Honolulu, to California, whose Governor honored an Illinois requisition for his surrender. *Ker*, 119 U.S. at 438. Thus, there was no delivery of the extradition request to Peru.

83. *See* Ker v. People, 110 Ill. 627, 634 (1884), *aff'd*, 119 U.S. 436 (1886).

84. *Id.* at 638.

85. *Id.*

86. *Id.* at 639-40.

87. *Id.*

88. *Id.* at 640.

89. *Id.*

ment is a national affair.[90]

Because the matter did not, therefore, arise under a statute or treaty, the U.S. Supreme Court in 1886 could not review the question of whether a criminal defendant's presence before a court as a direct result of an international law violation deprived that court of jurisdiction.[91] Its appellate jurisdiction over state courts extended only to final judgments denying rights claimed under the U.S. Constitution, statutes, or treaties.[92]

Thus, the issues Ker brought on a writ of error to the U.S. Supreme Court only concerned his abduction by a private person in Peru and enforced transport for trial in Illinois. In short, the U.S. Supreme Court could only decide the much narrower issue of whether the acts of abduction and subsequent forced transport to the United States deprived him of due process and, pursuant to an existing extradition treaty, his right to asylum in Peru.[93]

The Court read due process narrowly. It concluded that "[t]he 'due process of law' here guaranteed is complied with when the party is regularly indicted by the proper grand jury in the State court, has a trial according to the forms and modes prescribed for such trials, and when, in that trial and proceedings, he is deprived of no rights to which he is lawfully entitled."[94] Though the Constitution's Fourteenth Amendment might govern some aspects of pretrial proceedings, the Court noted, "mere irregularities" in the manner in which a criminal defendant was brought within the court's custody did not preclude his trial.[95]

Ker's right of asylum claim[96] fared no better. Ker, using the very cases that the Court cited with approval in *Rauscher*, argued

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90. *Id.* at 640. There was no necessity for the last observation because Ker's counsel, citing *Ex parte Scott*, *State v. Brewster*, *State v. Smith*, *Dow's Case*, and *State v. Ross*, with complete confidence in their due process and right of asylum claims, conceded in their argument that aside from the treaty Ker could not maintain that the manner in which he arrived before the court deprived it of jurisdiction. *Id.* at 630. Nevertheless, the court returned to this point later in its opinion when it noted that if Ker's capture invaded Peru's sovereignty, it was accomplished by private individuals rather than the U.S. government, "precisely as was done in *Ex parte Scott* and *The State v. Brewster*." *Id.* at 643 (citations omitted). Any Peruvian protest would be a matter arising under international law rather than a U.S. statute or treaty. *Id.*

91. *See* Fairman, *supra* note 82, at 682.

92. *Id.*

93. *See* Ker v. Illinois, 119 U.S. 436, 439-41 (1886).

94. *Id.* at 440.

95. *Id.*

96. *Id.* at 441.

that the extradition treaty created a right of asylum.[97] Justice Miller did not distinguish these cases in *Ker*, but merely repeated the Illinois Supreme Court's argument.[98] First, he noted that no right of asylum for fleeing criminals appeared in the extradition treaty's terms, nor did the treaty imply such a right.[99] Peru could have surrendered or expelled Ker at any time, and the treaty merely limited that country's right to offer him or any other criminal fugitive asylum when its treaty partner demanded his surrender under the treaty.[100] Peru had the right to offer asylum, but the treaty afforded Ker no right to demand it.[101]

Furthermore, because the Pinkerton agent never presented the extradition request to the Peruvian government, or claimed to be acting under the treaty when he kidnapped Ker, the Court stated that Ker's apprehension "was a clear case of kidnapping within the dominions of Peru, without any pretense of authority under the treaty or from the government of the United States."[102] Thus, he arrived before the Illinois courts "clothed with no rights which a proceeding under the treaty could have given him, and no duty which this country owes to Peru or to him under the treaty."[103]

Next, the Court addressed the question of whether Ker's arrival before Illinois' courts by means of abduction in another country impaired the state courts' jurisdiction. The Court concluded that was an issue of common or international law, and one for the respective state courts' decision.[104]

Perhaps regrettably, Justice Miller chose not to conclude his opinion at this point. Instead, he added, "[t]here are authorities of the highest respectability which hold that such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offense, and presents no valid objection to his

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97. *See* Fairman, *supra* note 82, at 680-81; *see also* United States v. Rauscher, 119 U.S. 407, 427-29 (1886) (citing Commonwealth v. Hawes, 13 Bush 697 (Ky. 1878); Blandford v. State, 10 Tex. Crim. 627 (Crim. App. 1881); State v. Vanderpool, 39 Ohio St. 273 (1883)).

98. *Compare* Ker v. People, 110 Ill. 627, 640-42 (1884), *with* Ker v. Illinois, 119 U.S. 436, 442-43 (1886).

99. *Ker*, 119 U.S. at 442.

100. *Id.*

101. *Id.*

102. *Id.* at 443.

103. Ker v. Illinois, 119 U.S. 436, 443 (1886).

104. *Id.* at 444.

trial in such court."[105]

That this was dictum and that the "authorities of the highest respectability" supported no more than private, unofficial abductions like Ker's have mattered little. Nor has the Justice's immediate qualification, "[a]nd though we might or might not differ with the Illinois court on that subject, it is one in which we have no right to review their decision."[106] *Ker* now stands for a rule on an issue which its author expressly declined to decide.

Ker v. Illinois most accurately stands for the proposition that a criminal defendant's abduction from the territory of another nation by private individuals, acting without official authorization and independent of any extradition treaty, does not deprive the defendant of due process of law or any rights under an extradition treaty. Thus, that kind of an abduction does not bar the Court's exercise of personal jurisdiction. The Court's dictum merely added that there was common law authority that "such forcible abduction" did not otherwise preclude the exercise of jurisdiction. Plainly, the Court addressed an unofficial abduction in *Ker*, in response to which Peru neither protested nor demanded Ker's restitution.

C. *The Supreme Court's Invocation of* Ker *After 1886*

Between 1886 and 1992, the Supreme Court invoked *Ker v. Illinois* in cases involving criminal defendants who attempted, through claims that their presence before those courts resulted from illegalities, to challenge the trial courts' jurisdiction.[107] Each case involved a claimed domestic illegality. And in each case, the Court invoked *Ker* to defeat a criminal defendant's contention that the exercise of personal jurisdiction denied him due process of law or other constitutional rights. Thus the Court always reached the *Ker* doctrine through the constitutional framework constructed by Justice Miller.

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105. *Id.*

106. *Ker*, 119 U.S. at 444; *see* Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law Continued*, 84 AM. J. INT'L L. 444, 464 (1990) (noting that Justice Miller himself may have doubted the justice of this result for Ker).

107. *See* United States v. Crews, 445 U.S. 463, 474 (1980); Gerstein v. Pugh, 420 U.S. 103, 119 (1975); Frisbie v. Collins, 342 U.S. 519, 522 (1952); Pettibone v. Nichols, 203 U.S. 192, 207 (1906); *In re* Johnson, 167 U.S. 120, 126 (1897); Lascelles v. Georgia, 148 U.S. 537, 545 (1893); Cook v. Hart, 140 U.S. 183, 190 (1892); Mahon v. Justice, 127 U.S. 700, 715 (1888).

Probably because they involve no international issues, these cases have received little attention from the *Ker-Frisbie* doctrine's critics. Even *Frisbie v. Collins*[108] receives little more than dismissal, with a note that it reinforced *Ker* and contributed the doctrine's second appellation.[109]

Precisely because they demonstrate that *Ker-Frisbie* has been a doctrine of narrow constitutional or "internal" use, some of these cases warrant brief examination. *Frisbie*, in addition to containing the most ringing endorsement of *Ker*, challenges the thesis that the *Ker-Frisbie* doctrine cannot extend to international law violations.

1. Domestic Cases

Two years after *Ker*, the Supreme Court decided a case involving a criminal defendant's abduction from West Virginia and forced return to Kentucky to stand trial for murder.[110] The Kentucky armed posse's invasion prompted West Virginia's demand for the prisoner's release and return.[111] Kentucky refused, on the grounds that the matters involved were judicial, rather than executive.[112] After granting a writ of *habeas corpus* and conducting a hearing, the federal district court denied the defendant's motion for discharge.[113] The Circuit Court affirmed, and West Virginia ap-

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108. 342 U.S. 519 (1952).

109. *See, e.g.*, Abraham Abramovsky, *Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok*, 31 VA. J. INT'L L. 151, 157-58 (1990) ("Although bereft of any basis either in international law or domestic precedent, the holding in *Ker*, buttressed by the interstate case of *Frisbie v. Collins*, has incredibly attained the status of a judicially sanctioned doctrine which recognizes jurisdiction over a defendant before the court regardless of how his presence was obtained.") (citations omitted); Lowenfeld, *supra* note 106, at 464-65 ("I have dwelt on *Ker v. Illinois* in so much detail because it is the only Supreme Court case, so far as I am aware, that addresses abduction abroad, and because the other pillar of the '*Ker-Frisbie*' rule arose out of a purely domestic incident and is thus not really relevant to the subject of this article—law enforcement by U.S. officers abroad.") (citations omitted).

110. Mahon v. Justice, 127 U.S. 700, 700 (1888). The Governor of Kentucky requested extradition, but the Governor of West Virginia was still pondering the requisition when the posse captured Mahon. *Id.*

111. *Id.* at 701.

112. *Id.* West Virginia's Governor applied, in federal court, for a writ of *habeas corpus*, "in alleged vindication of the rights of the State of West Virginia, and of every citizen thereof, and especially of the said Plyant Mahon thus confined and deprived of his liberty, to the end that due process of law secured by both the Constitution of the United States and the constitution of the State of West Virginia, and the laws made in pursuance thereof, might be respected and enforced." *Id.*

113. *Id.*

pealed to the Supreme Court.[114]

The U.S. Supreme Court framed the issue before it as:

> "whether a person indicted for a felony in one State, forcibly abducted from another State and brought to the State where he was indicted by parties acting without warrant or authority of law, is entitled under the Constitution or laws of the United States to release from detention under the indictment by reason of such forcible and unlawful abduction."[115]

The Court found that Kentucky's detention of Mahon did not violate the Fourteenth Amendment.[116] It reasoned that Kentucky had not authorized his unlawful abduction.[117] Therefore, Kentucky's detention of Mahon for trial denied him no right.[118] Further, because Article Four of the Constitution decreed that a person charged in one state with a crime who fled to another must be returned on the demand of the state from which he fled, Mahon had no right of asylum in West Virginia.[119] In short, that he had been removed from West Virginia by unlawful means was irrelevant to the Kentucky court's jurisdiction to try him for violating its law.[120]

The Court held that Mahon's arrest in Kentucky and detention before trial deprived him of no rights guaranteed by the Constitution or U.S. laws.[121] The Court relied on *Ex parte Scott*,[122] *State v. Smith*,[123] *State v. Brewster*,[124] *State v. Ross*,[125] and *Ker v. Illinois*[126] to support its holding.[127]

Justice Field, the opinion's author, noted that the Constitution limited individual states' sovereignty by preventing, among other actions, reprisals against other states for invasions such as the one which plucked Mahon from his refuge in West Virginia.[128]

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114. *Id.* at 704.
115. *Id.* at 706.
116. Mahon v. Justice, 127 U.S. 700, 707 (1888).
117. *Id.*
118. *Id.*
119. *Id.* at 707-08; U.S. CONST. art. IV, § 2, cl. 2.
120. *Mahon*, 127 U.S. at 708.
121. *Id.* at 715.
122. 109 Eng. Rep. 166 (K.B. 1829).
123. 8 S.C. (1 Bail.) 131 (S.C. Ct. App. 1829).
124. 7 Vt. 117 (1835).
125. 21 Iowa 467 (1866).
126. 119 U.S. 436 (1886).
127. Mahon v. Justice, 127 U.S. 700, 708-15 (1888). *See supra* text accompanying notes 19-109 for a discussion of these cases.
128. *Mahon*, 127 U.S. at 705.

In a passage illustrative of international law in 1887, he contrasted the right of completely sovereign states to respond to such injury:

> If the States of the Union were possessed of an absolute sovereignty, instead of a limited one, they could demand of each other reparation for an unlawful invasion of their territory and the surrender of the parties abducted, and of parties committing the offence, and in case of refusal to comply with the demand, could resort to reprisals, or take any other measures they might deem necessary as redress for the past and security for the future.[129]

Mahon v. Justice not only demonstrates the application of the *Ker* doctrine to due process issues, but also states the rule of customary international law which would apply to international nonconsensual kidnappings. If a nation demanded the return of a person kidnapped and forcibly removed from its territory for trial in another country, international law required the person's restitution. Failure to return him justified reprisals for the breach of law.

In *Lascelles v. Georgia*,[130] a criminal defendant maintained that his trial in Georgia's courts violated his due process rights.[131] He argued that trial for an offense other than that for which another state had extradited him deprived him of a right guaranteed by the Constitution and laws of the United States.[132] Relying on the rule announced in *Rauscher*,[133] he argued that the Constitution and U.S. statutes required that a state seeking the return of a person for a violation of its laws from another state have actually charged the fugitive with a crime.[134] Thus, by implication, he reasoned that the law conferred on him a right to be tried only for the crime listed on Georgia's extradition requisition.[135]

This might be the case were the states independent sovereignties, the Court said, but nothing in the Constitution constituted a pact limiting the rights of states to try fugitives extradited by other states to particular offenses.[136] The Court doubted whether the Constitution even permitted states to make pacts limiting surrenders to particular offenses, and even if they could do this,

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129. *Id.* at 704-05.
130. 148 U.S. 537 (1893).
131. *Id.* at 540.
132. *Id.*
133. United States v. Rauscher, 119 U.S. 407 (1886).
134. *See* U.S. CONST. art. IV, § 2.
135. *Lascelles*, 148 U.S. at 541.
136. *Id.* at 542-43.

> it is settled by the decisions of this court that, except in the case of a fugitive surrendered by a foreign government, there is nothing in the Constitution, treaties or laws of the United States which exempts an offender, brought before the courts of a State for an offence against its laws, from trial and punishment, even though brought from another State by unlawful violence, or by abuse of legal process.[137]

Thus, plainly the Court found *Ker* useful in defeating exorbitant claims to constitutional rights and in correcting the misapplication of the doctrine of specialty.

Frisbie v. Collins[138] has great significance for the applicability of the *Ker* doctrine to U.S. violations of international law. Here, the Court faced more than the usual argument that a deprivation of due process precluded exercise of a court's jurisdiction to try a criminal defendant. A Michigan court convicted Collins of murder and sentenced him to life imprisonment.[139] Collins sought a writ of *habeas corpus* in federal district court.[140] He claimed that his kidnapping in Chicago by Michigan police, forced return to Michigan, and subsequent trial there denied his right to due process and violated the Federal Kidnapping Act.[141] Although the district court, relying on the *Ker* rule, denied the writ, the court of appeals reversed and remanded on the ground that violation of the Kidnapping Act by the Michigan police barred that state court's exercise of jurisdiction over the person kidnapped.[142] Any other conclusion, it argued, would encourage law enforcement officers to commit crimes themselves.[143]

The Supreme Court reversed. Noting that Congress in the Federal Kidnapping Act imposed harsh punishment for its violators, the Court reasoned that courts could not construe the Act to include as another sanction, "barring a state from prosecuting persons wrongfully brought to it by its officers."[144] With the Federal Kidnapping Act thus dispatched and the remaining issue merely

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137. *Id.* at 543 (citing Ker v. Illinois, 119 U.S. 436, 444 (1886); Mahon v. Justice, 127 U.S. 700, 707, 708, 712, 715 (1888); Cook v. Hart, 146 U.S. 183, 190, 192 (1892)).

138. 342 U.S. 519 (1952).

139. *Id.* at 519-20.

140. *Id.*

141. *Id.* at 520. Federal Kidnapping Act, 47 Stat. 326 (1932) (codified as amended at 18 U.S.C. § 1201 (Supp. III 1991)).

142. *Frisbie*, 342 U.S. at 520, 522.

143. *Id.* at 522.

144. *Id.* at 523.

one of due process deprivation, the Court could reaffirm the *Ker* rule.

> This Court has never departed from the rule announced in *Ker v. Illinois*, 119 U.S. 436, 444, that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a "forcible abduction." No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of a crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.[145]

This well-known reaffirmation of *Ker*, because it merely confirms the *Ker* doctrine, is not the aspect of *Frisbie* which concerns the doctrine's extension to international law violations. Rather, it is the Court's holding that a violation of a U.S. statute in bringing a criminal defendant before a court does not bar its exercise of jurisdiction.

Expansionist *Ker* followers may argue that, if a violation of a federal statute does not bar jurisdiction, neither should a violation of international law.[146] One response to this argument is that the Federal Kidnapping Act already includes specific sanctions for its breach, but does not mandate the kidnapped person's restitution to the injured state. The remedy in international law when one country's law enforcement agents kidnap a person from another country without its permission is the person's return.[147] Therefore, the *Frisbie* Court could ignore the personal jurisdiction argument and apply the statutory sanctions. However, a court faced with an international abduction and no statutory sanctions should apply the international remedy of returning the kidnapped person.

After 1952, the Court invoked the *Ker-Frisbie* doctrine in two

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145. Frisbie v. Collins, 342 U.S. 514, 522 (1952) (citations omitted).

146. Since The Paquete Habana, 175 U.S. 677, 700 (1900), international law is U.S. law on a par with, but hardly superior to, statutes. For the argument that a unilateral abduction by one state of a person charged with violating its laws from the territory of another state without its consent is a breach of international law see *infra* text accompanying notes 189-229.

147. *See infra* text accompanying notes 230 & 231.

more due process cases involving purely domestic situations.[148] Neither domestic case supports the doctrine's extension to U.S. international law violations. Thus, the Court's lack of an occasion to apply Justice Miller's dictum to an international law violation, until *Álvarez-Machain*, does not conclusively establish that *Ker-Frisbie* is an exclusively domestic doctrine. Nevertheless, the Court has declined to apply the *Ker-Frisbie* doctrine in two cases involving questions of international law.

2. International Cases

Forty years after it decided *Rauscher*[149] and *Ker*,[150] the Supreme Court again encountered a case involving the extraterritorial implications of *male captus, bene detentus*. In *Ford v. United States*,[151] it explained why the *Ker* doctrine had no applicability to a U.S. treaty's contravention. Only five years later, the Court observed that, when the United States limited its territorial authority by treaty, it precluded its courts' exercise of jurisdiction over persons seized in violation of that treaty limitation.[152]

In the 1920s, the United States, engaged in a "War on Alcohol" arising from the Eighteenth Amendment,[153] began searching and seizing British vessels hovering off U.S. coasts beyond the three-mile territorial limit.[154] Britain, not burdened by prohibition, rejected a U.S. proposal for a treaty allowing both countries to search and seize hovering vessels beyond their three-mile limits. The U.S. Supreme Court then held in *Cunard Steamship Co. v. Mellon*[155] that U.S. prohibition laws applied to foreign vessels in U.S. territorial waters.[156] British liners plying the New York-Southampton route had to sail dry from New York and jettison their liquor stores at our three-mile line on arrival from England.[157] Now motivated to reach an accommodation with the

148. United States v. Crews, 445 U.S. 463, 474 (1980); Gerstein v. Pugh, 420 U.S. 103, 119 (1975).

149. United States v. Rauscher, 119 U.S. 407 (1886).

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

151. 273 U.S. 593 (1927).

152. Cook v. United States, 288 U.S. 102, 121-22 (1933).

153. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

154. *See Cook*, 288 U.S. at 112-16.

155. 262 U.S. 100 (1923).

156. *Id.*

157. *See* Cook v. United States, 288 U.S. 102, 112-16 (1933). For a more positive view of the Court's role in adjusting this transnational temperance tension see United States v. Ál-

United States, Britain agreed to a treaty.[158]

The defendants in *Ford* were captured with their vessel off San Francisco. On appeal, they argued that the trial court erred by not sending to the jury the question of whether their vessel had been within the treaty limit when captured.[159] When the government maintained that under *Ker* even a seizure contravening the treaty would not impair the trial court's jurisdiction, Chief Justice Taft announced that *Ker* simply did not apply.[160]

He reasoned that *Ker* held that trial by a state court of a defendant illegally brought before it was not a federal question because it did not violate the Constitution, any federal law, or a U.S. treaty, while *Ford* certainly involved a treaty.[161] The issue of whether the seizure contravened the treaty had no bearing on the defendants' innocence or guilt, but it "affected the right of the court to hold their persons for trial."[162] He did not elaborate on this statement. Instead, Chief Justice Taft held that the defendants should have raised the issue of the treaty's contravention in a plea to the trial court's jurisdiction, and their failure to file such a plea waived the question on appeal.[163] The Court then affirmed the lower courts on other grounds. This decision, in addition to the rule of *Rauscher*, was yet another indication that the Court did not wish to extend *Ker*.[164]

Cook v. United States[165] further confirmed the theory that international law violations stood outside the scope of *male captus, bene detentus*. In *Cook*, the Coast Guard boarded and seized a Canadian vessel, *The Mazel Tov*, loaded with liquor beyond the limit set by the treaty with Britain.[166]

Cook, the ship's master, successfully argued in the trial court

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varez-Machain, 112 S. Ct. 2188, 2196 n.16 (1992).

158. *See Cook*, 288 U.S. at 117-18; Ford v. United States, 273 U.S. 593, 607-08 (1927) (reprinting the relevant treaty provisions). The treaty allowed passenger vessels to carry sealed liquor through our territorial waters and gave the United States the right to search and seize vessels supplying liquor outside the three mile limit, but not beyond one hour's steaming from the actual coast. *Ford*, 273 U.S. at 607-08.

159. *Ford*, 273 U.S. at 605.

160. *Id.* at 605-06.

161. *Id.* at 606.

162. *Id.*

163. Ford v. United States, 273 U.S. 593, 606 (1927).

164. *See* United States v. Verdugo-Urquidez, 939 F.2d 1341, 1346 (9th Cir. 1991), *vacated and remanded*, 112 S. Ct. 2986 (1992).

165. 288 U.S. 102 (1933).

166. *Id.* at 107, 110-12.

that the treaty's provisions superseded the customs statute's grant of authority to the Coast Guard to board and search vessels within four miles of the coast, that the seizure was illegal and, therefore, that the court lacked jurisdiction.[167] The government argued that, even if the initial Coast Guard stop and seizure were illegal as a treaty violation, the subsequent Customs filing of a libel for forfeiture ratified the illegal seizure and removed any bar to the trial court's jurisdiction.[168]

The Supreme Court disagreed. There certainly was a rule that if the government illegally seized property, but subsequently filed a libel of forfeiture, the seizure could be ratified.[169] However, this was not such a case. The government itself, not merely the Coast Guard, had given up its power to seize in the treaty.[170] The United States explicitly gave up its power to seize, so the Court reasoned; therefore, it must have given up its power to adjudicate after a seizure because to adjudicate after such a seizure would defeat the treaty's purpose.[171] The Court distinguished *The Ship Richmond*[172] and a subsequent case. Those cases, the Court reasoned, involved seizures of U.S. owned ships in which no treaty was violated, just "the law of nations."[173] The Court in each had merely held that the illegal seizure did not invalidate the trial court's process or the action's venue;[174] neither case, the *Cook* Court reasoned, turned on treaty violations.

This was an invalid distinction. Customary international law and treaty law have equal force within the United States.[175] It follows that seizures violating "the law of nations" would be just as illegal as those violating treaties.

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167. *Id.* at 108.

168. *Id.* at 120-21. The issue is similar to The Ship Richmond, 13 U.S. (9 Cranch) 102 (1815). *See supra* text accompanying notes 64-68.

169. *See Cook*, 288 U.S. at 121.

170. *Id.* at 121.

171. Cook v. United States, 288 U.S. 102, 121-22 (1933).

172. 13 U.S. (9 Cranch) 102 (1815).

173. *Cook*, 288 U.S. at 122.

174. *Id.*

175. *See* Dickinson, *supra* note 69, at 241 (arguing that seizures violating customary international law are just as illegal as those violating treaties, stoutly maintaining that *The Ship Richmond* was "wrong in principle," and that *Cook* had in effect overruled it); *see also infra* discussion accompanying notes 232-42.

D. Ker-Frisbie *in the Lower Federal Courts*

A complete account of the lower federal courts' use of the *Ker* doctrine is beyond this Article's scope.[176] Apart from *United States v. Verdugo-Urquidez*[177] and *United States v. Álvarez-Machain*,[178] no other cases have involved abductions by U.S. government officials or agents from the territory of the country which has specifically demanded the abducted person's return.[179] One lower court, however, tried to create an exception to *Ker-Frisbie*'s actual doctrine that an illegal kidnapping does not deprive its victim of due process. In *United States v. Toscanino*,[180] a criminal defendant alleged that U.S. agents abducted him from Uruguay, tortured him, and interrogated him for seventeen days in Brazil, before forcing him onto a flight to New York.[181] Maintaining that the Supreme Court's constitutional decisions since *Frisbie* had ex-

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176. For a summary listing of cases in which defendants claimed to have been brought before the courts illegally, see Chermside Jr., *supra* note 13, at 689-90.

177. 939 F.2d 1341, 1344 (9th Cir. 1991), *vacated and remanded*, 112 S. Ct. 2986 (1992). For discussion of *Verdugo-Urquidez*, see generally Thomas L. Horan, Recent Development, 21 GA. J. INT'L & COMP. L. 525 (1990); Wilson G. Jones, Note, *The Ninth Circuit's Camarena Decisions: Exceptions or Aberrations of the* Ker-Frisbie *Doctrine*, 27 TEX. INT'L L.J. 211 (1992); Mark L. LaBollita, Note, *The Extraterritorial Rights of Nonresident Aliens: An Alternative Theoretical Approach*, 12 B.U. THIRD WORLD L.J. 363 (1992); Mindy Ann Oppenheim, Comment, United States v. Verdugo-Urquidez: *Hands Across the Border—the Long Reach of United States Agents Abroad, and the Short Reach of the Fourth Amendment*, 17 BROOK. L. REV. 617 (1991).

178. For a discussion of *Álvarez-Machain*, see generally Abramovsky, *supra* note 109, at 165-76; Jonathan A. Bush, *How Did We Get Here? Foreign Abduction After* Álvarez-Machain, 45 STAN. L. REV. 939 (1993); John R. Hitt, United States v. Álvarez-Machain*: United States Supreme Court Ratifies Government-Sanctioned Kidnappings*, 1993 DET. C.L. REV. 193; John Quigley, *Our Men in Gudalajara and the Abduction of Suspects Abroad: A Comment on* United States v. Álvarez-Machain, 68 NOTRE DAME L. REV. 723 (1992); Steven M. Schneebaum, *The Supreme Court Sanctions Transborder Kidnapping in* United States v. Álvarez-Machain*: Does International Law Still Matter?*, 18 BROOK. J. INT'L L. 303; Candace R. Somers, United States v. Álvarez-Machain*: Extradition and the Right to Abduct*, 18 N.C. J. INT'L & COM. REG.-213 (1992); Stephen M. Welsh, United States v. Álvarez-Machain, *The Implications of International Abductions by the United States*, 44 MERCER L. REV. 1023 (1993); Aimee Lee, Comment, United States v. Álvarez-Machain*: The Deleterious Ramifications of Illegal Abductions*, 17 FORDHAM INT'L L.J. 126 (1993); Andrew L. Wilder, Casenote, 32 VA. J. INT'L L. 979 (1992).

179. *See* United States v. Verdugo-Urquidez, 939 F.2d 1341, 1353 n.12 (9th Cir. 1991) (listing all cases upholding jurisdiction over defendants claiming an illegal extraterritorial kidnapping barred jurisdiction and showing that in all cases either the foreign nations gave permission for the abductions (in some cases they actively participated) or acquiesced by failing to protest), *vacated and remanded*, 112 S. Ct. 2986 (1992).

180. 500 F.2d 267 (2d Cir. 1974).

181. *Id.* at 270. The torture allegedly included pinching his fingers with metal pliers, flushing alcohol into his eyes and nose, and electric shocks to his genitals, ears, and toes. *Id.*

panded the concept of due process to include police misconduct, the court of appeals remanded the case for an evidentiary hearing on Toscanino's torture and other illegal conduct claims.[182]

Despite continuing respect from commentators,[183] the judiciary did not embrace the "*Toscanino* Exception." The same court which produced it quickly limited it to cases involving kidnappings accompanied by torture so vile as to shock the judicial conscience.[184] Since *Toscanino*, no U.S. court has applied that exception to divest jurisdiction.[185] However, unlike violations of international law, the "*Toscanino* Exception" represents an actual exception to the *Ker-Frisbie* doctrine because it is rooted in due process—[186] the doctrinal bedrock of *Ker-Frisbie*.

Some lower courts have implicitly acknowledged that *Ker-Frisbie* does not extend to violations of international law. For example, two cases from the Prohibition era, following the reasoning in *Ford*, sustained defendants' claims that seizure of their British-owned ships at distances greater than one hour's steaming from the United States' coast contravened its treaty with Britain and barred exercise of jurisdiction.[187] Others, in dicta, have implied that *Ker-Frisbie* would not apply had the victim's country, where abduction took place, protested.[188]

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182. *Id.* at 272-76, 281.

183. *See, e.g.*, GILBERT, *supra* note 29, at 191-92; Lowenfeld, *supra* note 106, at 467-72; F.A. Mann, *Reflections on the Prosecution of Persons Abducted in Breach of International Law*, *in* INTERNATIONAL LAW AT A TIME OF PERPLEXITY 407, 416-19 (Yoram Dinstein ed., 1989).

184. *See* United States *ex rel.* Lujan v. Gengler, 510 F.2d 62, 65-66 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975).

185. Abramovsky, *supra* note 109, at 159. In 1991, however, a South African Court of Appeals invoked *Toscanino*. That court held that South Africa's courts lacked jurisdiction to try a member of the African National Congress abducted by South African agents from Swaziland. *See* State v. Ebrahim, 1991(2) SA 553, 582-84 (S. Afr. Ct. App.), *translated in* 31 I.L.M. 888, 896-99 (1992).

In *Álvarez-Machain*, the dissent noted *Ebrahim* as evidence of the influence of U.S. Supreme Court decisions on other nations' jurisprudence. United States v. Álvarez-Machain, 112 S. Ct. 2188, 2206 (1992).

186. *See supra* note 18.

187. *See* United States v. Ferris, 19 F.2d 925 (N.D. Cal. 1927); United States v. Schouweiler, 19 F.2d 387 (S.D. Cal. 1927).

188. *See* United States v. Verdugo-Urquidez, 939 F.2d 1341, 1349 n.9 (9th Cir. 1991) (citing Matta-Ballesteros v. Henman, 896 F.2d 255, 260 (7th Cir.), *cert. denied*, 111 S. Ct. 209 (1990); United States v. Zabeneh, 837 F.2d 1249, 1261 (5th Cir. 1988); United States v. Reed, 639 F.2d 896, 902 (2d Cir. 1981); United States v. Cordero, 668 F.2d 32, 37 (1st Cir. 1981); Waits v. McGowan, 516 F.2d 203, 208 n.9 (3d Cir. 1975)), *vacated and remanded*, 112 S. Ct. 2986 (1992).

Thus, for international law violations, the *Ker-Frisbie* doctrine rests on dicta. But its base is not merely the doubtful authority of dicta in obscure common law cases. It also flows from dictum in the seminal case, *Ker v. Illinois*. Since *Ker*, the Supreme Court has only applied that case to defeat due process claims of domestic defendants, claiming a lack of personal jurisdiction because of their illegal mode of arrival before a trial court. In short, the Supreme Court has applied *Ker-Frisbie* solely to cases involving domestic criminal defendants and held *Ker-Frisbie* inapplicable to the only two cases involving international law.

III. CUSTOMARY INTERNATIONAL LAW AND OFFICIAL EXTRATERRITORIAL ABDUCTIONS

This Part argues that official, extraterritorial abductions violate customary international law. Second, it maintains that this same law requires the return of the abducted person upon the demand of the nation from whose territory the abduction occurred. Third, it argues that the existence of an international law rule of *male captus, bene detentus*, preserving the jurisdiction of an abducting nation's courts over a criminal whose abduction violated international law, is doubtful. Further, the U.S. Congress has recognized the highly questionable underpinnings of such a rule. Thus, without exception, a U.S. court's exercise of personal jurisdiction over a criminal defendant whose presence before it results from such an official abduction, in another nation's territory, without its consent, followed by that nation's demand for the abducted person's return, violates international law.

A. Official Extraterritorial Abductions Violate International Law

International rules of law have three sources: treaties, customary law, and general principles of law recognized by the world's nations.[189] Customary international law, in contrast to treaty law, is derived from international customs evincing general practice accepted as law.[190] Customary international law comprises a set of

189. Statute of the International Court of Justice, art. 38(1), 59 Stat. 1055, 1060 (1945); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(1) (1987) [hereinafter RESTATEMENT].

190. *See* Statute of the International Court of Justice, art. 38(1)(b), 59 Stat. 1055, 1060 (1945). The *Restatement* defines customary international law as law that "results from a

normative expectations, largely shaped and revealed by state practice in response to international incidents.[191]

A primary rule arising from past state practice is that one state may not carry out official acts in another state's territory without permission. Each state's sovereignty over its own territory is exclusive and absolute.[192] This rule necessarily includes official law enforcement activities of one state in another.[193] Thus, an abduction by one country's agents of a person within the territory of another country, without that other country's consent, violates customary international law.[194]

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general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT, *supra* note 189, § 102(1).

191. *See* RESTATEMENT, *supra* note 189, § 102(2); W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, 10 YALE J. INT'L L. 1 (1984).

192. *See* U.N. CHARTER art. 2, ¶ 4; CHARTER OF THE ORGANIZATION OF AMERICAN STATES art. 20; RESTATEMENT, *supra* note 189, § 432(2) ("A state's law enforcement officials may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state."); The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812); S.S. Lotus (Turk. v. Fr.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

The United States has specifically assented to this principle in the context of efforts to halt narcotics trafficking. *See, e.g.*, Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *entered into force* Nov. 11, 1990, art. 2(2), (3), 28 I.L.M. 493 (1989).

193. *See* RESTATEMENT, *supra* note 189, § 432(2).

194. *See* United States v. Verdugo-Urquidez, 939 F.2d 1341, 1352 (9th Cir. 1991), *vacated and remanded*, 112 S. Ct 2986 (1992); United States *ex rel.* Lujan v. Gengler, 510 F.2d 62, 68 (2d Cir. 1975); United States v. Toscanino, 500 F.2d 267, 277-78 (2d Cir. 1974); Collier v. Vaccaro, 51 F.2d 17, 19 (4th Cir. 1931); *see also* RESTATEMENT, *supra* note 189, § 432, cmt. c; 1 L. OPPENHEIM, INTERNATIONAL LAW 295 n.1 (H. Lauterpacht ed., 8th ed. 1955); Harvard Research in International Law, *Draft Convention on Jurisdiction with Respect to Crime*, art. 16, *in* 29 AM. J. INT'L L. 439, 442 (Supp. 1935); Michael J. Glennon, Comment, *State-Sponsored Abduction: A Comment on* United States v. Álvarez-Machain, 86 AM. J. INT'L L. 746, 746-47 (1992).

If the United States carries out such an abduction its action also violates treaties to which it is a party. *See, e.g.*, U.N. CHARTER art. 2, ¶ 4; CHARTER OF THE ORGANIZATION OF AMERICAN STATES art. 17. In the *Álvarez-Machain* and *Verdugo-Urquidez* abductions, the United States contravened the spirit, if not the letter of two agreements it had made with Mexico on mutual criminal legal cooperation. *See* Agreement on Cooperation in Combatting Narcotics Trafficking and Drug Dependency, Feb. 23, 1989, U.S.-Mex., art. 1, ¶ 3, 29 I.L.M. 58, 59 (1990) ("This Agreement does not empower one Party's authorities to undertake, in the territorial jurisdiction of the other, the exercise and performance of the functions or authority exclusively entrusted to the authorities of that other party by its national laws or regulations."); Mutual Legal Assistance Cooperation Treaty, art. 1 ¶ 2, S. TREATY DOC. No. 13, 100th Cong., 2d Sess. 1, *reprinted in* 27 I.L.M. 443, 446 (1988). These treaties are themselves evidence of customary international law. *See* R.R. Baxter, *Treaties and Custom*, 129 *Recueil des Cours d'Academie de Droit International* 25, 99-101 (1970).

1. United States Practice which Illustrates a Norm Against Abductions

The United States, through state practice, has recognized the existence of a norm against transboundary abduction.[195] In the first decade of the nineteenth century, the United States often found itself in the position of injured nation. Britain regularly stopped U.S. ships on the high seas and removed alien and U.S. sailors, claiming that they were British deserters.[196] In a famous 1807 incident, for example, the Royal Navy's frigate *Leopard* attacked the U.S.S. *Chesapeake*, searched the U.S. ship for British deserters, and captured several crewmen.[197] When the United States protested and demanded their return, Britain agreed to return the crew members and to pay damages to the *Chesapeake*'s crew wounded in the fray.[198]

In 1841, a party of British troops broke into a house in Vermont, seized a man, and carried him back to a Canadian mili-

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195. For international examples see RESTATEMENT, *supra* note 189, § 432 reporters' note 3; M. Cherif Bassiouni, *Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition*, 7 VAND. J. TRANSNAT'L L. 25, 60-61 (1973). Two international examples are *Attorney General of Israel v. Eichmann* and *In re Argoud*.

Attorney General of Israel v. Eichmann, 36 I.L.R. 5 (D. Ct. Jerusalem 1961), *aff'd*, 36 I.L.R. 277 (Sup. Ct. Israel 1962) is the most celebrated twentieth-century transborder-abduction case. Israeli agents abducted Nazi war criminal Adolf Eichmann from Argentina, and Argentina initially protested. However, Argentina withdrew its protest before Eichmann was brought to trial. The Israeli court deemed Argentina's withdrawal of its protest to be essential in sustaining its jurisdiction over Eichmann. *Eichmann*, 36 I.L.R. at 70-71.

Prior to Argentina's withdrawal of its objection, the United Nations Security Council declared that Israel's actions "violated the sovereignty of a Member State and were incompatible with the Charter of the United Nations." U.N. SCOR, 15th Sess., 868th mtg. at 35, U.N. Doc. S/4349 (1960). In addition, the Security Council asked Israel "to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law." *Id.* The two countries' Joint Communique of August 3, 1960 resolved the incident by acknowledging that Israel's actions infringed on Argentine sovereignty, and by acknowledging the Security Council resolution. *Eichmann*, 36 I.L.R. at 58-59. Nevertheless, Argentina allowed Israel to retain custody of and jurisdiction over Eichmann. *Id.*

In re Argoud involved a defendant abducted in Munich and taken to France. Judgment of June 4, 1964, Cass. crim., 45 I.L.R. 90 (Fr.). The case is significant because the French court expressly stated that Argoud's abduction violated the rights and sovereignty of the Federal Republic of Germany. *Id.* at 97. Despite this violation, the French court did not dismiss the prosecution, *id.* at 98, because the German government had not yet demanded the defendant's return. *Id.* at 94; *see also* Mann, *supra* note 183, at 413.

196. *See* O'Higgins, *supra* note 29, at 294 n.1. For the public's resentment of this practice and details of the return of a seaman claiming U.S. citizenship, under the extradition clause of the Jay Treaty with Britain of 1794, see United States v. Robbins, 27 F. Cas. 825 (D.S.C. 1799).

197. *See* O'Higgins, *supra* note 29, at 293-94.

198. *Id.* at 294.

tary jail.[199] After the United States protested and demanded the captive's return, the British government ordered his release.[200]

This was a minor fracas compared to the *Trent* Affair during the U.S. Civil War. On November 8, 1861, the U.S.S. *San Jacinto* fired a shot across the bow of the Royal mail steamer *Trent* in the Bahama Channel off Cuba.[201] After stopping the *Trent*, the crew of the *San Jacinto* removed the Commissioners of the Confederate States to France and England, who were travelling on board.[202] Had the Commissioner's release depended on the U.S. House of Representatives, which unanimously, with applause, passed resolutions requesting the President to confine the Commissioners in felons' cells, the two would not have been freed.[203] When, however, the British government demanded the delivery of the two men, the U.S. government delivered them.[204]

Again, in 1872, the United States, in response to a British demand, returned a doctor to Canada, who had been kidnapped in Ontario by a U.S. detective and a Canadian official, for trial in South Carolina.[205]

The United States, in 1887, demanded that Mexico return a Mexican Army Lieutenant whose fellow officers had rescued him in Arizona from arrest and imprisonment on a charge of assaulting a constable.[206] The Mexican government initially agreed to return him, but later asked if his trial and that of the officers involved in his rescue by Mexican authorities would suffice.[207] Having agreed, the U.S. government later found it necessary to request that Mexico mitigate the sentences of death meted out by its military court

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199. *See* 1 JOHN BASSETT MOORE, TREATISE ON EXTRADITION AND INTERSTATE RENDITION 282 (1891).

200. *Id.* at 283.

201. Letter from the Secretary to the Admiralty to M. Hammond, Esq. (Nov. 27, 1861), *in* 55 BRITISH & FOREIGN STATE PAPERS 1864-65, at 602-03 (1870).

202. *Id.*

203. Letter from Lord Lyons to Earl Russell (Dec. 3, 1861), *in* 55 BRITISH & FOREIGN STATE PAPERS 1864-65, at 614-15 (1870). The Secretary of the Navy sent the captain a public letter of commendation which ended with the admonition that the *San Jacinto*'s failure to seize the *Trent* as well as her passengers should not be treated as a precedent! Letter from Mr. Welles, Navy Dept. to Captain Wilkes (Nov. 30, 1861), *in* 55 BRITISH & FOREIGN STATE PAPERS 1864-65, at 617-18 (1870).

204. *See* Letter from William H. Seward, U.S. Secretary of State, to Lord Lyons (Dec. 26, 1861) Letters from Earl Russell to Lord Lyons (Jan. 10, 1862 & Jan. 23, 1862) *in* 55 BRITISH & FOREIGN STATE PAPERS 1864-65, at 627-40, 641-43, 650-57 (1870).

205. *See* MOORE, *supra* note 199, at 283-84.

206. *Id.* at 288.

207. *Id.* at 289.

to the Lieutenant and his rescuers![208] Prohibition provoked even more incidents.[209]

In the Colunje Claim case, the United States-Panama Claims Commission considered the Panamanian Government's claim arising from Guillermo Colunje's arrest.[210] In 1917, a Panama Canal Zone detective arrested Colunje for mail fraud after the detective persuaded him, by false pretence, to enter the Canal Zone.[211] Colunje regained the safety of his own country by posting bond, and the Canal Zone prosecutor later dropped the charge.[212] The Commission held that the United States was liable to the Panamanian government for damages for its citizen's "humiliation incident to a criminal proceeding."[213]

When the Soviet government apparently attempted to recover a defector who had jumped from a window in the Soviet Consulate, the U.S. Department of State declared that the "[g]overnment of the United States cannot permit the exercise within the United States of the police power of any foreign government."[214]

2. Canadian Practice which Illustrates a Norm Against Abductions

Canadian practice in cross-border abduction cases also supports a norm against abductions. Canada receives fifty percent of all federal extradition requests.[215] Canada provides sixty percent of

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208. *Id.* at 290.

209. When a Justice Department and two Internal Revenue officials arrested a suspected bootlegger on his boat in British waters off Bimini in 1920, the U.S. government reprimanded the agents, suspended them, disavowed their unauthorized action, and quashed the bootlegger's prosecution. *See* 1 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW 624 (1940). In another incident a U.S. Coast Guard boatswain seized two rum-running vessels close to Cat Cay and took them and their crew back to Florida for trial. *Id.* at 625. After the British Vice-Consul in Miami presented a request for the boatswain's extradition to the Bahamas, the two governments reached a satisfactory compromise including the return of the ships and their cargoes, dismissal of the crew members' prosecution, and an official United States expression of regret. *Id.*

210. 1933-34 ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES 250-51 (H. Lauterpacht ed., 1940).

211. *Id.*

212. *Id.*

213. *Id.*

214. *See U.S. Rejects Soviet Charges Concerning Refusal of Two Russian Teachers to Return to Soviet Union*, 19 DEP'T ST. BULL. 251, 253 (1948).

215. Brief of the Government of Canada as Amicus Curiae in Support of Respondent at 13, United States v. Álvarez-Machain, 112 S. Ct. 2188 (1992) (No. 91-712) [hereinafter Canada Amicus Brief].

all extraditions to the United States in response to requests made by our states (as opposed to the federal government).[216]

Canada frequently and consistently reiterates its position that transborder abductions to the United States violate both Canada's sovereignty and the United States-Canada extradition treaty.[217] The Canadian Amicus Brief in *Álvarez-Machain* discusses several such abduction cases.[218]

Sydney Jaffe's abduction, for example, is the case that triggered the strongest Canadian reaction.[219] On September 24, 1981, U.S. bounty hunters, allegedly at Florida's instigation, abducted Jaffe from Toronto and brought him to Florida, where he was tried and convicted of fraud.[220] The Canadian government objected to Jaffe's arrest and imprisonment in fifteen diplomatic notes between 1981 and 1986.[221] In 1983 Canada filed a *habeas corpus* action on Jaffe's behalf.[222] The U.S. Departments of Justice and State requested the Florida Probation and Parole Commission to grant Jaffe an early release, and Jaffe returned to Canada in 1983.[223]

During the furor over the *Jaffe* case, and again in 1992, Canada solicited statements from other states regarding their positions on official transborder abductions.[224] Austria, Britain, Finland, Germany, The Netherlands, Norway, New Zealand, Sweden, and Switzerland all stated that they would protest against such abductions as a violation of their sovereignty.[225] Switzerland objected that such an abduction contravened the "loyalty and good faith" principle of international law.[226] Australia, Britain, Norway, Sweden, and New Zealand considered transborder abductions to be a

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216. *Id.* at app. 1a, 3a (Statement of Secretary of State George P. Shultz to the State of Florida Probation and Parole Commission, *In re Jaffe*, June 22, 1983).

217. Treaty of Extradition, Dec. 3, 1971, U.S.-Can., 27 U.S.T. 985.

218. Canada Amicus Brief, *supra* note 215, at 9-11, *Álvarez-Machain* (No. 91-712).

219. *See* Jaffe v. Smith, 825 F.2d 304 (11th Cir. 1987); Canada Amicus Brief, *supra* note 215, at 10-12, app. A, *Álvarez-Machain* (No. 91-712); *see also* Wade A. Buser, Comment, *The Jaffe Case and the Use of International Kidnapping as an Alternative*, 14 GA. J. INT'L & COMP. L. 357 (1984).

220. Jaffe v. Boyles, 616 F. Supp. 1371, 1373 (W.D.N.Y. 1985).

221. Canada Amicus Brief, *supra* note 215, at 11 n.5, *Álvarez-Machain* (No. 91-712).

222. *Id.*

223. *Id.* at 11.

224. *Id.* at 8.

225. *Id.*

226. *Id.*

violation of bilateral extradition treaties.[227] Britain, Finland, Germany, and Sweden would demand the abducted person's return.[228] Most notably, if their officials carried out the abduction, Austria, Finland, The Netherlands, Norway, Sweden, and Switzerland believed that the abducted person should be repatriated.[229]

These incidents demonstrate that U.S., Canadian, and international practice has contributed to two critical customary law rules. One rule forbids law enforcement activity by one state without permission in the territory of another state. The second rule forbids official abductions from a country's territory without its permission.

They also demonstrate the corollary norm that a nation in which an abduction has occurred has the right to demand the abducted person's return; and, more importantly, when the injured state makes such a demand, the abducting state must comply.[230] Failure to comply with such a demand is a further breach of international law.[231]

B. U.S. Assent to Customary International Law Restricts U.S. Courts' Jurisdiction

The U.S. Supreme Court, in *The Paquete Habana*,[232] firmly established that customary international law is U.S. law.[233] It is also federal law, and binding on the states.[234] The United States has not only assented to the customary international law norm against law enforcement activity in another state,[235] but actively participated in its establishment.[236] Therefore, the United States has assented to a norm which prohibits extraterritorial abductions by its agents without the permission of the other country.

Since the United States lacks the authority to abduct abroad,

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227. *Id.*

228. *Id.*

229. *Id.*

230. *See* RESTATEMENT, *supra* note 189, § 432, cmt. c; Mann, *supra* note 183, at 411; O'Higgins, *supra* note 29, at 293-96.

231. *See* Mann, *supra* note 183, at 411.

232. 175 U.S. 677 (1900).

233. *See id.* at 700; RESTATEMENT, *supra* note 189, § 111(1).

234. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964); RESTATEMENT, *supra* note 189, § 111 reporters' note 2.

235. *See supra* text accompanying notes 192-231.

236. *See supra* text accompanying notes 192-231.

its courts should lack personal jurisdiction over those abducted. The U.S. Supreme Court has agreed.

In *Cook v. United States*,[237] the Supreme Court held that U.S. courts lacked personal jurisdiction over a ship seized in violation of a treaty which limited U.S. territorial authority.[238] The Court reasoned that, without the authority to seize, the United States had no jurisdiction over the subjects.[239]

Even though *Cook* involved treaty law, rather than customary international law, scholars have argued that there is no logical or legal difference between the two types of international law.[240] Therefore, *Cook*'s holding that U.S. courts have no jurisdiction over defendants seized in violation of a treaty should also apply to customary international law violations.[241]

The actual existence of an international norm of *male captus, bene detentus* might impair this conclusion's validity. Nevertheless, state practice evincing its existence is, at best, inconclusive.[242]

C. *Is* Male Captus, Bene Detentus *International Law?*

The exercise of personal jurisdiction by a court over a criminal defendant brought before it by official abduction from the territory of a nonconsenting country which clearly violates international law is, some commentators have ruefully observed, a norm supported by state practice.[243] Others have announced the rule's existence without criticism.[244] Close examination of actual state practice and other sources, however, suggests that *male captus, bene detentus* may not extend to non-consensual official abductions.

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237. 288 U.S. 102 (1933).

238. *Id.* at 121-22. For a brief discussion of *Cook*, see *supra* text accompanying notes 165-75.

239. *Cook*, 288 U.S. at 121.

240. Dickinson, *supra* note 69, at 237; Garcia-Mora, *supra* note 13, at 445-46.

241. Two cases which reach the opposite result are The Ship Richmond, 13 U.S. (9 Cranch) 102 (1815) and The Merino, 22 U.S. (9 Wheaton) 391 (1824). However, these cases were decided when customary international law was not the equivalent of U.S. treaties or statutes, before the Court decided *The Paquete Habana* in 1900.

242. *See infra* text accompanying notes 243-69.

243. *See, e.g.*, RESTATEMENT, *supra* note 189, § 432, reporters' note 2; M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 190 (2d rev. ed. 1987).

244. *See, e.g.*, Malvina Halberstam, *In Defense of the Supreme Court Decision in* Álvarez-Machain, 86 AM. J. INT'L L. 736, 737-38 (1992); John M. Rogers, *Prosecuting Terrorists: When Does Apprehension in Violation of International Law Preclude Trial?*, 42 U. MIAMI L. REV. 447, 449 (1987).

1. Commentators' Analysis

Some commentators who have examined the jurisprudence behind *male captus, bene detentus* conclude that the doctrine may not extend to non-consensual official abductions.

For instance, Professor Brownlie states the general rule that, "[w]hile international responsibility may arise as a consequence of the illegal seizure of offenders, the violation of the law does not affect the validity of the subsequent exercise of jurisdiction over them."[245] But he adds that "[t]his is the view adopted by courts in many states and by some writers. Much depends on the existence of *independently sustainable grounds for the actual exercise of jurisdiction or of a waiver of a claim to reconduction.*"[246] Therefore, Brownlie concludes that the general rule should not apply when a country expressly objects to an abduction in its territory.

Brownlie refers his readers to four sources. One of these, the Harvard Research in International Law's *Draft Convention on Jurisdiction with Respect to Crime*, supports his exception and challenges the doctrine of *male captus, bene detentus*.[247] The authors of the *Draft Convention* admitted that in Britain, the United States, and perhaps elsewhere national law did not accord with its proposal.[248] They cited *Ker v. Illinois*,[249] *State v. Brewster*,[250] and *The Ship Richmond*,[251] among other sources as not in accord with their article, but cited other national and international practices for support.[252] They certainly did not argue that *male captus, bene detentus* was an established international norm.[253]

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245. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 317 (4th ed. 1990) (citations omitted).

246. *Id.* at 317. n.6 (emphasis added).

247. *See* Harvard Research in International Law, *Draft Convention on Jurisdiction with Respect to Crime*, art. 16, *in* 29 AM. J. INT'L L. 437, 442 (Supp. 1935) [hereinafter *Draft Convention*] "[N]o State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated by such measures." *Id.*

248. *Id.* at 628.

249. 119 U.S. 436 (1886).

250. 7 Vt. 117 (1835).

251. 13 U.S. (9 Cranch) 102 (1815).

252. *See Draft Convention, supra* note 247, at 628-32.

253. The authors' criticism of U.S. law could be applied to *Álvarez-Machain*. "It is believed that the distinction made in the United States law between arrests in violation of treaty and arrests in violation of customary international law is arbitrary and unsound, prompted by a shortsighted desire to prosecute the person of whom custody has been ille-

Professor Dickinson and Mr. O'Higgins, the second and third of Brownlie's sources, also support Brownlie's conclusion that *male captus, bene detentus* does not apply when a country objects to an abduction in its territory.[254] Dickinson was scathingly critical of *Ker* and its predecessors,[255] while O'Higgins took pains to show that cases such as *Ex parte Scott*[256] did not involve defendants whose presence before the courts violated international law.[257] Indeed, he expressed considerable doubt whether a British court would exercise jurisdiction over a criminal defendant whose mode of arrival before it violated international law.[258]

Professor Brownlie's fourth and final source was an article on the *Eichmann* trial by J.E.S. Fawcett. Fawcett, after analyzing many cases, stated "the demand for the reconduction of the offender must prevail over the right of the State, having custody of him, to try him for an offence against its law, for the practical reason that the State cannot both comply with the demand and retain him for trial."[259]

Fawcett took pains to demonstrate that *Ker*, *Ex parte Scott*, and similar common law cases involved unofficial abductions without breaches of international law. Therefore, the rule of *male captus, bene detentus* which they exemplified should not extend to cases involving official abductions violating international law.[260] The *Eichmann* case, he noted, involved a withdrawn Argentine demand for Eichmann's return, and Eichmann's crimes were *jure gentium*.[261]

Another commentator's analysis led to the opposite conclusion. F.A. Mann asserted, of criminal jurisdiction over a defendant abducted from another country, that "[i]t would be idle to deny that such jurisdiction exists, and it exists however abhorrent the circumstances of the abduction may be."[262] Although Mann

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gally obtained . . . ." *Id.* at 631.

254. *See* Dickinson, *supra* note 69, at 231; O'Higgins, *supra* note 29, at 281.

255. *See* Dickinson, *supra* note 69, at 238-41.

256. 109 Eng. Rep. 166 (K.B. 1824).

257. *See* O'Higgins, *supra* note 29, at 281-89.

258. *Id.* at 288-89.

259. J.E.S. Fawcett, *The* Eichmann *Case*, 38 BRIT. Y.B. INT'L L. 181, 199 (1964) (citations omitted).

260. *Id.* at 194-96.

261. *Id.* at 199-200.

262. *See* Mann, *supra* note 183, at 412. His examples of state practice, however, are limited. *Id.* at 412-14. The first was the *Eichmann* case, one in which the injured country, Argentina, withdrew its demand for the abducted person's return and where the defendant's

acknowledged that courts have exercised jurisdiction in abduction cases, he argued that courts should not exercise jurisdiction.[263] Further, he provided evidence of state practice which supports a conclusion that the rule of *male captus, bene detentus* should not apply when a state objects.[264]

Mann reported that when the Netherlands demanded the return of a defendant in German custody, the German court stated "that public international law did not preclude the defendant's prosecution, but the Dutch right of restitution . . . 'could preclude the exercise of German jurisdiction.' "[265]

Male captus, bene detentus permits a state to exercise jurisdiction over a criminal defendant abducted from the territory of a nonconsenting country. The proposition that *male captus, bene detentus* is a customary rule of international law at best remains to be proven.

2. United States Practice

United States practice until *Álvarez-Machain* evinced a presumption of the rule's nonexistence, and a keen awareness that extraterritorial law enforcement activity might violate international law.[266] In a provision of the Maritime Drug Law Enforcement Prosecution Improvements Act of 1986, for example, the U.S. Congress assumed that an arrest by U.S. officials which violated international law would divest a U.S. court of its jurisdiction over the arrested person(s).[267] Obviously, Congress assumed that violations

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crimes invoked universal jurisdiction. *See* Fawcett, *supra* note 259, at 199-200. On universal jurisdiction, see GILBERT, *supra* note 29, at 222-23. Next are Ker v. Illinois, 119 U.S. 436 (1886), Frisbie v. Collins, 342 U.S. 519 (1952), and R. v. Officer Commanding Depot Battalion Colchester, ex parte Elliott, [1949] 1 All E.R. 373 (K.B.). The first two involved no official transnational abduction, and *Ker* not only lacked a demand for the abducted person's return by Peru, but was pure dictum. In the third case, a British deserter in Belgium found himself apprehended by two Belgian policemen and British military police. *Id.* at 373; *see also* O'Higgins, *supra* note 29, at 286. The case, therefore, involved no international law violation and no Belgian demand for the deserter's return.

263. Mann, *supra* note 183, at 414-21.

264. *Id.* at 421 n.72.

265. *Id.*

266. For keen awareness see FBI AUTHORITY TO SEIZE SUSPECTS ABROAD: HEARING BEFORE THE SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE HOUSE COMM. ON THE JUDICIARY, H.R. DOC. NO. 134, 101st Cong., 1st Sess. 22, 31 (1989) (statement of Abraham D. Sofaer, Legal Adviser, U.S. Dept. of State) [hereinafter FBI HEARINGS].

267. 46 U.S.C. app. § 1903(d) (1988).

A claim of failure to comply with international law in the enforcement of this

of international law in the enforcement of other statutes would divest courts of jurisdiction, and that defendants arriving before such courts as a result of international law breaches could invoke these violations.

3. *Male Captus, Bene Detentus* Is Not International Law

Official abductions in the territory of other nations, without those countries' permission, plainly violate customary international law.[268] Equally plain is the right of an injured country to demand the abducting state to return the abducted person.[269] Failure to comply with such a demand is an additional breach of international law. State practice evidencing a customary law norm permitting an abducting country's courts to retain such jurisdiction over a defendant is conspicuously absent. *Ker v. Illinois*, invariably offered as evidence of such U.S. practice, does not address abductions breaching international law. Yet, there is direct evidence that the executive branch of the U.S. government condemns nonconsensual extraterritorial abductions as breaches of international law. Similarly, the legislative branch assumes that such breaches divest U.S. courts of jurisdiction over criminal defendants.

IV. THE *CHARMING BETSY* DOCTRINE SHOULD TRUMP *KER*

The *Charming Betsy*, a schooner bound in 1800 from Danish St. Thomas to the French island of Guadaloupe in the West Indies, inadvertently prompted a famous canon of legal construction.[270] The U.S.S. *Constellation*, patrolling the islands to enforce a non intercourse act forbidding trade between the United States and France or her possessions,[271] stopped and seized the *Charming Betsy*, which was owned by a former U.S. citizen who had moved to St. Thomas and adopted Danish citizenship.[272] On appeal of a

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Act may be invoked solely by a foreign state, and a failure to comply with international law shall not divest a court of jurisdiction or otherwise constitute a defense to any proceeding under this Act.

Id.; *see also* Lowenfeld, *supra* note 106, at 480 n.188; Semmelman, *supra* note 13, at 557.

268. *See supra* text accompanying notes 189-229; *see also* Mann, *supra* note 183, at 407 ("A state which authorizes the abduction of a person from the territory of another sovereign State is guilty of a violation of public international law.").

269. *See supra* text accompanying notes 230-31.

270. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 69 (1804).

271. Act of February 27, 1800, 2 Stat. 7.

272. *The Charming Betsy*, 6 U.S. (2 Cranch) at 65.

lower court's decision that the *Charming Betsy* be restored to its owner, the Supreme Court had to determine, using standards of international law, the actual citizenship of the owner.[273] The Court decided that the owner was Danish, and that the *Charming Betsy* must be returned to him.[274] One of the questions the Court had to answer in reaching its decision was whether the Nonintercourse Act, which applied by its terms to persons resident in the United States or under its protection, should apply to a person, originally a U.S. citizen, who had sworn allegiance to another sovereign and resided in its territory. Chief Justice Marshall applied international law standards regarding diplomatic protection to decide this question and, in the process, enunciated what has since been called the *Charming Betsy* doctrine: "It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[275]

Since 1804, the Court has employed this principle repeatedly to construe statutes.[276] This same principle should control when a common law canon like the *Ker-Frisbie* doctrine, developed by the Court solely in the context of domestic, due process issues, conflicts with international law. When the executive branch maintains that official nonconsensual abductions in other nations are international law violations,[277] and the legislative branch presumes jurisdictional divestment,[278] the judiciary should respect these branches' powers to shape U.S. practice in international law by applying the appropriate canon to avoid an international law violation.[279]

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273. *Id.* at 120-21.

274. *Id.*

275. *Id.* at 118. *See* RESTATEMENT, *supra* note 189, § 114 (1987). For a comprehensive discussion of this principle's ramifications, see Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103 (1990).

276. *See, e.g.*, Weinberger v. Rossi, 456 U.S. 25, 33 (1982) (finding executive agreements to be treaties within the meaning of the word treaties in a statute); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21 (1963) (interpreting the National Labor Relations Act to avoid conflict with customary maritime law); Lauritzen v. Larsen, 345 U.S. 571, 578 (1953) (interpreting the application of the Jones Act to foreign seamens' claims).

277. *See* FBI HEARINGS, *supra* note 266, at 31.

278. *See supra* text accompanying notes 267-68.

279. For the Court's own acknowledgement that all branches of the U.S. government shape customary international law, see The Nereide, 13 U.S. (9 Cranch) 388, 422-23 (1815). Chief Justice Marshall, discussing the seizure of goods in retaliation for another nation's confiscation of U.S. property, said:

> It may be the policy of the nation to avenge its wrongs in a manner having no affinity to the injury sustained, or it may be its policy to recede from its full

V. CONCLUSION

The *Ker-Frisbie* doctrine originated in dictum. Further, the common law sources cited in its support, like the dictum itself, were not factually similar. They applied only to unofficial extraterritorial abductions which were unprotested by the nations in whose territory they took place. Neither the *Ker* case nor its common law forbears involved an actual breach of international law. In addition, *Ker*'s invocation by the U.S. Supreme Court from 1886 to 1992 always served as a device to defeat due process claims of criminal defendants abducted *within* the United States. When advanced in the two cases of that period which involved treaty violations, the Court expressly found *Ker-Frisbie* irrelevant.

Whether an international law norm of *male captus, bene detentus* exists has yet to be proven. A significant part of the state practice cited as evidence for this rule's existence is a distorted reading of *Ker v. Illinois*, which is completely unjustified by its holding or the actual dicta on forcible abductions itself.

The *Ker-Frisbie* doctrine lacks international content. The doctrine also bears no relationship to existing international law norms that prohibit unilateral abductions. It is a long-standing principle that U.S. courts should interpret domestic law, including *Ker-Frisbie*, in a way that it does not conflict with international law. All of these factors compel the conclusion that the *Ker-Frisbie* doctrine does not preserve our courts' jurisdiction to try criminal defendants whose abductions abroad breach international law and whose return the countries injured by such breaches demand.

> rights and not to avenge them at all. It is not for its Courts to interfere with the proceedings of the nation and to thwart its views. It is not for us to depart from the beaten track prescribed for us, and to tread the devious and intricate path of politics. Even in the case of salvage, a case peculiarly within the discretion of Courts, because no fixed rule is prescribed by the law of nations, congress has not left it to this department to say whether the rule of foreign nations shall be applied to them, but has by law applied that rule. If it be the will of the government to apply to Spain any rule respecting captures which Spain is supposed to apply to us, the government will manifest that will by passing an act for the purpose. Till such an act be passed, the Court is bound by the law of nations which is a part of the law of the land.

Id.; *see also* The Paquete Habana, 175 U.S. 677, 700 (1900) (announcing, again, that international law is United States' law and that courts must ascertain it, in the absence of "controlling executive or legislative act or judicial decision," from state practice).