

# REFUSAL TO EXTRADITE: AN EXAMINATION OF CANADA'S INDICTMENT OF THE AMERICAN LEGAL SYSTEM

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## INTRODUCTION

When alleged drug trafficker Daniel Jamieson fled to Canada seeking refuge from Michigan's stiff mandatory minimum sentence, Canada chose to let him stay there.<sup>1</sup> While Jamieson remains incarcerated in a Canadian prison, he awaits the Supreme Court of Canada's decision whether or not to hear the United States' final appeal in favor of extradition.<sup>2</sup> In choosing not to extradite an American criminal refugee, Canada openly indicts the entire American justice system and the severity of its criminal penalties for drug offenders.

On November 13, 1986, Daniel Jamieson was arrested for selling 273 grams of a cocaine-containing substance, valued at \$20,000, to an undercover police officer in Farmington, Michigan.<sup>3</sup> Jamieson was twenty-six years old when he was charged with drug trafficking, his first alleged offense.<sup>4</sup> If convicted, he would have received at least twenty years in prison without parole under Michigan's minimum-sentencing law, America's toughest. Fearing his fate, Jamieson escaped to Montreal in April of 1987, shortly after his preliminary hearing and release on bail.<sup>5</sup> He was arrested in Montreal while working as a doorman in a bar on September 12, 1990 and has fought extradition to Michigan ever since.<sup>6</sup>

The implications of Canada's refusal to extradite are enormous when viewed against the background of international law, whose tenets are primarily based upon individual sovereignty. Moreover, history proves time

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\* J.D. 1996. The author would like to dedicate this work to Sonia Abramson in appreciation of her unending love, encouragement, and support.

<sup>1</sup> Anne Swardson, *Quebec Court Finds a U.S. Drug Sentence Shocking to Canadian Sensibility*, THE WASH. POST, Sept. 3, 1994, at A13.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Canada Won't Extradite Drug Trafficker to U.S.* (NPR radio broadcast, Sept. 21, 1994) [hereinafter *NPR*].

<sup>5</sup> Swardson, *supra* note 1.

<sup>6</sup> *Id.*

and again what can occur when these fundamental principles are ignored. Given President Clinton's tough stance on crime in the United States, such as his "three strikes and you're out" program,<sup>7</sup> Canada's refusal to extradite is sure to create animosity and tension between the two countries, in addition to setting a poor example for the international community in terms of mutual respect for differing policies among nations.

Part I of this Recent Development will outline the *Jamieson* case and the United States' extradition policy. Part II will discuss the international law issues that are raised by the Canadian Appellate Court's decision. Part III will illustrate the implications of Canada's decision on the American criminal justice system and its policy-making.

## I.

### A. *Case History*

Once incarcerated in Montreal, Jamieson began his battle against extradition in the Canadian court system. In 1992, the issue was handled by then-Justice Kim Campbell. After a meeting with Jamieson's attorney and an extensive review of the record and various written submissions, including those from the U.S. National Association of Criminal Defense Lawyers and other groups opposed to minimum sentencing laws, Justice Campbell opted, like many European countries<sup>8</sup> in recent years, to return Jamieson to his hunters.<sup>9</sup> Jamieson then brought an application for habeas corpus with certiorari in aid to quash the decision of the Minister, which was dis-

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<sup>7</sup> See, e.g., H.R. 3355, 103d Cong. 2d Sess. §§ 2408, 5111 (1994); Leslie Phillips, *Clinton Pitch: Hardball/Three Strikes' Plan Targets Repeat Felons*, USA TODAY, Jan. 26, 1994, at 49.

<sup>8</sup> See, e.g., *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A), 11 Eur. H.R. Rep. 439 (1989); Judgment of Dec. 14, 1987 (Gacem), Conseil d'etat, 62 La Semaine Juridique [J.C.P.] IV 86 (1988) (refusing to extradite in view of an existing death penalty).

<sup>9</sup> *United States v. Jamieson* (1992), 73 C.C.C. 3d 460, 1992 R.J.Q. 561, 16 W.C.B. 2d 70 (Que. C.A. 1992). On June 11, 1992, the Supreme Court of Canada denied leave for a further appeal to that court. S.C.C. 22879, June 11, 1992 [C.C.C. loc. cit. vi, 52 Q.A.C. 79n, 139 N.R. 398]. In deciding to surrender Jamieson, Campbell pointed out that Canada is a party to two significant multilateral conventions: the Single Convention on Narcotic Drugs and the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, emphasizing Canada's commitment to extradite those with serious drug offenses.

missed.<sup>10</sup> Jamieson appealed the Court's decision, and in August 1994, Quebec's Court of Appeals with Judge Morris J. Fish presiding, ruled that Jamieson could remain in Canada and granted his application for habeas corpus with certiorari in aid. At the prosecutor's request, the Supreme Court of Canada temporarily suspended the judgment shortly after it was issued. As a result, Jamieson, now eight years older, remains in a Montreal jail until Canada's highest court settles the issue.<sup>11</sup> The wait for a decision could last another year.<sup>12</sup>

Pierre Poupart, Jamieson's attorney, compares Jamieson's Michigan sentence to "sending a human being to sheer inferno" for twenty years, calling the punishment for his offense "absurd, cruel, and unusual."<sup>13</sup> Judge Morris J. Fish found harsher words claiming, "It is my view that a majority of . . . reasonably well-informed Canadians would consider that appellant (Jamieson) faces a situation in Michigan that shocks the conscience and is simply unacceptable."<sup>14</sup>

In Canada, the discretionary authority to surrender fugitives is vested entirely in the executive, and the role of the judiciary is confined to a review within the boundaries of Canada's domestic constitutional requirements. While Judge Fish stated that Section 7 of the Canadian Charter of Rights and Freedoms<sup>15</sup> was not violated from a procedural standpoint, he found that extradition would deprive Jamieson of his substantive right to liberty without compliance with the principles of fundamental justice.<sup>16</sup> The judge stated that sending Jamieson to Michigan would violate his human rights under

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<sup>10</sup> *United States v. Jamieson*, 93 C.C.C. 3d 265 (Que. C.A. 1994), *appeal docketed*, No. 24253 (Can. Oct. 25, 1994). See note 9 for earlier appeal and dismissal of leave to appeal by the Supreme Court of Canada.

<sup>11</sup> Swardson *supra* note 1.

<sup>12</sup> *Id.*

<sup>13</sup> *NPR, supra* note 4.

<sup>14</sup> *United States v. Jamieson*, 93 C.C.C. 3d 265 (Que. C.A. 1994), *appeal docketed*, No. 24253 (Can. Oct. 25, 1994). The court adopted the "shocks the Canadian conscience" test as a result of the finding in *Kindler v. Canada*, 2 S.C.R. 779 (Minister of Justice 1991), which applied the test with regard to the imposition of the death penalty by foreign jurisdictions. Other considerations in applying the test include comity and the security within Canada. See also *United States v. Allard*, 33 C.C.C. (3d) 501 (Can. 1987), adding that the "fugitive must establish that he or she faces a situation that is simply unacceptable." *Id.*

<sup>15</sup> CAN. CONST. (Constitutional Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 7 Canadian Charter of Rights and Freedoms, Constitution Act, 1982 (UK), ch. 11, sched. B, 1985 R.S.C., App. II, No.44. (created to prevent U.S. extradition).

<sup>16</sup> *Id.*

Section 12 of Canada's Charter of Rights and Freedoms, which protects against cruel and unusual punishment.<sup>17</sup> The standard of review for Section 7, in view of Section 12, demands that the court find that the severity of the Michigan laws would "offend the Canadian sense of what is right, and fair, and just."<sup>18</sup> Even the single dissenting Judge on the appeals court noted the "repressive philosophy" embodied in Michigan's minimum sentencing laws.<sup>19</sup>

Michigan's statute includes a deviation clause which allows for a lesser sentence in the presence of substantial and compelling reasons.<sup>20</sup> On review, however, the court found that Jamieson stood no realistic chance of establishing such reasons.<sup>21</sup> Therefore, the court found that the "inescapable question in this case . . . is whether an average informed Canadian would consider it shocking and unacceptable to surrender appellant to the State of Michigan to spend much of his adult life in the penitentiary for having as a young man with no previous convictions, sold 270 grams of a

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<sup>17</sup> 17 *United States v. Jamieson*, 93 C.C.C.3d 265 (Que. C.A. 1994), *appeal docketed*, No. 24253 (Can. Oct. 25, 1994).

<sup>18</sup> *United States v. Jamieson*, 93 C.C.C. 3d 265 (Que. C.A. 1994), *appeal docketed*, No. 24253 (Can. Oct. 25, 1994). Section 7, which guarantees the right of life, liberty, and security of the person . . . except in accordance with the principles of fundamental justice, and section 12 are often analogized to the U.S. Bill of Rights. "Indeed, in the early years of Charter interpretation, Section 7 was often called the 'due process' clause . . . and it is now construed as providing not only 'procedural', but also 'substantive' due process." William A. Schabas, *Decision: Decision of Regional And Foreign Court*, 87 A.J.I.L. 128, 129 (1993).

<sup>19</sup> *United States v. Jamieson*, 93 C.C.C. 3d 265 (Que. C.A. 1994), *appeal docketed*, No. 24253 (Can. Oct. 25, 1994). Dissenting Judge Baudouin also points out that Jamieson admitted to having trafficked cocaine for two years prior to arrest and that two guns were found in his car at the time of arrest. Further, the judge notes that the Michigan law was conceived by democratically elected officials battling a serious drug trafficking problem within the state. He argued further that the statute is not arbitrary because the severity of the sentence is commensurate with the quantity and the type of drugs involved. The judge deemed the Michigan law a "strict philosophy of societal self-defense." Finally, the judge brought up policy considerations of respecting treaties entered into by Canada and the probability of a criminal floodgate.

<sup>20</sup> MICH. COMP. LAWS ANN. § 333.7401(4) (1992) (MICH. STAT. ANN. § 14.15 (Callaghan 1994)). According to the decision in *People v. Hill*, 480 N.W. 2d 913 (1991)(Mich. App.), the departure from the legislatively prescribed 20-year sentence is only permitted where these "substantial and compelling reasons" were, in addition, both "objective" and "verifiable."

<sup>21</sup> *United States v. Jamieson*, 93 C.C.C. 3d 265 (Que. C.A. 1994), *appeal docketed*, No. 24253 (Can. Oct. 25, 1994).

mixture containing cocaine, of unknown purity to a police officer.”<sup>22</sup> The court was satisfied that a majority of the Canadian people would find such an outcome abhorrent and ruled accordingly.<sup>23</sup>

Jamieson has already served more time in the Canadian prison than if he had been tried and convicted under Canadian law.<sup>24</sup> The Appellate Court in Quebec has not abandoned the idea of releasing Jamieson to Michigan authorities should they assure a more lenient sentence. However, the prosecutor’s office in Oakland County, Michigan, who requested the extradition has given no such assurances.<sup>25</sup> If Canada’s Supreme Court grants certiorari and allows the Appellate Court’s ruling to stand, an important precedent will be set where Canadian courts may have a most difficult task, actually sitting in judgment of the American criminal justice system.

### *B. U.S. Policy on Extradition: A Legal History*

Traditionally, United States extradition law was based upon individual treaties between nations:

Apart from the provisions of treaties on the subject, there exists no well-defined obligation on one independent nation to deliver to another fugitives from its justice; and, though such delivery has often been made, it was upon the principle of comity. The right to demand it has not been recognized as among the duties of one government to another which rest upon established principles of international law.<sup>26</sup>

Extradition is a federal remedy, and no state may request it, even though the federal government may demand extradition for a crime committed against state law.<sup>27</sup> Therefore, even if Michigan sought the extradition of Jamieson on its own behalf, the actual request must be negotiated through the federal

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See *NPR*, *supra* note 4.

<sup>25</sup> *Id.*

<sup>26</sup> *United States v. Rauscher*, 119 U.S. 407, 407-08 (1886) (stating division in opinion between judges of circuit court of the United States for the Southern District of New York outlining extradition policy in view of international obligations).

<sup>27</sup> *Id.*

government, a procedure which has been followed in this case.

When the United States is a party to a treaty it becomes the law of the land and *all* courts are to take judicial notice.<sup>28</sup> Under international law, as recognized by the United States, any nation has the right to grant asylum to fugitives rather than surrender them.<sup>29</sup> Actions between the United States and Canada are governed by the Treaty on Extradition; the most recent amendment is from 1988.<sup>30</sup> This treaty has been continually revised, due largely to a desire to "increase United States efforts to negotiate updated extradition treaties relating to narcotics offenses with each major drug-producing country, particularly those in Latin America."<sup>31</sup> Where international law provides the right to grant asylum, these treaties function to create exceptions to this right.

The Treaty on Extradition provides that an offense is extraditable if punishable by imprisonment for more than one year in both countries or any greater punishment.<sup>32</sup> Jamieson's crime is punishable in Canada by five years of imprisonment and in Michigan by a minimum of twenty years confinement<sup>33</sup> with no chance of parole in the absence of compelling circumstances.<sup>34</sup> Article III of the Treaty provides that "the requested country has discretion to extradite for a crime committed outside the requesting country's territory, even though the requested country's laws would not confer jurisdiction for a similar crime (dual jurisdiction)."<sup>35</sup> The Treaty also stipulates that if someone has charges brought against him or her

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<sup>28</sup> *Id.*

<sup>29</sup> *Jaffe v. Smith*, 825 F.2d 304, 306 (11th Cir. 1987).

<sup>30</sup> Treaty on Extradition, Dec. 3, 1971, U.S.-Can, 27 U.S.T. 983 (amended Jun. 28, July 9, 1974, 27 U.S.T. 1017; amended Jan. 11, 1988, T.I.A.S. No. 8237).

<sup>31</sup> 18 U.S.C. § 3181, Pub.L. 99-93, Title I, § 133, Aug. 16, 1985, 99 Stat. 420 (outlining all bilateral treaties of extradition made between U.S. and other countries).

<sup>32</sup> Canada-United States: Protocol Amending the Treaty on Extradition, Jan. 11, 1988, U.S.-Can., 27 I.L.M. 423 [reproduced from text given to International Legal Materials by Canadian Department of External Affairs] (Article I replaces Article 2 of the Treaty; fiscal crimes are also extraditable) [hereinafter Canada Protocol]. On Aug. 2, 1991, the Senate adopted a resolution of ratification giving its advice and consent to this treaty. 137 CONG. REC. § 12131 (daily ed. Aug. 2, 1991). This condition, referred to as "dual criminality," applies to all extradition requests, regardless of whether the individual sought is a U.S. citizen, a citizen of the state requesting extradition, or a citizen of a third state. U.N. GAOR, 100th mtg. at 8, U.N. Doc A/C.6/SR.100 (1948).

<sup>33</sup> Mich. Comp. Laws § 333.7401(2)(a) (1994).

<sup>34</sup> Mich. Comp. Laws § 333.7401(4) (1994).

<sup>35</sup> Canada Protocol, *supra* note 32.

in the requested country, or is serving a sentence therein for an offense other than that for which the request for extradition was made, the requested State may surrender the person sought. The requested State may also choose to postpone surrender until the conclusion of the proceedings or the service of the sentence imposed.<sup>36</sup> Relevant factors to be considered in deciding whether to extradite the person whose action is deemed to be a crime in both countries are as follows:

- (i) the place where the act was committed or intended to be committed or the injury occurred or was intended to occur;
- (ii) the respective interests of the Contracting Parties;
- (iii) the nationality of the victim or the intended victim; and
- (iv) the availability and location of the evidence.<sup>37</sup>

However, the American Embassy in Canada denies that the treaty is the only avenue by which the two governments may exchange criminals:

There is nothing in the texts of either the bilateral extradition treaty or the relevant multilateral conventions, or their negotiating record, which provides the basis for the assertion that these treaties are, or were ever intended to be, the exclusive means by which fugitive offenders can be transferred between Canada and the United States.<sup>38</sup>

The United States is also bound by multilateral treaties and Conventions which dictate extradition law. However, the United States is quick to reserve the right not to be bound where the agreement is not in accordance with the Constitution.<sup>39</sup> Similarly, the United States informs other Treaty signatories

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<sup>36</sup> *Id.* Article 7 of the original treaty was deleted and Article 5, regarding offenses committed while in the country of refuge, stands in its place.

<sup>37</sup> Canada Protocol, *supra* note 32 at 425. Article VII of the treaty notes the addition of these factors to be considered following Article 17. *Id.*

<sup>38</sup> Dept. of State File No. P91 0149-1190/1192. Note No. 133, dated May 23, 1991, further stated that the U.S. looked forward to a "cordial, growing, and mutually beneficial law enforcement cooperation relationship with the Government of Canada." *Id.*

<sup>39</sup> *E.g.*, Genocide Convention Implementation Act of 1987, 28 I.L.M. 754, 774-776. (1988) (confirming that power to bind United States in a treaty belongs to President coupled with Senate as well as asserting Constitution as supreme over Convention). [hereinafter Genocide Convention].

of a key part of United States extradition law, in that it reserves the right to refuse extradition where the act would not be a crime if committed within its borders.<sup>40</sup> The United Nations agreed that a state (or nation) also has the right to try its nationals for acts committed abroad as long as those acts are crimes within that state.<sup>41</sup> Importantly, the United States reserves the right to specific consent before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice.<sup>42</sup> This reservation exemplifies the United States' insistence on sovereignty and its ardent support for the principles of the U.S. Constitution.

## II. INTERNATIONAL LAW ISSUES RAISED

### A. Kidnapping

A serious trend within the United States and other countries is to resort to kidnapping when a requested country refuses to extradite.<sup>43</sup> The government may go after the criminal or send a "bounty hunter" to accomplish the mission of bringing an offender to justice. Treaties are prepared between countries expressly to avoid such outcomes.

Canada and the United States have dealt previously with this issue, in the case of *Jaffe v. Smith*.<sup>44</sup> In that case, Jaffe was convicted of land sale violations and failure to appear at trial by a Florida court. Jaffe secured bond through Accredited Surety & Casualty Company, and then fled to his home in Canada. The court prompted Accredited to seek out Jaffe by vacating the earlier judgment for payment on the bond, on the condition that Accredited place the money in escrow and produce Jaffe within ninety days. Two professional bail bond recovery agents (i.e., bounty hunters) achieved their goal. The bondsmen did not act pursuant to the Extradition Treaty between the United States and Canada, nor did they carry papers pertaining

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<sup>40</sup> *Id.* at 772-3. Article VII of this convention requires the parties considering requests for extradition to act in accordance with their own laws and treaties in force. *See also* Collins v. Loisel, 259 U.S. 309 (1922).

<sup>41</sup> U.N. GAOR 6th Comm., Agenda Item 32 at 500, U.N. Doc. A/760 & Corr. 2 (1948).

<sup>42</sup> Genocide Convention, *supra* note 39 at 774 (reserving sovereignty within the Convention affirming the criminality of genocide).

<sup>43</sup> *See, e.g.*, United States v. Verdugo-Urquidez, 939 F.2d 1341, 1348 (9th Cir. 1991); Ker v. Illinois, 119 U.S. 436, 444 (1886); United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 504 U.S. 655 (1992).

<sup>44</sup> *Jaffe v. Smith*, 825 F.2d 304 (11th Cir. 1987).

to Jaffe's extradition. Governmental actors were not involved in any way, either from the United States or Canada.<sup>45</sup> The defendant then filed a habeas corpus petition claiming that he was abducted from Canada in violation of the Extradition Treaty.<sup>46</sup> The Court denied his petition, stating that the Court was not concerned with the manner in which a criminal defendant "finds his or her way into the court."<sup>47</sup> The criminal defendant may not complain without proof that his/her abduction was a result of governmental action confirming and establishing a treaty violation. The defendant in *Jaffe* tried to use a breach of treaty theory in order to defeat the court's jurisdiction over him.<sup>48</sup> His plea was denied for failure to prove that his abduction, committed by professional bondsmen, had state's imprimatur.<sup>49</sup>

In *Jaffe*, the Extradition Treaty was found unviolated, and no deprivation of due process occurred.<sup>50</sup> The U.S. Court of Appeals held the defendant's substantive claim to be without merit.<sup>51</sup> The Court acknowledged a country's right to refuse to "deliver up such fugitives to another"<sup>52</sup> citing *U.S. v. Rauscher*<sup>53</sup> as its source of established international law. However, the court's main contention, based upon *Ker v. Illinois*,<sup>54</sup> was that "absent governmental action, either through a direct violation of a treaty or through circumvention of the treaty, a fugitive has no basis upon which to challenge

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<sup>45</sup> *Id.* at 305-07.

<sup>46</sup> *Id.* at 306.

<sup>47</sup> *Id.* at 307.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 308. The defendant also tried to establish that the bondsmen were working in conjunction with the state once they heard that Jaffe had returned to his home in Toronto, Ontario, Canada.

<sup>50</sup> *Id.* at 307.

<sup>51</sup> *Id.* at 306.

<sup>52</sup> *Id.*

<sup>53</sup> *U.S. v. Rauscher*, 119 U.S. 407 (1886). See also *supra* text accompanying note 26.

<sup>54</sup> *Ker v. Illinois*, 119 U.S. 436, 444 (1886). In this case, an agent of the U.S. was sent to Peru to bring back Ker, the necessary papers of procurement in hand. Once in Peru, the agent seized Ker, without mention of the papers to Ker or to the Peruvian government, and delivered Ker to U.S. officials. Since the agent did not act under color of the government nor did he profess to act under the treaty, the Court found that he was acting without pretense of U.S. authority. Ker was not permitted to challenge the legality of a U.S. trial. See also *United States v. Quesada*, 512 F.2d 1043, 1045 (5th Cir. 1975), *cert. denied*, 423 U.S. 946 (1975); *Frisbie v. Collins*, 342 U.S. 519, 522 (1952), *reh'g denied*, 343 U.S. 937 (1952).

his/her return to the prosecuting jurisdiction.”<sup>55</sup> The court was primarily concerned that a fugitive not escape justice because he/she was brought to trial against his/her will, sending a powerful message to would-be fugitives of the American justice system. Jamieson, were he kidnapped, would have to raise the Extradition Treaty as a barrier to a U.S. court’s personal jurisdiction over him.<sup>56</sup>

Currently, the United States views extradition treaties as mere formalities that leave a nation free to “ignore the comprehensive scheme of the treaty”<sup>57</sup> and kidnap an alleged criminal offender without consent or knowledge of the country denying an extradition request. The notion that kidnapping is permissible even where it violates a treaty blatantly frustrates the purpose of an extradition treaty. Therefore, the rules of a treaty must be held mandatory unless the host country chooses either to waive its treaty rights or to consent to intervention.<sup>58</sup>

Kidnapping may not always stem from refusal to extradite. In the case of *U.S. v. Alvarez Machain*,<sup>59</sup> the United States resorted to kidnapping when an extradition request attempt from Mexico would have been fruitless. Here, a doctor was abducted by Drug Enforcement Administration (DEA) agents for his participation in the kidnapping and murder of a DEA agent and the agents’s pilot, and brought to trial in the United States.<sup>60</sup> After numerous

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<sup>55</sup> *Jaffe v. Smith*, 825 F.2d 304, 307 (11th Cir. 1987).

<sup>56</sup> *See United States v. Verdugo-Urquidez*, 939 F.2d 1341, 1348 (9th Cir. 1991). There, the court insisted that it is “manifestly untrue that a court may never inquire into how a criminal defendant came before it.” *Id.* (citing *United States v. Rauscher*, 119 U.S. 407 (1886)). The court decided that *Rauscher* expressly rejected the broad reading of the *Ker/Frisbie* doctrine (proposition that once defendant is within United States jurisdiction, courts are not concerned with manner in which he/she arrived). The Ninth Circuit also stated that “*Ker* stands only for the proposition that a private kidnapping does not violate an extradition treaty. It does not address the question of a kidnapping authorized by the United States.” *Id.* at 1346.

<sup>57</sup> *Id.* at 1349 (finding that a treaty truly binds United States and defendant may object to personal jurisdiction after being kidnapped by the American government from a protecting country). This court’s rationale that kidnapping is impliedly forbidden by virtue of the spirit of the Treaty without explicit language is overturned by the Supreme Court’s decision in *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

<sup>58</sup> Andreas F. Lowenfield, Comment, *Still More on Kidnapping*, 85 A.J.I.L. 655, 658 (1991).

<sup>59</sup> *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

<sup>60</sup> *Id.* at 657. The DEA believes that the defendant prolonged special agent Enrique Camarena-Salazar’s life “so that others could further torture and interrogate him.” *Id.*

appeals, the United States Supreme Court decided that Alvarez-Machain's abduction did not violate the Extradition Treaty between the United States and Mexico.<sup>61</sup> The Court also held, applying the Ker-Frisbie doctrine, that United States courts had jurisdiction over a criminal defendant regardless of how he was brought to trial.<sup>62</sup> This case also created a huge controversy as to whether a court could obtain jurisdiction to prosecute over a defendant within the territorial jurisdiction of another country. The Court limited the application of *Rauscher*<sup>63</sup> "without acknowledging its general application as a rule of federal treaty law."<sup>64</sup> The court reasoned that although Alvarez-Machain was abducted forcibly and against the will of Mexico and its laws, the treaty between the United States and Mexico did not expressly prohibit abduction. Thus, the abduction did not expressly violate the treaty and no implicit ban could be inferred from the simple existence of the treaty.<sup>65</sup>

The implications of this landmark case suggest that the United States is primarily concerned with dealing justice from its own courts to fugitives, rather than abiding by the federal law which forbids kidnapping.<sup>66</sup> Canada,

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<sup>61</sup> *Id.* at 669. Noting the absence of express language in the Treaty concerning abduction, the Court states, "[T]o imply from the terms of this Treaty that it prohibits obtaining the presence of an individual by means outside of the procedures the Treaty establishes requires a much larger inferential leap, with only the most general of international law principles to support it." *Id.*

<sup>62</sup> *Id.* at 669-70.

<sup>63</sup> *Id.* at 660. While the rule in *Rauscher* states that a defendant may not be prosecuted in violation of the terms of an extradition treaty, the Supreme Court limited the holding to specialty, the doctrine prohibiting a defendant from being prosecuted for a crime other than the crime for which he had been extradited. "Unlike the case before us today, the defendant in *Rauscher* had been brought to the United States by way of an extradition treaty; there was no issue of a forcible abduction." *Id.*

<sup>64</sup> Viddell L. Heard, *United States v. Alvarez-Machain: Extraterritorial Abductions and the Rule of Law*, 41 UCLA L. REV. 1397, 1413 (1994).

<sup>65</sup> *United States v. Alvarez-Machain*, 504 U.S. 655, 669 (1992).

<sup>66</sup> 18 U.S.C. § 1201 (1988 & Supp. 1991) (covering abduction by federal agents). Under the statutes, kidnapping violates both customary international law and the laws of the country in which agents commit the act of abduction. *See also* *Valentine v. United States ex. rel. Neidecker*, 299 U.S. 5, 8-9 (1936) (explaining that United States may not extradite citizen in absence of statute or treaty obligation). The respondent in *Alvarez-Machain* cites the United Nations Charter and the Charter of the Organization of the United States asserting international censure of international abductions in that they should "inform the interpretation of the Treaty terms." 504 U.S. 655 at 666 (1992).

along with many other nations, was particularly outraged<sup>67</sup> by the finding in the *Alvarez-Machain* case, believing that the ruling conferred a new authority upon the United States to abduct individuals from foreign territories of its choosing.<sup>68</sup> Canada, the second of the United States' neighboring countries, had cause to fear as striking similarities appear in the treaty between the United States and Canada and that between the United States and Mexico.<sup>69</sup> The U.S. Supreme Court's decision served to "confirm that it is the executive branch, not the courts, that will ultimately decide whether such arrests are within the national interest."<sup>70</sup> The *Alvarez-Machain* decision may have incited Canada to become less cooperative in applying its own treaty with the United States, as in the *Jamieson* case.

### B. Sovereignty

Canada's refusal to extradite Jamieson raises a serious sovereignty issue, the repercussions of which may include loss of respect in the international community for the United States judicial system. Fundamental to any nation is its autonomy and the right to establish a government representing the will of its people. Extradition treaties are "principally designed to further the sovereign interests of nations, and therefore any rights they confer on

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<sup>67</sup> Canada submitted an amicus curiae brief, Brief of the Government of Canada as Amicus Curiae in Support of Respondent, *Alvarez-Machain*, United States v. *Alvarez-Machain*, 504 U.S. 655 (1992) (No.91-712) [hereinafter Brief for Canada], reprinted in 31 I.L.M. 921 (1992), (challenging the court's decision in creating a right to prosecute after abduction in defiance of extradition treaty). Other briefs submitted include: Brief of the Association of the Bar of the City of New York as Amicus Curiae in Support of Respondent, United States v. *Alvarez-Machain*, 504 U.S. 655 (1992) (No. 91-712); Brief Amicus Curiae of Americas Watch in Support of Respondent, (United States v. *Alvarez-Machain*, 504 U.S. 655 (1992)) (No. 91-712); Brief of Amicus Curiae Minnesota Lawyers International Human Rights Committee in Support of Respondent, *Alvarez-Machain*, (No.91-712).

<sup>68</sup> *Id.*

<sup>69</sup> See Bradley Thrush, *United States' Sanctioned Kidnappings Abroad: Can the United States Restore International Confidence in its Extradition Treaties?*, 11 ARIZ. J. INT'L & COMP. L. 181, 193-194 (1994) (examining pertinent clauses in extradition treaties).

<sup>70</sup> Alan J. Kreczko, *The Alvarez-Machain Decision*, Statement before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, July 24, 1992. Kreczko, the Deputy Legal Advisor for the Department of State, assures international governments in this address that the United States has not directed its policy away from cooperative law enforcement operations. *Id.*

individuals are derivative of the rights of nations."<sup>71</sup> Treaties aim to promote international cooperation, and failure to comply with an extradition treaty sabotages a nation's sovereign interest in subjecting its own citizens to its own courts.

Extradition treaties, as Justice Stevens recognized in *Alvarez-Machain*, "exist not simply to impose obligations on states to surrender criminal suspects, but also to safeguard fugitives' rights and to protect individual freedom against arbitrary detentions."<sup>72</sup> In addition, these treaties censure kidnapping by underscoring international law principles, namely, the importance of the territorial integrity of a sovereign nation in that it may not be breached by force.<sup>73</sup> While a nation may choose to waive the requirements of an extradition treaty by handing a defendant over without invoking the treaty,<sup>74</sup> an abduction clearly violates the purpose of an extradition treaty, as espoused in respondent's brief and the dissent in *Alvarez-Machain*.<sup>75</sup>

Currently, Jamieson remains in the Canadian judicial system, afforded the benefits and protections of its policies while the United States is denied the right to try him for a crime committed on United States soil. Granted, Jamieson is not a prime candidate for United States intervention in the form of kidnapping, such as a criminal who perhaps committed murder of an American citizen. However, the United States must demand the right to exercise its sovereignty to punish this individual whose crime was against the people of the United States, regardless of the fact that the Canadian government feels that our policies are too severe. American laws are made for Americans with American issues at their roots.<sup>76</sup>

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<sup>71</sup> 30 I.L.M. 1197, 1203 (1991).

<sup>72</sup> Harold Hongju Koh, *The 'Haiti Paradigm' in United States Human Rights Policy*, 103 YALE L.J. 2391, 2422 n. 189 (1994) (paraphrasing Justice Stevens dissent in *U.S. v. Alvarez-Machain*, 504 U.S. 655 at 670-88 (1992)).

<sup>73</sup> See Article 17 of the Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, amended by the Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847; United Nations Charter, June 26, 1945, 59 Stat. 1031, 1946-47 Y.B. U.N., U.N. Sales No. 1947, XVIII.I, (numerous provisions evidence the assertion made).

<sup>74</sup> See, e.g., *United States v. Valot*, 625 F.2d 308, 310 (9th Cir. 1980) (holding that no treaty violation exists where Thailand chose to surrender defendant to U.S. authorities).

<sup>75</sup> See *Alvarez-Machain*, supra note 59.

<sup>76</sup> See *Canada Should Return Fugitive*, MONTREAL GAZETTE, Aug. 30, 1994, at B2.

## III. RAMIFICATIONS ON U.S. POLICY

A. *Opening the Floodgates*

An extreme repercussion should this case be upheld may be an outpouring of criminals escaping to Canada hoping to evade the American justice system. Jamieson is not the first to seek Canada's protection. In other situations, Canada has refused to extradite certain criminals, but eventually, all were returned to their jurisdictions.<sup>77</sup> Pierre Poupart, Jamieson's attorney adds, "[T]he case is not open season for American traffickers. It simply signifies that if a human being is to be submitted to a sentence contrary to fundamental justice, he should not be sent back. If that is open season, to defend people against inhumanity, so be it."<sup>78</sup> Local Canadian newspapers are not as vehemently opposed to sending back Mr. Jamieson and voice strong concerns that Canada will receive waves of fugitives.<sup>79</sup> An editorial in the *Montreal Gazette* takes note of Clinton's newest and toughest crime bill recently passed by Congress, which mandates life imprisonment for three-time offenders.<sup>80</sup> The article notes the crime epidemic plaguing Michigan and how the social conditions forced the Michigan legislature, "after a free and full democratic debate" to establish strong deterrent measures to combat the crisis.<sup>81</sup> The editorial also asserts that Canada cannot possibly imagine the devastating effects of Michigan's drug war, and Canada simply cannot stand in judgment of its system: What's inhumane is not the twenty-year term so much as the victimization

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<sup>77</sup> NPR, *supra* note 4 (recalling past floods of fugitives when Canada abolished its death penalty in 1976, except for a limited number of military offenses, and offered a temporary haven for criminals). The Treaty on Extradition between the United States and Canada now provides that the requested State may require assurances that the death penalty will not be imposed before complying with a request for extradition. Treaty on Extradition, Dec. 3, 1971, U.S.-Can, Art. 6, 27 UST 983.

<sup>78</sup> Swardson, *supra* note 1.

<sup>79</sup> *Canada Should Return Fugitive*, *supra* note 76 at B2.

<sup>80</sup> *Id.* In 1994, several states implemented "three strikes and you're out" provisions as a means of coping with crime. *California Enacts Enhancements for Prior Felony Convictions—Act of March 7, 1994*, 107 HARV. L. REV. 2123 (1994) (citing Stephen Braun & Judy Pasternak, *A Nation with Terror on its Mind*, L.A. TIMES, Feb. 13, 1994, at A1, A17 [hereinafter *California Enacts*]). See also Tom C. Smith, *Closing in on Crime Bill 1994*, 9 SUM CRIM. JUST. 38 (discussing the provisions of the new crime bill proposed by the House of Representatives and the repercussions of "the federalization of crime.") *Id.*

<sup>81</sup> *Id.*

that trafficking creates. Dealers will not be deterred with five-year terms, such as those imposed by the Canadian courts.<sup>82</sup> The editor inquires, "How would Canadians feel if some United States judges, appalled by Canada's relatively severe gun control law, refused to extradite gun-runners to this country? How would they feel if some other countries, shocked by Canada's imprisonment of wife beaters, refused to return domestic thugs?"<sup>83</sup> The important point made by the article is that different penalties are placed upon criminals in a society based upon the particular values deemed important by its constituents. Should Canada deny the United States' request for extradition, Canada's criminal justice system may become overwhelmed with United States criminals desiring a more lenient drug policy.

Andre Paradis, executive director of the Quebec Civil Liberties Union, rejects claims that drug traffickers would flock to Canada, arguing that Canadian judges are compelled to consider a criminal's individual circumstances on a case-by-case basis. He believes that the courts will refuse to extend refuge to habitual and egregious offenders. Jamieson is an alleged first-time offender charged with carrying a relatively small quantity of illegal drugs (barely meeting the criteria as a legally defined "trafficker") and other criminals could not expect identical treatment.<sup>84</sup> Paradis' attempt to assuage the Canadian fear of floodgating may not withstand pressure as America's position on crime escalates in severity of punishment.<sup>85</sup>

### *B. A Look at America's Prisons*

America needs to respond to allegations of cruelty in its own prison system before demanding respect and deference for United States sovereignty. The United States prison system has frequently been criticized by a human rights organization comprised mostly of Americans: Amnesty International USA (Amnesty). When Amnesty inspected the Oklahoma State Penitentiary's H-Unit in June 1994, representatives were appalled by the

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<sup>82</sup> *Id.* Also, the federal crime bill is a limited three strikes program, dealing punishment upon perpetrators of violent crimes and drug dealers. *See California Enacts, supra* note 80, at 2128 n. 18. *But see* Kenneth Reich, "Three Strikes' Plan Flawed, Sheriff Says, L.A. TIMES, Dec. 30, 1993, at A3, A19 (stating that some police administrators are opposed to the new law because resultant increased resistance to arrest creates a costly increase in law enforcement.).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *See supra* note 80 and accompanying text.

seemingly inhuman conditions.<sup>86</sup> This maximum-security facility housing death row inmates is referred to by prisoners as "a stifling tomb"<sup>87</sup> and by Amnesty International as "cruel and degrading. [P]risoners, mostly two to a cell, are locked in small windowless cells for all but about five hours each week."<sup>88</sup> The penitentiary, while undergoing review for renewal of accreditation by the American Correction Association, has high standards of sanitation, but Amnesty still voiced concerns regarding the proximity within the cells of the toilets to the eating area.<sup>89</sup> Amnesty also reported a poor medical system and a one-way intercom system that invades privacy and provides no means by which a prisoner may call for help should a complication arise.<sup>90</sup>

America is also in the international arena for its less than humane treatment of the refugees held at Guantanamo Bay,<sup>91</sup> its execution of

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<sup>86</sup> Tom Kuntz, *Word for Word/Amnesty International; A Grim Glimpse at Oklahoma's Thoroughly Modern Death Row*, N.Y. TIMES, Jan. 15, 1995, at 7.

<sup>87</sup> *Id.*

<sup>88</sup> Arnold Hamilton, *Prison Criticized in Report gets New Warden Human Rights Group Faulted Oklahoma Unit*, DALLAS MORNING NEWS, Dec. 5, 1994, at 1A. Amnesty International also commented on the lack of educational and rehabilitative programs. Michael Johns, a representative of Amnesty International, reports that the inmates in the prison have told him that conditions have worsened since the reports by Amnesty International. He suggested that prison officials were retaliating against those who chose to cooperate with the press and the human rights group. *Id.*

<sup>89</sup> Kuntz, *supra* note 86, at 7. "The gross floor area of the cells in H-Unit measures 58.45 square feet per person in double occupancy (116.9 sq. ft. in single occupancy) and is in clear breach of American Correctional Association standards, which require 'at least 80 square feet of total floor space per occupant' when confinement exceeds ten hours per day." *Id.* Also, the prisoners eat all of their meals in their cells and the width between the bunks is only three feet. "[t]he toilet is only inches from the bunk." *Id.*

<sup>90</sup> *Id.* A tragic report made to Amnesty included the death of an inmate suffering a heart attack whose cellmate was unable to attract a guards's attention until an hour had passed. Another reported allegation stated that the intercom system was being used by guards to create "imaginary voices" in the case of a mentally disturbed prisoner. *Id.*

<sup>91</sup> *Amnesty International USA News Conference Announcing The Release of its Annual Report on Human Rights Abuses Around the World*, Federal News Service, July 8, 1993 available in WESTLAW, 1993 WL 9427706 [hereinafter *Amnesty Annual Report*]. Speaker Curt Goering, executive director of Amnesty International USA, spoke of the many U.S. abominations in its exercise of justice and exacting of punishment. One speaker, a Haitian refugee detained at Guantanamo Bay for being HIV-positive relayed the horrendous conditions and made allegations of experimental drugs being forced upon her. The conference also released accounts of inhumanities carried out upon prisoners in California's Pelican Bay Prison. *Id.*

prisoners who were minors at the time of committing their crime,<sup>92</sup> and police brutality within prisons and in communities at large.<sup>93</sup> The account of the Rodney King beating was not a single isolated incident of police brutality, and as a result, America has been forced to defend its justice system. As submitted by former acting executive director of Amnesty International Curt Goering, "[I]t takes more than a democracy to guarantee human rights protection."<sup>94</sup>

### CONCLUSION

Canada's further detention and protection of Daniel Jamieson is an indictment of the American justice system, as well as a violation of the legal precedent as set forth by the Canadian legal system. While the United States penal system battles crime daily with more stringent measures of deterrence and punishments, the United States remains a signatory to the U.S.-Canadian Treaty on Extradition demanding the deference imposed by consent to the agreement. True, the United States penal system, including the conditions in its prisons, needs renovation, but the United States retains the power to create laws within constitutional boundaries for its citizens and the right to punish those who would offend those laws.

When countries refuse to abide by treaties of extradition, kidnapping often ensues, creating an even more egregious breach of a nation's sovereignty and territoriality. The *Alvarez-Machain* decision lends insight into how the United States can respond to uncooperative nations. International law forums would most likely surface in order for governments to challenge unilateral abductions. Some nations may renegotiate law enforcement agreements with the United States to deal with future narcotics traffickers who may be apprehended by United States officials or bounty hunters. Canada's Minister

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<sup>92</sup> *Id.* Mr. Goering (see note 87) marveled at how the U.S. "stands almost alone in the world community in still executing people who were juveniles at the time the crime was committed" and pleaded for the public to do more through human rights activism. See Kuntz, *supra* note 86. He added, the "United States has more juveniles on death row than any country in the world that we know of, as well as more prisoners on death row than any country in the world." *Id.*

<sup>93</sup> See Amnesty Annual Report, *supra* note 91. The report documented instances within prisons where some prisoners were not allowed to practice their religions and in some cases were forced to have their hair cut, and when they have refused to do so, were put into "lockdown for 24 hours." *Id.*

<sup>94</sup> *Id.*

of External Affairs told the Canadian Parliament following the *Alvarez-Machain* decision that any attempt by the United States to kidnap a person within Canada's borders would be considered a criminal act in violation of the Extradition Treaty.<sup>95</sup> Canada's bold decision to retain Jamieson following this case is a challenge to United States authorities.

Mainly, international rules of law are grounded in the principles of respect for territorial integrity and sovereign equality. Canada should maintain its policy of cooperation in achieving law enforcement objectives. The vast number of negotiations, agreements, and treaties between the United States and Canada should serve as the primary impetus to combat narcotics trafficking and other crimes in a cohesive manner.

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<sup>95</sup> *Kidnapping Suspects Abroad: Hearings on H.R. 5565 Before the Subcomm. on Civil and Constitutional Issues of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 114 (1992) (statement of Alan J. Kreczko, Deputy Legal Advisor, U.S. Department of State). See also Kreczko, *supra* note 70.