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# The Practice of Extradition from Antiquity to Modern France and the United States: a Brief History

by Christopher L. Blakesley\*

## I. INTRODUCTION

This article will focus on the history of extradition law as it has influenced contemporary law in the United States and France. The purpose of the article is to provide insight into the development of the "modern" extradition. The author has concluded that the phenomenon of extradition has existed from antiquity. Indeed, although the process has not always been executed by use of a treaty agreement, treaty authorized extraditions have existed since antiquity. Moreover, a treaty authorized extradition for common crimes, as opposed to political offenses, was utilized in the earliest known diplomatic document of any kind. This article will discuss evidence, that Grotius and Jean Bodin were incorrect regarding the rationale for their belief that extradition existed in antiquity, although they were right in contending that extradition existed.<sup>1</sup>

In order to understand the extradition phenomenon one must view it from the perspective of each of the relevant parties. Obviously, this requires an

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1. Some of the material considered in this introduction, is also included in a portion of the author's article, Blakesley, *Extradition Between France and the United States: an Exercise in Comparative and International Law*, 13 VAND. J. OF TRANSNAT'L L. 653, 655-62 (1980) [hereinafter cited as Blakesley]. The material in the Vanderbilt article serves to introduce a technical discussion of the modern extradition process and considers only the "modern" development of extradition. This article uses the material, along with additional historical information and analysis, in order to present the historical development of extradition as a diplomatic/legal phenomenon. Although some of the "modern history" of extradition is repeated, it serves a different purpose. Here it establishes the proposition that extradition (even by treaty) has existed continuously from antiquity. The purpose of this article is to accept the proposition of Grotius and Bodin that extradition has existed since antiquity, while rejecting their rationale for so concluding, and in addition, to reject the Pufendorf school's criticism of the hypothesis of Grotius and Bodin. Thus, any retread ground serves the independent purpose of presenting extradition as an historical phenomenon.

understanding of the historical, anthropological and cultural background to the concept of extradition.

Marjorie Whiteman has defined extradition as:

the process by which persons charged with or convicted of crime against the law of a State and found in a foreign State are returned by the latter to the former for trial or punishment. It applies to those who are merely charged with an offense but have not been brought to trial; to those who have been tried and convicted and have subsequently escaped from custody; and to those who have been convicted *in absentia*. It does not apply to persons merely suspected of having committed an offense but against whom no charge has been laid or to a person whose presence is desired as a witness or for obtaining or enforcing a civil judgment.<sup>2</sup>

In 1878, Fernand de Cardaillac defined extradition as "the right for a State on the territory of which an accused or convicted person has taken refuge, to deliver him up to another State which has requisitioned his return and is competent to judge and punish him."<sup>3</sup> More recently, a French commentator has defined it as: "The procedure by which a sovereign state, the requested state, accepts to deliver an individual who is found on this latter's territory to another state, the requesting state, to permit the latter to judge the subject or, if he has already been convicted, to have it execute its sentence."<sup>4</sup>

The term "extradition" was imported to the United States from France, where the *décret-loi* of February 19, 1791, appears to be the first official document to have used the term. The term is not found in treaties or conventions until 1828.<sup>5</sup> The French Treaties with Wurtemberg of March 26, 1759, and of December 3, 1765; with Spain of September 29, 1765; and with Spain and Portugal in 1778 (ratified July 5, 1783) incorporated the equivalent terms *restituer* (to restore or hand-over) or *remettre* (to send back, restore or hand-over).<sup>6</sup> The Latin equivalent to extradition, *tradere*, is not found in early Latin works, but the comparable term *remittere*, to remit, is often employed.<sup>7</sup> Thus, although the actual term "extradition" was not used essentially until the late

2. M. WHITEMAN, 6 DIGEST OF INT'L LAW 727 (1968) [hereinafter cited as WHITEMAN]. See also *Terlinden v. Ames*, 184 U.S. 270, 289 (1902).

3. FERNAND DE CARDAILLAC, DE L' EXTRADITION 3-4 (1878) [hereinafter cited as FERNAND DE CARDAILLAC] Author's translation.

4. R. MERLE & A. VITU, TRAITÉ DE DROIT CRIMINEL: PROBLÈMES GÉNÉRAUX DE LA SCIENCE CRIMINELLE 320 (2d ed. 1973) [hereinafter cited as MERLE & VITU]. Author's translation.

5. A. BILLOT, TRAITÉ DE L'EXTRADITION 34 (1874) [hereinafter cited as BILLOT].

6. *Id.* See, e.g., Convention on Extradition, Dec. 3, 1765, France-Wurtemberg, 43 Parry's T.S. 243 (the earlier convention of Mar. 26, 1759 expired and was superseded by this Convention, see *id.* at 245); Convention on Extradition, Sep. 29, 1765, France-Spain, 43 Parry's T.S. 211.

7. BILLOT, *supra* note 5, at 34.

eighteenth century, the notion was extant, and equivalent or similar terms were not uncommon.<sup>8</sup>

The author will first discuss the perception of extradition in antiquity. Then extradition in the Middle Ages and in the modern era will be discussed in turn. Finally, the author will analyze the issue of whether extradition is proper in the absence of a treaty obligation. This analysis will focus on France and the United States, two countries which are important in the development of extradition law and which have taken opposite positions on this issue. The author concludes that the practice of extradition under changing legal philosophies has established the modern law of extradition.

## II. PERCEPTIONS OF EXTRADITION IN ANTIQUITY

In order to understand the perceptions of extradition's function and purpose in modern France and the United States, it is important to consider the evolution of thought regarding extradition. The French spent a significant amount of doctrinal effort considering the question of extradition in antiquity and the Middle Ages.

Extradition, or at least rendition of fugitives from one people or nation to another, was not unknown in antiquity. Ancient civilizations appear to have developed it and practiced it.<sup>9</sup> In fact, the earliest known diplomatic document

8. See, e.g., text accompanying notes 6 and 7, *supra*. Article 20 of the Treaty of Amiens states that the contracting parties "are to be obligated to deliver to justice the persons accused . . ." (i.e., the author's translation of: "*s'ont tenu de livrer en justice les personnes accusées. . .*"). E. DESCAMP & L. RENAULT, 1 RECUEIL INT'L DES TRAITÉS DU XIX<sup>e</sup> SIÈCLE 33, 42 (1801-1825), 42 DALLOZ REPERTOIRE DE LÉGISLATION, DOCTRINE ET JURISPRUDENCE 495, 579-80 (1861), Treaty of Peace Between France, Great Britain, Spain and the Batavian Republic, Mar. 27, 1802, 56 Parry's T.S. 289, art. 20 [hereinafter cited as Treaty of Amiens].

9. Langdon & Gardiner, *The Treaty of Alliance Between Hattusili King of the Hittites and the Pharaoh Ramesses II of Egypt*, 6 J. OF EGYPTIAN ARCHAEOLOGY 179 (1920) [hereinafter cited as Langdon & Gardiner]; W. Mettgenberg, *Vor mehr als 3000 Jahren*, 23 ZVOLKR 23 (1939), cited in I. SHEARER, EXTRADITION IN INTERNATIONAL LAW 5 (1971) [hereinafter cited as SHEARER]. See C. BASSIOUNI, EXTRADITION AND WORLD PUBLIC ORDER 1 (1974) [hereinafter cited as BASSIOUNI]; Kutner, *World Habeas Corpus and International Extradition*, 41 U. DET. L. J. 25 (1964); A. NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 9, 37, 111, 208, 253, 260 (1947) [hereinafter cited as NUSSBAUM].

There are many other excellent works concerned either in whole or in part with criminal law or what may be called "international" (or inter-peoples) "law" in antiquity, which contain worthwhile information on the ancient practice of extradition or rendition. These include: E. EGGER, ÉTUDES HISTORIQUES SUR LES TRAITÉS PUBLICS ANCIENS (1866); A. DU BOYS, HISTOIRE DU DROIT CRIMINEL DES PEUPLES ANCIENS (1845); M. FAUSTIN HÉLIE, TRAITÉ DE L'INSTRUCTION CRIMINELLE Liv. II, ch. V (on extradition) (5th ed. 1951) [hereinafter cited as FAUSTIN HÉLIE, TRAITÉ]; J. FOELIX, DROIT INT'L (4th ed. 1866) [hereinafter cited as FOELIX]; F. SAINT-AUBIN, L'EXTRADITION ET LE DROIT EXTRADITIONNEL (1913) [hereinafter cited as SAINT-AUBIN]; P. BERNARD, TRAITÉ THÉORIQUE ET PRATIQUE DE L'EXTRADITION (2 vols. 1890) [hereinafter cited as BERNARD]; Faustin Hélie, *Du Droit Pénal dans ses Rapports avec le Droit des Gens*, 17 REVUE DE LÉGISLATION ET DE JURISPRUDENCE 220 (1843) [hereinafter cited as Faustin Hélie, *Du Droit Pénal*]; Billot, *supra* note 5; M. VILLEFORT, DES TRAITÉS D'EXTRADITION DE LA FRANCE AVEC LES

of any type contains a section providing for the reciprocal rendition of fugitives. This was the Treaty of Peace between Ramses II, Pharaoh of Egypt, and the Hittite King Hattusili III, which was signed after the latter's abortive attempt to invade and conquer Egypt.<sup>10</sup> This document, written in Hieroglyphics, was carved onto the Temple of Ammon at Karnak and is also preserved on clay tablets in Akkodrain in the Hittite archives of Boghazköi.<sup>11</sup> This document is characteristic of most early examples of extradition or rendition agreements in that extradition was only part of, and incidental to, a larger document designed for a larger purpose. This was also true for the first extradition documents of the modern era.<sup>12</sup>

Many authorities in France and the United States have written that prior to the nineteenth century extradition in the modern sense of that term did not exist.<sup>13</sup> These authorities contend that rendition of fugitives occurred on a haphazard basis and that these renditions were totally political occurrences in which the political enemies of the various sovereigns, rather than common criminals, were the objects; coercion, not the binding force of a legal agreement or of some abstract international right or duty, was the true motivator of compliance with such requests.<sup>14</sup> The United States Supreme Court expressed the common American view in 1886:

It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice to the States where their crimes were committed, for trial and punishment. This has been done generally by treaties made by one independent government with another. Prior

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PAYS ETRANGERS (1851) [hereinafter cited as VILLEFORT]; V. KIRCHNER, RECUEIL DES TRAITÉS D'EXTRADITION (1883); FERNAND DE CARDIALLAC, *supra* note 3; P. FIORE, TRAITÉ DE DROIT PÉNAL INTERNATIONAL ET DE L'EXTRADITION (2d ed. 1880); M. Aupecle, *l'Extradition et la Loi de 10 Mars 1927* (Paris, 1927) (unpublished thesis in Columbia University School of Law Library) [hereinafter cited as Aupecle]; J. MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION (1891) [hereinafter cited as MOORE]; L. KOZIEBRODZKI, LE DROIT D'ASILE (1962); C. MONTESQUIEU, 3 DE L'ESPRIT DES LOIS, Liv. 25, ch. 3 ("Des Temples;" this chapter discusses the right of asylum in ancient times) (1748); Ginzberg, *Asylum in Rabbinical Literature*, 2 THE JEWISH ENCYCLOPAEDIA 257 (1901).

10. The Treaty of Alliance Between Hattusili, King of the Hittites, and the Pharaoh Ramses II of Egypt, §§ 11, 12, 13, 14, Langdon and Gardiner, *supra* note 9, at 192-94. See SHEARER, *supra* note 9, at 5; BASSIOUNI, *supra* note 9, at 1.

11. BASSIOUNI, *supra* note 9, at 3-4.

12. *E.g.*, Treaty of Amity, Commerce and Navigation (The Jay Treaty), Nov. 19, 1794 (entered into force Oct. 28, 1795), United States-Great Britain, art. 27, 8 Stat. 116, T.S. 105, collected in I. BEVANS, 12 TREATIES AND OTHER INT'L AGREEMENTS OF THE UNITED STATES OF AMERICA [BEVANS] 13, W. MALLOY, 1 TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS [MALLOY] 590 (1910) [hereinafter cited as the Jay Treaty]; Treaty of Amiens, *supra* note 8, art. 20.

13. See text accompanying note 20 *infra*.

14. *E.g.*, L. OPPENHEIM, I INT'L LAW 696, 704 (8th ed. 1958); C. DE VISSCHER, THEORY AND

to these treaties, and apart from them, it may be stated as the general result of the writers upon international law, that there was no well-defined obligation on one country to deliver up such fugitives to another, and though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked; and it has never been recognized as among those obligations of one government towards another which rest upon established principles of international law.<sup>15</sup>

A debate over whether or not extradition existed in antiquity raged in French academic circles near the end of the nineteenth century. One side, represented most notably by Professor Billot, the *Rédacteur* for the *Ministère des Affaires Étrangères* at the time, opposed the view that extradition had existed since antiquity.<sup>16</sup> Professor Billot maintained that the examples, claimed to be "extradition" by Hugo Grotius and Jean Bodin in the seventeenth century and later cited by Faustin Hélie<sup>17</sup> and Paul Bernard<sup>18</sup> to support their argument that extradition did occur in antiquity, were not really analogous to the contemporary phenomenon of extradition.<sup>19</sup> A clear statement of this "non-believer" position was made by Professor Villefort in his treatise on extradition:

The authors who have written on the subject, and particularly the publicists of the seventeenth century, have pushed the origin of extradition back to antiquity. But, in truth, the examples they cite can not be analogized to our present extraditions. They were not matters of malefactors requisitioned by the nation of which they had found refuge. All these examples refer to . . . violations of the Law of Nations, like aggression, violations of territory, pillaging of temples, committed by inhabitants of the 'country' to which the outraged nation comes to demand satisfaction for the offense through the rendition of the culpable. If there were a refusal (by the requested 'state'), war would result. These events appear to belong to an entirely different order of idea, and one discerns this by the attempt to explain the rarity of extradition cases in antiquity by claiming that the infrequency was the effect of the law of asylum

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REALITY IN PUBLIC INT'L LAW 243-44 (P. Corbett trans. 1957); Nussbaum, *supra* note 9, at 9.

15. *United States v. Rauscher*, 119 U.S. 407, 411 (1886). See *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540 (1840).

16. BILLOT, *supra* note 5, at 35.

17. FAUSTIN HÉLIE, *TRAITÉ*, *supra* note 9; Faustin Hélie, *Du Droit Pénal*, *supra* note 9.

18. BERNARD, *supra* note 9, vol. 2 at 22-65.

19. BILLOT, *supra* note 5, at 35-40. Among the other scholars in the Billot camp were: M. Villefort, Fernand de Cardaillac, and P. Fiore, whose works on the subject are cited in note 9 *supra*.

and other considerations which really can only have had secondary influence. The true general cause is that a principle similar to modern extradition cannot exist amidst the state of hostile isolation in which the peoples of that epoch lived. In order for extradition to enter into international usage, it requires no less than the moral solidarity which ties the diverse modern nations. During the entire Middle Ages, and even after several centuries which followed, one can say that extradition only had an accidental existence; it is only barely by the end of the eighteenth century that this right appears to have been admitted universally by virtue of the principle of reciprocity.<sup>20</sup>

Both sides of the debate believed that if extradition in the "contemporary" sense of that term occurred, it had to have occurred by authority of "natural right and justice." That is, they all believed that rendition of fugitives was not extradition, unless it was motivated by the participants' belief that they were obligated by "natural right and justice" or the moral solidarity of the "community of nations" to do so. Indeed, Grotius presented his examples of "extradition" as proof that all nations had a "natural right and duty" either to extradite or to prosecute malefactors.<sup>21</sup> Grotius' ancient examples were attacked as not meeting the requisites of his own definition. They were seen as rare or accidental happenings accomplished solely by force or coercion. Therefore, argued the Billot school, if no rendition occurred in antiquity by authority of "natural right," or rights based on the solidarity of nations, and the corresponding obligation to have reciprocal rendition of fugitives between nations, there was no extradition.

Even if it were true, as the Billot school asserts, that few extraditions occurred in antiquity which were perceived as having a basis in some abstract, reciprocal, international right and correlative obligation, the same proposition is also true today.<sup>22</sup> Neither French nor United States law perceives a *duty* to

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20. VILLEFORT, *supra* note 9, at 5. Author's translation. M. Villefort labors under the perception that the "modern" world has a "community of nations." But see generally, e.g., Boyle, *The Irrelevance of Int'l Law: The Schism Between Int'l Law and Int'l Politics*, 10 CAL. W. INT'L L. J. 193 (1980).

21. E.g., H. GROTIUS, II DE JURE BELLI AC PACIS LIBRI TRES 526-29 (F. Kelsey trans. 1925). It is true that many of the examples proposed by the seventeenth century writers to indicate that extradition was practiced in antiquity, were presented primarily to prove that there was a natural duty to extradite or prosecute all criminals. *Id.*

22. The notion of an abstract, natural right of extradition based on international solidarity has not been recognized in United States case law, at least since 1840. Extradition from the United States has traditionally been allowed only on the basis of a treaty obligation. See, e.g., *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540 (1840); *United States v. Rauscher*, 119 U.S. 407 (1886); *Valentine v. United States*, 299 U.S. 5 (1936). See also the discussion of the duty to extradite based on a treaty obligation, notes 57-93 and accompanying text, *infra*.

Despite the requirement of a treaty obligation to extradite, the United States Government will accept extradition of a fugitive from a country with which the United States has no treaty. During a two-year period in the Legal Adviser's office in the U.S. Department of State, the author

extradite, apart from that imposed by a treaty or other *agreement* to extradite. Thus the Billot school due to its own perception of the nature of international law took Grotius to task over the wrong issue, as it certainly does not follow that a lack of participant belief in a natural obligation to extradite establishes the non-existence of extradition.

Extradition in antiquity did not represent any constant practice or develop into any science of extradition. This reservation was accepted by the major nineteenth century proponents of the Grotius view that extradition existed in antiquity.<sup>23</sup> It is also true that there was usually quite a close affinity between ancient extradition and the laws of war. Moreover, corruption, violence and menace were often the "tools for execution" utilized to obtain the rendition of fugitives.<sup>24</sup> This is not difficult to understand, given the ongoing relations among the peoples of antiquity which was similar to that of the Middle Ages. The territorial and national ruler during these epochs considered it a duty of his honor to protect fugitives entering his territory. This duty to protect fugitives became linked to the very prepolence and integrity of the ruler. Any act or demand emanating from a foreign power to obtain jurisdiction over any person within another power's territory represented at least a potential treat to the sovereignty of the requested ruler.<sup>25</sup> This approach is not totally consistent with the modern notion of extradition which has legality as its essence. However, it does not follow from this that there was no extradition in antiquity. Authority for and relationships according rendition of fugitives were authorized and "legalized" by treaties.<sup>26</sup>

Ancient history does provide examples of individuals being delivered up between peoples not only for political offenses or acts of aggression against the "sovereign," but also for murder, rape, theft, robbery, abduction and other serious, non-political offenses.<sup>27</sup> Indeed, many ancient and medieval renditions resemble present day extradition much more than the nineteenth century "nonbelievers" would admit.

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observed several of these extraditions. For a discussion of this topic and an analysis of the current law of extradition in general and between France and the United States see Blakesley, *supra* note 1.

23. See BERNARD, *supra* note 9; at 22-65. See also FAUSTIN HÉLIE, *TRAITÉ*, *supra* note 9; Faustin Hélie, *Du Droit Pénal*, *supra* note 9.

24. FERNAND DE CARDAILLAC, *supra* note 3, at 5.

25. See, e.g., SAINT-AUBIN, *supra* note 9, at 1 (chapter entitled *Origine de l'Extradition*). Interestingly, this reaction of sovereign jealousy is not too different from today's sovereign reaction to problems in extradition cases. Many of the formal requirements, such as the necessity of using the diplomatic channel, stem, at least partially, from jealousy of encroaching sovereignty. The sensitivity over problems arising in connection with extradition cases also derives from this phenomenon.

26. E.g., Langdon & Gardiner, *supra* note 9. (Treaty of Alliance Between Hattusili III and Ramses II).

27. O'Higgins, *The History of Extradition in British Practice*, 13 INDIAN Y. B. OF INT'L AFF. 78, 108 (1964); 6 BRIT. DIG. OF INT'L L. 445 (1965). See SHEARER, *supra* note 9, at 5.



One of the problems scholars have had in interpreting ancient rendition of fugitives is the fact that for a long period of time in human history there were no "states." Acts, such as theft, murder or rape, considered common crimes today, were subject to "private justice" or individual reprisal rather than the modern reaction of a sovereign or state.<sup>28</sup>

Patriarchal families, tribes, and clans were in control of their own destiny and their own justice. The *pater familias* represented the "sovereignty" of the family, clan, or tribe. Moreover, in ancient social cells, such as the family, clan, or tribe, expulsion was the ultimate penalty for internal crime. For example, endangering the tribal food supply usually incurred the sanction of banishment. Thus, if the ultimate sanction was banishment, the authority of the social cell certainly would not seek the return of individuals who had committed offenses within the cell. Even in the very early social cells certain activities were considered "criminal," as they threatened the society as a whole. When a serious offense occurred, for example, in addition to banishment, it was necessary that the cell purge itself from the "curse of the gods or the threat of the unknown."<sup>29</sup>

The *pater familias* or tribal chieftain, in keeping with whatever procedure was required by its law and custom, would determine what activities were to be deemed punishable. Different conduct was considered dangerous, therefore punishable, by different groups at different times. When murder, theft, or assault, which were relatively rare although not unheard of in the kinship group, occurred as a result of external intervention into the social cell, retaliation, vengeance, or an attempt to acquire the return of the perpetrators often resulted, so that the "purging" of the crime could take place. When this conduct occurred internally, the result was usually banishment or a phenomenon called the *composition*. The latter was similar to what modern states reserve for tort claims. The injured individual was compensated by the perpetrator or his family for the damage done.<sup>30</sup> *Composition* was not entirely tort-like, however, as the social cell often felt obliged to purge itself of the threat of metaphysical dangers resulting from the occurrence of the wrongful act.<sup>31</sup>

Thus, offenses committed by individuals belonging to the tribe or social cell were met with sanctions determined by the *pater familias* or a designated group

28. See Tappa, *Pre-Classical Penology*, in G.O.W. MUELLER, *ESSAYS IN CRIMINAL SCIENCE* 33 (1961).

29. E.g., R. Fairbanks, *A Discussion of the Nation State Status of American Indian Tribes: A Case Study of the Cheyenne Nation* 31 (1976) (unpublished LL. M. thesis in Columbia University School of Law Library) [hereinafter cited as Fairbanks thesis]. Intra-tribal murder, for example, in Native American society "required the keeper of the arrows to cleanse the tribe of the spectre of death." *Id.* See M. FUSTEL DE COULANGES, *LA CITÉ ANTIQUE*, Liv. III, Ch. XIII (1864) [hereinafter cited as FUSTEL DE COULANGES].

30. See H. MAINE, *ANCIENT LAW* 358 (5th ed. 1878) [hereinafter cited as MAINE].

31. See Fairbanks thesis, *supra* note 29; K. LLEWELLYN & E. HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941); FUSTEL DE COULANGES, *supra* note 29.

under his direction. If banishment were the sanction, "escape" from the sanction by flight, obviously, presented no problem; no tribe would seek the fugitive's return to banish him. If the "fugitive" were needed for the tribal expiation, his rendition would be sought.

The sanction for another tribe's refusal to return such a fugitive was often war or an attack to punish the entire refusing tribe, thus, purging the taint through punishment by proxy. Notwithstanding the "private justice" caveat, attempts to obtain rendition of fugitives were sometimes not too dissimilar from modern extradition.

Indeed in ancient Israel it was considered necessary to have a murderer expiate his sin and purge society of its blemish through spilling the criminal's blood.<sup>32</sup> Asylum was possible for those who committed sin or crime involuntarily, but not for the intentional wrongdoer.<sup>33</sup> Thus, the intentional wrongdoer's extradition was sought. Similarly, the *Code of Manu* provided that there was to be no possibility of happiness for the criminal or society without punishment. Rest and happiness for the sinner and society must be obtained through a soul-purging punishment of the wrong-doer.<sup>34</sup> Extradition, therefore, had to be sought.

This practice continued as society expanded beyond the family, clan, or tribe and individuals or cliques acquired authority, more or less enforceable, over several smaller social cells. As the concept of group identity and solidarity broadened, acts previously considered to be external and requiring group vengeance became internal and required application of the internal "criminal justice system." Attempts to obtain rendition of fugitive violators of the law became more and more common.<sup>35</sup>

Thus, although there was no constant practice or development of a science of extradition in antiquity, many ancient societies sought the return of common criminals. These renditions had some characteristics similar to those of modern extradition. Often the request was made "officially" through the respective "sovereigns." Rendition was sought for "common" and political type crimes.

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32. See, e.g., 1 Kings 2:28-34.

33. Cf. Joshua 20: 9 (cities of asylum to which one who kills might flee); 1 Kings 1:50-53 (taking asylum at the altar).

34. *Code of Manu*, Bk. VII, 18, 23-24, Bk. VIII, 17. On the Hindu Code, or Laws of Manu (or Menu), see generally, e.g., MAINE, *supra* note 30, at 16-17; S. SINHA, ASYLUM AND INT'L LAW 6 (1971) [hereinafter cited as SINHA].

35. The following incidents in history range from something very similar to today's extradition to what the Billot school would denominate "non-analogous" occurrences. Some of the examples have aspects of both "modern extradition" and "non-analogous" occurrences. The Lacedaemonians made war on the Messenians when the latter refused to deliver up the perpetrators of rape and violation of young Lacedaemonian girls sent to religious ceremonies. *Strabo*, ch. VIII, cited in BERNARD, *supra* note 9, at 26. The Lacedaemonians made war on the Messenians another time because the latter did not deliver up the assassin of a Lacedaemonian.

### III. EXTRADITION FROM THE MIDDLE AGES TO THE EARLY MODERN ERA

An examination of fugitive rendition during the Middle Ages indicates that a rather large number of renditions were accomplished by way of formal convention. Many early conventions, including the Treaty of 1174, between Henry II and Guillaume of Scotland, and the 1303 Treaty of Paris, between Edward II of England and Phillippe *le Bel* of France, were basically political in nature.<sup>36</sup> Their basic purpose was to provide for the return of political enemies of the respective sovereigns. Even so, they constituted reciprocal sovereign agreements to deliver up felons who had taken refuge in the requested sovereign's territory.<sup>37</sup>

The Convention of March 4, 1376, between Charles V ("the Wise"), King of France, and the Count of Savoy, was most similar to the modern conceptualization of extradition.<sup>38</sup> It was the most non-political convention of the time period. The Convention called for the reciprocal rendition of "malefactors promptly upon the first request" specifying that the perpetrators of common crimes would be delivered up. The purpose of the Convention was to combat crimes and common criminals in general more than to punish or persecute political enemies.

*Pausanias*, Bk. IV, cited in BERNARD, *supra* note 9, at 26. Several of the Tribes of Israel addressed a request to the Tribe of Benjamin for the delivery of certain citizens of Gibeah who were the authors of the rape and murder of the concubine belonging to the Levite sojourning on Mount Ephraim. *Judges*, 19, 20. The Levite, who, being the "victim," had the responsibility and the right to take vengeance for the crime, sent a portion of his concubine's cadaver to each Tribe of Israel to symbolize their unity and solidarity in vengeance for the crime. Refusal to deliver up the fugitives brought the Tribe of Benjamin devastation by war. The grisly nature of the evidence and the reprisal for refusal, epitomized some of the basic differences between some ancient "extraditions" and the modern phenomenon. The Philistines sought delivery from the Hebrews of Samson, who was charged with having ravaged the former's harvests and with having massacred some Philistine compatriots. *Judges*, 15. Simon, brother of Johathan, received, in exchange for a gold shield, an agreement for the extradition of Israelite criminals wherever found in the entire Roman Empire. *Mace*, Bk. LXV, cited in BERNARD, *supra* note 9, at 26.

36. See H. DONNEDIEU DE VABRES, *TRAITÉ DE DROIT CRIMINEL ET DE LÉGISLATION PÉNALE COMPARÉE* 975 (3d ed. 1947) [hereinafter cited as DONNEDIEU DE VABRES]; C. CALVO, *DROIT INT'L* Liv. IX (1896) [hereinafter cited as CALVO]; BERNARD, *supra* note 9, at 135; MERLE & VITU, *supra* note 4, at 321; P. BOUZAT & J. PINATEL, *TRAITÉ DE DROIT PÉNAL ET DE CRIMINOLOGIE*, 1657-58 (2d ed. 1970) [hereinafter cited as BOUZAT & PINATEL]; FERNAND DE CARDAILLAC, *supra* note 3, at 9; FOELIX, *supra* note 9, at vol. II, 331.

37. See BERNARD, *supra* note 9, at 152-53. See also CHRISTINE DE PISAN, *LE LIVRE DES FAITS ET BONNES MOEURS DU SAGE ROY CHARLES V*, Part II, ch. X (c. 1411) (Paris, 1936-40 S. Solente ed.) [hereinafter cited as C. DE PISAN]; CALVO, *supra* note 36, at Bk. IX; BERNARD, *supra* note 9, at 135.

38. See C. DE PISAN, *supra* note 37, at Part II, ch. X; ST. AUBIN, *supra* note 9, at 14. See also DONNEDIEU DE VABRES, *supra* note 36; CALVO, *supra* note 36; MERLE & VITU, *supra* note 4; BOUZAT & PINATEL, *supra* note 36; FERNAND DE CARDAILLAC, *supra* note 3; FOELIX, *supra* note 9. The Convention between Charles the Wise and the Count of Savoy made no distinction between *crimes* and *délits*, which was a purposeful attempt to avoid confusion or difficulty in interpretation. The

Nevertheless, as late as the 1660's, the purpose of most major rendition agreements remained essentially political. For example, when Denmark and Holland delivered to England those persons implicated in the murder of Charles I, the renditions were accomplished pursuant to a Convention concluded on February 23, 1661, between Charles II and the Government of Denmark,<sup>39</sup> and a Convention concluded on September 14, 1662, between England and Holland.<sup>40</sup> There was a hint of non-political extradition in the latter Convention. Although Holland undertook to deliver to England certain individuals who had been excepted from the Bill of Amnesty, "all other persons that would be reclaimed by England" were also included.<sup>41</sup>

Louis XIV provides a striking example of Seventeenth Century politically oriented "rendition" in conjunction with his revocation of the Edict of Nantes. When he prohibited emigration from his realm, a large number of the inhabitants of the City of Gex, nevertheless, expatriated themselves. In 1679, *le Grand Louis* "requested" (rather demanded) the magistrates of Geneva to order the return, *en masse*, of the expatriates. The magistrates of Geneva issued a decree ordering the Gexois to return to their homeland. Most did not return, however, and Louis, displeased by the magistrates' effort, issued another "request." This time he threatened Geneva with a reaction that would make them "repent of having displeased him."<sup>42</sup> Thus, the magistrates ordered their own citizens to deliver up the expatriates under the threat of corporal punishment.<sup>43</sup>

To discuss the early development of extradition without mentioning the great criminalist Beccaria, would not be proper. Although Beccaria's interests certainly transcended this narrow issue, he had clearly defined views on extradition in keeping with his general philosophy of criminal justice. Extradition, after all, was a part of the overall fabric of criminal justice. Beccaria believed that extradition could play a role in diminishing crime. He stated that, "the conviction of finding nowhere a span of earth where real crimes were pardoned might be the most efficacious way of preventing their occurrence."<sup>44</sup> This comment reflects his distaste for the almost religious sanctity

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procedure for extradition under this Treaty was very simple. Once the fact of an accused person's status as a fugitive had been established by a summary examination, the fugitive was to be remitted promptly upon the first request. See SAINT-AUBIN, *supra* note 9, at 14-15.

39. See FERNAND DE CARDAILLAC, *supra* note 3, at 9.

40. *Id.*; E. CLARKE, A TREATISE UPON THE LAW OF EXTRADITION 20 (4th ed. 1903).

41. FERNAND DE CARDAILLAC, *supra* note 3, at 9.

42. This "request" represents the best example of what the Billot camp of "non-believers" refer to as events that are "non-analogous" to modern extradition events. BERNARD, *supra* note 9, vol. 1, at 290-91, citing Depping, *Correspondence Administratif*, tome IV, and quoting Louis XIV.

43. Aupele, *supra* note 9, at 13.

44. C. BECCARIA, DEI DELITTI E DELLE PENE (1764), translated in J. FARRER, CRIMES AND PUNISHMENTS 193-94 (1880) [hereinafter cited as BECCARIA]. See generally M. MAESTRO, CESARE

possessed by the notion of asylum during the period. Beccaria qualified his stand, however, by stating that he would not decide an extradition's ultimate usefulness "until laws more in conformity with the needs of humanity, until milder penalties, and until the emancipation of law from the caprice of mere opinion, shall have given security to oppressed innocence and hated virtue. . . ."<sup>45</sup> These ideas found their way into extradition and influenced, among other ideas, the rule of speciality and that of dual criminality.

#### IV. EXTRADITION IN THE MODERN ERA

A 1376 Treaty between France and Savoy,<sup>46</sup> was an incipient *modern* extradition treaty. In spite of this early, propitious beginning to "modernity" in extradition, it was not until 1736, that another treaty so *modern* would appear. It was in 1736, that France and Holland established an agreement for the extradition of individuals charged with having committed common crimes.<sup>47</sup> This compact was followed by accords between France and Egypt, Switzerland, Sardinia, and several German States.<sup>48</sup>

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BECCARIA AND THE ORIGINS OF PENAL REFORM (1973). Beccaria's *chef d'oeuvre*, *DEI DELITTI E DELLE PENE*, has been one of the most influential works in the field of criminal justice in modern western history. Beccaria's theory of criminal justice is based on philosophical utilitarianism. He believed that the punishment for crime should follow directly and surely upon its commission and that the punishment must fit the offense. His goals were to reduce crime, to induce the moderation of barbaric punishment, to eradicate the inequality of application of criminal law and to make the punishment following the commission of a crime by anyone be swift and sure.

Beccaria was a bit ambivalent regarding extradition; he wanted no sanctuaries, but he wanted extradition to be fair and based on law. Voltaire, probably the greatest and most influential devotee of Beccaria's philosophy of criminal justice, found himself an example of the reason Beccaria was ambivalent about extradition. Frederick the Great had sought Voltaire's extradition from the Free City of Frankfurt, because, after a dispute with the Great Frederick, Voltaire had quit Potsdam carrying a book of verse in which he portrayed Frederick deriding Louis XV, Madame de Pompadour, and the Empress Marie Thérèse, among others. Pursuant to the Prussian's request, Voltaire was arrested in Frankfurt for extradition. Although he was not extradited, he remained in a Frankfurt prison for several weeks awaiting a decision. *See* Aupecle, *supra* note 9, at 14.

Ancient religious society developed a different rationale for the swift and sure punishment sought by classical Beccarian penology. Anciently, breach of the law constituted an offense against God. Thus, there was no authority to condone or to provide refuge. SINHA, *supra* note 34, at 6. The Code of Manu required punishment for all crime. As the soul never died, it was a religious necessity and a prerequisite for happiness in the next life to expiate by punishment for the sins of this life. *Manu, Lois de Manou*, annotated in French by L. Deslongschamps, Vol. I, Bk. VII, 18, 23-24, Bk. VIII, 17 (1830), *cited in* SINHA, *supra* note 34, at 37 n.9.

45. BECCARIA, *supra* note 44, at 193-94.

46. *See* note 38 and accompanying text, *supra*.

47. SAINT-AUBIN, *supra* note 9, at 15-16.

48. *Id.* G. F. Martens lists ninety-two treaties concerning the return of fugitives concluded between 1718 and 1830. G. F. MARTENS, *RECUEIL DE TRAITÉS*, 7 vols. (1791-1826), *SUPPLÉMENTS AU RECUEIL DE PRINCIPAUX TRAITÉS*, 20 vols. (1802-42), *cited in* SHEARER, *supra* note 9, at 8.

France continued to take an uncontested role of leadership in the development of extradition law during the eighteenth and nineteenth centuries. In the middle and later part of the eighteenth century, France concluded bilateral extradition treaties with all of her neighbors, except Great Britain.<sup>49</sup> The Treaty of 1759 between France and Wurtemberg was the prototype of the extradition treaty of the modern era.<sup>50</sup> Extradition was still possible in these early treaties, however, for political offenses and desertion from the armed forces as well as for common crimes.

The rules and procedures established in these conventions endure in the law of extradition to this day. The rules required extradition requests to be made through the diplomatic channel, or at least through specific frontier authorities. Exact reciprocity was demanded. The requesting state was required to provide an act of accusation or of condemnation with its request. The costs were charged to the requesting state.

France was clearly the catalyst for development of the law of extradition from the end of the eighteenth to the end of the nineteenth centuries, and probably earlier. Most of the remaining modern, substantive and procedural characteristics and principles of extradition, that had not been developed by France prior to the end of the eighteenth century, were generated by France during this one-hundred year period. The political offense exemption and the prescriptive limitation to extradition, for example, were initiated in the 1834 Treaty between France and Belgium.<sup>51</sup> The Treaty of 1844, between France and Luxembourg, was the first to incorporate the prohibition against prosecuting fugitives returned by way of extradition for any offense except those

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49. A listing of current extradition treaties relating to France appears in R. MERLE & A. VITU, *TRAITÉ DE DROIT CRIMINEL: PROBLÈMES GÉNÉRAUX DE LA SCIENCE CRIMINELLE* 389 (3d ed. 1978). For example France entered into bilateral treaty arrangements with Wurtemberg in 1759, Holland in 1765, Spain in 1765, and Portugal in 1783. See BILLOT, *supra* note 5, at 34.

50. This treaty is usually cited as the prime example of the nascent modern extradition treaty. E.g., SHEARER, *supra* note 9, at 10, 17, 103; BASSIOUNI, *supra* note 9, at 4-5; Aupecle, *supra* note 9, at 14-16.

The Treaty between France and Wurtemberg, of December 3, 1765, provides for the extradition of "brigands, malefactors, robbers, incendiaries, murderers, assassins, vagabonds, cavalry, infantrymen, dragoons and *housards* (light cavalry)." Author's translation. G. F. MARTENS, 6 *RECUEIL DE TRAITÉS* 42 (1800); 43 Parry's T.S. 243.

51. Convention on the Extradition of Criminals, Nov. 22, 1834, Belgium-France, 84 Parry's T.S. 457, 22 *BRITISH AND FOREIGN STATE PAPERS* 223, art. 5. Billot insists that France first introduced the political offense exemption in an exchange of notes between France and Switzerland on September 30, 1833, just prior to the use of the principle in the Belgian domestic law of extradition of October 1, 1833. BILLOT, *supra* note 9, at 12, 109-10, 425. See SHEARER, *supra* note 9, at 18 n.1; Deere, *Political Offenses in the Law and Practice of Extradition*, 27 *AM. J. INT'L L.* 247, 250-51 (1933). For a discussion of the political offense exception to extradition, see Blakesley, *supra* note 1, at 697-706.

listed in the treaty.<sup>52</sup> This later developed into the rule of speciality, first seen in the 1850 Treaty between France and Saxony.<sup>53</sup>

Although French influence was comparatively stronger, United States' judicial decisions were important in the early development of modern extradition law. Sir Edward Clarke betrayed his bias for the Anglo-American system of judicially developed law, when he extolled the value of the American influence:

In the matter of extradition the American law was, until 1870 better than that of any country in the world; and the decisions of the American judges are the best existing exposition of the duty of extradition, in its relations at once to the judicial rights of nations and the general interests of the civilization of the world.<sup>54</sup>

The first two general treaties between the United States and Great Britain<sup>55</sup> and the first between the United States and France<sup>56</sup> had significantly adopted the law of extradition as developed by the French theoreticians and American judges. These treaties set the trend for the development of extradition law in the United States.

52. Convention on Extradition, Sep. 26, 1844, France-Luxembourg, 97 Parry's T.S. 317. See BILLOT, *supra* note 9, at 526; SHEARER, *supra* note 9, at 18.

53. Convention on Extradition, Apr. 28, 1850, France-Saxony, 104 Parry's T.S. 69. See BILLOT, *supra* note 9, at 552; SHEARER, *supra* note 9, at 18. The rule of speciality requires that the returned fugitive be tried only for those offenses for which he was extradited. See Blakesley, *supra* note 1, at 706-09. The 1850 Treaty between France and Spain allowed the principle of speciality to be waived upon request. Convention on Extradition, Aug. 26, 1850, France-Spain, 104 Parry's T.S. 293, art. 7. See BILLOT, *supra* note 9, at 498.

54. E. CLARKE, A TREATISE UPON THE LAW OF EXTRADITION 28-29 (2d ed. 1874).

55. The Jay Treaty, *supra* note 12, art. 27. A general analysis of the Treaty is found in S. BEMIS, JAY'S TREATY: A STUDY IN COMMERCE AND DIPLOMACY (2d ed. 1962). Article 27 reads:

It is further agreed that His Majesty and the United States on mutual requisitions, by them respectively, or by their respective Ministers or officers authorized to make the same, will deliver up to justice all persons who, being charged with murder or forgery, committed within the jurisdiction of either, shall seek an asylum within any of the countries of the other, provided that this shall only be done on such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the offense had there been committed. The expense of such apprehension and delivery shall be borne and defrayed by those who make the requisition and receive the fugitive.

The Jay Treaty, *supra* note 12, art. 27. Convention on Boundaries, the Slave Trade and Extradition (Webster-Ashburton Treaty), Aug. 9, 1842, United States-Great Britain, 8 Stat. 572, TS 119, 12 BEVANS 82, 1 MALLOY 650, art. 10. This Treaty extended the list of extraditable offenses from murder and forgery, as in the Jay Treaty, to include arson, piracy, robbery and uttering forged papers. *Id.*

56. Treaty of Extradition, Nov. 9, 1843, United States-France, 8 Stat. 581, TS 89, 7 BEVANS 830, 1 MALLOY 526. This was the first United States treaty to include a political offense clause. *Id.* art. v. As evidenced by the 1889 Supplementary Convention to the Webster-Ashburton Treaty, Extradition Convention, Jul. 12, 1889, United States-Great Britain, 26 Stat. 1508, TS 139, 12 BEVANS 211, the political offense clause was soon adopted as standard in United States extradition treaties. *Id.*, art. ii.

## V. EXTRADITION WITHOUT TREATY OBLIGATION

A distinguishing feature of the law relating to extradition in France as opposed to that in the United States is the ability of the French Government to extradite fugitives without the authority of a treaty. The reason for the distinction is the American constitutional prescription that the Executive Branch has no prerogative to dispose of the liberty of the individual. Unless the Executive has been given this authority by treaty after the advice and consent of the Senate, there is no executive discretion to surrender a fugitive to a foreign state.<sup>57</sup> France did not develop the same constitutional prohibition.

De Vattel believed that each state has a duty, imposed by international law, to extradite all those who have been accused of committing serious crimes.<sup>58</sup> Jean Bodin and Hugo Grotius believed that there was a "natural duty" under international law, either to extradite or to prosecute fugitives, from one state's justice, who are found within another state's borders.<sup>59</sup> The views of Bodin, Grotius and de Vattel have been followed by a diverse group of scholars.<sup>60</sup> Pufendorf and others of the "positivist school" have disagreed, however, and argue that extradition is only an imperfect obligation requiring a special compact or treaty to secure the full force and effect of international law.<sup>61</sup>

A. *Extradition Allowed with No Treaty Obligation — France*

The Continental conceptualization of extradition, exemplified by that of France, evolved away from the "natural law" theory of Bodin and Grotius that each state has a duty to extradite or to prosecute. Nevertheless, French law explicitly allows extradition without any treaty obligation.

In the late nineteenth century, Professor Billot wrote that it is "an established principle that extradition *may* be authorized in the absence of a treaty."<sup>62</sup> French judicial decisions recognized this principle as early as 1827:

57. See, e.g., *Valentine v. United States*, 299 U.S. 5 (1936).

58. E. DE VATTEL, *LE DROIT DES GENS* 311-13 (Liv. 2, ch. 6, §§ 76, 77) (1758) (Carnegie Inst. 1916).

59. J. BODIN, *LES SIX LIVRES DE LA RÉPUBLIQUE* (1576), *THE SIX BOOKES OF A COMMONWEALE* (Harvard Pol. Classics, K. D. McRae ed. 1962) 100-11; H. GROTIUS, *II DE JURE BELLI AC PACIS* (1646) (F. Kelsey, trans. 1925) 527. Cf., note 29 *supra* (ancient religious duty to punish).

60. See, e.g., H. WEATON, *ELEMENTS OF INT'L LAW* 188 (5th ed. C. Phillipson ed. 1916). The list of scholars accepting the "natural duty" view of extradition includes: Heineccius, Burlamaqui, Rutherford, Schmelzing and Kent. *Id.* See SHEARER, *supra* note 9, at 24; BASSIOUNI, *supra* note 9, at 7.

61. E.g., S. PUFENDORF, *THE ELEMENTS OF UNIVERSAL JURISPRUDENCE*, Bk. VII, c. 3, §§ 23, 24 (1672, W. Oldfather trans. 1931). See WHEATON, *supra* note 60, at 188. Among other early adherents of the "positivist" view are: Voet, Martens, Kluber, Leyser, Luit, Saalfeld, Schmaltz, Mittermaier and Heffter. SHEARER, *supra* note 9, at 24; BASSIOUNI, *supra* note 9, at 7. The United States Supreme Court has followed the tenets of the "positivist school." See, e.g., *Valentine v. United States*, 299 U.S. 5 (1936).

62. BILLOT, *supra* note 5, at 259 (emphasis supplied). See H. DONNEDIEU DE VABRES, *LES PRIN-*



[T]he right to deliver up a foreigner, accused of a crime or a misdemeanor in his country of origin, to the tribunals of that country, does not take its point of origin in treaties concluded with foreign Powers; but in the rights which the King derives from his birth and by virtue of which he maintains relations of comity with neighboring States.<sup>63</sup>

In 1872, the French Minister of Justice provided explicit recognition of the authority to extradite in the absence of any treaty when he issued a *circulaire* to the effect that extradition might be granted in the absence of a treaty on the basis of reciprocity. This *circulaire* stipulates that the rules applicable to such an undertaking are those of international law.<sup>64</sup> Although authority exists in France for allowing extradition in the absence of a treaty, the extradition treaty has been the most constant source of developing extradition law.

The French source of authority to extradite in the absence of a treaty is no longer the King's birthright, but the Extradition Law of 1927.<sup>65</sup> Article I of the Extradition Law, however, recognizes the premier position of the extradition treaty: "In the absence of a treaty, the conditions, the procedures and the effects of extradition are determined by the dispositions of the present law."<sup>66</sup>

The French Extradition Law of 1927,<sup>67</sup> therefore, expressly applies only in

CIPES MODERNES DE DROIT PÉNAL INT'L 249 (1928); MERLE & VITU, *supra* note 4, at 322; BOUZAT & PINATEL, *supra* note 36, at 1658-59. Today, in the absence of a treaty, the source of authority for extradition is the Extradition Law of Mar. 10, 1927, "*Loi Relative à l'extradition des étrangers*" [1927] DALLOZ PÉRIODIQUE IV 265; [1927] SIREY RECUEIL GÉNÉRAL 910; CODE DE PROCÉDURE PÉNALE 363 (laws cited following art. 696) (Petits Codes Dalloz, 21st ed., 1979-1980) [hereinafter cited as Law of Mar. 10, 1927].

63. Judgment of Jun. 30, 1827, Cour de Cassation, 52 BULL. DE CASSATION (CRIMINEL) 541(1827). See BILLOT, *supra* note 5, at 259; SHEARER, *supra* note 9, at 30-31 n.6.

64. *Circulaire du Garde des Sceaux*, Jul. 30, 1872, § 8, reprinted in BILLOT, *supra* note 5, at 422-23. See SHEARER, *supra* note 9, at 25.

65. Law of Mar. 10, 1927, *supra* note 62. See Donnedieu de Vabres, *De l'Extradition*, 20 BULLETIN DE LA SOCIÉTÉ D'ÉTUDE LEGISLATIVE 330 (1924); Donnedieu de Vabres, *La Loi du 10 mars 1927, sur l'Extradition des Étrangers*, [1927] SEMAINE JURIDIQUE 593; Donnedieu de Vabres, *La Nouvelle Loi Relative à l'Extradition des Étrangers*, 2 ÉTUDE CRIMINOLOGIQUES 21 (1927); Donnedieu de Vabres, *Le Régime Nouveau de l'Extradition d'après la Loi du 10 mars 1927*, 22 REVUE CRITIQUE DE DROIT INT'L PRIVÉ 169 (1927); Rioufol, *l'Extradition d'après la Loi du 10 mars 1927*, 47 REVUE CRITIQUE DE LÉGISLATION ET DE JURISPRUDENCE 503 (1927); M. TRAVERS, *L'ENTR'AIDE RÉPRESSIVE INT'L ET LA LOI FRANÇAISE DU 10 MARS 1927* (1928); Aupecle, *supra* note 9.

66. Law of Mar. 10, 1927, *supra* note 62, art. 1. Author's translation. See MERLE & VITU, *supra* note 4, at 322.

67. Note 62, *supra*. See *Annexe to the procès-verbal de la Séance du 4 mars 1926*, JOURNAL OFFICIEL, May 1926, at 159; [1927] SIREY, RECUEIL GENERAL 910 n.1 *bis*. The history of the 1927 extradition law's nascency is a protracted one. It started in 1878, when an extradition law presented by M. Defaure was approved by the *Sénat* but not by the *Chambre*. After that, there were several other abortive attempts to promulgate an extradition law. In 1900, another version was presented, but never discussed. In 1923, another new proposition was presented by M. Renoult. It reproduced, with a few modifications, the essential provisions of the 1900 project. The *Sénat* submitted it to the Society of Legislative Studies, which studied and generally approved it. Finally, its propositions

the absence of an extradition treaty. Therefore, this law is designed principally to play the dual role of *droit commun* (basic law) for extradition in the absence of a treaty and *droit supplétif* where lacunae are found in existing extradition treaties. The law does not abrogate any treaties of extradition, but applies when a default of a treaty occurs, or where no treaty exists at all, or where there is a gap in a particular extradition treaty.<sup>68</sup> The law also functions as a guide for negotiations of new extradition treaties.

**B. Extradition Not Required in the Absence of a Treaty Obligation — United States<sup>69</sup>**

There was a grand debate in the United States between 1794 and 1840, over the issue of whether or not there was a duty to extradite fugitives in the absence of a treaty obligation. The first judicial decision to consider the issue was *United States v. Robins*.<sup>70</sup> The *Robins* decision did not settle the debate, however, and divergence of opinion among judges and commentators reigned until 1840, when the United States Supreme Court held that no obligation to extradite existed apart from that imposed by treaty.<sup>71</sup> The Supreme Court reaffirmed its holding in the famous case of *United States v. Rauscher*,<sup>72</sup> in which the Court adopted the positivist school's view that extradition had not existed until "modern times." Moreover, explained the Court, extradition did not come into existence until the "nations of the earth . . . imposed upon themselves the obligation of delivering up these fugitives from justice to the States where their crimes were committed . . . ."<sup>73</sup>

Where extradition did occur, it was generally done pursuant to a treaty between two sovereign powers. The Court explained that prior to and apart from treaties there exists no duty to extradite. If extradition were to occur

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and amendments were approved by the *Sénat* under the report of M. Vallier, and by the *Chambre*, under the report of M. Ranaldy. On March 10, 1927, the law was officially promulgated. See Donnedieu de Vabres, *DE L'EXTRADITION* 20 BULLETIN DE LA SOCIÉTÉ D'ÉTUDE LÉGISLATIVE 330 (1924); Donnedieu de Vabres, *Rapport à la Société d'Études Législatives*, 21 BULLETIN DE LA SOCIÉTÉ D'ÉTUDES LÉGISLATIVES 99 (1925); DONNEDIEU DE VABRES, *supra* note 36, at 976-77.

68. BOUZAT & PINATEL, *supra* note 36, at 1658-59. French extradition treaties are self-executing; if they are duly approved by the legislature and promulgated, they operate without further legislative implementation. See MERLE & VITU, *supra* note 4, at 322; *Harvard Research (Extradition)*, 29 AM. J. INT'L L. SUPP. 380 (1935); SHEARER, *supra* note 9, at 11. The Treaties must be approved and promulgated by the legislature because they are of the type that modify legislative dispositions. CONSTITUTION (Oct. 4, 1958), arts. 52, 53. MERLE & VITU, *supra* note 4, at 322. Once ratification has been obtained, a decree ordains the publication of the treaty in the JOURNAL OFFICIEL and the treaty is, henceforth, in full force and effect. *E.g., id.*

69. Extradition in the United States is a federal, as opposed to a state, power. U.S. CONST. art. I, § 10; *United States v. Rauscher*, 119 U.S. 407, 412-14 (1886).

70. 27 F. Cas. 825 (D.S.C. 1799) (No. 16,175).

71. *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540 (1840).

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

73. *Id.* at 411-12.

without the authority of a treaty, it was not based upon a legal obligation, but as a matter of comity within the discretion of the government which took the action.<sup>74</sup> The Court was adamant that such an obligation had never been recognized as deriving from principles of international law.<sup>75</sup>

The Court inferred from the doctrine writers that because an *obligation* to extradite could not exist until a state assumed that obligation by treaty or one of its analogues, it could not have existed except in modern times.

The perception that extradition required a treaty for its authority influences the historical view taken, as well as the practice, of extradition. In *Factor v. Laubenheimer*,<sup>76</sup> the Supreme Court reiterated its view that the right, and the related obligation, to extradite could only exist pursuant to a treaty:

[T]he principles of international law recognize no right to extradition apart from treaty. While a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender a fugitive from justice to the country from which he has fled, and it has been said that it is under a moral duty to do so . . . the legal right to demand his extradition and the correlative duty to surrender him to the demanding country exists only when created by treaty.<sup>77</sup>

Finally, in 1936 the Supreme Court of the United States took the logical next step by holding that not only is there no duty to extradite apart from that created by a treaty, there is no authority in United States law to do so without an express legislative or treaty stipulation.<sup>78</sup> The Court declared:

Applying, as we must, our law in determining the authority of the President, we are constrained to hold that this power, in the absence of statute conferring an independent power, must be found in the terms of the treaty and that, as the treaty with France fails to grant the necessary authority, the President is without power to surrender the respondent.<sup>79</sup>

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74. *Id.*

75. *Id.*

76. 290 U.S. 276 (1933).

77. *Id.* at 287.

78. *Valentine v. United States*, 299 U.S. 5 (1936).

79. *Id.*, at 18. The opinion continues with an explanation:

It cannot be doubted that the power to provide for extradition is a national power; it pertains to the national government and not to the states. . . . But, albeit a national power, it is not confined to the executive in the absence of treaty or legislative provision. At the very beginning Mr. Jefferson, as Secretary of State, advised the President: "The laws of the United States, like those of England, receive every fugitive, and no authority has been given to their Executive to deliver them up." As stated by John Bassett Moore in his treatise on extradition — summarizing the precedents — "the general opinion has been, and practice has been in accordance with it that in the absence of a conventional or legislative provision, there is no authority vested in any department of the

An extradition treaty, of course, is the law of the land<sup>80</sup> and, being generally self-executing, does not require implementing legislation.<sup>81</sup> Nevertheless, statutes relating to extradition have been enacted by Congress. These statutes, unlike those in France, do not authorize extradition in the absence of a treaty. In fact, their operation and the authority they confer are expressly made dependent on the existence of an appropriate extradition convention.<sup>82</sup>

The first United States legislation concerning extradition was enacted in 1848.<sup>83</sup> The Act of 1848 required that any act of extradition be under the authority of a treaty and that it be subject to judicial proceedings in federal district court. The extradition statute currently in force reads as follows: "The provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such government."<sup>84</sup>

The United States Government has consistently articulated this requirement to foreign governments:

Under the laws of the United States, the Government of the United States may extradite an individual from this country to a foreign country only in accordance with an extradition agreement. It may not extradite an individual to a foreign country in the absence of such an agreement or in a case not coming within the terms of such agreement.<sup>85</sup>

In 1947, for example, the United States Government denied a request by the

government to seize a fugitive criminal and surrender him to a foreign government, unless that discretion is granted by law." It necessarily follows that as the legal authority does not exist save as it is given by act of Congress or by the terms of a treaty, it is not enough that a statute does not deny the power to surrender. It must be found that the statute or treaty confers the power.

*Id.*, at 8-9. United States practice has not always been consistent with this view. See, e.g., *re* Joseph Fisher, 1 Stuart 245 (1827) (Lower Canada), 6 BRIT. DIG. OF INT'L L. 455 (extradition was granted by the United States to Canada in the absence of an applicable treaty provision). Such extraditions have occurred during the period of debate over the issue and it appears that extradition has been granted on the basis of a moral, rather than a legal duty. See SHEARER, *supra* note 9, at 25. International law authorizes, but does not require, extradition. International law is the law of the land and regulating the relations between sovereign states does provide for significant *executive* prerogative. Congress could conceivably authorize extradition in the absence of a treaty, but it has never done so. See *Argento v. Horn*, 241 F.2d 258, 259 (6th Cir. 1957).

80. U.S. CONST. art. VI, § 2; *Head Money Cases*, 112 U.S. 580 (1884); *Chew Heong v. United States*, 112 U.S. 536, 540, 556 (1884).

81. WHITEMAN, *supra* note 2, at 734.

82. *Id.*

83. Act of Aug. 12, 1848, ch. 167, 9 Stat. 302. The current U.S. law is found in 18 U.S.C. § 3181 (1976).

84. 18 U.S.C. § 3181 (1976).

85. Note to Ambassador of the Turkish Republic (Ürgüplü), from Secretary of State Herter, May 1, 1959, MS. Dept. of State file 211.8215, Yeneriz, Muhip/3-3059, reprinted in WHITEMAN, *supra* note 2, at 734-35.

Soviet Embassy at Washington, to extradite a Soviet national accused of embezzlement, explaining: "[I]t is a well-established principle of international law that no right to extradition exists apart from treaty."<sup>86</sup> The result is the same when the terms of an existing treaty do not cover the circumstances of the particular case before the court. Christian Herter, as Acting Secretary of State in 1958, suggested this in a letter to an individual who had asked for information on the subject:

[I]t may be said that if the offense for which an individual's return is desired is not one of those enumerated in the treaty between the two countries concerned, the requested country would be under no obligation to surrender in extradition an individual charged with that offense and the requesting country would be unable to invoke the provisions of the treaty to obtain his surrender.<sup>87</sup>

The fountainhead for United States judicial refusal to grant extradition, unless there is treaty authority for it, is the

fundamental consideration that the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law. There is no executive discretion to surrender him to a foreign government, unless that discretion is granted by law . . . legal authority does not exist, save as it is given by act of Congress or by the terms of a treaty . . .<sup>88</sup>

The language used by the United States Supreme Court in *Valentine* leaves no doubt that the United States Government will not extradite a fugitive unless the circumstances are covered by the terms of a treaty.<sup>89</sup>

Although the executive has no direct power to extradite without prior legislative (*i.e.*, statutory or treaty) authorization, the Executive Branch has a powerful influence on judicial interpretation with respect to the existence, appropriateness and applicability of treaty provisions. The judiciary relies on ex-

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86. Communication handed by the Chief of the Division of Eastern European Affairs (Thompson) to the Counselor of the Soviet Embassy at Washington (Tarassenko), Jan. 20, 1947, reported in 16 DEPT STATE BULL. 212 (Feb. 2, 1947). See WHITEMAN, *supra* note 2, at 733.

87. Letter from Acting Secretary of State Herter to A.I. Mendelsohn, Dec. 29, 1958, MS. Dept. of State, file 266.1115/12-1158, reprinted in WHITEMAN, *supra* note 2, at 733.

88. *Valentine v. United States* 299 U.S. 5, 9 (1936). In this case, the United States Supreme Court refused to extradite an American national to France, even though the general policy of the United States' Government was to eliminate the nationality exemption from extradition. It held that the "nationals exemption clause" in the treaty absolutely precluded the right of the executive to extradite one of its nationals. Of course, the holding applies to United States nationals only. However, the rationale of the holding is not that nationals will not be extradited unless there is reciprocity, but that no extradition can take place unless there is a specific treaty provision covering it.

89. *Valentine v. United States*, 299 U.S. 5 (1936).

executive expertise in the field of foreign affairs; a Department of State determination that a treaty exists or that its provisions apply to the facts will be upheld in most cases. The executive power to make treaties with the advice and consent of the Senate<sup>90</sup> and its power to conduct foreign affairs<sup>91</sup> provide the rationale for this reliance.

Although American jurisprudence will not allow the United States Government to extradite a fugitive except under the terms of a valid treaty, the United States Government does not hesitate to seek extradition from states with which there exists no extradition treaty or when the pertinent treaty fails to cover the facts of the specific case.<sup>92</sup> The Department of State is always careful to draft such an extradition request so as to indicate clearly to the requested state that there can be no hope for reciprocity under United States law.<sup>93</sup> Positive responses by foreign governments to extradition requests made in this manner are not uncommon as a matter of comity or on the basis of that country's municipal extradition law.

## VI. CONCLUSION

The law of extradition evolved from the need or the desire to obtain custody over individuals deemed dangerous to the social cell. This could follow from the perception that an affront to the gods or to the leader's authority had to be avenged. Such a perception arose when the leader was challenged in his authority, as in a directly "political" offense, or when the leader's authority was undermined because of some "wrong" committed within the scope of his "sovereignty." Thus, the distinction between rendition for "common," rather than "political," offenses was not appreciated in ancient times. Each type of offense endangered the sovereignty of the leader of the social cell. In many cases, banishment was the appropriate penalty, so the issue of extradi-

90. See, e.g., *Ivancevic v. Artukovic*, 211 F.2d 565 (9th Cir. 1954), *cert. denied*, 348 U.S. 818 (1954); see also *Charlton v. Kelly*, 229 U.S. 447 (1913).

91. *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936); *Missouri v. Holland*, 252 U.S. 416 (1920); L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* (1972); Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 197 U. PA. L. REV. 903 (1959)."

92. E.g., MOORE, *supra* note 9, at 33-35; WHITEMAN, *supra* note 2, at 732-37; SHEARER, *supra* note 9, at 27. Cf. I. STANBROOK & C. STANBROOK, *THE LAW AND PRACTICE OF EXTRADITION* xxvii (1980) (the United Kingdom only grants extradition where reciprocal arrangements have been made).

During the author's stay with the Legal Adviser's Office of the Department of State, which included two years of working on extradition matters, there were many such requests. They are most common in cases of narcotics violations, which are not included as extraditable offenses in most of the older extradition treaties. There is obviously a valid interest in making these requests and most of the time a valid interest on the part of the requested country to approve the request. Apparently, British practice is similar to that of the United States in this regard. See, *id.*

93. See note 92 *infra*.

tion was moot. However, when either type of offense had to be avenged, rendition was sought. Accordingly, "extradition" and treaties of extradition have ancient precedents.<sup>94</sup>

When the "nation-state" evolved, the sovereign continued to desire the rendition of criminals and, frequently, "political" offenders. As modern theories of criminal science evolved, so did theories of extradition.<sup>95</sup> The notion that the relative power of the sovereigns required the extradition of fugitives,<sup>96</sup> gave way to the view that natural right and justice required extradition.<sup>97</sup> Later, positivism served to promote the concept that the "legality" of extradition is derived from an extradition treaty, local legislation or case law.<sup>98</sup> While the reigning legal philosophy has changed, this brief historical sketch indicates that extradition has existed from antiquity and that the role of extradition in society has remained relatively constant.

The modern French and American legal cultures present contrasting versions of the law of extradition as it has presently evolved. These versions were significantly influenced by legal notions developed in diplomatic practice both in antiquity and the Middle Ages. The modern French and American views, in turn, have impacted the general law of extradition in modern times.<sup>99</sup> This is particularly true with respect to the French influence. The modern extradition treaty is greatly influenced in its language, scope and structure, by the French approach to this ancient problem.<sup>100</sup>

The debate in France in the last century,<sup>101</sup> over the existence of extradition in antiquity, as well as the controversy between the "natural law" and "positivist" schools with respect to the basis for an obligation to extradite, has framed the basic issue of contemporary extradition law. However, whether extradition is derived from the nature of man or from the nature of the modern world, the practice of extradition is a fundamental and historically justified part of the law of nations.\*

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94. See, e.g., Langdon & Gardiner, *supra* note 9.

95. See note 44 and accompanying text, *supra*.

96. See, e.g., notes 42-43 and accompanying text, *supra*.

97. See notes 59-60 and accompanying text, *supra*.

98. See, e.g., note 61 and accompanying text, *supra*.

99. See, e.g., note 54 and accompanying text, *supra*.

100. See, e.g., notes 6-8 and accompanying text, *supra*.

101. See, e.g., notes 16-20 and accompanying text, *supra*.

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