

# THE MARTYRDOM AND AVENGING OF ENRIQUE CAMARENA-SALAZAR: A REVIEW OF CASELAW AND SCHOLARSHIP AFTER THIRTY YEARS

*Arthur F. McEvoy\**

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\* Professor of Law, Southwestern Law School, Los Angeles, California. J.D., Stanford University, 1989; Ph.D. (History), University of California, San Diego, 1979. This Article grew out of remarks prepared for the Southwestern Journal of International Law Symposium, “The U.S. District Court for the Central District of California, 1966-2016: International Context,” held at Southwestern Law School, Los Angeles, March 18, 2016. Thanks to Jonathan Miller and the members of the symposium panel for the opportunity to take part, and to the staff of the Southwestern Journal of International Law for their help in bringing the article to fruition. Mistakes and infelicities of style are my responsibility.

## INTRODUCTION

This symposium celebrates the fiftieth anniversary of the creation of the U.S. District Court for the Central District of California, which serves seven Southern California counties and, with a population of over nineteen million people, is the largest and most diverse federal judicial district in the country.<sup>1</sup> Its heart is the city of Los Angeles, the second-largest city in the United States and a focal point of social change, not only for the country but for the entire world. The symposium's organizers built the program around a selection of internationally significant cases that have been litigated in the Central District Court. These include a suit in which heirs of people killed in the Armenian genocide of 1915 successfully recovered claims on more than 2,000 policies issued by the New York Life Insurance Company,<sup>2</sup> a series of civil and criminal cases that arose out of the enslavement of Thai immigrants in an El Monte garment factory,<sup>3</sup> and challenges to the constitutionality of the U.S. military's ban on openly lesbian, gay, or bisexual personnel.<sup>4</sup> A fourth panel concerned the murder of Enrique "Kiki" Camarena-Salazar, a Special Agent for the United States Drug Enforcement Administration (DEA) who was kidnapped and tortured by members of a Mexican drug cartel in 1985.<sup>5</sup>

The effort to bring Agent Camarena's murderers to justice left a deep imprint on the Central California District's institutional memory. The investigation, which was run out of the U.S. Attorney's Office in Los Angeles, was one of the largest in the DEA's history and "marked a turning point in the war on drugs," according to the agency's official history.<sup>6</sup> On the symposium panel were three of the principal actors in the case: Robert Bonner, who was both a U.S. Attorney for the Central District and DEA Administrator while the Camarena investigation went on; Manuel Medrano, an Assistant U.S. Attorney at the time who prosecuted the criminal cases to which the investigation led;

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1. *The United States Attorney's Office, Central District of California: Our District*, U.S. DEP'T OF JUST. (Jan. 22, 2016), <https://www.justice.gov/usao-cdca/our-district>.

2. Henry Weinstein, *Insurer Settles Armenian Genocide Suit*, L.A. TIMES, Jan. 29, 2004, at B1.

3. See Teresa Watanabe, *Home of the Freed*, L.A. TIMES, Aug. 14, 2008, at A1.

4. *Log Cabin Republicans v. United States*, 658 F.3d 1162 (9th Cir. 2011); see John Schwartz, *U.S. Judge Halts 'Don't Ask' Law for the Military*, N.Y. TIMES, Oct. 13, 2010, at A1.

5. *United States v. Alvarez-Machain*, 542 U.S. 655 (1992); Chris Kraul, *From Torture to Terrorism*, L.A. TIMES, Feb. 26, 2015, at A2.

6. U.S. DRUG ENF'T ADMIN., DRUG ENFORCEMENT ADMINISTRATION 1985-1990, at 64, <https://www.dea.gov/about/history/1985-1990.pdf>; see also Jerry Seper, *Brutal DEA Agent Murder Reminder of Agency Priority*, WASH. TIMES (Mar. 5, 2010), <http://www.washingtontimes.com/news/2010/mar/05/dea-has-25-year-burning-reminder/>.

and Paul Hoffman, an American Civil Liberties Union lawyer who represented one of the defendants in the Central District, Ninth Circuit, and U.S. Supreme Courts. The investigation generated three appeals to the Supreme Court, the last of which was heard in 2004, nearly twenty years after Agent Camarena's death.<sup>7</sup> The thirtieth anniversary of the murder, in 2015, was the subject of observances in many parts of the country.<sup>8</sup>

The martyrdom of Enrique Camarena also left a significant impact on the American law of criminal procedure; that impact and the evolution of our understanding of it over time is the subject of this Article. The point to be made is that Camarena's death was tragic in the classical sense: he met his end while serving bravely and with integrity in a cause whose fundamental contradictions exposed him to danger. In Mexico, Camarena became a target because he was good at his job; official ambivalence toward his mission, however—from his own government as well as that of his hosts—both enabled the threat to grow and left him exposed to it.<sup>9</sup> The talented investigators and lawyers charged with bringing the murderers to justice likewise struggled under the contradiction between the worthwhile goal of avenging his death and the felt necessity to sacrifice, in the process, the rule-of-law principles for which he died.<sup>10</sup> Like any great tragedy, finally, Camarena's death raised important questions about the nature of American criminal justice: questions that have led scholars to new insights about our justice system as the response to his death changed it over time.<sup>11</sup> In the end, Agent Camarena's story leaves the rest of us both with a cautionary lesson about the risks of pride and, perhaps, a guide to reconciliation and renewal.

## I. THE MARTYRDOM OF ENRIQUE CAMARENA

Special Agent Enrique Camarena lost his life while working out of the DEA office in Guadalajara, Jalisco, Mexico; his job was to investigate and interdict the smuggling of marijuana into the United

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7. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *United States v. Alvarez-Machain*, 504 U.S. 655 (1992); see *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

8. Kraul, *supra* note 5; see *DEA Atlanta Office Observes 30th Anniversary of Slain Special Agent*, U.S. DRUG ENFORCEMENT ADMIN. (Mar. 5, 2010), <https://www.dea.gov/divisions/atl/2015/atl030515.shtml>; see *30th Anniversary: Red Ribbon Week Kicks off*, EL CENTRO CHAMBER OF COMMERCE & VISITORS BUREAU (Oct. 27, 2015), <http://www.elcentrochamber.org/news/details/30th-anniversary-red-ribbon-week-kicks-off>.

9. See *infra* Part I.

10. See *infra* Part II.

11. See *infra* Part III.

States.<sup>12</sup> An exceptionally large bust in November 1984 drew the ire of traffickers headquartered in Guadalajara, who kidnapped Agent Camarena on February 7 of the following year, interrogated him and one of his informants under torture for three days, and finally killed the two men and left their bodies where they would not be found until some weeks later.<sup>13</sup> U.S. and Mexican authorities responded to the crime immediately and energetically, although bureaucratic tangles and official corruption ensured that the investigation would not be as successful as it might have been.<sup>14</sup> Hindrances to the investigation were not peculiar to the particular case, but were intrinsic to the so-called “War on Drugs” in which Camarena was a soldier.<sup>15</sup> The investigation did, however, lead to a number of significant convictions,<sup>16</sup> as well as to a handful of appeals that worked their way through the federal courts and left important legal changes in their wake.<sup>17</sup>

#### A. *The Abduction of “Kiki” Camarena*

At the time of his murder, Special Agent Enrique Camarena-Salazar was thirty-seven years old.<sup>18</sup> He had a wife, Geneva, and three children.<sup>19</sup> Although born in Mexicali, Camarena graduated from high school in Calexico, California, and served two years in the Marine Corps.<sup>20</sup> After separating from the service as a corporal in 1970, he worked as a firefighter and a police officer in Calexico and as a drug investigator for Imperial County in nearby El Centro.<sup>21</sup> In 1974, Camarena went to work for the DEA, first at the agency’s Calexico office and later in Fresno.<sup>22</sup> In 1981, the agency transferred him to its

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12. See U.S. DRUG ENF’T ADMIN., *supra* note 6, at 63.

13. Seper, *supra* note 6.

14. U.S. DRUG ENF’T ADMIN., *supra* note 6, at 64.

15. The first “War on Drugs” was officially declared by President Richard Nixon in 1971. See Gary S. Becker & Kevin M. Murphy, *Have We Lost the War on Drugs?*, WALL ST. J., Jan. 5-6, 2013, at C1; Kraul, *supra* note 5.

16. See, e.g., *United States v. Zuno-Arce*, 44 F.3d 1420 (9th Cir. 1995).

17. See *United States v. Alvarez-Machain*, 542 U.S. 655 (1992); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

18. *Kiki and the History of Red Ribbon Week*, U.S. DRUG ENFORCEMENT ADMIN., [https://www.dea.gov/redribbon/RedRibbon\\_history.shtml](https://www.dea.gov/redribbon/RedRibbon_history.shtml) (last visited Oct. 26, 2016).

19. *Id.*

20. *Id.*

21. *Id.*; Roman Flores, *A Look into Slain DEA Agent Enrique Camarena’s Story During Red Ribbon Week*, IMPERIAL VALLEY PRESS (Oct. 27, 2011), [http://articles.ivpressonline.com/2011-10-27/dea-agent\\_30330461](http://articles.ivpressonline.com/2011-10-27/dea-agent_30330461).

22. *Kiki and the History of Red Ribbon Week*, *supra* note 18.

Resident Office in Guadalajara.<sup>23</sup> Camarena was a good investigator and won several awards during his eleven years with the DEA.<sup>24</sup>

In November 1984, Camarena's investigation led to what one State Department official called "the Bust of the Century."<sup>25</sup> DEA and Mexican officers raided a network of marijuana plantations in the state of Chihuahua and seized more than 10,000 tons of marijuana with an estimated value of \$2.5 billion.<sup>26</sup> The plantations, which covered more than 700 acres and employed a workforce variously estimated at six or seven thousand, belonged to a ring based in Guadalajara. The *narco* in charge was Rafael Caro-Quintero, a thirty-two-year-old Sinaloa native who was one of the early leaders of the Mexican drug trade.<sup>27</sup> This was by some distance the largest drug seizure the DEA had made until that point: it uncovered an elaborate industry for growing, processing, and smuggling marijuana, whose existence had hitherto been unknown to U.S. officials.<sup>28</sup> It suggested not only that the DEA had grossly underestimated the amount of marijuana used in the United States, but also a need for the federal government to revise its statistical methods for estimating levels of drug production and drug use around the world.<sup>29</sup> In particular, it forced U.S. officials to reassess their position that they were making progress in controlling the drug trade, especially from Mexico.<sup>30</sup>

Three months later, on February 7, 1985, a group of men abducted Camarena from a Guadalajara street while he was walking from his office at the U.S. Consulate to meet his wife for lunch.<sup>31</sup> His captors took him to a private residence in Guadalajara, where they tortured and interrogated the agent over a thirty-hour period before

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23. *Id.*

24. *Id.* The investigation of Camarena's abduction and murder is the focal point of Elaine Shannon's book on the War on Drugs. See ELAINE SHANNON, *DESPERADOS: LATIN DRUG LORDS, U.S. LAWYERS, AND THE WAR AMERICA CAN'T WIN* (2015); see also the memoir by James Kuykendall, JAMES KUYKENDALL, *¿O PLATA O PLOMO? "SILVER OR LEAD?"* (2005).

25. The phrase was that of Jon R. Thomas, Assistant Secretary of State for International Narcotics Matters. See Joel Brinkley, *Vast, Undreamed-of Drug Use Feared*, N.Y. TIMES, Nov. 23, 1984, at A3; see also Jacob V. Lamar Jr., *The Bust of the Century*, TIME, Dec 3, 1984, at 26; *Kiki and the History of Red Ribbon Week*, *supra* note 18.

26. Brinkley, *supra* note 25; *Thirty Years of America's Drug War: A Chronology*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/index.html#39> (last visited Oct. 26, 2016).

27. Brinkley, *supra* note 25; Kraul *supra* note 5; Juan Vasquez, *Mexican Tied to Agent's Death May Be Gone but He Isn't Forgotten*, L.A. TIMES, Apr. 2, 1985, pt. 1, at 10.

28. *Thirty Years of America's Drug War: A Chronology*, *supra* note 26.

29. Brinkley, *supra* note 25, at A3.

30. *Id.*

31. Richard J. Meislin, *U.S. Drug Agent Kidnapped*, N.Y. TIMES, Feb. 12, 1985, at A6; *Kiki and the History of Red Ribbon Week*, *supra* note 18.

killing him.<sup>32</sup> Alfredo Zavala Avelar, a pilot for the Mexican Agriculture Department and one of Camarena's informants was abducted later the same day and likewise interrogated under torture before being killed.<sup>33</sup> Testimony showed that officers of the Jalisco State Police took part in the abduction, that Caro-Quintero and other Guadalajara *narcos* planned and executed the murders in retaliation for the raids of the previous November, and that some half-dozen or more high-ranking Mexican political and law-enforcement officials were in the house during the interrogation.<sup>34</sup> A Guadalajara physician, Humberto Álvarez-Machain, reportedly medicated Camarena so as to keep him alive and conscious during the three-day ordeal.<sup>35</sup> Camarena's and Zavala's bodies were first buried in Guadalajara and later moved to a rural area in the neighboring state of Michoacán, where authorities found them a month later in the wake of a shoot-out between police and the property owners.<sup>36</sup>

### B. Operation Leyenda

The torture and murder of a U.S. federal law-enforcement agent was a shocking event, one that laid bare the dysfunction of both Mexican and U.S. efforts against the drug trade as much as the raids of the previous November uncovered the magnitude of the trade itself. Mexican authorities began arresting suspects within a few weeks of Camarena's abduction and eventually convicted some two dozen people in the case, including Rafael Caro-Quintero.<sup>37</sup> The DEA organized a task force under the name "Operation Leyenda," which worked on the case for several years, indicted another score of suspects, and ultimately secured convictions against fourteen of them in the U.S. District Court for the Central District of California.<sup>38</sup> In the end, the

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32. Jim Newton, *Camarena's Abduction and Torture Described*, L.A. TIMES, Dec. 10, 1992, at B1; Seper, *supra* note 6.

33. Marjorie Miller & Juan M. Vasquez, *DEA Agent, Pilot's Bodies Positively Identified*, L.A. TIMES, Mar. 8, 1985, pt. 1, at 3; *Body of U.S. Drug Agent Believed Found in Mexico*, L.A. TIMES, Mar. 6, 1985, pt. 1, at 1.

34. Juan M. Vasquez, *Mexican Police Drug Link Told*, L.A. TIMES, Mar. 19, 1985, pt. 1, at 1; Newton, *supra* note 32.

35. Kraul, *supra* note 5.

36. William A. Orme Jr., *Body of DEA Agent Is Found in Mexico*, WASH. POST (Mar. 7, 1985), <https://www.washingtonpost.com/archive/politics/1985/03/07/body-of-dea-agent-is-found-in-mexico/58bd7a28-57bf-4eb3-931f-0a64dc5fcf12/>; Newton, *supra* note 32, at B3; U.S. DRUG ENF'T ADMIN., *supra* note 6, at 63.

37. U.S. DRUG ENF'T ADMIN., *supra* note 6, at 64.

38. *Id.*; Tracy Wilkinson, *DEA Agent 'Kiki' Camarena's Mexico Slaying Called a Game Changer*, L.A. TIMES (Aug. 9, 2013), <http://articles.latimes.com/2013/aug/09/world/la-fg-wn-dea-agent-killing-a-game-changer-20130809>; Kraul, *supra* note 5, at A2. The Spanish word *leyenda*

response was less successful than Camarena's friends might have wished, limited as it was by tensions between U.S. and Mexican authorities as well as within the U.S. legal system itself — tensions that the Camarena investigation exacerbated but did little to resolve.<sup>39</sup>

Mexican authorities quickly arrested seven present and former officers of the Jalisco State Judicial Police for the kidnapping of Agent Camarena; one of the suspects died under interrogation for undisclosed reasons.<sup>40</sup> Testimony from the arrested officers showed that the Jalisco state police “functioned as a private army for narcotics traffickers in Guadalajara,” and were, in the words of *The Los Angeles Times*, “virtually at the beck and call of the drug dealers,” who “were, in effect, the real bosses of the state police.”<sup>41</sup> Although DEA and Mexican authorities had already identified Caro-Quintero as a likely suspect, Mexican federal police allowed him to escape to Costa Rica after a brief standoff at the Guadalajara airport, two days after the kidnapping.<sup>42</sup> With the help of DEA investigators, Costa Rican police arrested Caro-Quintero and returned him to Mexico, where in 1989 a Guadalajara criminal court sentenced him and twenty-four others to prison for their roles in the Camarena killing: Caro-Quintero and his lieutenant Ernesto Rafael Fonseca-Carrillo to forty years and the others to lesser sentences.<sup>43</sup> To the outrage of U.S. officials, another Mexican court ordered Caro-Quintero's release in 2013, on the ground that he had been improperly tried in federal rather than state court.<sup>44</sup> Although the Mexican Supreme Court reversed the ruling, Caro-Quintero disappeared immediately after walking out of prison

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can mean either “legend” or “lawman,” depending on the context. NEW REVISED VELÁZQUEZ SPANISH AND ENGLISH DICTIONARY 427 (1985). For an overview of the “Operation Leyenda” task force, see Paul Lieberman, *Camarena Case Spotlight Shifts to L.A. Unit's Tactics*, L.A. TIMES, May 7, 1990, at A1.

39. Kraul, *supra* note 5, at A2.

40. Vasquez, *supra* note 27.

41. Juan M. Vasquez, *Mexican Police Drug Link Told*, L.A. TIMES, Mar. 19, 1985, at 1.

42. Ronald J. Ostrow & Paul Houston, *Camarena Case Suspect Caught in Costa Rica*, L.A. TIMES, Apr. 5, 1985, at 1.

43. See *id.* Caro-Quintero's total sentences in relation to convictions of kidnapping, drug trafficking, and weapons smuggling added up to 116 years, but the court ordered concurrent service of sentences due to a Mexican constitutional provision that prohibits terms longer than 40 years for a single conviction. Hector Tobar, *Drug Lord Convicted in Camarena's 1985 Murder*, L.A. TIMES, Dec. 13, 1989, at A3.

44. Randal C. Archibold & Karla Zabudovsky, *Mexican Tied to Killing of D.E.A. Agent Is Freed*, N.Y. TIMES, Aug. 10, 2013, at A4; Peter Baker & Randal C. Archibold, *U.S. Asks for Arrest of Mexican Kingpin Who Was Freed in American's Murder*, N.Y. TIMES, Aug. 14, 2013, at A8; Randal C. Archibold, *U.S. Officials Return to Pursuit of 1985 Killer of American Agent*, N.Y. TIMES, Aug. 28, 2013, at A4.

and remains a fugitive at the time of this writing.<sup>45</sup> Corruption in Mexican law enforcement hampered the efforts of both Mexican and U.S. agencies to prosecute the Camarena murder; Robert Bonner, who led the investigation as U.S. Attorney for Los Angeles, remembered that “[t]he Mexican government was either unwilling or unable to investigate or bring to justice those involved” in the case.<sup>46</sup>

U.S. prosecutors were likewise frustrated by their inability to secure Mexican cooperation in the extradition of suspects for trial in U.S. federal court.<sup>47</sup> First to go to trial, before Central District Judge Edward J. Rafeedie in July 1988, were Raul López Álvarez and René Verdugo-Urquidez in connection with the kidnap and murder of Agent Camarena, and Jesús Felix Gutiérrez for helping Caro-Quintero escape to Costa Rica immediately after the abduction.<sup>48</sup> On his conviction after an eight-week trial, Judge Rafeedie sentenced Verdugo, a “top lieutenant” to Caro-Quintero, to a total of 240 years in prison.<sup>49</sup> López-Álvarez, a state police officer, likewise received 240 years, while Gutiérrez drew a ten-year sentence.<sup>50</sup> These were the only three of nine people indicted in the first round whom prosecutors were able to bring before the court. The others, including Caro-Quintero himself and another leading Guadalajara *narco*, Ernesto Fonseca Carrillo, were all in Mexican custody on charges stemming from the Camarena abduction.<sup>51</sup> At trial, the three convicted men alleged that Mexican officials, from the state police to the highest levels of govern-

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45. Karen McVeigh, *U.S. ‘Deeply Concerned’ over Freeing of Mexico Drug Lord Rafael Caro Quintero*, *GUARDIAN* (Aug. 11, 2013 3:14 PM), <https://www.theguardian.com/world/2013/aug/11/mexico-frees-drugs-rafael-caro-quintero>; Baker & Archibold, *supra* note 44; Tracy Wilkinson, *Fugitive Drug Lord to Mexican President: Reject U.S. Extradition Bid*, *L.A. TIMES* (Dec. 3, 2013), <http://articles.latimes.com/2013/dec/03/world/la-fg-wn-fugitive-drug-lord-mexico-president-20131203>; *Veteran Drug Lord Still Trafficking After Prison Release, US Treasury Says*, *GUARDIAN* (May 11, 2016, 4:52 PM), <https://www.theguardian.com/world/2016/may/11/rafael-caro-quintero-resumed-drug-trafficking-mexico>; *World Briefing: Mexico: Fugitive Denies Tiff with Cartel*, *L.A. TIMES*, July 25, 2016, at A5.

46. Kraul, *supra* note 5; Mary Thornton, *Drug Slaying Embitters U.S. Agents*, *WASH. POST* (Mar. 18, 1985), <https://www.washingtonpost.com/archive/politics/1985/03/18/drug-slaying-embitters-us-agents/d884df3a-de2b-4d2b-84e8-7a71c55772ad/>.

47. Kim Murphy, *Suspects in DEA Slaying Charge Massive Cover-up*, *L.A. TIMES*, July 29, 1988, at 3.

48. *Trial Opens in Death of Tortured Drug Agent*, *N.Y. TIMES*, July 31, 1988, at 25.

49. Kim Murphy, *Mexican Drug Figure Found Guilty in Death of U.S. Agent*, *L.A. TIMES*, Sept. 27, 1988, at 3; Edward J. Boyer, *Drug Trafficker Gets Life Plus 240 Years in U.S. Agent’s Killing*, *L.A. TIMES* (Oct. 28, 1988), [http://articles.latimes.com/1988-10-28/local/me-320\\_1\\_drug-trafficker](http://articles.latimes.com/1988-10-28/local/me-320_1_drug-trafficker).

50. Paul Feldman, *Camarena’s Killer Gets 240-Year Prison Term*, *L.A. TIMES*, Oct. 29, 1988, *Metro* pt. 2, at 1; Tobar, *supra* note 43.

51. Feldman, *supra* note 50; see *Ernesto Fonseca Carrillo, Another Mexican Drug kingpin in DEA Killing, May Go Free, Lawyer Says*, *CBS NEWS* (Aug. 10, 2013, 6:14 PM), <http://>



ment, had from the beginning frustrated U.S. efforts to apprehend and extradite the real killers so as to conceal what they called “massive corruption” in Mexican law-enforcement and military agencies.<sup>52</sup>

High-value defendants remained frustratingly out of reach for the U.S. Attorneys in Los Angeles.<sup>53</sup> One successful prosecution, however, was that of Rubén Zuno Arce, son of a former governor of Jalisco and brother-in-law of former-President of Mexico Luis Echeverría Álvarez.<sup>54</sup> Zuno Arce was an alleged intermediary between the Guadalajara *narcos* and corrupt officials in the Mexican judiciary and military, although he was not charged with Camarena’s murder.<sup>55</sup> He reportedly sold the house in which Camarena and Zavala were murdered to Caro-Quintero.<sup>56</sup> In July 1990, in a case prosecuted before Judge Rafeedie by Assistant U.S. Attorney Manuel Medrano, the jury found Zuno Arce guilty of violent acts in aid of racketeering, conspiracy, and kidnapping in connection with the abduction.<sup>57</sup> Zuno Arce was convicted a second time after a successful appeal. He died in prison in 2012.<sup>58</sup>

Less successful was the U.S. Attorney’s effort to prosecute Humberto Álvarez-Machain, the Guadalajara physician who allegedly medicated Agent Camarena in order to keep him alive and conscious during his interrogation.<sup>59</sup> Unable to secure Álvarez-Machain’s extradition through normal channels, DEA agents paid \$50,000 in 1990 to have him abducted from his Guadalajara office and flown in a private plane to El Paso, where U.S. Marshals arrested and transferred him to Los Angeles for prosecution.<sup>60</sup> Álvarez was one of three suspects that Operation Leyenda brought to trial after abducting them from

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[www.cbsnews.com/news/ernesto-fonseca-carrillo-another-mexican-drug-kingpin-in-dea-killing-may-go-free-lawyer-says/](http://www.cbsnews.com/news/ernesto-fonseca-carrillo-another-mexican-drug-kingpin-in-dea-killing-may-go-free-lawyer-says/).

52. Murphy, *supra* note 47.

53. Kraul, *supra* note 5.

54. *Passings: Rubén Zuno Arce, Convicted in Death of Drug Agent*, L.A. TIMES, Sept. 22, 2012, at AA5.

55. See William Yardley, *Rubén Zuno Arce, Guilty in Drug Killing, Dies at 82*, N.Y. TIMES, Sept. 20, 2012, at B19.

56. *Passings: Rubén Zuno Arce*, *supra* note 54.

57. *Central Figure Is Convicted in '85 Killing of Drug Agent*, N.Y. TIMES, Aug. 1, 1990, at A10.

58. Yardley, *supra* note 55; *Passings: Rubén Zuno Arce*, *supra* note 54.

59. Kraul, *supra* note 5.

60. KUYKENDALL, *supra* note 24, at 217-218; Henry Weinstein, *Witness Tells of Kidnaping Payout*, L.A. TIMES, May 26, 1990, at A26; see *United States v. Caro-Quintero*, 745 F. Supp. 599, 602-04 (C.D. Cal. 1990) (detailing the Álvarez-Machain prosecution history). See also *Alvarez-Machain v. United States*, 107 F.3d 696, 699 (9th Cir. 1996). Weinstein’s article quotes a witness as saying that the payoff amounted to \$60,000, although later testimony and the District Court itself used the lower figure. See *Caro-Quintero*, 745 F. Supp. at 603. See also *infra* note 117.

abroad. Another was René Martín Verdugo-Urquidez, taken from his car in 1986 by Baja California state police and turned over to the Border Patrol at Mexicali. The third was Juan Ramón Matta Ballesteros, a Honduran trafficker whom local police put on a plane to the Dominican Republic, where authorities promptly put him on another to Puerto Rico, on which flight U.S. marshals placed him under arrest.<sup>61</sup> The abductions in particular heightened tensions between U.S. and Mexican authorities, saber-rattling from the former matching threats of retaliation from the latter.<sup>62</sup>

In what was probably the most important Constitutional case to emerge from the Camarena investigation, the U.S. Supreme Court ultimately approved the informal rendition of Álvarez-Machain, who finally stood trial after two years in U.S. custody and ultimately won a judgment of acquittal.<sup>63</sup> In the end, although seven people were convicted in U.S. courts for their roles in the abduction, torture, and murder of Enrique Camarena, none were convicted of the murder itself, and the instigators of the crime remained out of reach.<sup>64</sup> The DEA's official history summarized Operation Leyenda as "a long and complex investigation, made more difficult by the fact that the crime was committed on foreign soil and involved major drug traffickers and government officials from Mexico."<sup>65</sup>

### C. *The War on Drugs*

Enrique Camarena found himself in Guadalajara in 1984 as U.S. drug interdiction policy entered a new, more militant phase. Federal efforts to regulate commerce in psychoactive drugs date back to the late nineteenth century, although the tumultuous changes that disrupted American society and culture in the 1960s both changed the nature of the drug trade and enhanced its political significance.<sup>66</sup> One source of instability was the contradiction between the traditional association between drug use and criminality, on one hand, and on the other an increased tolerance of so-called "softer" drugs like marijuana

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61. Paul Lieberman, *Camarena Case Spotlight Shifts to L.A. Unit's Tactics*, L.A. TIMES, May 7, 1990, at A1.

62. *Id.*

63. *United States v. Alvarez-Machain*, 504 U.S. 655, 670 (1992); Seth Mydans, *Judge Clears Mexican in Agent's Killing*, N.Y. TIMES, Dec. 15, 1992, at A20.

64. Wilkinson, *supra* note 38; Kraul, *supra* note 5; e.g., *Honduran Guilty of Kidnapping, Not Murder, of U.S. Drug Agent*, N.Y. TIMES, July 27, 1990, at A14 (reporting acquittal of Juan Ramón Matta Ballesteros on a charge of murdering Camarena).

65. U.S. DRUG ENF'T ADMIN., *supra* note 6, at 64.

66. SHANNON, *supra* note 24, at 28-39; *Thirty Years of America's Drug War: A Chronology*, *supra* note 26.

and cocaine among middle-class people not usually associated in popular culture with the criminal underworld.<sup>67</sup> Another contradiction was between the older strategy of criminalizing the use of drugs and newer policies aimed at the treatment and rehabilitation of drug users. Successive federal Administrations from the late 1960s onward tried with little success to synthesize the two policies, although law enforcement was usually easier to sell, politically, than rehabilitation.<sup>68</sup> The Nixon Administration gave more lip service to treatment than any previous administration but, at the same time, found drug enforcement an effective way to energize its law-and-order constituency as well as to harass its political enemies in the anti-war and Black liberation movements.<sup>69</sup> Still a third source of internal conflict was rivalry between different parts of government: between the Customs, CIA, and the Justice Department;<sup>70</sup> and between Northeast regional offices used to dealing with heroin from Europe and those in the West and South confronting new and different problems with marijuana and cocaine from Latin America.<sup>71</sup> When the Nixon Administration created the DEA “superagency” by cobbling together various executive-

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67. SHANNON, *supra* note 24, at 32-33; *Thirty Years of America's Drug War: A Chronology*, *supra* note 26.

68. See *Thirty Years of America's Drug War: A Chronology*, *supra* note 26; SHANNON, *supra* note 24, at 37, 38.

69. For example, the now-famous testament by John Ehrlichman, President Nixon's Assistant for Domestic Affairs, who in 1994 explained to an interviewer that:

The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.

Dan Baum, *Legalize It All: How to Win the War on Drugs*, HARPER'S MAG., Apr. 2016, at 22. See also Emily Dufton, *The War on Drugs: How President Nixon Tied Addiction to Crime*, ATLANTIC (Mar. 26, 2012), <http://www.theatlantic.com/health/archive/2012/03/the-war-on-drugs-how-president-nixon-tied-addiction-to-crime/254319/>; SHANNON, *supra* note 24, at 33-34.

70. See SHANNON, *supra* note 24, at 34. See, e.g., COMPTROLLER GEN., U.S. GEN. ACCOUNTING OFFICE, GGD-75-80, PROBLEMS IN SLOWING THE FLOW OF COCAINE AND HEROIN FROM AND THROUGH SOUTH AMERICA 16-31 (1975), <http://www.gao.gov/assets/120/112354.pdf> (discussing problems in slowing drug trades from and through South America due to inter-agency disagreements); COMPTROLLER GEN., U.S. GEN. ACCOUNTING OFFICE, B-164031(2), HEROIN BEING SMUGGLED INTO NEW YORK CITY SUCCESSFULLY 68-71 (1972), <http://www.gao.gov/assets/200/199036.pdf> (indicating the existence of jurisdictional conflicts between the Bureau of Customs and the Bureau of Narcotics and Dangerous Drugs).

71. See SHANNON, *supra* note 24, at 34; Charles R. Babcock & Joel Kotkin, *Opium: Troubling Export from Troubled 'Golden Crescent'*, WASH. POST (Jan. 31, 1980), <https://www.washingtonpost.com/archive/politics/1980/01/31/opium-troubling-export-from-troubled-golden-crescent/db16fa33-1e7b-48c7-bf55-14eaf344b684/>; Leslie Maitland, *3 Drug Officials Transferred, 2 for Poor Northeast Results*, N.Y. TIMES, Feb. 25, 1981, at B3.

branch offices with missions related to drug enforcement, it did little more than to internalize all of those overlapping and interlocking conflicts within one unwieldy, hard-to-steer bureaucracy.<sup>72</sup>

Under the Reagan Administration, the DEA grappled with all of the inherited historical contradictions, as well as two new ones. One of these contradictions was between Reagan's general indifference to the drug issue and his keen interest in fighting Communism in Latin America.<sup>73</sup> Overlying this tension was a second conflict, between law-and-order advocates in Congress, an Executive Branch eager to spend money on the drug war, and budget hawks in the newly-created Office of Management and Budget, to which all other agencies had to answer.<sup>74</sup> At the same time, the stakes in the Latin American drug trade grew enormously: the so-called "Medellín Cartel" consolidated the processing and distribution of Colombian cocaine in the early 1980s, roughly at the same time Caro-Quintero and other Sinaloan smugglers converged on Guadalajara and from there organized the large-scale production of high-grade *sinsemilla* (seedless) marijuana.<sup>75</sup> By the fall of 1984, seizures of marijuana at the U.S.-Mexican border had increased significantly.<sup>76</sup> There was, moreover, evidence that the structure of the Mexican drug industry was changing, not only for marijuana but for heroin as well, with more potent goods, more organized distribution, and more violent internecine struggle.<sup>77</sup> Publicly, Mexican and U.S. officials stated their belief that they had the situation in hand.<sup>78</sup> The November 1984 raid on Caro-Quintero's plantations, however, indicated that this was probably not the case.<sup>79</sup> By that time, Guadalajara was well known among DEA agents as a small, under-equipped, and dangerous post; agents reported having trouble communicating their situation to their superiors in Washington D.C., whose attention was focused on problems in Colombia and who, in any case, were reluctant to call the Mexican government to account

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72. See SHANNON, *supra* note 24, at 34.

73. See SHANNON, *supra* note 24, at 37-39; *Thirty Years of America's Drug War: A Chronology*, *supra* note 26.

74. SHANNON, *supra* note 24, at 80-81.

75. *Thirty Years of America's Drug War: A Chronology*, *supra* note 26; SHANNON, *supra* note 24, at 2-4, 24, 117-21.

76. Lamar Jr., *supra* note 25, at 26.

77. See *id.*; Joel Brinkley, *In the Drug War, Battles Won and Lost*, N.Y. TIMES, Sept. 13, 1984, at A1.

78. Brinkley, *supra* note 77.

79. Lamar Jr., *supra* note 25, at 26.

for fear of disrupting other aspects of the complex relationship between the two countries.<sup>80</sup>

#### D. Conclusion: Drift, Default, and Sacrifice

The February 1985 murder of Agent Camarena was a pivotal event in the evolution of U.S. efforts to combat the international drug trade. “The decision to kill a U.S. federal agent changed everything,” recalled James Kuykendall who, as the DEA’s resident agent in Guadalajara, was Camarena’s supervisor at the time of his abduction.<sup>81</sup> Kuykendall later said, “[t]he war on drugs . . . began on February 7, 1985. Nobody did anything until Kiki Camarena was gone, and a lot of people just wouldn’t let him disappear into the mist.”<sup>82</sup> The DEA’s official history describes the murder as “a turning point in the war on drugs. His violent death brought the American public face-to-face with the vicious brutality of drug trafficking.”<sup>83</sup> “In Bogota,” reported *The Los Angeles Times* thirty years later, “federal agents say the Camarena case has established a steely template for how the U.S. pursues drug investigations in what remains one of the world’s most perilous law enforcement terrains.”<sup>84</sup> Camarena remains to this day a revered figure in federal law enforcement.<sup>85</sup> In the end, however, Operation Leyenda did little to resolve the “drift and default”<sup>86</sup> that characterized the War on Drugs as a whole, that impeded the investigation into Camarena’s murder, and indeed that likely contributed to

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80. SHANNON, *supra* note 24, at 7-9, 37-40; KUYKENDALL, *supra* note 24, at 203-12. See also Christopher Lehmann-Haupt, *Books of the Times: Behind the Torture-Death of a U.S. Drug Agent*, N.Y. TIMES, Oct. 13, 1988, at C25; Jason McGahan, *How a Dogged L.A. DEA Agent Unraveled the CIA’s Alleged Role in the Murder of Kiki Camarena*, L.A. WEEKLY (July 1, 2015, 6:30 AM), <http://www.laweekly.com/news/how-a-dogged-la-dea-agent-unraveled-the-cias-alleged-role-in-the-murder-of-kiki-camarena-5750278>.

81. Wilkinson, *supra* note 38.

82. SHANNON, *supra* note 24, at 453.

83. U.S. DRUG ENF’T ADMIN., *supra* note 6, at 64.

84. Kraul, *supra* note 5.

85. The accounts of other contributors to this Symposium, who knew Camarena and fought to bring his killers to justice, testify eloquently to this. See Gary Feess et al., *The Enrique “Kiki” Camarena Murder and Its Aftermath*, 23 SW. J. INT’L L. 17 (2017). See also Kiki and the History of Red Ribbon Week, *supra* note 18.

86. The phrase “drift and default” is the work of J. Willard Hurst. JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 78, 80 (1956). The phrase, according to one scholar, describes “a lack of applied intelligence in public policy.” Carl Landauer, *Social Science on a Lawyer’s Bookshelf: Willard Hurst’s Law and the Conditions of Freedom in the Nineteenth-Century United States*, 18 LAW & HIST. REV. 59, 87 (2000).

his sacrifice in the first place.<sup>87</sup> The Camarena investigation did, however, lead to significant changes in the American law of international criminal procedure.

## II. THE LEYENDA CASES AND INTERNATIONAL CRIMINAL PROCEDURE

The campaign to bring Agent Camarena's killers to justice generated a number of complicated legal issues that made their way into the federal appellate system. Three cases ultimately led to appeals to the United States Supreme Court; two of these originated in the District Court for the Central District of California while a third began in San Diego, in the Southern District. *United States v. Verdugo-Urquidez*<sup>88</sup> asked whether or not a Mexican national, whose Mexican residence U.S. agents searched without a warrant, could have the resulting evidence suppressed under the Fourth Amendment of the U.S. Constitution.<sup>89</sup> The most famous of the three, *United States v. Alvarez-Machain*,<sup>90</sup> challenged the District Court's jurisdiction over a defendant whom Mexican nationals had abducted in Mexico and delivered to the custody of U.S. agents at the border.<sup>91</sup> The last was a civil case, *Sosa v. Alvarez-Machain*,<sup>92</sup> which raised the issue of whether the abducted defendant could recover in tort from the parties who captured him and/or the U.S. officials at whose behest they did so.<sup>93</sup> In all three cases, the Supreme Court reversed rulings of the California courts in favor of the government and, in the process, established precedents that became significant in the wake of the attacks of September 11, 2001.<sup>94</sup>

### A. *United States v. Verdugo-Urquidez*

First of the Operation Leyenda prosecutions to reach the U.S. Supreme Court was that of René Martín Verdugo-Urquidez. Verdugo,

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87. Then-DEA Administrator John C. Lawn "suggested that Camarena was killed because 'the level of cooperation' between U.S. and Mexican police had broken down." 9 *Indicted in Torture, Slaying of DEA Agent*, L.A. TIMES, Jan. 6, 1988, pt. 1, at 1. See also Will Grant, *Mexico Drugs: How One DEA Killing Began a Brutal War*, BBC NEWS (Feb. 7, 2012), <http://www.bbc.com/news/world-us-canada-16920870>.

88. 494 U.S. 259 (1990).

89. *Id.* at 263, 264; U.S. CONST. amend. IV.

90. 504 U.S. 655 (1992).

91. *Id.* at 658.

92. 542 U.S. 692 (2004).

93. *Id.* at 697.

94. See *id.* at 699, 738; *Verdugo-Urquidez*, 494 U.S. at 263, 275; *Alvarez-Machain*, 504 U.S. at 658-59, 670.

like Enrique Camarena, was a native of Mexicali. They were about the same age, as well: Verdugo, who was thirty-four at the time of his arrest in 1986, came from a “respectable” family, owned a variety of legitimate businesses, and had a green card that permitted him frequent travel to San Diego.<sup>95</sup> On his own, he built a highly sophisticated network for smuggling marijuana into the United States by air.<sup>96</sup> Eventually, he became what *The Los Angeles Times* called “a top lieutenant for Mexican drug lord Rafael Caro-Quintero;”<sup>97</sup> the journalist Elaine Shannon described him as “a senior vice-president in charge of transportation and wholesaling for California” in the Caro-Quintero organization.<sup>98</sup>

The DEA believed that Verdugo had taken part in Camarena’s murder. Unable to catch him north of the border, the agency paid a half-dozen Baja California state police officers \$32,000 to abduct Verdugo from his car one night in January, 1986.<sup>99</sup> The officers drove him, bound and blindfolded, to the border near Mexicali, where they pushed him through a hole in the fence and into the hands of U.S. Border Patrol officers, who then delivered him to DEA officers in Calexico.<sup>100</sup> Thereafter, the Mexican officers requested (and received) asylum in the United States for themselves and their families.<sup>101</sup> With the help of the Mexican Federal Judicial Police, DEA officers then searched Verdugo’s Mexicali residence, where they found evidence of smuggling activities for which he was indicted in San Diego.<sup>102</sup> In January 1988, a federal grand jury in Los Angeles indicted Verdugo and eight others in the Camarena murder; Verdugo was convicted and sentenced later that year.<sup>103</sup>

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95. SHANNON, *supra* note 24, at 308.

96. *Id.* at 308-09.

97. Kim Murphy, *Mexican Drug Figure Found Guilty in Death of U.S. Agent*, L.A. TIMES, Sept. 27, 1988, pt. 1, at 3.

98. SHANNON, *supra* note 24 at 309.

99. SHANNON, *supra* note 24, 309-10.

100. *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1216 (9th Cir. 1988), *rev’d*, 494 U.S. 259 (1990); KUYKENDALL, *supra* note 24, at 214; SHANNON, *supra* note 24, at 310.

101. KUYKENDALL, *supra* note 24, at 216.

102. *Verdugo-Urquidez*, 856 F.2d at 1215-17.

103. *9 Indicted in Torture, Slaying of DEA Agent*, *supra* note 87; Murphy, *supra* note 97; Feldman, *supra* note 50; *United States v. Verdugo-Urquidez*, 939 F.2d 1341, 1343 (9th Cir. 1991).

The charges against Verdugo, on all of which the jury found him guilty, were (1) conspiracy to kidnap a federal agent, (2) kidnapping a federal agent, (3) felony-murder of a federal agent, and two counts of committing violent crimes in aid of racketeering activity. *United States v. Verdugo-Urquidez*, No. 88-5462, 1994 U.S. App. LEXIS 16083, at \*5-6 (9th Cir. 1994).

Verdugo made the same claim that Álvarez-Machain did later, that his abduction into custody voided the court’s jurisdiction in his case, although the District Court denied his motion to dismiss. *See Verdugo-Urquidez*, 939 F.2d at 1343 n.1. The Court of Appeals reversed the order,

In San Diego, Verdugo's lawyers in the smuggling case challenged both the manner of his arrest and the seizure of evidence from his home in Mexicali.<sup>104</sup> District Judge Lawrence Irving rejected Verdugo's challenge to the arrest, but suppressed the disputed evidence on the ground that the DEA agents had conducted the search without a warrant.<sup>105</sup> A three-judge panel of the Ninth Circuit Court of Appeals affirmed the exclusion in August 1988, noting first that there were no reported cases at the time on the question of whether a foreign national could challenge a search of a foreign residence under the Fourth Amendment.<sup>106</sup> The Ninth Circuit panel concluded that the Constitution "imposes substantive constraints on the federal government, even when it operates abroad."<sup>107</sup> The Constitution immunized Verdugo's residence from unreasonable search and seizure, even though he was an alien, because he was in a U.S. court being tried for violations of U.S. law. It made no sense, the court concluded, to regulate the search-and-seizure authority of U.S. agents differently just because the residence to be searched was in a foreign country rather than in the United States.<sup>108</sup>

In 1990, however, the U.S. Supreme Court reversed.<sup>109</sup> In an opinion by Chief Justice Rehnquist, joined by Justices White, O'Connor, Scalia, and Kennedy, the Court withheld the exclusionary rule from Verdugo for several reasons.<sup>110</sup> Since the DEA's action was against Verdugo's property in Mexico (as opposed, say, to his person now in U.S. custody), any Constitutional violation that may have occurred took place in Mexico.<sup>111</sup> Going deeper, the Court held that the phrase "the people," as used in the Fourth Amendment, referred only

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however, and remanded the case for an evidentiary hearing on whether Verdugo's rendition violated the extradition treaty with Mexico. *Id.* at 1362. The Court of Appeals later used that decision as authority in *Álvarez-Machain's* case. *United States v. Alvarez-Machain*, 946 F.2d 1466, 1466 (9th Cir. 1991). Following the U.S. Supreme Court's approval of *Álvarez-Machain's* rendition, *United States v. Alvarez-Machain*, 504 U.S. 655, 670 (1992), the Court of Appeals reversed its disapproval of Verdugo's rendition accordingly, *Verdugo-Urquidez*, 1994 U.S. App. LEXIS 16083, at \*1-5. Judge Reinhardt, who wrote the Court's original opinion on the Verdugo rendition, dissented from the 1994 decision, addressing both Verdugo's and *Álvarez-Machain's* cases. *Id.* at \*20-23 (Reinhardt, J., dissenting). In the same dissent, Reinhardt strenuously expressed his opinion that the evidence against Verdugo was insufficient to support his conviction. *Id.* at \*23.

104. *See Verdugo-Urquidez*, 856 F.2d at 1215.

105. *Id.* at 1214-15, 1217.

106. *Id.* at 1217, 1230.

107. *Id.* at 1218.

108. *Id.* at 1230.

109. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990).

110. *See id.* at 261, 274-75.

111. *See id.* at 274-75.



to “persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”<sup>112</sup> The purpose of the Amendment was “to protect the people of the United States against arbitrary action by their own Government,” not to restrain Federal action against aliens outside of U.S. territory.<sup>113</sup> A contrary ruling, moreover, would have “significant and deleterious consequences for the United States in conducting activities beyond its boundaries.”<sup>114</sup> In dissent, Justices Brennan and Marshall agreed with the Court of Appeals that the Amendment was a substantive limitation on federal power, not a privilege afforded to U.S. citizens: Verdugo became “one of the governed” at the moment the DEA took him into custody.<sup>115</sup> As a case of first impression, the *Verdugo* case contributed significantly to what the dissenters decried as “[t]he enormous expansion of federal criminal jurisdiction outside our Nation’s boundaries.”<sup>116</sup>

#### B. *United States v. Alvarez-Machain*

The second Operation Leyenda case to make its way to the U.S. Supreme Court did so on facts nearly identical with those in *U.S. v. Verdugo-Urquidez*. The defendant this time was Humberto Álvarez-Machain, the Guadalajara obstetrician/gynecologist whom the DEA believed had kept Agent Camarena alive and conscious during his interrogation. This time, when informal negotiations to secure Álvarez’s arrest failed, the Leyenda agents got permission from Washington D.C. to pay \$50,000 to have Mexican nationals deliver him to the border, which they did in April 1990.<sup>117</sup> Within the same month, Álvarez was arraigned—with the same charges as those of which Verdugo had been convicted two years before—and moved to Los Angeles for trial in Central District Court.<sup>118</sup> Although the DEA denied it, a Justice Department spokesman said that an informal reward had apparently

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112. *Id.* at 265 (citing *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904)). On this issue, see Note, *The Meaning(s) of “The People” in the Constitution*, 126 HARV. L. REV. 1078, 1079-82 (2013).

113. *Verdugo-Urquidez*, 494 U.S. at 266.

114. *Id.* at 273.

115. *Id.* at 283-84 (Brennan, J., dissenting).

116. *Id.* at 281-82.

117. Jim Newton, *2 Suspects in Camarena Case Ordered to Stand Trial*, L.A. TIMES, June 23, 1992, at A3; *United States v. Caro-Quintero*, 745 F. Supp. 599, 602-04 (C.D. Cal. 1990). See also KUYKENDALL, *supra* note 24, at 217-19.

118. *Alvarez-Machain v. United States*, 504 U.S. 655, 657 n.1 (1992); see *supra* text accompanying note 103.

motivated the abduction.<sup>119</sup> The Justice Department insisted, however, that Dr. Álvarez would not be returned even if the capture violated Mexican sovereignty.<sup>120</sup>

As in the *Verdugo* case, the abduction generated outrage in Mexico.<sup>121</sup> Then-President Carlos Salinas de Gortari declared that future perpetrators of such abductions would be tried for treason; he also threatened to withdraw from the North American Free Trade Agreement.<sup>122</sup> In Los Angeles, Judge Edward Rafeedie ruled that Álvarez's rendition violated the U.S.-Mexico Extradition Treaty<sup>123</sup> and ordered him repatriated.<sup>124</sup> Noting that Álvarez was the third defendant in the case to have been kidnapped into custody, Judge Rafeedie concluded that "maintaining civilized standards of procedure and evidence" required him to bar jurisdiction "in the interest of the greater good in preserving respect for the law."<sup>125</sup> The Ninth Circuit Court of Appeals affirmed in October 1991, in a perfunctory opinion that pointed to its decision in the *Verdugo* case two months earlier.<sup>126</sup> The fact of the abduction, its authorization by the United States, and Mexico's formal objection to it were enough to allow Álvarez to invoke the treaty and defeat the Central District Court's jurisdiction to try him.<sup>127</sup>

Paul L. Hoffman, Legal Director of the American Civil Liberties Union (ACLU) Foundation of Southern California, argued Álvarez-Machain's appeal before the U.S. Supreme Court on April 1 of the following year.<sup>128</sup> In June, the Court issued its opinion: writing for himself and five others, Chief Justice Rehnquist held that the fact of

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119. Philip Shenon, *U.S. Says It Won't Return Mexican Doctor Linked to Drug Killing*, N.Y. TIMES, Apr. 21, 1990, at A3.

120. *Id.*

121. *E.g., Yes, Prosecute the Torture Doctor*, N.Y. TIMES, June 13, 1990, at A30; Editorial, *Imperial Arrogance*, MILITANT, Jan. 8, 1993, <https://www.themilitant.com/1993/5701/MIL5701.pdf>.

122. KUYKENDALL, *supra* note 24, at 219; North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

123. Extradition Treaty, May 4, 1978, U.S.-Mex., T.I.A.S. No. 9656.

124. *United States v. Caro-Quintero*, 745 F. Supp. 599, 614 (C.D. Cal. 1990).

125. *Id.* at 615 (quoting Judge Oakes' warning in *United States v. Lira*, 515 F.2d 68, 73 (2d Cir. 1975) (Oakes, J., concurring)). On Judge Rafeedie, *see generally* Jocelyn Y. Stewart, *Judge Exhibited Pragmatism, Independence*, L.A. TIMES, Mar. 30, 2008, at B12, (expounding Judge Rafeedie's reputation in the courts).

126. *United States v. Alvarez-Machain*, 946 F.2d 1466, 1466 (9th Cir. 1991), *rev'd*, 504 U.S. 655 (1992).

127. *Id.* at 1466-67. *See also* *United States v. Verdugo-Urquidez*, 939 F.2d 1341, 1350-51 (9th Cir. 1991), *rev'd sub nom.* *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

128. *United States v. Alvarez-Machain*, 504 U.S. 655, 656 (1992); *Attorneys: Paul L. Hoffman*, SCHONBRUN DE SIMONE SEPLow HARRIS AND HOFFMAN, LLP, <http://www.losangelesemploymentlawyer.com/Attorneys/Paul-L-Hoffman.shtml> (last visited Oct. 29, 2016).

Álvarez's forcible rendition did not prohibit his trial in a U.S. court for violations of U.S. criminal law.<sup>129</sup> The court relied chiefly on a case from the 1880s, *Ker v. Illinois*,<sup>130</sup> in which a private detective who had a warrant to secure the extradition of a fugitive from Peru, but who "disdained reliance on the treaty processes," forcibly kidnapped the suspect and returned him to Illinois to stand trial for larceny.<sup>131</sup> The extradition treaty with Peru did not apply because the agent had not, in fact, invoked it in returning Ker for trial.<sup>132</sup> *Ker* applied in Álvarez's case, the Court decided, because the extradition treaty with Mexico did not explicitly prohibit forcible rendition.<sup>133</sup> Chief Justice Rehnquist found nothing in general principles of international law to prohibit international abductions, no matter how "shocking" or contrary to general principle the particular abduction might be: whether to return Dr. Álvarez to Mexico or not was solely within the discretion of the Executive Branch.<sup>134</sup>

Justice Stevens dissented, joined by Justices Blackmun and O'Connor. The dissenters argued that *Ker* did not apply for several reasons: first, because the alleged crime took place in Mexico, not the United States; second, because the alleged crime violated both Mexican and U.S. law; third, because the abduction took place at the behest of U.S. government agents; and finally because Mexico had formally demanded the suspect's return for trial in its own courts.<sup>135</sup> The Ninth Circuit, the dissenters thought, had correctly interpreted both the extradition treaty and international law in upholding Verdugo's challenges to his abduction.<sup>136</sup> The "critical flaw" in the majority's opinion, they thought, was to ignore the key fact that Álvarez's abduction, unlike Ker's, was "expressly authorized by the Executive Branch of the Government, which unquestionably constitutes a flagrant violation of international law."<sup>137</sup> Quoting Holmes to underscore the emotional charge of the Camarena case, Justice Stevens acknowledged that "the desire for revenge" could exert "a kind of hydraulic pressure . . . before which even well settled principles of law

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129. *Id.* at 670.

130. 119 U.S. 436 (1886).

131. *Alvarez-Machain*, 504 U.S. at 660.

132. *Id.* at 660-61.

133. *Id.* at 663-66, 670.

134. *Id.* at 669.

135. *Id.* at 670-71.

136. *Id.* at 671.

137. *Id.* at 682.

will bend.”<sup>138</sup> In this “monstrous” case, however, Justice Stevens reached all the way to Thomas Paine: “an avidity to punish is always dangerous to liberty. . . . He that would make his own liberty secure[ ] must guard even his enemy from oppression; for if he violates this duty, he establishes a precedent that will reach to himself.”<sup>139</sup>

### C. *Sosa v. Alvarez-Machain*

The third and final *Leyenda* case to reach the Supreme Court was a civil, rather than a criminal one. In the wake of the Supreme Court decision in June 1992, Judge Rafeedie scheduled Álvarez-Machain and co-defendant Rubén Zuno-Arce for trial at the end of August.<sup>140</sup> This was the second trial for Zuno-Arce, who had been arrested legally in the United States and convicted in 1990, although Judge Rafeedie had overturned that conviction on procedural grounds.<sup>141</sup> The 1992 jury convicted Zuno again and Judge Rafeedie sentenced him to two life terms.<sup>142</sup> At the close of the government’s case against Álvarez, however, Judge Rafeedie entered a judgment of acquittal because, in addition to procedural faults, the government’s case consisted of “suspicion,” “hunch,” and “wild speculation” and was legally insufficient to support a guilty verdict.<sup>143</sup>

Álvarez soon returned to Mexico as recrimination flew between the defense, the U.S. Attorney’s office, and President Salinas de Gortari of Mexico.<sup>144</sup> Although the Supreme Court had dismissed Álvarez’s objection to his arrest, it had also noted that he might have

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138. *Id.* at 687 (quoting *N. Sec. Co. v. United States*, 193 U.S. 197, 401 (1904) (Holmes, J., dissenting)). See also Edmund S. McAlister, *The Hydraulic Pressure of Vengeance: United States v. Alvarez-Machain and the Case for a Justifiable Abduction*, 43 DEPAUL L. REV. 449, 449 n.1, 508 (1994) (offering a balanced assessment of the decision in the years before the attacks of September 11, 2001, which brought the issue of abduction to its current prominence).

139. *Alvarez-Machain*, 504 U.S. at 687-88 (quoting THOMAS PAINE, DISSERTATION ON FIRST PRINCIPLES OF GOVERNMENT 39 (1795)).

140. Newton, *supra* note 117.

141. Henry Weinstein, *Camarena Indictment Names Business Figure*, L.A. TIMES, Dec. 12, 1989, at A3; Henry Weinstein, *Zuno Arce Gets Life in Camarena Kidnapping*, L.A. TIMES, Mar. 25, 1993, at B1.

142. Jim Newton, *Businessman Convicted in Camarena Case*, L.A. TIMES, Dec. 22, 1992, at A1; Weinstein, *supra* note 141. The charges against Zuno were the same as those against Verdugo and Álvarez, except for the kidnapping of a federal agent. See Sixth Superseding Indictment at 11-26, *United States v. Caro-Quintero*, No. CR 87-422(F)-ER (C.D. Cal. 1989).

143. *Alvarez-Machain v. United States*, 107 F.3d 696, 699 (9th Cir. 1997); Seth Mydans, *Judge Clears Mexican in Agent’s Killing*, N.Y. TIMES, Dec. 15, 1992, at A20; Jim Newton, *Judge Orders Camarena Case Defendant Freed*, L.A. TIMES, Dec. 15, 1992, at A1.

144. Marjorie Miller & Jim Newton, *Defendant Freed in Camarena Case Returns to Mexico*, L.A. TIMES, Dec. 16, 1992, at A3.

private-law remedies against his abductors in tort or trespass.<sup>145</sup> Accordingly, after he returned to Mexico, Álvarez sued José Francisco Sosa, the former Mexican police officer who organized the abduction, the Mexican DEA employee who recruited him, five unnamed Mexican civilians, the United States, and four North American DEA agents.<sup>146</sup> The core of the suit was a claim against the DEA for false imprisonment under the Federal Tort Claims Act (FTCA),<sup>147</sup> and one against “collaborator” Sosa under the 1948 Alien Tort Statute<sup>148</sup> (ATS), which lawyers had revived in the 1980s as a tool for creating subject matter jurisdiction in U.S. courts over human rights violations in other countries.<sup>149</sup> This case was also heard in Central District Court, with Judge Stephen V. Wilson presiding, and Paul Hoffman of the ACLU once again represented Álvarez.<sup>150</sup>

As in many of the cases that emerged out of the Camarena investigation, the courts disagreed wildly on the law in the new and rapidly developing area of trans-border criminal procedure. By the time *Sosa v. Alvarez-Machain* reached the U.S. Supreme Court in 2004, the Central District and the Ninth Circuit courts had agreed that Álvarez’s Fourth, Fifth, and Eighth Amendment claims would be dismissed;<sup>151</sup> that the United States could be liable under the FTCA for the acts of its agents in organizing a false arrest by foreign nationals in a foreign country;<sup>152</sup> and that the ATS gave Álvarez an action against collaborator Sosa for an alleged violation of the law of nations.<sup>153</sup> The Central District court had gone so far as to grant summary judgment against collaborator Sosa and \$25,000 in damages to Álvarez, both of which the Court of Appeals affirmed in a decision that it filed on September 11, 2001.<sup>154</sup> Sosa and the United States argued their appeals before the Supreme Court in 2004.<sup>155</sup>

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145. United States v. Alvarez-Machain, 504 U.S. 655, 670 (1992).

146. Alvarez-Machain v. United States, 331 F.3d 604, 610 (9th Cir. 2003) (en banc), *rev’d sub nom.* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

147. 28 U.S.C. § 1346(b) (2012).

148. 28 U.S.C. § 1350.

149. See Alvarez-Machain, 331 F.3d at 610-611; see also Penny M. Venetis, *The Broad Jurisdictional Significance of Sosa v. Alvarez-Machain*, 21 TEMP. POL. & CIV. RTS. L. REV. 41, 43-49 (2011); Igor Fuks, *Sosa v. Alvarez-Machain and the Future of ATCA Litigation: Examining Bonded Labor Claims and Corporate Liability*, 106 COLUM. L. REV. 112, 113 (2006).

150. *Id.* at 607.

151. Alvarez-Machain v. United States, 107 F.3d 696, 699, 703 (9th Cir. 1997).

152. Alvarez-Machain, 331 F.3d at 641.

153. *Id.* at 614.

154. Alvarez-Machain v. United States, 266 F.3d 1045, 1049, 1064 (9th Cir. 2001), *rev’d sub nom.* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

155. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

In *Sosa v. Alvarez-Machain* the Supreme Court, through Justice Souter, affirmed the government's prerogative to pursue criminal law enforcement abroad, as it had previously done in Verdugo's Fourth Amendment case and in Álvarez's rendition appeal. The FTCA contains an explicit exception to its waiver of sovereign immunity for actions "arising in a foreign country."<sup>156</sup> The Ninth Circuit, under what it called the "headquarters doctrine," held that the exception did not apply in Álvarez's case because the DEA had planned and directed his abduction from its offices in California.<sup>157</sup> The Supreme Court, on the other hand, pointed out that a tort in which the physical harm to the plaintiff takes place in a foreign country "arises in" that country within the plain meaning of the statute.<sup>158</sup> The actions of Sosa and his henchmen, moreover, and not those of the DEA, were the proximate cause of Álvarez-Machain's abduction.<sup>159</sup> For both reasons, the "arising in a foreign country" exception applied and the government remained immune from suit.<sup>160</sup>

The *Sosa* case raised a significant issue of first impression with regard to the ATS, which was whether the First Congress had intended the statute to do any more than give the federal courts jurisdiction over the limited number of international law violations—offenses against ambassadors or piracy, for example—with which it was familiar.<sup>161</sup> Sosa claimed that it did no more than that; Álvarez claimed that the statute's authorization of jurisdiction "for a tort only, committed in violation of the law of nations or a treaty of the United States,"<sup>162</sup> gave him an action for his unlawful detention and rendition by the DEA.<sup>163</sup> Justice Souter's opinion offered the first in-depth analysis of the ATS in its history and concluded that the statute did grant jurisdiction over a limited number of serious violations of "definable, universal, and obligatory" customary international norms.<sup>164</sup> This was enough to sustain the significant body of case law that had recognized ATS jurisdiction over human rights violations since

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156. 28 U.S.C. § 2680(k) (2012).

157. *Alvarez-Machain*, 331 F.3d at 638-39.

158. *Sosa*, 542 U.S. at 700-01.

159. *Id.* at 704.

160. *Id.* at 712.

161. *Id.* at 712, 715, 724-25.

162. 28 U.S.C. § 1350 (2012).

163. *See Sosa*, 542 U.S. at 712-13.

164. *Id.* at 732 (citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984)).

1980.<sup>165</sup> It did not, however, include the “relatively brief detention in excess of positive authority” of which Álvarez complained.<sup>166</sup>

*D. Conclusion: New Rules in a New Context*

The same year *Sosa v. Alvarez-Machain* came down, one writer criticized the decision for departing from the Supreme Court’s “long-standing practice” of “willingly extend[ing] its jurisdiction to victims of human rights violations” under the FTCA and the ATS.<sup>167</sup> Five years later, another writer praised the decision for holding that federal common law *could* grant jurisdiction over law-of-nations abuses, although Álvarez’s abduction did not count as one.<sup>168</sup> The more recent article paid little attention to the case itself, nor did it explain why other facts might trigger jurisdiction under the ATS where *Sosa* did not, other than to point to the *Sosa* court’s assertion that extending jurisdiction to law-of-nations violations was necessarily a policy exercise and that Álvarez’s hardship was a minor one.<sup>169</sup> Another key difference, although unstated, between *Sosa* and earlier ATS cases was that in Álvarez’s case the author of the violation was the United States government, and in a very different context: Álvarez’s fourteen-year career in federal court had begun as part of a campaign to avenge the murder of a much-admired DEA agent but ended in the midst of a “struggle against global terrorism.”<sup>170</sup> *Sosa* thus joined the other two cases that made their way from the Camarena investigation to the Supreme Court—Verdugo’s Fourth Amendment challenge to the search of his foreign residence and Álvarez-Machain’s challenge to his unauthorized abduction by the DEA—in presenting new questions whose resolution contributed significantly to the national secur-

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165. *See id.* at 731-34.

166. *Id.* at 736-38.

167. Laura A. Cisneros, Note, *Sosa v. Alvarez-Machain – Restricting Access to US Courts Under the Federal Tort Claims Act and the Alien Tort Statute: Reversing the Trend*, 6 *LOY. J. PUB. INT. L.* 81, 81-82 (2004).

168. *See Venetis, supra* note 149, at 55-56. *See also* Carolyn A. D’Amore, Note, *Sosa v. Alvarez-Machain and the Alien Tort Statute: How Wide Has the Door to Human Rights Litigation Been Left Open?*, 39 *AKRON L. REV.* 593, 611-14 (2006).

169. *See Venetis, supra* note 149, at 49-50. *See also Sosa*, 542 U.S. at 732-33 (noting that “the determination whether a norm is sufficiently definite to support a cause of action . . . inevitably must[ ] involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts”); *id.* at 737 (stating that an application of a principle against arbitrary detention requires more than “relatively brief detention in excess of positive authority”).

170. *Alvarez-Machain v. United States*, 331 F.3d 604, 608 (9th Cir. 2003) (en banc) (McKeown, J.), *rev’d sub nom. Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

ity apparatus that developed in the wake of the attacks of September 11, 2001.<sup>171</sup>

### III. EVOLVING SCHOLARSHIP ON THE CAMARENA CASE AND THE WAR ON DRUGS

In the same way that the significance of the *Leyenda* cases only became clear in the wake of the September 11 attacks, scholarship on the Camarena case and the War on Drugs generally took on a markedly different aspect as the Bush Administration pushed national security and criminal procedure in directions at which the earlier cases offered only hints.<sup>172</sup> The *Leyenda* cases' civil liberties aspects generated a good bit of law review writing in their immediate aftermath (much of which was in the form of student case notes),<sup>173</sup> but scholarship proliferated as federal prosecutors enlisted the precedents in what became known as the "War on Terror."<sup>174</sup> Law and Society scholars, likewise, took a new interest in the War on Drugs after 2001, although earlier writing had useful things to say about the subject as it stood before then. In 2010, the law professor Michelle Alexander published a significant study of the criminal justice system that re-oriented scholarship in the field and led to new and creative reworking of some well-studied topics.<sup>175</sup>

#### A. Legal Scholarship

The two *Leyenda* cases that reached the Supreme Court before 2001 generated substantial commentary on their own, although writers seem to have paid more attention to the forcible abductions of Verdugo and Álvarez-Machain than to the Fourth Amendment issue raised by the warrantless search of Verdugo's residence. Commentators recognized that the decisions represented a modification of the *Ker-Frisbie* doctrine, viz., that "forcible abduction, standing alone, will not defeat the personal jurisdiction of a court over a defendant" un-

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171. See Kraul, *supra* note 5.

172. See generally JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (2009); BENJAMIN WITTES, *LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR* (2008); ROSA BROOKS, *HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING* (2016).

173. See, e.g., Cisneros, *supra* note 167; D'Amore, *supra* note 168.

174. See Kraul, *supra* note 5.

175. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).



less the abduction was so outrageous as to “shock the conscience.”<sup>176</sup> One thought the extension appropriate to meet the exigencies of the War on Drugs.<sup>177</sup> Others thought that it might invite retaliation, one noting that in 1989 the Iranian Parliament had authorized that country’s officers to arrest American citizens anywhere and to transport them to Iran for trial.<sup>178</sup> A 1994 article noted that the U.S. assertion of unilateral authority to enforce U.S. law extraterritorially represented “a 180-degree turn between 1980 and 1989” as a result of the frustration of U.S. law enforcement agencies with their inability to secure foreign cooperation.<sup>179</sup> “Nowhere,” the writer claimed, was “that frustration, nor law enforcement’s willingness to ride the edge of legality, more apparent than in the intensive investigation that resulted from the abduction, torture, and murder of United States DEA agent Enrique Camarena-Salazar.”<sup>180</sup>

Both law and scholarship on the extraterritorial projection of U.S. criminal justice mushroomed after 2001. Looking back from the vantage of 2006, Owen Fiss identified the *Verdugo* case as “one of the defining decisions of the modern period:” a key move by Chief Justice Rehnquist—well-known as “a master of the long game”—“in freeing the Executive from the shackles of the Bill of Rights in foreign military operations.”<sup>181</sup> In hindsight, Fiss could see clearly the germ of *Verdugo* in the three 2004 cases—*Rumsfeld v. Padilla*,<sup>182</sup> *Hamdi v. Rumsfeld*,<sup>183</sup> and *Rasul v. Bush*<sup>184</sup>—in which the Supreme Court made its ambivalent peace with the Bush Administration’s “War Against Terrorism.”<sup>185</sup> At New York University, Margaret Satterthwaite analyzed the process by which what she called “rendition to justice,” the

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176. Peter S. McCarthy, Comment, *United States v. Verdugo-Urquidez: Extending the Ker-Frisbie Doctrine to Meet the Modern Challenges Posed by the International Drug Trade*, 27 NEW ENG. L. REV. 1067, 1071-73 (1993).

177. *Id.* at 1093-98.

178. Linda C. Ward, Note, *Forcible Abduction Made Fashionable: United States v. Alvarez-Machain’s Extension of the Ker-Frisbie Doctrine*, 47 ARK. L. REV. 477, 477 (1994); see also Molly McConville, Note, *A Global War on Drugs: Why the United States Should Support the Prosecution of Drug Traffickers in the International Criminal Court*, 37 AM. CRIM. L. REV. 75, 86-87 (2000).

179. McAlister, *supra* note 138, at 452.

180. *Id.*

181. Owen Fiss, *The War Against Terrorism and the Rule of Law*, 26 OXFORD J. LEGAL STUD. 235, 250 (2006). The “long game” sobriquet is that of Linda Greenhouse. Linda Greenhouse, *A Justice in Chief*, N.Y. TIMES (June 28, 2012, 5:19 PM), <http://opinionator.blogs.nytimes.com>.

182. 542 U.S. 426 (2004).

183. 542 U.S. 507 (2004).

184. 542 U.S. 466 (2004).

185. Fiss, *supra* note 181, at 256.

extrajudicial transfer of suspects like Verdugo and Álvarez-Machain from foreign countries into the United States for prosecution, evolved into “extraordinary rendition:” “the transfer of an individual, without benefit of a legal proceeding in which the individual can challenge the transfer, to a country where he or she is at risk of torture.”<sup>186</sup> This “move to the dark side,” as then-Vice President Cheney famously described it,<sup>187</sup> began with the War on Drugs in the 1980s but assumed a different character entirely after 2001.<sup>188</sup> Operation Leyenda was an important testing ground, although the DEA undertook the renditions of Verdugo, Álvarez-Machain, and Ballesteros in the heat of passion and without much planning or analysis.<sup>189</sup> The Supreme Court’s decision in *United States v. Alvarez-Machain*, however, was for Satterthwaite and Fisher a key point in the process because it “effectively removed the limits on the rendition policy by making practically irrelevant the existence of formal methods of approving transfer between countries.”<sup>190</sup> *Alvarez-Machain* “opened up an alternative to extraditions when the U.S. for political reasons [didn’t] want to go through that lengthy process,” Satterthwaite told *The Los Angeles Times*.<sup>191</sup>

### B. Law and Society Scholarship

Like the doctrinal scholarship, historical and social science writing on the War on Drugs, international law enforcement, and other areas changed significantly after 2001. Lawrence M. Friedman had relatively little to say about the War on Drugs in his comprehensive 1993 history of the American criminal justice system.<sup>192</sup> For Friedman, the

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186. Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1335-37 (2007). See also Margaret Satterthwaite & Angelina Fisher, *Tortured Logic: Renditions to Justice, Extraordinary Rendition, and Human Rights Law*, 6 LONG TERM VIEW 52, 55-60 (2006); ASS’N OF THE BAR OF THE CITY OF N.Y. & CTR. FOR HUMAN RIGHTS AND GLOBAL JUSTICE, TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO “EXTRAORDINARY RENDITIONS” 4 (2004), [http://www.nycbar.org/pdf/report/Torture%20by%20Proxy%20-%20Final%20\(PDF\).pdf](http://www.nycbar.org/pdf/report/Torture%20by%20Proxy%20-%20Final%20(PDF).pdf).

187. MAYER, *supra* note 172, at 9 (quoting Vice President Cheney’s statement). See generally WITTES, *supra* note 172 (addressing legal issues surrounding the Bush Administration’s responses to the 9/11 attacks).

188. See M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 289-90 (6th ed. 2014). See also Satterthwaite, *supra* note 186, at 1134.

189. McAlister, *supra* note 138, at 490-91; see generally SHANNON, *supra* note 24.

190. Satterthwaite & Fisher, *supra* note 186, at 56; Kraul, *supra* note 5.

191. Kraul, *supra* note 5.

192. See generally LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY (1993). For other works of legal history that touch on drug enforcement, see DAVID F. MUSTO, THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL (Oxford Univ. Press 3d ed. 1999) (1973); JOHN C. McWILLIAMS, THE PROTECTORS: HARRY J. ANSLINGER AND THE FEDERAL BUREAU OF NARCOTICS, 1930-1962 (1990).

drug laws were “the great exception” to the general trend in which criminal statutes aimed at sexual behavior, gambling, alcohol use, and the like gradually withered away after the Second World War.<sup>193</sup> Since Congress created the Federal Bureau of Narcotics in 1930, the federal government has “never looked back,” as Friedman put it, and never retreated from its equation of drug use with social disorder as well as of the drug trade with foreign threats to national security.<sup>194</sup> Since the formation of the DEA in 1973, the federal government has been “sucked further and further into the pit of drug-law enforcement. . . . The ‘war on drugs’ now consumes billions of dollars every year; it is fought in the streets, in the air, along the coasts, and even in foreign countries.”<sup>195</sup> Friedman thought the drug war largely an “exercise[ ] in futility,” although “[t]he public hysteria over drugs is not, of course, totally wrongheaded.”<sup>196</sup> The important question for Friedman was “why, in an age that has relaxed so noticeably its attitudes on sex, vice, and gambling, does drug prohibition still stand so firm?”<sup>197</sup> Although the War on Drugs seems no less futile today than it did to Friedman, the violence of the drug trade and its costs to society are of a different order of magnitude now.<sup>198</sup>

Nonetheless, several of Friedman’s ideas remain useful in explaining the complexity of the drug problem and its resistance to change. One is that criminal justice is a *social system*: a complex interaction between the way society is organized, people’s ideas about it, and the changing social/political environment.<sup>199</sup> People’s ideas about

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193. See FRIEDMAN, *supra* note 192, at 354-56.

194. See *id.* at 356.

195. *Id.*

196. *Id.*

197. *Id.*

198. The Sentencing Project, a non-profit research-and-advocacy program in Washington, D.C., has published several worthwhile social-science studies of drug enforcement. See generally RYAN S. KING & MARC MAUER, SENTENCING PROJECT, THE WAR ON MARIJUANA: THE TRANSFORMATION OF THE WAR ON DRUGS IN THE 1990s (2005), <http://www.sentencingproject.org/wp-content/uploads/2016/01/War-on-Marijuana-Transformation-of-War-on-Drugs-in-the-1990s.pdf> (assessing the role of drug enforcement in the criminal justice system during the period of 1990 to 2002); MARC MAUER & RYAN S. KING, SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY (2007), <http://www.sentencingproject.org/wp-content/uploads/2016/01/A-25-Year-Quagmire-The-War-On-Drugs-and-Its-Impact-on-American-Society.pdf> (analyzing twenty-five years of government data regarding drugs and the criminal justice system); MARK MAUER, SENTENCING PROJECT, THE CHANGING RACIAL DYNAMICS OF THE WAR ON DRUGS (2009), <http://www.sentencingproject.org/wp-content/uploads/2016/01/The-Changing-Racial-Dynamics-of-the-War-on-Drugs.pdf> (examining a dynamic shift in the racial composition of people incarcerated for a drug offense).

199. FRIEDMAN, *supra* note 192, at 6. See, e.g., Lawrence M. Friedman, *Crimes of Mobility*, 43 STAN. L. REV. 637 (1991) (addressing bigamy, confidence fraud, and infanticide); Joseph R.

such things as race (especially), national security, or morality likely have more impact on drug policy than on many other social problems; such ideas are often more or less impervious to reason and resistant to change. The identification of drug use with race, immorality, or social decay is one such set of ideas that powerfully influences drug policy;<sup>200</sup> the idea that drugs are best interdicted at the source by state power is another.<sup>201</sup>

Another useful idea that Friedman developed is that law and law-making institutions may be especially resistant to calculated change when opposing social forces impinging on a particular issue work themselves into stalemate. Collusive divorce, for example, in which people had to allege (typically fraudulently) one or another statutory ground before judges (who were in on the fraud) would grant them the legal divorce they needed, persisted from the Reconstruction Era until 1970, when California passed the first no-fault divorce statute.<sup>202</sup> This corrupt, inefficient, and destructive system survived so long because the defenders of traditional marriage norms deadlocked with the multitudes of unhappy couples seeking easy divorce, so that reform legislation was impossible.<sup>203</sup> Once the political gridlock broke in 1970, legislatures tumbled over each other to enact overdue reforms.<sup>204</sup> The theory explains other areas in which legalized absurdity persists: immigration, same-sex marriage, or, indeed, drug use. For drug use in particular, normative gridlock explains the “drift and default” to which drug policy is subject: the aggregated political vectors impinging on the issue frustrate the development of rational policy while inexorably, by default, nudging it toward racism, militarization at home and abroad, and violence. For all the energy and bravery that went into it, the campaign to avenge Enrique Camarena’s death thus

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Gusfield, *Moral Passage: The Symbolic Process in Public Designations of Deviance*, 15 SOC. PROBS. 175 (1967) (discussing the cultural valence of “victimless” crimes); Leslie J. Reagan, “About to Meet Her Maker”: Women, Doctors, Dying Declarations, and the State’s Investigation of Abortion, *Chicago, 1867-1940*, 77 J. AM. HIST. 1240 (1991) (illustrating how state officials and medical professionals collaborated to enforce the anti-abortion law in Illinois). See also MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE 3-9 (2004).

200. See TONRY, *supra* note 199, at 109-12.

201. E.g., CATO INST., CATO HANDBOOK FOR CONGRESS: POLICY RECOMMENDATIONS FOR THE 106TH CONGRESS 169-73 (1999).

202. See Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497, 1504 (2000) (discussing collusive divorce); CAL. FAM. CODE § 2310 (West 2004 & Supp. 2016).

203. See Friedman, *supra* note 202, at 1533, 1536.

204. See *id.* at 1533-34.

contributed materially to the “hydraulic pressure” that bent U.S. law-enforcement agencies to “the dark side” in the years after 2001.<sup>205</sup>

### C. *New Scholarship after 2010*

In 2010, the law professor Michelle Alexander published a book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*,<sup>206</sup> that made a powerful impact not only on the scholarship but also the law of criminal justice. The book’s thesis is that “rather than rely on race” to inscribe white supremacy on the law, as Americans did in the century between Emancipation and the 1970s, “we [now] use our criminal justice system to label people of color ‘criminals’ and then engage in all the practices [discrimination, exclusion, social contempt] we supposedly left behind.”<sup>207</sup> Arrest records and criminal convictions deprive people—Black men, particularly—of civil liberties, economic opportunities, and political franchise more efficiently and on a larger scale than the Jim Crow system ever could.<sup>208</sup> “Mass incarceration,” Alexander argued, “is, metaphorically, the new Jim Crow: the most damaging manifestation of the backlash against the Civil Rights Movement.”<sup>209</sup> For Alexander, the leading edge of this campaign has been the War on Drugs that began during the Nixon Administration and has continued under every Administration since.<sup>210</sup>

Alexander’s impact on the politics of criminal justice compares to that of Upton Sinclair on food safety, or Rachel Carson on environment.<sup>211</sup> If Alexander did not invent the term “mass incarceration”

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205. *See supra* notes 138, 187.

206. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

207. *Id.* at 2. *Cf.* Baum, *supra* note 69 (quoting the words of John Ehrlichman indicating that the Nixon Administration used the War on Drugs as a pretext to suppress the Black community).

208. *See id.* at 175-76.

209. *Id.* at 11.

210. *See id.* at 54-56.

211. *See* Jennifer Schuessler, *Drug Policy as Race Policy: Best Seller Galvanizes the Debate*, N.Y. TIMES, Mar. 7, 2012, at C1 (describing people’s reactions to Alexander’s theory of the new Jim Crow). *See generally* UPTON SINCLAIR, *THE JUNGLE* (Barnes & Noble 1995) (1906) (exposing the appalling working conditions in the meat-packing industry); RACHEL CARSON, *SILENT SPRING* (1962) (illustrating the harmful effects on the environment of the widespread use of pesticides). On the relationship between social change and political ideas, *see* Arthur F. McEvoy, *The Triangle Shirtwaist Factory Fire of 1911: Social Change, Industrial Accidents, and the Evolution of Common-Sense Causality*, 20 LAW & SOC. INQUIRY 621, 622-24 (1995); DEBORAH A. STONE, *POLICY PARADOX AND POLITICAL REASON* 162 (1988); JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 99-105 (1984).

(whose earliest use seems to have been by Marx in 1852),<sup>212</sup> she certainly energized it politically,<sup>213</sup> just as Catharine MacKinnon did with the term “sexual harassment” in the 1980s.<sup>214</sup> The idea took on new substance in people’s comprehension of events in a political culture disrupted by international terrorism and the Great Recession of 2007-09. Its ability to explain events in the new environment lent it momentum in political debate that it lacked before.<sup>215</sup> Whether *The New Jim Crow* ultimately makes the kind of impact on the legal system that followed Carson’s *Silent Spring*,<sup>216</sup> Sinclair’s *The Jungle*,<sup>217</sup> or MacKinnon’s *Sexual Harassment of Working Women*<sup>218</sup> remains to be seen. Initiatives at all levels of government toward decriminalizing marijuana, rolling back mass incarceration, even improving relations between police and communities of color may be evidence that the normative gridlock that has beset criminal justice for so long may be loosening.<sup>219</sup>

Two recent works by historians betray the influence of Alexander’s masterwork, as well as of the social experiences that germinated it. Lisa McGirr’s *The War on Alcohol* argues that Prohibition “was no mere distraction with few lasting consequences: [it] remade national party politics and imprinted the path of American state development

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212. Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte* in KARL MARX: SELECTED WRITINGS 347 (David McLellen ed., 2d ed. 2000). The term Marx used was “maßenhafte Einkerkerung.”

213. Oliver Roeder, *A Million People Were in Prison Before We Called It Mass Incarceration*, FIVETHIRTYEIGHT (Sept. 18, 2015, 10:46 AM), <http://fivethirtyeight.com/features/a-million-people-were-in-prison-before-we-called-it-mass-incarceration/>.

214. See generally CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979). See also *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66-67 (1986) (citing *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)) (recognizing sexual harassment that creates a “hostile working environment” as a violation of Title VII of the 1964 Civil Rights Act).

215. See, e.g., ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* 307-08 (2016). For the role of the Reagan Administration’s War on Drugs in militarizing domestic policing, see *id.* at 309-14.

216. CARSON, *supra* note 211.

217. SINCLAIR, *supra* note 211.

218. MACKINNON, *supra* note 214.

219. See, e.g., *Marijuana Overview*, NAT’L CONF. OF ST. LEGISLATURES (Sept. 2, 2016), <http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx>; Erica Goode, *U.S. Prison Populations Decline, Reflecting New Approach to Crime*, N.Y. TIMES, July 26, 2013, at A11; PALLADIAN PARTNERS, *STRENGTHENING THE RELATIONSHIPS BETWEEN LAW ENFORCEMENT AND COMMUNITIES OF COLOR: DEVELOPING AN AGENDA FOR ACTION* (2014), [https://nnscommunities.org/uploads/StrengtheningtheRelationshipBetweenLE\\_CommunitiesofColor-DevelopinganAgendaforAction.pdf](https://nnscommunities.org/uploads/StrengtheningtheRelationshipBetweenLE_CommunitiesofColor-DevelopinganAgendaforAction.pdf).

into distinctive and permanent molds.”<sup>220</sup> The book shows how Prohibition, which McGirr calls “one of America’s greatest experiments in state building,” had “highly differential impact[s] on distinct social groups, many of whom face parallel challenges to this day.”<sup>221</sup> It also shows how Prohibition’s legacy, more than the usual cautionary tale about “legislating morality,” also included “the political awakening of the religious right, the electoral realignment that launched the New Deal, and the emergence of the twentieth-century federal penal state.”<sup>222</sup>

Another new work, Katherine Unterman’s *Uncle Sam’s Policemen*, uses the term “rendition,” which made few appearances either in legal or academic writing before it entered common parlance during the George W. Bush Administration.<sup>223</sup> Unterman’s book shows how the practice of extra-legal rendition by Pinkerton detectives and other private agents became common in the last decades of the nineteenth century;<sup>224</sup> the germinal case, *Ker v. Illinois* in 1886, affirmed that private bounty hunters “still lacked authority to operate internationally, [but] that there would be no consequences within the United States if they crossed borders.”<sup>225</sup> Informal rendition, the book argues, enabled “American law enforcers . . . to treat the Western Hemisphere—the space where the United States so often rehearsed imperial strategies—as part of their criminal jurisdiction;”<sup>226</sup> it “encouraged Americans to view the entire world as legitimately subject to U.S. laws and norms.”<sup>227</sup> Domestically, the book makes the significant point that, like today, “pursuit of American fugitives abroad aimed not only to secure the nation’s physical borders but also to stabilize the cultural boundaries of citizenship and national identity during an era of increasing mobility, demographic flux, and social upheaval.”<sup>228</sup>

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220. LISA MCGIRR, *THE WAR ON ALCOHOL: PROHIBITION AND THE RISE OF THE AMERICAN STATE*, at xvii (2016).

221. *Id.* at xvi.

222. *Id.* at xvi-xvii.

223. KATHERINE UNTERMAN, *UNCLE SAM’S POLICEMEN: THE PURSUIT OF FUGITIVES ACROSS BORDERS* (2015). The term “rendition” in legal and political senses means “the transfer of a criminal suspect from one jurisdiction to another.” *Id.* at 5.

224. *Id.* at 66.

225. 119 U.S. 436, 444 (1886); UNTERMAN, *supra* note 223, at 66.

226. UNTERMAN, *supra* note 223, at 10.

227. *Id.* at 7.

228. *Id.* at 5.

#### D. Conclusion: Law Enforcement and Social Change

Like *The New Jim Crow*, both of these new books point to new ways of understanding relationships between law enforcement, social structure, and social change. They suggest, as well, different ways of understanding the legacy of the Camarena case. Satterthwaite developed a typology of abductions, from “rendition to justice” to “extraordinary rendition,” as law enforcement agencies thought of new ways to subject international suspects to U.S. law. The abductions of Verdugo-Urquidez and Álvarez-Machain were early examples of this process although, with the Supreme Court’s approval, they underwrote less benign efforts later on. Law and Society scholars have long been interested in the social context of official behavior; the ideas of “drift and default” and “normative stalemate” shed light on the complex, interacting forces that exposed Agent Camarena to danger and guided the effort to bring his killers to justice into the particular channels that it took. New scholarship inspired by Lisa Alexander’s remarkable book, finally, shows how law enforcement tactics both ratify existing power relations and limit opportunities to alter them in the future.

#### CONCLUSION

Friedman’s lesson is still apt: criminal justice is a social system in which every action has sources in and consequences for its social environment, although the lesson manifests itself differently over time. Enrique Camarena brought bravery and considerable talent to the suppression of drug trafficking from Mexico, although competing priorities in both Mexican and U.S. governments—some of them legitimate, some not—hindered authorities from appreciating the dangerousness of the trade and from responding effectively once Camarena was taken. Camarena’s fellow officers, likewise, mounted an unprecedented effort to bring his killers to justice. Without the cooperation of the host country and frustrated by the inadequacy of procedures available to them, they improvised as best they could and thereby ran afoul of established norms of criminal justice. The War on Drugs itself, driven as it was by contradictory strategic, political, and diplomatic considerations, impeded effective control of the drug trade and drifted gradually into lawlessness and violence.

California courts, especially the Central District Court, struggled to keep the *Leyenda* prosecutions within established norms of criminal procedure, often to the frustration of law enforcement officers in the DEA and the U.S. Attorney’s office. Although there was no law



on the books to say whether René Verdugo-Urquidez could suppress evidence taken in a warrantless search by U.S. agents of his foreign residence, the Southern District Court and the Ninth Circuit Court of Appeals agreed that he could because the Fourth Amendment limited the federal government's authority to act, regardless of where or upon whom. Judge Rafeedie of the Central District and the Court of Appeals likewise agreed that the extrajudicial rendition of Humberto Álvarez-Machain defeated U.S. jurisdiction over his case, and when the Supreme Court returned Álvarez for trial, the Judge directed his acquittal because the DEA's evidence was in his view insufficient to convict. Both the Central District Court and the Court of Appeals agreed that Álvarez-Machain was entitled to a private-law remedy against his abductors and the government agents who directed them, whether under the Alien Tort Statute or the Federal Tort Claims Act. In every case, the Supreme Court supported the authority of U.S. law enforcement officers to act in foreign territory free from restrictions under which they would operate at home. In doing so, the Court played an essential role in constructing what would become the post-2001 national security apparatus.

Meanwhile, doctrinal and socio-legal scholars have tried to put order to the legal system's haphazard response to new challenges to U.S. law, first from international drug traffickers and later from terrorists. They explained the mysterious evolution of the "wars," first on drugs and then on terror, in terms of the contradictory social vectors that first produced them and then all but guaranteed that they would be counterproductive. They systematized all of the different ways in which the government tried to arrest and interrogate international suspects without regard to established norms of criminal procedure. They showed how the militarization of criminal justice abroad was of a piece with that at home, and how militarization at home and abroad tended mostly to exacerbate the problems it was supposed to resolve.<sup>229</sup> New work based on the combined experience of the War on Terror and the Great Recession of 2007-09, finally, has brought the whole into new perspective, suggested new ways of understanding the history and structure of our criminal justice system, and may point to more effective strategies for reform.

The abduction and murder of Enrique Camarena was a relatively small part of this story, although his own commitment to his work and the devotion of his comrades who sought to avenge him contributed in important ways to the evolution of the law of international criminal

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229. See BROOKS, *supra* note 172.

procedure. The law enforcement community honors his memory with particular feeling because he devoted his considerable gifts and gave his life in the service of a policy that, while honorable in concept, was neither coherently motivated nor well strategized. His story provides students of our legal system with a powerful case study in the relationships between individual action and broader social changes, as well as in the subtle ways in which passion for a righteous cause can “make[ ] what previously was clear seem doubtful, and before which even settled principles of law will bend,” as Justice Holmes put it.<sup>230</sup> His heirs can best honor his memory by taking the right lessons from his sacrifice.

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230. *Northern Securities v. United States*, 193 U.S. 197, 401 (1904) (Holmes, J., dissenting).