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# HUMAN RIGHTS BEYOND THE WAR ON TERRORISM: EXTRADITION DEFENSES BASED ON PRISON CONDITIONS IN THE UNITED STATES

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## I. INTRODUCTION

Two months after the attacks on the World Trade Center and Pentagon, Spanish authorities made widely publicized arrests of alleged terrorists in Madrid and Granada.<sup>1</sup> Eight men were formally charged with being members of cells affiliated with the al-Qaeda network.<sup>2</sup> According to Spanish authorities, the terrorist cells had been in direct communication with the participants in the attacks; Mohammed Atta, who piloted the first airplane into the Trade Center, visited Spain twice in the nine months prior to attack.<sup>3</sup>

Despite the United States' interest in these prisoners,<sup>4</sup>

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1. See *Spain Shows Suspect Terrorist Haul*, CNN.COM (Nov. 14, 2001), at <http://www.cnn.com/2001/WORLD/europe/11/14/inv.spain.videos/index.html>.

2. See Sam Dillon, *Spanish Judge Charges 8 With Terrorism, Citing Likely Links to Al Qaeda*, N.Y. TIMES, Nov. 19, 2001, at B5. The alleged leader of one Spanish terrorist cell had met with Osama bin Laden twice, was in regular contact with Mohammed Atef, a high-ranking al-Qaeda deputy who was killed in Afghanistan, and had traveled around the world to meet with "extremists from Australia to Indonesia to Jordan." See Bruce Zagaris, *International Cooperation Against Transnational Terrorism Continues*, INT'L ENFORCEMENT L. REP., Jan. 2002; Sebastian Rotella & David Zucchino, *Hunt is on for Middle Managers of Terrorism*, L.A. TIMES, Dec. 23, 2001, at A1; Sam Dillon, *Indictment by Spanish Judge Portrays a Secret Terror Cell*, N.Y. TIMES, Nov. 20, 2001.

3. Al Goodman, *Suspected Terrorists in Spanish Court*, CNN.COM (Nov. 17, 2001), at <http://www.cnn.com/2001/WORLD/europe/11/17/inv.spain.court/index.html>.

4. See, e.g., Associated Press, *U.S. Seeks Access to Al-Qaida Suspects in Spanish Custody*, ST. PETERSBURG TIMES, Dec. 11, 2001 (quoting Jimmy Gure, U.S. Treasury undersecretary for enforcement: "The United States is interested in any evidence pertaining to terrorist financing involving the eight de-

they remain in Spanish custody. Although the United States has not made any formal extradition requests, it has been reported that Spain may block extradition on human rights grounds. Spain's objections are based in part on the Bush administration's plan to try suspected foreign terrorists in military courts, which would arguably violate the guarantee of an "independent and impartial tribunal" as provided for in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention on Human Rights").<sup>5</sup>

The other main roadblock for extradition is, of course, the possibility that suspected terrorists might face the death penalty in the United States. In 1989, the European Court of Human Rights held in *Soering v. United Kingdom* that extraditions to the United States of people charged with capital crimes violated Article 3 of the convention.<sup>6</sup> The court found that the lengthy average stays in the harsh conditions of death row in Virginia constituted "inhuman" treatment or punishment.<sup>7</sup> As a result, absent assurances from U.S. authorities that terrorism suspects will not face the death penalty, there may be no extraditions of suspected terrorists from Europe.

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defendants who have been detained in Spain. . . . I'm anxious to sit down with Spanish authorities and learn as much as I can about the al-Qaida-related defendants.").

5. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222 (council of Europe) (entered into force Sept. 3, 1953) [hereinafter European Convention on Human Rights]. See also Sam Dillon & Donald G. McNeil, Jr., *Spain Sets Hurdle for Extraditions*, N.Y. TIMES, Nov. 24, 2001, at 1 (quoting a Spanish foreign ministry spokesman: "[I]f we're talking about a tribunal in the United States with summary procedures and military judges, then these are not the same conditions that would characterize a trial in Spain or France or England or anywhere else in Europe. . . . Extradition would be impossible."). British human rights lawyer Geoffrey Robertson explained that "[m]ilitary officers in the pay of the U.S. government are not regarded as independent or impartial. . . . In effect, there would be little or no chance of extraditing from Europe." *Id.*

6. See *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989); European Convention on Human Rights, *supra* note 5, Art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment.").

7. *Soering*, 161 Eur. Ct. H.R. (ser. A). See also *Extradition Deal Falters Over Death Penalty Policy*, PRESS ASS'N, Sept. 27, 2001, available at LEXIS, News Library, News Group File (quoting Belgian Justice Minister Marc Verwilghen: "We always have said in the EU that the execution of the death penalty is not an option."). HeinOnline -- 42 Santa Clara L. Rev. 1138 2001-2002

Ever since *Soering* raised the prospect that European extradition cases might become forums for scrutinizing and debating human rights in the United States, commentators have predicted that such cases would force the United States to step in line with the rest of the free world.<sup>8</sup> These predictions, however, were doomed from the start. Two weeks before the *Soering* opinion was issued, the U.S. Supreme Court ignored international law arguments in a case about the constitutionality of executing juveniles,<sup>9</sup> and the Court has remained consistently hostile to such arguments.<sup>10</sup> Instead, over the course of some thirteen years, the United States has negotiated around *Soering* by giving assurances that the death penalty would not be sought in potential capital cases.<sup>11</sup> Rather than foster interactions that lead to the generation, interpretation and, ultimately, the internalization of international norms,<sup>12</sup> European extradition proceedings have been

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8. See, e.g., Mark E. DeWitt, Comment, *Extradition Enigma: Italy and Human Rights vs. America and the Death Penalty*, 47 CATH. U. L. REV. 535, 588 (1998) (“[T]he United States will find itself with a choice: either keep the death penalty at the expense of losing extradition for capital offenses, or join the ranks of abolitionist nations.”); Richard B. Lillich, *The Soering Case*, 85 AM. J. INT’L L. 128, 143 (1991) (“[T]he Court’s reliance upon the death penalty to undergird the ‘death row phenomenon’ may well lead to the eventual reduction in the use of capital punishment in other countries. It is reasonable to assume that this possibility was one of the major factors motivating the *Soering* judgment.”); Major John E. Parkerson, Jr. & Major Steven J. Lepper, *Decision: Short v. Kingdom of the Netherlands*, 85 AM. J. INT’L L. 698, 702 (1991) (“[T]he impact of *Soering* as part of a cumulative, developing European human rights process clearly makes U.S. imposition of the death penalty increasingly difficult.”).

9. See *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) (“We emphasize that it is American conceptions of decency that are dispositive, rejecting the contention of petitioners and their various amici . . . that the sentencing practices of other countries are relevant. . . . They cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.”).

10. For example, in a concurrence to the Court’s denial of certiorari to a petition in which a prisoner argued that his lengthy stay on death row was unconstitutional, Justice Thomas stated that “were there any such support in our own jurisprudence, it would be unnecessary for the proponents of the claim to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council.” See *Knight v. Florida*, 528 U.S. 990, 990 (1999) (Thomas, J., concurring).

11. See generally Daniel J. Sharfstein, *European Courts, American Rights: Extradition and Prison Conditions*, 67 BROOK. L. REV. (forthcoming 2002).

12. See Harold Hongju Koh, *Why do Nations Obey International Law?*, 106 YALE L.J. 2599, 2651, 2659 (1997); see also Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 654 (1998). Professor Koh identifies such repeated interactions as the hallmark of a

occasions for avoiding meaningful debate and discussion. The willingness of most U.S. prosecutors to make routine assurances by the United States has afforded Americans and their leaders the luxury of not having to think about the morality and legality of capital punishment.<sup>13</sup>

Nevertheless, the war on terrorism may finally spark the extradition crisis that scholars have long predicted. Thus far, of course, officials in the Bush administration who are not known for rhetorical understatement have been preternaturally live-and-let-live about European objections to the death penalty. Appearing on *Meet the Press*, Secretary of Defense Donald Rumsfeld dismissed concern that European countries may block extradition on human rights grounds:

[W]e have known for years that there are some differences in Europe with respect to views as to capital punishment,

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“normative and constitutive” “transnational legal process” that creates obedience to and the eventual internalization of international law. Koh, *Why do Nations Obey International Law?*, *supra*, at 2651, 2659. “Normative” and “constitutive” transnational legal process is the process that creates obedience to and internalization of norms. *Id.*

13. The *Current-Argus* of Carlsbad, New Mexico, provided a particularly apt expression of how assurances foster avoidance: “While it’s regrettable that the extradition of terrorism suspects may be conditional, it’s more important the United States gain custody of the evildoers. The last thing we need now is a big debate over the death penalty.” Editorial, *Concessions Will be Made*, CARLSBAD CURRENT-ARGUS, Dec. 3, 2001, available at <http://search.newschoice.com/>. Even when prosecutors in jurisdictions such as Harris County, Texas, have refused to make conditional extradition requests, it cannot be said that extradition cases have caused Americans to reexamine their attitudes towards the death penalty. See, e.g., Edward Hegstrom, *D.A. Stands Pat on Foreigners, Death Penalty*, HOUS. CHRON., Jan. 12, 2001, at 21. In U.S. courts, *Soering* has been largely ignored. See Sharfstein, *supra* note 11.

Objections to the death penalty that appeal to long-held national values regarding the right to counsel, due process, and equality under the law have been and will likely remain more effective than international law arguments. Such objections have been most effective when discussed in the context of the high prevalence of wrongful conviction, and of racial and class disparities in the application of capital punishment. See, e.g., *National Briefing: Death-Row Inmate Freed*, N.Y. TIMES, Jan. 4, 2002 (wrongful conviction) (describing Florida’s decision to drop all charges against Juan Roberto Melendez, who had been on death row since 1984); Daniel LeDuc, *Md. House Backs 2-Year Moratorium on Death Penalty*, WASH. POST, Mar. 25, 2001, at C1 (racial and class disparities) (“Nine of the 13 people on death row are black. The preponderance of those sentenced are from one county. Most are poor. There is a problem with the system . . . We want to make sure it’s fair for all Marylanders—black, white, rich, poor” (quoting Del. William H. Cole IV (D-Baltimore)); see also *Kansas Court Orders Change in Rules for Death Sentences*, N.Y. TIMES, Dec. 30, 2001, at A16 (describing state supreme court decision banning the death penalty when mitigating and aggravating factors are equal).

and that's fair enough. They have their countries; we have ours. They can make their judgments. I would suggest that I think that'll not prove to be much of an impediment.<sup>14</sup>

When asked at a London news conference whether the death penalty would make extradition of suspected terrorists "very difficult," Attorney General John Ashcroft responded:

[E]ach case is dealt with independently in regard to extradition from various countries. And we have in the last several months, frankly, been favored with high levels of cooperation, particularly by European nations in extraditions. . . . The United Kingdom has been a model partner to the United States in law enforcement issues, but we understand that case by case defines the way in which we operate in the universe of extraditions.<sup>15</sup>

But the Bush administration has signaled that this casual relativism would likely end if bin Laden or a similarly senior and culpable terrorist wound up in European custody.<sup>16</sup>

14. *Meet the Press* (NBC television broadcast, Dec. 2, 2001).

15. Catherine Callaway, *John Ashcroft's News Conference in London* (CNN Live Event/Special, Dec. 12, 2001) (transcript no. 121201CN.V54).

16. See, e.g., Paul Richter, *U.S. Lays Plans for Interrogation, Trials*, L.A. TIMES, Dec. 12, 2001, at A1 ("Rumsfeld said that while it was the 'privilege' of other nations to ban the death penalty, 'we don't want it to get in our way with respect to the people who fit in these senior-level categories.' A senior U.S. defense official . . . said Rumsfeld's views represent 'a warning shot [to other countries] that we have a vested interest in this issue.'"); *Minister Warns of Rift Over Death Penalty for Sept 11 Suspect*, AGENCE PRESSE FRANCE, Dec. 12, 2001 ("US Attorney General John Ashcroft . . . refused to rule out the possibility that Saudi-born extremist Osama bin Laden could be executed if he is captured and sent to the United States."). At least one former Clinton administration official has expressed the view that the United States will not make assurances for any terrorist. Ivo Daalder, who was director of European affairs for the National Security Council, told the *Los Angeles Times*, "When we are dealing with terrorists, it will be very difficult to say we will not seek the death penalty—which may mean we don't get some of these people." Josh Meyer, *U.S. Shifts Terror Hunt to Europe*, L.A. TIMES, Dec. 8, 2001, at A1. Although Prime Minister Tony Blair backed down from comments by British Defense Secretary Geoffrey Hoon that bin Laden would be subject to conditional extradition if captured by British troops in Afghanistan, compare *UK Against bin Laden Execution*, CNN, Dec. 9, 2001, available at <http://www.cnn.com/2001/WORLD/Europe/12/09/ret.uk.laden/index.html>, with *UK Vows to Hand Over bin Laden*, CNN, Dec. 10, 2001, available at <http://www.cnn.com/2001/WORLD/Europe/12/10/ret.hoon.laden>, there seems to be a general consensus that the death penalty would be an obstacle to extradition to the United States if bin Laden were arrested on English soil. See Shihab Rattansi & Hala Gorani, *Should Osama bin Laden and al Qaeda Receive the Death Penalty?*, CNN International, Dec. 10, 2001, transcript no. 121001cb.k18 (quoting Hoon and mem-  
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The case of the Spanish prisoners, as well as the numerous other al-Qaeda operatives in custody elsewhere in Europe,<sup>17</sup> raises a series of questions about whether European refusals to extradite suspected terrorists will finally engage the United States in a process that would lead to internalizing international human rights norms. Will the extradition process create a strategic imperative for the United States to re-examine the death penalty? Will capital punishment in the United States create rifts in the anti-terrorism coalition,<sup>18</sup> lose the war for the hearts and minds of the Muslim world,<sup>19</sup> or

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bers of the conservative opposition in agreement on the fact that the European Convention on Human Rights would block extradition of bin Laden absent assurances that the death penalty would not be sought in the United States).

17. See Adam Cohen, *Rough Justice*, TIME, Dec. 10, 2001, at 30 ("Spain has said it will resist extraditing 14 suspected al-Qaeda members it has arrested unless it is assured they will be given civilian trials. Since foreign countries have so far rounded up the vast majority of the 350 al-Qaeda members the Administration says have been arrested since Sept. 11—including two more in Italy late last week—the Administration may be forced to back down and hold civil trials if it wants to try them in the U.S."); Josh Meyer, *U.S. Shifts Terror Hunt to Europe*, L.A. TIMES, Dec. 8, 2001, at A1 ("Justice Department officials now believe that most, if not all, of the suspects in the Sept. 11 attacks . . . either are in custody in Europe or are being sought by authorities there."). See also Sebastian Rotella & David Zucchino, *Hunt is on for Middle Managers of Terrorism*, L.A. TIMES, Dec. 23, 2001, at A1 ("London is clearly the pivot for networks spread across Europe. . . . Germany and Belgium have been bases for the preparation of terrorist teams . . . . Italy and France have been logistical centers for fake documents and recruiting along with Spain, a source of financing and a busy transit point.").

18. See, e.g., Charles Madigan, *Allies' Support is Far From Solid*, CHI. TRIB., Dec. 30, 2001, at C1. Cf. *Beharry v. Reno*, No. 98-CV-5381 (JBW), 2002 U.S. Dist. Lexis 757, at \*39-40

This nation's credibility would be weakened by non-compliance with . . . international norms. The United States seeks to impose international law norms—including, notably, those on terrorism—upon other nations. It would seem strange, then, if the government would seek to avoid enforcement of such norms within its own borders. . . . The United States cannot expect to reap the benefits of internationally recognized human rights—in the form of greater worldwide stability and respect for people—without being willing to adhere to them itself. As a moral leader of the world, the United States has obligated itself not to disregard rights uniformly recognized by other nations.

*Id.*

19. See, e.g., David Scheffer, *Options for Prosecuting International Terrorists*, SPECIAL REP. (U.S. Inst. of Peace, Washington, D.C.), Nov. 14, 2001, at 7 ("[M]ilitary trials in the United States would present exceptionally negative optics to international audiences, particularly in the Islamic world."). Ambassador Scheffer's report begs the question: How much of a distinction would the "Islamic world" make between military and civilian justice in the United States? Given the widespread views that Osama bin Laden had no role in the Septem-

“undermin[e] our ability to bring terrorists to justice?”<sup>20</sup>

While it is understandable that these issues are being discussed in newspapers and on television, the cause of internalizing international human rights norms in U.S. policy and jurisprudence is probably better served if an extradition crisis never comes to pass in the context of the war on terrorism. From a human rights perspective, the best realistic case scenario for such a crisis is one in which the United States agrees to make assurances not to seek the death penalty against bin Laden or to allow an international tribunal to try him.<sup>21</sup> This would not in all likelihood have much effect on capital case practice in the United States. Rather, the government would have negotiated once again around the issue of human rights and the death penalty. The down side, even in this best case scenario, is that many Americans would come to view international human rights as hostile to the United States. According to a December 2001 Gallup poll, nearly seventy percent of the American public would choose capital punishment for bin Laden over a sentence of life in prison without the possibility of parole.<sup>22</sup> In fact, fifty-two

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ber 11 attacks and that incriminating videos of bin Laden were doctored by United States authorities, it seems that trials in civilian courts would almost certainly be perceived by many people overseas as unfair. In the case of Zacharias Moussaoui, who is currently facing trial on six counts relating to September 11, the defendant's mother is entirely skeptical of the protections afforded her son in the United States District Court for the Eastern District of Virginia: “I have no confidence in US justice,” she told *Agence Presse France*. “They want to make an example of him, their first. They can make up evidence. They are good at that.” *Minister Warns of Rift Over Death Penalty for September 11 Suspect*, *supra* note 16.

20. James Orenstein, *Rooting Out Terrorists Just Became Harder*, N.Y. TIMES, Dec. 6, 2001, at A29; see also Bruce Shapiro, *U.S. Confronts International Opposition to the Death Penalty*, BERGEN COUNTY REC., Dec. 28, 2001 (“Will the United States have to choose between its war on terrorism and its addiction to the death penalty? . . . As the war in Afghanistan winds down, it is clear that American isolation over capital punishment jeopardizes our capacity to bring al-Qaeda suspects to justice in our own courts.”).

21. The worst realistic case scenario for human rights activists probably would be that a European country extradites bin Laden to the United States without going through the formalities of the extradition process, weakening the power and legitimacy of European human rights norms and institutions and increasing U.S. government incentives to pressure countries to disobey regional and international obligations.

22. See Jeffrey M. Jones, *Seven in 10 Americans Would Favor Death Sentence for bin Laden*, GALLUP NEWS SERVICE, Dec. 19, 2001, available at <http://www.gallup.com/poll/releases/pr011219.asp>. Just a year ago, only about half of Americans said they would “approve of the death penalty” when a sen-  
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percent of those polled went so far as to favor refusal of any demands for conditional extradition.<sup>23</sup> Considering the fact that the Bush administration has pointedly equated criticism of the war on terrorism with a lack of patriotism,<sup>24</sup> one can easily imagine how U.S. policy makers and much of the American public would perceive European hesitation over bringing terrorist masterminds to justice—and how such perceptions would color future attempts to import international opinion into domestic policy debates.<sup>25</sup>

The less intuitive but ultimately more valuable lesson to be drawn from the controversy over extraditing suspected terrorists from Europe to the United States lies far from the headlines on terrorism. The *Soering* case described enforcement of the prohibition against torture and other inhuman or degrading treatment and punishment as “a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the in-

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tence of life in prison without the possibility of parole was offered as an alternative. See Bill Blakemore, *Support for Death Penalty Drops*, ABC NEWS, May 2, 2001, available at [http://more.abcnews.go.com/sections/wnt/worldnewstnight/wnt010502\\_deathpenaltypoll\\_feature.html](http://more.abcnews.go.com/sections/wnt/worldnewstnight/wnt010502_deathpenaltypoll_feature.html) (describing a poll in which less than half supported the death penalty over life in prison without parole); see also Jones, *supra* (displaying results of a May 10-14, 2001, poll in which fifty-two percent of Americans favored the death penalty over life in prison without parole).

23. See Jones, *supra* note 22.

24. See, e.g., *The Department of Justice and Terrorism: Hearing Before the Senate Judiciary Comm.*, 107th Cong. (Dec. 6, 2001) (testimony of Attorney General John Ashcroft) (“[T]o those who scare peace-loving people with phantoms of lost liberty, my message is this: your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America’s enemies, and pause to America’s friends.”) available at <http://www.nytimes.com/library/politics/011207ashcroft-text.html>.

25. For example, former Georgia Attorney General Mike Bowers once said at a debate: “Are we going to listen to people from places like France to decide how we are going to run our court system here? Are we going to listen to people from Sweden tell us what to do? From Canada? And Mexico? These people don’t understand our customs. They don’t understand our practices.” See Panel Discussion, *Human Rights and Human Wrongs: Is the United States Death Penalty System Inconsistent with International Human Rights Law?*, 67 FORDHAM L. REV. 2793, 2799 (1999) (statement by Stephen B. Bright) (attributing the quote to Mr. Bowers). International opinion has scarcely affected the Bush administration on a number of issues post-September 11. See, e.g., Terence Neilan, *Bush Pulls Out of ABM Treaty; Putin Calls Move a Mistake*, N.Y. TIMES, Dec. 13, 2001; Ronald D. White, *Waxman Critical of President’s Tobacco Stance*, L.A. TIMES, Nov. 19, 2001, at C2 (describing the Bush administration positions that would undermine the Framework Convention on Tobacco Control).

dividual's fundamental rights."<sup>26</sup> At present, however, the potentially enormous security risks of holding terrorists<sup>27</sup> have not outweighed European countries' expressed unwillingness to violate terrorists' human rights by extraditing them without conditions to the United States. Such a stand has broad ramifications for the extradition of people not accused of terrorism.

The remainder of this article suggests one way in which extradition cases might yet become a source of "dynamic" and "constitutive" transnational legal process.<sup>28</sup> Perhaps conspicuously in a symposium about the death penalty, this suggestion does not involve capital punishment.<sup>29</sup> Rather, it proceeds from the fact that the *Soering* case did not hold that capital punishment violated the European Convention on Human Rights. The European Court of Human Rights blocked extradition because prisoners usually spent years waiting in harsh conditions of confinement in Virginia's death row prior to execution.<sup>30</sup> If the European Court extended *So-*

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26. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) ¶ 89 (1989). Such a balancing could well suggest that security concerns inherent to the war against terrorism outweigh human rights:

As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases.

*Id.*

27. See, e.g., *You Want Him, Tony?*, N.Y. POST, Dec. 11, 2001 ("If bin Laden should fall into British custody, why not let London just keep him? Lock him up in the Tower of London, or somewhere, and wait for his holy warriors to start blowing up innocent civilians there for a while.").

28. See Koh, *Why Do Nations Obey International Law?*, *supra* note 12, at 2659.

29. This argument is explained in greater detail in Sharfstein, *supra* note 11.

30. If the Bush administration can draft regulations for its military tribunals that conform with the European Convention on Human Rights, there may be an argument that the death penalty for terrorists would not violate the prohibition on inhuman treatment or punishment because the lack of multiple avenues of appeal would mean less lengthy stays on death row. When Congress was debating whether to curtail habeas appeals, at least one Senator cited *Soering* as a reason for enacting the Antiterrorism and Effective Death Penalty Act. See 141 CONG. REC. S7803, S7804 (June 7, 1995) (statement of Sen. Specter)

ering to block extraditions to the United States because of inhuman or degrading prison conditions *outside* of death row, the United States could find itself in a briar patch of legal and policy issues. A prison conditions defense to extradition is conceivably available to terrorists,<sup>31</sup> but more significantly, it

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("We . . . have an adjudication under the European Convention on Human Rights that concluded that the practice in the State of Virginia where cases were delayed for 6 to 8 years constitutes cruel and unusual punishment . . . . It seems to me the Congress of the United States . . . ought to act to make the death penalty an effective deterrent.").

The Bush administration may well draft regulations for military tribunals that satisfy European allies. Administration lawyers seem to be attempting to address concerns expressed by domestic as well as international critics. See Katharine Q. Seelye, *Draft Rules for Tribunals Ease Worries, but Not All*, N.Y. TIMES, Dec. 29, 2001, at B7 (describing "reports that the regulations would allow tribunals to be open to the public and the news media, would grant defendants the presumption of innocence and allow them to have military lawyers and their own civilian lawyers and would require a unanimous verdict for imposition of the death penalty"); see also David J. Scheffer, *Reality Check on Military Commissions*, CHRISTIAN SCI. MONITOR, Dec. 10, 2001, at 11 ("The best course would be to fix the military order with congressional action that makes the military commissions more user-friendly for foreign authorities and that casts the order as an exceptional option for use only when US federal courts truly cannot assume their rightful role in prosecuting international terrorists."); *Preserving Freedoms While Defending Against Terrorism: Hearings Before the Senate Judiciary Comm.*, Dec. 4, 2001 (testimony of Pierre-Richard Prosper, State Department Ambassador-at-Large for War Crimes Issues) ("I think we will have the responsibility, once the commission is actually created and the rules are put forth, to talk to our allies to show them that this is a fair process. It does provide fundamental fairness; the military judges or lawyers that are attached to the proceeding are competent and credible people."). Enhanced procedural protections for suspected foreign terrorists may provide some force to the argument that a prisoner at Guantanamo Bay will have a better lawyer and a better chance of avoiding the death penalty than an accused murderer in, say, Harris County, Texas. But even in the unlikely event that such an argument stirs sympathy in ordinary citizens for a generally unsympathetic group of people, states are unlikely to invest in indigent defender systems, especially given the fiscal crisis spawned by heightened security concerns. See, e.g., Joe Mathews, *Local Governments Pay the Price for a Nation's New Vigilance*, L.A. TIMES, Dec. 27, 2001, at A1 ("The new security and public health costs—defense budgets in practice if not in name—are expected to total as much as \$4 billion for state governments and \$3 billion for localities by the end of this year. These obligations have left city councils and county supervisors facing a dilemma once reserved for those in Congress: If we spend more money on defense, where do we cut?").

31. See, e.g., *Straw Presses U.S. on Detainees*, CNN.COM (Jan. 21, 2002), at <http://www.cnn.com/WORLD/Europe/01/20/ret.uk.cuba.row/index.html> (describing U.K. Foreign Secretary Jack Straw's concern over photographs of masked and manacled prisoners at the holding facility for al Qaeda and Taliban prisoners at the U.S. naval base at Guantanamo Bay). Of course, the willingness of the U.S. to build separate facilities for terrorists may give U.S. authorities a way to make assurances around an Article 3 defense to extradition raised by an

is available to the rest of the extradition caseload. Such cases would be difficult to negotiate around and would by and large avoid the politics, publicity, and emotion generated by terrorism or the death penalty.

## II. DEFENSES TO EXTRADITION BASED ON INHUMAN OR DEGRADING PRISON CONDITIONS IN THE UNITED STATES

If there is a "real risk" that a prisoner would be subject to torture or inhuman or degrading treatment or punishment in a country requesting extradition from Europe, the European Convention on Human Rights mandates refusal of the request.<sup>32</sup> Therefore, the biggest challenge for blocking extradition to the United States on human rights grounds will always be proof of risk.<sup>33</sup> Although just about every prison system in the United States is run contrary to European rehabilitative ideals, the strongest claims will be grounded in evidence of specific practices at specific prisons.<sup>34</sup> Two start-

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accused terrorist.

32. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 44-45 (1989); see also *Chahal v. United Kingdom*, 23 Eur. H.R. Rep. 413, ¶ 81 (1997) ("It should not be inferred from the [*Soering*] Court's remarks concerning the risk of undermining the foundations of extradition . . . that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 is engaged."); *Aksoy v. Turkey*, 23 Eur. H.R. Rep. 553, ¶ 62 (1996) ("Article 3 . . . enshrines one of the fundamental values of democratic society. Even in the most difficult of circumstances, such as the fight against organized terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment.").

33. In *Soering*, the undisputed average length of stay and the harsh conditions on death row created a real risk even though the United Kingdom argued that Jens Soering, who had murdered his girlfriend's parents in Virginia, might be found not guilty by reason of insanity or might not receive the death penalty. *Soering*, 161 Eur. Ct. H.R. (ser. A) ¶¶ 50, 93. By contrast, in *B., H. & L. v. Austria*, the European Commission on Human Rights denied an extradition challenge by three people indicted on drug "kingpin" charges in federal court in Indiana. See *B., H. & L. v. Austria*, App. No. 15776/89, 64 Eur. Comm'n H.R. Dec. & Rep. 264 (1989). The potential to receive a life sentence without the possibility of parole was held not to be *per se* inhuman. See *id.* at 271. Proof of inhuman conditions of confinement must be established in order to block extradition to the United States.

34. In *Soering*, for example, the European Court of Human Rights was swayed by undisputed evidence about cell size on death row in Virginia, the amount and types of recreation permitted, visitation policies, medical services, lockdown procedures, "death house" conditions for those facing imminent execution, and "channels by which grievances may be ventilated." *Soering*, 161 Eur. Ct. H.R. (ser. A) at 26-28. The court, however, declined to consider evidence about risk of rape and physical assault at Mecklenburg, which was presented by

ing points for a litigation strategy seeking to expand the *Soering* holding to prison conditions generally in the United States are cases involving juveniles and women. Such cases may involve special circumstances that prompt leniency from the European Court of Human Rights.<sup>35</sup> Furthermore, the relatively small number of penal facilities for women and juveniles in any given state increases the likelihood that individuals facing extradition may predict with some certainty the conditions of confinement that they will experience upon return to the United States.

#### A. *Claims by Women Prisoners*

Women facing extradition to the United States have compelling claims that they would face prison conditions that violate the European prohibition on inhuman treatment. Court decisions and U.S. government investigations, as well as reports by the U.N. Special Rapporteur on Violence Against Women, Amnesty International and Human Rights Watch, have detailed the mistreatment of women prisoners in numerous states.<sup>36</sup> In recent years, the Department of Justice has litigated and settled high-profile cases involving women's prisons in Michigan and Arizona.<sup>37</sup> Furthermore, individual

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Soering but "strongly contested" by the United Kingdom and the Virginia Department of Corrections. *Id.* at 27.

35. The *Soering* court examined the harsh conditions of Virginia's death row in light of the young age of the accused. *See id.* at 43. Women prisoners have distinct health needs and often have histories of abuse. *See, e.g.,* Lynn Smith, *Majority of State's Women Inmates Abused as Children, Warden Says*, L.A. TIMES, Mar. 19, 1992, at 5.

36. *See infra* notes 37, 38, 40, 43, 44.

37. *See, e.g.,* Settlement Agreement, United States v. Arizona, No. 97-476-PHX-ROS (D. Ariz. settled Mar. 11, 1999), available at <http://www.usdoj.gov/crt/split/documents/azsa.htm> (detailing Arizona's agreement to strengthen sexual misconduct policies, increase pre-employment screening and training of guards, and educate inmates about their rights with respect to sexual misconduct by guards); Settlement Agreement, United States v. Michigan, No. 97-CVB-71514-BDT, (E.D. Mich. settled May 25, 1999), available at <http://www.usdoj.gov/crt/split/documents/michigansa.htm>; Complaint, United States v. Michigan, No. 97-CVB-71514-BDT (filed Mar. 10, 1997), available at <http://www.usdoj.gov/crt/split/documents/michcomp.htm> (alleging widespread sexual misconduct at Crane Correctional Facility and Scott Correctional Facility); Letter from Deval L. Patrick, Assistant Attorney General, U.S. Department of Justice, to Honorable J. Fife Symington, Governor of Arizona (Aug. 8, 1996) (finding that "sexual misconduct is occurring in [Arizona Department of Corrections] facilities with constitutionally unacceptable frequency" and that "male correctional officers engage in frequent, prolonged, close-up and prurient

and class actions by prisoners have brought additional facts to light.<sup>38</sup> Such evidence historically has carried a large amount of persuasive authority with European tribunals,<sup>39</sup> effectively putting a burden on the United States to show that abusive conditions have abated.

From these disparate strands of evidence, pictures of widespread abuse have come into focus. For example, the practice of using male guards to supervise women prisoners runs contrary to European practice and the U.N. Standard Minimum Rules for Prisoners<sup>40</sup> and has spawned lawsuits

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viewing of female inmates showering and using toilet facilities.”), available at <http://www.usdoj.gov/crt/split/documents/azwofind.htm>. See also *Report of the Mission to the United States of America on the Issue of Violence Against Women in State and Federal Prisons: Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, U.N. ESCOR, U.N. Doc. E/CN.4/1999/68/Add.2 (1999) [hereinafter *Special Rapporteur on Violence Against Women*]; Cheryl Bell et al., *Rape and Sexual Misconduct in the Prison System: Analyzing America's Most "Open" Secret*, 18 YALE L. & POL'Y REV. 195, 206-18 (1999); *Special Report: Women in Prison, Nowhere to Hide* (NBC television broadcast, Sept. 10, 1999) (detailing sexual abuse and the use of teargas and shackles in Michigan women's prisons).

38. See, e.g., *Women Prisoners of the Dist. of Columbia Dep't of Corr. v. District of Columbia*, 968 F. Supp. 744 (D.D.C. 1997) (issuing injunctive relief regarding sexual harassment policies, medical care, educational and vocational programs, environmental health and fire safety); *Shumate v. Wilson*, No. Civ. S-95-0619 WBS JFM (E.D. Cal. filed 1995) (describing life-threatening deficient medical care in two California women's prisons). See also Mark Andrew Sherman, *Indirect Incorporation of Human Rights Treaty Provisions in Criminal Cases in United States Courts*, 3 ILSA J. INT'L & COMP. L. 719, 735-40 (1997) (describing cases about the sexual abuse and medical mistreatment of women prisoners); Bell et al., *supra* note 37, at 206-18 (examining recent prisoner litigation); National Institute of Corrections, *Sexual Misconduct in Prisons: Law, Agency Response, and Prevention*, SPECIAL ISSUES IN CORRECTIONS 4 (Nov. 1996) (surveying recent litigation relating to sexual misconduct). Inmates generally lose claims alleging sexual misconduct. The U.S. General Accounting Office conducted a study of staff sexual misconduct in Texas, California, and federal women's prisons. From 1995 to 1998, only 92 of 506 allegations were sustained on administrative review. During that period, the Federal Bureau of Prisons was involved in fourteen lawsuits; California faced two suits; and Texas faced four, involving fifteen inmates. See U.S. General Accounting Office, *Women in Prison: Sexual Misconduct by Correctional Staff*, GAO/GGD-99-104, at 8, 12 (June 1999).

39. See, e.g., *Chahal v. United Kingdom*, 23 Eur. H.R. Rep. 413 (1997); *Aksoy v. Turkey*, 23 Eur. H.R. Rep. 553 (1996).

40. *Special Rapporteur on Violence Against Women*, *supra* note 37, ¶ 56 (citing Rule 53(3), Standard Minimum Rules for the Treatment of Prisoners). Although the 1987 revision of the European Prison Rules encourages “[t]he appointment of staff in institutions . . . housing prisoners of the opposite sex,” Rule 62, the main effect of the new rule was to increase female staff at men's prisons. European practice overwhelmingly favors the view that “at any given time and

across the country.<sup>41</sup> The U.N. Special Rapporteur criticized a general lack of attention to the “distinct health-care needs” of women.<sup>42</sup> And prison conditions in Michigan have received intense outside scrutiny for the “truly shocking” amount of sexual misconduct by male guards, verbal abuse, inappropriate use of shackles, pat-down searches, and “frequent, prolonged, close-up and prurient viewing of female inmates during dressing, showering and use of toilet facilities.”<sup>43</sup>

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in any situation in custody there should always be at least as many female staff supervising any women prisoners as there are male staff.” Sylvia Casale, *A Visit to Valley State Prison*, Amnesty Int’l Rep. (Apr. 1999), available at <http://www.amnesty.org/ailib/aipub/1999/AMR/25105599.htm> (quoting PRISONS AND HUMAN RIGHTS, MANUAL OF INTERNATIONAL PRISON STANDARDS FOR USE IN THE RUSSIAN FEDERATION 95 (1999)).

41. See, e.g., *Jordan v. Gardner*, 986 F.2d 1521, 1525, 1528 (9th Cir. 1993) (describing cross-gender body searches of a psychologically vulnerable population of abuse survivors as “an infliction of pain” prohibited by the Eighth Amendment); *Peddle v. Sawyer*, 64 F. Supp. 2d 12, 14 (D. Conn. 1999) (describing abusive pat searches at the Federal Correctional Institution in Danbury, Connecticut). When a member of the European Committee for the Prevention of Torture (“CPT”) accompanied two Amnesty International researchers on a visit to Valley State Prison for Women (“VSPW”) in California, she expressed serious concern with conditions in administrative segregation units (“Ad. Seg.”), the practice of shackling hospitalized women, and the employment of male guards who are authorized to conduct pat searches and have access to areas where women shower and are strip-searched. See Casale, *supra* note 40 (“In Europe the CPT has identified regime elements that could be considered to amount to inhuman treatment, [including] very limited direct staff/inmate contacts, frequent body searches, . . . too little time out of cell, association with a small number of inmates, . . . This reads like a description of the regime in the Ad Seg and S H Unit at VSPW.”). See also AMNESTY INTERNATIONAL, USA: A VISIT TO VALLEY STATE PRISON FOR WOMEN (Apr. 1, 1999) (criticizing a “blanket policy” of keeping hospitalized prisoners in shackles, the lack of independent monitoring of prison health care standards, the authorization of male guards to conduct pat searches and to watch strip searches, and “cruel, inhuman or degrading” conditions in administrative segregation).

42. See *Special Rapporteur on Violence Against Women*, *supra* note 37, ¶¶ 64-67.

43. *Id.* ¶¶ 145-48 (“The abuse taking place is truly shocking.”); Complaint, *United States v. Michigan*, No. 97-CVB-71514-BDT (E.D. Mich. filed Mar. 10, 1997). See also Letter from the U.S. Department of Justice to Honorable John Engler, Governor of Michigan (Mar. 27, 1995) (“[T]here is frequent sexual activity between guards and inmates.”); AMNESTY INTERNATIONAL, “NOT A PART OF MY SENTENCE”: VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY (Mar. 1999), available at <http://www.web.amnesty.org/ai.nsf/index/AMR510011999> (“In October 1998, inmates and a guard reported to Amnesty International that sexual abuse of female inmates by staff continues to occur.”); *Nowhere To Hide: Retaliation Against Women in Michigan State Prisons*, 10 HUMAN RIGHTS WATCH REPORT 2 (G) (1998) [hereinafter *Nowhere To Hide*], available at <http://www.hrw.org/reports98/women/>; HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS

In its favor, the United States can argue that most evidence of mistreatment was compiled in the context of investigations that have yielded significant improvements.<sup>44</sup> In Michigan, for example, the state's settlement agreement with federal authorities led to a six-month moratorium on cross-gender pat searches,<sup>45</sup> and a monitor chosen by both parties has reported dramatic reforms.<sup>46</sup> International observers have remarked on the night-and-day improvement of Georgia's women prisons after a class action suit led to a media storm and a permanent injunction.<sup>47</sup> Other class actions have yielded similarly encouraging results.<sup>48</sup> Over the last decade, most states have criminalized sexual misconduct by prison guards, and the Department of Justice has made investigating conditions in women's prisons a priority.<sup>49</sup>

Nevertheless, structural reforms and continuing investigations have failed to resolve many problems in women's prisons. The criminalization of guard misconduct has not been accompanied by better staff training and has done little by itself to halt sexual abuse.<sup>50</sup> Human Rights Watch has ar-

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(Dec. 1996) [hereinafter HUMAN RIGHTS WATCH, ALL TOO FAMILIAR].

44. See *Special Rapporteur on Violence Against Women*, *supra* note 37, ¶ 59 ("Though sexual misconduct remains a serious problem in United States women's prisons, recent court cases and awareness campaigns have resulted in some encouraging changes . . ."); AMNESTY INTERNATIONAL, *supra* note 43, at n.132 & accompanying text.

45. Settlement Agreement, *United States v. Michigan*, No. 97-CVB-71514-BDT.

46. See United States' Memorandum in Support of Stipulation to Dismiss, *United States v. Michigan*, No. 97-CVB-71514-BDT (filed Mar. 7, 2000), available at <http://www.usdoj.gov/crt/split/documents/michmemo.htm>.

47. See *Cason v. Seckinger*, Civ. No. 84-313-1-MAC (M.D. Ga. Mar. 4, 1994); *Special Rapporteur on Violence Against Women*, *supra* note 37, ¶¶ 118, 121, 124 ("[T]he Special Rapporteur was able to confirm that, although prior to *Cason*, sexual abuse and harassment was widespread in women's prisons in Georgia, . . . the situation has improved and awareness about the seriousness of sexual misconduct in prisons has greatly increased."); HUMAN RIGHTS WATCH, ALL TOO FAMILIAR, *supra* note 43, at 135-37; Eric Harrison, *Nearly 200 Women Have Told of Being Raped, Abused in a Georgia Prison Scandal So Broad Even Officials Say It's a 13-Year Nightmare*, L.A. TIMES, Dec. 30, 1992, at E1.

48. See Amy Laderberg, Note, *The "Dirty Little Secret": Why Class Actions Have Emerged as the Only Viable Option for Women Inmates Attempting to Satisfy the Subjective Prong of the Eighth Amendment in Suits for Custodial Sexual Abuse*, 40 WM. & MARY L. REV. 323, 326-28 (1998).

49. See National Institute of Corrections, *supra* note 38; U.S. General Accounting Office, *supra* note 38; Bell et al., *supra* note 37.

50. See National Institute of Corrections, *supra* note 38, at 2 (noting that despite laws prohibiting sexual abuse of female prisoners, "relatively few DOCs



gued that the Department of Justice's investigative and enforcement efforts have targeted too few states and that its settlement agreements with Arizona and Michigan are "flawed and weak."<sup>51</sup> Moreover, no systematic implementation of Human Rights Watch and Amnesty International's recommendations has taken place.<sup>52</sup> Evidence that prison officials have retaliated against prisoners who have made complaints<sup>53</sup> and refused to allow outside investigations of women's facilities<sup>54</sup> reinforce the basic presumption that ill treatment remains prevalent in many states. Additionally, in states operating under consent decrees, the reluctance of many victims to report sexual abuse has hampered reform efforts, as have institutional inertia and the political power of correctional unions.<sup>55</sup> Although reforms are taking root, there

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have looked closely at whether and to what extent their policies and practices offer clear direction to staff and inmates on the issue of sexual misconduct"); *Officials Consider CO Segregation by Gender*, CORRECTIONS PROF., Nov. 19, 1999 ("[I]n late October, Virginia officials ordered an investigation into complaints of widespread sexual abuse by male [corrections officers] at the state's largest women's prison. In the past nine months, there have been 25 sexual misconduct complaints at the Virginia Correctional Center for Women.").

51. HUMAN RIGHTS WATCH, WORLD REPORT 2000 (1999), <http://www.hrw.org/wr2k/> (United States overview).

The U.S. government has bungled its response to the sexual abuse women face in state prisons. During the year, the Justice Department reached negotiated settlements . . . in only two cases under consideration that involved sexual abuse of incarcerated women in two states. The settlement reached in the Arizona case . . . allowed Arizona Department of Corrections officials to place women in solitary confinement after they file a complaint of sexual abuse, an act the women perceived to be punitive. The settlement failed both to set up a mechanism through which women could safely file complaints without fear of retaliation and to establish independent oversight of the system.

The settlement reached with the Michigan Department of Corrections was a travesty, with all of the flaws of the Arizona settlement, but also including elements that actually placed the women at increased risk of sexual abuse. One of its most disturbing aspect [sic] was the imposition of uniforms on the women. This sent a message to the women that they 'provoked' sexual assaults and provided another means for corrections staff to punish them.

*Id.*

52. See *Nowhere to Hide*, *supra* note 43; AMNESTY INTERNATIONAL, *supra* note 43.

53. See *Nowhere to Hide*, *supra* note 43.

54. See *Special Rapporteur on Violence Against Women*, *supra* note 37, ¶ 9.

55. See *The Role of the U.S. Department of Justice in Implementing the Prison Litigation Reform Act: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong. (1996) (statement of Mark I. Soler) (describing how Georgia often discounted claims of sexual abuse even when complainants passed and

is a question of how long these reforms will last. For example, the Prison Litigation Reform Act ("PLRA") requires that consent decrees be lifted upon a minimal showing that constitutional violations have ceased.<sup>56</sup> Another hurdle created by the PLRA is the requirement of a prior showing of physical injury as a prerequisite to allowing damages for mental or emotional injury. This requirement directly affects lawsuits brought by women inmates.<sup>57</sup> Such evidence, showing the recalcitrance of the problems and the courts' limited ability to give redress, would strongly favor women contesting extradition before European human rights tribunals.<sup>58</sup> In the absence of humane alternate housing facilities, the United States might have difficulty negotiating around the European Convention on Human Rights.

### B. *Claims by Juveniles*

The European Court and Commission have more readily found Article 3 violations in cases involving youthful offenders because the vulnerability and special needs of a claimant may lower the burden for showing that a practice is inhuman or degrading.<sup>59</sup> Children may therefore have strong Article 3

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guards failed polygraph tests); Rhonda Cook, *Prison Guard Accused of Abusing Female Inmates Is Rehired*, ATL. J. & CONST., July 12, 1994, at B1 (describing how prosecutors were dropping rape and assault charges against a Georgia prison official and how he was being rehired at a male facility with back pay and a settlement bonus, even though the firing was upheld by the state Personnel Board).

56. See John Sullivan, *States and Cities Removing Prisons from Courts' Grip*, N.Y. TIMES, Jan. 30, 2000, at 1; U.S. Dep't of Justice, *CRIPA Report (1997) available at <http://www.usdoj.gov/crt/split/documents/cripa97.htm>* ("When jurisdictions comply with consent decree requirements and correct unlawful conditions in the institution, the Section joins defendants in a motion to dismiss the consent decree.") (detailing six dismissals based upon joint motions of the parties).

57. See Daniel J. Sharfstein, Case Note, *No Cure for a Broken Heart*, 108 YALE L.J. 2451 (1999); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 66 n.325 (1997); Julie M. Riewe, Note, *The Least Among Us: Unconstitutional Changes in Prisoner Litigation Under the Prison Litigation Reform Act of 1995*, 47 DUKE L.J. 117, 153 (1997).

58. Cf. *Chahal v. United Kingdom*, 23 Eur. H.R. Rep. 413 (1997).

59. Many of these cases involve findings of "degrading," as opposed to "inhuman," treatment. See, e.g., *Warwick v. United Kingdom*, App. No. 9471/81, 60 Eur. Comm'n H.R. Dec. & Rep. 5 (1986) (finding that a single stroke to the hand of a sixteen-year-old girl by male school officials was degrading); *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) at 15-16 (1978) (finding an Article 3 violation); *See also* *Prison Litigation Reform Act of 1995*, 47 DUKE L.J. 1, 66 n.325 (1997).

defenses to extradition based on poor conditions in juvenile detention facilities and the growing practice of charging juveniles as adults and housing them with adult populations. In the United States, governmental and non-governmental entities have documented widespread problems in numerous state and territorial juvenile justice systems. These abuses include overcrowded, poorly lit, unventilated, and vermin-infested conditions of confinement; sanctioned physical abuse by guards and among detainees; malnutrition; a paucity of education, health, and mental health services; and excessive use of restraints and solitary confinement.<sup>60</sup> A lawsuit filed

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violation where a teenage boy was sentenced to three strokes of a birch cane on his "bare posterior").

60. See, e.g., Letter from Bill Lann Lee, Acting Assistant Attorney General, U.S. Department of Justice, to Honorable Zell Miller, Governor of Georgia (Feb. 13, 1998), available at <http://www.usdoj.gov/crt/split/documents/gajuvfind.htm>. This letter stated the following:

Our investigation identified a pattern of egregious conditions violating the federal rights of youths in the Georgia juvenile facilities we toured. These violations include the failure to provide adequate mental health care . . . ; overcrowded and unsafe conditions . . . ; abusive disciplinary practices . . . including physical abuse by staff and abusive use of mechanical and chemical restraints on mentally ill youths; inadequate education and rehabilitative services; and inadequate medical care in certain areas.

*Id.* (footnote omitted). See also Letter from Isabelle Katz Pinzler, Acting Assistant Attorney General, U.S. Department of Justice, to Honorable Mike Foster, Governor of Louisiana (June 18, 1997), available at <http://www.usdoj.gov/crt/split/documents/lajuvfind1.htm> (finding physical abuse and corporal punishment by guards, "abusive use of mace," policies permitting juveniles to be "hog-tied," solitary confinement, inadequate medical and mental health care, inadequate education services, restrictive visitation policies, and lack of access to courts); Letter from Deval L. Patrick, Assistant Attorney General, U.S. Department of Justice, to Honorable Brereton C. Jones, Governor of Kentucky (July 28, 1995), available at <http://www.usdoj.gov/crt/split/documents/kyjuvfind.htm> (describing abusive solitary confinement, inadequate health services, overcrowding, staffing shortages, and inadequate abuse investigations); Steven H. Rosenbaum, U.S. Dep't of Justice, *Remarks Before the Fourteenth Annual National Juvenile Corrections and Detention Forum* (May 16, 1999), available at <http://www.usdoj.gov/crt/split/documents/juvspeech.htm> (describing U.S. Department of Justice investigations process and expressing general concerns about overcrowding, lack of attention to the special needs of very young and mentally ill juveniles, the increased use of restraints, chemical sprays and solitary confinement, and the need for proper educational services); Patricia Puritz & Mary Ann Scali, *Beyond the Walls: Improving Conditions of Confinement for Youth in Custody*, Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice (Jan. 1998), available at <http://www.ojjdp.ncjrs.org/pubs/walls/sect-01.html#8> (noting investigations in Alabama, Georgia, Kentucky, Michigan, Mississippi, Ohio, and Virginia); Bar-

late in January 2002 alleged that juveniles in the custody of the California Youth Authority

are routinely maced and assaulted by guards, live in constant fear of being raped . . . [,] are sometimes locked in solitary confinement 23 hours a day for months on end . . . [,] are forcibly injected with mind-altering drugs, denied psychiatric care, housed in units where they are vulnerable to sexual assaults and sometimes schooled while locked in metal cages.<sup>61</sup>

Considering that the European Court of Human Rights found a violation of Article 3 when male school officials administered a single lash to a sixteen year old girl's hand,<sup>62</sup> conditions in juvenile facilities in the United States often cross the Article 3 threshold. Although conditions in many juvenile facilities have improved in direct response to investigations and consent decrees, the volume of evidence to the contrary suggests that the government party to an extradition challenge often will bear a burden of showing that present conditions do not violate Article 3.

A separate basis for challenging the extradition of juve-

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bara Allen-Hagen, *Conditions of Confinement in Juvenile Detention and Correctional Facilities*, Office of Juvenile Justice and Delinquency Prevention, Fact Sheet #1 (Apr. 1993), available at <http://www.ncjrs.org/txtfiles/fs-9301.txt> (describing "serious and widespread problems . . . in the areas of living space, health care, institutional security and safety, and control of suicidal behavior" and "pervasive" overcrowding that affected more than seventy-five percent of the confined population between 1987 and 1991); Human Rights Watch, *No Minor Matter: Children in Maryland's Jails* (1999), available at <http://www.hrw.org/reports/1999/maryland/Maryland-01.htm> ("Children in Baltimore's jail spend their days in grim cells lacking direct natural lighting and crawling with cockroaches, rodents, and other vermin."); Amnesty International, *Betraying the Young: Human Rights Violations Against Children in the U.S. Justice System* (1999), available at <http://www.amnesty-usa.org/rightsforall/juvenile/report/index.html> (describing overcrowding in facilities in California, Illinois, Michigan, New York City, Maine, Virginia, and Colorado; the use of excessive physical force, shackles, chemical sprays and stun devices in facilities in Maine, Louisiana, Puerto Rico, South Carolina, Kentucky, Georgia, Florida, Virginia, and Washington, D.C.; and the widespread use of solitary confinement in Maine, Arizona, Louisiana, Georgia, Illinois, and Kentucky); Human Rights Watch, *High Country Lockup: Children in Confinement in Colorado* 25 (1996) (describing overcrowding, poor hygiene, lack of drug and alcohol treatment services, use of restraints and solitary confinement, and widespread violence in various detention facilities).

61. Jenifer Warren, *Suit Assails Conditions at Youth Prisons*, L.A. TIMES, Jan. 25, 2002.

62. See *Warwick v. United Kingdom*, App. No. 9471/81, 60 Eur. Comm'n H.R. Dec. & Rep. 5 (1986).

niles lies in the growing ease with which states can try juveniles as adults and place them in adult prisons.<sup>63</sup> For example, in March 2000, more than sixty percent of California voters approved a ballot measure that gives prosecutors complete discretion over whether to try juveniles as young as fourteen as adults.<sup>64</sup> Such practices, which expose a vulnerable class of people to physical and sexual abuse, violate international norms that require the separation of juveniles from adult offenders.<sup>65</sup> Nevertheless, even if the number of such prosecutions rises rapidly, an Article 3 challenge based on trying juveniles as adults and housing youthful offenders with the adult population will affect a miniscule number of extradition cases and easily is overcome by prosecutorial assurances that a relator will be tried as a juvenile.<sup>66</sup>

### III. CONCLUSION

The extradition of women and juveniles may seem remote from the controversy surrounding the suspected al-Qaeda operatives currently held in prisons across Europe, but Europe's public affirmations of its human rights norms in the context of the war on terrorism may provide an opening for the expansion of human rights norms in less publicized and less political cases. The death penalty presents an issue where a clearly stated norm that is widely held by U.S. allies exists in stark contrast to U.S. practices. The war on terrorism has shone a spotlight on European refusals to extradite terrorists

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63. See Patrick Griffin et al., U.S. Dep't of Justice, *Trying Juveniles as Adults in Criminal Court: An Analysis of State Transfer Provisions, Office of Juvenile Justice and Delinquency Prevention*, at iii ("From 1992 through 1995, 40 States and the District of Columbia passed laws making it easier for juveniles to be tried as adults.")

64. See Rene Sanchez & William Booth, *California Toughens Juvenile Crime Laws; Rules to Treat Young Offenders More Like Adults*, WASH. POST, Mar. 13, 2000, at A3; Mark Gladstone, *Proposition 21: Authorities Fear Fallout but Weigh Options; State and County Officials Brace for Costly Impact on Courts and Prisons as More Juvenile Lawbreakers Are Charged as Adults*, L.A. TIMES, Mar. 9, 2000, at A3; Sandra Gonzales, *Prosecutor Says Voter Approval of Prop 21 Will Not Result in Rapid Change*, S.J. MERCURY NEWS, Mar. 9, 2000.

65. See, e.g., International Covenant on Civil and Political Rights, Dec. 19, 1996, 999 U.N.T.S. 171, art. 10 ("Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.")

66. See Keven J. Strom et al., *Juvenile Felony Defendants in Criminal Courts*, Bureau of Justice Statistics Special Report (Sept. 1998) (finding that 1,638 juveniles in the country's 75 largest counties were tried as adults in 1990, 1992 and 1994, comprising 1% of all felony defendants).

who are accused of capital crimes, but such refusals are double-edged from a human rights perspective. Although capital punishment would seem to be a natural testing ground for human rights advocates to expand the internalization of international norms in the United States, human rights law arguments that support abolishing the death penalty risk making international opinion seem irrelevant or even hostile to U.S. values and interests.

It may well be that these refusals to extradite terrorists will not amount to much. After all, *Soering v. United Kingdom* was the case that launched a thousand law review articles, a significant number of which stated that the United States eventually will have to abandon capital punishment to maintain a position of moral leadership in world affairs.<sup>67</sup> Yet *Soering's* only tangible effect in the United States is that in a small fraction of extradition cases, prosecutors have made assurances not to seek the death penalty; neither capital punishment nor extradition has been much affected. In the event, however, that the United States stops negotiating around *Soering* and refuses to agree to the conditional extradition of a terrorist leader, such an impasse may well deepen the hostility of most Americans to international norms.

The cause of human rights may fare better in the United States if Europe remains publicly committed to defending its norms despite the terrorist threat, yet the situation never arises in which the U.S. government refuses to make death penalty assurances. That way, a litigation strategy may develop human rights defenses to extradition in contexts that are neither easily avoided nor politically explosive. At a time when terrorism and the death penalty are making headlines, such a strategy may seem counterintuitive, but ultimately it has a greater likelihood of achieving meaningful reform of U.S. policies and practices.

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67. See *supra* note 8.

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