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NOTE

THE WIDENING OF THE ATLANTIC: EXTRADITION PRACTICES BETWEEN THE UNITED STATES AND EUROPE*

When American soldiers entered Afghanistan after the September 11, 2001 terrorist attacks, the press questioned what the criminal process would be if foreign forces captured alive key members of the Al Qaeda terrorist organization. Popular sentiment in Europe stirred about this issue, particularly after the British government committed ground forces in the campaign to topple the Taliban government in Afghanistan.¹ Many Europeans wondered what British forces would do if they captured terrorists alive.

Most observers feared that the Americans would try key plotters of the attacks and seek the death penalty.² British law, however, forbids extradition of anyone facing the death penalty.³ British Defense Secretary Geoff Hoon thus originally announced that Britain would hand no one, not even Al Qaeda

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¹ The British, as well as the rest of Europe, have a particular interest in and concern with the September 11 attacks. First, seventy-eight British citizens were killed in the World Trade Center. Gregory Katz, *Britons Mourn Countrymen Killed in New York Attacks*, *Queen, Blair, Elder Bush Pays Tribute to 78 Dead*, DALLAS MORNING NEWS, Nov. 30, 2001, at 24A. Second, some of the early leads in the fight against terrorism have led to Europe. The first person to face criminal charges in the U.S. for 9/11, Zacarias Moussaoui, is a French national who worshipped at a London Mosque. Brooke A. Masters, *Invoking Allah, Terror Suspect Enters No Plea*, WASH. POST, Jan. 3, 2002, at A1. Richard Reid, a British citizen who tried to ignite an explosive in his shoe on a flight between Paris and Miami attended the same London mosque as Moussaoui. *Id.* Furthermore, terror experts believe that there are undiscovered Al Qaeda terror cells in Europe, for most of the September 11 terrorists lived and studied in Europe. Peter Finn, *Hijackers Depicted as Elite Group*, WASH. POST, Nov. 5, 2001, at A1.

² See, e.g., Bronwen Maddox, *U.S. Justice Falls Foul of Europe*, TIMES (London), Dec. 14, 2001, at 6.

³ See Human Rights Act, 1998, pt. 3 (Eng.); see also *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (1989).

leader Osama Bin Laden, over to the Americans if he would face the death penalty.⁴ However, the British government backed down from this stance a few days later when it publicly acknowledged that it would immediately hand any key terrorists over to the Americans.⁵

The hunt for those responsible for recent terrorist activity demonstrates the potential for international conflicts in connection with the extradition of fugitives and criminals from foreign countries to the United States. This Note discusses situations where nations, in particular the U.S. and European countries, have squarely disagreed on extradition practices and, as a result, have delayed extradition, frustrated punishment and allowed wanted criminals to roam free. September 11 should be a sobering reminder to all nations that extradition practices must be streamlined to vanquish the modern threat of terrorism. If terrorism is to be eradicated, nations must be capable of combating dangerous activities across borders, for crime today often transcends national and even continental borders. Bin Laden's Al Qaeda terror web, for example, is estimated to span over sixty different countries.⁶ Europe in particular is home to many of the active Al Qaeda cells.⁷ To ensure success in America's fight against terrorism and crime in this highly mobile world, extradition practices between the U.S. and Europe must be revised and streamlined.

This Note briefly chronicles American extradition history in Part I, and then turns, in Part II, to the theories underlying extradition. Part III outlines some of the tensions that occur when extradition cases arise between the U.S. and Europe. The two continents have developed differing approaches to extradition: America embraces the non-inquiry model, while European nations tend to use the judicial inquiry model. This Note uses cases to highlight the differences between the two approaches, which sometimes lead to

⁴ British Defense Secretary Geoff Hoon announced on December 9, 2001 that Bin Laden or any other terrorist would be handed over to American authorities only after the U.S. gave assurances that the death penalty would not be sought. Joan Smith, *Death Penalty is a Gulf Between Us and America*, INDEP. (London), Dec. 16, 2001, at 24.

⁵ Officials from British Prime Minister Tony Blair's office announced that Bin Laden would be handed directly over to the Americans if captured alive in Afghanistan. *Id.*

⁶ Juan O. Tamayo, *War on Terror Unfinished as Targets Move*, MIAMI HERALD, Sept. 9, 2002, at 1A.

⁷ See discussion *supra* note 1.

international crisis, threatening the countries' diplomatic relations. The Ira Einhorn case, for example, has headlined newspapers for years as the American killer hid in France to evade extradition to Philadelphia where he had been sentenced to death in absentia.⁸ Part IV explains how the U.S. uses assurances to solve problems created by extradition conflicts. Assurances, while effective in ultimately gaining jurisdiction over a fugitive, force the U.S. to compromise its own judicial process. Part V explores trickery and abduction—legally recognized methods of obtaining wanted criminals that circumvent the formal extradition request—and criticizes them as unrealistic solutions in the context of American-European diplomacy. Finally this Note discusses possible future trends in extradition between the U.S. and the European Union, in light of the recent global threat of terrorism, and proposes a solution of a single extradition treaty between the U.S. and the EU.

I. AMERICAN EXTRADITION PRACTICES: A BRIEF HISTORICAL TOUR

The American government now prioritizes the improvement of extradition practices in an effort to find the parties responsible for 9/11 and to prevent future attacks. Extradition was not always a priority in American foreign policy, however, for it was rarely necessary or practical. In early American history, fugitives could more easily disappear into the wilderness of unsettled America.⁹ The border between Canada and the U.S. was another useful escape route for fugitives fleeing the U.S. because no official certification was necessary to travel between the countries until the Civil War.¹⁰ The difficulty of world travel and problems tracking travelers in early American history made extradition even less practical.¹¹

⁸ See discussion *infra* Part III.B.1.

⁹ Rural, undeveloped lands of America provided an easy escape for criminals, for there were no organized law enforcement bodies to capture them. See Ethan A. Nadelmann, *The Evolution of United States Involvement in the International Rendition of Fugitive Criminals*, 25 N.Y.U. J. INT'L L. & POL. 813, 820 (1993).

¹⁰ Passport Office-Government of Canada, *The History of Passports*, at http://www.dfait-maeci.gc.ca/passport/history_e.asp (last visited Jan. 19, 2003).

¹¹ Although the U.S. has issued passports to its citizens traveling abroad since 1789, the process of tracking movement of people to foreign lands did not become centralized until 1856, when Congress passed the Passport Act that gave the U.S. government the sole power to issue passports. See U.S. DEPT. OF STATE, *THE AMERICAN PASSPORT* 36-42 (1898). Prior to this act, states and judicial authorities were permitted

The U.S. was initially reluctant to enter into extradition treaties with other countries. The U.S. did not want to handcuff its democratic ideals with the legal confines of extradition treaties to protect its reputation as a haven for political refugees who were enemies of foreign governments.¹² However, the increase in open-seas trading during the nineteenth century eventually made such treaties a necessity.¹³ In the 1840s, Congress finally enacted a statute that required the U.S. government to use a treaty to extradite.¹⁴ The use of extradition treaties began an era of diplomacy during which the U.S. entered into many bilateral treaties with other countries. These treaties spelled out the boundaries and terms of extradition.¹⁵ Historically, the precise language contained in the extradition statutes restricted extradition to persons accused of certain specifically listed offenses.¹⁶ When an extradition case presented an offense the statute did not list, Congress had to overhaul and rewrite the treaties to accommodate the new offense.¹⁷ The U.S. still uses this system today. Current extradition treaties between the U.S. and other

to issue passports, and, thus, there was no clear way of monitoring the movement of people into and out of America. *Id.*

¹² Nadelmann, *supra* note 9, at 820-21.

¹³ Foreign travel began to increase rapidly during the nineteenth century. The State Department issued roughly 130,360 passports between 1810 and 1873. That number, however, jumped to more than 1,184,085 between 1912 and 1925. National Archives and Records Administration, *Passport Applications*, at http://www.archives.gov/research_room/genealogy/research_topics/passport_applications.html (last visited Jan. 30, 2003).

¹⁴ 18 U.S.C. §§ 3181, 3184 (1948). The need for a defined extradition process was exposed in the nation's first extradition case, *United States v. Robins*, 27 F. Cas. 825 (D.S.C. 1799) (No. 16,175). In *Robins*, the U.K. requested the defendant's extradition after he had participated in a mutiny aboard a British ship. The U.S., lacking defined extradition laws, struggled with the case, which soon turned into a small controversy. One commentator noted that *Robins* was one of the causes of the overthrow of John Adams's administration. Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198, 1207 n.62 (1991) (quoting JOHN B. MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION 549 (1891)).

¹⁵ Each treaty contained detailed lists of extraditable offenses. For example, the 1843 extradition treaty between the U.S. and France listed the following as extraditable crimes: murder, attempted murder, rape, forgery, arson and embezzlement by public officials. Nadelmann, *supra* note 9, at 829. The descriptions of each crime were carefully defined in each instance to discourage abuse by either country. *Id.*

¹⁶ See generally *id.* at 830.

¹⁷ The U.S. overhauled many of its extradition treaties in the 1970s due to two principle reasons: the increasing problem of drug enforcement and because many of the colonial powers controlled by European colonization projects were now independent countries. *Id.* at 825.

nations, while all based on the same fundamental principles, are each unique because each country tends to have separate needs and goals that it wants to address.

II. RATIONALES SUPPORTING EXTRADITION

Many political and legal rationales support the need for extradition.¹⁸ A traditional state interest exists in obtaining reciprocal return of fugitives.¹⁹ For law-abiding nations to thrive and prosper, it is necessary to establish a society in which citizens are confident in their legal system.²⁰ If one is wronged he can feel confident that the justice system will work in his favor. For retribution's sake, nations need to be able to punish those who have wronged their citizens.²¹ Any potential crimes might also be deterred if there is a legitimate fear that illegal activities will have real consequences.

The U.S. in particular has a heightened interest in procuring the return of known fugitives because, in the past, other countries that tried criminals sought by the U.S. sometimes allowed fugitives to return to society after light punishment. In 1985, for example, Italian authorities released Mohammad Abul Abbas, the suspected mastermind behind the Achille Lauro cruise ship hijacking and murder of American passenger Leon Klinghoffer, without explanation.²² Another international incident involved Abu Daoud, who was "arrested . . . for coordinating the murder of eleven Israeli athletes in the 1972 Olympic games in Munich."²³ French authorities released Daoud four days later to the Algerian government where he returned with a hero's welcome.²⁴

¹⁸ See generally Matthew W. Henning, Note, *Extradition Controversies: How Enthusiastic Prosecutions Can Lead to International Incidents*, 22 B.C. INT'L & COMP. L. REV. 347, 350 (1999).

¹⁹ *Id.*

²⁰ See *id.* at 350.

²¹ See MICHAEL S. MOORE, LAW AND PSYCHIATRY 238 (1984); see also *infra* note 168 and accompanying text.

²² A group of Palestinian terrorists took over an Italian cruise ship and demanded that Palestinian prisoners be released by Israel in exchange for the hostages on the ship. *Terrorists Seize Italian Cruise Ship*, MIAMI HERALD, Oct. 8, 1985, at 1A. See also Arlen Specter, *The Time Has Come for a Terrorist Death Penalty Law*, 95 DICK. L. REV. 739, 740 (1991). Specter, now Senator from Pennsylvania, coincidentally defended convicted murderer Ira Einhorn in the late 1970s. Steve Lopez, *The Search for the Unicorn*, TIME, Sept. 29, 1997, at 53; see discussion *infra* Part III.B.1.

²³ Specter, *supra* note 22, at 740.

²⁴ *Id.*

Many countries fear retaliation by other countries or militant groups for punishing foreign criminals, especially for politically motivated crimes, and thus are less stringent than American authorities may be for the same crimes.²⁵ France, for example, released Daoud in fear of reprisals by other terrorists.²⁶ Conversely, America is known as a bastion of uncompromising justice. Fugitives fear the swiftness and severity of the American justice system and thus try to resist extradition.²⁷ For example, in 1989, Shiek Obeid, arrested by Israel for the murder of American hostages in Lebanon, said he was "terrified" of being extradited back to the U.S.²⁸ Obeid knew that the American justice system would not bend to political pressure and that he would be prosecuted swiftly.²⁹

Today's criminals' fears of capture are lessened because the increasingly borderless world gives them the ability to evade arrest. Governments of many nations have made recent strides to allow free borders between countries in order to facilitate trading. For example, the emergence of the EU and the fall of Communism in Eastern Europe allow for relatively easy travel between European countries.³⁰ As a result, travel between EU countries for its citizens is becoming similar to travel between the states of the U.S.³¹ The relaxing of borders may conveniently ease trade and travel, but with the increased liberty also comes the risk of abuse by criminals.

²⁵ *Id.* Cf. Douglas Jehl, *Islamic Group Vows Revenge on Americans*, N.Y. TIMES, Jan. 22, 1996, at B1 (noting that Americans faced terrorist threats after the financier/planner of the 1993 World Trade Center bombing, Sheik Omar Abdel-Rahman, was sentenced to life in prison in a U.S. district court).

²⁶ Specter, *supra* note 22, at 740 n.5.

²⁷ *Id.* at 753. This fear is probably well founded. U.S. District Court Judge William G. Young recently voiced this sentiment, addressing convicted shoe-bomber, Richard Ried at his sentencing: "You are a terrorist, and we do not negotiate with terrorists. We hunt them down one by one and bring them to justice." Pam Belluck, *Unrepentant Shoe Bomber is Given a Life Sentence for Trying to Blow Up Jet*, N.Y. TIMES, Jan. 31, 2003, at A13.

²⁸ Specter, *supra* note 22, at 753.

²⁹ *Id.*

³⁰ The "Chunnel," for example, linking France and England by train and car now allows passengers and freight to travel between the nations in less than twenty minutes in what used to take several hours by ferry. See Rail Europe, *The Channel Tunnel*, at http://www.raileurope.com/us/rail/eurostar/channel_tunnel.html (last visited Feb. 9, 2003).

³¹ The EU has the goal of allowing inter-country passage of its citizens without the need of checking nationality. Presently, EU members can travel across its states' borders with only an identification card, thus needing no passport. *Dialogue With Citizens and Businesses*, at <http://citizens.eu.int/en/en/gf/tr/es/gi/77/giitem.htm> (last visited Feb. 9, 2003).

For a nation choosing to scrutinize passage along its borders, an increasing frequency of illegal border crossings also necessitates extradition. The border between the U.S. and Mexico, spanning 1,933 miles, is a prime example of the infeasibility of patrolling everyone crossing an international border.³² While a majority of the border is virtually impassible due to the harsh desert conditions, each day three to five thousand people attempt to cross the California-Mexico border alone.³³ Those who attempt to cross international borders illegally are becoming more creative and evasive in their methods. At America's borders, for example, semi-trucks have been pulled over and found with over 100 illegal immigrants;³⁴ shipping containers in foreign boats have been found packed with illegal aliens;³⁵ and tunnels have been carved under the borders.³⁶ As borders open, the futility of trying to stop every unreported border-crosser forces countries to rely on extradition practices to ensure that their fugitives be returned to them.

Public safety further encourages the improvement of extradition practices.³⁷ Countries want to avoid becoming a haven for criminals who evade other countries' judicial systems.³⁸ While some countries are quite isolated and

³² Donna Leinwand & Yasmin Anwar, *America's Guard is Down on Porous Frontier*, USA TODAY, Mar. 15, 2000, at 21A. Even after security was supposedly tightened at the borders after 9/11 large numbers of people continue to cross the U.S. border illegally each day. See Philip Shenon, *Investigators Entered U.S. with Fake Names and IDs*, N.Y. TIMES, Jan. 31, 2003, at A13.

³³ Patrick J. Buchanan, *Clinton has Immigration on his Mind*, L.A. DAILY NEWS, July 11, 1993, at V1.

³⁴ Rick Lyman, *In Rush at Border, Borrowed Children Ease Illegal Passage*, N.Y. TIMES, June 18, 1999, at A1. ("You can't search every semi," [Border Agent] Quiroja said, "You'd back up the whole border and [the truck drivers] know that.").

³⁵ See, e.g., *26 Men Found in Ship's Cargo*, MILWAUKEE J. SENTINEL, Oct. 20, 2000, at 13; Joel Brinkley, *Border Security; Coast Guard Encounters Big Hurdles in New Effort to Screen Arriving Ships*, N.Y. TIMES, March 16, 2002, at A9 ("As a matter of policy, the Coast Guard does not ordinarily even board container ships, since there is no way to inspect the contents of the containers. Often they are stacked six-deep and -wide, and so gaining access to many of them is impossible until they are unloaded, even though containers that may hold terrorists or weapons of mass destruction are a central concern in Washington.").

³⁶ In 2001 alone, American Customs officials found eight tunnels from Mexico to Arizona. Candus Thomson, *Drug Traffic Grows in Desert Smuggling*, BALTIMORE SUN, May 2, 2001, at 1A.

³⁷ See Henning, *supra* note 18, at 350.

³⁸ A handful of nations have become internationally notorious for harboring dangerous criminals. Afghanistan's tumultuous history of inter-faction fighting produced a virtually lawless state that allowed terrorists, such as Osama Bin Laden, to operate within its borders. Neil MacFarquhar, *Saudis Criticize the Taliban and Halt*

impervious to uncontrolled entry, other nations are geographically susceptible to becoming a popular hideout for a neighboring country's criminals. Canada, for example, is especially prone to becoming a safe haven for American criminals due to its 4,000 mile, largely unguarded, border with the contiguous U.S.³⁹ Similarly, the border between Afghanistan and Pakistan is rough, mountainous terrain that makes it nearly impossible to track the movement of people.⁴⁰ Harboring criminals can exacerbate a country's crime problem and provide aid or indifference to criminals, particularly terrorists. Given the severity of the 9/11 attacks, states that are safe havens for criminals create problems for the entire international community.⁴¹

Finally, extradition helps countries avoid international tension and diplomatic crisis.⁴² One case in particular exhibits how the extradition battle over fugitives can cause foreign relations between the U.S. and other nations to deteriorate. In 1997, Benjamin Sheinbein was suspected of the killing and gruesome dismemberment of an acquaintance in Maryland.⁴³

Diplomatic Ties, N.Y. TIMES, Sept. 26, 2001, at B5. Similarly, Somalia and Sudan have been deemed pariah nations and are under the watch of anti-terrorism movements due to their lack of internal control of international criminals and terrorists. See Jules Crittenden, *War on Terror Enters Next Phase*, BOSTON HERALD, Dec. 19, 2001, at 7.

³⁹ See Craig R. Roecks, *Extradition, Human Rights, and the Death Penalty: When Nations Must Refuse to Extradite a Person Charged With a Capital Crime*, 25 CAL. W. INT'L L.J. 189, 215 (1994); see also Leinwand & Anwar, *supra* note 32. In Walhalla, North Dakota, for example, a border highway is routinely left unguarded at night, leaving only a set of orange traffic cones to stop unwanted persons. *Id.* The Canadian border is the suspected entryway for many terror suspects. In 1999, U.S. border patrol in Vermont captured Algerian Ahmed Ressay, a suspected terrorist with "118 pounds of urea, used to make fertilizer or explosives; two 22-ounce jars of nitroglycerin; and, where the spare tire should have been, four circuit boards connected to Casio watches." *Id.*

⁴⁰ There are countless un-patrolled mountain passes between Afghanistan and its five neighbors. See ALI AHMAD JALALI & LESTER W. GRAU, *THE OTHER SIDE OF THE MOUNTAIN: MUJAHIDEEN TACTICS IN THE SOVIET-AFGHAN WAR* 339, 402-03 (1995); LESTER W. GRAU, *THE BEAR WENT OVER THE MOUNTAIN* 75 (1998); STEVEN TANNER, *AFGHANISTAN: A MILITARY HISTORY FROM ALEXANDER THE GREAT TO THE FALL OF THE TALIBAN* 3-6 (2002).

⁴¹ President Bush, in his speech before the United Nations directly following the September 11 attacks, identified the danger of safe-haven states: "Terrorist groups like Al Qaeda depend upon the aid or indifference of governments. They need the support of a financial infrastructure and safe havens to train and plan and hide." President George W. Bush, Address at the United Nations (Nov. 10, 2001) (transcript available at <http://www.cnn.com/2001/US/11/10/ret.bush.un.transcript>).

⁴² See generally Henning, *supra* note 18, at 350.

⁴³ Abraham Abramovsky & Jonathan I. Edelstein, *The Sheinbein Case and the Israeli-American Extradition Experience: A Need for Compromise*, 32 VAND. J. TRANSNAT'L L. 305, 309 (1999) ("On September 19, 1997, Maryland state police located a black plastic bag containing the remains of a dismembered human body burned

Sheinbein fled to Israel three days after the body was found.⁴⁴ Because Israeli law forbids extradition of any of its citizens for any crime, Sheinbein argued that he was an Israeli citizen.⁴⁵ Although Sheinbein claimed Israeli citizenship through his father who was in fact an American citizen,⁴⁶ Israeli courts nonetheless refused to grant his extradition to the U.S.⁴⁷ The American government fiercely responded to the extradition refusal. Robert Livingston, Chair to the U.S. House of Representatives Appropriations Committee, for instance, threatened to cut off Israel's \$3 billion American aid package unless Sheinbein was extradited to the U.S.⁴⁸ Secretary of State Madeleine Albright personally contacted Israeli Prime Minister Benjamin Netanyahu and asked for his "maximum cooperation" with extraditing Sheinbein.⁴⁹ These efforts were for the murder of a single person. In the wake of the thousands of people murdered in the World Trade Center and Pentagon terrorist attacks, tensions will undoubtedly increase between the U.S. and nations reluctant to extradite.

III. DIFFERING APPROACHES TO EXTRADITION

A. *The Executive Model of Extradition: Non-Inquiry*

Nations generally take one of two differing approaches to extradition requests. The first approach is called non-inquiry, which places the power of extradition decisions solely in the hands of the executive branch rather than a nation's judiciary.⁵⁰ The Supreme Court in *Neely v. Henkel*⁵¹ established non-inquiry as the American approach to extradition requests from other countries. In *Neeley*, the defendant, Charles Neely, faced extradition from the U.S. to Cuba on a charge of

almost beyond recognition. The body was later identified as that of Enrique Tello, Jr., a local teenager."); see also Henning *supra* note 18, at 350.

⁴⁴ Abramovsky & Edelstein, *supra* note 43, at 309.

⁴⁵ *Id.* at 306-07.

⁴⁶ Sheinbein's father moved from Israel to America in 1950 and therefore the American government viewed his Israeli citizenship as tenuous. *Id.* at 318.

⁴⁷ *Id.* at 310.

⁴⁸ *Id.* at 316.

⁴⁹ Abramovsky & Edelstein, *supra* note 43, at 317 ("Livingston's efforts, however, went considerably beyond a protest note to the Secretary of State. On October 15, 1997, a House subcommittee which reported to Livingston's Appropriations Committee froze approximately \$76 million in U.S. aid payments to Israel.").

⁵⁰ Semmelman, *supra* note 14, at 1203-04.

⁵¹ 180 U.S. 109 (1901).

embezzling more than \$10,000.⁵² Neely argued that the American statute governing extradition⁵³ did not guarantee him "all of the rights, privileges and immunities that are guaranteed in the Constitution."⁵⁴ Neely further argued that he would not receive a fair trial if he were to be extradited to Cuba.⁵⁵ The Court rejected Neely's arguments and spelled out the principle of non-inquiry, stating that American citizens committing crimes in other countries must submit to their method of trial and punishment.⁵⁶

Non-inquiry was recently restated and reaffirmed in *Ahmad v. Wigen*.⁵⁷ Petitioner Mahmoud El-Abed Ahmad, a naturalized American citizen, filed for habeas corpus relief to stop his extradition to Israel after he was accused of attacking an Israeli bus.⁵⁸ When faced with the prospect of Ahmad being mistreated by Israeli authorities if the extradition was granted, the Second Circuit Court of Appeals ruled that it was not the duty of the American court system to monitor the integrity of other nations' courts.⁵⁹

⁵² *Id.* at 113.

⁵³ The statute included a provision for the return of a fugitive "to the authorities in control of such foreign country or territory . . . who shall secure to such a person a fair and impartial trial." Ch. 793, 31 Stat. 656, *cited in Neely*, 180 U.S. at 112.

⁵⁴ *Neely*, 180 U.S. at 122.

⁵⁵ *Id.* at 123.

⁵⁶ *Id.*

When an American citizen commits a crime in a foreign country, he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States. By the act in question the appellant cannot be extradited except upon the order of a judge of a court of the United States, and then only upon evidence establishing probable cause to believe him guilty of the offense charged; and when tried in the country to which he is sent, he is secured by the same act "a fair and impartial trial,"—not necessarily a trial according to the mode prescribed by this country for crimes committed against its laws, but a trial according to the modes established in the country where the crime was committed, provided such trial be had without discrimination against the accused because of his American citizenship. In the judgment of Congress these provisions were deemed adequate to the ends of justice in cases of persons committing crimes in a foreign country or territory "occupied by or under the control of the United States," and subsequently fleeing to this country. We cannot adjudge that Congress in this matter has abused its discretion, nor decline to enforce obedience to its will as expressed in the act of June 6th, 1900.

Id.

⁵⁷ 910 F.2d 1063 (2d Cir. 1990).

⁵⁸ *Id.* at 1063.

⁵⁹ *Id.* at 1067 (citing *Jhirad v. Ferrandina*, 536 F.2d 478, 484-85 (2d Cir. 1976)) ("The interests of international comity are ill-served by requiring a foreign nation such as Israel to satisfy a United States district judge concerning the fairness of its

American courts follow the non-inquiry method in extradition cases because extradition treaties are delegated to the executive branch.⁶⁰ In 1829, Supreme Court Chief Justice John Marshall explained in the case of *Foster v. Neilson* that, "[o]ur Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative supervision."⁶¹ Thus, very early in American history, non-inquiry guided courts when dealing with treaties executed by the executive branch.

The United States continues to follow the non-inquiry approach to extradition for several reasons. First, the United States does not want its courts to scrutinize foreign affairs.⁶² The Constitution gives such responsibility to the executive branch, not the judiciary.⁶³ Second, the courts are not suited to investigate and evaluate foreign affairs.⁶⁴ Third, courts are reluctant to render decisions that would infringe upon another nation's sovereignty.⁶⁵ Finally, judicial scrutiny of foreign judicial practices impedes the extradition process, therefore allowing dangerous criminals to evade prosecution.⁶⁶

Non-inquiry functions under the diplomatic theory that all countries will fully cooperate with each other; meaning, each country should strive to accommodate another country in returning fugitives without questions, for one day that country may need the favor returned.⁶⁷ For such a liberal policy to work, non-inquiry relies on the assumption that the requesting country will give the criminal a fair trial. As one extradition expert noted:

In truth the assumption by an extradition judge that delay or other defences would not be given the appropriate consideration by the

laws and the manner in which they are enforced.")).

⁶⁰ The United States cannot extradite criminals unless there is a treaty between itself and the requesting country. See *Factor v. Laubheimer*, 290 U.S. 276, 287 (1933).

⁶¹ 27 U.S. 253, 314 (1829). Marshall's theory that treaties should fall wholly within the power of the executive branch was first established in 1800 in a speech before the House of Representatives while he was a congressman. See Semmelman, *supra* note 14, at 1206.

⁶² Michael P. Shea, *Expanding Judicial Scrutiny of Human Rights in Extradition Cases After Soering*, 17 YALE J. INT'L L. 85, 93 (1992).

⁶³ See U.S. CONST. art. II, § 2.

⁶⁴ Shea, *supra* note 62, at 93.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See generally ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984).

foreign court is even more offensive than the assumption of control over the actions of foreign diplomatic and prosecutorial officials. It amounts to a serious adverse reflection not only on a foreign government to whom [the requesting country] has a treaty obligation but on its judicial authorities concerning matters that are exclusively within their competence.⁶⁸

Because European countries do not follow the non-inquiry process in extradition, as described below in Part II.B, the U.S. is essentially practicing unreciprocated diplomacy with European nations.

B. *The Judicial Inquiry Model: Increased Scrutiny and Criticism of American Legal and Domestic Affairs*

Judicial inquiry takes the opposite approach to extradition from non-inquiry: The judiciary asserts an active role in determining whether particular cases merit extradition. Since extradition cases are weighed on individual merits and are not decided in a per se manner, this approach naturally finds favor with those who support individual human rights. European countries tend to apply the judicial inquiry model in extradition cases.⁶⁹ In 1960, the Second Circuit considered abandoning the non-inquiry approach in favor of a judicial inquiry model in *Gallina v. Fraser*.⁷⁰ The court, in dictum, stated that it did not fully agree with an absolute rule of non-inquiry.⁷¹ Instead the court stated that non-inquiry may have to be abandoned if the extradition is to another country in which the procedures are "antipathetic to a federal court's sense of decency"⁷² This partial inquiry standard, however, has not been used in practice in American courts and the rule of non-inquiry still prevails in the U.S.⁷³

Countries that choose the judicial inquiry model routinely inquire into the requesting country's judicial procedure and methods of punishment. In recent years there has been an increasing tendency for EU nations to refuse

⁶⁸ *Argentina v. Mellino* [1987] S.C.R. 536, 554-55, quoted in John Dugard & Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT'L L. 187, 189-90 (1998) (quoting Justice La Forest, Canada's leading authority on extradition law).

⁶⁹ See, e.g., *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (1989).

⁷⁰ 278 F.2d 77 (2d Cir. 1960).

⁷¹ *Id.* at 79 ("Nevertheless, we confess to some disquiet at this result.").

⁷² *Id.*

⁷³ See *In re Extradition of Singh*, 123 F.R.D. 127 (D.N.J. 1987).

extradition of fugitives to the U.S. after reviewing judicial practice and prison conditions.⁷⁴ The case of *Soering v. United Kingdom* established the current trend of extradition practices for European nations dealing with the United States.⁷⁵

In 1985, eighteen-year-old Jens Soering and his girlfriend brutally murdered the girl's parents at their home in Virginia.⁷⁶ Soering, a West German citizen, fled to the U.K. after the murder.⁷⁷ He was arrested in the U.K. one year later and the U.S. government promptly asked the U.K. to extradite Soering in accordance with the 1972 extradition treaty between the two countries.⁷⁸ Europe allowed for the death penalty in certain circumstances according to the Convention for the Protection of Human Rights and Fundamental Freedoms ("Convention"), a 1950 treaty to which the U.K. was a signatory nation.⁷⁹ Since the signing of the Convention, however, the regional trend in Europe was to abolish the death penalty.⁸⁰ The U.K. domestically abolished the death penalty for all but military crimes in 1989, before the U.S. requested extradition for Soering.⁸¹ Soering argued that he should not be extradited because the U.K. internally abolished the death penalty and the regional trend in Europe forbade the U.K. from extraditing a criminal to any nation that would impose the death penalty.⁸² Adding to the complexity of the extradition request, Soering argued that he should not face the death penalty because he was only eighteen years old when he committed the murders,⁸³ and that he suffered from a psychological disorder called "folie a deux."⁸⁴

⁷⁴ See, e.g., *infra* notes 87 & 165 and accompanying text.

⁷⁵ *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (1989).

⁷⁶ *Id.* at 11.

⁷⁷ *Id.*

⁷⁸ *Id.* at 11-12.

⁷⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 2, 213 U.N.T.S. 221, 224 (allowing for the imposition of the death penalty).

⁸⁰ Protocol Six of the Convention, which specifically outlawed the death penalty, was ratified by thirteen European countries in 1983, but the U.K. had not yet ratified it before *Soering*. *Soering*, 161 Eur. Ct. H.R. at 40.

⁸¹ The U.K. abolished the death penalty for all crimes in 1998. Human Rights Act, 1998, pt. 3 (Eng.).

⁸² *Soering*, 161 Eur. Ct. H.R. at 40.

⁸³ *Id.* at 41.

⁸⁴ "Folie a deux" is a condition in which a person loses his identity and acts at the suggestion of another. It is recognized in the U.K. to be a defense of "not guilty to murder but guilty of manslaughter." Roecks, *supra* note 39, at 198-99 n.63.

The European Court of Human Rights ruled that according to the Convention, Soering should not be extradited back to the U.S. if he faced the death penalty.⁸⁵ A dominant argument used in the court's decision was that Soering should not be returned because of the "death row phenomenon" that he might experience in the U.S.⁸⁶ The *Soering* court's interpretation of the Convention is likely to limit European extradition of future criminals to the U.S. who face the possibility of the death penalty.⁸⁷

1. The Ira Einhorn Case

Ira Einhorn's extradition from France to the U.S. evolved into a long, international episode epitomizing the current struggle of opposing extradition viewpoints and approaches between European nations and the U.S. The duration of the battle and the publicity it received in both the American and French media make it the most powerful example of the increasing problems surrounding extradition cases.

The U.S. sought the extradition of Einhorn for the murder of his ex-girlfriend, Holly Maddox.⁸⁸ Einhorn was a hippie leader in Philadelphia during the 1960s who was quite radical and outspoken on ecological and political issues, calling himself a "planetary enzyme."⁸⁹ Einhorn became a well-known and well-connected political figure in Philadelphia. In 1970, Einhorn helped organize the first national Earth Day

⁸⁵ *Soering*, 161 Eur. Ct. H.R. at 50.

⁸⁶ The "death row phenomenon" is the inhuman treatment of prisoners waiting on death row, including the agonizing wait in the shadow of death and the actual conditions of the Virginia detention center where Soering would have been held. *Id.* at 61.

⁸⁷ Richard B. Lillich, *The Soering Case*, 85 AM. J. INT'L L. 128, 145 (1991). Other international agreements, including the International Covenant on Civil and Political Rights, the American Convention on Human Rights and the African Charter on Human and People's Rights, have adopted the language of the Convention, banning the extradition of those facing the death penalty. *Id.* at 145-46; International Covenant on Civil and Political Rights, Mar. 23, 1976, pmbl., 999 U.N.T.S. 172; American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S., No. 36, 1144 U.N.T.S. 123; African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58 (1982).

⁸⁸ Steven Levy, *Getting Away With It*, NEWSWEEK, Dec. 15, 1997, at 58.

⁸⁹ STEVEN LEVY, *THE UNICORN'S SECRET* 13-14 (1999). Einhorn, which means "one horn" in German, referred to himself as "the Unicorn." Lopez, *supra* note 22, at 52 ("Einhorn charmed many into believing the planet was warping into new frontiers and only the Unicorn could lead them to the age of Aquarius.").

celebration,⁹⁰ a day devoted to ecological awareness and preservation.⁹¹

Einhorn and Maddox met in 1972 and began a very stormy five-year romantic relationship.⁹² In 1977, Maddox attempted to end the relationship and see other people.⁹³ Einhorn was angered by the break-up and threatened to destroy all of her belongings that were stored in his apartment.⁹⁴ In the early autumn of 1977, Maddox returned to the apartment to appease Einhorn and to retrieve her personal belongings.⁹⁵ Maddox was last seen the following evening at a movie theater with Einhorn.⁹⁶ A neighbor living below Einhorn's apartment recalled hearing a "blood curdling" scream followed by heavy banging one evening in the autumn of 1977.⁹⁷ Two teenage girls testified that a few nights after the night Maddox and Einhorn were spotted at the movie theater, Einhorn asked them to help him toss a heavy trunk into the river, but the girls refused.⁹⁸ Soon after Maddox's disappearance, Einhorn spent a semester as a fellow at Harvard's Kennedy School of Government.⁹⁹ During his time away from Philadelphia, a neighbor living beneath Einhorn's apartment complained to the police about a putrid smell and a dark-brown fluid leaking through the ceiling from Einhorn's apartment.¹⁰⁰ Einhorn refused to allow building janitors to open a closet in his apartment to investigate the problem.¹⁰¹ He kept the closet locked with a padlock and refused to let anyone open the door.¹⁰² On March 28, 1979, however, the Philadelphia Police obtained a warrant and opened the closet door, finding Maddox's mummified body inside a locked steamer trunk.¹⁰³

⁹⁰ LEVY, *supra* note 89, at 138.

⁹¹ International Earth Day is celebrated on March 21st. See International Earth Day, at <http://www.earthsite.org> (last visited Mar. 9, 2003).

⁹² LEVY, *supra* note 89, at 160.

⁹³ *Id.* at 340.

⁹⁴ *Id.*

⁹⁵ *Id.* at 341.

⁹⁶ *Id.*

⁹⁷ Lopez, *supra* note 22, at 53.

⁹⁸ LEVY, *supra* note 89, at 342.

⁹⁹ *Id.* at 354.

¹⁰⁰ Lopez, *supra* note 22, at 53; LEVY, *supra* note 89, at 349.

¹⁰¹ Lopez, *supra* note 22, at 53.

¹⁰² LEVY, *supra* note 89, at 24, 362.

¹⁰³ *Id.* at 26-27.

Her skull was fractured in at least six places by trauma from a blunt instrument.¹⁰⁴

After discovering Maddox's body, the Philadelphia Police arrested Einhorn for murder.¹⁰⁵ Einhorn claimed the KGB or CIA planted Maddox's body in his closet in a plot against him due to his knowledge of secret mind control weapons research.¹⁰⁶ Bail was set at \$40,000 and Einhorn was quickly released with the assistance of his affluent friends in Philadelphia.¹⁰⁷ Instead of using his conspiracy theory defense in court, Einhorn fled to Europe.¹⁰⁸ He fled to Ireland first, under the alias of Ben Moore, and attended Trinity College.¹⁰⁹ A Trinity professor reported Einhorn to Irish police in 1981, but without an extradition treaty in place with the U.S., the Irish police could do nothing.¹¹⁰ Einhorn then left Ireland, living undetected in Europe for more than sixteen years under the Moore alias, and then later using the alias Eugene Mellon.¹¹¹

In 1993, while the global search for Einhorn continued, the Philadelphia District Attorney decided to try Einhorn in absentia, fearing that material witnesses and important evidence would disappear before he was found.¹¹² The jury deliberated for less than two hours and found Einhorn guilty.¹¹³

Finally, in May 1994, French authorities found Einhorn living in rural France with his Swedish wife, Anika Flodin.¹¹⁴ At his trial in France, Einhorn hired a flashy, powerful defense attorney, Dominique Tricaud.¹¹⁵ Tricaud argued that it was illegal for the Philadelphia District Attorney to try Einhorn in absentia and that France should therefore not grant the request of the extradition.¹¹⁶ Tricaud filled his presentation

¹⁰⁴ *Id.* at 348.

¹⁰⁵ *Id.* at 27.

¹⁰⁶ *Id.* at 351.

¹⁰⁷ LEVY, *supra* note 89, at 39.

¹⁰⁸ *Id.* at 388.

¹⁰⁹ Lopez, *supra* note 22, at 56.

¹¹⁰ *Id.* The U.S. requires an extradition treaty with another country in order to extradite criminals back to its jurisdiction. 18 U.S.C. §§ 3181, 3184.

¹¹¹ Lopez, *supra* note 22, at 57; LEVY, *supra* note 89, at 389.

¹¹² See Steven C. Kiernan, *Extradition of a Convicted Killer: The Ira Einhorn Case*, 24 SUFFOLK TRANSNAT'L L. REV. 353, 357 (2001).

¹¹³ Henning, *supra* note 18, at 369. Einhorn was sentenced to life imprisonment without parole. LEVY, *supra* note 89, at 391.

¹¹⁴ Authorities traced Einhorn to Flodin after she applied for a French driving permit. LEVY, *supra* note 89, at 391.

¹¹⁵ Levy, *supra* note 88, at 60.

¹¹⁶ *Id.*

with anti-American rhetoric concerning the negative treatment that Einhorn would receive in the U.S. if the French granted extradition.¹¹⁷ Tricaud told reporters that the French would not send a man back to a “barbaric” country where he was tried without being present to defend himself.¹¹⁸ Tricaud later added that the Einhorn case was a chance for France to “give the United States a lesson in human rights.”¹¹⁹ Tricaud emphasized his argument by presenting the French judges with facts about America’s death penalty practices, including a record of imposing the death penalty on the mentally ill and minors.¹²⁰ The French Appeals Court decided to free Einhorn, providing no explanation for its ruling.¹²¹

Einhorn resumed a normal life after the trial, although he was under investigation by the French for immigration violations.¹²² American authorities were frustrated that the French court denied the U.S. custody of an American citizen who killed another American citizen on American soil.¹²³

French authorities arrested Einhorn again in February 1999, after a second request for extradition by the Americans.¹²⁴ The French agreed to the extradition as long as Einhorn was allowed a second trial.¹²⁵ Einhorn was permitted to remain free pending further French appeal, leaving open the possibility that Einhorn would flee again. The highest French administrative court finally agreed to the extradition in July 2001.¹²⁶ Einhorn appealed his case to the European Court of Human Rights.¹²⁷ That court, however, decided that Einhorn could be extradited because of American authorities’

¹¹⁷ *Id.*

¹¹⁸ Lopez, *supra* note 22, at 49.

¹¹⁹ *Id.* at 57.

¹²⁰ Levy, *supra* note 88, at 59. *See also* discussion *infra* notes 208-10 and accompanying text.

¹²¹ Levy, *supra* note 88, at 59.

¹²² *U.S. Murderer Resumes Life in His Adopted French Village*, ORANGE COUNTY REG., Dec. 6, 1997, at A31.

¹²³ Levy, *supra* note 88, at 59.

¹²⁴ Kiernan, *supra* note 112, at 359.

¹²⁵ The Pennsylvania legislature passed a law in 1998 permitting a new trial for those tried in absentia. This was done specifically to appease the French courts who refused to extradite Einhorn unless the Pennsylvania law, stating that a defendant who forgoes his trial in absentia automatically waives his constitutional right to an appeal, was repealed. *Id.* at 357-58.

¹²⁶ Josh Getlin, *Philadelphia Cheers Second Chance to Try New Age Guru Crime*, L.A. TIMES, July 21, 2001, at A1.

¹²⁷ *Id.*

assurances that they would not seek the death penalty.¹²⁸ Upon having exhausted the last of his appeals to avoid extradition back to America, Einhorn slashed his throat, hoping to kill himself in France rather than return to face a second trial in America.¹²⁹

On July 19, 2002, French Officials arrested Einhorn and turned him over to awaiting U.S. Marshals in Paris.¹³⁰ He arrived back in Philadelphia to stand trial for the murder that he had already been convicted of in absentia. The jury, once again, took less than two hours to convict Einhorn of first-degree murder.¹³¹ Einhorn is currently serving a life sentence in prison.¹³²

The saga of Einhorn's extradition headlined newspapers in America and Europe, and actually spawned a television mini-series in the U.S.¹³³ While the bizarre facts may have produced an interesting movie plot, the case highlights a point of contention between the U.S. and Europe and the lack of corresponding laws and procedures that would please both parties to the extradition.

2. Beyond *Soering* & *Einhorn*: Continued Scrutiny by Europe and the International Community

Einhorn and *Soering* manifest the differing viewpoints in Europe of the U.S. Because of many of these differences, America increasingly faces scrutiny from Europe regarding many of its domestic legal policies. In 1990, the EU Parliament called for a resolution on the abolition of the death penalty in

¹²⁸ *Id.* Assurances are discussed further *infra* Part IV.

¹²⁹ Keith B. Richburg, *U.S. Fugitive Ordered Extradited by France*, WASH. POST, July 13, 2001, at A14. Alternatively, Einhorn was trying to put his health in such a status that it would be unsafe for him to travel and thereby prolong his return to the U.S. The treaty between the U.S. and France allowed for a refusal of extradition if the fugitive's health made it too risky to physically survive the extradition. Einhorn blamed French Prime Minister Lionel Jospin for the wound: "Einhorn invited a television crew inside his house after the suicide attempt. 'He created this,' Einhorn . . . said as blood dripped onto his shirt. 'He is responsible. He is sending me back to America where I will stay for the rest of my life in prison, without mercy.'" *Id.*

¹³⁰ Theresa Conroy et al., *The World's a Better Place*, PHILA. DAILY NEWS, July 20, 2001, at 3.

¹³¹ Theresa Conroy, *I-RAH! I-RAH! 'Tis Goodbah!*, PHILA. DAILY NEWS, Oct. 18, 2002, at 4.

¹³² *Id.*

¹³³ *The Hunt for the Unicorn Killer* (NBC television broadcast, May 9-10, 1999).

the U.S.¹³⁴ In December 1997, the EU Parliament held a meeting in Strasbourg and proposed a resolution aimed at discouraging EU businesses from investing in the U.S. in an effort to persuade America to abolish its death penalty practices.¹³⁵ The goal of the proposed resolution was to brand the U.S. as a pariah nation.¹³⁶ European companies, while not heeding the call to cease trade with the U.S., have joined in the protests against American social policies. For example, in January 2000, the Italian fashion company Benetton ran a worldwide advertising campaign condemning the death penalty practices of the U.S.¹³⁷ The large billboards and magazine pages displayed solemn photographs of American prisoners condemned to death.¹³⁸

European public opinion on criminal justice fuels European legal and political pressure. Strong European distaste for American criminal procedure is manifested through the actions and words of the European government officials and citizens alike. For example, Tricaud's statements in Einhorn's defense were undoubtedly fodder for the French papers; Tricaud knew that his words would stir up public opinion against extradition to sway the French courts.¹³⁹ Editorials in European newspapers routinely lambaste the U.S.¹⁴⁰ Prior to 9/11, President George W. Bush made his first official visit to Europe and was coolly greeted by protesters in

¹³⁴ See William A. Schabas, *International Law and Abolition of the Death Penalty: Recent Developments*, 4 ILSA J. INT'L & COMP. L. 535, 559 (1998). This call for abolition was based on the Treaty of Amsterdam, the basis for the abolition of the death penalty in all European Union member states. TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, 1997 O.J. (C 340) 1 [hereinafter TREATY OF AMSTERDAM]. The Treaty of Amsterdam was executed in 1998 and codifies the customary law developed in the European Union countries, which abolished the death penalty. See Schabas, *supra*, at 559.

¹³⁵ Doreen Marguerite Koenig, *A Death Penalty Primer: Reviewing International Human Rights Development & The ABA Resolution for a Moratorium on Capital Punishment in Order to Inform Debates in U.S. State Legislatures*, 4 ILSA J. INT'L & COMP. L. 513, 522 (1998).

¹³⁶ *Id.*

¹³⁷ Benetton, *Looking Death in the Face*, at <http://www.benetton.com/www/aboutyou/campinfo/index.html> (last visited Feb. 4, 2003).

¹³⁸ The information project was headed by Italian photographer Oliviero Toscani. *Id.*

¹³⁹ See *supra* notes 117-20 and accompanying text.

¹⁴⁰ An editorial in the *Edinburgh Evening News*, commenting on Texas's June 9, 2000 execution of mentally retarded prisoner Gary Graham, stated, "[T]he United States . . . reeks of primitive, misguided vengeance and barbarism." Doreen Marguerite Koenig, *International Reaction to Death Penalty Practices in the United States*, 28 HUM. RTS. Q. 14, 15 (2001).

several countries who voiced their disapproval of American policies.¹⁴¹ A popular Austrian newspaper commented on the Bush visit, stating: "It's been a long time since a U.S. president got such a bad reception in Europe."¹⁴² In another example, immediately following 9/11, a majority of French online pollsters showed a lack of confidence concerning calculated American responses in disciplinary matters.¹⁴³ The polls prove that, even in the wake of an event that produced an enormous amount of European sympathy towards the U.S., the French still remained critical of American disciplinary actions. The trend of popular European criticism continues, as more recently, Gerhard Schröder won reelection as German Chancellor on a largely Anti-American platform.¹⁴⁴

The United Nations has also expressed their disapproval of, or at least their concern with, the internal practices of the U.S. In 1996, the U.N. Human Rights Commission's ("Commission") special rapporteur, Senegalese lawyer Waly Ndaye, demanded several times in 1996 to make a special visit to the U.S. in order to survey its prisons.¹⁴⁵ Ndaye's desire to visit was particularly prompted by the United States' executions of the mentally retarded, practices that did not satisfy the international community's legal standards to guarantee a fair trial.¹⁴⁶

In May 2001, U.N. members voted the U.S. off the Commission, a division of the U.N. that the U.S. started in 1947, and had retained a seat on since its origin.¹⁴⁷ The U.S. was voted off the Commission while notorious abusers of human rights were voted on, including Sudan, Sierra Leone, Pakistan and Uganda.¹⁴⁸

¹⁴¹ Philippe Debeusscher, AGENCE FRANCE-PRESSE, June 15, 2001.

¹⁴² *Id.*

¹⁴³ 65.5% of those polled said that they do not have confidence that the U.S. will respond to the terrorist attacks in an appropriate manner. LE MONDE, *Votre Avis*, at <http://www.lemonde.fr/sondage/0,5987,177,00.html> (last visited Mar. 16, 2003).

¹⁴⁴ Alan Cowell, *Schröder Uses London Visit to Fix Rift with U.S.*, N.Y. TIMES, Sept. 25, 2002, at A6.

¹⁴⁵ Schabas, *supra* note 134, at 553.

¹⁴⁶ *Id.* at 552. For a discussion of the United States' problematic standards and practices, see *infra* notes 208-11 & 217-18 and accompanying text. The U.S. government granted Ndaye's request on October 17, 1996. Schabas, *supra* note 134, at 552. Ndaye performed a two-week long tour of American prisons in California, Florida and Texas. *Id.*

¹⁴⁷ Michael Kelly, *Blind-Sided by the 'Allies'*, WASH. POST, May 9, 2001, at A31.

¹⁴⁸ *Id.*

Despite heavy foreign criticism of its legal practices, the American government does not seem overly concerned about how it is perceived abroad.¹⁴⁹ Chair of the Senate Foreign Relations Committee, Jesse Helms called the visit by the U.N. special rapporteur Ndaye "an absurd U.N. charade."¹⁵⁰ Helms asked the United States' Permanent Representative to the U.N., William Richardson, if the U.N. was confusing the U.S. with another country or if Ndaye's visit was an international insult to the U.S. and its legal system.¹⁵¹ In 1990, Robert Friedlander, minority counsel of the Senate Foreign Relations Committee, said of international law enforcement matters that, "it seems to be the practice of the United States to do what it wants to do; it long has been so and probably will continue to be so."¹⁵² The development of the war with Iraq reinforces the foreign perception of America as a go-it-alone, arrogant world leader. Even though key historical allies and many U.N. member states objected to an American invasion of Iraq, the George W. Bush Administration vowed to act alone if necessary.¹⁵³

As evinced above, the U.S. and many of the European nations have a growing philosophical rift concerning crime prevention and punishment. In order to avert any future controversies similar to those presented by *Einhorn* or *Soering*, both sides of the Atlantic must reconsider and ameliorate their extradition practices and find a middle ground of cooperation.

¹⁴⁹ The American public, too, does not seem motivated to change traditional American legal practices. For example, statistics show that with respect to the death penalty, Americans are concerned only with the sovereignty of the nation and do not think much about the legal practices or concerns of other states. In May of 1966, only 42% of Americans surveyed approved of the death penalty. However, in May of 2001, 65% were in favor. The Gallup Organization, *The Death Penalty*, at http://www.gallup.com/poll/topics/death_pen.asp (last visited Feb. 14, 2003).

¹⁵⁰ Schabas, *supra* note 134, at 553.

¹⁵¹ *Id.* Ndaye was surprised that the U.S. would view the visit as an insult, considering the support that the U.S. provided on his human rights mission to the Congo. *Id.* at 554.

¹⁵² Nadelmann, *supra* note 9, at 884-85.

¹⁵³ Michael R. Gordon, *Serving Notice of a New U.S.; Poised to Hit First and Alone*, N.Y. TIMES, Jan. 27, 2003, at A1. Adding insult to injury, Secretary of Defense Donald Rumsfeld scoffed at European resistance (particularly that of France and Germany) to an Iraqi invasion, calling them "old Europe." Keith B. Richburg, "Old Europe" Reacts to Rumsfeld's Label, WASH. POST, Jan. 24, 2003, at A20.

IV. ASSURANCES: THE CURRENT AMERICAN-EUROPEAN COMPROMISE AND ARGUMENT

U.S. law enforcement officials use assurances in retrieving fugitives from foreign nations that refuse to extradite because of differences in legal opinions. To make an assurance, a representative from the requesting country promises the country holding the fugitive that if the fugitive is extradited, the requesting country will conform to the holding country's requests.¹⁵⁴ Harvard Law School drafted a model extradition treaty in 1935, stating that a country may refuse to extradite unless it had proper assurances that the requesting country would not impose cruel and unusual punishment.¹⁵⁵ The model was used in drafting many early extradition treaties between the U.S. and Europe.¹⁵⁶ While the Harvard model treaty's intended use was generally to prevent extradition if it was to result in cruel and unusual punishment, as countries began abolishing the death penalty, countries began using the treaty in death penalty cases. A 1991 U.N. General Assembly Resolution resulted in a model treaty on extradition that included assurance language, in particular surrounding the death penalty.¹⁵⁷

France sought assurances in the Einhorn case, specifically that he would get a second trial at which the District Attorney would not seek the death penalty.¹⁵⁸ The U.S. also offered assurances to the U.K. that it would not seek the death penalty if it extradited Soering.¹⁵⁹ In another recent case, the U.S. gave assurances that it would sacrifice the normal path of justice in order to retrieve a highly sought-after fugitive.

That fugitive, James Charles Kopp, murdered New York abortion doctor Barnett Slepian in 1998 and was one of the FBI's ten most wanted persons for over two years.¹⁶⁰ Kopp killed Slepian with a gunshot that pierced through Slepian's

¹⁵⁴ BLACK'S LAW DICTIONARY 121 (7th ed. 1999).

¹⁵⁵ Roecks, *supra* note 39, at 194.

¹⁵⁶ *Id.*

¹⁵⁷ Model Treaty on Extradition, G.A. Res. 45/116, U.N. GAOR, 45th Sess., 68th plen. Mtg., U.N. Doc. A/RES/45/116 (1991).

¹⁵⁸ See *supra* note 128 and accompanying text.

¹⁵⁹ Soering v. United Kingdom, 161 Eur. Ct. H.R. 13 (1989).

¹⁶⁰ Keith B. Richburg, *Court in France Approves Extradition of U.S. Fugitive*, WASH. POST, June 29, 2001, at A33.

kitchen window at his home in Amherst, New York.¹⁶¹ Kopp was a widely known anti-abortion activist, calling himself the "Atomic Dog."¹⁶² Authorities caught Kopp after a two-and-a-half-year manhunt that finally ended in Dinan, France.¹⁶³ American authorities requested extradition but were refused due to Kopp's possible death penalty sentence under the Freedom of Access to Clinic Entrances Act.¹⁶⁴ The U.S. Ambassador in Paris originally gave assurances that American authorities would not seek the death penalty; however, the French court distrusted the assurances, forcing U.S. Attorney General John Ashcroft to deliver an unprecedented direct assurance.¹⁶⁵ Kopp lost his final appeal in France's highest court, the Conseil d'Etat, and was extradited to the U.S. in June 2002.¹⁶⁶ In March 2003, Kopp was tried in Buffalo, New York and convicted of second degree murder.¹⁶⁷

Assurances, while ultimately an effective means to retrieve fugitives, require the U.S. to concede to foreign pressure and alter its normal prosecutorial procedures. Attorney General John Ashcroft faced this problem when seeking the extradition of James Kopp. He said of the event:

I share the sentiments of Dr. Slepian's widow . . . that if the choice is between extraditing Kopp to face these serious charges in a United States court, or risking his release by France, the priority must be [in his] return. In order to ensure that Kopp is not released from custody and is brought to justice in America, we have had to agree not to seek the death penalty.¹⁶⁸

¹⁶¹ See Lou Michel & Dan Herbeck, *Kopp Confesses; Tells News in Jail Interview That Outrage About Abortion Prompted Shooting of Doctor*, BUFFALO NEWS, Nov. 20, 2002, at A1.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Richburg, *supra* note 160. The Freedom of access to clinic entrances act makes it a crime to:

by force or threat of force or by physical obstruction, intentionally injure, intimidate or interfere with or attempt to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services

18 U.S.C. § 248 (a)(1) (2001).

¹⁶⁵ Richburg, *supra* note 160.

¹⁶⁶ Dan Herbeck, *Kopp Loses Appeal in Extradition Fight*, BUFFALO NEWS, Oct. 1, 2001, at B1; Dan Herbeck & Gene Warner, *Kopp in WNY to Face Charges*, BUFFALO NEWS, June 5, 2002, at A1.

¹⁶⁷ Lydia Polgreen, *Guilty Verdict in Killing of Abortion Provider*, N.Y. TIMES, Mar. 19, 2003, at B1.

¹⁶⁸ Richburg, *supra* note 160.

When foreign courts scrutinize and discredit American assurances, as the French courts did in the case of Kopp, they jeopardize even this loophole in retrieving wanted criminals from foreign countries.

V. NEW DIRECTIONS AND ALTERNATIVES FOR THE UNITED STATES IF EUROPEAN NATIONS CONTINUE TO REFUSE EXTRADITION

A. *Forced Abductions and Trickery*

Forced abductions and trickery sound like plots from an action film, but the U.S. has used both in recent times to obtain fugitives from foreign lands, bypassing the traditional extradition request approaches. The legal basis for forcible abductions on foreign soil is known as the Ker-Frisbie Doctrine. The Supreme Court established the doctrine in the 1886 case *Ker v. Illinois*.¹⁶⁹ In this case, the defendant, living in Peru at the time, was indicted in Illinois for charges of larceny and embezzlement.¹⁷⁰ The Governor of Illinois made a formal extradition request with the U.S. Secretary of State in accordance with the extradition treaty between the U.S. and Peru.¹⁷¹ An American agent was dispatched to Peru to obtain Ker.¹⁷² Instead of following the formal procedure established by the extradition treaty, however, the American agent forcibly took Ker onto a boat and escorted him back to the U.S.¹⁷³ Ker was subsequently tried and convicted in Illinois despite his protest of the forceful abduction.¹⁷⁴

While American courts continue to allow forcible abductions to gain personal jurisdiction,¹⁷⁵ now the country on

¹⁶⁹ 119 U.S. 436 (1886).

¹⁷⁰ *Id.* at 437.

¹⁷¹ *Id.* at 438.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Ker*, 119 U.S. at 445. For other early abduction cases approved by the Supreme Court, see *Mahon v. Justice*, 127 U.S. 700 (1888); *Lascelles v. Georgia*, 148 U.S. 537 (1893); and *In re Johnson*, 167 U.S. 120 (1897).

¹⁷⁵ The Court reiterated the legality of forceful abductions to gain personal jurisdiction later in the twentieth century. *Frisbie v. Collins*, 342 U.S. 519 (1952). In *Frisbie v. Collins*, the defendant, wanted for a murder in Michigan, was forcibly abducted from his residence in Chicago. *Id.* at 521 n.5. The Court stated:

[T]he power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a forcible abduction. Due process of law is satisfied when one present is

whose soil the abduction occurs must approve of the abduction. In *Alvarez-Machain v. United States*, U.S. officials went into Mexico and forcibly removed Dr. Alvarez-Machain.¹⁷⁶ The abduction was particularly forceful, including beatings, electrical-shock treatments, starvation and injections of unidentified chemical substances, causing Dr. Alvarez-Machain nausea and dizziness.¹⁷⁷ Alvarez-Machain, a Guadalajara gynecologist, was accused of murdering a U.S. Drug Enforcement Agency ("DEA") agent.¹⁷⁸ Dr. Alvarez-Machain assisted a drug syndicate by medically keeping the agent alive for days after the syndicate brutally tortured the agent in an attempt to extract information.¹⁷⁹ The Mexican government did not condone the doctor's abduction, and sent a series of diplomatic notes to Washington stating that the abduction violated the Mexican-American extradition treaty.¹⁸⁰ The Ninth Circuit found the abduction legal according to the Ker-Frisbe Doctrine, but found that the DEA agents had indeed violated the treaty between the U.S. and Mexico because they did not consult with Mexican authorities prior to the abduction.¹⁸¹

Abduction is likely not an option to obtain fugitives from European countries. If Europeans view the U.S. government and legal system as brutal and uncivilized as suggested above,¹⁸² then they likely would perceive American agents storming foreign flats as a menace to another country's internal affairs, and thus, a per se violation of that country's sovereignty.¹⁸³ Forcible abductions seem to be a more appropriate alternative to extradition in unstable regimes and underdeveloped nations, in which a violation of sovereignty

convicted of a crime after having been apprised of the charges against him, and after a fair trial in accordance with constitutional procedural safeguards.

Id. at 522.

¹⁷⁶ 107 F.3d 696 (9th Cir. 1996).

¹⁷⁷ *Id.* at 699.

¹⁷⁸ The DEA agent was found dead in Mexico. *See United States v. Caro-Quintero*, 745 F. Supp. 599, 602 (C.D. Cal. 1990).

¹⁷⁹ Edmund S. McAlister, *The Hydraulic Pressure of Vengeance: United States v. Alvarez-Machain and the Case for Justifiable Abduction*, 43 DEPAUL L. REV. 449 (1994).

¹⁸⁰ *Id.* at 497.

¹⁸¹ *Alvarez-Machain*, 107 F.3d at 703. Alvarez-Machain was acquitted of murder and is currently pursuing a tort claim against the U.S. *See id.* at 699; *Alvarez-Machain v. United States*, 284 F.3d 1039 (9th Cir. 2002).

¹⁸² *See, e.g., supra* notes 139-40 and accompanying text.

¹⁸³ *See* U.N. CHARTER art. 2, para. 7; G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, at 11, U.N. Doc. A/6014 (1965).

would be more justifiable once all other means of extradition were exhausted.¹⁸⁴

Trickery is another method that American officials have successfully used to retrieve criminals from abroad. In 1987, the DEA, FBI and CIA conducted an operation where an agent lured Fawaz Younis, a suspected Lebanese terrorist connected to the June 1985 hijacking of a Jordanian airplane, onto a boat in the Mediterranean Sea and arrested him in international waters.¹⁸⁵ In 1975, the DEA worked with Senegalese authorities to arrest wanted drug trafficker Dominique Orsini while the flight from Argentina to France briefly stopped in Senegal for refueling.¹⁸⁶ Orsini was sent directly to the U.S. to face drug charges.¹⁸⁷

Trickery, however, requires full cooperation by the foreign government in which the criminal is located. In 1971, for example, the U.S. arrested a Panamanian official during a softball game in the U.S. territory of the Canal Zone.¹⁸⁸ Tensions were high after U.S. officials bypassed the traditional method of extradition and essentially went behind the back of the controlling regime in Panama.¹⁸⁹ Also, in 1983, the U.S. ambassador to the Bahamas vetoed a plan to lure a suspected money launderer onto a boat off the coast of the Bahamas, fearing harm to the diplomatic relations between the two countries.¹⁹⁰

In the past, trickery has proven a useful tool for the U.S. in capturing wanted criminals in foreign countries. It is unlikely, however, to be a practical alternative with many of today's wanted criminals. Osama Bin Laden, for example, is very wary of any plots toward capture or trickery.¹⁹¹ He

¹⁸⁴ See McAlister, *supra* note 179, at 512-13. Forcible abductions should also be limited to only serious international crimes, as violating another country's sovereignty violates international law. *Id.* at 513. This, however, raises another problem with defining what is meant by a "serious international crime." *Id.* at 514. Commentators suggest that those offenses listed in international documents could form the basis of a definition. *Id.* Listing those offenses that result in the loss of life could further narrow the definition. See *id.*

¹⁸⁵ Nadelmann, *supra* note 9, at 867.

¹⁸⁶ *Id.* at 866.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 867-68.

¹⁸⁹ *Id.* at 868.

¹⁹⁰ Nadelmann, *supra* note 9, at 867.

¹⁹¹ Bin Laden's camps and cave complexes in Afghanistan took over two hours to reach from a main city through treacherous roads and passes. The camps and caves were heavily guarded by armed Al Qaeda fighters. Bin Laden constructed his own grocery stores and schools, creating Al Qaeda's own autonomy and detaching himself

maintains extreme secrecy and an armed entourage to protect him, and has hidden in some of the most remote places on earth.¹⁹² Only a few non-Al Qaeda members are permitted to meet with Bin Laden.¹⁹³ Hamid Mir, a Pakistani journalist widely known for his frequent contacts with Bin Laden, received permission to interview Bin Laden in Afghanistan after 9/11.¹⁹⁴ But even Mir had to be blindfolded and then taken on a five-hour-long drive to a cold mud hut where the interview was held.¹⁹⁵ The most elusive and most sought-after criminals will probably prove too reclusive, cautious and protected to be susceptible to methods of trickery.

B. *A Proposed Alternative*

A future possibility to ease the frustrating extradition problems between the U.S. and European countries is for the U.S. to develop a new, single extradition treaty with the EU instead of treaties with each individual country. While this idea may be somewhat premature due to the European Union's inexperience in handling foreign relations, it may prove to be a successful approach to solving future extradition problems for the U.S.

Recently, the EU has made increasing strides to become unified not only in economic matters, but also in political matters.¹⁹⁶ More and more, the EU has committed itself to strengthening its internal political ties.¹⁹⁷ It is likely, as time passes, that the EU will politically act as a single unit, rather than individually in regards to foreign affairs.

from the outside world. Molly Moore & Peter Baker, *Inside Al Qaeda's Secret World; Bin Laden Bought Precious Autonomy*, WASH. POST, Dec. 23, 2001, at A1.

¹⁹² *Id.*

¹⁹³ See generally *id.*; Donna Petrozzello, S. FLA. SUN-SENTINEL, Nov. 22, 2001, at 4E.

¹⁹⁴ Christina Lamb, *Meeting in a Cold Mud Hut; Pakistani Reporter Describes Talk With Osama Bin Laden*, CHI. SUN-TIMES, Nov. 11, 2001, at 5.

¹⁹⁵ *Id.*

¹⁹⁶ LAURENCE W. GORMLEY, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITY 1271 (1998). The recent intervention of American soldiers in the former Yugoslavia highlighted Europe's lack of a unified, powerful voice even in its own geographical region. *Id.* America's central role in the attacks on the former Yugoslavia spawned discourse among European officials that drove a unified Europe in executive matters to the top of political agendas. *Id.*

¹⁹⁷ TREATY OF AMSTERDAM ("The Union shall set itself the following objectives: . . . to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the eventual framing of a common defence policy, which might in time lead to a common defence . . .").

Precedence already exists for European nations using a single collective voice in matters traditionally handled by each nation's executive.¹⁹⁸ For example, the EU has, as a whole, recognized new nations and regimes.¹⁹⁹ They have also used a single political voice in the open criticism of American legal practices.²⁰⁰ Europe also has precedence for executing treaties with other nations as a unified European Union.²⁰¹ European courts have struck down any extension of this treaty power to other areas in the past,²⁰² however, as the legislative backbone of the EU strengthens, so too may its ability and desire to enter into treaties as a unified European voice.

European nations would benefit from unity in their decisions, as the chorus of their voices rings much louder than one solo nation in the fray of international debate and decision making. The logic of unifying and streamlining to become a more powerful economic entity carries over to the political arena as well.²⁰³

The U.S. could also profit from a single extradition treaty with the EU, by gaining an important and powerful ally in international extraditions, particularly in high-profile American cases. Individual nationalistic challenges, as perhaps the French thumbing their noses at America in the *Einhorn* case, could be balanced out by other reasoned, unified voices.²⁰⁴

¹⁹⁸ See GORMLEY, *supra* note 196, at 1271.

¹⁹⁹ *Id.*

²⁰⁰ For example, opening Alaskan oil drilling expeditions and rejecting the Kyoto treaty. *Id.*

²⁰¹ The EU entered into the Euratom treaties—a series of treaties dealing with the international handling of nuclear materials. Council Directive No. 66/45, art. 15, 1965-1966 O.J. SPEC. ED. 265, 268 (Euratom).

²⁰² GORMLEY, *supra* note 196, at 1271.

²⁰³ TREATY OF AMSTERDAM (introduction) ("Determined to promote economic and social progress for their peoples, . . . within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields . . .").

²⁰⁴ Lopez, *supra* note 22, at 61. Defense counsel argued to the French courts that the small courtroom that they were in could send a message about human rights to "the new masters of the world across the ocean." *Id.* While some nations such as France and Germany routinely defy America's foreign policy, other European countries remain staunchly loyal to the U.S. For example, leaders of eight European nations recently wrote an open letter to the U.S. pledging solidarity for the then looming attack on Iraq. Jose Maria Annar et al., *United We Stand*, WALL ST. J., Jan. 30, 2003, at A14 (Spain, Portugal, Italy, United Kingdom, Hungary, Poland, Denmark and the Czech Republic). This stance is starkly in opposition to the views of other European nations, such as France and Germany.

It is unlikely, however, that the EU will enter into a current American-law-friendly extradition treaty with the U.S. due to the manner in which the U.S. enforces the death penalty.²⁰⁵ The EU has voiced its political views on the death penalty as an important foreign policy issue. Countries seeking entry into the EU must, for example, achieve “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.”²⁰⁶ The EU recognizes abolishing the death penalty as part and parcel to this human rights standard.²⁰⁷ The EU can only be persuaded to agree to such a treaty if the U.S. makes its death penalty practices seem more democratic to international critics. If the death penalty is becoming a “barbaric practice” according to international custom, then the U.S. must take strides to make the process as humane and consistent as possible.

The U.S. needs to address the most severe and criticized areas of its death penalty practice. The practice of executing juveniles is one of the most heavily criticized areas of American law. Currently, twenty-four states allow for the death penalty for crimes committed under the age of eighteen.²⁰⁸ Since 1990, the U.S. has executed seventeen juvenile offenders.²⁰⁹ Only the Congo, Iran, Nigeria, Pakistan, Saudi Arabia and Yemen executed juveniles during the same time period, none of them with more executions than the U.S.²¹⁰

²⁰⁵ The European Union On-Line, *Abolition of the Death Penalty*, at http://europa.eu.int/comm/external_relations/human_rights/adp/index.htm (last visited Feb. 14, 2003) (“The EU is deeply concerned about the increasing number of executions in the United States of America.”).

²⁰⁶ Decision of Copenhagen European Council, June 1993, available at http://europa.eu.int/comm/enlargement/report2001/tu_en.pdf (last visited Feb. 20, 2003).

²⁰⁷ Many countries seeking entry into the EU must reduce their human rights violations, including the practice of the death penalty, before they are admitted. The European Union On-Line, *Abolition of the Death Penalty*, at http://europa.eu.int/comm/external_relations/human_rights/adp/index.htm (last visited Feb. 15, 2003).

²⁰⁸ Amnesty International, *Robert Anthony Carter-Juvenile Offender Scheduled to be Executed in Texas*, at <http://www.web.amnesty.org/ai.nsf/index/AMR51-0241998> (last visited Feb. 2, 2003).

²⁰⁹ Amnesty International, *Facts and Figures on the Death Penalty*, at <http://www.web.amnesty.org/rmp/dplibrary.nsf/ff6dd728f6268d0480256aab003d14a8/46e4de9db9087e35802568810050f05f?OpenDocument> (last visited Feb. 2, 2003) [hereinafter *Facts & Figures*].

²¹⁰ *Id.* The frequency with which the U.S. executes prisoners is also scrutinized by other nations. *Id.* In 2001, for example, the U.S. executed sixty-six prisoners. *Id.* Only Iran, China and Saudi Arabia executed more prisoners in the same year. *Id.*

Despite all of the negative statistics, America has made some progress in reforming its death penalty practice. Historically, the U.S. position on executing the mentally ill garnered much criticism.²¹¹ In the case of *Ford v. Wainwright*, decided in 1986, the Supreme Court clearly established that the execution of the mentally ill was forbidden.²¹² Many criticized the decision for not establishing sufficient guidelines for states to define what “mentally ill” meant.²¹³ Recently, however, the Supreme Court revisited this subject and held that executing a mentally ill convict is cruel and unusual punishment and violated the Eighth Amendment.²¹⁴ In another recent Supreme Court decision, the dissent voiced an opposition to execution of minors, citing “further debate and discussion both in this country and in other civilized nations.”²¹⁵ While only a dissent, the mention of international debate lends hope that the U.S. may change its views to facilitate interaction with other nations.

While the U.S. may be on the track to abolishing the death penalty²¹⁶ and other practices that offend the international community, that date may be long in coming. Alternatively, it may be possible for America to keep its legal procedures, like the death penalty, but apply them more justly. For example, the United States must address the racial disparity in death penalty sentencing. Blacks account for only 12% of the American population, yet they comprise 42% of prisoners sentenced to death.²¹⁷ In 1998, only five prisoners of twenty-six sentenced to death under federal law were white.²¹⁸ Such staggering statistical disparity indicates significant social problems with death penalty sentencing in the U.S. One way to more fairly apply the death penalty is through the increased use of technology to determine the guilt or innocence of alleged

²¹¹ *Id.*

²¹² 477 U.S. 399, 401 (1986).

²¹³ See, e.g., Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 634 n.279 (1993); Sanford M. Pastroff, *Eighth Amendment—The Constitutional Rights of the Insane on Death Row*, 77 J. CRIM. L. & CRIMINOLOGY 844, 866 (1986).

²¹⁴ *Atkins v. Virginia*, 536 U.S. 304 (2002).

²¹⁵ *Patterson v. Texas*, 123 S.Ct. 24, 24 (2002) (Stevens, J., dissenting).

²¹⁶ In Illinois, for example, Governor George Ryan declared a commutation on the death penalty in the state due to the repeated finding of innocent prisoners sentenced to death. Illinois Governor George Ryan, Speech on Commutation (Jan. 11, 2003) (excerpt from speech reprinted in N.Y. TIMES, Jan. 12, 2003, § 1, at 22).

²¹⁷ Amnesty International, *United States of America: Rights for All Campaign*, 1998, at <http://www.rightsforall-usa.org/into/report/r06.htm> (last visited Feb. 4, 2003).

²¹⁸ *Id.*

criminals. It appears increasingly certain that DNA evidence absolutely pins offenders to a crime.²¹⁹ Expanded use of DNA evidence is desperately needed in the U.S., as many prisoners sentenced to death have subsequently been proven innocent and exonerated before their execution.²²⁰

CONCLUSION

Senator Helms's comment about whether U.N. Special Rapporteur Ndaye was confusing the U.S. with another country²²¹ is a telling remark about the state of American legal practices vis-à-vis the rest of the world. As shown above, it is quite possible to confuse American disciplinary practices with other notorious human rights violators.²²² The U.S. must address the glaring statistical problems arising from implementation of its practices²²³ before any country, or as proposed here, the EU, likely will consider entering into a liberal extradition treaty, which allows the U.S. to maintain its swift system of justice. Moreover, since the worldwide trend seems to suggest that abolition of the death penalty is a global goal, more countries in the future will pose a threat to extradition practices of the U.S.²²⁴

After 9/11, the U.S. will likely be seeking extradition of wanted criminals and fugitives more ardently. Crime is becoming an increasingly international threat due to an increase in mobility and ease of travel. The U.S., therefore, has a high incentive to streamline its extradition practices both for national security and for retribution's sake.

The emergence of the EU as a political power is an opportune chance for the U.S. to refine its extradition practices. Assurances, while generally effective in ultimately gaining custody of a wanted criminal, allow other nations to politically manipulate the U.S. and, thus, force the American judicial

²¹⁹ Gregg Easterbrook, *DNA and the End of Innocence; The Myth of Fingerprints*, NEW REPUBLIC, available at <http://www.thenewrepublic.com/073100/easterbrook073100.html> (last visited Feb. 4, 2003).

²²⁰ Over eighty prisoners have been exonerated from life sentences or death row due to DNA evidence. Dianne Molvig, *DNA Evidence: Freeing the Innocent*, WIS. LAW., Apr. 2001, at 14.

²²¹ See *supra* notes 150-51 and accompanying text.

²²² See *supra* notes 209-10, 217-18 and accompanying text.

²²³ See *id.*

²²⁴ 111 countries have abolished the death penalty in law or in practice. See *Facts & Figures*, *supra* note 209.

system to succumb to their views on justice. Future cases in which the U.S. must resort to assurances, could lead to more international incidents, particularly if the wanted criminal is a high-profile terrorist. To remedy future extradition problems, the U.S. should craft a single extradition treaty with the EU rather than negotiate the terms of extradition with each of the (soon to be) twenty-five member states.

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