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EUROPEAN COURTS, AMERICAN RIGHTS: EXTRADITION AND PRISON CONDITIONS*

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INTRODUCTION

In 1989, the European Court of Human Rights became a beacon of hope for death penalty opponents when it blocked the extradition of a young German man from England to Virginia, where he faced charges of capital murder for cutting the throats of his girlfriend's parents. Although *Soering v. United Kingdom*[1] did not rule that capital punishment in itself violated international law,[2] the European Court held that "the very long period of time spent on death row in . . . extreme conditions, with the ever-present and mounting anguish of awaiting execution"[3] might well breach Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which states that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."[4] Even though the United States was not a party to the European Convention, the European Court prohibited a contracting state from knowingly surrendering a fugitive where "substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country."[5]

For many commentators, *Soering* marked a "dramatic 'breakthrough' for extradition and human rights on the international scene."[6] The European Court not only took a strong substantive stand against the "death row phenomenon," but it also made procedural strides with its willingness to scrutinize penal conditions of a requesting state, contrary to the traditional deference to executive decisions about extradition known as the "rule of non-inquiry."[7] Noting that *Soering* was being cited as persuasive authority by foreign

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[1] Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989).

[2] *See id.* at 40-41.

[3] *Id.* at 44.

[4] 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].

[5] *Soering*, 161 Eur. Ct. H.R. (ser. A) at 35.

[6] *See* John Dugard & Christine Van Den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT'L L. 187, 191 (1998).

[7] *Soering*, 161 Eur. Ct. H.R. (ser. A) at 36, 42.

courts and by two U.S. Supreme Court justices, some commentators suggested that *Soering* and the international consensus it represented had the potential to influence capital punishment and extradition jurisprudence in the United States.[8]

More than a decade after *Soering*, however, the undeniable truth is that its injection of international opprobrium into death penalty debates has hardly been lethal to capital punishment in the United States. Executions proceed virtually unabated, and federal and state legislatures continue to expand the number of crimes punishable by death, with scant consideration of international perspectives.[9] The Supreme Court has refused to take other countries' practices into account in setting Eighth Amendment standards of decency,[10] and lower courts deciding extradition cases have by and large ignored evidence of human rights abuses in requesting states.[11]

But that is not to say that *Soering* is of no consequence to U.S. policies on extradition and punishment. This Article attempts to refocus discussion of the case. The majority of

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[8] *See, e.g.*, Robert F. Drinan, *Will Religious Teachings and International Law End Capital Punishment?*, 29 ST. MARY'S L.J. 957, 966 (1998) ("Could the new and adamant opposition of the Catholic Church to the death penalty and the evermore specific adjudication of the ban on cruel, inhuman or dangerous treatment or punishment lead to the phasing out of the death penalty? No one can predict, but it is useful to remind ourselves that, very often, the moral aspirations of one generation become the binding laws of the next generation."); Laurence A. Grayer, Comment, *A Paradox: Death Penalty Flourishes in U.S. While Declining Worldwide*, 23 DENV. J. INT'L L. & POL'Y 555, 567 (1995) ("Considering the world's steady move towards the abolition of the death penalty, the United States must reevaluate its role as a global leader and as an advocate of human rights if it allows the death penalty to continually thrive."); Michael P. Shea, Note, *Expanding Judicial Scrutiny of Human Rights in Extradition Cases After* Soering, 17 YALE J. INT'L L. 85, 119 (1992) ("*Soering* has had its most dramatic impact in the United States. This decision has given substance to vague dicta in prior cases concerning the possibility of applying human rights considerations to extradition.").

[9] *See* Death Penalty Information Center, *Execution Information, at* http://-www.deathpenaltyinfo.org/dpicexec.html (last visited April 13, 2002); Grayer, *supra* note 8, at 555-56.

[10] *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 . . . that the sentencing practices of other countries are relevant. . . . [The practices of other nations] cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.").

[11] *See infra* note 62 and accompanying text.

nearly 200 scholarly articles written over the past decade have read *Soering* as a case about capital punishment, but as such, it has affected neither the United States's enthusiasm for the death penalty nor its ability to gain the extradition of fugitives from Europe. Read as a case about prison conditions, however, *Soering* becomes a much more intrusive basis for forcing the U.S. government to consider its criminal justice policies in light of international human rights norms. In *Soering*, the European Court of Human Rights weighed the merits of a defense that conditions on death row in Virginia violated the European Convention. The next logical step from this holding is not the per se illegality of the death penalty; rather, it is that prison conditions outside of death row may also violate the European Convention. Unlike extradition controversies involving the death penalty, challenges based on inhuman or degrading prison conditions affect nearly every extradition and are not always amenable to resolution by case-by-case diplomatic assurances or by revised treaty protocols. Given that European countries have expressed considerable reluctance to extradite suspected terrorists to the United States despite the security risks of keeping such prisoners,[12] human rights defenses to

[12] The main obstacles to the extradition of terrorists are the Bush Administration's plans for using military courts, which might violate the European Convention's guarantee of an "independent and impartial tribunal," European Convention, *supra* note 4, at art. 6, as well as the possibility that suspected terrorists might face the death penalty. *See* Sam Dillon & Donald G. McNeil, Jr., *Spain Sets Hurdle for Extraditions*, N.Y. TIMES, Nov. 24, 2001, at A1. Thus far, Bush Administration officials have downplayed the potential for difficulties in gaining custody over suspected terrorists in Europe. For example, Donald Rumsfeld told *Meet the Press*, "[W]e have known for years that there are some differences in Europe with respect to views on capital punishment, 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." *Meet the Press* (NBC television broadcast, Dec. 2, 2001). At the same time, however, the U.S. has signaled that it would be less amenable to compromise over the extradition of a high-ranking and culpable terrorist. *See, e.g., Minister Warns of Rift Over Death Penalty for Sept 11 Suspect*, AGENCE PRESSE FRANCE, Dec. 12, 2001 ("U.S. 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."). Even as speculation over the non-extradition of suspected terrorists from Europe to the United States percolates, European countries have been streamlining the extradition process. *See, e.g.*, Kamal Ahmed & Martin Bright, *Law Change on Terror Extradition*, THE OBSERVER, Sept. 16, 2001, at 2 ("Britain's extradition laws are to be overhauled . . . so that those accused of terrorist crimes abroad have fewer legal rights to appeal. The

extradition are more viable than ever for people who make up the bulk of the extradition caseload, accused of everything from drug trafficking to telemarketing fraud. As the United States attempts to organize a broad coalition against terrorism and inspire the world to engage in a protracted struggle in the name of freedom and justice, human rights claims against the United States—successful or not—may prove embarrassing and damaging. Even as the government mobilizes for a struggle far graver than, say, the fight against telemarketing fraud, it will still have to take seriously the mundane matters of international criminal enforcement.

Part I of this Article discusses the rising number of extradition requests by the United States, the common grounds for denial of extradition, and the controversies that such denials have aroused. Part II examines *Soering* against this background and analyzes its scholarly reception, influence on international and foreign jurisprudence, and lack of effect in the United States. Part III explores the implications of *Soering* for defenses to extradition based on prison conditions: whether prison conditions in the United States could conceivably rise to the level of a human rights violation, whether the European Court of Human Rights would ever stop an extradition to the United States on these grounds, and how such a ruling would affect international criminal enforcement policy and prison conditions in the United States.

I. EXTRADITION IN A BRAVE NEW WORLD

A. *The Increasing Importance of Extradition*

The "vast majority" of people suspected of involvement in the September 11 terrorist attacks have been arrested or are being sought overseas.[13] Although the United States has

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Government will also announce a 'fast-track' system in an effort to stop endless legal delays.").

[13] *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

actively bypassed formal extradition with secret, informal procedures in numerous cases of suspected terrorists,[14] the war on terrorism shows unequivocally what has become increasingly true over the past two decades: that extradition is an essential tool for prosecutors in the United States. The rising tide of people and goods across borders and the ascendance of global technologies such as the Internet have blurred the line between domestic and international criminal enforcement. From terrorism to drug trafficking to price fixing, multinational conspiracies have taken root in the fertile soil of an ever-smaller world.[15] For technology-driven crimes such as telemarketing fraud, international boundaries often separate

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arrested since September 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.").

[14] *See* Rajiv Chandrasekaran & Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, WASH. POST, Mar. 11, 2002, at A1.

[15] *See* William J. Clinton, *Transmittal of the International Crime Control Act of 1998 to the Congress* (June 9, 1998), *at* http://clinton6.nara.gov/1998/06/1998-06-09-transmittal-on-international-crime-control-act.html ("Advances in technology, the resurgence of democracy, and the lowering of global political and economic barriers have brought increased freedom and higher living standards to countries around the world, including our own. However, these changes have also provided new opportunities for international criminals trafficking in drugs, firearms, weapons of mass destruction, and human beings, and engaging in fraud, theft, extortion, and terrorism."). *See also* Janet Reno, *Statement Before the Committee on the Judiciary, United States Senate, Concerning Justice Department Oversight* (May 5, 1999), *at* http://www.usdoj.gov/archive/ag/testimony/1999/agjudic050599.htm ("One of the greatest challenges I have faced as Attorney General has been confronting the striking increase in international crime . . . . The impact of international crime is felt daily in our communities. International drug trade produces the horrible consequences of drug abuse . . . . International financial crime robs Americans of their savings, and exploits our banks and businesses. . . . Cybercrime threatens the American financial sectors and our critical infrastructures as well."). The potential for a seamless international conspiracy was nearly realized several years ago, when Mexican cocaine traffickers nearly completed a ventilated and lighted tunnel that ran 1400 feet underground between Tijuana and Otay Mesa, California. In the summer of 1998, illegal immigrants reopened the tunnel for several days. *See* SEBASTIAN ROTELLA, TWILIGHT ON THE LINE: UNDERWORLDS AND POLITICS AT THE U.S.-MEXICO BORDER 161 (1998).

perpetrators and victims.[16] Even when criminals live in the same country as their victims, more fugitives from justice have managed to flee across national borders.[17]

Since the Department of Justice's Office of International Affairs was created in 1979 to facilitate and rationalize extradition procedures,[18] the number of extradition requests made and received by the United States has skyrocketed.[19] Well before September 11, American policy makers had emphasized the rising threat of international crime and the crucial role of extradition in fighting it.[20] In October 1995, President Bill Clinton issued Presidential Decision Directive 42, ordering U.S. government agencies to intensify international crime-fighting efforts, and in a speech to the United Nations General Assembly, he urged "every country" to endorse "a declaration which would first include a no sanctuary pledge, so that we could say together to organized criminals, terrorists, drug traffickers and smugglers, you have nowhere to

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[16] *See, e.g., Report of the United States-Canada Working Group on Telemarketing Fraud* (Nov. 1997), *at* http://www.usdoj.gov/criminal/uscwgrtf/legal.html. The working group described "boiler room" operations in Canada that targeted elderly Americans with a range of telemarketing scams. The working group urged that Canada-U.S. extradition arrangements be examined with an eye to accelerating fraud extraditions.

> [T]he delays which occur often mean that elderly witnesses die or become incapacitated before a criminal trial can be held. The Working Group is concerned that the costs and procedural delays for extradition are often so great that agencies reported abandonment of prosecutions or agreement to unfavourable pleas in extreme cases.

Id. § 3.7.

[17] *See* White House, *International Crime Control Strategy* (May 1998), *at* http://www.usdoj.gov/criminal/press/iccs.htm [hereinafter White House] (noting that the "ease and speed of modern travel have increased the number of fugitives wanted for serious violent crimes . . .").

[18] Prior to 1979, prosecutors had to navigate tortuous State Department channels, and foreign governments had to hire local counsel to file extradition requests. *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, 818 (1993).

[19] *See id.* at 817-18 (1993). *See also* ETHAN A. NADELMANN, COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT 342, 464-65 (1993).

[20] Reno, *supra* note 15 ("Confronting transnational crime requires . . . an effective infrastructure of cooperation with other countries; we need that infrastructure to collect evidence of trans-border crime and to bring international criminals to justice.").

run and nowhere to hide."[21] In an October 1997 memorandum to all U.S. Attorneys, Attorney General Janet Reno praised federal prosecutors for "go[ing] the extra mile" to obtain the international extradition of fugitives. "[Y]our need to obtain the international extradition of fugitives [is] more important than ever," she wrote.[22] Six months later, a report developed by the Departments of Justice, State, and Treasury outlined a comprehensive strategy to fight international crime. In a chapter entitled "Denying Safe Haven to International Criminals," the report described how the Departments of State and Justice were aggressively renegotiating extradition treaties to "seek[] the broadest possible extradition obligations . . . ."[23]

B. *Common Defenses, Uncommon Reactions*

The natural consequence of the increased number of extradition requests is that foreign courts have held more extradition proceedings and ruled on more of the defenses commonly brought to defeat extradition.[24] An extradition request must meet certain substantive requirements. For example, the requesting state must have a basis for jurisdiction that is recognized by the requested state.[25]

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[21] William J. Clinton, *Remarks by the President to the U.N. General Assembly* (Oct. 22, 1995), *at* http://clinton6.nara.gov/1995/10/1995-10-22-the-presidents-speech-at-the-united-nations-nyc.html.

[22] Office of the Attorney General, *International Extradition* (Oct. 16, 1997), *at* http://www.usdoj.gov/ag/readingroom/interextra.htm [hereinafter *International Extradition*].

[23] *See* White House, *supra* note 17.

[24] These defenses are time worn and well documented. *See generally* M. Cherif Bassiouni, *Extradition: Law and Practice of the United States*, *in* II INTERNATIONAL CRIMINAL LAW 191, 229-48 (M. Cherif Bassiouni ed., 1999); M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 383-647 (3d rev. ed. 1996).

[25] *See* Liangsiriprasert v. United States, 2 All E.R. 866 (1990) (Hong Kong) (rejecting a challenge to Hong Kong's jurisdiction in the extradition of a Thai national to the United States for drug crimes committed in Thailand); BASSIOUNI, *supra* note 24, at 295; Eric Zubel, *The Lockerbie Controversy: Tension Between the International Court of Justice and the Security Council*, 5 ANN. SURV. INT'L & COMP. L. 259, 266 (1999) (describing Libya's resistance to American and British calls for the extradition of Libyan nationals accused of the 1988 bombing of a Pan Am jet on the grounds that extradition treaties existed neither between Libya and the United States nor between

Extradition requests must also involve conduct that treaties recognize as extraditable offenses. Although some treaties list specific extraditable offenses, most recent treaties follow a "dual criminality" approach, defining extraditable offenses as any crime that is an offense in both countries and punishable by more than one year in prison.[26]

A number of affirmative defenses are also available to relators in extradition proceedings. Many countries, for example, refuse to extradite people charged with political offenses, such as treason, espionage, and terrorist acts not directed at civilians.[27] Civil law countries have long barred the extradition of their own nationals,[28] and several countries prohibit the extradition of relators whom requesting states have tried in absentia.[29] Pursuant to the "rule of non-inquiry," concerns about due process violations, excessive punishment, and poor prison conditions in the requesting state have traditionally not been available as affirmative defenses.[30]

As the number and importance of extraditions have increased, the United States's patience with many of these common defenses has waned.[31] Fairly predictable denials or

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Libya and the United Kingdom); Matthew Goode, *The Tortured Tale of Criminal Jurisdiction*, 21 MELB. U. L. REV. 411, 435 (1997) (describing *Liangsiriprasert*).

[26] *See* BASSIOUNI, *supra* note 24, at 388-93.

[27] *See id.* at 502-83; CHRISTINE VAN DEN WIJNGAERT, THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION: THE DELICATE PROBLEM OF BALANCING THE RIGHTS OF THE INDIVIDUAL AND THE INTERNATIONAL PUBLIC ORDER (1980).

[28] *See* Dominique Poncet & Paul Gully-Hart, *Extradition: Legal Framework of Extradition in Europe, in* II INTERNATIONAL CRIMINAL LAW, *supra* note 24, at 277, 296-97; Michael Plachta, *(Non-)Extradition of Nationals: A Neverending Story?*, 13 EMORY INT'L L. REV. 77 (1999).

[29] BASSIOUNI, *supra* note 24, at 631-34; MICHAEL FORDE, THE LAW OF EXTRADITION IN THE UNITED KINGDOM 125-27 (1995); Francois Serres & Elodie LeGal, *Defending U.S. Citizens and Corporations in Cross Border Proceedings, Extradition, Mutual Assistance, and Asset Seizures: A French Perspective*, 15 INT'L ENFORCEMENT L. REP. 299 (1999).

[30] *See infra* notes 62, 165 and accompanying text (describing American and Canadian cases that follow the "rule of non-inquiry").

[31] *See* Matthew W. Henning, Note, *Extradition Controversies: How Enthusiastic Prosecutions Can Lead to International Incidents*, 22 B.C. INT'L & COMP. L. REV. 347, 367-80 (1999). Likewise, other countries have decried the United States's refusal to extradite or waive primary jurisdiction over certain high-profile criminal defendants. *See, e.g.*, Jonathan Weisman, *Italian Leader Demands Justice in Gondola Deaths; D'Alema Appeals for Punishment of Those Responsible; Clinton Reiterates Apology*, BALT. SUN, Mar. 6, 1999, at 1A, *available at* 1999 WL 5175073 (describing how Italian politicians called for a review of the jurisdictional provisions of the NATO Status of Forces Agreement after a court martial acquitted a U.S. marine pilot charged

stays of extradition in recent years have prompted apoplectic responses from politicians and the public. Throughout the 1990s, members of Congress repeatedly condemned Mexico for its non-extradition of nationals, a policy that at times meant near impunity for drug cartels perceived to be some of the gravest threats to U.S. security interests.[32] After a French court refused to extradite murder suspect Ira Einhorn to face charges in Pennsylvania because he had been convicted in absentia there, the case became the subject of hundreds of news reports and a television miniseries, bringing outrage at the extradition process into millions of living rooms.[33] In the

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with the deaths of twenty Alpine skiers who were killed when a low-flying plane clipped a ski lift's cables); Alessandra Stanley, *Italian Officials Seek Charges in Ski Lift Case*, N.Y. TIMES, May 27, 1998, at A8.

[32] *Hearing on the Extradition Case of Jose Luis Del Toro Before the Subcomm. on Criminal Justice, Drug Policy and Human Resources of the House Comm. on Government Reform*, 106th Cong. (1999) (statement of Rep. Mica) ("Mexico has repeatedly failed to respect over 275 extradition requests in the past ten years. These cases include murder and illegal narcotics trafficking. In fact, Mexico has failed to extradite a single major Mexican drug kingpin. I am concerned that Mexico has become a haven for murderers and drug lords. And personally I hold great contempt for their inaction to respect international law."); 139 CONG. REC. H6964 (1993) (statement of Rep. Brown) ("Now is an appropriate and opportune time for the United States Government to persuade the Mexican Government to abandon its nonextradition policy and to come into full compliance with the letter and spirit of the United States-Mexico Extradition Treaty. . . . With [NAFTA] before the Congress this fall, now is a crucial time to impress upon the Mexican Government the primacy of the rule of law, not just in commercial trade considerations."). Mexico's refusal to extradite its nationals has also led the United States to use informal means of rendition such as abduction. *See, e.g.*, United States v. Alvarez-Machain, 504 U.S. 655 (1992) (holding that a federal district court had jurisdiction to try a Mexican national who was abducted in Mexico and forcibly taken to the United States).

Recently, Mexican authorities have intensified their drug enforcement efforts, which have led to the death and arrest of the two leaders of the notorious Arrellano Felix cartel. *See* Will Weissert, *Mexico Says Genetic Tests Prove Death of Drug Lord*, WASH. POST, Mar. 14, 2002, at A16.

[33] Einhorn was a hippie activist who fled to Europe in 1981 after Philadelphia police found his girlfriend's body stuffed in a trunk in his apartment. Sixteen years later, investigators found him living in France. In the meantime, a Pennsylvania court had convicted Einhorn of first-degree murder and sentenced him to life in prison after a trial held in absentia. A French appeals court blocked his extradition in 1997 because French law prohibits extradition where there has been a trial in absentia unless a requesting state makes assurances that it will hold a new trial. Pennsylvania has since made such assurances to the satisfaction of the French courts, and Einhorn was extradited in July 2001. *See National Briefing: Mid-Atlantic: Pennsylvania: Killer Returned*, N.Y. TIMES, July 21, 2001, at A1; *French Court Rejects Appeal on Extradition*, N.Y. TIMES, May 28, 1999, at A18; Craig R. Whitney, *France Grants Extradition in 1977 Killing*, N.Y. TIMES, Feb. 19, 1999, at A14; Connie Chung, *20/20:*

Samuel Sheinbein case, the chairman of the House Appropriations Committee threatened to disrupt billions of dollars of foreign aid if Israel did not violate its own laws and extradite an Israeli citizen accused of strangling, dismembering, and burning a teenage classmate in Maryland.[34]

The strategic and political urgency of international criminal enforcement has prompted the U.S. government to take affirmative steps to pressure countries to change their internal extradition practices. Attorney General Janet Reno declared that she was "committed to convincing governments around the world to extradite their citizens."[35] In the wake of

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The Fugitive (ABC television broadcast, Nov. 15, 1998). *See also* Ron Wertheimer, *A Guru and Grisly Acts: The Ira Einhorn Story*, N.Y. TIMES, May 8, 1999, at B15 (giving an unfavorable review to NBC's mini-series, *The Hunt for the Unicorn Killer* (NBC television broadcast, May 9 - 10, 1999)).

[34] Israel's Offenses Committed Abroad Act of 1978 prohibited the extradition of suspects accused of crimes committed while they were Israeli citizens. Within a matter of days of Sheinbein's September 1997 flight, Robert L. Livingston declared the possibility of non-extradition an "outrage" and wrote a letter to Secretary of State Madeline Albright, threatening to disrupt foreign aid to Israel. David Briscoe, *Israel's Refusal to Extradite Teen Wanted for Murder Could Prompt Aid Review*, A.P. (Sept. 30, 1997), *at* http://work.nando.net/newsroom/ntn/world/093097/world6_10021_body.html (last visited Dec. 19, 1999) (on file with author). For a sense of the awkward position in which the State Department found itself by virtue of Rep. Livingston's remarks, see U.S. Dep't of State, *Daily Press Briefing* (Oct. 1, 1997), *at* http://secretary.state.gov/-www/briefings/9710/971001db.html. *See generally* 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 (1999). After the Israeli Supreme Court blocked Sheinbein's extradition in February 1999, newspapers across the country decried what they called "a terrible injustice," *An Injustice: Sheinbein Should Stand Trial in U.S.*, CUMBERLAND (MD.) TIMES-NEWS (Mar. 2, 1999), *available at* http://www.times-news.com/op/1999/edit1999/edit787.htm, "a bizarre and controversial decision," *Israeli Injustice*, DAILY OKLAHOMAN, Mar. 9, 1999, at 4, *available at* 1999 WL 7702025, and an "egregious abuse[] of foreign extradition bans." *Nowhere to Hide: Change Extradition Law to End Safe Havens for Criminals*, HOUS. CHRON., Mar. 11, 1999, at A30, *available at* 1999 WL 3978422. *See also* Jay Greene, *Change Israel's Bad Law: It Shields Criminals*, MIAMI HERALD, Mar. 5, 1999, at A22 ("[S]omething is terribly wrong in this case. The crime occurred on American soil, our laws were broken, a U.S. citizen was the victim, our judicial system mocked, our relations with an ally strained."). Sheinbein was sentenced to twenty-four years in an Israeli prison. *See* William A. Orme, Jr., *Israel Sentences Maryland Man in U.S. Murder*, N.Y. TIMES, Oct. 25, 1999, at A22; William A. Orme, Jr., *Israel Convicts U.S. Teenager After He Admits to Murder*, N.Y. TIMES, Sept. 3, 1999, at A16.

[35] *International Extradition*, *supra* note 22. *See also* Reno, *supra* note 15 ("We are making real inroads into what had been the greatest problem in bringing international fugitives to justice: other countries' refusal to extradite their own citizens. In every possible international forum, I put this issue on the top of my agenda. And we are seeing results: the first extraditions of Mexicans from Mexico; new treaties

the Sheinbein case, Israel amended its laws so that its citizens can now be extradited for trial for crimes committed abroad, with sentence to be served in Israel. Lawmakers there cited their unwillingness to make Israel a safe haven for criminals and to jeopardize the country's relationship with the United States.[36] Numerous Latin American countries have also changed their extradition practices.[37] In 1997, for example, Colombia, responding to aggressive American pressure, repealed a 1991 constitutional provision that halted the extradition of nationals.[38] The Dominican Republic changed its policy the following year.[39] New extradition treaties with Argentina, Bolivia, and Paraguay mandate the extradition of nationals.[40] Although the U.S. government has criticized Colombia for not giving its extradition reform measures

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in Latin America—with Bolivia, Paraguay and Argentina—that remove centuries-old bars to extradition of nationals; and promising changes in the laws of countries such as the Dominican Republic and Colombia.").

[36] *See* Dina Kroft, *Knesset Votes to Permit the Extradition of Israelis: Maryland Murder Case Influenced Lawmakers*, BOSTON GLOBE, Apr. 20, 1999, at A4, *available at* 1999 WL 6058423; Nina Gilbert, *Knesset Changes Extradition Law*, JERUSALEM POST, Apr. 20, 1999, at 1, *available at* 1999 WL 9001969. In the first case brought under the new law, Israel arrested an Israeli soldier accused of participating in the murder of a teenager in Canada. *See* Heidi J. Gleit & Arieh O'Sullivan, *Soldier Arrested in Toronto Murder*, JERUSALEM POST, Dec. 20, 1999, at 2, *available at* 1999 WL 9012724 ("Weiz would be the first Israeli extradited since the Knesset altered the Extradition Law in response to the Sheinbein case."); Adrienne Arsenault, *Sunday Report: Another Suspect Charged in Baranovski Murder* (CBC-TV transcript, Dec. 19, 1999).

[37] *See* Joshua H. Warmund, Comment, *Removing Drug Lords and Street Pushers: The Extradition of Nationals in Colombia and the Dominican Republic*, 22 FORDHAM INT'L L.J. 2373 (1999). *See also* ROTELLA, *supra* note 15.

[38] Warmund, *supra* note 37, at 2387-88, 2418-19, n.315. Colombia's reform efforts were prompted in large part by President Clinton's decision to "decertify" Colombia as a drug-fighting ally, a penalty that potentially carried severe economic sanctions. *See* Benjamin F. Nelson, U.S. General Accounting Office, *Drug Control: U.S. Counternarcotics Efforts in Colombia Face Continuing Challenges*, 1998 WL 250280, at *5-6 (Feb. 1998) ("Since the initial presidential decertification decision in March 1996, Colombia has taken steps to address some U.S. concerns, including (1) enacting a new law allowing for the seizure of drug traffickers' assets, (2) approving legislation increasing sentences for drug-trafficking and money-laundering activities, (3) signing a maritime agreement allowing the United States to pursue suspected drug traffickers, and (4) passing a new extradition law.").

[39] *See* Warmund, *supra* note 37, at 2419 n.315.

[40] *International Extradition*, *supra* note 22.

retroactive effect,[41] Colombia has extradited more than twenty-five people since the enactment of its new extradition law.[42]

II. THE EFFECT OF *SOERING* ON EXTRADITION AND THE DEATH PENALTY IN THE UNITED STATES

A. *The Predicted Aftermath: Change or Crisis*

With the stakes for a frictionless extradition system getting higher and with the United States responding more punitively to denials of extradition, the *Soering* case seemed worthy of serious concern. "Like the proverbial pebble thrown in the pond," one scholar wrote, "*Soering* will cause ripples for some time to come."[43] On a substantive level, the European Court of Human Rights crystallized widespread international disapproval with American practices and conditioned Soering's extradition on assurances from the United States that he would not face the death penalty.[44] By forcing the United States's hand, the European Court gave some legitimacy to the argument that if the United States were to continue its

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[41] *See* James P. Rubin, U.S. Dep't of State Office of the Spokesman, *Colombia: Senate Votes to Strip Retroactivity from Pending Extradition Bill* (Sept. 17, 1997), *at* http://secretary.state.gov/www/briefings/statements/970917.html ("We are dismayed and deeply troubled by the . . . vote in the Colombian Senate which removes retroactivity from a pending constitutional bill which would permit, once again, extradition of Colombian nationals from Colombia."). *See also* Warmund, *supra* note 37, at 2428 (describing Colombian reform measures as "toothless").

[42] *See DEA Official: Ochoa Extradition Sends a Message*, CNN, Sept. 8, 2001, *at* http://www.cnn.com/2001/WORLD/americas/09/08/hutchinson.cnna/index.html (last visited Mar. 24, 2002).

[43] Richard B. Lillich, Comment, *The Soering Case*, 85 AM. J. INT'L L. 128, 128 (1991).

[44] *See* Holly Dawn Jarmul, Note, *The Effect of Decisions of Regional Human Rights Tribunals on National Courts*, 28 N.Y.U. J. INT'L L. & POL. 311, 362-63 (1995-96) ("It is clear . . . that the ECHR's decision in this case did have an extraterritorial effect on the U.S. domestic law because the U.S. courts could not sentence Soering as they wished. . . . It is clear that the rationale used in the *Soering* case . . . will have the effect of the European Convention influencing not only its own members, but numerous other countries as well."). *Cf.* Mark E. DeWitt, Comment, *Extradition Enigma: Italy and Human Rights vs. America and the Death Penalty*, 47 CATH. U. L. REV. 535, 587 (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.").

leadership role in world affairs, it would have to conform to an emerging norm against the death penalty.[45] This argument was strengthened by the fact that *Soering* inspired a series of abolitionist decisions in tribunals around the world. The English Privy Council and high courts in the Netherlands,

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[45] *See* Dwight Aarons, *Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?*, 29 SETON HALL L. REV. 147, 204-05 (1998) ("If actors and legal institutions in the United States continue to disregard the views of other jurists in the international community, analysis of this nation's laws under the Eighth Amendment will become increasingly disjointed from the views of the world and will not reflect the full views of a 'maturing society' . . . .") (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)); Ursula Bentele, *Back to an International Perspective on the Death Penalty as a Cruel Punishment: The Example of South Africa*, 73 TUL. L. REV. 251, 303-04 (1998) ("In a world where the vast majority of democratic industrialized nations no longer use the death penalty, the insistence on its retention in the United States should be reexamined."); Regina C. Donnelly, Comment, Soering v. United Kingdom*: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking?*, 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 339, 368 (1990) ("As the movement to abolish the death penalty continues to grow through both international treaties and foreign law, the United States must recognize that as a member of the international community, it must begin to adopt and assimilate international standards when reviewing violations of the eighth amendment dealing with the death penalty and death row."); Drinan, *supra* note 8; Grayer, *supra* note 8; Tamela R. Hughlett, Comment, *International Law: The Use of International Law as a Guide to Interpretation of the United States Constitution*, 45 OKLA. L. REV. 169, 200 (1992) ("The European Court's use of international law [in *Soering*] can serve as a model for United States courts to use in interpreting the contours of the Eighth Amendment."); Keith Highet et al., *Jurisdiction—NATO Status of Forces Agreement—U.S. Servicemen Charged with Criminal Offenses Overseas—European Convention on Human Rights* 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."); Lillich, *supra* note 43, at 143 ("[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."); Victor Mayer-Schonberger, *Crossing the River of No Return: International Restrictions on the Death Penalty and the Execution of Charles Coleman*, 43 OKLA. L. REV. 677, 678 n.4 (1990) (arguing that the death penalty is against customary international law and noting that although the United States, as a non-party, is not bound by treaties restricting the death penalty, *Soering* shows that those treaties affect the United States nevertheless). *See also* Death Penalty Information Center, *International Perspectives on the Death Penalty: A Costly Isolation for the U.S.* (1999), *at* http://www.deathpenaltyinfo.org/intenationalreport.html ("Right now, no other issue is pushing the United States further apart from its allies and the growing consensus of international law then the death penalty. . . . The potential costs to the U.S. will be measured in loss of leadership and prestige, endangerment of the rights of U.S. citizens abroad, disrespect for international law and the tribunals which protect it, and a lost opportunity to be part of a fundamental change in the status of human rights at the start of the 21st Century.").

Zimbabwe, India, South Africa, and Italy all took strong stands against the "death row phenomenon."[46] To one commentator, the cases that followed *Soering* showed not only an increased willingness of national courts to look to international tribunals for guidance (and vice versa), but also an increased possibility for "normative consistency" among tribunals and thus a broad strengthening of human rights recognition and enforcement.[47]

On a procedural level, by weighing evidence of death row conditions at Mecklenburg Correctional Center, the *Soering* Court abandoned the judiciary's traditionally ministerial role in extradition proceedings for a far more active one.[48] This activism suggested a model of reform for U.S.

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[46] *See, e.g.*, Catholic Comm'n for Justice and Peace in Zimbabwe v. Attorney-General, 1 Zimb. L.R. 239, 240, 269(S) (Aug. 4, 1999) (on file with author); Venezia v. Ministero Di Grazia E Giustizia, Corte cost., No. 223, 79 Rivista di Diritto Internazionale 815 (Italy 1996); State v. Makwanyane, 1995 (3) South African Law Reports [S.A.L.R.] (CC) (S. Afr.); Pratt v. Attorney General of Jamaica, 4 All E.R. 769, 788-89 (P.C. 1993) (en banc); Short/Netherlands, Hoge Raad der Nederlanden [HR] 30 Mar. 1990, Nederlandse Jurisprudentie [NJ] 249 (A.H.J. Swart), *excerpted and translated in* 29 I.L.M. 1375 (1990) (Neth.); Singh v. State of Punjab, All India Reporter [A.I.R.] 1983 S.C. 465 (India). Although Canada allowed the extradition of a man who fled Pennsylvania after a jury convicted him of murder and recommended the death penalty, its Supreme Court nevertheless "looked to the European Court for persuasive guidance in interpreting the Canadian Charter's similar provision," merely distinguishing *Soering* on its facts. Richard B. Lillich, *Harmonizing Human Rights Law Nationally and Internationally: The Death Row Phenomenon as a Case Study*, 40 ST. LOUIS U.L. J. 699, 705 (1996). *See* Kindler v. Canada Minister of Justice [1991] 2 Supreme Court Reports [S.C.R.] 779, 838 (Can.) ("As in *Soering*, . . . there may be situations where the age or mental capacity of the fugitive may affect the matter, . . . but that is not the case here."). The United Nations Human Rights Committee, hearing the case pursuant to the Optional Protocol of the International Covenant on Civil and Political Rights, likewise distinguished *Soering* on its facts. *See* Kindler v. Canada, Comm. No. 470/1991 (U.N. Human Rights Committee) (July 30, 1993) ("[I]mportant facts leading to the judgment of the European Court are distinguishable on material points from the facts in the present case. In particular, the facts differ as to the age and mental state of the offender, and the conditions on death row in the respective prison systems."). Significantly, the Canadian Supreme Court has since held that "in the absence of exceptional circumstances, . . . assurances in death penalty cases are always constitutionally required." United States v. Burns, [2001] 1 SCR 283, ¶ 65 (Can.).

[47] Lillich, *supra* note 43, at 701-02, 711-12. *See also* Stephan Breitenmoser & Gunter E. Wilms, *Human Rights v. Extradition: The* Soering *Case*, 11 MICH. J. INT'L L. 845 (1990) (praising *Soering* for helping to push extradition law out of the realm of international criminal law and into the realm of public international and human rights law).

[48] *See Soering*, 161 Eur. Ct. H.R. (ser. A) at 42 ("The period that a condemned prisoner can expect to spend on death row in Virginia before being executed is on average six to eight years. This length of time awaiting death, is . . . in a sense largely

courts, which, despite dicta suggesting human rights-related exceptions to the rule of non-inquiry, had almost universally declined to hear extradition defenses based on conditions in the requesting state.[49] Following *Soering*'s lead, Judge Weinstein in the Eastern District of New York scrutinized Israeli prison conditions in a 1989 extradition proceeding involving a Palestinian-American accused of firebombing and shooting at a bus traveling through the West Bank.[50] Such a holding was proof enough for one commentator that U.S. judges had "utilized and even embraced" *Soering*.[51]

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of the prisoner's own making in that he takes advantage of all avenues of appeal which are offered to him by Virginia law."); BASSIOUNI, *supra* note 24; Dugard & Van Den Wyngaert, *supra* note 6, at 189-91.

[49] *See, e.g.*, Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir. 1960) ("We can imagine situations where the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require reexamination of the principle [of non-inquiry]."). *See also* John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1479-80 (1988) (acknowledging that while the exception had never been invoked, it "has now been widely repeated, and probably has substantial in terrorem effect on United States officials in deciding which extradition requests they will endorse."); Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198, 1203-04 (1991) (describing United States courts' tradition of adherence to the rule of non-inquiry). Much commentary has been devoted to arguing that the rule of non-inquiry is out-dated. *See, e.g.*, John Quigley, *The Rule of Non-Inquiry and Human Rights Treaties*, 45 CATH. U. L. REV. 1213, 1248 (1996) ("The federal rule of non-inquiry was consistent with international practice at the time it was developed. Today, however, it is at odds with international practice and as such has been repudiated by the international community. . . . The federal courts should give heed to these developments and reject the rule of non-inquiry."); John Quigley, *The Rule of Non-Inquiry and the Impact of Human Rights on Extradition Law*, 15 N.C .J. INT'L L. & COM. REG. 401 (1990) ("Apart from this issue of [not allowing mere differences in trial procedures be the basis for non-extradition], it is not clear that a rule of non-inquiry exists in the federal courts. . . . If a rule of non-inquiry exists, it is inconsistent with human rights law."); David B. Sullivan, Note, *Abandoning the Rule of Non-Inquiry in International Extradition*, 15 HASTINGS INT'L & COMP. L. REV. 111, 131, 133 (1991) ("*Soering* represents an important international precedent on the refusal to extradite because of anticipated torture, cruel conditions of incarceration, or lack of due process at trial in the requesting country. . . . These international examples demonstrate that the United States needs to do more to protect relators from potential mistreatment.").

[50] Ahmad v. Wigen, 726 F. Supp. 389, 414-15 (E.D.N.Y. 1989) ("*Soering* constitutes an important precedent on the refusal to extradite because of anticipated torture, cruel conditions of incarceration, or lack of due process at trial in the requesting country. It reflects a persuasive though non-binding international standard.").

[51] Shea, *supra* note 8, at 125.

Soering's substantive and procedural innovations threatened to cause a number of crises for international criminal enforcement and for U.S. security interests. First, categorical refusals to extradite certain types of fugitives risked turning Europe into a safe haven for American criminals.[52] Second, slowing normal channels for extradition could have adverse consequences in areas such as counter-terrorism and could force countries to engage in informal practices such as abductions, resulting in fewer rights for defendants facing extradition.[53] Finally, as the Cold War

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[52] *See Soering*, 161 Eur. Ct. H.R. (ser. A) at 35 ("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."). *See also* David L. Gappa, *European Court of Human Rights—Extradition—Inhuman or Degrading Treatment or Punishment,* Soering *Case, 161 Eur. Ct. H.R. (ser. A) (1989)*, 20 GA. J. INT'L & COMP. L. 463, 487 (1990) ("After *Soering*, a criminal can now reduce his or her death sentence to life imprisonment simply by traveling to a member state of the Council of Europe. This aspect of the case may present problems in the future for the United States and for states which are parties to the Council of Europe."); Bernard Robertson, *Extradition, Inhuman Treatment and the Death Penalty*, 154 JUST. PEACE 231, 232 (1990) ("Every prisoner awaiting extradition to the USA [for a capital offense] is going to have to take his case all the way up the ladder to see if the European Court of Human Rights will make the same decision in his case. . . . If extradition were refused by the Court in such a case, the prospect opens up on the UK filling up with wanted American murderers.").

[53] When Congress was debating legislation that would extend the death penalty to acts of terrorism committed abroad against United States citizens, one opponent of the measure argued that "the key to getting your hands on terrorists is to extradite them. And if you have even the possibility of a death penalty, we are not going to be able to extradite terrorists." 135 CONG. REC. S14,224, 14,225 (1989) (statement of Sen. Levin). Senator Levin further noted that "the existence of the death penalty may provide an excuse to countries in Central and South American and Europe to refuse to cooperate in sending drug kingpins to the United States for trial." *Id.* at 14,226. *See also* Semmelman, *supra* note 49, at 1230-31 (arguing that any heightened judicial role in extradition proceedings would undermine American foreign policy goals); Christine Van Den Wyngaert, *Applying the European Convention on Human Rights to Extradition: Opening a Pandora's Box?*, 39 INT'L & COMP. L.Q. 757, 759 (1990) ("The concomitant policy question is whether applying human rights to extradition will not, in practice, make extradition too difficult because of the many new obstacles to it that may arise. This may prove to be the opening of Pandora's box, in that the impossibility of States using the normal extradition process may lure them into less 'recommendable' practices such as abduction or disguised extradition."); Colin Warbruck, *Coherence and the European Court of Human Rights: The Adjudicative Background to the* Soering *Case*, 11 MICH. J. INT'L L. 1073, 1095 (1990) ("The Court's judgment was of considerable disadvantage to the British government, which regards the effective functioning of extradition with the United States as particularly important to its campaign against terrorism connected with Northern Ireland. Any

neared its end, *Soering* jeopardized the relationship between American troops and NATO host states. Pursuant to a NATO Status of Forces Agreement,[54] the United States generally assumed jurisdiction over military personnel accused of crimes. These arrangements were cast into doubt when the high court of the Netherlands refused to cede jurisdiction in the case of a U.S. Air Force sergeant who admitted to killing his wife[55]—a capital offense under military law.[56] Citing *Soering*, the Dutch court held that the "interest of [the defendant] not to be put to death takes precedence over the interest of the State to fulfill its obligations under the NATO Status Treaty."[57] The Dutch decision not only threatened to raise tensions between the U.S. military and Western European countries,[58] but it also had the potential to undermine the uniform application of discipline among American troops stationed around the world.[59]

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weakening of the obligation by the United States to return fugitives to the United Kingdom would be much deprecated."); Henning, *supra* note 31, at 367 ("U.S. law enforcement officials have increasingly turned to abduction as a viable alternative to traditional extradition. If formal extradition is not achievable because of a human rights conflict, . . . it could seem that the only obstacles to abduction for the U.S. are the foreign relations implications."); Kent Wellington, Note, *Extradition: A Fair and Effective Weapon in the War on Terrorism*, 51 OHIO ST. L.J. 1447, 1454-55 (1990) ("[C]onsistent refusals to extradite . . . severely impede the war on terrorism. . . . [I]t would not be surprising to see those same countries, being denied extradition on constitutional or human rights grounds, reciprocate by refusing to surrender suspected terrorists themselves.").

[54] Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67.

[55] *See* Short/Netherlands, HR 30 Mar. 1990, NJ 249 (A.H.J. Swart), *excerpted and translated in* 29 I.L.M. 1375 (1990) (Neth.). *See also* Kellee A. Brown & Sophia A. Muirhead, *Extradition: Divergent Trends in International Cooperation*, 33 HARV. INT'L L.J. 223 (1992); Keith Highet et al., *Jurisdiction—NATO Status of Forces Agreement—U.S. Servicemen Charged with Criminal Offenses Overseas—European Convention on Human Rights*, 85 AM. J. INT'L L. 698 (1991).

[56] *See* Uniform Code of Military Justice, art. 118, 10 U.S.C. § 918 (2002).

[57] *Short/Netherlands*, 29 I.L.M. at ¶ 3.5.

[58] *See* John E. Parkerson, Jr. & Carolyn S. Stoehr, *The United States Military Death Penalty in Europe: Threats from Recent European Human Rights Developments*, 129 MIL. L. REV. 41, 75 (1990) ("The death penalty is a highly visible issue, and the U.S. cannot benefit in its relations with host nations from additional tensions resulting from divergent views about the death penalty. As opposition to the death penalty increasingly becomes to Europeans an aspect of their fundamental sovereign interests, the U.S. will be forced to make some policy choices.").

[59] *See* Highet et al., *supra* note 55, at 702 ("The thread that holds such a far-flung force together is military discipline—discipline that can be enforced only through the Uniform Code of Military Justice. The danger that the *Short* precedent portends is

B. *Anticlimax*

More than ten years after *Soering*, the predictions that the case would spur change in U.S. policy or possible crisis have not become reality. Courts in the United States have virtually ignored *Soering*.[60] The case appears in a mere eight published federal opinions—four of which were by Judge Weinstein,[61] whose move away from the rule of non-inquiry has been decisively rejected by the Second Circuit and numerous other jurisdictions.[62] Two courts of appeals refused to consider

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that receiving states will ever-increasingly insulate subordinates from their commanders in the name of human rights.").

[60] Death row defendants have been bringing excessive delay claims for at least forty years. *See* Chessman v. Dickson, 275 F.2d 604 (9th Cir. 1960). *See also* Aarons, *supra* note 45. In recent years, such claims have been termed "Lackey claims," after *Lackey v. Texas*, 514 U.S. 1045 (1995), a memorandum by Justice Stevens respecting the denial of certiorari in the case of a prisoner who had spent seventeen years on death row. Lackey's excessive delay claim, "with its legal complexity and its potential for far-reaching consequences, seem[ed] an ideal example of one which would benefit from . . . further study [in state and lower federal courts]." *Id.* at 1047. After *Lackey*, numerous jurisdictions heard similar issues and have nearly universally refused to entertain excessive delay claims. *See, e.g.*, State v. Moore, 591 N.W.2d 86, 93-94 (Neb. 1999) (listing cases).

[61] Of the four, only *Ahmad v. Wigen*, 726 F. Supp. 389, 413-15 (E.D.N.Y. 1989), can be said to rely in any way on *Soering*'s reasoning. *Soering* appears in two other Weinstein decisions as fairly extraneous support for large departures from the United States Sentencing Guidelines. *See* United States v. DeRiggi, 893 F. Supp. 171, 182-83 (E.D.N.Y. 1995); United States v. Ekwunoh, 888 F. Supp. 369, 374 (E.D.N.Y. 1994). One final opinion notes that a defendant's extradition from Italy merely precludes a death sentence and does not limit the length of a prison sentence. *See* United States v. El-Jassem, 819 F. Supp. 166, 182 (E.D.N.Y. 1993).

[62] *See* Ahmad v. Wigen, 910 F.2d 1063, 1066-67 (2d Cir. 1990) ("We have no problem with the district court's rejection of Ahmad's remaining argument to the effect that, if he is returned to Israel, he probably will be mistreated, denied a fair trial, and deprived of his constitutional and human rights. We do, however, question the district court's decision to explore the merits of this contention in the manner that it did. . . . The interests of international comity are ill-served by requiring a foreign nation . . . to satisfy a United States district judge concerning the fairness of its laws and the manner in which they are enforced. . . . It is the function of the Secretary of State to determine whether extradition should be denied on humanitarian grounds."). *See also* Andreas F. Lowenfeld, *Ahmad: Profile of an Extradition Case*, 23 N.Y.U. J. INT'L L. & POL. 723 (1991).

See also Ntakirutimana v. Reno, 184 F.3d 419, 430 (5th Cir. 1999) (declining to inquire into the procedures awaiting a relator upon his extradition to the International Criminal Tribunal for Rwanda); Mainero v. Gregg, 164 F.3d 1199, 1210 (9th Cir. 1999) ("[I]n view of the facts of this case, the well-established rule of non-inquiry, and the scant authority for creating a humanitarian exception, we decline to overturn either extradition order on humanitarian grounds."); United States v. Kin-Hong, 110 F.3d

Soering as providing any plausible support for a constitutional claim arising from excessive delays on death row.[63]

Most significantly, Justice Breyer, joined by Justice Stevens, cited *Soering* as persuasive authority in two dissents from denials of certiorari, arguing that a lengthy stay on death row may well render an execution "inhuman."[64] Nevertheless, the Supreme Court has been less than receptive to evidence of international practices when calibrating the Eighth Amendment by contemporary standards of decency.[65]

103, 110-11 (1st Cir. 1997) ("[T]he rule of non-inquiry tightly limits the appropriate scope of judicial analysis in an extradition proceeding. . . . It is not that questions about what awaits the relator in the requesting country are irrelevant to extradition; it is that there is another branch of government, which has both final say and greater discretion in these proceedings, to whom these questions are more properly addressed."); Martin v. Warden, Atlanta Pen., 993 F.2d 824, 830 n.10 (10th Cir. 1993) ("[J]udicial intervention in extradition proceedings based on humanitarian conditions is inappropriate. . . . [H]umanitarian considerations are matters properly reviewed by the Department of State."); *In re* Extradition of Manzi, 888 F.2d 204, 206 (1st Cir. 1989) (citing numerous cases that follow the rule of non-inquiry).

[63] *See* Chambers v. Bowersox, 157 F.3d 560, 570 (8th Cir. 1998) ("We believe that delay in capital cases is too long. But delay, in large part, is a function of the desire of our courts, state and federal, to get it right, to explore exhaustively, or at least sufficiently, any argument that might save someone's life. . . . If it is not cruel and unusual punishment to execute someone after the electric chair malfunctioned the first time, . . . we do not see how the present situation even begins to approach a constitutional violation."); McKenzie v. Day, 57 F.3d 1461, 1466 (9th Cir. 1995) ("With all due respect to our colleagues abroad, we do not believe this view will prevail in the United States."). In dissent, Judge Norris cited *Pratt & Morgan v. Attorney General of Jamaica, Catholic Comm'n for Justice & Peace in Zimbabwe v. Attorney General*, and *Soering* to support his view that an Eighth Amendment claim of excessive delay on death row was "substantial, important, and deserving of careful and thoughtful adjudication." *Id.* at 1487-88 (Norris, J., dissenting). A few additional cases noted defendants' citations of *Pratt & Morgan v. Attorney General of Jamaica*, with a predictably discouraging response. *See, e.g.*, Turner v. Jabe, 58 F.3d 924, 933 (4th Cir. 1995) (Luttig, J., concurring) ("With this argument, we have indeed entered the theater of the absurd, where politics disguised as 'intellectualism' occupies center stage, no argument is acknowledged to be frivolous, and common sense and judgment play no role.").

[64] *See* Knight v. Florida, 528 U.S. 990, 996-97 (1999) (Breyer, J., dissenting); Elledge v. Florida, 525 U.S. 944, 944 (1998) (Breyer, J., dissenting). *See also Lackey*, 514 U.S. at 1047 (Stevens, J., respecting the denial of certiorari) (citing *Pratt*, 2 A.C. at 32-33, 4 All. E.R. at 785-86). The Florida Supreme Court recently vacated a conviction where the trial court waited twelve years before holding an evidentiary hearing on a death row convict's state habeas claim. *See* Jones v. State, 740 So. 2d 520, 524-25 (Fla. 1999) (citing *Elledge* (Breyer, J., dissenting)). *See also Developments in the Law—International Criminal Law*, 114 HARV. L. REV. 1943, 2049 (2001).

[65] *See Knight*, 528 U.S. at 996 ("[W]e are interpreting a 'Constitution for the United States of America.' ") (quoting Thompson v. Oklahoma, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting)). *See also* Stanford v. Kentucky, 492 U.S. 361, 369 n.1

Reflecting that hostility, Justice Thomas viewed Justice Breyer's openness to international precedent as a sign of weakness: "Indeed, were there any such support in our own jurisprudence, it would be unnecessary for 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."[66]

Nor has *Soering* had much practical effect on the exercise of the death penalty in the United States. Since the case was decided, more than 600 people have been lethally injected, electrocuted, gassed, hanged, and shot by firing squad.[67] Ninety-eight people were executed in 1999, the most in nearly fifty years and about five times more than were executed in 1989.[68] Many of them spent more than ten years on death row prior to execution.[69] Support for capital punishment has generally exceeded seventy percent in public opinion polls for the last two decades and is virtually a prerequisite for many offices, from state judgeships to the presidency.[70]

(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. . . . [T]hey cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.") (citations omitted).

[66] *Knight*, 528 U.S. at 990 (Thomas, J., concurring).

[67] Data compiled by the Bureau of Justice Statistics, United States Department of Justice, are available at http://www.ojp.usdoj.gov/bjs/pubalp2.htm-#CapitalPunishment (last visited Apr. 19, 2002).

[68] *See id. See also* Death Penalty Information Center statistics, *at* http://www.deathpenaltyinfo.org/dpicexec.html (last visited Apr. 19, 2002). Eighty-five people were executed in 2000 and sixty-six in 2001.

[69] *See* Tracy L. Snell, Bureau of Justice Statistics, *Capital Punishment 1998*, NCJ 179012, at 1 (Dec. 1999), *available at*, http://www.ojp.usdoj.gov/bjs/pub/-pdf/cp98.pdf. (computing that inmates executed in 1998 waited on death row an average of ten years and ten months).

[70] *See* Samuel R. Gross, *Update: American Public Opinion on the Death Penalty—It's Getting Personal*, 83 CORNELL L. REV. 1448, 1453 (1998) ("We seem to have reached a new status quo in which the death penalty is an accepted part of our criminal justice system; it is widely available, widely supported, and less controversial than in decades past. . . . Perhaps in twenty or forty years many Americans will once again have no clear position on capital punishment, for or against. For now, it remains a powerful issue over which there is little conflict because the sides are so severely mismatched."); Hugo Adam Bedau, *Interpreting the Eighth Amendment: Principled vs. Populist Strategies*, 13 T.M. COOLEY L. REV. 789, 799 (1996); Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, 50 J. SOC. ISSUES 19 (1994); Kristi Tumminello Prinzo, *The United States—"Capital" of the World: An Analysis of Why the United States Practices Capital Punishment While*

Although public support for the death penalty has recently declined somewhat after revelations about the actual innocence of dozens of people wrongly sent to death row, this adjustment in public opinion has had little to do with pressure from proponents of international human rights norms.[71] Congress has expanded the federal death penalty,[72] and in the past decade, more crimes have become punishable by death in more states.[73] Politicians have responded to foreign criticism of the

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the International Trend Is Towards Its Abolition, 24 BROOK. J. INT'L L. 855 (1999); Christopher J. Meade, Note, *Reading Death Sentences: The Narrative Construction of Capital Punishment*, 71 N.Y.U. L. REV. 732, 732-33 (1996). *But see* Earl Martin, *Towards an Evolving Debate on the Decency of Capital Punishment*, 66 GEO. WASH. L. REV. 84, 85 (1997) ("Although popular support for capital punishment has increased over time, public consideration of the issue has declined greatly from the 1970s to the present day."); William J. Bowers et al., *A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer*, 22 AM. J. CRIM. L. 77 (1994) (arguing that support for the death penalty is a "self-perpetuating political myth" and that while Americans accept the death penalty as an abstract symbol of just punishment, they often prefer alternatives in specific cases).

None of the major presidential candidates in the 2000 campaign opposed capital punishment. Gross, *supra*, at 1452 ("Since Michael Dukakis's debacle in 1988, no serious candidate for president has expressed any opposition to capital punishment."); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995); Henry Weinstein, *Pope Asks Bush to Stay Murderer's Execution Appeal*, L.A. TIMES, Jan. 21, 2000, at A24, *available at* 2000 WL 2203080. When President George W. Bush was governor of Texas, more than 152 people were executed—nearly twenty percent of the 765 executions performed since the resumption of capital punishment in 1976. *See id.*; Death Penalty Information Center, *Number of Executions by State Since 1976*, *at* http://www.deathpenaltyinfo.org/dpicreg.html (last visited Apr. 19, 2002); Death Penalty Information Center, *Upcoming Executions*, http://www.deathpenaltyinfo.org/executionalert.html (last visited Apr. 19, 2002). Bush was elected governor in 1994 after a campaign that questioned incumbent Ann Richards's support for the death penalty. Forty-five people were executed during Richards's term of office. *See* Bright & Keenan, *supra*.

[71] *See* Steven A. Holmes, *Look Who's Questioning the Death Penalty*, N.Y. TIMES, Apr. 16, 2000, § 4, at 3; Editorial, *Bills to Stop Executing the Innocent*, N.Y. TIMES, Apr. 4, 2000, at A22; Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. TIMES, Feb. 1, 2000, at A1. The Canadian Supreme Court's recent decision requiring assurances in extraditions to the United States that the death penalty would not be sought showed a heightened concern with the issue of actual innocence. *See* United States v. Burns, [2001] 1 S.C.R. 283, ¶¶ 1, 38, 95, 108-10 (Can.).

[72] *See* Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 386-88 (1999).

[73] According to Bacre Waly Ndiaye, United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, "[o]nly China has expanded the death penalty laws at the same rate." Ann Cooper, *Human Rights Investigator Finds U.S. Is Touchy*, WALL ST. J., Oct. 13, 1997, at A19, *available at* 1997 WL-WSJ 14169630. Thirty-eight states now impose the death penalty. *See* Gross, *supra* note 70,

death penalty with defiance and contempt,[74] invoking *Soering* to justify the curtailment of death penalty appeals. Because lengthy stays on death row are often the result of direct appeals and collateral attacks, streamlining such avenues of relief becomes arguably more humane.[75] In 1996, Congress imposed a one-year filing deadline for federal habeas claims and established strict timetables for judicial review.[76] One of the bill's sponsors, Pennsylvania Senator Arlen Specter, had for years cited *Soering* in floor debates to support curbing habeas corpus.[77]

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at 1453. Kansas and New York enacted death penalty legislation in 1994 and 1995. *See* 1995 N.Y. Laws ch. 1; 1994 Kan. Sess. Laws ch. 252 (H.B. 2578); James Dao, *Death Penalty in New York Reinstated After 18 Years*, N.Y. TIMES, Mar. 8, 1995, at A1. *See also* Stephanie Salter, *Voters to Judges: Discretion Is Not an Option*, S.F. EXAMINER, Mar. 31, 1996, at A21, *available at* 1996 WL 3707061 (describing three voter initiatives, all of which passed with more than eighty percent of the popular vote, that added carjacking, drive-by shootings, and the murders of jurors to the list of "special circumstances" mandating sentences of death or life without parole).

[74] When United Nations Special Rapporteur Ndiaye spent eighteen days in 1997 investigating the death penalty in the United States, neither President Clinton, Vice President Gore, nor Secretary of State Albright would meet with him. Senator Jesse Helms called the visit "an intentional insult to the U.S.," and United States Ambassador to the U.N. Bill Richardson said that Ndiaye's report "will collect a lot of dust." Cooper, *supra* note 73. In a recent debate, former Georgia Attorney General Michael Bowers said, "'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? Canada? Mexico? These people don't understand our customs. They don't understand our practices.'" Warren Allmand et al., *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) (quoted by Stephen B. Bright during a panel discussion).

[75] *See* John Quigley & S. Adele Shank, *Death Row as a Violation of Human Rights: Is It Illegal to Extradite to Virginia?*, 30 VA. J. INT'L L. 241, 268-69 (1989) ("One solution, of course, would be to eliminate the collateral attack procedures that consume most of the post-trial time in the typical capital case."); Gregory B. Richardson et al., *Major Contemporary Issues in Extradition Law*, 84 AM. SOC'Y INT'L L. PROC. 389, 405 (1990) (remarks of Yoram Dinstein) ("The incongruous moral of the story is that the United States would not run afoul of human rights if it were to execute without delay all prisoners convicted of capital crimes.") Susan M. McGarvey, Note, *Missed Opportunity?: The Affirmation of the Death Penalty in the AEDPA: Extradition Scenarios*, 24 J. LEGIS. 99, 104 (1998) ("The proponents of the AEDPA presumably would assert that habeas corpus reforms lessen any possible death row phenomenon.").

[76] *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (amending 28 U.S.C. §§ 2244, 2253-55 and adding 28 U.S.C. §§ 2261-66).

[77] *See* 141 CONG. REC. S7,803, 7,804 (June 7, 1995) (statement of Sen. Specter) ("[W]e have a situation where these long delays involve continuing travail and pain to the family of the victims awaiting closure . . . . We also have an adjudication under the European Convention on Human Rights that concluded that the practice in the State

Soering has not had a chilling effect on the extradition process; the United States makes and receives more extradition requests than ever before.[78] When faced with a *Soering*-type situation, American prosecutors simply make assurances that they will not seek the death penalty.[79] As a result, Jens Soering is serving two life sentences in Virginia. Likewise, Charles Short, whom the Netherlands initially refused to extradite, faced a court martial and is imprisoned in

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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."); 137 CONG. REC. S8,649, S8,662 (June 26, 1991) (statement of Sen. Specter) ("The death penalty and the whole judicial system are really the laughingstock of the criminal element in this country because, succinctly stated, the death penalty is not carried out in any rational way . . . . [L]engthy delays are, in effect, a way to defeat the imposition of the death penalty. But I suggest that does not make any sense in terms of a rational criminal justice system. The European Court on Human Rights recently concluded that such delay raised an issue of cruel and unusual punishment. In the *Soering* case, that court found cruel and unusual punishment when somebody was on death row for many years, as in the U.S. system, contrasted with no finding of cruel and unusual punishment for the actual imposition of the death penalty."). Specter has also argued that *Soering* is generally irrelevant for prosecutors. *See* Arlen Specter, *The Time Has Come for a Terrorist Death Penalty Law*, 95 DICK. L. REV. 739, 754 (1991) ("When a country refuses to extradite a criminal unless the United States agrees not to seek the death penalty, the United States has no choice but to agree to such terms. To use the extradition problem as an argument against the death penalty, however, merely obscures the issue. The addition of the death penalty option does not *require* United States law enforcement officials to seek the death penalty, it merely affords them the *option* of invoking the death penalty.").

The reaction of Caribbean nations to *Pratt and Morgan v. Attorney General of Jamaica*, a *Soering*-influenced Privy Council decision upholding excessive delay claims, similarly shows the perverse effects of recognizing the validity of "death row phenomenon" defenses. Trinidad and Jamaica withdrew from the American Convention of Human Rights and the International Covenant on Civil and Political Rights, on the grounds that appeals to the Interamerican Court of Human Rights and the United Nations Human Rights Committee would cause inhumane delay for death row inmates. *See* Natalia Schiffrin, *Jamaica Withdraws the Right of International Petition Under the International Covenant on Civil and Political Rights*, 92 AM. J. INT'L L. 563 (1998); *Trinidad Executes 9 Persons and Other Caribbean Governments Follow Its Lead*, 15 INT'L ENF. L. REP. (July 1999); Douglass W. Cassel, Jr., *Court's Promise Now in Peril*, CHI. DAILY L. BULL., July 13, 1999, at 6; Larry Rohter, *In the Caribbean, Support Growing for the Death Penalty*, N.Y. TIMES, Oct. 4, 1998, at A14.

[78] *See supra* notes 18-19 and accompanying text.

[79] A shrinking minority of state prosecutors refuse to make such assurances. *See, e.g.*, Edward Hegstrom, *D.A. Stands Pat on Foreigners, Death Penalty*, HOUS. CHRON., Jan. 12, 2001, at 21, *available at* 2001 WL 299229; Ted Rohrlich, *D.A. to Stop Seeking Death in Some Cases to Ease Extraditions Justice*, L.A. TIMES, Jan. 9, 2001, at B3, *available at* 2001 WL 2450544.

the United States.[80] Because only a trivial number of extraditions involve capital offenses, prosecutors seldom have to make *Soering*-type assurances, and neither international criminal enforcement nor capital punishment is ever much affected. Death penalty exceptions to extradition have emerged less as a repudiation of the rule of non-inquiry than as an easily decided formal issue—similar to dual criminality—that is routinely incorporated into treaties.[81] *Soering* merely adds a low procedural hurdle in a small subset of cases. Given the level of critical interest devoted to the case, its impact on American practices and policies has been eerily slight.

III. REFOCUSING THE DISCUSSION OF *SOERING*: ATTACKING PRISON CONDITIONS IN THE UNITED STATES

Scholars have primarily examined *Soering* in the context of debates over the desirability of the rule of non-inquiry and the legality of the death penalty and the death row phenomenon.[82] This compartmentalization is understandable; *Soering* contributed a dramatic narrative and a bold legal opinion to two fertile academic fields. Nevertheless, such scholarship has suffered from a certain myopia. Because *Soering* was widely assumed to catalyze change, the commentary did not examine the mechanics of how such change would occur. The rare instances in which commentators

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[80] *See* Highet et al., *supra* note 55, at 702 ("As this case ultimately turned out, the U.S. official exercising prosecutorial discretion elected not to charge Staff Sergeant Short with capital murder. After that decision was conveyed to the Dutch Government, it transferred him to U.S. custody.").

[81] *See* Dugard & Van Den Wyngaert, *supra* note 6, at 206 ("The death penalty exception is . . . a form of conditional extradition: states that have adopted this exception in their extradition treaties or statutes will normally secure satisfactory assurances from the requesting state, as an explicit precondition to extradition, that the individual will not be executed. . . . Conditions of the above kind are not controversial, as they do not reflect upon the quality of criminal justice in the requesting state.").

[82] *See, e.g.*, Quigley & Shank, *supra* note 75, at 256-67 (applying *Soering*'s implications for the extraterritorial reach of human rights obligations solely to the death row situation); Mary K. Martin, Note, *A One-Way Ticket Back to the United States: The Collision of International Extradition Law and the Death Penalty*, 11 CAP. DEF. J. 243 (1999) (exploring "the question whether the United States will be able to continue to seek successfully extradition of foreign-nationals from abolitionist countries without agreeing in advance to eschew the death penalty").

questioned the extent of *Soering*'s impact occurred within narrow discussions of death row jurisprudence and never considered that *Soering* might affect other contexts.[83]

In fact, as a precedent for extradition challenges based on inhuman or degrading prison conditions in the United States, *Soering* has broad potential to confront problems of achieving "normative consistency" and expanding the judicial role in an area of the law traditionally guided by foreign policy considerations. Although *Soering*'s implications for cases about prison conditions have been noted in summary fashion,[84] they have never been explored in any depth or with an eye towards the larger question of whether the European Court of Human Rights can—or even wants to—confront the United States on a significant domestic policy issue. If the European Court blocked an extradition to the United States because prison conditions there violated the European Convention, the United States could not shrug off such challenges by making assurances about the treatment relators would receive upon extradition. Compared to extraditions involving capital cases, a much larger number of defendants would be entitled to assurances. These assurances would be far more intrusive into the daily operations and physical upkeep of prison facilities and would force the United States to admit, in essence, that it has violated the rights of thousands of prisoners.[85] The sections that follow will survey European human rights law regarding conditions of confinement, the elements of a successful extradition defense, and how the European Court might evaluate certain widely reported abuses in American prisons.

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[83] *See, e.g.*, Florencio J. Yuzon, *Conditions and Circumstances of Living on Death Row—Violative of Individual Rights and Fundamental Freedoms?: Divergent Trends of Judicial Review in Evaluating the "Death Row Phenomenon,"* 30 GEO. WASH. J. INT'L L. & ECON. 39 (1996) (comparing European and American cases on death row conditions); Renee E. Boxman, Comment, *The Road to* Soering *and Beyond: Will the United States Recognize the "Death Row Phenomenon?,"* 14 HOUS. J. INT'L L. 151 (1991).

[84] *See* Van Den Wyngaert, *supra* note 53.

[85] *See* Dugard & Van Den Wyngaert, *supra* note 6, at 201 ("[A]ssurances of acceptable prison conditions are unlikely to be forthcoming from requesting states, as most states reject suggestions that their prisons fail to meet international minimum standards."). *See infra* notes 139-40 and accompanying text.

A. *European Case Law on Prison Conditions*

Soering observed that in the extradition context, the notion of "inhuman or degrading treatment or punishment" may require balancing "the protection of the individual's fundamental rights" with "the interest of all nations that suspected offenders who flee abroad should be brought to justice."[86] At the same time, however, the right of individuals to be free from torture and inhuman or degrading treatment has long trumped national and international security interests in European Convention case law.[87] Although *Soering* marked the first time that the European Court heard an extradition defense premised on the potential for Article 3 violations in the requesting country, nearly thirty years of European Commission of Human Rights[88] case law on the subject had held that "the sole factor to be considered is the existence of an objective danger to the person extradited."[89] The *Soering* Court

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[86] *Soering*, 161 Eur. Ct. H.R. (ser. A) at 35. In cases involving torture, as opposed to inhuman or degrading treatment, presumably no balancing of defendants' rights against the interests of international criminal justice would ever be permissible. *Id. See also* GEOFF GILBERT, TRANSNATIONAL FUGITIVE OFFENDERS IN INTERNATIONAL LAW: EXTRADITION AND OTHER MECHANISMS 173 (1998).

[87] *See, e.g.*, Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 65 (1978) ("The Convention prohibits in absolute terms torture and inhuman or degrading treatment and punishment, irrespective of the victim's conduct. . . . [T]here can be no derogation therefrom even in the event of a public emergency threatening the life of the nation.").

[88] The European Convention established both the Court and the Commission. *See* European Convention, *supra* note 4, at art. 19. The Commission may receive petitions from any person, non-governmental organization or group of individuals claiming to be victims of a Convention violation. *Id.* at art. 25. A case can only be referred to the Court by the Commission or a High Contracting Party and only after "the Commission has acknowledged the failure of efforts for a friendly settlement . . . ." *Id.* at art. 47, 48. *See* Michael O'Boyle, *Extradition and Expulsion Under the European Convention on Human Rights: Reflections on the* Soering *Case*, *in* HUMAN RIGHTS AND CONSTITUTIONAL LAW: ESSAYS IN HONOUR OF BRIAN WALSH 93, 95 (James O'Reilly ed., 1992) ("That the Court had to wait until the *Soering* case to be seised of the Article 3 issue can be explained by the fact that many of these cases [before the Commission] were rejected as inadmissible on grounds of non-substantiation or, in meritorious cases, were settled quietly and privately prior to the determination of admissibility.").

[89] B. v. France, App. No. 11722/85, 51 Eur. Comm'n H.R. Dec. & Rep. 165, 177 (1987). *See also* K. and F. v. Netherlands, App. No. 12543/86, 51 Eur. Comm'n H.R. Dec. & Rep. 272, 276 (1986) ("[A] person's extradition may, exceptionally, give rise to issues under Article 3 of the Convention where extradition is contemplated to a country in which 'due to the very nature of the regime of that country or to a particular situation in that country, basic human rights, such as are guaranteed by the

prefaced its brief discussion of balancing individual and state interests by noting that Article 3 is an "absolute prohibition" on torture and inhuman or degrading treatment or punishment.[90] In concluding that the "death row phenomenon" violated Article 3, the European Court did not in fact conduct a balancing test. Rather, the Court reached its holding because "the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3."[91] This inquiry—whether an individual faces (1) a real risk of (2) treatment or punishment that violates Article 3—has exclusively engaged the European Court in subsequent cases.[92] Although the dicta in *Soering* preserve the possibility that the European Court will consider security interests when

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Convention, might be either grossly violated or entirely suppressed.' ") (citations omitted); Altun v. Federal Republic of Germany, App. No. 10308/83, 36 Eur. Comm'n H.R. Dec. & Rep. 209, 232 (1984) ("[O]nly the existence of an objective danger to the person to be extradited may be considered."); X. v. Federal Republic of Germany, App. No. 6315/73, 1 Eur. Comm'n H.R. Dec. & Rep. 73, 75 (1974) ("[T]he expulsion or extradition of an individual could, in certain exceptional cases, prove to be in breach of . . . Article 3, whilst there are serious reasons to believe that he could be subjected to such treatment prohibited by the said Article 3 in the State to which he must be sent."). *See also* O'Boyle, *supra* note 88, at 94-95 (describing Commission caselaw dating back to the 1960s); Van Den Wyngaert, *supra* note 53, at 765-67 ("In Western Europe [the application of Article 3 to extradition] is clear from the consistent case law of the European Commission on Human Rights since the early 1960s, and is now also explicitly included in various international instruments and in many modern extradition treaties in the form of the discrimination clause.").

[90] *Soering*, 161 Eur. Ct. H.R. (ser. A) at 34 ("Article 3 makes no provision for exceptions and no derogation from it is permissible . . . in time of war or other national emergency. This absolute prohibition on torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe."). The "inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment . . . ." *Id.*

[91] *Id.* at 44-45.

[92] *See, e.g.*, Chahal v. United Kingdom, 1996-V Eur. Ct. H.R. 1831, 23 Eur. H.R. Rep. 413 (1996), at ¶ 81 ("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."); H.L.R. v. France, 1997-III Eur. Ct. H.R. 745, 26 Eur. H.R. Rep. 29 (1997) at ¶¶ 34-35, 39; Ahmed v. Austria, 1996-VI Eur. Ct. H.R., Rep. Judgments & Dec. 2195, 24 Eur. H.R. Rep. 278 (1997), at ¶41 ("[T]he activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.").

faced with cases that truly threaten the extradition system,[93] the prohibition against torture and inhuman or degrading treatment remains absolute.[94] The following sections discuss how European human rights bodies have defined "real risk" and torture and inhuman or degrading treatment or punishment and whether a fugitive from the United States could ever raise a colorable claim under these standards.

1. Torture and Inhuman or Degrading Treatment or Punishment

a. Methodological Preliminaries

In giving meaning to Article 3, the European Court and Commission have conceived of torture, inhuman treatment or punishment, and degrading treatment or punishment as three separate classes of violations, "different points along a continuum, or in a hierarchy, of severity."[95] This continuum runs from torture, the most severe, to degrading treatment or punishment, the least severe. As one might expect from a system that requires exhaustion of domestic remedies and offers numerous opportunities for settlement,[96] the Court and

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[93] *See* GILBERT, *supra* note 86, at 173 ("[T]he balancing exercise seen in *Soering* between protecting the fugitive's human rights and ensuring that criminal laws are enforced will necessarily provide States with a great deal of discretion in this field, subject only to the absolute bar on surrender if the fugitive would face torture . . . .").

[94] *See* Aksoy v. Turkey, 1996-VI Eur. Ct. H.R. 2260, 23 Eur. H.R. Rep. 553 (1996), at ¶ 62 ("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. . . .").

[95] Rod Morgan & Malcolm D. Evans, *CPT Standards: An Overview*, *in* PROTECTING PRISONERS: THE STANDARDS OF THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE IN CONTEXT 31, 39 (Morgan & Evans eds., 1999) [hereinafter PROTECTING PRISONERS]; Gilles Dutertre & Jakob Van der Velde, *Article 3ECHR—The Prohibition of Torture*, 41A Y.B. Eur. Conv. on H.R. 19, 19-20 (1998).

[96] *See, e.g.*, B. v. France, App. No. 11722/85, 51 Eur. Comm'n H.R. Dec. & Rep. 165, 173, 177 (1987) (rejecting Moroccan national's challenge of extradition from France to Morocco, where he was sentenced to death in absentia, because his case was subject to subsequent appeal in French courts). *See also* Wolfgang Peukert, *The European Convention for the Prevention of Torture and the European Convention on*

Commission have not completely delimited the standards for an Article 3 violation. Short-term detainees, as opposed to prisoners, have brought the bulk of the cases, so much of the case law focuses on police practices rather than conditions of confinement.

A clearer picture of European norms emerges by additional reference to other sources of human rights law, sources that have influenced and been influenced by the case law.[97] Although the revised European version of the Standard Minimum Rules for the Treatment of Prisoners is not binding on member states (and deviation from them has not been the basis for any action brought under Article 3), it has provided an undoubtedly influential "yardstick and frame of reference."[98] It would be little exaggeration to say that the Court, Commission, and member states all subscribe to the basic premise of the Rules: "Imprisonment is by the deprivation of liberty a punishment in itself. The conditions of imprisonment and the prison regimes shall not, therefore, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in this."[99] International human rights tribunals, such as the United Nations Human Rights Committee and the Committee Against Torture, have heard a number of cases involving circumstances similar to Article 3 claims in Europe, providing another useful point of reference.[100] Most importantly, since 1989, the European Committee for the Prevention of Torture and

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Human Rights, *in* PROTECTING PRISONERS, *supra* note 95, at 85, 100 ("Some of the alleged victims will obtain reparation on the domestic level but prisoners will often not have either the courage and perseverance or the financial or intellectual capacity to complain effectively about their treatment following their arrest.").

[97] *See* A. REYNAUD, HUMAN RIGHTS IN PRISONS 52-60 (1986) (merging discussion of caselaw with that of the Council of Europe's Standard Minimum Rules for the Treatment of Prisoners); Peukert, *supra* note 96, at 101 ("Above all else, the development of the ECHR case law shows that terms such as 'torture,' 'inhuman,' and 'degrading' cannot be interpreted in a static manner, but have to be understood and interpreted in light of the existing standards in European public order.").

[98] Council of Europe, *European Prison Rules (Recommendation No. R (87) 3 adopted by the Committee of Ministers of the Council of Europe on 12 February 1987 and Explanatory Memorandum)*, at 79-80 (1987).

[99] *Id.*, Rule 64, at 19.

[100] These two bodies were established by the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 1465 U.N.T.S. 85 [hereinafter Torture Convention], respectively.

Inhuman or Degrading Treatment or Punishment ("CPT") has inspected and reported on prisons and detention facilities in Council of Europe member states.[101] Although CPT reports do not perfectly overlap with Court and Commission decisions in their use of the terms "torture," "inhuman treatment or punishment," and "degrading treatment or punishment,"[102] the meticulous attention[103] that the CPT has devoted to conditions of confinement in scores of prisons has accelerated the development of common practices in prison administration throughout Europe.[104]

b. Distinguishing Torture from Inhuman Treatment or Punishment

"The special stigma of torture" attaches to egregious conduct and egregious effects on victims—"deliberate inhuman treatment causing very serious and cruel suffering."[105] Designed to elicit admissions or information from the victim, torture generally requires special "preparation and exertion" on the part of the torturers.[106] For example, the Court held that

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[101] *See generally* Malcolm D. Evans & Rod Morgan, *The CPT: An Introduction*, *in* PROTECTING PRISONERS, *supra* note 95, at 9-19.

[102] Morgan & Evans, *supra* note 95, at 34-40.

[103] Note, for example, the hefty report devoted to prison conditions in Denmark, CPT Denmark Report, CPT/Inf (97) 4 [EN] (Apr. 24, 1997), http://www.cpt.coe.int/en/reports/inf1997-04en.htm.

[104] *See* Jim Murdoch, *CPT Standards Within the Context of the Council of Europe*, *in* PROTECTING PRISONERS, *supra* note 95, at 103, 106-10 (describing the CPT as a quasi-legislative body that is pushing member states beyond the "internal reflection" promoted by the rules towards specific external standards). Although CPT reports are not binding on the human rights tribunals, they have been cited in cases as authority. *See* Peukert, *supra* note 96, at 91-92 (describing *Aerts v. Belgium*, 1998-V Eur. Ct. H.R. 1939, a 1998 case in which an inmate in a prison psychiatric wing successfully made an Article 3 claim to the European Commission based on a CPT report of substandard medical care but was reversed by the European Court).

[105] *Aksoy*, 1996-VI Eur. Ct. H.R. at ¶ 63 (quoting Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 66-67).

[106] *See id.* at ¶ 64. Similarly, the CPT "considers torture to be the premeditated (as opposed to casual or heat-of-the-moment), purposive infliction of severe pain, generally involving the use of specialized techniques or instruments, with a view to extracting information or confessions or the attainment of other specific ends." Morgan & Evans, *supra* note 95, at 36 (citing the CPT's first Bulgaria Report, which documented the police practices of beating the soles of the feet). This standard is narrower than the Torture Convention's definition:

Turkish authorities tortured a Kurdish activist when they tied his arms behind his back and suspended him from the ceiling by his arms, resulting in paralysis of the arms.[107] By contrast, British authorities merely engaged in "inhuman and degrading" conduct when they forced IRA prisoners to stand for hours spread-eagle against a wall with their weight on their fingers, hooded them, subjected them to loud and hissing noises, and deprived them of sleep, food, and drink.[108] Neither the penal "techniques" alleged in *Ireland v. United Kingdom* nor the suffering inflicted crossed the torture threshold.

While *Ireland* nonetheless involved punishment of a fairly high level of severity, inhuman and degrading treatment encompasses a broad range of conduct and injury. Nearly every

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> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him . . . or intimidiating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Torture Conv., *supra* note 100, at art. 1.

[107] *Aksoy*, 1996-VI Eur. Ct. H.R. at ¶¶ 14, 64. This practice is known as "Palestinian hanging." Turkish authorities also stripped the prisoner naked, blindfolded him, and administered electric shocks to his genitals while he was hanging. *See also* Yagiz v. Turkey, App. No. 19092/91, 75 Eur. Comm'n H.R. Dec. & Rep. 207 (1993) (admitting claim of torture where police inflicted crippling injuries with a truncheon on a suspect's feet and sexually assaulted her); Sargin and Yagci v. Turkey, App. Nos. 14116/88 & 14117/88, 61 Eur. Comm'n H.R. Dec. & Rep. 250, 272, 283-84 (1989) (admitting the application of political prisoners who through nineteen days of detention were questioned continuously by teams of interrogators while either blindfolded or with bright lights in their eyes, given tea laced with narcotics and injections, subjected to high pressure jets of cold water to their heads and testicles, suspended with arms tied behind backs from the ceiling, administered electric shocks, and threatened with being thrown out of a window). For discussion of additional cases of torture in Turkey, see Peukert, *supra* note 96, at 95-97. The adjudications of other international bodies enforcing treaties prohibiting torture provide additional factual situations. *Cf.* Tala v. Sweden, Committee Against Torture, Comm. No. 43/1996, U.N. Doc. CAT/C/17/D/43/1996 (1996), at ¶ 2.3 (Iranian opposition activist beaten and kicked and subjected to interrogations that involved, among other tortures, being forced to lie down on his stomach and having a hot metal object pressed against his thighs until he passed out); Mutombo v. Switzerland, Committee Against Torture, Comm. No. 13/1993, U.N. Doc. A/49/44 at 45, ¶ 2.2 (1994) (Zairian political activist subjected to electric shocks, beaten with a rifle, and his testicles were bruised until he lost consciousness); Khan v. Canada, Committee Against Torture, Comm. No. 15/1994, U.N. Doc. A/50/44 at 46, ¶ 3.3 (1995) (Pakistani activist given cuts on his back, with chemicals being applied to the cuts to intensify the pain).

[108] *Ireland*, 25 Eur. Ct. H.R. (ser. A) at 41, 66.

decision on the issue by the Court and Commission includes boilerplate language to the effect that such claims must meet a "minimum level of severity,"[109] but that minimum "depends on all circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim."[110] Claims of "inhuman" treatment or punishment need not involve severe injury, as long as the petitioner can prove that he or she suffered unnecessary pain while in custody. The standard for inhuman treatment or punishment seems linked to practices that lack a rational or proportional relationship to the basic security and disciplinary purposes of detention: "[I]n respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention."[111] This rule arises in part from the recognition that severe pain may be inflicted without leaving physical marks. Thus, slight bruising met the minimum level of severity where medical examinations noted its consistency with a Corsican detainee's allegations that French police working in shifts beat him continuously for forty hours.[112] Likewise, because of its severe psychological effects, "total social and sensory isolation" constitutes inhuman

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[109] Costello-Roberts v. United Kingdom, 247 Eur. Ct. H.R. (ser. A) at 59 (1993) ("Article 3, by expressly prohibiting 'inhuman' and 'degrading' punishment, implies that there is a distinction between such punishment and punishment more generally."). *See also* Vilvarajah and Others v. United Kingdom, 215 Eur. Ct. H.R. (ser. A) (1991) ("Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum, is, in the nature of things, relative; it depends on all the circumstances of the case."); Tyrer v. United Kingdom, 26 Eur. Ct. H.R. (ser. A) at 15 (1978).

[110] *Vilvarajah*, 215 Eur. Ct. H.R. at ¶ 162.

[111] Ribitsch v. Austria, 336 Eur. Ct. H.R. (ser. A) at 26 (1995).

[112] *See* Tomasi v. France, 241 Eur. Ct. H.R. (ser. A) (1992). *See also Ribitsch*, 336 Eur. Ct. H.R. (ser. A) at 26. *Ribitsch* ruled in favor of a suspected heroin dealer who claimed that he was taken into custody, "grossly insulted," threatened, punched and kicked, pulled to the ground by his hair, and had his head rammed into the floor. Aside from bruising, the injuries were mainly psychological and psychosomatic. *Id.* at ¶ 12. In another case, the Commission made a finding of inhuman treatment where Swiss authorities did not allow a suspected Colombian drug cartel trafficker to change out of his dirty and torn clothes for twenty-four hours and neglected to treat his broken rib for a week. The case was settled prior to a European Court ruling. *See* Hurtado v. Switzerland, 280 Eur. Ct. H.R. (ser. A), annex at 10, 13-16 (commission report).

treatment,[113] as does the threat of torture or impending death.[114] Additionally, a 1997 ruling that prohibited the United Kingdom from deporting a man who was dying of AIDS to a country with few health care resources suggests that extraditing an ill person to a country with inadequate prison hospitals may amount to inhuman treatment.[115] Similarly, the CPT has designated as "inhuman" environmental deprivations such as overcrowding, lack of proper sanitation, confinement to cells, lack of outdoor exercise, and isolation from the outside world.[116]

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[113] *See* R. v. Denmark, App. No. 10263/83, 41 Eur. Comm'n H.R. Dec. & Rep. 149, 153 (1985) ("Complete sensory isolation coupled with complete social isolation can no doubt ultimately destroy the personality, and may therefore, in certain circumstances, constitute a form of inhuman treatment which cannot be justified by the requirements of security, the prohibition of torture and inhuman treatment . . . being absolute."); X v. United Kingdom, App. No. 8158/78, 21 Eur. Comm'n H.R. Dec. & Rep. 95 (1980) (same). In each of these cases, the Commission found that prolonged solitary confinement did not violate Article 3 because it was justified by security, disciplinary or protective reasons and was a far cry from complete sensory or social isolation.

[114] *See Soering*, 161 Eur. Ct. H.R. (ser. A) at 44; Case of Campbell and Cosans, 48 Eur. Ct. H.R. (ser. A) at 12 (1982) ("[P]rovided it is sufficiently real and immediate, a mere threat of conduct prohibited by Article 3 may itself be in conflict with the provision. Thus, to threaten an individual with torture might in some circumstances constitute at least 'inhuman treatment'." [sic]).

[115] *See* D. v. United Kingdom, 1997-III Eur. Ct. H.R. 777, 791, 24 Eur. H.R. Rep. 423 (1997) (cited in Dutertre & Van der Velde, *supra* note 95, at 24-27).

[116] *See* CPT, *Report to the Government of Greece on the Visit to Greece Carried Out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 26 March 1993*, CPT/Inf (94) 20 [EN], at ¶ 76 (Nov. 29, 1994), *at* http://www.cpt.coe.int/en/reports/inf9420en.htm (describing as "inhuman" a detention center that held forty-six inmates despite its capacity of forty and provided "old and dirty" mattresses, unhygienic toilet facilities, limited outdoor exercise, and poor lighting and ventilation); CPT, *2nd General Report on the CPT's Activities Covering the Period 1 January to 31 December 1991*, CPT/Inf (92) 3 [EN], at ¶¶ 46-58 (Apr. 13, 1992), *at* http://www.cpt.coe.int/en/general/rep-2.htm#III.b. ("[T]he level of overcrowding in a prison, or in a particular part of it, might be such as to be in itself inhuman or degrading from a physical standpoint. . . . [P]risoners cannot simply be left to languish for weeks, possibly months, locked up in their cells, and this regardless of how good material conditions might be within the cells. . . . It is also very important for prisoners to maintain reasonably good contact with the outside world."); Morgan & Evans, *supra* note 95, at 38 ("[T]he combination of overcrowding, lack of integral sanitation, almost unalleviated cellular confinement, and/or lack of outdoor exercise have on several occasions been judged [by the CPT] to amount to inhuman and degrading treatment."); Council of Europe, *supra* note 98, Rules 14-32 (specifying standards for accommodations, hygiene, food, and medical care).

The Court and Commission have rejected claims where the alleged suffering arguably occurred incident to legitimate arrest procedures[117] or reasonable penal practice.[118] Likewise, cases have turned on the claimant's failure to prove that authorities actually inflicted the alleged injuries.[119] In one case, however, where it was impossible to tell whether the claimant was beaten by Bulgarian police or by his father, the Court found an Article 3 violation because authorities failed to investigate the claim thoroughly.[120]

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[117] *See, e.g.*, Klaas v. Germany, 269 Eur. Ct. H.R. (ser. A) at 17, 18 Eur. H.R. Rep. 305 (1993) (dismissing claim that police manhandled a woman being taken into custody for a blood alcohol test where the injuries were equally consistent with a police account that she resisted arrest and where national courts found against the claimant). In *Hurtado*, described *supra*, note 112, the Commission dismissed a claim alleging an Article 3 violation where Swiss police put a hood over a suspected drug trafficker's head while arresting him. *See also* X. v. United Kingdom, App. No. 8158/78, 21 Eur. Comm'n H.R. Dec. & Rep. 95, 98 (1980) (finding no violation for injuries sustained during arrest where 150 witnesses said that the use of force was reasonable to prevent his escape and where only bruising resulted).

[118] *See Treholt v. Norway*, App. No. 14610/89, 71 Eur. Comm'n H.R. Dec. & Rep. 168, 190 (1991). For example, the Commission held that a former civil servant serving twenty years in prison for espionage did not make an Article 3 claim of sufficient severity regarding his conditions of confinement. While detained before trial, Treholt was put under constant surveillance and held in a prison cell with little fresh air—but he was given a bicycle and treadmill for exercise and had three rooms for sleep, visitors, and storage. Later, he was placed in a ward with violent offenders, but such treatment was consistent with the practice of grouping prisoners by length of sentence. In addition, Treholt was allowed nearly daily visits and was permitted to attend French classes. *See also* Wakefield v. United Kingdom, App. No. 15817/89, 66 Eur. Comm'n H.R. Dec. & Rep. 251 (1990) (holding no Article 3 violation for the refusal to transfer prisoner convicted of murder and manslaughter from England to Scotland to be near his family); R. v. Denmark, App. No. 10263/83, 41 Eur. Comm'n H.R. Dec. & Rep. 149 (1985) (finding no Article 3 violation for preventively detaining man accused of drug and murder charges in solitary confinement for seventeen months before trial, where he was allowed limited visits and one hour of fresh air per day, and had a radio, television, and prison library privileges); X v. United Kingdom, 21 Eur. Comm'n H.R. Dec. & Rep. at 95 (finding no violation for placing IRA member in solitary confinement for more than two years where he had helped other prisoners build explosives, had access to books from the library, regular exercise, access to writing materials, and was allowed to go to chapel); Guzzardi Case, 39 Eur. Ct. H.R. (ser. A) at 40-41 (1980) (holding that it was not a violation to sentence convict to three years of "special supervision" on a Mediterranean island with limited employment opportunities rather than near his family in Northern Italy).

[119] *See, e.g.*, Diaz Ruano v. Spain, 285-B Eur. Ct. H.R. (ser. A), 19 Eur. H.R. Rep. 542 (1994), annex at 47 (commission report) (finding no violation where marks on the body of a Canary Islander killed in a gunfight with police during interrogation were arguably not caused by police).

[120] *See* Assenov v. Bulgaria, 1998 Eur. Ct. H.R., Rep. Judgments & Dec. at ¶ 106 (1998).

c. Degrading Treatment or Punishment

The victim of degrading treatment or punishment need not "suffer any severe or long-lasting effects."[121] A cognizable claim depends only on whether the victim suffers "humiliation or debasement" of some minimum degree in his own eyes or in the eyes of others.[122] Much of the case law concerns the corporal punishment of British school children. Sometimes the nature and circumstances of the punishment seem inherently degrading. For example, a judicial sentence of three strokes of a birch cane given by police to a teenage boy's "bare posterior" was degrading,[123] as was a single lash to the hand of a sixteen-year-old girl, when administered and witnessed by male school officials.[124] Otherwise, without medical certificates or other evidence of adverse psychological effects, a claim will fail.[125] Government or police measures that seem rationally related to

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[121] *Tyrer*, 26 Eur. Ct. H.R. (Ser. A) at 16-17. *Compare* Raninen v. Finland, 1998 Eur. Ct. H.R., 26 Eur. H.R. Rep. 563 (1998), at ¶ 55 ("[I]n considering whether a punishment or treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3.").

[122] *Campbell and Cosans*, 48 Eur. Ct. H.R. (ser. A) at 13 (1982). *See also Raninen*, 1998 Eur. Ct. H.R. at ¶ 55 ("[T]he public nature of the punishment or treatment may be a relevant factor. At the same time, it should be recalled, the absence of publicity will not necessarily prevent a given treatment from falling into that category: it may well suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others."). *See also* Morgan & Evans, *supra* note 95, at 39 (describing how the CPT labeled as "degrading" the practice of Swiss police to watch suspected drug mules defecate in a special toilet called "the throne").

[123] *See Tyrer*, 26 Eur. Ct. H.R. (ser. A) at 16 ("[H]is punishment—whereby he was treated as an object in the power of the authorities—constituted an assault on precisely that which it is one of the main purposes of Article three to protect, namely a person's dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects."). *Compare Costello-Roberts*, 247-C Eur. Ct. H.R. at 52 (holding that three "'whacks' on the bottom through [a seven-year-old boarding school student's] shorts with a rubber-soled gym shoe" lacked the minimum level of severity for a claim of degrading treatment).

[124] *See* Warwick v. United Kingdom, App. No. 9471/81, Eur. Comm'n H.R., Report of July 18, 1986 (unreported).

[125] *See Campbell and Cosans*, 48 Eur. Ct. H.R. (ser. A) at 13 (holding that two Scottish students who had not been subject to corporal punishment but merely feared its application could not prove requisite psychological injury to state an Article 3 claim).

a regulatory goal and are "not designed to, and did not, humiliate or debase" do not give rise to claims of degrading treatment.[126]

2. Real Risk

Before blocking an extradition, the European Court and Commission must determine not only whether the requesting country is actually violating Article 3, but also whether the individual claimant actually risks being victimized.[127] In practice, proof of risk closely tracks proof of the substantive Article 3 violation. The less convincing the evidence is that an alleged practice violates Article 3, the harder European tribunals police the risk requirement.[128] For example, the

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[126] Case of Abdulaziz, Cabales and Balkandali v. United Kingdom, 94 Eur. Ct. H.R. (ser. A) at 40, 42 (1985) (denying claim by legal United Kingdom residents whose husbands were denied entry because of laws purporting to control immigration and protect the domestic labor market). *See also Raninen*, 1998 Eur. Ct. H.R. at ¶ 58 (holding that the public handcuffing of a conscientious objector arrested and escorted to a military hospital was not degrading where the arresting officer acted within orders that showed no purpose to humiliate, even though the arrest was illegal); López Ostra v. Spain, 303-C Eur. Ct. H.R. (ser. A) (1994) (denying claim by neighbors of a foul smelling tannery waste treatment plain built with a state subsidy twelve meters from their homes); Case of Albert and LeCompte, 58 Eur. Ct. H.R. (ser. A) at 13 (1983) (denying claims by two doctors that being suspended from practice by disciplinary authorities was degrading); Marckx Case, 31 Eur. Ct. H.R. (ser. A) (1979) (denying challenge to a Belgian law that does not automatically give biological parents rights over their illegitimate children).

[127] *See Soering*, 161 Eur. Ct. H.R. (ser. A) at 35-36. *See also* GILBERT, *supra* note 86, at 158-59, 164-65. *Cf.* Torture Convention, *supra* note 100, at art. 3 § 1 ("No State Party shall expel, return . . . or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."). Note that unlike the European case law, the Torture Convention does not prohibit extradition in situations involving inhuman or degrading treatment.

[128] *See also* Djeroud v. France, 191 Eur. Ct. H.R. (ser. A) at 25 (1991) (reporting a friendly settlement after the Commission found no real risk of ill treatment for an Algerian deportee where he had provided only vague proof of two alleged occasions of prior ill treatment by Algerian authorities); Y.H. v. Federal Republic of Germany, App. No. 12461/86, 51 Eur. Comm'n H.R. Dec. & Rep. 258, 264 (1986) ("[T]he application is . . . manifestly ill-founded . . . [because] the applicant has provided no evidence for her allegation that, while being a Lebanese citizen, she would be persecuted as the spouse of a Palestinian currently residing in Berlin, throughout the entire Lebanon, or in a Palestinian camp established in the country in which she would have to reside."); Lynas v. Switzerland, App. No. 7317/75, 6 Eur. Comm'n H.R. Dec. & Rep. 141, 165 (1976) (denying challenge by American in Swiss custody facing extradition to the United States on cocaine charges where he did not adequately prove that by extraditing him to the United States, Swiss authorities did in fact expose him

Soering case involved someone who had a reasonable chance of avoiding the death penalty. The United Kingdom argued that Jens Soering might win a verdict of not guilty by reason of insanity, and if convicted, his age, mental state, and lack of a criminal record might lower the sentence.[129] Yet those mitigating circumstances factored little in the calculus of "real risk" once the Court accepted that the lengthy average stay on Virginia's harsh death row was in fact an Article 3 violation.

In a subsequent case, however, the Commission denied an extradition challenge by three people indicted in the United States District Court for the Southern District of Indiana on charges of large-scale marijuana distribution and continuing criminal enterprise. The claimants faced life sentences without the possibility of parole, sentences that they alleged constituted inhuman punishment. The Commission ruled that "it is not established that the first applicant, if extradited, would actually risk imprisonment for life without any hope of release. Even if convicted, he might get a lesser sentence, and, even if he should receive a life sentence, he might be released before having completed his sentence."[130] A substantive judgment on whether a sentence of life in prison in itself violated Article 3 seemed built into the "real risk" analysis: "The possibility under the law of the United States . . . of release of persons found to be physically or mentally unable to serve a penalty shows concern to prevent treatment incompatible with Article 3 of the Convention."[131] Without specific proof of inhuman conditions of confinement, a claimant facing a long prison sentence in the United States will not be able to establish that he risks being the victim of torture or inhuman or degrading treatment or punishment.

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to CIA reprisals); M. v. France, App. No. 10078/82, 41 Eur. Comm'n H.R. Dec. & Rep. 103, 120 (1984) (denying claim by Romanian computer science lecturer in France convicted of being a foreign intelligence agent and ordered expelled where he had visited Romania several times without incident and where the effect of his staying in France after completing his studies and his efforts to renounce citizenship were merely speculative).

[129] Virginia also promised the United Kingdom that prosecutors would tell the judge that the extraditing country was against the imposition of the death penalty. *See Soering*, 161 Eur. Ct. H.R. (ser. A) at 13.

[130] B., H. and L. v. Austria, App. No. 15776/89, 64 Eur. Comm'n H.R. Dec. & Rep. 264, 270 (1989).

[131] *Id.*

Although petitioners sometimes present evidence of prior episodes of ill treatment in requesting countries, such personal narratives are not essential to establishing real risk of victimization.[132] "[T]he very nature of the regime . . . or . . . a particular situation in [the requesting] country" may be sufficient to prove the existence of Article 3 violations.[133] As a result, the European Court and Commission have often determined real risk on the basis of national and international

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[132] In the absence of strong corroborating evidence, the Commission and Court have discounted petitioners' testimony about abuse. *See, e.g.*, Cruz Varas v. Sweden, 201 Eur. Ct. H.R. (ser. A) (1991) (finding denial of asylum acceptable for Chilean whose claims of torture were consistent with medical evidence but who had no direct evidence and did not mention these claims in initial interviews with Swedish police); Kozlov v. Finland, App. No. 16832/90, 69 Eur. Comm'n H.R. Dec. & Rep. 321, 330-31 (1991) (allowing extradition of man who hijacked a Soviet plane to Finland after he refused to serve in the army based on conscientious objection and then claimed he was hospitalized, forcibly injected with sulphuric substances, and declared mentally ill, based on improving human rights situation, leniency of sentences for other hijackers, and no evidence of likelihood of Article 3 violation).

[133] K. and F. v. Netherlands, App. No. 12543/86, 51 Eur. Comm'n H.R. Dec. & Rep. 272, 276 (1986). At the same time, the Court and Commission have consistently held in expulsion cases that a general situation of violence in a country did not establish that the petitioner would face a real risk of being the victim of Article 3 violations. *See Vilvarajah*, 215 Eur. Ct. H.R. at ¶ 111 (denying claim that applicants would face abuse if deported to Sri Lanka where their problems were not appreciably different from those of all young male Tamils); *H.L.R.*, 1997-III Eur. Ct. H.R. at ¶¶ 41-42 (holding that a drug informant faced no real risk of retaliation from narco-traffickers upon deportation to Colombia despite the general situation of violence there). Challenges to deportations have been successful where petitioners have shown they would be singled out for ill treatment. *See, e.g.*, *Chahal*, 70 Eur. Ct. H.R. at ¶¶ 93, 106 (Sikh activist prominently identified in Indian newspapers had shown real risk of ill treatment upon expulsion to India). By contrast, extradition cases may cross the risk threshold because of general situations in prisons. Jens Soering faced the same inhuman conditions as ever other death row prisoner in Virginia; it was enough for the European Court that he was targeted for prosecution. *Cf.* Torture Convention, *supra* note 100, at art. 3, § 2 ("For the purpose of determining whether there are [substantial grounds for believing a person would be subjected to torture in a requesting state], the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."); *Tala*, *supra* note 107, at ¶ 10.1 ("[T]he Committee must take into account . . . the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of the determination, however is to establish whether the individual concerned would be *personally* at risk of being subjected to torture in the country to which he or she would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his return to that country . . . .").

court decisions[134] and general reports by government agencies and nongovernmental organizations.[135] Most notably, in *Chahal v. United Kingdom*, the Court disallowed the deportation to India of a prominent Sikh separatist, paying special attention to evidence of widespread police misconduct in Punjab, as reported by Amnesty International, the United Kingdom High Commission in New Delhi, the United States Department of State, the Indian National Human Rights Commission, and the United Nations Special Rapporteur on Torture.[136] Such evidence effectively established a presumption that Chahal risked ill treatment in India. Neither the Indian government's assurances that it would not violate Chahal's human rights[137] nor reports that the human rights situation in India had substantially improved since the initiation of expulsion proceedings could overcome this presumption because India had not implemented structural reforms suggested in earlier reports.[138] Interestingly, the types of evidence that proved

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[134] *Ahmed*, 71 Eur. Ct. H.R. (1995) at ¶¶ 42-44 (disallowing an expulsion order for Somalian refugee convicted of crimes in Austria and "attach[ing] particular weight" to the fact that Austria had previously granted him asylum). *See also Chahal*, 70 Eur. Ct. H.R. (1995) at ¶ 99 (accepting Amnesty International's allegations of extrajudicial killings by Indian police in part because a United Kingdom Immigration Appeal Tribunal accepted similar assertions in an unrelated case).

[135] *See, e.g., Altun*, 36 Eur. Comm'n H.R. Dec. & Rep., at 232, 234 (1983) (admitting an extradition challenge by a Turkish national who was active in politics, given the undisputed fact that torture occurs in Turkey and that once extradited, the national would lose his right of individual petition). Adjudications under the Torture Convention have used similar evidence. *See, e.g., Tala, supra* note 107, at ¶ 11.5 ("The Committee regretfully notes . . . that the practice of torture is still systematic in Turkey, as attested to in [a Committee report to the U.N. General Assembly]."), Mutombo v. Switzerland, Committee Against Torture, Comm. No. 13/1993, U.N. Doc. A/49/44 at 45 (1994), at ¶¶ 3.2, 9.4-9.5 (blocking petitioner's deportation to Zaire given his personal history of abuse, generally corroborating reports by Amnesty International, and reports by the United Nations Secretary General, Special Rapporteur on the question of torture, and the Working Group on Enforced or Involuntary Disappearances). *See also* Kisoki v. Sweden, Committee Against Torture, Comm. No. 41/1996 (1996) (same).

[136] *Chahal*, 70 Eur. Ct. H.R. (1995) at ¶¶ 99, 102-05.

[137] *Cf.* X. v. Switzerland, App. No. 9012/80, 24 Eur. Comm'n H.R. Dec. & Rep. 205, 219 (1980) (finding no violation where Switzerland extradited an Indian national wanted for fraud in Dubai, which accepted thirteen conditions to the effect that it would honor Convention standards and had actually treated the petitioner well).

[138] *Chahal*, 70 Eur. Ct. H.R. (1995) at ¶¶ 103-05 ("Although the Court does not doubt the good faith of the Indian Government in providing the assurances mentioned above, it would appear that, despite the efforts of the Government, the NHRC and the Indian courts to bring about reform, the violation of human rights by certain members

crucial in *Chahal* exist in abundance on the topic of prison conditions in the United States. If *Chahal* is any guidepost, reports of persistent and recalcitrant problems in specific U.S. prisons, coupled with a lack of judicial remedy, may go a long way to establishing a prima facie case of Article 3 violation. These issues are the subject of the next section.

B. *Prison Conditions in the United States*

In October 1999, the United States submitted a report to the United Nations Committee Against Torture detailing its compliance with the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The report stated that "overall, the country's law enforcement agencies and correctional institutions set and maintain high standards of conduct for their officers and treatment for persons in their custody."[139] According to the government, such high standards are partly the result of "strong policy guidance and enforcement from the federal government, independent promotional and investigative activities by knowledgeable non-governmental groups and organizations, and the availability of effective administrative and judicial remedies for those who believe they have been the victims of abuse or excess."[140] Although this self-assessment may be optimistic and retributive corrections policy in the United States is often fundamentally at odds with rehabilitation-oriented European systems,[141] European human rights case law stands in general

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of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem.").

[139] U.S. Dep't of State, *Initial Report of the United States of America to the U.N. Committee Against Torture* (Oct. 15, 1999), *at* http://www.state.gov/www/global/-human_rights/-torture_geninfo.html.

[140] *Id.*

[141] *See, e.g.*, Orientation Committee of the Human Rights Center, *Human Rights in Prison: The Professional Training of Prison Officials: Proceedings*, at 58 (1995) (remarks of Vivien Stern)

> I saw in San Quentin Prison, in California, the adjustment Centre. The worst prisoners in that prison are kept there. . . . The prisoners live in cells with barred doors like cages. They are never allowed out of the cells unless they are handcuffed with their hands behind their backs. They exercise in small yards covered with wire netting and have few other activities except reading law books.

agreement with the U.S. government's view of conditions in American prisons. As described above, the European Commission on Human Rights has refused to stand in the way of extraditions to the United States merely because a relator might face a lengthy prison term,[142] presupposing that the United States is in compliance with norms concerning the treatment of prisoners.

Something more—specific evidence of specific practices at specific prisons—is required for a successful claim. For example, in *Soering*, because the majority of death row inmates in Virginia were detained at the Mecklenburg Correctional Center,[143] the European Court could develop a focused picture of life on death row based on state regulations and a federal consent decree governing conditions there. Its decision was based partly on abstract notions about the "ever-present and mounting anguish of awaiting execution" and partly on the "extreme conditions" on death row[144]—that is, undisputed evidence about cell size, 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

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> In contrast, in Scotland, in a high-security prison called Shotts, there is a special high security building, surrounded by a garden. The building consists of small rooms arranged around a living area where activities take place, such as cooking education, discussions and group meetings. The unit is for some of Scotland's most dangerous prisoners.

Id. 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., at ¶ 30 (1999) [hereinafter *Special Rapporteur on Violence Against Women*] ("[T]he Special Rapporteur found that the recent trend in prison management highlights the punishment aspect of imprisonment. 'Done the Crime, Do the Time' was a slogan repeated to the Special Rapporteur numerous times."); *id.* at ¶ 83 ("The Special Rapporteur is concerned that the attitude of the California correctional authorities seems largely to be that reflected in the 1977 revision to section 3000 of the California Penal Code which expressly changed the objective of prisons from 'rehabilitation and punishment' to 'punishment' only."). *Cf.* Roberta M. Harding, *In the Belly of the Beast: A Comparison of the Evolution and Status of Prisoners' Rights in the United States and Europe*, 27 GA. J. INT'L & COMP. L. 1, 46, 48-49 (1998) (noting that European human rights bodies have maintained a commitment to expanding prisoners' rights while the United States judiciary has curtailed them).

[142] *See supra* notes 130-31 and accompanying text.

[143] *See Soering*, 161 Eur. Ct. H.R. at 26.

[144] *Id.* at 44-45.

ventilated."[145] In order to be successful outside the death row context, a claimant would have to paint a similarly precise picture of objectively "extreme conditions."

The United States report to the Committee Against Torture raised several areas of concern regarding conditions in American prisons and juvenile facilities, including overcrowding, deteriorating physical infrastructure, inadequate medical care, racism and sexual abuse, sensory deprivation at "supermax" security units, and the inappropriate use of tear gas, pepper spray, stun guns and stun belts, guard dogs, cuffs and shackles.[146] Although the report explained the problem areas as "aberrational situations" in a general policy of compliance with international norms,[147] they provide a starting point for issues likely to be raised in an extradition challenge. The sections that follow will survey problem areas in American prison administration that may make for some of the strongest claims that an extradition relator would face a "real risk" of being the victim of Article 3 violations. The first sections will consider general problems that may apply to numerous claims, as well as general defenses that work strongly in the United States's favor. Abuse of women prisoners will receive more specific attention, as will the mistreatment of juveniles and sensory deprivation in "supermax" security units. One of the reasons the U.S. report identified these problem areas is the scrutiny given them by scholarly commentary and reports by governmental and non-governmental organizations.[148] Rather than retreading the

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[145] *Id. at* 26-28. The court declined to consider evidence about risk of rape and physical assault at Mecklenburg, which was presented by Soering and "strongly contested" by the United Kingdom and the Virginia Department of Corrections. *Id.* at 27.

[146] U.S. Dep't of State, *supra* note 139.

[147] *Id.* ("Torture does not occur in the United States except in aberrational situations and never as a matter of policy. When it does, it constitutes a serious criminal offense, subjecting the perpetrators to prosecution and entitling the victims to various remedies, including rehabilitation and compensation."); Harold Hongju Koh, U.S. Dep't of State, *On-the-Record Briefing* (Oct. 15, 1999), *at* http://www.state.gov/-www/policy_remarks/1999/991015_koh_rpt_torture.html ("We've erred on the side of completeness.").

[148] *See, e.g.*, Amnesty International, *Violations in Prisons and Jails: Needless Brutality*, *in* RIGHTS FOR ALL (1998), *available at* http://www.rightsforall-usa.org/info/report/r04.htm (focusing on overcrowding, privatization of prisons, physical brutality by guards, sexual abuse, supermaximum security units, inadequate

ground covered by these studies, the discussion that follows will assess the strength of the available evidence in light of European human rights case law and the United States's strongest defenses.

1. General Claims

In 1984, a Canadian national named Michael Lucian Gwynne was sentenced to sixty years in Alabama prison for two counts of attempted extortion. After nine years in custody, he escaped to Canada. When the United States sought his extradition, he attempted to stay the proceedings on the ground that conditions in Alabama prisons violated the Canadian Charter of Rights and Freedoms.[149] Even though the British Columbia Court of Appeal held in 1998 that the conditions in Alabama prisons did not sufficiently "shock the conscience" to justify ruling in Gwynne's favor, his allegations exemplify the kind of challenge that may work in the European Court of Human Rights. In an affidavit to the British Columbia Court of Appeal, Gwynne described living double-bunked in small cells "infested with cockroaches, spiders, snakes, rats, and mice."[150] Brutal beatings by guards and stabbings and rape among inmates were weekly occurrences.[151] Prisoners were malnourished.[152] When Gwynne had dental problems, he was denied medical care; at various points during his incarceration, he had to remove stitches with a razor blade and pull one of his own teeth.[153]

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healthcare, juvenile corrections, and the improper use of restraints, stun devices, pepper spray, and teargas).

[149] *See* Gwynne v. Canada [1998] 50 Canadian Rights Reporter [C.R.R.2d] 250 (B.C.C.A.) (Can.).

[150] *Id.* at app. A ¶¶ 7, 8 ("On my first night in Holman [Prison] I was lying in bed and I felt something crawling over me. They were cockroaches. This became a daily thing for the next nine years. You wake up in the middle of the night, cockroaches crawling down your neck, on your arms, under your bedclothes.").

[151] *Id.* at ¶¶ 11, 39 ("You're not safe in your own cell when the guards will open the door to let people in to stab you or beat you."); *id.* at ¶ 43 ("We had stabbings every week, if not more often.").

[152] *Id.* at ¶¶ 13-14, 38 (describing boxes of food for prisoners marked "not for human consumption").

[153] *Id.* at ¶¶ 34-35. *Cf.* Council of Europe, *supra* note 98, Rule 26.3, at 11 ("The services of a qualified dental officer shall be available to every prisoner.").

Nearly every prison system in the United States is overcrowded and underfunded.[154] Government and non-governmental observers have described squalid conditions of confinement, including problems with sewage, bug infestation, and lack of ventilation.[155] Increased physical attacks, sexual assaults, and suicide among prisoners have resulted from the stresses incident to double- and triple-bunking inmates in already cramped cells, as well as from the inability of overwhelmed guards to protect vulnerable prisoners.[156] Guards have increasingly relied on electric stun devices to control prisoners.[157] Poor diets and the lack of adequate medical and mental health care are also common consequences of underfunded systems.[158] Such treatment is, by European Court

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[154] According to the Bureau of Justice Statistics, by year end 1998, state prisons were operating at between thirteen and twenty-two percent over-capacity, while federal prisons were twenty-seven percent above capacity. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Prison Statistics, at* http://www.ojp.usdoj.gov/bjs/prisons.htm (last revised Apr. 20, 2000); U.S. Dep't of State, *supra* note 139, *at* http://www.state.gov/www/global/human_rights/-torture_articles.html ("Although a significant percentage of the nation's correctional facilities are relatively new, many are not, and in recent years virtually all have been subject to the pressures of overcrowding and the lack of adequate funding. As a result, the conditions in the nation's prisons have continued to be a matter of concern.").

[155] *See, e.g.*, Amnesty International, *supra* note 148; Bill Lann Lee, U.S. Dep't of Justice, *Letter to James Geringer, Governor of Wyoming, part f, at* http://www.usdoj.gov/crt/split/documents/wyofind.htm (last visited Apr. 19, 2002). ("[D]uring out tour, we observed several bags of flour that had been torn open by rodents as rodent prints were evident in the spilled flour. . . . The absence of vacuum breakers at a number of critical locations in [Wyoming State Penitentiary's] plumbing system jeopardizes the entire potable water supply. . . . Inmate workers in the coal ash operation were not wearing adequate respiratory protection equipment. We observed an inmate worker covered with coal ash from head to toe, including around his nose and mouth.").

[156] Amnesty International, *supra* note 148; Mike Davis, *The Politics of Super Incarceration, in* CRIMINAL INJUSTICE: CONFRONTING THE PRISON CRISIS 73, 73-74 (Elihu Rosenblatt ed., 1996); Jessica Saunders, *Corrections Tries Triple Bunk Beds*, MONTGOMERY ADVERTISER, Dec. 5, 1995, at 3B; Mike Cason, *Corrections Officers Fearful After Cutbacks*, MONTGOMERY ADVERTISER, Jan. 27, 1996, at 3F.

[157] Amnesty International, *Cruelty in Control?: The Stun Belt and Other Electro-Shock Equipment in Law Enforcement*, AMR 51/54/99 (June 8, 1999), *at* http://www.amnesty.org/ai.nsf/index/AMR510541999 (noting that twenty states authorize the use of stun belts, and more than 1000 belts are in circulation in more than 100 jurisdictions, used in court, when transporting prisoners, and in prisons); Shelley A. Nieto Dahlberg, *The React Security Belt: Stunning Prisoners and Human Rights Groups Into Questioning Whether Its Use Is Permissible Under the United States and Texas Constitutions*, 30 ST. MARY'S L.J. 239 (1998) (describing practices in Texas).

[158] *See, e.g.*, Amnesty International, *supra* note 148; Lee, *supra* note 155 (describing "inadequate" medical care, "considerable difficulty administering

standards, arguably inhuman and certainly falls well below the Council of Europe's standard minimum rules for the treatment of prisoners.[159]

Additionally, the United States report to the Committee Against Torture noted the concerns of "[s]ome prisoners' rights advocates" that the Prison Litigation Reform Act ("PLRA") has undermined inmates' abilities to seek judicial redress for abuses of their rights.[160] Such concerns about flawed mechanisms for enforcing and remedying rights violations may well prove important because challenges to extradition will hinge on the persistence and recalcitrance of inhuman conditions of confinement. As prison officials aggressively move to lift consent decrees, even amid charges of continuing abuse,[161] relators in extradition proceedings can argue compellingly that they would face Article 3 violations without hope of remedy in United States courts.

2. Government Responses

A fugitive alleging poor prison conditions in a particular state may succeed if supported by a large quantity of facility-

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prescribed medications," and "critically deficient" mental health care at the Wyoming State Penitentiary).

[159] *See supra* notes 111-16 and accompanying text.

[160] U.S. Dep't of State, *supra* note 139 ("Congress passed this law to establish more restrictive standards for the entry and continuation of prospective injunctive relief regarding conditions of confinement in prisons, jails, and juvenile facilities. This law was a response to the large number of frivolous or harassing prisoner suits which have . . . grown to become the single largest category of federal civil rights cases, constituting approximately 17% of the federal district court civil docket and 22% of federal civil appeals. The new law requires that, before an inmate can file a civil rights action in Federal court, he or she must (i) exhaust all available administrative remedies, and (ii) show physical injury to receive damages for mental or emotional injury suffered while in custody. In addition, the law generally prohibits an inmate from filing a petition in forma pauperis (as an indigent without liability for court fees and costs) if the inmate has filed three or more actions in federal court that were dismissed as frivolous or malicious or for failing to state a claim upon which relief could be granted."). *See also* Brief for Amicus Curiae Law Professors, Harris v. Garner, 190 F.3d 1279, *vacated for rehearing en banc*, 197 F.3d 1059 (11th Cir. 1999), *available at* http://diana.law.yale.edu/diana/db/110998-2.html (arguing that the PLRA violates the Torture Convention); *Special Rapporteur on Violence Against Women*, *supra* note 141, ¶ 33 (noting concerns that the PLRA cuts off access to federal courts, "the primary recourse pursued by prisoners").

[161] *See* John Sullivan, *States and Cities Removing Prisons from Courts' Grip*, N.Y. TIMES, Jan. 30, 2000, at 1.

specific evidence, but such a defense is nevertheless difficult to win. The European Court and Commission depend on Council of Europe member nations to stay extradition proceedings voluntarily while the human rights tribunals consider an application.[162] These nations are less likely to comply voluntarily with stays of extradition if it is too easy to make an Article 3 claim and the risk of turning Europe into a safe haven for American criminals becomes sufficiently compelling.[163] As a point of comparison, such concerns of legitimacy in the face of serious "safe haven" risks were, at least until the recent decision of *United States v. Burns*,[164] at the core of Canadian extradition jurisprudence, which is extremely deferential to decisions made by executive branch authorities and has shown far greater reluctance to block extraditions on human rights grounds than the European Court or Commission.[165] Although

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[162] *See* GILBERT, *supra* note 86, at 152 ("It ought to be noted that Rule 36 of the [European Convention Rules of Procedure] only allows the Commission to indicate to the requested State that it wishes a stay in the domestic proceedings, it cannot compel such an action. However, most States comply with the request, and thus the extradition is delayed until the Commission considers the application.") (citations omitted).

[163] *Cf. Soering*, 161 Eur. Ct. H.R. (ser. A) at 35.

[164] 1 S.C.R. 283, ¶ 65 (Can.) ("[I]n the absence of exceptional circumstances, . . . assurances in death penalty cases are always constitutionally required.").

[165] Canadian courts will only block extraditions on human rights grounds where conduct in the requesting state "sufficiently shocks the conscience" and would be "fundamentally unacceptable to our society." This standard has proved to be extremely difficult to meet. *See, e.g.*, R. v. Schmidt, [1987] 1 S.C.R. 500 (Can.) ("[I]n most cases, at least, judicial intervention should await the exercise of executive discretion. For the decision to surrender is that of the executive authorities, not the courts, and it should not be lightly assumed that they will overlook their duty to obey constitutional norms by surrendering an individual to a foreign country under circumstances where doing so would be fundamentally unjust."); Kindler v. Canada (Minister of Justice), [1991] 2 S.C.R. 779 (Can.) (finding no violation of Canadian Charter of Rights where minister allowed extradition to United States of fugitive facing capital punishment without seeking assurances that the death penalty would not be imposed); United States v. Jamieson [1996] 1 S.C.R. 465 (Can.) (holding that mandatory minimum drug sentences in the United States did not shock the conscience); Gwynne v. Canada, [1998] 50 C.R.R.2d 250 (B.C.C.A.) (Can.); Mexico v. Hurley, [1997] 116 C.C.C.3d 414 (Ont. C.A.) (Can.) (accepting reports by Amnesty International and other groups that there are continuing human rights abuses in Mexico against gays involving police and military but nevertheless allowing the extradition of a gay man accused of murdering his lover in Mexico because of assurances by the Mexican government that the relator would not be mistreated and that Canadian officials would be allowed to visit him in prison); Zolfiqar v. Minister of Citizenship & Immigration [1999] No. IMM-5694-98, 1999 Fed. Ct. Trial Lexis 211, at *5 (Fed. Ct. Trial. Div.) (Can.) (finding no substantial grounds for believing that deportee member of persecuted Afghan minority would be in danger

the European human rights tribunals have responsibilities to apply international human rights norms that differ greatly from the mandate of Canadian courts,[166] the European Court and Commission may interpret strictly the Article 3 requirements of minimum severity and real risk rather than test the limits of their institutional competence.

Prison conditions challenges not involving death row scenarios will undoubtedly hinge on disputed points of fact, which the *Soering* Court showed great reluctance to consider.[167] Establishing minimum severity and real risk would become difficult in the face of arguments that no systematic abuse exists, reported incidents of abuse were aberrations affecting only a small fraction of prisoners, conditions have improved, the Department of Justice has effectively policed prison conditions, the vast majority of prisoner litigation is frivolous, and inmates continue to have unrestricted access to state

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of being subjected to torture in Afghanistan); Suresh v. Canada, [1999] 65 C.R.R.2d 344 (Fed. Ct. Trial Div.) (Can.) (finding that Tamil activist facing deportation to Sri Lanka had not established the substantial grounds for believing he would be tortured there); Singh v. Minister of Citizenship and Immigration, [1997] No. IMM-5294-97, 1997 Fed. Ct. Trial Lexis 1465, ¶ 7 (Fed. Ct. Trial Div.) (Can.) (requiring Sikh detainee facing deportation to India to show "demonstrable probability" of police brutality upon return to India) ("Sometimes police agents, in a high emotion of self-righteous God-playing wrath, harm prisoners, even in Canada, which is not facing concerted organized terrorism. The State which employs those police officers ought ruthlessly to stamp out police brutality, but it happens, even in peaceful societies. No country's deportation laws or extradition laws could ever operate if such a deplorable but everyday risk stopped their enforcement."). *See also* ANNE WARNER LA FOREST, LA FOREST'S EXTRADITION TO AND FROM CANADA 199-212 (3d ed. 1991). The only reported case of a Canadian court's refusal to extradite someone wanted in the United States involved an extradition for telemarketing fraud, in which an American prosecutor went on Canadian television and demanded that a group of conspirators waive all challenges to extradition, saying, "You're going to be the boyfriend of a very bad man if you wait out your extradition." United States v. Cobb, [1997] Weekly Criminal Bulletin and Judgments [W.C.B.J.] LEXIS 14080, at **39-40 (Ont. Ct. Gen. Div.) (Can.). For a thorough examination of Canadian extradition and human rights, see Paul Michell, *Domestic Rights and International Responsibilities: Extradition Under the Canadian Charter*, 23 YALE J. INT'L L. 141 (1998).

[166] *See* Anne Mori Kobayashi, Note, *International and Domestic Approaches to Constitutional Protections of Individual Rights: Reconciling the Soering and Kindler Decisions*, 34 AM. CRIM. L. REV. 225 (1996). *See also The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation*, 114 HARV. L. REV. 2049 (May 2001).

[167] *See Soering*, 161 Eur. Ct. H.R. (ser. A) at 42-43 (considering only uncontested facts and disregarding evidence of widespread sexual assaults and other violence on death row).

courts and can fully seek injunctive relief in federal courts. Where such arguments are made, *Soering* may be less the rule than *Kozlov v. Finland*, a 1991 Commission ruling that allowed the extradition of a man who hijacked a Soviet plane to Finland.[168] The Commission ignored the relator's claim that he had been declared mentally ill and forcibly injected with sulfuric substances as punishment for refusing military service, basing its decision instead on evidence that the human rights situation was improving and that sentences for other hijackers had been lenient.[169]

Where a decision in a relator's favor would encourage fugitives to come to Europe, a successful claim becomes much harder to make. Yet such claims are far from impossible, and it may even be strategically advantageous for relators to bring cases that would likely go against them. Before considering how the European Court might decide the difficult issues inherent in some likely extradition scenarios and how its decisions might affect U.S. policy, it is worth examining a series of more specialized claims that would affect fewer prisoners and are supported by a large amount of undisputed evidence. Cases involving women's prisons, juvenile facilities, and supermax prisons would seriously implicate neither European security interests nor the legitimacy of the regional human rights tribunals, yet decisions blocking their extraditions would still be embarrassing and invasive for the United States.

3. Claims by Women Prisoners

Women facing extradition to the United States have compelling claims that they would face sexual abuse, inadequate medical care, and the inappropriate use of shackles in certain American prisons. The types of evidence supporting such claims—court decisions and reports by the U.S. government, the U.N. Special Rapporteur on Violence Against Women, and Amnesty International and Human Rights Watch—have historically carried a large amount of persuasive

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[168] Kozlov v. Finland, App. No. 16832/90 69 Eur. Comm'n H.R. Dec. & Rep. 321 (1991).

[169] *Id.* at 330-31.

authority with the European Court and Commission,[170] effectively putting a burden on the United States to show that abusive conditions have abated.[171] Because of the relatively discrete number of women's prisons,[172] relators in extradition proceedings can predict with reasonable certainty the kinds of conditions that await them in the United States, bolstering their chances of establishing the "real risk" element of an Article 3 defense.[173]

Numerous reports produced in recent years by governmental and non-governmental entities have detailed the mistreatment of women prisoners, and between 1997 and 1999, the Department of Justice investigated, litigated, and settled high-profile cases involving women's prisons in Michigan and Arizona.[174] Individual and class actions by prisoners have

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[170] *See, e.g., Chahal*, 70 Eur. Ct. H.R. (1995) at ¶¶ 99, 102-05; *Aksoy*, 1996-VI Eur. Ct. H.R. at ¶ 80.

[171] *See supra* notes 134-38.

[172] Women comprise approximately 6.5 % of the prison population in the United States. The 84,427 women in prison at year-end 1998 marked a 92 % increase from the number of female prisoners in 1990. *See* Allen J. Beck & Christopher J. Mumola, Bureau of Justice Statistics, *Prisoners in 1998* (Aug. 1999), http://www.ojp.usdoj.gov/bjs/abstract/p98.htm. Twenty-one states and New York City keep all women inmates in one single-sex prison, and nineteen—including California, Michigan, Texas, and Virginia—maintain between two and six women's prisons. *See* National Institute of Corrections, *Current Issues in the Operation of Women's Prisons*, *in* SPECIAL ISSUES IN CORRECTIONS 2, 8-11 (Sept. 1998), *available at*, http://www.nicic.org/pubs/1998/014784.pdf. Hawaii, Illinois, New Hampshire and Oregon house women prisoners in same-sex and co-correctional facilities, and Alaska, Kansas, Maine, North Dakota, Vermont, and West Virginia house them in co-correctional facilities only. *See id.*

[173] *Cf. Soering*, 161 Eur. Ct. H.R. at 42.

[174] *See, e.g.*, United States v. Arizona, No. 97-476-PHX-ROS, Settlement Agreement (Mar. 1999), 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); United States v. Michigan, No. 97-CVB-71514-BDT, Settlement Agreement (May 25, 1999), http://www.usdoj.gov/crt/split-/documents/michigansa.htm (same); United States v. Michigan, No. 97-CVB-71514-BDT, Complaint (Mar. 10, 1997), http://www.usdoj.gov/crt/split/documents/mich-comp.htm (alleging widespread sexual misconduct at Crane Correctional Facility and Scott Correctional Facility); Deval L. Patrick, U.S. Dep't of Justice, *Letter to J. Fife Symington, Governor of Arizona*, http://www.usdoj.gov/crt/split/documents/azwo-find.htm (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 viewing of female inmates showering and using toilet facilities."). *See also Special Rapporteur on Violence Against Women*, *supra* note 141; Cheryl Bell et al., *Rape and Sexual*

brought additional facts to light.[175] From these disparate strands of evidence, pictures of widespread abuse in several states have come into focus.[176] For example, prison conditions in Michigan have received enormous 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 dressings, showering and use of facilities."[177] By European standards, such conditions would undoubtedly be inhuman or degrading,[178] even more so in cases

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Misconduct in the Prison System: Analyzing America's Most "Open" Secret, 18 YALE L. & POL'Y REV. 195, 205-18 (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).

[175] *See, e.g.*, Women Prisoners of the District of Columbia Dep't of Corrections 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. 5 95 619 (WBS) (JFM) (N.D. Cal. 1996) (describing life-threateningly 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 174, at 206-18 (examining recent prisoner litigation); National Institute of Corrections, *Sexual Misconduct in Prisons: Law, Agency Response, and Prevention*, *in* 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 ninety-two 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).

[176] Examples of states with exemplary records have also emerged. *See, e.g.*, *Special Rapporteur on Violence Against Women*, *supra* note 141, at ¶¶ 34, 49, 152-69 (describing humane conditions of confinement in Minnesota).

[177] *Special Rapporteur on Violence Against Women*, *supra* note 141, at ¶¶ 145-48 ("The abuse taking place is truly shocking."); United States v. Michigan, No. 97-CVB-71514-BDT, Complaint at ¶ 16. *See also* Amnesty International, *"Not a Part of My Sentence": Violations of the Human Rights of Women in Custody* (Mar. 1999) http://www.amnesty.org/ai.nsf/index/AMR510011999.htm ("In October 1998, inmates and a guard reported to Amnesty International that sexual abuse of female inmates by staff continues to occur."); Human Rights Watch, *Nowhere to Hide: Retaliation Against Michigan Women Prisoners* (July 1998), http://www.hrw.org/reports98/women/ [hereinafter Human Rights Watch, *Nowhere to Hide*]; Human Rights Watch, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* (Dec. 1996) [hereinafter Human Rights Watch, *All Too Familiar*].

[178] *See supra* notes 110-14, 124 and accompanying text.

involving relators who have a history of abuse, like the majority of women prisoners.[179]

Numerous other states engage in practices that are contrary to international norms. The widespread practice of using male guards to supervise women prisoners runs contrary to the U.N. Standard Minimum Rules for Prisoners and European practice,[180] and lawsuits involving cross-gender pat-searches have involved prisons from Oregon to Connecticut.[181] The U.N. Special Rapporteur criticized a general lack of attention to the "distinct health-care needs" of women.[182] When a member of the European Committee for the Prevention of Torture accompanied two Amnesty International researchers on a visit to Valley State Prison for Women in California, she expressed serious concern with conditions in administrative segregation units, 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.[183]

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[179] *See* Human Rights Watch, *Nowhere to Hide*, *supra* note 177, at n.8 and accompanying text; Lynn Smith, *Majority of State's Women Inmates Abused as Children, Warden Says*, L.A. TIMES, Mar. 19, 1992, at 5, *available at* 1992 WL 2937221. *Cf. Soering*, 161 Eur. Ct. H.R. (ser. A) at 43.

[180] *Special Rapporteur on Violence Against Women*, *supra* note 141, at ¶ 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 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), *at* http://www.web.amnesty.org/ai.nsf/index/AMR510551999.htm (quoting PRISONS AND HUMAN RIGHTS, MANUAL OF INTERNATIONAL PRISON STANDARDS FOR USE IN THE RUSSIAN FEDERATION 95 (1999)).

[181] *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).

[182] *See Special Rapporteur on Violence Against Women*, *supra* note 141, at ¶¶ 64-67.

[183] Casale, *supra* note 180 ("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 SHU at VSPW."). *See also* Amnesty International, *The Findings of a Visit to Valley State Prison for Women, California* (Apr. 1999) (criticizing

In its favor, the United States can argue that most evidence of mistreatment was compiled in the context of investigations that have yielded significant reform efforts and improvements.[184] In Michigan, for example, the state's settlement agreement with federal authorities led to a six-month moratorium on cross-gender pat searches,[185] and an expert chosen by Michigan and the United States reported that Michigan had "implemented significant new policies and procedures" and substantially complied with the settlement.[186] 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.[187] Other class actions have yielded similarly encouraging results.[188] Over the last decade, most states have criminalized sexual

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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); *Special Rapporteur on Violence Against Women*, *supra* note 141, at ¶¶ 87, 91-92, 94-99, 101, 109 (describing California's "inadequate administrative or penal protection against sexual misconduct in custody," cross-gender pat- and strip-searches, the "constant fear of rape" by male guards among women in administrative segregation, and inadequate health services); Human Rights Watch, *All Too Familiar*, *supra* note 177.

[184] *See Special Rapporteur on Violence Against Women*, *supra* note 141, at ¶ 59 ("Though sexual misconduct remains a serious problem in United States women's prisons, recent court cases and awareness campaigns have result in some encouraging changes . . . ."); Amnesty International, *supra* note 177, at n.132 and accompanying text.

[185] United States v. Michigan, No. 97-CVB-71514-BDT, Settlement Agreement (May 25, 1999), *available at* http://www.usdoj.gov/crt/split/documents/michigansa.htm.

[186] U.S. Dep't of Justice, United States' Memorandum in Support of Stipulation to Dismiss, United States v. Michigan, No. 97-CV-71514 (Mar. 7, 2000), *available at* http://www.usdoj.gov/crt/split/documents/michmemo.htm (last visited Mar. 24, 2001).

[187] *See* Cason v. Seckinger, Civ. No. 84-313-1-MAC (M.D. Ga. Mar. 4, 1994); *Special Rapporteur on Violence Against Women*, *supra* note 141, at ¶¶ 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 177, 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, *available at* 1992 WL 2821314.

[188] *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).

misconduct by prison guards, and the Department of Justice has made investigating conditions in women's prisons a priority.[189]

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.[190] Human Rights Watch has argued 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."[191] No systematic implementation of Human Rights Watch and Amnesty International's recommendations has

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[189] *See* National Institute of Corrections, *supra* note 175; U.S. General Accounting Office, *supra* note 175; Bell et al., *supra* note 174.

[190] *See* National Institute of Corrections, *supra* note 175, at 2 (noting that despite laws prohibiting sexual abuse of female prisoners, "relatively few DOCs 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 PROFESSIONAL, 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.").

[191] Human Rights Watch, *United States*, *in* World Report 2000, *available at* http://www.hrw.org/hrw/wr2k/Us.htm.

> 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.

taken place.[192] Evidence that prison officials have retaliated against prisoners who have made complaints[193] and have refused to allow outside investigations of women's facilities[194] reinforce a basic presumption that ill treatment remains prevalent in many states. 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.[195] Even where reforms are taking root, the PLRA requires that consent decrees be lifted upon a bare showing that constitutional violations have ceased, raising questions about how long reforms will last.[196] A further provision of the PLRA prohibits damages for mental or emotional injury absent a prior showing of physical injury, directly affecting lawsuits by women inmates.[197] Such evidence, showing the recalcitrance of the problems and the courts' limited ability to give redress, would strongly militate in favor of women contesting extradition before European human rights tribunals.[198] In the absence of certifiably humane alternate housing facilities, the United States might have a difficult time negotiating around Article 3.

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[192] *See* Human Rights Watch, *Nowhere to Hide, supra* note 177; Amnesty International, *supra* note 177.

[193] *See* Human Rights Watch, *Nowhere to Hide*, *supra* note 177.

[194] *See Special Rapporteur on Violence Against Women, supra* note 141, at ¶ 9.

[195] *See* Mark I. Soler, Testimony Before the Senate Judiciary Committee, Sept. 25, 1996 (describing how Georgia often discounted claims of sexual abuse even when complainants passed and guards failed polygraph tests); Rhonda Cook, *Prison Guard Accused of Abusing Female Inmates Is Rehired*, ATL. J. & CONST., July 12, 1994, at B1, *available at* 1994 WL 4465595 (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).

[196] *See* Sullivan, *supra* note 161; U.S. Dep't of Justice, *CRIPA Report* (1997), *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).

[197] *See* Daniel J. Sharfstein, 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).

[198] *Cf. Chahal*, 70 Eur. Ct. H.R. (1995) at ¶ 105.

4. Claims by Juveniles

Because the question of whether a practice is inhuman or degrading may depend on the vulnerability and special needs of a claimant, the European Court and Commission have more readily found Article 3 violations in cases involving youthful offenders.[199] Children have potentially strong Article 3 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.[200] When viewed

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[199] *See Soering*, 161 Eur. Ct. H.R. (ser. A) at 43. *See also supra* notes 121-26 and accompanying text.

[200] *See, e.g.*, Bill Lann Lee, U.S. Dep't of Justice, *Letter to Zell Miller, Governor of Georgia, available at* http://www.usdoj.gov/crt/split/documents/gajuvfind.htm (last visited Apr. 19, 2002) ("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."); Isabelle Katz Pinzler, U.S. Dep't of Justice, *Letter to Mike Foster, Governor of Louisiana, available at*, http://www.usdoj.gov/crt/split/documents/lajuv-find1.htm (last visited Apr. 19, 2002) (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); Deval L. Patrick, U.S. Dep't of Justice, *Letter to Brereton C. Jones, Governor of Kentucky, available at* http://www.usdoj.gov/crt/split/documents/kyjuvfind.htm (last visited Apr. 19, 2002) (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), *at* http://www.usdoj.gov/crt/split/documents/-juvspeech.htm (describing U.S. D.O.J. 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

against the comparatively mild treatment ruled to be inhuman or degrading by the European Court and Commission, conditions as reported in juvenile facilities in the United States cross the Article 3 threshold.[201] 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 will often bear a burden of showing that present conditions do not violate Article 3.

A separate basis for challenges to extraditions of juveniles lies in the growing ease with which states can try juveniles as adults and place them in adult prisons.[202] Such practices, which expose a vulnerable class of people to physical and sexual abuse, violate international norms requiring the separation of juveniles from adult offenders.[203] Two years ago, California voters approved a ballot measure that gives

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(Jan. 1998), *at* http://www.ojjdp.ncjrs.org/pubs/walls/sect-01.html#8 (noting investigations in Alabama, Georgia, Kentucky, Michigan, Mississippi, Ohio, and Virginia); Barbara Allen-Hagen, *Conditions of Confinement in Juvenile Detention and Correctional Facilities*, Office of Juvenile Justice and Delinquency Prevention, Fact Sheet #1 (Apr. 1993), *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 75 percent of the confined population between 1987 and 1991); Human Rights Watch, *No Minor Matter: Children in Maryland's Jails* (1999), *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), *at* http://www.amnesty-usa.org/rightsforall/juvenile/report/index.html (describing overcrowding in California, Illinois, Michigan, New York City, Maine, Virginia, and Colorado; the use of excessive physical force, shackles, chemical sprays and stun devices 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, (1997), *at* http://www.hrw.org/reports/1997/usacol (describing overcrowding, poor hygiene, lack of drug and alcohol treatment services, use of restraints and solitary confinement, and widespread violence in various detention facilities).

[201] *Cf. supra* notes 121-26 and accompanying text.

[202] *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.").

[203] *See* Human Rights Watch, *supra* note 200, at apps. A-D; Amnesty International, *supra* note 200.

prosecutors complete discretion over whether to try as adults juveniles as young as fourteen, leading some to predict that thousands of youthful offenders will wind up in prison.[204] Even if the number of adult prosecutions rise rapidly, an Article 3 challenge based on the treatment of youthful offenders as adults will affect a miniscule number of extradition cases[205] and is easily overcome by prosecutorial assurances that a relator will be tried as a juvenile.

5. Supermax Facilities

One final area of concern involves "supermax" units or prisons, where disruptive prisoners are kept in solitary confinement "for an average of 23 hours per day with limited human interaction, little constructive activity, and an environment that assures maximum control over the individual."[206] More than thirty states operate such facilities, with the number of prisoners kept in these conditions varying widely across jurisdictions, from zero to twenty percent of the incarcerated population;[207] in some jurisdictions, prisoners can be held in supermax confinement indefinitely.[208] Article 3 caselaw has repeatedly commented on the unacceptability of complete sensory deprivation,[209] and for that very reason,

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[204] Proposition 21 was passed by more than sixty percent of California voters on March 7, 2000. *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, *available at* 2000 WL 2218707; 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.

[205] *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 seventy-five largest counties were tried as adults in 1990, 1992, and 1994, comprising one percent of all felony defendants).

[206] Chase Riveland, National Institute of Corrections, *Supermax Prisons: Overview and General Considerations* 1 (Jan. 1999), *at* http://www.nicic.org/pubs/-1999/014937.pdf.

[207] *Id.* at 3-4.

[208] *Id.* at 4.

[209] *See supra* note 113 and accompanying text; Nan D. Miller, Comment, *International Protection of the Rights of Prisoners: Is Solitary Confinement in the United States a Violation of International Standards?*, 26 CAL. W. INT'L L.J. 139, 165-69 (1995) (arguing that solitary confinement in United States prisons violates the

conditions in supermax prisons have sparked criticism and concern from international observers, human rights groups, scholars, and the courts.[210] Assignment criteria for supermax incarceration vary widely among jurisdictions. Where admission depends solely on conduct within the prison system,[211] it would be difficult for an extradition relator to claim that he faced a real risk of being the victim of cruel or inhuman treatment. Where all new arrivals to a prison system are housed in supermax facilities,[212] or where inmates convicted of certain crimes are automatically eligible for supermax confinement,[213] the defense to extradition is plausible—though easily overcome by assurances that the relator would be housed elsewhere.

European Convention on Human Rights, the American Convention on Human Rights, and the U.N. Standard Minimum Rules for the Treatment of Prisoners).

[210] *See* Nigel S. Rodley, *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. ESCOR, U.N. Doc. E/CN.4/1996/35, at ¶ 183 (Jan. 9, 1996) (expressing concern for treatment of prisoners in supermax facilities in Oklahoma and California); Amnesty International, *supra* note 148 (describing the growth in the construction of supermax facilities and surveying inhuman conditions in Maryland, Texas, and Indiana facilities); Human Rights Watch, *Red Onion State Prison: Super-Maximum Security Confinement in Virginia* (Apr. 1999), *at* http://www.hrw.org/reports/1999/redonion (describing unnecessary use of force, sensory deprivation, the placement of non-threatening inmates in Red Onion to fill excess capacity, and the denial of educational, vocational, and religious programs) [hereinafter Human Rights Watch, *Red Onion*]; Human Rights Watch, *Cold Storage: Super-Maximum Security Confinement in Indiana* (Oct. 1997), *at* http://www.hrw.org/reports/1997/usind (same) [Human Rights Watch, *Cold Storage*]. *See also* Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995) (finding that the conditions of confinement for mentally ill prisoners at the Pelican Bay supermax facility in California violated the Eighth Amendment); Christine Rebman, Comment, *The Eighth Amendment and Solitary Confinement: The Gap in Protection from Psychological Consequences*, 49 DEPAUL L. REV. 567 (1999) (summarizing psychological and sociological studies of supermax incarceration and describing the difficulty prisoners have in litigating Eighth Amendment claims based on sensory deprivation).

[211] *See* Human Rights Watch, *Cold Storage*, *supra* note 210, at 43 ("No judge ever sentences a defendant to serve time in [Indiana's two supermax facilities], and no one ever begins his prison sentence in one").

[212] *See* Riveland, *supra* note 206, at 3.

[213] *See* Human Rights Watch, *Red Onion*, *supra* note 210, *at* http://www.hrw-.org/reports/1999/redonion ("Governor James Gilmore stated on April 9, 1999 that felons caught with guns who qualify for a five-year mandatory sentence would be eligible for incarceration in Red Onion or Wallens Ridge.").

CONCLUSION: POINTS OF FRICTION, POSSIBILITIES FOR CHANGE

- Four months after the terrorist attacks on the World Trade Center and Pentagon, Spanish authorities arrest two men on suspicion of being members of al-Qaeda cells that had allegedly been in direct contact with participants in the attacks. Mohammed Atta, who is thought to have led the September 11 attacks, had visited a beachfront town about an hour from where the arrests were made.[214]

- A respected figure in New York's Chinatown business community flees the country after being indicted for organizing a ring that imported illegal aliens by the shipload. For five years, she travels under false passports throughout Asia, South America and Europe.[215]

- A chicly dressed young woman with a trace of a French accent deposits two checks totaling more than $100,000 in a Los Angeles bank. By the time bank officials realize that the checks were stolen and forged, she has closed her account. Fluent in five languages, she books a first-class ticket to Paris.[216]

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[214] *See Al Qaeda Suspects Held in Spain*, CNN, Jan. 19, 2002, *at* http://www.cnn.com/2002/WORLD/Europe/01/19/inv.Spanish.arrests/index.html (last visited Mar. 24, 2002).

[215] *See* David W. Chen, *People-Smuggling Suspect Is Held After 5-Year Hunt*, N.Y. TIMES, Apr. 21, 2000, at B3.

[216] This scenario is loosely based on a current entry in the Los Angeles Police Department's "Most Wanted List." The suspect is not believed to have fled the country. *See LAPD Most Wanted, at* http://www.lapdonline.org/get_involved/most_wanted-/fcd/mw_etourneau_vanessa.htm (last visited May 3, 2000) (describing a young women with a trace of a French accent and fluent in five languages, who deposited and then withdrew $136,500 from stolen and forged checks). *See also German Court Clears Suspect's Extradition*, N.Y. TIMES, Feb. 18, 2000, at B8; Leslie Wayne, *U.S. Indicts a Financier Held in Germany on 36 Counts of Fraud*, N.Y. TIMES, Oct. 8, 1999, at C1; Katherine E. Finkelstein et al, *On the Run: A Special Report; A Fugitive, Hiding in Plain Sight, Eludes a Dragnet*, N.Y. TIMES, Aug. 16, 1999, at A1; Joseph Kahn & Katherine E. Finkelstein, *How Bigger Didn't Turn Out to Be Better in Insurance Scheme*, N.Y. TIMES, Aug. 7, 1999, at C1 (describing the Martin R. Frankel case, in which a Greenwich, Connecticut, man suspected of bilking insurance companies of some $200 million fled for Europe and eluded authorities for several months, during which time he sought expert legal advice on extradition).

- An Israeli man and his girlfriend recruit young Hasidic Jews in Borough Park, Brooklyn, to smuggle the popular drug Ecstasy between New York and Europe. When several couriers are arrested, the two flee to the Netherlands and contest extradition to the United States.[217]

- A mysterious computer hacker in Eastern Europe steals hundreds of thousands of credit card records from a popular internet retailer. When the company refuses to pay him $100,000, he posts the data on his own website.[218]

Terrorism, alien smuggling, white collar frauds, drugs, and computer offenses: The international character of a broad range of crimes will increasingly confront law enforcement agencies in the coming years. If *Soering* has had little effect on the death penalty in the United States, it is nonetheless a precedent that gives extradition defendants in each of the above scenarios a plausible basis for staying in Europe. Even though the European Court and all Council of Europe member nations have an interest in not making it too easy to avoid extradition, the success of such challenges may well hinge on a series of thorny factual questions, such as a fugitive's gender, age,[219] and physical and mental health, including history of sexual abuse, as well as the actual prison conditions in the jurisdiction that is charging him or her. Even claims that may prove ultimately unsuccessful could incur high enough transaction costs to push prosecutors to make generous plea offers in exchange for voluntary repatriation.

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[217] *See* Alan Feuer, *Sentencing a Drug Courier, Judge Rebukes the Hasidim*, N.Y. TIMES, Mar. 29, 2000, at B3.

[218] *See* John Markoff, *Thief Reveals Credit Card Data When Web Extortion Plot Fails*, N.Y. TIMES, Jan. 10, 2000, at A1.

[219] Although the number of juveniles facing extradition is likely to remain trivial, teenagers have comprised a large number of internet criminals. *See, e.g.*, Matt Richtel, *Canada Arrests 15-Year-Old in Web Attack*, N.Y. TIMES, Apr. 20, 2000, at C1 (describing the arrest of "mafiaboy," suspected of shutting down CNN's website for two hours); John Markoff, *2 British Youths Held in Theft of Credit Card Accounts on Internet*, N.Y. TIMES, Mar. 25, 2000, at C1 (describing two eighteen-year-olds suspected of stealing 26,000 credit card numbers).

Prosecutors working on extradition cases must make careful charging decisions and must develop certain assurances that would satisfy European standards. In terms of charging decisions, prison conditions defenses to extradition are weaker in federal cases. Human rights organizations have devoted much less scrutiny to federal prisons than to state institutions. Only a small percentage of prisoner civil rights lawsuits every year involve federal prisons,[220] and nearly seventy federal institutions have received outside accreditation by the American Correctional Association, to the effect that they "provide decent living conditions, offer adequate programs, and accommodate inmates' constitutional rights . . . ."[221] Most of the scenarios described above fit neatly into federal charging schemes, although the woman who deposited stolen and forged checks is wanted for violating California grand theft property laws. Given the much documented abuses in California women's prisons,[222] a federal fraud charge is more likely to yield a successful extradition.

Although such facts obviously favor the government, extradition relators can point to gross overcrowding of federal high- and medium-security institutions, at fifty-six and forty-eight percent, respectively.[223] There is at least anecdotal evidence of improper use of solitary confinement in federal facilities,[224] and the Atlanta Federal Penitentiary was sued over its shackling policies.[225] The fact that the PLRA limits the types of relief available to prisoners for obvious deprivations of their rights increases the risk of abuse. Additionally, federal women's prisons have recently faced embarrassing lawsuits that suggest that many of the problems documented in state

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[220] *See* Marika F. X. Litras, *Civil Rights Complaints in U.S. District Courts, 1990-98*, U.S. Dep't of Justice, Office of Justice Programs, NCJ 173427, at 5 (Jan. 2000) ("Civil rights prisoner petitions were brought primarily against State officials. Less than 5% in any given year were brought against Federal officials.").

[221] Federal Bureau of Prisons, *State of the Bureau 1998*, at 11, *available at* http://www.bop.gov/ipapg/sob98.pdf.

[222] *See supra* note 183 and accompanying text.

[223] Federal Bureau of Prisons, *supra* note 221, at 7.

[224] *See, e.g.*, SOL WACHTLER, AFTER THE MADNESS: A JUDGE'S OWN PRISON MEMOIR (1997).

[225] Rhonda Cook, *Prison Is Called "Torture Chamber": Inmates in Atlanta Federal Penitentiary Allege in a Lawsuit that They Were Tied to Their Beds for Days*, ATLANTA J.-CONST., Mar. 27, 1998, at D1, *available at* 1998 WL 3684724.

institutions apply to the federal level as well.[226] A federal indictment does not end the necessity of providing evidence that prisons meet European human rights standards.

A series of assurances by prosecutors about the treatment of extradition relators may also facilitate the process. One way that the European Court or Commission may resolve controversies over prison conditions with only minimal effect on American policy would be to accept bare assurances that a defendant will not be subject to inhuman or degrading treatment or punishment and that embassy officials from the requested country can visit the relator periodically. Although the European Commission has accepted such an assurance before, that case involved a relator who had already been extradited to the requesting country and who had not in fact suffered any violations of his rights.[227] In a case that presents clear evidence of widespread abuse, a European human rights tribunal might be reluctant to take such promises at face value.

Prosecutors could also promise to house the relator in specific prisons that meet European standards. For white collar crimes, assurances that defendants would be placed in minimum security facilities would probably short-circuit most human rights defenses. Especially in jurisdictions that deal with only the occasional extradition, placing relators in minimum-security settings would have little effect on the overall administration of prisons. Obviously, such assurances would not be available for violent criminals, and because many extradition relators have proven to be serious escape risks, minimum-security prisons may be additionally unacceptable. Rising prison populations may require inspections to insure that facilities remain adequately maintained and staffed. As populations of extradited prisoners grow and as budgetary constraints tighten, these assurances may cross the line into the politically unpalatable option of creating separate prison

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[226] *See, e.g.*, Peddle v. Sawyer, 64 F. Supp. 2d 12, 14 (D. Conn. 1999) (documenting abuses at the Federal Correctional Institution at Danbury, Connecticut); Lucas v. White, 63 F. Supp. 2d 1046, 1050 (N.D. Cal. 1999) (describing sexual assaults, harassment and unwelcome advances at the Federal Detention Center in Pleasanton, California).

[227] *See* X. v. Switzerland, App. No. 9012/80, 24 Eur. Comm'n H.R. Dec. & Rep. 205, 219 (1980). *See also* Mexico v. Hurley [1997] 116 C.C.C.3d 414 (Can. 1997).

facilities for international fugitives. If it were not hard enough to imagine tough-on-crime legislators supporting special treatment for a class of serious offenders, such a policy also might encourage criminals to flee the country. Read as an admission that other prisons do not satisfy certain minimum human rights standards, such a policy could provide a basis for a wave of lawsuits by the general prison population.

For policy makers in the Department of Justice, a frictionless international extradition system necessarily entails working for better domestic prison conditions. Increased federal monitoring and investigation of prisons, as well as internal audits by states, could provide important sources of evidence for extradition tribunals. Although widespread abuses have occurred in accredited institutions, the promotion of voluntary minimum standards for the treatment of prisoners such as those developed by the American Correctional Association and the expansion of training programs such as those offered by the National Institute of Corrections would help foster measurable norms and benchmarks for proper prison administration nationwide. Finally, revisions of the PLRA's physical injury requirement and restrictions on prospective relief, consent decrees, and attorney's fees might keep European courts from presuming that prison abuses may go unredressed in the United States.

If the European Court or Commission cannot force the U.S. government to work for substantive reform, it can force policy makers to scrutinize prison conditions. As a death penalty precedent, *Soering* came to represent the sobering truth that international norms that are antithetical to domestic values will not take root in the United States. The European Court of Human Rights affirmed its norms in individual capital cases without forcing the United States to change its overall practices. With extradition challenges based on prison conditions, the opposite situation presents itself: Affirming individual rights threatens to upend prison administration in the United States. Law enforcement authorities not only have little choice but to take seriously non-capital extradition challenges based on prison conditions, but they also must confront an idea that in today's political climate

may seem counter-intuitive: The abuse of prisoners is at odds with crime control. If prosecutors can no longer ignore the pathologies of American prison administration, *Soering*'s second decade on the books will surely be more dramatic than its first.