

***Wayne Morse Center for Law and Politics Symposium: The Law and Politics of the
Death Penalty: Abolition, Moratorium, or Reform?***

***131 The Death Penalty in the United States: Following the European Lead?**

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During the months following the attacks on the World Trade Center and the Pentagon in September 2001, the disagreements between Western Europe and the United States over the death penalty have become ever more pronounced. Despite the declaration of a “war” on terrorism by the United States, [\[FN1\]](#) a number of European countries have announced that they will not extradite alleged terrorists if the suspects are threatened by a death sentence. [\[FN2\]](#) In addition, they will not provide specific intelligence information on defendants charged with the death penalty. [\[FN3\]](#)

In the long run these events may prove decisive for the future development of the death penalty in the United States. In recent years, the United States has come under growing pressure, if not attack, by its European allies over its use of the death penalty. In various fora--domestic, regional and international--Europeans have taken issue with the notion that death can ever be an appropriate sentence and with the actual or threatened imposition of *132 capital punishment in individual cases. [\[FN4\]](#)

This Article provides a short historical overview of the death penalty abolitionist movement (“abolitionist movement”) in various European states, and highlights how after largely parallel paths, during the 1970s Europe and the United States parted ways. Next it discusses the various ways in which individual European states, the European human rights machinery and the European Union (EU) have indicated their disagreement and disenchantment with the United States over the issue of the death penalty. Like segregation, the death penalty increasingly causes international problems for the United States. It allows countries to charge the United States with human rights violations, isolates the United States from European states, and symbolizes the American determination to interpret human rights so as to accord with the U.S. Constitution and public opinion, rather than internationally recognized principles. While most Americans remain unaware of the embarrassment the imposition of the death penalty--especially when employed against juveniles and the mentally challenged--causes its diplomats abroad and in international fora, the U.S. fight against terrorism will increasingly highlight the problems the imposition of the death penalty constitutes in creating an international coalition and providing for effective cross-border cooperation. Publicity of Europe’s opposition and refusal to cooperate in death penalty cases arising from the “War Against Terrorism” might provide the necessary impetus to move domestic institutions to restrict, and ultimately abolish, the death penalty, despite popular support for it.

I Abolitionism in Europe and the United States

A. Parallelism

The modern abolitionist movement traces its origins to Italy's criminologist Cesare Beccaria, who argued for the abolition of the death penalty as inhumane in the late eighteenth century. [FN5] *133 Over the next few decades, the abolitionist movement took hold [FN6] even though the modern history of the death penalty in Europe is as varied as in the individual states making up the United States. While a few European states abolished capital punishment in the nineteenth century, [FN7] most did not take this step until the second half of the twentieth century. [FN8] Certain groups of individuals- juveniles and pregnant women-however, came to be exempted from execution much earlier. [FN9] In addition, the number of death-eligible offenses declined during the nineteenth and early twentieth centuries in all European countries. [FN10] The time in which no execution occurred also lengthened in numerous European countries. This was particularly important since de jure abolition often lagged behind de facto abolition. [FN11] However, newly emerging criminological theories and fascist regimes reversed the abolitionist trend in Europe which existed prior to World War I. [FN12]

During World War II, the number of executions surged on all sides, often after long execution-free periods. In its aftermath, the Nuremberg trials led to the hanging of numerous individuals implicated in crimes against humanity, and war crimes. [FN13] War criminals were also executed following domestic prosecutions in Germany, France, the Netherlands, Norway, and Denmark. [FN14]

After this dramatic upsurge in executions, further imposition of the death penalty declined substantially. Over popular opinion, *134 Germany, in its Basic Law of 1949, abolished capital punishment. [FN15] While an abolitionist attitude developed in some European states in the 1950s, in others this did not occur until the late 1960s and 1970s. Even though some European countries continued executions throughout the 1950s and 1960s, by the end of that decade, most of them stopped executions de facto. [FN16] By 1970, five European countries--Belgium, Cyprus, Greece, the United Kingdom, and Ireland-- were de facto, but not yet de jure, abolitionist. While the population in most European countries continued to support the death penalty throughout these decades, [FN17] the political elites argued for, and ultimately accomplished, first a de facto and finally a de jure ban on executions. [FN18] It was not until the last decade of the twentieth century that the majority of the population in at least some European countries became abolitionist. [FN19]

The development in the United States during much of this time runs largely parallel to the events in Europe. The Michigan Territory abolished the death penalty, with the exception of punishment for treason, in 1846. [FN20] By 1929, sixteen states had abolished capital punishment, [FN21] with many of them acting during the late nineteenth and early twentieth century. [FN22] Between the two world wars, however, the death penalty experienced a short resurgence. [FN23] Nevertheless, by the 1960s it had become increasingly *135 a regional phenomenon, primarily focused on the southern states. [FN24]

Even states that permitted capital punishment, however, grew ever more reluctant to execute. In 1966, only one person was executed; in 1968 and 1969, no executions occurred. [FN25] With the Supreme Court's de facto moratorium imposed in *Furman v. Georgia*, [FN26] it appeared at the time as if the abolitionist development would take the same course in the United States as in Europe. Because of the

small number of executions annually during the late 1960s, a judicially-imposed moratorium appeared to foreshadow the ultimate demise of capital punishment. [\[FN27\]](#) While this held true for European countries, it did not for the United States. [\[FN28\]](#)

B. Parting Ways

Opposition to the Supreme Court's Furman decision developed immediately, and the state legislatures whose statutes had been invalidated began to draw up new punishment regimes that would allow for the imposition of the death penalty under the Furman framework. [\[FN29\]](#) With the Supreme Court's decision in *Gregg v. Georgia*, [\[FN30\]](#) which declared the revised state death penalty statutes constitutional, executions in the United States resumed; and the death row population has increased dramatically since the late 1970s. [\[FN31\]](#)

***136** During the late 1980s and the 1990s, an increasing number of states, including some that had long been abolitionist de jure, reinstated the death penalty. [\[FN32\]](#) Moreover, congressional legislation reinvigorated the federal death penalty starting in the late 1980s, and substantially expanded its reach with the 1994 Federal Death Penalty Act. [\[FN33\]](#) The first federal execution in almost forty years occurred in the summer of 2001, when Timothy McVeigh was sent to death for his involvement in the Oklahoma City bombing. [\[FN34\]](#) Even though federal death row is very small, compared to the number of individuals awaiting execution by the states, [\[FN35\]](#) its existence carries substantial symbolic meaning.

As of 2002, about 3700 individuals are on death row, with 540 having been executed between 1991 and 2000. [\[FN36\]](#) A number of them are citizens of Spain, England, Germany, France, and other European countries. [\[FN37\]](#)

The divergence in attitudes and practices between the United States and European countries that began in the early to mid-1970s parallels developments in a host of other criminal justice areas, including the imposition of incarcerative sentences and collateral sanctions. [\[FN38\]](#) While the United States expanded its use of the death penalty starting in the late 1970s, shortly thereafter the European countries began to institutionalize abolition of the death penalty. The European Convention on Human Rights, ***137** which entered into force in 1953, [\[FN39\]](#) still allows for capital punishment as an exception to the right to life, [\[FN40\]](#) but the Sixth Protocol to the European Convention—opened for signature in 1983—captures the abolitionist spirit. [\[FN41\]](#) The Protocol outlaws death sentences generally, but narrowly allows countries to retain capital punishment “in time of war or imminent threat of war.”[\[FN42\]](#) In that situation, executions become analogized to the killing of enemy soldiers on the battlefield, while there seems little connection to the execution of offenders in the criminal arena. The exception can therefore be explained by the fact that capital sentences in war are viewed as part of the war effort rather than as a tool of the criminal justice process. [\[FN43\]](#) Capital punishment in times of war is tied more closely to the existence and survival of the state and state sovereignty than in times of peace.

Since the Sixth Protocol has been opened for ratification, states applying for membership to the Council of Europe have been expected to sign it prior to admission. [\[FN44\]](#) While those countries that were already member-states of the Council of Europe were not under the same pressure, [\[FN45\]](#) no executions have occurred in those states. [\[FN46\]](#)

Turkey's imposition of the death penalty on Abdullah Öcalan, the leader of the Kurdish independence movement and convicted terrorist, has caused widespread public and diplomatic protest in *138 the other Council of Europe member-states. [\[FN47\]](#) Because of their extensive diplomatic threats against Turkey, it complied with the stay of execution issued while Öcalan's case is being heard before the European Court of Human Rights, and agreed to lift the death penalty even for terrorism crimes. [\[FN48\]](#) The European response to the Öcalan case is indicative of the pressure the member-states of the Council of Europe and the European Union have exerted on other member-states and applicant states with regard to the death penalty. [\[FN49\]](#)

In February 2002, the Committee of Ministers of the Council of Europe took the final step on the road to abolition. It signed the Thirteenth Protocol to the European Convention on Human Rights, which completes the mission of the Sixth Protocol by abolishing the death penalty even in times of war and serious national emergencies. [\[FN50\]](#) This development, following on the heels of the U.S. administration's declaration of a "war on terrorism," indicates how serious the Council member states are about abolishing the death penalty entirely. Even though popular support for the death penalty may continue in many European countries, the present regional legal regime makes it impossible for Council of Europe member-states to re-introduce the death penalty without violating the European Convention and its *139 Protocols. [\[FN51\]](#)

The death penalty has become a growing issue of contention between Europe and the United States. Among the leading and most vocal countries opposing capital punishment are the former fascist nations of Germany, Austria, Italy, Spain, and Portugal. [\[FN52\]](#) In recent years, they have developed a panoply of responses to U.S. executions.

II European Pressure

In recent years, European countries--acting individually and in a wide variety of domestic, regional, and international fora--have strongly criticized the United States on its use of the death penalty. They have attempted to exert pressure in individual death cases and have publicly embarrassed the United States. [\[FN53\]](#)

While the United States is not the only target of European pressure, [\[FN54\]](#) because of its international stature, its use of the death penalty has attracted particular censure. For Europeans to *140 succeed in their ultimate goal of a world-wide ban on capital punishment, they will need U.S. support. [\[FN55\]](#)

A. Actions within International and Regional Human Rights Bodies

The European countries have taken a variety of measures within the European Union and the Council of Europe to prevent continued imposition of the death penalty in the United States. Among their actions are a powerful information campaign against the death penalty, the financing of amicus briefs in U.S. courts, and relentless diplomatic efforts. [\[FN56\]](#)

There appears to be universal agreement that pregnant women and mothers of very young children should not be executed [\[FN57\]](#) and that the death penalty should be imposed only for the most serious offenses. [\[FN58\]](#) The United States, however, has resisted the increasing international consensus

against the execution of juveniles--those who commit offenses while they are under eighteen years old, [\[FN59\]](#) a group for whose exemption the European countries work particularly. Until the Supreme Court's recent decision in *Atkins v. Virginia*, [\[FN60\]](#) the United States also permitted *141 executions of mentally retarded offenders. Much of the legal activity within the European countries has been aimed at cases in which juveniles and the mentally impaired are threatened with execution. [\[FN61\]](#) For that reason, European countries will consider *Atkins* a victory, indicative of the impact their campaign has had. [\[FN62\]](#) While not determinative, the Court did refer to the opinion of the "world community" in its opinion, and cited to the European Union's amicus brief in *McCarver*. [\[FN63\]](#)

In their opposition to the death penalty, the European countries also support other regional bodies. European parliament resolutions, for example, have urged the United States to follow determinations and requests by the Inter- American Commission on Human Rights. [\[FN64\]](#) However, the Council of Europe recently took its most decisive direct diplomatic action in opposing capital punishment in the United States and Japan. It threatened both countries with suspending their observer status if no changes toward abolition occur by January 1, 2003. [\[FN65\]](#)

1. Actions within the United Nations

In 1994, the United States ratified the International Covenant on Civil and Political Rights (ICCPR), which prohibits "torture or . . . cruel, inhuman or degrading treatment or punishment." [\[FN66\]](#) However, the United States entered a reservation to this provision, *142 indicating that it interprets it identical to the Due Process Clauses and the Eighth Amendment to the Constitution. [\[FN67\]](#)

Eleven European countries objected to this reservation, and the U.N. Human Rights Committee, which evaluates state compliance with the ICCPR, found it incompatible with the Convention. [\[FN68\]](#) The United States, however, did not withdraw it. On the contrary, legislation was introduced in the U.S. Senate that opposed the U.N. Human Rights Committee's criticism of the United States. [\[FN69\]](#) The European Parliament has implicitly rejected the reservation, and has urged the U.S. Supreme Court to force the United States into compliance with the ICCPR. [\[FN70\]](#)

While international human rights norms have not yet developed a consensus regarding the abolition of the death penalty, within the United Nations the European states continue to urge moratoria with the ultimate goal of abolition. Every year the European countries have pressed for a moratorium at the U.N. Commission on Human Rights. [\[FN71\]](#) The General Assembly has *143 also seen resolutions on the abolition of the death penalty, introduced by the European Union, but has not adopted any yet. [\[FN72\]](#)

Empowered by its European and Latin American member states, the United Nations committees have taken a more forceful stand against the death penalty. Since 1997, the U.N. Commission on Human Rights has called annually for a moratorium on death sentences. [\[FN73\]](#) Despite a goal of total abolition, the Commission has focused on "[p]rogressively . . . restrict[ing] the number of offences for which the death penalty may be imposed." [\[FN74\]](#) The initial aims are to stop the execution of pregnant women, juvenile offenders, and the mentally ill. The resolutions also call on non-death states not to extradite offenders who are threatened with the death penalty in the receiving state.

2. Supranational Criminal Tribunals

In the supranational criminal tribunals following World War II, death sentences were imposed on a number of offenders. [\[FN75\]](#) Even though the Nuremberg and Tokyo War Crimes trials are frequently held up as precedent in the development of international criminal law, [\[FN76\]](#) their use of the death penalty has not continued in recently established tribunals. Neither the International Criminal Court for Yugoslavia nor the Rwanda Tribunal allow for the imposition of capital punishment. [\[FN77\]](#) Moreover, the newly established *144 International Criminal Court does not provide for death sentences. [\[FN78\]](#) For all of these tribunals, the maximum sentence is life imprisonment. [\[FN79\]](#)

In light of the strong preference of the United States for capital punishment, it seems surprising that the United States has not attempted to include a death sanction in these international tribunals. [\[FN80\]](#) After all, these courts have been designed to deal with the most serious of offenders. Aware of the European and Latin American opposition to capital punishment, the United States has stood virtually mute on the punishment provisions in the documents creating these tribunals. It has avoided direct confrontation with its allies by accepting maximum life sentences. [\[FN81\]](#) This could be interpreted as acquiescence to the international abolitionist movement, and silent recognition, at least on part of the U.S. government, that the death penalty is no longer defensible internationally.

Advocacy within and through international and regional tribunals is only one aspect of Europe's campaign against the death penalty. Europe's anti-capital punishment work has had the most impact in areas where it has directly affected U.S. prosecutions and policies.

B. The European Court of Human Rights: Extradition

One of the most celebrated cases in the death penalty arena is the 1989 decision by the European Court of Human Rights in *Soering v. United Kingdom*. [\[FN82\]](#) This case did not present the Court with a direct challenge to the death penalty. Instead, Soering, a citizen of Germany, claimed that his requested extradition from the United Kingdom to the state of Virginia would violate *145 his rights under Article 3 of the Convention, which prohibits torture and inhumane or degrading treatment, because of the so-called "death-row phenomenon." The Court agreed. It found that during the extended time period between imposition of a death sentence and its execution, which averaged six to eight years in Virginia, the condemned person was subjected to severe and increasing anguish and stress, and suffered inhumane conditions while being held on death row. Therefore, Soering could not be extradited to the United States as long as he was threatened by the death penalty. [\[FN83\]](#)

Based on *Soering*, European states have refused extradition of fugitives to the United States unless they get explicit assurances that these individuals will not be subjected to capital trials. [\[FN84\]](#) Italy and Portugal go yet a step further; they refuse extradition to any retentionist country. [\[FN85\]](#)

The *Soering* decision did not only have a direct impact on extradition to the United States and other retentionist countries. It also provided other tribunals with a powerful rationale to attack at least the circumstances surrounding executions, albeit not capital *146 punishment itself. The Judicial Committee of the Privy Council, for example, cited the *Soering* decision in its line of cases striking

down individual death sentences. [\[FN86\]](#) Justice Breyer also referred to Soering in two dissents from denials of certiorari. [\[FN87\]](#)

Even though the Soering decision has not affected the jurisprudence of U.S. courts, it has had an impact on law-enforcement practices. Extraditions from European countries can only be expected if the state or federal government requesting the extradition provides assurances that it will not seek the death penalty. [\[FN88\]](#) While this policy has been in place for over a decade, it came to the attention of the U.S. public in the wake of the attacks of September 11, 2001, when a number of European countries, including Spain and France, announced that they would not extradite suspected members of the terrorist organization Al-Qaeda unless they received assurances by the U.S. government that it would not ask for the death penalty in their trials. [\[FN89\]](#)

***147** Other forms of international cooperation in criminal and terrorist investigations might also be impacted by U.S. requests for the death penalty. Prior to a decision by the U.S. Department of Justice on whether to ask for a capital sentence in the trial of Zacharias Moussaoui, a French citizen charged with involvement in the attacks of September 11, 2001, the French government asked the United States not to demand the death penalty. [\[FN90\]](#) When Attorney General John Ashcroft announced the decision to proceed with a death request, the French administration immediately denounced it and declared that it would no longer share intelligence information that would assist the federal government in the prosecution of Moussaoui. [\[FN91\]](#) The existing cooperation agreement between France and the United States allows France to stop the exchange of information in death penalty cases. [\[FN92\]](#)

In other cases, European countries have attempted to prevent the execution of their citizens directly, albeit with little success.

C. The International Court of Justice: Consular Notification

The imposition of the death penalty on foreign citizens has led to the United States being sued in the International Court of Justice (ICJ) twice in the last five years. [\[FN93\]](#) In both cases, the countries representing their citizens--Paraguay and Germany--accused the United States of violating the Vienna Convention on Consular Relations, [\[FN94\]](#) under which the United States is obligated ***148** to inform foreign consuls of arrests and indictments issued against their citizens. [\[FN95\]](#)

The case brought by Germany involved two German citizens, Walter and Karl LaGrand, who had been sentenced to death in Arizona. The ICJ issued a temporary injunction to prevent the execution of Walter LaGrand. [\[FN96\]](#) Germany had requested that the ICJ stay the execution after diplomatic attempts at settling the case had failed. In its intermediate ruling, the ICJ explicitly asked the United States to assure that Arizona comply with the United States' international obligations. [\[FN97\]](#) Nevertheless, Arizona executed Walter LaGrand. [\[FN98\]](#)

Domestically, the federal government sent mixed messages to the state of Arizona. [\[FN99\]](#) While the federal government opposed a stay at the ICJ, upon the ICJ's ruling it reluctantly asked the governor to postpone the execution. Most disturbingly, however, it opposed a stay at the Supreme Court level, which could have legally bound Arizona not to proceed with the execution. [\[FN100\]](#)

The United States has been frequently criticized for its actions in LaGrand, [\[FN101\]](#) including by the ICJ. [\[FN102\]](#) Even though this is not *149 the first time that the United States has failed to comply with international obligations, [\[FN103\]](#) its action in LaGrand indicates how the federal government is inclined to allow individual states that do not seem concerned about international norms [\[FN104\]](#) to flout the decisions of a supranational tribunal and violate the international obligations of the United States with impunity. Pro-death penalty attitudes on the federal level and state sovereignty concerns ultimately trumped compliance with the consular convention and an ICJ order. [\[FN105\]](#)

Even though Germany did not style the LaGrand case as an attack on the death penalty, after the World Court's final ruling, in which the Court chastised the United States for its failure to adhere to the Vienna Convention, German politicians expressed the hope that the decision would lead the United States to reconsider its retentionist stance. [\[FN106\]](#) Recourse to the ICJ indicates the powerful feelings that the Europeans hold with regard to the use of the death penalty by the United States. What explains their abolitionist fervor?

*150 III In Search of a Motive

U.S. politicians and diplomats encounter European objections to the death penalty frequently and in numerous fora. What drives the European agenda?

A. Public Pressure

Since all Western European countries from where the opposition to the death penalty emanates are mature democracies, it is conceivable that much of their governmental opposition to the death penalty is informed by popular opinion. However, over the years, opinion polls in many European countries indicated that their populations continued to support the death penalty even after its abolition. [\[FN107\]](#) In recent years, though, the margins have narrowed, and in some countries the majority of the population now supports the government's anti-death penalty stance. [\[FN108\]](#)

Opposition to the death penalty as carried out in the United States may be connected to this change in European public opinion and the wide publicity executions in the United States receive on the other side of the Atlantic. European newspapers regularly carry stories about pending executions. The most publicity surrounds executions of individuals who belong to groups perceived as particularly vulnerable, such as juveniles, women, and the mentally retarded, as well as European nationals. [\[FN109\]](#)

Much of the criticism of the death penalty in the United States is connected to other perceived inequities in the U.S. criminal justice system. Frequently, racial disparities in the imposition and execution of the death penalty are noted. Not surprisingly, Europeans also focus strongly on the class component. Most death row inmates are poor. In a recent case involving a Spanish citizen who was sentenced to death in Florida but acquitted upon re-trial, the Spanish media vociferously criticized the cost of a good defense attorney and the general wealth disparities in the *151 U.S. criminal justice system. [\[FN110\]](#) The case also served as a warning for possible miscarriages of justice. [\[FN111\]](#)

Popular protests that occurred during recent visits of U.S. Presidents to Europe frequently centered around the American use of the death penalty. Protesters have objected to its existence generally, and particularly to what they perceive as its racially biased application.

A growing number of powerful anti-death penalty advocacy groups have also developed in Europe. Among them are Amnesty International, which is headquartered in London, and the League of Human Rights, which operates from Paris. [\[FN112\]](#)

Advocacy groups have often focused on individual cases which they consider to stand for particular perversions of the U.S. criminal justice system and the death penalty. The case of Mumia Abu-Jamal has been among those championed by European human rights activists, who have ultimately gotten the European Parliament involved. [\[FN113\]](#)

As a member of the European Parliament noted, Abu-Jamal “stands out as a symbol” because he is black and on death row, because he is an intellectual writer, and because of his militant activism. [\[FN114\]](#) The speaker compared Abu-Jamal to Nelson Mandela and Alexander Solzhenitsyn. [\[FN115\]](#) Such a comparison implies that Abu-Jamal’s death sentence is unjust because it is *152 based on racism and political opinion rather than factual guilt. [\[FN116\]](#)

While popular opposition and advocacy groups may be able to exert certain pressure on governments, recent diplomatic and legal efforts have been infused with a very powerful missionary fervor on the part of many European governments.

B. The Death Penalty as a Human Rights Violation

While the current strategy of Europe’s governments has been to object to the imposition of the death sentence in particularly egregious cases and to persuade the United States to join the growing international consensus against the imposition of the death penalty against juveniles and the mentally retarded, their overall goal is the abolition of the death penalty. [\[FN117\]](#) They have reached the conclusion that the death penalty, under any circumstance, violates human rights norms. Its imposition infringes on maturing norms which prevent the government from interfering with the preservation of human life. At the same time, it does not fulfill any penological goals. [\[FN118\]](#)

Opposition to the U.S. embrace of the death penalty allows European countries to constitute themselves as the defenders of human rights. The European Parliament, for example, characterizes abolition of capital punishment as “a fundamental step towards enhancing human dignity, ongoing developing of human rights and increasing respect for those rights.” [\[FN119\]](#) Such a position implies that the United States has lost its status as the foremost human rights defender which it perceives itself to be.

Even though in the past the rationale of individual European governments for abolition may have varied dramatically, [\[FN120\]](#) today abolition serves as a rallying cry for the moral superiority of the *153 European states. [\[FN121\]](#) This may also be a reason why European people have become more inclined to support abolitionism. Retention of the death penalty presents a dramatic showcase for American backwardness and disregard for human and civil rights.

This does not imply that merely political or strategic considerations motivate European opposition to the death penalty. For the European countries, the death penalty symbolizes America's lack of civility and its unilateralism. The United States' refusal to be bound by international agreements and to adhere to decisions by international bodies merely appears to highlight America's arrogance and its inability to work towards a true international consensus in the human rights arena. Ultimately, European objections to the death penalty challenge the United States' moral leadership of democratic nations and its commitment to civil and human rights.

How can and should the United States react to this development, assuming that it wants to preserve its standing in the international human rights arena? [\[FN122\]](#)

IV Segregation and the Death Penalty: International Costs of Domestic Policies

The use of the death penalty, in general and especially against groups where a wide international consensus has developed against their execution, creates a similar foreign policy embarrassment for the United States as segregation did after World War II. In the early years of the Cold War, publicity about the treatment of African Americans in the United States, and in the Southern states in particular, severely damaged the United States in its attempts to portray its positions as enlightened, as compared with those of the then Soviet Union. [\[FN123\]](#)

***154** News about the atrocious treatment of African Americans made headlines, not only in communist countries, but also in nation-states allied with the United States. [\[FN124\]](#) Segregation inflicted a heavy blow to the image of the United States abroad, in part because the communist nations exploited this shortcoming. [\[FN125\]](#) The U.S. media were aware of this development. They widely documented the impact segregation had on the battle of images conducted during the Cold War. [\[FN126\]](#)

This impact extended to the United Nations. During segregation, African Americans regularly brought their plight to the attention of the General Assembly. In this way they could draw international attention to the issue. [\[FN127\]](#) Similarly, today U.S. anti-death penalty organizations and death-row inmates bring cases before the U.N. Human Rights Committee.

Foreign countries also exploit the death penalty issue. When the U.S. government has attacked their human rights records, other countries have frequently retorted by focusing on the U.S. use of capital punishment. Other retentionist countries have been critical of the United States, either because of its more expansive use of executions, or because of what they perceive as a double standard. [\[FN128\]](#) For abolitionist countries, the death penalty constitutes a dramatic indication of U.S. violation of human rights norms. [\[FN129\]](#)

Despite these similarities in the international perception and exploitation of segregation and the death penalty, there are dramatic differences in the domestic responses. While the Truman administration acknowledged the former as a serious human rights issue, the U.S. government has defended its use of the death penalty, in part through relying on strong public support at ***155** home and arguing retention to be a mandate of popular democracy. [\[FN130\]](#) During the Cold War, the State Department documented the damage that segregation and the treatment of blacks--African Americans as well as foreign dignitaries-- inflicted on the standing of the United States abroad. [\[FN131\]](#) It took it upon itself to educate domestic agencies and departments about the impact segregation had on U.S. foreign policy.

[FN132] Moreover, the Truman administration informed the U.S. Supreme Court, through amicus briefs, about the negative implications of segregation on the development of U.S. foreign policy.

[FN133] Ultimately, the Supreme Court's decision in *Brown v. Board of Education* [FN134] constituted a crucial symbol--at home and abroad--that the United States was committed to racial equality and that the U.S. Constitution protected the American dream for all. [FN135]

Quite the contrary appears to be occurring in the death penalty context. Foreign critiques of the U.S. application of the death penalty are generally disregarded. On his trip to Europe in June 2001, President George W. Bush defended the use of the death penalty as a sovereign choice of the United States, based on and supported by public opinion. [FN136] Attorney General John Ashcroft voiced the same theme in his response to French criticism of the Department of Justice's decision to seek the death penalty in the case of Zacharias Moussaoui. [FN137]

In *The Federal Republic of Germany v. The United States*, [FN138] the United States went yet a step further in its defense of the death penalty. In rejecting Germany's demand for a stay of execution in the case of Walter LaGrand, the Solicitor General argued that consideration of the ICJ's stay order was irrelevant to the legal case before the U.S. Supreme Court. [FN139] The Supreme Court's ruling denying a preliminary injunction and leave to file a *156 bill of complaint led to the execution of Walter LaGrand, and the subsequent rebuke of the United States' action by the ICJ. [FN140]

U.S. administrations do not appear to comprehend fully the damage American adherence to the death penalty has caused to foreign relations and their standing in the world. While the executive branch's influence on state governments may be limited in the U.S. federal system, it could exert some persuasive power and throw its support behind anti-death penalty positions in select court cases. [FN141] Had it chosen to support Germany's demand for a stay of execution, for example, it would have merely vindicated rights under the Vienna Convention rather than espoused an abolitionist argument. However, at this point, the federal government has not attempted to persuade the courts to narrow their position on the death penalty in light of foreign policy and international human rights concerns.

In a number of death penalty cases involving the execution of mentally retarded individuals and juveniles, former diplomats filed amicus briefs, indicating the problems such executions cause for the development of U.S. foreign policy. They noted that "[i]n diplomatic settings, the United States faces daily and growing criticism from the international community for maintaining a cruel and uncivilized practice." [FN142] They urged the Supreme Court not only to consider the growing international consensus against such practices, but also their practical ramifications. The amici argued that continuing the execution of mentally retarded individuals "would strain diplomatic relations with close American allies, increasing America's diplomatic isolation and impairing other United States foreign policy interests." [FN143] Despite their focus on the execution of the mentally retarded, all executions make the conduct of foreign policy, at least in Europe, difficult. [FN144]

*157 V The Death Penalty in the "War on Terrorism"

While there are substantial differences between the fight against segregation and attempts to abolish the death penalty, the United States' use of capital punishment has become the symbol of a battle of images that centers around human rights. European criticism of the death penalty is closely tied to a larger

critique of other aspects of the U.S. criminal justice system, usually centering around the race and class of criminal defendants [\[FN145\]](#) and the overall harshness of the existing punishment regime, which is exemplified by chain gangs, life without parole, and three-strikes laws. [\[FN146\]](#) Anti-death penalty advocacy from abroad is often intimately connected with a larger social justice critique that frequently centers around disparities in American society. [\[FN147\]](#) Ultimately, the question of whether the United States can be a legitimate protector of and advocate for human rights abroad when it fails to protect them at home becomes distilled to the issue of whether a “civilized” country can employ the death penalty in its criminal justice system. [\[FN148\]](#)

As the “War on Terrorism” is a global struggle, despite its military might, the United States will have to rely on the cooperation of its allies, including European countries. [\[FN149\]](#) If this “war” takes ***158** on the same importance and apocalyptic terms as the Cold War, domestic policies that constitute barriers against more effective international cooperation may have to be scrutinized more carefully, as occurred during the Cold War. [\[FN150\]](#) Depending on the ramifications of its decision to seek death sentences for Zacharias Moussaoui and possibly others involved in the attacks of September 11, the United States may have to consider seriously the special sensibilities of its European allies in the prosecution of their citizens. [\[FN151\]](#) So far, however, the United States seems engaged in attempting to circumvent the European restrictions on cooperation in cases where death sentences are threatened. [\[FN152\]](#) Ultimately, however, failure of such attempts might lead to a more restricted use of the death penalty, and possibly even motions towards abolition. [\[FN153\]](#) After all, European cooperation in terrorism ***159** prosecutions may be more crucial than the imposition of death sentences on individual defendants.

Many Europeans consider the United States’ use of the death penalty symbolic of its disregard of international norms and an utter lack of concern for the interests and sensibilities of its allies. [\[FN154\]](#) Therefore, gradual abolitionism may symbolize more than merely a retreat from capital punishment as a sanction. It would reassert American (co-)leadership in the human rights arena and allow the United States to reassert itself as an international player, rather than a unilateral power. [\[FN155\]](#) Therefore, the importance of the death penalty extends far beyond its domestic meaning, and Europe’s fight against it symbolizes a larger schism in the relationship between the Europeans and the United States.

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[FN1]. See, e.g., Lionel Barber, *America’s War*, *Fin. Times*, Sept. 14, 2001, at 22.

[FN2]. See, e.g., *E.U. to Seek Global Extradition Agreement with U.S.*, *Deutsche Presse-Agentur*, Feb. 15, 2002; Elizabeth Bryant, *Council of Europe Faults Terror Treatment*, *United Press Int’l*, Jan. 24, 2002.

[FN3]. See, e.g., Joel Blocker, France/U.S.: Criticism Tempered On Decision to Seek Death Penalty for Moussaoui, Middle East News Online (Apr. 2, 2002), at <http://www.middleeastwire.com:8080/storypage.jsp?id=2457>.

[FN4]. For an example of intervention by the European Union in a specific case, see Letter of the European Union to Roy Barnes, the Governor of Georgia, on behalf of Tracy Housel, at <http://www.eurunion.org/legislat/DeathPenalty/HouselGAGovLett.htm> (last visited Mar. 15, 2002) [hereinafter Letter of the European Union].

[FN5]. William A. Schabas, *The Abolition of the Death Penalty in International Law* 4-5 (2d ed. 1997).

[FN6]. See, e.g., *id.* at 5-6.

[FN7]. Portugal, for example, abolished the death penalty in 1867. Franklin E. Zimring & Gordon Hawkins, *Capital Punishment and the American Agenda* 9 (1986). It was followed by the Netherlands three years later. Schabas, *supra* note 5, at 6.

[FN8]. Peter Hodgkinson, *The United Kingdom and the European Union*, in *Capital Punishment: Global Issues and Prospects* 193, 204-06 (Peter Hodgkinson & Andrew Rutherford eds., 1996).

[FN9]. Schabas, *supra* note 5, at 19.

[FN10]. See, e.g., Christopher Hollis, *The Homicide Act* 9-10, 33 (1964) (describing decrease in number of death eligible offenses and ultimate classification of homicides into those leading to death and those allowing only for imprisonment); Michael L. Radelet, *More Trends Toward Moratoria on Executions*, 33 *Conn. L. Rev.* 845, 845 (2001) (describing the situation in England).

[FN11]. Zimring & Hawkins, *supra* note 7, at 10.

[FN12]. Schabas, *supra* note 5, at 6.

[FN13]. Telford Taylor, *The Anatomy of the Nuremberg Trials* 609-10 (1992) (recounting the executions of those convicted in Nuremberg); William A. Schabas, *War Crimes, Crimes Against Humanity and the Death Penalty*, 60 *Alb. L. Rev.* 733, 737-40 (1997) [hereinafter *War Crimes*].

[FN14]. Zimring & Hawkins, *supra* note 7, at 9, 12.

[FN15]. Grundgesetz [GG] [Constitution] art. 102 (F.R.G.), English translation available at <http://www.iuscomp.org/gla/statutes/GG.htm>.

[FN16]. Hodgkinson, *supra* note 8, at 195, 205 (last executions in England occurred in 1964).

[FN17]. For some polling data from the 1990s, see *id.* at 8, at 196-97 (England), 204 (France), 205 (Denmark), 206 (Spain and Sweden). While in a few countries--England and France--popular support for the death penalty continues to be strong, in others--Denmark and Sweden--it has largely abated.

[FN18]. *Id.* at 205-06 (support for death penalty virtually non-existent among church bodies and the legal and medical professions). For a critique of elite policy-making in this context, see John McAdams, *It's Good, and We're Going to Keep It: A Response to Ronald Tabak*, 33 *Conn. L. Rev.* 819, 821-22 (2001).

[FN19]. Polling data in this area appears unreliable or at least subject to relatively quick change. See, e.g., Hodgkinson, *supra* note 8, at 205-06 (providing data for Denmark and Sweden, with Spain's popular opinion equally divided); Thomas Sancton, *A Matter of Life or Death*, *Time Atlantic*, May 21, 2001, at 28 (indicating sixty percent disapproval rate for the death penalty in France and Italy).

[FN20]. Zimring & Hawkins, *supra* note 7, at 28.

[FN21]. Tom Wicker, Foreword, in Zimring & Hawkins, *supra* note 7, at ix, x.

[FN22]. Zimring & Hawkins, *supra* note 7, at 29 tbl.2.1, at 29 (giving chronology of abolition in the United States).

[FN23]. Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 *U. Colo. L. Rev.* 1, 10-11 (2002).

[FN24]. Zimring & Hawkins, *supra* note 7, at 30-33.

[FN25]. *Id.* at 26, 30 tbl.2.2.

[FN26]. 408 U.S. 238 (1972). *Furman* rejected the state punishment regimes in place because of the extraordinary discretion they allowed juries which caused arbitrary decisions. It did not declare death sentences *per se* unconstitutional.

[FN27]. Zimring & Hawkins, *supra* note 7, at 37 (quoting U.S. commentators on the *Furman* decision); Kirchmeier, *supra* note 23, at 15.

[FN28]. Numerous domestic anti-death penalty advocates continue to advocate for a moratorium on the death penalty; others have argued that a moratorium will ultimately prolong the existence of capital punishment. See, e.g., Kirchmeier, *supra* note 23, at 75-76 (judicially imposed moratorium almost destroyed the anti-death penalty movement in the 1970s), 78, 103-06 (narrow focus on innocent death row inmates may lead only to narrow procedural changes rather than abolition); Council of Europe, Parliamentary Assembly, *Abolition of the Death Penalty in Council of Europe Observer States*, Doc. 9115, at para. 36 (June 7, 2001) [hereinafter *Parliamentary Assembly Report*], available at <http://www.assembly.coe.int/Documents/WorkingDocs/Doc01/EDOC9115.htm>.

[FN29]. Zimring & Hawkins, *supra* note 7, at 38-41.

[FN30]. 428 U.S. 153 (1976).

[FN31]. In the last twenty-five years the death row population has grown steadily, to reach a high of 3711 in 2001. *Summary of State Lists of Prisoners on Death Row, Death Row U.S.A.* at 25 (Winter

2002), at <http://www.deathpenaltyinfo.org/DEATHROWUSArecent.pdf> (last visited Apr. 4, 2002); see also James S. Liebman, *The Overproduction of Death*, 100 *Colum. L. Rev.* 2030, 2065 *tbl.4* (2000).

[FN32]. New York, for example, reinstated the death penalty in 1995. See Kirchmeier, *supra* note 23, at 20.

[FN33]. Pub. L. No. 103-322, § 60002(a), 108 Stat. 1796, 1959-82 (1994) (codified at 18 U.S.C. §§ 3591-99 (1994)); see generally Rory K. Little, *Foreword: The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 *Fordham Urb. L.J.* 347 (1999).

[FN34]. See, e.g., Cecile S. Holmes, *Christianity's Ties to Penal System Explored*, *The Times-Picayune*, July 7, 2001, at 14. McVeigh's execution was followed closely by that of Juan Garza, a convicted drug trafficker.

[FN35]. As of January 1, 2002, 24 individuals were on federal death row, as compared to 3680 in the states. See *Summary of State Lists of Prisoners on Death Row*, *supra* note 31.

[FN36]. See *id.*

[FN37]. See, e.g., Raymond Bonner, *Mexican Killer Is Refused Clemency by Oklahoma*, *N.Y. Times*, July 21, 2001, at A8 (as of July 2001, ninety-seven non- U.S. citizens were on death row in seventeen states; they hailed from thirty- four different countries, though approximately half of them were Mexican citizens).

[FN38]. See, e.g., Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 *Minn. L. Rev.* 753, 767 (2000).

[FN39]. *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 *U.N.T.S.* 222 (entered into force Sept. 3, 1953).

[FN40]. *Id.*, art.2(1).

[FN41]. *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, *Europ. T.S. No. 114* (entered into force March 1, 1985), available at <http://www.eurunion.org/legislat/deathpenalty/couneurproto6.htm> [hereinafter *Protocol No. 6*].

[FN42]. *Id.*, art. 2. See also *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, art. 2 (adopted June 8, 1990), at <http://www.eurunion.org/legislat/deathpenalty/oasdeath.htm>.

[FN43]. Zimring & Hawkins, *supra* note 7, at 21.

[FN44]. Leena Kurki, *International Standards for Sentencing and Punishment*, in *Sentencing and Sanctions in Western Countries* 331, 347 (Michael Tonry & Richard S. Frase eds., 2001). Membership in the Council of Europe is a prerequisite for admission to the European Union.

[FN45]. The Protocol is in effect in thirty-five Council of Europe member- states, and has been signed by four others. Id. Only Turkey has not yet taken any action on it. Chris Patten, Intervention at the Council of Europe, June 21, 2001, at http://europa.eu.int/comm/external_relations/news/pattern/sp01_300.htm.

[FN46]. For a detailed listing of the legal situation in all Council of Europe member states and observer states, see Council of Europe, Death Is Not Justice: The Council of Europe and the Death Penalty 26-42 (Oct. 2001), at <http://www.humanrights.coe.int/dp/pdfs/deathpen.pdf>.

[FN47]. See, e.g., Kurd Leader Wins Appeal Right, United Press Int'l, Dec. 15, 2000.

[FN48]. See, e.g., Ayla Ganioglu, Poll Expectation Obstructs Lifting of Death Penalty, Turkish Daily News (Apr. 1, 2002), available at http://www.turkishdailynews.com/old_editions/0_4_01_02/dom.htm#d5; Ilana Navaro, Breaking Turkish Taboos, The Jerusalem Report, May 8, 2000, at 34.

Compare Turkey's reaction to European pressure with the response of the state of Arizona in the LaGrand case, *infra* notes 94-106 and accompanying text.

[FN49]. Turkey has long aspired to membership in the European Union, and has been warned that an execution would put these plans on hold indefinitely. The European Union has been accused of imposing its vision of human rights on countries where it can exert power but does not do so in situations where its economic strength is insufficient. Elizabeth Shaver Duquette, Human Rights in the European Union: Internal Versus External Objectives, 34 Cornell Int'l L.J. 363, 378 (2001).

See also David F. Greenberg & Valerie West, Siting the Death Penalty Internationally (2001) (draft on file with the author) (outlining the anti- death penalty pressure Western European countries have exerted on Eastern European countries planning to join the Council of Europe, and ultimately the European Union).

[FN50]. Council of Europe, Ministers' Deputies, Decisions CM/Del/Dec(2002)784, 784th meeting (Feb. 21, 2002), at 4.5 & App. 9, at http://cm.coe.int/stat/E/Decisions/2002/784/d04_5. Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, at <http://conventions.coe.int/Treaty/en/Treaties/html/187.htm>. The Protocol was opened for ratification on May 3, 2002. It does not allow any derogations or reservations.

[FN51]. Despite a moratorium on death sentences, Russia has still not fulfilled its obligation toward the Council of Europe of banning the death penalty altogether and signing the Sixth Protocol. Russian Parliament Will Refuse to Abolish Death Penalty: Deputy, Agence France Press, Feb. 8, 2002.

[FN52]. Toni M. Fine, Moratorium 2000: An International Dialogue Toward a Ban on Capital Punishment, 30 Colum. Hum. Rts. L. Rev. 421, 427-28 (1999) ("The Italian government has been the driving force behind the recent international abolitionist movement").

[FN53]. European diplomatic efforts have created difficulties for U.S. diplomats in their conduct of foreign policy. See Brief of Amici Curiae Diplomats, *McCarver v. North Carolina*, 532 U.S. 941 (2001)

(No. 00-8727), available at 2001 WL 648607 [hereinafter Diplomats' Brief]; *infra* notes 142- 44 and accompanying text.

In addition to legal and diplomatic measures, European countries have also suggested an economic boycott of goods manufactured in states that continue to employ capital punishment. Fine, *supra* note 52, at 428; Peter O. Spiro, The New Sovereignists, 79(6) *Foreign Affairs* 9, 14 (Nov./Dec. 2000). For a discussion of the increasing importance of subnational governments within the international human rights regime, see Peter J. Spiro, The States and International Human Rights, 66 *Fordham L. Rev.* 567, 583-87 (1997) [hereinafter *The States and International Human Rights*].

[FN54]. See, e.g., EU Policy on the Death Penalty, Excerpts from the Memorandum by the European Union at the 54th United Nations General Assembly, at <http://www.eurunion.org/legislat/DeathPenalty/54thUNexcrpt.htm> (last visited Mar. 15, 2002) (detailing various EU interventions in death cases around the globe). The European Union has developed guidelines how to approach the imposition of the death penalty in third countries. The Council of the European Union, Guidelines to EU Policy Towards Third Countries on the Death Penalty, June 3, 1998, at <http://www.eurunion.org/legislat/DeathPenalty/Guidelines.htm> (last visited Mar. 15, 2002) [hereinafter *EU Guidelines*].

[FN55]. The Death Penalty: Europe v. America, *World View Commentary* No. 87, Nov. 16, 2000, at http://www.law.nwu.edu/depts/clinic/ihr/hrcomments/2000/Nov16_00.htm (last visited Feb. 6, 2002).

[FN56]. For some examples of this strategy, see Patten, *supra* note 45.

[FN57]. See Kurki, *supra* note 44, at 349. The time frame during which a woman should not be executed after giving birth varies dramatically. A number of countries seem to extend it to two years--the length of time the World Health Organization suggests that women nurse their children.

[FN58]. While the intentional and unjustified taking of human life is generally considered the most serious offense, there is disagreement as to what other types of crimes might fit into this category. In addition, a substantial number of states violate this prohibition by imposing the death penalty for drug trafficking or adultery. See, e.g., Kurki, *supra* note 44, at 348.

[FN59]. Compare *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (imposition of death penalty on people who were under sixteen when crime was committed violates Eighth and Fourteenth Amendments), with *Stanford v. Kentucky*, 492 U.S. 361 (1989) (imposition of capital punishment on sixteen- and seventeen-year-old offenders constitutionally permissible).

Eighty-three of eighty-nine retentionist countries respect this prohibition. Among the remaining six, during the 1990s the United States executed the largest number of individuals who committed offenses while under eighteen. Kurki, *supra* note 44, at 348.

[FN60]. 122 S. Ct. 2242 (2002). In oral argument, the Court raised the question whether the Europeans' position on the execution of the mentally retarded should be relevant in the Court's decision making. Oral Arguments, *Atkins v. Virginia*, 2002 WL 341765 (U.S. 2002). For other death cases in which the Supreme Court looked outside U.S. borders to determine international norms, see, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 389-90 (1989) (Brennan, J., dissenting); *Thompson v. Oklahoma*, 487 U.S. 815, 830- 31 (1988).

[FN61]. See, e.g., Letter of the European Union, *supra* note 4; EU Guidelines, *supra* note 54.

[FN62]. The decision, however, indicates that the Europeans may not have to expect much support from the Supreme Court in their efforts to protect juveniles from the imposition of the death penalty. See *Atkins*, 122 S. Ct. at 2249 n.18.

[FN63]. *Id.* at 2249 n.21. In his dissenting opinion Chief Justice Rehnquist considers the Court's reference to international opinion and foreign laws flawed as he "fail[s] to see... how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination." *Id.* at 2254 (Rehnquist, C.J., dissenting).

[FN64]. European Parliament Resolution on the Abolition of the Death Penalty in the United States, B5-0341, 0354, 0359, 0370 and 0376/00 (Apr. 13, 2000), at <http://www.eurunion.org/legislat/deathpenalty/epres041300.htm>.

[FN65]. Council of Europe, Abolition of the Death Penalty in Council of Europe Observer States, Resolution 1253 (2001), at <http://assembly.coe.int/Documents/AdoptedText/ta01/eres1253.htm> (last visited Mar. 6, 2002); see also Parliamentary Assembly Report, *supra* note 28. US Warned on Death Penalty, *Fin. Times*, June 27, 2001, at 1; Council of Europe to Urge Japan, U.S. to Stop Death Penalty, *Japan Econ. Newswire*, June 25, 2001.

[FN66]. 999 U.N.T.S. 171, Art. 7.

[FN67]. 138 Cong. Rec. S4781-01, S4783 (daily ed. Apr. 2, 1992). This reservation was taken to prevent Article 7 from being interpreted as outlawing the death penalty or declaring the circumstances surrounding capital punishment to be a violation of international law. This so-called Soering reservation refers to the decision by the European Court of Human Rights, which interpreted the identical provision in the European Convention on Human Rights to be violated by the so-called "death row phenomenon." See *infra* notes 82-85 and accompanying text. See S. Exec. Rpt. No. 102-23 at 12 (1992); William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 *Brook. J. Int'l L.* 277, 282 (1995) [hereinafter *Invalid Reservations*].

The United States also entered a reservation to Article 6, in which it reserved the right to execute those who commit crimes while below the age of eighteen.

[FN68]. Kurki, *supra* note 44, at 335; Schabas, *Invalid Reservations*, *supra* note 67, at 310, 315 (Human Rights Committee held US reservations under articles 6 and 7 invalid); EU Demarche on the Death Penalty, Feb. 25, 2000, at <http://www.eurunion.org/legislat/DeathPenalty/Demarche.htm> (last visited Mar. 15, 2002).

[FN69]. Schabas, *Invalid Reservations*, *supra* note 67, at 325 n.246.

[FN70]. European Parliament Resolution on the Death Penalty in the United States, B5-0613, 0619, 0624, 0631 and 0638/2000 at P 5 (June 7, 2000), at <http://www.eurunion.org/legislat/DeathPenalty/EPRes070600.htm>.

[FN71]. See, e.g., U.N. Commission on Human Rights, 56th Session, Resolution on the Death Penalty, Sponsored by the European Union, Apr. 27, 2000, E/CN.4/RES/2000/65 at <http://www.eurunion.org/legislat/DeathPenalty/UN56Res2000.htm> (last visited Mar. 15, 2002).

Various sub-groups within the United Nations have criticized the United States for its imposition of the death penalty. See, e.g., Kurki, *supra* note 44, at 349 (discussing critique of U.N. Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions of U.S. use of death penalty against juvenile offenders). An exhaustive discussion of non-European criticism of the death penalty, including that occurring in international fora, is beyond the scope of this paper.

[FN72]. Michael J. Dennis, *The Fifty-Sixth Session of the UN Commission on Human Rights*, 95 *Am. J. Int'l L.* 213, 214 (2001); see also EU Policy on the Death Penalty, Excerpts from a Statement Delivered to the European Parliament by EU External Relations Commissioner the Rt. Hon. Christopher Patten, Feb. 16, 2000, at <http://www.eurunion.org/legislat/DeathPenalty/Patten.htm> (explaining why EU froze its death penalty resolution introduced at the General Assembly).

[FN73]. See, e.g., Ved P. Nanda, *Bases for Refusing International Extradition Requests--Capital Punishment and Torture*, 23 *Fordham Int'l L.J.* 1369, 1377-78 (2000). The United States has opposed the text every year by relying on arguments of national self-determination. Dennis, *supra* note 72, at 214. See also Radelet, *supra* note 10, at 847.

[FN74]. *Question of the Death Penalty, Res. 1999/61*, U.N. Comm'n on Human Rights, 56th Session, U.N. Doc. E/CN.4/RES/1999/61.

[FN75]. See, e.g., Taylor, *supra* note 13, at 598.

[FN76]. See, e.g., Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 *Am. J. Int'l L.* 57, 95 (1999); Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 *Am. J. Int'l L.* 302, 309 (1999).

[FN77]. While domestic courts in Croatia, Slovenia, Macedonia, and Bosnia abolished capital sanctions during the 1990s, the national courts of Rwanda have assessed the death penalty in a number of cases arising from the Hutu massacres in the early 1990s. This discrepancy in sentences has caused serious concern since the goal of the international tribunal has been to try the most serious offenders. Schabas, *War Crimes*, *supra* note 13, at 763 (citing statement of Rwanda's representative before the Security Council).

[FN78]. The Rome Statute for an International Criminal Court was adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on July 17, 1998. U.N. GAOR, 53d Sess., U.N. Doc. A/CONF. 183/9 (1998) art. 77.

[FN79]. See, e.g., *id.* at art. 77(1)(b).

[FN80]. Despite its defense of the death penalty at home, the United States has not crusaded for its greater adoption abroad. This contrasts with its attempts to export other features of the U.S. criminal justice system, such as the jury.

[FN81]. Schabas, War Crimes, *supra* note 13, 770 (recounting the debates surrounding the punishment provisions in the statute for the International Criminal Court and evaluating the position of the United States).

[FN82]. No. 161, 11 Eur. H.R. Rep. 439 (Eur. Ct. H.R. 1989).

[FN83]. Federal courts have rejected similar arguments on the death-row phenomenon. See, e.g., *Ceja v. Stewart*, 134 F.3d 1368 (9th Cir. 1998); *White v. Johnson*, 79 F.3d 432 (5th Cir. 1996). But see *Gomez v. Ruiz*, 519 U.S. 918 (1996) (Stevens, J., dissenting); *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J.) (memorandum on denial of certiorari).

The Judicial Committee of the Privy Council--the highest Commonwealth Court-- adopted the argument of the Soering court in *Pratt v. Attorney-General for Jamaica*, [1993] 4 All E.R. 769 P.C., 2 A.C.1, P.C.

Even though two regional tribunals have accepted this argument, it has been criticized frequently. The defendant can vindicate his rights through the appellate process. If he succeeds in preventing an execution for a sufficiently long period of time while exhausting all legal avenues, under Soering that delay prevents his execution because of the conditions on death row. For a discussion of the issue of delay in a developed criminal justice system, see *Knight v. Florida*, 528 U.S. 990 (1999) (concurring in denial of certiorari, Thomas, J.; dissenting from denial of certiorari, Breyer, J.).

[FN84]. Kurki, *supra* note 44, at 351. Canada also no longer permits extraditions without such assurances. *Minister of Justice v. Burns*, No. 26129, 2001 S.C.C. 7, 2001 Can. Sup. Ct. LEXIS 9 (Can., Feb. 15, 2001).

In the Soering case, the state of Virginia promised not to seek the death penalty in exchange for extradition. Soering was convicted and sentenced to two terms of life imprisonment. See *Soering v. Deeds*, 2000 U.S. App. Lexis 15443 (4th Cir. 2000) (unpublished opinion), cert. denied, 531 U.S. 1074 (2001).

[FN85]. Kurki, *supra* note 44, at 351. For a discussion of the relevant Italian extradition case, see *Nanda*, *supra* note 73, at 1393-94; Amnesty International, United States of America: No return to execution--the US death penalty as a barrier to extradition, Nov. 29, 2001, 5-6 at [http://web.amnesty.org/aidoc/aidoc_pdf.nsf/index/AMR511712001ENGLISH/\\$File/AMR5117101.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/index/AMR511712001ENGLISH/$File/AMR5117101.pdf) The term "retentionist" applies to countries that "retain" the death penalty.

[FN86]. See, e.g., *Pratt*, [1993] 4 All E.R. 769 P.C.

[FN87]. *Knight v. Florida*, 528 U.S. 990, 996 (1999) (Breyer, J., dissenting from denial of certiorari); *Elledge v. Florida*, 525 U.S. 944, 944 (1998) (Breyer, J., dissenting from denial of certiorari) ("[A] reasoned answer to the 'delay' question could help to ease the practical anomaly created when foreign courts refuse to extradite capital defendants to America for fear of undue delay in execution.").

[FN88]. Domestic European courts have refused extradition to the United States and other retentionist countries without assurances that the prosecution would not seek the death penalty. *Nanda*, *supra* note 73, at 1391-94.

A number of the individuals tried for the U.S. embassy bombings in Kenya and Tanzania in 1998 were extradited from European countries, in exchange for assurances that they would not receive the death penalty. Jon Sawyer, Ashcroft Bucks Trend in Seeking Death Penalty, *St. Louis Post-Dispatch*, Mar. 31, 2002, at B6; Amnesty International, *supra* note 85, at 14.

In a recent decision, the highest Mexican court announced a constitutional ruling that will prevent the Mexican government from extraditing individuals who are threatened with a sentence of more than forty years. Mexico considers forty-year sentences the maximum allowable so as not to render punishment cruel and inhumane. Mexico Supreme Court Stays U.S. Extradition Request Due to Life Imprisonment Penalty, 18(3) *Int'l Enforcement L. Rep.* (Mar. 2002).

[FN89]. Sam Dillon, Spain Sets Hurdle for Extraditions, *N.Y. Times*, Nov. 24, 2001, at A1. The extradition treaty between the United States and France permits either party to refuse extradition “[w]hen the offense for which extradition is sought is punishable by death under the laws in the Requesting State and is not punishable by death under the laws in the Requested State.” Exceptions are permitted when the Requesting State “provides the assurance that the death penalty will not be imposed or, if imposed, will not be carried out.” Extradition Treaty Between the United States of America and France, S. Treaty Doc. No. 105-13 (signed Apr. 23, 1996) art. 7.

The European governments have also expressed their reluctance to extradite suspected terrorists to the United States if they might be tried before the special military tribunals established by the president for suspected terrorists. These tribunals allow for the imposition of the death penalty following only a two-thirds majority vote for conviction. President Issues Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, at <http://www.whitehouse.gov/news/releases/2001/11/print/20011113-27.html> (last visited Mar. 1, 2002).

[FN90]. Robert Graham et al., Europe Warns US on Death Penalty Terror Charges, *Fin. Times*, Dec. 13, 2001, at 6.

[FN91]. Michelle Mittelstadt, U.S. Will Seek Death Penalty for Moussaoui, *Dallas Morning News*, Mar. 29, 2002, at 10A.

[FN92]. Treaty with France on Mutual Legal Assistance in Criminal Matters, S. Treaty Doc. 106-17 (signed Dec. 10, 1998) art. 6. The treaty allows for denial of assistance if “execution of the request would prejudice [the Requested State’s] sovereignty, security, public order, or other essential interests.” *Id.* at 6(1)(b).

[FN93]. Consular notification has also recently been raised domestically in death cases. See *Valdez v. State*, 2002 WL 809243, 2002 Okla. Crim. 20 (Okla. Crim. App.).

[FN94]. Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 99 (Nov. 10), available at <http://www.icj-cij.org/icjwww/idocket/ipaus/ipausframe.htm> [hereinafter Breard Case]. *LaGrand Case* (F.R.G. v. U.S.), 40 I.L.M. 1069 (June 27, 2001), available at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm>.

[FN95]. Vienna Convention on Consular Relations, opened for signature Apr. 18, 1961, 21 U.S.T. 77, 596 U.N.T.S. 261 (entered into force Mar. 19, 1967). See the Breard Case, 1998 I.C.J. 99, and the *LaGrand Case*, 40 I.L.M. 1069.

Because of the focus of this article on Europe, the Breard Case involving Paraguay will not be discussed in any detail. For further information on that case, see, e.g., Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 *Am. J. Int'l L.* 161 (1999); Jonathan I. Charney & W. Michael Reisman, *Agora: Breard: The Facts*, 92 *Am. J. Int'l L.* 666 (1998).

[FN96]. At that point Karl LaGrand had already been executed. In its case before the ICJ, Germany demanded compensation for his death. See Jehanne E. Henry, *Overcoming Federalism in Internationalized Death Penalty Cases*, 35 *Tx. Int'l L.J.* 459, 464-65 (2000).

[FN97]. See *LaGrand Case*, 40 *I.L.M.* 1069, P 32 (describing provisional measures issued by the court on Mar. 3, 1999).

[FN98]. For a discussion of the effectiveness of ICJ interim measures, see Alison Duxbury, *Saving Lives in the International Court of Justice: The Use of Provisional Measures to Protect Human Rights*, 31 *Cal. W. Int'l L.J.* 141 (2000).

[FN99]. The same was true for its action in the Breard Case. See Henry, *supra* note 96, at 463.

[FN100]. *Id.* at 476 (criticizing action of federal government and outlining actions the administration could have taken to have the executions postponed). For proposals on how the Supreme Court could have accommodated the ICJ's stay order, see, e.g., Anne-Marie Slaughter, *Agora: Breard: Court to Court*, 92 *Am. J. Int'l L.* 708 (1998).

[FN101]. *LaGrand Case*, 40 *I.L.M.* 1069.

[FN102]. See e.g., Karin Oellers-Frahm, *Pacta sunt servanda--Gilt das auch für die USA?*, 26 *EuGRZ* 437 (Oct. 4, 1999); Cara S. O'Driscoll, *The Execution of Foreign Nationals in Arizona: Violations of the Vienna Convention on Consular Relations*, 32 *Ariz. St. L.J.* 323 (2000).

[FN103]. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, Merits, 1986 *I.C.J.* 14, P 10 (June 27) (United States unilaterally rescinded its submission to the ICJ's jurisdiction). For a critique of the U.S. action in this case, see, e.g., Keith Highet, *Evidence, the Court, and the Nicaragua Case*, 81 *Am. J. Int'l L.* 1 (1987); Anthony D'Amato, *Nicaragua and International Law: The "Academic" and the "Real,"* 79 *Am. J. Int'l L.* 657 (1985).

[FN104]. See e.g., *Stanford v. Kentucky*, 492 *U.S.* 361 (1989) (executions of juveniles); *Atkins v. Virginia*, 122 *S. Ct.* 2242 (2002) (executions of mentally retarded prohibited by overturning a relatively recent precedent, *Penry v. Lynaugh*, 492 *U.S.* 302 (1989)). For other examples of state action that led to international protests, see Peter J. Spiro, *New Players on the International Stage*, 2 *Hofstra L. & Pol'y Symposium* 19, 31 (1997) [hereinafter *New Players*].

[FN105]. At the ICJ, the United States pointed to its extensive training program of local police officials regarding the requirements of the Vienna Convention. However, State Department representatives have privately indicated that future violations of the consular notification mandate are not unlikely, as many foreign citizens are reluctant to reveal their immigration status to law-enforcement authorities. Interview with D. Stephen Mathias, Assistant Legal Adviser for United Nations Affairs, United States

Department of State, January 2002. The judgment of the ICJ regarding relief required should the consular rights of German citizens be violated in a criminal case where serious sanctions are imposed--"the review and reconsideration of the conviction and sentence"--does not extend to the citizens of other countries. *LaGrand Case*, 40 I.L.M. 1069, P 128.

[FN106]. See, e.g., *World Court Rules US Broke Law Over Brothers' Execution*, *The Scotsman*, June 28, 2001, at 10.

[FN107]. As an example, see Germany, which constitutionally abolished the death penalty in 1949, but whose population continued to support it strongly for decades afterwards. Elisabeth Noelle & Erich Peter Neumann, *The Germans: Public Opinion Polls 1947-1966* 312-13 (1967).

[FN108]. See, e.g., *Zimring & Hawkins*, *supra* note 7, at 22.

[FN109]. See, e.g., Thomas Sancton, *A Matter of Life or Death*, *Time Atlantic*, May 21, 2001, at 28.

[FN110]. See, e.g., Suzanne Daley, *President Facing Skeptical Europe on Trip This Week*, *N.Y. Times*, June 11, 2001, at A1.

[FN111]. Debates of the European Parliament, *Death Penalty in the World* (SRA Gonzáles Álvarez) (July 5, 2001), at <http://www3.europarl.eu.int/omkk/omnsapir.so/debats?FILE=01-07-05&LANGUE=EN&LEVEL=DOC&GCSELECTCHAP=6&GCSELECTPERS=101> (on file with the Oregon Law Review) (noting the acquittal of Joaquin Jose Martinez).

The data on the death penalty in Illinois and Governor Ryan's subsequent moratorium on the death penalty garnered a similar reaction in the United States. See *Kirchmeier*, *supra* note 23, at 43-48.

[FN112]. For a description of the influence of non-governmental organizations on the international level, see *Spiro*, *New Players*, *supra* note 104, at 25-28.

[FN113]. The European Parliament passed a number of resolutions pertaining to the fate of Abu-Jamal. See, e.g., *Resolution on the Death Penalty in the United States and the Abu-Jamal Case*, B4-0889, 0907 and 0923/95, 1995 O.J. (C 166) 131 (June 15, 1995).

It has not been unusual to find posters demanding the release of Mumia Abu- Jamal on lamp posts all over Italy's major cities.

[FN114]. Debates of the European Parliament, *Death Penalty in the World* (M. Fodé Sylla, Member from France) (July 5, 2001), at <http://www3.europarl.eu.int/omk/omnsapir.so/debats?FILE=01-07-05&LANGUE=EN&LEVEL=DOC&GCSELECTCHAP=6&GCSELECTPERS=99> (on file with the Oregon Law Review).

[FN115]. *Id.*

[FN116]. Some credit European protests in that case for the delays in Abu- Jamal's execution, and ultimately the grant of a new trial. Thomas Maier, *Record Executions in US--Opponents Look to Europe for Help*, *Deutsche Presse- Agentur*, Dec. 29, 1995.

[FN117]. See, e.g., EU Policy on the Death Penalty, Excerpt from the Speech by Minister for Foreign Affairs Tarja Halonen at the 54th UN General Assembly, Sept. 21, 1999, at <http://www.eurunion.org/legislat/DeathPenalty/54thFinspeechexcrpt.htm>.

[FN118]. EU Memorandum on the Death Penalty, <http://www.eurunion.org/legislat/DeathPenalty/eumemorandum.htm> (last visited Mar. 15, 2002).

[FN119]. European Parliament Resolution on the Death Penalty in the United States, *supra* note 70, at P1.

[FN120]. Germany's abolition, for example, required an alliance between left- and right-wing groups. While the former considered the death penalty morally abhorrent and rejected its abuses during the Nazi regime, the latter wanted to protect former Nazis from execution.

[FN121]. Sancton, *supra* note 19.

[FN122]. While the United States is able to point to numerous other countries that impose the death penalty--often in larger numbers and within a less fair criminal justice system--it does not generally seek to compare its human rights record with those countries, which include China, Saudi Arabia, Iraq, and Iran.

[FN123]. Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 *Stan. L. Rev.* 61, 62 (1988). Segregation was also a problem for the United States' propaganda war during World War II, when Germany and Japan cited U.S. policies toward African-Americans to rally other countries to their cause. *Id.* at 69.

[FN124]. *Id.* at 86 (describing British press coverage of execution of black juveniles in Mississippi in the mid-1940s).

[FN125]. *Id.* at 66, 80-81.

[FN126]. *Id.* at 65.

[FN127]. *Id.* at 94.

[FN128]. See, e.g., *Diplomats' Brief*, *supra* note 53 at 12 n.10 ("The People's Republic of China... regularly raises the U.S. practice of executing people with mental retardation when demarched about its own human rights practices.").

During segregation, India, which still operated under a very strict caste system, criticized the United States. Therefore, it does not necessarily follow that criticism of the United States will be restricted to abolitionist countries. However, if any foreign critique is accepted domestically, theirs is likely to be credited more.

[FN129]. It has been argued that the United States' surprising loss of its seat in the U.N. Human Rights Commission was due to increasing opposition to the death penalty on the Commission. *Id.* at 11 n.8; Sancton, *supra* note 19.

[FN130]. European leaders have come to proclaim proudly their anti-death penalty stance despite popular opinion. See Kirchmeier, *supra* note 23, at 85- 88.

[FN131]. Dudziak, *supra* note 123, at 65.

[FN132]. *Id.* at 101.

[FN133]. *Id.* at 103.

[FN134]. 347 U.S. 483 (1954).

[FN135]. Dudziak, *supra* note 123, at 103-04, 118.

[FN136]. Giftspritze für psychisch Kranke, *Süddeutsche Zeitung*, June 15, 2001.

[FN137]. Michael Isikoff, Should This Man Die?, *Newsweek*, Apr. 8, 2002, at 30. See *supra* notes 89-92 and accompanying text.

[FN138]. 526 U.S. 111 (1999).

[FN139]. 526 U.S. at 113 (Breyer, J., dissenting from denial of motion for leave to file a bill of complaint) (recounting Solicitor General's argument).

[FN140]. LaGrand Case, 40 I.L.M. 1069. See *supra* notes 93-105 and accompanying text.

[FN141]. See Spiro, *The States and International Human Rights*, *supra* note 53, at 573.

[FN142]. Diplomats' Brief, *supra* note 53 at 7.

[FN143]. *Id.* at 2.

[FN144]. Raymond Bonner, Veteran U.S. Envoys Seek End to Executions of Retarded, *N.Y. Times*, June 9, 2001, at 3.

[FN145]. See, e.g., European Parliament Resolution on the Death Penalty in the World and the Introduction of a European Day Against the Death Penalty B5- 0484, 0486, 0497, 0504, 0512 and 0527/2001 (July 5, 2001), at <http://www3.europarl.eu.int/omk/omnsapir.so/calendar?APP=PDF&TYPE=PV2&FILE=20010705EN.pdf&LANGUE=EN> at 118 (on file with the Oregon Law Review) (“[T]he death penalty is carried out in thirty-eight of the US States, often unfairly against the innocent, the poor, minorities, the mentally ill, the mentally retarded and juveniles....”).

In this respect, some of the debate does not seem to have changed much since the 1940s, when the British public and the House of Commons objected to the execution of two African-American juveniles in Mississippi. Dudziak, *supra* note 123, at 86-87.

[FN146]. See, e.g., Michael Tonry, Symbol, Substance, and Severity in Western Penal Policies, 3 *Punishment & Soc'y* 517, 521 (2001).

[FN147]. These discussions are often eerily reminiscent of some of the foreign media coverage of racism in the United States prior to desegregation. Dudziak, *supra* note 123, at 88.

[FN148]. For a summary of theoretical approaches on how the convergence of international legal norms occurs, see Harold Hongju Koh, *Bringing International Law Home*, 35 *Hous. L. Rev.* 623 (1998).

[FN149]. In part as a result of the joint fight against terrorism, the United States and the European Union are currently negotiating a cooperation agreement. The death penalty and the military tribunals for alleged terrorists are among the most serious obstacles to such an agreement. Cornelia Bolesch, *Justizminister verlangen Schutz der Grundrechte*, *Süddeutsche Zeitung*, Feb. 16, 2002.

[FN150]. Dudziak, *supra* note 123, at 74. The Council of Europe has repeatedly urged its member-states to adhere to human rights standards in their fight against terrorism and to refuse extradition to retentionist countries without adequate assurances. Council of Europe, Parliamentary Assembly, *Combating Terrorism and Respect for Human Rights*, Doc. 9331 (Jan. 22, 2002) at <http://assembly.coe.int/Documents/WorkingDocs/Doc02/EDOC9331.htm>. See also Motion for a Resolution on EU Judicial Cooperation with the United States in Combating Terrorism (Dec. 11, 2001), at http://epped.europarl.eu.int/Activities/pday01/day161_en.asp.

[FN151]. Even though many would expect the war on terrorism to lead largely to the arrest and prosecution of men from Middle Eastern or other Islamic countries, so far this has not proven to be the case. The only individuals indicted for offenses directly connected to terrorism are six U.S. citizens from upstate New York, Zacharias Moussaoui and Richard Reed, citizens of France and Great Britain, respectively--both countries that have abolished the death penalty.

Even if future prosecutions were to involve citizens of Middle Eastern and other Islamic countries that have retained the death penalty, Islamic law does not prescribe death sentences for terrorism or for murder. See, e.g., William A. Schabas, *Islam and the Death Penalty*, 9 *Wm. & Mary Bill Rts. J.* 223, 234 (2000). Therefore, concern about the death penalty in the United States might even be voiced by countries that use it themselves, albeit for different types of offenses.

[FN152]. Amnesty International, *supra* note 85, at 3 (quoting a Reuters report discussing confidential memorandum in which the United States asked the European Union to “explore alternatives to extradition including expulsion and deportation” to avoid having to forego death requests in alleged terrorist prosecutions); Peter Ford, *Trying Al Qaeda: US v. Europe*, *The Christian Science Monitor*, Dec. 14, 2001, at 1. For the European response, see Motion for a Resolution on EU Judicial Cooperation with the United States in Combating Terrorism, *supra* note 150; see also *Analysis of the Proposal for US-EU Counter-Terrorism Cooperation*, at <http://www.statewatch.org/news/2001/nov/06Buslet.htm> (last visited Apr. 2, 2002).

[FN153]. This development would occur separate from, though parallel to, the growing movement toward abolition within the United States, which is based on concerns about the execution of the innocent. See, e.g., *Moratorium on Executions in Illinois* at <http://www.state.il.us/gov/press/00/Jan/morat.htm>; *National Death Penalty Moratorium Act of 2000*, S.

2463, 106th Cong. (2000). For concern about the negative impact the “war on terrorism” may have on the moratorium effort, see Kirchmeier, *supra* note 23, at 113-14.

[FN154]. See, e.g., Katharine Q. Seelye & Steven Erlanger, U.S. Suspends the Transport of Terror Suspects to Cuba, *N.Y. Times*, Jan. 24, 2002, at A1.

[FN155]. This would be the case even though it is likely that European states and others would subsequently press the United States on a number of punishment practices unknown abroad, including life-without-parole sentences and the super-maximum security prisons.