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# The European View of American Justice

Allen E. Schoenberger
*Loyola University Chicago, School of Law*, aschoen1@luc.edu

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*Allen E. Shoenberger**

The European view of American justice is heavily influenced by European attitudes towards the death penalty. Indeed, all fifteen of the original European Union countries have abolished the death penalty.[1] Perhaps the sharpest difference between the United States and the rest of the world is on the issue of the use of the death penalty against juvenile offenders. Since January 1990, only seven countries other than the United States are known to have executed juvenile offenders: the Democratic Republic of Congo, Yemen, China, Iran, Nigeria, Pakistan, and Saudi Arabia.[2] China, Yemen, and Pakistan have now outlawed the practice.[3] In the 1990s, more executions of child offenders occurred in the United States than in the rest of the world combined.[4]

Symbolically, the European view towards the American death penalty was reflected by the special illuminations of the Coliseum in Rome, Italy during the years 2000 and 2001. It was lit up twice because of the actions of Illinois Governor Ryan in imposing a death penalty moratorium and then commuting the death sentences for all death row inmates.[5]

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* Professor of Law, Loyola University of Chicago School of Law.

1. *See generally* AGENCE FRANCE PRESSE, *International Day Against Death Penalty Blazes Forth Message* (Nov. 30, 2002), *available at* http://www.commondreams.org/headlines02/1130-03.htm (discussing countries that have abolished executions). *But see id.* (stating that Albania and Russia maintain the death penalty for peacetime crimes in Europe).

2. AMNESTY INT'L, STOP CHILD EXECUTIONS! ENDING THE DEATH PENALTY FOR CHILD OFFENDERS 3 (Sept. 15, 2004) [hereinafter AMNESTY INT'L, STOP CHILD EXECUTIONS], available at http://web.amnesty.org/library/Index/ENGACT500152004.

3. *Id.* A move is underway in Iran to prohibit the execution of juvenile offenders. *Id.*

4. AMNESTY INT'L, THE DEATH PENALTY WORLDWIDE: DEVELOPMENTS IN 2000 23, tbl.1 (May 2000), *available at* http://web.amnesty.org/library/pdf/ACT500012001ENGLISH/$File/ACT5000101.pdf. Since January 1990, the United States has executed nineteen juvenile offenders. AMNESTY INT'L, STOP CHILD EXECUTIONS, *supra* note 2, at 3. Although the United States has ratified the International Covenant on Civil and Political Rights, which bans the execution of those who commit crimes under the age of eighteen, the United States specifically reserved its right to ignore the covenant's ban on executing juveniles. THOMAS BURGENTHAL ET AL., INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 369 (3d ed. 2002).

5. Former Governor George Ryan continued his efforts against the death penalty by speaking to the United Nations Human Rights Commission in Geneva, Switzerland on April 19, 2004. Naomi Koppel, *Ryan: Stop Executions Worldwide*, CHI. SUN-TIMES, Apr. 20, 2004, at 24. Ryan

The European Parliament in July 1998 warned then Governor Bush of Texas that many European companies, under pressures from European shareholders, were considering restricting their investments in American states that have the death penalty.[6] No massive boycott has occurred to date. Why should we care? This all seems quite remote from the United States.

In reality, the European sense of justice already is impacting the United States in ways that are sometimes unpredictable. Indeed, upon closer examination, whether it be attitudes towards the death penalty, anti-trust law, torture, or family law, European law already impacts the United States. It is time that Americans, and specifically American lawyers, recognize this fact.

## DEATH PENALTY: THE DEATH ROW PHENOMENON PREVENTS EXTRADITION OF ACCUSED MURDERERS FROM EUROPE!

The European Convention on Human Rights now is applicable to nearly 800 million Europeans (including Russians).[7] Final decisions about that convention are rendered by the European Court of Human Rights which sits in Strasbourg, France.[8]

In 1989, the European Court of Human Rights prohibited Great Britain from extraditing an accused murderer from Great Britain to Virginia.[9] Great Britain had an extradition treaty with the United States and was quite willing to extradite the accused, Jens Soering, a German

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questioned the United Nations Human Rights Commission, "[I]n the name of human rights, morality and mercy, I ask why not stop the machinery of death to study its accuracy, its fairness and its faults?" *Id.*

6. This may not be an idle threat. It was estimated that 184,500 jobs in Texas were supported by European investment, and thirty-nine percent of those jobs were high paying manufacturing jobs. Steven A. Drizin & Stephen K. Harper, *Old Enough to Kill, Old Enough to Die*, para. 26 (Apr. 16, 2000) *at* http://venus.soci.niu.edu/~archives/ABOLISH/rick-halperin/apr00/0081.html. Of the $67.5 billion invested in the Texas economy from around the world, fifty-six percent, or $38.1 billion, comes from Europe. *Id.* Europe was also Texas's number two export market with $8.8 billion worth of goods bought in 1996. *Id.*

7. The European Convention on Human Rights is a convention ratified by all members of the Council of Europe. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 11, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights], *available at* http://www.echr.coe.int/Convention/webConvenENG.pdf (Feb. 2003). For a breakdown of the dates of signing, ratification, and entry into force for each individual country, see COUNCIL OF EUROPE, *at* http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG (last updated Jan. 10, 2005). The Council of Europe, founded in 1949, is the European continent's oldest political organization. The organization consists of forty-six countries, twenty-one of which are from Central and Eastern Europe. COUNCIL OF EUROPE, *at* http://www.coe.int/T/e/Com/about_coe/default.asp (last updated Oct. 2004).

8. European Convention on Human Rights, *supra* note 7, Sect. II, art 19.

9. Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) at 50 (1989).

national.[10] However, the European Court of Human Rights determined that Soering's extradition would violate Article 3 of the European Convention.[11]

The court determined that subjecting a capital defendant to the death row phenomenon[12] would constitute inhuman and degrading treatment in violation of Article 3.[13] The conclusion of the court reflects its detailed analysis:

> For any prisoner condemned to death, some element of delay between imposition and execution of the sentence and the experience of severe stress in conditions necessary for strict incarceration are inevitable. The democratic character of the Virginia legal system in general and the positive features of Virginia trial, sentencing and appeal procedures in particular are beyond doubt. The Court agrees with the Commission that the machinery of justice to which the applicant would be subject in the United States is in itself neither arbitrary nor unreasonable, but, rather, respects the rule of law and affords not inconsiderable procedural safeguards to the defendant in a capital trial. Facilities are available on death row for the assistance of inmates, notably through provision of psychological and psychiatric services.
>
> However, in the Court's view, having regard to the very long period of time spent on death row in such extreme conditions, with the ever-present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstance[s] of the applicant, especially his age and mental state at the time of the offences, 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. A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration.[14]

The case arose when Soering killed his girlfriend's parents.[15] Apparently the parents disapproved of Soering's relationship with their

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10. *Id.* at 12.

11. *Id.* at 44. Article 3 provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." European Convention on Human Rights, *supra* note 7, § I, art. 3.

12. The death row phenomenon include the circumstances a death row inmate faces, including: (1) the delays in appeal and review, during which time the inmate is subject to increasing tension and psychological trauma; (2) the extreme conditions on death row in which the inmate is at risk of homosexual abuse and physical attack by prisoners on death row; and (3) the fact that the judge or jury is not obliged to take into account the inmate's age and mental state at the time of the offence. *Soering*, 161 Eur. Ct. H.R. (ser. A) at 12.

13. *Id.* at 44–45.

14. *Id.*

15. *Id.* at 11.

daughter.[16] Together, the daughter and Soering killed her parents through multiple and massive stab and slash wounds to the neck, throat and body.[17]

From the viewpoint of the court, the fact that Soering was eighteen years of age,[18] immature, and afflicted with a psychiatric condition in which he lost his personal identity in a symbiotic relationship with his girlfriend, who was a powerful, persuasive and disturbed young woman, weighed heavily on its decision.[19] The court also noted that four out of five of the specified factors in mitigation expressly mentioned by the Virginia Code arguably applied to Soering: (1) lack of prior criminal record; (2) the fact that the offense was committed while the defendant was under an extreme mental or emotional disturbance; (3) the fact that at the time of the crime the ability of the defendant to appreciate its criminality was significantly diminished; and (4) the age of the defendant.[20]

Nevertheless, the Virginia prosecutor was unwilling to relent on seeking the death penalty.[21] The only accommodation the prosecutor was willing to make was a promise that a representation would be made to the jury that the government of Great Britain did not wish to have the death penalty applied or carried out.[22]

The resulting decision effectively barred extradition from Great Britain to Virginia until further assurances were conveyed.[23] However, when one reads the *Soering* decision, it becomes plain that the

16. *Id.* at 44–45.

17. *Id.*

18. *Id.* at 11, 14.

19. *Id.* at 14. The consultant forensic psychiatrist opined that there existed between Mr. Soering and his girlfriend, a *folie à deux*, a well recognized state of mind in which one partner is suggestible to the extent that he or she believes in the psychotic delusions of the other. *Id.* The degree of disturbance of the girlfriend bordered on the psychotic. *Id.* Over the course of several months she had persuaded Mr. Soering that they had to kill her parents for them to survive as a couple. *Id.*

20. *Id.* at 37; *see* VA. CODE ANN. § 19.2-264.4B (Michie 2000 & Supp. 2003) (setting forth the mitigating factors for capital offenses).

21. *Soering*, 161 Eur. Ct. H.R. (ser. A) at 38 (noting that the Virginia prosecutor certified that should Soering be convicted of capital murder, a representation would be made in the name of the United Kingdom to the judge at the time of sentencing that it is the wish of the United Kingdom that the death penalty should not be imposed or carried out).

22. *Id.* at 38.

23. Eventually the United States federal government assured Great Britain that Soering would not be tried for a capital crime. RICHARD B. LILLICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS 768 (3d ed. 1995). The value of this assurance was uncertain, for although it bound the United States internationally, the ability of the federal government to bind the state prosecutor was unclear. *Id.* In any event, the jury that convicted Mr. Soering eventually recommended that he be sentenced to two life terms. *Id.*

American legal system can no longer ignore European law. The Soering case certainly raises the question of whether American criminal defense attorneys must advise potential capital murder clients of the difficulties of extradition from Europe to the United States. But one must also ask whether such advice would constitute a criminal act on the part of the attorney—that is, advocating a criminal flight to avoid prosecution.

## THE EUROPEAN ATTITUDE TOWARDS TORTURE AND MISTREATMENT IS MORE PROTECTIVE THAN CURRENT UNITED STATES LAW

The language in the European Convention on Human Rights prohibiting inhuman and degrading treatment as well as torture provided the basis for *Soering*.[24] No doubt this language reflects the European antipathy towards the death penalty, but it also reflects a distinctly different approach towards appropriate levels of punishment.

In a series of cases dealing with school children, the European Court of Human Rights reached results contradictory to current American law. In *Tyrer v. United Kingdom*,[25] the court held that three strokes of a birch paddle on a naked rear end violated the European Convention on Human Rights prohibition of degrading punishment.[26] In a later case, the European Court of Human Rights permitted the lesser corporal punishment of slippering.[27]

By contrast, the United States Supreme Court approved the infliction of twenty licks with a paddle so severe that medical attention was required after a hematoma resulted, necessitating that the child stay home from school for several days.[28] In a separate case, another child was struck on the arm, depriving him of full use of his arm for a week.[29] The Court held that such punishment did not rise to cruel and unusual

24. European Convention on Human Rights, *supra* note 7, Sect. I, art. 3.

25. Tyrer v. United Kingdom, 26 Eur. Ct. H.R. (ser. A) at 4 (1978).

26. *Id.* at 4, 12. The fact that total strangers inflicted the punishment, that it was a result of institutionalized character, and that it was inflicted after an interval of several weeks after the conviction which added mental pain to the physical pain, were all aggravating circumstances according to the court. *Id.* at 16–17. The safeguards, including regulation of the dimensions of the birch rod, a prior medical examination and limitation upon the number of strokes, and the possible attendance by a parent of the child, were inadequate protections against the degrading nature of the punishment. *Id.* at 16.

27. Costello-Roberts v. United Kingdom, 247 Eur. Ct. H.R. (ser. A) at 50, 52 (1993). "Slippering" is three whacks on the bottom through shorts with a rubber-soled gym shoe by the headmaster without anyone else present within three days of being informed of or issued a demerit for talking in the corridor. *Id.*

28. Ingraham v. Wright, 430 U.S. 651, 657, 683 (1977).

29. *Id.* at 657.

punishment within the meaning of the Eighth Amendment and did not violate the Due Process Clause of the Fourteenth Amendment.[30] Legal limitations, if any, upon such conduct were not contained in constitutional law, but regulated only by the possibility of state tort remedies.[31]

Official conduct of a more serious nature has also been held to violate the prohibition of the inhuman and degrading treatment provisions of Article 3. As a reaction to acts of terrorism in Northern Ireland, the United Kingdom introduced a policy of detention and internment.[32] During such detention the security forces instituted five techniques against suspected terrorists who had been detained.[33] These included wall-standing,[34] hooding,[35] subjection to loud noise, deprivation of sleep, and deprivation of food and drink.[36] Although it was alleged that these five techniques constituted torture, the court declined to so find.[37] However, it did find that they constituted inhuman treatment as well as degrading treatment within the meaning of Article 3 of the European Convention on Human Rights.[38] The abuses were found degrading since they were intended to arouse in their victims feelings of fear, anguish, and inferiority, capable of humiliating and debasing them and possibly breaking their physical or mental resistance.[39]

Thus the Europeans might legitimately view the atrocities at Abu Ghraib through the lens of this 1978 decision and condemn the

30. *Id.* at 683. The Eighth Amendment prohibits "cruel and unusual punishment." U.S. CONST. amend. VIII. The Due Process Clause Provides that no State shall "deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST., amend. XIV, §1.

31. *Ingraham*, 430 U.S. at 670–71 (concluding that the Eighth Amendment was inapplicable to corporal punishment because common-law constraints will effectively remedy and deter excesses); *id.* at 682 (concluding that the Due Process Clause did not require notice and a hearing prior to imposition of corporal punishment because of the low incidence of abuse, the openness of schools, and the common-law safeguards already in place). *But see id.* at 693–95 (White, J., dissenting) (noting that a tort action is utterly inadequate because a student cannot recover damages from a teacher "proceeding in utmost good faith" and the lawsuit occurs after the punishment has been finally imposed).

32. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 40 (1978).

33. *Id.* at 41.

34. *Id.* This involved forcing the detainees to remain in a stress position for hours at a time, spread eagled against the wall touching the wall with finger tips and standing on tip toes so that the weight of the body was mainly upon the fingers. *Id.*

35. *Id.* Putting a black or navy colored hood over the detainees' head and keeping it there except during interrogation. *Id.*

36. *Id.*

37. *Id.* at 67.

38. *Id.*

39. *Id.* at 66.

American conduct.[40] Recently, the United States Supreme Court held that the detainees, such as those at Guantanamo Bay, have a constitutional right of access to courts.[41] Thus it remains unclear whether such conduct infringes upon United States law—at least the issue now may be brought to a judicial forum—but we cannot ignore the attitude of Europeans towards such conduct.

### A GOVERNMENT IS RESPONSIBLE FOR PROTECTING CHILDREN

The European Court of Human Rights held in *Z and Others v. United Kingdom*,[42] that the United Kingdom was financially responsible when its child protective workers permitted psychological and physical abuse from the abuse and neglect of parents after the situation had been brought to the attention of government authorities.[43] Such a failure was found to constitute a breach of the requirements of Article 13 of the Convention that guarantees the availability of a remedy to enforce the substance of Convention rights.[44] The failure of United Kingdom law to make available a tort remedy against the government for the negligence of the local authority meant that the children's experiences, described as horrific by a psychiatrist,[45] implicated a violation of Article 3 of the Convention, the infliction of inhumane and degrading treatment upon the children.[46] The court awarded the children various amounts ranging from £36,000, to £132,000, plus legal costs and expenses.[47]

Contrast that decision with the decision of the United States Supreme Court in *DeShaney v. Winnebago County Department of Social*

40. The Army inspector found ninety-four prisoner-abuse cases. Associated Press, *Army Inspector Finds 94 Prisoner-Abuse Cases*, INT'L HERALD TRIB., July 23, 2004, at 3. Most of the alleged abuses, forty-five of the ninety-four, occurred at the point the detainees were captured. *Id.* Of these forty-five cases, twenty involved allegations of physical abuse. *Id.* Twenty-one cases were identified at Abu Ghraib. *Id.* Only eight cases happened during or surrounding interrogations. *Id.* The Army inspector's report cited the International Committee for the Red Cross that alleged that "methods of ill treatment" were "used in a systematic way" by the U.S. military in Iraq. *Id.*

41. Rasul v. Bush, 124 S. Ct. 2686, 2699 (2004).

42. Z and Others v. United Kingdom, 2001-V Eur. Ct. H.R. at 1.

43. *Id.* at 40 (finding a direct causal connection between the government's breach of a duty to protect the children and the children's injuries from their abusive parents).

44. *Id.* at 34. Article 13 provides, "[e]veryone whose rights and freedoms set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." European Convention on Human Rights, *supra* note 7, sect. I, art. 13.

45. *Z and Others*, 2001-V Eur. Ct. H.R. at 32.

46. *Id.* at 33.

47. *See id.* at 41–43 (discussing damage awards, costs, and expenses).

*Services*.[48] In *DeShaney* the petitioner, Joshua, was beaten and permanently injured by his father.[49] Ultimately, the father beat the child so severely that he fell into a life-threatening coma.[50] Emergency brain surgery revealed a series of hemorrhages caused by traumatic injuries to the head inflicted over a long period of time.[51] Joshua did not die but suffered such severe injury that he is expected to spend the rest of his life confined to an institution for the profoundly retarded.[52]

The Supreme Court rejected the argument that the years of ineffective intervention by the state department of social services entitled Joshua to a remedy.[53] The "Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure [a] life, liberty, or property interest of which the government itself may not deprive the individual."[54] Since Joshua was not taken into state custody, the state bore no responsibility for his safety and general welfare.[55] "While the state may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them."[56] Under these conditions, the state had no constitutional duty to protect Joshua.[57] "Its failure to do so—though calamitous in hindsight—simply does not constitute a violation of the Due Process Clause."[58]

## CONCLUSION

A brief review of leading decisions of the European Court of Human Rights indicates several marked differences between its jurisprudence and that of the United States Supreme Court. Not only are different attitudes towards the death penalty reflected in such decisions, but different attitudes towards the dignity of individuals. The textual prohibition of cruel and unusual punishment of the Eighth Amendment, while groundbreaking in its time, is not as protective of human dignity as prohibitions against inhumane and degrading treatment. Perhaps

48. DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189 (1989).
49. *Id.* at 191.
50. *Id.* at 193.
51. *Id.*
52. *Id.*
53. *Id.* at 201–02.
54. *Id.* at 196; *see supra* note 30 and accompanying text (discussing the Due Process Clause of the Fourteenth Amendment).
55. *DeShaney*, 489 U.S. at 199–201.
56. *Id.* at 201.
57. *Id.*
58. *Id.* at 202.

consideration should be given to a constitutional amendment explicitly prohibiting such conduct. Many people might consider such an amendment more important than proposed amendments dealing with flag burning[59] or same-sex marriage.[60] If Americans truly believe in a moral government, serious consideration of such an amendment would be appropriate.

Moreover, it may be time to consider the appropriateness of the "nightwatchman" view[61] of the state as articulated by John Locke's Second Treatise on Government.[62] Are Americans content with the result of the *DeShaney* case? Once child abuse is brought to the attention of government officials, is there no responsibility to act? Does not inaction encourage cruel, inhumane, and degrading treatment?

In short, a European perspective on American constitutional jurisprudence deserves contemplation.

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59. Associated Press, *Flag-Burning Amendment Reaches Senate Again* (July 20, 2004), *available at* http://www.foxnews.com/story/0,2933,126364,00.html.

60. Associated Press, *Senate to Take Up Gay Marriage Amendment* (June 18, 2004), *available at* http://www.foxnews.com/story/0,2933,123094,00.html.

61. *See* ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 26–27 (1974) (discussing the "minimalist nightwatchman state" as the much scaled-down state derived from the Lockean man); Richard Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 24 (1987) (stating that "the legitimacy of the state depends on our being able to say that people would give up the liberties they enjoy in the state of nature in exchange for the state's guarantee of internal and external security. The 'nightwatchman state' is the consideration for the surrender of these liberties"); Lawrence Solum, *To our Children's Children's Children: The Problems of Intergenerational Ethics*, 35 LOY. L.A. L. REV. 163, 185–86 (2001) ("Locke's theory, as developed in the Second Treatise of Government, is sometimes thought to be a libertarian theory, with parties in the state of nature agreeing to a 'night-watchman' state." (footnotes omitted)); *see also* Robert Mcgee, *The Case to Repeal the Antidumping Laws*, 13 NW. J. INT'L L. & BUS. 491, 557 (1993) ("Another view on the legitimate scope of government argues that government should be limited to the defense of life, liberty and property. This view has been expressed by John Locke. . . . This view of government has been referred to as minimal government or the nightwatchman state." The term has also been used disparagingly); James McLaughlin, *Majoritarian Theft in the Regulatory State: What's a Takings Clause For?*, 19 WM. & MARY ENVTL. L. & POL'Y REV. 161, 221 n. 29 (stating that "theft is a concept imminent in the state as conservator of private ownership and private deals and transfers of ownership; the Lockean State—what Morton Horwitz calls disparingly the 'nightwatchman state'").

62. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 157–58 (Mark Goldie ed., 2003) (stating "[a]nd thus all private judgment of every particular member being excluded, the community comes to be umpire, by settled standing rules, indifferent, and the same to all parties").