I believe the law, which is clear in relation to capital punishment in the United States, is a law that we ought to be able to enforce.

—Former United States Attorney General John Ashcroft

Attorney General Ashcroft’s concerns reflect those uttered by King County, Washington Prosecuting Attorney Norm Maleng a few months earlier. “I am personally troubled,” he told the *Seattle Times*, “by the idea that a foreign government can restrict the application of our state law for a crime that occurred within our borders.” Mr. Maleng, however, was referring not to al-Qaeda but to the Supreme Court of Canada’s judgment in *United States v. Burns*, which dealt with a request by the United States that Canada extradite two Canadian citizens, Glen Sebastian Burns and Atif Ahmad Rafay, for trial in the state of Washington on capital murder charges.
In all but exceptional cases, the court had stated, section seven of Canada’s *Charter of Rights and Freedoms* requires the Canadian minister of justice to seek assurances from a country requesting extradition that the death penalty will not be sought or, if sought, will not be imposed.⁴ The court ruled further that such assurances were necessary in *Burns* because it was not an exceptional case.⁵ Therein lies Mr. Maleng’s sense of discomfort, as he was apparently of the view that, in so ruling, the Supreme Court of Canada had somehow applied section seven of the *Charter* extraterritorially.⁶ Whether that is an accurate portrayal of the decision or not—and in our view it is not—it is certainly true that the decision limits or interferes with the discretion that Washington prosecutors normally have to seek the death penalty.⁷

Any attempt by one country to place restrictions on another’s legal system is fraught with political and legal difficulties. Even when this sort of interference may appear justified, national governments resent or even resist such attempts; and recently, the sovereign authority of the national states to insist upon such restrictions has hit the front page.⁸ One reason is that some states have informed the United States government that they will not extradite suspected al-Qaeda terrorists to the United States unless they are given assurances that the death penalty will not be sought or imposed.⁹ The United States therefore not only decided to send what they refer to as “unlawful combatants” directly from Afghanistan to its military base in Cuba, but it also insisted that combat troops from other coalition countries turn over such people to them.¹⁰ Although this policy may be effective in Afghanistan, it

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⁴ *Burns*, [2001] 1 S.C.R. at 357. Section seven provides that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 7. Readers familiar with the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution will note the similarity. Cf. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1. Nonetheless, they are not the same: section seven, for example, does not protect property rights and on occasion has been used by the Supreme Court of Canada to review the substantive content of legislation. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 7.


⁶ See Ko, supra note 2.


⁸ See, e.g., Murphy & Wastell, supra note 1.


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cannot be enforced with respect to suspected terrorists apprehended in most other countries. When one considers that no major democracy retains the death penalty except for India, Japan, and some of the United States, and that eighty-five percent of the world’s executions in 1999 were carried out by only five countries, one of which is the United States, refusals to extradite without assurances can only increase.11 A number of questions arise. Are such refusals really a kind of illegitimate extraterritorial extension of one state’s law to another? Whether they are or not, is there any room left for an extradition from Canada to the United States on a capital charge after Burns? And what effect, if any, will this have on the death penalty in the United States?

We do not propose to resolve these issues, only to discuss them in the context of Burns. We begin by looking, first, at how the Supreme Court of Canada has dealt with the extraterritorial application of the Charter generally, and second, how it did so with respect to Burns and the death penalty. Accordingly, in Part I we examine two lines of authority in which the Supreme Court of Canada has refused to apply the Charter beyond Canada’s borders, with one unique exception. The first group of cases involves interrogations of Canadian citizens or searches of property belonging to Canadians by foreign law enforcement officers acting in their own country.12 The second group consists of extradition judgments where the court has refused to apply the Charter extraterritorially.13 As we shall see, although the Burns judgment clearly limits the King County Prosecutor’s discretion to seek the death penalty, the Supreme Court of Canada has thus far been reluctant to give the Charter extraterritorial effect.14 Equally noteworthy is that three years before the judgment in Burns was

http://www.theglobeandmail.com/servlet/story/LAC.20020117.UDEFEN/BNPrint/theglobeandmail.com (quoting Donald Rumsfeld). U.S. Secretary of Defense Donald Rumsfeld made this point in December 2001, speaking of coalition soldiers from countries other than the United States. He said that “[e]ither a country will indicate that they will turn [captured Taliban or al-Qaeda combatants] over to us—quite apart from whether or not their laws may be different with respect to the death penalty—or they will be positioned in places where they’re unlikely to come in contact with someone that we would like to have control over.” The United States has presumably called such people “unlawful combatants” in an attempt to avoid having them classified as prisoners of war subject to the Geneva Convention, and Rumsfeld’s position has created something of a dilemma for the Canadian government, which accepted (and perhaps even requested) a combat role in Afghanistan. Cf id. Canada, however, declined to send troops to Iraq.

11. Burns, [2001] 1 S.C.R. 283, 334-35. The other four countries enamored by the death penalty in 1999 were China, the Congo, Saudi Arabia and Iran—interesting company. Id. Amnesty International’s most recent figures are similar. Editorial, China’s Killing Binge. GLOBE AND MAIL, July 5, 2004, at A12, available at http://www.theglobeandmail.com/servlet/story/LAC.20040705.EDEATH05/BNPrint (stating that in 2003, eighty-four percent of the world’s executions were in Iran, Vietnam, the United States, and China, the latter accounting for at least two thirds of the total).

12. See infra Part I.A.

13. See infra Part I.B.

handed down, a defendant was extradited from Brazil to the United States for trial in
Washington State that raised issues similar to those in Burns. In that case, Washington’s Supreme Court interpreted the judgment of the Federal Supreme Court
of Brazil as limiting prosecutorial discretion much more profoundly than Burns did. So, notwithstanding Mr. Maleng’s complaint, the Canadian decision should not be
regarded as a bolt from the blue.

In Part II we analyze Burns for an American audience, focusing on the facts and
context of the judgment, the legal history of the death penalty in Canada over the past
thirty years, and the supreme court’s reasoning. Most importantly, we examine the
court’s use—or at least purported use—of a balancing test in its application of section
seven of the Charter, as well as the arguments for requiring assurances, including
the relevance of the international movement toward elimination of the death penalty,
Canada’s role in that movement, the potential for wrongful convictions, and the so-
called “death row phenomenon.”

In conclusion, we consider in Part III whether, since Burns, Canada would ever
extradite a suspect facing capital charges without first seeking assurances that the
dead penalty will not be sought or, if sought, will not be imposed. Part III also
briefly speculates about the future of the death penalty in the United States.

PART I

[T]his court has emphasized that we must avoid extraterritorial application of the
 guarantees in our Charter under the guise of ruling extradition procedures
 unconstitutional.

—Kindler v. Canada (Minister of Justice)

The Supreme Court of Canada has developed two lines of authority that limit the
extraterritorial application of the Charter. The first set of cases is concerned mainly
with investigations conducted by foreign police with respect to Canadian citizens
who have fled Canada. Notably, the final case in the first series involves an

16. See id. at 1323.
17. To be fair, even some Canadian commentators took offense. See, e.g., Neil Seeman, Who Do You Think You Are?, GLOBE AND MAIL, Feb. 20, 2001, at A17. Mr. Seeman argued that by deciding Burns the way it did, the Supreme Court of Canada had “insulted U.S. courts and the will of U.S. voters.” Id. According to him, “the imperial arrogance of this Supreme Court knows few bounds.” Id. Seeman is a Canadian lawyer and a member of the editorial staff of the National Review in New York. Id.
20. Id. at 845.
extraterritorial investigation conducted by Canadian police.\footnote{22} The second line of authority deals with extradition.\footnote{23}

A. Interrogations and Searches

In its first foray into this area, the Supreme Court of Canada held in \textit{R. v. Terry} and \textit{R. v. Harrer} that section ten(b) of the \textit{Charter of Rights and Freedoms}, Canada's version of the Fifth Amendment \textit{Miranda} warning, does not apply to interrogations of Canadian citizens conducted in the United States by United States law enforcement officers.\footnote{24} Two years later in \textit{Schreiber v. Canada (Attorney General)}, the majority applied the reasoning in \textit{Terry} and \textit{Harrer} to find that section eight of the \textit{Charter}, which is analogous to the Fourth Amendment of the United States Constitution, was not violated when Canadian authorities sent a letter of request to the Swiss government to search Schreiber's bank account without prior judicial authorization.\footnote{25} According to the majority, a letter of request is not a search under section eight of the \textit{Charter}, and, in any event, the Swiss authorities who would have conducted the search of Schreiber's bank account are not subject to the \textit{Charter}.\footnote{26} Justice L'Heureux-Dubé captured the essence of these three decisions in \textit{Schreiber}:

\begin{quote}
[T]he rights and freedoms enumerated in the Charter are guaranteed only against interference from actions taken by Parliament and the government of Canada, or the provincial legislatures and the provincial governments. Where there is no
\end{quote}

\footnote{24. \textit{R. v. Terry}, [1996] 2 S.C.R. 207, 212; \textit{R. v. Harrer}, [1995] 3 S.C.R. 562, 566-67. In these cases U.S. law enforcement officers had given the suspects the warnings mandated by \textit{Miranda v. Arizona}, 384 U.S. 436 (1966); however, the warnings required by section ten (b) of the Canadian \textit{Charter of Rights and Freedoms} provide more protection for a detainee than \textit{Miranda}. The Canadian warnings (1) must be administered upon detention, (2) are subject to a more stringent waiver requirement, (3) can result, if not administered properly, in the exclusion of non-testimonial as well as testimonial evidence from the accused, and (4) involve an enhanced right to counsel, including the right to be advised of any toll-free phone numbers for contacting duty counsel. \textit{CAN. CONST.} (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 10. For a perspective on police interrogation law in Canada and the United States see Robert Harvie & Hamar Foster, \textit{When the Constable Blunders: A Comparison of the Law of Police Interrogation in Canada and the United States}, 19 \textit{SEATTLE U. L. REV.} 497 (1996).}
action by one of these entities which infringes a right or freedom guaranteed by the Charter, there can be no Charter violation. 27

However, in R v. Cook—where a United States citizen was convicted of second-degree murder in Vancouver for killing a cab driver—this approach led the Supreme Court of Canada to make a decision that, unlike its earlier rulings, resulted in the extraterritorial application of the Charter. 28 The relevant facts were that, shortly after committing this crime, Cook fled Canada and was arrested in New Orleans, where he was interrogated by two Vancouver detectives who had flown south to take him into custody. 29 Before the interrogation began, Cook, who had already had Miranda warnings from local police, was advised of his section ten(b) right to an attorney in a manner described by the Canadian trial court as misleading and unbusinesslike. 30 This, of course, only mattered if section ten(b) applied to Cook's interrogation in New Orleans, and the majority of the Supreme Court justices who heard the appeal held that it did. 31 They ruled that the Charter applied to Canadian officials acting on behalf of Canada, even in a foreign country, so long as the application of the Charter did not conflict or interfere with the foreign state’s sovereign jurisdiction. 32

In sum, the line of cases represented by Terry, Harrer, Schreiber, and Cook suggests that the Supreme Court of Canada is reluctant to apply the Charter beyond Canada’s borders. The sole exception to date is where the investigation is conducted on foreign soil by Canadian officials working on behalf of the Canadian government, so long as that investigation does not conflict or interfere with the foreign country’s sovereign jurisdiction. 33

B. Extraditions

Extradition cases make up the second line of authority illustrating the Supreme Court of Canada’s reluctance to apply the Charter extraterritorially. In Canada v. Schmidt, Helen Schmidt fled to Canada in order to avoid prosecution for child stealing in Ohio after being acquitted on federal kidnapping charges in the United

27. Id. at 858.
30. Id.
31. Id. at 641.
32. Id. at 649-51. The present authors prefer the dissent in Cook, which avoids extraterritorial application of the Charter. See Harvie & Foster, supra note 28.
States arising out of the same fact situation. She resisted extradition on the ground that sending her back to Ohio for trial violated sections seven (fundamental justice) and eleven(h) (double jeopardy) of the Charter. The Supreme Court of Canada rejected the section eleven(h) argument, reasoning that section thirty-two of the Charter limited its application to the governments of Canada and its provinces, and, accordingly, that section eleven(h) "cannot be given extraterritorial effect to govern how criminal proceedings in a foreign country are to be conducted." Significantly, however, the court pointed out that the extradition treaty, the extradition hearing in Canada, and the executive’s decision to surrender a fugitive to a foreign state must all conform to the guarantees of fundamental justice contained in section seven. Even more significantly, the court added that situations may arise “where the nature of the criminal procedure or penalties [emphasis added] in a foreign country sufficiently shocks the conscience as to make a decision to surrender a fugitive for trial there one that breaches the principles of fundamental justice enshrined in section 7.” Thus, although a refusal to extradite in such circumstances would have significant consequences for the requesting jurisdiction, a court order requiring such refusal would not give the Charter extraterritorial effect. It would simply be applying the Charter to a domestic legal decision-making process. The line between the two analyses is hardly a bright one; but it is not illusory. In Schmidt, the court found no compelling reason to apply section seven.

In United States v. Allard, the United States government requested extradition fifteen years after the defendant allegedly hijacked an airliner to Cuba and five years after his return to Canada. Allard argued that the delay in seeking extradition violated section eleven(b) of the Charter, but the court disagreed, pointing out that the

35. Id. Section eleven (h) of the Charter represents a double jeopardy principle that is narrow when compared to its British and United States equivalents, because in Canada the prosecution can appeal jury acquittals. Hence the word “finally” in the section, which provides that “[a]ny person charged with an offence has the right ... if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again.” CAN. CONST. (Constitution Act, 1982) pt. I. (Canadian Charter of Rights and Freedoms), § 11(h). See supra note 4, for text of section seven.
36. Schmidt, [1987] 1 S.C.R. at 518. Section thirty-two of the Canadian Charter provides that “[t]his Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.” CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 32(1).
38. Id. at 522.
39. See id. at 518.
40. Id. at 529.
delay did not occur in Canada, but in the United States. Applying section eleven(b) to assess delays in United States prosecutions would be to apply it to the government of another country, i.e., extraterritorially and contrary to section thirty-two of the Charter.

In United States v. Cotroni, a Canadian citizen who lived in and had never left Canada during the relevant period was charged in the United States with conspiracy to import drugs. He argued that extradition violated his section six subsection one mobility rights and that he should therefore be prosecuted in Canada rather than the United States. The Supreme Court of Canada agreed that Canada’s Extradition Act was a prima facie infringement on the section six subsection one right of every Canadian citizen to remain in Canada. However, the court used the three prong test developed in R. v. Oakes to justify the infringement as a “reasonable limit” on Cotroni’s section six subsection one rights, as provided for by section one of the Charter. Justice La Forest, writing for the majority, found that the legislation could

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42. Id. at 571. Section eleven (b) of the Charter provides that “[a]ny person charged with an offense has the right . . . to be tried within a reasonable time.” CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 11(b).


45. See id. at 1479. Section six subsection one of the Charter provides that “[e]very citizen of Canada has the right to enter, remain in and leave Canada.” CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 6(1) (emphasis added).

46. Cotroni, [1989] 1 S.C.R. at 1482-83. The Extradition Act, R.S.C., ch. E-23 (1985) (Can.), governs Canada’s extradition procedure. Once a foreign country has made a request for extradition, an extradition judge determines whether the offense falls within the scope of the extradition treaty and whether there is sufficient evidence to establish a prima facie case that the fugitive has committed the crime charged in the foreign state. Id. §§ 11, 13. If the extradition judge finds that the offense falls within the scope of the extradition treaty between Canada and the requesting country and there is prima facie evidence, the judge issues a committal order pending a decision by the minister of justice to surrender the fugitive. Id. § 29. The minister of justice then entertains submissions on the issue, after which he makes a decision whether to surrender the fugitive and on what terms. Id.

be saved under section one of the Charter because the concern addressed by the extradition legislation was pressing and substantial, extradition was rationally connected to the important objectives of international law enforcement, and the means to achieve these objectives impaired the section six subsection one right as little as possible.48

Subsequently, in 1991, the Supreme Court of Canada had to confront the issue of whether the Extradition Act and, in particular, the minister of justice’s decision to extradite fugitives without first obtaining assurances that the death penalty would not be imposed, violated sections seven and twelve of the Charter.49 The justices did this in Kindler v. Canada (Minister of Justice) and its companion case, In re Ng.50 In addressing these questions, the majority was particularly concerned—as Justice (now Chief Justice) McLachlin, writing for the majority, put it—to “avoid extraterritorial application of the guarantees in our Charter.”51 For this reason, the majority’s judgment emphasized that section twelve was not the appropriate Charter section to rely on because the death penalty would be carried out in the United States, not Canada.52 Although the court concluded that section twelve did not apply beyond Canada’s borders, it emphasized that the purposes and objectives underlying the prohibition against cruel and unusual punishment clarify and illuminate the principles of fundamental justice found in section seven.53 That is to say the prohibition is a principle of fundamental justice that section seven requires the government to respect when it passes legislation that might infringe upon life, liberty, or security of the person.54 Nonetheless, the court ruled four to three that, other than in exceptional cases, section seven does not require assurances and neither Kindler nor Ng was an exceptional case.55

48. Cotroni, [1989] 1 S.C.R. at 1488. Justice Wilson dissented, arguing that to minimize the violation of section six subsection one Cotroni should be tried in Canada. Id. at 1514.
52. See id. at 846. The three dissenting justices believed that capital punishment constituted cruel and unusual punishment in violation of section twelve. Id. Justices Lamer and Cory, as they then were, argued that extradition without assurances violated section twelve. Id. at 815. Although they agreed that the Charter does not have extraterritorial application, they were of the view that Canada has an obligation not to surrender those individuals for extradition who will face cruel and unusual punishment. See id. at 823-24. Justice Sopinka, with whom Justice Lamer agreed, argued that a surrender without assurances violated section 7. Id. at 790.
53. See id. at 847.
54. Subsequently, in Burns, the court reiterated its position that section twelve of the Charter does not apply outside Canada and that section seven is the proper focus for challenging an extradition. Burns, [1991] 1 S.C.R. 283, 317-19.
In *Schmidt, Allard, Cotroni, and Kindler*, the Supreme Court of Canada clearly signaled its unwillingness to apply the *Charter* beyond the Canadian border in extradition cases.\(^5\) Furthermore, as Justice Wilson pointed out in *Allard*, permitting persons resisting extradition to use section seven does not amount to giving the *Charter* extraterritorial effect.\(^6\) "It is to give it effect in domestic proceedings in Canada which may, of course, have ramifications abroad."\(^7\) This is, of course, what happened in *Burns* and, as has been suggested, was nothing new for Washington's state prosecutors. Three years before the *Burns* decision, the Washington Supreme Court, in *State v. Pang*, recognized that a foreign court’s extradition order restricts the ability of Washington prosecutors to file specific criminal charges.\(^8\)

In 1995, Martin Pang set fire to his parent’s warehouse in Seattle.\(^9\) Four firefighters died fighting the blaze, and prosecutors filed four counts of first-degree felony-murder against him.\(^10\) Before Pang could be arrested, he fled to Brazil,\(^11\) which has an extradition treaty with the United States that, like Canada’s, provides for assurances respecting the death penalty.\(^12\) The issue in *Pang* was not capital punishment; rather, it was whether charges could be filed that, upon conviction, would ensure Pang received a term of imprisonment commensurate with his crimes, *i.e.*, life or something comparable.\(^13\) The problem was that on December 18, 1995 the Federal Supreme Court of Brazil ruled that he could be extradited “for the crime

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58. *Id*.


60. *Id.* at 1295.

61. *Id.* at 1295, 1297.

62. *Id.* at 1296.

63. *Id.* at 1357. For an account of how Pang evaded arrest, see Eric Nalder et. al, *How Pang Got Away*, SEATTLE TIMES, Aug. 1, 1997, at A1. Had he not fled to Brazil, prosecutors could have presumably sought the death penalty because at least two provisions of Washington’s aggravated murder law were potentially violated. First, the victims were firefighters engaged in fighting a fire and, second, the deaths were a result of arson in the first-degree. See WASH. REV. CODE §§ 9A.32.030(1)(c), 10.95.020(1) (2004). However, once Pang fled to Brazil, which does not have the death penalty, article VI of the extradition treaty between the United States of America and Brazil applied, which reads as follows:

When the commission of the crime or offense for which the extradition of the person is sought is punishable by death under the laws of the requesting State and the laws of the requested State do not permit this punishment, the requested State shall not be obligated to grant the extradition unless the requesting State provides assurances satisfactory to the requested State that the death penalty will not be imposed on such person.


of arson in the first degree resulting in four deaths but without the additional charge of four counts of murder.\textsuperscript{65}

When Pang was extradited to the United States, Washington State prosecutors, concerned that the penalty for first degree arson would not be sufficient, refused to drop the four felony-murder counts.\textsuperscript{66} In response, Pang filed a motion to dismiss, invoking the "specialty" doctrine.\textsuperscript{67} This is not a simple doctrine, but the policy behind it is to prevent states from requesting extradition on one set of charges and then, once extradition is granted, charging the extradited person with new or different offenses.\textsuperscript{68} Accordingly, the doctrine, at its widest, provides that the requesting state may prosecute only those offenses for which extradition was specifically granted.\textsuperscript{69} The trial judge ruled that the Brazilian authorities had implicitly waived the specialty article in the extradition treaty between the United States and Brazil; so Pang had no standing to challenge the violation he alleged.\textsuperscript{70} He, therefore, appealed to the Washington State Supreme Court.\textsuperscript{71}

Justice Charles Smith, writing for the five member majority, agreed with Pang,\textsuperscript{72} but, again, the details need not detain us. The majority concluded that Pang had standing to object to a violation by Washington State of the extradition order, that

\textsuperscript{65} Id. at 1304.

\textsuperscript{66} See id. at 1308. The legal and political furor over Pang's extradition focused on the potential penalty, and the problem was the state of Washington's mandatory presumptive sentencing scheme. Felony-murder and arson in the first-degree can be punished by life imprisonment or perhaps death, see WASH. REV. CODE §§ 9A.32.030(1)(c), 9A.48.020(1)(a),(d) (2004), but the terms of the extradition ruled out felony-murder and, pursuant to the sentencing scheme, Pang's standard range sentence for first-degree arson would be twenty-one to twenty-seven months confinement; which was totally unacceptable in a case where four fire fighters died as a result of his setting fire to the warehouse. \textit{Id.} § 9.94A.510. The Washington Supreme Court, therefore, suggested that the sentencing judge might go outside the standard range and establish an exceptional sentence. \textit{Pang}, 940 P.2d at 1315. The dissent maintained that the judge could not go outside the standard range and suggested that "under the majority's holding, the deaths of four innocent victims will go unpunished." \textit{Id.} at 1334. Then-Justice Alexander, in his concurring dissent, reproved both the majority and the dissent for this: "Any speculation about the validity of a sentence that has not or may never be imposed," the Justice opined, "is dicta of the first order and should not be a part of either the majority or dissenting opinion." \textit{Id.} In the result, Pang pled guilty to four counts of manslaughter and received a thirty-five year prison sentence. Jack Broom et. al, \textit{Pang Gets 35 Years in Prison}, \textit{Seattle Times}, March 23, 1998, at A1. Recently Washington's sentencing scheme for establishing an exceptional sentence came under Sixth Amendment scrutiny, and was found wanting. \textit{See Blakely v. Washington}, 124 S. Ct. 2531, 2538 (2004).

\textsuperscript{67} \textit{Pang}, 940 P.2d at 1310 \& n.23.

\textsuperscript{68} \textit{Id.} at 1326.

\textsuperscript{69} The Brazilian criminal code does not include the felony-murder doctrine. \textit{See id.} at 1305. In R. v. Vaillancourt, [1987] 2 S.C.R. 636, the Supreme Court of Canada ruled that Canada's felony-murder law violated section seven of the \textit{Charter}.

\textsuperscript{70} \textit{Cf. Pang}, 940 P.2d at 1313.

\textsuperscript{71} \textit{See id.} at 1294-95.

\textsuperscript{72} \textit{Id.}
Brazil had not explicitly or even implicitly waived any objection to Pang being tried on the four murder counts, and that the implied doctrine of specialty in international extradition law prohibited the state from prosecuting him on the four felony-murder counts. Although this aspect of the opinion has been criticized, there is little doubt that the Washington State Supreme Court credits foreign court extradition rulings that restrict the ability of state prosecutors to bring specific criminal charges or to seek specific penalties. This, of course, was the situation in Burns. The difference is that the charges in Burns alleged pre-meditated murder, which, if proved, could result in the death penalty.

PART II

Legal systems have to live with the possibility of error. The unique feature of capital punishment is that it puts beyond recall the possibility of correction.

—United States v. Burns

As we have seen, the first time that the Supreme Court of Canada addressed the question of whether Canadian authorities must seek assurances against the imposition

73. Id. at 1325. Treaties may expand or limit the protection afforded by the international law specialty doctrine, and a key issue appears to be whether the court misapplied precedent when it interpreted the treaty with Brazil. There are four other requirements typical of extradition treaties: (1) “reciprocity” is the requirement that the judicial systems of the two nations have similar procedures; (2) “double criminality” requires that the individual be extradited only for acts that are criminal under the laws of both countries; (3) “extraditable offense” means that an individual can be extradited only for an offense enumerated in the applicable extradition treaty; and (4) “non-inquiry” limits the surrendering states inquiry into the means by which evidence was obtained, the method of trial or the possible treatment upon conviction. M. Cherif Bassioune, International Extradition: United States Law and Practice 384-93 (3d ed. 1996). A treaty provision that permits the seeking of assurances that the death penalty will not be imposed appears to be a negotiated exception to the fourth requirement. See Jacques Semmelman, Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings, 76 CORNELL L. REV. 1198, 1214 (1991). The Supreme Court of Washington’s opinion in Pang, however, focused on the specialty doctrine. Pang, 940 P.2d at 1325.


76. Id. at 297-99.

77. Id. at 294.
of the death penalty before extraditing was in Kindler v. Canada (Minister of Justice) and the companion case of In re Ng in 1991. Kindler was a United States citizen and Ng a British subject who had immigrated to the United States from Hong Kong a number of years before the alleged crimes. Kindler escaped to Canada from Pennsylvania after having been sentenced to death by a jury but before the actual sentence was imposed. Ng fled north from California to avoid prosecution on twelve murder counts. After disposing of an argument based on section twelve (cruel and unusual treatment or punishment) of the Charter, then-Justice, now Chief Justice, McLachlin, writing for the court, examined whether the failure of section twenty-five of Canada's Extradition Act, requiring assurances against imposition of the death penalty, violated section seven of the Charter. Section twenty-five reads:

Subject to this Part, the Minister of Justice, on the requisition of the foreign state, may within a period of 90 days after the date of a fugitive's committed for surrender, under the hand and seal of the minister, order the fugitive to be surrendered to the person or persons who are, in the Minister's opinion, duly authorized to receive the fugitive in the name and on behalf of the foreign state, and the fugitive shall be so surrendered accordingly.

Examining the basic tenets of the Canadian justice system, specifically the system of extradition and the values and purposes underlying section twelve, Justice McLachlin concluded that extradition has deep roots in Canada because fairness requires that fugitives be brought to justice and extradition is the normal means of accomplishing this. The fact that these defendants faced the death penalty, she stated, would not shock the Canadian conscience. Kindler had committed a brutal murder and faced execution in a country whose legal system was similar to Canada's, and Ng was alleged to be a mass murderer. Moreover, in 1987, four years before the Kindler and Ng decisions, the Canadian Parliament, by a 148-127 vote, narrowly defeated a resolution to reinstate capital punishment. According to Justice McLachlin, the closeness of the vote indicated that there was not a broad consensus against the death penalty in Canada—at least, not in Parliament. Justice McLachlin

86. Id.
87. Id. at 840.
88. Id.
89. See id. at 852.
noted that Canada retained capital punishment for some military offenses and that public opinion polls showed strong support for the death penalty among Canadians. She further mentioned that there may be cases that shock the conscience of Canadians, thereby requiring the Minister to obtain assurances against the imposition of the death penalty; but she concluded *Kindler* and *Ng* did not qualify.1

Justice McLachlin then turned to international developments regarding the death penalty. She noted that there had been a welcome trend toward eliminating capital punishment, but that most international agreements on the death penalty fell short of actually prohibiting it, and most nations retained it. Moreover, article four of the United Nations Model Treaty of Extradition provided for a discretion similar to that found in article six of Canada's extradition treaty with the United States. In addition, Justice McLachlin emphasized that effective extradition procedures with other countries ensure comity between nations.

Turning away from the international arena to domestic concerns, Justice McLachlin emphasized the close law enforcement relationship between the United States and Canada, while expressing the view that requiring routine assurances against imposing the death penalty might harm an otherwise excellent working relationship. On balance, the court found that section twenty-five of the *Extradition Act* did not violate section seven of the *Charter*. Finally, Justice McLachlin addressed whether the minister of justice's exercise of discretion under section

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91. *Kindler*, 2 S.C.R. at 839. The court was unclear what circumstances might require the minister of justice to obtain assurance against imposition of the death penalty before extradition. *See id.*

92. *Id.* at 856.

93. *See id.*


> When the offense for which extradition is requested is punishable by death under the laws of the requesting State and the law of the requested State do not permit such punishment for that offense, extradition may be refused unless the requesting State provides such assurances as the requested State considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.

Treaty on Extradition, Dec. 3, 1971, United States-Canada, art. 6, 27 U.S.T. 983, T.I.A.S. No. 8237 [hereinafter Treaty on Extradition]. The treaty was signed on December 3, 1971 and ratified by the United States Senate on December 1, 1975. *Id.* The President signed the treaty on December 12, 1975. *Id.* Canada ratified the treaty on February 2, 1976 and the treaty went into effect on March 22, 1976. *Id.*


96. *Cf. id.*

97. *See id.* at 854.
twenty-five, given that no assurances were sought, violated section seven. She concluded that the fact Kindler and Ng faced the death penalty was not, in and of itself, sufficient and that the minister's decision not to seek assurances was not out-of-step with the practice in the international community. In short, the minister's balancing of factors for and against assurances passed Charter muster.

The state of Canadian law immediately prior to the Burns decision regarding the extraterritorial application of the Charter and the need to obtain assurances against the imposition of the death penalty in extradition cases can be stated as follows. First, enumerated sections of the Charter, for example, the right to counsel, do not have extraterritorial effect, other than in the exceptional situation addressed by the court in Cook. Second, using section seven of the Charter to challenge extraditions under Canada's Extradition Act and to dispute the justice minister's decision to extradite does not involve extraterritorial application; but a successful challenge on this basis will be exceptional. That is to say, extraditions to the United States without assurances respecting the death penalty are the norm, i.e., they are presumptively constitutional since neither section twenty-five of the Extradition Act nor the minister's interpretation of it offends the principles of fundamental justice enshrined in section seven.

98. Id.
99. See id. at 855-56. Years later the minister of justice at the time wrote that he "didn't consider it to be the business of Canada to try to impose our views on the justice system of another country. We have no right to judge whether that country should or should not execute murderers simply because we have abolished the death penalty here." JOHN C. CROSBIE, NO HOLDS BARRED: MY LIFE IN POLITICS 279 (1997).
103. After the Canadian authorities surrendered Kindler and Ng to authorities in the United States, both Kindler and Ng filed communications with the United Nations Human Rights Committee arguing that Canada had violated articles six & seven of the International Covenant on Civil and Political Rights. See Ved P. Nanda, Bases For Refusing International Extradition Requests—Capital Punishment and Torture, 23 FORDHAM INT'L LJ. 1369, 1380-84 (2000). Article six provides that the death penalty can be imposed only for the most serious offenses; that it must be imposed by a competent court; and that it must not be imposed on anyone under eighteen years old or on pregnant women. International Covenant on Civil and Political Rights, art. VI, GA. Res. 2220 (XXI), U.N. GAOR, 21st Sess., U.N. Doc. A/6316 (1966), available at http://www.hrweb.org/legal/cpr.html. Article seven ensures that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment." Id. at art. 7. The committee found that Canada did not violate article six when it extradited Kindler and Ng to the United States. Nanda, supra, at 1382-83. In Ng's case, however, the committee found that Canada violated article seven. Id. California, at the time, carried out the death penalty by means of gas asphyxiation, a means that, according to the committee, can cause prolonged suffering. Id. Canada should, therefore, have reasonably foreseen that if Ng received the death penalty the means to carry it out would violate article seven. Id. at 1383-84. As a result, Canada should have asked for assurances against imposition of the death penalty prior to extradition. Cf. id. What role this rebuke played, if any, in the
In Burns, however, the Supreme Court of Canada joined an increasing number of countries by reversing direction with respect to extradition and the death penalty. A unanimous court ruled that section seven of the Charter requires that the minister of justice, before granting extradition in death penalty cases, must in all but the most exceptional circumstances seek assurances from the requesting state that the death penalty will not be sought or imposed.\textsuperscript{104} To understand this "dramatic about-face,"\textsuperscript{105} it is necessary, first, to briefly review the history of the death penalty in Canada, then the facts of and reasoning in the Burns case.

A. The Death Penalty in Canada

Historically, the only penalty for murder in Canada was death by hanging.\textsuperscript{106} This penalty was mandatory and could be avoided only on a discretionary basis.\textsuperscript{107} For example, in appropriate cases, the Crown might elect to charge the lesser offense of manslaughter, which was punishable by imprisonment, or the jury might convict the defendant of manslaughter.\textsuperscript{108} Even if the verdict were murder, the Governor General in Council (the federal executive) might decide to commute the death penalty, substituting a term of imprisonment.\textsuperscript{109} As opposition to capital punishment grew, such commutations increased to the point that, by the time the death penalty was abolished for civil offences in 1976, a moratorium had been in place for most murders for nearly ten years and every death sentence since 1962 had been commuted to life imprisonment.\textsuperscript{110}

The first private bill to advocate abolishing the death penalty was introduced in 1914, and throughout the twentieth century there were various proposals to abolish or, at least, mitigate it.\textsuperscript{111} In 1948, the offense of infanticide was introduced, thereby removing cases involving mothers who kill their newborn children from the ambit of the death penalty.\textsuperscript{112} In the 1950s, agitation increased. There were more private

\begin{thebibliography}{99}
\begin{footnotesize}
\item 105. Clarke, \textit{supra} note 9, at 798.
\item 106. \textsc{Neil Boyd}, \textsc{The Last Dance: Murder in Canada} 22 (1988). For example, section 206 of the 1955 Criminal Code, SC 1953-54, which represented the first major revision of the Code since 1892, provided that "[e]very one who commits murder is guilty of an indictable offence and shall be sentenced to death."
\item 107. \textit{See id.}
\item 108. \textit{Id.} at 31-32.
\item 109. \textit{Id.} at 32.
\item 110. \textit{See id.} at 41-43.
\item 111. \textsc{Boyd, supra} note 106 at 28.
\item 112. \textit{See id.} at 28-31. Of course, this change was made not because mothers were being executed, but rather because juries would not convict and prosecutors were laying lesser charges as a result. \textit{Id.} at 30. Rape ceased to be a capital offense in 1954. Amnesty International, \textit{The Death Penalty in Canada: Twenty Years of Abolition, at http://www.amnesty.ca/deathpenalty/canada.php
\end{footnotesize}

members' bills calling for abolition; and in 1956, a parliamentary committee recommended, *inter alia*, that legal counsel be provided for persons accused of capital crimes, that an appeal be mandatory in such cases, and that juvenile offenders be exempted from the death penalty. However, the committee also recommended retaining capital punishment in all other cases and opposed dividing murder into two categories, only one of which would attract the death penalty.

The first real change came in 1961—prompted in part by the controversy surrounding the conviction and execution of Wilbert Coffin in Québec and the capital sentence imposed on fourteen year old Steven Truscott of Ontario. The federal government introduced Bill C-92, amending the Criminal Code of Canada to provide that murder should be either capital or non-capital, the latter carrying a mandatory sentence of life imprisonment with eligibility for parole after seven years. Capital murder was confined to (1) planned and deliberate killing, (2) a broadly defined category of felony-murder, and (3) the killing of police officers and prison guards in the line of duty. This, however, did not silence those who advocated abolition, and when the Liberals replaced the Progressive Conservatives in Ottawa in 1963, they proceeded to commute every death sentence handed down by the courts.

(last visited Jan. 26, 2005).

113. BOYD, supra note 106 at 30-32.
114. *Id. at 31-32; see also* Amnesty International, *supra* note 112.

116. *Reference re Truscott*, [1967] S.C.R. 309; *see also* Brian Whitman, Media's Fascination with Forty-five Year-old Truscott File Kept Case in Spotlight, *CANADIAN PRESS*, Oct. 31, 2004. Because of his age, Truscott's death sentence was commuted to life imprisonment: Canada had not executed anyone so young since the nineteenth century. But controversy surrounded the conviction from the start. As with the Coffin case, a journalist wrote a popular book about the trial, and a few years later the matter was referred to the Supreme Court of Canada, which affirmed the conviction in *Reference re Truscott*, [1967] SCR 309. Truscott was paroled in 1969 and lived for the next thirty years under an assumed name. Once his children were grown he went public in 2000 and resumed his quest for vindication. New evidence was discovered and the Association for the Defence of the Wrongfully Convicted became involved. On October 28, 2004, the Canadian minister of justice announced that he had concluded there had been a miscarriage of justice and referred Truscott’s conviction to the Ontario Court of Appeal for Review.

117. BOYD, *supra* note 106 at 40.
118. *Id.* at 39.
119. *See id.* at 41.
In 1966, there was a major debate on abolition in Parliament, but a motion to abolish the death penalty was defeated by a vote of 143-112. Then, in 1967, the Liberal government of Prime Minister Lester Pearson introduced Bill C-168, further restricting the ambit of capital punishment by confining it solely to those who killed police officers or prison guards acting in the line of duty. After a vigorous debate, the bill passed third reading by a vote of 114-87. The new law, however, contained a sunset clause; it was to remain in effect for only five years unless renewed, which it was in 1973. This meant that, legally, there was a moratorium on, or suspension of, the civil death penalty for two successive five year periods after 1967, except for those who killed police officers or prison guards. But this exception was theoretical, because the Liberal government, at least until 1976, appeared committed to commuting all death sentences.

It is at this point that the narrative begins to intersect with the issue that would be resolved in the Burns case, because in 1971 Canada and the United States signed the extradition treaty under which Burns and Rafay would be extradited thirty years later. However, it took a few years to have the treaty ratified by both nations; so it did not come into force until March of 1976. In the meantime, a number of other significant legal events had occurred. In 1972 the United States Supreme Court ruled that the death penalty, as then administered in the two states (Georgia and Texas) whose procedures had been challenged, violated the Eighth Amendment and was therefore unconstitutional. Shortly thereafter, the Parliament of Canada enacted the Criminal Law Amendment (Capital Punishment) Act. This statute extended the moratorium on the death penalty for all convicted murderers, except those who killed police officers and prison guards, for five years, i.e., to December 31, 1977.

By 1975, the political pressure generated by this state of affairs was considerable. The government had commuted every death sentence since taking office, yet the polls indicated that a majority of Canadians continued to support capital punishment, and many people believed that blanket commutation was not consistent with a law that, notwithstanding the moratorium, specifically preserved capital punishment for

120. Id.
121. Id.
122. BOYD, supra note 106 at 42.
124. See id.
125. BOYD, supra note 106 at 40-43.
126. Treaty on Extradition, supra note 94.
127. Id.
129. Capital Punishment Act, supra note 123.
130. Id. § 10.
convicted "cop killers." The pressure increased when appeals in such cases were
denied by provincial appellate courts and headed for the Supreme Court of
Canada. Given all this, it is not surprising that, before it had to deal with the death
sentences in these cases, the government introduced an amendment into Parliament
that would affect the permanent abolition of the death penalty for all civilian offenses.
And on the very same day in June of 1976 that Parliament was giving
second reading to this amendment, lawyers were arguing a challenge to the death
penalty based on section two(b) of the Canadian Bill of Rights that had been brought
by two of the men who had been convicted of murdering a police officer. The
court challenge failed, but the amendment passed on its third reading, 130-124.
The trade-off that might have made this slim victory possible was a substantial
increase in the length of prison terms for murder, although still not as lengthy as those
imposed by the state of Washington.

From this brief account of the legal situation in the 1970s, it can be seen that
when Canada and the United States were negotiating and ratifying their extradition
treaty, the law respecting the death penalty in both countries was in a state of flux.
Indeed, there was a period after the 1972 decision of the United States Supreme Court
in Furman v. Georgia during which the Canadian moratorium on capital punishment

132. Cf. id.
Act No. 2].
134. Miller, [1977] 2 S.C.R. at 684. One of the present authors was junior counsel for the
Crown in Miller, and confidential information available to the prosecution at that time indicated that,
if neither the supreme court nor Parliament put an end to the death penalty that summer, the pressure
on the federal executive was such that it was unlikely to commute the death sentences Miller and
Cockriell were facing. This meant that it was really up to Parliament: the Canadian Bill of Rights,
which was enacted in 1960, is only a federal statute and, unlike the Charter, does not have
constitutional force. See generally An Act for the Recognition and Protection of Human Rights and
Fundamental Freedoms, R.S.C., ch. 44 (1960) (Can.). In 1976, however, it was all there was.
136. Boyd, supra note 106 at 44.
137. Murder was re-categorized as first-degree and second-degree, both of which carried life
imprisonment. Act No. 2, supra note 133 § 214(1). The difference is that there is no parole eligibility
for those convicted of first-degree murder for twenty-five years, whereas the period is ten years for
those convicted of second-degree murder (although the jury can recommend a longer term). Id. §
670. There is also a complicated and controversial process whereby some of those convicted of first-
degree murder can apply after fifteen years to have a jury recommend that they be able to seek
parole. Id. § 672(1)-(2). This is the so-called, and aptly named, "faint hope" clause. See, e.g., Karin
Stein, Section 745.6—The "Faint Hope Clause," Dec. 2001, available at
http://canada.justice.gc.ca/en/ps/rs/rep/fs01/fs01_1.html. Before the abolition of capital punishment
those serving a life term for capital murder where the death penalty had been commuted were eligible
to be considered for parole after ten years, and those doing life for non-capital murder were eligible
after only seven. See Act No. 2, supra note 133 §§ 670-72.
had an exception for the killers of police and prison guards, whereas in the United States the more general de facto moratorium that had lasted since 1967 was now reinforced by Furman. All of which explains why it was apparently not Canada but the United States who requested that article six, providing for assurances that its nationals would not be extradited to face a penalty unavailable at home, be inserted—an important fact that people should probably be reminded of now and then. However, by the time the treaty was ratified, Georgia and Texas—and many other states whose laws suffered from the same defects singled out in Furman—had responded to the Court’s decision by enacting new death penalty laws. And when the Supreme Court reviewed Georgia’s law in 1976, it gave the constitutional green light to the death penalty in the United States once again. This is where the real divergence began because, a few months later, the Criminal Law Amendment Act (1976) made the death penalty legally as well as practically defunct in Canada.

This, of course, did not end the Canadian debate, it only muted it; and in the 1980s and most of the 1990s, when the Supreme Court decided the Kindler and Ng cases, public opinion continued to favor capital punishment. Nonetheless, a motion to re-introduce the death penalty that was debated in Parliament in 1987 was, as noted earlier, defeated. And although as recently as 1995 a national poll indicated that sixty-nine percent of Canadians either “moderately or strongly favored the return of the death penalty,” it is not an issue that has, so far, come to the forefront during federal elections. Indeed, in 1998 another poll recorded support for the death penalty at only forty-eight percent. Other changes had also occurred by then. The fact of fundamental importance is that Canada abolished the death penalty for all civil offenses in 1976 and has not looked back.

138. See Capital Punishment Act, supra note 123 § 10.
139. Burns, [2001] 1 S.C.R. 283, 309. As the court put it, “[i]n recognition, perhaps, of this fluid state of affairs the parties agreed that the extradition treaty should include Article 6 in respect of seeking assurances.” Id.
140. Rose, supra note 7, at 197 n.20.
142. Gregg, 428 U.S. at 207.
143. See generally Act No. 2, R.S.C., supra note 133. Note as well that, although the death penalty was not imposed under military law during any of the years discussed here, it was not formally removed from the National Defence Act until 1998. See An Act to Amend the National Defence Act and to Make Consequential Amendments to Other Acts, R.S.C., ch. 35 (1998) (Can.).
144. Amnesty International, supra note 112.
145. See supra text accompanying notes 88-89.
146. Amnesty International, supra note 112.
147. Id. This same poll indicated 47% opposed and 6% undecided. Id.
B. Burns and Rafay: The Minister's Decision

Glen Sebastian Burns and Atif Ahmad Rafay, who are Canadian citizens and who were both eighteen years old when they committed their crimes, were arrested in Canada on three counts of aggravated first-degree murder filed by the King County, Washington Prosecutor's office. Rafay's parents had been found murdered and his sister beaten in their Bellevue, Washington home in July 1994. Rafay and Burns admitted being in Bellevue during the night of the murders but stated they had gone out and returned home to find Rafay's parents dead and his sister dying. During the investigation, the Bellevue police discovered hairs with Caucasian characteristics in the master bedroom where the two parents were killed and diluted blood from the victim in a shower stall. Although the police suspected the two boys, there was insufficient evidence to link them to the crime, and they returned to Canada. At the request of the Bellevue police, the Royal Canadian Mounted Police (RCMP) began an undercover operation in which an officer posed as a crime boss recruiting 'hit men.' The undercover officer approached the two boys who, in an effort to impress the supposed crime boss, told him about the murders in Bellevue. Burns told the undercover officer that he had beaten Rafay's parents and sister with a baseball bat while dressed only in his underwear, and that following the attacks he showered to clean off the victim's blood. Based on the statements to the RCMP's undercover officer and on the scientific evidence, the extradition judge found a prima facie case that the two boys committed the murders and issued a committal order for their extradition to the United States, pending a decision by the minister of justice.

Lawyers for the fugitives then made submissions to the minister, Alan Rock, arguing that the minister was required by section six subsection one and sections seven and twelve of the Charter, to seek assurances—pursuant to article six of the extradition treaty between Canada and the United States—that the death penalty would not be imposed. They argued further that Cotrini left open the possibility of a prosecution in Canada, and that even though the murder did not occur here, a charge of conspiracy to murder could be brought. The minister, however, was of the view that because the Attorney General of British Columbia had concluded there

149. Id. at 297.
150. Id.
151. Id.
152. Id. at 298.
154. See id.
155. Id. at 297-98.
156. Id. at 299.
157. Id. at 300.
was insufficient evidence to support a conspiracy charge, this was not an option. Counsel then sought to distinguish *Kindler* and *Ng* on two grounds. First, Counsel sought to distinguish on the grounds that Burns and Rafay were Canadian citizens who could not be expelled by the government and face the risk of never returning, whereas Kindler, a United States citizen, and Ng, who had lived in United States for years, had sought safe haven in Canada. Second, Counsel argued that, unlike Kindler and Ng, the boys were only eighteen at the time of the crime. The minister rejected these arguments and determined that neither the boys' citizenship nor their ages constituted the sort of circumstance, contemplated, but not described in *Kindler* and *Ng*, that would "shock the Canadian conscience" and, thereby, require him to seek assurances against imposing the death penalty. Therefore, he signed an unconditional order of surrender to have Burns and Rafay extradited to the United States.

Burns and Rafay appealed to the British Columbia Court of Appeal. That court, in a split decision, set aside the minister's decision and directed him to seek assurances that the death penalty would not be imposed as a condition of surrender. Although the court's majority felt bound by *Kindler* and *Ng* with respect to Charter sections seven and twelve, when it came to section six subsection one, they distinguished *Burns* from *Cotroni* on the ground that Cotroni would ultimately be released from prison and could return to Canada, whereas Burns and Rafay might be executed. As a result, the majority's judgment held that section six subsection one obligated the minister not to force Canadian citizens facing the possibility of capital punishment out of the country, because if they were executed they would be unable to exercise their Charter right of return. He was therefore required to seek assurances

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159. See id.
160. Id. at 300.
161. See id.
162. Id.
164. Id. at 301.
165. Id.
166. Id. The majority held that the argument that Canada might become a "safe haven" for fugitives if assurances were required did not apply to Canadian citizens, who are entitled to regard Canada as a safe haven because "access to its constitutional protections is a feature of citizenship." Id. at 302.
168. Id. at para. 30.
against the imposition of the death penalty. The Crown was granted leave to appeal to the Supreme Court of Canada.

C. Burns and Rafay in the Supreme Court of Canada

When Burns reached the supreme court the justices not only invoked the Charter to overturn a minister's surrender order for the first time, but they also delivered a set of reasons on behalf of the court that, to quote one commentator, "effectively overrules" their decisions in Kindler and Ng. In doing so, the court brought its approach to the death penalty much closer to that of the judiciary in such countries as France, Italy, and The Netherlands, as well as to that of the European Court of Human Rights and the Judicial Committee of the Privy Council—which until 1949 was Canada's highest appellate court. Indeed, Europe is now "for all practical purposes a death penalty-free extradition zone."

The technical heart of the judgment in Burns lies in the "balancing process" that governs the decision of the minister of justice to extradite in death penalty cases—a process that was first emphasized in Kindler and Ng. According to the court, among the considerations favoring assurances are the following: (1) the possibility of making an error that capital punishment renders incapable of correction; (2) the fact

169. Burns, [2001] 1 S.C.R. at 302. The dissenting judge felt bound by the Supreme Court of Canada's rulings in Kindler and Ng, even where Canadian citizens were involved, and found that it would be the state of Washington, not the minister, who denied them their section six rights if they were executed. Id. at 303.

170. See id. at 308.

171. The Quebec Court of Appeal had previously overturned a minister's order in United States v. Jamieson, but this decision was subsequently reversed by Canada's Supreme Court. See [1996] 1 S.C.R. 465.


173. Schabas, supra note 172, at 666. In Pratt v. Attorney General for Jamaica, [1994] 2 AC 1 (P.C. 1993), paras. 52-55, reprinted in 33 I.L.M. 364 (1994), the Judicial Committee had disagreed with Justice La Forest's rejection in Kindler of the "death row phenomenon" as an important factor, holding that a lengthy delay between sentencing and execution is relevant whether or not the delay was caused by the appellant's decision to pursue all available avenues of appeal. Schabas, supra note 172, at 669. Schabas suggests that in Burns the Canadian justices were "clearly troubled" that their court's jurisprudence on this issue had lagged behind and notes that Burns has since been cited with approval by the South African Constitutional Court in a case involving a suspected al-Qaeda member. Id. at 670. In Mohamed, which Clarke, supra note 9, at 803, describes as a "potential bombshell," the South African court held that it was unconstitutional to deport someone to the United States without assurances if the charge was capital. Mohamed v. President of the RSA, 2001, (7) BCLR 685 (CC).

174. Clarke, supra note 9, at 798.

175. See id. at 799.
that Canada abolished the death penalty a quarter of a century ago; (3) and the movement towards abolition in an increasing number of states and in international law.\textsuperscript{176} Other factors include personal characteristics of the fugitive, such as youth, and the "death row phenomenon," whereby the finality of the penalty produces lengthy appeal procedures that prolong the agony of being on death row.\textsuperscript{177}

However, the court allots most of the space in its judgment to discussing the possibility of error and the declining acceptability of the death penalty, both domestically and internationally.\textsuperscript{178} Significantly, interventions were permitted by Amnesty International, the International Centre for Criminal Law & Human Rights, the Criminal Lawyers Association, the Washington Association of Criminal Defense Lawyers, and—rather interestingly—the Senate of the Italian Republic.\textsuperscript{179} All of this tends to emphasize a point that is often made about the difference between the jurisprudence of the Canadian and United States Supreme Courts: The latter tends to confine itself to domestic law and precedent, whereas the former regularly looks, "not only to its own history and Constitution, but also to international law and political opinion for guidance, at times even treating them as compelling authorities."\textsuperscript{180}

\textsuperscript{176} Burns, [2001] 1 S.C.R. 283 at 329-37.

\textsuperscript{177} Id. at 335-37. Concerns over expediting death penalty cases and relieving federal courts from the burden of reviewing new evidence claims led the Supreme Court of the United States to reject a habeas corpus petition based on newly discovered evidence unless the claim of "actual innocence" is accompanied by an independent constitutional claim. Herrera v. Collins, 506 U.S. 390, 400 (1993). Although six justices would permit a showing of "actual innocence," they varied widely on the proper standard for allowing such a claim. Justices Scalia and Thomas were of the mind that "[t]here is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction." Id. at 427-28. One commentator has pointed out that since Herrera, "no habeas court has granted relief based on evidence of actual innocence." Lissa Griffin, The Correction of Wrongful Convictions: A Comparative Perspective, 16 AM. U. INT'L L. REV. 1241, 1305 (2001). In a death penalty case involving an "actual innocence" claim accompanied by an independent constitutional claim, the Court in Sawyer v. Whitley, 505 U.S. 333, 336 (1992), ruled that a federal habeas corpus petitioner must show that but for the federal constitutional error no reasonable jury would have found the petitioner eligible for the death penalty. Congress, as part of the Antiterrorism and Effective Death Penalty Act of 1996, amended the Federal Habeas Corpus Act, 28 U.S.C. § 2254 (e)(1) (2000), to require the higher clear and convincing standard.

\textsuperscript{178} See generally Burns, [2001] 1 S.C.R. 283.

\textsuperscript{179} Id. at 283. Only Amnesty International had counsel at the hearing; the other interveners made written submissions.

\textsuperscript{180} Rose, supra note 7, at 195. The authors would add only that "compelling" does not mean "binding." Cf. Iris Weiser, Undressing the Window: Treating International Human Rights Law Meaningfully in the Canadian Commonwealth System, 37 U. B.C. L. REV. 113, 115 (2004). By way of contrast, see the views of Justice Scalia, dissenting in Atkins v. Virginia, 536 U.S. 304, 337 (2002). Reacting to a reference in Justice Steven's opinion to the position of professional organizations and other governments on executing the mentally handicapped, Justice Scalia wrote that it was irrelevant: "Equally irrelevant are the practices of the 'world community,' whose notions of justice are (thankfully) not always those of our people." Id. at 347-48.
On the other side are such considerations as: ensuring that fugitives are brought to trial in the jurisdiction where the crime was committed (arguably, insisting on assurances might prevent this); the generally salutary principle, emphasized in Harrer, Terry, and Schreiber, that persons who leave Canada leave Canadian law and jurisdiction behind, and should normally be prepared to accept the law of the jurisdiction in which they allegedly transgressed; and international comity. Although the arguments made by the Justice Department in defense of extradition without assurances are considered throughout, explicit discussion of the factors supporting this result occupies only a few paragraphs in the judgment, compared to the fifty-plus paragraphs allotted to the factors favoring assurances. Of course, all these factors had also been canvassed a decade earlier in Kindler and Ng. But two things had changed since then: first, internationally, the death penalty was falling increasingly out of favor; and second, in both Canada and the United States, concerns about the possibility of executing the innocent had significantly increased. Arguably, and notwithstanding the Court’s insistence that it has retained the balancing test in Burns, these considerations have resulted, not in a “re-balancing,” but in a decision that is indeed very close to the dissent in Kindler.

If the technical heart of the judgment is the re-assertion of the so-called balancing process, the real heart is in the discussion of wrongful convictions and the changing attitude toward the death penalty. But before dealing with these issues the Court had to dispose of some preliminary matters. The first was the nature of the minister’s discretion under section twenty-five subsection one of the Extradition Act, which the court confirmed as involving the balancing test set forth in Kindler and Ng. The court then briefly reviewed the extradition treaty with the United States and the recent history of the death penalty in each country before moving on to address the basis of the ruling being appealed, that is, the British Columbia Court of Appeal’s invocation of section six subsection one of the Charter, mobility rights, as requiring assurances. The Canadian Court also looks to United States jurisprudence quite often, whereas the United States Supreme Court refers to Canadian precedent very, very rarely. See Robert Harvie & Hamar Foster, Different Drummer’s, Different Drums: The Supreme Court of Canada, American Jurisprudence and the Continuing Revision of Criminal Law under the Charter, 24 OTTAWA L. REV. 39, 65 n.112 (1992).

181. See discussion infra Part I.A.
183. See id.
184. Id. at 334-35.
185. Kindler, [1991] 2 S.C.R. 779. Two of the dissenting justices, Sopinka, J. and Lamer, CJ., held that extraditing without assurances regarding the death penalty, the imposition of which would be a violation of section twelve of the Charter if it were imposed in Canada, offends the principles of fundamental justice and would therefore violate section seven. (Lamar, CJ., and Cory, J., also held it would violate section twelve). Id. at 784-85.
187. Id. at 308-09.
in the *Burns* case.\footnote{188} After affirming their earlier rulings that extradition constitutes a \textit{prima facie} infringement of section six subsection one, but that it is justified under section one (*Cotroni*), the justices considered whether the death penalty made a difference.\footnote{189} Because life imprisonment in Washington holds no possibility of parole, they concluded that “whether assurances are obtained or not, the fugitive, if convicted, will equally be unable to return to or ‘enter’ Canada.”\footnote{190} The death penalty therefore made no difference, and in both cases the “bar” to return would be imposed not by Canada but by Washington.\footnote{191} Moreover, they added, “efforts to stretch mobility rights to cover the death penalty controversy are misplaced.”\footnote{192} They therefore dissociated themselves from the court of appeal’s reasoning on this ground.\footnote{193}

The argument that extraditing without assurances violated the ban against cruel and unusual punishment contained in section twelve of the *Charter* was also easily overcome.\footnote{194} Although the justices conceded that there was some support for this argument in the decision of the European Court of Human Rights in *Soering*, they confirmed their position in *Kindler* and *Ng* that using section twelve would be to give the *Charter* extraterritorial effect and that “the proper place for the ‘state responsibility’ debate is under section 7,” not section twelve.\footnote{195} However, they laid the foundation for their ultimate conclusion by emphasizing that the values underlying the *Charter*’s many provisions, including section twelve, “form part of the balancing process engaged in under section 7.”\footnote{196}

Given that the extradition order deprived Burns and Rafay of “liberty and security of the person,” the real issue was whether this deprivation was in accordance with “the principles of fundamental justice.”\footnote{197} The justices found that it was not.\footnote{198} “Our analysis,” they wrote, leads to the conclusion that “in the absence of exceptional circumstances, which we refrain from trying to anticipate, assurances in death penalty

\footnotesize{\begin{itemize}
  \item 188. *Id.* at 304-06.
  \item 189. *Id.* at 313.
  \item 190. *Id.* at 316-17.
  \item 192. *Id.* at 317. This is quite true, but of course the British Columbia Court of Appeal resorted to section six mobility rights only because the supreme court had seemingly removed the possibility of using section seven by its decisions in *Kindler* and *Ng*. *Kindler v. Canada*, [1991] 2 S.C.R. 779, 854-57; *In re Ng*, [1991] 2 S.C.R. 858, 861.
  \item 194. *Id.* at 317-18.
  \item 195. *Id.* at 319. *Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439 (1989), has been described by one commentator as “one of the most cited international cases” and probably “the most important international extradition case of the Twentieth Century.” Clarke, *supra* note 9, at 787-88.
  \item 197. *Id.* at 321.
  \item 198. *Id.* at 353-54.
\end{itemize}}
cases are always constitutionally required.”199 This not only reverses the *Kindler* formulation, but also sits rather uneasily with the court’s holding in *Kindler* that only those situations that “shock the conscience” should require assurances.200 The justices’ explanation in *Burns* is that the rule “is not that departures from fundamental justice are to be tolerated unless in a particular case it shocks the conscience. An extradition that violates the principles of fundamental justice will always shock the conscience.”201 They reached this conclusion by finding that by the year 2000, as opposed to 1991, when *Kindler* was decided, capital punishment had, in effect, become as unacceptable as stoning people convicted of adultery or chopping the hands off thieves.202

The judgment then relies on a long-standing and not uncontroversial distinction in *Charter* jurisprudence between general public policy, on the one hand, and the “basic tenets of the justice system,” on the other.203 The latter, unlike the former, is “the inherent domain of the judiciary... as guardian of the justice system” and in *Burns* the court declared that the controversy in Canada and the United States “over possible miscarriages of justice in murder convictions... [falls] within” that domain.204 After briefly examining the factors favoring extradition without assurances, the justices then focus on this controversy, noting the abolition of the death penalty in Canada for civil offenses and the fact that, since *Kindler* was decided, Canada had also abolished it for military offenses.205 Not only had Canada executed no one since 1962, but the Federal government had taken a major role in the

199. *Id.* at 323.


201. *Burns*, [2001] 1 S.C.R. at 325. In Thomas M.J. Bateman, *The New Globalism in Canadian Charter of Rights Interpretation: Extradition, the Death Penalty, and the Courts*, 7 THE INT’L J. OF HUM. RTS. 49, 60 (2003), the author argues that the separate standards in *Kindler*—what shocks the conscience and violates the principles of fundamental justice in Canada—“are conflated in *Burns*.” In other words, now everything that would violate section seven in Canada is sufficiently shocking to affect extradition, and that was not what they said in *Kindler*. But the court did telegraph this possibility in its earlier decisions and—although this is surely implicit in *Burns*—technically, the court has yet to rule that the death penalty violates section seven; until an attempt is made to re-instate capital punishment in Canada, the point is moot. What *Burns* does say is that, because Canada does not have a death penalty, extraditing to the United States without requiring the assurances provided for by treaty violates section seven in all but the most exceptional cases.


203. *Id.* at 326-27.

204. *Id.* (citing *Reference re S* (94) of the B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486). We have criticized some of what the court has said about this distinction in the articles referred to, *supra* note 177, but it is now firmly embedded in Canadian Charter Law. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 7.

abolition movement internationally, where more and more states were abandoning capital punishment.\textsuperscript{206}

The court seems to have been especially impressed by the fact that Amnesty International believed Canada to be the only country in the world that, having abolished the death penalty, was nonetheless still prepared to extradite without assurances.\textsuperscript{207} The court then reviewed the matter of the relative youth of Burns and Rafay, concluding that it was a mitigating circumstance, albeit one of limited weight, and moved on to what was probably the decisive factor in the decision—the shocking history of wrongful convictions in both Canada and the United States since \textit{Kindler}.\textsuperscript{208}

From the Canadian perspective, the essence of this point can be turned into a mantra of three names: Marshall, Milgaard, and Morin. Although Donald Marshall's wrongful conviction of murder preceded the \textit{Kindler} decision, the revelations in the \textit{Milgaard} and \textit{Morin} cases, and in two more that the court discusses, came afterwards.\textsuperscript{209} Similar problems surfaced in the United States, where concerns have been expressed by the American Bar Association and, significantly, the Board of Governors of the Washington State Bar Association.\textsuperscript{210} Other examples cited by the court include Illinois Governor Ryan's moratorium on executions, which was prompted by concerns about convicting the innocent, and legislative initiatives in New Hampshire, Nebraska, and Wisconsin.\textsuperscript{211} As the justices put it, what was unknown in 1991, when they decided \textit{Kindler}, "was the number of other instances of miscarriages of justice in murder cases that would surface" in the ensuing years.\textsuperscript{212} After reviewing similar cases in the United Kingdom, notably two which involved

\begin{itemize}
  \item \textsuperscript{206} Id. at 329-35. Schabas, \textit{supra} note 172, at 671, clearly admires the decision, nonetheless points out that the court seems to have exaggerated Canada's role in the international abolition movement.
  \item \textsuperscript{207} \textit{Burns}, [2001] 1 S.C.R. at 331-32.
  \item \textsuperscript{208} Id. at 335-36.
  \item \textsuperscript{209} Id. at 337-41. Donald Marshall was exonerated in 1989 after serving eleven years in prison. \textit{Id}. at 337-38. A royal commission confirmed his innocence and severely criticized everyone involved in his 1971 conviction—the police, the lawyers, even the judges. \textit{Id}. The real killer was subsequently convicted of manslaughter. \textit{Id}. David Milgaard was exonerated, on the basis of DNA evidence, after serving nearly twenty-three years in prison. \textit{Id}. at 338-39. Guy Paul Morin was also cleared on the basis of DNA evidence, but ten years after his initial arrest. \textit{Id}. at 339-40. Had the death penalty—which the court in \textit{Burns} described as final, irreversible and probably arbitrary and without real deterrent value—been imposed, the injustice would of course have been that much greater. \textit{Id}. at 329-30. The court went on to discuss two further examples, that of Thomas Sophonow and Gregory Parsons, before moving on to the U.S. experience. \textit{Id}. at 340-41. For a discussion of Marshall, Milgaard and Morin in the context of \textit{Burns} see Teresa Mitchell, \textit{The 3M Factor in Canadian Justice}, 25 LAWNOW 8 (2001).
  \item \textsuperscript{210} \textit{Burns}, [2001] 1 S.C.R. at 342-43.
  \item \textsuperscript{211} Id. at 343.
  \item \textsuperscript{212} Id. at 337.
\end{itemize}
the posthumous quashing of capital convictions dating back fifty years, the court concluded that the many disclosures of wrongful convictions in the 1990s provide:

[T]ragic testimony to the fallibility of the legal system, despite its elaborate safeguards for the protection of the innocent. When fugitives are sought to be tried for murder by a retentionist state, however, similar in other respects to our own system, this history weighs powerfully in the balance against extradition without assurances.213

After considering the “death row phenomenon” as yet another factor that weighed in the balance against extraditing without assurances, the justices then began the actual “balancing.”214

However, by this point in the judgment the conclusion was clear: Assurances are required in all but exceptional circumstances, therefore extradition without them in this case constituted a violation of section seven of the Charter.215 Moreover, this was not a violation that could be justified under section one as a reasonable limit on the section seven right.216 Not only is it almost axiomatic that it would be rare for a violation of the principles of fundamental justice to nonetheless be justifiable under section one; but the court also held that the government had failed to show, as required by the test laid down in R. v. Oakes,217 that extraditing without assurances was necessary in order to achieve the legitimate objective of mutual assistance in law enforcement.218 The extradition treaty at issue “explicitly” provides for requiring assurances, and there was no evidence that doing so would “undermine Canada’s international obligations or good relations with neighbouring states.”219 Other abolitionist states do not generally extradite without assurances, and there was no evidence that the United States “would prefer no extradition at all to extradition without assurances.”220 However, what was clearly the bottom line for the court was the fact that “despite the best efforts of all concerned, the judicial system is and will remain fallible and reversible whereas the death penalty will forever remain final and irreversible.”221 Although one must read the whole decision to appreciate the skill with which this position is developed, we agree with a recent commentator who has

213. Id. at 350.
214. Id. at 351-52 (citing Pratt, [1994] 2 A.C. 1 (P.C.)). The court cited Pratt in support, thereby preferring the dissent in Kindler to Justice La Forest’s view that it would be “ironic” if delay attributable to the prisoner’s availing himself of all avenues of appeal should be seen as a violation of fundamental justice. Id.
216. Id. at 357.
219. Id. at 358.
220. Id. at 354.
221. Id. at 355-56.
written that he is unaware of any international extradition case "that makes the innocence argument as forcefully and as well as the court in Burns."  

Nonetheless, one aspect of the judgment is strained. By insisting that the test is a matter of "balancing," the court does not describe the evolution from Kindler to Burns very well. What has really happened is that Canada has gone from a rule that was highly deferential to executive decision-making, requiring assurances only in exceptional extraditions, to one that, as a matter of constitutional law, requires assurances in all extraditions, leaving only a bare possibility that there might be exceptions. Because the heart of the court's reasoning is the innocence argument, it is difficult to imagine how a retentionist state might modify its capital punishment regime so as to fit into such an exception. We, therefore, agree with Alan Clarke, who describes Burns as "very close" to laying down a rule that makes assurances mandatory. As he puts it, Burns is "a transitional case that speaks one way while moving in another. Such cases are not unheard of in the history of jurisprudence." A more fanciful way of putting it is that the court maintains re-balancing the wheels and installing new shocks on its 1991 model does not make it a new car, even though it can now go all sorts of places it could not go before.

PART III

Murder takes us to the Land's End of the law. Our horror and revulsion undermine our capacity to reason—and prove that justice alone will not make us whole.

—Scott Turow, Ultimate Punishment

222. Clarke, supra note 9, at 800 n.80.
223. See id. at 799.
225. Clarke, supra note 9, at 799-800:
   The criteria cut against each other such that if you satisfy one, you are forced to violate the other—repair the length of stays on death row [to address the death row phenomenon] at the expense of increasing the probability of executing the innocent. Thomas Hobson could not have improved on this.

Id. at 803.

226. Id. at 799.
227. Id. at 801. Richard Haigh, A Kindler, Gentler Supreme Court? The Case of Burns and the Need for a Principled Approach to Overruling, 14 Sup. Ct. L. Rev. 139, 158 (2001) makes a similar point, arguing (if we may be forgiven for paraphrasing) that a "balancing" test that leans always sharply one way (Kindler) or the other (Burns), is not much of a balance. Cf. id. The court, he concludes, should have "bitten the bullet and admitted that it was wrong the first time around, and overruled itself." Id.

228. Scott Turow, ULTIMATE PUNISHMENT: A LAWYER'S REFLECTIONS ON DEALING WITH THE DEATH PENALTY 109 (Farrar, Strauss & Giroux 2003).
Burns has been referred to in a number of cases since it was decided. Its most notable application, however, was in Suresh v. Canada (Minister of Citizenship and Immigration), which the supreme court decided about a year later. Suresh was a deportation case that involved a number of Charter and procedural issues. For our purposes, its importance lies in the court ruling that section seven requires the minister of citizenship and immigration to refuse to deport if there is evidence of a substantial risk that the appellant will be tortured if forced to return to his home country.

Suresh is significant not only for what it says about Burns, but also for its timing. The appeal, by a man with links to the Liberation Tigers of Tamil Eelam in Sri Lanka, was argued in May 2001. Before the supreme court handed down its decision, the September 11 attacks on the World Trade Center and the Pentagon took place, and one week later the Canadian Minister of Justice, Anne McLellan, made it clear that she was considering asking the court to re-hear the Suresh appeal in light of 9/11 and the threat of terrorism. As Thomas Bateman put it, if the court’s earlier decision “was a weak reed, then the impact of the 9/11 attacks would surely have crushed it[,]” adding, “[b]ut Burns stood up.” In January 2002, the court held that “barring extraordinary circumstances, deportation to torture will generally violate the principles of fundamental justice protected by section 7 of the Charter.” The court, moreover, was clear that “nothing in [its] section 7 analysis” in Burns “turned on the fact that” it was an extradition case.

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229. A quick search turned up seven cases in the lower courts, the most recent of which is the Ontario Court of Appeal’s decision in Bouzari v. Iran, [2004] O.J. No. 2800, para. 99. The supreme court itself had occasion to refer to Burns in United States v. Cobb, [2001] 1 S.C.R. 587, 595, where the court approved a stay of proceedings in an extradition case because the American judge and the prosecutor had made comments that led the court to conclude that extraditing Cobb would violate section seven. As for Burns, the court said that it confirmed that “the Charter applies to extradition proceedings in the sense that the [extradition] treaty [with the United States], the extradition hearing in Canada and the exercise of the executive discretion to surrender the fugitive all have to conform to the requirements of the Charter.” Id. at 599-600.
231. See id. at 108-09.
232. Bateman, supra note 201, at 66.
234. Bateman, supra note 201, at 66. The author quoted the minister as saying: “I think the events of last Tuesday speak very clearly to the very real risk of terrorism to all of us and how very difficult it is to deal with terrorist organizations.” Id. (citing Janice Tibbetts, McLellan May Ask Top Court to Rehear Terrorism Case, EDMONTON J., Sept. 20, 2001, at A6).
235. Bateman, supra note 201, at 66.
236. Suresh, [2002] 1 S.C.R. at 45. It is troubling, however, that the possibility for exceptions lingers here as well.
237. Id. at 35-36.
Rather, the governing principle was a general one—namely, that the guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our government, if there is a sufficient causal connection [emphasis added] between our government's participation and the deprivation ultimately effected. We reaffirm that principle here. At least where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation [emphasis added], the government does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand.238

Coupling the causality requirement described in Suresh with the innocence argument emphasized in Burns would appear to make it very unlikely that there can be any death penalty cases, including cases involving terrorists, mass murderers, or serial killers, in which assurances are not required. In extradition cases for capital crimes the death penalty is "entirely foreseeable," and Canada's participation is "a necessary precondition."239 The court's emphasis on the innocence argument in Burns, and the fact that it is precisely when the crime is most heinous that pressure to get a conviction can lead to grievous error, renders it very difficult to see how the court could make an exception in any circumstances.240 Still, we agree with those commentators who speculate that, if such circumstances are to be found, the most likely scenario will involve al-Qaeda suspects or other terrorists.241

We also agree with Thomas Bateman's observation that the court has moved in its extradition jurisprudence from "territorial sovereignty and comity to a more non-territorial, human rights-based regime."242 But we disagree with those who suggest that the court has "expanded the doctrine of extraterritoriality."243 Burns certainly restricted the King County Prosecutor's discretion; but so did Pang, a domestic decision.244 The limitation in Burns, in our view, does not really involve applying the

238. Id. It is important, however, not to lose sight of an important difference between extradition and deportation. In Burns there was a detailed and carefully negotiated treaty involved, one that had already placed significant limits on the sovereignty of each nation and that specifically permits the signatories to seek assurances regarding the death penalty. Burns, [2001] 1 S.C.R. at 309-10. Canada and the United States signed the treaty with their eyes open, so to speak, and surely anticipated that this clause would be invoked. See supra text accompanying notes 94, 126. Indeed, the evidence shows that it was the United States that requested the clause. See supra text accompanying note 140.


240. Cf. Clarke, supra note 9, at 799.


242. Bateman, supra note 201, at 64; see also Clarke et al., supra note 9, at 264-65.

243. Rose, supra note 7, at 207; see also Bateman, supra note 201, at 63.

The court’s decision is in line with the Supreme Court of Canada’s traditional reluctance to extend Canadian law beyond Canada’s borders, particularly because it does not rely directly upon section twelve of the Charter. Technically, the court has simply said that it would be a violation of section seven of the Charter for the Canadian government to send someone currently in Canada to another state to face possible execution. The Charter is therefore not being applied to a foreign government or, as in what we regard as the somewhat aberrant decision in R. v. Cook, to agents of the Canadian government in a foreign state. Burns addresses a violation in Canada by Canada’s government; and, of course, the treaty between Canada and the United States specifically provides for assurances.

Finally, it remains to speculate about what all this might portend for the future of the death penalty south of the forty-ninth parallel. In other words, how long will the United States continue to be one of the very few democracies to retain the death penalty? How long will it continue to keep company instead with countries such as Saudi Arabia, Vietnam, the Congo, Iran, and China? What effect, if any, will the sort of evidence and arguments that persuaded the Supreme Court of Canada in Burns to “re-balance” its approach to extradition have on United States courts and policy makers? And what effect, if any, will the refusal of democracies other than Canada to extradite to the United States without assurances eventually have on domestic opinion?

Although it would be foolish to anticipate real change any time soon, there are some interesting, if limited, signs of movement. Over the past two years, the United States Supreme Court has ruled that a sentencing scheme that permits a judge,
rather than a jury, to impose a death sentence is unconstitutional.\textsuperscript{253} It has held that executing the mentally retarded is unconstitutional.\textsuperscript{254} It has made post-conviction review in capital cases a little easier and, arguably, also made it easier to argue in such cases that defense counsel were incompetent.\textsuperscript{255} And four justices have stated that executing persons who were under eighteen years of age when they committed murder violates the Eighth Amendment.\textsuperscript{256} Recently the Court decided to reconsider the issue whether the Eight Amendment prohibits sixteen or seventeen year olds at the time they committed the crime from facing the death penalty.\textsuperscript{257} These seem like tiny steps to anyone from a nation without the death penalty; indeed, the reaction in Canada to the news that the United States Supreme Court had ruled executing the mentally handicapped unconstitutional was, generally, amazement that this had not been done years ago and shock that three justices dissented.\textsuperscript{258} But it is a start.

Of course there are political developments, notably Illinois Governor Ryan’s moratorium on executions, referred to by the Supreme Court of Canada in \textit{Burns}.

\begin{itemize}
\item[256.] \textit{See generally In re Stanford}, 537 U.S. 968 (2002) (Breyer, Stevens, Souter and Ginsberg, J.J., dissenting). Twenty-one of the thirty-eight states that retain the death penalty forbid the execution of persons under seventeen. TuRow, \textit{supra} note 228, at 132.
\item[257.] While our article was under review, the United States Supreme Court handed down its decision in \textit{Roper v. Simmons}, 125 S. Ct. 1183 (2005). In a five to four decision the Court overruled \textit{Stanford v. Kentucky}, 492 U.S. 361 (1989), and held that the Eighth and Fourteenth Amendments prohibit imposing the death penalty upon someone who was under eighteen at the time of the crime. \textit{Id.} at 1200. Six of the justices, including Justice O’Connor’s dissent, agreed that international and foreign law have a place in Eighth Amendment jurisprudence. \textit{Id.} at 1215-16. However, in his dissent Justice Scalia reiterated his strongly held view developed in \textit{Atkins v. Virginia}, 536 U.S. 304, 347-48 (2002), that international practices are irrelevant. \textit{See id.} at 1225-27. Justice Scalia went on to say that, “Canada rarely excludes evidence and will only do so if admission will ‘bring the administration of justice into disrepute.’” \textit{Id.} at 1227 (quoting C. Slobogin, \textit{Criminal Procedure: Regulation of Police Investigation} 550-51 (3d ed. 2002). This, however, is an incomplete description of how the exclusionary rule works in Canada. We have argued elsewhere that the Supreme Court of Canada has adopted a virtually automatic exclusionary rule when the police are found to have obtained statements from suspects in violation of their \textit{Charter} right to counsel. Harvie & Foster, \textit{supra} notes 24, 180. In \textit{Stanford}, 492 U.S. at 380, the Court held that the Eighth Amendment does not prohibit imposing the death penalty on a person who was sixteen or seventeen years old at the time of the crime. A year earlier the United States Supreme Court in \textit{Thompson v. Oklahoma}, 487 U.S. 815, 838 (1988), ruled that the Eighth Amendment prohibits the execution of a person who was under sixteen years old at the time of the crime.
\item[258.] Editorial, \textit{Spared by the Court}, \textit{The Globe and Mail}, June 21, 2002, at A16. The editors of \textit{The Globe and Mail}, for example, wrote that the decision was welcome, but that it was hard “to applaud when the U.S. at last moves beyond the moral standards of Kyrgyzstan, the only remaining country that explicitly allows the death penalty for mentally handicapped people.” \textit{Id.}
\item[259.] \textit{Burns}, [2001] 1 S.C.R. 283, 343-44.
\end{itemize}
Ryan appointed a commission on capital punishment and ultimately commuted all the sentences, which prompted the legislature to enact some minor reforms. One of the members of the commission was lawyer and novelist Scott Turow, who voted, after much deliberation, for abolishing the death penalty in Illinois. He believes that the reluctance of politicians to act and the increasing complexity of death penalty litigation will "eventually stretch the fabric of the law to the point that it is too much of a patchwork to be regarded as the work of reason." Turow suggests at that point the United States Supreme Court will conclude that "capital punishment and the promise of due process of law are incompatible." In a passage that likely sums up the thoughts and feelings of many people, including judges, on both sides of the border, he writes:

I admit I am still attracted to a death penalty that would be available for... crimes of unimaginable dimensions... or that would fully eliminate the marginal risks that incorrigible monsters... might ever again satisfy their vampire appetites. But if my time on the Commission taught me one lesson, it was that I was approaching the question of capital punishment the wrong way. There will always be cases that cry out for the ultimate punishment. That is not the true issue. The pivotal question instead is whether a system of justice can be constructed that reaches only the rare, right cases, without also occasionally condemning the innocent or the undeserving.

He concludes that it cannot, and does so basically for the same reasons, although without appealing to the growing international rejection of the death penalty, that persuaded the Supreme Court of Canada in *Burns*. It remains to be seen whether the United States Supreme Court will relent and declare the death penalty unconstitutional or whether some new horror causes the Canadian court, in some future extradition case involving an appalling crime, to decide that assurances are not required. It is no doubt a commentary on the jurisprudence of both countries that neither event is likely to happen soon.

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260. *See Turow, supra* note 228, at 10-11, 98, 100. The preamble to the report of the commission the governor established, including a summary of its recommendations, may be found in *Turow, supra* note 228, at 119-25.

261. *See id.* at 11, 123.

262. *Id.* at 113.

263. *Id.* at 114.

264. *Id.*
