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Richard Haigh

Osgoode Hall Law School of York University

rhaigh@osgoode.yorku.ca

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A *KINDLER*, GENTLER SUPREME COURT? THE CASE OF *BURNS* AND THE NEED FOR A PRINCIPLED APPROACH TO OVERRULING

Richard Haigh^{*}

I. INTRODUCTION

In *United States of America v. Burns*¹ the Supreme Court of Canada reconsidered a constitutional issue raised fewer than 10 years previously in two cases, *Kindler v. Canada (Minister of Justice)*² and *Reference Re Ng Extradition (Can.)*.³ All three involved extraditing a fugitive to a known death-penalty state.

Extradition of fugitives between Canada and the United States is governed by the Extradition Treaty.⁴ Under this Treaty, one country can refuse to extradite fugitives unless it is provided with assurances from the other country that they will not seek the death penalty. The constitutional issue that arose in these cases was whether or not this assurance must be obtained in Canada by virtue of the guarantees set out in the *Canadian Charter of Rights and Freedoms*.⁵ In *Kindler* and *Ng*, the Court allowed extradition without requiring

^{*} Visiting Professor, Osgoode Hall Law School. Thanks to Tracey Rynard for assisting with some of the research.

¹ (2001), 195 D.L.R. (4th) 1 (S.C.C.) (“*Burns*”).

² [1991] 2 S.C.R. 779 (“*Kindler*”).

³ [1991] 2 S.C.R. 858 (“*Ng*”).

⁴ *Extradition Treaty Between Canada and United States of America*, Canada and United States, 1976, Can. T.S. No. 3.

⁵ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereafter the Charter].

an assurance that death would not follow, the majority⁶ coming to the conclusion that neither section 12 nor section 7 of the Charter were offended when convicted or alleged criminals were to be extradited to a place where death was a possible criminal sanction.⁷ These decisions both held that, based on an appreciation of the nature of the offence and the penalty, the considerations of comity and of security between Canada and the U.S. and the safeguards and guarantees of the U.S. justice system, there was no Charter infringement. According due latitude to the Minister to balance the competing interests involved, the Court found that neither case presented Canadians with a shocking and fundamentally unacceptable result. In other words, in 1991, there was no clear consensus of capital punishment's moral abhorrence or absolute unacceptability.

Arguably, not much about the barbarism of the death penalty, nor the scope of international comity, has changed in this past decade, but the matter was nevertheless reheard in *Burns*. In this latest instalment, a differently-composed bench unanimously found it unconstitutional to send someone to another country without obtaining assurances that the death penalty would not be employed.

What happened in the intervening years? What about the ancient maxim "*stare decisis et non quieta movere* — stand by the thing decided and do not disturb the calm?"⁸ In *Burns*, there was not even a dissenting voice asking, "what has changed?"⁹ Welcome to the strange world of precedent, *stare decisis* and overruling in Canada.

The Supreme Court of Canada has shown a great reluctance in the past to overrule its previous decisions. Instead of admitting earlier problems and overruling, the Court in these instances almost always engages in hair splitting and tortured reasoning in an attempt to distinguish earlier precedents. When it

⁶ The Court split 4-3, with La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. for the majority. The dissent was further split — Lamer C.J.C. and Sopinka J. deciding that the Minister's action offended section 7 of the Charter and Cory J. finding that it offended section 12 of the Charter.

⁷ Joseph John Kindler had been convicted of murder in Pennsylvania and escaped while awaiting sentencing. Charles Ng was accused of multiple murders in California, but had not faced trial.

⁸ See, for example, Rehnquist, "The Power That Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court" (1986), 66 *Bos. U. L. Rev.* 345, at 347.

⁹ See, for example Kirby J. in dissent in *Re Wakim; Ex parte McNally* (1999) 198 C.L.R. 511, at 595. In *Wakim* the Australian High Court overruled its decision of 12 months' prior in *Gould v. Brown* (1998) 193 C.L.R. 346, determining that a cross-vesting scheme of judicial cooperation agreed to by all six States and the Commonwealth government was invalid.

does overrule, it is usually so dismissive of its own earlier precedent as to lead one to wonder whether old cases have any value whatsoever. As such, the Court has failed to formulate any general theory of overruling. There is therefore a dearth of analysis in Canada on the meaning of overruling and its broader and deeper implications.

Overruling past decisions, particularly constitutional decisions, is an important aspect of an evolved legal system. So far, both courts and commentators have devoted little time to fully comprehending this issue. Even Canada's pre-eminent constitutional scholar, Dean Peter Hogg, reflects the general indifference to this issue in Canada, dispensing with the matter in one short paragraph out of his two-volume opus:

It is arguable that in constitutional cases the Court should be more willing to overrule prior decisions than in other kinds of cases. In non-constitutional cases, there is always a legislative remedy if the doctrine developed by the courts proves to be undesirable: the unwanted doctrine can simply be changed by the competent legislative body. That is not true of constitutional doctrine, which after its establishment by the Court can be altered only by the difficult process of constitutional amendment. It follows that there is a greater need for judicial adaptation of constitutional law to keep the law abreast of new technology and new social and economic needs.¹⁰

Understanding a court's role in overruling prior decisions requires an understanding of the roles of precedent and *stare decisis* in decision-making. The next section of this paper briefly explores these concepts.

II. THE SUPREME COURT AND CONSTITUTIONAL OVERRULING

1. The Nature of Precedent and Overruling

Precedent in law functions as a way to aid human categorization. As noted by Henry Monaghan, referring to American constitutional adjudication, it promotes "system-wide stability and continuity by ensuring the survival of governmental norms."¹¹ Precedent economizes on information and helps all legal actors minimize idiosyncratic conclusions. It thus serves a variety of purposes: it aids in

¹⁰ Hogg, *Constitutional Law of Canada*, looseleaf (Toronto: Carswell, 1997 release), section 8.7, at 8-21 (footnotes omitted).

¹¹ Monaghan, "Stare Decisis and Constitutional Adjudication" (1988), 88 Col. L. Rev. 723, at 749.

the stability and coherence of the law, making it more predictable; it provides fairness in decision-making; it promotes efficiency and eliminates sources of error, such as judicial bias; and it fulfils a symbolic role by recognizing the relationship between courts and the legislature. It therefore has independent value.

Precedent in constitutional cases has an even larger role to play. Constitutional judgments do not exist in a conceptual vacuum, nor can they be restricted to a limited sphere of influence encompassing the parties to a dispute. As Canada's constitutional arbiter, the Supreme Court's function is to settle disputes stemming from differing readings of the Constitution. Each constitutional precedent also defines how the nation is governed. Constitutional cases have indirect impacts often far greater than those on the immediate participants. The Supreme Court plays, in its role as an adjudicator, a contributing role in the organization and regulation of government and society. The Court must therefore be aware of the potential havoc that can occur once it overrules a previous decision.

This means that in constitutional cases the arguments for having an even more rational basis for overruling are compelling. For one, the effects are more permanent than in ordinary litigation. Where Parliament disagrees with a court's constitutional decisions, it has few options: in some Charter cases, it can use the override in section 33; it can commence the process to amend the Constitution; or it can litigate a fresh case in which the principle of *stare decisis* will be ignored. This gives the Supreme Court great potential power and control over fundamental issues related to society. While overruling non-constitutional precedents is of course not without its dangers, it is only in constitutional reconsiderations that decisions must be weighed against a loyalty to the organic law of the Constitution.¹²

Given the importance of constitutional overruling and the unique set of competing concerns, it is surprising that there is a lack of detailed focus on it. Overruling constitutional decisions is not something to be treated as simply part of the process of judicial decision-making. It is fundamentally different. For this reason there is a need to examine the conceptual and procedural issues most pertinent, or exclusive, to overruling constitutional decisions.

¹² See the language of Isaacs J. in *Australian Agricultural Co v. Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 C.L.R. 261, at 278. Chief Justice Rehnquist of the United States Supreme Court has argued that as there are *fewer* reliance interests which would be affected in constitutional adjudication, constitutional decisions should be given less weight in contrast with property and contractual law precedents (see *Payne v. Tennessee*, 111 S. Ct. 2597, at 2610 (1991)).

When it is appropriate, a court should not hesitate to overrule, swiftly and decisively. At the same time, courts must be reluctant to overrule without compelling reasons. Such hesitancy is simply pragmatic. Overruling constitutional cases should not be employed as a way around constitutional amendment — a process made expressly difficult in most countries in order to promote stability in governmental arrangements.¹³ Eliminating *stare decisis* from constitutional adjudication also endangers the stability of the law, as legislation and executive action are often reliant on prior constitutional decisions. In Canada, previous Supreme Court decisions can have a huge influence on governmental policy to initiate legislative or executive action in sensitive areas of social policy. It was this very situation faced by Minister Rock in *Burns*.

2. The Supreme Court's Approach to Overruling

The few cases where the Supreme Court has spoken to the issue of overruling lack coherence. First, there is an initial presumption that the Court should not easily overrule its prior judgments. But there is no discussion in the case law as to whether constitutional cases should be treated differently from non-constitutional cases. Some recent examples of this jurisprudence include *Clark v. Canadian National Railway Co.*,¹⁴ Dickson C.J.C.'s dissenting ruling in *R. v. Bernard*¹⁵ (the other justices did not disagree with him on this point), Lamer C.J.C.'s majority decision in *R. v. Chaulk*,¹⁶ and *R. v. B. (K.G.)*¹⁷ and Wilson J.'s majority decision in *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*.¹⁸

In *Clark*, the Court was deciding whether or not to apply a precedent established in *Canadian Northern Railway Co. v. Pszeniczny*.¹⁹ That precedent relied on the constitutional validity of a provision of the *Railway Act* which altered the common law duty of care for railways. The Court in *Clark* determined that the prior precedent should be overruled, but paid scant attention to the mechanics of overruling. It noted that one reason for maintaining a precedent was whether a point was fully argued. Courts should be less willing to interfere with a

¹³ For an overview of this debate in Australia, see Blackshield & Williams, *Australian Constitutional Law and Theory: Commentary and Materials*, 2nd ed (Annandale, N.S.W.: Federation Press, 1998), at chapter 28. For this argument in the U.S. context, see Easterbrook, "Stability and Reliability in Judicial Decisionmaking" (1988), 73 Cornell L. Rev. 422, at 430.

¹⁴ [1988] 2 S.C.R. 680 ("*Clark*").

¹⁵ [1988] 2 S.C.R. 833 ("*Bernard*").

¹⁶ [1990] 3 S.C.R. 1303 (see especially at 1353).

¹⁷ [1993] 1 S.C.R. 740 ("*B. (K.G.)*").

¹⁸ [1990] 2 S.C.R. 489 ("*Central Alberta Dairy Pool*").

¹⁹ (1916), 54 S.C.R. 36 ("*Pszeniczny*").

decision arrived at after full argument and deliberation. Changed circumstances were cited as another reason the Court could overrule: the formative nature of Canada's railway at the time of *Pszeniczny* was not, in 1988, a reason for the railway to benefit from a relaxed legal rule.

The methodology developed in *Clark* has been further refined. The gist of the Court's current approach to overruling is contained in Dickson C.J.C.'s dissenting statement in *Bernard*:

Let me say immediately that, even if a case were wrongly decided, certainty in the law remains an important consideration. There must be compelling circumstances to justify departure from a prior decision. On the other hand, it is clear that this Court may overrule its own decisions and indeed, it has exercised that discretion on a number of occasions.²⁰

A majority of the Court affirmed this approach in *B. (K.G.)*, adopting Dickson C.J.C.'s four-factor test from *Bernard*. The factors that should be reviewed in order to support a decision to overrule an earlier judgment can be stated as follows:

- (1) Is variation required in order to avoid a Charter breach?
- (2) Has the rule or principle been attenuated or undermined by other decisions of the Supreme Court or other appellate courts?
- (3) Has the rule or principle created uncertainty or become "unduly and unnecessarily complex and technical"?
- (4) Does the proposed change in the rule or principle broaden the scope of criminal liability, or is it otherwise unfavourable to the position of the accused? (The same argument does not apply, however, where the result of overruling a prior decision is to establish a rule favourable to the accused.)²¹

The above factors do not provide a comprehensive list, nor must they all be present in a particular case to justify overruling a prior decision. They are to be used as guidelines to assist the Court in exercising its discretion. They do,

²⁰ *Bernard*, *supra*, note 15, at 849.

²¹ *B. (K.G.) supra*, note 17, at 778. In *John v. Federal Commissioner of Taxation* (1989) 166 C.L.R. 417 the Australian High Court derived a four-factor test which is more theoretically sound. There, the High Court is required to ask: (1) Do the earlier decisions rest upon a principle that is worked out in successive cases? (2) Is there a difference in reasoning between the majority justices in one of the earlier decisions? (3) Has the earlier decision not achieved a useful result, but rather caused considerable inconvenience? and (4) Have the earlier decisions been acted upon in such a manner as to militate against reconsidering?

however, represent an attempt to balance, on one hand, the reason for maintaining a system of precedent, and on the other, the search for truth.

In *B. (K.G.)*, the Court concluded that it should do nothing other than what it thinks best in reconsidering whether an existing rule of evidence should be overturned. Reviewing the four factors, the Court found (most importantly) that reform of the rule was necessary to avoid breaching the Charter; the old rule had been weakened by other developments in the law of hearsay and is somewhat, if not overly, technical; and reforming the rule would not directly expand the scope of criminal liability.

In *R. v. Robinson*,²² Lamer C.J.C., on behalf of the majority, concluded that it was time to overrule the Beard rules (evidentiary rules related to intoxication and diminished capacity). This time, the Court gave five reasons for overruling:

- (1) strong dissenting opinions of the two previous chief justices Laskin and Dickson in a series of cases involving the application of the rules;
- (2) the fact that none of the provincial appellate courts considering the issue in the last few years had followed the Beard rules;
- (3) there had been similar developments in England, New Zealand and Australia;
- (4) a large body of academic commentary in Canada favoured abandoning the Beard rules; and
- (5) the Beard rules are inconsistent with the Charter as they create a form of constructive liability.

Although the majority does not relate these explicitly to the factors developed in *B. (K.G.)*, there is some attempt at consistency as the first three reasons could be equated directly with the second factor, the fourth reason indirectly relates to the third factor, and the fifth is equivalent to the first factor.

In contrast to these cases where the Court tries to follow a principled approach to overruling, however, are examples of what I call bare overruling. The worst example is found in *Central Alberta Dairy Pool* where the Court was faced with conflicting lines of authority about a *bona fide* occupational requirement (BFOR) in human rights jurisprudence. While very forthcoming about some of its previous decisions on this topic,²³ the Court failed to address

²² [1996] 1 S.C.R. 683 (“*Robinson*”).

²³ Wilson J. on behalf of the majority stating, “It seems to me in retrospect that the majority of this Court may indeed have erred in concluding that the hard hat rule [established in the case *Bhinder v. Canadian National Railway Co.*, [1985] 2 S.C.R. 561] was a BFOR” (*Central Alberta Dairy Pool*, *supra*, note 18, at 512).

the role of precedent in law or apply any of its overruling factors. Instead, two reasons were cited for the Court's previous incorrect approach, both related to the substance of the *Bhinder* decision itself. This meant, however, that the Court never engaged in the balancing approach set out in *B. (K.G.)* between the correctness of a decision and its value as precedent.

While the Supreme Court's four-factor approach is to be commended as fashioning the beginnings of a Canadian theory of constitutional overruling, there is still some way to go. Missing from the guidelines in *B. (K.G.)* are elements that relate to the foundational values of precedent. An improved version of an overruling theory would, at a minimum, take into account public support and reliance, and inconvenience.

Both public and governmental support, or lack thereof, should be examined when a court reconsiders a decision. The Australian High Court has established this as an overruling factor. In *Commonwealth v. Hospital Contribution Fund of Australia* Wilson J. recognized that the fact that the precedents had been decided "in the face of united opposition from both the Commonwealth and State Governments," in conjunction with other factors, placed them in a "special category."²⁴ In *Re Wakim; Ex parte McNally*, Kirby J. emphasized that the collective voice of all the governments and Parliaments of the nation had been heard, in harmony, to urge that the "constitutional status quo, achieved after the Court's earlier decision, be maintained."²⁵

Public approval should be seen as a necessary step in determining whether to overrule a previous case. A proper consideration of the place to be given for public approval in a precedent does not mean a court is abdicating its duty to decide upon the correctness of a particular authority. Assessing public opinion allows a court to take into account practical views of the potential consequences of upholding or departing from a prior decision. This, of course, cuts both ways. After all, a government may support a decision which, if overruled, would create great inconvenience to its administration but which would relieve citizens, or other institutional bodies, of an inappropriate burden. Where a court finds unanimous support for a particular option, however, as was the case with all levels of government in *Re Wakim*, it should not dismiss the potential for inconvenience caused by overturning a previously accepted scheme.

If a court is not averse to examining public support in its reconsiderations, it should at the same time be aware of the difficulty of ascertaining what level of

²⁴ (1982) 150 C.L.R. 49, at 72.

²⁵ See *Re Wakim, supra*, note 9, at 598-99.

approval exists. Moreover, it needs to be aware of the tightrope it must walk to assess whether such a level is sufficient to warrant an overruling or upholding. Simply paying lip service to public approval as a factor in the overruling equation is not sufficient. At the very least, appropriate economic and sociological evidence must be assessed.

Harlan J., of the United States Supreme Court, explained that adherence to precedent is supported by “the necessity of maintaining public faith in the judiciary.”²⁶ Judges in constitutional courts must not easily dismiss the effect that overruling a prior case may have on both perception and reliance. Acknowledging the effect that a court’s attitude to *stare decisis* has on public confidence, however, is not the same as arguing that it should take this into account in reconsidering constitutional cases. Respect for precedents is said to support the worthwhile belief that all organs of governments are bound by the law.²⁷ In Canada the Supreme Court plays an integral part in the governance of the nation by sitting as the peak, and often sole, constitutional umpire. The fact that changes in its public standing cannot generally affect its work does not mean that maintaining public faith in its processes is not a worthwhile aim. Ensuring stability and confidence in our constitutional system goes hand in hand with maintaining a functioning democracy. That is one reason why the doctrine of precedent performs symbolic functions in relation to the constitutional and political interaction between the courts and the legislature.²⁸

The Court should, therefore, be concerned with the effect its actions have on its public standing, but not in the way that is perhaps most obvious. The Court’s concern must be with the effect the *process* it undertakes would have on public opinion, not with the particular conclusions it reaches. Once the Court is satisfied that the process of overruling has taken into account all legitimate considerations, the Court should be indifferent to the effect on public opinion a resulting choice would have. There is a marked difference between a proper overruling of a widely supported decision and an improper overruling of a widely criticized precedent. The former may generate immediate negative reaction, but would in the long term confirm the integrity of the Court’s approach to constitutional adjudication. The latter may momentarily satisfy public opinion, but ultimately detracts from public confidence in the Court’s processes and sets unacceptable standards for future reconsiderations. While it

²⁶ See *Moragne v. States Marine Lines*, 398 US 375, at 403 (1970).

²⁷ See, for example, “Constitutional Stare Decisis” (1990), 103 Harv. L. Rev. 1344, at 1350 (unattributed).

²⁸ See Twining & Miers, *How to Do Things with Rules*, 2nd ed. (London: Weidenfeld and Nicolson, 1982), especially at 275.

can appear perverse for a court to adhere to decisions which it finds depart from the law,²⁹ the need to do so is a practical reflection of the fact that the Court decides whether to overrule against a backdrop of constitutional arrangements shaped by the Court's own prior pronouncements.

Similar reasons suggest that inconvenience is another factor worth considering before overruling. Inconvenience applies both to the consequences of altering decisions that are widely approved of and the effects of refusing to overrule a decision that is widely condemned. In Australia, for example, *Re Wakim* invalidated a significant scheme of cooperative legislation that had been upheld by the same Court one year previously in *Gould v. Brown*.³⁰ Although Parliament did not rely on a judicial precedent in first enacting the legislative scheme, great inconvenience still flowed when the Court disregarded *Gould* one year later.

Refusing to recognize inconvenience as a factor results in making adjudication inappropriately inflexible. The Privy Council's time as Canada's final constitutional court provides an apt, if extreme, example. It repeatedly refused to depart from its previous constitutional decisions,³¹ completely disregarding the often great inconvenience that resulted. As a result Canadian legislatures made frequent attempts to avoid the consequences of inopportune constitutional authorities.³² If the Privy Council had placed any emphasis at all on the protests of the legislatures, a different approach may have been taken.

Failing to address this thorny issue of overruling and precedent as it arose in *Burns* is the Supreme Court's latest missed opportunity.

III. THE CASE OF GLEN BURNS AND ATIF RAFAY

1. The Decision

Glen Sebastian Burns and Atif Ahmad Rafay are Canadian high school friends. In July 1994, Rafay's father, mother and sister were found bludgeoned to death in their home in Bellevue, Washington. The Bellevue police suspected both Burns and Rafay but did not have enough evidence to charge them. They both returned to Canada where, after additional evidence was obtained, they

²⁹ See Monaghan, *supra*, note 11, at 752.

³⁰ *Re Wakim; Ex parte McNally* (1999) 198 C.L.R. 511; *Gould v. Brown* (1998) 193 C.L.R. 346.

³¹ See, e.g., *Ontario (Attorney General) v. Canada Temperance Federation*, [1946] A.C. 193, especially at 206.

³² See Laskin, "The Supreme Court of Canada: A Final Court of and for Canadians" (1951), 29 Can. Bar Rev. 1038, at 1070.

were eventually arrested and a committal order issued for their extradition pending the Minister of Justice's decision.

Burns and Rafay, if convicted in Washington, will face either life in prison, without the possibility of parole, or the death penalty. Under the old *Extradition Act*,³³ which applies to Burns and Rafay, the Justice Minister has to determine whether or not to surrender fugitives, and if so on what terms. In this case, the then Minister, Allan Rock, proceeded on the assumption that the death penalty would be sought by the prosecutors in the state of Washington. He signed an unconditional Order for Surrender to have them both extradited to the state of Washington to stand trial without assurances in respect of the death penalty.

The case that came before the Supreme Court of Canada, after the Minister's determination and a subsequent appeal at the British Columbia Court of Appeal, was whether the two should be extradited to Washington in the face of this possible death sentence. The main arguments relied on by both Burns and Rafay was that the Minister is required by sections 6(1), 7 and 12 of the Charter to seek assurances that the death penalty would not be imposed. They argued that their unconditional extradition to face the death penalty would "shock the Canadian conscience" because of their age (18 years at the time of the offence) and the fact that, unlike Kindler or Ng, they were Canadian.³⁴ Despite this minor factual difference, they seemed to run up directly against the precedents set in *Kindler* and *Ng*.

Interestingly, it was the doctrine of precedent that forced the British Columbia Court of Appeal in *Burns* to find a new argument. Because of *Kindler* and *Ng*, sections 7 and 12 of the Charter were largely out of play. So, the Court of Appeal found a new Charter provision — section 6(1) mobility rights — which allowed it to set aside the Minister's decision and direct him to seek Article 6 assurances.³⁵ The majority of the Court of Appeal noted that if Burns and Rafay are put to death in the state of Washington, they will no longer be able to exercise a right of return under section 6(1) of the Charter. It was this, in combination with their Canadian citizenship, which allowed Donald J.A. (with whom McEachern C.J.B.C. concurred) to find a way to distinguish *Kindler*. To him, it was obvious that the *Kindler* analysis did not apply to Canadian citizens facing the death penalty because the "government, in the person of the Minister, has an obligation not to force citizens out of the country

³³ R.S.C. 1985, c. E-23.

³⁴ *United States of America v. Burns* (2001), 195 D.L.R. (4th) 1, at 14 (S.C.C.).

³⁵ See *United States of America v. Burns* (1997), 116 C.C.C. (3d) 524 (B.C.C.A.); Article 6 of *Extradition Treaty Between Canada and United States of America*, Canada and United States, 1976, Can. T.S. No. 3.

with the jeopardy of never returning” and that Canadian citizens must be able to consider their own country a safe haven and “access to ... constitutional protections ... a feature of citizenship.”³⁶ As even convicted criminals on death row have a faint hope of returning to their country, the Court of Appeal found that the Minister breached section 6(1) of the Charter.

The Supreme Court held that using mobility rights to cover the death penalty controversy was misplaced. It was too remote to contemplate the possibility of legislative change or other exceptional relief in a foreign jurisdiction. It was also too remote considering that the death penalty may not be imposed. Neither point was a plausible argument for the right of return to country. The main issue was one of fundamental justice.³⁷

It was thus section 7 on which the Court focused. In doing so, the Court returned to the main analysis made under *Kindler*, except this time it was much kinder to the fugitives — assurances in death penalty cases must now be sought under our Charter.

The analytical approach set out in *Kindler* and *Ng* remains the starting point. In neither of those cases, the Court argues, was blanket approval given to extraditions which could lead to death. Instead, the approach requires balancing between the global context and the possibility that circumstances may constitutionally vitiate an order for surrender without assurances. A number of factors are at play in this process, including the mental condition of a fugitive and the difficulties (practical and philosophic) associated with the death penalty. Under this analysis each case will need to be decided on its merits; however, unless significant strides are made to humanize and dignify state-sanctioned death, it seems unlikely that a Minister could constitutionally extradite without now seeking assurances. As the *Burns* Court noted, “in the absence of exceptional circumstances, which we refrain from trying to anticipate, assurances in death penalty cases are always constitutionally required.”³⁸

This is somewhat strange. The Court affirms the balancing process set out in *Kindler* and *Ng*, but indicates that now, the balance is almost always tipped in favour of preserving the life of an accused. The ultimate assessment is still whether the extradition is in accordance with the principles of fundamental justice, but given the latest knowledge of the problems surrounding use of the death penalty, it is now a straightforward exercise. The lower courts had mistakenly thought that *Kindler* required a finding that shocks the conscience

³⁶ *Burns*, *supra*, note 35, at 536 and 541.

³⁷ The Supreme Court also dismissed the argument based on section 12 of the Charter, but it is not relevant to this discussion.

³⁸ *Burns*, *supra*, note 34, at 31.

before a Minister must seek assurances. As stated by the Court in *Burns*, “shocking the conscience” simply alludes to the exceptional nature of circumstances that would constitutionally limit the Minister’s decision in extradition cases. According to the Court, the balancing is still there — it is simply that the death penalty has gone from an unexceptional act in *Kindler* to one that is now exceptional. In formulating their reasons, the Court makes three arguments as to why a decade should make a difference.

(a) *Abolition Is on the Rise*

A large portion of the judgment details the changes that have supposedly occurred in death penalty jurisprudence in a number of locations including Canada, the United States and Europe. Evidence is presented showing the ever-increasing global abhorrence to the death penalty. In Canada, for example, when Ng and Kindler challenged their extradition, it was still possible to be executed for certain military offences. This was abolished in 1998, seven years after *Kindler* and *Ng* were decided.³⁹

Other facts establish the new-found acceptability of abolition. In 1948, only eight countries had abolished the death penalty. In 1998, there were 102 abolitionist countries — 61 were totally abolitionist, 14 abolitionist in part and 27 *de facto* abolitionist (no executions for the past 10 years). Only 90 countries retained the death penalty. Abolitionist states include all of the major democracies except parts of the United States, India and Japan. Eighty-five percent of the world’s executions in 1999 were conducted by only five countries: the United States, China, the Congo, Saudi Arabia and Iran.

But statistics only reveal the picture that you want them to. Canada has not, for example, ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights, which calls for abolition of the death penalty.⁴⁰ As well, although a number of countries have added their signatures to international documents calling for abolition since *Kindler* and *Ng* were extradited, it was not as if there were only a few abolitionist voices in the wilderness in 1991. Lamer C.J.C. and Sopinka J. in their dissent in *Kindler* listed over 60 countries attesting to the concern in 1991.

The Court in *Burns* also ignored the fact that retentionist states account for a large portion of the world’s population (China, India and the United States

³⁹ See *An Act to Amend the National Defence Act*, S.C. 1998, c. 35.

⁴⁰ G.A. res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/44/49 (1989), entered into force July 11, 1991. This point was noted by the Court in *Burns* — see *supra*, note 34, at 39.

themselves constituting over 40% of the world's approximately 6 billion people). It never explained how fundamental justice (which by its nature seems to decry statistical analysis) is affected by a "counting of heads" approach. An honest use of statistical evidence should deal with all the facts, both helpful and contrary.

(b) More Wrongful Convictions

While the Court acknowledges that potential miscarriage of justice has always been a valid objection to the death penalty, it also notes that knowledge of the extent of this problem since *Kindler* and *Ng* were decided has grown to "unanticipated and unprecedented proportions."⁴¹ The Court cites a number of examples in Canada, including the cases of Donald Marshall, David Milgaard, Guy Paul Morin, Thomas Sophonow and Gregory Parsons. Oddly enough, it is Marshall's case that is probably foremost in the Court's mind, yet the Court admits that the miscarriage of justice in his case was known at the time *Kindler* and *Ng* were decided. Of course, the mounting number of wrongful convictions do help to establish a possible pattern.

The Court also relies on a recent study by Professor James Liebman which convincingly details the extent of this problem in the United States. The study concluded that two out of three death penalty sentences in the United States were reversed on appeal, that the overall rate of prejudicial error in the American capital punishment system was 68%, and that between 1972 and the beginning of 1998, 68 people were released from death row on the grounds that their convictions were faulty.⁴² As Professor Liebman began collecting data on capital cases the year that *Kindler* and *Ng* were decided, the Court used it to further advance its claim of changed circumstances.

Again, citing statistics belies the truth. It is in fact not true that the rate of wrongful convictions in murder cases is rising, although the Court does not clearly note this. Rather, procedures and safeguards are better now than they have ever been, and the recent use of DNA evidence is likely to aid in curtailing further wrongful convictions. What is increasing is the use of DNA and other methods to unearth past mistakes. In addition, the Court plays a slippery game here, by relying on current statistics about past wrongs to

⁴¹ *Burns, supra*, note 34, at 42.

⁴² Liebman *et al.*, "Capital Attrition: Error Rates in Capital Cases, 1973-1995" (2000), 78 Tex. L. Rev. 1839. See also Liebman, Fagan & West, "A Broken System: Error Rates in Capital Cases 1973-1995" (2000), available at <<http://justice.policy.net/proactive/newsroom/release.vtml?id=18200>>.

establish future trends. The evidence establishing current statistics is evidence that was unavailable at the time most of the crimes in the Liebman study were committed. If, as the Court prescribes, a case-by-case approach is necessary, it is much more likely that in Burns' and Rafay's case, any DNA evidence will be available for use at trial. DNA science exists now to aid in establishing guilt for crimes committed in 1994, not only as a source for unearthing past wrongs.

Furthermore, how valid to Burns and Rafay are statistics of wrongful convictions in Canada or in other U.S. states? In the United States, criminal law is a state matter. In fact, one of the main reasons why a democracy such as the U.S. is the world's largest capital punishment state is that it is up to each state to determine sentencing policy — making it politically palatable for many to pass retentionist laws. This should have made the Supreme Court examine more carefully the state of Washington's record with wrongful convictions. According to the Liebman study, Washington is below average for combined error rates in convictions. It has also carried out only two executions out of 40 death sentences, in the 18 years studied. Statistics are helpful, but if a case-by-case analysis is the new standard, a more penetrating analysis of the particular state is required.⁴³

(c) *A Better Understanding of the Death Row Phenomenon*

The “death row phenomenon” is experienced by inmates on death row who find that procedural safeguards causing lengthy delays bring about associated psychological trauma. This argument, effectively dismissed in *Kindler*, was given greater prominence in *Burns*, albeit held to be of limited weight.⁴⁴ The Court referred to a report of Chief Justice Guy of Washington State, which found sufficient proof of this phenomenon. Reference is also made to a similar observation made well before *Kindler*'s case in 1991 — this time to a dissenting Frankfurter J. of the United States Supreme Court in *Solesbee v. Balkcom*⁴⁵ in 1950!

⁴³ The Court acknowledges that the Washington State Bar Association has adopted a resolution to review the death penalty process, but cites no evidence on wrongful conviction rates in Washington (see *Burns*, *supra*, note 34, at 46). Liebman *et al.*, “Capital Attrition,” *supra*, note 42, also does not specifically assess Washington. In their more detailed study, “A Broken System,” *supra*, note 42, Washington is found to be below average in error rates.

⁴⁴ See *Burns*, *supra*, note 34, at 53.

⁴⁵ 339 U.S. 9 (1950), at 14.

2. Death Penalty Jurisprudence and Burns

In some ways, the arbitrariness of life worked against Joseph Kindler and Charles Ng. After finding section 7 of the Charter was breached for Glen Burns and Atif Rafay because of these three changes since *Kindler* and *Ng*, it was a short step for the Court to find that the main government justification under section 1 — ensuring Canada does not become a safe haven for criminals — is also now out of date. No evidence was tendered showing that extradition from Canada with assurances would act as an incentive to American fugitives to come here. Instead, the Court held that so-called safe havens exist as a matter of simple geographical determinism (American fugitives choose Canada because we are neighbours), or logic (poor law enforcement is an incentive, not the leniency of ultimate sentence).⁴⁶

In the end, the Court reasons that concerns over implementation of capital punishment, some of which pre-dated *Kindler* and *Ng*, have, in the intervening years, grown greatly in scope and degree of proof. But none of this should have come as a surprise.

In its first paragraph the Court already tips its hand. It is worth quoting in its entirety:

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. In recent years, aided by the advances in the forensic sciences, including DNA testing, the courts and governments in this country and elsewhere have come to acknowledge a number of instances of wrongful convictions for murder despite all of the careful safeguards put in place for the protection of the innocent. The instances in Canada are few, but if capital punishment had been carried out, the result could have been the killing by the government of innocent individuals. The names of Marshall, Milgaard, Morin, Sophonow and Parsons signal prudence and caution in a murder case. Other countries have also experienced revelations of wrongful convictions, including states of the United States where the death penalty is still imposed and carried into execution.⁴⁷

Does this suggest that our post-modern world has finally shown us the truth about institutional fallibility? The Court returns to this theme, recognizing that “despite the best efforts of all concerned, the judicial system is and will remain

⁴⁶ *United States of America v. Burns*, *supra*, note 34, at 58.

⁴⁷ *Id.*, at 10.

fallible and reversible whereas the death penalty will forever remain final and irreversible.”⁴⁸ Is it really groundbreaking news?

To our highest court it is. Ten years after *Kindler* was sent by Canada to face his death in the state of Pennsylvania, the Court finds that the world has changed so much that Burns and Rafay must not face the death penalty in the state of Washington in 2001. To me, it is an unfortunate consequence of our doctrine of precedent, and reluctance to overrule, that led the Court to embark on this rather strange rhetorical journey.⁴⁹

One of the most poetic legal accounts of the horrors of capital punishment is to be found in *Callins v. Collins*⁵⁰ where Justice Blackmun, in dissent, discusses his own overturning of views he previously held. The language soars:

On February 23, 1994, at approximately 1:00 a.m., Bruce Edwin Callins will be executed by the State of Texas. Intravenous tubes attached to his arms will carry the instrument of death, a toxic fluid designed specifically for the purpose of killing human beings. The witnesses, standing a few feet away, will behold Callins, no longer a defendant, an appellant, or a petitioner, but a man, strapped to a gurney, and seconds away from extinction.

Within days, or perhaps hours, the memory of Callins will begin to fade. The wheels of justice will churn again, and somewhere, another jury or another judge will have the unenviable task of determining whether some human being is to live or die ...

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years, I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules

⁴⁸ *Id.*, at 55.

⁴⁹ The Court ignores a vast literature on wrongful convictions that was available in 1991: a small sample includes U.K., Royal Commission on Criminal Procedure, Report (Cmnd. 8092) (London: Her Majesty’s Stationery Office, 1981); U.K., Home Affairs Committee, *Miscarriages of Justice*, H.C. (1981-82) 421; Bedau & Radelet, “Miscarriage of Justice in Potentially Capital Cases” (1987), 40 *Stan. L. Rev.* 21; Gault, “Find No Unjust Hangings” (1912-13), 3 *J. Am. Inst. Crim. L. & Criminology* 131. Famous wrongful conviction cases include the Sacco and Vanzetti trial in Massachusetts in 1927, Jean Calas in Toulouse, France in 1762 and Timothy John Evans in the U.K. in 1950.

⁵⁰ 114 S. Ct. 1127 (1994) (“*Callins*”).

or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question—does the system accurately and consistently determine which defendants “deserve” to die?—cannot be answered in the affirmative. ... The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.⁵¹

I should state that I do not believe in capital punishment. I also believe that courts have a huge role to play in setting the tone of this debate. So what about the case of *Burns*? Its ultimate finding is profound for anyone opposed to death sentences. But why did the Supreme Court not simply overrule its earlier duo of *Kindler* and *Ng*? By trying to create the appearance of a new era in death penalty jurisprudence through the marshalling of tendentious facts, the Court seems to me to skirt the real problem. It should have, as Justice Blackmun did, bitten the bullet and admitted that it was wrong the first time around, and overruled itself.

Instead, it chose to rely on the age-old judicial technique of distinguishing. In fact, the Court did not even allude to the possibility of overruling the two previous cases of *Kindler* and *Ng*. It is possible that it was hampered from doing this by its own overruling factors established in *B. (K.G.)* and *Robinson*. None are very appropriate to this case. The first factor — whether the need exists to change the old precedent in order to avoid a Charter breach — makes much more sense in dealing with precedents that had been established prior to the Charter. The second and third factors are also largely inapplicable. And as the proposed change in the rule or principle is favourable to the accused, the fourth factor does not come into play either.

On the other hand, an approach to overruling that drew upon a deeper understanding of the role of precedent and *stare decisis* could have made it easier for the Court to produce a different result. For example, in deciding whether to overrule, the Court could have looked at whether the earlier decisions rest upon a principle that is fully worked out in successive cases. If not, overruling is simpler. In the case of *Burns*, there was no long line of authority related to extradition and death penalty assurances. By its very nature, it is not the kind of case that will crop up very often in Canada. This makes it much easier for the Court to decide that its original determination was incorrect, and should be overruled. The Court could also have assessed whether earlier decisions have been relied upon so as to militate against reconsidering.

⁵¹ *Id.*, at 1128, 1130 (footnotes omitted).

In an extradition case such as this, it would be stretching argument to find much individual reliance. The federal government could conceivably have relied on the *Kindler* and *Ng* principle to extradite other fugitives who may have been subject to the death penalty; however, the number of cases is limited, and each must be decided individually by the Minister.⁵² Where the reliance interest is low, there is less importance placed on stability as a value served by precedent.

Commenting on the death of *stare decisis* in constitutional law, American law professor Earl Maltz lamented the “relatively little attention paid to the problems generated by the process of change itself.”⁵³ The Supreme Court of Canada has sometimes paid little attention to implications that arise when departing from any previous decision. It certainly has not come up with a specialized theory to guide the overturning of previous constitutional decisions. If only the Supreme Court had had the courage in *Burns* to admit its earlier errors, its eloquence may have climbed as high as Justice Blackmun’s in *Callins*. Championing abolition of the death penalty deserves no less.

⁵² In fact, in my research I have found eight cases between 1991 and 2000 where, following the holdings in *Kindler* and *Ng*, extraditions occurred without assurances — see *R. v. Hanson*, [1994] S.C.C.A. No. 112; *United States of America v. Bounnam*, [1995] O.J. No. 877; *United States of America v. Chong*, [1996] S.C.C.A. No. 346; *Gervasoni v. Canada (Minister of Justice)*, [1996] B.C.J. No. 506; *United States of America v. Garcia*, [1996] S.C.C.A. No. 544; *United States of America v. Campbell*, [1996] O.J. No. 2090; *R. v. Judge*, [1998] Q.J. No. 2322; and *United States of America v. Nguyen*, [1998] S.C.C.A. No. 308.

⁵³ Maltz, “Some Thoughts on the Death of *Stare Decisis* in Constitutional Law” (1980), *Wis. L. Rev.* 467, at 467-68.