there is a similarity of functions between legal systems. Although it
case that the institutional setting of public law is likely to be
distinctive. Public law is anchored firmly in a national setting,
whatever wider trends also impinge on it. Public law operates in a
constitutional and administrative setting, which dialogues as much
with a nation's past as with the future. There are particular dynamics of
the system that are specific.

QUESTIONS AND COMMENTS
1. Consider the extent to which our earlier discussion of the treatment of
abortion in the United States is relevant for the cases like Frankenberg's.
2. Consider the implications of comparing abortion rights should
include more, or different, materials on (a) public financial support for
abortion and for childbirth and (b) public financial support for child-care,
upbringing, health care and education.
3. Does Bell's position suggest a need to know more about the
institutional and historical context of the U.S., Canadian, and German
abortion decisions than was presented in Chapter I in order to understand
their meaning? Does Bell's position suggest the impossibility of the kind of
generalized knowledge that Kornmacher argues can be obtained from
comparative study?
4. In reflecting on the implications of Bell's argument for the limitations
on comparison, consider Professor Tushnet's argument:

Functional analysis is possible when a few "case studies" are
placed in a more general theoretical context. Then, of course, the
theory rather than the case studies does the analytic work. Still,
examining a few cases—comparing the U.S. with foreign
experience—may alert us to some theories about which we might
want to think, and the comparison may suggest that something
seems initially to be a purely local phenomenon... actually
implies some more general trends. This is not everything that
a strong functionalist would claim for comparative analysis, but it is
not nothing either.

The "omitted variables" critique of functionalism has prepared the
way for a consideration of the expressivist approach to
comparative constitutional law. As an analyst introduces one new
variable after another, she can always focus on treating each
constitutional system as the unique expression of the particular
values each variable takes on. In this sense, expressivism might not
be different from a full-fledged functionalism, except that
expressivism abandons the language of science in which
functionalism is usually cloaked.

Mark Tushnet, The Possibilities of Comparative Constitutional Law, 108
Yale L. J. 1225, 1269 (1999). How do functionalism and Bell's approach
differ? What do they suggest about the possibilities of comparative
constitutional study?

SECTION B
COMPARING LEGAL DECISIONS

5. Engaging in a comparison of different legal systems runs the risk of
error or misunderstanding, even on the level of vocabulary. "We all know
some of us through experience, that bilingualism is difficult to achieve-
bigotry is even harder." The institutional setting of public law is likely to be
distinctive. Public law is anchored firmly in a national setting,
whatever wider trends also impinge on it. Public law operates in a
constitutional and administrative setting, which dialogues as much
with a nation's past as with the future. There are particular dynamics of
the system that are specific.

Professor Jocelyn Benthall has argued, for example, that even though
increasing numbers of constitutional systems apply "balancing" or
"proportionality" analyses to resolve constitutional problems, the
appearance of a common vocabulary may be an illusion. "One significant
difference between U.S. and European practices seems to hinge on the
scope and the scope of application of 'fairness' in constitutional
adjudication. In U.S. constitutional law terms such as 'fairness' and
'proportionality' terms primarily in three specific areas of constitutional
law: (a) Due Process Clause, the Equal Protection Clause, and the Eighth
Amendment prohibition of cruel and unusual punishment. ... In much of
European law, ... fairness and proportionality are accorded the status of
general principles, applicable to all cases involving fundamental rights,
and with a radiating effect throughout the legal order. Appeals to fairness
and proportionality, in the context of judicial balancing in Europe, must be
restrained against this comprehensive background. This setting imbues such
invention with a very specific meaning, not found in the U.S. context."

Jocelyn Benthall, Balancing, the Global and the Local: Judicial Balancing as
A Problematic Topic in Comparative Constitutional Law, 31 Hastings Int'l

6. Professor Benthall also describes "one of the most vigorous
counted dilemmas: the question of similarities and differences
among legal cultures. Successive waves of comparative law scholarship
have debated this question to such an extent that for some modern authors,
'the division between the proponents of similarity-oriented and those of
difference-oriented comparison constitutes the most visible methodological
discussion in contemporary comparative law' (quoting Mitchell Lassner,
Judicial Deliberations: A Comparative Study of Judicial Transparency and
Legitimacy, 146 (2004)). The similarities/differences debate, in turn, is a
reflection of two fundamental issues at stake in comparative research: (a)
the question of what to compare (objects of comparison), and (b) the question
of what and how much context to include (scope of comparison).

B. COMPARING LEGAL DECISIONS

1. THE DEATH PENALTY IN THE EUROPEAN UNION,
CANADA AND THE UNITED STATES

The constitutionality or legality of the death penalty has engaged
the attention of courts and legislatures in the United States and
elsewhere for several decades. One of the persistent questions, at least
in the U.S. cases, has been the relevance of comparative practice. In
1989, both the European Court of Human Rights (ECHR) and the U.S.
Supreme Court decided important cases about the constitutionality of
the death penalty. The ECHR found a violation of the European
Convention on Human Rights to arise from extraditing a defendant, 18
years old at the time of the offense, to the United States to face the
death penalty. The U.S. Court rejected claims that it was
unconstitutional under the U.S. Constitution to execute defendants who
were aged 16 or 17 at the time of their crimes. We provide brief excerpts
and descriptions of these two cases, before introducing our two principal
cases, one from Canada in 2001 and the other from the United States in 2005.

a) Stanford v. Kentucky, 492 U.S. 361 (1989), Justice Scalia,
writing for the five-justice majority, concluded that “the imposition of
capital punishment on an individual for a crime committed at 16 or 17
years of age [did not] constitute cruel and unusual punishment under
the Eighth Amendment.” The cases involved the brutal murders of two
young women. In one case, the 20-year-old victim was repeatedly raped
before being killed; there was testimony that the 17-year-old defendant
“explained the murder as follows: ‘He said, I had to shoot her, [she]
lived next door to me and she would recognize me... I guess we could
have tied her up or something or beat [her up]... and tell her if she
tells, we would kill her...’ Then after he said that he started
laughing.” The second victim, a 20-year-old mother of two working at a
convenience store, was killed by multiple stab wounds as part of the 16
year-old defendant’s plan “to rob the store and murder ‘whoever was
behind the counter’ because ‘a dead person can’t talk.’”

The Court noted that “the common law set the rebuttable presumption of incapacity to commit felony at the age of 14, and
then it set the age of permissibility of capital punishment to be imposed on anyone
over the age of 7. In accordance with the standards of this common-law
tradition, at least 281 offenders under the age of 18 have been executed in this
country, and at least 126 under the age of 17.” Accordingly, petitioners' only argument was “that their punishment is contrary to the ‘evolving standards of decency that mark the progress of a maturing society,’ Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).” The Court accepted that “this Court has ‘not confined the prohibition embodied in the Eighth Amendment to “barbarous” methods that were
generally outlawed in the 18th century, but instead has interpreted the
Amendment in a flexible and dynamic manner,’” citing Gregg v.
Georgia, 428 U.S. 153, 171 (1976) (opinion of Stewart, Powell, and
Stevens, JJ.). However, the Court explained:

In determining what standards have “evolved...” we have
looked not to our own conceptions of decency, but to those of
modern American society as a whole. As we have said, “Eighth
Amendment judgments should not be, or appear to be, merely
the subjective views of individual Justices; judgment should be
informed by objective factors to the maximum possible extent.”

1 We emphasize that it is American conceptions of decency that are dispositive, rejecting
the contention of petitioners and their various amici (accepted by the dissent) that the
sentencing practices of other countries are relevant. While “the practices of other nations,
particularly other democracies, can be relevant to determining whether a practice unites
under the concept of ‘unusual and cruel punishment’ that it occupies a place not merely in our
mores, but also permitting, in our Constitution as well,” Thompson v. Oklahoma, 487 U.S. 815, 889-900 (1988) (Scalia, J.
dissenting), noting Falco v. Connecticut, 302 U.S. 319, 335 (1938) (Cardozo, J.) the cases
serve to establish the first Eighth Amendment prerequisite, that the practice is accepted
among our people.

This approach is dictated both by the language of the Amendment—which proscribes only those punishments that are both “cruel and unusual” and the decision of the state legislatures under our federal system.” Gregg v. Georgia, at 176...

“First” among the “objective indicia that reflect the public
attitude toward a given sanction” are statutes passed by
society’s elected representatives. McCluskey v. Kemp, 481 U.S.
279, 300 (1987), quoting Gregg v. Georgia, at 173. Of the 37
States whose laws permit capital punishment, 15 decline to
impose it upon 16-year-old offenders and 12 decline to impose
it on 17-year-old offenders. This does not establish the degree
of national consensus this Court has previously thought
sufficient to label a particular punishment cruel and unusual.
In invalidating the death penalty for rape of an adult woman,
we stressed that Georgia was the sole jurisdiction that
authorized such a punishment. See Coker v. Georgia, at 595-
596. In striking down capital punishment for participation in
a robbery in which an accomplice takes a life, we emphasized
that only eight jurisdictions authorized similar punishment.

Enmund v. Florida, at 792. In finding that the Eighth
Amendment precludes execution of the insane... we relied
upon... the fact that “no State in the Union” permitted such
punishment. Ford v. Wainwright, 477 U.S. at 498. And in
striking down a life sentence without parole under a recidivist
statute, we stressed that “it appears that [petitioner] was
treated more severely than he would have been in any other

Having failed to establish a consensus against capital
punishment for 16- and 17-year-old offenders through state
and federal statutes and the behavior of prosecutors and
juries, petitioners seek to demonstrate it through other
indicia, including public opinion polls, the views of interest groups, and
the positions adopted by various professional associations. We
decline the invitation to rest constitutional law upon such
uncertain foundations. A revised national consensus so broad,
so clear, and so enduring as to justify a permanent prohibition
upon all units of democratic government must appear in the
operative acts (laws and the application of laws) that the
people have approved.

A vigorous dissent, written by Justice Brennan, argued that it was
“cruel and unusual” to “take the life of a person as punishment for a
crime committed when below the age of 18” and disagreed with the
barring of the majority’s criteria for determining “evolving
standards of decency.”
then notes the views of the American Bar Association, the National Council of Juvenile and Family Court Judges, the American Law Institute’s Model Penal Code, and the National Commission on Reform of the Federal Criminal Laws.

Our cases recognize that objective indicators of contemporary standards of decency in the form of legislation in other countries is also of relevance to Eighth Amendment analysis. Thompson, at 590–591; Edmund, 458 U.S. at 796, n. 22; Col. 453 U.S. at 596, n. 16; Yopp v. Dulles, 356 U.S. at 102, and n. 35. Many countries, of course—over 50, including nearly all in Western Europe—have formally abolished the death penalty, or have limited its use to exceptional crimes such as treason. App. to Brief for Amnesty International as Amicus Curiae. Twenty-seven others do not in practice impose the penalty. Of the nations that retain capital punishment, a majority—65—prohibit the execution of juveniles. Sixty-one countries retain capital punishment and have no statutory provision exempting juveniles, though some of these nations are ratifiers of international treaties that do prohibit the execution of juveniles. Since 1979, Amnesty International has recorded only eight executions of offenders under 18 throughout the world. Three of those in the United States. The other five executions were carried out in Pakistan, Bangladesh, Rwanda, and Barbados. In addition to national laws, three leading human rights treaties ratified or signed by the United States explicitly prohibit juvenile death penalties. Within the world community, the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disappproved.

Together, the rejection of the death penalty for juveniles by a majority of the States, the rarity of the sentence for juveniles, both as an absolute and a comparative matter, the decisions of respected organizations in relevant fields that this punishment is unacceptable, and its rejection generally throughout the world, provide to my mind a strong grounding for the view that it is not constitutionally tolerable that certain States persist in authorizing the execution of adolescent offenders...

b) Soering v. United Kingdom, in the European Court of Human Rights, (Judgment of July 7, 1989) 161 Eur. Ct. H.R. (Ser. A) at 8 (Soering Case) * A challenge to extradition to face the death penalty in the United States was made under Article 3 of the European Convention on Human Rights, which provides: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Soering, an 18-year-old German national who was a student at the University of Virginia at the time of the murders, was detained in England pending extradition to the United States to face murder charges in Virginia. Soering was charged, with his Canadian girlfriend (Haysom, a 20-year-old University of Virginia student) with murdering her parents in Virginia. Soering confessed to the murders in the presence of U.K. police officers, recounting the couple’s efforts to overcome her parents’ opposition to the relationship and the subsequent murders. Haysom was extradited to the United States, pled guilty as an accessory to the murder of her parents and was sentenced to 90 years in prison. Soering was indicted in Virginia for capital murder and extradition was sought.

1 The British Embassy in Washington asked the United States to provide assurances that if Soering were surrendered to the United States and convicted, the death penalty would not be carried out, or, if it were not possible on constitutional grounds for the United States to provide such assurances, that the United States agree to recommend to the appropriate state authorities that the death penalty not be imposed or carried out. In apparent response to this request, a Bedford County, Virginia, prosecutor certified only that if Soering were convicted, “a representation will be made in the name of the United Kingdom to the judge at the time of sentencing that it is the wish of the United Kingdom that the death penalty should not be imposed or carried out.” The Virginia authorities informed the United Kingdom that no further assurances would be offered because the county attorney “intended to seek the death penalty in Mr. Soering’s case because the evidence, in his determination, supported such action.”

At the extradition hearing, the U.S. government introduced evidence that Soering had killed Haysom’s parents; on Soering’s behalf, a psychiatric report was introduced concluding that Soering “was immature and inexperienced and had lost his personal identity in a symbiotic relationship with his girlfriend—a powerful, persuasive and disturbed young woman.” The report described the relationship as a “fable à deux,” in which the most disturbed partner was Miss Haysom,” which at the time of the offense led to Soering’s “suffering from an abnormality of mind due to inherent causes as substantially impaired his mental responsibility for his acts....”, which would in the UK constitute a defense to murder (though not to manslaughter) charges.

The hearing magistrate found the psychiatric evidence irrelevant to the issue before him and concluded that Soering was subject to extradition. After further efforts for discretionary refusal of extradition in England failed, Soering filed an application in the European Court of Human Rights.

The European Court noted that there was significant evidence of “severe stress, psychological deterioration and risk of homosexual abuse and physical attack undergone by prisoners on death row, including Mecklenburg Correctional Center,” and that Soering believed there was a “serious likelihood that he would be sentenced to death if...

1 The report continued: “The degree of disturbance of Miss Haysom borders on the psychotic and, over the course of many months, she was able to persuade Soering that he might find it easier to kill her parents for her and to him to survive as a couple. Miss Haysom had a depersonalizing and numbing effect on Soering which led to an abnormal psychological state in which he became unable to think rationally or question the absurdities in Miss Haysom’s view of her life and... her parents.”
extradited to the United States of America. He maintained that in the circumstances and, in particular, having regard to the 'death row phenomenon' he would thereby be subjected to inhuman and degrading treatment and punishment contrary to Article 3 of the Convention. The death row phenomenon, the Court said, consisted of "a combination of circumstances to which the applicant would be exposed if, after having been extradited to Virginia to face a capital murder charge, he were sentenced to death." Brief excerpts from the decision appear below:

PANIE: The President, JUDGE RYSSDAL, JUDGES CREMONA, THOR VELJALDSNESS, GOLDBLE, MATSCHERI, POTTI, WALESH, SIR VINCENT EVANS, MACDONALD, RUSO, BERNHARDT, SPELMANN, DE MEYER, CARRILLO SALCEDO, VALTICOS, MAITENS, PALM, FOGHER...

82. . . . Article 5 s. (1)(d) . . . permits "the lawful . . . detention of a person against whom action is being taken with a view to . . . extradition" . . . [No right to not be extradited is as such protected by the Convention. What is at issue in the present case is whether Article 3 can be applicable when the adverse consequences of extradition are, or may be, suffered outside the jurisdiction of the extraditing State as a result of treatment or punishment administered in the receiving State . . .

88. . . . That the abhorrence of torture has such implications is recognised in Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that "no State Party shall . . . extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture". The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention. It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extraordinary in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and aim of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment prescribed by that Article.

89. What amounts to "inhuman or degrading treatment or punishment" depends on all the circumstances of the case. Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notion of inhuman and degrading treatment or punishment in extradition cases . . .

91. . . . The decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3 . . . The establishment of . . . responsibility invariably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to prescribed ill-treatment . . .

The Court concluded that Soering ran "a real risk of a death sentence and hence of exposure to the death row phenomenon". It explained that capital punishment is permitted by Article 2(1) of the Convention, which provides: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." It rejected arguments by Amnesty International that "the evolving standards in Western Europe regarding the existence and use of the death penalty required that the death penalty should now be considered as an inhuman and degrading punishment within the meaning of Article 3":

102. Certainly, the Convention is a living instrument which . . . must be interpreted in the light of present-day conditions" and, in assessing whether a given treatment or punishment is to be regarded as inhuman or degrading for the purposes of Article 3, "the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field."

De facto the death penalty no longer exists in time of peace in the Contracting States to the Convention. In the few Contracting States which retain the death penalty in law for some premeditated offences, death sentences, if ever imposed, are nowadays not carried out. This "virtual consensus in Western European legal systems that the death penalty is, under current circumstances, no longer consistent with regional standards of justice", to use the words of Amnesty International, is reflected in Protocol No 6 to the Convention,
which provides for the abolition of the death penalty in time of peace. Protocol No 6 was opened for signature in April 1983, which in the practice of the Council of Europe indicates the absence of objection on the part of any of the Member States of the Organisation; it came into force in March 1985 and to date has been ratified by thirteen Contracting States to the Convention, not however including the United Kingdom. Whether these marked changes have the effect of bringing the death penalty per se within the provisions of Article 3 must be determined on the principles governing the interpretation of the Convention.

103. The Convention is to be read as a whole and Article 3 should therefore be construed in harmony with the provisions of Article 2. On this basis Article 3 evidently cannot have been intended by the drafters of the Convention to include a general prohibition of the death penalty since that would nullify the clear wording of Article 2(1).

Subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2(1) and hence to remove a textual limit on the scope for evolutive interpretation of Article 3. However, Protocol No 6, as a subsequent written agreement, shows that the intention of the Contracting Parties as recently as 1985 was to adapt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace and, what is more, to do so by an optional instrument allowing each State to choose the moment when to undertake such an engagement. In this respect, notwithstanding the special character of the Convention, Article 3 cannot be interpreted as generally prohibiting the death penalty.

104. That does not mean however that circumstances relating to a death sentence can never give rise to an issue under Article 3. The manner in which it is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the provisions under Article 3. Present-day attitudes in the Contracting States to capital punishment are relevant for the assessment whether the acceptable threshold of suffering or degradation has been exceeded.

However, the Court found, the particular circumstances to which Scouring would be exposed "cumulatively constituted such serious treatment that his extradition would be contrary to Article 3." The Court noted Scouring’s reliance in particular on the delays in the appeal and review proceedings following a death sentence, during which time he would be subject to increasing tension and psychological trauma; the fact, so he said, that the judge or jury in determining sentence is not obliged to take into account the defendant’s age and mental state at the time of the offence; the extreme conditions of his future detention for ‘death row’ in Mecklenburg Correctional Center, where he expects to be the victim of violence and sexual abuse because of his age, colour and nationality; and the constant spectre of the execution itself, including the ritual of execution,” and Soering’s consent to being extradited to Germany, as factors “accentuating the disproportionality of the British Secretary of State’s decision.” The Court commented:

111. For any prisoner condemned to death, some element of delay between imposition and execution of the sentence and the experience of severe stress in conditions necessary for strict incarceration are inevitable. The democratic character of the Virginia legal system in general and the positive features of Virginia trial, sentencing and appeal procedures in particular are beyond doubt. The Court agrees with the Commission that the machinery of justice to which the applicant would be subject in the United States is in itself neither arbitrary nor unreasonable, but, rather, respects the rule of law and affords not inconsiderable procedural safeguards to the defendant in a capital trial. Facilities are available on death row for the assistance of inmates, notably through provision of psychological and psychiatric services.

However, in the Court’s view, having regard to the very long period of time spent on death row in such extreme conditions, with the attendant fear and mounting anguish of the pending execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant’s extradition to the United States would expose him to a real risk of treatment giving rise to a decisive breach of Article 3. An exhaustive consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration.

Accordingly, the Secretary of State’s decision to extradite the applicant to the United States would, if implemented, give rise to a breach of Article 3. . .

One judge (De Meyer) concurred separately, arguing that extradition to face the death penalty would violate the right to life in Article 2 § (1) of the Convention. As far as the specific language of the Convention might “seem to permit, under certain conditions, capital punishment in time of peace, it does not reflect the contemporary situation; and is now overridden by the development of legal conscience and practice.” Judge De Meyer specifically alluded to article 6 of the International Covenant on Civil and Political Rights and Article 4 of the American Convention on Human Rights, adopted in 1966 and 1969 respectively, as “reflect[ing] the evolution of legal conscience and practice towards the universal abolition of the death penalty.” Id at n. 4. The death penalty was “not consistent with the present state of
European civilisation’ and ‘de facto, it no longer exists in any State Party to the Convention.” Thus, Judge De Meyer would have held, no state party to the Convention, even one who had not yet ratified the Sixth Protocol, could lawfully extradite anyone to face a “risk of being put to death in the requesting State.”

(c) Since 1998: Since the Stanford and Soering decisions, opinion in the world community has grown in opposition to the death penalty. In a pair of cases in 1991, the Canadian Supreme Court rejected arguments that it would violate the Canadian Charter of Rights and Freedoms to extradite criminals to the United States without seeking assurances (such as those referred to in Soering) that the death penalty would not be sought. Kuebler v Canada (Minister of Justice), [1991] 2 S.C.R. 779; Re Ng, [1991] 2 S.C.R. 858. By 2001, however, the Canadian Supreme Court, emphasizing Canada’s international leadership in opposing the death penalty, held that at least in most cases, it would violate the Canadian Charter to extradite a death eligible defendant without obtaining assurances that the death penalty would not be sought.

United States v. Burns

[2001] 1 S.C.R. 283 (Supreme Court of Canada)

[Glen Sebastian Burns and Atif Ahmad Rafay, both Canadian citizens, were accused of killing Rafay’s father, mother, and sister in the state of Washington in the United States. Respondents were arrested by British Columbia by the Canadian police (RCMP) after they confessed to an undercover officer. The United States petitioned the Canadian government to have the respondents extradited to Washington to stand trial, a request which the Minister of Justice granted unconditionally, despite the fact that Washington law permitted the prosecutor to seek the death penalty for the respondents.]

The following is the judgment delivered by THE COURT—

The extradition of the respondents is sought pursuant to the Extradition Treaty between Canada and the United States of America, Can T.S. 1976 No. 3, which permits the requested state (in this case Canada) to refuse extradition of fugitives unless provided with assurances that if extradited and convicted they will not suffer the death penalty. The Minister declined to seek such assurances because of his policy that such assurances should only be sought in exceptional circumstances, which he decided did not exist in this case.

The evidence amply justifies the extradition of the respondents to Washington State to stand trial on charges of aggravated first degree murder. Under the law of that state, a conviction would carry a maximum sentence of imprisonment for life without the possibility of release or parole. ... An individual convicted of aggravated first degree murder in Washington state thus will either die in prison by execution or will die in prison eventually by other causes.

The respondents’ position is that the death penalty is so horrific, the chances of error are so high, the death row phenomenon is so repugnant, and the impossibility of correction is so draconian, that it is simply unacceptable that Canada should participate, however indirectly, in its imposition.

... [W]e conclude that the respondents are entitled to succeed on the sole ground that their extradition to face the death penalty would, in the present circumstances, violate their rights guaranteed by s. 7 of the Charter. ... The Charter only guarantees certain rights and freedoms from infringement by “the Parliament and government of Canada” (s. 2(b)(e)(f) and “the legislature and government of each province” (s. 2(b)(e)(f)). ... Nevertheless, counsel for the respondents suggest that Canada cannot avoid shouldering responsibility for the imposition of the death penalty just because it would be a foreign government that ... puts the respondents to death.

There is some support for this view in the decision of the European Court of Human Rights in Soering [v. United Kingdom]. ...
The "responsibility of the State" is certainly engaged under the Charter by a ministerial decision to extradite without assurances. While the Canadian government would not itself inflict capital punishment, its decision to extradite without assurances would be a necessary link in the chain of causation to that potential result.

In our view, the degree of causal remoteness between the extradition order to face trial and the potential imposition of capital punishment as one of many possible outcomes to this prosecution make this a case more appropriately reviewed under s. 7 than under s. 12. 

Section 7 of the Charter provides that:

7. Everyone 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.

It is evident that the respondents are deprived of their liberty and security of the person by the extradition order. Their lives are potentially in danger. The issue is whether the threatened deprivation is in accordance with the principles of fundamental justice.

This Court has recognized from the outset that the punishment or treatment reasonably anticipated in the requesting country is clearly relevant. Section 7 is concerned not only with the act of extraditing, but also the potential consequences of the act of extradition.

In their submissions on whether extradition without assurances is contrary to the principles of fundamental justice, the parties drew heavily on the decisions in Kindler and Ng. Kindler was an American citizen who had escaped to Canada after being convicted in Pennsylvania for the brutal murder of a 18-year old who was scheduled to testify against him in a burglary case. The jury recommended the death penalty. Prior to being sentenced, he escaped to Canada. Judicial review of Kindler's surrender order was disallowed by this Court even though (unlike this case) the death penalty was no longer simply a possibility. It had already been recommended by the jury. Nevertheless, we held that the Minister was entitled to extradite without assurances.

[Respondent Ng was a British subject born in Hong Kong and subsequently resident in the United States. He was arrested in Calgary after shooting two department store security guards. He has since been convicted and sentenced to death for murdering 11 people. In that case, as well, the Minister was held to have the power, though not the duty, to extradite without assurances.

It is important to recognize that neither Kindler nor Ng provides a blanket approval to extraditions to face the death penalty. In Kindler, La Forest J. referred to a p. 7 "balancing process" in which "the global context must be kept squarely in mind".

It is inherent in the Kindler and Ng balancing process that the outcome may well vary from case to case depending on the mix of contextual factors put into the balance. The outcome of this appeal turns more on the practical and philosophical difficulties associated with the death penalty that have increasingly preoccupied the courts and legislatures in Canada, the United States, and elsewhere rather than on the specific circumstances of the respondents in this case. Our analysis will lead us to the conclusion that in the absence of exceptional circumstances, which we refrain from trying to anticipate, assurances in death penalty cases are always constitutionally required.

We now turn to the factors that appear to weigh against extradition without assurances that the death penalty will not be imposed.

(a) Principles of Criminal Justice as Applied in Canada

The death penalty has been rejected as an acceptable element of criminal justice by the Canadian people, speaking through their elected federal representatives, after years of protracted debate. Canada has not executed anyone since 1962. Parliament abolished the last legal vestiges of the death penalty in 1988. In his letter to the respondents, the Minister of Justice emphasized that "in Canada, Parliament has decided that capital punishment is not an appropriate penalty for crimes committed here, and I am firmly committed to that position."

While government policy at any particular moment may or may not be consistent with principles of fundamental justice, the fact that successive governments and Parliaments over a period of almost 40 years have refused to inflict the death penalty reflects, we believe, a fundamental Canadian principle about the appropriate limits of the criminal justice system.

(b) The Abolition of the Death Penalty has Emerged as a Major Canadian Initiative at the International Level, and Reflects a Concern Increasingly Shared by Most of the World’s Democracies

In R v. B.C. Motor Vehicles Act, Lamir J. expressly recognized that international law and opinion is of use to the courts in elucidating the scope of fundamental justice:

[Principles of fundamental justice] represent principles which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the Charter, as essential elements of a system for the administration of justice which is founded upon the belief in the dignity and worth of the human person and the rule of law.

Dickson C.J. made a similar observation in Strachan Communications:

Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the Charter but also the interpretation of what can constitute pressing and substantial s. 1 objectives which may justify restrictions upon those rights.

Further in Reference re Public Service Employee Relations Act (Alberta), [1987] 1 S.C.R. 313, at p. 345, Dickson C.J. stated:

The various sources of international human rights law—declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms—must, in my opinion, be relevant and persuasive sources for interpretation of the Charter's provisions.

* [Editors' Note: Section 12 provides that, "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."]
(i) International Initiatives Opposing Extradition Without Assurances

A provision for assurances is found in the extradition arrangements of countries other than Canada and the United States. Article 11 of the Council of Europe's European Convention on Extradition, signed December 13, 1957 (B.T.S. No. 24) is virtually identical to Article 6 of the Canada-US treaty. To the same effect is Article 4(2) of the Model Treaty on Extradition passed by the General Assembly of the United Nations in December 1990. . .

... Amnesty International submitted that Canada currently is the only country in the world, to its knowledge, that has abolished the death penalty at home but continues to extradite without assurances to face the death penalty abroad.

The United Nations Commission on Human Rights Resolutions 1999/61 (adopted April 28, 1999) and 2000/65 (adopted April 27, 2000) call for the abolition of the death penalty, and in terms of extradition state that the Commission

[requests States that have received a request for extradition on a capital charge to reserve explicitly the right to refuse extradition in the absence of effective assurances . . . that capital punishment will not be carried out.]

Canada supported these initiatives. When they are combined with other examples of Canada's international advocacy of the abolition of the death penalty itself, as described below, it is difficult to avoid the conclusion that in the Canadian view of fundamental justice, capital punishment is unjust and should be stopped.

(ii) International Initiatives to Abolish the Death Penalty

As stated, there have been important initiatives within the international community denouncing the death penalty, with the government of Canada often at the forefront. Canada's representative to the United Nations Commission on Human Rights was reported as stating to the Commission as follows:

Suggestions that the national legal systems needed merely to take into account international law was inconsistent with international legal principles. National legal systems should make sure that they were in compliance with international laws and rights, in particular when it came to the right to life.


It is noteworthy that the United Nations Security Council excluded the death penalty from the punishments available to the International Criminal Tribunals for the former Yugoslavia (Resolution 827, May 28, 1993) and for Rwanda (Resolution 955, November 8, 1994), despite the heinous nature of the crimes alleged. . . . This exclusion was affirmed in

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the Rome Statute of the International Criminal Court, signed on December 17, 1998 and ratified on July 7, 2000 by Canada.

This evidence does not establish an international law norm against the death penalty, or against extradition to face the death penalty. It does show, however, significant movement towards acceptance internationally of a principle of fundamental justice that Canada has already adopted internally, namely the abolition of capital punishment.

(iii) State Practice Increasingly Favours Abolition of the Death Penalty

State practice is frequently taken as reflecting underlying legal principles. To the extent this is true in the criminal justice field, it must be noted that since Kinsler and Ng were decided in 1991, a greater number of countries have become abolitionist.

The existence of an international trend against the death penalty is useful in testing our values against those of comparable jurisdictions. This trend against the death penalty supports some relevant conclusions. First, criminal justice, according to international standards, is moving in the direction of abolition of the death penalty. Second, the trend is more pronounced among democratic states with systems of criminal justice comparable to our own. The United States (or those parts of it that have retained the death penalty) is the exception, although of course it is an important exception. Third, the trend to abolition in democracies, particularly Western democracies, mirrors and perhaps corroborates the principles of fundamental justice that led to the rejection of the death penalty in Canada.

10. An Accelerating Concern about Potential Wrongful Convictions is a Factor of Increased Weight since Kinsler and Ng were Decided . . .

(a) The Canadian Experience:

There have been well-publicized recent instances of miscarriages of justice in murder cases in Canada. Fortunately, because of the abolition of the death penalty, meaningful remedies for wrongful conviction are still possible in this country.

The first of a disturbing Canadian series of wrongful murder convictions, whose ramifications were still being worked out when Kinsler and Ng were decided, involved Donald Marshall, Jr. He was convicted in 1971 of murder by a Nova Scotia jury. He served 12 years of his sentence. He was eventually acquitted by the courts on the basis of new evidence. . . .

In 1970, David Milgaard was convicted of murder by a Saskatchewan jury and sentenced to life imprisonment. He served almost 23 years in jail. On two occasions separated by almost 22 years, it was held by Canadian courts that Milgaard was given the benefit of a fair trial. . . . Notwithstanding the fact that the conviction for murder followed a fair trial, new evidence surfaced years later. This Court, on a special reference, considered that "the continued conviction of Milgaard would amount to a miscarriage of justice if an opportunity was not provided for a jury to consider fresh evidence." In 1994, Milgaard commenced proceedings against the Government of Saskatchewan for wrongful conviction and in 1995 he sued the
provincial Attorney General personally after the latter had told the media he believed Milgard was guilty of the murder. DNA testing in 1997 ultimately satisfied the Saskatchewan government that Milgard had been wrongly convicted. In May 2000 another individual was prosecuted and convicted for the same murder. The history of the wrongful conviction of David Milgard shows that in Canada, as in the United States, a fair trial does not always guarantee a safe verdict.

The court also notes the wrongful convictions of Guy Paul Morin in 1985, exonerated by DNA testing in 1995; Thomas Sophonow who served 45 months in jail before his conviction was overturned in 1985; and Gregory Parsons who, after his initial conviction was overturned, was saved from a second trial on the basis of DNA testing.

These miscarriages of justice of course represent a tiny and wholly exceptional fraction of the workload of Canadian courts in murder cases. Still, where capital punishment is sought, the state’s execution of even one innocent person is one too many. Accordingly, when Canada looks south to the present controversies in the United States associated with the investigation, defense, conviction, appeal and punishment in murder cases, it is with a sense of appreciation that many of the underlying criminal justice problems are similar. The difference is that imposition of the death penalty in the retentionist states inevitably deprives the legal system of the possibility of redress to wrongly convicted individuals.

(b) The U.S. Experience

Concerns in the United States have been raised by such authoritative bodies as the American Bar Association which in 1997 recommended a moratorium on the death penalty throughout the United States because, as stated in an ABA press release in October 2000:

The adequacy of legal representation of those charged with capital crimes is a major concern. Many death penalty states have no working public defender systems, and many simply assign lawyers at random from a general list. The defendant’s life ends up entrusted to an often underqualified and overburdened lawyer who may have no experience with the criminal law at all, let alone with death penalty cases.

The U.S. Supreme Court and the Congress have dramatically restricted the ability of our federal courts to review petitions of inmates who claim their state death sentences were imposed in violation of the Constitution or federal law. Studies show racial bias and poverty continue to play too great a role in determining who is sentenced to death.

Other retentionist jurisdictions in the United States have also expressed recent disquiet about the conduct of capital cases, and the imposition and carrying out of the death penalty. These include:

(i) Early last year Governor George Ryan of Illinois, a known retentionist, declared a moratorium on executions in that state. The Governor noted that more than half the people sentenced to die there in the last 25 years were eventually exonerated of murder. Specifically, Illinois exonerated 13

death row inmates since 1977, one more than it actually executed. Governor Ryan said “I have grave concerns about our state’s shameful record of convicting innocent people and putting them on death row”. He remarked that he could not support a system that has come “so close to the ultimate nightmare, the state’s taking of an innocent life.”

(ii) The Illinois moratorium followed closely in the wake of a major study on wrongful convictions in death penalty cases by the Chicago Tribune newspaper, and a conference held at Northwestern University School of Law. The study examined the 385 death penalty cases that had occurred in Illinois since capital punishment was restored there. “The findings reveal a system so plagued by unprofessionalism, imprecision and bias that they have rendered the state’s ultimate form of punishment its least credible.”

(iii) One of the more significant exonerations in Illinois was the case of Anthony Porter who came within 48 hours of being executed for a crime he did not commit.

(iv) Both the New Hampshire House of Representatives and Senate voted to abolish the death penalty last year, although the measure was vetoed by the Governor. It is noteworthy that New Hampshire has not executed anyone since 1939.

(v) In May 1999, the Nebraska legislature approved a bill that imposed a two-year moratorium on executions in that state and appropriated funds for a study of the issue. That initiative was vetoed by the Governor. However, the legislature unanimously overrode part of the veto so that the study could proceed.

(vi) Senator Russ Feingold of Wisconsin introduced a bill in Congress in April 2000 calling on the federal government and all states that impose the death penalty to suspend executions while a national commission reviews the administration of the death penalty.

(vii) On September 12, 2000, the United States Justice Department released a study of death penalty under federal law. It was the first comprehensive review of the federal death penalty since it was reinstated in 1988. The data shows that federal prosecutors were almost twice as likely to recommend the death penalty for a black defendant when the victim is non-black than when he or she was black. Moreover, a white defendant was almost twice as likely to be given a plea agreement whereby the prosecution agreed not to seek the death penalty. The study also revealed that 43% of the 183 cases in which the death penalty was sought came from 9 of the 94 federal Judicial districts. This has led to concerns about racial and geographic disparity. The then Attorney General Janet
Reno said that she was "solely troubled" by the data and requested further studies.

Foremost among concerns of the American Bar Association, the Washington State Bar Association and other bodies is the possibility of wrongful convictions and the potential state killings of the innocent. It has been reported that 43 wrongly convicted people have been freed in the United States as a result of work undertaken by The Innocence Project, a clinical law program started in 1992 at the Cardozo School of Law in New York.

Finally, we should note the recent Columbia University study by Professor James Liebman and others which concludes that 2 out of 3 death penalty sentences in the United States were reversed on appeal. In their executive summaries, the authors report that "the overall rate of prejudicial error in the American capital punishment system in 68%." ... [The court discusses wrongful convictions for murder in the United Kingdom.]

(d) Conclusion

The recent and continuing disclosures of wrongful convictions for murder in Canada, the United States and the United Kingdom provide tragic 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 legal system, this history weighs powerfully in the balance against extradition without assurances. ... Reviewing the factors for and against unconditional extradition, we concluded that to order extradition of the respondents without obtaining assurances that the death penalty will not be imposed would violate the principles of fundamental justice. ... [The Court concludes that Chapter Section 7 is violated by extradition without assurances, a violation that cannot be justified under Section 1.]

[Although] the basic tenets of Canada's legal system ... have not changed since 1991 when Kinder and Ng were denied their application in particular cases (the "balancing process") must take note of factual developments in Canada and in relevant foreign jurisdictions. ... The balance which tilted in favor of extradition without assurances in Kinder and Ng now tilts against the constitutionality of such an outcome. ...


* Justice Kennedy delivered the opinion of the Court.

This case requires us to address ... whether it is permissible under the Eighth and Fourteenth Amendments to the Constitution of the United States to execute a juvenile offender who was older than 15 but younger than 18 when he committed a capital crime. In Stanford v.

Kentucky, 492 U.S. 361 (1989), a divided Court rejected the proposition that the Constitution bars capital punishment for juvenile offenders in this age group. We reconsider the question. ... When he was seventeen years old and a junior in high school, Christopher Simmons murdered Shirley Crook. Before committing the crime, Simmons had talked with two younger friends about committing a murder. He told them that they could "get away with it" because they were minors. Simmons and one of his friends broke into Mrs. Crook's house. When she awoke and Simmons realized that she might be able to identify him, his determination to kill her was confirmed. Simmons and his friend put duct tape over Mrs. Crook's eyes and around her hands and drove her to a state park. Covering her head with a towel, they walked her to the railroad bridge over a river, tied her hands and feet with wire, placed duct tape over her whole face, and threw her from the bridge. Mrs. Crook drowned in the river. The police arrested Simmons within two days of the murder. After a two-hour interrogation, Simmons confessed. He was tried as an adult and convicted of first-degree murder. At the sentencing stage, Simmons' family members testified about Simmons taking care of his younger brothers and his grandmother. Simmons's attorney, in his closing argument, pointed out that juveniles of Simmons's age could not legally drink, serve on juries, or see R-rated movies, because "the legislatures have wisely decided that individuals of a certain age aren't responsible enough." He also argued that Simmons's age should make "a huge difference" when the jury considered punishment. The prosecutor also referred to Simmons's age: "Age, he says. Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary." The jury recommended, and the judge imposed, a death sentence.

II.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." ... The Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic "precept of justice that punishment for crime should be graduated and proportional to the offense." [Alkins v. Virginia, 535 U.S., at 321 (quoting Weems v. United States, 217 U.S. 348, 367 (1910)]. By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.

The prohibition against "cruel and unusual punishments," like other expensive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual. Trop v. Dulles, 356 U.S. 86, 100-101 (1958) (plurality opinion). ...
right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.

For deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles. In general we leave to legislatures the assessment of the efficacy of various criminal penalty schemes. Here, however, the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.

IV

Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court’s decision in Trop, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of “cruel and unusual punishments.”


Respondent and his amici have submitted, and petitioner does not contest, that only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice. In sum, it is fair to
say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.

Though the international covenants prohibiting the juvenile death penalty are of more recent date, it is instructive to note that the United Kingdom abolished the juvenile death penalty before these covenants came into being. The United Kingdom's experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment's own origins. The Amendment was modeled on a parallel provision in the English Declaration of Rights of 1689, which provided: "[A]ll excessive bail ought not to be required nor excessive fines imposed; nor cruel and unusual punishments inflicted." As of now, the United Kingdom has abolished the death penalty in its entirety; but, decades before it took this step, it recognized the disproportionate nature of the juvenile death penalty; and it abolished that penalty as a separate matter. In 1930 an official committee recommended that the minimum age for execution be raised to 21. Parliament then enacted the Children and Young Persons' Act of 1933, which prevented execution of those aged 18 at the date of the sentence. And in 1948, Parliament enacted the Criminal Justice Act, prohibiting the execution of any person under 18 at the time of the offense. In the 56 years that have passed since the United Kingdom abolished the juvenile death penalty, the weight of authority against it there, and in the international community, has become well established.

It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.

Over time, from one generation to the next, the Constitution has come to embody the high respect and even, as Madison dared to hope, the veneration of the American people. See The Federalist No. 49, p. 314 (C. Rossiter ed. 1961). The document sets forth, and rests upon, innovative principles original to the American experience, such as federalism; a proven balance in political mechanisms through separation of powers; specific guarantees for the accused in criminal cases; and broad provisions to secure individual freedom and preserve human dignity. These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity. Not the least of the reasons we honor the Constitution, then, is because we know it to be our own. It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom. **

The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed. The judgment of the Missouri Supreme Court setting aside the sentence of death imposed upon Christopher Simons is affirmed.

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It is so ordered.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, concurring [omitted].

JUSTICE O'CONNOR, dissenting.

The Court's decision today establishes a categorical rule forbidding the execution of any offender for any crime committed before his 18th birthday, no matter how deliberate, wanton, or cruel the offense. Neither the objective evidence of contemporary societal values, nor the Court's moral proportionality analysis, nor the two in tandem suffice to justify this ruling.

Although the Court finds support for its decision in the fact that a majority of the States now disallow capital punishment of 17-year-old offenders, it refrains from asserting that its holding is compelled by a genuine national consensus. Indeed, the evidence before us fails to demonstrate conclusively that any such consensus has emerged in the brief period since we upheld the constitutionality of this practice in Stanford v. Kentucky.

Instead, the rule decreed by the Court rests, ultimately, on its independent moral judgment that death is a disproportionately severe punishment for any 17-year-old offender. I do not subscribe to this judgment. Adolescents as a class are undoubtedly less mature, and therefore less culpable for their misconduct, than adults. But the Court has adduced no evidence impeaching the seemingly reasonable conclusion reached by many state legislatures: that at least some 17-year-old murderers are sufficiently mature to deserve the death penalty in an appropriate case. Nor has it been shown that capital sentencing juries are incapable of accurately assessing a youthful defendant's maturity or of giving due weight to the mitigating characteristics associated with youth.

On this record—and especially in light of the fact that so little has changed since our recent decision in Stanford—I would not substitute our judgment about the moral propriety of capital punishment for 17-year-old murderers for the judgments of the Nation's legislatures. Rather, I would demand a clearer showing that our society truly has set its face against this practice before reading the Eighth Amendment categorically to forbid it....

II...

D

I turn... to the Court's discussion of foreign and international law. Without question, there has been a global trend in recent years towards abolishing capital punishment for under-18 offenders. ... Because I do not believe that a genuine national consensus against the juvenile death penalty has yet developed, and because I do not believe the Court's moral proportionality argument justifies a categorical, age-based constitutional rule, I can assign no such confirmatory role to the international consensus described by the Court. In short, the evidence of an international consensus does not alter my determination that the Eighth Amendment does not, at this time, forbid capital punishment of 17-year-old murderers in all cases.
pursuit, including such punishment for crime committed by persons below eighteen years of age.

Unless the Court has added to its arsenal the power to join and ratify treaties on behalf of the United States, I cannot see how this evidence favors, rather than refutes, its position. That the Senate and the President—these actions our Constitution empowers to enter into treaties, see Art. II, § 2—have declined to join and ratify treaties prohibiting execution of under-18 offenders can only suggest that our country has either not reached a national consensus on the question, or has reached a consensus contrary to what the Court announces. That the reservation to the ICCPR was made in 1992 does not suggest otherwise, since the reservation still remains in place today. It is also worth noting that, in addition to barring the execution of under-18 offenders, the United Nations Convention on the Rights of the Child prohibits punishing them with life in prison without the possibility of release. If we are truly going to get in line with the international community, then the Court’s reassurance that the death penalty is really not needed, since “the punishment of life imprisonment without the possibility of parole is itself a severe sanction,” gives little comfort.

It is interesting that whereas the Court is not content to accept what the States of our Federal Union say, but insists on inquiring into what they do (specifically, whether they in fact apply the juvenile death penalty that their laws allow), the Court is quite willing to believe that every foreign nation—of whatever tyrannical political makeup and with however subservient or incompetent a court system—in fact adheres to a rule of no death penalty for offenders under 18.

More fundamentally, however, the basic premise of the Court’s argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand. In fact the Court itself does not believe it. In many significant respects the laws of most other countries differ from our law—including not only such explicit proscriptions as the right to trial and grand jury indictment, but even many interpretations of the Constitution prescribed by this Court itself. The Court-pronounced exclusionary rule, for example, is distinctively American. When we adopted that rule in Mapp v. Ohio, 367 U.S. 643, 655 (1961), it was “unique to American Jurisprudence.” Deeks v. Six Unknown Pub. Narcotics Agents, 440 U.S. 388, 415 (1971) (Burger, C. J., dissenting). Since then a categorical exclusionary rule has been “universally rejected” by other countries, including those with rules prohibiting illegal searches and police misconduct, despite the fact that none of those countries “appears to have any alternative form of discipline for police that is effective in preventing search violations.” Bradley, Mapp Goes Abroad, 52 Case W. Res. L. Rev. 376, 399-400 (2001). England, for example, rarely excludes evidence obtained during an illegal search or seizure and has only recently begun excluding evidence from illegally obtained confessions. England rarely excludes evidence and will only do so if admission will “bring the administration of justice into disrepute.” The European Court of Human Rights has held that introduction of illegally seized evidence does not violate the “fair trial” requirement in Article 6, § 1, of the European Convention on Human Rights.
common law, England now permits all but the most serious offenders to be tried by magistrates without a jury.

The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreign views as part of the relevant premises in its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.*

The Court responds that "it does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own canons of freedom." To begin with, I do not believe that anyone, by "other nations and peoples" should buttress our commitment to American principles any more than (what should logically follow) disapproval by "other nations and peoples" should weaken that commitment. More importantly, however, the Court's statement flatly misdescribes what is going on here. Foreign sources are cited today, not to underscore our "fidelity" to the Constitution, our "pride in its origins," and "our own [American] heritage." To the contrary, they are cited to set aside the centuries-old American practice—a practice still engaged by a large majority of the relevant States—in letting a jury of 12 citizens decide whether, in the particular case, youth should be the basis for withholding the death penalty. What these foreign sources "affirm," rather than repudiate, is the Justices' own notion of how the world ought to be, and their dictat that it shall be so henceforth in America. The Court's partial attempt to downplay the significance of its extensive discussion of foreign law is unconvincing. "Acknowledgment" of foreign approval has no place in the legal opinion of this Court unless it is part of the basis for the Court's judgment—which is wholly what it parades as today... .

QUESTIONS AND COMMENTS

1. The disagreement between the majority and dissent in Roper are part of an extended disagreement among members of the current U.S. Court about the death penalty's constitutionality in various circumstances and...
views mentally retarded offenders as categorically less culpable than the average criminal. The evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition. Moreover, even in those States that allow the execution of mentally retarded offenders, the practice is uncommon. Some States, for example New Hampshire and New Jersey, continue to authorize executions, but none have been carried out in decades. Thus there is little need to pursue legislation barring the execution of the mentally retarded in those States. And it appears that even among those States that regularly execute offenders and that have no prohibition with regard to the mentally retarded, only five have executed offenders possessing a known IQ less than 70 since [1980], when the Court had rejected the constitutional argument against executing offenders with mental retardation. The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.21 

This consensus unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty. Additionally, it suggests that some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards.

2. Chief Justice Rehnquist wrote a lengthy dissent in Atkins. As he explained:

I write separately . . . to call attention to the defects in the Court's decision to place weight on foreign laws, the views of professional and religious organizations, and opinion polls in reaching its conclusion. See ante, at n. 21. The Court's suggestion that these sources are relevant to the constitutional question finds little support.

21 Additional evidence makes it clear that this legislative judgment reflects a much broader, less rigid social consensus. For example, several organizations with personnel expertise have adopted official positions opposing the imposition of the death penalty upon a mentally retarded offender. See Brief for American Psychological Association et al. as Amici Curiae; Brief for AAMR & et al. as Amici Curiae. In addition, representatives of widely diverse religious communities in the United States, reflecting Christian, Jewish, Muslim, and Buddhist traditions, have filed an amicus curiae brief explaining that even though their views about the death penalty differ, they all "share a conviction that the execution of persons with mental retardation cannot be morally justified." See Brief for United States Catholic Conference et al. as Amici Curiae. Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved. Brief for The European Union as Amicus Curiae 4. Finally, polling data shows a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong. R. Benner & S. Rimor, Executing the Mentally Retarded Even as Laws Begin to Shift, N. Y. Times, Aug. 7, 2000, p. A1; App. B to Brief for AAMR & et al. as Amici Curiae. (Approximately 90% of Americans oppose it.) Although these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue that execution of the mentally retarded is morally impermissible.
support in our precedents and, in my view, is antithetical to considerations of federalism, which instruct that any "permanent prohibition upon all units of democratic government must be apparent in the operative acts and laws and the application of laws that the people have approved." Stanford v. Kentucky, 492 U.S. 361, 377

Consider the role of the decisions of other nations in the majority opinion: do you agree with the Chief Justice that the Court "placed weight" on foreign laws? Why would note 21 have elicited the reaction it did in the Chief Justice's dissent? The Chief Justice's dissent was noteworthy in part because it appeared in tension with his earlier extraterritorially expressed views encouraging U.S. courts to "begin looking to the decisions of other constitutional courts to aid in their own deliberative process." William Rehnquist, Constitutional Courts—Comparative Remarks, in Germany and Its Basic Law: Past, Present and Future—A German-American Symposium 412 (Paul Kirchhof & Donald P. Kommers eds. 1993); for similar effect, see William H. Rehnquist, Forward, in Defining the Field of Comparative Constitutional Law (Vicki Jackson & Mark Tushnet eds. 2002).

3. Is there a principled distinction to be drawn between issues of federalism and issues of individual rights? What kind of a case was Printz? If foreign decisions were not relevant to the Eighth Amendment issue, which under the established doctrine requires consideration of evolving views, to what constitutional questions would the Chief Justice think foreign law is relevant to?

In Printz v. United States, 521 U.S. 898 (1997), the Court held a federal requirement that local law enforcement officers perform background checks on prospective gun buyers to be an unconstitutional federal "commandeering" of state employees to administer federal law. Justice Breyer, in dissent, argued:

[O]ther countries, facing the same basic problem, have found that local control is better maintained through application of a principle that is the direct opposite of the principle the majority derives from the silence of our Constitution. The federal systems of Switzerland, Germany and the European Union, for example, all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations or decrees enacted by the central, 'federal' body. They do so in part because they believe that such a system interferes less, not more, with the independent authority of the ... subsidiary government. ...

...[T]heir experience may... cast an empirical light on the consequences of different solutions to a common legal problem—in this case the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent government entity. ...

...[C]omparative experience suggests there is no need to interpret the Constitution as containing an absolute principle— forbidding the assignment of virtually any federal duty to any state official. ...

Justice Scalia, writing for the Court, responded with his version of "American exceptionalism":

[S]uch comparative analysis [is] inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one. The Framers were familiar with many federal systems, from classical antiquity down to their own time;... Federalist 20, after an extended critique of the system of government established by the Union of Utrecht for the United Netherlands, concludes:

"I make no apology for having dwelt so long on the contemplation of these federal precedents. Experience is the oracle of truth; and where its responses are unequivocal, they ought to be conclusive and sacred. The important truth, which it unequivocally pronounces in the present case, is that a sovereignty over sovereigns, a government over governments, a legislation for communities as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity."

Antifederalists...pointed specifically to Switzerland—and its then-400 years success as a "confederate republic"—as proof that the proposed Constitution and its federal structure was unnecessary. The fact is that our federalism is not Europe's. It is the "unique contribution of the Framers to political science and political theory." United States v. Lopez, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring).

What is the difference between "interpreting" and "writing" a constitution? Why are the consequences of different rules irrelevant to "interpretation"?

4. Vigorous objections have been made—by members of Congress and others—to U.S. courts referring to foreign decisions in resolving questions of U.S. constitutional law, particularly in the wake of the Court's reference to world opinion in Adkins and the Court's subsequent references, in Lawrence v. Texas, 539 U.S. 558 (2003), to the European Court of Human Rights' decisions on the invalidity of sodomy laws. Consider these comments by Judge Richard Posner:

My objection is to citing a foreign decision as authority in a case involving U.S. domestic law, e.g., the U.S. Constitution; in other words as a precedent; that is, as a reason for following it that is independent of its intrinsic persuasiveness; as evidence, in short, for a budding international consensus that should influence U.S. law.

My objections are numerous...[F]irst... it is undemocratic to subject Americans to even the limited role of foreign courts, except to the extent that treaties or other conventional sources of international law authorize the delegation of lawmaking to foreign bodies. There is a profound political difference between even an appointed, life-tenured U.S. federal judge and a judge of a foreign country. The U.S. judge is appointed by an elected official
Second, legal principles are not instantiations of a universal moral law, but the product of local political, cultural, and historical circumstances. Without a deep study of foreign legal, political, and social systems—a study that few U.S. judges or justices, or for that matter academics, have made or are capable of making—it is impossible to determine whether a foreign decision on gay marriage, abortion, hate speech, capital punishment, religious establishments, etc., is the product of a reasoning process, values, ideology, or other circumstances that are the same or similar in the United States.

Third, the citation of foreign decisions is a form of figleafing, reflecting the efforts of opinion writers (often law clerks still suffering from the misconceptions of law students) to escape responsibility for stating the true grounds of decision. A judge or justice who votes in favor of homosexual rights is reluctant to admit that he is doing so not because the Constitution commands that he do so but because he is sympathetic to homosexuals or minorities in general, or dislikes the motivations or beliefs of the people who object to homosexual rights, or never misses an opportunity to invalidate unequal treatment, or thinks homosexual rights the new liberal frontier. If instead he can point to an emerging international consensus (as the Supreme Court did in invalidating capital punishment of 16 year olds), he can minimize the appearance of subjective decisionmaking by pointing to something outside his personal values, politics, emotions, and ideology. It would not be figleafing if American judges really were willing to take their cues from foreigners, but I don’t believe it. Almost the whole world prohibits hate speech, but in the U.S. it is considered constitutionally privileged and the fact that we are out of step with the rest of the world seems not to bother any of the judges who cite foreign decisions.


1. Did the Court in Roper cite foreign practice "as a precedent?" Were the decisions of other countries or the international consensus relied on, in Judge Posner’s words, "independent of [their] intrinsic persuasiveness"?

2. Consider whether Justice Breyer’s dissent in Printz is distinguishable from the use of foreign law made in Atkins and Lawrence. Would Judge Posner’s objection to the use of foreign law as precedent apply to Justice Breyer’s effort to use foreign experience to understand the consequences of different interpretations? See Sanford Levinson, Looking

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to refrain from seeking the death penalty. Soering was extradited, convicted, and sentenced to two life terms for the Haysom murders.

b. The Relevance of Comparative Constitutional Law in Generating Philosophical or Social Scientific "Hypotheses"

Comparative constitutional law shows different mid-level institutional arrangements designed to deal with enduring problems of social order. Philosophers and social scientists address those problems in their own ways. Comparative constitutional law might be able to illuminate their discussions. For example, Chapter IX presents an argument that federalism may be an institutional arrangement that contributes to the developing of the overlapping consensus that philosopher John Rawls claims is essential to having stable liberal societies. Similarly, Chapter IX presents an argument that federal systems have a tendency to centralize rather than disperse power over time. Neither argument may be correct, but both may help people think about the more general questions concerning liberalism and centralization that they deal with in other settings.

c. Dispelling the Sense of False Necessity and Learning About Other Cultures

As noted earlier, comparative study can help dispel the sense of false necessity about the existing constitutional arrangements in one's home country, although it may be difficult on further reflection to distinguish false from true necessities within different systems of constitutionalism. Apart from the possibility of dispelling one's sense of "false necessity" about familiar legal arrangements, the study of comparative constitutional law may be justified on the simple ground that it exposes students to different ways of doing things, and thereby enhances their general education. But consider Frankenberg's critique of unreflective foreign travel.

3. CONSTITUTIONAL "BORROWING" AND OTHER TRANSNATIONAL INFLUENCES

Judge Guido Calabresi, noting that several post-1945 constitutions were modeled explicitly on the U.S. Constitution, has argued that experience with judicial review in those systems could inform our judgment about how judicial review should operate in the United States: "Wise parents," Judge Calabresi wrote, "learn from their children." United States v. Thon, 56 F.3d 464, 469 (2d Cir.1995) (Calabresi, J., concurring). And as Justice Scalia noted in Printz, the framers of the U.S. Constitution considered various models of government organization in deliberating on a constitutional framework for the United States. To what extent can constitutional solutions be "borrowed" from one system to another? Consider these observations:

Borrowing constitutional ideas from other countries has its hazards. . . . Placing a proposition in a different cultural, historical, or traditional context may lead to results quite different from those one finds in the country from which the proposition was borrowed. . . . Liberal reformers in early nineteenth century Latin America . . . often tried to copy the experience of the United States. Those transplants failed because the soil in which they were planted was simply not congenial; the conditions for constitutional democracy were not yet in existence. . . . The limits of imitation are suggested by an observation penned by Juan Bautista Alberdi, the father of Argentine constitutionalism:

All constitutions change or succumb when they are but children of imitation; the only one which does not change, the only one which moves and lives with the country, is the constitution which that country has received from the events of its history, that is to say, from those deeds which form the chain of its existence, from the day of its birth. . . .

Alberdi . . . seems to have underestimated the value of borrowing. . . . There are many examples of successful constitutional adaptations from one country's experience to another. . . . When India achieved its independence and drafted a constitution, there seemed widespread agreement on the Euro-American constitutional tradition as a source both of principles and often of specific provisions. But Alberdi's statement is still useful as a cautionary note: a constitution is unlikely to succeed if it is drafted without regard for a country's history, traditions, and political culture.

Diverse or contending parties may well agree, in general, on the usefulness of a foreign model when they are at work drafting their own country's constitution. Such agreement, however, may only mask the essential ambiguity of the model to which they seem jointly to aspire. . . . Even among those countries sharing notions about constitutionalism, specific norms may play out quite differently, depending on the cultural assumptions that qualify a norm's interpretation. Consider, for example, freedom of expression. Every post-communist constitution has guaranteed freedom of speech and press. One who examines the actual contours of free expression in those countries, however, will find striking differences between the way those principles are perceived in the United States, on the one hand, and in the emerging democracies, on the other.


Howard also asks why constitutional drafters borrow from other countries:

One reason for borrowing . . . is convenience: why reinvent the constitutional wheel when there are so many constitutions