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JUVENILE EXECUTION, TERRORIST EXTRADITION, AND SUPREME COURT DISCRETION TO CONSIDER INTERNATIONAL DEATH PENALTY JURISPRUDENCE

*Elizabeth Burleson**

I. INTRODUCTION

Multilateral treaties and international institutions have impacted the extradition of capital offenders and influenced the development of human rights law within the United States. Refusal to extradite without assurances that the death penalty will not be imposed has continuing ramifications for the implementation of transnational counter-terrorism measures. In the absence of consensus regarding the death penalty, prohibition against torture has served as justification for not extraditing people who would be likely to face death sentences. Determining a contemporary standard of decency regarding cruel and unusual punishment, what shocks the public conscience, or what constitutes torture depends upon what societal parameters one uses. Should capital punishment remain within the purview of provincial criminal law, depend upon national sentiment, or consider international legal standards?

The execution of foreign nationals without notification of their consular rights has internationalized the United States' death penalty policy. Recently, the United States Supreme Court has been willing to consider international developments in relation to evolving standards of decency. The Court has extended greater protection on the basis of sexual orientation and prohibited the execution of individuals with mental retardation. In *Roper v. Simmons*, the United States Supreme Court determined that it is cruel and unusual to execute sixteen and seventeen year olds.¹ Prior to 2005, the United States had executed seventy percent of the

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¹ *Roper v. Simmons*, 125 S. Ct. 1183, 1200 (2005). The phrases "juvenile death penalty," "juvenile capital punishment," and "juvenile executions" refer to the execution of individuals who were younger than eighteen at the time that they committed their crimes.

juveniles that have been put to death worldwide since 1998.² Up until the *Roper* decision, there were eighty-two people between the ages of sixteen and eighteen on death row in the United States.³

While customary international law prohibiting capital punishment has yet to fully develop, collective condemnation of torture exists and has had a significant impact on extradition law. In *Soering v. United Kingdom*, the European Court of Human Rights held that the United States would expose Soering to a real risk of torture in violation of the European Convention on Human Rights ("ECHR").⁴ The European Court of Human Rights based its decision on the length of time that Soering was likely to spend on death row in Virginia; the mounting anxiety of awaiting execution; and on Soering's youth and mental state at the time of the offense.⁵ While subsequent decisions around the world have not always followed *Soering*, a growing body of case law provides a warning to States that still use the death penalty that their extradition treaties may not be upheld without assurances that capital punishment will not be imposed.

This article considers the obligations of a supreme court in a liberal democracy and the effect that public opinion has upon the legality of the death penalty. Given the mounting need for international coordination to maintain peace and security, a consensus must be reached regarding capital punishment.

II. THE EFFECT OF MULTILATERAL AND REGIONAL TREATIES ON CAPITAL PUNISHMENT

As criminal conduct increasingly becomes transboundary, the European Court of Human Rights continues to clarify the scope of the ECHR. A *per se* rule is developing against extradition of a suspect who potentially will face capital punishment.⁶ *Öcalan v.*

² See Amnesty International, *Indecent and Internationally Illegal: The Death Penalty Against Child Offenders* (2002), available at <http://www.amnestyusa.org/abolish/document.do?id=4F86B0B7CA5B235A80256C3200478E26> (last visited May 30, 2005).

³ See American Civil Liberties Union, *Juveniles and the Death Penalty* (May 11, 2004), available at <http://www.aclu.org/DeathPenalty/DeathPenalty.cfm?ID=14837&c=66> (last visited May 30, 2005).

⁴ *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989). The European Court of Human Rights, located in Strasbourg, France, was established in 1959 to determine violations of the 1950 Convention for Protection of Human Rights and Fundamental Freedoms (known as the European Convention on Human Rights). A permanent full-time court came into operation on November 1, 1998, superseding a two-tier, part-time court and commission.

⁵ *Id.*

⁶ While Article 2 of the ECHR protects an individual's right to life, the Convention did not

Turkey may shed light on whether member States can extradite terrorist suspects to nonmember States if there is a risk that they will receive the death penalty.⁷

A. Extradition and the War on Terrorism

The war on terrorism has concentrated efforts to bring to justice suspects who flee across international borders. Extradition proceedings allow the international community to consider the lawful parameters of such a war vis a vis human rights. *Soering v. United Kingdom* provides a guide for countries who extradite suspects to retentionist States.⁸ *Öcalan v. Turkey* further clarifies the balance that should be struck between fundamental human rights and counter-terrorism measures in regard to the extradition of terrorist suspects.⁹

In 1998, Syria expelled a Turkish national, Abdullah Öcalan. Prior to this expulsion, Syria had protected Öcalan for years from Turkish prosecution for his leadership of the Kurdistan Workers'

prohibit capital punishment. Rather, Article 2(1) was interpreted to allow States to execute people, provided that the sentence was proportional to the crime committed. The Sixth Protocol to the ECHR, however, abolished the death penalty for States that chose to become signatories. See Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Apr. 28, 1983, 1983 Europe T.S. No. 114.

Protocol 6 was signed in 1983 and came into force in 1985. In 1994, the Parliamentary Assembly of the Council of Europe decided to make ratification of the Sixth Protocol a prerequisite for membership in the Council of Europe. See *Recommendation 1246 on the Abolition of Capital Punishment*, Eur. Parl. Ass., 25th Sess. (1994); *Resolution 1044 on the Abolition of Capital Punishment*, Eur. Parl. Ass., 25th Sess. (1994) at para. 6; Roger Hood, *The Death Penalty: The USA in World Perspective*, 6 J. TRANSNAT'L L. & POL'Y 517, 521 (1997). The following forty-six states comprise the Council of Europe: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia & Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, the Russian Federation, San Marino, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, "The former Yugoslav Republic of Macedonia," Turkey, Ukraine, and the United Kingdom. See The Council of Europe's Member States, available at http://www.coe.int/T/E/Com/About_Coe/Member_states/default.asp (last visited May 31, 2005).

All new members to the ECHR had to agree to abolish the death penalty, except for acts committed in time of war or of imminent threat of war. The Sixth Protocol has since been superseded by the Thirteenth Protocol to the ECHR, which abolishes the death penalty in all circumstances. See Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in All Circumstances, May 3, 2002, entered into force, July 1, 2003, 2002 Europe T.S. No. 187.

⁷ See Jon Yorke, *Europe's Judicial Inquiry in Extradition Cases: Closing the Door on The Death Penalty*, EUR. L. REV. 2004, 29(4), 546-56.

⁸ See *Soering*, 161 Eur. Ct. H.R. (ser. A) at 479-82 paras. 113-15, 120-24.

⁹ See *Öcalan v. Turkey*, 37 Eur. H.R. Rep. 10 (App. No. 46221/99) para. 90 (2003).

Party ("PKK"). Öcalan traveled from Greece to Russia to Italy. The latter refused Turkey's extradition request since Öcalan faced a real risk of being sentenced to death. The Turkish Government eventually caught him in Kenya on February 15, 1999. His abduction, blindfolding, and lack of access to legal assistance led the European Court of Human Rights to rule that the death sentence imposed by the Ankara State Security Court and upheld by the Court of Cassation violated the ECHR.¹⁰

It remains to be seen whether the European Court of Human Rights will reinforce the Article 3 human rights test set forth in *Soering* in light of the war on terrorism. Thus far, Europe has remained resolute concerning non-extradition in death penalty cases. The United Kingdom ratified Protocol 13 on October 10, 2003. On December 16, 2003, President George W. Bush called for Saddam Hussein to receive a death sentence.¹¹ Bruce Zagaris notes that, "Mr. Hussein will be tried by an occupied country with no legitimate government and by a criminal justice system with little experience in the complex legal issues posed by this trial."¹² He goes on to note that although the Coalition Provisional Authority suspended capital punishment in Iraq, the death penalty remains on the books and could be brought back in a case against Saddam Hussein. On June 29, 2004, the European Court of Human Rights declined to grant Saddam Hussein's interim measure request:

to permanently prohibit the United Kingdom from facilitating, allowing for, acquiescing in, or in any other form whatsoever effectively participating, through an act or omission, in the transfer of the applicant to the custody of the Iraqi Interim Government unless and until the Iraqi Interim Government has provided adequate assurances that

¹⁰ *Id.* at paras. 211–15. Subsequently, Turkey abolished the death penalty in peacetime pursuant to Law no. 4771, which was published on August 9, 2002. Press Release, European Court of Human Rights, Grand Chamber Hearing: Öcalan v. Turkey (June 9, 2004), available at <http://www.echr.coe.int/Eng/Press/2004/June/HearingOcalanvTurkey090604.htm> (last visited May 30, 2005). The Ankara State Security Court commuted Öcalan's death sentence to life imprisonment on October 3, 2002. *Id.* The Constitutional Court rejected an effort to make a terrorist exception to the ban on capital punishment on December 27, 2002. *Id.* The European Court of Human Rights Chamber judgment of March 12, 2003 found that Turkey had violated Article 3 of the ECHR by imposing a death sentence after an unfair trial. *Id.* Pursuant to Article 43 of the ECHR, a party may request that the case be referred to the Grand Chamber of the Court if the case raises a serious legal issue. *Id.* Such a request was accepted and a decision is pending. *Id.*

¹¹ Edward Alden et al., *Bush Calls for Death Sentence for Saddam*, FIN. TIMES, Dec. 17, 2003, at 15.

¹² Bruce Zagaris, *Iraq Governing Council Establish Special Tribunal and Saddam Hussein is Arrested*, 20 INT'L ENFORCEMENT L. REP. (Feb. 2004).

the applicant will not be subject to the death penalty.¹³

Saddam Hussein may still pursue a case before the European Court of Human Rights that the United Kingdom violated Article 3 of the ECHR by not requiring assurances that he will not face a death sentence.¹⁴ Such a case might clarify ECHR member obligations outside of Europe.

In light of increased global terrorism, the United States and the European Union have agreed to speed up extradition of suspected terrorists. Yet fast track extradition retains the following anti-death penalty article:

Where the offence for which extradition is sought is punishable by death under the laws in the requesting State and not punishable by death under the laws in the requested State, the requested State may grant extradition on the condition that the death penalty shall not be imposed on the person sought, or if for procedural reasons such condition cannot be complied with by the requesting State, on condition that the death penalty if imposed shall not be carried out. If the requesting State accepts extradition subject to conditions pursuant to this Article, it shall comply with the conditions. If the requesting State does not accept the conditions, the request for extradition may be denied.¹⁵

The execution of foreign nationals and extradition of suspects arrested in other countries who are wanted for crimes in the United States raises the use of capital punishment in the United States to an international level. Extraditing people who may face death sentences is unacceptable to an increasing number of countries. Counter terrorism measures and the war on terrorism have strained already tenuous diplomatic relationships, particularly when suspects may be tried in military tribunals that do not have due process procedures comparable to those of civilian courts.¹⁶ Canada and Mexico have joined European countries in refusing to extradite if a suspect faces a death sentence within the United

¹³ Press Release, European Court of Human Rights, European Court of Human Rights Rejects Interim Measures by Saddam Hussein (Jun. 29, 2004), available at <http://www.ECHR.coe.int/Eng/Press/2004/June/RequestforInterimmeasure-SaddamHussein.htm> (last visited May 30, 2005).

¹⁴ *Id.*

¹⁵ Agreement on Extradition, June 25, 2003, U.S.-E.U., 2003 O.J. (L 181) 27, at art. 13.

¹⁶ The 2001 execution of Timothy McVeigh for bombing the Oklahoma City Federal Building marked the first federal execution since 1963. The alleged twentieth terrorist of the September 11th attacks, Zacarias Moussaoui, may also be executed. The United States assured the United Kingdom that capital punishment would not be sought against British citizens held at Guantanamo Bay, Cuba, pending military tribunals.

States.¹⁷ Having lost its seat on the United Nations Commission on Human Rights in 2001, and only recently being allowed readmittance, the United States does not want the further notoriety of losing observer status in the Council of Europe. Yet, United States death penalty policy jeopardizes relations with the European Union, which has made progress toward abolition as a requirement of admission.¹⁸

B. Foreign Nationals: Mexico v. United States and Notification of Consular Rights

International law may not develop as a result of prosecuting former heads of state such as Saddam Hussein or Pinochet, but international norms are impacting the United States' death penalty policy in other ways. International views are beginning to influence due process provisions for foreign nationals facing death sentences.

1. Mexico v. United States and Notification of Consular Rights

The United States has been criticized severely by the international community for violating the Vienna Convention on Consular Relations ("Vienna Convention").¹⁹ Years of noncompliance came to a head when Paraguay attempted to intervene on behalf of its national, Breard, who had a scheduled execution in Virginia in 1998.²⁰ Paraguay brought a case to the International Court of Justice ("ICJ"), receiving an order for a stay of execution.²¹

The United States did not honor the order and Breard was executed. Similarly, in 2001, the ICJ ruled in *LaGrand Case* that the United States had violated international law by refusing to notify two German defendants of their rights to consular advice under the Vienna Convention, and in refusing to stay the order of execution until the ICJ had reached a decision.²² The two Germans had not been informed of their consular rights, prompting Germany

¹⁷ Richard C. Dieter, *International Influence on the Death Penalty in the U.S.*, FOREIGN SERVICE J. (Oct. 2003), available at <http://www.deathpenaltyinfo.org/article.php?scid=17&did=806> (last visited May 30, 2005).

¹⁸ *Id.*

¹⁹ See Vienna Convention on Consular Relations, April 24, 1969, art. 36, 21 U.S.T. 77, 596 U.N.T.S. 261 (requiring a State to notify all detained foreign nationals without delay of their consular rights). The United States ratified the Convention in 1969.

²⁰ See *Breard v. Greene*, 523 U.S. 371, 372, 374 (1998).

²¹ Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248 (Apr. 9).

²² See *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466, 515–16 (June 27).

to bring a case before the ICJ, which unanimously agreed upon a stay of execution.²³ When the United States rejected the order and proceeded to execute the brothers, Germany continued to pursue the ICJ case.

In its 2003 decision in *Mexico v. United States*, the ICJ held that the United States has systematically violated the Vienna Convention by failing to inform defendants of their consular rights in fifty-one out of fifty-two cases.²⁴ The ICJ ruled that the United States is required to provide effective judicial review.²⁵ It also mandated that the United States reconsider the ramifications of Vienna Convention violations for the use of capital punishment against foreign nationals. Ultimately, Condoleezza Rice, the United States Secretary of State, "informed U.N. Secretary General Kofi Annan that the United States 'hereby withdraws' from the Optional Protocol to the Vienna Convention on Consular Relations."²⁶

2. *Roper v. Simmons* and the Convention on the Rights of the Child

In support of a European Union amicus curiae brief submitted to the United States Supreme Court in *Roper v. Simmons*, Mexico attached the following statement:

Of the seventy-three juvenile offenders currently incarcerated on death rows across the United States, three are Mexican nationals. Both Tonatihu Aguilar Saucedo, who was sixteen at the time of the offense for which he received the death penalty, and Martin Raúl Fong Soto, who was seventeen, were sentenced to death in Arizona. Osvaldo Regalado Soriano was sentenced to death in Texas for a crime committed when he was seventeen years old.²⁷

The Convention on the Rights of the Child ("CRC") forbids juvenile executions under the age of eighteen.²⁸ The CRC has been

²³ *Id.*

²⁴ Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. No. 128, at para. 106 (Mar. 31).

²⁵ *Id.* para. 121.

²⁶ Charles Lane, *U.S. Quits Pact Used in Capital Cases; Foes of Death Penalty Cite Access to Envoys*, WASH. POST, Mar. 10, 2005, at A1.

²⁷ Brief of Amici Curiae The European Union and Members of the International Community, at 2a, *Roper v. Simmons*, 125 S. Ct. 1183 (2005) (No. 03-633), available at www.internationaljusticeproject.org/juvSimmonsEUamicus.pdf (last visited Apr. 17, 2005).

²⁸ Article 37 of the CRC states that: "Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age." Convention on the Rights of the Child, GA/RES/44/25, annex, U.N. GAOR, Supp. No. 49, at 167, U.N. Doc. A/44/49 (1989), available at <http://www.unhchr.ch/html/menu3/b/k2crc.htm> (last visited Apr. 17, 2005).

ratified by 192 States.²⁹ While Somalia and the United States are the only countries that have not yet ratified the CRC, both states have signed it.³⁰ Article 18 of the 1969 Vienna Convention on the Law of Treaties requires States not to defeat the object and purpose of a treaty once a country has signed the treaty.³¹ The United States is the only country to publicly express its belief in the right to sentence juveniles to death. The CRC and the International Covenant on Civil and Political Rights ("ICCPR") are the only global instruments explicitly prohibiting the use of the death penalty against individuals under the age of eighteen. The Human Rights Committee and the Committee on the Rights of the Child review country reports that measure treaty compliance. Every country other than the United States is a party to either the CRC or the ICCPR without reserving the right to execute juvenile offenders.

The ICCPR was adopted by the General Assembly in 1966 and came into force in 1976.³² Article 6(1) provides that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."³³ While capital punishment can still be used for serious crimes subsequent to due process, Article 6(6) sends a strong message that abolition of the death penalty is the ultimate objective of international human rights law. It states that "[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant."³⁴ In December 1989, the United Nations General Assembly went further by adopting the Second Optional Protocol to the International Covenant on Civil and Political Rights, Article 1 of which states: "No one within the

²⁹ Office of the United Nations High Commissioner For Human Rights, Status of Ratifications of the Principal International Human Rights Treaties (Oct. 1, 2004), available at <http://www.ohchr.org/english/bodies/docs/RatificationStatus.pdf>.

³⁰ *Id.*

³¹ Vienna Convention on the Law of Treaties, Opened for Signature May 23, 1969, art. 18, 1155 U.N.T.S. 331, 336. Article 18 of the 1969 Vienna Convention on the Law of Treaties reads:

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

Id.

³² International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 175 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

³³ *Id.* art. 6(1).

³⁴ *Id.* art. 6(6).

jurisdiction of a State party to the present Protocol shall be executed.”³⁵

While the United States ratified the ICCPR in 1992, it made a reservation to Article 6, allowing for the continued use of capital punishment in keeping with the U.S. Constitution. The reservation stated that:

The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.³⁶

The last line of this reservation expressly rejects the ICCPR Article 6(5) prohibition of executing juveniles.³⁷ No other country has made a substantive reservation to Article 6. In fact, eleven member States of the ICCPR have objected to the United States’ reservation, insisting that it is illegal as contrary to the goal of the convention.³⁸ In 1995, the Human Rights Committee agreed, concluding that the United States’ reservation is invalid since it conflicts with the purpose of the convention. In contrast to the original ICCPR document, Article 2 of the Second Optional Protocol limits States’ ability to make reservations to the complete prohibition of capital punishment.³⁹

In making reservations to the ICCPR, the United States has rejected the *Soering* notion that a “death row phenomenon” constitutes “cruel, inhuman or degrading treatment or punishment.”⁴⁰ Instead, the United States prohibits cruel, unusual

³⁵ Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, G.A. Res. 44/128, U.N. GAOR, 3d Comm., 44th Sess., 82d plen. mtg., U.N. Doc. A/RES/44/128 (1990) [hereinafter Second Optional Protocol].

³⁶ United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights, 31 I.L.M. 645, 653 (1992).

³⁷ In contrast to the international standard of eighteen, the United States had allowed individuals over the age of sixteen to be put to death. As Justice Scalia stated in *Stanford v. Kentucky*, 492 U.S. 361 (1989):

We discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age. Accordingly, we conclude that such punishment does not offend the Eighth Amendment’s prohibition against cruel and unusual punishment.

Id. at 380.

³⁸ See *Reservations, Declarations, Notifications and Objections Relating to the International Covenant on Civil and Political Rights and the Optional Protocols Thereto*, U.N. GAOR, U.N. Doc. CCPR/C/2/Rev.4 (1994).

³⁹ See Second Optional Protocol, *supra* note 35.

⁴⁰ John Dugard & Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT’L L. 187, 198 (1998).

and inhumane treatment or punishment only insofar as it is prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the United States Constitution.

In 1988, the U.S. Supreme Court assessed, but rejected, international condemnation of executing juveniles under eighteen in *Thompson v. Oklahoma*.⁴¹ *Stanford v. Kentucky* found that the Eighth Amendment does not prohibit the death penalty for crimes committed by sixteen or seventeen year old offenders.⁴²

For the first time since the late 1980s, the Court agreed to consider whether executing individuals who were under the age of eighteen when the crime was committed constitutes cruel and unusual punishment—*Roper v. Simmons* was argued on October 13, 2004.⁴³ Christopher Simmons was seventeen when he committed the murder-robbery for which he received a death sentence. In light of the Supreme Court's "evolving standards of decency" rationale in *Atkins v. Virginia* that banned the execution of people who are mentally retarded,⁴⁴ Simmons brought a claim that a similar evolution had developed for juvenile death sentences. In 2003, the Supreme Court of Missouri overturned Simmons conviction, ruling that "a national consensus has developed against the execution of juvenile offenders."⁴⁵ By a vote of five-to-four, the U.S. Supreme Court upheld the ruling made by the Missouri Supreme Court. Thus, the United States has joined the rest of the world in abolishing the death penalty for crimes committed prior to the age of eighteen. On March 1, 2005, *Roper v. Simmons* held that the execution of individuals who were between the ages of fifteen and eighteen at the time that the crime was committed violates the

⁴¹ 487 U.S. 815 (1998) (holding that the Eighth Amendment to the United States Constitution prohibited executing juveniles who were fifteen or younger at the time of the offense).

⁴² *Stanford v. Kentucky*, 492 U.S. 361 (1989).

⁴³ *Roper v. Simmons*, 125 S. Ct. 1183 (2005).

⁴⁴ *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002).

⁴⁵ The Missouri Supreme Court ruled that:

[a]pplying the approach taken in *Atkins*, this Court finds that, in the fourteen years since *Stanford* was decided, a national consensus has developed against the execution of juvenile offenders, as demonstrated by the fact that eighteen states now bar such executions for juveniles, that twelve other states bar executions altogether, that no state has lowered its age of execution below 18 since *Stanford*, that five states have legislatively or by case law raised or established the minimum age at 18, and that the imposition of the juvenile death penalty has become truly unusual over the last decade. Accordingly, this Court finds the Supreme Court would today hold such executions are prohibited by the Eighth and Fourteenth Amendments. It therefore sets aside Mr. Simmons' death sentence and re-sentences him to life imprisonment without eligibility for probation, parole, or release except by act of the Governor.

State ex rel. Simmons v. Roper, 112 S.W.3d 397, 399–400 (Mo. 2003).

Eighth Amendment's ban on cruel and unusual punishment.⁴⁶

Since the 1976 reintroduction of capital punishment, twenty-two individuals in seven states have been put to death for offenses that they committed when they were less than eighteen years old.⁴⁷ *Roper v. Simmons* had the effect of moving seventy-two individuals who were under eighteen at the time of their offenses off of death row.⁴⁸

Writing for the majority, Justice Kennedy based the finding that "the death penalty constitutes an excessive sanction for the entire category" of offenders whose crimes were committed under the age of 18 on (1) national consensus,⁴⁹ (2) the independent judgment of the Supreme Court Justices,⁵⁰ and (3) international law and practice.⁵¹

In her dissent, Justice O'Connor stated that "were my office that of a legislator, rather than a judge, then I, too, would be inclined to support legislation setting a minimum age of 18 in this context."⁵² The majority opinion speaks to this concern in noting that the United States Congress rejected juvenile execution in enacting the Federal Death Penalty Act in 1994.⁵³ Congress concluded that juveniles should not receive the death penalty.⁵⁴ In a dissent delivered from the bench, Justice Scalia contended that the 1992 United States reservation to the ICCPR indicates a lack of national consensus for the abolition of juvenile capital punishment.⁵⁵ The majority did not agree in light of the Federal Death Penalty Act of

⁴⁶ *Roper*, 125 S. Ct. at 1200.

⁴⁷ Death Penalty Information Center, *Supreme Court Bans Execution of Juvenile Offenders*, available at <http://www.deathpenaltyinfo.org/article.php?did=1329&scid=64> (last visited May 30, 2005).

⁴⁸ See Nina Totenberg, National Public Radio, *Supreme Court Ends Death Penalty for Juveniles*, available at <http://www.npr.org/templates/story/story.php?storyId=4518051> (last visited May 30, 2005) (twenty-nine in Texas; fourteen in Alabama; five in Mississippi; four in Arizona; four in Louisiana; four in North Carolina; three in Florida; three in South Carolina; two in Georgia; two in Pennsylvania; one in Nevada; and one in Virginia).

⁴⁹ *Roper*, 125 S. Ct. at 1192.

⁵⁰ *Id.* at 1200.

⁵¹ *Id.* Joining Justice Kennedy were Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer. *Id.* at 1187.

⁵² *Id.* at 1217 (O'Connor, J., dissenting).

⁵³ *Id.* at 1194.

⁵⁴ 18 U.S.C. § 3591 (1994). The Federal Death Penalty Act of 1994 was enacted as Title VI of the Violent Crime Control and Law Enforcement Act of 1994 and became effective on September 13, 1994.

⁵⁵ *Roper*, 125 S. Ct. at 1226 (Scalia, J., dissenting). Justice Scalia wrote the opinion in *Stanford v. Kentucky* which was overturned by *Roper v. Simmons*. Chief Justice Rehnquist and Justice Thomas joined Justice Scalia's *Roper* dissent. While Justice Kennedy had joined Scalia in holding that the juvenile death penalty remained constitutional in 1989, by 2005 he believed that standards of decency had evolved.

1994 and of the fact that the majority of states no longer permit juvenile capital punishment.⁵⁶ The trend has been consistently in the direction of abolition and it is an unusual punishment in those states where the death penalty remains on the books.⁵⁷

Since the 1992 ICCPR reservation to the Article 6(5) prohibition of juvenile capital punishment, five more states across the nation had prohibited death sentences for juveniles. This brought the number of states that did not permit juvenile death sentences to thirty.⁵⁸ Federal and military death sentences also require that an individual be at least eighteen at the time of the offense. Out of the thirty-eight states that retain capital punishment, nineteen states do not prohibit the execution of juvenile offenders.

In his dissent, Justice Scalia insisted that if the analysis were restricted to death-penalty states alone, then the eighteen states that allow capital punishment for adults but not juveniles do not represent a majority of the death penalty states.⁵⁹ In contrast, the majority in *Roper v. Simmons* included the twelve states that have abolished the death penalty outright.⁶⁰ When these states are considered, there is a clear national consensus against juvenile capital punishment.

In making its own independent judgment, the majority's analysis considered recent scientific research indicating that juveniles' capacity for reasoning and restricting impulsivity is much less developed than that of adults. Combined with an increased vulnerability to outside pressure and a still developing character, the majority concluded that, "[t]hese differences render suspect any conclusion that a juvenile falls among the worst offenders."⁶¹ As a result, "it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character."⁶² A government may take away "basic liberties," but it may not execute anyone whose crime was committed as a juvenile.⁶³

Roper v. Simmons reaffirmed the relevance of international law and practice in United States constitutional jurisprudence. "It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty," Justice

⁵⁶ *Id.* at 1194.

⁵⁷ *Id.*

⁵⁸ *Id.* at 1192.

⁵⁹ *Roper*, 125 S. Ct. at 1219 (Scalia, J., dissenting).

⁶⁰ *Id.* at 1192.

⁶¹ *Id.* at 1195.

⁶² *Id.*

⁶³ *Id.* at 1197.

Kennedy noted.⁶⁴ “The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”⁶⁵ Justice O'Connor joined the majority on this point, noting in her dissenting opinion that:

[o]ver the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency. . . [T]his Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries.⁶⁶

Since the Eighth Amendment comes from a provision in the English Declaration of Rights of 1689,⁶⁷ United Kingdom jurisprudence has significant relevance in determining what is cruel and unusual. The United Kingdom, currently without a death penalty, abolished juvenile execution long before addressing capital punishment generally. Parliament ended juvenile executions by enacting the Children and Young Person's Act of 1933⁶⁸ and the Criminal Justice Act of 1948.⁶⁹ The United States has a distinct national character from that of the United Kingdom. Yet, as Justice Kennedy has pointed out, “[i]t 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.”⁷⁰ This statement builds upon *Atkins*' 2002 reaffirmation that the Supreme Court may consider international developments in determining “evolving standards of decency.”⁷¹

⁶⁴ *Id.* at 1200; see also Brief of Amici Curiae Human Rights Committee of the Bar of England and Wales, Human Rights Advocates, Human Rights Watch, and the World Organization for Human Rights USA, 2005 WL 1628523, at *12, *Roper v. Simmons*, 125 S. Ct. 1183 [hereinafter Human Rights Brief].

⁶⁵ *Roper*, 125 S. Ct. at 1200.

⁶⁶ *Id.* at 1215–16 (O'Connor, J., dissenting).

⁶⁷ According to the Human Rights Brief, the principle of cruel and unusual punishment itself came from the Magna Carta. See Human Rights Brief, *supra* note 64, at *4. The English Declaration of Rights of 1688 states that, “excessive bail ought not to be required nor excessive Fines imposed; nor cruel and unusual Punishments inflicted.” 1 W. & M., c. 2, §10, in 9 Eng. Stat. at Large 69 (1770).

⁶⁸ Children and Young Person's Act, 1933, 23 Geo. 5, c. 12, § 53, sched. 1 (Eng.) (rejecting execution of those who were eighteen when they were sentenced).

⁶⁹ Criminal Justice Act, 1948, 11 & 12 Geo. 6, c. 58, § 16 (Eng.) (abolishing capital punishment for individuals under eighteen at the time their crime was committed).

⁷⁰ *Roper*, 125 S. Ct. at 1200.

⁷¹ See *Atkins*, 536 U.S. at 311–12. *Atkins* returned to *Thompson*'s approach rather than the approach taken in *Stanford*. See *id.* at 316 n.21. While the Court in *Thompson* said that

3. *Atkins v. Virginia*, Mental Retardation, and Comparative Constitutionalism

In its 1989 *Penry v. Lynaugh* decision, the U.S. Supreme Court ruled that the execution of individuals who are mentally retarded did not violate the Eighth Amendment of the United States Constitution.⁷² Such a condition was only a mitigating factor since a “national consensus” had not evolved against putting people who were mentally retarded to death. Georgia and Maryland were the only states to have banned executions of this kind. By 2002, the Court was able to find that a national consensus had evolved against executing people with mental retardation since sixteen more states had prohibited such executions. Given this development, the Court in *Atkins v. Virginia* found the execution of people who are mentally retarded to be an unconstitutional violation of the Eighth Amendment’s ban on cruel and unusual punishment.⁷³

The Supreme Court’s reference in *Atkins* to the amicus curiae brief filed by the European Union in favor of a ban indicates that the United States’ death penalty policy can be influenced by international legal and political developments.⁷⁴ Comparative constitutionalism appears to be emerging as a means by which the U.S. Supreme Court determines contemporary standards of decency regarding cruel and unusual punishment and due process.⁷⁵ Justice Brennan’s *Stanford* dissent,⁷⁶ a plurality in *Thompson*,⁷⁷ the majority in *Atkins*,⁷⁸ and the majority in *Roper*⁷⁹ used a comparative

the laws and practices of other nations were relevant to determining current standards of decency, *Thompson v. Oklahoma*, 487 U.S. 815, 830–31 & n.31 (1988), Justice Scalia’s majority opinion in *Stanford* stated that the practices of foreign countries should not be considered. *Stanford*, 492 U.S. at 369 n.1.

⁷² *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989).

⁷³ *Atkins*, 536 U.S. at 321 (holding that the execution of prisoners with mental retardation was unconstitutional since a “national consensus” had developed that such executions were cruel and unusual punishment). No states had reinstated juvenile capital punishment and many states had passed legislation prohibiting executions of offenders with mentally retardation. *See id.* at 315–16.

⁷⁴ *See* Dieter, *supra* note 17.

⁷⁵ A plurality of the Court in *Trop v. Dulles* noted that the scope of the Eighth Amendment is not fixed; rather “evolving standards of decency” should be used in determining cruel and unusual punishment. 356 U.S. 86, 100–01 (1958); *see* Ruti Teitel, *Comparative Constitutional Law in a Global Age*, 117 HARV. L. REV. 2570, 2594–95 (2004).

⁷⁶ *Stanford*, 492 U.S. at 389–90 (Brennan, J., dissenting).

⁷⁷ *Thompson v. Oklahoma*, 487 U.S. 815, 830–31 (1988) (plurality opinion). Justice Scalia made the counter-argument that international law should not be relevant to constitutional interpretation. *See id.* at 868 n.4 (Scalia, J., dissenting).

⁷⁸ *Atkins*, 536 U.S. at 316 n.21. The dissent argued that national developments, particularly state legislation, should provide the basis for decency. *Id.* at 324–25 (Rehnquist,

analysis of international developments to determine evolving standards of decency. Beyond the death penalty context, *Lawrence v. Texas* found a due process violation in part by considering ECHR jurisprudence.⁸⁰

C. *Lawrence v. Texas and Consideration of International Developments*

In *Lawrence v. Texas*, Justice Kennedy explained that:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.⁸¹

Lawrence overturned *Bowers v. Hardwick*.⁸² In 2003, *Lawrence* marked a turning point in the Supreme Court's readiness to consider laws beyond the United States.⁸³ The Court looked to the ECHR and ICCPR in determining the evolving standards of decency regarding sexual orientation. In three separate decisions, the European Court of Human Rights has interpreted the ECHR as prohibiting criminalization of private, same-sex sexual conduct between consenting adults.⁸⁴ In the 1981 *Dudgeon v. United Kingdom* decision, the European Court of Human Rights found that Northern Ireland's sodomy law could not be justified under Article 8(2) as necessary in a democratic society for the protection of morals or the rights and freedoms of others.⁸⁵ In reaching this conclusion, the European Court of Human Rights observed that the majority of the member states of the Council of Europe did not have similar laws.⁸⁶ It went on to note that Northern Ireland itself had not

C.J., dissenting).

⁷⁹ *Roper*, 125 S. Ct. at 1198–1200.

⁸⁰ See *Lawrence v. Texas*, 539 U.S. 558, 576 (2003).

⁸¹ *Id.* at 578–79.

⁸² *Id.* at 578 (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)). *Bowers* had upheld the constitutionality of a Georgia sex statute that prohibited private consensual adult sodomy between two men. *Id.* at 196.

⁸³ Diane Marie Amann, "Raise the Flag and Let it Talk": On the Use of External Norms in Constitutional Decision Making, 2 INT'L J. CONST. L. 597, 598 (2004).

⁸⁴ *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) para. 60 (1981); *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) para. 38 (1988); *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (ser. A) paras. 23–26 (1993).

⁸⁵ *Dudgeon*, 45 Eur. Ct. H.R. para. 60.

⁸⁶ *Id.*

enforced its law.⁸⁷ In similar cases brought by David Norris against the Republic of Ireland and by Alecos Modinos against Cyprus, the European Court of Human Rights reached the same conclusion. In *Norris v. Ireland*, the European Court of Human Rights went on to reject the notion that a government such as Ireland could claim that “the moral fibre of a democratic nation is a matter for its own institutions. . . .”⁸⁸ In *Modinos v. Cyprus*, the European Court of Human Rights held that the fact that a law such as that of Cyprus had not been enforced was irrelevant to the country’s obligation to repeal the law.⁸⁹

Toonen v. Australia broadens the *Dudgeon* rationale beyond Europe.⁹⁰ In 1994, the Human Rights Committee found that Tasmania’s criminalization of same-sex sexual conduct violated Australia’s obligations under the ICCPR.⁹¹ In particular, it concluded that sections 122 and 123 of the Tasmanian Criminal Code⁹² violate ICCPR Article 17 right of privacy and Articles 2 and 26 right to nondiscrimination.⁹³ Furthermore, in a unanimous decision, the Human Rights Committee concluded that the ICCPR classification of “sex” should be taken to include “sexual orientation.”⁹⁴ Thus, sexual orientation discrimination can be incorporated into the well-developed jurisprudence of sex discrimination.

Toonen and *Dudgeon* exemplify international cases that have influenced Supreme Court constitutional analysis. Recognizing that society is fluid rather than a fixed entity enables a community to move beyond exclusion to regain the original protective rationale for having a society. Harold Hongju Koh suggests that American exceptionalism can be laudable in the form of exceptional

⁸⁷ *Id.*

⁸⁸ *Norris*, 142 Eur. Ct. H.R. paras. 44–45.

⁸⁹ *Modinos*, 259 Eur. Ct. H.R. at paras. 23–24.

⁹⁰ *Toonen v. Australia*, U.N. Doc. CCPR/C/50/D/488/1992 (1994), available at <http://www.unhcr.ch/tbs/doc.nsf/0/d22a00bcd1320c9c80256724005e60d5?Opendocument> (last visited Apr. 17, 2005).

⁹¹ *Id.* para. 9.

⁹² Criminal Code Act, No. 69 (1924) (Tas.). Section 122(a) forbids “sexual intercourse with any person against the order of nature,” and section 122(c) forbids “consent[ing] to a male person having sexual intercourse with him or her against the order of nature.” Section 123 prohibits “indecent assault” and “act[s] of gross indecency” between males, “whether in public or private.”

⁹³ *Toonen*, UN Doc CCPR/C/50/D/488/1992 paras. 8.2, 8.3. Article 2(1) relates to rights recognized in the ICCPR itself, while Article 26 goes further in establishing a right to equality, independent of the ICCPR. ICCPR, *supra* note 32, art. 2, 17, 26.

⁹⁴ *Toonen*, U.N. Doc. CCPR/C/50/D/488/1992 para. 8.7.

leadership, but is unacceptable in the form of double standards.⁹⁵ Executing juvenile offenders or declining to enforce International Court of Justice preliminary stays of execution have weakened the ability of the United States to help mediate human rights violations around the world.⁹⁶ Transnational legal process involves internalizing international law norms into domestic legal systems. Koh notes that, “the goal should not be to give these nations an easy way out of their commitments, but to enmesh them within the global treaty system to encourage them to internalize those norms over time.”⁹⁷ Koh explains that transnational interaction between judicial systems helps integrate human rights principles into international and domestic law.⁹⁸

Those who support eventual abolition of the death penalty in the United States have attempted to internalize recognition through increased interactions between the United States Government and the ICJ. Using a Kantian perspective, Jenny Martinez describes the goal as “a system in which independent rights-respecting, democratic nation-states interact with one another in a zone of comity, cooperation, and law.”⁹⁹ She goes on to recommend that the United States consider the use of a “second-look” doctrine such as that used by the German Constitutional Court.¹⁰⁰ Countries can benefit from requiring the federal government to consult and cooperate with states before signing treaties that affect issues primarily controlled by states. In turn, states within a federal system would have to enforce international legal obligations.

III. EXTRADITION OF CAPITAL OFFENDERS IN LIGHT OF THE ECHR AND ICCPR

Given the lack of international law supporting a complete prohibition of capital punishment, combined with a strong international condemnation of torture, individuals advocating the abolition of the death penalty have turned to the use of torture provisions to restrict the implementation of the death penalty. The European Court of Human Rights has grappled with the definition

⁹⁵ Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1485–87 (2003).

⁹⁶ *Id.* at 1486–87.

⁹⁷ *Id.* at 1508.

⁹⁸ *Id.* at 1506–07.

⁹⁹ Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 462 (2003).

¹⁰⁰ *Id.* at 503–04.

of torture in a series of Article 3 decisions, ranging from a school's right to impose corporal punishment to a country's right to extradite a fugitive who is wanted for murder.

A. Inhuman or Degrading Treatment or Punishment

Article 3 of the ECHR states that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."¹⁰¹ A number of ECHR cases have begun to clarify the protection that Article 3 provides. The European Court of Human Rights was unwilling to hold that capital punishment itself constitutes torture since this would appear to contradict Article 2 acceptance of its use. Instead, the European Court of Human Rights established that Article 3 prohibits three broad activities: torture, inhuman treatment or punishment, and degrading treatment or punishment. The following series of cases laid the groundwork for the ECHR to find that placing an individual on death row can constitute torture in violation of Article 3.

In *Ireland v. United Kingdom*, the European Court of Human Rights considered whether British interrogation techniques used against suspected terrorists constituted a violation of Article 3.¹⁰² British authorities in Northern Ireland had interrogated fourteen individuals who were thought to be Irish Republican Army ("IRA"). terrorists. The European Court of Human Rights created a standard whereby the ill treatment must attain a minimum level of severity to constitute torture.¹⁰³ Torture necessitated intense cruelty and significant physical suffering. While the European Court of Human Rights held that the techniques were "inhuman" and "degrading," they fell short of "torture."¹⁰⁴ Looking at a variety of factors, the European Court of Human Rights concluded that the interrogation techniques caused severe physical and mental suffering amounting to "inhuman treatment."¹⁰⁵ Thus, the British government had violated Article 3. Further, the European Court of Human Rights found that the techniques were also "degrading" because they were "such as to arouse in their victims feelings of

¹⁰¹ ECHR, *supra* note 6, 213 U.N.T.S. at 224.

¹⁰² 25 Eur. Ct. H.R. (ser. A) (1978). The British interrogation techniques included: (a) wall standing (forcing the detainees to remain for hours in a stress position), (b) hooding (putting a bag over the detainees' heads), (c) subjection to continuous loud noise, (d) sleep deprivation and (e) deprivation of water and food. *Id.*

¹⁰³ *Id.* para. 162.

¹⁰⁴ *Id.* para. 167.

¹⁰⁵ *Id.*

fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.”¹⁰⁶ Thus, *Ireland v. United Kingdom* distinguishes among “torture,” “inhuman treatment or punishment,” and “degrading treatment or punishment” based on all the circumstances of a given case.¹⁰⁷

An examination must be made regarding length and physical or physiological effects of the treatment. Additionally, such factors as the age, health and gender of the victim can play a role in determining whether a violation of Article 3 has occurred. In *Tyrer v. United Kingdom*,¹⁰⁸ the European Court of Human Rights further developed its Article 3 standard by examining an Isle of Man statute allowing for judicial corporal punishment. At age fifteen, Anthony M. Tyrer was convicted of assault of another student and was sentenced to three lashes with a birch rod.¹⁰⁹ While the European Court of Human Rights concluded that this punishment did not reach the minimum severity to be “inhuman” pursuant to *Ireland v. United Kingdom*, the conduct did amount to “degrading punishment.”¹¹⁰ The European Court of Human Rights based this finding on the totality of the circumstances, “in particular, on the nature and context of the punishment itself and the manner and method of its execution.”¹¹¹ Judicial corporal punishment involves one person inflicting physical violence on another person; as institutionalized violence, it is carried out by state authorities.¹¹² The European Court of Human Rights found that despite a lack of severe or long-term physical damage, the punishment violated the Article 3 guarantee of physical integrity and dignity.¹¹³ While safeguards were implemented and Tyrer did not suffer severe or lasting physical damage, the European Court of Human Rights held that the corporal punishment levied on Tyrer was an infringement of his dignity and physical integrity, and was therefore “degrading.”¹¹⁴

In *Campbell & Cosans v. United Kingdom*, the European Court of Human Rights addressed the propriety of using a leather strap to discipline Scottish school children.¹¹⁵ The mothers of two students

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* para. 162.

¹⁰⁸ 26 Eur. Ct. H.R. (ser. A) (1978).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* paras. 29, 33, 35.

¹¹¹ *Id.* para. 30.

¹¹² *Id.* para. 33.

¹¹³ *Id.*

¹¹⁴ *Id.* para. 35.

¹¹⁵ 48 Eur. Ct. H.R. (ser. A) (1982).

each filed separate applications with the European Commission, contending that corporal punishment violated Article 3.¹¹⁶ Campbell was a student at a school that imposed corporal punishment.¹¹⁷ The Regional Education Council had refused to guarantee that Campbell would not be subject to such treatment.¹¹⁸ Likewise, Cosans was a student at a school with a similar policy. He was to receive corporal punishment for having allegedly taken a shortcut through a cemetery on his way home from school.¹¹⁹ The European Court of Human Rights did not feel that the circumstances of the applicants amounted to a violation of Article 3.¹²⁰ Yet, this case remains important for its expansion of the notion that potential punishment or treatment may violate Article 3.¹²¹

Together, these cases establish an Article 3 standard that provides guidelines for determining what constitutes torture, inhumane, or degrading treatment or punishment. In implementing the standard, courts consider the totality of the circumstances.¹²² Further, the European Court of Human Rights will examine the prospective physical and psychological effects on the individual.¹²³ The *Tyrer* Court made several findings that lay a solid foundation for the European Court's subsequent holding in *Soering*. For instance, it noted that the violation against Tyrer was exacerbated by the delay between sentencing and execution.¹²⁴ The European Court of Human Rights rejected the government's argument that corporal punishment was an effective deterrent, concluding that provisions of Article 3 are absolute and therefore must be strictly construed.¹²⁵ Perhaps most significantly, the European Court of Human Rights rejected the Attorney-General for the Isle of Man's argument that the judicial corporal punishment was not a violation of Article 3 because it did not violate local conventions.¹²⁶

Similarly, in *Campbell & Cosans v. United Kingdom*, the

¹¹⁶ *Id.* para. 20.

¹¹⁷ *Id.* para. 9.

¹¹⁸ *Id.*

¹¹⁹ *Id.* para. 10.

¹²⁰ *Id.* para. 42 (1).

¹²¹ *Id.* para. 26.

¹²² See *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) para. 30 (1978); see also *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) para. 89 (1989).

¹²³ *Tyrer*, 26 Eur. Ct. H.R. para. 33; see *Soering*, 161 Eur. Ct. H.R. para. 111.

¹²⁴ *Tyrer*, 26 Eur. Ct. H.R. para. 33.

¹²⁵ The Court emphasized that "it [is] never permissible to have recourse to punishments which [are] contrary to Article 3, whatever their deterrent effect might be." *Id.* para. 31.

¹²⁶ *Id.* para. 31.

European Court of Human Rights found that “provided it is sufficiently real and immediate, a *mere threat* of conduct prohibited by Article 3 may itself be in conflict with that provision. Thus, to threaten an individual with torture might in some circumstances constitute at least ‘inhuman treatment.’”¹²⁷

While this case was in the context of corporal punishment, it has had an impact on subsequent decisions concerning capital punishment and prison conditions.¹²⁸

B. Soering v. The United Kingdom

In the absence of an international consensus on capital punishment, human rights advocates have sought to obstruct the use of the death penalty on the grounds that the living conditions on death row constitutes torture. In *Soering*, the European Court of Human Rights found that the United Kingdom would violate Article 3 of the ECHR if it extradited Soering to the United States to face capital punishment for murder charges.¹²⁹ While critics argued that the *Soering* decision impeded extradition law and would turn Europe into a “safe haven for fugitive[s],” death penalty abolitionists promoted the decision as proof that capital punishment no longer constituted a justifiable punishment under international human rights law.¹³⁰

Jens Soering, a teenage West German national, accompanied his diplomat parents to live in the United States.¹³¹ He then went to the University of Virginia and fell in love with classmate Elizabeth Haysom. Haysom’s parents intensely disliked Soering; animosity that eventually culminated in a plan between Haysom and Soering to kill her parents. Soering carried out this plan in 1985, fleeing shortly thereafter with Haysom to the United Kingdom. Upon hearing that Haysom and Soering had been picked up for check fraud, the United States requested their extradition. While Haysom did not challenge the request and was returned to the United States,¹³² Soering objected to being extradited.¹³³

¹²⁷ *Campbell & Cosans*, 48 Eur. Ct. H.R. para. 26 (1982) (emphasis added).

¹²⁸ It also has implications for treatment of prisoners generally, a topic that has recently been the subject of intense debate regarding Iraq, Afghanistan, and Guantanamo Bay. See *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004).

¹²⁹ *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) para. 111 (1989).

¹³⁰ Michael P. Shea, *Expanding Judicial Scrutiny of Human Rights in Extradition Cases After Soering*, 17 YALE J. INT’L L. 85, 86 (1992).

¹³¹ *Id.* at 104 (discussing the background of the *Soering* case).

¹³² *Id.* She pleaded guilty as an accessory to murder and was sentenced to ninety years in prison. *Id.*

Soering argued "the British Government violated Article IV of the U.S.-U.K. Extradition Treaty by failing to obtain an absolute assurance from Virginia prosecutors that they would not seek the death penalty."¹³⁴ Virginia prosecutors only agreed to let the sentencing judge know about the British government's wish that Soering not be put to death.¹³⁵ Soering argued that such an arrangement did not meet the U.S.-U.K. Extradition Treaty requirements.¹³⁶ The divisional court rejected Soering's claim, finding instead that the Foreign Secretary had discretion to determine the sufficiency of assurances.¹³⁷ In contrast, the European Court of Human Rights did not leave a wide margin of appreciation for executive deference.¹³⁸

Once he had exhausted his remedies in the United Kingdom, Soering applied to the European Commission.¹³⁹ In a six-to-five vote, the Commission rejected Soering's Article 3 claim, finding that "the death row phenomenon did not constitute inhuman or degrading treatment or punishment."¹⁴⁰ The Commission also rejected Soering's Article 6 claim, noting that the United Kingdom should not be held responsible for the fact that there was a "lack of funds for legal aid in Virginia."¹⁴¹ The Commission did however find an Article 13 violation because United Kingdom extradition procedures "unduly restricted" limited judicial review of a fugitive's claim.¹⁴²

The European Court of Human Rights found that the United Kingdom had an obligation under Article 3 not to extradite Soering to the United States where he faced "a real risk of being subjected to torture or to inhuman or degrading treatment."¹⁴³ The European Court of Human Rights based its *Soering* finding on the death row phenomenon as opposed to capital punishment since the ECHR did not prohibit the death penalty.¹⁴⁴ Regardless of the rationale, the *Soering* decision left the British government with a dilemma. If it extradited Soering, it would be in violation of the ECHR. If it did

¹³³ *Id.*

¹³⁴ *See id.* at 105 & n. 107. *See also Soering*, 161 Eur. Ct. H.R. para. 22.

¹³⁵ Shea, *supra* note 130, at 97.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 98.

¹³⁹ *Id.* at 105.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 106.

¹⁴³ *Id.* at 108.

¹⁴⁴ *See id.* at 109-11.

not extradite Soering, it would violate the U.S.-U.K. Extradition Treaty, which requires extradition for capital offenses when the requesting State provides assurances that are acceptable to the requested nation. Today, Soering would not be put to death for a similar offense in the United Kingdom.¹⁴⁵ The United Kingdom surrendered Soering when Virginia prosecutors finally agreed to give assurances that he would not be tried for a capital offense.¹⁴⁶

Extradition law combines international and national law. Traditionally, these treaties have been seen as agreements between States.¹⁴⁷ Not granting fugitive standing to challenge violations is in keeping with the traditional perspective that States are the only subjects of international law.¹⁴⁸ In such a paradigm, individuals are merely objects of international law. As a result, an individual who is to be extradited has little recourse to ensure that his or her human rights are considered.

Courts did not play an official role in considering extradition cases until the mid-1800s.¹⁴⁹ Extradition remained exclusively within the realm of foreign policy, to be decided by heads of state.¹⁵⁰ Michael Shea notes that:

Monarchs regarded the fugitive as part of the currency of diplomacy, in the same way as their modern counterparts now look upon foreign aid, military supplies or a barrel of oil. The surrender of a fugitive often raised sensitive political concerns that required the attention of political officials in the government. The head of state enjoyed absolute discretion in carrying out extradition agreements and could surrender fugitives or refuse their surrender without

¹⁴⁵ See Kristi Tumminello Prinzo, Note, *The United States—"Capital" of The World: An Analysis of Why the United States Practices Capital Punishment While the International Trend is Towards its Abolition*, 24 BROOK. J. INT'L L. 855, 857 (1999). British law has steadily progressed towards total abolition of capital punishment. Parliament made efforts to abolish capital offenses as early as the 1940s. By 1956, England became a de facto abolitionist state, and in 1983 the death penalty was prohibited for all civilian offenses. No one has been executed in the United Kingdom since 1964. The Criminal Justice Bill in 1998 removed treason and piracy from the list of capital crimes. Capital punishment could be implemented under military law until the renewal of the Armed Forces Act in 2001, after which the United Kingdom became an abolitionist country for all offenses. Amnesty International Abolitionist and Retentionist Countries, *available at* <http://web.amnesty.org/pages/deathpenalty-countries-eng> (last visited June 16, 2005).

¹⁴⁶ Shea, *supra* note 130, at 112. Soering was convicted of first-degree murder. On June 21, 1990, a Virginia jury sentenced him to two life terms. *Id.* at 112 n.149. See also *British High Court Refuses to Block Soering Extradition*, RICHMOND TIMES-DISPATCH, Nov. 22, 1989.

¹⁴⁷ See Shea, *supra* note 130, at 87.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

answering to any domestic authority.¹⁵¹

The Rule of Non-Inquiry further weakens a fugitive's opportunity to voice an objection since it prevents him or her from offering evidence of likely abuse if he or she is to be extradited.¹⁵² The rule "has blocked judicial inquiry into the fairness of judicial procedures and penal conditions in the requesting country."¹⁵³ This provision prohibits judges from examining judicial and penal circumstances in the requesting country.¹⁵⁴ Instead, the judiciary is to defer to executive decisions.

Soering illustrates how difficult it can be to find the balance between crime prevention and the protection of human rights.¹⁵⁵ Countering the rule of non-inquiry and its preference for a limited judicial role in extradition cases, *Soering* provides a framework for enveloping human rights protections into extradition law. *Soering's* broad notion of State responsibility offers a powerful rationale for strengthening judicial review of human rights in extradition cases. Judicial deference to "foreign policy" should not justify human rights violations by other States. The growing recognition of human rights in the international community supports the increased judicial scrutiny of human rights in extradition requests. Human rights are not simply aspects to be weighed in foreign policy decisions. No matter how criminal their conduct has been, whether a fugitive may be subjected to torture in another country requires judicial inquiry.

Courts have access to information about the legal systems of other states and are therefore capable of analyzing human rights aspects of extradition cases.¹⁵⁶ Such information is often "freely available," particularly with regard to actual laws of a requesting State.¹⁵⁷ Moreover, a number of government and private organizations specialize in distributing human rights materials.¹⁵⁸ For these reasons, extradition cases should not be treated as non-justiciable.¹⁵⁹ In providing a model for judicial review, *Soering* has had three important impacts on extradition law.¹⁶⁰ It has affected

¹⁵¹ *Id.* at 87-88.

¹⁵² *Id.* at 93.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *See id.*

¹⁵⁶ *Id.* at 135.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 104.

requested State responsibility, established a standard of proof for potential violations, and clarified that anticipated punishments can be inhuman and degrading.¹⁶¹

First, the *Soering* Court held that a requested State is responsible for the way in which a prisoner is treated after extradition if that treatment is in violation of the ECHR.¹⁶² The European Court of Human Rights found that by extraditing *Soering*, the United Kingdom would incur liability for having “‘subjected’ him to any treatment he received in the United States that violated Article 3.”¹⁶³ Thus, a member State has the obligation not only to protect everyone within their jurisdiction under Article 1, but also to “secure” rights and obligations of the ECHR to individuals sent to States who are not members of the ECHR.¹⁶⁴ If it is clear that the treatment would violate human rights provisions in the requested State, then the State should have the same obligation not to extradite as it would have to make sure that an individual’s rights are protected within the requested State.¹⁶⁵

Second, a “substantial grounds” standard of proof will be used for potential violations.¹⁶⁶ While *Campbell* clarified that “threat[s]” can constitute a violation of Article 3, the European Court of Human Rights did not specify a standard of proof for assessing a potential violation other than stating that it must be “sufficiently real and immediate.”¹⁶⁷ *Soering* went further in finding that an “extradition violated Article 3 ‘where substantial grounds have been shown for believing that the [fugitive], if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment in the requesting country.’”¹⁶⁸

The European Court of Human Rights held that *Soering* was in such a position since the Virginia prosecutors planned to pursue capital punishment.¹⁶⁹ The “assurances” offered were insufficient to reduce the risk of an Article 3 violation.¹⁷⁰ *Soering* created a new standard of proof for potential violations in the extradition context.¹⁷¹ Now a requested State must show that a breach of the

¹⁶¹ *Id.*

¹⁶² *Id.* at 106.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 107.

¹⁶⁵ *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) para. 111 (1989).

¹⁶⁶ *Shea*, *supra* note 130, at 108.

¹⁶⁷ *Campbell & Cosans v. United Kingdom*, 48 Eur. Ct. H.R. (ser. A) para. 26 (1982).

¹⁶⁸ *Shea*, *supra* note 130, at 108.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

ECHR is "highly unlikely."¹⁷²

Finally, anticipated punishment falls within the Article 3 category of "'inhuman or degrading treatment or punishment.'"¹⁷³ The European Court of Human Rights' third holding established "that the 'death row phenomenon constituted inhuman or degrading treatment or punishment' under Article 3."¹⁷⁴ Noting that Article 2 of the ECHR allows for capital punishment, the European Court of Human Rights refused to go as far as to say that Article 3 outright prohibits it.¹⁷⁵ Rather, the European Court of Human Rights concluded that the way in which Virginia implements capital punishment amounted to inhuman or degrading punishment.¹⁷⁶

C. Responses to the Soering Decision

Several Canadian extradition cases resemble the dilemma that the United Kingdom faced in *Soering*. In particular, *Kindler v. Canada*,¹⁷⁷ *Ng v. Canada*,¹⁷⁸ and *United States v. Burns*¹⁷⁹ provide a useful framework with which to assess the impact that *Soering* has had on the extradition of capital offenders.

1. The Canadian Approach to Extradition Law Subsequent to *Soering*

Joseph Kindler was convicted of murder in Pennsylvania in 1983.¹⁸⁰ The jury had called for capital punishment, but Kindler escaped to Canada before he was formally sentenced.¹⁸¹ Similarly, Charles Ng escaped to Canada in 1985.¹⁸² Ng left before California was able to charge him with twelve counts of murder.¹⁸³ If convicted in California, Ng likely would have faced capital punishment.¹⁸⁴ Pennsylvania and California based their extradition requests on the U.S.-Canada Extradition Treaty.¹⁸⁵ Canada, like the United

¹⁷² *Id.*

¹⁷³ *Id.* at 109.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ [1991] S.C.R. 779.

¹⁷⁸ [1991] S.C.R. 858.

¹⁷⁹ [2001] S.C.R. 283.

¹⁸⁰ Shea, *supra* note 130, at 114; *Kindler*, S.C.R. at 840.

¹⁸¹ Shea, *supra* note 130, at 114-15; *Kindler*, S.C.R. at 840.

¹⁸² Shea, *supra* note 130, at 115; *Ng*, S.C.R. at 859.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Shea, *supra* note 130, at 115; *Kindler*, S.C.R. at 840-41. The U.S.-Canada Extradition

Kingdom in *Soering*, did not require that the United States make such assurances.¹⁸⁶ Kindler and Ng challenged Canada's decision.¹⁸⁷

The Canadian Supreme Court consolidated the *Kindler* and *Ng* cases, hearing them both on the same day.¹⁸⁸ In a pair of four-to-three rulings, the Canadian Supreme Court held that Canada would not violate the Canadian Charter of Fundamental Rights and Freedoms (Canadian Charter) by extraditing Kindler and Ng to the United States.¹⁸⁹ The plurality opinion, written by Justice McLachlin, assessed whether extradition without assurances would shock the Canadian conscience.¹⁹⁰ Kindler and Ng argued that it would.¹⁹¹ In 1976, the Canadian Parliament had virtually abolished capital punishment except for a few military offenses.¹⁹² Canadians had rejected an initiative to reinstate capital punishment for civilian crimes in 1987.¹⁹³ Justice McLachlin did not find that such public opinion indicators reflected an unambiguous sentiment that the death penalty shocked the Canadian conscience.¹⁹⁴ In particular, Justice McLachlin pointed out that the vote for reinstatement had been narrow, and thus there was not a strong consensus against capital punishment.¹⁹⁵ He went on to note that any shock to the Canadians would be outweighed by recognition that the United States has similar democratic procedural safeguards to those of Canada.¹⁹⁶ Thus, while Canada abolished capital punishment for nearly all crimes in 1976, the Supreme Court of Canada found that extraditing Kindler to a country where he might be executed would not shock the Canadian conscience.¹⁹⁷

In contrast, the dissent asserted that capital punishment is always "cruel and unusual."¹⁹⁸ Justice Sopinka's dissent addressed the issue of public opinion, noting that abolition of the death

Treaty is comparable to the U.S.-U.K. Extradition Treaty relied upon in *Soering*. Article 6 of the U.S.-Canadian Treaty is similar to Article IV of the U.S.-U.K. Treaty. Both allow the requested State to refuse extradition unless it receives assurances that capital punishment will not be sought. Shea, *supra* note 130, at 115.

¹⁸⁶ Shea, *supra* note 130, at 115; *Kindler*, S.C.R. at 841.

¹⁸⁷ *Id.*

¹⁸⁸ Shea, *supra* note 130, at 114; *Ng*, S.C.R. at 861.

¹⁸⁹ See *Kindler*, S.C.R. at 841-42.

¹⁹⁰ *Id.* at 849, 852.

¹⁹¹ *Id.* at 850-51.

¹⁹² *Id.* at 851.

¹⁹³ *Id.* at 852.

¹⁹⁴ *Id.* at 852. For an example of how the United States Supreme Court has viewed such public opinion factors, see *Gregg v. Georgia*, 428 U.S. 153, 173-81 (1976).

¹⁹⁵ *Kindler*, S.C.R. at 852 (McLachlin, J., plurality opinion).

¹⁹⁶ *Kindler*, S.C.R. at 852.

¹⁹⁷ *Id.* at 851-52.

¹⁹⁸ *Id.* at 790 (Sopinka, J., dissenting).

penalty in 1976 and refusal to reinstate it in 1987 provided a strong indication that Canadians are "clearly opposed to the death penalty."¹⁹⁹ Thus, not securing assurances from the requesting state would indeed shock the Canadian conscience.²⁰⁰ The Canadian Court in *Kindler* and *Ng* appears to limit the *Soering* decision to situations in which youth, mental disability, or other factors might lead to a violation similar to that of *Soering*'s. Yet, the fact that the Canadian Court cited *Soering* at all is significant since Canada is not bound by the ECHR.

2. The Human Rights Committee Response to *Soering*

In contrast with the *Soering* decision, the Canadian Court found that Canada was not responsible for protecting Canadian Charter rights beyond its own borders.²⁰¹ The United Nations Human Rights Committee disagreed.²⁰² When *Ng* brought a claim that Canada would be violating the ICCPR, the Human Rights Committee followed the *Soering* rationale on State responsibility.²⁰³ In *Ng v. Canada*, the Human Rights Committee found that Canada's extradition of *Ng* to the United States violated Article 7 of the ICCPR that prohibited cruel, inhuman or degrading treatment or punishment.²⁰⁴ Just as the European Court of Human Rights held that the United Kingdom could have reasonably foreseen the abuse of *Soering*'s human rights in the United States, the Human Rights Committee found that Canada could have reasonably foreseen a violation of *Ng*'s rights.²⁰⁵ In determining a violation of Article 7 in the *Ng* case, the Human Rights Committee followed the *Soering* real risk standard.²⁰⁶ Thus, the Human Rights Committee found that the prolonged suffering of dying by gas asphyxiation reached the level of cruel and inhuman treatment pursuant to the ICCPR.²⁰⁷

Only a few months earlier, the Human Rights Committee came to

¹⁹⁹ *Kindler*, S.C.R. at 789-93 (Sopinka, J., dissenting). Justice Sopinka also countered the plurality's safe haven contention, noting that it was artificial only to lay out the options of (1) extraditing without assurances and (2) not extraditing at all since a third option of (3) extraditing with assurances was also available. *Id.* at 792 (Sopinka, J., dissenting).

²⁰⁰ *See id.* at 792-93 (Sopinka, J., dissenting).

²⁰¹ *Id.* at 854.

²⁰² Dugard & Van den Wyngaert, *supra* note 40, at 199.

²⁰³ *See id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* The Committee noted that California death sentences are carried out via gas asphyxiation. *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

the opposite conclusion when it heard *Kindler's* case.²⁰⁸ Perhaps this was because the Committee felt that a convicted murderer should be treated differently than someone who had not yet been charged. Unlike *Soering* or *Ng*, *Kindler* had already been sentenced, and thus would clearly be going directly to death row. Alternatively, gas asphyxiation may have appeared more intolerable than lethal injection since it often takes longer to kill a person. *Kindler* argued that since Canada abolished the death penalty, it should not be able to send an individual to a country where he or she could receive a punishment that is not permitted in Canada. The Human Rights Committee's decisions in *Kindler* and *Ng* indicate that the death penalty can be a violation of the Article 7 cruel and unusual treatment of the ICCPR, but that such a conclusion depends on the facts of the given case.

3. Several Unresolved Extradition Considerations

The Canadian Supreme Court and the Human Rights Committee in *Kindler* rejected one of the most significant aspects of the *Soering* holding, namely that the "death row phenomenon" constituted torture. The Canadian Supreme Court, in *Kindler*, stated that: "It would be ironic if delay caused by the appellant's taking advantage of the full and generous avenue of the appeals available to him should be viewed as a violation of fundamental justice."²⁰⁹ The Human Rights Committee, in its *Kindler* analysis, held that "prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies."²¹⁰ In contrast, the Privy Council came to the opposite conclusion in *Pratt v. Attorney General for Jamaica*.²¹¹ The Privy Council found that when an individual utilizes his or her legitimate right to appeal, the delay which results can not be blamed on the death row inmate since:

It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of

²⁰⁸ *Kindler v. Canada*, 98 I.L.R. 426 (1993).

²⁰⁹ *Kindler*, S.C.R. at 838 (LaForest, J., plurality opinion).

²¹⁰ *Kindler*, 98 I.L.R. at 447.

²¹¹ 98 I.L.R. 335, 348, 354 (P.C. 1993) (finding that a delay of twelve years on death row before execution constituted, "inhuman or degrading punishment or other treatment" was in breach of Section 17 of the Jamaican Constitution).

years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it.²¹²

These varying interpretations illustrate that a great deal of controversy still surrounds whether the "death row phenomenon" constitutes torture, and the degree to which judicial systems consider the decisions of their counterparts around the world. Clearly, the *Soering* case has had a significant impact on extradition law. Even member States to the ECHR, however, are not following *Soering* without conducting their own analysis of the issues. For instance, in *Netherlands v. Short*,²¹³ an American soldier was accused of murdering his wife. The United States requested that Short be extradited pursuant to the 1951 NATO Status of Forces Agreement between the Netherlands and the United States.²¹⁴ Upon learning that the United States would not give any assurance that capital punishment would not be sought, the Dutch trial court concluded that it would be impossible to adhere to both the extradition treaty and the Sixth Protocol of the ECHR.²¹⁵ Unlike *Soering*, the High Court (Hoge Raad) did not go as far as to find that the ECHR took precedence. It concluded that a balance must be struck between the parties. In weighing the competing interests, the High Court held that Short's human rights were more important than The Netherlands' interest in extradition.²¹⁶ However, just as in *Soering*, Short was eventually handed over once the United States made assurances that the death penalty would not be implemented.²¹⁷

²¹² *Id.* at 353.

²¹³ 29 I.L.M. 1375 (1990).

²¹⁴ *Id.* at 1376.

²¹⁵ *Id.* at 1378.

²¹⁶ *Id.* at 1389.

²¹⁷ *Id.*; see Dugard & Van den Wyngaert, *supra* note 40, at 194-96. Conditional extraditions that surrender an individual as long as he or she will not be charged with a capital offense can be instrumental in reaching a compromise. *Id.* at 206. Such agreements can also avoid the safe-haven problem. Protecting human rights does not have to come at the expense of allowing fugitives to escape justice. A requested state that consistently extradites once it is provided with assurances that capital punishment will not be sought is unlikely to attract fugitives. However, an Italian court, in *Venezia v. Ministero di Grazia e Giustizia*, Corte cost., 27 June 1996, n.223, 79 RIVISTA DI DIRITTO INTERNAZIONALE 815 (1996), noted that assurances by the requesting state that capital punishment will not be used are not sufficient since such statements by the executive branch are not binding on the judicial branch. See Dugard & Van den Wyngaert, *supra* note 40, at 206 n.143.

4. Canadian Reconsideration of Extradition: *United States v. Burns*

In *United States v. Burns*, the Canadian Supreme Court held that “in the absence of exceptional circumstances, which we refrain from trying to anticipate, assurances in death penalty cases are always constitutionally required.”²¹⁸ It remains to be seen whether extradition of al-Qaeda members will be seen as “exceptional circumstances.” The Canadian Supreme Court is moving very close to a *per se* rule requiring that assurances be sought before extradition in potential capital cases. This is a striking reversal of direction in the ten years since *Kindler* and *Ng*. *Burns* held that the Minister of Justice that ordered the extradition of Canadians Glenn Sebastian Burns and Atif Ahmad Rafay had violated the Canadian Charter of Rights.²¹⁹ Both individuals faced capital murder charges in the United States and should not have been extradited without assurances that the death penalty would not be pursued.²²⁰

IV. CAPITAL PUNISHMENT IN THE UNITED STATES

Legislatures are elected by majorities that are not always interested in protecting minorities. For this reason, it is important for courts to enforce a constitutional bill of rights or an international human rights treaty even if the occasional ruling is unpopular. Liberal democracy is not simply about majoritarian decision-making and popular rule; it involves a liberal notion of protection. The international community has criticized the United States for violating both procedural and substantive provisions of international law. Recognizing that public opinion within the United States has played a large role in death penalty politics, the human rights movement seeks to raise awareness about the attitude that the United States has taken towards international conventions and the inadequacy of the United States’ standards in implementing the death penalty.

A. National Consensus: *The Scope of Cruel and Unusual Punishment*

The United States is “the only western democratic state to employ the death penalty for ordinary crimes during times of peace.”²²¹ In

²¹⁸ [2001] S.C.R. 283, 323.

²¹⁹ *Id.* at 360.

²²⁰ *Id.*

²²¹ Prinzo, *supra* note 145, at 856. The United States has had the death penalty since its

the 1850s, several American states were at the forefront of the death penalty abolitionist movement. In this period, Michigan, Wisconsin and Rhode Island all abolished the death penalty for murder.²²² Internationally, Portugal was the first European country to abolish the death penalty in 1864; Italy and The Netherlands soon followed.²²³ Executions in Europe became rare by the end of the nineteenth century.²²⁴ In the United States, the trend has developed in the opposite direction. This is illustrated by the fact that Kansas²²⁵ and New York²²⁶ have reinstated the death penalty, bringing the number of retentionist states to thirty-eight.²²⁷ The Violent Crime Control and Law Enforcement Act of 1994 broadened federal law significantly.²²⁸ It makes the death penalty discretionary for over fifty offenses, including crimes that have not resulted in death.²²⁹ In 1988, twenty-five of the thirty-six states that had capital punishment had not put anyone to death in well over a decade.²³⁰ By 1995, this number had fallen to twelve states.²³¹ The United States executed sixty-five prisoners in 2003; by March 3, 2004, the United States had executed over 900 prisoners since the death penalty was reinstated in 1977.²³²

Capital punishment in the United States came to an abrupt end

colonial period. At that time, there were thirteen capital crimes: "idolatry, witchcraft, blasphemy, murder, assault in sudden anger, sodomy, buggery, adultery, statutory rape, rape, manstealing, perjury in a capital trial, and rebellion." *Furman v. Georgia*, 408 U.S. 238, 335 (1972).

²²² Hood, *supra* note 6, at 518.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ See KAN. STAT. ANN. § 21-4624 (1995).

²²⁶ See N.Y. CRIM. PROC. LAW § 400.27(1), (11)(a)-(d) (McKinney Supp. 1996).

²²⁷ The New York State Court of Appeals held the State Death Penalty law unconstitutional on June 24, 2004. See *People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004). A moratorium went into effect. *Law Enforcement Officials Call on New York State Legislature to Keep New York's Unjust Death Penalty Law Off the Books*, available at <http://nyadp.org/main/police811> (last visited June 16, 2005). Law Enforcement officials are asking the New York State Legislature not to lift the ban. *Id.* Catherine Abate, former Commissioner of the New York City Department of Correction and Probation and Chair of the New York State Crime Victims Board, notes that life imprisonment without parole "provides a margin for error in cases of wrongful convictions. Since 1973, 115 innocent people have been sentenced to death in the U.S. That's an alarming figure that ought to give anyone pause." *Id.*

²²⁸ The Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C. §§ 3591-3598 (1995).

²²⁹ *Id.* § 3591(a)(1)-(2)(d)

²³⁰ Hood, *supra* note 6, at 519.

²³¹ *Id.*

²³² Amnesty International, *Facts and Figures on the Death Penalty*, available at <http://web.amnesty.org/pages/deathpenalty-facts-eng> (last visited, March 7, 2005) [hereinafter *Facts and Figures on the Death Penalty*].

in 1972 when the Supreme Court found, in *Furman v. Georgia*, that the manner in which Georgia's death penalty was implemented was unconstitutionally arbitrary and thus violated both the Eighth and Fourteenth Amendments.²³³ As Justice Douglas pointed out:

We deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.²³⁴

Furman had the effect of invalidating death penalty statutes in thirty-nine states, the federal government and the District of Columbia. Yet, only a year after *Furman* was decided, twenty states had passed new death penalty statutes with lists of aggravating and mitigating factors to guide judges and juries.²³⁵ Given the new legislative landscape, by 1976 the Supreme Court found that capital punishment could be conducted in a way that did not conflict with the Constitution.²³⁶ In *Gregg v. Georgia*, a plurality of the Supreme Court found that "the punishment of death does not invariably violate the Constitution."²³⁷ Since *Gregg*, Congress has passed a number of statutes that have expanded the use of the death penalty.²³⁸ In 1984, twenty-one people were executed. In 1993, thirty-eight people were executed. In 1995, fifty-six people were executed. In 1997, seventy-four people were executed. As Kristi Tumminello Prinzo has noted: "By 1990, approximately two executions occurred each month."²³⁹ The number of capital convictions has also risen substantially with the mid 1980s figure of approximately one thousand people on death row growing to over three thousand individuals by the mid 1990s.²⁴⁰ By the end of 2004, over 3,400 prisoners were under sentence of death

²³³ 408 U.S. 238, 256–57 (1972).

²³⁴ *Id.* at 253. (Douglas, J., concurring).

²³⁵ Nathan A. Forrester, *Judge Versus Jury: The Continuing Validity of Alabama's Capital Sentencing Regime after Ring v. Arizona*, 54 ALA. L. REV. 1157, 1196 n.334 (2003).

²³⁶ Florencio J. Yuzon, *Conditions and Circumstances of Living on Death Row—Violative of Individual Rights and Fundamental Freedoms?: Divergent Trends of Judicial Review in Evaluating the "Death Row Phenomenon,"* 30 GEO. WASH. J. INT'L & ECON. 39, 59 (1996) [hereinafter Yuzon].

²³⁷ 428 U.S. 153, 169 (1976).

²³⁸ See Yuzon, *supra* note 236, at 59–60. "[I]ncluding: (1) espionage by a member of the armed forces, (2) witness tampering resulting in death, and (3) the intentional killing of a law enforcement official" in specific situations. *Id.*

²³⁹ Prinzo, *supra* note 145, at 873.

²⁴⁰ See *id.* at 873–74.

in the United States.²⁴¹

In applying the Eighth Amendment to capital punishment, the Supreme Court established a two-prong "excessiveness" standard.²⁴² First, the punishment cannot inflict unnecessary and wanton pain, and second, the punishment must be proportionate to the crime.²⁴³ While the actual language of Article 3 of the ECHR and the Eighth Amendment of the U.S. Constitution are similar, the United States has used a much narrower form of judicial review. With regard to the first prong, the *Gregg* Court stated that "an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment. . . . It requires. . . that [a court] look to objective indicia that reflect the public attitude toward a given sanction."²⁴⁴

In determining whether the United States' public considered capital punishment to be cruel and unusual, the Court looked at jury sentencing patterns and the fact that death penalty statutes remained in thirty-five states after *Furman*.²⁴⁵ The U.S. Supreme Court found such factors conclusive in determining the death penalty had popular support and, thus, did not constitute a *per se* violation of the Eighth Amendment.²⁴⁶

Advocates who seek to abolish the death penalty point to empirical studies that show that capital punishment fails to have a deterrent effect on violent crime in society.²⁴⁷ One argument for why the death penalty should not be imposed for crimes other than murder is that criminals who are likely to receive capital punishment are more inclined to murder in order to prevent someone from becoming a witness.²⁴⁸ Death penalty proponents, on the other hand, use crime statistics to indicate that the death penalty has a deterrent effect.²⁴⁹ They also note that prisons are over-crowded and that felons are released on parole having served only a small portion of their sentences.²⁵⁰

Elected judges are sensitive to public opinion concerning capital

²⁴¹ *Facts and Figures on the Death Penalty*, *supra* note 232.

²⁴² Yuzon, *supra* note 236, at 62.

²⁴³ *Id.*

²⁴⁴ *Id.* at 61-62; see also *Gregg*, 428 U.S. at 173.

²⁴⁵ *Gregg*, 428 U.S. at 179-80.

²⁴⁶ *Id.* at 178, 180-81.

²⁴⁷ Ariane M. Schreiber, *States That Kill: Discretion and the Death Penalty—A Worldwide Perspective*, 29 CORNELL INT'L L.J. 263, 265 n.3 (1996).

²⁴⁸ *Id.* at 265 n.3.

²⁴⁹ *Id.* at 264.

²⁵⁰ *Id.*

punishment.²⁵¹ As Supreme Court Justice Stevens has pointed out: "The higher authority to whom present day capital judges may be 'too responsive' is political climate, in which judges who covet higher office—or who merely wish to remain judges—must constantly profess their fealty to the death penalty."²⁵²

The 1994, the New York gubernatorial campaign between Mario Cuomo and George Pataki provided one of the best examples of how the death penalty debate has become a central election issue.²⁵³ Cuomo consistently opposed reintroduction of the death penalty throughout his time as governor.²⁵⁴ Yet, opinion polls indicated that a majority of the residents of New York were in favor of capital punishment.²⁵⁵ Reinstating capital punishment was one of Pataki's primary campaign issues.²⁵⁶ Given a population uninformed about the way in which capital punishment has been implemented in the United States, this "tough on crime" stance helped Pataki win the election.²⁵⁷

B. United States Practice in Relation to International Standards

In 1984, the U.N. General Assembly endorsed a resolution adopted by the Economic and Social Council.²⁵⁸ This resolution set

²⁵¹ See Prinzo, *supra* note 145, at 885.

²⁵² *Id.*

²⁵³ Schreiber, *supra* note 247, at 264 n.1.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty*, E.S.C. Res. 1984/50, U.N. ESCOR, 1st Sess., Supp. No. 1, at 33, U.N. Doc. E/1984/84 (1984) [hereinafter *Safeguards I*].

1. In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences.

2. Capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

3. Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane.

4. Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.

5. Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on

forth safeguards for individuals facing capital punishment.²⁵⁹ The United Nations subsequently strengthened these safeguards, adding due process, juvenile and mental disability provisions.²⁶⁰ The first set of safeguards states, in effect, that capital punishment should not be used in an arbitrary manner.²⁶¹ There is broad consensus that the use of the death penalty in the United States remains arbitrary.²⁶² As Roger Hood points out:

Given that the nature, seriousness, and circumstances of murder meets the threshold required, the reasons why people are executed have as much to do with factors relating to their personal biography, their economic status, the status and race of their victim, and the way the case is processed through the system, as it has to do with the seriousness of the offense committed.²⁶³

The first safeguard also insists that the death penalty should only be used for the most serious, exceptional offenses.²⁶⁴ The expansion of capital offenses pursuant to the Violent Crime Control and Law Enforcement Act of 1994 indicates that the United States has a different conception of "most serious" than the drafters of this safeguard. The United States is not only unwilling to curb the current execution rate for murder convictions, but also has allowed people to be put to death for an expanded range of offenses.

The third safeguard that the United Nations set forth states that countries should not put juveniles to death.²⁶⁵ The international

Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.

6. Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.

7. Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.

8. Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence.

9. Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering.

²⁵⁹ See *id.*

²⁶⁰ See *Implementation of the United Nations Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, E.S.C. Res. 1989/64, U.N. ESCOR, 1st Sess., Supp. No. 1, at 51, para. 1, U.N. Doc. E/1989/89 (1989).

²⁶¹ See *Safeguards I*, *supra* note 258.

²⁶² See Hood, *supra* note 6, at 531.

²⁶³ *Id.*

²⁶⁴ See *Safeguards I*, *supra* note 258.

²⁶⁵ *Id.*

community has agreed upon the age of eighteen as a threshold.²⁶⁶ Both the Council of Europe and European Union have intervened on behalf of Simmons' United States Supreme Court case, which determined that juvenile offenders in United States cannot be put to death.²⁶⁷

The fourth safeguard prohibits the execution of innocent individuals.²⁶⁸ As Matas notes, there is no forum for exonerating innocent people who have been put to death.²⁶⁹ "Resurrection of the dead, executed in error, is beyond human powers. Exculpatory evidence that is suppressed by the prosecution may later surface and lead to a new trial. But when the prisoner is dead, the effort to release the suppressed evidence also dies."²⁷⁰

The fifth safeguard tries to confront such occurrences by insisting on fair procedures.²⁷¹ The United States' failure to provide sufficient legal representation in capital cases, both at the trial and appellate level, has led to international condemnation of judicial procedures in capital cases.²⁷² Court-appointed lawyers are often poorly paid and inexperienced.²⁷³ Many lawyers have been shown to be dealing with their first capital case.²⁷⁴ Inadequate funding has also hindered the United States from conforming to the sixth safeguard, requiring a right to appeal.²⁷⁵ Individuals on death row—most of who are indigent—are not entitled to a state-appointed attorney after their first appeal.²⁷⁶ The opportunity for an individual who is convicted of a capital offense to receive adequate representation is declining.²⁷⁷

Congress enacted the Antiterrorism and Effective Death Penalty Act ("AEDPA") in 1996.²⁷⁸ In an effort to respond to terrorism more effectively, the United States reduced procedural protections.²⁷⁹

²⁶⁶ *Id.*

²⁶⁷ David Stout, *U.S. Bars Death for Minors Who Kill*, INT'L HERALD TRIB., March 2, 2005, at 1.

²⁶⁸ See Safeguards I, *supra* note 258.

²⁶⁹ See David Matas, *The Death Penalty as a Violation of International Human Rights Norms*, 22 AM. J. CRIM. L. 254, 255–56 (1994).

²⁷⁰ *Id.*

²⁷¹ See Safeguards I, *supra* note 258.

²⁷² See Hood, *supra* note 6, at 534–35.

²⁷³ Matas, *supra* note 269, at 256–57.

²⁷⁴ Hood, *supra* note 6, at 535.

²⁷⁵ *Id.*

²⁷⁶ See Matas, *supra* note 269, at 257.

²⁷⁷ *Id.* at 256–57.

²⁷⁸ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

²⁷⁹ David Cole, *Politicians Need to Halt 'Get Tough' Rhetoric*, 146 N.J.L.J. 619 (Nov. 18, 1996).

Decreasing the number of years that an individual spends on death row to reduce the death row phenomenon increases the risk of killing innocent people. Abolishing the death penalty would be a clear resolution to this dilemma. Apprehension regarding wrongful executions led to Governor Ryan's 2003 commutation of all 164 death sentences in Illinois.²⁸⁰ Ursula Bentele suggests "continued use of the death penalty violates substantive due process because no compelling state interest justifies the risk that innocent people will be put to death."²⁸¹ The Eighth Amendment prohibition against cruel and unusual punishments does not remedy the problem of executing innocent individuals. Since 1970, over one hundred people have been sentenced to death that were later discovered to be innocent.²⁸²

V. CONCLUSION

The American legal philosopher, John Rawls, described a state of nature in which individuals have complete freedom within the following hypothetical societal framework. People are initially identical with regard to physical strength, financial security, religion, race, et cetera. Moreover, these fungible individuals have no idea what they will become in the future. Given these two basic tenets, Rawls predicts that the rules that people would establish would be fair because no one would be able to skew them to benefit a given individual circumstance. In this way, we can assess laws by considering whether a given rule would have been agreed upon in Rawls' state of nature. Without knowing one's future, individuals would like to be assured that if they are charged with a capital offense that they would receive a fair trial and that they would not receive a death sentence based upon such arbitrary considerations as race or financial resources.

The atrocities of World War II taught Europeans a powerful lesson. People were thrown into circumstances similar to Rawls' model. The United States has had less intimate experience with such social upheaval. As the United States Supreme Court indicated in *Gregg*, public awareness is crucial.²⁸³ If the way in

²⁸⁰ Ryan Keith, *Illinois High Court Upholds Ryan's Commutation of Death Sentence*, ST. LOUIS POST DISPATCH, Jan. 24, 2004, at 8.

²⁸¹ Ursula Bentele, *Does the Death Penalty, By Risking Execution of the Innocent, Violate Substantive Due Process?*, 40 HOUS. L. REV. 1359, 1364 (2004).

²⁸² Death Penalty Information Center, *Innocence: Freed From Death Row*, available at <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110> (last visited Apr. 18, 2005).

²⁸³ See *Gregg v. Georgia*, 428 U.S. 153, 179–80 (1976).

which the death penalty is being implemented in the United States does not shock people it is because they are unaware of the degree to which the criminal system is broken. In contrast, the American Bar Association is all too familiar with the current state of affairs and thus has called for a moratorium on the death penalty.²⁸⁴ Proactively addressing problems within the judicial system of the United States is a better approach than having the International Court of Justice, Human Rights Committee, European Court of Human Rights, and other judicial bodies find that the use of capital punishment in the United States is illegal. Ignorance of the law is no defense, particularly when such ignorance is lethal. The Supreme Court's willingness to consider transnational jurisprudence in wrestling with the complexities of proportional punishment and justice is encouraging. International peace and security can be restored through cooperative codification of human rights provisions that balance the rights of any given individual vis a vis members of society as a whole.

²⁸⁴ See American Bar Association, Death Penalty Moratorium Implementation Project, available at <http://www.abanet.org/moratorium/> (last visited June 16, 2005).

