The Supreme Court's decision in *United States v. Burns and Rafay* (2001), 151 C.C.C. (3d) 97 that s. 7 of the Charter requires the Minister of Justice to seek assurances that the death penalty will not be applied before extraditing a fugitive was predictably greeted by hostile op-eds in the two national newspapers. The Court was accused of judicial activism and the police and the official opposition warned that Canada would become a safe haven for murderers on the run. These criticisms play into images of an activist Court subverting the will of the people and being soft on crime. Those who take the time to read the decision will, however, find a carefully justified and compelling reminder of the fallibility of the criminal process.

Contrary to their critics, the judges did not simply read their own personal views about the death penalty into s. 7 of the Charter. The Court relied on the distinction between the basic tenets of the justice system and matters of general public policy. The real harm of extradition without assurances is not that the death penalty is immoral and ineffective, but the possibility of executing the innocent. The Court elaborated on the American, British and Canadian experience of wrongful murder convictions. DNA testing has revealed some recent wrongful convictions, but the Court wisely noted that biological evidence will not be available in many murder cases, that eyewitness testimony can be wrong, and that wrongful convictions can occur even after a fair trial and appeal.

The Court's decision also underlines the continued value of bold and broad constitutional decisions. The Court could have followed the Court of Appeal in distinguishing previous decisions allowing extradition without assurances on the basis that Burns' and Rafay's mobility rights as Canadian citizens to enter and stay in Canada were at stake. The Court could have even more narrowly based its decision on the fact that Burns
and Rafay were not only Canadian, but 18 years old at the time of the alleged offence. This "one case at a time" approach would have diluted rights and made the law less certain. No execution of most teenagers, but what about 19-year-olds? No execution of pregnant women, but what about after birth? No execution of those with severe mental disabilities, but what about the less severely disabled? Instead, the Court proclaimed a general principle against extradition to face the death penalty, albeit subject to the Minister having a discretion in undefined "exceptional circumstances". As will be seen, even bold and broad judicial decisions under the Charter do not have to be the final word.

The Court was also not oblivious to the state's interests in extradition. It noted that when Canada, Mexico and European states sought assurances in the past, they were granted. This, of course, subsequently occurred in this case, as Washington agreed not to execute Burns and Rafay. The Court also left some wiggle room for exceptional circumstances if a state refuses to give assurances. It also dealt with the safe haven fear. After extradition, Burns and Rafay face life imprisonment without even a faint hope of parole in Washington. Vigorous law enforcement and not the possibility of death at the state's hands by lethal injection or (at the prisoner's option, hanging) is the proper response to safe haven fears. Certainty of punishment is more important than its severity. The state's interest in crime control can often be fulfilled by more proportionate means.

The case is also a testament to the continued importance of intervenors in criminal cases. A little over 15 years ago, the Court had a policy that non-governmental intervenors were inappropriate in criminal cases. Now it regularly allows intervenors on both sides. In this case, there were five intervenors who addressed the important issues of wrongful convictions both in Washington and elsewhere, death row phenomena, and international standards and practices regarding the death penalty. Nothing would have prevented advocates of the death penalty or victims' groups from seeking intervenor status.

The Court's decision is also a testament to the continued importance of anti-majoritarian judicial review. The facts of the case — the blood of Rafay's mother, father and sister was splattered on all four walls and the ceiling — may have led many to conclude that the death penalty was appropriate. Public opinion, however, is a matter for the elected representatives and not the Court, which as an independent body has an obligation "to protect the worst and weakest among us [so] that all of us can be secure that our own rights will be protected". (Idem, at para. 67).

Finally, the Court's decision is evidence of the possibility of law over discretion. When the Minister of Justice decided in his office who might live and who might die, we could not watch. When the Court heard its case and made its decision, we could all watch and read its decision. Under the Charter, we can do more than watch — we can even reinstate the death penalty.

If after an election or a referendum on capital punishment, Canadians decide that they really want to bring back the death penalty, they can still do so. Although the Court avoided ruling on whether the reintroduction of the death penalty would be constitutional, its decision, which relies so heavily on the shameful Canadian experience of wrongful convictions, can not be distinguished in the domestic context with a straight face. The Court might consider the reintroduction of the death penalty to be a rebuke, but it should strike down such legislation as an unjustified violation of ss. 7 and 12 of the Charter.

This, however, would not end matters. Canadians could still have the death penalty if they really wanted it and without changing the Court or the Constitution. All that would be necessary is ordinary legislation invoking the s. 33 override, overruling the Court's courageous and principled judgment. Were this to occur, the Court should not view such an override as a sign of shame or an indication that they were out of touch. The judges should wear it as a badge of pride that they did their job and did it well.

The override would allow the Court to preserve its point of principle in the face of public opposition. It would also have the advantages of requiring sober second thoughts. If after five years another Donald Marshall, David Milgaard, Guy Paul Morin, Thomas Sophonow or Gregory Parsons was released after being wrongfully convicted of murder, or if (forbid it) we executed an innocent person, Canadians would have a perfect opportunity to reconsider the wisdom of the Court's decision, let the override expire and repeal the death penalty. If the critics of the Court's decision in Burns and Rafay can convince Canadians this is really what they want, they can have it. The Court's decision is gratifying and wise, but in a democracy we all must remain vigilant about the dangers of bringing back the death penalty.

K.R.