

3-1-1996

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Dana L. Bogie

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Recommended Citation

Dana L. Bogie, *Life or Death - The Death Penalty in the United States and the New Republic of South Africa*, 3 Tulsa J. Comp. & Int'l L. 229 (1995).

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LIFE OR DEATH? THE DEATH PENALTY IN THE UNITED STATES AND THE NEW REPUBLIC OF SOUTH AFRICA

I. INTRODUCTION

The death penalty is an extremely complex subject in many nations around the world. Arguments on whether it is allowable under many nations' laws have been occurring for some time now. Two countries, South Africa and the United States, travelled interesting and divergent paths when deciding if the death penalty was constitutional.

South Africa, previously one of the countries most adherent to the penalty, has now abolished the death penalty under its new government. The United States, on the other hand, has moved from implementing the death penalty in almost every state, to finding the death penalty laws of those states unconstitutional, to holding the death penalty constitutional in those states that implemented new laws.

What happened in these two countries to cause such divergent paths concerning the death penalty? This paper will discuss how the paths were created and the future of the death penalty by comparing the history of the law in South Africa and the United States.

II. SOUTH AFRICA

A. *A Gruesome Past*

1. The History of the Death Penalty

The implementation of the death penalty began in South Africa when the Dutch colonists settled in the Cape of South Africa during the seventeenth century.¹ Roman-Dutch law governed the colonists. The law provided that the punishment for murder and many other crimes was death.² Along with the death penalty, torture was allowable until 1827 when the First Charter of Justice abolished all forms of torture.³ Roman-Dutch legal traditions, however, kept the death penalty as a possible punishment. The First Charter of Justice, although it abolished torture, allowed the government to apply the death penalty with one stipulation: the convicted criminal must not be tortured before being put to death.⁴ During this period in history, the courts embraced the death penalty, imposing it for hundreds of crimes.⁵ South African courts imposed the death penalty for rape, robbery, housebreaking with aggravating circumstances, sabotage involving murder, terrorism, kidnapping, child-stealing, and murder.⁶

The next turn in the path of the death penalty occurred with the Criminal Procedure and Evidence Act of 1917. The Act limited capital punishment to three crimes: murder, treason, and rape.⁷ It seems strange, though, that the number of crimes the South African Parliament allowed to be punished by the death penalty changed frequently. The strong presence of apartheid and political issues were most likely the cause.⁸ For example, the Criminal Procedure Act of 1977, introduced during an "intensification of political oppression," provided for eleven capital crimes.⁹

Political oppression has been a large part of South Africa's past. The oppressed were the blacks of South Africa, and the death penalty was one of the means of oppression. The black population argued that

1. George Devenish, *The Historical and Jurisprudential Evolution and Background to the Application of the Death Penalty in South Africa and Its Relationship with the Constitutional Reform*, 5 S. AFR. J. CRIM. JUST. 1, 5 (1992).

2. *Id.* at 5-6.

3. *Id.* at 7.

4. *Id.*

5. The "Bloody Code" was in effect in England during the 1700s. The Code made the death penalty applicable to two hundred crimes. Van Niekerk, *Hanged By the Neck Until You Are Dead*, 86 S. AFR. L.J. 457, 461 (1969).

6. *Id.* at 459. See also E. Kahn, *The Death Penalty in South Africa*, 33 J. CONTEMPT. ROMAN/DUTCH L. 108, 117 (1970).

7. Devenish, *supra* note 1, at 8. See also Kahn, *supra* note 6, at 139.

8. See generally Van Niekerk, *supra* note 5, at 457.

9. Devenish, *supra* note 1, at 8-9.

the death penalty was being used to control their race, and their race alone. From 1947 to 1966, 288 whites were convicted of raping blacks, yet none were sentenced to death.¹⁰ In contrast, 844 blacks were convicted of raping whites, resulting in 122 executions.¹¹ The abolitionist movement used this "race card" to try and defeat the death penalty. Further, the abolitionist movement used the highly publicized crimes of blacks raping whites as a tool. By writing stories and publishing statistics about the death penalty and race, the movement showed that the death penalty was being used as a social and political tool by whites in South Africa.

Conversely, the South African Parliament suggested that capital punishment needed to be retained to protect policemen,¹² to adhere to public support for the imposition of the death penalty,¹³ and to create a deterrent for crime.¹⁴ The penalty was a mandatory sentence of death for many crimes, with no right for the convicted person to appeal.

2. The Statistics of the Death Penalty

Although differing views existed in South Africa about why the death penalty should or should not be maintained, the death penalty was being applied to hundreds of cases. Sentencing people to death was not an unusual occurrence in South African courts. From its unionization in 1910, South Africa has imposed the death penalty more than any other country.¹⁵ In fact, this country accounts for about forty-seven percent of the executions that have occurred in the world.¹⁶ The death penalty was applied to such an unusually large number of cases in South Africa that the public was deemed "to be crimson with shame and confusion."¹⁷

Most countries' execution rates fluctuate down during a period of war, a national crisis, or a change in society such as industrialization. South Africa on the other hand, throughout its national crisis of apartheid, continued to send its citizens to the gallows at a "normal" rate.¹⁸

10. *Id.* at 23. See also Van Niekerk, *supra* note 5, at 18.

11. Devenish, *supra* note 1, at 23-24. "Out of 2,740 persons executed between 1910 and 1975, less than one hundred were white." *Id.* at 23.

12. Van Niekerk, *supra* note 5, at 472.

13. *Id.* at 473.

14. *Id.* at 474. See generally *State v. Makwanyane and Mchunu* (Const. Ct. Republic S. Afr. 1995) (Internet, <http://pc72.law.wits.ac.za/index.html>); Kahn, *supra* note 6; Devenish, *supra* note 1.

15. Van Niekerk, *supra* note 5, at 458.

16. *Id.*

17. *Id.* at 457.

18. *Id.* at 458. From 1911 to 1947, South Africa executed fewer than 25 people per year.

In 1911, for example, fifty-seven people were hanged.¹⁹ The death toll continued to rise when, in 1954, seventy-three people died from being hanged at the gallows.²⁰ Even though the figures from 1911-47 seem extraordinarily high, the death penalty rate still continued to rise.²¹ Since 1948, the average number of convicted criminals to be executed per year was 66.6.²² During the years of 1957-66, an average of 89.3 persons were hanged per year.²³

With so many criminals being put to death, the abolitionist movement in South Africa began to build steam in the 1970's. The formation of an organized movement against the death penalty dramatically lowered the number of persons being executed. For example, in 1970-73 a total number of 246 persons were executed.²⁴ However, the efforts of the Society for the Abolition of the Death Penalty in South Africa, headed by B. Van Niekerk, soon lost their effectiveness.²⁵ In 1987, 164 people in one city of South Africa were executed, "thirty-two times more than China with its population of [two] billion."²⁶

The trend in the number of persons being executed changed again beginning in 1988. After a campaign to save a highly-publicized group of accused criminals known as the "Sharpsville Six", international and domestic pressure to abolish the death penalty in South Africa lowered the actual number of people put to death.²⁷ In 1988, the death toll was 117, and in 1989, the number executed decreased significantly to fifty-three. Even though fifty-three might seem low, South Africa was still executing in numbers that were relatively large to the size of the country.²⁸

With the death penalty in force and large numbers of South Afri-

During one of the most detrimental economic crisis of South African history, the penalty rate stayed at 14.4 deaths per year. *Id.*

19. *Id.*

20. Van Niekerk, *supra* note 5, at 458.

21. *Id.*

22. *Id.*

23. *Id.* Two thousand, one hundred and seven persons were put to death by hangings in South African gallows from 1911-66. *Id.* It is interesting to note that the author, Van Niekerk, was prosecuted for contempt of court after the publication of his article in the South African Law Journal. Devenish, *supra* note 1, at 11.

24. Van Neikerk, *supra* note 5, at 458.

25. Devenish, *supra* note 1, at 11. Van Niekerk died at the age of 42. The Society he created suffered without his presence. *Id.*

26. *Id.* at 12.

27. *Id.* at 13. The "Sharpsville Six" were six men sentenced to death for being named as the killers of Sharpsville Counselor Khuzwayne Dlamini. "Domestic and international pressure against the death penalty in South Africa reached unprecedented climaxes during 1989," according to Devenish. Organizations, like the Lawyer for Human Rights (LHR), were being formed to call for a moratorium on eleven executions in South Africa during this period. *Id.*

28. South Africa's population in 1992 was 27 million people. *Id.*

can blacks being sentenced to death, pressure was put on the government to establish some guidelines for the death penalty. On February 2, 1990, President F.W. De Klerk announced a moratorium for the death penalty.²⁹ In his speech, the President called for the reform of the death penalty by stating that it should be imposed only in extreme cases, by broadening the judicial imposition of the penalty, and by establishing an appeal process.³⁰

In response to President De Klerk speech, Parliament enacted the Criminal Law Amendment Act. The Act provided for the death penalty for six crimes, one of the six being murder.³¹ As a result of the moratorium, the last execution in South Africa was the hanging of S. Ngobeni on November 14, 1989.³²

In order to smooth over political unrest, could the citizens of South Africa see the abolition of the death penalty in their future? Devenish, the author of *The Evolution*, stated, "The abolition of the death penalty in South Africa would contribute to the process of political reconciliation since many blacks view the excessive use of the death penalty in South Africa as a tool of oppression by a minority racist re-

29. *State v. Makwanyane & Mchunu* (Const. Ct. Republic S. Afr. 1995), at *n.192 (Internet, <http://pc72.law.wits.ac.za/index.html>). The moratorium applied to 304 people on death row at that time. *Id.* The announcement did not stop the imposition of the penalty, though. People were still sentenced to death after the moratorium was in place. *Id.*

30. *Id.*

31. Devenish, *supra* note 1, at 27. The Act made the death moratorium mandatory and gave the convicted a right to an appeal. *Makwanyane & Mchunu* at *n.193 (Internet, <http://pc72.law.wits.ac.za/index.html>). Section 277(1)(a) provides:

Sentence of Death

(1) The sentence of death may be passed by a superior court only and only in the case of a conviction for-

- (a) murder;
- (b) treason committed when the Republic is in a state of war;
- (c) robbery or attempted robbery, if the court finds aggravating circumstances to be present;
- (d) kidnapping;
- (e) child-stealing;
- (f) rape.

(2) The sentence of death shall be imposed-

- (a) after the presiding judge conjointly with the assessors (if any), . . . or, in the case of a trial by a special superior court, that court, with due regard to any evidence and argument on the sentence . . . , has made a finding on the presence or absence of mitigating or aggravating factors; and
- (b) if the presiding judge or court . . . with due regard to that finding, is satisfied that the sentence of death is the proper sentence. . . .

Id.

32. See, Minister of Justice, Dullah Omar, Inaugural Address of the Constitutional Court (Feb. 14, 1995), available in Internet, <http://pc72.law.wits.ac.za/index.html> [hereinafter Inaugural Address].

gime."³³ Many people began to predict a change in South Africa regarding apartheid and the justice system. After the moratorium was announced, Nelson Mandela, a prominent black leader, was released from prison, and a new system of justice in South Africa, as Devenish predicted, would soon be formed.

B. Today in South Africa: Makwanyane and Mchunu

1. A New Constitution

The new governing constitution was established prior to South Africa's first democratic elections in April, 1994.³⁴ The constitution was formed through negotiations conducted by the Multi-Party Negotiation Process.³⁵ Technical committees advised negotiators through documented reports.³⁶ However, it is only an "interim" constitution because it has not yet been adopted by a "democratically elected" body.³⁷

The constitution must be implemented by the Constitutional Assembly - that is, the old Parliament. The Assembly, if it has any questions regarding a proposed portion of the new constitution, can submit the portion to the court for its opinion.³⁸ The Assembly differs from South Africa's old government, a parliamentary system, because now a court and constitution will also govern along with the Assembly.³⁹

Even though it has yet to be ratified, the people of South Africa are very proud of their new constitution. As stated in the inaugural address for the installation of the new court, "[The Constitution] belongs to the people and it was the people who, together, gave it shape and life."⁴⁰ It was established that the constitution "shall be the supreme law of the Republic"⁴¹ Although the constitution is still being amended, South Africa is ready to govern itself through a democratic process.

The constitution contains many provisions and a Bill of Rights that relate to the death penalty issue. Chapter Three of the constitution lays out the fundamental rights of South African citizens, along with how the courts are to interpret those rights. Section 11(2) prohibits "cruel,

33. Devenish, *supra* note 1, at 27.

34. Inaugural Address, *supra* note 32.

35. *Id.*

36. *Id.*

37. *Id.*

38. *State v. Makwanyane & Mchunu* (Const. Ct. Republic S. Afr. 1995) (Internet, <http://pc72.law.wits.ac.za/index.html>). There must be one-fifth of the members that want to send the proposal to the Court. *Id.* See also Inaugural Address, *supra* note 32.

39. *Makwanyane & Mchunu*, (Internet, <http://pc72.law.wits.ac.za/index.html>).

40. Inaugural Address, *supra* note 32.

41. REPUBLIC OF S. AFR. CONST. § 4(1).

inhuman or degrading treatment or punishment."⁴² Section 8 states that "every person shall have the right to equality before the law and equal protection of the law."⁴³ Section 9 says that "every person should have the right to life."⁴⁴ Along the same lines, section 10 states that "every person shall have the right to respect for and protection of his or her dignity."⁴⁵ Also, the constitution provides through section 33(1):

The right in this chapter may be limited by law of general application, provided that such limitation (a) shall be permissible only to the extent that it is (i) reasonable; (ii) justifiable in an open and democratic society based on freedom and equality; and (b) shall not negate the content of the essential right in question.⁴⁶

Section 33(1)(b) also provides that the limitation of certain rights "shall, in addition to being reasonable . . . also be necessary."⁴⁷ Each of the sections mentioned were important to the Constitutional Court in the interpretation of whether the death penalty should be used in South Africa.

2. A New Court

Along with the constitution and the Parliament, a new court was created. With the words of their new leader, President Nelson Mandela, who stated "[t]he last time I was in court was to hear whether or not I was going to be sentenced to death," the new judges of the Constitutional Court of South Africa were inaugurated.⁴⁸ The court consists of eleven members, nine men and two women, each serving a term of seven years.⁴⁹ The judges' installation was "another milestone on [South Africa's] difficult journey toward democracy and a culture of human rights."⁵⁰ With the creation of the court, South Africa will

42. *Id.* § 11(2).

43. *Id.* § 8.

44. *Id.* § 9.

45. *Id.* § 10.

46. *Id.* § 33(1).

47. *Id.*

48. Paul Taylor, *Mandela Swears in First Constitutional Court; By Creating a System of Checks and Balances, South Africa Joins World's Democracies*, WASH. POST, Feb. 15, 1995, at A13.

49. *Welcome to South Africa's First Constitutional Court*, available in Internet, <http://pc72.law.wits.ac.za/index.html> [hereinafter *Welcome*]. The number of judges could change if there is an amendment by the Constitutional Assembly between now and the ratification of the Constitution. *Id.* The Judges of the Constitutional Court are: The President Arthur Chaskalson, Ismail Mohamed, Sydney Kentridge standing in for Richard Goldstone, Laurence Ackerman, Tole Madala, John Didcott, Johann Kriegler, Kate O'Regan, Yvonne Mokgoro, and Puis Langa. *Id.*

50. Taylor, *supra* note 48, at A13.

now have a system of checks and balances like those of other democracies of the world.⁵¹

How does a case reach the new court? First, the case must go to the Supreme Court, which can refer the case to the Constitutional Court or decide the case itself.⁵² If the judges on the Supreme Court think that a case involves interpretation of the constitution, they send the case to the new Constitutional Court, putting their decision on hold.⁵³ Second, an appeal can be lodged with the Constitutional Court. If the Constitutional Court decides that the question posed relates to an interpretation of the constitution, it will hear the case.⁵⁴ These cases are not heard automatically.⁵⁵ The role of the Constitutional Court, as the judges were told during their inauguration, is "to act as guardian and protector of the Constitution . . . guided by wisdom and a deep respect for human rights, and, in particular, the dignity of every woman and man in our country."⁵⁶

The court is an important part of the new South Africa. It has the authority to overrule the Parliament when laws are established that the court interprets as violating the constitution.⁵⁷ The court can also "check" the disputes of the Parliament.⁵⁸ If a dispute arises that questions whether any proposed legislation is constitutional, the members of Parliament may petition the Constitutional Court.⁵⁹

How do the court proceedings work? The court is open to the public and the press, although no cameras or recorders are permitted.⁶⁰ The court decides whether the issue(s) involved in the case relate to the constitution and if they do, whether they fall within the constitution's parameters.⁶¹ The court does not hear evidence or question any witnesses, and it does not decide whether someone is guilty or deserves damages.⁶²

The court has an important role to play in the evolution of the democratic society in South Africa. The judges must view their roles as the protectors of the rights of South African citizens. Mr. Dullah

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. Inaugural Address, *supra* note 32.

57. *South Africa High Court Sworn*, MORNING EDITION, Feb. 14, 1995, transcript available in WESTLAW, AFRNEWS Database.

58. *Welcome*, *supra* note 49.

59. *Id.*

60. *Id.* The court is in session as follows: February 15th to March 31st, May 1st to May 31st, August 1st to September 1st, and November 1st to November 30th. *Id.*

61. *Id.*

62. *Id.*

Omar, Minister of Justice, reminded them, "[T]he eyes of the people of South Africa - and indeed the world - are upon you. We wish you success."⁶³ The eyes of the South African inmates and the abolitionists around the world were definitely watching when the court decided its first case - the constitutionality of the death penalty.

C. The State v. Makwanyane and Mchunu: The End of the Death Penalty for South Africa

1. The Facts

Two black males, T. Makwanyane and M. Mchunu, robbed a bank security vehicle that was delivering monthly wages to a hospital in Johannesburg. The men were part of a robbery "ring" that planned robberies. Armed with assault rifles, the men opened fire on a security vehicle and the vehicle's police escort. As a result of the shooting, two policemen and two bank security officers were killed.⁶⁴

The men accused were tried and convicted in the Witwatersrand Local Division of the Supreme Court of South Africa.⁶⁵ They were found guilty of four counts of murder, one count of attempted murder, and one count of robbery with aggravating circumstances.⁶⁶ The accused were sentenced to long terms of imprisonment for the attempted murder and robbery charges, and were sentenced to death for the murders.⁶⁷ An appeal to the Appellate Division of the Supreme Court ensued. The court dismissed the appeals on the attempted murder charge and the robbery charge.⁶⁸ The appellate division decided that for the four murder charges, the accused should receive the heaviest penalty available under the law. However, the new constitution was implemented during the review of this case, so the appellate division postponed its hearing on the murder charges until the constitutional issues could be decided by the Constitutional Court.⁶⁹

On February 15, 1995, the Constitutional Court began hearing the case. The issues presented by the defendants were: (1) "the constitutionality of section 277(1)(a) of the Criminal Procedure Act," and (2) "the implications of section 241(8) of the Constitution."⁷⁰ The court decided that, since the issue of constitutionality was not raised at the trial level because the constitution was not yet in force, counsel for

63. Inaugural Address, *supra* note 32.

64. *State v. Makwanyane & Mchunu* (Const. Ct. Republic S. Afr. 1995) (Internet, <http://pc72.law.wits.ac.za/index.html>).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Makwanyane & Mchunu* (Internet, <http://pc72.law.wits.ac.za/index.html>).

70. *See id.* for the text of § 277.

each side would appear before the court to argue their side of the case.⁷¹

2. The Decision

The court decided unanimously that the death penalty was unconstitutional. The President of the court wrote the main opinion, with each of the other nine judges writing concurring opinions. The court used many resources to reach its conclusion. It used the sections of the constitution mentioned earlier to evaluate the constitutionality of the death penalty.⁷² In analyzing the sections of the constitution, the court looked to parliamentary material to aid in the interpretation of ambiguous or obscure terms.⁷³ The court, under the guidance of section 35(1) of the constitution, also "regarded" foreign law in its attempt to understand the international aspect of the death penalty.⁷⁴ The laws and the interpretation of those laws came from many international sources including the United States,⁷⁵ Germany,⁷⁶ Canada,⁷⁷ the United Nations,⁷⁸ the European Convention on Human Rights,⁷⁹ India,⁸⁰ and the Republic of Hungary.⁸¹

In using the resources mentioned, the court first examined whether or not the death penalty violated the right to equal protection under the law. The court found that disparity was involved in the application of the death penalty because The Criminal Procedure Act, which allowed for the death penalty, was in force for the "Old Republic of South Africa."⁸² The other "states" of South Africa had either repealed the death penalty all together or developed different criteria for its imposition.⁸³

Under section 229 of the constitution, all of the laws in force in any area of the national territory, immediately before the commencement of the constitution, were to continue to be in force, subject to repeal or amendment.⁸⁴ Therefore, The Criminal Procedure Act applied only to the "Old Republic of South Africa," and none of the

71. *Id.*

72. REPUBLIC OF S. AFR. CONST. § I (B)(2).

73. *Makwanyane & Mchunu* (Internet, <http://pc72.law.wits.ac.za/index.html>).

74. *Id.*

75. *See id.*

76. *Id.*

77. *Id.*

78. *Makwanyane & Mchunu* (Internet, <http://pc72.law.wits.ac.za/index.html>).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Makwanyane & Mchunu* (Internet, <http://pc72.law.wits.ac.za/index.html>).

84. *Id.*

other "states." Now that one new national territory existed, the rules needed to be the same.

The defendants argued that the disparity in sentencing violated their rights to "equal protection under the law."⁸⁵ The court agreed. It stated that the constitution was formed to bring the country together, and under section 229 of the constitution, it can rule that section 277 caused disparity in the sentencing structure of South Africa.⁸⁶ The court then mentioned that disparity is only one of the factors it used to find that the death penalty was unconstitutional.⁸⁷

Another factor the court examined was whether or not the death penalty was arbitrarily applied. The court believed each stage of the death penalty process was an element of chance.⁸⁸ Whether or not a criminal is put to death was dependant upon an investigation by the police, the presentation of the prosecution at trial, the effectiveness or ineffectiveness of defense counsel, the personality of the trial and appellate judge regarding the death penalty, and the race and economic status of the criminal.⁸⁹ The court contends that mistakes are too easily made in such a system. The court repeatedly referred to how imprisonment was the better alternative in case a mistake was made. The President of the court stated that "unjust imprisonment is a great wrong, but if it is discovered, the prisoner can be released . . . but the killing of an innocent person is irremediable."⁹⁰

After deciding that the death penalty denied citizens equality under the law, the court developed a "two-stage" test to determine whether the law violated rights under chapter three of the constitution. The first stage of the test was to determine if there is disparity between the crime and the penalty.⁹¹ In evaluating whether or not disparity exists, a broad versus a narrow approach was given to the fundamental rights laid out in chapter three of the constitution.⁹² In deciding whether proportionality existed between the two, the court cited factors such as "the enormity and irredeemable character of the death sentence in

85. *Id.*

86. *Id.*

87. *Id.*

88. *Makwanyane & Mchunu* (Internet, <http://pc72.law.wits.ac.za/index.html>).

89. *Id.*

90. *Id.* Under the line of reasoning that the system creates mistakes, is it not true that for any punishment mistakes can be made? Although death of the criminal is irrevocable, is the death of the victim also not irrevocable? In many cases, the system itself can be monitored to stop innocent persons from being condemned. The situation in South Africa differs from other countries in that the judge decides the implication of the death penalty, and until recently, an appeal process did not exist. Without even trying to remedy the system, the Court just abolished the punishment all together. *Id.*

91. *Id.*

92. *Id.*

circumstances where neither arbitrariness nor error exist between the accused and other persons facing similar charges, race, poverty, and ignorance.”⁹³

The factors mentioned above are not to be considered alone. Stage two demands that a court consider the limitation clause in the constitution under section 33. The limitation clause provides that the rights outlined in chapter three of the constitution can be limited only if the limitation is “reasonable and justifiable in an open and democratic society based on freedom and equality.”⁹⁴ Therefore, the decision of the State to execute someone must be justifiable under section 33.

The first “right” in chapter three that the court tested was the right not to be subjected to cruel and unusual punishment under section 11(2). The State failed to prove, even under a broad interpretation, that the death penalty is proportional to the crime of murder. Under section 11(2) of the constitution, the court held that the death penalty was degrading because it stripped “the convicted person of all dignity” and treated “him or her as an object to be eliminated by the state.”⁹⁵ The death penalty is “final and irrevocable,” making it an “undoubtedly cruel punishment.” It was also held to be inhuman because it denied criminals their humanity.⁹⁶

The court, after examining section 11(2), looked at section 9, the right to life. The main opinion of the court did not spend time analyzing the death penalty and how it violated section 9 under section 33.⁹⁷ The court found that the section was straight forward—the right to life was guaranteed to every person. An individual’s right to life in South Africa is the “most fundamental of all human rights.”⁹⁸

However, under the second stage of the test, the court looked to whether or not the State had a reason to limit the right to life under section 33. The stage involved balancing: (1) the limitation of the nature of the right; (2) the importance of the right in a democratic and free society; (3) the purpose of the limitation and the importance of that limitation; and (4) the “extent of the limitation” particularly looking at whether the ends could be reached in another, comparable, less damaging means.⁹⁹

In its case to prove that the State had a reason to limit the right to life, the State argued first that the death penalty is a necessary deter-

93. *Makwanyane & Mchunu* (Internet, <http://pc72.law.wits.ac.za/index.html>).

94. *Id.*

95. *Id.*

96. *Id.*

97. Many of the concurring opinions spoke about the extent to which the death penalty violated § 9.

98. *Makwanyane & Mchunu* (Internet, <http://pc72.law.wits.ac.za/index.html>).

99. *Id.*

rent for the "preservation and protection of society . . . [w]ithout law, society cannot exist, [w]ithout law, individuals in society have no rights."¹⁰⁰ It argued that if the law is too lenient, then the people of South Africa would begin to take the law into their own hands.¹⁰¹ The Attorney General, in his argument stated that "[t]he level of violent crime in our country has reached alarming proportions."¹⁰²

The court did not agree. It stated that the reason crime was at an all time high was because of the social changes going on in the country, including the political turmoil from 1990-94.¹⁰³ In addition, poverty and homelessness were on the rise. Last, the court stated that there will always be "unstable, desperate, and pathological" people in society.¹⁰⁴ The court stated that the way to combat crime was to impose a penalty as a deterrent and although the death penalty and imprisonment are both deterrents, imprisonment was the one more favored by the

100. *Id.*

101. *Id.*

102. *Id.* Judge Mahomed, in his concurring opinion, argued against the Attorney General's statement that the death penalty is a deterrent for murderers. *Id.* (Mahomed, J., concurring). He stated that "[s]uccessful deterrence of crime also involves the need for substantial redress in the socio-economical conditions of those ravaged by poverty, debilitated by disease and malnutrition and disempowered by illiteracy." *Id.* The statement by the Judge was very broad, and, is on its face, very believable. However, the changes the Judge proposed are what every society in the world hopes for in their country. Is this a legitimate goal, especially for a country that is still feeling the currents of the apartheid?

Judge Mohomad does continue, though, by saying that, "[c]rime is a multi-faceted phenomenon. It has to be assaulted on a multi-dimensional level to facilitate effective deterrence." *Id.* Dealing with crime is very complex. It involves the creation and use of police departments, the government, lawyers, prosecutors, criminal courts and the court staff and judges, jails, legislation. Crime also invokes fear in society, and involves victims and their feelings or their loved ones feelings. This list is not all-inclusive. Does the death penalty not act as a deterrent to anyone who thinks about committing a crime?

Judge Madala, in his concurring opinion, also commented on how to combat having to use the death penalty. He called to his country by saying, "[w]e must stand tallest in these troubled times and realize that every accused person who is sent to jail is not beyond being rehabilitated-properly counselled- or, at the very least, beyond losing the will and capacity to do evil." *Id.* He cites to the post-amble of the constitution, which is mentioned by each judge, which uses the concept of *ubuntu*. *Id.* Judge Mokgoro defined the concept generally as "humaneness," and fundamentally as "personhood" and "morality." *Id.* The post-amble of the constitution calls for the need of *ubuntu* instead of the need for victimization. *Id.* Can a criminal who has murdered many times be counselled into "goodness" and stopped from committing another brutal murder?

Cases throughout the United States have proven that many criminals, once released on parole, will commit another crime. Is it possible for a person who is inherently evil to conform? Again, many societies wish this concept to be true. Yes, it is a goal to strive towards making a better society, but is it literally possible? Do citizens want to risk their lives and the lives of their loved ones on the belief that a violent criminal has been rehabilitated into an angel?

103. *Makwanyane & Mchunu* (Internet, <http://pc72.law.wits.ac.za/index.html>).

104. *Id.*

court.¹⁰⁵

The State then argued that the death penalty meets society's need for adequate retribution for heinous offenses.¹⁰⁶ Again, the court disagreed. It found that South Africans had outgrown the concept of "an eye for an eye" by stating that the "State does not need to engage in the cold and calculated killing of murderers in order to express moral outrage at their conduct."¹⁰⁷ The conclusion drawn by the court was that the State can send criminals to prison instead of to their deaths.

The State's next argument was that the death penalty was regarded as an acceptable punishment in South Africa. The court objected saying that the question before it was whether the constitution allows the sentence, not whether the public likes the sentence.¹⁰⁸ While holding that the opinion of the public was important, the court decided that if public opinion was to govern, then there would be no need for "constitutional adjudication."¹⁰⁹

After the second stage of the test was completed, the court applied a balancing test to consider the section 33(1)(b) requirement that a limitation on any right cannot negate "an essential content of the right."¹¹⁰ The court acknowledged that the meaning of the phrase "an essential content of the right" was difficult to decipher.¹¹¹ The court had to examine the phrase through subjective and objective eyes.¹¹²

Viewed subjectively, if "the essential content of the right not to be subjected to cruel, inhuman or degrading punishment . . . is found to be respect for life and dignity . . . ," then the death penalty clearly fails.¹¹³ If viewed objectively, through a "constitutional norm" that requires life and dignity to be respected, the penalty does not meet the test.¹¹⁴ The court pointed out that although the argument exists that the death penalty protects the dignity and right to life of innocent public persons, this argument includes a deterrent factor or retribution

105. *Id.*

106. *Id.*

107. *Id.* Another argument presented to the court by the Attorney General was that the death penalty should be used for prevention. Once the criminal is executed, he or she can no longer commit another murder. The court did not follow the reasoning of the Attorney General, stating that imprisonment is also a way to prevent criminals from committing crimes. *Id.* Hopefully, South Africa has enough jails to permanently house all of those convicted to life imprisonment.

108. *Makwanyane & Mchunu* (Internet, <http://pc72.law.wits.ac.za/index.html>).

109. *Id.*

110. *Id.*

111. *Id.*

112. The court did not interpret the meaning of the section, since it believes that under the "guise of the limitation" rights should not be taken away, period. *Id.*

113. *Makwanyane & Mchunu* (Internet, <http://pc72.law.wits.ac.za/index.html>).

114. *Id.*

factor with which the court did not agree.¹¹⁵ The court instead balances the deterrence, prevention, and retribution factors against the possibility of an alternative punishment and the factors that make the death penalty cruel, inhuman, and degrading.¹¹⁶ The State argued that criminals forfeit their rights under the constitution when they commit murder. The court disagreed, citing that in certain instances killing another should be condoned.¹¹⁷

In concluding their opinion, the judges decided that the death penalty was unconstitutional.¹¹⁸ They ordered the State not to execute any citizen in the future or any criminal already convicted. The criminals that were sentenced to die would have their sentences revoked and replaced by another proper sentence.¹¹⁹

III. THE UNITED STATES

A. *The History of the Death Penalty in the United States*

1. How the Death Penalty is Applied, the Methods, and the Statistics

The United States has put many criminals to death because several states allow the death penalty. In the 1920s more than 1,000 persons were executed.¹²⁰ The 1930's can be remembered as the "heyday" for the death penalty in America, with 199 persons being executed in 1935.¹²¹ However, in the 1960's, executions became rare, and by 1967, executions ceased pending the resolutions of the challenges against the penalty in front of the United States Supreme Court.¹²² Interestingly enough, most of the executions from 1900 to 1976 took place in the Southern states, leaving many wondering about the racial aspect of the death penalty.¹²³

How did the death penalty begin in America? The colonists from England brought the laws of their country to the new world. In the fifteenth century, English law recognized eight crimes that could result

115. *Id.*

116. *Id.* The factors the court cites that make the death penalty cruel, inhuman, and degrading are: (1) the destruction of life; (2) the loss of a person's dignity; (3) the arbitrary way in which the penalty is applied; and (4) the inequality of the penalty. *Id.*

117. *Id.* The Court acknowledged killing for self-defense, in wartime, and in police emergencies. *Id.*

118. *Makwanyane & Mchunu* (Internet, <http://pc72.law.wits.ac.za/index.html>).

119. *Id.*

120. AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA THE DEATH PENALTY 1, 9 (1987).

121. *Id.* For a chart on executions from 1930 to 1986, see *id.* at 207.

122. *Id.* at 9.

123. *Id.* at 10. For example, two-thirds of the offenders executed in 1930 to 1967 were black. *Id.* However, the number of whites executed from 1976 to 1986 were 67, whereas only 19 were black. *Id.* at 195.

in the death penalty: treason, murder, petty treason (a wife killing her husband), larceny, robbery, burglary, rape, and arson.¹²⁴ By 1688, fifty crimes were added to the list of those crimes that were punishable by the death penalty.¹²⁵ In the late sixteenth and early seventeenth century, the "Bloody Code" was in effect, which added sixty more crimes to the list.¹²⁶

More recently, the death penalty has been imposed only for murder with aggravating circumstances in some states. The most common circumstances when the death penalty is applied are those crimes: that are defined as heinous, atrocious, and cruel; that involve multiple victims; that are committed during the commission of a felony; that are committed for pecuniary gain; that involve a victim that was a police officer; those where the offender was a prior violent offender; or where the offender caused another to commit a murder.¹²⁷ The Supreme Court held that for aggravating circumstance to be valid, they must not apply to every person convicted of murder, but only to a "subclass of defendants."¹²⁸ Also, as the circumstances are defined by statute, they cannot be unconstitutionally vague.¹²⁹

In addition to analyzing the circumstances behind a crime, the Supreme Court also began to narrow the number of crimes to which a state could apply the death penalty. In 1977, the Supreme Court ruled that the death penalty was "grossly unproportionate" to the crime of non-homicidal rape.¹³⁰ In the same year, the Court decided that the crime of non-homicidal kidnapping should not draw the death penalty because it would be "cruel and unusual."¹³¹ In 1982, the Court ruled in *Enmund v. Florida*, that the death penalty being imposed on accomplices to a felony-murder was unlawful.¹³² The Supreme Court also decided that a person who becomes insane while awaiting execution cannot be put to death.¹³³ However, the Court then ruled that a mild-

124. THE DEATH PENALTY IN AMERICA 1, 6 (Hugo A. Bedau ed., 3d ed. 1982).

125. *Id.*

126. *Id.*

127. AMNESTY INTERNATIONAL, *supra* note 120, at 19. Some states, as of 1987, still impose the death penalty for crimes other than homicide. For example, Mississippi still imposes the death penalty for felonious child abuse (rape of a female child under the age of twelve). *Id.*

128. *Tuilaepa v. California*, __ U.S. __, 114 S.Ct. 2630 (1994); *see also* Kevin Sullivan & Gaela Gehring, *Project: Twenty-Fourth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1993-1994*, 83 GEO. L.J. 1281, 1288 (1995).

129. *Id.* at 1288.

130. *Coker v. Georgia*, 433 U.S. 585 (1977). The decision was a plurality opinion by the Court. *See also* Sullivan & Gehring, *supra* note 128, at 1282.

131. *Eberhart v. Georgia*, 433 U.S. 917, 917 (1977). The decision was written in a summary opinion. *See also* Sullivan & Gehring, *supra* note 128, at 1282.

132. 458 U.S. 782 (1982). The decision was five votes to four.

133. *Ford v. Wainwright*, 477 U.S. 399 (1986). *See also* Sullivan & Gehring, *supra* note

ly retarded person did not lack the capacity to understand the imposition of the death penalty and could be sentenced to death.¹³⁴

Even though the American public has agreed to narrow the use of the death penalty to certain crimes with certain circumstances, they have always been fascinated with the death penalty. Executions were viewed by the public in America "well into the nineteenth century."¹³⁵ New York was the first to outlaw the public from viewing its executions in 1835.¹³⁶ A century passed before the rest of the states followed suit. The last public execution in the United States was on May 21, 1937.¹³⁷

Most executions today are conducted with few witnesses. The wardens of the prison systems do not allow pictures to be taken or cameras to be in the execution chambers while the prisoner is being executed. The decision that cameras were not allowed was first challenged in *Garrett v. Estelle* in 1977.¹³⁸ In that case, a Dallas newsman argued that the city's public television had a right to cover the execution since the print media were allowed to cover the executions. The Fifth Circuit Court of Appeals reversed a lower court decision by ruling that the First and Fourteenth Amendment did not require Texas to permit the admission of television cameras.¹³⁹

Along with the publicity surrounding the death penalty, the method of execution was also changed. In the eighteenth century, "American criminals were occasionally pressed to death, drawn and quartered, and burned at the stake."¹⁴⁰ The states changed the way they put criminals to death beginning with New York, which was the first to take down its gallows and construct an electric chair in 1888.¹⁴¹ Next, in 1921, Nevada enacted a "Humane Death Bill" to provide that while asleep in his or her cell, a criminal would be subjected to a dose of lethal gas.¹⁴² Gas chambers were soon installed in six other states. In 1977, Utah used firing squads to execute prisoners.¹⁴³ Oklahoma was the first state to use lethal injection, in May of 1977.¹⁴⁴ Today most of

128, at 1283.

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

135. THE DEATH PENALTY IN AMERICA, *supra* note 124, at 12.

136. *Id.* at 13.

137. *Id.* Five hundred persons watched Mr. Jackson die. Admission was charged for those who wanted to stand in a forty-foot square around the gallows. *Id.* Many of the spectators took home a piece of the rope for a "souvenir." *Id.*

138. 556 F.2d 1274 (5th Cir. 1977).

139. THE DEATH PENALTY IN AMERICA, *supra* note 124, at 14.

140. *Id.*

141. *Id.* at 15.

142. *Id.* at 16.

143. THE DEATH PENALTY IN AMERICA, *supra* 124, at 17.

144. *Id.*

the states that still use the death penalty as a method of execution use lethal injection, the electric chair, or the gas chamber.¹⁴⁵ However, as of October 1, 1986, four states still used hanging,¹⁴⁶ and thirty-seven states still impose the death penalty.¹⁴⁷

2. The Process of Receiving the Death Penalty

The United States has a very complex system of checks and balances regarding the imposition of the death penalty. Although a meticulous system of ensuring that a person should be put to death is needed, it is very costly. Most states give the criminal the right of automatic appeal to the highest court in the state after imposing the death penalty. In the automatic appeal, the defendant may contest the conviction or sentence on legal or constitutional grounds that may have arisen during the trial.¹⁴⁸ However, the appeal is limited to the trial record, and what the court actually reviews varies by state.

If the state supreme court upholds the sentence, then the defendant can petition the U.S. Supreme Court. The defendant submits what is known as a writ of certiorari, which the Supreme Court either hears or denies. The only cases the court agrees to hear are those that involve a substantial constitutional issue.¹⁴⁹

After a state court has upheld a criminal's sentence, the defendant may also lodge a writ of habeas corpus to the state and federal courts. A habeas corpus review differs from the automatic appeal because the court can look beyond the trial record to find any new evidence or issues, including the issue of ineffective assistance of counsel.¹⁵⁰ State appeals can be taken as far as the state supreme court. If the sentence is still upheld, a petition can be sent to the U.S. Supreme Court.

Once a defendant has exhausted the state court reviews, he or she can file a federal writ of habeas corpus. The federal claims differ from the state claims because they must be limited to federal violations of the United States Constitution. The petitions begin in the district courts, go through the courts of appeals, and then reach the U.S. Supreme Court.¹⁵¹

145. AMNESTY INTERNATIONAL, *supra* note 120, at 192-93.

146. *Id.* The states are Delaware, Montana, Washington, and New Hampshire.

147. *Id.* at 192-93.

148. *Id.* at 24.

149. *Id.*

150. AMNESTY INTERNATIONAL, *supra* note 120, at 24.

151. *Id.* at 26.

B. *The Case Law*

1. The Downfall of the Death Penalty in the United States¹⁵²

The death penalty came to a halt when the Supreme Court decided *Furman v. Georgia* in 1972.¹⁵³ The longest written opinion in the history of the Supreme Court narrowly held that the death penalty laws were unconstitutional in many states because they violated the Eighth Amendment of the Constitution. The Eighth Amendment prohibits "cruel and unusual punishment" and is applied to the states through the Fourteenth Amendment.¹⁵⁴ The Court ruled five to four in favor of unconstitutionality. Two justices, Brennan and Marshall, found that the death penalty was per se unconstitutional, while the others based their opinions on the proposition that the sentence was randomly given, creating disparity.

In the *Furman* decision, Texas and Georgia's statutes were examined.¹⁵⁵ The Court held that the statutes were unconstitutional because they were arbitrary and capricious, lacking the proper standards to guide a sentence.¹⁵⁶ Justice Stewart of the majority stated that the prisoners sentenced "were among a capriciously selected handful."¹⁵⁷ Justice White of the majority also found "no meaningful basis for distinguishing" the prisoners who were to die from those who were not.¹⁵⁸ When the *Furman* decision was finally handed down, it stopped the deaths of over 600 prisoners then on states' death rows.¹⁵⁹

The Court looked to the Eighth Amendment to decide that the

152. Since the death penalty has been a controversial topic in the United States for many years, and many issues have arisen from the numerous decisions of the Supreme Court, this paper will consider the cases dealing directly with the punishment itself.

153. 408 U.S. 238 (1972).

154. U.S. CONST. amends. VIII & XIV; see AMNESTY INTERNATIONAL, *supra* note 120, at 214.

155. See Stephen R. Mcallister, *The Problem of Interpreting a Constitutional System of Capital Punishment*, 43 K. L. REV. 1039 (1995). The reason that the Texas and Georgia statutes were examined was because the cases that went up to the Supreme Court were from those states. The Georgia statute provided that the punishment for murder would be death, but could be for life instead if "(1) the jury returned a 'recommutation of mercy' or (2) the conviction rested 'solely on circumstantial testimony'." *Id.* at 1049. Under the first situation, the trial judge was required to sentence the accused to life imprisonment over death. In the second situation, the judge could discretionally choose life or death. *Id.*

The Texas statute in question provided that the punishment for murder was death or life imprisonment or for any term of imprisonment not less than two years. *Id.* The jury was to make the call with seemingly no guidance.

156. *Id.* at 1040. See also AMNESTY INTERNATIONAL, *supra* note 120, at 214.

157. *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring).

158. *Id.* (White, J., concurring). See also Mcallister, *supra* note 155, at 1080.

159. AMNESTY INTERNATIONAL, *supra* note 120, at 14.

death penalty was unconstitutional, but the grounds on which they held it unconstitutional were procedural. The Court did not analyze the substantive meaning that the punishment itself was "cruel and unusual." Therefore, to make the death penalty constitutional, states needed only to make the procedure for imposing the death penalty constitutional.

2. The Aftermath

After the *Furman* decision was handed down, many state legislatures quickly rewrote their death penalty laws. The "veritable stampede of state reenactment of the death penalty" on the coattails of *Furman* proved with "unmistakable clarity that the issue is nothing less than the right of the people to govern themselves."¹⁶⁰ In fact, thirty-five states enacted new statutes after the decision. Many states enacted statutes that took the discretion out of the juror's hands by making the death penalty mandatory for certain crimes.

C. *The Reinstatement of the Death Penalty*

The Supreme Court was faced with new cases after the numerous statutes that were created in order to abide by the *Furman* decision.¹⁶¹ In *Gregg v. Georgia*,¹⁶² and its companion cases of *Proffitt v. Florida*¹⁶³ and *Jurek v. Texas*,¹⁶⁴ the Supreme Court held seven to two that the statutes used to advise and guide jurors made sentencing prisoners with the death penalty constitutional once again.¹⁶⁵ The statutes allowed the jurors to consider aggravating and mitigating circumstances. Also, the statutes provided that a death penalty sentence will be considered separately after the determination of guilt or innocence.¹⁶⁶ The statutes further provided for an automatic appeal to the highest state court. The steps enumerated in these statutes are known as "guided discretion."¹⁶⁷

The Court also had to consider the statutes that made the death penalty mandatory. In *Woodson v. North Carolina*¹⁶⁸ and *Roberts v.*

160. *Furman*, 408 U.S. 238. See also RAOUL BERGER, DEATH PENALTIES, THE SUPREME COURT'S OBSTACLE COURSE 1, 8 (1982).

161. *Furman*, 408 U.S. 238.

162. 428 U.S. 153 (1976).

163. 428 U.S. 242 (1976).

164. 428 U.S. 262 (1976).

165. See Mcallister, *supra* note 155, at 1040; AMNESTY INTERNATIONAL, *supra* note 120, at 15, 215.

166. AMNESTY INTERNATIONAL, *supra* note 120, at 15.

167. See Mcallister, *supra* note 155, at 1040.

168. 428 U.S. 280 (1976).

Louisiana,¹⁶⁹ the Court invalidated mandatory sentencing. This created the concept of "individualized sentencing."¹⁷⁰ The Court, relying on the Eighth Amendment held that: (1) the mandatory sentence was inconsistent with contemporary ideas regarding punishment and were considered "cruel and unusual"; (2) the sentence would only "mask the problem" of guided discretion since jurors could beat the system by finding the accused not guilty; and (3) aggravating and mitigating circumstances must be considered in each case.¹⁷¹

The decisions of the Court are conflicting. If the Court focuses on guided discretion, "it upholds particular sentencing procedures and the State prevails."¹⁷² In contrast, when the Court considers individualized sentencing, the "capital defendants generally prevail."¹⁷³ In a recent case, *Graham v. Collins*,¹⁷⁴ Justice Thomas tried to untangle the Court's new death penalty web. He stated that:

We need only conclude that it is consistent with the Eighth Amendment for the States to channel the sentence's consideration of a defendant's arguably mitigating evidence so as to limit the relevance of that evidence in any reasonable manner, so long as the State does not deny the defendant a full and fair opportunity to appraise the sentence of all constitutionally relevant circumstances.¹⁷⁵

Justice Thomas emphasized that the federal courts could use the reasonableness standard in reviewing what the state chose as guides to a sentence.¹⁷⁶

In another recent decision, *Callins v. Collins*,¹⁷⁷ Justice Blackmun acknowledged the "tension" between the death penalty decisions.¹⁷⁸ He stated that "[t]he problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants."¹⁷⁹ Justice Thomas stated that "a step towards consistency is a step away from fairness."¹⁸⁰ He concluded by stating that the day would come when the Supreme Court would abandon the death penalty altogether.¹⁸¹

169. 428 U.S. 325 (1976).

170. See Mcallister, *supra* note 155, at 1040.

171. *Id.*

172. *Id.* at 1064.

173. *Id.*

174. 506 U.S. 461 (1993).

175. *Id.* at 478 (Thomas, J., concurring).

176. See Mcallister, *supra* note 155, at 1075; see also *Graham*, 506 U.S. at 914-15.

177. ___ U.S. ___, 114 S.Ct. 1127 (1994).

178. *Id.* at 1128 (Blackmun, J., dissenting from denial of stay).

179. *Id.* at 1130 (Blackmun, J., dissenting from denial of stay).

180. *Id.* at 1132.

181. *Id.* at 1138.

IV. A COMPARISON OF THE DEATH PENALTY IN THE UNITED STATES AND SOUTH AFRICA AND THE PATHS OF THE PENALTY IN BOTH COUNTRIES

In deciding the death penalty issue, the Constitutional Court of South Africa and the U.S. Supreme Court compared some of the same elements, but some elements differed. First, the Courts both examined the importance of disparity through the arbitrary and capricious application of the death penalty, but they applied the element differently. The South African courts were required to examine mitigating circumstances, which contained personal and subjective factors.¹⁸² The United States courts, through recent decisions by the Supreme Court, must consider aggravating and mitigating circumstances when applying the death penalty.¹⁸³

The Constitutional Court noted that "little difference" existed between the guided discretion concept of the United States and their appellate division's imposition of sentences in South Africa.¹⁸⁴ The South African court stated that it believed educated and experienced judges would be able to apply the death penalty more consistently than jurors who were given only statutory guidance.¹⁸⁵ Then, the Constitutional Court took the argument further than the U.S. Supreme Court by looking at the actual "element of chance" that existed in the implementation of the death penalty. Amazingly, the Court decided that the death penalty is arbitrarily used through an approach mentioned by a U.S. Supreme Court Justice: "[a]ny law nondiscriminatory on its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment."¹⁸⁶ Through the words of U.S. Justices, the South African Constitutional Court held the death penalty unconstitutional in South Africa.

Although the Constitutions of both countries are similar in many ways, they also differ. The South African Constitution contains the "limitation clause," which allows the Constitutional Court to decide after a fundamental had been identified, whether the decision of the State to impede on a right was justified.

The U.S. Constitution does not have such a clause. As a result, the U.S. Supreme Court Justices were forced to decide limits of constitutional rights by narrowly interpreting the rights.¹⁸⁷ The South Afri-

182. *State v. Makwanyane & Mchunu* (Const. Ct. Republic S. Afr. 1995) (Internet, <http://pc72.law.wits.ac.za/index.html>).

183. See discussion *supra* section III(B).

184. *Makwanyane & Mchunu* (Internet, <http://pc72.law.wits.ac.za/index.html>).

185. *Id.*

186. *Id.* (citing *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring)).

187. *Id.*

can court even notes that the U.S. Supreme Court is struggling to "eliminate the dangers of arbitrariness" by having to employ the Fifth and Fourteenth Amendments provisions of due process.¹⁸⁸ The South African court acknowledged that the constitution does not require consideration of the arbitrary imposition of the death penalty, which the Justices of the U.S. Supreme Court had to consider. The South African justices needed only examine the right to life itself.¹⁸⁹

The Courts did agree on some of the same elements in their decisions. For instance, both Courts agree that public opinion cannot be allowed to "divert" the justices from acting as "independent arbiters" of their Constitutions.¹⁹⁰ The South African court even cites the U.S. Supreme Court in *Furman*, which stated that "[t]he assessment of popular opinion is essentially a legislative, and not a judicial function."¹⁹¹

Also, both Courts acknowledged, through their respective constitutions that the right to dignity exists. However, the South African counterpart to the United States Eighth Amendment is different. Section 11(2) prohibits "cruel, inhuman or degrading treatment or punishment."¹⁹² The Eighth Amendment prohibits "cruel and unusual punishment."¹⁹³ The United States Supreme Court read the concept of dignity into the Eighth Amendment in *Gregg v. Georgia*.¹⁹⁴ Justice Brennan stated that "the punishment of death treats members of the human race as nonhumans, as objects to be toyed with and discarded."¹⁹⁵ The South African Constitution implicitly states that the right to dignity will be a right every citizen of South Africa will hold.

The difference in the background of the Constitutions is noted by the South African Supreme Court, and is important to discuss. The South African Constitution was written after the country experienced events that the United States experienced only after its Constitution was written. The United States Constitution was written to be used as a legal instrument to accommodate the needs of the citizens in the future.¹⁹⁶ The South African Constitution, on the other hand, was written only to retain the defenses to protect the country from the racist

188. *Id.* (Akerman, J., concurring).

189. See *Makwanyane & Mchunu* (Internet, <http://pc72.law.wits.ac.za/index.html>)

190. *Id.*

191. *Furman v. Georgia*, 408 U.S. 238, 443 (1972) (Powell, J., dissenting).

192. REPUBLIC OF S. AFRICA CONST. § 11(2).

193. U.S. CONST. amend. VIII.

194. 428 U.S. 153 (1976).

195. *Gregg v. Georgia*, 428 U.S. 153, 230 (1976) (Brennan, J., dissenting).

196. See *State v. Makwanyane & Mchunu* (Const. Ct. Republic S. Afr. 1995) (Internet, <http://pc72.law.wits.ac.za/index.html>) (Mohamed, J., concurring).

and troubled background from which it has suffered.¹⁹⁷

Seeing that similarities and differences exist, what is the path of the death penalty for both countries? The United States Supreme Court could look toward the opinion of the Constitutional Court in abolishing the death penalty. The Supreme Court has already tried to analyze the death penalty by narrowing the crimes to which it can be applied, the circumstances surrounding the crimes, and the manner in which the jury is instructed. However, problems still exist.

The original problem lies in how the Court has decided to analyze the application of the penalty. Instead of deciding whether it is cruel or unusual, the Court has tried to fix the way the penalty is procedurally applied. The next step for the Court could be to examine the death penalty under the Eighth Amendment of the Constitution deciding if it is cruel and unusual, just like in South Africa.

The United States could move toward the South African decision of abolition, while South Africa could be headed towards the United States' decision of narrowly applying the death penalty. South Africa went from having the death penalty that was applied in enormous numbers to the extreme of abolishing it altogether. If the Assembly reinstates the death penalty, the court might have to rule on the issue again. In that case, members of the Assembly may decide to follow some of the U.S. Supreme Court decisions, allowing for the death penalty, but under more stringent circumstances.

In conclusion, both countries tried to examine a penalty that was applied throughout much of each country's history, and make a decision about its future. The death penalty issue in both countries appears to be circular. The next step for the United States could be to end the confusion and turmoil by, as Justice Blackmun predicted, abolishing it altogether. If that is so, the United States could be looking to the opinion of the Constitutional Court of South Africa for guidance. On the other side, the South African Court has not heard the last of the death penalty. Deputy President De Klerk has already vowed to contest the decision ending the death penalty and to move for a constitutional amendment. Where will South Africa's debate regarding the death penalty lead the country? Clearly the paths of the death penalty in both countries show us that it is entirely possible for sentiment regarding the death penalty to change. Anything is possible.

Dana L. Bogie

197. *Id.*