
THE PROGRESS OF OUR MATURING SOCIETY: AN ANALYSIS OF STATE-SANCTIONED VIOLENCE

I. INTRODUCTION

Pleas for the United States to abandon its practice of capital punishment are made annually by academics, practitioners, and compassionate citizens. Yet, the majority of states continue to allow the use of the death penalty in spite of international criticism.¹ In fact, the United States stands alone amongst Western, “first world” nations, as the sole proprietor of state-sanctioned death sentences.² In 1994 Kansas re-

1. Professor William Schabas' article contemplating and criticizing the current use of the death penalty illustrates the contemptuous view through which human rights organizations view the United States. See William A. Schabas, *International Law and Abolition of the Death Penalty*, 55 WASH. & LEE L. REV. 797 (1998). The United States Supreme Court has, in fact, rejected the international criticism as a premise for changing its constitutional analysis of capital punishment. See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) (declaring that international repudiation of the death penalty for juvenile offenders has no bearing on the Court's determination of whether the death penalty meets American standards of decency).

2. Cheryl Aviva Amitay, Note, *Justice or "Just Us": The Anomalous Retention of the Death Penalty in the United States*, 7 MD. J. CONTEMP. LEGAL ISSUES 543 (1996) (arguing that the persistent use of the death penalty in the United States stems from the country's traditional adherence to valuing racism, violence, and retribution); Ariane M. Schreiber, Note, *States That Kill: Discretion and the Death Penalty—A Worldwide Perspective*, 29 CORNELL INT'L L.J. 263 (1996) (comparing the use of discretion in capital punishment cases decided in the United States, India, and the Philippines, and then assessing the possibility of future abolition based on those comparisons) (citing AMNESTY INTERNATIONAL, THE DEATH PENALTY: LIST OF ABOLITIONIST AND RETENTIONIST COUNTRIES 5 (Dec. 1995) (listing the following countries and territories as still retaining use of the death penalty in 1995: Afghanistan, Algeria, Antigua and Barbuda, Armenia, Bahamas, Bangladesh, Barbados, Belarus, Belize, Benin, Bosnia-Herzegovina, Botswana, Bulgaria, Burkina Faso, Cameroon, Chad, Chile, People's Republic of China, Cuba, Dominica, Egypt, Equatorial Guinea, Eritrea, Estonia, Ethiopia, Gabon, Georgia, Ghana, Grenada, Guatemala, Guinea, Guyana, India, Indonesia, Iran, Iraq, Jamaica, Japan, Jordan, Kazakhstan, Kenya, North Korea, South Korea, Kuwait, Kyrgyzstan, Laos, Latvia, Lebanon, Lesotho, Liberia, Libya, Lithuania, Malawi, Malaysia, Mauritania, Mongolia, Morocco, Myanmar, Nigeria, Oman, Pakistan, Poland, Qatar, Russia, Saint Christopher and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Saudi Arabia, Sierra Leone, Singapore, Somalia, Sudan, Swaziland, Syria, Tadjikistan, Taiwan, Tanzania, Thailand, Trinidad and Tabago, Tunisia, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United States of America, Uzbekistan, Vietnam, Yemen, Yugoslavia, Zaire, Zambia, and Zimbabwe). The United Nations Security Council prohibited the war crimes tribunals for the Former Yugoslavia and Rwanda from using the death penalty as a form of punishment. See Schabas, *supra* note 1, at 798 (citing Res. 827, U.N. SCOR, *Statute of the International Tribunal for the Former Yugoslavia*, Annex, art. 24, § 1, U.N. Doc. S/RES/827 (1993); U.N. SCOR, *Statute of the International Tribunal for Rwanda*, Annex, art. 23 § 1, U.N. Doc. S/RES/955 (1994); U.N., *Rome Statute of the International Criminal Court*, 17 July 1998, art. 77, U.N. Doc. A/CONF.183/9 (1998), available at <<http://www.un.org/icc>>). In fact, as many as ten European countries have formally objected to the United States Senate's reservation to the International Covenant on Civil and Political Rights forbidding death sentences for offenders who committed crimes before turning eighteen. See Ursula Bentele, *Back to an International Perspective on the Death Penalty as a Cruel Punishment: The Example of South Africa*, 73 TUL. L. REV. 251, 258 n.35 (1998) (citing the Right Honourable The Lord Scarman & Philip Sapsford, QC, *The Death Penalty: Can Delay Render Execution Unlawful?*, 25 ANGLO-AM. L. REV. 265, 282 (1996)).

joined the list of death penalty states when the legislature passed a new capital murder statute.³

With Kansas added to the list, thirty-eight states have a death penalty law currently in force.⁴ Additionally, capital punishment is a permissible punishment for certain federal offenses.⁵ Analytically, the reason for endorsing this practice is clear: the United States has held fast to a long tradition of state institutionalized violence.⁶ Given this history, it

3. See KAN. STAT. ANN. § 21-3439 (1996). In Kansas, capital murder is defined as: an intentional and premeditated killing committed under one or more of the following circumstances: while committing the crime of kidnapping; killing based on a contractual agreement; killing another person while incarcerated in a state correctional facility, jail or while in the custody of a state correctional facility officer; killing a person after raping or sodomizing that person or killing that person while in the commission of the aggravating crime; killing a law enforcement officer; killing more than one person as a part of the same criminal episode or plan; killing a child under fourteen while kidnapping the child with an intent to sexually assault the child or with the intent to force the child to commit or submit to a sexual offense.

See *id.* This statute will be challenged in front of the Kansas Supreme Court for the first time in the near future. See Carl Manning, *State's Execution Chamber to be Completed by November*, THE TOPEKA CAPITAL J., July 4, 1999, available in 1999 WL 20055083. Gary Kleypas and Michael Marsh were convicted in separate cases by Kansas juries of capital murder in 1998. See *id.* Both have been on death row awaiting the commencement of the appeals process. See *id.*

For an overview of the death penalty law in Kansas, see Marianne Deagle, Note, *Kansas' New Death Penalty Law: Will It be Administered Fairly and Consistently?*, 34 WASHBURN L.J. 539 (1995) (detailing Kansas' death penalty history and exploring the perennial question of whether death sentences are carried out in a fair and consistent manner).

4. See Roger Hood, *The Death Penalty: The USA in World Perspective*, 6 J. TRANSNAT'L L. & POL'Y 517, 520 (1997) (listing those states as: Alabama (ALA. CODE § 13-5-45 (1994)); Arizona (ARIZ. REV. STAT. § 13-703 (Supp. 1999)); Arkansas (ARK. CODE ANN. § 5-4-602 (Michie 1997)); California (CAL. PENAL CODE § 190.3 (1999)); Colorado (COLO. REV. STAT. § 16-11-103 (Supp. 1999)); Connecticut (CONN. GEN. STAT. § 53a-46a Supp. 1999); Delaware (DEL. CODE ANN. tit. ii, § 4209 (1995)); Florida (FLA. STAT. ANN. § 921.141 (Supp. 2000)); Georgia (GA. CODE ANN. § 17-10-2 (1997)); Idaho (IDAHO CODE § 19-2515 (Supp. 1999)); Illinois (720 ILL. COMP. STAT. 5/9-1 (Supp. 1999)); Indiana (IND. CODE ANN. § 35-50-2-9 (Supp. 1999)); Kansas (KAN. STAT. ANN. § 21-4624 (1996)); Kentucky (KY. REV. STAT. ANN. § 532.025 (1999)); Louisiana (LA. REV. STAT. ANN. § 905 (West 1992)); Maryland (MD. CODE ANN. § 413 (Supp. 1999)); Mississippi (MISS. CODE ANN. § 99-19-101 (1994)); Missouri (MO. REV. STAT. § 565.0304 (1999)); Montana (MONT. CODE ANN. § 46-18-302 (1999)); Nebraska (NEB. REV. STAT. § 29-2522 (1995)); Nevada (NEV. REV. STAT. § 175.552 (1999)); New Hampshire (N.H. REV. STAT. ANN. § 630.5 (1996)); New Jersey (N.J. STAT. ANN. § 2C:11-3c (Supp. 1999)); New Mexico (N.M. STAT. ANN. § 31-20A-1 (1978)); New York (N.Y. CRIM. PROC. LAW § 400.27 (McKinney Supp. 1996)); North Carolina (N.C. GEN. STAT. § 15A-2000 (1999)); Ohio (OHIO REV. CODE ANN. § 2929.03 (West 1997)); Oklahoma (OKLA. STAT. ANN. § 701.10 (Supp. 2000)); Oregon (OR. REV. STAT. § 163.150 (Supp. 1998)); Pennsylvania (42 PA. CONS. STAT. ANN. § 9711 (Supp. 1999)); South Carolina (S.C. CODE ANN. § 16-3-20 (Law Co-op 1999)); South Dakota (S.D. CODIFIED LAWS § 23A-27A (1998)); Tennessee (TENN. CODE ANN. § 39-13-204 (Supp. 1997)); Texas (TEX. PENAL CODE ANN. § 12.31 (West 1994)); Utah (UTAH CODE ANN. § 76-3-207 (1999)); Virginia (VA. CODE ANN. § 19.2-264.4 (Supp. 1999)); Washington (WASH. REV. CODE § 10.95.060 (1990)) and Wyoming (WYO. STAT. ANN. § 6-2-101 (1999)). Likewise, Michigan and Rhode Island have recently, but unsuccessfully, attempted at trying to reinstate the death penalty. See ROGER HOOD, *THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE* 7-8 (2d ed. 1996). In addition, the death penalty has also been legislated into federal law as a discretionary penalty for over fifty crimes, including some crimes that do not involve the commission of a homicide. See *id.* at 520 (citing the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 60001-60022, 108 Stat. 1796 (codified at 18 U.S.C. §§ 3591-3598 (1995))).

5. See Pub. L. No. 103-322, §§ 60001-60022, 108 Stat. 1796 (codified at 18 U.S.C. §§ 3591-3598 (1995)); see also Hood, *supra* note 4, at 520 (comparing the United States' use of capital punishment to other countries' and advocating the complete abolition of capital punishment).

6. Acclaimed human rights scholar Professor William Schabas describes contemporary rejection of the death penalty as "breaking with a past characterized by terror, injustice and repression." Schabas, *supra* note 1, at 799. The legal mechanisms of segregation and slavery are but a part of the United States' institutionalized vengeance. See AMNESTY INTERNATIONAL, UNITED STATES OF

is understandable why an educated and wealthy nation adhering to such antiquated practices is abhorred by the international community.⁷ Other nations, including certain members of the European Union, which formerly enforced death penalty legislation, have rejected capital punishment because it violates the most fundamental of human rights—namely the right to life.⁸ South Africa provides the best example of this international renouncement of the death penalty. In 1995, the South African Constitutional Court abolished the death penalty as an acceptable means of punishment in *State v. Makwanyane and Mchunu*.⁹

To grasp the implications emanating from the South African Constitutional Court's decision, an educated understanding of the theoretical basis underlying capital punishment is paramount. This is essential to understand why the death penalty has been an accepted practice in

AMERICA - KILLING WITH PREJUDICE: RACE AND THE DEATH PENALTY IN THE USA 2 (May 1999) (AI Index AMR 51/52/99) <<http://www.amnesty.org/ailib/aipub/1999/AMR/25105299.htm>> [hereinafter AMNESTY INTERNATIONAL]. Amnesty International's report depicts the indiscriminate use of the death penalty against people of color as an outgrowth of slavery and ethnic divisions. *See id.* The use of the death penalty in slave-holding states was dependent upon the color of the offender's skin, not upon the gravity of the crime. *See id.* For instance, crimes such as rape were punishable by death in Virginia, yet the only death sentences carried out were on black men. *See id.* The evidence supporting the use of the death penalty as vengeance can be found in the Virginia Supreme Court's rejection of an appeal of a death sentence against a black man that noted the racial prejudice behind the death sentence. *See id.* (citing ERIC W. RISE, *THE MARTINVILLE SEVEN: RACE, RAPE AND CAPITAL PUNISHMENT*). Specifically, the appeal argued that the death penalty was only sought in cases of rape perpetrated by black men. *See id.* The court denied the appeal stating that it did not find a "scintilla of evidence" that racial prejudice influenced the sentence. *Id.* Yet, interestingly, the Virginia governor granted a white man who was convicted of the same crime commutation from his death sentence and instead sentenced him to life in prison. *See id.*

7. The Universal Declaration of Human Rights, adopted on December 10, 1948, declared that all human beings have "the right to life, liberty and the security of person," and that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Schabas, *supra* note 1, at 798 (citing *Universal Declaration of Human Rights*, G.A. Res. 217 (A) (III), U.N. GAOR, 3d Sess., art. 3, U.N. Doc. A/810 (1948)). Upon the fiftieth anniversary of that declaration, the United Nations Secretary General reported that 102 countries had abolished the death penalty. *See id.* at 798 (citing *Question of the Death Penalty: Report of the Secretary-General* submitted pursuant to Commission resolution 1997/12, U.N. ESCOR Hum. Rts. Comm'n, 54th Sess., 82d mtg. at 10, U.N. Doc. E/CN.4/1998/82 (1998)). Professor Schabas observes that fifty-one countries have adhered to international standards abolishing the death penalty. *See id.* at 798 n.7 (citing Jean-Bernard Marie, *International Instruments Relating to Human Rights*, 18 HUM. RTS. L.J. 79, 84-86 (1997)). Those countries are Andorra, Australia, Austria, Bolivia, Brazil, Chile, Colombia, Costa Rica, Croatia, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Finland, France, Germany, Greece, Haiti, Honduras, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Macedonia, Malta, Mexico, Moldova, Mozambique, San Marino, Seychelles, Slovakia, Slovenia, Spain, Surinam, Sweden, Switzerland, Uruguay, and Venezuela. *See id.* Professor Schabas also notes that several countries not included in the list of ratifying countries have announced their intention to follow international trends rejecting the death penalty either in writing or by public declaration. *See id.* at 798 n.8. Those countries are Albania, Belgium, Bosnia and Herzegovina, Cyprus, Estonia, Lithuania, Russia, and the Ukraine. *See id.* Professor Schabas also notes that abolition of such punishment has been achieved when judges interpret the constitutional language as to preserve the right to life and to prohibit "cruel, inhuman, and degrading treatment or punishment." *Id.* at 799 n.10 (citing *State v. Makwanyane and Mchunu*, 1995 (6) BCLR 665 (CC), available in 1995 SACLX LEXIS).

8. *See* Schabas, *supra* note 1, at 798. As of the summer of 1998, Albania, Belgium, Bosnia and Herzegovina, Cyprus, Estonia, Lithuania, Russia and the Ukraine have either signed an instrument declaring their intention to abolish the death penalty or have publicly declared that goal. *See id.* at 797 n.9.

9. 1995 (6) BCLR 665 (CC), available in 1995 SACLX LEXIS.

the United States and South Africa, and to illustrate how South Africa's abolition of the death penalty provides a platform that the United States can and should adopt.

This Note seeks to illustrate why the Kansas Supreme Court and other state supreme courts should find the death penalty unconstitutional using the rationale set forth in *State v. Makwanyane and Mchunu* as a critical guide. Specifically, this Note encourages the Kansas Supreme Court to acknowledge death penalty defendants' inherent human rights, particularly their right to life, as a legal basis from which to reject the death penalty in Kansas.¹⁰

Part II of this Note analyzes the death penalty as a form of violence.¹¹ This analysis will demonstrate that the issue of killing human beings is not a legal question, but is instead a philosophical matter encompassing human rights that have been incorporated into the auspices of international legal interpretation. Part III depicts the historical use of state-sanctioned violence, quietly called the death penalty, against traditionally oppressed groups in South Africa and the United States. Building on this comparison, Part IV analyzes the South African Constitutional Court's abolition of the death penalty and state-sanctioned violence. Through this lens, this Note will demonstrate why the United States and Kansas, in particular, must move beyond the historical support for the death penalty and instead join the international community in recognizing the value of human life. Additionally, Part V focuses specifically on the South African Constitutional Court's interpretation of human dignity and the right to life as components that most prominently illustrate the international value of rejecting institutionalized violence as acceptable to a contemporary society. This Note ultimately concludes that violence must be rejected as a societal value in order for Kansas and the United States to advance in stride with their international neighbors and colleagues.

II. CAPITAL PUNISHMENT AS A FORM OF VIOLENCE

Capital punishment is indisputably a form of violence in that carrying out a death sentence entails the premeditated killing of another human being.¹² The most troubling aspects of the death penalty, how-

10. See *id.* As Mumia Abu-Jamal, a Philadelphia radio broadcaster currently incarcerated on a death sentence, observed:

South Africa continues to fascinate us in the U.S., for it is, in a sense, a dark mirror though which we see ourselves, as both lands are driven by racial conflict. . . . Seen from this light, South Africa, once so roundly condemned by the world community, walks in step with the world majority, who have damned the practice of capital punishment.

Mumia Abu-Jamal, *Death Penalty Abolished in South Africa: A Commentary by Mumia Abu-Jamal* (visited Apr. 22, 1999) <<http://www.pacifica.org/democracy/mumia/mumia2.html>>.

11. As Amnesty International has stated in its on-going protest to capital punishment: "[E]very execution deepens the culture of violence." AMNESTY INTERNATIONAL, *supra* note 6, at 2.

12. See Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and*

ever, are the analytical and political perspectives that are held by the communities that unquestionably accept death as a proper form of punishment.¹³ Such a passive acceptance of the death penalty often involves the unconscious separation of the realities that death extinguishes human life and that political agendas can ascribe to using death as a form of punishment.¹⁴ To achieve this unquestioning acceptance of state-sanctioned act, a single definition must be widely distributed to and accepted by the populace as a whole.¹⁵ In the context of capital punishment, the media's role in disseminating political views is one illustration of how state-sanctioned acts can result in a blind acceptance by the public.

The media's tales of an epidemic of crime have contributed to society's blind acceptance of the death penalty as an easy answer to rid society of violent or disturbed individuals.¹⁶ By appealing to the public's fear of crime, the media covertly distracts the public from consciously considering the fact that intentional killing is a violent act.¹⁷ The media achieves such a monopoly over public beliefs by playing on the relationship between criminal law and violence.

the Impulse to Condemn to Death, 49 STAN. L. REV. 1447 (1997). According to Professor Craig Haney, a system that uses the death penalty as punishment relies upon the "moral disengagement" of its citizens to promote killing those convicted of capital crimes. *Id.* at 1448-49. Such disengagement is achieved through the creation of an unusual psychological setting that allows jurors to calmly and rationally consider killing another human being. *See id.* at 1447-48. Professor Haney proposes that this disengagement is a requisite to the promotion of capital punishment. *See id.* Otherwise, he submits, "under typical circumstances, a group of twelve law-abiding persons would not calmly, rationally, and seriously discuss the killing of another, or decide that the person in question should die and then take actions to bring about that death . . ." *Id.* Professor Haney carefully notes that his statement is not meant to equate juror-imposed death sentences with the violence depicted in the facts of each death penalty case. *See id.* at 1447 n.2. Rather, he argues that capital juries are assigned to contemplate taking the action of ordering the death of a fellow human being. *See id.*

13. *See id.* at 1448 (citing Edward Bronson, *On the Conviction-Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen*, 42 U. COLO. L. REV. 1, 31-32 (1970); Craig Haney, *Juries and the Death Penalty: Readdressing the Witherspoon Question*, 26 CRIME & DELINQ. 512, 517-21 (1980)). In a critical survey of the U.S. Supreme Court's death penalty decisions, it has been proposed that the Court contributes to the public's fear of crime and unquestioning support of the death penalty by leaving the issue of death open to the states to resolve from purely American standards. Bentele, *supra* note 2, at 252-53.

14. *See Haney, supra* note 12, at 1448 (citing Robert Fitzgerald & Phoebe Ellesworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31, 33-34 (1984)). Professor Haney explains that the typical capital juror views the accused as having committed a crime purely as a result of "his evil makeup," and, therefore, deserves to be punished simply because of his evilness. *Id.* This belief in singular judgment results from a historically rooted phenomenon that jurors have grown to accept without question. *See id.* (citing Craig Haney, *Criminal Justice and the Nineteenth-Century Paradigm: The Triumph of Psychological Individualism in the "Formative Era"*, 6 LAW & HUM. BEHAV. 191, 195-99 (1982)).

15. *See* Ted Chiricos, *The Media, Moral Panic and the Politics of Crime Control*, in THE CRIMINAL JUSTICE SYSTEM: POLITICS AND POLICIES 58-60 (George F. Cole et al. eds., 1998). Additionally, the public's fear of crime has been exacerbated by the media in recent years. *See id.*

16. *See id.* at 71-73. The media's creation of a "moral panic" in response to the promulgation of soaring crime stories has found comfort in the use of the death penalty and other harsh punishments as deterrents to crime. *See id.* at 72.

17. *See Haney, supra* note 12, at 1448 (citing Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1613 (1986)).

Indisputably, many facets of criminal law revolve around acts of violence.¹⁸ Yet, the majority of discussions regarding violence and criminal law involve violent acts that are portrayed only as being committed by individuals who are accused of committing a crime.¹⁹ Such repeated discussion forces the public to focus on the private crime as violent while discreetly encouraging the acceptance of public killing as the law.²⁰ The best example of this is the flurry of editorials surrounding any high profile murderer that has fallen short of a death sentence.²¹ To fully understand this phenomenon, a definition of violence is required. Furthermore, for purposes of analyzing capital punishment, violence can only be properly questioned while considering its relationship to the State.

German philosopher, Hannah Arendt, defines "violence" as an instrument to supplement individual or natural strength.²² Within the con-

18. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW § 2 (1972). Herbert Morris describes the criminal law in his analysis of punishment as a system of rules that prohibit "violence and deception" and in turn provide "benefits for all persons" if the rules are followed. Herbert Morris, *Persons and Punishment*, in PHILOSOPHY OF PUNISHMENT 67, 68 (Robert M. Baird et al. eds., 1988).

19. See Morris, *supra* note 18, at 68-69.

20. Moral intelligence, however, is not completely absent from the arena of capital punishment. Consider, for example, Colorado District Court Judge Michael Heydt who recently resigned his tenure on the bench in protest to Colorado's death penalty statute which requires the punishment phase of the trial to be decided by a three-judge panel rather than a twelve-person jury. See *In Colorado, 3 Judges Rule on Penalty in Murder Case*, N.Y. TIMES, Apr. 18, 1999; Bill Johnson, *Michael Heydt, Judge of Character*, ROCKY MTN. NEWS, Apr. 14, 1999 at 6A. Judge Heydt's courageous act discourages the blind acceptance of death as "law," as he identified in his letter of resignation the inherent problems that reside in a law that requires two judges who have not heard the live testimony in a case to determine whether the accused should live or die. Letter from Michael Heydt, District Court Judge, Fourth Judicial District Court, Colorado Springs, Colorado, to Chief Justice Mullarkey, Chief Justice, Colorado Supreme Court (Apr. 12, 1999) (on file with author). Specifically, Judge Heydt stated that he did not "believe that a fair and just decision" could be reached from merely reading the transcripts of the case. *Id.* Similarly, he objected to the fact that the statute inhibits the panel from having enough time, information, or personal experience with the case to "make judgments on the materiality and probative value of evidence at the sentencing hearing in order to make a principled decision whether the defendant should live or die." *Id.* Ultimately and most importantly, Judge Heydt acknowledged that the determination of whether a fellow human being should live or die is the "most important decision a trial judge can make," and he did not want to assume that responsibility without having personally heard the continuity of the case. *Id.* In effect, Judge Heydt did not want to make such a critical decision without having had the defendant's person, dignity, and humanity portrayed for him. See *id.* For discussion of the Colorado statute, see Roxanne J. Perruso, *And Then There Were Three: Colorado's New Death Penalty Sentencing Statute*, 68 U. COLO. L. REV. 189 (1997) (discussing Colorado's three-judge panel sentencing law and arguing that it withstands constitutional challenge). Additionally, the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions voiced concern from the international community over the fact that some states allow judges to override jury verdicts giving defendants a life sentence. *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR 54th Sess., Agenda Item 10, at 73, U.N. Doc. E/CN.4/1998/68/Add.3 (1998). Similarly, the Special Rapporteur noted the danger presented by state statutes allowing judges to override a jury verdict calling for death when those judges are elected officials. See *id.* The precise danger is the pressure that public criticism could effectively oust a judge from the bench, thus persuading him or her to respect the jury's death verdict. See *id.*

21. See, e.g., *Reasons for Death Penalty Come Up Short*, GAZETTE TELEGRAPH, Jul. 31, 1999, at News 5 (debating the meaning of justice when an accused murderer escapes the death penalty in spite of the public spirit of revenge surrounding the case).

22. HANNAH ARENDT, ON VIOLENCE 46 (2d ed. 1970).

text of capital punishment, Arendt's analysis illustrates that while violence may theoretically be justifiable to maintain control, it is never legitimate.²³ Arendt's definition is intricately enmeshed in her analysis of power, which she defines as "the human ability not just to act but to act in concert."²⁴ Arendt asserts that power and violence are intimately connected and create the philosophical framework from which violence is used to quell differences within a society.²⁵ Arendt rejects, however, the notion that power and violence are opposite entities with only one dominating a society while the other is nonexistent.²⁶ Instead, Arendt posits that the force of violence is supreme to the force wielded by power when it is used to ensure that one group dominates and controls another group.²⁷

Violence, as a means of power, can be best understood by considering the situation that arises when a person is accused of committing a crime.²⁸ This illustration depends upon the assumption that the accused individual did not obey the law and thus is not conforming to the "consensus of the majority."²⁹ By refusing to conform to the rules, the criminally accused becomes a victim under the force of the majority that uses its power to control the accused's nonconforming behavior.³⁰ Thus, violence is really an instrument used to control individual behavior because it allows the dominate group to maintain power over individuals, both physically and politically.³¹

Furthermore, power is an inherent component in the exercise of political control and, therefore, does not require justification.³² Power, however, requires legitimacy to maintain recognition and support.³³ Moreover, the legitimacy of power is achieved at the conception of a group's initial affiliation; in this case, legitimacy is achieved at the state's incorporation as a governing body.³⁴ An act conducted by the state, such as carrying out a death sentence, may be legitimate when considered in light of the circumstances surrounding the situation that deemed the action necessary.³⁵ Action can only be justified, however, if it relates

23. *See id.* at 52.

24. *Id.* at 44. Arendt further explains that power is never an individual characteristic, but rather a characteristic that can only be achieved by a group. *See id.*

25. *See id.* at 36-39. Concretely, Arendt observes that "there exists a consensus among political theorists from Left to Right to the effect that violence is nothing more than the most flagrant manifestation of power." *Id.* at 35.

26. *See id.* at 51-52.

27. *See id.* at 54-55.

28. *See id.* at 51.

29. *Id.*

30. *See id.*

31. *See id.*

32. *See id.* at 52.

33. *See id.* at 52-53.

34. *See id.*

35. *See id.* 51-53.

to some objective to be realized in the future.³⁶

The best illustration of “justified action” is the use of force in self-defense.³⁷ When a person defends himself or herself with force that violence may be justified as a necessary reaction to danger. The conduct is considered legitimate because the consequence of harm is immediately apparent.³⁸ If the individual had not reacted, he or she would have been killed or maimed.³⁹

Capital punishment, however, does not fall within this definition of legitimate violence because it is not an immediate response to a threat of harm. Rather, it is a contemplated act, thought out over a period of years that occurs within a structured set of rules.⁴⁰ Furthermore, a death sentence proposes a violent act that would occur at some uncertain time in the future to punish an individual for an act that happened some time in the past.⁴¹ Thus, this act of killing appears to be an expression of illegitimate control rather than an act of self-preservation.⁴²

Using this definition of violence as a vehicle, the intricacies of state-sanctioned killing of an individual in a vengeful act can be explored.⁴³ The law is the supporting paradigm for the death penalty, but the legality of capital punishment must be harmonized with society’s evolution.⁴⁴ As law is society’s vehicle for change, it must be interpreted through contemporary standards that incorporate an empathic and global view of human rights.⁴⁵ Viewing the law in this light exposes the

36. *See id.*

37. *Id.*

38. *See id.*

39. *See id.*

40. *See id.*

41. *See id.*

42. *See id.* at 51-53.

43. *See Haney, supra* note 12, at 1455-56. Professor Haney describes the guilt phase of a capital murder trial as a period of time spent depicting the accused “only as an autonomous agent of violence acting outside of any historical context . . .” *Id.* at 1456. Once the jury has formed a solidified vision of the accused as an “agent of violence,” viewing capital punishment as violence has been nullified by the jury’s fear of the accused. *Id.* Thus, viewing the act of killing as vengeance or violence is shrouded because the jury’s attention has been focused upon the accused and the surrounding accusations of individual violence. *See id.* This reality has been resoundingly aired through the media by those critics who balk at the propriety of rejecting revenge as a legitimate motive for punishment. *See, e.g.,* Laurence D. Cohen, *Death Penalty is Society’s Right*, ORLANDO SENTINEL, Feb. 26, 1998, at A23 (arguing that criticism of the death penalty “as an unhealthy thirst for revenge, driven by anger” is misplaced and that the death penalty is, in fact, a rational expression of moral indignation that society is entitled to exercise). Consequently, the number of criminal defendants who are sentenced to die and those who are killed by the state increases annually. *See AMNESTY INTERNATIONAL, supra* note 6, at 3.

44. *See* William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View From the Court*, 100 HARV. L. REV. 313, 328 (1986). Justice Brennan argues that the fundamental foundation of the Eighth Amendment’s prohibition of cruel and unusual punishment is the fact that the death penalty is “cruel and unusual” because it violates human dignity. *Id.* at 330.

45. *Id.* at 331. Justice Brennan posits that:

[L]aw can be a vital engine not merely of change but of other civilizing change. That is because law, when it merits the synonym justice, is based on reason and insight. Decisional law evolves as litigants and judges develop a better understanding of the world in which we live. Sometimes, these insights appear pedestrian, such as when we recognize, for example, that a suitcase is more like a home than it is like a car. On occasion, these

illegitimacy of state-sanctioned killing. A full exposure of such illegitimacy can only be achieved by defining the concept of "law."

What constitutes "the law" is not universally defined.⁴⁶ To understand its meaning, the law must be considered within the social framework from which it arises to understand its meaning.⁴⁷ Within the criminal arena, the law can be defined as a set of prohibitions.⁴⁸ It is the interpretation of the law, however, which gives the law its living, breathing meaning.⁴⁹ Consequently, the law can have a variety of meanings and definitions as it is interpreted not only by the courts, but also by practitioners and academics.⁵⁰ For instance, one academic interprets the American judicial process as an authoritative use of power.⁵¹ This analysis relies upon the observation that within the American legal system, judicial decisions are the highest authority from which the law emanates, and are consequently the foundation of American authoritarianism.⁵²

Two meanings can be ascribed to the term "authoritarianism."⁵³ One definition is the "unquestioning obedience to authority, blind obedience, or . . . obedience to traditionally constituted authorities out of an attitude of acceptance."⁵⁴ Authoritarianism, however, can also be described as using the "personal epistemologies and political structures

insights are momentous, such as when we finally understand that separate can never be equal. I believe that these steps, which are the building blocks of progress, are fashioned from a great deal more than the changing views of judges over time. I believe that problems are susceptible to rational solution if we work hard at making and understanding arguments that are based on reason and experience. With respect to the death penalty, I believe that a majority of the Supreme Court will one day accept that when the state punishes with death, it denies the humanity and dignity of the victim and transgresses the prohibition against cruel and unusual punishment. That day will be a great day for our country, for it will be a great day for our Constitution.

Id. Thus, the argument that society is entitled to kill criminals based on the "moral basis" of punishment lacks merit in that it claims that society has no interest in progressing through the law. See Editorial, *Fitting Punishment Death Penalty Foes' Flawed Premise: That It's About Deterrence or Revenge*, COLO. SPRINGS GAZETTE TELEGRAPH, July 28, 1999, available in 1999 WL 22528925 (arguing that society is entitled to use death as a punishment based on moral values and sarcastically rejecting those arguments against the death penalty as European-based and contending that state-sanctioned killing is "not vengeance," but rather "justice").

46. German law professor, Bernhard Schlink, poses the eternal questions of law: "What is law? Is it what is on the books, or what is actually enacted and obeyed in a society? Or is law what must be enacted and obeyed, whether or not it is on the books, if things are to go right?" BERNHARD SCHLINK, *THE READER* 91 (Carol Brown Janeway trans., 1998).

47. See Brennan, *supra* note 44, at 327-28.

48. See LAFAVE & SCOTT, *supra* note 18. Professor LaFave describes the criminal law as aiming to "prevent harm to society—more specifically, to prevent injury to the health, safety, morals and welfare of the public." *Id.*

49. See Brennan, *supra* note 44, at 321-31 (discussing the U.S. Supreme Court's analytical process for considering whether the death penalty constitutes "cruel and unusual punishment" under the Eighth Amendment and demonstrating why the process of constitutional analysis is dependent upon circumstances specific to each individual case).

50. See *id.*

51. See Lynne Henderson, *Authoritarianism and the Rule of Law*, 66 IND. L.J. 379 (1991).

52. See *id.* at 381.

53. *Id.* at 382.

54. *Id.*

and practices that are directly threatening to human freedom and dignity."⁵⁵ In the context of the death penalty, both definitions work together to undermine human dignity, while contemporaneously promoting the blind acceptance of a violent act as a legitimate, legal process.⁵⁶

Additionally, a central component of authoritarianism is the unquestioning obedience of an authoritative figure.⁵⁷ This blind obedience allows the follower to justify the acceptance of any set of rules or laws that have been suggested or imposed by the authoritative figure.⁵⁸ Such obedience is a form of "formal authoritarianism."⁵⁹ "Substantive authoritarianism," on the other hand, is not only the act of obeying laws, but is also the act of using such laws to oppress or punish others, particularly members of minority or powerless groups.⁶⁰ Furthermore, in a substantive authoritarian scheme, blind acceptance of authority enables those with power to oppress and thus, dominate weaker groups.⁶¹ Such authoritarian systems tend to classify "human beings as monsters," a classification that justifies the systematic oppression of individuals.⁶² Moreover, the use of the death penalty as a legal punishment plays a double role in an authoritarian system: it legitimizes the public's moral panic and fear of crime, and serves to oppress those groups feared as perpetrating crime.⁶³

Those groups portrayed as perpetrators of crime are indisputably the most oppressed individuals in society.⁶⁴ In the United States, eco-

55. *Id.*

56. *See id.* As Amnesty International observes,

[e]ven if it were possible to create a judicial system entirely free from bias, the punishment of death would still violate the most fundamental of all human rights. Each death sentence is an affront to human dignity: the ultimate form of cruel, inhuman and degrading punishment; every execution deepens the culture of violence.

AMNESTY INTERNATIONAL, *supra* note 6, at 2.

57. *See* Henderson, *supra* note 51, at 390-98.

58. *See id.*

59. *Id.* at 390.

60. *Id.*

61. *See id.* at 390-92.

62. *See id.* at 393.

63. *Id.* The term "moral panic" has been coined to describe the phenomenon of prominent community leaders, such as clergy or politicians, proclaiming certain activity as threatening to community values. *See* Chiricos, *supra* note 15, at 58-59 (citing STAN COHEN, *FOLK DEVILS AND MORAL PANICS: THE CREATION OF THE MODS AND ROCKERS* 9 (1972)). Such threats are perceived by the community as arising from the community leader's "diagnoses" and are disseminated by the media in simple and digestible language so that the public can assimilate them into its thinking without questioning their veracity. *Id.* It has been emphasized by scholars that the end objective of a moral panic is not that a threat to community values is non-existent, but rather that societal reactions to such problems are "fundamentally inappropriate." *Id.* Scholars have posited that a direct result of "moral panic" is the creation of a "discourse that justifies repression" and a growing justification for "expanding the punitive apparatus of the state." *Id.* at 60. The increase in prison populations by lower economic and racial minority groups is but one example of the wave created by "moral panic." *Id.*

64. *See* Chiricos, *supra* note 15, at 63-66. The United Nations Special Rapporteur of the Commission on Human Rights commented in his 1995 report on contemporary forms of racism that: [T]he [American] media, apart from substituting the term "African American" for those

onomically underprivileged individuals and ethnic minorities face a continuous barrage of oppression by the police and by the criminal justice system.⁶⁵ Likewise, poor and minority communities are portrayed as faceless and are marginalized as unimportant and dispensable, a reality further exacerbated by the media.⁶⁶

Perhaps inadvertently, the media uses this oppressive dehumanization of poor and minority individuals to foster the public's fear of crime by portraying them as faceless individuals who perpetrate crimes.⁶⁷ Thus, the media encourages the public to dismiss people of different ethnic backgrounds or of lower economic stature as dispensable.⁶⁸ Such societal disenfranchisement works to support the use of violence as an oppressive force and is most clearly portrayed by the hype surrounding the use of the death penalty.⁶⁹ A broad explanation of such social disen-

of "Nigger," "Negro" or "Black," in feigned or genuine support of the doctrine of "political correctness," should endeavor to provide images of the African-American community which are not reduced to the clichés of dealer, prostitute, procurer, drug addict or delinquent.

Elimination of Racism and Racial Discrimination: Report of the Special Rapporteur of the Commission on Human Rights, U.N. GAOR, 50th Sess., Agenda Item 103 at 126, U.N. Doc. A/50/476 (1995).

65. See Michael Tonry, *Racial Politics, Racial Disparities, and the War on Crime*, in THE CRIMINAL JUSTICE SYSTEM: POLITICS AND POLICIES 41-45 (George F. Cole et al. eds., 1998). Incidences of police brutality against ethnic minorities most clearly depict the pervasive racial discrimination within the criminal justice system. One example of this is the recent and particularly egregious incident of police brutality against an ethnic minority in New York City. See *Morning Edition: News* (National Public Radio broadcast, Feb. 27, 1998) (transcript on file with the author). Abner Louima, a Haitian immigrant, was beaten by police in a police cruiser, then taken to the station house where he was sexually assaulted with a plunger handle by police officers while his arms were restrained with handcuffs. See *id.* As Louima's attack was publicized, it became clear that similar incidences have plagued various poor and ethnic communities in New York City for a long time but have either gone unreported or more likely, been ignored. See *id.* For further discussion on police brutality and the blue wall of silence see Jennifer E. Koepke, Note, *The Failure to Breach the Blue Wall of Silence: The Circling of the Wagons to Protect Police Perjury*, 39 WASHBURN L.J. 211 (1999).

66. See BELL HOOKS, *KILLING RAGE: ENDING RACISM* 108-18 (1995).

67. See Chiricos, *supra* note 15, at 63-66.

68. See HOOKS, *supra* note 66, at 108-18; A. Leon Higginbotham, Jr., *Violence in America: "Contracts," Myths and History*, 36 B.C. L. REV. 899, 901 (1995); Haney, *supra* note 12, at 1451. Professor Haney explains that killing another person—whether in a courtroom setting or otherwise—always involves the "systematic dehumanization of the victim." *Id.* at 1452. Professor Haney describes such dehumanization as eliminating the recognition of the victim's human qualities, often achieved by portraying the victim as a monster or some other non-human entity which denies the existence of uniquely human qualities. See *id.* In the practical context of death penalty litigation, it becomes the trial lawyer's job to introduce his or her client as a human being. See Austin Sarat, *Bearing Witness and Writing History in the Struggle Against Capital Punishment*, 8 YALE J.L. & HUMAN. 451, 455 (1996). The task of portraying an accused person's humanity to a jury and to the public in a death penalty trial is an enormous challenge. See *id.* Introducing an accused person facing the death penalty to a jury directly confronts the political cloud that shrouds the penalty and more concretely aims at making the jury feel compassion for a life possibly diseased by poverty, mental illness, or abuse. See *id.* at 458.

69. ARENDT, *supra* note 22, at 51. Derrick Bell has shown the use of racial defamation as an oppressive tool used to perpetuate the oppression of blacks in America. See Derrick Bell, *Racial Libel as American Ritual*, 36 WASHBURN L.J. 1 (1996). Although different in substance from the death penalty, the use of racial defamation is intended to inflict pain upon African Americans to ensure social domination by wealthy white Americans. See *id.* The end result of each mechanism is to deny a particular group in society equality in the power structure. See ARENDT, *supra* note 22, at 51.

franchisement is best drawn by considering two societies that, although culturally distinct, share many political and economic commonalities.

III. A COMPARISON OF SOUTH AFRICA AND THE UNITED STATES

Although historically, economically, and racially dissimilar,⁷⁰ a comparison between South Africa and the United States can be drawn to better reveal the oppressive power behind state-sanctioned violence.⁷¹ Both South Africa and the United States share a background defined by racial segregation.⁷² Moreover, the United States' post-slavery, legal segregation, challenged in *Brown v. Board of Education*,⁷³ is not so different from South Africa's apartheid.⁷⁴

Likewise, in both countries the ethnic minorities and poor are plagued by economic deprivation, discrimination at the hands of government institutions, and recurring denial of education and opportunity.⁷⁵ Each of these factors leads to political disenfranchisement.⁷⁶ Moreover, the judicial system is the main component used to promulgate such political disenfranchisement.⁷⁷

The judicial systems in South Africa and the United States are microcosms of the respective societies in which they function.⁷⁸ The greatest potential danger in this fact is the reality that the courtroom players—the judges and the lawyers—wield a terrific amount of power.⁷⁹

70. In the United States, the white population has historically been larger in number than other ethnic groups. See A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences*, 65 N.Y.U. L. REV. 479, 490 (1990). Similarly, the white majority has held the economic and political power that fuels the United States' present-day status as a first-world nation. See *id.* Blacks, on the other hand, have generally comprised less than fifteen percent of the population and far less than that in terms of political power. See *id.* In contrast, South Africa's white population has always been significantly smaller than the black African majority. See *id.* at 491. Seventy-four percent of South Africa's population is African. See *id.* at 491-92. Despite this disparity in the racial makeup of South Africa, political, military, and economic power all reside with the white minority. See *id.* at 492. Due to the white governmental and business control, South African blacks are in fact a powerless, disenfranchised majority. See *id.*

71. See *id.* at 489.

72. See *id.* at 486-87.

73. 347 U.S. 483 (1954) (holding that the Constitution does not tolerate schools segregated on the basis of race and that such segregation practices violate the right to equal protection of the law).

74. See Higginbotham, *supra* note 70, at 487-89.

75. See *id.* at 488-89.

76. See *id.*

77. See *id.* at 545-51. Certainly, the impact of the judicial system upon minority groups is further exacerbated by the media's interpretation of what happens in the courtroom and the media's promulgation of theories determining why certain individuals become criminal defendants. See Chiricos, *supra* note 15, at 58.

78. See Higginbotham, *supra* note 70, at 502.

79. See *id.* at 545-51. The South African Constitutional Court acknowledges the role that race and class play in the courtroom. See *State v. Makwanyane and Mchunu*, 1995 (6) BCLR 665 (CC), available in 1995 SACLX LEXIS ¶ 54. The Court observed that:

The differences that exist between rich and poor, between good and bad prosecutions, between good and bad defence [sic], between severe and lenient judges, . . . and the subjective attitudes that might be brought into play by factors such as race and class, may in similar ways affect any case that comes before the courts, and is almost certainly present to some degree in all court systems.

Id.

This threatening power suggests that these players' private views or feelings of prejudice will influence how ethnic minorities are treated in the courtroom.⁸⁰ This power, in turn, influences how such minorities are viewed by the public who, in the courtroom, makes up the jury.⁸¹ Similarly, in the context of capital punishment, the accused faces the threat of receiving a punishment based upon personal prejudices rather than one that conforms to the guiding legal rules and principles of the law.⁸² South Africa's scheme of institutionalized discrimination illustrates both how South African courtrooms were historically fueled by racism and how the institution of capital punishment evolved.

A. South Africa

Leading up to the end of apartheid,⁸³ South Africa was continually criticized for violating the full pendulum of human rights.⁸⁴ For example, the basic premise of apartheid's strict racial separation was evinced in the courtroom where seating for both black lawyers and spectators was segregated.⁸⁵ Such segregation, when challenged, was deemed to be a "reasonable" measure under the apartheid system.⁸⁶ This reasoning

80. See Higginbotham, *supra* note 70, at 545-46.

81. See *id.* See also Douglas O. Linder, *Juror Empathy and Race*, 63 TENN. L. REV. 887, 900-10 (1996). Extensive research supports the finding that white jurors treat black defendants more severely. See *id.* at 901 (citing HARVEY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 310-12 (1996)). The severity in treatment handed down by white jurors against black defendants also reflects the cultural chasm between white society and other ethnic groups evidenced by linguistic and economic differences. See *id.* at 902 (citing VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 140-41 (1986)).

82. See AMNESTY INTERNATIONAL, *supra* note 6, at 1. Amnesty International's statistics show that between 1977 and 1998, over eighty percent of executed defendants were killed for murdering a white victim. See *id.* at 4. Yet, those same statistics claim that equal numbers of whites and blacks were homicide victims during that time. See *id.* Consistent with these statistics, Amnesty International reports that the odds that a black defendant will be killed is eleven times greater when a black person murders a white victim than when a white person murders a black victim. See *id.* According to the Death Penalty Information Center, "[r]ace is more likely to affect death sentencing than smoking affects the likelihood of dying from heart disease." *Id.* (citing THE DEATH PENALTY INFORMATION CENTER, *THE DEATH PENALTY IN BLACK AND WHITE, WHO LIVES, WHO DIES, WHO DECIDES* (1998)). It should be noted that American legislatures in 1994 created over 180 bills to broaden the list of aggravating circumstances used to determine whether a defendant may qualify for a death sentence. See Hood, *supra* note 4, at 520. Although many of the bills were defeated, the sentiment behind the proposed legislation is significant as it could influence every death penalty proceeding. See *id.*

83. Judge A. Leon Higginbotham describes apartheid as:

[A] system of racial segregation, discrimination, or oppression in housing, employment, public accommodation, health care, freedom of association, freedom of speech, and education. . . . [T]hese forms of segregation serve, among other functions, as ways to stigmatize black people as less than fully human. In addition, apartheid involves the systematic deprivation of political power and the economic opportunity that forms its basis.

Higginbotham, *supra* note 70, at 487.

84. See Peter Norbert Bouckaert, *Shutting Down the Death Factory: The Abolition of Capital Punishment in South Africa*, 32 STAN. J. INT'L L. 287 (1996).

85. See Higginbotham, *supra* note 70, at 502.

86. *Id.* at 502-07 (citing *R. v. Pitje*, 1960 (4) S.A. 709 (A.D.)). In *R. v. Pitje*, a lawyer working for the law firm of which former South African President Nelson Mandela was a partner, was fined after he sat at the counsel table designated for European lawyers and protested to the court after being ordered to move to the Non-European table. See *R. v. Pitje*, 1960 (4) S.A. 709, 710 (A.D.). Although the appellate court found that the magistrate had placed an additional counsel table in his

signified to the public that people of “European descent”⁸⁷ were valued over black Africans in the court of law, a fact well established since the arrival of Dutch traders in 1652.⁸⁸

Similarly, and not surprisingly, the segregated courtroom also encompassed the judicial bench. Even in post-apartheid South Africa at the time of the *Makwanyane and Mchunu* decision, all of the judges on the trial and appellate benches were white and economically and socially fell within the South African middle class.⁸⁹ Moreover, in the hundreds of death penalty cases that had been filed in South Africa, the overwhelming majority of defendants sentenced to die had been from poor and black communities.⁹⁰ Furthermore, the proceedings conducted by South African judges are recorded in the judges’ native languages, either English or Afrikaans.⁹¹ Consequently, black defendants often could not understand the proceedings, as they did not speak either English or Afrikaans.⁹² To compound the confusion that may arise from such language barriers, the cultural differences between the defendants and the bench often hamper a full evaluation of the accused for purposes of determining whether a death sentence was warranted in the case.⁹³

South Africa’s historical use of the death penalty is no more admirable than the separation of lawyers in the courtroom or the racial and cultural chasm between the criminally accused and the bench.⁹⁴ In fact, capital punishment emphasized the South African government’s ability to wield great power over its black constituents. In 1945, a government commission designated to consider the propriety of the death penalty determined that abolition was inappropriate for the country.⁹⁵ The

courtroom in violation of the Separate Amenities Act, the court upheld Pitje’s fine citing the segregation of the courtroom as merely an act of discretion by the trial judge. *See id.*

87. “European” meaning white to the exclusion of all other ethnic groups. *See Higginbotham, supra* note 70, at 503.

88. *See id.* at 502; Bouckaert, *supra* note 84, at 288.

89. *See State v. Makwanyane and Mchunu*, 1995 (6) BCLR 665 (CC), available in 1995 SACLX LEXIS ¶ 48 n.78 (citing Amicus Brief of Lawyer’s for Human Rights (no specific citation given by the Court)). In assessing the power that chance plays in the outcome of a death penalty case, the *Makwanyane and Mchunu* Court acknowledges that the race of the players who control the investigatory process and the later litigation of the facts and legal issues often influences the eventual sentence. *See id.* at ¶48.

90. *See id.* at ¶48 n.78.

91. *See id.* (citing Amicus Brief of Lawyer’s for Human Rights (no specific citation given by the Court)).

92. *See id.*

93. *See id.*

94. *See Bouckaert, supra* note 84, at 288-94. The early system of executing criminals in South Africa consisted not only of the “traditional” methods of execution such as hanging, but also included such practices as slow strangulation and disembowling. *See id.* at 288 (citing Ellison Kahn, *The Death Penalty in South Africa*, 33 TYDSKRIFT VIR HEDENDAAGSE ROMEINS—HOLLANDSE REG 108, 109 (1970) (noting that payments to executioners were dependent upon the method of torture and the particular body part that was maimed or crushed)).

95. *See Bouckaert, supra* note 84, at 290; Bentele, *supra* note 2, at 303 (noting that the United States, along with many other “free world” countries, condemned South Africa for its practices un-

commission supported its decision with the observation that for the “underdeveloped Native . . . [who has recently been] brought into contact with western civilisation and ideas, the sanctity of human life is a matter of less concern than it would be to the western civilised man.”⁹⁶ Likewise, a later commission appointed to consider issues pertaining to criminal justice was specifically prohibited from examining the status of the death penalty, signifying the control the government gleaned from having the power to impute capital punishment onto the black majority population.⁹⁷

In fact, South Africa’s use of the death penalty has been referred to as a “tool specifically for controlling and punishing opponents of apartheid.”⁹⁸ Hand in hand with this impetus to kill in order to quiet political distention, is the abundant evidence delineating racial discrimination as a motive for sentencing blacks to death.⁹⁹ The reasons behind such racial hatred have been posited as stemming from the white minority’s fear of losing control over its economic and political dominion of the larger black majority.¹⁰⁰

Furthermore, the prevailing fear of losing control over the black population is exemplified by the numbers of blacks executed as opposed to whites.¹⁰¹ For example, during the period between 1947 and 1969, none of the 288 white criminal defendants convicted of raping white vic-

der apartheid).

96. Bouckaert, *supra* note 84, at 290 (citing Rep. of the Penal and Prison Reform Comm’n ¶ 460 (1947), and noting that the decision by other countries to abolish the death penalty could be distinguished from the South African Commission’s findings as other abolitionist countries were not faced with the same racial or economic setting).

97. *See id.* at 291 (citing Janos Mihalik, *The Moratorium on Executions: Its Background and Implications*, 108 S. AFR. L.J. 118, 122 (1991)).

98. *Id.* at 292 (citing Nathan V. Holt, Jr., *Human Rights and Capital Punishment: The Case of South Africa*, 30 VA. J. INT’L L. 273, 301 (1989)).

99. *See id.*

100. *See id.* at 293. The myth that blacks were inherently a more violent people, controlled by “primitive instincts” combined with the strict religious belief in personal responsibility became the foundation for public support of harsh criminal penalties. *See id.* This myth operates in two fashions: it promotes the guise of racism as a legal construct, and it works to dehumanize the criminally accused before their story is ever told to a judge or jury. *See* Higginbotham, *supra* note 70, at 502-03; Craig Haney, *Commonsense Justice and Capital Punishment: Problematizing the “Will of the People”*, 3 PSYCHOL. PUB. POL’Y & L. 303, 324 (1997). In South African courtrooms, the venom of such myths is systematically spread by judges discrediting black testimony, devaluing harm to black victims, and treating black criminal defendants with open attitudes of bias. *See* Higginbotham, *supra* note 70, at 503-21. This myth is further augmented by the media, as explained here from a project exposing the lives and stories of death row inmates:

The pages of newspapers tell us the official version of crimes, and perhaps a little about the backgrounds of the perpetrators. Rarely do all parties to a crime agree on precisely what occurred, however, much less what caused the crime. What kind of person could have done this? we [sic] wonder. The question is never answered, and the reader is left to conclude that the accused is subhuman. It is easy to support the execution of those we consider subhuman; it is easy to kill someone who is simply a number.

Michael Radelet, *Introduction* to LOU JONES, *FINAL EXPOSURE, PORTRAITS FROM DEATH ROW* xiii, xv (Michael Radelet ed., 1996).

101. *See* Bouckaert, *supra* note 84, at 293; *see also* 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 (1992).

tims were sentenced to death.¹⁰² Conversely, of the 844 black criminal defendants convicted of the same crime, 120 were executed.¹⁰³ Unfortunately, the hate-based history that blacks have suffered in the United States parallels blacks' experience in South Africa.

B. The United States

The United States' history of racism and disparate use of the death penalty against minorities parallels the force of South Africa's apartheid. Additionally, the American institution of slavery¹⁰⁴ is akin to South Africa's apartheid in that the legal outgrowths of each system continue to oppress minorities, even after the formal abolition of codified injustice.¹⁰⁵

The term "slavery" immediately connotes powerlessness.¹⁰⁶ The American institution of slavery systematically maintained the inferiority of black individuals whose purpose, as designated by their white owners, was to perform uncompensated, economy-building labor for the benefit of whites.¹⁰⁷ Within this structure, the purpose of capital punishment played a dubious role; it was needed to maintain control over those slaves who were considered villainous, yet it threatened the slave holders with a loss of property.¹⁰⁸ In spite of the fact that black slaves

102. *See id.*

103. *See id.*

104. The first three of Judge Higginbotham's ten identified principles and goals of slavery expose the true "definition" for the institution:

1. Inferiority: Presume, preserve, protect, and defend the ideal of superiority of whites and the inferiority of blacks.
2. Property: Define the slave as the master's property, maximize the master's economic interest, disregard the humanity of the slave
3. Powerlessness: Keep blacks—whether slave or free—as powerless as possible so that they will be submissive and dependent in every respect, not only to the master, but to whites in general. Limit blacks' accessibility to the courts and subject blacks to an inferior system of justice with lesser rights and protections and greater punishments than for whites. Utilize violence and the powers of government to assure the submissiveness of blacks.

A. Leon Higginbotham, Jr., *The Ten Precepts of American Slavery Jurisprudence: Chief Justice Roger Taney's Defense and Justice Thurgood Marshall's Condemnation of the Precept of Black Inferiority*, 17 CARDOZO L. REV. 1695, 1697-98 (1996).

105. *See id.* at 1696.

106. A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The "Law Only as an Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 975 (1992). Judge Higginbotham and Ms. Jacobs note that gaining a comprehensive view of slavery can be appropriately achieved by looking at one state's history in detail. *See id.* at 972 n.6 (citing A. Leon Higginbotham, Jr. & Greer C. Bosworth, "Rather Than the Free": *Free Blacks in Colonial and Antebellum Virginia*, 26 HARV. C.R.-C.L. L. REV. 17, 20-21 (1991)). They selected Virginia for a variety of reasons, not the least of which is its tenor as the "birthplace of American slavery." *Id.* Similarly, Virginia developed a legal system shrewdly based in perpetuating racial oppression which other colonies emulated in their own laws. *See id.*

107. *See id.* at 971-83. Many whites justified the disparate treatment meted out to blacks through their belief that whites were inherently superior to blacks. *See id.* at 972 n.6 (citing Higginbotham & Bosworth, *supra* note 106, at 20-21). Economically, the white population recognized that the slave system could only be maximized through oppressing the workforce and hence constructing an elaborate system that personified the white landowners' believed superiority over the black slaves. *See id.*

108. *See id.* A conundrum of slavery was the identification of a slave's status as property or as a

could be criminally prosecuted, the reality that slaves were considered property eliminated any consideration of them as human beings, and thus made them disposable tools rather than constitutional subjects.¹⁰⁹

The historical foundations of slavery and oppression in the United States can perhaps aid in an examination of the most recent survey reporting the disproportionate use of the death penalty against ethnic minorities.¹¹⁰ Unfortunately, the existence of racism as shown through empirical evidence only serves to depict America's limited progress as a maturing society.¹¹¹

Amnesty International reports that between colonial times and 1990, approximately 18,000 people have been executed in the United States.¹¹² Of those cases, only thirty involved the execution of white defendants for murdering black victims.¹¹³ Furthermore, even today, specific state-by-state surveys illustrate that race and ethnicity directly influence prosecutorial decisions to pursue the death penalty.¹¹⁴ In

person. *See id.* at 971. Slaves were persons when confronting the criminal laws. *See id.* Yet, at trial they were denied the basic rights so treasured by their white owners: the right to a jury trial; the right to a unanimous verdict; the right to appeal; and the right to testify against others and on one's own behalf. *See id.* Slaves in Virginia were entitled to the assistance of counsel for representation concerning "matters of fact" in death penalty cases. *See id.* at 1011-12. This protection stemmed directly from the property concept of slavery: if a slave were condemned to die, his master would lose a valuable asset. *See id.*

109. *See* Higginbotham, *supra* note 104, at 1700-04. Judge Higginbotham's tenth precept of slavery "By Any Means Possible," articulates a further philosophical premise of slavery: "[s]upport all measures, including the use of violence, which maximize the profitability of slavery and which legitimize racism. Oppose, by the use of violence if necessary, all measures which advocate the abolition of slavery or the diminution of white supremacy." *Id.* at 1698. Slavery's philosophical foundation arises from the belief that black inferiority was a fact of nature as Africans were not human, but rather a "subspecies of man." *Id.* at 1700.

110. *See* Amnesty International, *supra* note 6, at 2.

111. Amnesty International's report directly addresses this point:

Despite overwhelming evidence to the contrary, authorities in the USA vehemently deny that the use of the death penalty is in any way influenced by racial considerations. Most officials would likely accept that instances of racial discrimination are an everyday occurrence in US society, yet few are willing to acknowledge its contamination of the capital judicial system. The refusal of the US authorities to admit and address the obvious taint of racism in the administration of the death penalty itself serves to indicate the extent of the problem.

Id. The U.S. Supreme Court's rejection of evidence of racial bias in death sentences appropriately illustrates the international fervor over judicial practices in the United States today. *See, e.g.,* McCleskey v. Kemp, 481 U.S. 279 (1987) (rejecting evidence that death sentences in Georgia are imposed more frequently on black defendants and those blacks accused of killing white victims, while stating that the supporting evidence did not establish a significant risk of racial prejudice adversely affecting the process delineated by the Georgia death penalty statute).

112. *See* Amnesty International, *supra* note 6, at 2.

113. *See id.*

114. *See id.* at 4-6. The survey supports the proposition that prosecutorial discretion in determining when and against whom to seek the death penalty is unbridled and, therefore, ripe for abuse. *See id.* Amnesty International accounts such prosecutorial discretion as an "obvious source for racial discrimination." *Id.* at 5. The survey further revealed that of those individuals incarcerated on death row, black individuals outnumbered whites by more than sixty percent. *See id.* at 4-6. Similarly, the survey reports that of the twenty inmates sentenced to death under federal law, only five are white. *Id.* at 14. Furthermore, a staff report filed by the Congressional Subcommittee on Civil and Constitutional Rights in March, 1994, observed that "[u]nder our system, the federal government has long assumed the role of protecting against racially biased application of the law. But under the only active federal death penalty statute, the federal record of racial disparity has been

support of this survey, statistics show that of the 500 prisoners executed between 1977 and 1998, 81.8 percent were sentenced to die for killing a white person.¹¹⁵

Similarly, factors other than race or ethnicity have been deemed determinant in decisions to seek the death penalty. Specifically, the economic status and social class of both the accused and the victim have been shown as influential in the decision-making process.¹¹⁶ Furthermore, considerations of "death eligibility"¹¹⁷ based on class status are magnified by a poor defendants' inability to afford competent and experienced representation.¹¹⁸

Unfortunately, in the United States, indigence and race are intimately connected, as the poorest communities in the country are primarily comprised of ethnic minorities including African Americans.¹¹⁹ When combined with statistics that show the rate at which the death penalty is sought against poor and minority individuals, these facts all support the claim that the death penalty is a violent mechanism used to perpetuate the social, economic, and moral oppression of minority groups in the United States.¹²⁰ For these reasons, it is critical that the United States consider the South African Constitutional Court's deci-

even worse than that of the states." *Id.* The same staff report explained that seventy-five percent of the defendants convicted under the federal Anti-Drug Act were white and only twenty-four percent were black. *See id.* Under the death penalty provision of the same section, however, seventy-eight percent of those defendants selected for prosecution were black and only eleven percent were white. *See id.* at 4.

115. *See id.*

116. *See Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR, 54th Sess. Agenda Item 10, at 62, U.N. Doc. E/CN.4/1998/68/Add.3 (1998).

117. Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 *FORDHAM L. REV.* 21 (1997) (arguing that deathworthiness is a determination of whether a defendant is "worthy" of being executed, not a contemplation of the defendant's blameworthiness, an issue decided during the guilt phase of a death penalty trial). *See also* Anthony Neddo, Comment, *Prosecutorial Discretion in Charging the Death Penalty: Opening the Doors to Arbitrary Decisionmaking in New York Capital Cases*, 60 *ALB. L. REV.* 1949 (1997) (examining the inherent danger of prosecutorial discretion in deciding whom to charge with capital punishment under the new New York death penalty statute).

118. *See Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR, 54th Sess. Agenda Item 10, at 62, U.N. Doc. E/CN.4/1998/68/Add.3 (1998).

119. *See* Higginbotham & Jacobs, *supra* note 106, at 1067-70.

120. *See id.* The closing question posited by Judge Higginbotham and Ms. Jacobs is one that the South African Constitutional Court strives to answer in its *Makwanyane and Mchunu* decision:

What is the relevance of this history to our nation today? Should we ponder over our treatment of the weak, the poor, and the dispossessed of all races? How far have we really come in recognizing the equal value of every human being? Should we wonder whether future generations will find parallels between today's system of justice and national policy and the cruelty imposed upon powerless blacks and slaves during the colonial and antebellum period?

Id. at 1068-69. The South African Constitutional Court's opinion exemplifies a conscientious effort to learn from the evils of the past while building a democracy founded on valuing all people as dignified human beings. *See* *State v. Makwanyane and Mchunu*, 1995 (6) BCLR 665 (CC), available in 1995 SACLX LEXIS ¶ 48 n.78 (stating that the demise of South Africa's apartheid will mark the beginning of the rejection of the separation between black and white, but the accompanying stigmas attached to race and class are deeply ingrained in the South African psyche and will be difficult to dismiss as irrelevant).

sion championing the human dignity of all human beings, not only those who are wealthy or white.

IV. SOUTH AFRICAN CONSTITUTIONAL COURT: THE STATE V. MAKWANYANE AND MCHUNU¹²¹

In America, the case law surrounding the death penalty revolves in great part around the consideration of whether a decision to condemn the accused to death was reached by arbitrary and capricious means.¹²² The U.S. Supreme Court has acknowledged that the death penalty is the “deliberate extinguishment of human life by the State,” but the Court has yet to analyze that acknowledgment and to discuss what such “extinguishment of human life” means in terms of human rights.¹²³

The Court shuns human rights challenges by claiming that its decisions can only be confined to the constructs of the Constitution.¹²⁴ While it is true that the Constitution is the “supreme law of the land,” its interpretation need not be stagnant in light of contemporary thinking.¹²⁵ As such, the Court is not restricted to interpreting the Constitution under the traditional arbitrary and capricious standard, which has traditionally overlooked the concept of human dignity.¹²⁶

The U.S. Supreme Court, however, should consider the South African Constitutional Court’s decision in the *State v. Makwanyane and Mchunu*¹²⁷ to demonstrate how human dignity cannot be trapped within the confines of the traditional “cruel and unusual punishment” analysis.¹²⁸ Specifically, the Supreme Court should focus on the Constitu-

121. *See id.*

122. The landmark cases from which the construct of the arbitrary and capricious standard grew are *Furman v. Georgia*, 408 U.S. 238 (1972) and *Gregg v. Georgia*, 428 U.S. 153 (1976). The *Furman* decision was the culmination of challenges against the Georgia and Texas death penalty statutes. *Furman v. Georgia*, 408 U.S. 238 (1972). The Supreme Court held that the statutes were in fact unconstitutional because they did not provide adequate guidelines to curb the sentencer’s discretion in deciding whether to impose a death sentence. *See id.* at 239-40. This lack of guidance, the Court held, increased the danger of arbitrary and capricious decisions sentencing defendants to death. *Id.* Under such an unbridled scheme, the Court held that it would be impossible to determine which instances actually merited the death penalty and those in which a death sentence was inappropriate. *See id.* at 294. The Court ultimately held that death sentences imposed by arbitrary or capricious means equaled cruel and unusual punishment under the Eighth Amendment. *Id.* at 291-95. *Furman* also created the standard that the Eighth Amendment require that death sentences be fairly and consistently imposed. *See id.*

123. *Id.* at 291.

124. *See Henderson, supra note 51; Cheryl I. Harris, Whiteness as Property*, 106 HARV. L. REV. 1709 (1993).

125. Bentele, *supra note 2*, at 252-53.

126. *See District Attorney for the Suffolk Dist. v. Watson*, 411 N.E.2d 1274, 1281-83 (Mass. 1980). In *Watson*, the Massachusetts Supreme Court found the death penalty unconstitutional under the Massachusetts Constitution. *See id.* at 1286. The court specifically found that the death penalty offended “contemporary standards of decency” under the state constitution’s prohibition of cruel “or” unusual punishment. *Id.* at 1281-83. The court also acknowledged that the death penalty “may cruelly frustrate justice” by extinguishing a human life without regard for advances in the law or the discovery of new evidence. *Id.* at 1282.

127. *State v. Makwanyane and Mchunu*, 1995 (6) BCLR 665 (CC), available in 1995 SACLX LEXIS.

128. *Id.* at ¶ 56.

tional Court's interpretation of the South African interim Constitution's human dignity and right to life clauses as the avenue to an interpretation of global human rights.

A. *The Underlying Facts of the Case*

On February 2, 1990, during the climatic height of the struggle to end apartheid, then President F.W. De Klerk announced that Nelson Mandela would be released from confinement.¹²⁹ During that same announcement, De Klerk declared that all pending executions would be suspended.¹³⁰ Themba Makwanyane and Mvuso Mchunu had been sentenced to death after a botched bank robbery resulted in the death of two police officers and two bank employees.¹³¹ Their appeal was the first to be considered by the newly appointed Constitutional Court.¹³²

B. *The Constitutional Court's Opinion*

The Constitutional Court declared that, as the judicial authority for an "open and democratic society based on freedom and equality," it had the ability to consider international law as it applied to the rights protected under the South African Constitution.¹³³ In doing so, the Court acknowledged its role not only to adjudicate matters concerning the citizens of South Africa, but more poignantly, to represent South Africa as a community that shares in international values.¹³⁴

Furthermore, the Court viewed the interim Constitution as bridging the "past of a deeply divided society" defined by social injustices and strife to a future based in the recognition of human rights and "peaceful co-existence . . . for all South Africans."¹³⁵ The pillars of this bridge to the future are the fundamental rights secured by Chapter Three of the South African Constitution, which, unlike the United States Constitution, does not address, either directly or impliedly, the

129. See Bentele, *supra* note 2, at 296-97.

130. See *id.* (citing State President F. W. De Klerk, Speech to Parliament (Feb. 2, 1990)). In his speech, De Klerk specifically announced that due to the "intensive discussion" of the death penalty in the months leading up to February 2, the South African death penalty legislation would be revised to restrict its use to "extreme cases." *Id.* The legislation would permit more judicial discretion in its implementation and would provide for automatic appeal upon reaching a death sentence. See *id.* De Klerk specifically announced that "no executions will take place until Parliament has taken a final decision on the new proposals." *Id.* He further added that all individuals who were currently awaiting execution would benefit from any legislative changes. See *id.* Until this moratorium, South Africa was known as a leader of death penalty states, sometimes killing as many as seven condemned individuals at once. See *id.* at 266. When De Klerk announced the suspension, over three hundred prisoners sentenced to die awaited news of their fate on death row. See *id.* at 266-67.

131. See *id.* at 267 (citing Rohan Minogue, *South African Constitutional Court Considers the Death Penalty*, DEUTSCH PRESSE-ARGENTEUR, Feb. 14, 1995).

132. See *id.*

133. State v. Makwanyane and Mchunu, 1995 (6) BCLR 665 (CC), available in 1995 SACLRL EXIS ¶ 34.

134. See *id.*

135. *Id.* at ¶ 7.

notion of capital punishment.¹³⁶

Moreover, the South African Constitution prohibits “cruel, inhuman or degrading treatment or punishment.”¹³⁷ The arguments before the Court to determine the meaning of this clause were those that have perennially been raised in American challenges to the death penalty: it is cruel because it extinguishes a life and it is inhumane because it degrades the life which it claims.¹³⁸ The pivotal move by the Constitutional Court, however, was the manner in which it adopted these arguments as true and, thus, established the right to life as inviolable.¹³⁹

C. Human Dignity Clause

The Constitutional Court first looked to the death penalty case law decided by the U.S. Supreme Court to help guide its interpretation of the South African Constitution’s human dignity clause.¹⁴⁰ The Constitutional Court acknowledged that, although the United States Constitution does not specifically guarantee the protection of human dignity, the Supreme Court has found that human dignity is indeed a foundation of the prohibition against cruel and unusual punishment.¹⁴¹

The Constitutional Court further noted that the concept of dignity, has not been completely foreign in U.S. jurisprudence.¹⁴² In his dissenting opinion in *Gregg v. Georgia*,¹⁴³ Justice Brennan recognized that the “fatal constitutional infirmity” in capital punishment is that it regards “members of the human race as nonhumans, as objects to be toyed with and discarded. . . . [It is] thus inconsistent with the funda-

136. See *id.* at ¶ 8. Chapter Three of the interim Constitution provides a list of protected, fundamental rights: Section 8 preserves the right to equality and equal protection under the law; Section 9 affirms the right to life; and Section 10 guarantees “[e]veryone . . . the right to have their dignity respected and protected.” S. AFR. CONST. ch. 3, §§ 8-10 (1993). See also <http://www.uni-wuerzburg.de/law/sf00000_.html>.

137. S. AFR. CONST. ch. 3, §§ 11(2) (1993); *State v. Makwanyane and Mchunu*, 1995 (6) BCLR 665 (CC), available in 1995 SACLX LEXIS ¶ 8. As compared to the Eighth Amendment of the United States Constitution prohibiting “cruel and unusual punishment,” the South African Constitution incorporates the notion of human dignity into the prohibition with the language “degrading.”

138. See *State v. Makwanyane and Mchunu*, 1995 (6) BCLR 665 (CC), available in 1995 SACLX LEXIS ¶ 27. Counsel for Themba Makwanyane and Mvuso Mchunu argued that the death penalty is in fact an affront to human dignity and, therefore, constitutes “cruel, inhuman or degrading punishment.” *Id.* In addition, the death penalty specifically violates the right to life entrenched in the constitution because the sentence cannot be reversed or remanded upon discovery of an error or upon arbitrary application. See *id.*

139. See *id.* at ¶ 144.

140. See *id.* at ¶ 57.

141. See *id.* (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

142. See *State v. Makwanyane and Mchunu*, 1995 (6) BCLR 665 (CC), available in 1995 SACLX LEXIS ¶ 57 (citing *Gregg v. Georgia*, 428 U.S. 153, 230 (1976) (Brennan, J., dissenting) which quotes Brennan’s opinion in *Furman v. Georgia*, 408 U.S. 238, 273 (1972) (Brennan, J., concurring)).

143. 428 U.S. 153 (1976). The U.S. Supreme Court has upheld the use of the death penalty in a long series of cases since finding the punishment constitutional in *Gregg v. Georgia*, 428 U.S. 153 (1976), *Proffitt v. Florida*, 428 U.S. 242 (1976), and *Jurek v. Texas*, 428 U.S. 262 (1976). All three cases held that the death penalty statutes in question met constitutional standards by statutorily guiding jurors through the death or life determination.

mental premise of the Clause that even the vilest . . . criminal remains a human being possessed of common human dignity.”¹⁴⁴

Despite its inspiration from Justice Brennan, the Constitutional Court declared that any guidance from the United States Constitution is limited by the fact that capital punishment is contemplated within the document itself.¹⁴⁵ Furthermore, Justice Chaskalson admits that the jurisprudential history of the death penalty in the United States is a complex series of procedural safeguards that attempt to avoid arbitrary and capricious outcomes.¹⁴⁶ Justice Chaskalson also acknowledges that the reality of following this scheme of constitutional adjudication is one fraught with difficulty and discrepancies as the perimeters developed by the Supreme Court are highly complicated and involve a body of case law that is enormous.¹⁴⁷

144. *State v. Makwanyane and Mchunu*, 1995 (6) BCLR 665 (CC), available in 1995 SACL R LEXIS ¶ 57 (citing *Gregg v. Georgia*, 428 U.S. 153, 230 which quotes Brennan’s opinion in *Furman v. Georgia*, 408 U.S. 238, 273 (1972) (Brennan, J., concurring)).

145. *See id.* at ¶ 56.

146. *See id.*

147. *See id.* In its decisions upholding the use of the death penalty, the U.S. Supreme Court adheres to its analytical platform of procedural safeguards under the Eighth Amendment. The analysis has evolved into a complex maze of opinions revolving around procedural safeguards, supposedly intended to protect the goal of “individualized sentencing.” *See, e.g., Woodson v. North Carolina*, 428 U.S. 280 (1976) (holding that mandatory death sentences for first-degree murder violate the Eighth and Fourteenth Amendments because they fail to avoid arbitrary and capricious jury decisions, and that the court failed to take into account the individual characteristics of the accused or to respect the humanity of the accused). The bulk of the cases contemplate a scheme of weighing equations involving aggravating and mitigating circumstances geared toward determining whether a death sentence is both appropriate for and proportionate to both the crime and the accused. *See, e.g., Roberts v. Louisiana*, 428 U.S. 325 (1976) (stating that the death penalty in itself is not per se unconstitutional, and finding that Louisiana’s statute narrowly defining five categories of first degree murder, which mandated the sentence of death, did not comport with constitutional standards); *Lockett v. Ohio*, 438 U.S. 586 (1978) (holding that a death penalty statute that fails to provide for consideration of individual characteristics of the accused as mitigating circumstances violates the Eighth and Fourteenth Amendments); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (vacating a death sentence and remanding to a trial court for specific consideration of mitigating factors stemming from the accused’s personal and familial circumstances); *Zant v. Stephens*, 462 U.S. 862 (1983) (finding that a jury verdict based in part on the finding of an invalid aggravating factor withstood constitutional challenge as the death sentence was reached after finding additional valid aggravating circumstances); *Lowenfield v. Phelps*, 484 U.S. 231 (1988) (holding that an element of a capital offense could be properly considered as an aggravating factor in determining whether the death penalty is appropriate); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (ruling that a failure to instruct the jury that it could consider evidence of the accused’s mental retardation and personal background to mitigate the imposition of a death sentence deprived the jury of the ability to make a “reasoned moral response” with regard to the mitigating evidence pertaining to sentencing, but noting that the Eighth Amendment does not categorically prohibit the execution of mentally disabled individuals); *Blystone v. Pennsylvania*, 494 U.S. 299 (1990) (deciding that the Pennsylvania death penalty statute’s “catchall” provision allowing for the consideration of mitigating evidence does not violate constitutional standards, nor does it allow the judge to unconstitutionally limit the jury’s consideration of mitigating evidence); *Clemons v. Mississippi*, 494 U.S. 738 (1990) (holding that a court’s decision to uphold a death sentence based in part on an invalid aggravating circumstance after either reweighing the aggravating and mitigating evidence or by reviewing the sentence under the harmless error standard is not unconstitutional but remanding the case due to uncertainty over whether the appellate court had actually performed either review properly); *Walton v. Arizona*, 497 U.S. 639 (1990) (holding that specific statutory delineation of aggravating factors was not required to allow for a constitutional imposition of a death sentence); *Romano v. Oklahoma*, 512 U.S. 1 (1994) (holding that introduction of a prior death sentence imposed upon the accused did not render the jury’s verdict of a death sentence in the present case unconstitutional).

Similarly, the Court has abstained from viewing cases outside of the procedural perimeters

Despite this fact, the South African Constitutional Court derived strength from Justice Brennan's opinions by using them to highlight the fact that the South African Constitution specifically guarantees the acknowledgment and protection of human dignity.¹⁴⁸ Furthermore, the Court found that the consideration of whether capital punishment is cruel or inhuman punishment hinges upon the interpretation of the South African Constitution's human dignity section and does not merely emanate from individual conceptions of morality.¹⁴⁹

To avoid basing its decision purely on its own conception of mo-

when possible. See, e.g., *Callins v. Collins*, 510 U.S. 1141 (1994) (Scalia, J., concurring) (denying writ of certiorari and stating that the death penalty "as currently administered" is constitutional and disregarding any arguments that the punishment should be considered through intellectual, moral, or personal perceptions). Although the Court has followed contemporary thinking when considering the pure issue of "cruel and unusual" punishment as it applies to individual characteristics, it has recently abandoned meeting international standards of compassion. Compare *Coker v. Georgia*, 433 U.S. 584 (1977) (finding that death is an overly excessive and disproportionate sentence for the crime of rape); *Enmund v. Florida*, 458 U.S. 782 (1982) (concluding that the death penalty is unconstitutional when the accused is charged as an accomplice in a felony that results in death but not as a participant in the killing nor the attempt to kill); *Spaziano v. Florida*, 468 U.S. 447 (1984) (holding that the trial court's imposition of the death penalty after the jury recommended a life sentence does not violate the Eighth Amendment); *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (holding that a death sentence reached by a jury that believed that the responsibility for the actual determination of the appropriateness of the accused's death lies elsewhere is unconstitutional); *Ford v. Wainwright*, 477 U.S. 399 (1986) (finding that the Eighth Amendment prohibits executing death row inmates who have been determined to be insane and that inmates are entitled to a hearing on the issue of insanity guided by less stringent standards than those governing a capital trial); *Tison v. Arizona*, 481 U.S. 137 (1987) (finding that the death penalty is not a disproportionate sentence for an accused charged with participating in a felony resulting in death and whose mental state is determined to be recklessly indifferent to life); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (finding that the imposition of the death penalty for crimes committed while the accused was fifteen-years old is unconstitutional); and *Stanford v. Kentucky*, 492 U.S. 361 (1989) (holding that the imposition of the death penalty for crimes committed when the accused was sixteen or seventeen years old is not cruel and unusual punishment and does not violate evolving standards of decency).

148. See *State v. Makwanyane and Mchunu*, 1995 (6) BCLR 665 (CC), available in 1995 SACLRL EXIS ¶ 57. The Constitutional Court viewed the 1993 Republic of South Africa Constitution as a threshold between the country's history of apartheid, "characterised [sic] by strife, conflict, untold suffering and injustice," and the country's future of "peaceful co-existence . . . for all South Africans, irrespective of colour [sic], race, class, belief or sex." *Id.* at ¶ 7. The Court also proclaimed that the 1993 Constitution was founded upon the recognition of human rights and democracy. See *id.* A fundamental pillar of the constitutional adherence to respecting human rights is the prohibition of "cruel, inhuman or degrading" treatment upon South Africans. *Id.* at ¶ 8. The Court declared that this adherence to human rights emanates specifically from the constitutional language ensuring South Africans the "right to equality before the law and to equal protection of the law," the "right to life" and "the right to respect for and protection of his or her dignity." *Id.* at ¶ 10 (citing Chap. 3, §§ 8, 10, 11(2) of the 1993 Constitution of the Republic of South Africa). Interestingly, it should be noted that the human rights instrument that has governed African states since 1986, the African Charter of Human and People's Rights, establishes the right to life but without "mention of capital punishment as an exception or limitation" upon that right. Schabas, *supra* note 1, at 805 (citing African Charter on Human and People's Rights, Oct. 21, 1986, art. 4, O.A.U. Doc. CAB/LEG/67/3 REV. 5). Some scholars have argued that this provision does not prohibit the use of the death penalty based upon its use by a majority of African states. See *id.* (citing Etienne-Richard Mbaya, *A la recherche du noyau intangible dans la Charte africaine*, in LE NOYAU INTANGIBLE DES DROITS DE L'HOMME 207-26 (Patrice Meyer-Bisch ed., 1991)). See also KEBA MBAYE, *LES DROITS DE L'HOMME EN AFRIQUE* 197 (1992). Professor Schabas argues, however, that the charter should be read in light of various international instruments, including the Universal Declaration of Human Rights and others, which specifically denounce capital punishment as violating the right to life. See Schabas, *supra* note 1, at 805-06.

149. See *State v. Makwanyane and Mchunu*, 1995 (6) BCLR 665 (CC), available in 1995 SACLRL EXIS ¶ 26.

rality, the Constitutional Court also considered Germany's view of the death penalty. The Constitutional Court incorporated the German Constitutional Court's opinions into its definition of human dignity, which denied the State any ability to "turn the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth and respect."¹⁵⁰ Similarly, the Constitutional Court incorporated the opinions of three Canadian Supreme Court Justices found in *Kindler v. Canada*.¹⁵¹ The Canadian Justices deemed capital punishment as the "complete and final lobotomy" of human life and the "ultimate desecration of human dignity" in support of their view that the death penalty constitutes cruel and unusual punishment.¹⁵² The South African Constitutional Court thus linked the Canadian Justices' opinions to its own abolition of capital punishment by focusing on the Canadian interpretation of the International Covenant on Civil and Political Rights.¹⁵³

Similarly, the South African Constitutional Court also reviewed the progression of the *Kindler* appeal to the United Nations under the governance of the International Covenant on Civil and Political Rights.¹⁵⁴ The United Nations' appellate decision unanimously held that all death sentences "may be" considered cruel and unusual punishment.¹⁵⁵ Therefore, the Constitutional Court acknowledged that the Covenant allows capital punishment but does not justify its use, and only leaves the punishment open to "the most serious crimes."¹⁵⁶ As such, the Court's recognition of the International Covenant is perhaps most significant in its interpretation of the right to life clause of the South African Constitution.

D. The Right to Life

Perhaps the most persuasive section of the Constitutional Court's decision is its analysis of the right to life clause. The Court used the Hungarian Constitution to interpret the language of the South African

150. *Id.* at ¶ 59 (citing the German Federal Constitutional Court's opinion in [1977] 45 BVerfGE 187, which acknowledged that the constitutional framers, in abolishing capital punishment, viewed life imprisonment as the alternative to death, and citing KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 315 (1989)).

151. *Id.* at ¶ 60 (citing *Kindler v. Canada*, 6 CRR (2d) 193 (SC) (1992)).

152. *Id.* (citing *Kindler v. Canada*, 6 CRR (2d) 193, 241 (SC) (1992)).

153. *See id.* at ¶ 62.

154. *See id.* at ¶ 63 (citing *Ng v. Canada*, United Nations Committee on Human Rights, Communication No. 469/1991, Nov. 5, 1993, at 21). *Kindler* and *Ng* appealed the Canadian Supreme Court's decision to the United Nations' Human Rights Committee claiming that Canada had violated its duty under the International Covenant on Civil and Political Rights. *Id.*

155. *Id.* at ¶ 64.

156. *Id.* at ¶ 66. The Court also notes that the Covenant declares 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." *Id.* (citing *Kindler v. Canada*, United Nations Committee on Human Rights, Communication No. 470/1991, Jul. 30, 1991).

interim Constitution's right to life clause.¹⁵⁷ Specifically, the Hungarian Constitution declares that any laws of the State shall not impede in any way the "essential content of fundamental rights."¹⁵⁸

The Hungarian Constitutional Court interpreted the use of the death penalty as a direct violation of the constitutional guarantee of the protection of fundamental rights.¹⁵⁹ Specifically, the Hungarian Court found that the death penalty unconstitutionally impedes the fundamental content of the rights to life and human dignity that arise from the fact that the two are mutually entwined.¹⁶⁰ The South African Constitutional Court highlighted this finding with alacrity.¹⁶¹ In fact, the South African Court declared that the relationship between these "twin" rights constitutes the "essential content of all rights under the Constitution."¹⁶² The crux of the Constitutional Court's decision, therefore, became the determination of the extent to which the relationship between dignity and life can be limited by the death penalty.¹⁶³

The Constitutional Court's discussion of the concept of retribution is particularly crucial to the determination of what constitutes a constitutional "limitation."¹⁶⁴ The Constitutional Court entertained the State's argument that death serves a needed retributive goal of punishment with a critical tone.¹⁶⁵ In fact, the Court countered the State's claim that retribution serves a prescribed role for society by declaring that humanitarian principles defy the need for "vengeance."¹⁶⁶ Additionally, the Court emphasized that the South African Constitution is premised on the "recognition of human rights" and such a foundation

157. See *id.* at ¶ 84 (citing A MAGYAR KOZTARSASAG ALKOTMANYA, § 8).

158. *Id.* (citing R v. Home Secretary, Ex Parte Bugdaycay, (1987) AC 514, at 531G); A MAGYAR KOZTARSASAG ALKOTMANYA, § 8. The Hungarian Constitution declares that "everyone has the inherent right to life and to human dignity, and no one shall be arbitrarily deprived of these rights." A MAGYAR KOZTARSASAG ALKOTMANYA, § 54.

159. See *State v. Makwanyane and Mchunu*, 1995 (6) BCLR 665 (CC), available in 1995 SACLX LEXIS ¶ 84-85 (citing R v. Home Secretary, Ex Parte Bugdaycay, (1987) AC 514, at 531G).

160. See *id.*

161. See *id.*

162. *Id.*

163. See *id.*

164. The Court considered a plethora of arguments raised by the State as permissible limitations upon the right to life. The discussion of these arguments, however, does not fall within the purview of this Note, which aims specifically to analyze the concept of violence as an affront to human rights. For a discussion of the case as a whole, see Bouckaert, *supra* note 84, which discusses the decision in its entirety and explains the Court's considerations of the role of international law; the specific perimeters of the Constitution; the fundamental rights secured by the Constitution including the right to equality and the prohibition of cruel and degrading punishment; the role of public opinion surrounding the death penalty; and the arguments regarding the deterrent and retributive effects of the death penalty.

165. See *State v. Makwanyane and Mchunu*, 1995 (6) BCLR 665 (CC), available in 1995 SACLX LEXIS ¶ 129. The Court employed such language as "righteous anger" to describe moral outrage at violent crime and decried the belief that "an eye for an eye, and a tooth for a tooth" is an acceptable standard for modern society. *Id.*

166. *Id.*

rejects the need for revenge.¹⁶⁷ Moreover, the Court defined vengeance as the “cold and calculated killing of murderers,”¹⁶⁸ and stated that such action was not necessary for a contemporary society to “express moral outrage” toward the acts of criminals.¹⁶⁹

Within the Constitutional Court’s perspective for rejecting retribution as a societal value, it must be understood that the Court interprets the rights to life and human dignity as unable to exist independent of one another.¹⁷⁰ Concretely, the Court views these rights as the most fundamental of human rights.¹⁷¹ In fact, the Court values them as the “source of all other personal rights” contained in Chapter Three of the Constitution.¹⁷² The parallel right to which Americans are entitled under the United States Constitution—the right to equal protection of the law—flows from the twin rights to life and human dignity.¹⁷³ It is from this platform that the Court’s final interpretation of the death penalty as unconstitutional must be viewed. The obvious implication in this determination is that without the recognition of human dignity and the right to life as sacred and fundamental so as to be untouchable by the State, the true meaning of the right to equal protection is diminished.¹⁷⁴

VI. CONCLUSION

As *State v. Makwanyane and Mchunu* exemplifies, the law can be viewed as a constructive device to reject the myths propagated by the media and political pundits. All human beings, whether black or white, rich or poor, are dignified persons. As such, this realization can be incorporated into an interpretation of the law.¹⁷⁵ Recognizing human dig-

167. *Id.* at ¶ 130.

168. *Id.* at ¶ 129. The Court further stated that “ours should be a society that ‘wishes to prevent crime . . . [not] to kill criminals simply to get even with them.’” *Id.* at ¶ 131 (citing *Furman v. Georgia*, 408 U.S. 238, 305 (1972) (Brennan, J., concurring)).

169. *Id.* at ¶ 129. The Court similarly recognized the fallacy in believing that punishment should be identical to the crime itself. *See id.* The Court used the example of punishing a rapist by castrating him and subjecting him to the “utmost humiliation in gaol” to illustrate this truth. *Id.*

170. *See id.* at ¶ 144.

171. *See id.*

172. *Id.*

173. *See id.* at ¶ 144.

174. *See id.*

175. As *Makwanyane* demonstrates, courts do hold the power to overcome the weight generated by the media. *See id.* at ¶ 88. As Hoyt Webb, a former law clerk for Justice Arthur Chaskalson, President of the Constitutional Court, notes in his article, the court’s decision was reached despite public opinion that the death penalty did not violate the constitutional prohibition against cruel, inhuman or degrading treatment or punishment. *See Hoyt Webb, The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 205, 233 (1998). Webb quotes Justice Chaskalson’s observation that public opinion cannot override the recognition of human rights:

Public opinion may have some relevance to the inquiry, but, in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has made a mandate from the public, and is answerable to the public for the way its mandate is exercised. . . . By the same token the issue of constitutionality of capital pun-

nity through the law is imperative to overcome an authoritarian system and achieve equality for all individuals.¹⁷⁶ The challenge for American courts in the new century is to find the courage to follow the South African Constitutional Court's lead. Unfortunately, inspiring the U.S. courts to accept such a challenge is not a simple task, due in part to the tradition of property-based jurisprudence and its history of categorizing people as marketable items, rather than dignified beings.¹⁷⁷

One force the Kansas Supreme Court and other courts must pay credence to is the increasing international pressure to recognize basic human rights and abolish death as an acceptable form of punishment.¹⁷⁸ With the growth of powerful international political and economic entities, the United States will be forced to address the issue of state-sanctioned violence.¹⁷⁹ One avenue of conceding to this international pressure may be reached by encouraging judges, prosecutors, and juries to consider an analysis of why human beings are still categorized¹⁸⁰ for purposes of punishment rather than viewed as human beings.¹⁸¹

Part of the problem can be attributed to the media's continual focus on a growing world of crime and violent perpetrators, and the public's reaction of a believed identity of victimhood.¹⁸² The system of state sponsored violence is legitimized in the eyes of the public by believing the myth that the public has fallen victim to the perpetrators of crimes.¹⁸³ Such false legitimization negates any empathic view for those accused of a crime.¹⁸⁴

ishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately in the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and weakest amongst us that all of us can be secure that our own rights will be protected.

Id. at 234 (citing *State v. Makwanyane and Mchunu*, 1995 (6) BCLR 665 (CC), available in 1995 SACLX LEXIS ¶ 31).

176. See Henderson, *supra* note 51, at 455-56.

177. See Harris, *supra* note 124, at 1791.

178. See Schabas, *supra* note 1, at 845-46.

179. On March 3, 1999, the International Court of Justice issued an order directing the United States, and specifically the state of Arizona, not to execute Walter LeGrand, a German national. See *Case Concerning the Vienna Convention on Consular Relations Germany v. United States of America*, 1999 I.C.J. 104. Despite the Order, the U.S. Supreme Court rejected a request for a stay of execution. *Walter LaGrand Dies in Arizona Gas Chamber*, EURONEWS (visited Mar. 4, 1999) <<http://www.itn.co.uk:80/World/world19990304/030403w.htm>>. Similarly, Arizona Governor Jane Hull refused to acknowledge Germany's impending request to the International Court in the "interest of justice and the victims." Jerry Nachtigal, *Hull Refuses to Halt LaGrand's Execution*, THE ARIZ. REPUBLIC, Mar. 2, 1999.

180. See Haney, *supra* note 12, at 1459.

181. See Lynne Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1653 (1987).

182. See Paul Arthur, *The Blocks to Forgiveness in WOODSTOCK COLLOQUIUM: FORGIVENESS IN CONFLICT RESOLUTION: REALITY AND UTILITY, THE NORTHERN IRELAND EXPERIENCE* 15-26 (June, 1997).

183. See *id.*

184. See Henderson, *supra* note 51, at 447-56.

Overcoming the identity of victimhood¹⁸⁵ and moving instead toward empathic expressions of law is possible by instilling the concept of forgiveness as a culturally identified value.¹⁸⁶ The courts are the proper forum from which such a value should emanate. A critical key to the courts' role in defining the value of forgiveness is the meaning of forgiveness. Forgiveness is "an act that joins moral truth, forbearance, empathy, and commitment to repair a fractured human relation."¹⁸⁷ Similarly crucial to making forgiveness a cultural value is the understanding that it is only effective when expressed through community effort.¹⁸⁸ Recognizing the fractured human relation in the criminal law is not difficult, as it is clear that the poor, neglected, and abused are most often cited with criminal acts.¹⁸⁹ Similarly, it is clear that minority, oppressed communities suffer the greatest harm from use of the death penalty.¹⁹⁰ As public servants, the difficult task that lawyers, law students, and judges must embrace as their duty is to instill this community forgiveness and understanding for the oppressed and ill into our legal system.¹⁹¹

The South African Constitutional Court exercised empathic decision-making when abolishing the death penalty. In *State v. Makwanyane and Mchunu*, the Court exemplified the notion of forgiveness

185. The identity of "victimhood" has been associated with a lack of empathy and has been deemed to arise from cultures in which intimidation, vigilance, and territoriality are valued. See Arthur, *supra* note 182, at 21. Additionally, victimhood can be a component of valuing violence as "self-assertion" or "power." *Id.* In such a setting, rather than viewing collective responsibility as acknowledging the pain inflicted by violence, collective responsibility is often used to validate the misuse of power through violence. See *id.*

186. See Cardinal Cahal B. Daly, *Reflections on How Forgiveness has Functioned in Northern Ireland (A Catholic View)*, in WOODSTOCK COLLOQUIUM: FORGIVENESS IN CONFLICT RESOLUTION: REALITY AND UTILITY, THE NORTHERN IRELAND EXPERIENCE 5 (June, 1997); Doug Baker, *Reflections on How Forgiveness has Functioned in Northern Ireland (A Protestant View)*, in WOODSTOCK COLLOQUIUM: FORGIVENESS IN CONFLICT RESOLUTION: REALITY AND UTILITY, THE NORTHERN IRELAND EXPERIENCE 45 (June, 1997).

187. James J. Connor, *Introduction*, in WOODSTOCK COLLOQUIUM: FORGIVENESS IN CONFLICT RESOLUTION: REALITY AND UTILITY, THE NORTHERN IRELAND EXPERIENCE 2 (June, 1997) (citing DONALD SHRIVER, AN ETHIC FOR ENEMIES: FORGIVENESS IN POLITICS).

188. See Arthur, *supra* note 182, at 21.

189. See Henderson, *supra* note 181, at 1589-90. The South African Constitutional Court noted in the *Makwanyane and Mchunu* opinion that "[t]he cause of the high incidence of violent crime cannot simply be attributed to the failure to carry out the death sentences imposed by the courts. . . . Homelessness, unemployment, poverty and the frustration consequent upon such conditions are . . . causes of the crime wave." *State v. Makwanyane and Mchunu*, 1995 (6) BCLR 665 (CC), available in 1995 SACLX LEXIS ¶ 119-20.

190. See Henderson, *supra* note 181, at 1589-90.

191. See Henderson, *supra* note 51, at 454-56. The South African Constitutional Court declared its commitment to a future:

"[F]ounded on the recognition of human rights, democracy and peaceful co-existence for all South Africans." . . . Respect for life and dignity lies at the heart of that commitment. One of the reasons for the prohibition of capital punishment is "that allowing the State to kill will cheapen the value of human life and thus [through not doing so] the State will serve in a sense as a role model for individuals in society."

State v. Makwanyane and Mchunu, 1995 (6) BCLR 665 (CC), available in 1995 SACLX LEXIS ¶ 124 (quoting Rodriguez v. British Columbia (1994) 17 CRR(2d) 193, 218 (La Forest, Gonthier, Iacobucci and Major, JJ. concurring)).

rather than vengeance as a model of a mature society. It is this leadership and decision-making that the United States' courts must follow to eradicate violence as a legal value.

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