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## Race and Capital Punishment in the United States and South Africa

Ursula Bentele

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# ARTICLES

## RACE AND CAPITAL PUNISHMENT IN THE UNITED STATES AND SOUTH AFRICA

*Ursula Bentele\**

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\* Professor of Law, Brooklyn Law School; B.A. Swarthmore College, 1965; J.D. University of Chicago Law School, 1969. The author gratefully acknowledges the research assistance of Traycee Klein, as well as the support of the Brooklyn Law School Summer Research Stipend Program.

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## I. INTRODUCTION

Although South Africa and the United States are different in many significant ways, what is striking to an American visiting South Africa<sup>1</sup> are the similarities. Others have remarked on these common characteristics, in general political and social terms,<sup>2</sup> in the justice system,<sup>3</sup> and in the context of the practice of capital punishment.<sup>4</sup> Prompted by observations contained in an essay in honor of a leader of the movement to abolish capital punishment in South Africa,<sup>5</sup> this article ex-

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1. The author spent a sabbatical visiting the University of Cape Town, South Africa in the spring, 1992.

2. ADAM HOCHSCHILD, *THE MIRROR AT MIDNIGHT* (1990).

3. A. Leon Higginbotham, *Racism in American and South African Courts: Similarities and Differences*, 65 N.Y.U. L. REV. 479 (1990).

4. David Bruck, *On Death Row in Pretoria Central*, *THE NEW REPUBLIC*, July 13, 1987, at 18.

5. Etienne Mureinik, *Caring About Capital Punishment*, in *ESSAYS IN HONOUR OF ELLISON KAHN* 216 (Coenraad Visser ed., 1989). See *infra* note 142

plores the question of whether the history of racial discrimination in these countries has played a role in their practice of imposing the death penalty, and in their continued willingness to execute citizens despite the trend towards abolition of this penalty in the civilized world.

The United States stands alone among Western democratic states in retaining, and carrying out, the death penalty for ordinary crimes during peacetime. South Africa presents a somewhat more complicated picture. The country could hardly be described as an egalitarian democratic state, given that it has denied the vote to a majority of its citizens and strictly enforced the law of apartheid that made discrimination based on race mandatory in virtually all aspects of life. Nonetheless, it prides itself on its Western style judicial system, praised as next only to the British system in its fairness and the high quality of its bench and bar.<sup>6</sup> In terms of capital punishment, however, South Africa, unlike Great Britain, has continued to employ this extreme penalty as punishment for murder and other serious felonies.<sup>7</sup>

Both the United States and South Africa might have been expected to follow the trend in the countries of Western Europe, Canada, and South America towards abolition of the death penalty for ordinary crimes during peacetime. The United States has much more in common with abolitionist coun-

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and accompanying text.

6. See, e.g., ALBIE SACHS, *JUSTICE IN SOUTH AFRICA* 32-34 (1973); see also C.R.M. Dlamini, *The Influence of Race on the Administration of Justice in South Africa*, 4 S. AFR. J. HUM. RTS. 37, 40 (1988) (noting that the judiciary is regarded as impartial).

7. While the death penalty remains an authorized punishment in South Africa today, and judges impose it with some frequency, no one has actually been hanged (except for one person in the independent homeland of Bophuthatswana) since the moratorium declared in connection with the current negotiations aimed at a new constitution. The African National Congress has called for the abolition of capital punishment. The African National Congress, *The Structure of a Constitution for a Democratic South Africa*, in *A CONSTITUTION FOR A DEMOCRATIC SOUTH AFRICA* 24, 32 (advising the South African Bill of Rights should contain "protection of life including the abolition of the death sentence.") reprinted in *XVII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* 5 (Albert P. Blaustein ed., 1992).

tries than with most of the remaining retentionist countries, such as Iran, Iraq, or China. Similarly, despite the shameful history of its apartheid regime, South Africa, too, shares more common values in terms of its judicial system and cultural norms with Western democracies than it does with the totalitarian regimes that represent the bulk of retentionist states. In this connection, it is significant that South Africa generally imposes death as a punishment through the formal judicial system, and observing basic due process guarantees, rather than extralegally as is the case in most other African states.<sup>8</sup>

My hypothesis is that the attitude towards capital punishment, as well as perhaps towards other methods of corporal punishment, in the United States and South Africa may have been formed, and may continue to be influenced by, the history of racial relationships in the two countries.<sup>9</sup> In both countries, white Europeans subjugated blacks, first through slavery and then through repressive legislation and practices. Blacks were seen as inferior to the dominant white race, and the law tried to prevent intermingling of the races through regulation of interracial sex and marriage.<sup>10</sup> Blacks were also disproportionately likely to be the victims of the capital and corporal punishment system.<sup>11</sup> I am suggesting that physical punishments, and particularly the death penalty, were used more extensively, and continue to be tolerated, in part because blacks were not seen fully as human beings, beings who feel pain the same way others do. The dehumanizing aspect of these penalties was therefore obscured by their application

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8. AMNESTY INT'L, WHEN THE STATE KILLS 205 (1989) [hereinafter WHEN THE STATE KILLS].

9. By positing this theory, and suggesting ways in which the history of the two countries contains parallel developments that seem to support it, I am not claiming to establish that there is a direct connection between race and capital punishment. If proof could ever be adduced to show such a connection, it would require inquiry in the fields of social science, psychology, and history that is far beyond the capacity of the present author or the scope of this article.

10. See *infra* parts III.A.2, III.B.2.

11. See *infra* parts III.A.3, III.B.3.

disproportionately to blacks, and more particularly to black men, who were perceived to be threatening to white women.

Accordingly, even though capital punishment appears no longer to be applied in an overtly discriminatory way, its association with the subjugation of blacks may well have prevented both South Africa and the United States from fully recognizing the pain and torture that have caused most of the Western civilized world to abandon the practice. Countries with much in common with the United States and South Africa have decided that capital punishment can no longer be justified, perhaps partly because, to paraphrase Nietzsche, the pain involved hurts more than it did before.<sup>12</sup> In the modern civilized world, the execution of citizens by the state is seen more and more in the same light as torture. Like torture, capital punishment denies the humanity of the offender and implies the total subjugation of a fellow human being.<sup>13</sup> When that fellow human being is not recognized as just like us, however, we may not notice that the pain "hurts more."

My thoughts about the relationship between continued imposition of death sentences and racism are informed not only by the history of the application of the penalty in both the United States and South Africa, but also by the images associated with a state's execution of one of its citizens. An execution ordered and carried out by government authority implies total subjugation of the person, just as did the slave laws of the early American South and the system of apartheid in force until recently in South Africa. An execution, no matter how it is accomplished, involves killing a bound and defenseless human being. Such physical punishment, outside perhaps the context of war, has been tolerated only when the object of the treatment is seen as an inferior being, a being who does not

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12. FRIEDRICH NIETZSCHE, *THE BIRTH OF TRAGEDY AND THE GENEALOGY OF MORALS* 199-200 (1956) (stating that in early times "pain did not hurt as much as it does today"), quoted in Jeffrey Reiman, *Justice, Civilization, and the Death Penalty: Answering van den Haag*, 14 PHIL. & PUB. AFF. 111, 135 (1985).

13. Reiman, *supra* note 12, at 140.

have the same values, feelings, or rights as the dominant society.

## II. THE ANOMALY OF THE CONTINUED PRACTICE OF EXECUTION IN THE UNITED STATES AND SOUTH AFRICA IN THE WORLD CONTEXT

### A. *The United States Stands Alone Among Western Democracies*

A recent book on capital punishment in the United States begins as follows: "The pattern is so simple it is stunning. Every Western industrial nation has stopped executing criminals, except the United States."<sup>14</sup> All of Western Europe has abolished the death penalty during peacetime. In the Americas, Mexico has long prohibited capital punishment for ordinary crimes,<sup>15</sup> with the last execution having taken place in 1937. Canada abolished the death penalty for ordinary offenses in 1976. In 1979 Nicaragua abolished the death penalty for all crimes, while Brazil and Peru abolished the penalty for ordinary offenses. In the early 1980s, El Salvador and Argentina abolished capital punishment for ordinary crimes. Australia abolished the penalty for ordinary offenses in 1984, and for all offenses in 1985. The Philippines and New Zealand joined the abolitionist ranks in the late 1980s. Among highly developed countries across the globe, only Japan still retains capital punishment for ordinary crimes, and even there the debate over its use is intense following recent hangings after a three-year moratorium.<sup>16</sup>

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14. FRANKLIN E. ZIMRING & GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 3 (1986).

15. Countries that are abolitionist only for "ordinary crimes" retain the possibility of death sentences for exceptional crimes, such as those committed during wartime or under military law. *WHEN THE STATE KILLS*, *supra* note 8, at 260.

16. See Yoshiaki Itoh, *Reported Executions Revive Debate Over Capital Punishment*, *NIKKEI WEEKLY*, Apr. 5, 1993; Kevin Rafferty, *Japan Resumes Death Penalty*, *REUTERS GUARDIAN*, Mar. 29, 1993.

The United States thus stands alone among civilized, industrialized Western democracies in retaining capital punishment for ordinary crimes in times of peace. This position has resulted in placing the United States in some rather anomalous situations with respect to the international community, a community which the United States normally prides itself in leading, especially in the area of human rights. As early as 1966, the United Nations General Assembly unanimously adopted the International Covenant on Civil and Political Rights (International Covenant), which reserves the death penalty for only the most serious crimes and prohibits its imposition on those who were under eighteen years of age at the time of the offense.<sup>17</sup> Yet for twenty-five years, as the International Covenant was being signed by more than one hundred countries, the United States refused to adopt this covenant, maintaining what to some was a highly hypocritical position.<sup>18</sup>

The United States has now finally ratified,<sup>19</sup> effective September 1992, the International Covenant, but it has done so only with significant reservations relating to the imposition

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17. International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 6, 999 U.N.T.S. 171. Subsequently, the UN General Assembly has repeatedly affirmed the desirability of abolishing capital punishment. See G.A. Res. 28/57, U.N. GAOR, 26th Sess., Supp. No. 29, ¶ 3, U.N. Doc. A/8429 (1972); G.A. Res. 32/61, U.N. GAOR, 32d Sess., Supp. No. 45, ¶ 1, U.N. Doc. A/3245 (1978). In addition, in 1983, the Council of Europe added a protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, providing, except in wartime: "The death penalty shall be abolished. No one shall be condemned to such penalty or executed." Nov. 4, 1950, Protocol No. 6, art. 1, 213 U.N.T.S. 222 [hereinafter European Convention].

18. SENATE COMM. ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. Doc. No. 102-23, 102d Cong., 2d Sess. \*6 (1992), reprinted in 31 I.L.M. 645, 649 (1992) [hereinafter COMMITTEE REPORT].

19. Discussions had taken place under the Carter Administration; President Reagan let them lapse, but President Bush, after the collapse of the Soviet Union, put the discussions back on Congress's agenda. The Senate gave its advice and consent to the ratification of the Covenant, with the important reservations discussed in the text, on April 2, 1992. *Id.* at \*9; see *infra* notes 20-24 and accompanying text.



of capital punishment.<sup>20</sup> First, the United States insists on being able to execute persons who were under the age of eighteen when they committed their crimes.<sup>21</sup> Second, the United States refuses to comply with the prohibition against cruel, inhuman, or degrading treatment or punishment except to the extent that such treatment or punishment is prohibited under the Fifth, Eighth, or Fourteenth Amendments to the United States Constitution.<sup>22</sup> This second reservation was necessary to deal with the decision of the European Court of Human Rights in the *Soering* case,<sup>23</sup> which found that subjecting the defendant, Jens Soering, to Virginia's death row would violate his human rights, according to the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>24</sup>

The *Soering* case is one of several recent instances which highlight the irony of the United States as defender of a penalty which the rest of the Western world has abandoned, at least in part because it is considered to constitute a violation of basic human rights. In 1985 a couple was killed in Virginia. Investigation soon focused on their twenty year old daughter, a student at the University of Virginia, and her boyfriend, Jens Soering, the son of a West German diplomat. The two had fled to Great Britain, and when the United States sought their extradition on murder charges, an international rights lawyer urged Great Britain to refuse on the grounds that Soering

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20. COMMITTEE REPORT, *supra* note 18.

21. COMMITTEE REPORT, *supra* note 18, at \*9. In *Stanford v. Kentucky*, 492 U.S. 361 (1989), and *Wilkins v. Missouri*, 492 U.S. 361 (1989), the United States Supreme Court affirmed death sentences imposed on defendants who were 17 and 16 years of age, respectively, when they committed the homicide. In *Thompson v. Oklahoma*, 487 U.S. 815 (1988), by a plurality vote, the Court failed to approve the death sentence imposed on one who was 15 at the time of the crime, with Justice O'Connor supplying a fifth vote only on the basis that the Oklahoma legislature had not made clear its intention to allow execution of those under the age of 18.

22. COMMITTEE REPORT, *supra* note 18, at \*10.

23. Case of *Soering*, 195 Eur. Ct. H.R. (ser. A) (1989), reprinted in 28 I.L.M. 1063 (1989).

24. European Convention, *supra* note 17, art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment.").

would be subject to cruel, inhuman, or degrading treatment if he were to face the prospect of death row in Virginia.<sup>25</sup>

The European Court of Human Rights agreed, primarily relying on the undisputed facts that convicted capital defendants in Virginia spent an average of six to eight years on death row, with most of that time spent confined to a small cell, and that, fifteen days before their scheduled execution date, inmates are moved to an unlighted cell near the electric chair, where they are watched constantly.<sup>26</sup> The Court also noted that human rights law prohibits imposition of the death penalty on one who was under eighteen years old at the time of the crime,<sup>27</sup> and that therefore Soering, who was just eighteen when he committed the crime, would be more susceptible to the inhumane treatment of death row.

A second example where this country has been placed in the position of defending capital punishment against the charge that it violates basic human rights concerns several natives of Mexico facing execution in the United States. Mexico, though not generally known for the respect for human rights accorded by its judicial and penal systems, has not carried out an execution in more than fifty years. When two men in Texas, Ramon Montoya and Ricardo Aldape Guerra, approached their execution dates recently, both the Mexican government and protestors in Mexico called on Governor Ann Richards to commute the sentences.<sup>28</sup> On behalf of Montoya, the Mexican National Human Rights Commission, as well as the National Network of Civil Human Rights Organizations made up of more than thirty Mexican groups, called for a re-

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25. *Case of Soering*, 28 I.L.M. at 1088.

26. *Case of Soering*, 28 I.L.M. at 1086.

27. *Case of Soering*, 28 I.L.M. at 1099.

28. Before Governor Richards was required to act on the applications, Ramon Montoya was initially granted a stay of his January 16, 1993 execution date by the Supreme Court pending disposition of his certiorari petition, *see Montoya v. Texas*, 744 S.W.2d 15 (Tex. Crim. App. 1987), *cert. denied*, 61 U.S.L.W. 3584 (U.S. Jan. 26, 1993) (No. 92-7351), and Guerra was granted a stay by the Texas Court of Criminal Appeals. *Guerra v. Texas*, 771 S.W.2d 453 (1988), *cert. denied*, 492 U.S. 925 (1989).

prieve, not challenging Montoya's guilt (he had killed a Dallas police officer), but only objecting to the death sentence.<sup>29</sup> Mexicans were reported as "view[ing] the United States' increasingly liberal use of the death penalty as racist and repugnant."<sup>30</sup> A spokesman for the Mexican attorney general's office was quoted as describing the death penalty as "barbarous."<sup>31</sup> Over the protestations of the Mexican government, Montoya was executed on March 25, 1993.<sup>32</sup>

Not only do these examples show the uncomfortable and ironic position in which the continued practice of capital punishment places the United States in the world context, they have also resulted in abandonment of this country's long tradition of looking to international norms to help define what is "cruel and unusual." When the Supreme Court evaluated, and struck down, the penalty of denationalization in 1958, it noted, citing to a United Nations survey, that "civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as a punishment for crime."<sup>33</sup> Similarly, when the Court found that the death penalty was a cruel and unusual punishment when applied to the crime of rape of an adult woman, it found that it was "not irrelevant" that only three of

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29. *Supreme Court Grants Stay for Texas Cop Killer*, UPI, Jan. 27, 1993, available in LEXIS, Nexis Library, UPI File. In addition to objecting to the death penalty, groups worldwide protested against the pending execution of Ricardo Aldape Guerra, asserting that he was innocent of killing a police officer. A director of *Comite Nacional de La Raza* explained: "This is the global aspect—not only are we trying to save the life of an innocent man and how he was used as a scapegoat—but it's also a protest of the justice system that is discriminatorily used against people of color." Jo Ann Zuniga, *The Wrong Man?*, THE HOUS. CHRON., Jan. 10, 1993, at A1.

Amnesty International has also petitioned for the return of an Illinois death row inmate to Mexico. This man had fled to Mexico after being accused of killing a police officer but was brought back to Illinois without the permission of the Mexican government. Heather Heerssen, *Holy Name Students Backing Rights Group*, THE PLAIN DEALER, Jan. 4, 1993, at 1C.

30. Christine Tierney, *Mexicans View U.S. Death Penalty As Barbaric*, REUTERS, Sept. 23, 1992, available in LEXIS, Nexis Library, Reuter File.

31. *Id.*

32. *Texas Executes a Mexican Killer, Raising a Furor Across the Border*, N.Y. TIMES, Mar. 26, 1993, at A15.

33. *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (plurality opinion).

sixty major nations in the world retained the death penalty for that crime.<sup>34</sup> The Court also noted the trend worldwide against application of the felony-murder doctrine to execute the nontriggerman when it held that capital punishment would be disproportionately severe for one who did not kill, attempt to kill, or intend to kill.<sup>35</sup>

Recently, however, when confronted with worldwide statistics showing the trend away from capital punishment for ordinary crimes during peacetime, and particularly as applied to defendants under the age of eighteen at the time of the offense,<sup>36</sup> the Court has scoffed at the notion that the Eighth Amendment of the United States Constitution should be interpreted by reference to international norms. This development, too, shows the growing isolation of the United States in terms of its insistence on retaining the death penalty, even when this ultimate punishment is imposed on very young offenders.

#### *B. South Africa's Retention of the Death Penalty*

In its capital punishment practices, South Africa is out of step both with the western democracies it seeks to emulate and with a significant movement toward abolition in Africa. In developments comparable to those taking place in the United States in the nineteenth century, South Africa restricted the number of capital crimes. Moreover, even when the death penalty was mandatory for several crimes, a large number of death sentences were commuted by the executive branch.

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34. *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977). According to a 1965 United Nations survey, aside from the United States, only China (Taiwan), Malawi, and the Republic of South Africa still used capital punishment for rape. U.N. DEPT OF ECONOMIC & SOCIAL AFFAIRS, CAPITAL PUNISHMENT, 1968, at 40, U.N. Doc. ST/SOA/SD/9-10, U.N. Sales No. 62.IV.2 (1968), cited in Brief for Petitioner at 50, *Coker*, 433 U.S. 584.

35. *Enmund v. Florida*, 458 U.S. 782, 796-97 n.22 (1982). The Court limited this principle to some extent in *Tison v. Arizona*, 481 U.S. 137, 157-58 (1987), when it announced that a death sentence could be imposed on a major participant in the underlying felony who displayed reckless indifference towards human life.

36. In *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989), the Court pointedly noted that only "American conceptions of decency . . . are dispositive" rejecting the dissenters' reliance on the overwhelming world trend against executing juveniles.

During the 1960s, scholars and some members of the judiciary in South Africa noted that South Africa was responsible for a staggering proportion of the offenders being executed throughout the world. The Society for the Abolition of the Death Penalty in South Africa was established, and for a number of years, in a pattern comparable to that taking place in the United States during the 1960s and early 1970s, executions dropped as challenges were raised to the use of capital punishment in the modern era.

Similar challenges resulted in abolition of the penalty in several newly emerging self-governing nations in Africa. Although capital punishment continues to be used on the African continent, a trend towards abolition can also be observed. Cape Verde abolished the death penalty upon independence in 1975; in 1990 Namibia, Sao Tome and Principe, and Mozambique became abolitionist states. Eight other African countries are either abolitionist for all but exceptional crimes or do not, in practice, execute: Comoros, Cote d'Ivoire, Madagascar, Niger, Senegal, Seychelles, and Togo.<sup>37</sup>

In both South Africa and the United States, the worldwide trend toward abolition of capital punishment might have been expected to prevail. While South Africa's apartheid policies have made it a pariah state in recent history, its government has generally followed British and Dutch traditions, and its judicial system, in fact, places greater emphasis on due process than most of its African neighbors. The United States has found itself in the position of defending its adherence to capital punishment against the overwhelming opinion of its strongest allies. Perhaps the willingness of these two countries to continue to execute fellow citizens may have its roots in their histories, histories that contain some telling parallels in terms of relationships between people of different races.

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37. WHEN THE STATE KILLS, *supra* note 8, at 216.

### III. SIMILAR DEVELOPMENT OF THE LAW WITH REGARD TO RACIAL DISCRIMINATION

A dramatic historical fact is common to both the United States and South Africa. Although countless numbers of black men have been executed to punish them for the alleged rape of white women, not a single white man has been executed, ever, in either country, for raping a black woman. This striking phenomenon, which surely cannot be dismissed as pure coincidence, is just the most visible symbol of an entire system of laws that, sometimes on their face and sometimes only as applied, have differentiated between the races.

Three aspects of these countries' histories seem relevant to an understanding of this remarkable statistic. First, both countries were heavily involved in the slave trade, and both continued discriminatory practices long after outlawing slavery itself. Although the comprehensive system of apartheid in South Africa is in many ways not comparable with the situation in the United States after the Civil War, racism has undoubtedly affected, and continues to plague, significant aspects of life in both countries.

Second, laws in each country were specifically concerned with the regulation of interracial sex and marriage. These laws incorporated the assumptions made in society about interracial sexual relationships. White men were assumed to be "entitled" to impose themselves on black women, whether they be slaves, servants, or free women, while black men were seen as an enormous threat to white women, requiring the utmost penalties for any suggestion of attention, attention that was conclusively presumed to be unwanted, if not hated and feared. This double standard<sup>38</sup> formed the basis of laws that explicitly differentiated between conduct according to the race of the actors involved. Such laws also reflect attitudes on the part of white

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38. Rennie Simson, *The Afro-American Female: The Historical Context of the Construction of Sexual Identity*, in POWERS OF DESIRE: THE POLITICS OF SEXUALITY 229, 234 (Ann Snitow et al. eds., 1983).

society that, even today, refuse to accept free association, especially sexual association, between men and women of different races.<sup>39</sup>

Finally, both societies punished conduct more severely if it was committed by a black offender, particularly when the victim of the crime was white. At times, the law made such distinctions explicit, but even when the law itself was colorblind, in fact, black offenders were treated more harshly, again especially when the victim was white.

In combination, these aspects of legal developments in the United States and South Africa help to explain how two societies, different in many ways, come to share the characteristic of treating black rapists of white women with such unyielding strictness while extending great leniency to white men who rape black women. They also reflect, I submit, the dominant white society's general belief in its own superiority, and therefore the inferiority of blacks, that lies at the heart of its willingness to subject fellow human beings to penalties that have been abandoned as barbarous in most of the civilized world.

#### A. *Differential Treatment by Race in the United States*

##### 1. Slavery and Racial Discrimination

The history of slavery in this country is too well known to require extensive repetition here. Specific aspects of the slave laws and Black Codes are, however, particularly relevant to the present discussion. It must be remembered that slaves in the antebellum South were treated as property, subject to the total control of their masters, and not as human beings. One commentator has noted that "[s]lavery in the American colo-

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39. Studies from the 1970s show that a majority of whites surveyed objected to interracial marriage, and 83% of whites would be "concerned" if their teenage child was dating a black person. GARY D. LAFREE, RAPE AND CRIMINAL JUSTICE 50 (1989). Although there has been a steady increase of black-white marriages in the United States, as of 1990, interracial marriages (between blacks and all other races) still amounted to only 6% of all married couples. *Climbing Jacob's Ladder*, THE HOUS. CHRON., Mar. 3, 1993, at 1.

nies took a particularly dehumanizing form."<sup>40</sup> Slaves here were under the absolute and total control of their masters, unlike, for example, slaves in Latin America, whose family and religious affairs stayed within the sphere of the church.<sup>41</sup> Even laws that appeared to recognize the humanity of the slave, such as laws making certain willful assaults on slaves criminal offenses, had as their ultimate motivation the protection of the master's property interest.<sup>42</sup> In addition, bounty laws in effect in various states offering rewards for bringing in the scalp and ears of runaway slaves hardly suggest that slaves were regarded as anything resembling human beings.<sup>43</sup>

In states outside the South, after slavery was abolished, discrimination against the newly freed blacks was common. In New York, for instance, five years after passage of the state's emancipation statute, the legislature increased the property requirement for blacks to vote, while at the same time removing any property qualification for voting by whites.<sup>44</sup> And while Pennsylvania, under the influence of the Quakers, was significantly more tolerant towards its black population than most of the colonies, even there blacks could be stopped on the street and, if they lacked a ticket from their master, imprisoned overnight without food or water and subjected to a public whipping on their bare backs the next morning.<sup>45</sup> The white

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40. WILLIAM BOWERS, LEGAL HOMICIDE 141 (1984) [hereinafter BOWERS, LEGAL HOMICIDE].

41. *Id.*

42. The history of Virginia's statutes and cases regarding crimes by and against slaves is chronicled in fascinating and thorough detail in A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The "Law Only as an Enemy": The Legitimation of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969 (1992) [hereinafter *Racial Powerlessness*]. Two examples in which the law ostensibly protected slaves as persons but was actually designed to maintain owners' property rights include a statute making it a crime to maliciously stab a slave, *id.* at 1047, and a case allowing indictment of a white person for knowingly injuring a female slave. *Id.* at 1053.

43. A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR 12-13 (1978) [hereinafter IN THE MATTER OF COLOR].

44. *Id.* at 148.

45. *Id.* at 276.



colonists simply "could not, or at least did not, accept blacks in anything but an inferior status."<sup>46</sup>

Moreover, while slavery and differential treatment based on race were officially ended with the post-Civil War amendments, racial discrimination has been much more difficult to eradicate. It is worth remembering that the military remained segregated until after World War II; Jackie Robinson was allowed to play in the major leagues only in 1947; *Brown v. Board of Education*<sup>47</sup> was not decided until 1954; in 1955 Marion Anderson was the first black singer to perform at the Metropolitan Opera in New York; until 1967 statutes in more than sixteen states still prohibited interracial marriages;<sup>48</sup> and, even now, litigation is pending which challenges de facto school segregation in Hartford, Connecticut.<sup>49</sup>

## 2. Interracial Sexual Relationships and Marriage

From their arrival in America, European migrants "merged racial and sexual ideology in order to differentiate themselves from Indians and blacks, [and] to strengthen the mechanisms of social control over slaves . . ."<sup>50</sup> Sexuality served to confirm white dominance: civilized and rational whites were naturally superior to savage and sensual blacks.

The antebellum South was deeply concerned with maintaining racial purity, and therefore strictly prohibited sex and marriage across racial lines. For example, in Virginia interracial marriage was prohibited by a 1691 statute which provided that white men or women who married a black or Indian would be banished from the colony forever.<sup>51</sup> When the threat

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46. *Id.* at 309.

47. 347 U.S. 483 (1954).

48. In *Loving v. Virginia*, 388 U.S. 1 (1967), the Supreme Court declared such statutes unconstitutional.

49. See, e.g., George Judson, *Lawsuit Attacks the Segregation of Urban Schools from White Suburbs*, N.Y. TIMES, Nov. 29, 1992, at 48.

50. ESTELLE FREEDMAN & JOHN D'EMILIO, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 86 (1988).

51. Act XVI, 3 LAWS OF VA. 86, 86-87 (Hening 1823) (enacted 1691), cited in A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial*

of banishment failed to act as a sufficient deterrent, the penalty was changed to six months imprisonment and a ten pound fine, along with a fine of ten thousand pounds of tobacco for the minister who performed the ceremony.<sup>52</sup> All these penalties for interracial marriage applied, until 1932, only to the white partner; at that time, the penalty was increased to one to five years' imprisonment and applied to both the white and black spouse.<sup>53</sup> Moreover, these laws prohibited only legitimizing interracial sexual relationships—they did not prevent white masters from having sexual relationships with their black slaves or servants.

Black women in the days of slavery were treated as objects of sexual gratification, and were presumed to consent to such treatment. Black women were seen as sensuous,<sup>54</sup> if not promiscuous, so that a sexual encounter was "never against her will."<sup>55</sup> The white man's sexual relationships with black women were regarded as a natural and normal outlet in a country in which men greatly outnumbered women. In addition to instances of forcible intercourse with slaves and servants, white men were also known to take black mistresses, either

*Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 1967-68 n.5 (1989).

52. Ch. XLIX, 3 LAWS OF VA. 447, 454 (Hening 1823) (enacted 1705), cited in Higginbotham & Kopytoff, *supra* note 51, 1995-96.

53. IN THE MATTER OF COLOR, *supra* note 43, at 46 (referring to VA. CODE ANN. § 20-59 (1960) Repl. Vol.).

54. RICHARD G. HOFSTADTER, AMERICA AT 1750: A SOCIAL PORTRAIT 108 (1971).

Naked and libidinous: for the white man's preoccupation with Negro sexuality was there at the very beginning, an outcome not only of his own guilt at sexual exploitation—his easy access to the black woman was immediately blamed on *her* lasciviousness—but also of his envious suspicion that some extraordinary potency and ecstatic experience were associated with primitive lust.

*Id.*

55. Jessie Daniel Ames wrote in 1936: "White men have said over and over—and we have believed it because it was repeated so often—that not only was there no such thing as a chaste Negro woman—but that a Negro woman could not be assaulted, that it was never against her will." Quoted in Jacquelyn Dowd Hall, *The Mind That Burns in Each Body*, in POWERS OF DESIRE, *supra* note 38, at 328, 331 [hereinafter *The Mind That Burns in Each Body*].

visiting them in their quarters or maintaining separate residences for them.<sup>56</sup>

On the other hand, white society found it inconceivable that a white woman might consent to a sexual relationship with a black man. The perceived sexual purity of white women presented a sharp contrast to the supposed lasciviousness of black women; a white southern woman who gave up her chastity was indeed a "fallen woman."<sup>57</sup> A white woman who succumbed to a black man had not just fallen; she must have been raped. The law in some states specifically allowed a jury to infer intent to commit rape from evidence merely showing assault, if the complainant was a white woman and the defendant a black man.<sup>58</sup> Moreover, race was explicitly permitted to be taken into account to rebut a presumption that a defendant was trying to obtain consent to sexual intercourse.<sup>59</sup>

The response of white male society to sex between a black man and a white woman, sex that was presumed to be the result of force, was powerful. One frequent reaction refused to wait for the judicial system: lynching served as a tool of psychological intimidation aimed at black men as a group, and outbreaks of mob violence "were increasingly accompanied by torture and sexual mutilation."<sup>60</sup> Even as lynchings declined, they continued to take place in response to the "special crime of sexual assault,"<sup>61</sup> which appeared to warrant extreme measures for the protection of white women against black rapists.

In addition to serving as an outlet for sexual desire, black slave women were also seen, and treated, as breeders of more slaves.<sup>62</sup> The status of a child, free or slave, was by law deter-

56. FREEDMAN & D'EMILIO, *supra* note 50, at 102-03.

57. Simson, *supra* note 38, at 231.

58. See, e.g., McCullough v. State, 73 S.E. 546, 547 (1912), cited in Brief Amici Curiae of the American Civil Liberties Union et al. at 17, Coker v. Georgia, 433 U.S. 584 (1977).

59. See, e.g., Dorsey v. State, 34 S.E. 135, 136 (1899) cited in Brief Amici Curiae of the American Civil Liberties Union et al., Coker v. Georgia, 433 U.S. 584 (1977).

60. *The Mind That Burns in Each Body*, *supra* note 55, at 330.

61. *The Mind That Burns in Each Body*, *supra* note 55, at 334.

62. Simson, *supra* note 38, at 230.

mined by the status of its mother.<sup>63</sup> Accordingly, children of a white man and a black slave were considered children of the mother, despite the well-established English practice of determining the status of children according to their father.<sup>64</sup>

The treatment of interracial sexual relationships and marriage in American history conveys the consistent message that black women are available for the sexual pleasure of white men, and that any offspring of such unions will be regarded as black. On the other hand, white women are strictly off limits to black men, and society will punish severely any violation of their sexual purity. The value of the life and personal integrity of women is directly related to race, as is society's tolerance of the conduct of men in their sexual relationships.

### 3. Harsher Punishments Based on Race of Offender and Victim

The punishment of criminal behavior by slaves and servants was complicated by the economic impact of most penalties on the master: imprisonment would deprive the owner of the slave's or servant's services during the period of incarceration; execution would deprive the owner of a valuable property permanently. Indeed, at least one jurisdiction in the United States, Virginia, compensated the owner of a slave who was condemned to death.<sup>65</sup> Punishment by whipping did not involve such problems, and accordingly was the favored penalty in both the United States and South Africa.

#### *a. Different Penalties Prescribed Based on Race*

In the antebellum South, the law explicitly authorized slaves, and sometimes free blacks as well, to be subjected to physical punishment that was off limits for whites, even for

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63. Act XII, 2 LAWS OF VA. 170, 170 (Hening 1823) (enacted 1662), cited in Higginbotham & Kopytoff, *supra* note 51, at 1967, 1971 nn.16 & 17.

64. IN THE MATTER OF COLOR, *supra* note 43, at 44.

65. See, e.g., *Racial Powerlessness*, *supra* note 42, at 1007, 1060.

white servants. Thus, for example, it was no criminal offense to subject a slave woman to a "cruel and unreasonable battery," as the master must have uncontrolled authority over the body of his slaves in order to preserve their value as property.<sup>66</sup> The disciplining of slaves was left entirely to the master, such that even a master who killed his slave during the course of such discipline was entitled to be acquitted.<sup>67</sup> White servants, on the other hand, could not be subjected to "immoderate correction," and were allowed to be whipped while naked only with the authorization of a justice of the peace.<sup>68</sup> The usual punishment for resistance by white servants was extension of their period of servitude, while slaves, already committed for life, were subject to whipping. The racial basis of the law is demonstrated, however, by its provision calling for both slaves and free blacks who resisted any whites to be whipped on their bare backs.<sup>69</sup>

In Virginia, as well as in some other states,<sup>70</sup> at various times legislation that imposed prison sentences on white men convicted of rape required castration of blacks convicted of the rape or attempted rape of white women.<sup>71</sup> When a 1769 Virginia law noted that dismembering is often disproportionate to the offense and contrary to principles of humanity, so that castration of slaves would no longer be allowed, it retained a specific exception for the attempted rape of a white woman.<sup>72</sup> Similarly, in pre-Civil War Georgia, white men convicted of

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66. *State v. Mann*, 13 N.C. 263 (1829), described in *IN THE MATTER OF COLOR*, *supra* note 43, at 8-9.

67. *Racial Powerlessness*, *supra* note 42, at 1027-28.

68. *Racial Powerlessness*, *supra* note 42, at 1027.

69. *Racial Powerlessness*, *supra* note 42, at 1028.

70. For example, an 1855 Kansas statute provided that a black man convicted of raping a white woman could be castrated, while a white man convicted of the same offense was subject to a maximum of five years' imprisonment. *W. Haywood Burns*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 89 (David Kairys ed., 1982), cited in *LAFREE*, *supra* note 39, at 114.

71. *Racial Powerlessness*, *supra* note 42, at 1058 (referring to Act of 1769, ch. XIX), in 8 *HENING'S STATUTES AT LARGE* 358, 358-61 (William W. Hening ed., 1819-23) [hereinafter *HENING'S STATUTES*].

72. *Racial Powerlessness*, *supra* note 42, at 1058 (referring to Act of 1769, ch. XIX, § 1 in *HENING'S STATUTES* 358, 358).

rape were punishable by a fine or imprisonment, while a black man, whether slave or free, convicted of raping or attempting to rape a white woman was punished with death.<sup>73</sup>

Penalties for other crimes were also often more severe for blacks, and especially for slaves, than those prescribed for white offenders. In Virginia, for example, sixty-eight offenses were capital crimes when committed by slaves, while the same conduct by whites was punishable by, at most, imprisonment.<sup>74</sup> In addition, even *free* blacks could be sold into slavery for offenses subject only to a prison term if committed by whites.<sup>75</sup>

After the Civil War, the so-called Black Codes were enacted in the South to preserve white supremacy. These codes provided for different punishments for whites and blacks, as well as calling for harsher punishments, in some instances, when the victims of crime were white. Crimes with black victims were often not prosecuted at all, or penalized only very lightly. The equal protection clause of the Fourteenth Amendment had as one of its primary purposes the invalidation of such codes.<sup>76</sup>

#### b. *Southern States Retain Death Penalty for Rape*

By the early twentieth century, capital punishment as an authorized penalty for the crime of rape was almost exclusively limited to the states of the former Confederacy.<sup>77</sup> While south-

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73. Brief *Amici Curiae* of the American Civil Liberties Union at 54 n.62, *Coker v. Georgia*, 433 U.S. 584 (1977). The Georgia Penal Code of 1816, Secs. 33-34, provided for two to twenty years imprisonment for rape and one to five years for attempted rape. *Id.* at app. 2a n.5a. Ga. Acts of 1816, No. 508, Sec. 1, provided that, when committed by a slave or "free person of colour," rape or attempted rape of a free white female was a capital offense to be punished by death. *Id.* at app. 2a n.6a; see also LAFREE, *supra* note 39, at 141.

74. *Racial Powerlessness*, *supra* note 42, at 977.

75. *Racial Powerlessness*, *supra* note 42, at 978, 1023.

76. SAMUEL R. GROSS & ROBERT MAURO, *DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* 119 (1989).

77. Eighteen states retained the penalty as of 1926, including Alabama, Ar-

ern statutes did not explicitly differentiate on the basis of race, studies have demonstrated that black men convicted of raping white women were "the primary targets of the death penalty" for rape: eighty-five percent of all executions for rape involved this combination.<sup>78</sup> Moreover, of the 455 persons executed for rape between 1930 and 1969, 443 (97.4 percent) were executed in the South. These figures, and the concentration of executions for rape in the South, surely support the notion that the retention of capital punishment for this crime was related to the abhorrence among whites of sexual assaults committed by black men upon white women. A racial motivation may also have played a role in a rather unusual legislative decision in Tennessee, which abolished the death penalty in 1915 for murder and treason, but specifically retained it for rape.<sup>79</sup>

*c. More Severe Penalties Actually Imposed*

In the United States, as in South Africa, statutes providing that the death penalty was mandatory for numerous serious felonies gave way first to statutes reducing the number of capital crimes, and ultimately towards explicit granting of discretion to the capital sentencer. Most jurisdictions in the United States had, early in the twentieth century, replaced the former mandatory capital punishment statutes with laws permitting juries, or judges, to grant mercy to defendants convicted of capital crimes.<sup>80</sup> Even though these modern capital punishment statutes do not differentiate on the basis of the race of the offender or the victim, comprehensive studies have shown

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kansas, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia. See Petitioners' Brief at 37-38, *Coker v. Georgia*, 433 U.S. 584 (1977) citing Bye, *Recent History and Present Status of Capital Punishment in the United States*, 17 J. CRIM. L. 234, 241-42 (1926).

78. LEGAL HOMICIDE, *supra* note 40, at 75 (citing a 1972 study by Professor Marvin Wolfgang).

79. HUGO A. BEDAU, *THE DEATH PENALTY IN AMERICA* 413 (rev. ed. 1967).

80. See *Woodson v. North Carolina*, 428 U.S. 280, 299, 318 (1976).

that the death penalty is more likely to be imposed and carried out if the offender is black, particularly if the victim is white.<sup>81</sup>

When Donald Gaskins was electrocuted in 1991, he was the first white man to be executed for killing a black victim in almost fifty years.<sup>82</sup> Mr. Gaskins had previously been convicted of nine other murders, all of whites, and had been implicated in several other killings. His death sentence resulted from his killing of a black fellow inmate, an inmate who had himself been convicted of murder. Gaskins had been hired by the son of the couple the black inmate had killed. The son, who was white, served six months in prison.<sup>83</sup>

One of the historical phenomena that led to the suspension of capital punishment in the United States was the undisputed fact that, for the crime of rape, of 455 men who had been executed between 1930 and 1969, 405 were black.<sup>84</sup> Black men convicted of rape were seven times more likely to be sentenced to death than white men; black men convicted of raping white women were eighteen times more likely to be sentenced to death than men convicted of rape in any other racial combination.<sup>85</sup> And, as has been noted, in the history of the United States, no white man had ever been executed for raping a black woman.

These figures were partly a reflection of the fact, discussed above, that capital punishment, especially for rape, was largely a product of the South.<sup>86</sup> "Between 1935 and 1969 more exe-

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81. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987). The Supreme Court, by a five to four vote, rejected a systemic challenge to Georgia's capital sentencing system, despite a convincing showing of gross disparities based on the race of the offender and of the victim, finding that no inference of racial discrimination in any particular case could be drawn from such disparate results.

82. David Margolick, *Rarity for U.S. Executions: White Dies for Killing Black*, N.Y. TIMES, Sept. 7, 1991, at 1.

83. As David Bruck noted at the time, "That's apparently the sort of criminal record a white man needs to be executed for the murder of a black." *Id.*

84. BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, 18 CAPITAL PUNISHMENT (1979).

85. See GROSS & MAURO, *supra* note 76, at 122-23.

86. Marvin Wolfgang found a "systematic, differential practice of imposing the



cutions took place in the South than in all the other regions combined."<sup>87</sup> And even in non-southern states, such as New York, executions tended to increase during periods when the black population increased dramatically.<sup>88</sup>

This trend continues to the present. Post-*Gregg*<sup>89</sup> executions have also been predominantly in the states that had high execution rates pre-*Furman*,<sup>90</sup> which were primarily the southern states.<sup>91</sup> Between 1977 and 1986, Florida, Texas, Louisiana, and Georgia executed three times as many prisoners as all of the rest of the states combined.<sup>92</sup> Of the total number of executions since the Supreme Court approved new

death penalty on blacks for rape and, most particularly, when the defendants are black and their victims are white" in a study of seven southern states from 1945 to 1965. Marvin Wolfgang, *Racial Discrimination in the Death Sentence for Rape*, reported in WILLIAM BOWERS, *EXECUTIONS IN AMERICA* (1974).

87. ZIMRING & HAWKINS, *supra* note 14, at 30.

88. The proportion of blacks doubled among those executed in New York in the 1930s and 1940s, and blacks tended to be executed at a younger age, as well as being executed without resorting to appeals to higher courts. BOWERS, *LEGAL HOMICIDE*, *supra* note 40, at 97.

89. In *Gregg v. Georgia*, 428 U.S. 153 (1976), along with its companion cases involving statutes from Florida, Texas, North Carolina and Louisiana, the Supreme Court approved statutes that provided for separate guilt-innocence and penalty phases, and guided the sentencer's discretion as to whether to impose a death sentence, while striking down statutes making capital punishment mandatory for specific categories of crime.

90. In *Furman v. Georgia*, 408 U.S. 238 (1972), the Supreme Court, in a brief *per curiam* opinion, effectively invalidated all death penalty statutes as they were then applied. Five justices concurred in this result, relying on different rationales. Justices Brennan and Marshall found the death penalty *per se* violative of the Eighth Amendment proscription against cruel and unusual punishments. *Id.* at 305, 370. Justice Douglas based his opinion largely on the discriminatory application of capital punishment, *id.* at 256-57; Justice Stewart objected mainly to its "freakish" imposition, *id.* at 309-10; while Justice White saw it being applied so infrequently and arbitrarily as to cease to serve any proper penological function. *Id.* at 313.

91. The main exceptions to the predominance of the South were New York and California, which had high execution rates before *Furman*. BOWERS, *LEGAL HOMICIDE*, *supra* note 40, at 30. California retains the death penalty and has more than 300 inmates on death row, but only one has been executed since *Gregg*. Evan Ca Minker & Erwin Chemerinsky, *The Lawless Execution of Robert Alton Harris*, 102 *YALE L.J.* 225 (1992). New York does not authorize capital punishment. N.Y. PENAL § 70.00 (McKinney 1986).

92. ZIMRING & HAWKINS, *supra* note 14, at 140.

state capital punishment statutes in 1976, close to ninety per cent took place in the South.<sup>93</sup>

Moreover, differentiation of punishment based on the race of the offender and the victim is not limited to executions, nor to an earlier part of the nation's history. Disparities in the penalties imposed for rape persist; when the combination of black men and white women was isolated, a study conducted in a midwestern city in the 1970s found that black sex offenders were treated by far the most harshly.<sup>94</sup>

Racial disparities have also been found in the history of executions carried out by the military. A recent study of executions after courts-martial in Europe during World War II by Professor J. Robert Lilly at Northern Kentucky University demonstrated that, even though blacks accounted for less than ten percent of the troops, eighty-seven percent of those executed for the crime of rape were black.<sup>95</sup>

Differential treatment of offenders according to their own race as well as the race of their victims has thus been prevalent throughout American history. This differentiation is consistent both with the lesser value placed on black life and liberty, and with the stereotype of blacks, especially black men, as posing a particular threat to white society.

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93. The figures through the end of 1992 are as follows: Texas (59); Florida (31); Louisiana (21); Virginia (19); Georgia (15); Alabama (10); Missouri (8); Nevada (5); North Carolina (5); Arkansas (4); Mississippi (4); South Carolina (4); Utah (4); Arizona (3); Oklahoma (3); Delaware (2); Indiana (2); California (1); Illinois (1); Washington (1); Wyoming (1). Of the 203 executions, 180 took place in the South. Telephone Interview with Kica Matos, Research Director of the Capital Punishment Project of the NAACP Legal Defense and Education Fund (May 18, 1993).

94. Gary D. LaFree, *The Effect of Sexual Stratification by Race on Official Reactions to Rape*, 45 AM. SOC. REV. 842, 844, 852 (1980) (describing a study conducted in a large midwestern city between 1970 and 1975, which found that black men accused of sexually assaulting white women received significantly more serious sanctions than other sexual assault suspects).

95. Francis X. Clines, *When Black Soldiers Were Hanged: a War's Footnote*, N.Y. TIMES, Feb. 7, 1993, at 20 (25 blacks and 4 whites were executed for the rape of civilians).

## B. South Africa: From Colonial Rule to Apartheid

### 1. Racial Stratification

Almost as familiar as the history of slavery in the United States is the apartheid regime established in South Africa by the National Party in 1948. Under this strict system of segregation of the races, the sort of citizenship and rights a person enjoyed correlated precisely with that person's racial classification.<sup>96</sup> The apartheid rule codified and expanded the racial stratification prevalent throughout the modern history of southern Africa, after the appearance of white settlers in the seventeenth century.

White domination was initiated almost immediately by the Dutch East India Company, which divided society into two classes, the white colonists, who were landowners and employers, and the black laborers, both imported slaves and local Khoikhoi workers, who performed the manual labor deemed to be too degrading for whites.<sup>97</sup> White control spread throughout southern Africa, as the British and Afrikaner colonists moved east and north from the original Cape Colony settlement, and continued to be maintained through technological advantages, despite the fact that whites comprised less than twenty percent of the population.<sup>98</sup> Colonialism here, as elsewhere, assumed the superiority of European culture over the "primitive backwardness" of the "childlike" native people.<sup>99</sup>

Slavery was prevalent in South Africa during the early colonial period. In 1828 the House of Commons passed a motion that the colonial government was to be told to "secure to all the natives of South Africa, the same freedom and protection as are enjoyed by other free people of that Colony whether

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96. RACE AND THE LAW IN SOUTH AFRICA 209 (A.J. Rycroft et al. eds., 1987) [hereinafter RACE AND THE LAW].

97. STUDY COMMISSION ON U.S. POLICY TOWARD SOUTHERN AFRICA, SOUTH AFRICA: TIME RUNNING OUT 32-33 (1981) [hereinafter TIME RUNNING OUT].

98. *Id.* at 31-32.

99. Dlamini, *supra* note 6, at 37.

English or Dutch."<sup>100</sup> Even after the abolition of slavery, however, as in the United States, white superiority was maintained through political, economic, and social domination.

During the nineteenth century, somewhat comparably to the situation in the pre-Civil War United States, the treatment of blacks varied in different parts of the country. In the Cape of Good Hope and Natal, which were dominated by British influence, blacks enjoyed limited citizenship rights. In the Orange Free State and Transvaal Republics, under the rule primarily of Afrikaners, blacks, while subject to taxation and service of white farmers, were denied any right to citizenship or equal treatment under the law.<sup>101</sup>

When the Union of South Africa became a self-governing British dominion in 1910, the parliament consisted of only white members, and, except in the Cape Province,<sup>102</sup> the franchise was limited to the white population. Most white South Africans, whether British or Afrikaner, shared the prevalent view that blacks were an innately inferior race that must be governed by the white man.<sup>103</sup> Long before the National Party explicitly adopted the comprehensive policy of apartheid in 1948, segregation of the races had been the norm in the Republic of South Africa throughout the twentieth century. Pass laws and land laws prohibited blacks from traveling freely or owning land, except in designated African preserves, and even from living legally outside these preserves (which later became the so-called "homelands") unless employed by whites.<sup>104</sup> And, of course, the apartheid system in effect until February 2, 1990, controlled all aspects of a person's life in direct relation to the color of that person's skin.

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100. LEONARD THOMPSON, *A HISTORY OF SOUTH AFRICA* 60 (1990). Actually, the Cape Governor independently, two days after passage of this legislation, made Khoikhoi equal before the law with whites. *Id.*

101. S.D. Girvin, *Race and Race Classification*, in *RACE AND THE LAW*, *supra* note 96, at 3.

102. L.J. Boule, *Race and the Franchise*, in *RACE AND THE LAW*, *supra* note 96, at 12.

103. *TIME RUNNING OUT*, *supra* note 97, at 38-39.

104. *TIME RUNNING OUT*, *supra* note 97, at 39.

## 2. Regulation of Sex and Marriage

Comparably to developments in the United States, in parts of South Africa, such as the Transvaal and Orange Free State, whites and blacks were treated differently in terms of the laws relating to sexual relationships. Before formation of the Union of South Africa, statutes generally prohibited sexual intercourse between white women and black men, though violators were usually prosecuted only when such intercourse was forced.<sup>105</sup> On the other hand, in a country with very few white women, white men frequently had sexual relationships with the black servants of the household.<sup>106</sup>

In the Transvaal, the principal marriage law<sup>107</sup> made no provision for marriages other than those of white persons. Later, an 1896 statute provided: "The People will not permit any equalisation of coloured persons with white inhabitants."<sup>108</sup> Yet, the following year, a law was passed authorizing the marriage of coloured people who "by education and civilisation have become distinguished from barbarians, and who therefore desire to live in a Christian and civilised manner, and accordingly wish to be lawfully united in marriage."<sup>109</sup>

Voluntary sexual intercourse was also generally prohibited between black men and white women. In the Transvaal, by a 1902 statute, it was an offense punishable by five years imprisonment for a white woman voluntarily to have unlawful carnal

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105. SACHS, *supra* note 6, at 174.

106. A popular book, recently aired as a television series in South Africa, follows the history of a prominent white vineyard owner who tried to gain acceptance in the white world for the son he fathered with his black mistress. LUANSHYA GREER, *REAP THE WHIRLWIND* (Rowan Books, 1992) (1991). The story resembles in many ways Alex Haley's depiction of his own ancestors in the American miniseries *Queen*.

107. See E.L. Matthews, *South African Legislation Relating to Marriage or Sexual Intercourse Between Europeans and Natives or Coloured Persons*, Vol. XXXVIII S. AFR. L.J. 315-16 (1921).

108. *Id.*

109. *Id.*

connection with any native; the native man was subject to six years imprisonment, as well as twenty-four lashes. It was also an offense punishable by ten years and twenty-four lashes for any person to procure a white woman for such purposes.<sup>110</sup>

The public attitudes towards interracial marriage in the Orange Free State were comparable to those in the Transvaal, though that province had no formal prohibition against mixed marriages as of 1899. In practice, very few marriages between the races took place in the Orange Free State.

In the Cape and Natal provinces, on the other hand, much like in the northern states of the United States, after abolition of slavery mixed marriages were authorized; no legal bar existed to marriage between Europeans and members of other races.<sup>111</sup> Later, however, in 1903, the Natal parliament declared any illicit sexual intercourse between a white woman and a coloured person to be unlawful, with each party subject to two years imprisonment. In addition, the male was also subject to twenty-five lashes.<sup>112</sup>

Early in the twentieth century, South Africa determined that sexual contact between the races must be curtailed, and accordingly prohibited sexual intercourse between "Europeans" and "natives," gradually increasing the penalties, and even extending the prohibition to sexual activity short of intercourse.<sup>113</sup> One report recommended that rape remain a capital crime in order to protect "poor white girls . . . going into Chinese laundries and liquor bottling establishments, where they are . . . exposed to the evils of close objectionable contact with orientals and natives."<sup>114</sup> The same report noted that "violating chastity, especially where the offender is a male of

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110. *Id.* at 317-18.

111. *Id.* at 313, 314-15.

112. *Id.* at 318.

113. See SACHS, *supra* note 6, at 174-77 (describing South African Immorality Acts of years 1927, 1950, and 1957).

114. Section 127 of the 1913 Report of the deVilliers Commission into *Assaults on Women*, quoted in Ellison Kahn, *How Did We Get Our Lopsided Law on the Imposition of the Death Penalty for Common Law Crimes? And What Should We Do About It?*, 2 S. AFR. J. CRIM. JUST. 137, 140 n.27 (1989).

inferior race, is keenly felt among white people as an irreparable wrong to the victim and her relatives and an outrage upon the white race."<sup>115</sup> Conduct that would be innocuous if it occurred between members of the same race could become criminal when the accused was black and the "victim" white.<sup>116</sup>

Thus, as in America, the regulation of sexual intercourse and marriage was closely tied to the race of the partners. The dominant white society, although numerically in the minority, asserted its superiority over the black population in part through its control over sexual relationships.

### 3. Differential Punishments

#### *a. Laws Providing Greater Punishment*

In South Africa, from the earliest colonial era, punishments were defined by the race of the offender. While imprisonment was considered an appropriate penalty for white Europeans, it was deemed far too lenient for native Africans, who would instead be subject to whipping or other corporal punishment.<sup>117</sup> The colonists were convinced that only corporal punishment would have any effect on the blacks—and the whipping had to be severe because blacks were thought to have thicker skin, and therefore to feel the pain less, than white men.<sup>118</sup> The Director of Prisons concluded in 1935 that at least six strokes for whites and eight strokes for blacks were necessary to constitute effective punishment.<sup>119</sup>

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115. *Id.* § 38.

116. *See, e.g.,* R. v. Olakwu, 1958 (2) S.A. 357 (c) (involving an African domestic servant convicted for writing love letter to an unmarried white woman), cited in SACHS, *supra* note 6, at 152.

117. Steve Peté, *Punishment and Race: The Emergence of Racially Defined Punishment in Colonial Natal*, 1 NATAL U.L. & SOC'Y REV. 99 (1986).

118. SACHS, *supra* note 6, at 196.

119. SACHS, *supra* note 6, at 197. The Penal Reform Commission noted, however, that after the eighth stroke the flesh would be numb. SACHS, *supra* note 6, at 197.

Within the prisons, as well, brutal flogging was routinely used against black prisoners, even for minor offenses, while white prisoners would have to commit a serious infraction to be subject to a flogging.<sup>120</sup>

*b. Harsher Penalties Imposed*

As in the United States, capital punishment was the mandatory penalty for several crimes in the early history of South Africa. Yet during the nineteenth and early twentieth centuries, relatively few offenders were actually hanged, with a majority of those convicted of capital crimes receiving reprieves from the Ministry of Justice.<sup>121</sup> This system of reprieves by executive authority, an authority with overtly racist policies, surely tended to benefit white defendants, while black defendants, particularly those whose victims were white, were more likely to be executed.<sup>122</sup> One Minister of Justice proudly announced that he had never granted a reprieve to a black man convicted of raping a white woman.<sup>123</sup>

After Union, the death penalty continued to be mandatory for murder except where the offender was under sixteen or was a woman who had murdered her newly born child.<sup>124</sup> In 1935 the law was amended to allow the court to impose a sentence other than death if it found mitigating (later referred to as

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120. Peté, *supra* note 117, at 104-05.

121. SACHS, *supra* note 6, at 5, 192; JOHN DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER 126 (1978).

122. A 1949 study suggested that racial considerations influenced the executive's decisions on reprieves in murder cases: "Non-Whites convicted of raping or murdering Whites are usually hanged. This pattern was attributed to the fact that less value is attached to the life of a Non-White, while emphasis is placed on the sanctity of the life of a White." Rhadamanthus, *Contempt of Court? The Trial of Barend Van Dyk Niekerk*, in ACTA JURIDICA 77, 136 (1970) (B. Beinart et al. eds., 1971) [hereinafter ACTA JURIDICA] quoting Handbook on Race Relations in South Africa, 1949.

123. DUGARD, *supra* note 121, at 127 (quoting Mr. C.R. Swart during his tenure as Minister of Justice).

124. 1917 Criminal Procedure and Evidence Act (Sec. 338).



extenuating) circumstances.<sup>125</sup> This law, explicitly incorporating an element of discretion in capital sentencing, has resulted in execution rates that are difficult to explain without reference to the race of the offender and the victim. While accurate figures are not always available,<sup>126</sup> it has been estimated that of the 2,740 persons executed since 1910, fewer than one hundred were white.<sup>127</sup> Nor can this disparity be explained by the higher percentage of blacks in the population, or even among those accused of murder and rape. For example, during one period for which the relevant information is available, more whites were charged with the murder or rape of black victims than were blacks charged with the murder or rape of white victims.<sup>128</sup> Nonetheless, no white was sentenced to death for the rape or murder of a black victim during three years of that period, while thirty-seven blacks were executed for the murder of a white victim, and thirteen for the rape of a white woman.<sup>129</sup>

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125. General Law Amendment Act 46, Section 61(a).

126. Research focusing on the impact of race on criminal penalties in South Africa has been stymied not only by incomplete records, but by a distinct hostility to scholars so much as broaching the subject. In 1970, law professor Barend van Niekerk was tried on charges of contempt for having published the results of a survey of advocates in which a significant number of respondents expressed the opinion that black offenders were more likely to be sentenced to death than white offenders, and that this disparity was a result of conscious and deliberate discrimination. *State v. Van Niekerk*, 1970(3) S.A. 655 (T). Professor van Niekerk was found not guilty only because the court accepted his statement that "at no time did he have any intention to reflect improperly on the judges or the administration and that he had always held them in the highest esteem." See *ACTA JURIDICA*, *supra* note 122, at 77, 199 (reporting the full record of the trial).

Five years later, Professor van Niekerk was sued for defamation after he criticized the Minister of Justice for granting a reprieve to a white defendant, while allowing his black accomplice to be hanged. His motion to dismiss was denied, but apparently the lawsuit lapsed upon the death of the minister. See *South African Associated Newspapers Ltd. v. Estate Pelser*, 1975(4) S.A. 797 (A.D.).

127. See *DUGARD*, *supra* note 121, at 127.

128. *ACTA JURIDICA*, *supra* note 122, at 137 (reporting figures from 1953 to 1962 derived by Mr. David Welsh from the Commissioner of Police's Report).

129. *ACTA JURIDICA*, *supra* note 122, at 137 (reporting on an analysis of sentences imposed for cross-color rape and murder during 1957 to 1959).

The same remarkable phenomenon is reported in South Africa as in the United States: no white man has ever been executed for raping a brown or black woman.<sup>130</sup> Indeed, very few white men have been executed for the crime of rape, as compared to the numbers of blacks executed for that crime. Between 1911 and 1968, only two of the 132 South African men executed for rape were white, both convicted of raping young white girls.<sup>131</sup>

A study of all 118 rape convictions returned by the Durban and Coast Local Division of the Supreme Court in the ten years from 1970 to 1979 found that sentences for rapes with white victims were more severe than those involving "coloureds," Asians and blacks, in that order.<sup>132</sup> There was almost a two-fold increase in the severity of the sentence where a white person was raped as compared to where the victim was black. Where non-whites were victims, there was an eighty percent chance of a light sentence,<sup>133</sup> as opposed to a thirty-seven percent chance when a white person was the victim.<sup>134</sup> In one case, the judge explicitly found the fact that the defendant accused of rape was black, while his victim was white, to constitute an aggravating feature justifying a death sentence, stating that the shock to her would have been all the greater.<sup>135</sup>

As in the United States, the death penalty for murder has also been imposed disproportionately on blacks, especially when the victim is white. For example, from June 1982 to

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130. SACHS, *supra* note 6, at 154.

131. SACHS, *supra* note 6, at 154.

132. O. Salmon, *Sentences for Rape*, in CRIMINAL JUSTICE IN SOUTH AFRICA, SELECTED ASPECTS OF DISCRETION 171 (MCJ Olmesdahl & NC Steytler eds., 1983) [hereinafter Salmon].

133. Albie Sachs also noted that young white men convicted of raping black women were treated very leniently, sometimes just with light strokes. Sachs remarked that their punishment seemed to be more for giving in to temptation and disgracing themselves than for doing violence to the victim. SACHS, *supra* note 6, at 155.

134. Salmon, *supra* note 132, at 172.

135. *S. v. Ngubelanga* (Diemont, J., 6/10/66), unreported (Cape), noted in SACHS, *supra* note 6, at 153.

June 1983, of eighty-one blacks convicted of murdering whites, thirty-eight were hanged. Of fifty-two whites convicted of murdering whites, one was hanged. Of twenty-one whites convicted of murdering blacks, none was hanged.<sup>136</sup>

Also strikingly similar to the attitudes reported in the antebellum United States is the different treatment accorded to assaults depending on the race of the parties. In the late 1940s, a well respected South African philosophy professor described the phenomenon:

For a Native to use, or threaten, physical violence against a White is a challenge to the domination of the White group and is resented as such; similar action on the part of a White man against a Native is more readily minimized as legitimate punishment of insubordination or as "teaching the nigger to respect the White man."<sup>137</sup>

Black Africans are seen, by white South Africans, as are black Americans by many white Americans, as posing a physical danger, such that assaults must be heavily and promptly punished so as to deter such perceived threatened violence. Here, too, assaults regarded as particularly threatening involve black men and white women.<sup>138</sup>

When a commission on crime published its report in 1947, it concluded that capital punishment should be retained in South Africa despite the growing movement towards abolition in Europe. The report noted that the experience of these abolitionist countries was not applicable to South Africa, where the bulk of the population "ha[s] not yet emerged from a state of barbarism."<sup>139</sup>

136. Amnesty International, *Racial Discrimination*, FOCUS, Nov. 1988, at 5.

137. ALFRED HOERNLE, SOUTH AFRICAN NATIVE POLICY AND THE LIBERAL SPIRIT 36 (1945) in ACTA JURIDICA, *supra* note 122, at 139.

138. Leo Marquand, *Peoples and Policies of South Africa* (1969), in ACTA JURIDICA, *supra* note 122, at 140.

139. ACTA JURIDICA, *supra* note 122, at 135; SACHS, *supra* note 6, at 195.

## IV. RACISM AND CAPITAL PUNISHMENT

In the two most recent presidential elections in the United States, the Democratic candidates' treatment of two black offenders may have made a critical difference in the outcome, and surely provided one of the most potent symbols for the electorate. Michael Dukakis was severely damaged by an incident where a black man, who had been permitted out on furlough from a Massachusetts prison, was arrested for raping a white woman.<sup>140</sup> On the other hand, William Clinton, despite enormous pressure from around the world on behalf of a black mentally disabled death row inmate, emerged stronger than ever after allowing the execution to proceed.<sup>141</sup> In South Africa, too, while significant strides have been made since President deKlerk's February 2, 1990 announcements declaring an intention to end the apartheid era, no universal elections have yet been held, and political, economic, and social life remains stratified along racial lines.

Surely few would dispute that racism has played a significant role in the history of both the United States and South Africa, and that neither country has eradicated its effects on the life of its citizens. I suggest that one such effect is to overcome some of the inhibition one might expect against deliberately putting fellow citizens to death as a punishment for crimes.

My hypothesis is that the retention of capital punishment as part of the judicial systems of these countries may be related to its imposition on those who have long themselves been seen, when they are seen at all, as not fully human, not entirely emerged from barbarism. For the same reason, capital pun-

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140. The powerful appeal to white fears of the Willie Horton advertisement has been widely noted. *See, e.g.,* Juan Williams, *The Survival of Racism under the Constitution*, 34 WM. & MARY L. REV. 7, 13 (1992).

141. As David Garth, the political consultant, put it: Clinton "had someone put to death who had only part of a brain. You can't find them any tougher than that." THE NEW YORKER, Feb. 22, 1993, at 132.

ishment has only rarely been imposed in these countries for a crime whose victim is black, whether that crime is murder or, even more dramatically, rape. Whether as offender or victim, the black man or woman is simply less of a person, a being whose life has less value and is therefore more easily disposable.

The possible connection between racism and capital punishment has been suggested by the prominent South African advocate, Etienne Mureinik:

My point is a simple intuitive observation—it is just that capital sentencing and racial prejudice, whether conscious or unconscious, intersect at the phenomenon of treating people as less than fully people. And the nature of the intersection is this: to decide that someone should die is to say that he or she should cease to be a person. It facilitates that decision if there is some psychological resource permitting the decisionmaker to see the victim in advance as less than fully a person. Racial prejudice, or growing up in a system built on racial prejudice, or even just living in one, are resources of that kind.<sup>142</sup>

When a person is either not seen as a human being at all, or seen primarily as embodying a threat to the dominant society, it is easier to justify executing that person. Blacks, both in the United States and in South Africa, have long fallen into these twin categories of the invisible and the potentially dangerous. Examples in American culture and literature abound, with Mark Twain perhaps capturing best the failure to perceive blacks as human beings in his classic parody of white attitudes:

“Good gracious. Anybody hurt?”

“No’m. Killed a nigger.”

“Well, it’s lucky because sometimes people do get hurt.”<sup>143</sup>

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142. Mureinik, *supra* note 5, at 221.

143. MARK TWAIN, HUCKLEBERRY FINN 306 (1884).

The same idea was conveyed by the story of a white South African emigre:

It happened one afternoon when he was still a child, and he was being driven past the Zoo Lake in Johannesburg. The lake's park was crowded with off-duty workers and their children, all of them black. And because they were black, it was possible for someone in the car to remark, "There's no one here today."<sup>144</sup>

The universality of the notion that blacks are invisible is also depicted in a popular cartoon involving a white mistress and her black domestic servant being run in a progressive South African newspaper. A recent strip portrayed the white matron on a psychiatrist's couch, who, even as she confesses that whites treat blacks as part of the furniture, fails to see the two black workers painting a wall in the office.<sup>145</sup>

Both South Africa and the United States might do well to consider the reasons for their adherence to a penalty regarded in so much of the civilized world as barbaric and inhumane. If it is at all plausible that those reasons include an element of racism, surely that should be a powerful incentive to abandon the practice.

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144. Mureinik, *supra* note 5, at 220.

145. Bill Keller, *Time to Laugh? The Beloved Country Thinks So*, N.Y. TIMES, Apr. 5, 1993, at A4.

