

# From Pretoria to Philadelphia: Judge Higginbotham's Racial Justice Jurisprudence on South Africa and the United States

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## INTRODUCTION

Judge A. Leon Higginbotham, Jr. will long be remembered for his tireless efforts to further justice in the United States. However, his vision of a society free from racial prejudice and discriminatory treatment was not limited to our borders, and thus he spent years working to eradicate the most blatant form of racial discrimination that existed during his lifetime: apartheid in South Africa. At the trial at which he faced the death penalty for his own efforts to oppose apartheid,<sup>1</sup> Nelson Mandela stated,

[d]uring my lifetime I have dedicated myself to this struggle of the African people. I have fought against white domination, and I have fought against black domination. I have cherished the ideal of a democratic and free society in which all persons live together in harmony and with equal opportunities. It is an ideal which I hope to live for and to achieve. But if needs be, it is an ideal for which I am prepared to die.<sup>2</sup>

Judge Higginbotham adhered to similar principles, and dedicated his life to the fight for equality. However, while Judge Higginbotham lived to see the end of apartheid, he recognized that we still have a long way to go, both in South Africa and the United States. We would be well advised to heed his observations. Furthermore, events of recent years may indicate that South Africa is in fact becoming a model for reform that we should emulate.

## JUDGE HIGGINBOTHAM'S PATH TO THE LAW

Growing up in Trenton, New Jersey,<sup>3</sup> in the 1920s and 1930s,<sup>4</sup> A. Leon

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1. Toward Robben Island: The Rivonia Trial (citing THOMAS KARIS & GAIL M. GERHART, 3 FROM PROTEST TO CHALLENGE: A DOCUMENTARY HISTORY OF SOUTH AFRICAN POLITICS IN SOUTH AFRICA, 1882-1964, at 673-84 (1977)), available at [http://www.anc.org.za/ancdocs/history/trials/toward\\_robben\\_island.html](http://www.anc.org.za/ancdocs/history/trials/toward_robben_island.html) (last visited Mar. 21, 2002).

2. NELSON MANDELA, LONG WALK TO FREEDOM 322 (1994).

3. F. Michael Higginbotham, *A Man for All Seasons*, 16 HARV. BLACKLETTER L.J. 7, 7 n.3 (2000).

4. Just the Beginning Foundation, *A. Leon Higginbotham*, at [http://www.jtbf.org/article\\_iii\\_judges/higginbotham\\_a.htm](http://www.jtbf.org/article_iii_judges/higginbotham_a.htm) (last visited March 21, 2002).

Higginbotham, Jr. could not help but be affected by issues of race. Racial discrimination was the norm, and it was not until college that he met a white person who “treated him as an equal . . . [and] ‘a member of the human family.’”<sup>5</sup> Thus, there were many factors that could have prevented him from becoming the influential figure that he eventually was. For example, when he was a child, segregated schools still existed, and the junior high school he attended did not offer courses in Latin to African Americans. Students without Latin were placed in an industrial program in high school. Fortunately, his mother was well aware of this and campaigned to get her son into a Latin course, with success. He later realized that he never would have been able to attend college without it.<sup>6</sup>

A. Leon Higginbotham, Jr. had also originally intended to become an engineer, not a crusader for minority rights.<sup>7</sup> However, an incident at Purdue University, where he enrolled in 1944, changed his mind.<sup>8</sup> The University housed the African-American students in an unheated attic where snow came through the rafters. When Higginbotham requested that they be moved—and not even that they be integrated with the other students in the dorms—the university president told him that African Americans had no right to live in the dorms, and if he didn’t like the housing situation, he could leave.<sup>9</sup> Higginbotham chose to leave, and to become a lawyer, in order to “challenge the system” itself.<sup>10</sup>

From that moment on, his direction in life was clear, and he advocated racial equality while overcoming numerous instances of discrimination in his own life. For example, upon graduating from Yale Law School, despite his excellent credentials, he could not find a job.<sup>11</sup> Nevertheless, he persevered, and in 1965, he became the youngest federal judge in three decades, at the age of thirty-five.<sup>12</sup>

#### JUDGE HIGGINBOTHAM AND THE JUDICIARY

Given his background, it is not surprising that Judge Higginbotham chose to dedicate most of his extrajudicial efforts to advocating issues of civil rights. But as a judge, he was first and foremost dedicated to the rule of law and thus was committed to providing justice for all, not advancing the interests of minorities at the expense of others. As a federal judge, the majority of his cases

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5. Max Rosenn, *A. Leon Higginbotham, Jr.: A Lamplighter in Pursuit of Social Justice*, 53 RUTGERS L. REV. 553, 555 (2001).

6. *Id.* at 544.

7. *Id.* at 553.

8. Just the Beginning Foundation, *supra* note 4.

9. *Id.*

10. *Id.*

11. Charles J. Ogletree, Jr., *A. Leon Higginbotham, Jr.: A Reciprocal Legacy of Scholarship and Advocacy*, 53 RUTGERS L. REV. 665, 668 (2001).

12. *Id.*

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were in fact commercial, and his former colleague, Edward Becker, the Chief Judge of the United States Court of Appeals for the Third Circuit, described Higginbotham as

never . . . a rubber stamp for a civil rights plaintiff or a criminal defendant. . . . [H]e was basically a centrist judge, respectful of precedent and judicial tradition. He decided every case on its merits, not on ideology. But when there was leeway to entertain claims and to vindicate rights, as against the contention that the doors of the federal courts were closed, he would look for an entryway.<sup>13</sup>

Judge Higginbotham also described his judicial methodology as follows: "I don't write 'black opinions,' I write 'black-letter opinions.'"<sup>14</sup>

Although Judge Higginbotham strove to reach just results in individual cases without regard to race, his race and reputation as an advocate for civil rights made him an easy target for accusations of impartiality. For example, in *Pennsylvania v. Local Union 542, International Union of Operating Engineers*,<sup>15</sup> a case involving charges of racial discrimination,<sup>16</sup> the defendant union's counsel immediately made a motion for recusal, based on the claim that Judge Higginbotham, as a black judge, would be unable to remain impartial in a case involving discrimination against blacks.<sup>17</sup> Judge Higginbotham denied the motion, explaining that "judges obviously should not decide issues on the basis of race, and as a judge he had not done so, but he also knew that he 'should not have to disparage blacks in order to placate whites who otherwise would be fearful of his impartiality.'"<sup>18</sup> As the nonjury trial progressed, the union's lawyer persisted in ignoring Judge Higginbotham's directions, including those regarding the scope of cross-examination and warnings regarding contempt, and the judge finally held the lawyer in contempt.<sup>19</sup> On appeal, the Third Circuit carefully examined Judge Higginbotham's conduct and sustained his findings of contempt, rejecting the union lawyer's claims that the judge was biased, acid, and sarcastic.<sup>20</sup> Instead, the appellate court found that Judge Higginbotham had "exhibited patience and restraint, and did his utmost to preserve order and decorum; he did not engage in wrangling or bickering, and used the summary contempt power only as a last resort."<sup>21</sup>

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13. Edward R. Becker, *In Memoriam: A. Leon Higginbotham, Jr.*, 112 HARV. L. REV. 1813, 1815-16 (1999). Chief Judge Becker also praised Judge Higginbotham for his preparation for oral argument and authorship of opinions, stating that Higginbotham "passes any test with flying colors." *Id.* at 1814.

14. *Id.* at 1813 (internal citations omitted).

15. 388 F. Supp. 155 (E.D. Pa. 1974).

16. *Id.* at 157.

17. *Id.*

18. *Id.* at 180.

19. Rosenn, *supra* note 5, at 557.

20. *Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs*, 552 F.2d 498 (3d Cir. 1977).

21. *Id.* at 514.

## JUDGE HIGGINBOTHAM AND SOUTH AFRICA

Despite his many duties in the United States, as a federal judge, scholar, and educator,<sup>22</sup> Judge Higginbotham was at the forefront of American opposition to apartheid. Although he had more than enough battles to fight in the United States, Judge Higginbotham recognized the danger of allowing such evils to exist and dedicated years to helping eradicate it. He was one of the first to condemn apartheid<sup>23</sup> and actively lobbied both in the United States and South Africa.<sup>24</sup> He implored those with opposing views, ranging from members of the white South African National Party<sup>25</sup> to members of the University of Pennsylvania,<sup>26</sup> attempting to appeal to their senses of basic human decency, even on occasions when he knew there was little chance in persuading them.<sup>27</sup> Judge Higginbotham also made six trips to South Africa.<sup>28</sup> He traveled throughout the country and viewed the effects of apartheid firsthand.<sup>29</sup> In the United States, he worked with organizations such as the Southern African Legal Services and Legal Education Project, Inc., and the Southern Africa Project of the Lawyers Committee for Civil Rights Under Law.<sup>30</sup>

When the first “free” elections were scheduled to take place in South Africa in 1994, Judge Higginbotham undertook a massive effort in order to ensure that the elections were more than a mere formality.<sup>31</sup> Because many first-time voters were illiterate and misinformed, and believed that marking an “x” by a candidate’s name eliminated him from contention, Judge Higginbotham joined others in founding the South Africa Free Election (SAFE) Fund.<sup>32</sup> He helped to raise millions of dollars for the Fund, which were used to educate and to provide for nonpartisan publicity encouraging South Africans to vote.<sup>33</sup> Furthermore, Nelson Mandela selected him to be an international mediator for the elections.<sup>34</sup> He continued his efforts even after his health began to fail.<sup>35</sup>

In great part due to the efforts of Judge Higginbotham, South Africa has made a significant amount of progress in the past few decades. After Judge

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22. Clifford Scott Green & Stephanie L. Franklin-Suber, *Keeping Thurgood Marshall's Promise—A Venerable Voice for Equal Justice*, 16 HARV. BLACKLETTER L.J. 27, 36-37 (2000).

23. Ogletree, *supra* note 11, at 676.

24. Green & Franklin-Suber, *supra* note 22, at 37.

25. Higginbotham, *supra* note 3, at 9-10.

26. Ogletree, *supra* note 11, at 676.

27. Higginbotham, *supra* note 3, at 9.

28. Anita F. Hill, *The Scholarly Legacy of A. Leon Higginbotham, Jr.: Voice, Storytelling, and Narrative*, 53 RUTGERS L. REV. 641, 641 n.3 (2001).

29. Green & Franklin-Suber, *supra* note 22, at 37.

30. *Id.*

31. Ogletree, *supra* note 11, at 677.

32. *Id.*

33. *Id.*

34. A. Leon Higginbotham Jr.: *Commencement Speaker*, at <http://www.voice.neu.edu/960516/higgin.html> (May 16, 1996).

35. Rosenn, *supra* note 5, at 564.

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Higginbotham's death in 1998,<sup>36</sup> President Mandela sent a letter to his family, stating,

Judge Higginbotham[']s work and the example he set made a critical contribution to the course of the rule of law in the United States and a difference in the lives of African Americans, and indeed the lives of all Americans. But his influence also crossed borders and inspired many who fought for freedom and equality in other countries. . . . Judge Higginbotham played an important role in [South Africa's] first democratic elections, supported the development of public interest law work in South Africa and helped to create broader opportunities for black South African lawyers.<sup>37</sup>

### RACE RELATIONS IN SOUTH AFRICA AND THE UNITED STATES

Even as Judge Higginbotham recognized that progress was being made in South Africa, he was cognizant of the many reforms that were still needed. Furthermore, as evidenced by numerous articles that he took the time to write,<sup>38</sup> Judge Higginbotham was well aware of the parallels between the situations in South Africa and the United States. However, while South Africa has recently implemented reforms that may lead to significant social reform, the United States seems to be stuck in a sort of status quo.

#### *The Constitutions*

South Africa has adopted a constitution that mandates racial and gender equality.<sup>39</sup> The American experience has demonstrated that when rights are granted ambiguously, and the forces in power are more interested in maintaining the status quo than in enacting reform, rights are too easily construed in ways such that they end up being taken away from powerless groups.<sup>40</sup> Learning from our example, the new South African government has attempted to

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36. William Glaberson, *A. Leon Higginbotham Jr., Federal Judge, Is Dead at 70*, N.Y. TIMES, Dec. 15, 1998, at B14.

37. Charles J. Ogletree, Jr., *In Memoriam: A. Leon Higginbotham, Jr.*, 112 HARV. L. REV. 1801, 1811 n.51 (1999) (quoting letter from Nelson Mandela to the family of A. Leon Higginbotham, Jr. (Dec. 21, 1998) (on file with the Harvard Law School Library)).

38. E.g., A. Leon Higginbotham, Jr., *Seeking Pluralism in Judicial Systems: The American Experience and the South African Challenge*, 42 DUKE L.J. 1028 (1993) [hereinafter *Seeking Pluralism in Judicial Systems*]; A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences*, 65 N.Y.U. L. REV. 479 (1990) [hereinafter *Racism in American and South African Courts*]; A. Leon Higginbotham, Jr. et al., *De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice*, 1990 U. ILL. L. REV. 763.

39. Audrey E. Haroz, *South Africa's 1996 Choice on Termination of Pregnancy Act: Expanding Choice and International Human Rights to Black South African Women*, 30 VAND. J. TRANSNAT'L L. 863, 863 (1997).

40. Margaret A. Burnham, *Cultivating a Seedling Charter: South Africa's Court Grows Its Constitution*, 3 MICH. J. RACE & L. 29, 47-48 (1997) (noting that the "American experience illustrates that when rights are not anchored to a progressive political process, they can become counter-rights that have nothing to do with building community and redressing inequity and have everything to do with maintaining the status quo").

eliminate such interpretive problems,<sup>41</sup> and thus, rights have been codified in a manner that prioritizes the elimination of racism and sexism.<sup>42</sup>

In this new constitutional regime, civil rights are clearly considered to be of primary importance. The postamble of South Africa's interim Constitution stated that "[t]he adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge."<sup>43</sup> The present constitution provides "the right to equal protection and benefit of the law,"<sup>44</sup> "the right to life,"<sup>45</sup> and "the right to have . . . dignity respected and protected."<sup>46</sup> Furthermore, in "interpreting the Constitution, the [Constitutional] Court is required to consider international human rights law and may consider the law of other democratic countries."<sup>47</sup> This requirement is not surprising, given South Africa's history, including its past case law, and thus far, the Constitutional Court has adhered to this duty.<sup>48</sup> As a result, "South Africa has moved from being a subject of international human rights deliberations to being a leading exponent of international public law in the world today."<sup>49</sup> In contrast, the majority of the United States Supreme Court has remained reluctant to consider the laws of other nations.<sup>50</sup>

Furthermore, the South African Constitutional Court does not stand alone as a protector of civil rights. It is only "one of many bodies created by the Constitution to defend the rights of citizens," which include a Human Rights Commission that was "established to handle complaints of violation of human rights in daily life."<sup>51</sup> The South African Parliament is also relatively representative of the population, and is made up of almost twenty-five percent women, which puts South Africa among the world leaders for female legislative representation.<sup>52</sup>

### *The Highest Courts*

When the new democratic South African government decided to create a

41. *Id.* at 46-47.

42. *Id.* at 46.

43. S. AFR. INTERIM CONST. of 1994, ch. 16.

44. S. AFR. CONST., ch. 2, § 9(1).

45. *Id.* at § 11.

46. *Id.* at § 10.

47. Constitutional Court of South Africa, *Information About the Constitutional Court*, at <http://www.concourt.gov.za/about.html> (last visited Mar. 21, 2002).

48. Burnham, *supra* note 40, at 34.

49. *Id.*

50. Clare L'Heureux-Dube, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15 (1998).

51. Constitutional Court of South Africa, *supra* note 47.

52. Haroz, *supra* note 39, at 866-67.

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constitutional court as the highest court of the land, it convened a conference, in which Judge Higginbotham was the only American judge invited to participate.<sup>53</sup> Judge Higginbotham brought a keen awareness of the importance of a diverse judiciary.<sup>54</sup> Pursuant to the interim South African Constitution, the Judicial Service Commission was charged with selecting nominees for the Constitutional Court who were representative of the population in terms of race and gender.<sup>55</sup> Today, the new South African Constitutional Court is comprised of eleven judges: nine men and two women.<sup>56</sup> The court is approximately half black and half white.<sup>57</sup> This is a great change, considering that as of 1995, “all of the judges on the trial and appellate benches were white and economically and socially fell within the South African middle class.”<sup>58</sup> Although, or perhaps because, the court has only been in existence for a few years, it “has repeatedly identified its task as that of ‘promot[ing] and develop[ing] . . . a new culture’ of respect for human rights.”<sup>59</sup> Furthermore, the court is cognizant of the fact that the South African Bill of Rights was designed to redress the nation’s history of discrimination and violence, and thus its decisions suggest that “the rights to equality, freedom, and personal security are accorded preferred standing.”<sup>60</sup>

In contrast, our Supreme Court is mainly comprised of white people, and is on balance conservative in ideology.<sup>61</sup> As a result, civil rights recognized by the Warren Court have slowly been eroded. It is strange that while we hold ourselves out as a model for other nations to emulate, our highest court’s composition and its resulting decisions have provided an example that should not be followed. While any action that can be construed as judicial activism in the United States has been sharply criticized, in South Africa, the Constitutional Court prides itself in being a proactive agent of change.<sup>62</sup>

Judge Higginbotham has noted that

the United States federal courts were *de facto* racially exclusionary from 1789 to 1949. From 1949 to 1980, the federal judiciary was characterized by a slowly evolving racial pluralism. Then, from 1980 to 1992, because of the policies of Presidents Reagan and Bush, there was a marked decline in the percentage of blacks

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53. Green & Franklin-Suber, *supra* note 22, at 37.

54. See generally Higginbotham, *Seeking Pluralism in Judicial Systems*, *supra* note 38.

55. Brice Dickson, *Protecting Human Rights Through a Constitutional Court: The Case of South Africa*, 66 FORDHAM L. REV. 531, 533 (1997) (citing S. AFR. INTERIM CONST. of 1994, ch. 7, § 99(5)(d)).

56. Constitutional Court of South Africa, *supra* note 47.

57. Constitutional Court of South Africa, *Judges of the Constitutional Court*, at <http://www.concourt.gov.za/judges/index.html> (last visited Mar. 21, 2002).

58. Katherine Corry Eastman, *The Progress of Our Maturing Society: An Analysis of State-Sanctioned Violence*, 39 WASHBURN L.J. 526, 539 (2000).

59. Burnham, *supra* note 40, at 50.

60. *Id.* at 54.

61. Staci Rosche, *How Conservative Is the Rehnquist Court? Three Issues, One Answer*, 65 FORDHAM L. REV. 2685, 2686 (1997) (noting that “only 25% of the Rehnquist Court’s decisions benefited alleged victims of racial discrimination”).

62. Arthur Chaskalson, *Equality & Dignity in South Africa*, 5 GREEN BAG 2D 189, 191 (2002).

appointed to the federal courts and thus a decrease in pluralism.<sup>63</sup>

President Clinton appointed a number of minorities to the federal bench, but now that George W. Bush has been elected, it is unlikely that judges sensitive to civil rights will be appointed.

While it is clear that the race of judges cannot and should not predict the outcomes of individual cases, it is also clear that the presence of all-white and male judiciaries led to the validation and propagation of discriminatory practices. In his book, *Shades of Freedom*,<sup>64</sup> Judge Higginbotham outlined what he termed the "Ten Precepts of American Slavery Jurisprudence."<sup>65</sup> He noted that two, inferiority and powerlessness, still exist,<sup>66</sup> and given the great power and discretion and power possessed by judges, excluding minorities from the judiciary goes a long way toward perpetuating these precepts.

Our Supreme Court has gone beyond merely adopting a conservative agenda. In *Shaw v. Reno*,<sup>67</sup> it found that North Carolina's minority-majority voting district of "dramatically irregular" shape was subject to strict scrutiny.<sup>68</sup> In doing so, it perverted the concept of apartheid, ignoring its history, context, and impact,<sup>69</sup> by analogizing the minority-majority district to "political apartheid."<sup>70</sup> Thus, the Court managed to further reduce the political power of blacks in the United States, drawing on the most blatant form of racial discrimination for support.

### *The Death Penalty*

Perhaps the most striking example of the differences in ideology between the South African Constitutional Court and the United States Supreme Court is found in their attitudes toward the death penalty. In South Africa, before the fall of apartheid, the death penalty was overwhelmingly imposed on poor black defendants.<sup>71</sup> For example, according to a 1988 Amnesty International study, "during a one-year period, forty-seven percent of blacks convicted of murdering whites were sentenced to death, compared to no death sentences for whites convicted of murdering blacks, and only two and a half percent for blacks con-

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63. Higginbotham, *Seeking Pluralism in Judicial Systems*, *supra* note 38, at 1035-36.

64. A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM* (1996).

65. *Id.* at 195-206.

66. *Id.* at 5.

67. 509 U.S. 630 (1993).

68. *Id.* at 633.

69. A. Leon Higginbotham et al., *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 *FORDHAM L. REV.* 1593 (1994).

70. *Shaw*, 509 U.S. at 647.

71. Eastman, *supra* note 58, at 539. "For example, during the period between 1947 and 1969, none of the 288 white criminal defendants convicted of raping white victims were sentenced to death. Conversely, of the 844 black criminal defendants convicted of the same crime, 120 were executed." *Id.* at 540-41 (citations omitted).



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victed of killing blacks.”<sup>72</sup> Furthermore, “between 1947 and 1969[,] no whites were executed for the rape of black women, despite 288 such convictions. During the same period, 120 out of 844 black men convicted of raping white women were executed.”<sup>73</sup> In addition, because of the criminal laws themselves, which made certain actions crimes only when committed by minorities, it was possible for the death penalty to be used as a “tool specifically for controlling and punishing opponents of apartheid”<sup>74</sup> and a “tool of state repression.”<sup>75</sup> However, even before the end of apartheid, due to pressure from other countries and various advocacy groups, President F.W. DeKlerk imposed a moratorium on the death penalty and called for reform, which resulted in the death penalty being limited to punishment for six crimes.<sup>76</sup>

However, in 1995, in the case of *State v. Makwanyane & Mchunu*,<sup>77</sup> the Constitutional Court unanimously struck down the death penalty as unconstitutional. In doing so, it found an equal protection violation because the death penalty was only available in the “Old Republic of South Africa” and not in the other “states” of South Africa, and such a sentencing disparity was unconstitutional.<sup>78</sup> Furthermore, the court found that mistakes would be too easily made in the death penalty system, and thus imprisonment would provide a better alternative, one that allowed for correction of such mistakes.<sup>79</sup> The court also found that the death penalty violated the new Constitution’s prohibition against cruel and unusual punishment, even for those convicted of murder.<sup>80</sup> Thus, death sentences already imposed were revoked and ordered to be replaced by proper sentences.<sup>81</sup> The Constitutional Court later found, in *Mohamed v. President of Republic of South Africa*,<sup>82</sup> that the removal of an illegal immigrant to the United States for a trial on a capital crime was unconstitutional, as exposing a person to the death penalty would infringe his rights to life, to dignity, and against cruel punishment.

In contrast, in the United States, challenges to the death penalty based on equal protection and cruel and unusual punishment principles have been regularly rejected despite the fact that great disparities exist in the way that the

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72. Michelle M. Sharoni, *A Journey of Two Countries: A Comparative Study of the Death Penalty in Israel and South Africa*, 24 HASTINGS INT’L & COMP. L. REV. 257, 268 (2001).

73. *Id.* at 269.

74. Eastman, *supra* note 58, at 540 (citing Nathan V. Holt, Jr., *Human Rights and Capital Punishment: The Case of South Africa*, 30 VA. J. INT’L L. 273, 301 (1989)).

75. Sharoni, *supra* note 72, at 268.

76. *Id.* at 270.

77. 1995 (3) SALR 391, 504, available at 1995 SACLR LEXIS 218, at \*319.

78. Sharoni, *supra* note 72, at 275-76.

79. *Id.* at 276.

80. *Id.* at 277.

81. *Id.* at 278. However, the death penalty may be reconsidered in South Africa, perhaps through a constitutional amendment. *Id.*

82. 2001 (3) SA 893 (CC), available at <http://www.concourt.gov.za/cases/2001/mohamedsum.shtml>.

death penalty is imposed. As stated by Katherine Corry Eastman,

Amnesty International reports that between colonial times and 1990, approximately 18,000 people have been executed in the United States. Of those cases, only thirty involved the execution of white defendants for murdering black victims. Furthermore, even today, specific state-by-state surveys illustrate that race and ethnicity directly influence prosecutorial decisions to pursue the death penalty. In 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.<sup>83</sup>

Nevertheless, American courts have rejected challenges to the death penalty based on disparate impact, even in the face of extensive empirical evidence. For example, in the case of *McCleskey v. Kemp*,<sup>84</sup> the Supreme Court rejected the conclusions of the famous Baldus study, a complex multiple-regression analysis of over 2000 Georgia murder cases.<sup>85</sup> Despite the fact that the study showed that, even accounting for 39 variables that could contribute to sentencing disparities, “defendants charged with killing white victims were 4.3 times more likely to receive the death penalty than defendants charged with killing black victims, and that black defendants were 1.1 times more likely to receive the death sentence than white defendants,”<sup>86</sup> the Supreme Court found the evidence insufficient to sustain an equal protection claim. Disparate imposition of the death penalty is not limited to Georgia, and yet constitutional challenges to the death penalty have been routinely denied. The rejection of such compelling empirical evidence “only serves to depict America’s limited progress as a maturing society,”<sup>87</sup> and American courts’ refusal to take action, or to uphold legislative actions enacted to remedy the situation,<sup>88</sup> have further compounded the problem. It is ironic that only a few years ago, we were condemning South Africa for its discriminatory practices, and now some are imploring us to follow South Africa’s lead, by abolishing the death penalty.<sup>89</sup>

### *Criminal Sentencing*

In the United States, explicitly racist laws have been prohibited for decades. However, serious discrimination can and has taken place in their absence. Furthermore, attempts to limit the arbitrariness and injustice that can result from

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83. Eastman, *supra* note 58, at 542-43 (citations omitted).

84. 481 U.S. 279 (1987).

85. Gregory S. Brown, Comment, *McCleskey v. Kemp*, 107 S. Ct. 1756 (1987), 27 WASHBURN L.J. 194, 194 n.2 (1987).

86. *Id.*

87. Eastman, *supra* note 58, at 542.

88. *Shaw v. Reno*, 509 U.S. 630 (1993).

89. Eastman, *supra* note 58, at 529 (arguing that “South Africa’s abolition of the death penalty provides a platform that the United States can and should adopt”); see also 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, 303-04 (1998) (arguing that “[i]n a world where the vast majority of democratic industrialized nations no longer use the death penalty, the insistence on its retention in the United States should be reexamined”).

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indeterminate sentencing have led to further disparities in sentencing. The Federal Sentencing Guidelines were created in order to address this problem, but they have created great disparities in sentencing for crack and cocaine offenders, with serious racial implications. Pursuant to the “100-to-1” sentencing approach, “[a]t every quantity level federal defendants convicted of a crack cocaine offense receive the same sentences as powder cocaine defendants convicted of an offense involving 100 times as much cocaine. The impact of the ‘100-to-1’ disparity is felt almost exclusively by black defendants.”<sup>90</sup>

In contrast, in *S v. Niemand*,<sup>91</sup> in response to the problem posed by indeterminate sentences imposed on habitual criminals, the South African Constitutional Court imposed a maximum sentence of 15 years. In doing so, it noted that such a limitation would ensure that convicts would not be subjected to cruel or inhuman punishment.<sup>92</sup>

### *Racial Discrimination*

While the United States Supreme Court requires proof of discriminatory purpose in equal protection cases, which makes it extremely difficult to bring successful claims, the South African Constitutional Court has taken a different approach. As stated by Arthur Chaskalson, President of the Constitutional Court of South Africa, in “[d]ealing with cases of discrimination . . . we look at the impact of discrimination. We say that if differentiation has had an impact which impairs the dignity of the person affected by it, or if it affects that person in a comparably serious manner, then it constitutes discrimination within the meaning of the equality clause.”<sup>93</sup> Furthermore, in sharp contrast to the United States Supreme Court’s approach in cases such as *Shaw v. Reno*, the South African Constitutional Court has recognized that differential treatment is sometimes necessary to eradicate discrimination.<sup>94</sup> In addition, the South African Constitution explicitly provides for affirmative action, which is a highly disputed subject in the United States.<sup>95</sup>

### *Socio-Economic Rights*

In recognition of the great disparities in the distribution of wealth and other resources, the South African Constitution requires the state to provide for “ac-

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90. David H. Angeli, *A “Second Look” at Crack Cocaine Sentencing Policies: One More Try for Federal Equal Protection*, 34 AM. CRIM. L. REV. 1211, 1212-13 (1997).

91. 2001 (11) BCLR 1181 (CC), available at <http://www.concourt.gov.za/cases/2001/niemandsum.shtml>.

92. *Id.* ¶ 27.

93. Chaskalson, *supra* note 62, at 190.

94. *Id.*

95. Adila Hassim, *Affirmative Action Policies in the United States and South Africa: A Comparative Study*, 2000 ST. LOUIS-WARSZAW TRANSATLANTIC L.J. 119, 120 (2000).

cess to basic services such as health, housing and social welfare within its available resources."<sup>96</sup> The Constitutional Court has attempted to enforce these provisions, despite the shortage of government resources. For example, in *Government of South Africa v. Grootboom*,<sup>97</sup> the court reaffirmed the right of access to adequate housing. The court ordered the state to take positive steps to ameliorate the plight of hundreds of South Africans who were living in deplorable conditions.<sup>98</sup> In doing so, it recognized that dignity and equality are denied to those without food or shelter.<sup>99</sup> While it acknowledged that resources were scarce, it found that the state had failed to take reasonable steps toward providing housing for the plaintiffs and ordered the state to undertake such actions.<sup>100</sup>

### *Right of Access to Courts*

While the United States Supreme Court has emphasized procedural defaults in recent years, thus foreclosing avenues of judicial review, the South African Constitutional Court has attempted to ensure that such access to review is available in criminal cases. For example, in *S v. Ntuli*,<sup>101</sup> the court struck down a statutory provision that prevented persons convicted in magistrate courts from appealing their convictions without representation unless a judge certifies that there are reasonable grounds for an appeal, emphasizing the constitutional rights to appeal and to equality under the law.<sup>102</sup> Similarly, in *S v. Steyn*,<sup>103</sup> the Constitutional Court struck down provisions of the Criminal Procedure Act requiring persons convicted in magistrates' courts to obtain leave to appeal from the magistrate and, if denied, from the high court. Furthermore, the South African Constitution includes broad provisions for standing which enable persons to enforce their constitutional rights.<sup>104</sup>

### CONTINUING PROBLEMS

Although South Africa arguably provides a model for the United States in various areas of reform, it faces certain systemic problems, shared by the United States, that have been less susceptible to remedy.

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96. Chaskalson, *supra* note 62, at 190.

97. 2001 (1) SA 46 (CC), available at <http://www.concourt.gov.za/cases/2000/grootboom1sum.shtml>.

98. *Id.*

99. *Id.*

100. *Id.*

101. 1996 (1) BCLR 141 (CC), available at <http://www.concourt.gov.za/cases/1995/ntulisum.shtml>.

102. Dickson, *supra* note 55, at 559.

103. 2000 CCT19/00 (CC), available at <http://www.concourt.gov.za/cases/2000/steynsum.shtml>.

104. David J. McQuoid-Mason, *The Delivery of Civil Legal Aid Services in South Africa*, 24 FORDHAM INT'L L.J. S111, S112 (2000).

## Jurisprudence on South Africa and the United States

### *Black Lawyers*

Discrimination against black lawyers in South Africa has been a long-established tradition. Before the end of apartheid, both lawyers and spectators could be segregated under the Reservation of Separate Amenities Act of 1953 (“Separate Amenities Act”).<sup>105</sup> One magistrate judge had even installed separate counsel tables for white prosecutors, European (white) practitioners, and non-European (non-white) practitioners, allegedly pursuant to the Separate Amenities Act.<sup>106</sup> When one young black lawyer, Godfrey Pitje, sat at the European table and asked for an explanation for the judge’s command that he move to the black table, he was cited for contempt.<sup>107</sup> Pitje appealed the ruling, and the Appellate Division of the Supreme Court eventually found that although the magistrate had failed to comply with the notice requirements of the Separate Amenities Act and “the separate counsel table for blacks was neither required by statute, nor by any prior case law, nor even by any long-standing tradition or custom,”<sup>108</sup> it would not overturn the contempt conviction because it was a matter “largely within the discretion of the judge.”<sup>109</sup> Furthermore, the fact this was a minor proceeding in a trial-level court, and yet the Attorney General took the time to appear, made it clear that the segregation of lawyers was not an agenda that appealed only to the magistrate in this case.<sup>110</sup>

While by 1990, the overt segregation of lawyers in the courtroom had ended, black lawyers were still subject to patent racism, revealed by judges’ “comments, rulings, and conduct of proceedings.”<sup>111</sup> It will take a significant amount of time to change this situation, as only fifteen percent of the legal profession is black, as a result of apartheid.<sup>112</sup> Likewise, in the United States, discrimination against minority lawyers exists, and until 1943, the American Bar Association openly refused to admit blacks.<sup>113</sup>

### *Police Brutality*

Police brutality of black defendants and detainees in South Africa is a widespread practice.<sup>114</sup> An Amnesty International press release issued in 2000

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105. Higginbotham, *Racism in American and South African Courts*, *supra* note 38, at 505 (citing Section 2 of the Separate Amenities Act). The Act allowed public premises to be segregated on the basis of race. *Id.*

106. *Id.* at 503, 505.

107. *Id.* at 503-04.

108. *Id.* at 505.

109. *Id.* (quoting *R. v. Pitje*, 1960 (4) S.A. 709, 710).

110. *Id.* at 511-12.

111. *Id.* at 514.

112. McQuoid-Mason, *supra* note 104, at S111.

113. Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727, 757-58 (2000).

114. *E.g.*, Higginbotham, *Racism in American and South African Courts*, *supra* note 38, at 516. Furthermore, certain individuals who committed human rights violations “with political motives” have

stated that it has

corroborated evidence, including during a visit to the country last month, of the torture and severe ill-treatment of individuals in the custody of law enforcement agents, including the military. The alleged abuses included the use of electric shock, suffocation tortures, forced painful postures, suspension from moving vehicles and helicopters, and severe and prolonged beatings.<sup>115</sup>

In addition, “[i]n just the first six months of 1998, the Independent Complaints Directorate, a body created to monitor and curtail police brutality, received 480 complaints of deaths occurring while in police custody or as a result of police aggression.”<sup>116</sup>

However, the situation may be changing somewhat. For example, in November 2000, “shocking evidence of police torture of suspected illegal immigrants” was broadcast on state television.<sup>117</sup> In response, six police officers were suspended from duty without pay and arrested, and the Safety and Security Minister issued a statement condemning their brutal and racist actions.<sup>118</sup>

In the United States, racially motivated police brutality undeniably exists,<sup>119</sup> and courts seem to be playing a role in the perpetuation of such practices. Rodney King and Amadou Diallou are prime examples. In the case of Rodney King, even though police officers were videotaped viciously beating him, they were acquitted of state assault charges.<sup>120</sup> In the case of Amadou Diallou, although he was unarmed, police shot him 41 times.<sup>121</sup> All four officers were acquitted at trial.<sup>122</sup> The government has made some attempts to address this problem. For example, pursuant to the Violent Crime Control and Law Enforcement Act of 1994, the Attorney General is required to collect data on excessive force by police.<sup>123</sup> However, the collection of such data has been ham-

been granted amnesty by the South African Truth and Reconciliation Commission. Emily W. Schabacker, *Reconciliation or Justice and Ashes: Amnesty Commission and the Duty to Punish Human Rights Offenses*, N.Y. INT’L L. REV., Summer 1999, at 1, 15-21.

115. Amnesty International, *South Africa: Amnesty International Welcomes Government Action Against Racially-Motivated Violence by Police*, AI Index AFR 53/003/2000 (Nov. 8, 2000), available at <http://web.amnesty.org/802568F7005C4453/0/E82232050D23B74B802569930041ACDB?Open>.

116. Thomas F. Hicks, *The Constitution, Aliens Control Act, and Xenophobia: The Struggle to Protect South Africa’s Pariah—The Undocumented Immigrant*, 7 IND. J. GLOBAL LEGAL STUD. 393, 404 n.61 (1999) (citing HUMAN RIGHTS WATCH WORLD REPORT: SOUTH AFRICA 70-71 (1999)).

117. Amnesty International, *supra* note 115.

118. *Id.*

119. For example, “[d]uring a period of at least thirteen years, a large number of African American men, perhaps as many as sixty, were tortured into confessing by several named officers in the Area Two Violent Crimes Unit on Chicago’s South Side.” Susan Bandes, *Tracing the Pattern of No Pattern: Stories of Police Brutality*, 34 LOY. L.A. L. REV. 665, 666 n.5 (2001) (citing JOHN CONROY, UNSPEAKABLE ACTS, ORDINARY PEOPLE: THE DYNAMICS OF TORTURE 233-41 (2000)).

120. David O. Stewart, *One More Legacy of Rodney King: U.S. Supreme Court Ruling Affirms Trial Court Discretion in Sentencing*, A.B.A. J., Sept. 1996, at 44.

121. Bandes, *supra* note 119, at 666 n.3.

122. *Id.*

123. TOM MCEWEN, U.S. DEPARTMENT OF JUSTICE, NATIONAL DATA COLLECTION ON POLICE USE OF FORCE 3 (1996), available at <http://www.ojp.usdoj.gov:80/bjs/pub/pdf/ndcopouof.pdf> (last visited Mar. 21, 2002).

## Jurisprudence on South Africa and the United States

pered by problems such as the variation in definitions of excessive force and inaccuracy in reporting.<sup>124</sup> Furthermore, as long as the offenders themselves are not held liable, nor are their employers,<sup>125</sup> there is little incentive to cease these practices.

### CONCLUSION

As stated by Ronald K. Noble, Judge Higginbotham was a “man whose race made him an object of legally enforced racial discrimination, who rose above discrimination’s oppressive force to become one of the nation’s leading litigators and jurists, and who participated in the legal struggle to dismantle the American system of ‘racial apartheid’ and establish ‘varying shades of freedom.’”<sup>126</sup> While Judge Higginbotham’s efforts have resulted in progress in both the United States and South Africa, he was quick to point out that

[m]any barriers in the United States and even more in South Africa must be overcome. Nevertheless, the South African experience boosts my spirits. I keep my fervent belief in the possibility of substantial equality and significant equity in the United States, despite the conservative winds that sometimes delay the journey.<sup>127</sup>

Therefore, it may be time to look to South Africa for instructions on how to deal with the problems of racial discrimination that still plague our nation, keeping in mind the fact that while blacks are a majority in South Africa,<sup>128</sup> they are only a minority in the United States. At the same time, “[t]he fear, however, is that [while] South Africa swiftly moved from being a notorious violator of human rights to a champion of human rights . . . the lack of gradation in this process may lead South Africa to regress to its old ways.”<sup>129</sup> Furthermore, while the importance of fair laws, and the just application of such laws, cannot be denied, it is also important to recognize that racism is deeply ingrained in society.<sup>130</sup> Therefore, courts have a greater duty to remain vigilant and to recognize the context in which cases arise.

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124. *Id.* at 4.

125. *Cf.* James Cahoy, *City of Los Angeles Does Not Have to Pay Legal Costs in Lawsuit Against Officers over Rodney King Beating*, 9th Circuit Rules, WEST’S LEGAL NEWS, Aug. 12, 1996, at 1996 WL 449754.

126. Ronald K. Noble, *Between Complicity and Contempt: Racial Presumptions of the American Legal Process*, 72 N.Y.U. L. REV. 664 (1997) (book review) (citations omitted).

127. HIGGINBOTHAM, *supra* note 64, at x.

128. McQuoid-Mason, *supra* note 104, at S111 (stating that eighty-five percent of the population is black while only fifteen percent of the legal profession is black).

129. Sharoni, *supra* note 72, at 284.

130. Eastman, *supra* note 58, at 543 n.120; Paul Finkelman, *Segregation in the United States*, [http://www.africana.com/Articles/tt\\_928.htm](http://www.africana.com/Articles/tt_928.htm) (noting that “[d]e facto segregation has continued even when state and federal civil rights laws have explicitly prohibited racial segregation”) (last visited Mar. 21, 2002).

