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TOWARD A NEW SOUTH AFRICA WITHOUT THE DEATH SENTENCE—STRUGGLES, STRATEGIES, AND HOPES*

JAN H. VAN ROOYEN**

I. INTRODUCTION

IN 1989 Amnesty International listed some 100 countries and territories that retained and used the death sentence for ordinary crimes.1 These “retentionist” countries and territories ranged from the A’s of Afghanistan, Albania, and Algeria through Burkina Faso, Chad, Dominica, Ethiopia, Gabon, Iran, and Iraq to the Z’s of Zaire, Zambia, and Zimbabwe.2 This list also included South Africa and the United States of America.3 Today the list could very well exclude South Africa because South Africa has not had an execution since November 1989.4 Regrettably, the United States would still remain on the list.

The “abolitionist for all crimes” countries (countries whose laws do not provide for the death sentence for any crime) numbered thirty-five,5 while the “abolitionist for ordinary crimes only” countries

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* This is the final article to be published from the Florida State University Law Review’s Capital Punishment Symposium held in February 1992. Because of the difficulty involved in editing a foreign article, the Law Review has added or modified footnotes to include sources available in the United States. We have also made many of the foreign materials, including some English translations of Afrikaans documents, available at the State of Florida Archives. For access to these materials, contact the Archives at (904) 487-2073—The Editors.

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2. Id.
3. Id. at 262.
5. AMNESTY INT’L, supra note 1, at 259.

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(countries whose laws provide for the death sentence only for exceptional crimes such as crimes under military law or crimes committed in exceptional circumstances such as wartime) numbered eighteen. The "abolitionist in practice" countries (countries that retain the death sentence on their statute books, but have not executed anyone for at least ten years) numbered twenty-seven.7

Amnesty International lists ten countries that have each carried out more than fifty executions between 1985 and mid-1988, altogether accounting for more than eighty-three percent of all executions recorded.8 Those countries and their respective numbers of executions are Malaysia (52 +), U.S.S.R. (63 +), the United States (66), Pakistan (115 +), Saudi Arabia (140), Somalia (150 +), Nigeria (439 +), China (500 +), South Africa (537 +), and Iran (743 +).9 The majority of retentionist countries execute by hanging or shooting, with only a handful of states employing beheading and stoning.10 The United States legally sports the greatest variety of killing methods, five in all: hanging, shooting, electrocution, gassing, and lethal injection.11

South Africa is presently a country in turmoil. This Article will sketch aspects of the socio-politico-economic context of the death sentence as it has developed during the past four decades in South Africa. It will indicate that, for this author, the asking of the questions "What?" (the facts regarding the administration of the death sentence) and "So What?" (the significance and implications of the facts) have inexorably led to the last question, "Now What?," which has led to a personal commitment toward involvement, action, engagement, praxis. The abolition of the death sentence in South Africa has become a personal obsession—a magnificent obsession, I hope.

This Article tells in a cursory way the story of the "What," the "So What," and the "Now What"; it describes some of the struggles and hopes of this author and other abolitionists in South Africa. It hopes to reflect some contemporary South African "advocacy scholarship,"12 or, rather, "engaged advocacy scholarship," a term which will become clearer in due course.

6. Id. at 260.
7. Id. at 260-61.
8. Id. at 263.
9. Id.
10. Id. at 265-68.
11. Id. at 267.
II. THE WAY IT WAS: THE OLD SOUTH AFRICA

Apartheid ("separateness") in some or other form has always existed in South Africa. However, the system that became infamous was really instituted systematically and enforced by law since 1948, when the predominantly Afrikaans National Party came to power in an all-white election. Some of the most infamous aspects of legally-enforced apartheid were the Population Registration Act (which divided the population into different "race" groups); the Group Areas Act (which determined where the members of the "races" could live and under which millions of blacks were "removed"—often forcibly—from their homes and dumped elsewhere); the various Pass Laws (which required blacks to carry identity documents and had the effect of internal passports; the criminal provisions of these measures landed millions of blacks in prison); the Job Reservation Laws (which reserved certain forms of employment for whites); the Prohibition on Political Interference Act (which prohibited blacks from being members of political parties with whites); the Prohibition of Mixed Marriages Act (which prohibited "inter-racial" marriage); and the Immorality Act (which prohibited sexual intercourse between black and white).

The term "petty apartheid" was used to indicate the measures that regulated social segregation, such as separate entrances to buildings, separate lines at counters, and separate toilets.

"Grand apartheid" referred to segregated political systems for the different "races" and included the creation of "Bantustans" (tribal/ethnic homelands, some of which eventually became "independent states" and others semi-independent "self-governing states"). This

13. Most of what follows is based on personal experience and observation—"participant-observation" in the darkest days of apartheid.
16. Id. at 30-34.
17. Id. at 12, 35-36.
18. Id. at 36-46.
19. Id. at 17-18.
20. Id. at 13.
21. Id. at 8, 13.
was justified as being a requirement of internationally accepted principles regarding "self-determination."  

Segregation in sport was the first apartheid measure gradually to crumble in the 1980s, South Africans in general being sport-crazy. As happened in sport, apartheid fairly rapidly crumbled in the economic sphere, resulting virtually in economic integration.

Until apartheid began to crumble, the enforced separation of races had devastating consequences. Apartheid resulted in massive forced population removals. This involved bulldozing whole neighbourhoods, carting away people, their belongings and building rubble in trucks, to be dumped in remote, god-forsaken areas with names such as Stinkwater. This, coupled with the Pass Laws under which black laborers could not bring their wives and children with them to the (white) cities, had as a consequence the tragic breakup of black family and community life. Black social structure became ruptured, destroyed.

Apartheid was mainly enforced by operation of the criminal law, through action by police and by Black Affairs inspectors. I personally experienced the terror and corruption of their night raids. During a police swoop on my neighbourhood to search for "illegal" blacks, a man whom I had employed to lay paving was arrested outside my front door as he clung to the door handle and begged for mercy. When I opened the door, the police asked me: "Is this your Kaffir (a derogatory word for a black person)?" I replied in the positive and asked the police officer, "How much?" He mentioned a sum, which I paid, and my employee was released. That night my employee slept in my house—which was also illegal.

The Pass Law raids turned the magistrates' courts into sausage machines and led to gross prison overcrowding. In general, the law, the police, and the courts came, amongst blacks, to be viewed with distrust as machines of oppression. During those years, a wind was gathering which would result in the storm that continues to this day.

The "ordinary" criminal law was ruthlessly enforced. Compulsory/mandatory sentencing was the order of the day. Thousands, no mil-

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24. See UN's Long Campaign, supra note 23, at 40.
lions, were sentenced to a whipping (corporal punishment). The application of the death penalty made South Africa one of the chief executioners among record-keeping countries.

Apart from the "ordinary" criminal justice system, there existed a draconian state security machine, which became known as the Drastic Process. Much of what was done to people remains secret and unrevealed to this day. Incommunicado indefinite detention without trial (note the four concepts!) was accompanied by numerous deaths in detention. Allegations of torture and killings by the authorities were rife. The "banning" of persons became a much-used device. Banned persons were not allowed to teach, to publish, to be quoted, to receive more than one guest at a time, to leave their homes except at stated times; they were virtually turned into invisible entities living in a shadow world, half-alive, half-dead.

I could go on and on. I saw it all, lived through it, experienced it—as a white, of course; I cannot even begin to try to describe black agony. This was the dark late 1960s. South Africans lived under naked totalitarian, racist fascism under the ideological banner of separate development, self-determination, apartheid. A small white minority ruled—mainly through repression—an overwhelming but divided black majority. White South Africa was economically prosperous—very prosperous—enjoying a standard of life and luxury matched hardly anywhere in the world. The gold price was high, tourism flourished, luxury homes and vacation villas were built; people had lots of servants; they enjoyed hard currency with an extremely favourable exchange rate, relative peace, and a tolerable crime level in white neighbourhoods. For white South Africans, their god was on his throne and all was well with the world.

That is, until 1976. In that year, on June 6, the Soweto uprising resulted in numbers of blacks being shot and killed by the police—a grim repeat of the Sharpeville massacre of March 21, 1960. "Soweto 1976" rocked South Africa, sending shock waves and triggering civil unrest throughout the country. This resulted in the proclamation of a
state of emergency, which meant more repression, more detentions, more allegations of torture, and more deaths in detention—including that of Black Consciousness leader Steve Biko. But such was the mood of the government and of white South Africa that the then-Minister of the Police, the late Mr. Jimmy Kruger, could say with impunity at a National Party Congress that Biko’s death “laat my koud” (“left him cold”—an Afrikaans expression which means that he did not care and not, as he later claimed in the face of an international outcry, that he felt sorry about it).

The South African economy started its downward slide. International pressure mounted. International sanctions started to get off the ground. South Africa became embroiled in a no-win war in Angola. Under State President P.W. Botha, a former minister of defence, “securocrats” governed the country virtually in a military dictatorship. The new myth of a “Total Onslaught” by malignant international forces conspiring against South Africa as a country (and not just against apartheid) was eagerly swallowed by gullible and timorous white South Africans of all walks of life, including intellectuals—some of whom, in the midst of the worst period of corrupt government ever, were so overcome by fear that they actually joined the National Party, believing that P.W. Botha was truly an enlightened reformer whose hands needed to be strengthened. No country was more hated in South Africa than the United States, which was seen to be the instigator of all our troubles, the villain of the piece.

International sanctions “‘worked.’” The economy froze into icy immobility. The once-powerful rand become soft currency, unwanted and virtually worthless. The gold price plummeted.

In a series of moves and manipulations, some of the behind-the-scenes details of which still have to be described, P.W. Botha was ousted and replaced by F.W. de Klerk as State President. In his opening-of-Parliament speech of February 2, 1990, President de Klerk rocked South Africa and made the world sit up by announcing a reform program destined to change the face of South Africa forever by

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36. See South Africa: It Left Him Cold, supra note 32.
37. See id.
38. See UN’s Long Campaign, supra note 23.
abolishing apartheid and introducing democracy, justice, and human rights for all—the "New South Africa." But before discussing the new dispensation, it is fit to state the situation regarding the death sentence and the abolitionist movement under the old dispensation.

III. THE DEATH SENTENCE AND THE ABOLITIONIST MOVEMENT IN THE OLD SOUTH AFRICA

Under the dispensation described above, which shall be referred to as "the Old South Africa," the death sentence could ordinarily be imposed for eight crimes. Section 277 of the Criminal Procedure Act provided that the death sentence was mandatory for murder unless:

— the accused was a woman convicted of the murder of her newly born child;
— the accused was under eighteen years of age when he/she committed the murder; or
— the court, on convicting a person of murder, was of the opinion that there were extenuating circumstances.

For murder under these three sets of circumstances, the death sentence was discretionary. It was not strange for a judge, in the exercise of his discretion, to impose the death sentence despite a finding of extenuating circumstances (the onus rested on the accused to show the civil standard of a preponderance of probabilities).

The death sentence could also be imposed for seven crimes other than murder. These were treason, rape, kidnapping, childstealing (a form of kidnapping), "terrorism" in terms of the Terrorism Act 83 of 1967 (later section 54(1) of the Internal Security Act 74 of 1982), robbery, and housebreaking. In the latter two instances death was im-

45. Criminal Procedure Act, No. 51, § 277 (1977) (S. Afr.). For a concise statement of the interpretation of the various sections of this Act dealing with the "old" death sentence, see Hiemstra, supra note 44, at 614-30.
46. See Criminal Procedure Act, No. 51, § 277 (1977) (S. Afr.).
47. Id.
49. Terrorism Act, No. 83 (1967) (S. Afr.).
posed only if the court found "aggravating circumstances," as defined by statute, to have been present. Apart from the foregoing "ordinary" crimes, the death sentence could also be imposed for offences committed under South African military law.

In 1945 the Smuts government appointed a commission of enquiry into penal and prison reform under Mr. Justice C.W.H. Lansdown. The commission's report was published in 1947, just before the Nationalists ousted Smuts and gained power in 1948. In its report, the otherwise quite humanistic and enlightened commission would not recommend abolition of the death penalty on the ground that for the "undeveloped Native but recently brought into contact with western civilisation and ideas, the sanctity of human life is a matter of less concern than it would be to the western civilised man."

Only the superior courts could try murder cases or impose the death sentence. All judges were white. (The jury system was abolished in 1969.) A judge could summon up to two assessors to sit with him as triers of fact; he need not, however, and a single judge sitting alone could impose the death sentence. There was no automatic right of appeal for accused persons. Most black defendants were, because of poverty, defended by fairly junior "pro Deo" counsel (advocates, i.e., barristers; South Africa has a dual Bar system like the United Kingdom) who were paid at a low rate by the government and who did not have the benefit of being assisted by an attorney (solicitor). Often, "pro Deo" counsel saw their clients for the first time on the morning of the trial. Trials were conducted in one of the two official languages, with the result that black defendants often had to rely on interpreters. The courts' interpretation of "extenuating circumstances" limited the amount of factors that could be considered in

51. See Hiemstra, supra note 44.
52. See Death by Decree: South Africa and the Death Penalty 18 (Rolien Theron et al. eds., 1991) [hereinafter Death by Decree].
53. See Mihalik, supra note 40, at 121.
55. See Rosenthal, supra note 14, at 504-05, 517.
57. See generally Amnesty Int'l, supra note 1, at 205. Death by Decree, supra note 52; Hiemstra, supra note 44.
58. Amnesty Int'l, supra note 1, at 205; Kahn, supra note 28, at 145.
59. Amnesty Int'l, supra note 1, at 205; Kahn, supra note 28, at 145.
60. Amnesty Int'l, supra note 1, at 205.
62. Id.
imposing sentence. In every case, the defence carried the burden of proving extenuating circumstances. If the defence failed in this, the death sentence was mandatory; if it succeeded, the death sentence could still be imposed at the court’s discretion.

Black defendants stood a greater chance than white defendants of receiving the death sentence—especially if the victim was white. Between June 1982 and June 1983, thirty-eight blacks out of eighty-one convicted of murdering whites were hanged. Of fifty-two whites convicted of murdering whites, only one was hanged. Of the 2208 blacks convicted of murdering blacks, fifty-five were hanged; of the twenty-one whites convicted of murdering blacks, not one was hanged.

A national movement for the abolition of the death sentence was started in the late 1960s, mainly through the work of the late Professor Barend van Niekerk. Van Niekerk, although not the only writer favoring abolition, was undoubtedly the most important of those pioneers who fought for abolition. His work was mentioned in the 1969 Parliamentary debate on the death sentence. In that debate, Mrs. Helen Suzman’s private member’s motion calling for a commission of enquiry into the death sentence went without any support. Van Niekerk’s most important article (in two parts) led to his prosecution for contempt of court after he asked questions and published answers about the possibility of racial prejudice and discrimination in the courts’ application of the death sentence. A considerable number of his respondents believed that blacks had a better chance of being sentenced to death than whites and some thought that such discrimination was “conscious and deliberate.” It was held that, objectively seen, contempt had in fact taken place; however, van Niekerk was acquitted for lack of mens rea. Academics and reformers were thus

64. Van Zyl Smit, supra note 63.
65. Id.
66. See Amnesty Int’l, supra note 1, at 205.
67. See Mihálík, supra note 40, at 118.
68. Id.
forewarned that research in this field was a "no-no." A commentator recently stated that "[t]here can be little doubt that in the [twenty years after the van Niekerk trial] the warning that the judgment contains has seriously inhibited research into racial disparities in capital sentencing."

Equally frightening as the verdict in *S. v. Van Niekerk*, and handed down in the same year (1970), was the conviction under section 44(1)(f) of the Prisons Act 8 of 1959 in the so-called *Rand Daily Mail* case. The legal costs for the defence in that case ran into millions of rands (current purchasing power), which no academic could ever hope to raise were he similarly charged. The decision effectively placed a ban on independent research, exposure, and criticism of prison conditions in South Africa. The net result of these prosecutions was "almost total silence" on these important topics of concern.

In spite of—or perhaps because of—these factors, the Society for the Abolition of the Death Penalty in South Africa (SADPSA) was founded in 1970 by van Niekerk and others. Sadly, van Niekerk died in 1981 at the age of forty-two. SADPSA became moribund, but was revived in 1989 under the national directorship of Professor Dennis Davis.

Around this time also appeared articles by retentionists who, although in favor of the death sentence in principle, were nevertheless...

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74. See Statement by the Council of the Society of University Teachers of Law, 87 S. Afr. L.J. 467 (1970) (expressing alarm at the chilling effect of this judgment).
77. See J.H. van Rooyen, *Artikel 41(f) [sic] van die Wet op Gevangenisse—'n betoog ten gunste van sy skrapping* [Section 41(f) of the Prisons Act—An Argument for Scrapping It], 1981 DE REBUS 217.
78. See János Mihálik, *Restrictions on Prison Reporting: Protection of the Truth or a Licence for Distortion?, 5 S. Afr. J. on Hum. RTS. 406* (1989) (a comment on some of the consequences of muzzling reporting on prison conditions). I was banned from visiting South African prisons since 1979 when I was Director of the Institute of Criminology in the Law School of the University of Cape Town and published, with a co-author, evidence of neglect and abuse in certain prisons; the authorities stated in a letter to me that further prison visits by me "would serve no useful purpose." It is assumed that the ban has lapsed or has now been lifted: This year I was cordially invited to visit prisons.
79. See János Mihálik, *Free Speech and Prisons, 4 S. Afr. J. CRIM. L. & CRIMINOLOGY* 203, 213 (1980) (“The predictable result . . . has been an almost total silence in the media about the prisons, broken only by repeated reference in the press that they can say nothing.”).
81. *Id.*
dissatisfied by the then-current death sentence dispensation; this phenomenon can loosely be termed the "death sentence reform movement." Moreover, by now, as has been outlined, South Africa had virtually been brought to its knees as a result of worldwide and internal opposition to apartheid, sanctions, and the war it lost in Angola. The birth pangs of the New South Africa were being felt; inevitably this also had to involve changes in the death sentence.

The number of executions in South Africa for the ten-year period between 1980 and 1989 was 1122: 130 in 1980, 95 in 1981, 100 in 1982, 90 in 1983, 115 in 1984, 137 in 1985, 121 in 1986, an all-time high of 164 in 1987, 117 in 1988, and a low of 53 in 1989, the last year in which executions took place. The dramatic reduction in executions in 1989 was to a large extent achieved through presidential reprieves, which numbered sixty-six that year. This followed the 1988 and 1989 Parliamentary debates on the death sentence, the renewed work of abolitionists, the work of the retentionist "death sentence reform movement," and the great thrust under the leadership of State President F.W. de Klerk toward the creation of a New South Africa where there would be respect for human rights.

IV. THE EVOLVING NEW SOUTH AFRICA

In his February 2, 1990, speech, the State President announced the release from prison of Mr. Nelson Mandela, an African National Congress (ANC) leader who had been sentenced to life imprisonment in the 1960s for, inter alia, sabotage. He further announced the unbanning of the ANC and stated that the overall aims to which he was aspiring included:

[A] new, democratic constitution; universal franchise; no domination; equality before an independent judiciary; the protection of minorities as well as individual rights; freedom of religion; a sound economy based on proven economic principles and private enterprise; dynamic programmes directed at better education, health services, housing and social conditions for all.
Moreover, the State President announced an official moratorium on executions, pending the passage of a new bill on the death sentence by Parliament.88 (In fact, there had been an informal moratorium since the last execution took place in November 1989.89) One by one the pillars of apartheid were scrapped by Parliament. By early 1992 a small classified advertisement appeared in a local newspaper: “WANTED: By private collector: Old apartheid signs.”90

In 1990 the new legislative provisions regarding the death sentence were published, first as a bill to be commented on by all interested parties and finally, in an amended form, as an act.91 The provisions of this legislation will be discussed in more detail below.92 Suffice it to state here that the new legislation provided for the creation of panels to review the cases of those who had been sentenced to death under the old dispensation.93 The panels were empowered to recommend that the State President reprieve condemned prisoners; those who were not recommended for reprieve would be referred back to the Appellate Division to be dealt with under the new legislation.94 The panels completed their work at the end of 1991 after reviewing a huge number of cases.

When the new legislation came into force by mid-1990, the Minister of Justice announced that the moratorium on the death penalty was over. One prisoner, Bezuidenhout, came very close to being hanged after his imminent execution was officially announced, but was granted a last-minute stay of execution as a result of representations by two organisations, Lawyers for Human Rights and SADPSA.95 To date no execution has taken place, although some 300-plus prisoners are languishing on Death Row at Pretoria Central Prison.96 This means that, when this Article was completed in March 1993, South

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88. See Mihálík, supra note 40, at 129-31.
92. See infra notes 152-88 and accompanying text.
94. Id. § 19(12).
95. Peter Fabricius, First Execution in 15 Months Will Take Place Soon—Coetzee, THE STAR, Feb. 27, 1991, at 1 (announcing that Bezuidenhout would be executed); Charmaine Lourns, Bezuidenhout Hang Nie Na Aansoek [Bezuidenhout Will Not Be Hanged After Inquiry], PRETORIA BEELD, Mar. 5, 1991, at 1 (announcing that Bezuidenhout would not be executed). (A copy of the author’s representations on behalf of Bezuidenhout, done for the Pretoria chapter of SADPSA, is available at Fla. Dep’t of State, Div. of Archives, Tallahassee, Fla.).
Africa had for some thirty-nine months been a "non-executing country."

It is not as if there have been no pressures to recommence executions. The New South Africa is threatening to become a nightmare, if it is not one already, due, inter alia, to a crime wave spiraling out of control. Those reformers who dreamt that the ravages wrought by more than four decades of apartheid could be wiped out and that the abolition of that evil and ruthless system would quickly lead to a utopian New South Africa were in for a rude shock.

Black leaders and organisations, some only recently unbanned, are battling amongst themselves for power, control, and mass support. In the process, blacks have killed blacks on an unprecedented scale, the methods ranging from "necklacing" (putting a motorcar tyre around the victim, thereby pinning his or her arms to the body, dousing the tyre and the victim with gasoline, and striking a match), to spraying crowds with bullets from Russian AK-47 rifles, to throwing groups of people off moving trains—to mention but a few techniques of slaying. Apart from such "civil unrest," the figures for other murders and crimes of violence also rose steeply, with accompanying comment from the public and press, often asking for recommencement of executions. (Despite the moratorium on executions, the courts are presently imposing the death sentence at a rate of about seventy to 100 per year.)

The following paragraphs, recounting statistics and incidents gleaned from recent newspaper reports, dramatically illustrate some of the current features of the New South Africa—the background against which the struggle for the abolition of the death sentence must be viewed in order for the difficulties to be properly appreciated.

In 1990 South Africa had a population of 30,797,000, of which 70.2% (21,609,000) were so-called blacks, 16.3% (5,018,000) whites, 10.4% (3,214,000) "coloureds" (mulatto) and 3.1% (956,000) asiatic. Due to various factors, such as apartheid, sanctions, a lost war, inflation, mismanagement, and corruption, the South African
The economy slid into dire straits. The purchasing power of the rand in 1990 dropped to nine cents if 1970 is taken as the base year. (One rand was worth 100 cents in 1970, a few years before the Soweto uprising.) Price increases have been severe; compared with one rand in 1970, the average price level in 1990 was 11.11 rand.\textsuperscript{103}

The number of homeless black families reached a crisis level. The World Bank hammered South African housing policy "in a hard-hitting report" as hopelessly inefficient and full of contradictions and duplications: "Concrete proposals for reform should be made as early as possible."\textsuperscript{104} The Bank continued by stating that "the housing sector in South Africa is highly distorted, with major implications for the performance of the economy, the economic efficiency of the cities, [and] the economic welfare of non-whites. . . . The key feature of this distortion is the spatial segregation of different racial groups within cities."\textsuperscript{105} In the Pretoria-Witwatersrand-Vereeniging (PWV) area alone some 380,000 black families were crowded into "backyard shacks," another 250,000 families were packed into garages and out-buildings, and 100,000 more lived in freestanding units in squatter settlements. While white persons enjoyed an individual average living space of 33.2 square metres at home, the average for blacks plummeted to 4.8 in backyard shacks and barely 4.2 in squatter settlements.\textsuperscript{106} A newspaper sympathetic to the reformist government of State President de Klerk commented:

A squatter camp springing up next door is a form of theft, depriving a community . . . of value as efficiently as a car thief. . . . The culprits in all of this . . . are . . . the planners and administrators who have failed abjectly to make provision for the poor. In doing so, they have created the squatters, South Africa's own Boat People.\textsuperscript{107}

Despite a much-publicised "National Peace Accord" hammered out at National Peace Initiative meetings in 1991 by the Government, the Inkatha Freedom Party (IFP), and the African National Congress (ANC), political violence in the strife-torn black townships continued unabated.\textsuperscript{108} Unrest-related murders increased from 823 in 1985 to 2238 in 1991.\textsuperscript{109}

\textsuperscript{103} Id. paras. 19 ("Purchasing power of the Rand"), 20 ("Relative price increases").
\textsuperscript{104} The Star, Sept. 9, 1991; see generally Joe Kirwin, South Africa Faces Serious Industrial Third World Pollution Problems, 14 Int'l Env't Daily (BNA) No. 15 at 429 (July 31, 1991).
\textsuperscript{105} The Star, supra note 104.
\textsuperscript{106} Id.
\textsuperscript{108} Laurence, supra note 98, at 1.
\textsuperscript{109} Karin Brynard, Tot hiertoe en nie verder [Until This Point, But No Further], Pretoria Beeld, Jan. 19, 1992.
Regarding “ordinary” (not unrest-related) crime, a newspaper usually sympathetic toward the De Klerk government editorialised in September 1991: “When people are unsafe in their homes; when they risk being shot or hijacked in their cars; when city centres become the domain of muggers by night . . . then the country is experiencing more than a mere crime wave. What it is facing is an anarchic tide.” Citing official statistics, the same newspaper reported that South Africa was “in the grip of an unprecedented crime wave,” with between 8000 and 9000 more serious crimes being reported every month nationally in 1991 than in 1990. In 1990 serious crime (not political-unrest-related) included more than 15,000 murders, 125,000 serious assaults, 61,000 robberies, 20,000 rapes, and 225,000 burglaries. In Johannesburg alone (excluding Soweto) 951 people were murdered. The three main capital crimes (murder, rape, and robbery with aggravating circumstances) add up to 55,000 capital offenses per year.

The figures do not remain static. Reported burglaries increased by twenty-two percent during 1990 and by a further thirteen percent in 1991. Reported armed robbery took place 4514 times just in the month of November 1991 (150 incidents per day), an increase of twenty-two percent over November 1990.

The seriousness of these statistics is highlighted when they are compared with American figures. Washington, the “United States’ murder capital,” led all United States cities in 1990 with a homicide rate of 77.8 per 100,000 residents (a total of 490 homicides); by comparison, the Johannesburg rate (excluding Soweto) is 95 per 100,000. In a survey of 100 major cities of the world in 1990, Cape Town had the highest percentage of murders.

Not just violent crimes rocketed, but white-collar crime also soared as the economy plummeted. In January 1992 the police were investigating some 13,000 fraud cases totaling 10.8 billion rand, a staggering 5 billion rand (almost fifty percent) increase over the previous year.

111. Id.
112. Id. Compare the same newspaper’s editorial on October 29, 1991: “The public’s alarm at the soaring crime rate is one of the principal concerns . . . these days.” It Can Happen to You, supra note 97.
The magazine Hotelier and Caterer warned that the current crime wave, especially street crime, was seriously inhibiting the tourism industry, resulting in loss of revenue and, ultimately, in unemployment and crime—a vicious circle.\(^{117}\)

Murders (by blacks) of (white) families on lonely farms in outlying areas have shown a marked increase,\(^{118}\) as have attacks on the elderly.\(^{119}\) In November 1990 there were 540 attacks on old people reported, increasing to 737 in November 1991.\(^{120}\) Hardly any crime provokes stronger outrage amongst whites than the murder of white farm families or elderly whites by blacks. In the aftermath of one farm family murder in December 1991 near Verkeerdevlei in the Orange Free State province, local farmers kicked and beat to death a black suspect.\(^{121}\) The mouthpiece of the official white opposition party in Parliament, the Conservative Party, commented:

> Why... should the government get up tight when some Free State farmers got stuck into criminals who attacked a farm family in their beds? If nobody can protect old White people on farms, can the government expect concerned Whites to do nothing?... There is no law and order in South Africa.\(^{122}\)

The murderous attacks on white farmers and elderly people have in right-wing circles been interpreted as purposeful and political, intended to drive whites from the land and as unrelated to rapid black urbanisation, unemployment, and poverty. Strong law-and-order demands have been directed to the government by right-wing editors.\(^{123}\)

Statistics show that white-on-black violence increased significantly after State President de Klerk’s reform moves. Researchers have found evidence that as white privileges eroded, white prejudice and racist attacks increased.\(^{124}\) Two types of white-on-black violence have been identified: semi-spontaneous acts motivated by emotional anger and organisationally-based attacks involving planning and the marshaling of resources. Unlike black-on-white violence, which usually is

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119. See Dunn, supra note 100, at 3.
120. Brynard, supra note 109.
122. *Patriot*, Jan. 17, 1992 (editorial comment); see generally Potgieter, supra note 121.
based on economic motives, white violence generally has a political motive.\textsuperscript{125}

The black Pan-African Congress (PAC) announced a campaign to kill police officers.\textsuperscript{126} In fact, statistics show a significant increase in attacks on and killings of the police. During 1991, 135 police officers were murdered.\textsuperscript{127} Another 226 were slain in 1992.\textsuperscript{128}

The PAC announcement prompted a Conservative Party spokesperson, Mr. Chris de Jager, to call for the death sentence for the murder of a police officer.\textsuperscript{129} For the first time, a pro-government newspaper likewise demanded the reintroduction of executions during the time of stress, crime, and unrest following the start of the government's reform movement. This happened in the wake of the Conservative opposition's call for the death sentence and specifically agreed with Mr. de Jager's sentiments.\textsuperscript{130} The newspaper stated that barbaric crimes should be answered with a barbaric punishment, conceding that that is exactly what the death sentence is. The Minister of Law and Order, Mr. Hernus Kriel, eventually issued a public warning that the death sentence had not been abolished in South Africa.\textsuperscript{131} He emphasised that he agreed the cold-blooded murderer of a police officer deserved the death sentence.\textsuperscript{132} He later vowed to "do everything possible" to counter the phenomenon of police murders.\textsuperscript{133} He raised the rewards for information leading to the conviction of killers of police from 25,000 rand to 100,000 rand,\textsuperscript{134} announced the introduction of new lightweight but effective bullet-proof jackets, and increased the use of armoured vehicles.\textsuperscript{135}

Another Conservative Party spokesperson, Mr. Moolman Mentz, referring specifically to murderous attacks on farm families and on the police, stated that the State President should realise that South

\textsuperscript{125} Id.
\textsuperscript{126} Esther Waugh & Kim Helfrich, PAC's Violent Threat, PRETORIA NEWS, Jan. 4, 1992, at 1.
\textsuperscript{127} Brynard, supra note 109.
\textsuperscript{129} Waugh & Helfrich, supra note 126.
\textsuperscript{130} Moord [Murder], TRANSVALER, Jan. 6, 1992 (editorial).
\textsuperscript{131} Brynard, supra note 109 (emphasis added).
\textsuperscript{132} Id.; see also Brendan Boyle, South Africa Offers Big Reward for Police Killers' Arrest, Reuter Library Report, Jan. 19, 1992, available in LEXIS, Nexis Library, LBYRPT File; Dunn, supra note 100.
\textsuperscript{133} Dunn, supra note 100.
\textsuperscript{134} Boyle, supra note 132.
\textsuperscript{135} Dunn, supra note 100.
Africa is slipping into anarchy and that he personally would have to bear the blame.\textsuperscript{136}

Quoting a well-known graffito on a Johannesburg freeway embankment, which states cryptically: "The Lord knows, things cannot go on like this!", a liberal weekly newspaper warned that there is a dangerous craziness on the loose in our country, which, together with the prevalent feelings of fluidity and instability, could lead to a highly explosive situation.\textsuperscript{137} The paper drew attention to the fact that in one dreadfully crazy week in South Africa a young white person shot and killed ten people and wounded thirty-nine in Ladysmith; a berserker fired into crowds in Durban until he was shot and killed by the police; a Johannesburg man held his own wife hostage in the city centre; people were once again killed by being thrown out of moving trains in the Witwatersrand area; more police were murdered; the PAC stated that further murders would follow; a right-wing leader stated that he would encourage right-wingers toward violence; and the ANC hired a right-winger to assassinate a traitor.\textsuperscript{138} The paper editorialised: "We are reaping the fruits of generations' exploitation, repression, militant Afrikaner nationalism, apartheid, patriarchism, guilt feelings, bitterness, isolation," pointing out that it was the system of apartheid, as enforced by the police and the courts, which had made human dignity and life cheap.\textsuperscript{139} The solution, as the editor saw it, involved, first, the need to re-establish trust and confidence in the government and, second, the need to get the economy going and growing.\textsuperscript{140}

A pro-government Sunday newspaper, noting that the public is "throatful" of violence and suggesting that the medicine has in the immediate past perhaps been a little soft due to politics, demanded that the government should now use strong medicine to weed out and destroy violence.\textsuperscript{141} No mention was made of the death sentence, however.

The new Judge-President of the Cape, Mr. Justice Gerald Friedman, referring to recent paroles, early releases, and amnesties (done initially as part of the political negotiation process, but later to relieve prison overcrowding), noted his deep concern about such "wholesale and indiscriminate" releases of common-law prisoners who have been convicted of serious crime unconnected to politics.\textsuperscript{142}

\begin{itemize}
\item \textsuperscript{136} \textit{Patriot}, Jan. 24, 1992.
\item \textsuperscript{137} \textit{Vrye Weekblad}, Jan. 24-30, 1992 (a weekly paper).
\item \textsuperscript{138} \textit{id}.
\item \textsuperscript{139} \textit{id}.
\item \textsuperscript{140} \textit{id}.
\item \textsuperscript{141} \textit{Rapport}, Jan. 26, 1992.
\item \textsuperscript{142} \textit{Sunday Times}, Jan. 26, 1992.
\end{itemize}
In a phone-in poll conducted by an Afrikaans Sunday newspaper, eighty-five percent of the respondents stated that they believed that law and order should first be restored before the political negotiations of the Convention for a Democratic South Africa (Codesa) could be fruitful, while only fifteen percent believed that negotiations (such as Codesa) could lead to the restoration of law and order.\textsuperscript{143}

In a phone-in poll conducted by a black newspaper, \textit{The Sowetan}, most callers felt that the death sentence should be retained in the New South Africa, some stating that the death sentence would be appropriate for those who had advocated apartheid and their supporters “because they have killed so many people in their era.”\textsuperscript{144} I responded by telefaxing the following remarks to the newspaper’s editor:\textsuperscript{145}

1. The absence of executions is \textit{not} the cause of the current crime wave, nor can it be its cure.
2. Criminal justice policy cannot be determined by public opinion. The public would “believe in” the re-introduction of mutilation, the cat-o’ nine-tails, public executions and whatever other form of punishment mankind has devised and used in the past, just as they “believe in” the death sentence.
3. We have 15,000 murders per year. World opinion considered fifty hangings to be too many, which means that if we were to start executing again, we should hang fewer than fifty per year. To select so few out of so many is humanly an impossible task—it cannot be done with consistency and justice.
4. The true causes of the present high criminality are social, economic and political. Only thorough and rapid improvement for the neglected people of South Africa in these areas will bring about significant reduction in crime. Effective policing, even by itself, would accomplish much more than executions. The present government is not yet doing what it should in this regard. They should be pressured to perform.
5. The death sentence as a “solution” has been a false and cheap way for white politicians to pander to public fears and expectations. They know that they cannot use the death sentence effectively and fairly. Yet they pretend that they can and will. It would be just as bad if black politicians, populists and/or newspapers were now to continue along the same lines.

\textsuperscript{143} \textit{RAPPORT}, supra note 141.
\textsuperscript{144} \textit{Keep the Death Penalty Say Callers}, supra note 101.
\textsuperscript{145} Facsimile from Jan H. van Rooyen to Aggie Klaaste, Editor, \textit{THE SOWETAN} (Nov. 20, 1991) (available at Fla. Dep’t of State, Div. of Archives, Tallahassee, Fla.).
6. I believe that it is the duty and responsibility of your newspaper to teach and educate public opinion to see clearly where the actual causes of crime lie, in which direction solutions must be sought and to exert pressure for such action. The death sentence should be abolished once for all so that we can focus on the real issues. I hope that you will support and propagate this editorially and otherwise.

The new Judge-President of the Eastern Cape, Mr. Justice N. Zietsman, stated about the death sentence: "This is a matter which must be considered carefully by the whole population before a final decision is made."146

It should by now be clear that abolition of the death sentence is not under the present circumstances one of the top priorities of white law reformers or politicians in South Africa. This makes the existence of the de facto moratorium all the more interesting.

V. THE DEATH SENTENCE AND THE ABOLITIONIST MOVEMENT IN THE NEW SOUTH AFRICA

The hanging statistics in the Old South Africa toward the end of the 1980s elicited the comment that "South Africa has got itself into a situation where it is hanging people at a rate which would cause even the most sordid banana republic to hang its head in shame."147 Even though this sentiment is somewhat hyperbolic, it is clear that the time was ripe for change. Added to the factors mentioned earlier, there was now a political urgency for death sentence reform (if not for abolition): "Hanging, like most issues in South Africa, has been politicised. The intensification of South Africa's conflict has brought an increasing number of politically motivated people into the shadow of, and sometimes on to, the gallows . . . ."148 One of the first campaigns of the black South African Youth Congress after its formation in 1987 was to save their "compatriots" from the gallows.149

The work of retentionists who were dissatisfied with aspects of the existing death sentence dispensation (the "death sentence reform movement," led to a large extent by J.P.J. Coetzer, a former Secretary of Justice) was particularly influential in "softening up" the government for reform—which, abolitionists knew, would be the first

149. Id.
step that could eventually lead to abolition, whether de facto or de jure or both. There first had to be a shakeup of the inherited granite-like monolithic system.

During the 1988 Parliamentary discussions on the death sentence, the Minister of Justice, Mr. H.J. (Kobie) Coetsee, had felt that there was no need to investigate the death sentence in South Africa. By the time of the next year's debate, however, Coetsee stated that he was now receptive to ideas about reforming—but not abolishing—the death sentence.

The last execution in South Africa took place on November 4, 1989. On February 2, 1990, the State President, in his opening-of-Parliament speech, announced an immediate moratorium on executions, pending new legislation on the death sentence.

After the State President's speech, draft legislation was prepared for comment. Various bodies, including abolitionists, made submissions and representations to the Department of Justice. Strategy would now become of vital importance to the abolitionist movement. Abolitionists realised, on the basis of international scholarship, experience, and jurisprudence, that abolition would not come neatly and that the process would in all likelihood be unsystematic and even messy. Of utmost importance was that “establishment” persons acceptable in official circles, such as J.P.J. Coetzee, were now rocking the boat by proposing that the structure of the “old” death sentence (which had a large mandatory component) be changed to provide for a totally “free” judicial discretion. A group of the Pretoria-based abolitionists realised, on the basis of their understanding of American experience, that such introduction of a “free” discretion would eventually lead to a mess—that is, to demonstrable disparities in the imposition of the death sentence. The strategic decision was taken not to comment on this aspect of the new legislation (that is, not to refer to

150. See supra note 83 and accompanying text.
151. Mihálik, supra note 40, at 126-27.
152. Id. at 128-29.
153. Id. at 118.
154. See id. at 129.
155. E.g., United States Supreme Court judgments. These have for quite some time been taught and studied as part of a coursework LL.M. degree at my university; both teachers and students are fairly well-informed about international death sentence scholarship. My university has also been very supportive in supplying travel grants which have enabled me to visit extensively in the United States and to establish an academic “network.” Both Norval Morris (University of Chicago Law School) and Frank Zimring (University of California at Berkeley Law School) have agreed to become honorary Research Fellows in the Criminal Justice Research Unit (of which I am Chair) in the University of South Africa's Law School; to name but two American colleagues who care about criminal justice in South Africa and have given valuable advice regarding the abolition of the death sentence. About “networking,” see infra Part VIII.
the vast body of American experience and literature in this connection and not to voice any prophecies or make a projection of the coming mess), but to allow it to happen as a necessary prelude to eventual abolition. This decision, of course, had important ethical implications. However, abolitionists felt that this approach could be justified ethically on the ground that the abolitionists were not specifically asked for an opinion on the legislation; the authorities had briefed no-one—they had simply published the bill “in the air” for general comment. The situation would have been entirely different if a judicial commission of enquiry had been appointed; we would then have had to reveal what we foresaw. In the circumstances, therefore, the abolitionist group commented only on issues other than the free discretion and its expected disastrous consequences as far as uniformity and justice were concerned.156

The bill culminated in the Criminal Law Amendment Act 107 of 1990, which amends certain sections of the Criminal Procedure Act 51 of 1977. As has been stated previously, the amendments dispense with a mandatory death sentence, scrap the death sentence for housebreaking, create a sentence of substantially real life imprisonment, effect radical changes to appeals, and provide for ancillary matters, including reconsideration of sentences of persons who were sentenced to death before the commencement of the new Act.157 In the discussion that follows, it should be kept in mind that South Africa does not have a jury system.

The main provisions regarding the death sentence are contained in section 277. The Act provides158 that the death sentence may be passed by a superior court only, and only in the case of a conviction for (i) murder; (ii) treason (now only when committed when the Republic is in a state of war); (iii) kidnapping; (iv) child-stealing; (v) rape; and (vi) robbery (including attempted robbery) if aggravating circumstances were present, meaning the wielding of a firearm or any other dangerous weapon, the infliction of grievous bodily harm, or a threat to inflict grievous bodily harm by the offender or an accomplice on the occasion when the offence was committed, whether before or during or after the commission of the offence.159 The position regarding

158. Id. § 277(1).
159. Id. § 1 (defining terms).
terrorism remains unchanged, except that one may deduce that the change effected under (ii) above will now also apply to terrorism.

The Act further provided that the sentence of death shall be imposed (a) after the presiding judge conjointly with the assessors (if any), with due regard to any evidence and argument on sentence, has made a finding on the presence or absence of any mitigating or aggravating factors AND (b) if the judge, with due regard to this finding, is satisfied that the sentence of death is "the proper sentence." This applies not only to murder, but to all the capital offenses. Note that both (a) and (b) have to be present. Note further that the term "mitigating factors," being wider than the previous term "extenuating circumstances," will permit more evidence to be admissible for a finding of mitigating factors than was previously possible for a finding of extenuating circumstances. In addition, although the use of the word "shall" may create the impression that once again we have a mandatory death sentence, true discretion is actually created under (b), involving the decision whether, in the light of the mitigating and aggravating circumstances, the sentence of death is the proper sentence. In the context of the subsection, the adverb "only" should be understood before the phrase "proper sentence," with the consequence that a judge can impose the death sentence only if, in light of the mitigating and aggravating circumstances, he or she is "satisfied" that the sentence of death is the only proper sentence. Accordingly, if there is another sentence that could be equally "proper," the death sentence should not be imposed.

Where previously the onus of proving extenuating circumstances rested on the accused, the use of the word "satisfied" in the new Act means that if the judge reasonably doubts or is unsure whether the death sentence is the "only" proper sentence, the judge is not "satisfied" as required by the Act and thus may not impose the death sentence.

The sentence of death may not now be imposed at all upon an accused who was under the age of eighteen at the time of the commis-

160. Internal Security Act, No. 74, § 54(1) (1982) (S. Afr.) states that offenders shall be subject to the penalties provided for by the law of treason.

161. Criminal Procedure Act, No. 51, § 277(2) (1977), amended by No. 107 (1990) (S. Afr.); see also § 274 (permitting court to consider evidence, as referred to in § 277(2)(a), to inform itself as to proper sentence).


165. See Middleton, supra note 163, at 63.
sion of the act. If age is placed in issue, the onus is on the prosecution to prove it beyond reasonable doubt. It also should be kept in mind that although a regional court (which, with the magistrates' courts, is a "lower court" as opposed to a "superior court") may now try murder cases, it may not impose the death sentence.

An important innovation regarding appeals is that an attorney-general may now, if leave has been obtained from the court, appeal against a sentence imposed by a lower court (which includes a regional court) as well as against a sentence imposed by a superior court. However, the court of appeal may not impose the sentence of death in such cases.

A further very important change in the area of appeals is that an accused who has been sentenced to death may now as of right appeal to the Appellate Division against his conviction and sentence without having first to apply for leave to appeal. Furthermore, such an accused may apply for leave to lead further evidence. The state may now be ordered to pay the costs of the accused. Elaborate provision is made for safeguarding the interests of an accused who does not make use of this right of appeal.

A warrant for the execution of the death sentence issued by a judge may not be executed until the Minister of Justice has notified the sheriff that (1) the Appellate Division has confirmed the sentence of death and (2) the State President has decided not to extend mercy to the convicted person. The Minister of Justice must appoint counsel to submit a petition for mercy on behalf of a convicted person to the State President if such person does not do it him- or herself. There is also provision for reopening a criminal case if new material evidence comes to light after all the usual post-conviction remedies have been exhausted. But one thing has not changed: the manner of execution is still by hanging.

It is important to note that the standard for interfering with a death sentence of a trial court is different from the "normal" standard that

167. Id. § 277(3)(b).
168. Id. §§ 310A, 316B.
169. Id. § 322(6).
170. Id. § 316A(1).
171. Id. § 316A(3).
172. Id. § 316B(3).
173. Id. § 316A.
174. Id. § 279.
175. Id. § 325A.
176. Id. § 327.
177. Id. § 279(4).
applies to appeals against sentence. Normally a court of appeal will pay great deference to the sentencing discretion of a trial court. It will not substitute its own sentencing discretion for that of the trial court. (This approach rests upon the assumption that reasonable people may differ reasonably.) Before a court of appeal will interfere, it must find that the trial court exercised its sentencing discretion wrongfully.\(^\text{178}\) Now, however, the Act provides that, in the case of an appeal against the sentence of death, the Appellate Division may “set aside the sentence and impose such punishment as it considers to be proper if it is of the opinion that it would not itself have imposed the sentence of death.”\(^\text{179}\) In other words, in capital cases the Appellate Division may now substitute its own sentencing discretion for that of the trial court. This is a major departure from normal procedure, undoubtedly effected by considerations of policy, namely that no person should be sentenced to death unless the Appellate Division itself would have sentenced him or her to death.\(^\text{180}\)

Part of the “package” relating to the death sentence brought about by Act 107 of 1990 is the creation of a substantially true “life” sentence of imprisonment,\(^\text{181}\) which is a valuable sentencing alternative to the death penalty because it meets many of the objections of retentionists that are based on considerations relating to the protection of society. As has been mentioned, the new legislation created elaborate legal machinery for the reconsideration of the sentences of certain persons who were already under sentence of death at the time of the commencement of the new Act or whose cases were not yet finalised at that time.\(^\text{182}\)

Special provision is made for the Minister of Justice “joining in” an appeal against the death sentence on behalf of an accused. The Act provides that if, in a case where the sentence of death was imposed, the Minister of Justice has any doubt about the correctness of the conviction OR the propriety of the death sentence, he may, on behalf and without consent of the convicted person, refer a statement of the ground for his doubt to the Appellate Division for consideration at appeal or review proceedings.\(^\text{183}\)

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178. See Hiemstra, supra note 44, at 740-41.
The State President has the general constitutional power to pardon or reprieve offenders and to commute sentences, apart from the specific powers conferred on him by the Prisons Act. The 1990 Criminal Procedure Act furthermore states specifically that nothing contained in it shall affect the power of the State President to extend mercy to any person.

The Minister of Justice now also has the power to petition for mercy on behalf of an accused person. It is provided that when the Appellate Division has confirmed the death sentence and the accused himself has not submitted a petition for mercy to the State President within twenty-one days, the Minister of Justice must appoint counsel to submit such petition on behalf of the accused to the State President.

In any case in which the State President extends mercy to any person under sentence of death, he may commute the sentence of death to any other punishment provided by law without the consent of that person.

Elaborate provisions exist regarding the reopening of a case after all the recognised post-conviction remedies have been exhausted and new evidence comes to light which may materially affect either the conviction or the sentence.

The official moratorium on executions was stopped when Act 107 of 1990 became operative. However, executions did not recommence, even though the courts in their application of the new provisions were regularly sentencing convicted persons to death. The number of condemned convicts on death row grew to more than 300. The panels dealing with those sentenced to death under the old dispensation completed their work. Several condemned prisoners reached the end of all available procedures and were ready to be processed through the gallows. The government and the overwhelming majority of the South African population were in favour of capital punish-
ment; pressure mounted from all sides for executions to recommence\textsuperscript{194}—and yet there were no executions. There was also no official comment. Just silence. It was hard to understand.

In Pretoria, the local branch of the Society for the Abolition of the Death Penalty in South Africa (hereafter called SADPSA-Pretoria), worked in a very loose alliance with other groups which were, to a lesser extent, also in favour of and/or working for abolition. The most influential action groups included Lawyers for Human Rights, the Black Sash, the Death Penalty Monitoring Project, the National Association of Democratic Lawyers (NADEL), the Legal Resources Centre (LRC), the Institute for Criminology of the University of Cape Town, and the African National Congress (ANC). As a matter of policy, SADPSA-Pretoria followed a fairly cerebral approach, mostly encouraging and producing "advocacy scholarship,"\textsuperscript{195} leaving other approaches (e.g., practical legal aid, picketing) to other organisations. Although the products of the group's work were published in the academic and popular press, the group decided at a fairly early stage to have as the real target of its efforts only two persons: the State President, Mr. F.W. de Klerk, and the Minister of Justice, Mr. Kobie Coetsee. It was felt that, from a strategic point of view, the battle for abolition would be won if these two persons could be persuaded. Copies of all work produced was posted or telefaxed to these persons, sometimes with accompanying telephone calls (to aides) or letters.

Full-length academic articles were produced on the following topics:

—The Criminal Law Amendment Bill which preceded the Act that led to the "new" death sentence in South Africa;\textsuperscript{196}

—A critique of the Dutch Reformed Church's policy document in which that church came out strongly in favour of retaining the death sentence;\textsuperscript{197}

—A critique of the first Appellate cases reported under the new death sentence dispensation;\textsuperscript{198}

—The implications of disparities in the administration of the death sentence;\textsuperscript{199}

\textsuperscript{194} See Gov't Backs Executions, but . . . Kobie Urges Talks on Hanging, THE CITIZEN, Mar. 24, 1992, at 1 [hereinafter Gov't Backs Executions]; Keep the Death Penalty Say Callers, supra note 101; see also infra Part VII.

\textsuperscript{195} See supra note 12 and accompanying text.

\textsuperscript{196} See van Rooyen, supra note 4.

\textsuperscript{197} See Dutch Reformed Church, supra note 83.


—There were also several shorter contributions.  

—A large number of comments, letters and articles contributed by members of SADPSA-Pretoria appeared in newspapers during 1990 and 1991. In this period members of SADPSA-Pretoria also participated in a number of radio and TV programmes dealing, inter alia, with the death sentence and reprieves. Several submissions and representations were made to official bodies, including a memorandum to the SA Law Commission (on human rights, the death sentence, appeals by the state, alternatives to the death sentence, and the treatment of psychopathic offenders); a memorandum to the Joint Committee on Justice, Parliament, regarding the Criminal Law Amendment Bill B93-90 (GA); representations to the State President and the Minister of Justice requesting a stay of executions for one Bezuidenhout (which was successful); several suggestions to the State President and the Minister of Justice regarding the death sentence and its dilemmas; written and personal representations to President Lucas Mangope of the Republic of Bophuthatswana against pending executions there;  

—SADPSA-Pretoria finally participated in various symposia and seminars on the death penalty.  

At the November 12, 1991, Annual General Meeting (AGM) of SADPSA-Pretoria, the organisation had as guest speaker Mr. Justice Pierre J. Olivier, Vice-Chair of the South African Law Commission and project leader of the Commission's "Project 58: Group and Human Rights," which produced a 702-page Interim Report on Group and Human Rights in August 1991. This massive work discussed the

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201. See sources cited in PRETORIA CHAPTER, SOCIETY FOR THE ABDLUTION OF THE DEATH PENALTY IN SOUTH AFRICA, ANNUAL REPORT (1991) (available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.).

202. Id.


204. See SOUTH AFR. L. COMM'N, supra note 116. The South African Law Commission was established by the South African Law Commission Act, No. 19 (1973), and consists of members of the judiciary, the legal profession, academic lawyers, the magistracy, and the Department of Justice. The Act requires the Commission to do research regarding all branches of the law of the
comments which had been received on the Law Commission's previous Working Paper and the draft Bill of Rights contained therein, and finally produced a new proposed Bill of Rights for South Africa that consisted of forty-one Articles. In his address at the AGM, the judge pointed out that the proposed Bill of Rights does not scrap the death sentence per se (as has been done in the ANC's draft and in the Namibian Constitution), preferring instead what it calls a "Solomonic solution," which it sees as "a middle course between the retention of capital punishment and the abolition thereof." This proposal was, however, in my view, neither a "solution" nor of "Solomonic" proportions, but amounted merely to a passing of the buck to a future Constitutional Court. As the report states:

[T]he solution that is suggested is that the question of capital punishment should be seen in the correct perspective, i.e. as a limitation to the right to life, and that the [future Constitutional] court must exercise its proposed testing competence in accordance with the limitation clause which is of general force and effect. The Bill itself therefore does not express itself for or against capital punishment, but leaves it to the court to deliver a finely balanced judgment in the light of, inter alia, empirical evidence. This proposed solution naturally imposes an onerous task on the Constitutional Court. But it is a task which this Court will in future have to carry out in respect of many other laws and executive and administrative acts. The Court must not shrink from this task . . . .

At the AGM, Justice Olivier explained the South African Law Commission's viewpoint. A basic point of departure from the abolitionists is that the Law Commission maintains that not all human
rights are absolute in the sense that they can never be limited; some are only relative and may in certain circumstances be circumscribed or even suspended.211 The right to life,212 for instance, is a relative right.213 Thus the life of an unlawful attacker may, in appropriate circumstances, be taken in self-defence.214 According to the Law Commission, however, some rights are absolute. One such right is the right never to be subjected to "cruel and unusual" punishment, to use the American expression, or never to be sentenced to an "inhuman or degrading punishment," to use the Law Commission's wording.215 Other absolute rights include equality before the law and the right to a fair trial, i.e., the right to "justice."216

In the view of the Law Commission, a future South African Constitutional Court (i.e., the highest court, still to be created, which will deal only with constitutional and Bill of Rights matters) will have to decide whether our death sentence passes the tests for constitutionality.217 In my view, this will have to be done by investigating the death sentence both in theory and in application. The following approaches are possible:218 The court might first decide that the death sentence is an inhuman or degrading punishment and outlaw it on this ground. If the death sentence survives the foregoing challenge, the court might, secondly, investigate whether the death sentence's infringement of the right to life is demonstrably "necessary" for considerations of state security, public order and interest, or the prevention or combating of disorder or crime.219 The deterrence debate—and its empirical proofs or lack thereof—would therefore become directly relevant in a Constitutional Court.

A Constitutional Court might, thirdly, consider evidence that the death sentence is not applied evenhandedly—in other words, that

211. See id. at 697-98 (article 34 of proposed Bill of Rights, referring to circumscription and suspension of rights).
212. Article 2 of the South African Law Commission's proposed Bill of Rights reads: "Everyone has the right to the protection of his or her life." Id. at 686.
213. Id. at 697-98.
214. The device through which the distinction between absolute and relative rights is achieved is Article 34 of the proposed Bill of Rights, which lists the rights that may never be circumscribed or suspended. The criteria under which relative rights may be circumscribed or suspended are stated in the same Article. The "testing right of the courts" is guaranteed in Article 35. See id. at 697-99.
215. Article 7(g) of the proposed Bill of Rights reads: "Every accused person has the right . . . not to be sentenced to an inhuman or degrading punishment." Id. at 689. Under Article 34, these rights could not be circumscribed by legislation. Id. at 697.
216. See id. at 686 (Article 3 of the proposed Bill of Rights, entitled "Equality before the law"); id. at 697 (Article 3 cannot be circumscribed by legislation).
217. See id. at 277.
219. See SOUTH AFR. L. COMM’N, supra note 116, at 697.
there are disparities in the application of the death sentence in that some judges are so-called "hanging judges" while others are at heart abolitionists, with the result that the fate of an accused is to a significant extent determined by chance. In such a situation there would not be "equality before the law" or "justice." This by itself should lead a Constitutional Court to the conclusion that the death sentence is unconstitutional, for, as has been pointed out, "justice" is an absolute right under the proposed Bill of Rights.\textsuperscript{220} The recent "Curlewis Revelations"\textsuperscript{221} indicate that the foregoing possibility, grave disparity amounting to "chance" imposition of the death sentence, is indeed the situation in South Africa. This by itself should necessitate a finding that the death sentence is unconstitutional in South Africa.

VI. THE "CURLEWIS REVELATIONS"

The "Curlewis Revelations" are of such weighty import in the South African death sentence debate and struggle that they deserve special attention.\textsuperscript{222} The importance of these revelations lies therein that a judge, Mr. Justice D.J. Curlewis, has now revealed that there exists grave disparity (that is, a lack of substantial uniformity, and, therefore, lack of justice) in the application of the death sentence, upon which revelations can be built a basic and devastating argument against the continued use of that sanction.\textsuperscript{223} Academics could only have made the same "revelations" under fear of prosecution for contempt of court; now a retentionist judge has handed them to abolitionists on a platter.

It has of course been stated before (by Frank Zimring and Gordon Hawkins) that "some decisions can never be subjected to legal discipline, and of those the deliberate decision to take human life is, and will remain, preeminent."\textsuperscript{224} Zimring and Hawkins believe that it is not humanly possible to devise sentencing guidelines (either legislatively or through appellate judgments) that will efficiently bring about substantial uniformity in the imposition of the death sentence. In South Africa some—or, rather, many—have persistently denied this and have claimed that substantial uniformity (and, therefore, justice) can and has been achieved in the administration of the death sentence in South Africa. Those who maintained, in line with overseas research

\textsuperscript{220} See id. at 686.
\textsuperscript{221} D.J. Curlewis, Correspondence, 7 S. Afr. J. On Hum. Rts. 229 (1991); see also infra Part VI.
\textsuperscript{222} See Bertelsmann, supra note 200; van Rooyen, Die Doodvonnis, supra note 200; van Rooyen, supra note 199.
\textsuperscript{223} Curlewis, supra note 221.
\textsuperscript{224} ZIMRING & HAWKINS, supra note 12, at 91.
findings, that “justice” (especially in death sentence cases) is a very personal and subjective thing, have been maligned as leftist propagandists or even perpetrators of contempt of court.

The “Curlewis Revelations” were made by Curlewis, Deputy Judge-President of the Transvaal Provincial Division of the Supreme Court of South Africa, in the form of a letter dated April 15, 1991, published in the *South African Journal on Human Rights*. In this letter, in which he commented on a previous research article concerning death sentences in Transvaal by Laurel Angus and Evadné Grant (also published in the *South African Journal on Human Rights*), he made the following points:

—“Only an ignoramus, or a person with little regard for the truth would deny this,” i.e., that judicial attitudes towards the death penalty play a material role in imposing or not imposing that sentence.

—Since the imposition of the death sentence ultimately involves a moral judgment, that judgment may differ from judge to judge with the result that “a person’s life may depend upon who sits in judgment.” He states: “Of course this happens. I do not know why the authors are so hesitant in saying so.” Judge Curlewis sees that a sentence which depends upon a moral judgment “can never be made objectively or tested as objective”—thus affirming the statement of Zimring and Hawkins quoted above. He moreover sees that the South African death sentence dispensation has permanent systemic disparity built into it because some judges are “at heart” abolitionists while other judges “believe that the death sentence is an indispensable weapon in the fight against crime.”


226. *Curlewis, supra* note 221.


228. *Curlewis, supra* note 221, at 229.

229. *Id.* at 230 (quoting Angus & Grant, *supra* note 227).

230. *Id.*

231. *Id.* at 231.

232. *See Curlewis, supra* note 221, and accompanying text.

233. *Curlewis, supra* note 221, at 230-31. The judge actually names colleagues, not only “hanging” but also “non-hanging” judges. The judge is not suggesting that judges are wilfully unfaithful to their judicial oath; rather, he is stating that despite their integrity and their oath, their decisions whether or not to take human life cannot “be subjected to legal discipline”—to use the words of Zimring and Hawkins, *see supra* note 12, at 91. This fact by itself should render the death sentence as an institution unconstitutional under a Bill of Rights which contains an “Equal Justice” clause.
—Curlewis finally alleges that the government brought in the "new" death sentence in South Africa in order to try to do away with the death penalty in an "underhand way" and that they did it "not for any sound legal reason but simply to curry favour with Bonn, New York and London."  

A. The Meaning of Uniformity in Sentencing

In considering the significance of Judge Curlewis' admissions about the practical administration of the death penalty in South Africa, one should first determine the meaning of "uniformity" (opposite: "disparity") in sentencing. Uniformity does not mean that cases with some apparent similarity or involving crimes of a like nomenclature should have similar outcomes. Cases which on the surface appear to be similar will usually, on closer scrutiny, have a marked number of dissimilarities. Life and crime are complex. Rather, uniformity in sentencing means that if one and the same case were put to different judges, the judges would impose substantially the same sentence. The use of the word "substantially" signifies that room is left for certain differences in the case of relative sentences such as imprisonment. Thus, if one judge imposes ten years' imprisonment in a particular case while another would impose eight years' imprisonment, it need not be labeled an unacceptable disparity. Minor nonuniformities are tolerable precisely because of the possibility of administrative adjustments or corrections at a later stage. Also, the disparities here do not involve a choice between two mutually exclusive forms of punishment (such as the death sentence or imprisonment), but only differences of quantum within one form of punishment (i.e., the duration of imprisonment). However, with the death sentence there comes a time, fairly rapidly in the normal course of events, when corrections are no longer possible. With death comes an absoluteness. When "the wrong person" is executed, nothing can be done to rectify matters. Lack of uniformity becomes intolerable here.

B. What "The Wrong Person" Means

In the death penalty debate, the concept of "wrong person" is sometimes erroneously taken to mean "an innocent person." It is

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234. Regarding this development, see Dutch Reformed Church, supra note 83; van Rooyen, supra note 4; van Rooyen, supra note 199.
235. Curlewis, supra note 221, at 232.
236. Id. at 231. Perhaps the judge meant "Washington" instead of "New York."
237. See Dutch Reformed Church, supra note 83, at 174-75.
238. Within the bounds of judicially exercised discretion—"shocking" or irregular sentencing disparities are, of course, appealable. See HEMSTRA, supra note 44, at 740-41.
then claimed that in the more or less perfect judicial system prevailing (only!) in South Africa, it is simply impossible to execute the wrong person. But it is not so simple. “Wrong person” refers to the whole disparity problem; it means a person sentenced to death who, had he or she by chance been tried by a significant number of other judges, probably would not have been sentenced to death.

In this sense, as Judge Curlewis admits, quite a number of “wrong persons” are sentenced to death regularly in South Africa. Such a situation cannot be squared with the requirements of “justice” and surely constitutes a ground not only for holding the death sentence unconstitutional under a future Bill of Rights dispensation, but also for the immediate cessation of the implementation of the death sentence in South Africa.

C. Defining Who “Deserves” the Death Sentence

Judge Curlewis states that because of built-in personal philosophical and subjective factors that divide judges into two broad camps, chance determines who will be sentenced to death. That fact, he says, does not mean that people who do not “deserve to die” will be sentenced to death; rather, “it leads to people who should be sentenced to death escaping the death penalty.” He does not seem to realize that the reverse side of the coin is that those who are sentenced to death because they landed before him or his “ilk” (his own term), where they are “more likely to get the death sentence,” are singularly unlucky. He also completely misses the main point: that uniformity is a concomitant of justice. It accordingly flows from Judge Curlewis’ admissions that justice as such is endemically absent in the South African death penalty dispensation.

Uniformity, as it has been defined above, belongs to the very essence of justice itself. In the words of Zimring and Hawkins, sen-

239. It would be of no help to argue that the Appellate Division is our ultimate “safety net” which will ensure uniformity—there, too, are hanging and non-hanging judges! (Curlewis mentions names once again. See Curlewis, supra note 221, at 230.) Moreover, cases where the death sentence is not imposed at trial level cannot reach the Appellate Division, Criminal Procedure Act, No. 51, § 322(6) (1977), substituted by No. 107, § 13(c) (1990) (S. Afr.), thus insulating non-hanging trial judges from appellate censure and contributing to systemic disparity and, therefore, injustice in South Africa’s death sentence dispensation.

240. Curlewis, supra note 221, at 230 (“Such accused are undoubtedly lucky.”).

241. Id.

242. Cf. S.S. Terblanche, Die Boete as Strafvorm [The Fine as a Form of Punishment] ch. 2, 24-28 (1990) (unpublished LL.D. dissertation, Univ. of S. Afr.) (examining “consistency” as a requirement of “justice”). It is not here implied that strict proportionality, as an aspect of consistency or uniformity, is always of determinative importance; it plays a lesser role in “relative” sentences and would not militate against experimentation and creativity, e.g., in the area of non-custodial sentences. But in the case of an “absolute” sentence such as the death sentence, uniformity is crucial. See supra text accompanying notes 237-38.
tencing decisions should be subjected to legal discipline. \(^{243}\) When "luck," good or bad, plays a decisive role, there is no justice any more, but simply the uncivilised reign of blind chance—the very opposite of what the Germans call "Rechtsstaatllichkeit" or a state-under-the-rule-of-law.

There is another reason Judge Curlewis thinks that one need not worry that people are perhaps wrongly sentenced to death by him and his "ilk": It never occurs to him that he and his ilk may be wrong in their approach to the new legislation governing the death penalty in South Africa. He thinks he knows\(^ {244}\) who "should be" sentenced to death, who "deserves to hang."\(^ {245}\) Moreover, he thinks it is only "they," the abolitionist judges, who "cannot" be sound on the imposition of the death penalty; "they" should accordingly not sit in capital cases.\(^ {246}\) The arrogance of this view\(^ {247}\) is as astounding as its one-sidedness. The argument begs the question over and over again, petitio principii upon petitio principii. How does the judge (and his "ilk") know who "should be" sentenced to death, who "deserves to hang," or that the listed judges "cannot" be sound on the imposition of the death penalty? The "abolitionist"\(^ {248}\) judges may in fact be the better interpreters of the "new" death penalty. They may realise better than Curlewis that both the church and the state felt that judges under the old dispensation imposed too many death sentences.\(^ {249}\) They may understand more clearly than he the legislature's policy that the death sentence is now to be an exceptional punishment, reserved only for the most extreme cases.\(^ {250}\) They may give better expression to this new legislative policy. They may be right. Judge Curlewis may be wrong.\(^ {251}\)

In thinking about the death sentence, it is, in my view, important to keep in mind that there is no such thing as "the" death sentence. Death sentence dispensations vary from time to time and from country to country. A death sentence dispensation is a human creation—a piece of legislation created by a particular legislature for a particular country at a particular time. That legislation, and only it (as interpreted by the courts in so far as they are able to), can purport to spell

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243. ZIMRING & HAWKINS, supra note 12, at 91.
245. Curlewis, supra note 221, at 230.
246. Id.
247. Note "of this view"—not of the judge as a person.
248. See supra note 233.
249. See generally Dutch Reformed Church, supra note 83, and sources cited (especially to Coetzee's work).
251. The problem is that the possibility does not seem to occur to him.
out for judges who "deserves" the death penalty. There can, in human terms, be no "deserving the death penalty" in the abstract, in a vacuum. We might just as well say that we know who "deserves" torture, maiming, castration, the cat-o'-nine-tails, whipping, or whatever means of punishment humans have devised and used historically. It would be meaningless because the legislature (and/or the courts) has put to rest a lot of those punishments and has curtailed the use of others (such as whipping in South Africa)—no matter how much some may hanker after the "good old days" of such cruel and unusual punishments. Judge Curlewis and his "ilk" accordingly do not "know" who deserves the death sentence in South Africa any more than they or another judge, be it one from his list of abolitionists or anyone else, can ascertain from the relevant legislation and the court interpretations thereof. If the latter leaves so much leeway for subjective interpretation that it ultimately becomes a matter of chance, of personal prejudice, who gets hanged and who not—as Judge Curlewis and some researchers state the situation to be—then justice is no longer served. In the words of Zimring and Hawkins, the process of deciding whom to sentence to death has not been sufficiently subjected to legal discipline. Then we do not have "Rechtsstaatlichkeit," but personal whim in the imposition of the death sentence.

D. Is the Past the Future?

Judge Curlewis, having highlighted the injustice and unworkability of the present death sentence dispensation in South Africa, pleads for a restoration of the status quo ante. But will a return to the old dispensation help to overcome the fatal problems of chance, good/bad luck and injustice inherent in the "new" dispensation, which the judge has illustrated so effectively? Apparently he has forgotten that he himself expressed the view that the previous death penalty dispensations in South Africa, from 1935 onward, involved huge areas of ineffectively controlled discretion, very similar to the present dispensation. If, for instance, "extenuating circumstances" were found to be present, the judge was not prohibited from imposing the death sentence; he still had discretion to impose it or not to impose it. Given the admissions and revelations of Judge Curlewis regarding hanging

252. ZIMRING & HAWKINS, supra note 12, at 91.
253. Curlewis, supra note 221, at 232.
254. Id. at 229-30.
255. But see Bertelsmann, supra note 200, at 11 (expressing the qualifications of the term "discretion").
256. See supra notes 47-48 and accompanying text.
and non-hanging judges and their subjectivity, it is evident that exactly the same problems regarding chance would arise if we were to revert to olden days. In cases of a discretionary death sentence, Judge Curlewis would still be able to state that an accused is "more likely" to get the death sentence from him or his ilk than from his listed "abolitionist" brothers/sisters. Injustice would still reign.

E. Protecting the Innocent

In his concluding plea for restoration of the status quo ante, Judge Curlewis states that the purpose of such a return would be to "protect the innocent in the country, which after all is the raison d'être of any Criminal Judge [sic]." The role of the death sentence in protecting the innocent deserves brief attention.

1. Retribution and Justice

Presumably the aims of criminal justice should be striven after with justice. I have concluded above, based, inter alia, on facts supplied by Judge Curlewis in his letter, that justice cannot be achieved in the present death sentence dispensation. It was not achieved in the previous dispensation either. With Zimring and Hawkins, I doubt that it could ever be achieved with respect to the death sentence. The retributive/just approach can lead to one conclusion only: abolition.

But even if one were to ignore the demands of justice, could our death sentence (once again not "the" death penalty in the abstract, but the South African one, past or present) significantly "protect the innocent," as the judge believes? Protection of the innocent involves either general deterrence or incapacitation or both. As far as general deterrence is concerned, clarification of the terminology is in order.

2. Deterrence

Abolitionists sometimes assert that the death sentence deters no one. Retentionists reply that the death sentence, like all punishments, deters some. The real debate, however, should focus on relative or marginal deterrence. In my view, the proper question to ask is

257. Curlewis, supra note 221, at 229-30.
258. The judge rightly does not plead for a completely mandatory death sentence such as the one South Africa had before introducing the concept of "extenuating circumstances" in 1935; that would lead to other forms of injustice.
259. Curlewis, supra note 221, at 232 (emphasis added).
260. See Dutch Reformed Church, supra note 83, at 169 & n.45.
whether the death sentence in its present or immediate past form demonstrably deters significantly more people than alternative sanctions. In other words, on a cost-benefit analysis, is it in South Africa’s best interest to retain it? If yes, then we may retain it (if we can do so within the bounds of justice, including uniformity as discussed above). If not or if doubtful, we ought to abolish it.

For the sake of argument I shall assume that “protection of the innocent,” as the judge uses it, primarily means protecting citizens against the three capital crimes of murder, rape, and robbery with aggravating circumstances. I have indicated elsewhere that those who are serious about general deterrence should be willing to execute many more than South Africa executed in the past. We have more than 55,000 of these three capital crimes reported annually. (There are probably many more committed annually, but which do not come to light—the so-called “dark figure.”) In 1989 we hanged a total of fifty-three persons (only 0.1% of the reported capital offenders). In light of this fact alone it must be evident that the death-penalty-as-a-unique-deterrent argument can have no credibility at all.

3. Incapacitation

It is noteworthy that for some reason an important recent development in the law, the creation of a substantial sentence of true “life” imprisonment (which was also effected through Act 107 of 1990), does not seem to attract enough attention. Judge Curlewis does not mention it in his letter. As I have pointed out elsewhere, this new sentence may functionally satisfy the demands both of retribution and incapacitation: a person who does not “deserve” to live in society, can by means of life imprisonment be permanently removed from it without being exterminated; a person who is a danger to society can likewise permanently be incapacitated.

F. The “Curlewis Revelations”: Conclusion

The falseness of the death sentence as a “protection for the innocent” lies in that its proponents do not tell the public how very few people, relatively speaking, will in fact be executed, i.e., how minimal an impact this sentence can and will have on crime and on the protec-

261. Id. at 158.
262. See supra note 113 and accompanying text.
263. See supra note 84 and accompanying text.
264. See van Rooyen, supra note 198, at 83-84 and sources cited.
265. id.
tion of the public. As a false "solution" it lulls the public into a false sense of security. It is a very convenient political alternative to real, effective, and difficult public protection and crime prevention programmes. It is a cheap way for politicians to pretend to their fearful constituencies that something is being done to combat crime, to protect the innocent. It obscures the real difficulties and the real causes of crime. It delays long-term commitment to address these issues meaningfully.

In the light of the "Curlewis Revelations," I appealed to the authorities\(^2\) to accept that there is no other honest option but to (re-) proclaim an immediate moratorium on executions pending the abolition of death as a form of punishment forthwith. (My appeals did not meet with any official approval at the time.)

In my writings immediately following the "Curlewis Revelations," I of course thanked the judge for his important contribution to the abolitionist cause.\(^6\) Perhaps this was seriousness combined with some fun. However, it struck me that under a human rights culture, even persons who "believe" in the death sentence should balk at using it if its purported aims cannot be achieved with justice. It is accordingly distressing that the injustice Judge Curlewis has through his "Revelations" shown to be endemic in our death sentence dispensation, has provoked little, if any, concern amongst retentionist lawyers and other believers in the death sentence. This sad fact perhaps indicates that we still have a long way to go in cultivating a "justice" and "human rights" culture in South Africa—to which task the otherwise excellent and painstaking work of Judge Pierre Olivier in drafting a proposed Bill of Rights has, perhaps, not contributed enough in the area of the death sentence. However, Project 58 of the Law Commission, its draft Bill of Rights, Judge Olivier's speech at the SADPSA-Pretoria's AGM, and the projections regarding possible future constitutional litigation flowing therefrom have all combined to set the scene for the dramatic happenings which in South Africa, coincidentally, followed immediately after the Florida State University Law Review's Capital Punishment Symposium in 1992.

VII. DEVELOPMENTS SUBSEQUENT TO THE CAPITAL PUNISHMENT SYMPOSIUM

On February 7, 1992, I ended my speech at the Florida State Uni-

\(^2\) Through the three publications listed supra note 222.

\(^6\) See van Rooyen, Die Doodvonnis, supra note 222; van Rooyen, supra note 199.
versity Law Review Capital Punishment Symposium by quoting not from only two telefaxes which I sent to the State President and the ANC just before I left South Africa to attend the symposium, but also from an English newspaper editorial. In fact, I held up an enlarged copy of the editorial for all at the conference to see. The Citizen's editorial with the caption "Hang them" stated:

[W]e'll tell Minister of Justice Kobie Coetsee to his face:
The fact that nobody is being hanged encourages gangsters to believe they will not be hanged.
And if they think they will not be hanged, they are not going to care whether they kill anyone.
So it's time he resumed hangings, whatever outcry this causes (indeed, he need only refer to the number of people executed in some African countries, in Iran, in China, even in the United States, to show that there is nothing wrong if South Africa resumes executions) . . .
We have called several times for a return to hanging in appropriate cases, tougher sentences for violence, especially for the use of guns, and a generally sterner approach to the administration of justice.
We repeat those calls with even greater emphasis now: Let the criminals know they face death for acts of vile murder that no civilised society can tolerate or excuse.

I shall briefly recount the dramatic happenings in South Africa subsequent to my return from the symposium. These happenings have led to a major victory for abolitionists: An official reintroduction of the moratorium on executions which is, at the time of this writing, still in force in South Africa. I do this because when I was in the United States, both Frank Zimring (University of California at Berkeley) and Norval Morris (University of Chicago) urged me to keep a "diary" of the death throes of the death sentence in South Africa; with me, they were optimistic that we had reached a point of no return on the road to abolition. They, as others, also gave me valuable advice about strategy. I did keep a sort of diary. What follows is extracted therefore and published for the record. But first, a note about what happened immediately before my departure for the conference.

In January 1992 a small group of Pretoria-based abolitionists began to fear that executions could perhaps recommence soon. This feeling

269. At the FSU symposium, there was laughter at the end of the last line—I mention this for the record!
of apprehension was occasioned by the tone and thrust of newspaper reports on the spiraling crime wave in general and murder specifically—especially "farm murders" and the murder of police officers. Apart from these reports, our fears were also fed by editorial comments, ministerial pronouncements, intuition, and (most valuable!) a little bit of "inside information" leaked to us by a friend in the Department of Justice. For sure, the government was under tremendous pressure to do something drastic, something symbolic, about the apparently uncontrollable crime wave. I accordingly phoned the Director-General of Justice and told him of the coming Florida conference. I told him I was sure to be asked there why we were not executing people in South Africa (since we had the death sentence on the statute book, the judges were imposing it at a rate of about twice a week, public opinion was clamoring for it, the government was in favour of it, and the original moratorium on executions had lapsed). He would not be drawn. He simply stated that I could expect an announcement about the death sentence before I left for Florida.

A strategy meeting was hastily convened by those abolitionists who could be reached. For various reasons it was decided to send representations directly to the State President, with only a copy to the Department of Justice and with representations of a slightly different nature to the ANC. By this time, we thought, we were able to put two and two together: They were going to announce the recommencement of executions.

The first telefax, which I sent to the State President in the Afrikaans language, pleaded for the reinstatement of a moratorium on executions on the basis that the Law Commission itself in Project 58's proposed Bill of Rights foresaw that the constitutional validity of the death sentence would have to be pronounced upon by a future Constitutional Court. If hanging were to be recommenced now, those who were selected to be hanged first would be singularly unlucky; the survivors of the first few "draws" would in all probability be able to take their cases to that future Constitutional Court—and, perhaps, not be executed. Such a scenario could not be squared with equity and justice. I further warned that recommencement of executions could be interpreted as a sign of one-sidedness and bad faith by the ANC and lead to the failure of Codesa. The fax, regrettably, fell on deaf ears.

The second telefax was sent to the ANC Headoffice's Legal Department. It read:

There is going to be an official press release about the death sentence before 31 January 1992. I fear that executions may be about

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to begin again. I am faxing the State President confidentially, appealing for an official moratorium pending the creation of a Bill of Rights and a Constitutional Court, which would be in line with the position of the SA Law Commission (judge PJ Olivier)—see 'Interim Report on Group and Human Rights' August 1991.

If my representations to the State President fall on deaf ears, it will remain for the ANC to work through the Codesa committees to prevent hangings.

Good grounds for drastic action would, in my view, be that the present governmental dispensation should not 'jump the gun' by embarking on irreversible action such as executions—this is a matter for negotiation and for action by a future democratically elected government under a Bill of Rights and with a Constitutional Court. The legitimacy of any present action by the government which will have irreversible consequences should be seriously challenged. In fact, in my view such action would amount to proof of bad faith.

Let's hope that a moratorium will be announced. If my representations to the State President fail and the recommencement of executions is announced, can we rely on your organisation to stop such recommencement of executions through Codesa mechanisms? In other words, I am urgently requesting you to make contingency plans.

I shall look forward to hearing from you soon.  

I was assured by the ANC that I could rely on its members. On January 31, 1992, I departed for the United States to attend the Florida State University Law Review's Capital Punishment Symposium. When I left South Africa, the Department of Justice had not made its promised announcement regarding the death sentence. I was back in South Africa by February 21, 1992. No announcement had been made in the meantime regarding the death sentence, but a blitz general referendum had been called for March 17, 1992, on the question of whether whites in South Africa wanted the government to continue on the road of constitutional reform.

On March 16, 1992, the day before the referendum (which overwhelmingly returned a "Yes" vote), the Pretoria News carried the following in its correspondence columns:

Professor Jan H van Rooyen, head of the Department of Criminal and Procedural Law, University of South Africa, Pretoria, states: "I strongly support a Yes vote in the referendum. I have great confidence in Mr FW de Klerk as a man of integrity. Further, only a

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272. Facsimile from Jan H. van Rooyen to ANC Legal Department (Jan. 15, 1992) (emphasis original) (on file with author).
Yes vote can in the long run lead to an improvement in the crime situation, since only a Yes vote can stimulate the economy to growth with foreign support; the economy is the most important determinative factor in respect of the crime figure. The present weak state of the economy is the result of sanctions, which in turn is the result of apartheid. We cannot return to that. A Yes vote may lead to controllable reform; a No vote will without any doubt lead to uncontrollable revolution. Finally: I have had to spend my entire life until now under the hateful apartheid dispensation. I am now going to do a racist thing by voting in a ‘whites only’ referendum, but I do it in order to bring finally to an end a racist legal and governmental system . . . which will be a liberation for me personally. A Yes vote is the only way to go towards greater justice for all in our country. It is the only way to reach for peace. I accordingly ask all reasonable people to join me in voting Yes.”

On the afternoon of Saturday, March 21, 1992, I was alerted by a friend that a late-night news item on Friday night, March 20, 1992, had briefly mentioned that seventeen condemned prisoners were to be executed in the foreseeable future. I tried to find confirmation for this in the Saturday press but could find none. However, a personal telephone call from an “inside” source confirmed the news by Saturday evening. I decided to stay up to wait for the Sunday newspapers to appear on the streets. By Saturday midnight the Afrikaans Sunday newspaper Rapport carried the news of the impending executions on its front page.

Very early on Sunday morning, March 22, 1992, I went to my office at the University of South Africa and commenced phoning and faxing. In the course of the day, the government “firmly reiterated its support for the death penalty.” A spokesperson for the Minister of Justice said that a decision “to resume executions had been taken and that seventeen people would be hanged once they had been officially notified”; he did not name them but said that “they were criminals for whom all appeals, including clemency pleas to President F.W. de Klerk, had failed.” There were at the time 310 persons on Death Row at Pretoria Central Prison.

274. Buks Pietersen, Seventeen nou tog gaig toe [Seventeen To Be Hanged After All], Rapport, Mar. 22, 1992, at 1; see also le Grange, supra note 89.
275. See Gov’t Backs Executions, supra note 194.
276. Id. at 2.
277. Id.
278. Le Grange, supra note 89, at 1.
In the course of the Sunday, I made many phone calls and sent a dozen or so telefaxes alerting the following persons and organizations of the government’s decision and asking for their support to put pressure on the government not to go ahead with the executions:

—The Black Sash;
—Lawyers for Human Rights (LHR);
—A prominent Pretoria Senior Counsel (SC), who undertook to work with LHR in an attempt to block, through court action, the first execution by using the “pending Constitutional changes” argument discussed above;
—The director of the Centre for Applied Legal Studies at the University of the Witwatersrand in Johannesburg, who undertook to mobilise the Democratic Party (DP), the main Codesa players in opposition to the government, the ANC, and foreign embassies in South Africa;
—The South African Press Association (SAPA) (a news syndication organisation);
—A friend who works for Radio Bremen, Germany, who took a telephone interview; he undertook to have the interview syndicated to many European radio stations and to mobilise both Amnesty International (Europe) and the Anti-Apartheid Movement (Europe);
—The national director of Amnesty International United States;
—Many friends and contacts at U.S. universities, including new friends made during my February 1992 trip to the United States;
—The State President, Mr. F.W. de Klerk;
—The Minister of Justice, Mr. Kobie Coetsee;
—The Minister of Foreign Affairs, Mr. Pik Botha; and
—A few judge friends in South Africa.
The faxes to SAPA contained the following message: 279

Today the Sunday newspaper Rapport carried a front page news item that the Dept of Justice has announced that it will soon hang 17 people—“ordinary” criminals (murderers), not politicals. I am mounting, from my office, today, a national and international campaign to stop this. I am in touch with the ANC, the DP, Lawyers for Human Rights, Codesa, SAPA, the Black Sash, Radio Bremen, Amnesty International, various colleagues, judges etc—and you. It is extremely urgent—NOT ONE HANGING must take place. Especially the ANC must now show muscle.

279. Facsimile from Jan H. van Rooyen to South African Press Association (Mar. 22, 1992) (on file with author). The telefaxes to the other parties, including the State President, were similar, although not identical.
* It is cynical of the government to want to do this within a week of obtaining a landslide "Yes" vote for reform towards human rights and decency.
* It is totally insensitive to "justice", in the sense that we all know that we'll have a Bill of Rights and a Constitutional Court within a year or two, and that the validity of our death sentence will be decided upon there; most of the 300+ on death row will thus be able to muster constitutional challenge to their sentences—except those few who are hanged in advance.
* It shows contempt and bad faith towards the Conference for a Democratic SA (Codesa) and its parties, especially the ANC, which wants to negotiate a Bill of Rights and which has put an abolitionist clause in its proposals. The government is "jumping the gun" and plans to do, in the face of these negotiations, a unilateral act with irreversible consequences.
* It shows little respect or thanks for those European countries—all of them abolitionist—who are welcoming SA back into the fold of decent nations and who are now willing to scrap sanctions. It amounts to a slap in their faces. They have all signed conventions against the death sentence.

I should be very pleased if you could please syndicate the above viewpoint and statement as widely as possible.

A similar fax to the State President concluded by pleading urgently with him personally to intervene and announce a further moratorium on executions.

On Monday, March 23, 1992, the work of the various Codesa committees ground to a halt. The State President's office was inundated with faxes, as was the South African Embassy in Bonn.280 SAPA had done its work well and protests were carried in news items in most important Monday newspapers.281 At Codesa, proceedings ground to a halt. Delegates appealed to the government to suspend all executions in the transitional period.282 Even parties who supported capital punishment were in favour of suspending executions until there was a new dispensation.283 By Tuesday, March 24, 1992, the government was buckling under the pressure. The right-wing English newspaper The Citizen284 stated that it was apparent from statements made by the Minister of Justice that he was now contemplating "a possible rever-

280. "Inside information" supplied to me by a friendly government aide; otherwise, information supplied to me by my contact person at Radio Bremen.
281. See, e.g., le Grange, supra note 89.
283. Id.
284. This is the same publication which had published the "Hang them" editorial. See supra text accompanying notes 268-69.
sal of the decision to execute 17 criminals." I could now send the following fax to my European and American friends:

It seems that we have won the battle—but not yet the war. Please help to keep the pressure up on the SA government as well as on the ANC; please do NOT assume that the entire ANC is in favour of total abolition.

May I request you with the greatest urgency please to continue to mobilise the European nations, the various human rights and anti-death penalty convention signatories, Amnesty International and the AAM. The pressure must be kept up at all cost, because "The condition upon which God has given liberty to people is eternal vigilance"! (John Philpot Curran, 1750-1817). We dare not rest.

A thousand thanks for your tremendous cooperation, encouragement and support—the teamwork is great!

By Friday night, March 27, 1992, radio and television broadcasts carried the news that the State President had reinstated an official moratorium on executions. It was clear: the seventeen, and the 300-plus others on Death Row, were saved—for the time being. I immediately issued the following media statement through SAPA:

The reinstatement of an official moratorium on executions in South Africa (as recently announced by the government) can only be welcomed. The government deserves great respect for the restraint it has shown in this regard by submitting itself to negotiations, a future Bill of Rights, and a Constitutional Court. That it was willing to do this despite its own position in favour of the death sentence, makes the step all the more impressive. The government has clearly considered that justice and ethics demand that all condemned prisoners should be treated equally under the law; one should not execute some while others would have the benefit of a possibly different outcome under a future Bill of Rights. In adopting this approach, the South African government has set a splendid example of submission to justice, the democratic process and the rule of law—an example which gives one great hope for the future.

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286. Facsimile from Jan H. van Rooyen, Professor, Department of Criminal and Procedural Law, University of South Africa, to Christoph Sodemann, Radio Bremen (Mar. 24, 1992) (available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.).
287. See, e.g., SATURDAY STAR, Mar. 28, 1992; All Things Considered (NPR radio broadcast, Mar. 27, 1992), available in LEXIS, Nexis Library, Script File.
288. Facsimile from Jan H. van Rooyen to South African Press Association (Mar. 30, 1992) (available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.).
A fax from Mr. Albie Sachs, a prominent ANC leader and a delegate to one of the Codesa Working Groups, contained the following comments:

Just to let you know that in Working Group 2 the ANC raised in sharp form the question of executions as a violation of the spirit of CODESA and a unilateral determination in relation to one of the issues to be debated in relation to the Bill of Rights. We were supported by the majority of speakers. Only Inkatha spoke in favour of death sentences . . . . [W]e liaised with Working Group 1 and . . . I got the distinct impression that the advisors to the National Party were those opposed to the death penalty! What a cruel way to show who is boss. The greatest power the state has is to take the lives of its citizens. We have to move away from this—now and forever.289

In a follow-up fax he stated: "We had majority support at Codesa. Only the Government and Inkatha supported retention. . . . Keep up the pressure so we can resolve the matter in a Bill of Rights."290

My family and I became the targets of telephonic death threats from a person who claimed to be part of a militant retentionist group. Police protection was provided for a period and carried out by police officers who, I am sure, were not in agreement with my views and actions but who nevertheless demonstrated the greatest care, courtesy, and professionalism.291

VIII. CONCLUSION

How does one conclude a saga such as the one recounted in this Article, involving "engaged advocacy scholarship"?292 Perhaps one should simply bring together a few strands that have appeared.

289. Facsimile from Albie Sachs to Jan H. van Rooyen (Mar. 30, 1992) (available at Fla. Dept't of State, Div. of Archives, Tallahassee, Fla.).

290. Facsimile from Albie Sachs to Jan H. van Rooyen (Apr. 7, 1992) (available at Fla. Dept't of State, Div. of Archives, Tallahassee, Fla.).

291. The matter was fully reported in The Pretoria News on April 4, 1992. The news report stated:

A Unisa professor has become the target of death threats—apparently in response to his stance against hangings. Prof. Jan van Rooyen, head of the Department Criminal and Procedural Law, . . . [has] been called and threatened for the third time in about a month . . . . [The caller] claimed "You professors are f—ing this country" before threatening him with his life, injuries and death and even rape to his family . . . . [T]he police . . . have opened a docket under the Intimidation Act.

292. See supra note 12 and accompanying text.
First, it appears that enlightened penal reform, including the abolition of the death sentence (whether de facto or de lege), can only take place when general concern about human rights, human dignity, the rule of law, and decency in government takes root and becomes valued in a given society.293

Second, reform, especially after a long repressive period during which totalitarian values flourished, will not come easily or neatly. It is likely to be messy. Liberal democrats will be in for a rollercoaster ride.

Third, it is clear that in any abolitionist movement, strategy is of utmost importance. The techniques of “issue marketing” (i.e., effective propagandising) must be studied and applied. Practice makes perfect, but practice takes time. Abolitionists should therefore not give up, but continue on and on, sharpening themselves and their co-belligerents through meaningful interactional discourse. Methods of exerting pressure should likewise be studied and applied. Target groups or persons should be carefully identified, as should possible allies.

Fourth, one should be on the lookout for the unexpected fortuities which can be used powerfully. The “Curlewis Revelations” episode is a case in point.

Fifth, networking is crucial. It should be recognised and appreciated that various persons and/or organisations all can make a contribution, in their own style, with their own priorities and agendas. They could be valuable co-belligerents, if not allies. Networking includes international contacts, as has been illustrated by the most recent events surrounding the seventeen condemned prisoners whose imminent executions could be used to build up enough international pressure to tie up the government on the death sentence issue.

Sixth, commitment is required. One should be determined to see success. One should make a decision not to be afraid and not to be intimidated by anything or anyone. One’s scholarship (the “What?” and “So What?” questions)294 should be followed by commitment (“Now What?”) if one is to persevere—and eventually, hopefully, succeed—as an abolitionist.295

293. See ZIMRING & HAWKINS, supra note 12, at 1-23. (explaining why the United States remains committed to “retain” the death sentence, while it otherwise has a comparatively respectable human rights culture).

294. See supra text accompanying note 12.

295. This is not to suggest that scholarship without praxis is not valuable. Of course it is. Indeed, sound scholarship is a prerequisite to engaged advocacy scholarship. But I think one is unlikely to succeed on the basis of scholarship alone. There must be engagement, struggle.
Finally, it is interesting to compare South Africa's experience with the observations of Zimring and Hawkins. Yes, we have experienced "de facto" abolition long before "de jure" abolition. Yes, there has been public opposition to, yet to a large measure also acquiescence in, the moratorium; when "de jure" abolition comes, this would probably continue for a considerable time. Yes, there has been political leadership in the face of public opinion—but mostly behind the scenes and from political groups other than the government. And yes, there is a clear "human rights linkage": The present situation commenced when State President de Klerk took lead and prepared his now famous February 2, 1990, speech.

The outright abolition of the death sentence in a Bill of Rights can, in my view, only be achieved in South Africa if the ANC remains strong on this point. It will not be achieved by the present government, which remains committed to the death sentence, but has become "lame duck" in this area as in others. The ANC's proposed Bill of Rights contains an abolitionist clause, but that does not necessarily mean that the ANC will not switch in the course of negotiations, depending on what the prize is. Pressure, "issue marketing," propaganda—whatever one calls it—will have to be directed continuously at the ANC in the immediate future.

The moratorium on executions in South Africa is a vital part of a transition to democracy. The cessation of hangings in South Africa was the most abrupt halt in executions yet to occur in non-revolutionary circumstances. In one year South Africa went from one of the highest rates of executions on the planet to no executions at all. Demand for a recommencement of executions, which would be high in any event, has been exacerbated by epidemic increases in lethal violence. This highlights but also explains the persistence of the moratorium: It is only through a definitive break with the totalitarian past and all its trappings that the current government can make a credible transition to a new democratic state. It is thus that the abrupt cessation of hangings, despite so much pressure to the contrary, actually powerfully provides the present government (and a future transitional government) with evidence of sincere, firm, and legitimate intention—which is indispensable to peaceful transition. Therefore, in the final analysis, the moratorium on executions is a vital and crucial part of the transition to human rights and democracy not in spite of its great difficulty, but precisely because of it.

In conclusion, despite the cautious note above, I still have strong grounds to believe that no executions will be resumed in South Africa,
and I also believe that it will not be long before one will see South Africa listed officially as a "de jure" abolitionist country. I should hope that one will also in the not-too-distant future be able to state the same with regard to the United States, but presently I have less hope for that country than for South Africa.