An Anachronism Too Discordant to be Suffered: A comparative study of parliamentary and presidential approaches to regulation of the death penalty

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By Derek R. VerHagen

Spring 2013
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“It is only if there is a willingness to protect the worst and weakest among us, that all of us can be secure that our own rights will be protected.”


I. Introduction

It is well-documented that the United States remains the only western democracy to retain the death penalty and finds itself ranked among the world's leading human rights violators in executions per year.¹ In 2012, the U.S ranked fifth worldwide in executions, trailing only China, Iran, Iraq, and Saudi Arabia.² However, the United States has not always found itself among these “peer” countries. Until the *Gregg v. Georgia* decision in 1976, ending America's first and only moratorium on capital punishment, the U.S was well in line with the rest of the civilized world in its approach to the death penalty—even slightly ahead of some.³ What then is the reason for the American divergence from the path to abolition in the mid-1970s? And, is there hope yet for abolition in this country? Some argue that the American people simply harbor a more barbaric, “frontier” mentality⁴ that leads to a retributivist approach to sentencing, making the United States uniquely suited to retain the death penalty.⁵ Statistics, however, indicate that it is more complicated than that. Polls have found that public opinion in most, if not all, countries has favored the death penalty prior to government regulation or abolition.⁶ In fact, according to death penalty scholar Andrew Hammel, there is no recorded instance of abolition by “a popular, grass-roots political movement.”⁷

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³ See infra Part IV.
⁴ Steiker, *American Exceptionalism*, supra note 1, at 121.
⁵ See id.
⁶ Id. at 109-10.
This Note argues that America's return to the death penalty is based primarily on the differences between classic parliamentary approaches to regulation and that of the American presidential system. Parliamentary democracies have several characteristics that make them better-suited to abolish the death penalty despite public opinion to the contrary, most important of which is the recognition of substantive constitutional rights to life and human dignity.\(^8\) The United States Constitution, however, primarily provides for procedural protections from state action, such as rights to fair trial, due process, and confrontation of witnesses.\(^9\) This structural distinction disrupts the path to complete abolition because procedural regulation almost always allows for an opportunity for return to the prohibited practice once the deficiencies are corrected.\(^10\) However, complete abolition based on the argument that capital punishment violates substantive rights to life and human dignity is all but irreversible.

This Note will begin by introducing Andrew Hammel's “European Model of Abolition” in Part II. Hammel claims to have identified a model that lays out the necessary preconditions to complete abolition of the death penalty. Among other necessary factors, he identifies the need for a centralized parliamentary-type structure of government. Part III of the Note will explore the basis of Hammel's claim by describing the basic differences between parliamentary democracies and the American presidential system. The United States has taken a significantly different approach from that of other countries to the regulation of capital punishment. The American presidential system is essentially populist, characterized by a strict separation of powers among the branches of government and a decentralization of powers by way of federalism.\(^11\) The Federal Constitution addresses criminal law only insofar as it protects certain procedural rights of defendants, while questions of substantive criminal law and policy are generally left to the state legislatures.\(^12\) Since this structure makes it difficult for controversial or otherwise unpopular laws to come into effect, progressive reforms are often left in the hands of the judiciary—the only governmental body that is not accountable to the populace. In contrast, parliamentary systems are less populist, if not elitist, characterized by a

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\(^8\) See infra Part III.
\(^9\) Id.
\(^10\) See infra Part VI.
\(^12\) Id. at 121.
unification and centralization of powers, regardless of whether the state claims to be “federalist.”  

In parliamentary systems, the government is generally less accountable to the public for its decisions due to the structure of parliamentary elections and representation. Additionally, parliaments are provided with a greater opportunity to legislate on a broad range of national policy issues, often pursuant to substantive constitutional rights such as “human dignity.” Citizens of parliamentary systems are also more likely to accept the quasi-elitist approach of their government due to the concept of “Burkean trust”—meaning that the populace tends to defer to the expertise of lawmakers on law and policy issues. This deference to the expertise of lawmakers makes it easier to pass and enforce laws that are contrary to public opinion.

In Part IV, the Note will lay out what the author has identified as a common timeline to abolition. The timeline reflects a series of mile-markers that states tend to reach along the path to abolition as evidenced by the Canadian, South African, and American experiences. Part V will tell the story of regulation and abolition in Canada and South Africa, highlighting notable turning points, parliamentary strategies, and consistencies or inconsistencies with Hammel’s European Model of Abolition. The Canadian path to abolition exemplifies the power of a parliament to enact or repeal legislation without regard for public opinion. South Africa, however, took a slightly different path. Its story reveals that an insulated parliament poses the risk of entrenching an oppressive status quo. In South Africa’s case, it was necessary for the unelected Constitutional Court to step in and finally end capital punishment. Ultimately, this part will conclude that abolition of the death penalty must come by way of an elitist or counter-majoritarian effort to preserve the substantive rights to life and human dignity. Part VI will tell the American story of regulation. It will explain the United States Supreme Court’s turn to the “evolving standards of decency doctrine” as a way to potentially end capital punishment.

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13 See id.; infra Part III(A).
14 See infra Part III.
15 See infra Part III(B).
16 See infra Part III(C).
17 See Voter and Officeholder Requirements, 119 Harv. L. Rev. 2230, 2242 (2006) (“A Burkean trustee theory might suggest greater officeholder qualifications since the representative is given latitude to pursue policies based on her notion of what is best, rather than simply mirroring the current wishes of her constituents.”).
18 See infra Part V(A).
punishment under the Eighth Amendment’s ban on cruel and unusual punishment—the closest thing to an American substantive right to dignity. Oddly enough, the efficacy of this quasi-substantive doctrine relies on the continued procedural regulation of the American death penalty, which shifts the costs of capital punishment to the states, which in turn abolish the penalty for their state by democratic means. The final piece in the evolving standards of decency doctrine, then, is a counter-majoritarian effort by the Supreme Court to abolition capital punishment on substantive grounds in response to the trends of state legislation—the same legislation that states were all but forced to enact in response to rising “costs” of executions resulting from the procedural regulation that has been continuously handed down by the Court since the 1970s. Ultimately, this Note concludes that the tangled web of procedural regulation of the death penalty in the American presidential system is simply the precursor to complete abolition of capital punishment on substantive grounds similar to that observed in parliamentary governments over the past century.

II. Andrew Hammel's European Model of Abolition

In his 2010 book titled *Ending the Death Penalty: The European Experience in Global Perspective*, Professor Andrew Hammel introduces a “European Model of Abolition” which lists some of the common characteristics of European countries at the time of abolition. He notes that complete abolition of the death penalty tends to occur in parliamentary-type governments. Hammel argues that abolition requires two preliminary phases of rationalizing punishment combined with the existence of a particular kind of political professionals and certain structural preconditions. Hammel's preliminary phases of rationalizing punishment are: (1) overcoming vengeance and (2) humanizing the offender. The first requirement reflects the Enlightenment understanding of punishment, wherein the rational actor must show self-control by “distancing himself from his initial emotional reaction and subjecting it to critical analysis.” The second requirement—humanization of the accused—requires viewing the

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19 The term “costs” is intended to refer to not only financial costs, but also the undermining of traditional justifications for capital punishment. See infra Part VI for a discussion on the types of “costs” that states have been forced to bear since the Court's decision to begin procedurally regulating the death penalty in the 1970s.

20 See generally HAMMEL, supra note 7.

21 Id. at 149-61.

22 Id. at 150.
Derek VerHagen

offender not as an “object of vengeance” but as a “subject entitled to human dignity.”23 This shift in viewpoint is, of course, at the foundation of many abolition movements, even outside of continental Europe.24

Hammel believes that the public has a natural predisposition toward the death penalty due to an evolutionary and emotional need for vengeance.25 As a result, popular or democratic movements toward abolition are unlikely to succeed.26 This does not mean that humans cannot overcome these tendencies, but simply implies that on a large scale people will statistically be more likely to harbor these sentiments. The two preliminary phases that are necessary for abolition, as identified by Hammel, are much more likely to obtain when a state also has at least some presence of a population of “liberal professionals,” namely lawyers, who are willing to buy into the preliminary phases.27 These figures play a prominent role in abolition either as legislators themselves or simply as members of an elite class with political influence.28 In Hammel’s eyes, it is the liberal professionals who will convince the powers-that-be to abolish the death penalty. However, the level of influence that liberal professionals may have is contingent upon the structure of the state’s government. Hammel claims that the state must have a centralized parliamentary political system so that liberal professionals only have to convince one national legislature to support abolition.29

Reading Hammel’s preconditions to abolition, it quickly becomes clear that the United States does not appear to be well-positioned for abolition under his model. This Note will argue to the contrary in Part VI. Nevertheless, Hammel’s preconditions apply nicely to the stories of abolition in Canada and South Africa, with some minor deviations.


23 Berry, supra note 1, at 1012-13.
24 The South African path to abolition is a good example. See infra Part V(B).
25 See HAMMEL, supra note 7, at 50.
26 Id. at 29-34.
27 Id. at 159, 161-62.
28 See id. at 161-62.
29 Id. at 169.
To properly understand the difference in approaches to regulation of the death penalty, one must first grasp the differences between the two types of governmental structures. The primary differences will be discussed in terms of (a) separation of powers and relative strength of federalism; (b) substantive and procedural constitutional rights; (c) relative trust of government; and (d) legislative processes.

A. Separation of Powers

The American presidential system is characterized by a strict horizontal separation of powers among the branches of government and a decentralization of vertical powers by way of federalism. The horizontal power structure of the American system allows for each branch of the government to maintain some check on the others. For example, the executive may veto legislation that is passed by Congress; the judiciary may overrule legislation; and Congress may pass legislation replacing court decisions. By maintaining two separate popularly-elected branches of government, the American system theoretically reduces the risk of an authoritarian power grab. However, the drawback of such a structure—and one of the main benefits of the parliamentary system—is that the system of checks and balances has the potential to lead to gridlock. The United States has experienced this to an absurd level in recent years, leading to a 15% approval rating of Congress and 49% approval of President Barack Obama as of February 2013. The Federal Constitution dictates to a certain extent where on the horizontal and vertical axes certain types of powers fall. For example, questions of criminal law and policy are generally left to the states on the vertical axis and the legislature on the horizontal axis. This is required by Article 1, Section 8 of the Constitution, which specifically enumerates the powers of the United States Congress and the Tenth Amendment which reserves the remaining rights for the states. In the context of regulation of the death penalty, this means that each state legislature may

30 See FRANKLIN & BAUN, supra note 11, at 43-44.
31 Id. at 44.
35 See Berry, supra note 1, at 1015; Steiker, American Exceptionalism, supra note 1, at 121.
36 U.S. CONST. art. 1, § 8; U.S. CONST. amend. X.
Derek VerHagen

determine whether it will retain capital punishment and the United States Congress does not have the power to legislate otherwise. A state's decision to retain the death penalty and the process by which it adjudicates and carries out the punishment may only be regulated by the judiciary. While state courts play a role in this process, it is ultimately the United States Supreme Court that imposes constitutional standards on the imposition of the punishment and is the only body with the power to outlaw the penalty altogether.  

The parliamentary system differs greatly from the American presidential system in terms of the allocation of horizontal and vertical powers. While parliamentary systems technically have separation of powers, it is notably more unified than the American system. In a parliamentary system of government, the country is separated into several districts known as constituencies. Citizens of each constituency choose from among several candidates from several different parties—unlike the American presidential system which is essentially limited to two parties. The winner of each constituency gets a seat in parliament. The party with the largest percentage of representatives elected to parliament then becomes the de facto leading power in the country. This is because the ruling party is tasked with appointing the prime minister, who in turn is empowered to choose his cabinet members comprising the rest of the executive branch of government. The power of the leading party in parliament is further bolstered by the fact that members of parliament (“MPs”) are strongly encouraged to, and typically do, vote on each legislative issue along party lines. Therefore, the controlling party in parliament is in a good position to initiate and pass its own policies because it can count on full cooperation by all MPs within its party and that of the “executive” branch. Relative to the American approach, this is clearly a more unified notion of the separation of powers. Nevertheless, parliament

37 This is, of course, assuming that all 50 of the states do not individually decide to abolish the death penalty.
38 The Note will not discuss parliamentary democracies that use party lists for elections. Please assume that all references to parliamentary elections involve direct election.
40 See The Oxford Handbook of Political Institutions 457 (Robert E. Goodin et al eds., 2006).
Derek VerHagen

does possess the power to “check” the executive by issuing a vote of no confidence.\textsuperscript{41} This is a tremendous check in theory, but parliament tends to avoid using it because individual members fear losing their own seats in the process.\textsuperscript{42}

On the vertical power axis, parliamentary systems tend to be centralized. In other words, even in so-called federalist parliamentary democracies, the law- and policy-making powers lie with the national government. There a number of western democracies, other than the United States, that are structured on a federal model, including Canada.\textsuperscript{43} At the very least, these countries have “discrete governmental units allocated some autonomous spheres of authority within the larger federal nation-state.”\textsuperscript{44} However, this type of federalism is a shell of that found in the American presidential system. No country delegates as much criminal law-making power to sub-national units as the United States.\textsuperscript{45}

\textbf{B. Substantive Versus Procedural Constitutional Rights}

Another fundamental difference between the parliamentary and American presidential systems is the types of rights that are protected by the respective constitutions. American constitutionalism can be described as a form of protecting the rights of citizens by way of limiting the powers of the government. By regulating the process of state action, the freedom of citizens is ostensibly secured. In other words, individual rights are protected primarily on procedural grounds. There are no clear substantive rights granted to individuals by the U.S. Constitution, other than those falling under the Court-created doctrine of substantive due process. Human dignity, for example, is not mentioned in the Federal Constitution. “Human beings are referred to . . . as persons, citizens, residents, accused, subjects [of foreign states], and the people—but not as human beings. The word ‘dignity’ does not appear.”\textsuperscript{46} The closest thing to human dignity in the constitution may be the Eighth Amendment

\textsuperscript{41} Lowell Barrington, \textit{Comparative Politics: Structures and Choices} 164 (2d ed. 2013).
\textsuperscript{42} Id.
\textsuperscript{43} See Steiker, \textit{American Exceptionalism}, supra note 1, at 121.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
prohibition on cruel and unusual punishment. This unique approach to constitutional law explains in part the maze of procedural regulations that the U.S. Supreme Court has imposed on the use of the death penalty, as opposed to the clearer paths to abolition found in parliamentary democracies.

Parliamentary systems of government, on the other hand, tend to have constitutions with substantive protections, such as the rights to life and human dignity. Their constitutional language is typically phrased in terms of granting rights to citizens, as opposed to limiting the power of government. For example, the constitution may grant a right to life, human dignity, or even the right to work. These rights reflect values that cannot be contravened. More important, the substantive rights provided for in the constitutions are viewed not so much as discrete rights as they are a broad embodiment of the values of the particular country. Accordingly, substantive rights pervade any interpretation of the constitution with regard to any issue at hand. As such, the substantive rights to life and human dignity is paramount in many European constitutions and cannot be sidestepped via technical arguments about the language of any particular section or clause of the constitution.

C. Relative Trust of Government

One of the most striking differences between the two systems of government is the level of trust that the populace maintains for its representatives. With regard to the American system, Professor Carol Steiker states that “even though successful political candidates are frequently consummate political insiders, 'it is almost obligatory for American politicians of both the right and the left to profess a mistrust of government.'” As a result, “[American] politicians are conspicuously anti-elitist in their rhetoric and folksy in their self-presentation.” Ultimately, this political culture leads to a deference to majority sentiment “as a reflection of the role conception of elected officials.”

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47 See Trop v. Dulles, 365 U.S. 86 (1958) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . .”). See also Part VI, for a discussion on the quasi-substantive nature of the Eighth Amendment.
48 For example, Canada, South Africa, and all members of the European Union recognize a right to human dignity.
49 See Steiker, American Exceptionalism, supra note 1, at 115-16 (quoting SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD 23 (1996)).
50 Id. at 115.
51 Id. at 116.
The idea of parliament informing the public rather than simply reflecting the current state of public opinion is sometimes referred to as “Burkean Trusteeship.” 57 Edmund Burke described the unique balance of roles of the parliament as follows:

“It is [a member of parliament's] duty to sacrifice his repose, his pleasures, his satisfactions, to [the electorate's]; and above all, ever, and in all cases, to prefer [the electorate's] interest to his own. But his unbiased opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living. These he does not derive from your pleasure; no, nor from the law and the constitution. They are a trust from Providence, for the abuse of which he is deeply answerable. Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.” 58

54 Berry, supra note 1, at 1016.
56 Steiker, American Exceptionalism, supra note 1, at 116 (emphasis added).
57 See e.g., Voter and Officeholder Requirements, supra note 17.
58 THE WORKS OF EDMUND BURKE IN NINE VOLUMES, VOL. II 12 (1839).
Consistent with the philosophy of Bagehot and Burke, European parliaments have traditionally relied on expert opinion in developing criminal law and related legislation.\textsuperscript{59}

\textit{D. Legislative Processes}

The last major difference in the two systems is the legislative process. In the United States, legislation is most often drafted and, of course, voted on by Congress. Which branch drafts and votes on legislation is especially important when considering the insulation of representatives from their constituencies. In the United States, Senators are up for election every six years and Representatives every two years.\textsuperscript{60} Due to such short terms, they are essentially on a perpetual campaign trail. As a result, members of congress are unlikely to take a stance on a controversial issue that is unpopular among their constituency because they fear a backlash in the next election. This is particularly true in swing districts.

In parliamentary systems, on the other hand, legislation is more often proposed by the executive branch via the Prime Minister's cabinet.\textsuperscript{61} The proposed bill or bills are then voted up or down by parliament. As mentioned above, MPs almost always vote along party lines. Since elections are not necessarily conducted on set schedules, an executive branch member's primary concern is maintaining the confidence of parliament—the majority of which selected him in the first place.\textsuperscript{62} MPs also tend to be reluctant to vote no confidence because they fear losing their own seats in the shakeup.\textsuperscript{63} As a result, they try to avoid calling for new elections unless completely necessary. It should be noted, however, that parliamentary systems also permit “free votes” on some bills, which allow for MPs to break party lines when voting on particularly controversial issues or when a party does not have a stance on a

\textsuperscript{59} Berry, supra note 1, at 1016.

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\textsuperscript{62} See BARRINGTON, supra note 41, at 164.

\textsuperscript{63} Id.
specific issue. By opting for a free vote, the executive risks losing the votes of some moderate members of the party, but may gain the votes of moderate members of other parties. More important, by releasing MPs from their duties to particular parties, the executive minimizes the risk of an internal battle within the party or the possibility that a party’s own members will “cross the floor” on the controversial issue while other parties stay true to their own lines.

IV. Common Timeline of Abolition Movements

Before turning to the abolition stories specific to Canada and South Africa, it is important to frame the common paths to abolition so as to highlight consistencies and deviations along the way. Research into the paths to abolition in Canada, South Africa, and the United States reveals a common series of events leading to a moratorium on the death penalty, and eventually abolition. The United States closely followed the common path to abolition until the reinstatement of capital punishment by Supreme Court decision in 1976. In fact, the United States was actually considered to be well ahead of the curve in the 19th Century. Alexis de Tocqueville stated in his 1840 book Democracy in America that “[w]hereas the English seem to want to preserve carefully the bloody traces of the Middle Ages in their penal legislation, the Americans have almost made the death penalty disappear from their codes.” By other accounts, European visitors to America at that time were “positively astonished” by American movements to end the death penalty. Even American jurist Benjamin Cardozo predicted in 1931 that “[p]erhaps the whole business of the retention of the death penalty will seem to the next generation, as it seems to many even now, an anachronism too discordant to be suffered, mocking with grim reproach all our clamorous professions of the sanctity of life.” Despite these sentiments, the United States careened off course towards the end of the 20th Century and has yet to return. Regardless,

64 “[C]onscience votes (also called free votes) occur when parties have made no particular decision as to how their members should vote, usually because the parties have no particular policy on that issue or because the matter is controversial and the parties feel their members should be able to vote their conscience.” Bryn E. Floyd, Regulation of Stem Cell Research: A recommendation that the United States adopt the Australian approach, 13 Pac. Rim L. & Pol’y J. 31, 51 n.165 (2004).
66 See infra Part VI.
67 Steiker, American Exceptionalism, supra note 1, at 98-99 (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 58 (Harvey C. Mansfield et al eds., Chicago Univ. Press 2000) (1840)).
68 Id. at 99.
69 Id. at 97.
the United States shared many of the same milestones as Canada and South Africa prior to the wrong turn and I will enumerate those here.

The first step on the road to abolition appears to be a series of what this Note will refer to as “innocuous regulations” on the imposition of the death penalty, which typically occur around the turn of the 20th century. They are referred to as “innocuous” because they do not clearly threaten the existence of the death penalty. These regulations tend to reflect a very baseline sense of civility on the part of the people, as opposed to a robust understanding of human dignity. For example, states may limit the number of death-eligible crimes, so as to only execute violent offenders. This appears to be influenced by the basic concept of proportionality. States may also prohibit public executions. While this appears to be based in a concept of human dignity, it might be more accurately characterized as a type of “nausea test.” Moving executions inside prison walls is in the interest, not of the dignity of the offender, but of the citizens who are sickened by decapitation.

The innocuous regulations are typically followed by a series of events that causes a government to engage in a “civility check.” A civility check involves a state comparing its own level of civilization to that of other countries. These are prompted by especially embarrassing or inhumane events surrounding the imposition of the death penalty. Events prompting a civility check may include botched executions and negative media coverage. Note that each country may define its own “civility” in different ways.

The civility check is then followed by a debate—among government actors, the population, or special interest groups—and often some minor adjustments to the law regarding capital punishment. The adjustments may include procedural safeguards, such as discretionary sentencing, automatic right to appeal, or simply a modification of the method of execution.

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70 See infra Part V.
71 See infra Part V.
72 See infra Part V(A) for a discussion on the arguments over the definition of civility among the Canadian Parliament.
73 See infra Part V.
Following the minor adjustments, there is sometimes a second civility check which leads to a government-imposed moratorium. The moratorium may be imposed because of a second series of embarrassing or media-worthy events following the minor adjustments. It is almost always imposed for the purpose of “investigating” the use of the death penalty. The most important thing to note about this phase is that it must be achieved via an elitist or counter-majoritarian method to preserve the substantive rights to life and human dignity. In most, if not all, countries other than the United States, the moratorium is essentially the winning piece for abolitionists. The Canadian and South African stories illustrate how complete abolition can be secured and maintained.

V. Canadian and South African Abolition

A. Canadian Abolition

The Canadian story of abolition is a good example of how a parliament may be led by a group of influential elites to legislate contrary to public opinion. Of course, Canada's story begins with a series of innocuous regulations of the death penalty. The Canadian parliament began regulating the death penalty as such sporadically throughout the late 1800s, limiting death-eligible crimes to murder, rape, and treason. Around 1870, parliament also ended public executions. Canada's civility check came relatively early with “Canadian sensibilities about the aesthetics of [the] death penalty” being challenged by a series of botched executions beginning in 1918 and culminating in 1935. In 1918, hangman Arthur Ellis bungled the execution of Thomas Fletcher by using a rope that was too long for the gallows. As a result, Fletcher's feet reached the ground when the trap was sprung and “it was necessary to haul him off the ground and hold him suspended until he was pronounced dead. It was 34 minutes before the pulse ceased and it was 44 minutes when the jail physician pronounced death and

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74 See, e.g., Part V(A) Canadian Abolition.
75 CAROLYN STRANGE, CAPITAL PUNISHMENT, THE OXFORD COMPANION TO CANADIAN HISTORY 115 (Gerald Hallowell ed., 2004).
76 Id.
Derek VerHagen
gave permission for the body to be cut down.’’

Just eight years later Arthur Ellis again miscalculated the rope length at a hanging allowing Dan Prockiwiw’s body to fall too far before the rope caught and Prockiwiw was decapitated by the weight of his own body.

Then, in 1935, a woman by the name of Tomasina Teolis was accidentally decapitated during her hanging. The horror of Ms. Teolis’s botched execution—this time without the help of Arthur Ellis—was apparently the last straw for the Canadian parliament. In 1937, the government formed a Special Committee to investigate the use of capital punishment in Canada.

The Committee acknowledged the disturbing nature of the recent trend of traumatic accidents during executions, but opted not to abolish the punishment because much of the rest of the world retained it at that time. Following extensive debate on the matter, the Canadian government decided that the execution procedure should be regulated and standardized in order to avoid similar accidents in the future.

To achieve this goal, the Canadian government created a centralized penal institution where all future executions would take place.

A second civility check began in the early 1950s when Prime Minister Louis St. Laurent announced his commitment to the “overhaul and rationalisation” of the Canadian Criminal Code.

While parliament made several revisions to the 1954 Criminal Code, it reserved some issues for further investigation, including the use of capital punishment. In December 1953, Minister of Justice Stuart Garson commissioned two special committees to further investigate criminal law issues that would not be addressed in the new 1954 Criminal Code: one was tasked with reviewing parole and remission of sentences and the other to study “capital punishment, corporal punishment, and lotteries.”

Ironically, the Committee’s findings indicated that both lotteries and the imposition of the death penalty were

79 Id. at 96 (quoting Revolting Scene at Execution, MANITOBA FREE PRESS, Feb. 27, 1918).
80 Id. at 94.
81 Id.
82 Id.; see also Strange, Undercurrents of Penal Culture, supra note 77, at 351-52.
83 Strange, Undercurrents of Penal Culture, supra note 77, at 351-52.
84 Id. at 366.
85 Id.
86 Id.
88 Id. at 594.
89 Id. at 594.
essentially games of chance. Most notably, it found that capital punishment was imposed in a discriminatory and unprincipled fashion, leading to higher rates of execution for minorities.\textsuperscript{90} The findings sparked debate over what was the appropriate action to take to maintain Canada's level of civility in comparison with other countries.\textsuperscript{91} Parliament was split among members who argued that Canada had progressed too far to impose such outdated punishments and others who claimed that Canada could not afford the risk of “unleashing the tide of barbarism, so tenuously held back with stiff penalties.”\textsuperscript{92} At the time, the Canadian people were also equally divided between retention and abolition.\textsuperscript{93} In the end, the Canadian government decided to retain the death penalty for two reasons. First, it found that Canadians were not yet at the point at which the government could abolish severe penalties; lest they risk a tide of barbarism being unleashed.\textsuperscript{94} Second, there was a specific fear that abolishing the death penalty would effectively announce “open season” for American mobsters to cross the border into Canada.\textsuperscript{95} The Committee claimed that these “hardened” criminals considered prison to be nothing more than “an occupational hazard,” which it believed justified retention of the ultimate penalty.\textsuperscript{96} It is clear that at this point the Canadian parliament had yet to take the “elitist” approach to ensuring human dignity. That would begin to change in 1960.

In August 1960, Prime Minister John Diefenbaker's government enacted the Canadian Bill of Rights, marking the beginning of the rights-conscious approach to regulation of the death penalty.\textsuperscript{97} Parliament passed legislation classifying murder into capital and non-capital offenses in 1961, and in 1963 Prime Minister Lester B. Pearson's government began commuting all death sentences to life imprisonment rendering Canada a \textit{de facto} abolitionist state.\textsuperscript{98} With the death penalty on the ropes, the

\textsuperscript{91} Strange, \textit{Undercurrents of Penal Culture}, supra note 77, at 370 (“the Joint Committee's task was to decide whether the retention of physical punishment was more or less likely to keep Canadians high and dry atop the plane of civility”).
\textsuperscript{92} Id. at 370.
\textsuperscript{93} Id. at 362.
\textsuperscript{94} Id. at 364.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{97} \textsc{Joseph E. Magnat}, CONSTITUTIONAL LAW OF CANADA (2001); see also Carter, supra note 90, at 251.
government embraced civility and human dignity by introducing legislation to parliament intended to make capital punishment more “humane.” Parliament at the time was still struggling with the issues raised by the 1954 Special Committee: namely, was Canada too civilized to impose such retributive punishment or was the death penalty a legitimate response and deterrent to heinous crimes that constituted an affront to the decency of a civil nation? Due to the continued disagreement on the issue, the Canadian government opted for a free vote on whether to order a five year moratorium on the death penalty. In 1967, by a vote of 105 to 70, parliament agreed to the moratorium with the intention of monitoring whether the punishment actually deterred crime. As part of the compromise, the executive agreed to retain capital punishment for the murder of public servants. The seemingly modest win was all that the abolitionists needed to gain the upper hand and ultimately override most of the Canadian population's desire to retain the punishment.

At the end of the five year moratorium, studies indicated that murder rates had actually increased in the previous five years. In response, Solicitor General Warren Allmand, known as a “staunch abolitionist,” released an alternative study commissioned by his department, which argued that the increased murder rate was not indicative of any deterrent effect of the death penalty. Allmand then introduced legislation, endorsed by Prime Minister Pierre Trudeau, to extend the moratorium another five years with hope of “maintain[ing] status quo until a more permanent solution presented itself.” Allmand and Trudeau's complete disregard for the statistical findings during the first moratorium seemed to indicate that the powers-that-be found the death penalty to be inhumane or uncivil and were willing to override public, and some parliamentary, opinion to secure abolition. But, Allmand did not stop there. In 1976, he introduced Bill C-84 before parliament calling for the death penalty to be abolished.

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99 Id.
100 Id. at 174.
101 Id.
102 Id.
103 Id. at 174-75
105 Thompson, *supra* note 98, at 175.
106 Amitay, *supra* note 104, at 554 n.90.
107 See id. at 555; see also Thompson, *supra* note 98, at 175.
penalty to be removed from the Criminal Code altogether, save for some military crimes.\footnote{108}{Thompson, supra note 98, at 175.} Allmand was again supported by Prime Minister Trudeau.\footnote{109}{Id.} Their arguments clearly mirrored those of the abolitionists during the previous moratorium debate and even those of the 1954 Special Committee deliberations. Trudeau proceeded to deliver an “impassioned appeal” to parliament in support of the bill, claiming that the death penalty was the “emotive response of a socially bankrupt society, a punishment not fit for a rational and modern state.”\footnote{110}{Thompson, supra note 98, at 175.} He eloquently warned parliament that to retain capital punishment would be to “abandon reason in favour of vengeance; to abandon hope and confidence in favour of a despairing acceptance of our inability to cope with violent crime except with violence.”\footnote{111}{Id.} Passage of the bill was anything but guaranteed, though. Over 120 MPs spoke on its merits and many of Allmand and Trudeau's own party members were on the fence.\footnote{112}{Id.} In a strategic move to avoid the risk of a future loss of confidence in the government, they again opted for a free vote. On July 14, 1976, the bill passed by a margin of 130 to 124 and capital punishment was altogether removed from the Criminal Code despite the fact that over 70% of the population supported retention.\footnote{113}{Id.} There were attempts to reintroduce the death penalty following 1976, but none succeeded and complete \textit{de jure} abolition was finally secured in 1998 when parliament removed the military crime exceptions for the death penalty. The Canadian government had not executed anyone since 1962, five years before the first moratorium went into place.

The Canadian path to abolition stayed remarkably true to both Andrew Hammel's European Model of Abolition and the common timeline. Solicitor General Warren Allmand and Prime Minister Pierre Trudeau—clearly the “liberal professionals” that Hammel envisioned—both understood the importance of overcoming vengeance and humanizing the offender. Allmand's counter-report addressing the lack of deterrent effect of the death penalty was an attempt to rationalize the efficacy (or lack thereof) of the death penalty, and Trudeau clearly attacked the rationality of vengeance in his appeal to parliament. Thanks to the centralized power structure of the Canadian parliamentary system
Derek VerHagen

and the use of the free vote in this particular situation, the Canadian government was able to abolish the death penalty under the banner of “human dignity” at a time when the vast majority of the population still supported it.

B. South African Abolition

The South African road to abolition is markedly different from Canada’s, even though both are parliamentary democracies. Of course, the major cause of the divergent paths is the South African apartheid regime of the second half of the 20th Century and the creation of a Constitutional Court in 1994. Despite the differences, South Africa still abolished the death penalty using counter-majoritarian methods on the basis of a substantive right to life and human dignity.

Capital punishment in South Africa goes as far back as the 17th Century. The Dutch East India Company's arrival in 1652 marked the beginning of the Afrikaners (“ANP”)—the white minority party that would eventually institute apartheid in the 20th Century. Under Dutch rule, capital punishment was mandatory for murder and discretionary for rape, treason, arson, theft, and several other non-homicidal crimes. Executions were held in public and typically involved hanging or beheading. However, several other, terribly inhumane methods were also available, such as slow strangulation and burning alive. Prior to the execution, it was not uncommon to subject the offender to public torture, including the breaking wheel or disembowelment. Innocuous regulation began in the late 18th Century with the arrival of the British. Pre-execution torture was abolished, which oddly resulted in a drop in the number of executions, reflecting the extreme levels of inhumanity in South Africa at that time. Over the course of the late 1800s, death-eligible crimes were slowly chipped away until 1910 when the death penalty was finally reserved solely for murder. The Union of South

115 See Bouckaert, supra note 114, at 288.
116 Id.
117 Id.
118 Id.
119 Id. at 289
120 Id.
Africa reinstated the death penalty on a discretionary basis for rape and treason in 1917, but began considering mitigating and aggravating circumstances in 1935. At this time, there was no clear evidence of discrimination in the imposition of the death penalty as a punishment, though non-whites tended to be convicted of death-eligible crimes at a higher rate. Towards the end of British rule in 1945, the government considered abolition of the death penalty during a general overhaul of the penal and prison system, but opted to retain the penalty because to the “underdeveloped Native . . . recently brought into contact with western civilisation and ideas, the sanctity of human life [was] a matter of less concern than it would be to the western civilised man.” At this point, the rights to life and human dignity were hardly a twinkle in the eye of the ANP, which would soon take power in 1948 and institute over 35 years of apartheid government.

South Africa broke from the common timeline to abolition from 1948 until the late 1980s, and essentially went off the grid. In May 1948, South Africa held its first parliamentary elections following British rule. The ANP took power largely due to mass disenfranchisement of minority voters in the 1930s. Under the ANP's apartheid policy, the use of the death penalty began to increase dramatically. First, death-eligible crimes were expanded to include offenses that had not been eligible since the early 1800s, including aggravated robbery, attempted aggravated robbery, burglary, and kidnapping. Following the Sharpeville Massacre in 1960, the ANP officially outlawed membership in the African National Congress and Pan-African Congress and again expanded death-eligible crimes to include both violent and non-violent political acts. Capital crimes at that time included “undergoing training or obtaining information that could further an object of communism” and “advocating abroad economic or social change in South Africa by violent means through the aid of a foreign government or institution.” This expansion was clearly an attempt to silence political rivals, namely those representing minority rights. The situation in South Africa was the living example of the potential

121 Id. at 289-90.
122 Id. at 290, n.15.
123 Id. at 290 (quoting Report of the Penal and Prison Reform Commission, para. 460 (1947)).
124 Id. at 291; Kende, supra note 114, at 211-12.
125 Bouckaert, supra note 114, at 291; Kende, supra note 114, at 211-12.
126 Bouckaert, supra note 114, at 291.
127 Kende, supra note 114, at 212.
Derek VerHagen

dangers of an insulated parliament. By disenfranchising non-whites, the ANP was able to secure unbridled power over the country despite making up a small minority of the population. South African law professor, Janos Mihalik, writing during the moratorium in the early 1990s, stated, “It would appear that South Africans—or at least those who were represented in Parliament—generally ceded their right and delegated their duty to deliberate on (most) moral issues to the divine wisdom of their elected representatives and moral guides [in Parliament].”[128] From 1961 to 1974 there was only one MP opposed to apartheid in South Africa, Ms. Helen Suzman.[129] In 1969, Suzman introduced a motion to parliament calling for the abolition of the death penalty and was quoted as saying:

The idea that abolition is not possible because of our Non-White population, the so-called ‘barbarous’ 80 per cent, is widely held in South Africa. People fear that the abolition of the death penalty will result in thousands of Non-Whites, overcome by their primitive instincts, murdering us in our beds. Incidentally, I want to say that prosecution figures over a 10-year period show that Whites commit murder and rape on Non-Whites at a rate four times greater than Non-Whites on Whites.[130]

Ms. Suzman's call for abolition was futile, however, due to the lack of support from other “liberal professionals.”[131] She was joined by Professor Barend van Niekerk, who penned a two-part article in the South African Law Journal in 1968-69 calling death penalty practices into question.[132] However, van Niekerk was prosecuted for contempt following publication of the articles, highlighting the utter lack of tolerance for political backlash by the ANP parliament.[133]

Execution rates continued to climb well into the 1980s, with roughly 1100 people being

129 Bouckaert, supra note 114, at 294.
130 Id.
131 Professor Janos Mihalik described her call for abolition as “a voice in the wilderness.” Mihalik, supra note 128, at 122.
132 Bouckaert, supra note 114, at 294-95.
133 Id.
executed between 1981 and 1990.\textsuperscript{134} Statistics from that period show that the crackdown was clearly aimed at a discrete ethnic group. In 1988, Amnesty International reported that “during a one year period, 47\% of blacks convicted of murdering whites were sentenced to death, compared to no death sentences for whites convicted of murdering blacks and only 2.5\% for blacks convicted of killing blacks.”\textsuperscript{135} Similar statistics were reported for cases of rape.\textsuperscript{136}

South Africa’s first civility check did not occur until the late 1980s. The birth of a realistic abolition movement in South African took place in 1987 with the formation of the South African Youth Congress, a group devoted to saving anti-apartheid activists from execution.\textsuperscript{137} That same year South Africa executed 164 people, its highest number yet.\textsuperscript{138} In response, a well-respected political scientist, Herman Giliomee, came out saying that, “[a]lmost unnoticed, 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.”\textsuperscript{139} By this time, Ms. Suzman was no longer the only opposition MP. Opposition spokesman for Justice Dave Dalling, the former Director-General of the Department of Justice, and even one member of the ANP called for an inquiry into the use of the death penalty in 1988.\textsuperscript{140} Unfortunately, the Minister of Justice declined to form a commission for the inquiry, claiming that there was no basis for such an investigation and—in what appeared to be a brief moment of insight into the ANP's position—stated the importance of keeping death penalty issues “out of the limelight.”\textsuperscript{141} This was the first time that it appeared that the ANP actually may be embarrassed about the use of capital punishment in South Africa.\textsuperscript{142} During the 1989 parliamentary session, abolitionists again addressed parliament but this time non-whites were allowed to testify for the first time in South Africa's

\begin{footnotesize}
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\item[134] \textit{Id.} at 291-92 (“as recently as 1988, the Minister of Justice reported that in the previous three years, 101 'unrest-related' death sentences had been handed down, and seventeen executions had taken place”).
\item[136] \textit{Id.}
\item[137] \textit{Id.} at 296.
\item[138] Mihalik, \textit{supra} note 128, at 126.
\item[139] \textit{Id.}
\item[140] \textit{Id.}
\item[141] \textit{Id.} 126-27.
\item[142] \textit{Id.} at 127.
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This sparked a minimal amount of debate and a slight concession that may be considered one of the “minor adjustments” allowed by the regime. The Minister of Justice acknowledged that two sides of the argument existed but insisted that reform “must take place by a process of evolution” which would be left in the hands of experts, the Chief Justice, and the Department of Justice. Of course, the “evolution” had already been in those hands since 1948.

A much more sincere civility check took place in early 1990. In January, a British television show harshly criticized South Africa's use of the death penalty and included an interview with South African Justice John Didcott in which he expressed his disapproval of the practice. The program commanded widespread coverage by the South African media and led President F.W. De Klerk to address parliament in February. In his speech, President De Klerk announced that death penalty legislation would be introduced to parliament granting greater discretion in sentencing, limiting the number of death-eligible crimes, and granting an automatic right to appeal with the intention of limiting its imposition to “extreme” cases. Additionally, the President ordered a moratorium on death sentences pending the new legislation, lifted the ban on the African National Congress, and released Nelson Mandela from prison. Later that year, parliament passed the legislation with the additional features of prohibiting execution of minors and pregnant women. The influence of abolitionists and the media on parliament bred truly remarkable results. Only three years prior, South Africa had imposed the death penalty at a rate of one execution every two days.

As was the case in Canada, South Africa never reinstated the death penalty following the initial moratorium. In 1992, in the midst of negotiations over a new constitution, the South African

143 Id.
144 Id.
145 Bouckaert, supra note 114, at 296.
146 In South Africa, the “president” acts as head of state and head of government. His power is comparable to that of a prime minister.
147 Id. at 297.
148 Id.
149 Id. at 296-97.
150 Id. at 297.
151 Id. at 294.
government attempted to end the moratorium on the death penalty and immediately pursue the execution of 17 offenders. However, giving in to the backlash from abolitionists and retentionists alike, President De Klerk decided to renew the moratorium. In April 1994, South Africa's first multiracial elections took place. The African National Congress secured over 60% of the vote and Nelson Mandela—being the leader of the ANC—was selected as president. At the same time, an interim South African constitution was introduced, which included a Bill of Rights. Due to the massive power grab experienced during the apartheid, the new constitution also provided for a Constitutional Court with powers to review acts of parliament. As part of his newly found constitutional powers, President Mandela appointed all eleven members of the first Constitutional Court—each having been involved in the fight against apartheid in some form or fashion. Two months later, Mandela's new Minister of Justice Dullah Omar publicly expressed his abolitionist sentiments for the first time in an interview. In August of that year, Omar again raised the issue of abolition to parliament; this time in the context of respect for human life. “The first requirement of a human rights culture is respect for human life and in this the state must set the example. It should not take human life.” Omar went on to suggest that “instead of making the issue of the death penalty the scapegoat, we should look for the real causes and address the real issues in connection with the terrible killing of policemen and innocent civilians.” The groundwork was set for the inevitable abolition of the South African death penalty under the banner of human dignity. But, despite Mr. Omar's abolitionist appeals, the final step to ending capital punishment would be left in the hands of the Constitutional Court—defining the limitations on the right to life.

S. v. Makwanyane reached the South African Constitutional Court in 1995, providing the first

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152 ld. at 299.
153 ld. at 300.
154 ld. at 300-01.
155 ld. at 303-04.
156 ld. at 301 (“I would not like to see anyone hanged. We will have to consider how we are going to move towards a situation where the death penalty is abolished.”).
157 ld. at 301.
158 ld.
159 ld.
160 ld.
opportunity for the Court to exercise its powers to overrule the 1977 act of parliament allowing for capital punishment. The Court unanimously found the death penalty to be unconstitutional, but emphasized the importance of the decision by writing eleven individual opinions.\textsuperscript{161} The concept of \textit{ubuntu} appeared to carry the day for many of the justices. Justice Ismail Mahomed described \textit{ubuntu} as “the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; . . . the joy and the fulfillment involved in recognising their humanity.”\textsuperscript{162} Justice Yvonne Mokgoro wrote that “[\textit{ubuntu’s}] spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.”\textsuperscript{163} The clear basis for the Court’s decision was the relationship between the rights to life and human dignity. “Respect for the dignity of all human beings [was] particularly important in South Africa . . . [because] apartheid was a denial of a common humanity.”\textsuperscript{164} Justice Mahomed suggested that the dignity of all citizens may be affected by the continued imposition of the death penalty, stating “very arguably the dignity of all of us, in a caring civilization, must be compromised, by the act of repeating, systematically and deliberately, albeit for a different objective, what we find to be so repugnant in the conduct of the offender as a whole.”\textsuperscript{165} The Court also noted that the right to life in the South African constitution was phrased as an unconditional right. Unlike the Hungarian constitution, for instance, the South African Constitution did not prohibit the \textit{arbitrary} taking of life. Rather, it simply granted the right wholesale.\textsuperscript{166} Speaking to potential limitations on the right to life, famed Justice Albie Sachs stated, “Life is different. . . . [It] is not subject to incremental invasion. . . . While its enjoyment can be qualified, its existence cannot. Similarly, death is different. It is total and irrevocable.”\textsuperscript{167}

In addition to emphasizing its unquestionable commitment to the human rights culture, the Court directly addressed the issue of public opinion. At the time of the decision, polls indicated that

\begin{footnotesize}
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\item \textit{Id.} at 304.
\item \textit{Id.} at 309-10.
\item \textit{Id.}
\item S. v. Makwanyane, Constitutional Court of South Africa, at para. 329 (O'Regan, J., concurring).
\item \textit{Id.} at para. 271.
\item \textit{Id.} at para. 324 (O'Regan, J. concurring).
\item \textit{Id.} at para. 312.
\end{enumerate}
\end{footnotesize}
Derek VerHagen

roughly 63% of the population still supported the death penalty.\textsuperscript{168} Writing on behalf of the Court, Justice Arthur Chaskalson stated:

\begin{quote}
It was disputed whether public opinion, properly informed of the different considerations, would in fact favour the death penalty. I am, however, prepared to assume that it does and that the majority of South Africans agree that the death sentence should be imposed in extreme cases of murder. The question before us, however, it not what the majority of South Africans believe a proper sentence for murder should be. It is whether the Constitution allows the sentence.\textsuperscript{169}
\end{quote}

Perhaps the Court felt comfortable with contravening public opinion because the laws allowing capital punishment were passed under an undemocratic and racist regime.\textsuperscript{170} But, what of calling a referendum on the issue now? Justice Chaskalson went on to say:

\begin{quote}
By the same token the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest among us, that all of us can be secure that our own rights will be protected.\textsuperscript{171}
\end{quote}

Although the South African death penalty was ultimately abolished by the Constitutional Court rather than the parliament, the act still reflected a counter-majoritarian effort to uphold the substantive rights to life and human dignity. By taking this approach, the Court was assured that the imposition of capital punishment would never again be a question in South Africa. Perhaps this was a lesson taken from the

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\textsuperscript{168} Ursula Bentele, \textit{Back to an International Perspective on the Death Penalty as a Cruel Punishment: The Example of South Africa}, 73 Tul. L. Rev. 251, 271 (stating that the provincial Attorney General, defending retention of capital punishment, cited polls during his oral argument in \textit{State v. Makwanyane} that 63% of the population still supported the death penalty at that time).
\textsuperscript{169} \textit{Makwanyane}, at para. 87.
\textsuperscript{170} See Kende, \textit{supra} note 114, at 224.
\textsuperscript{171} \textit{Makwanyane}, at para. 88.
\end{footnotes}
Derek VerHagen

United States Supreme Court's failed experiment with abolition in the 1970s.

VI. Regulation of the Death Penalty in the United States

America's procedural approach to regulation of the death penalty via the judiciary (as opposed to the legislature) has resulted in a maze of procedural obstacles that often lead to years of litigation over whether a substantive argument may even be heard by the court.\textsuperscript{172} Without a doubt, this has crippled whatever efficacy the death penalty may have had prior to 1976. What caused the one-time leader in penal reform to take this long and confusing path?

Capital punishment has existed in the United States since its inception, having been carried over from England in the 18\textsuperscript{th} Century.\textsuperscript{173} While several of the founding fathers were familiar with Cesare Beccaria's 1764 penological treatise \textit{On Crimes and Punishment}—condemning the use of torture and the death penalty—it is argued that the penalty is acknowledged by the constitution's reference to “capital” crimes in the Fifth Amendment\textsuperscript{174} and deprivation of “life” in the Due Process Clause.\textsuperscript{175} Early on, capital punishment was available for an array of non-homicidal crimes, including burglary, rape, manslaughter, and arson.\textsuperscript{176} The first innocuous regulations of the American death penalty came via state legislation and began in 1794 when Pennsylvania began classifying murder into first and second degrees, limiting the death-eligibility to only first degree murders.\textsuperscript{177} Several states followed suit shortly thereafter.\textsuperscript{178} By the mid-nineteenth-century, capital offenses had been limited to murder and treason by almost all states, at least as applied to whites.\textsuperscript{179} Sentencing discretion first appeared in

\begin{thebibliography}{99}

\bibitem{173} \textit{Id.} at 331.
\bibitem{174} U.S. CONST. amend V.
\bibitem{175} Steiker, \textit{The American Death Penalty}, supra note 172, at 331.
\bibitem{176} \textit{Id.}
\bibitem{177} Jeffrey L. Kirchmeier, \textit{Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States}, 73 U. COLO. L. REV. 1, 6-7 (2002).
\bibitem{178} \textit{Id.}
\bibitem{179} Steiker, \textit{The American Death Penalty}, supra note 172, at 331-32.
\end{thebibliography}
Derek VerHagen

Tennessee in the 1830s, but took over a century to expand nationwide.\textsuperscript{180} Around the same time, states started to prohibit public executions.\textsuperscript{181} Apparently applying the aforementioned “nausea test,” executions were moved inside of prison walls not due to doubts about the wisdom of the penalty but because of “the emergence of a middle class . . . which cultivated a sense of refinement and culture.”\textsuperscript{182} All northern states had privatized executions by the time of the Civil War, but the south lagged behind—Kentucky holding its last public execution in 1936.\textsuperscript{183}

In response to botched executions resulting in “prolonged death, decapitation, or some other mishap,” methods switched from hanging to electrocution in the late 1800s.\textsuperscript{184} The first ever electrocution, however, was a disaster. In 1890, William Kemmler was the first man to be sentenced to death by electrocution.\textsuperscript{185} Unsure of how much voltage would be required to execute a human, the “state electrician” selected 1000 volts to pass through Kemmler's body for 17 seconds.\textsuperscript{186} At the end of the first round of voltage, members of the crowd began yelling that they could still see the defendant breathing. The physician present at the execution inspected Kemmler, confirmed that he was still alive, and immediately ordered a second round of electricity.\textsuperscript{187} This time Kemmler was hit with twice the voltage to ensure his death. Spectators reported a terrible odor caused by Kemmler's skin and hair being singed by the electrodes, and afterward the execution was described as “an awful spectacle . . . far worse than hanging.”\textsuperscript{188} George Westinghouse, the financial backer of the technology necessary for the electric chair, later stated that “they would have done better using an axe.”\textsuperscript{189} Despite the rough start, many states came around to the electric chair by 1950.\textsuperscript{190} Methods continued to advance throughout the

\textsuperscript{180} Id. at 333.
\textsuperscript{181} Id.
\textsuperscript{182} Id.
\textsuperscript{183} Id. at 334.
\textsuperscript{184} Id.
\textsuperscript{186} Id.
\textsuperscript{187} Id.
\textsuperscript{188} Id.
\textsuperscript{189} Id.
\textsuperscript{190} Steiker, The American Death Penalty, supra note 172, at 334.
Derek VerHagen

20\textsuperscript{th} Century, with a brief turn to the gas chamber, and finally lethal injection.\textsuperscript{191} It is important to note that all of the reforms to this point came by way of state legislation. It was not until the 1960s that America conducted its first civility check and the Supreme Court entered the picture.

In 1959, Alaska and Hawaii both joined the U.S. as abolitionist states, having repealed the punishment as territories prior to annexation. Beginning in the 1960s with the Civil Rights Movement and heated debate over the Vietnam War, death sentencing declined dramatically.\textsuperscript{192} While it is not clear that the events were causally related, it is undeniable that they signaled a shift in American perspective on civil and human rights. This may be evidenced by the fact that Iowa, Vermont, and West Virginia all abolished capital punishment in the mid-1960s. The Supreme Court first hinted at judicial regulation of the practice in \textit{Rudolph v. Alabama} in 1963, when Justices Douglas, Brennan and Goldberg dissented to a denial of certiorari on a case questioning whether it was cruel and unusual to impose the death penalty for the crime of rape.\textsuperscript{193} Encouraged by the apparent interest of the American version of the elite in the judicial regulation of the death penalty, the NAACP Legal Defense Fund (“LDF”) introduced its “moratorium strategy” by which it sought abolition of capital punishment by any constitutional means available.\textsuperscript{194} The LDF was particularly interested in the statistics indicating that the death penalty was imposed in a discriminatory manner. In a remarkably coordinated effort, the LDF effectively caused a “death row logjam” by raising constitutional challenges to virtually every pending execution. By 1966, public support for the death penalty dropped to its lowest level in history, at 42%.\textsuperscript{195} With public opinion finally in favor of abolition, the United States began a voluntary moratorium on the death penalty in 1967, while the Supreme Court attempted to sort out its constitutionality.

In 1972, the voluntary moratorium became official when the Supreme Court issued \textit{Furman v.} 

\footnotesize{\textsuperscript{191} Id.}
\footnotesize{\textsuperscript{192} Id. at 338.}
\footnotesize{\textsuperscript{193} Id. at 338-39; \textit{Rudolph v. Alabama}, 375 U.S. 889 (1963).}
\footnotesize{\textsuperscript{194} Id. at 339.}
\footnotesize{\textsuperscript{195} Frank Newport, \textit{In U.S., 64\% Support Death Penalty in Cases of Murder}, Gallup, Nov. 8, 2010, http://www.gallup.com/poll/144284/support-death-penalty-cases-murder.aspx ("In 1966, 42\% supported [the death penalty], the all-time low.").}
Derek VerHagen

*Georgia*, invalidating all current death penalty statutes on the basis that they resulted in the arbitrary and capricious imposition of the death penalty and therefore violated the Eighth Amendment prohibition on cruel and unusual punishment.196 The Court's decision was 5-4 with no clear majority opinion. In fact, all nine justices penned their own. The Court appeared to be most concerned with the lack of guidance provided to sentencers. It found that although many states allowed execution for murder and rape, very few defendants convicted of those crimes were actually sentenced to death and executed.197 Justice Potter Stewart perhaps said it best, stating “These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual . . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.”198 If world history was any indicator, the *Furman* decision would have signaled the end of the American death penalty. However, that was not the case. While securing a court-ordered moratorium was clearly a victory for abolitionists, the Court's reasoning was confusing and aimed at procedural deficiencies. Unlike Canada and South Africa, the U.S. Supreme Court did not order the moratorium on the basis of a substantive right to life or human dignity. Rather, it appeared to focus on the procedural aspects of the punishment that may lead to, or be an indicator of, violations of human dignity. By taking this procedural approach to the constitutionality of capital punishment, the Court inevitably allowed for states to “correct” their procedures and come into compliance with the requirements of *Furman*.199 Perhaps in anticipation of such a problem in the future, Justices Brennan and Marshall actually argued that the death penalty was contrary to evolving standards of decency and should be found unconstitutional under the Eighth Amendment in all cases.200 Unfortunately, Brennan and Marshall did not carry the day. However, their call for the use of the “evolving standards of decency doctrine” would eventually be heard, and as this Note argues, may yet lead to the final abolition of the American death penalty.

198 *Furman*, 408 U.S. at 310.
199 See Introduction to the Death Penalty, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/part-i-history-death-penalty#const (“the Court essentially opened the door to states to rewrite their death penalty statutes to eliminate the problems cited in *Furman*”).
In response to Furman's call for sentencer guidance, over 30 states passed new capital statutes focused on limiting arbitrary sentencer discretion.\(^{201}\) Just four years later, the Court returned to the constitutionality of the death penalty in \textit{Gregg v. Georgia},\(^{202}\) considering whether the modified state statutes complied with the new doctrine. The Court upheld three of the new statutes limiting the death penalty to cases of aggravated murder, as defined by certain specifically enumerated circumstances.\(^{203}\)

In \textit{Gregg}, the Court directly addressed the concept of human dignity, but found that capital punishment “comports with the basic concept of human dignity at the core of the [Eighth] Amendment;” specifically the justifications of retribution and deterrence. This notion of dignity was quite different than those found in Canada and South Africa, as it was purely victim-focused. Apparently, the Supreme Court treated human dignity as a privilege that could be revoked. After tracking the world's approach to human dignity and capital punishment for its entire history, and even leading the pack at times, the U.S. swerved off course and began cutting its own trail in 1976. The question is whether America will ever find its way back.

With the reinstatement of the death penalty, it became clear that \textit{Furman} and \textit{Gregg} “heralded a new era in which courts would play a much more substantial role in the American capital system.”\(^{204}\) This marked the beginning of a 35 year course of “proliferation of doctrines and sub-doctrines touching all aspects of the capital process—from investigation of crime, the conduct of both prosecutors and defense attorneys, jury selection, jury instructions, and so on.”\(^{205}\) The amount of procedural regulation was only multiplied with the passing of the Anti-Terrorism and Effective Death Penalty Act in 1996, which limited federal courts' ability to engage in \textit{de novo} review of state court decisions.\(^{206}\) The Act all but eliminated the possibility of presenting new evidence in an inmate's federal habeas corpus petition. In fact, the procedural regulations became so complicated that eventually a need arose for “a new cadre

\(^{201}\) \textit{Introduction to the Death Penalty}, supra note 199.
\(^{203}\) Steiker, \textit{The American Death Penalty}, supra note 172, at 339-40.
\(^{204}\) \textit{Id.} at 340.
\(^{205}\) \textit{Id.}
\(^{206}\) \textit{Id.} at 341.
Derek VerHagen

of lawyers specializing in capital litigation.” Capital representation is now almost entirely practiced by qualified professionals, as opposed to generalist attorneys. This continuously expanding mass of procedural regulations has complicated the process in many ways. Naturally, with the existence of so many distinct doctrines, courts find themselves issuing decisions with apparently absurd results. For example, the Eleventh Circuit recently denied relief for Georgia death row inmate Warren Lee Hill, who claimed to have new evidence regarding his intellectual disabilities. Because Hill had already raised a claim of intellectual disability in a prior petition, he was barred from introducing new evidence for support. In a dissenting opinion, Justice Rosemary Barkett stated:

There is no question that Georgia will be executing a mentally retarded man because all seven mental health experts who have ever evaluated Hill, both the state's and Hill's, now unanimously agree that he is mentally retarded. When Hill has proffered uncontroverted evidence of his mental retardation, I cannot agree that we have no choice but to execute him anyway because his claim does not fit neatly into the narrow procedural confines delimited by [the Anti-Terrorism and Effective Death Penalty Act]. The idea that courts are not permitted to acknowledge that a mistake has been made which would bar an execution is quite incredible for a country that not only prides itself on having the quintessential system of justice but attempts to export it to the world as a model of fairness.

While such results have surely influenced public opinion on the death penalty to some degree, it is clear that other disadvantages resulting from procedural regulation have made a bigger impact. Now, in order to comply with all procedural requirements, it is not uncommon for capital litigation for a single case to go on for well over a decade. The drawn-out process of seeking the death penalty for an offender has resulted in significant costs for the state; both financially and philosophically. Statistics

207 Id.
208 Id.
indicate that in many states it is between 1.5 and 5 times more expensive to seek the death penalty than life imprisonment.\textsuperscript{212} For example, a study found that in Kansas it is estimated that death penalty cases cost on average 70\% more than comparable non-death penalty cases, with a median cost of $1.26 million per case.\textsuperscript{213} The study found that a death penalty trial cost about 16 times more than a comparable non-death penalty trial; appeals costs were 21 times higher; and the total costs of carrying out the sentence of death were about twice as high as life imprisonment.\textsuperscript{214} The numbers remain consistent even when one takes into account the living expenses resulting from supporting an inmate who will spend the rest of his life in prison, as opposed to face execution at some point.\textsuperscript{215} This financial burden has been a significant factor in some states' decision to repeal the death penalty in recent years.\textsuperscript{216}

The prolonged process has also diluted the effectiveness of traditional justifications for the death penalty, as laid out in \textit{Gregg}: deterrence and retribution. Many commentators claim that the death penalty cannot serve as a deterrent to homicide when offenders know that they will likely spend a “second lifetime” on death row before facing execution.\textsuperscript{217} The value of retribution is also lost in the process. What retributive value is left in punishment that occurs 20 years after the commission of the crime? This is not to mention the traumatic impact on victims' families from having to relive the tragedy time and time again throughout the appeals process before the offender is eventually executed. These issues, directly resulting from the procedural regulation of the death penalty, have led several

\begin{thebibliography}{9}
\item \textsuperscript{212}See generally \textit{Financial Facts about the Death Penalty}, \textsc{Death Penalty Information Center}, http://www.deathpenaltyinfo.org/costs-death-penalty#financialfacts.
\item \textsuperscript{213}Id.
\item \textsuperscript{214}Id. Note that this includes the costs of housing an inmate on death row for the extended appeals process.
\item \textsuperscript{215}Id.
\item \textsuperscript{216}See \textit{e.g.}, Joe Sutton, \textit{Maryland Governor Signs Death Penalty Repeal}, CNN, May 2, 2013, http://www.cnn.com/2013/05/02/us/maryland-death-penalty (quoting Maryland governor as stating that “Maryland has effectively eliminated a policy that is proven not to work. Evidence shows that the death penalty is not a deterrent, it cannot be administered without racial bias, and it costs three times as much as life in prison without parole.”); David Ariosto, \textit{Connecticut becomes 17th State to Abolish Death Penalty}, CNN, April 25, 2012, http://www.cnn.com/2012/04/25/justice/connecticut-death-penalty-law-repealed (quoting the governor of Connecticut on the “unworkability” of the death penalty due in part to the costs of appeals).
\item \textsuperscript{217}See \textit{e.g.}, Michael L. Radelet & Marian J. Borg, \textit{The Changing Nature of Death Penalty Debates}, 26 \textsc{Ann. Rev. of Soc.} 43, 45 (2000).
\end{thebibliography}
states to abolition the practice in recent years without direct pressure from the Supreme Court or any other form of political elite. Six states in the past six years have abolished the death penalty by way of state legislation, including New Jersey, New York, New Mexico, Illinois, Connecticut, and most recently Maryland.218

A. The Evolving Standards of Decency Doctrine

The current trend of states repealing the death penalty is certainly encouraging to abolitionists. However, the Supreme Court's focus on procedural regulation of the penalty combined with the implications of American federalism seem to imply that total abolition may only come by way of 50 different states individually passing legislation.219 As the Canadian and South African stories have shown, complete abolition may only be possible when rooted in the substantive and unqualified rights to life or human dignity. Fortunately, from the abolitionist perspective, the Supreme Court has slowly, but relatively consistently, recognized a form of the substantive right to human dignity buried in the Eighth Amendment.220 The process by which it has done so is known as the “evolving standards of decency doctrine.” As the Court succinctly explained in Atkins v. Virginia221 in 2002, the doctrine essentially states that (1) the Eighth Amendment prohibits excessive punishments;222 (2) the excessiveness of a given punishment is judged based on the “evolving standards of decency that mark the progress of a maturing society;”223 (3) a review of the society's evolving standards of decency should be informed by objective factors to the maximum possible extent, including the trends of legislation passed by state legislatures;224 and (4) the review of the evolving standards of decency may

219 Steiker American Exceptionalism, supra note 1, at 121.
220 See e.g. Trop v. Dulles, 356 U.S. 86 (1958) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . .”).
221 536 U.S. 304 (2002).
also be informed by the Court's own judgment. The doctrine was first introduced in a non-capital case in 1954, *Trop v. Dulles*, where the Court held that the Eighth Amendment prohibited the punishment of denationalization for the crime of desertion during wartime. The holding was based in the understanding that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” The Court has since applied the doctrine in capital cases to find that it is cruel and unusual *per se* to impose the death penalty for the crime of rape, and to execute non-triggermen, minors, and the mentally retarded. In each case, the Court determined that the trends in state practice regarding the issue at hand, as well as the Court's own opinion, supported a finding that society's sense of decency has evolved to a point that capital punishment should be considered cruel and unusual and a violation of human dignity when applied to these particular categories of offenders. The Court has consistently rejected to date, however, any claim that society has evolved to a point where capital punishment should be considered cruel and unusual *per se* in all cases. That failing argument was championed by Justices Brennan and Marshall in the *Furman* dissent and all those that followed. However, times have changed and state practice appears to be moving in the direction of complete abolition.

**B. The Path to Complete Abolition**

The work that the evolving standards of decency doctrine essentially does is override federalism under certain circumstances where the Court decides to raise the baseline level of human dignity that it believes the nation embodies, or at least should embody. The Court's understanding of the nation's baseline level of human dignity is informed by state practice and its own opinion. This doctrine is essentially a nuanced way to shoehorn in the substantive right to human dignity in an otherwise

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225 See *Coker*, 433 U.S. at 597; *Enmund*, 458 U.S. at 801.
232 Justices Marshall and Brennan dissented from every affirmance of a death sentence and every denial of certiorari or a stay in a death penalty case following the *Gregg* decision. Valena Elizabeth Beety, *The Death Penalty: Ethics and Economics in Mississippi*, 81 Miss. L.J. 1437, 1443 (2012).
Derek VerHagen

procedure-focused approach to constitutionalism. Perhaps the most remarkable facet to the doctrine is that fact that the current trend of abolition in state practice that may eventually lead to the doctrine's outright abolition of the death penalty is largely influenced by the consequences of the tangled web of procedural regulations that the Court has put into place over the last three and a half decades. In a sense, the procedural regulations have shifted costs to the states in exchange for their use of the death penalty. In turn, states have started to abolish the penalty not on grounds of the substantive right to human dignity but on a combination of cold financial reasoning and difficulties in justifying the penalty on its traditional philosophical grounds. Regardless of the states' reasons for abolition, the Court's evolving standards of decency doctrine presumably will be forced to outlaw the death penalty altogether on the basis of the substantive right to human dignity found in the Eighth Amendment. This scheme actually tracks quite closely to Andrew Hammel's European Model of Abolition. In the American case, the Supreme Court is the analog to the European elite. The Court is considered by many to be comprised of some of the States' brightest and most influential personalities. Additionally, the Court is structurally insulated from the influences of public opinion. Taking advantage of these characteristics, the Court appears to have found a way—perhaps by accident or perhaps not—to circumvent or manipulate the limitations of the procedural approach to American constitutionalism and open the door for complete abolition of the death penalty on substantive grounds despite the fact that over 60% of the population still supports its imposition.233

Admittedly, state practice of abolition is still in its nascent stage. Nevertheless, the trend is consistent. There is reason to believe that states will continue to abolish the death penalty in the coming years. For example, California narrowly missed the opportunity for complete abolition in a referendum held in November 2012—the proposition losing by a mere six points.234 Seven other states have not executed an inmate in over a decade and seem to be poised for their own runs at abolition.235


234 California Retains Death Penalty by Narrow Margin, DEATH PENALTY INFORMATION CENTER, Nov. 7, 2012, http://www.deathpenaltyinfo.org/california-retains-death-penalty-narrow-margin (“California's Proposition 34, an initiative to replace the death penalty with a sentence of life without parole, was narrowly defeated by a vote of 53% to 47%”).

235 Jurisdictions with No Recent Executions, DEATH PENALTY INFORMATION CENTER,
Derek VerHagen

glaring problem, however, is the political makeup of the current Supreme Court. Many would argue that the current Court, if anything, leans to the right. Even so, this so-called conservative Court has issued at least some left-leaning landmark cases and may also soon be due for some turnover in light of the aging members. If nothing else, one thing is clear: the evolving standards of decency of this nation, at least according to the Court's standards, look to be moving towards complete abolition. Perhaps it is still early in the evolution process, but abolition will undoubtedly come, and oddly enough it will be based on the America's “evolving standards of decency” despite public opinion to the contrary.

VII. Conclusion

Despite being the last remaining Western democracy to retain the death penalty, it appears that the United States may be moving in the direction of abolition. Clearly, the parliamentary system of government is much better suited to make swift and sweeping changes with regard to controversial issues in law and policy, regardless of public opinion on the matter. The centralization of power and relatively unified legislative and executive branches remove many of the barriers that America faces in attempting to legislate efficiently. That, combined with the Burkean trust that parliamentary citizens typically harbor for their representatives and the tendency of parliamentary constitutions to contain substantive rights to life and human dignity, made the Canadian and South African paths from innocuous regulation to abolition more linear than that of the one taken by the United States. Ultimately, the Canadian and South African stories make clear that in order to accomplish complete abolition of the death penalty, the movement must come by way of a counter-majoritarian effort to secure a substantive right to life or human dignity.

To the untrained eye, it may appear that the United States is far from complete abolition, especially considering that 63% of the population still supports retention. However, as this Note makes clear, the end of the American death penalty is near, regardless of whether the general population is prepared to accept it. Granted, the American path has not lined up perfectly with Andrew Hammel's


European Model of Abolition but there are certainly similarities. Neither does the United States directly track this Note's proposed common timeline to abolition. America's departure from the rest of the civilized world in 1976 marked the beginning of a long and confusing story of procedural regulation that at times left both abolitionists and retentionists scratching their heads. Nevertheless, based on the development of the “evolving standards of decency doctrine” it looks as though post-1976 America has merely taken a detour. The increased financial cost of the death penalty resulting from the procedural regulations along with the fading of the traditional justifications caused by the prolonged appeals process has caused even the staunchest of retentionists to consider abolition. Meanwhile, as states continue to abolish the death penalty by way of state legislation on the basis of cold financial calculations, the evolving standards of decency doctrine is empowered by every repeal and creeps closer and closer to the day when it will finally stand up and say to the American people, “You're more decent than you ever knew.”