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Notes and Comments

MATURE ADJUDICATION: INTERPRETIVE CHOICE IN RECENT DEATH PENALTY CASES

Bernard E. Harcourt*

INTRODUCTION

Capital punishment presents a "hard" case for adjudication.[1] It provokes sharp conflict between competing constitutional interpretations and invariably raises questions of judicial bias. This is particularly true in the new Republic of South Africa, where the framers of the interim constitution deliberately were silent regarding the legality of the death penalty.[2] The tension is of equivalent force in the United States, where recent expressions of core constitutional rights have raised potentially irreconcilable conflicts in the application of capital punishment.

Two recent death penalty decisions—the South African Constitutional Court opinions in *State v. Makwanyane* and the United States

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1. Hard cases are those that provoke sharp conflict between interpretive choices, strain constitutional interpretation and produce heated moral debate in the public sphere. Hard cases include, for instance, Roe v. Wade, 410 U.S. 113 (1973), *see* Ronald M. Dworkin, *Hard Cases*, *in* TAKING RIGHTS SERIOUSLY 81, 125 (1977); Bowers v. Hardwick, 478 U.S. 186 (1986), *see* Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); *and* the Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1872), *see* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 95 (1991).

2. *See* Judgment of June 6, 1995 (State v. Makwanyane and Another), Constitutional Court No. CCT/3/94, at 408B–09A; *infra* note 10 and accompanying text. As this Comment goes to press, the South African Constitutional Assembly is debating final terms of the new constitution which may clarify the issue. Two alternatives of the right to life provision have been proposed. The first provides that "[e]veryone has the right to life [and the death penalty is hereby abolished]." The second provides that "Everyone has the right to life, and the right not to be deprived of life except by execution of a court sentence following conviction for a crime for which the death penalty is prescribed by an Act of Parliament." S. AFR. CONST. ch. 2, § 10 (Working Draft of Nov. 22, 1995). This clearly "could mean the reintroduction of capital punishment." *First Draft of New South African Constitution Unveiled*, Agence France Presse, Nov. 22, 1995, *available in* LEXIS, AFP File.

Supreme Court opinions in *Callins v. Collins*[3]—reflect the critical role of interpretive choice in capital adjudication. They demonstrate that the ultimate legal decision regarding capital punishment invariably is resolved by a normative choice among competing values, and that the competing normative choices equally support liberal constitutional aspirations.

A comparison of these two decisions offers, through the lens of the South African court, a visionary model of judicial decisionmaking—a model of "mature adjudication."[4] It is mature because it incorporates liberal aspirations within the larger context of an open and transparent discussion about values. It is also mature in its attentiveness to, and respect for, the experiences and opinions of judicial colleagues in the international community.

This Comment explores the contributions of the *Makwanyane* and *Callins* decisions to our evolving concept of adjudication. Part I explores the interpretive choices made by the two courts. Part II discusses the particular vision of "mature adjudication" offered by the South African court, and Part III comments upon the South African court's use of comparative law.

I. INTERPRETIVE CHOICE IN CAPITAL ADJUDICATION

A. The Makwanyane *Opinions*

In *State v. Makwanyane*, a remarkable set of nine separate opinions issued June 6, 1995, the South African Constitutional Court abolished capital punishment for general crimes.[5] Constitutional Court President Chaskalson ruled that the death penalty violates the prohibition on "cruel, inhuman or degrading treatment or punishment" set forth in section 11(2) of the interim constitution—as informed by the rights to life and dignity contained in sections 9 and 10—and that no clear and convincing case had yet been made to justify a limitation of these rights.[6] Chaskalson concluded that "[these] rights are the most important of all human rights, and the source of all other personal rights in [the interim constitution] . . . . [T]his must be demonstrated by the State in everything that it does, including the way it punishes criminals."[7]

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3. Callins v. Collins, 114 S. Ct. 1127 (1994).

4. "Mature" does not signify abolitionist—it relates to the type of jurisprudence, not content (political or moral views). Mature, in this sense, has its roots in concepts of moral development and how we, as individuals, deal with the tension between rules and indeterminacy. *See infra* part II.

5. The court explicitly reserved judgment on the propriety of capital punishment for treason. *See Makwanyane*, No. CCT/3/95, at 452F (Chaskalson).

6. *Id.* at 451G–52A.

7. *Id.* at 451C–D.

The court's judgment reflects an extremely difficult interpretive choice, for *Makwanyane* presents the truly hard case where constitution framers explicitly and deliberately avoided resolution of the constitutionality of the challenged practice. As Chaskalson explains, the framers "neither sanctioned nor excluded" the death penalty, but, instead, agreed on a "Solomonic solution"[8] whereby the Constitutional Court would decide whether the death penalty was consistent with the interim constitution.[9]

Accordingly, the traditional grounds of decision are not present in *Makwanyane*. There can be no recourse to the intent of the framers and, as a result, the actual language of the constitution offers little guidance. Although the constitutional text refers to an unqualified right to life, it also contains a separate "limitations clause."[10] There is no domestic precedent on point to help adjudicate the issue, and few prior decisions from which to extrapolate legal principles.[11] Moreover, public sentiment appeared to favor the death penalty; at least, Chaskalson was "prepared to assume that it does."[12]

A forceful argument was made that, because the interim constitution was silent, the court should leave the decision to elected representatives.[13] The court responded, however, that "[i]t is for the Court, and not society or Parliament, to decide whether the death sentence is justifiable under the provisions of section 33 of our Constitution."[14] South Africa had adopted a system of judicial review, and with it, a new role for its Constitutional Court.

Remarkably, the new responsibility that this young court has assumed is to engender *a culture of rights*. As Chaskalson explains, "In the long run more lives may be saved through the *inculcation of a rights culture*, than through the execution of murderers."[15] Justice Langa

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8. *Id.* at 408B, 409A.

9. It would be blinking reality to suggest, however, that the "Solomonic solution" was entirely neutral. Under the agreement, the constitutional assembly abdicated to a court whose members were going to be appointed by the next president of the republic—which most people knew would be Nelson Mandela.

10. S. AFR. CONST. ch. 3, § 33 (Interim Constitution). The "limitations clause" provides that rights, including the right to life, may be limited where "a clear and convincing case" justifies restriction. *Makwanyane* at 440A–B.

11. The only prior decision (post-interim constitution) that the court references is the Judgment of April 5, 1995 (State v. Zuma and Two Others) Constitutional Court, No. CCT/5/94 (addressing the right to counsel). *See Makwanyane*, No. CCT/3/94 at 403C–D n.6; *id.* at 415H n.53; *id.* at 435C–D.

12. *Makwanyane*, No. CCT/3/94 at 430I–31B.

13. This position was stated in briefs and argument. *See id.* at 404C–E. Throughout the court's judgment and the concurring opinions, the justices address this argument. *See, e.g.*, *id.* at 408A–C, 437F, 438B (Chaskalson); *id.* at 467J–68G (Didcott, J., concurring); *id.* at 469D–F, 474B (Kentridge, J., concurring); *id.* at 486H–87A (Madala, J. concurring); *id.* at 489B–F (Mahomed, J., concurring); *id.* at 511E–G (Sachs, J., concurring).

14. *Id.* at 441E–G (Chaskalson).

15. *Id.* at 444F (Chaskalson) (emphasis added).

develops this goal further in equally striking terms: "[a] culture of respect for human life and dignity, based on the values reflected in the Constitution, has to be *engendered*, and the *State must take the lead*."[16]

The values that the court attempts to inculcate are based on international human rights norms and liberal aspirations as well as African cultural traditions. The structure of rights is built upon the right to life and dignity found in the Universal Declaration of Human Rights.[17] In this sense, the *Makwanyane* opinion, as well as the interim constitution, are shaped by the human rights movement. Yet, the structure of rights reflects a liberal aspiration to foundational rights, the rule of law, and neutrality. The opinions make clear that South Africa is "a constitutional State in which the rights of individuals are guaranteed by the Constitution."[18]

The structure of rights also embraces a return to traditional South African values. In particular, at the heart of the *Makwanyane* opinions is the value of *ubuntu*, a concept given legal recognition in the concluding provision on National Unity and Reconciliation, which forms part of the interim constitution.[19]

Ubuntu places emphasis "on communality and on the interdependence of the members of a community,"[20] all of whom are "entitled to unconditional respect, dignity, value and acceptance."[21] "[*Ubuntu*] regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all."[22] *Ubuntu* is a basic respect for life and dignity, and is foundational to the structure of rights in the interim constitution.[23]

The *Makwanyane* court is self-consciously engendering a liberal culture of rights, which is both founded upon human rights and informed by indigenous values. In forming such a culture, the court openly discusses "the underlying values of the Constitution."[24] These *are* in-

16. *Id.* at 472B (Langa, J., concurring) (emphasis added).

17. *Universal Declaration of Human Rights, adopted* Dec. 10, 1948, G.A. Res. 217A (III), 3 U.N. Doc A/810 (1948), art. 3, ("[e]veryone has the right to life"), art. 5, ("[n]o one shall be subjected to . . . torture or to cruel, inhuman or degrading treatment or punishment.").

18. *Makwanyane*, No. CCT/3/94 at 480A (Langa, J., concurring); *see also id.* at 454C (Ackermann, J., concurring).

19. *See Makwanyane*, No. CCT/3/94 at 446C–F (Chaskalson); *id.* at 480G–81A (Langa, J., concurring); *id.* at 483I–84A (Madala, J., concurring); *id.* 488G–I (Mahomed, J., concurring); *id.* at 500H–01G (Mokgoro, J., concurring); *id.* at 516F–G (Sachs, J., concurring). *Ubuntu* is a term shared in a number of African languages. It means "humanity" in Xhosa, *see* ENGLISH-XHOSA DICTIONARY 284 (1985), and "human nature" in Zulu, *see* ENGLISH-ZULU, ZULU-ENGLISH DICTIONARY (first combined ed., 1990).

20. *Makwanyane*, No. CCT/3/94 at 481A (Langa, J., concurring).

21. *Id.* at 481B (Langa, J., concurring).

22. *Id.* at 481C (Langa, J., concurring).

23. *Id.* at 484A (Madala, J., concurring); *id.* at 501C (Mokgoro, J., concurring).

24. *Id.* at 403D; *see also id.* at 423B ("the values of our Constitution and the new order established by it").

terpretive choices. After all, the court explicitly recognizes that "[c]apital punishment is not prohibited by public international law."[25] Thus, the court is generating a rights structure that not only departs from the American model of due process but also from international human rights models.

And the court's choice is remarkable, first, because of its content. In his preface to Frantz Fanon's *Les Damnes de la Terre*, Jean-Paul Sartre writes that "the marks of violence, no tenderness will erase them: it is violence that alone can destroy them."[26] With a stroke of the pen,[27] however, the South African court displaces the need for violent praxis and replaces it with *ubuntu*. The court proclaims that the country's long history of violence does not trigger a need for more violence, but instead a call for *ubuntu*.[28]

The court's choice is also remarkable in its self-confidence, particularly in such a young democracy where fundamental political decisions are still being made. The court places itself at the very center of value-formation. The court and the State become the "role model" for the country:

> Implicit in the provisions and tone of the Constitution are values of a more mature society, which relies on moral persuasion rather than force; on example rather than coercion. In this new context, then, the role of the State becomes clear. For good or for worse, the State is a role model for our society. A culture of respect for human life and dignity, based on the values reflected in the Constitution, has to be engendered, and the State must take the lead . . . . [The State] demonstrates in the best way possible, by example, society's own regard for human life and dignity by refusing to destroy that of the criminal.[29]

The court resolves its interpretive dilemma by means of a normative and transparent discussion about values that, ultimately, promotes liberal aspirations. The decision is not arbitrary or unrestricted, but constrained by a culture, by liberal aspirations, and, most importantly, by a historical moment. The *Makwanyane* court is at *the* pivotal mo-

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25. *Id.* at 414C; *see also id.* at 434E, 414H. The death penalty is condoned in the International Covenant on Civil and Political Rights, Art. 6, 6 I.L.M. 368 (1967).

26. Jean-Paul Sartre, *Preface* to LES DAMNES DE LA TERRE 20 (1961) (translated by author).

27. A great challenge in South Africa is how the country will deal with the increasing levels of violence. Indeed, the stroke of the pen may not stand up against the rising tide of public sentiment. *See* Suzanne Daley, *Blacks in South Africa Turn to Vigilantes as Crime Soars*, N.Y. TIMES, Nov. 27, 1995, at A1.

28. *Makwanyane*, No. CCT/3/94 at 481G–82A (Langa, J., concurring).

29. *Id.* at 480C–E (Langa, J., concurring); *see also id.* at 444D–F (Chaskalson).

ment in its history—it is choosing a constitutional culture for the nation. This is "the constitutional moment" when, by analogy to the American experience, "We The People establish our own sovereignty by legislating to ourselves a supreme law."[30]

B. The Callins *Opinions*

In his dissenting opinion in *Callins v. Collins*, issued February 22, 1994, former Justice Harry A. Blackmun declares: "From this day forward, I no longer shall tinker with the machinery of death."[31] Blackmun argues that the Supreme Court's efforts to reconcile conflicting constitutional commands in the imposition of capital punishment have failed. Blackmun concludes that "the proper course when faced with irreconcilable constitutional commands is not to ignore one or the other, nor to pretend that the dilemma does not exist, but to admit the futility of the effort to harmonize them."[32]

In contrast to *Makwanyane*, *Callins* was not decided at the birth of a nation, nor does it represent a great turning point in constitutional history. Yet it, too, reflects the inescapably normative content of capital adjudication. The *Callins* opinions present a genuine dilemma of interpretive choice, principally—and ironically—because Justice Antonin Scalia agrees with Blackmun that the constitutional commands confronting courts in death penalty cases are ultimately irreconcilable.[33]

As Blackmun indicates, the incompatible constitutional commands of the right to consistency and the right to individuality each have their roots in liberal political theory and in the language and ideology of the American constitutional tradition.[34] Blackmun describes the right to consistency as "the constitutional goal of eliminating arbitrariness and discrimination from the administration of death"[35]—a fundamental tenet of due process. On the other hand, the right to individualized sentencing in death penalty cases speaks directly to the goal of individual freedom—"an equally essential component of fundamental fairness."[36]

Blackmun argues—and Scalia agrees—that these two fundamental rights are irreconcilably in conflict. "Experience has shown that the consistency and rationality promised in *Furman* are inversely related to

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30. Michelman, *supra* note 1, at 1509; *see also* 1 ACKERMAN, *supra* note 1, at 171–72.
31. *Callins*, 114 S. Ct. at 1130 (Blackmun, J., dissenting).
32. *Id.* at 1137.
33. *Callins*, 114 S. Ct. at 1128 (Scalia, J., concurring).
34. *Callins*, 114 S. Ct. at 1128 (Blackmun, J., dissenting); *see also* Carol Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 366–70 (1995).
35. *Callins*, 114 S. Ct. at 1129 (Blackmun, J., dissenting).
36. *Id.*

the fairness owed the individual when considering a sentence of death. *A step toward consistency is a step away from fairness.*"[37] According to Blackmun, a reconciliation of the two ideals is impossible. "[T]he consistency promised in *Furman* and the fairness to the individual demanded in *Lockett* are not only inversely related, but *irreconcilable* in the context of capital punishment."[38]

Blackmun would resolve the conflict by, at least temporarily, prohibiting capital punishment. His resolution is interesting—and paradoxical. As discussed earlier, both rights derive from liberal political theory, yet the concept of an irreconcilable conflict is a classic illustration of critical jurisprudence or, more particularly, of the conflict thesis.[39] At the same time, however, Blackmun's resolution ultimately accords with the mainstream jurisprudential argument for the rule of law—the argument that ours is a government of laws and not of men. Blackmun does not impose a value from outside the American constitutional culture to fill in the void created by the conflict. He does not argue that changing norms of an evolving society resolve the conflict by prohibiting the imposition of cruel and unusual punishment. Instead, Blackmun stays entirely within the liberal framework of rights and the constitutional culture of the Bill of Rights.

Scalia emphasizes that "Justice Blackmun joins those of us who have acknowledged the incompatibility of the Court's [right to consistency] and [right to individuality] lines of jurisprudence."[40] For Scalia, however, the answer is not to prohibit capital punishment until a reconciliation can be reached, but rather to overrule prior decisions articulating the right to individualized sentencing in death penalty cases.[41]

And it is here that the judges are faced with an inescapable normative choice between two positions that are both consistent with, and supportive of, liberal political theory. Both resolutions represent an

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37. *Id.* at 1132 (emphasis added). In Furman v. Georgia, 408 U.S. 238 (1972) (per curiam), the United States Supreme Court declared the death penalty as then administered unconstitutional because of the lack of constraints on the discretion of sentencing juries.

38. *Callins*, 114 S. Ct. at 1136 (Blackmun, J., dissenting). In Lockett v. Ohio, 438 U.S. 586 (1978), the Supreme Court held that the sentencing authority in a death penalty case could not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense.

39. *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (discussing the conflict between individualism and altruism in private law adjudication); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW—1780–1860, at 197 (1977) (discussing the conflict between the will theory of contract law and the later objective theory in private law adjudication); Karl E. Klare, *The Law-School Curriculum in the 1980s: What's Left?*, 32 J. LEGAL EDUC. 336, 340 (1982) ("Legal reasoning is a texture of openness, indeterminacy, and contradiction.").

40. *Callins*, 114 S. Ct. at 1128 (Scalia, J., concurring).

41. *Id.* ("Surely a different conclusion commends itself—to wit, that at least one of these judicially announced irreconcilable commands which cause the Constitution to prohibit what its text explicitly permits must be wrong.").

interpretive choice between four distinct sets of values, each of which are foundational to liberal democracy. These four values are: first, and not in order of importance, the value of consistency captured in the ideal that the death penalty should be meted out on objective standards rather than by whim or caprice; second, the value of individualized death penalty sentencing that is reflected in the aspiration that we only punish individuals capitally in relation to their own culpability and moral responsibility; third, the value of stability associated with a written constitution, which we might call the value of textualism; and fourth, the value of stability associated with *stare decisis*.

Scalia's position is that the first two sets of rights are merely "judicially announced," were "invented without benefit of any textual or historical support,"[42] and therefore must take second seat to the third principle. For Scalia, this is not a matter of interpretive choice, but rather a neutral rule of constitutional interpretation. Capital punishment is explicitly recognized in the Constitution, and therefore, Scalia argues, capital punishment and textualism take priority. Blackmun, however, does not write capital punishment out of the Constitution. He recognizes that the death penalty *per se* does not violate the Constitution. It is the death penalty "as currently administered" that invades core values of the Constitution.[43] He acknowledges that "[p]erhaps one day this Court will develop procedural rules or verbal formulas that actually will provide consistency, fairness, and reliability in a capital-sentencing scheme."[44] Blackmun's argument, then, is that the values of consistency and individualized sentencing are at the core of American constitutionalism and, so long as they cannot be reconciled, preclude the execution of the death penalty.

Ultimately, this disagreement between Blackmun and Scalia brings us to the locus of interpretive choice and value-formation. Whether we view the choice as being between these competing values, or between rules of constitutional interpretation, the resolution still calls for a normative choice between liberal aspirations. Choosing the right to individualized sentencing over the value of textualism—or the reverse—is not barred by liberal discourse. It is, instead, a different calibration of liberal values. One answer may be more "wrong,"[45] but only in relation to a normative choice between competing liberal premises and aspirations. Thus, what is so significant and revealing about *Callins* is that both Blackmun's and Scalia's resolutions of the

42. *Id.*
43. *Id.* at 1138 (Blackmun, J., dissenting).
44. *Id.*
45. *Callins*, 114 S. Ct. at 1128 (Scalia, J., concurring).

interpretive dilemma reflect and promote liberal aspirations to foundational rights and the rule of law.

II. THE VISION OF MATURE ADJUDICATION

While the *Callins* and *Makwanyane* opinions expose the inevitable dilemma of interpretive choice in capital adjudication, they offer two very different resolutions. The *Makwanyane* opinions offer a vision of transparent adjudication that articulates the values that underlie the interpretive choice, making them available for criticism. The *Makwanyane* opinions are mature because they recognize and embrace, instead of fear, the normative content of adjudication. It is an approach that "gives expression to the underlying values of the Constitution,"[46] while at the same time controlling subjectivity through the medium of transparency and open dialogue about the values in the constitutional history and culture. As Justice Mokgoro explains in her concurring opinion:

> By articulating rather than suppressing values which underlie our decisions, we are not being subjective. On the contrary, we set out in a transparent and objective way the foundations of our interpretive choice and make them available for criticism.[47]

The fear of interpretive choice can lead to an artificial formalism that can be as tyrannical as rampant subjectivity. The solution is not to hide behind an artificial neutrality, but rather to genuinely expose the values that underlie the interpretive choice and to place those values within the framework of an open debate about constitutional, historical and cultural constraints. This framework of limitations ensures that "the methods to be used are essentially legal, not moral or philosophical."[48]

In an abstract sense, the concept of mature adjudication owes much to contemporary theories of jurisprudence, especially those of Ronald Dworkin and Frank Michelman. Although the justices of the South African Constitutional Court make reference to Dworkin's thought,[49]

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46. *Makwanyane*, No. CCT/3/94 at 403D (Chaskalson); *see also* Judgment of April 5, 1995 (State v. Zuma and Two Others), Constitutional Court, No. CCT/5/94, (S. Afr.).

47. *Makwanyane*, No. CCT/3/94 at 499D (Mokgoro, J., concurring).

48. *Id.* at 476B (Kriegler, J., concurring). The framework of discussion and debate may provide sufficient constraint and may eliminate the need for judges to hold inaccurate beliefs, in contrast to what Scott Altman argues in Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 396 (1990).

49. *See, e.g.*, *Makwanyane*, No. CCT/3/94 at 457F–58A (Ackermann, J., concurring) ("I have no doubt that even on a court composed of members of the *genus* Hercules and Athena there would in many cases be differences of opinion, incapable of rational elucidation, on whether to impose the death penalty in a particular case, where its imposition was . . . dependent on the

it would be presumptuous to impute more than an abstract, conceptual lineage to the following analysis.

The central project of liberal political theory has been to sever the Aristotelian equation of law, politics and morality. From its earliest expressions to its most contemporary versions, the goal of liberalism has been to allow individuals to pursue their own conception of the good, rather than those imposed by government, society, or other individuals.[50] The traditional way to separate law from morality has been to discern a structure of rights that precedes the determination of the good life, and to embody those rights in a structure of liberal political institutions.

The role of neutrality within the liberal project translates, in mainstream jurisprudence, into the maxim that judges should decide cases without imposing their own values.[51] This is the notion that "[j]udges should apply the law that other institutions have made; they should not make new law,"[52] in order that we will be "governed by laws and not men."[53] The Legal Realists mounted a forceful challenge to this argument in the 1920s and 1930s,[54] but it nevertheless survives until today at the heart of jurisprudential debate.

Ronald Dworkin offers a vision of adjudication that, while consonant with the neutrality argument,[55] recognizes the role of moral judgment in adjudication. Dworkin proposes that judges resolve cases on the basis of principles that provide consistency and fairness to the parties

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application of widely formulated criteria and the exercise of difficult value judgments."); *id.* at 507E (O'Regan, J., concurring).

50. Thomas Hobbes wrote, referring to Aristotle, that "there is no such *Finis ultimus* (utmost ayme) nor *Summum Bonum* (greatest Good) as is spoken of in the Books of the old Moral Philosophers." THOMAS HOBBES, LEVIATHAN 160 (C.B. Macpherson, ed., 1985) (1914); *see also id.* at 225. As recently as 1971, John Rawls wrote, at least implicitly referring to Aristotle, that "[w]e should therefore reverse the relation between the right and the good proposed by teleological doctrines and view the right as prior." JOHN RAWLS, A THEORY OF JUSTICE 560 (1971).

51. I call this mainstream jurisprudence because, "[i]n their confirmation hearings, most candidates for judicial office still profess fidelity to the classical vision of adjudication," which holds, as a central tenet, that ours is a government of laws, not of men. WILLIAM W. FISHER III ET AL., AMERICAN LEGAL REALISM at xv (1993); *see also* RONALD M. DWORKIN, LAW'S EMPIRE 7–8 (1986) (discussing the popular view that judges should follow the law, rather than improve it).

52. Ronald M. Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1058 (1975).

53. Michelman, *supra* note 1, at 1500.

54. *See, e.g.*, Hessel E. Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468, 479 (1928) ("The ideal of a government of laws and not of men is a dream."). As Edward Purcell has observed of the Legal Realists, "[t]he most important practical point of their argument was questioning and in many cases rejecting the idea of a government of laws rather than of men." EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY 88 (1973).

55. Ronald Dworkin in fact anchors his "rights thesis"—the theory that rational resolution of legal disputes is, can and should be generated by a unified structure of legal principles—in "[t]he familiar story[ ] that adjudication must be subordinated to legislation." Dworkin, *supra* note 52, at 1061.

and that make sense of precedent, tradition, and text—all the while recognizing that this task involves a normative judgment rather than a purely literalist, originalist or objective application of legal principles. "Community morality," Dworkin argues, "is the political morality presupposed by the laws and institutions of the community. [The Herculean judge] must, of course, rely on his own judgment as to what the principles of that morality are, but this form of reliance . . . at some level is inevitable."[56]

Frank Michelman seeks to enrich the neutrality argument by recognizing and valuing[57] republican jurisgenerative politics in adjudication. "Jurisgenerative politics" refers to the process of ongoing moral discussion, evaluation, and revision among citizens that results in legal resolution that is not experienced as coercive.[58] The actual process is one "in which private-regarding 'men' become public-regarding citizens and thus members of a people. It would be by virtue of that people-making quality that the process would confer upon its law-like issue the character of law binding upon all as self-given."[59] What makes the process jurisgenerative is that through it, the law is received by its subjects as theirs—they can regard themselves as "actually agreeing that those utterances, issuing from that process, warrant being promulgated as law."[60] This process is, according to Michelman, experienced most often by citizens outside the formal channels of law.

The South African court offers a vision of adjudication that, like Dworkin's theory, acknowledges the moral dimension of the law—the "community morality" presupposed by the laws and institutions. Like Michelman's jurisgenerative politics, it emphasizes dialogue, self-revision and normativity, as well as the aspiration that laws be received as self-given and not experienced as coercive. The South African court also shares Michelman's ideals of refounding, renewing and renovation. It is in this sense that the process is one of maturation.

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56. *Id.* at 1105. In this sense, Dworkin rejects the extreme form of the neutrality argument, and ultimately concludes that the judge must not defer to the elected representatives or to public opinion. *See id.* at 1109 ("[Some] argue that since judges are fallible they should submit questions of institutional right raised by hard cases to someone else. But to whom? There is no reason to credit any other particular group with better facilities of moral argument; or, if there is, then it is the process of selecting judges, not the techniques of judging that they are asked to use, that must be changed.").

57. This is the sense in which republicanism, in Michelman's words, "is not optional with us." Michelman, *supra* note 1, at 1503.

58. *Id.* at 1502, 1506, 1526–27.

59. *Id.* at 1502.

60. *Id.* at 1526.

III. COMPARATIVE LEGAL ANALYSIS: PEER-DEFINITION AND SELF-DEFINITION

It is paradoxical that such a young court could offer such a mature vision of adjudication. The South African court reconciles this paradox by means of comparative law. Analyses of foreign decisions constitute the most significant portion of the *Makwanyane* opinions. Through these analyses, the South African court appropriates for itself a place among the world leaders. Whether the court is discussing the role of framers' intent,[61] concluding that the death penalty is cruel and inhuman,[62] or interpreting the "limitations clause" of the interim constitution,[63] the South African court is in constant dialogue with the leading judicial institutions of the United States, the United Nations, Germany, the European Union, Canada, India and elsewhere.[64]

At the same time, the court distinguishes itself from its self-selected peers.[65] This is demonstrated well by Chaskalson's treatment of American law. By constant and repeated references to American death penalty jurisprudence, Chaskalson communicates that the court's most important peers are the courts of the United States. In the highly self-reflective manner called for in recent comparative scholarship,[66] and in a

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61. On this issue, Chaskalson seeks the company of the United States, Germany, Canada, India, the European Community, and the United Nations. *See Makwanyane*, No. CCT/3/94 at 405G–06D.

62. On this issue, Chaskalson surrounds himself with ideas of the United Nations Committee on Human Rights, the Hungarian Constitutional Court, "three judges of the Canadian Supreme Court," and the state supreme courts of Massachusetts and California. *Makwanyane*, No. CCT/3/94 at 432D–E.

63. On this issue, Chaskalson places himself next to the United States Supreme Court, the Canadian Supreme Court, the German Constitutional Court, and the European Court of Human Rights. *Makwanyane*, No. CCT/3/94 at 435D–G, 436G–37D, 438B–F, 438F–39E.

64. President Chaskalson's opinion alone discusses rulings of the United States Supreme Court, *see, e.g., id.* at 405G–06D, 410G–I n.35, 415F–17B, 420E–F, 421E–22D, 434F; the Massachusetts Supreme Judicial Court, *see, e.g., id.* at 432D–E, 432F–G; the California Supreme Court, *see, e.g., id.* at 432E–F, 434F–G, 445E; the Hungarian Constitutional Court, *see, e.g., id.* at 429H–30F; the German Constitutional Court, *see, e.g., id.* at 406A, 423B–C, 438B–F, 446G, 448A; the Privy Council, *see, e.g., id.* at 420I n.3; the Canadian Supreme Court, *see, e.g., id.* at 406A–B, 423D–24A–E, 436G–38B; the Tanzanian Court of Appeals, *see, e.g., id.* at 440H–41F; the Supreme Court of India, *see, e.g., id.* at 406B–C, 426G–29C; the Supreme Court of Zimbabwe, *see, e.g., id.* at 402H–I n.3, 452I n.170; the European Court of Human Rights, *see, e.g., id.* at 406D, 425F–26A, 429D, 438F–39E; and the United Nations Committee on Human Rights, *see, e.g., id.* at 406D, 424E–25F, 429E–G. This is precisely what was envisioned by the interim constitution, which specifically provides that "[i]n interpreting the provisions of [the Bill of Rights] a court of law shall . . . have regard to public international law . . . and may have regard to comparable foreign case law." S. AFR. CONST. § 35(1) (Interim Constitution); *see Makwanyane*, No. CCT/3/94 at 423E–F.

65. Regarding the "limitations clause," for instance, Chaskalson sees "no reason . . . to attempt to fit our analysis . . . into the pattern followed by any of the other courts to which reference has been made." *Makwanyane*, No. CCT/3/94 at 439G.

66. *See* Gunter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411, 443 (1985) ("Instead of pretending to the posture of a neutral, objective, and disinter-

manner that contrasts with more formal and instrumental aspects of his comparative analysis,[67] Chaskalson nevertheless rejects the American approach.[68]

Yet, while rejecting the U.S. approach early in his opinion, Chaskalson continues the dialogue with the United States, conveying respect, equality, and, most importantly, individuality. It is in this sense that the court uses comparative law to define its own peer group while simultaneously creating its individual identity in the international community.

CONCLUSION

It may be surprising to turn to human rights cases for guidance in adjudication. Human rights texts often appear naively positivist, idealist and unreconstructed. Moreover, although the *Makwanyane* and *Callins* opinions share a liberal aspiration to foundational rights, they are in so many ways radically irreconcilable. The *Callins* opinions are the product, historically and culturally, of an eighteenth century Bill of Rights; the *Makwanyane* opinions are the product of a late-twentieth century human rights text. *Callins* reflects, in part, critical jurisprudence; the *Makwanyane* opinion remains strongly idealist. Blackmun's opinion in *Callins* is a pessimistic and critical confessional, weaving a tale of exasperation at the end of decades of death penalty jurisprudence. Chaskalson's opinion in *Makwanyane* is a more optimistic, idealistic expression at the dawn of a democracy.

Yet it is these dissonances that expose the vision of mature adjudication that is so promising for the twenty-first century. By means of transparency, the South African court is able to articulate forcefully the foundational changes that have taken place in South Africa. At the same time, transparency itself is a value-creating process. It is a process that encourages debate and dialogue among all members of society and has transformative potential for societal values. It is true that transparency may not resolve the charge of false consciousness; and critics of mature decisions may still believe that the judges are engaged in

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ested observer, the comparatist has to regard herself as being involved: involved in an ongoing, particular social practice constituted and pervaded by law; involved in a given tradition (a peculiar story of law); and involved in a specific mode of thinking and talking about law. It becomes clearer then that any vision of the foreign laws is derived from and shaped by domestic assumptions and bias.")

67. The court's comparative analysis is, in certain parts, excessively formal or doctrinal. Despite the fact (recognized by the court) that the South African constitutional text does not resolve the death penalty issue because the framers deliberately delegated the question to the Constitutional Court, Chaskalson repeatedly distinguishes foreign and international law because of *textual* differences. This seems overly rigid given the textual indeterminacy of the interim constitution. *See Makwanyane*, No. CCT/3/94 at 415C–E, 414C–E, 441D–F.

68. *Id.* at 422D (Chaskalson).

conscious or unconscious manipulation, deception or bad faith. However, this critique always remains available, and indeed may constitute an essential step in the process of maturation.