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An integrated approach to judicial decision making: the death penalty in South Africa

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AN INTEGRATED APPROACH TO JUDICIAL DECISION MAKING: THE DEATH PENALTY IN SOUTH AFRICA

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ABSTRACT

Existing judicial research has firmly established the role of the law and the courts in the political system of the United States. Yet very little systematic empirical research has been conducted to fully explore the extent to which theories of judicial behavior based upon the American judicial system are applicable to other legal systems. As a result, these theories lack generalizability and, moreover, have failed to determine if the U.S. judiciary is comparable to other court systems or simply an anomaly within a broader comparative framework.

Given this void within the existing literature, this study extends several theories of judicial behavior developed in the American context to South Africa's highest court, the Appellate Division, throughout the time period 1950-1990—roughly the rise and fall of apartheid. Specifically, it employs an integrated approach derived from both the legal and extralegal approaches of judicial decision making to a particularly salient issue area, the death penalty, and discovers that ideology and race—rather than legal factors—are perhaps the strongest predictors of death penalty decisions. The implications of these findings are that judicial decision making is much more complex than what the legal model suggests and, concomitantly, that theories of judicial behavior extrapolated from the American context are capable of similarly determining the degree to which politics plays a role within the legal system of South Africa.

INTRODUCTION

Contemporary research in judicial politics has provided great insight into the functioning of courts in the United States. Scholars have seemingly unveiled several of the underlying processes that significantly affect judicial decision making, substantially contributing to our knowledge of judicial behavior in the framework of such areas as agenda setting (Perry 1991), strategic behavior (Murphy 1964; Maltzman and Wahlbeck 1996; Epstein and Knight 1998), ideological or preference voting (Schubert 1962; Segal and Spaeth 1993, 2002) and the like. Yet these findings have been myopic in scope, focusing primarily upon the U.S. courts and consequently neglecting courts within a larger comparative context.

While studies on the American courts have been abundant, systematic empirical research on courts outside of the U.S. has been sparse, as few works have attempted to determine the role of law and the courts in other political systems.[1] With the global expansion of the "judicialization of politics" (Tate and Vallinder 1995),[2] however, scholars have steadily become more responsive to the need of the public law sub-field to obtain a more thorough understanding of legal systems via comparative research. As a result, judicial scholars have expanded their research into several countries including examinations of the court systems of Spain (Toharia 1975; Giles and Lancaster 1989), the Philippines (Haynie 1994, 1995), India (Epp 1998) Argentina (Helmke 2002) and South Africa (Haynie 2003), among others.

[1] For a similar criticism, see Gibson, Caldeira and Baird (1998).

[2] Tate and Vallinder (1995, 14) refer to the global expansion of judicial power, or the "judicialization of politics" as "the infusion of judicial decision-making and of courtlike procedures into political arenas where they did not previously reside."

Comparative judicial research is also necessary to establish the generalizability of the judicial behavior theories posited by scholars of the American courts. Is the U.S. legal system, on the whole, an anomaly? Or, conversely, is it similar to other judicial systems? These are questions that can only be answered after exporting our theories of judicial behavior to other court systems.

This study seeks to fill part of this void within the existing judicial literature by applying judicial decision-making theories developed in the U.S. context to the Appellate Division of the Supreme Court of South Africa. The primary goal is to determine the degree to which politics plays a role within the judicial decision-making process of South Africa's highest appellate court of the apartheid era. Specifically, an integrated model of decision making derived from both the legal and extralegal approaches to law is extended to a single issue area, the death penalty, in order to ascertain whether or not judges do indeed rely upon factors in addition to—or perhaps even exclusive of—the law in determining case decisions.

LITERATURE REVIEW

Models of Judicial Behavior

One of the most enduring questions posed by scholars of judicial politics concerns the basis upon which judges construct their decisions. Until the early 20th century, legal scholars strictly subscribed to the belief that judges embraced a mechanical jurisprudence approach to law, relying on *stare decisis* as the chief determinant in their case decisions. The legal model of decision making is thus based upon the notion that judicial decisions are solely derived from the framer's intent, precedent or the "plain meaning" of the statute or constitutional text and the facts of the case. According to 18th century British jurist William Blackstone (1765, 69), judges were "living oracles" of the law and adhered to precedent so that they were "not liable to waver with every new judge's opinion." The 1920's, however, began the era of legal realism; scholars began to recognize—or perhaps to admit—that judges were influenced by factors other than simply law and precedent (Pound 1910, 1922; Cohen 1914; Cardozo 1921; Llewellyn 1931).

This innovative belief quickly gave way to the judicial behavioralist movement, which spawned a plethora of studies focusing on the role of personal preferences and attitudes, as well as other extralegal factors, in the judicial decision-making process. Among the first of these works was Pritchett's (1948) study of the Roosevelt Court, whereby he systematically analyzed the patterns of ideological alignment among the justices of the Supreme Court.

Yet it was not until Schubert (1962) that a formal model of judicial decision making was introduced into the field. Using a method of cumulative scaling, his findings suggested that judges are influenced by their ideology and that their decisions are driven

by these ideological preferences. Thus, justices vote in the direction of an issue that is closest to them in their ideological space. Schubert's measure of ideology, however, was derived from the justices' votes themselves, a tautological dilemma both theoretically and methodologically. Nevertheless, this pivotal piece laid the groundwork for later attitudinal models, highlighting the impact of ideology on judicial decision making (Gibson 1978; Rohde and Spaeth 1976; Segal and Spaeth 1993).

Segal and Spaeth (1993; 2002) are most widely credited for their work on the attitudinal model and assert that decisions of Supreme Court justices are primarily based upon their personal political attitudes and values. Segal and Spaeth (1993, 73) discount the legal model, claiming that it is impossible to both accurately operationalize and falsify. Instead, the attitudinal model contends that justices use their ideologies as a guide to sift through the various legal factors presented and utilized in each case. Thus the facts and the law are not irrelevant, but are inevitably filtered through the attitudes and preferences of the judge.

In these analyses, the "circularity problem" of measuring ideology is avoided through the use of independent measures created by Segal and Cover (1989).[3] Now considered the standard measure in studies of the U.S. Supreme Court, ideology is captured through a content analysis of statements obtained from a number of newspaper editorials throughout the nomination and confirmation processes for each Supreme Court justice, from Warren to Kennedy. This technique has similarly been used to create independent measures of ideology for judges at the state level (Traut and Emmert 1998). Still others have used the judges' appointing president (Tate 1981; Songer and Haire

[3] Additional scores were later added by Segal et al. (1995).

1992, 1994) and the political environment surrounding the Court (George and Epstein 1992) as alternative independent measures of judicial ideology.

Though most scholars would agree that political ideology does play a significant role within judicial decisions, many admit that the attitudinal approach fails to paint a complete picture of the overall judicial decision-making process and are rather hesitant to wholly discount the role of legal factors within this process (e.g., Brenner and Stier 1996; Brisbin 1996). As a result, several scholars have presented more complex models of judicial behavior—those that not only include judicial ideology, but various other legal and extralegal considerations as well (Songer and Haire 1992; George and Epstein 1992; Knight and Epstein 1996; Songer and Lindquist 1996).

Within these integrated models, case characteristics are commonly used to test both legal and extralegal approaches of judicial decision making. According to Segal (1984, 892) the legal model "assumes decisions are based upon 'standards set in constitution, statute, precedent or court rule'." On the other hand, the extralegal model deals "with characteristics of the defendant that are legally irrelevant to the sentencing decision."[4] Integrating these two models, Segal (1984; 1986) was one of the first scholars to test the effect of case facts in analyses of the U.S. Supreme Court's search and seizure cases, with others quickly following suit. For instance, Songer and Haire (1992) determined that facts in obscenity cases, along with ideology and precedent, are important determinants of outcomes in U.S. Courts of Appeals.

Several others have also applied integrated approaches to a specific focus area, most notably, the death penalty. Emmert and Traut (1994) and Traut and Emmert's

[4] In particular, Segal (1984) says that the race of the defendant is often closely examined.

(1998) studies of the California Supreme Court demonstrated that case facts, coupled with judicial ideology, are important determinants of death penalty decisions. Similarly, Hall and Brace (1994; 1996) and Brace and Hall (1995; 1997) discovered that extralegal characteristics, particularly the judges' political affiliation, and legal characteristics, specifically those that consider whether or not the capital murder involved statutorily defined aggravating factors (e.g., robbery, rape, multiple victims), are significant predictors of death penalty outcomes in U.S. State Supreme Courts. Also combining the two main approaches to judicial decision making, George and Epstein (1992) determined the significant influence of both legal (e.g., crime proportionality, jury death qualification and both aggravating and mitigating circumstances) and extralegal factors (e.g., "repeat player" status) on death penalty decisions before the U.S. Supreme Court.

Yet some scholars have challenged the validity of these legal based fact pattern models. As mentioned above, Segal and Spaeth (1993, 65; 2002) have argued that it is the attitudes of judges which drive decision making and that legal disputes are settled "*in light of the facts of the case* vis-à-vis the ideological attitudes and values of the justices." (Emphasis added.) Thus according to these scholars, it is theoretically impossible to disentangle the effects of ideology from legal interpretation, since the latter is merely a function of the former. Haynie et al. (2002) are among the few to have disputed this legal fact pattern approach, with their results closely coinciding with the assertions made by Segal and Spaeth (1993, 2002): significant support was found for the attitudinal model of judicial decision making, while none was found for the legal model.

In addition to ideology and case characteristics, research has further demonstrated that success in court is often contingent upon litigant resources (Kleck 1981; Clarke and

Koch 1976; Farrell and Swigert 1986). "Repeat players," or those possessing greater resources in terms of wealth, experience and rapport with the court on account of repeated litigation,[5] are more likely to achieve success in case outcomes than "one shotters," or those possessing lesser amounts of these resources[6] (Galanter 1974).

For instance, Songer and Sheehan (1992) found that "upperdogs" (e.g., state, local and federal government) fare better than "underdogs" (e.g., individuals) in the U.S. Courts of Appeals. McGuire (1995) found a significant influential effect of counsel experience and determined that the "haves" usually achieve greater litigation success in the U.S. Supreme Court. In particular, it is the executive branch's representative, the Solicitor General, who enjoys the most success before the Court (McGuire 1998). Others (e.g., George and Epstein 1992; Haynie et al. 2002) have also found similar results.

Yet the degree to which resources are relevant in court outcomes has also been contested. Sheehan, Mishler and Songer (1992) found that judicial ideology has a stronger impact on litigation success than do differences among litigants in terms of their resources and expertise in cases before the U.S. Supreme Court. Moreover, it may be that Galanter's (1974) theory of resource inequality is not applicable to all judicial contexts. For instance, Haynie (1994, 769) discovered that in the Philippines the "have nots" achieve greater success than the "haves," because the Philippine Supreme Court serves a "redistributive function" in order to "enhance its legitimacy as a political institution." Similar results were also evident in South Africa (Haynie 2003).

[5] E.g., prosecutors or insurance companies (97).

[6] E.g., the criminally accused or a spouse in a divorce case (97).

Existing literature on the U.S. legal system therefore suggests that factors in addition to both law and precedent are evident within the judicial decision-making process. But are these theories of judicial behavior merely idiosyncratic? Or are these findings applicable to courts outside of the U.S. as well?

The South African Judicial Context

South Africa's struggle with race relations undeniably has been both lengthy and arduous. Entrenched within this struggle has been its legal system, and one institution that has played a particularly prominent role is South Africa's highest court, the Appellate Division. South Africa was officially formed with the South Africa Act of 1909, which combined the four British colonies of South Africa into the Union of South Africa (Forsyth 1985, 1). Along with this Act, the legislature created the Appellate Division of the Supreme Court of South Africa. Replacing the superior courts of the former colonies, the Appellate Division was designed to serve as an appeal court. Yet it did not serve as South Africa's final appellate court until the 1950 abolition of the Privy Council, making the Appellate Division the South Africa's highest court, or its court of last resort (Dugard 1978, 10; Forsyth 1985, 2; Haynie 2003, 31).

Although apartheid, or the separation of the races, had been a component of South African governance since the arrival of white settlers in 1652, more extreme and systematic separation measures followed the National Party Government's rise to power in 1948 (Dugard 1978, 6). Upon gaining control of the government, the National Party specifically sought to accomplish two goals: (1) restore the power of the government to its Afrikaner heritage; and (2) institutionalize apartheid (Haynie 2003, 33).

The National Party's goals were not so easily achieved, however, and its power was initially curtailed somewhat by the Appellate Division's power to determine legislative acts to be *ultra vires*, or beyond the scope of the constitutionally derived powers of Parliament (Ellmann 1992, 104-112). Using the "separate but equal" doctrine derived from the British common law, the Court negated several attempts of the legislature to separate the races. In response to the Court, however, the legislature passed the Separate Representation of Voters Act of 1951, which was designed to establish separate public facilities among the races (Haynie 2003, 34).

The Appellate Division was further weakened as a result of the Appellate Division Quorum Act 27 of 1955. This act was the National Party's response to the Court's invalidation of the Separate Representation of Voters Act of 1951 and was intended to remove the "coloureds" from the voting rolls by a simple majority vote rather than the two-thirds vote constitutionally mandated (Forsyth 1985, 14; Ellmann 1992, 13).[7] The Act succeeded in limiting the Court's power of judicial review by increasing the required quorum on "most" cases to five and a quorum of 11 in cases dealing with the legality of Acts of Parliament (Forsyth 1985, 15). Since only six judges comprised the Court at that time, the Act called for the appointment of five additional judges, thus "diluting" the power of the incumbent members of the Court with the inclusion of these new judges.[8]

[7] "Coloured" is a term of reference for individuals of mixed race. Its use in South Africa does not carry the negative connotations associated with its use in the United States. It should be noted that black voters had been previously removed with the requisite two-thirds majority. The National Party wanted to ensure the franchise for whites only.

[8] The size of Parliament was also expanded to achieve the requisite two-thirds and the "coloured" voters were "constitutionally" removed from the voter rolls.

Thus the Appellate Division consisted of a Chief Justice and a varying number of Judges of Appeal,[9] all of whom were white, given that a black judge never served on the Court during the era of apartheid (Dugard 1978, 11). Before the 1961 Constitution Act, judges of the Appellate Division were chosen by the Governor General (Haynie 2003, 31), but after 1961 were appointed by the cabinet, or the State President-in-Council (Dugard 1978, 10). The retirement age was 70, and judges could not be removed unless by both request of Parliament and permission of the State President on the basis of "misbehavior" or "incapacity" (Dugard 1978, 10). As a result of this design, Dugard (1978, 11) stated, "Inevitably, political considerations play[ed] an important part in the appointment of judges." Indeed they did, since at one point in its history more than half of the Court was staffed by appointees and presumed supporters of the National Party (Haynie 2003).

The structural weakness of the Court therefore left it susceptible to the political influences of the apartheid system, consequently creating the potential to shape judicial decision making. Nevertheless, Dugard (1978, 71-72) claimed that the common law of South Africa was "color-blind" and that the courts theoretically should not distinguish between blacks and whites in terms of basic civil rights and freedoms, with the exception of those rights specifically limited by the legislature. Similarly, Haynie (2003, 26) says that "judges were trained to appreciate the rule of law" and that the Roman-Dutch tradition "required that individual freedom be protected and only in those instances where Parliament specifically dictated inequality or specifically limited rights would courts sanction such restrictions" (115).

[9] There were six Judges of Appeal in 1950 but by 1990 had grown to 18 (Haynie 2003, 31).

Despite this legal rhetoric, it is apparent that the Court functioned within a political environment to which it was undoubtedly not immune. In this respect, did the stacking of the court in favor of the government succeed in creating a court that simply mirrored the political disposition of South Africa's authoritarian regime? Or was the Court capable of maintaining its independence and using its own discretion to challenge the regime's repressive apartheid policies? In a country that forbade the "scandalizing" and "contempt" of the Court,[10] little research has been conducted on South Africa's legal system to empirically test these questions.

Given these conditions, the case of South Africa not only provides a unique opportunity to examine the role of political ideology in the judicial decision-making process, but it also allows for a critical analysis of the role that other legal and extralegal factors may have played within the opinions of the Appellate Division during the reign of the National Party and its political progeny, apartheid. One area of law that is particularly amenable to such an analysis is that of the death penalty (e.g., Emmert and Traut 1994; Hall and Brace 1994, 1996; Brace and Hall 1995, 1997; Traut and Emmert 1998). This specific issue area is chosen because ideology is assumed to play a particularly critical role within the death penalty sentencing process. Because the issue at stake was, of course, the life or death of the defendant, it is assumed that ideologies among the judges were much more exacerbated in these types of cases than in less divisive areas of law. Thus the salience of ideology within death penalty cases makes

[10] One of the most famous cases to involve the "scandalization of the court" is that of Professor Van Niekerk of the University of Natal (Durban) who published an article in the *South African Law Journal*, which addressed the possibility that sentencing differed among black and white defendants in capital punishment cases. He was charged with "contempt of the court" for "bring[ing] the judiciary into contempt, to violate their dignity and respect, and to cast suspicion upon the administration of justice" (Dugard 1978, 292-293).

this issue area more conducive to analyzing the various political forces at play within the judicial decision making process.

Much like the United States, capital punishment has long been an appendage of South Africa's legal system. Prior to South Africa's 1990 moratorium on the death penalty and subsequent reforms in its criminal laws (Sloth-Nielson et al. 1991, 11-13), the sentence of death could either be compulsory, or based upon judicial discretion for cases involving murder.[11] In either type of case, however, it was *the judges* who decided whether or not extenuating circumstances were present, thus leaving the determination of the existence of these factors subject to judicial discretion. For murder cases in which the judge deemed an absence of extenuating circumstances, the death penalty was statutorily mandated. Conversely, in cases of murder for which the judge deemed the presence of extenuating circumstances, sentences were then statutorily dependent upon *judicial discretion*, in which judges—not the law—determined the imposition of the death penalty.

Extenuating circumstances were analogous to the mitigating circumstances currently employed by several U.S. states within their death penalty sentencing schemes. They were designed to provide a means of decreasing the moral culpability of the defendant, and examples of these circumstances included the youthfulness of the defendant,[12] a woman convicted of killing her newly born child,[13] the influence of alcohol or drugs, witchcraft and the presence of a psychopathic condition, among others. Crimes also warranting the death penalty—though not statutorily mandating it—were

[11] In 1995 the death penalty was finally deemed unconstitutional by the new Constitutional Court in *State v Makwanyane* 1995 (3) SA 391 (CC).

[12] The Criminal Procedure Act of 1977 (2)(a)

[13] The Criminal Procedure Act of 1977 (2)(a)

treason, kidnapping, child-stealing, rape, robbery and attempted robbery, housebreaking, sabotage or terrorism (Hiemstra 1977, 146-147; Dugard 1977, 103).

Also similar to the legal system of the United States, South Africa provided legal counsel to its indigent defendants. Yet its *pro deo*, or literally "for God," system of counsel was only available to indigent defendants in death penalty cases heard before the Appellate Division, or its highest court (Dugard 1977, 46). Separate from other forms of legal aid funded by tariffs, the *pro deo* system was not mandated by law, but rather was an "established" tradition practiced by the Court (McQuoid-Mason 1982, 11). *Pro deo* advocates were appointed to cases by the Bar Council and were usually private practitioners, paid R200 a day by the state and generally not provided an attorney for assistance[14] (McQuoid-Mason 1982, 12; Sloth-Nielson et al. 1991, 5). Moreover, *pro deo* advocates are usually the "most junior" and "inexperienced" within the legal profession (Van Niekerk 1969, 72-73; Sloth-Nielson et al. 1991, 5), lacking what Galanter (1974) referred to as "repeat player" status before the Court.

Unlike the U.S. Supreme Court, the Appellate Division lacked discretionary control over its docket. Appeals to the Appellate Division generally arrived to the Court via two routes: (1) cases were either certified to it from the lower courts[15]; or (2) petitioners denied leave to appeal in the lower courts could seek reprieve directly from the Appellate Division. Appeals resulting from the former were much more common than the latter, and a result of this design is that the Court's docket was largely comprised of leaves to appeal which they were required to hear (Haynie 2003). Therefore, it may be

[14] Attorneys usually assist advocates by gathering pertinent information, e.g., interviewing witnesses or investigating the facts surrounding the case (Sloth-Nielson et al. 1991, 5).

[15] It should be noted though that lower court judges were expected to refuse to grant leaves to appeal in cases that lacked substantive questions of law.

that these disputes represented routine legal challenges easily disposed of by the Court, rather than major constitutional and statutory disputes that were more likely to engender disagreement.

Yet the Appellate Division was able to maintain a minimal amount of discretion in cases arriving to the Court in the more atypical route, or rather, through appeals by petitioners seeking reprieve from the Appellate Division. In the context of capital punishment, it is plausible that the Court was more willing to accept a reprieve in this case, because a denial surely meant death for the petitioner. Another potential consequence of this discretion is that the Court potentially would be less likely to take a case that it would confirm, since this would not only seem unnecessary, but it also would be politically problematic under apartheid circumstances in which the Court's legitimacy was already in question. Therefore, the Court may have been more likely to both accept and reverse the death penalty when these various factors were taken into consideration. It is possible then that case outcomes substantively differed based upon the route by which they arrived at the Court.

Juxtaposing South Africa with the United States, it is clear both the commonalities and differences that existed between the two legal systems. In both systems the death penalty had long been considered a conventional form of punishment, and the sentencing structure within each system statutorily permitted a defined amount of judicial discretion. But unlike its democratic counterpart, the U.S. Supreme Court, the Appellate Division lacked control over its own docket and, further, was embedded within an authoritarian apartheid regime. Notwithstanding these variances, if theories based upon the U.S. judicial system are truly generalizable, the effects of both legal and

extralegal factors found within the American context should similarly appear in the comparative framework of South Africa. Therefore, in combining the various elements of South Africa's death penalty system along with its political history, it is quite evident that the Appellate Division is ripe for this type of exploration.

MATERIALS AND METHODS

Grounded in both evidence and theory posited by scholars of the U.S. courts, this study explores the extent to which politics plays a role within the judicial decision-making process of the South African Appellate Division, 1950-1990—roughly the rise and fall of apartheid in South Africa. Specifically, it examines the effects of both legal and extralegal factors within this overall process.

Guided by existing models of judicial behavior presented throughout the literature, the legal model is operationalized through the use of legal characteristics, or facts statutorily related to the law, provided in each individual case. Concomitantly, the extralegal model consists of judicial ideology, litigant resources and facts unrelated to the law surrounding each case. Recognizing the significant attention scholars have given to both models of judicial behavior, this study combines the two in order to create a more complex, integrated approach of judicial decision making and applies this model to the case of South Africa.

The scope of judicial decision making is confined to a single issue area, in this case, the death penalty, in order to meaningfully analyze the effects of both legal and extralegal factors on case decisions, which is a method consistent with a number of studies throughout the literature (Segal 1984, 1986; George and Epstein 1992; Songer and Haire 1992; Emmert and Traut 1994; Hall and Brace 1994, 1996; Brace and Hall 1995, 1997; Traut and Emmert 1998). The source of data utilized in this study was obtained from a dataset compiled by Haynie (2003), which includes all published cases of the South African Appellate Division throughout the time period 1950-1990.

Over the course of the 41-year time period studied, the Court published 220 cases in which the primary issue was the death penalty. Using these cases, a statistical model is estimated to depict the death penalty decisions of the Appellate Division as a function of legal and extralegal case facts, judicial ideology, litigant resources and the type of appeal granted to the Appellate Division. Additional models are employed to estimate the interaction effects of judicial ideology when combined with legal case facts, included to determine the influence of ideology in interpreting legal stimuli. Because the outcome of death penalty decisions is estimated, the dependent variable in this analysis is either to affirm (coded 1) or to overturn the death sentence (coded 0). Due to the dichotomous nature of the dependent variable, logistic regression analysis is used in the estimation of the statistical models.

The Legal Model: Crime Characteristics

In much of the current research, crime characteristics are often included as a means of gauging the degree to which legal factors play a role within the judicial decision-making process, and the legal model has generally been operationalized through measures based upon legal doctrine (e.g., Segal 1984, 1986; George and Epstein 1992; Hall and Brace 1994, 1996; Brace and Hall 1995, 1997). As discussed above, South African law deemed appropriate the sentence of death for cases involving murder, treason, kidnapping, child-stealing, rape, robbery and attempted robbery, housebreaking, sabotage or terrorism and mandatory for murder cases lacking extenuating circumstances (Dugard 1977, 103). Therefore, in order to effectively operationalize the legal model of judicial behavior, these various aspects of the South African law must be incorporated into the analyses.

In cases of murder in which there were no extenuating circumstances either presented by the defendant or found by the judge, judges at the trial level were *statutorily required* to impose the death sentence. Based on this legal doctrine, it is expected that the Appellate Division will affirm the lower courts' decisions when the murder case (MURDER) does not possess extenuating circumstances (coded 1 if present; 0 if otherwise), as determined by the Court. On the other hand, because the law allows judges to find extenuating circumstances as a means of decreasing the defendants' moral culpability in cases of murder (MURDEXT), it is posited that the Court will be more likely to overturn the death sentence when extenuating circumstances are present (coded 1; 0 if otherwise). Likewise, it is expected that the Court will be more likely to overturn the sentence when the case involves crimes considered less serious than murder (OTHER), such as robbery or rape (coded 1; 0 if otherwise).

The Extralegal Model: Ideology, Case Facts and Litigant Resources

A plethora of research on the U.S. courts has clearly demonstrated the effect of ideology on judicial decisions. However, measures of ideology comparable to those of Segal (1984) and Segal et al. (1995), which would be helpful to test the effects of this variable, are unavailable for the South African judges. In order to create an independent measure of ideology to be included in the models, the ideology for each judge[16] is obtained by calculating the percentage of liberal, or "pro-underdog," votes cast in all criminal cases, excluding the votes cast in all death penalty decisions.[17] The benefits to

[16] Individual ideology is a dichotomous variable (1 = vote to affirm the criminal sentence, a "conservative" decision; 3 = vote to overturn the criminal sentence, a "liberal" decision).

[17] It should be noted that judges with fewer than five votes in criminal cases are excluded from the analysis. When this occurs, the panel ideology is calculated using the ideology of the remaining judges on the panel.

this approach are two-fold. First, the votes cast in the Court's criminal cases will most closely coincide with the ideology associated with death penalty cases. Second, by removing the death penalty votes, Schubert's (1962) tautology or "circularity problem" of predicting votes via the votes themselves is safely avoided.

The Appellate Division generally sat in panels of three judges, but for more "complex" criminal cases, sat in panels of five (Haynie 2003, 32). Because of this design, the average ideology of the panel (PANLIB) is calculated for each death penalty case. Theory suggests that liberal judges are more concerned than conservative judges with protecting individual rights and liberties, particularly for defendants in criminal cases. Therefore, an inverse relationship is expected to exist between the panel ideology and the death penalty outcome, because as the ideology mean increases—thus becoming more liberal, or "pro-underdog,"—the more likely the panel is expected to overturn the death penalty.

Similar to the legal model of judicial behavior, extralegal models are also operationalized through the use of case facts. In empirical studies of the death penalty, scholars have included both defendant and victim characteristics in their analyses. According to Segal (1984, 892), models of extralegal factors usually include a focus on the defendants' race. As a result, many scholars have demonstrated the negative effects of race in the U.S. judicial system, particularly in terms of case disposition (Redelet 1981; Paternoster 1984; Haynie and Dover 1994) and sentence severity (Zatz 1984; Albonetti 1997). Research has thus demonstrated that black defendants are those most likely to be indicted for capital murder and generally receive harsher sentences than white defendants.

In the case of South Africa, comparable assertions have been made about the role of race in death penalty sentencing. Van Niekerk (1969; 1970), a well-known South African scholar, not only questioned the validity of capital punishment but also charged that race was frequently applied to the sentencing process. In a survey study of South African advocates, Van Niekerk (1969) discovered that over half of his sample believed that capital punishment was "meted out on a differential basis to the different races" (467). Extending theory derived from both the American and South African literatures, a positive relationship is expected between race (DEFRACE) and sentencing outcomes in that non-black defendants (coded 1) will be more likely than white defendants (coded 0) to have their death sentences affirmed.[18]

The gender of the defendant is another possible determinant of sentencing outcomes. Scholars have discovered that convicted males receive harsher penalties than convicted females (Albonetti 1997; Farrell and Swigert 1986). One possible theory is that judges often espouse paternalistic beliefs towards women, thus resulting in sentence differentials between male and female defendants. Based on this theoretical understanding, it is expected that male defendants (coded 1) will be more likely than female defendants (coded 0) to receive the death penalty (DEFMALE).

Relatedly, sentencing outcomes are often associated with victim characteristics, and among these, the most notable is the gender of the victim. Research has demonstrated that adjudication is more severe when the victim is female than when the

[18] An important caveat must be noted regarding the coding of the race variable. The defendants' race is not always available in the text of the case. In these instances, the race of the defendant is derived from the defendants' name, as listed in the case title, e.g., *State v. Hlongwana* 1975 (4) SA 567 (A).

victim is male (Farrell and Swigert 1986).[19] One possible explanation is that females are perceived as more vulnerable within society, and, consequently, the sentence of death is deemed more appropriate in such cases. Likewise, children are perceived by society in this manner, and a similar underlying theoretical basis can be assumed when the victim is a child. Therefore, in cases when the victim is a female or child (VICFEML), it is expected that the panel will be more likely to affirm the sentence (coded 1; 0 if otherwise) than when the victim is an adult male (VICMALE [coded 1; 0 if otherwise]).[20]

In several key pieces throughout the literature, litigant resources have been significantly related to court outcomes (Galanter 1974; Songer and Sheehan 1992; McGuire 1996), though the results have been somewhat mixed (Sheehan, Mishler and Songer 1992; Haynie 1994). In death penalty cases, however, the defendant is clearly the "underdog" or "have not" in relation to the state, which has an obligation to administer justice. On the whole, defendants possess fewer monetary resources than the state, and, further, criminal defendants lack the "repeat player" advantage also enjoyed by the state (Galanter 1974; George and Epstein 1992).

In South Africa scholars of the legal system have sharply criticized the *pro deo* system of counsel, charging that advocates in this system are often the most "inexperienced" and "junior" within the legal profession (Van Niekerk 1969, 72-73; Sloth-Nielson et al. 1991, 5). As a result, it is expected that the death sentence will be

[19] Others such as Brace and Hall (1995; 1997) and Hall and Brace (1994; 1996) have incorporated "female" into their integrated models of judicial behavior, but have used this measure as a means of operationalizing the legal model. This approach is not appropriate in the case of South Africa, because the gender of the victim is statutorily irrelevant in death penalty sentencing. Theoretically, however, it may be used as an extralegal factor in sentencing considerations.

[20] Though it would be very interesting to analyze the extralegal effects of additional victim characteristics in each of the death penalty cases, such as the victims' age and race, these data are not consistently provided within the published cases of the Appellate Division.

affirmed when advocates are *pro deo* (PRODEO), or appointed by the Court (coded 1), than when they are not appointed by the Court (coded 0).

The structure of the appeal process resulted in the Court's inability to control its own docket. Yet the Court was able to maintain a limited amount of discretion through its acceptance of cases from direct leaves of appeal. Theoretically, it may be that the Court, in order to avoid diluting its own power in the context of apartheid wherein its legitimacy was already threatened, did not accept cases that would simply lead to an affirmation of the lower court's decision. With this said, it is plausible that the Court would not only be more likely to accept death penalty cases—since the denial of a leave to appeal would almost certainly mean death for the appellant—but that these cases would also result in reversals. Therefore, it is expected that when the Appellate Division grants the leave to appeal (ADGRANT [coded 1; 0 if otherwise]), the Court will be more likely to reverse the outcome of the lower court than if the case arrives from the more typical route, a leave of appeal granted by the lower court (TRIAL [coded 1; 0 if otherwise]).[21]

Finally, scholars such as Segal and Spaeth (1993; 2002) have strongly contested the credibility of the legal model, arguing that it is theoretically impossible to disentangle the effects of personal preferences and attitudes from legal interpretation. Thus according to the attitudinal model of decision making, legal interpretation is merely a function of ideology. Further exploring this argument, the specified legal factors are interacted with ideology and included within a second model to test whether or not the

[21] It should be noted that two separate variables were created in order to overcome the problem of missing data for this measure.

use of these legal measures significantly differs among the panels (i.e., among liberal and conservative panels). If differences are found to exist, then the findings will simply serve to reaffirm the assertions of the attitudinal model of decision making.

The multiplicative terms are specifically used within the analyses to gauge the strength of the linkage between legal interpretation and the Court's decisions as ideology varies, and they include as follows: ideology and murder with no extenuating circumstances (PANLIB*MURDER); and ideology and other serious crimes (PANLIB*OTHER). Because liberal panels are expected to be those most likely to overturn the death penalty, negative coefficients are posited for the interaction variables. This implies that as ideology increases—thus becoming more liberal—the relationship between the usage of legal factors and the Court's decisions strengthens. The implication of this hypothesis is that the presence of certain legal factors should have a more pronounced effect for liberal panels than for their conservative counterparts. Intuitively, this makes sense. Conservative panels, which generally rule in favor of the state, are potentially more likely to affirm the sentence of death, *regardless* of the circumstances surrounding the case (i.e., the presence or absence of extenuating circumstances). On the other hand, liberal panels, which tend to rule in favor of the defendant, are more likely to overturn the sentence. Since liberals should be more likely to overturn the death sentence, they should particularly be more likely to do so in cases wherein they are permitted more discretion, or rather, in those cases whereby judicial discretion is statutorily defined (i.e., cases with the presence of extenuating circumstances).

Although the full (interaction) model will reveal the potential significant differences in the effect of ideology across the specified legal factors, it will not provide a

means of testing the degree to which the presence of these factors significantly impacts the Court's decision to either affirm or overturn the sentence of death. Furthermore, because it also controls for the other variables within the model—such as the extralegal factors and the type of leave to appeal granted—there is no way to compare these effects across the different types of legal stimuli. Subsequent models are thus included to separate out these various effects on the Court's decisions and are filtered by the three specified legal factors.

In summary, several statistical models are proposed to examine the effects of both legal and extralegal factors on the decision making process of the Appellate Division of South Africa throughout the time period 1950-1990. First, death penalty decisions before the Court are depicted as a function of legal and extralegal case facts, ideology, litigant resources and the form of leave to appeal granted to the defendant. A second model that includes interaction terms is employed to test the effect of judicial ideology when coupled with legal characteristics. Finally, three separate models for each of the three legal factors are estimated to determine the direct impact of the legal factors on the Court's decisions. Extending theory derived from the existing American judicial literature, this study posits that the affirmation of the capital sentence is dependent upon the severity of the crime, the conservatism of the panel, the type of leave to appeal granted, whether the victim is a female or a child and, finally, if the defendant is male, nonwhite or represented by *pro deo* counsel. Moreover, the attitudinal model of decision making assumes that ideology will have an interactive effect with the use of legal stimuli.

RESULTS

Table 1 presents the logistic regression estimates of both the baseline and full models of death penalty decisions in the South African Appellate Division, 1950-1990. The onset of the results presents an unexpected surprise: none of the variables employed within the baseline model have a strong and significant effect on the Court's death penalty decisions. Chi-square does indicate, however, that the overall model is significant.

First, there is no evidence to support the legal model of judicial decision making within the baseline model. In order to avoid perfect multicollinearity, one of the legal variables, murder with extenuating circumstances, is dropped from the analysis, and the effect of this measure is effectively captured in the intercept. It was posited that the Court would be more likely to affirm the trial or lower court's decision when the case of murder lacked extenuating circumstances and, concomitantly, that the Court would overturn the sentence of death in cases of murder with the presence of extenuating circumstances or in cases based upon other serious crimes. Yet all three of the legal variables, MURDER, OTHER and MURDEXT, the effect of which is captured within the intercept, fail to reach any levels of statistical significance, indicating that the Appellate Division was neither more nor less likely to depend upon these particular legal factors within its sentencing process.

Table 1. Baseline and Full (Interactive) Models of Death Penalty Decisions in the South African Appellate Division, 1950-1990

	Baseline Model		Full (Interactive) Model	
Variable	**b**	**s.e.**	**b**	**s.e.**
MURDER	0.336	0.335	-1.788	1.863
PANLIB*MURDER	--------	--------	5.094	4.553
OTHER	0.168	0.510	-7.757***	3.215
PANLIB*OTHER	--------	--------	18.555^{++}	7.602
PANLIB	-2.365*	1.785	-4.889***	2.171
DEFRACE	-0.660^{+}	0.344	-0.607^{+}	0.353
DEFMALE	7.563	18.158	7.555	18.236
VICFEML	0.650	0.539	0.632	0.548
VICMALE	0.018	0.518	-0.024	0.525
PRODEO	-0.073	0.322	-0.082	0.330
TRIAL	0.042	0.488	-0.135	0.506
ADGRANT	-0.522	0.545	-0.750*	0.566
Constant	-6.071	18.179	-4.782	18.267
Pseudo R^2	0.098		0.132	
Chi Square	22.349***		30.529***	
N	216		216	

*** prob. <0.01, using a 1-tailed test; $^{+++}$ prob. <0.01, using a 2-tailed test
** prob. <0.05, using a 1-tailed test; $^{++}$ prob. <0.05, using a 2-tailed test
* prob. <0.10, using a 1-tailed test; $^{+}$ prob. <0.10, using a 2-tailed test

The role of litigant resources in decisions before the Court has also not been fully established within this initial analysis. Based on Galanter's (1974) theory of resource inequality and the various criticisms lodged at South Africa's *pro deo* system (Van Niekerk 1969, 72-73; Sloth-Nielson et al. 1991, 5), it was expected that the presence of *pro deo* counsel would lead to an affirmation of the lower court's imposition of the death penalty. Although the sign is in its expected negative direction, the insignificance of the

PRODEO coefficient demonstrates that the relationship between litigant resources and court outcomes does not necessarily exist, since defendants represented by appointed counsel were neither more nor less likely to have their sentence of death affirmed.

The way by which the leave to appeal to the Appellate Division was granted also does not seem to have influenced the Court's decisions. Theoretically, it makes sense that the Court would have been more likely to overturn the sentence of death in cases whereby it granted the leave to appeal. But the insignificance of the coefficients of both ADGRANT and TRIAL does not provide evidence for this assumption, since there appears to be no systematic relationship between the form of leave granted and the death penalty decisions of the Court.

The results also indicate that the extralegal case facts within the baseline model—with the possible exception of race—are not significant predictors of the Appellate Division's decisions. For instance, it was posited that the Court would be more likely to affirm the sentence when the defendant was male, based upon the notion that judges often tend to treat female defendants more leniently than their male counterparts. Despite its correct positive direction, the insignificance of the DEFMALE coefficient demonstrates that the judges of the Appellate Division were neither more nor less likely to affirm the sentence of death for either male or female defendants.

It also appears that the Court did not rely upon the victims' characteristics. It was suggested that females and children were considered the most vulnerable within society, leading to the hypothesis that the death penalty would be considered more appropriate in cases involving these types of victims. The findings do not support this suggestion,

however, as is evidenced by the insignificant coefficients of both the VICFEML and VICMALE variables.

On the other hand, there does appear to be some sort of link between the panels' ideology and the sentencing outcomes of the Appellate Division. It was posited that liberal panels, or those most committed to upholding the civil rights and liberties of criminal defendants, would be more likely than conservative panels to overturn the sentence of death. The negative coefficient of PANLIB (significant at the .10 level) suggests some support for this hypothesis. However, the null hypothesis that the slope coefficient is equal to zero cannot be rejected, nor can it be fully determined whether or not a significant relationship exists between panel ideology and the Court's decisions.

Another potentially important finding to emerge from the results involves the use of the defendants' race within the sentencing process. Based on the findings of the U.S. courts and the assertions of a minority of South African scholars, it was posited that the Court would be more likely to affirm the death sentence when the defendant was nonwhite. The negative coefficient of DEFRACE (significant at the .10 level, using a two-tailed test) demonstrates the *opposite* effect, specifically that the Court was more likely to *overturn* the sentence of death in these instances. Again, however, the null hypothesis that no relationship exists between race and sentencing cannot be confidently rejected.

Thus the initial results reveal very little about the decision-making process of the Appellate Division, demonstrating no support for the legal model and modest support for the attitudinal model of judicial decision making. Is it possible then to conclude that the

theoretical basis derived from the American context simply fails to similarly relate to the case of South Africa? A more complex model is needed in order to test this possibility.

Table 1 further presents the logistic regression estimates of the full (interactive) model of death penalty decisions of the South African Appellate Division, 1950-1990, which includes interactions between panel ideology and the legal variables, in addition to the variables included within the initial analysis. Several of the hypotheses remain unsupported, and, once more, there appears to be no systematic link between the decisions of the Court and the victims' characteristics, the defendants' gender or the presence of *pro deo* counsel.

The coefficient for DEFRACE, however, continues to be in an unexpected *negative* direction but, yet again, is only significant at the more relaxed .10 level. It also appears that the type of leave granted to appeal to the Court now has some effect. Despite its significance at the weaker .10 level, the negative coefficient of ADGRANT is consistent with theoretical expectations that the Court would be more likely to overturn the death penalty in cases whereby it granted the leave to appeal.

Although the initial findings are substantively important to understanding the Court's decisions, the inclusion of the interactions reveal a much more interesting—perhaps even puzzling—story. As mentioned above, the multiplicative terms are included as a means of gauging the effect of legal interpretation as ideology varies. The findings suggest that this phenomenon has indeed occurred within the Court's decisions, particularly vis-à-vis the cases left up to judicial discretion.

Once again, to avoid perfect multicollinearity within the model it is necessary to drop a legal variable from the analysis. Theoretically, murder with extenuating

circumstances is the most important legal variable among the three. It is in these types of cases that liberal judges are potentially most likely to overturn the sentence of death because judicial discretion is statutorily built into the death-sentencing scheme. Therefore, MURDEXT is dropped from the analysis to test: (1) whether or not ideology has a significantly different effect for this type of case than it has for others; and (2) whether or not the effect is significantly related to the outcome of the case. Since the effects of ideology for both MURDER and OTHER are captured within their respective interaction coefficients, the coefficient for ideology, PANLIB, serves to capture the effect of ideology in cases possessing extenuating circumstances.

Inspecting the PANLIB coefficient, ideology has a clear and significant effect on cases of murder with extenuating circumstances. First, the high significance level (at the .01 level) of the coefficient suggests that ideology has a more pronounced effect for cases possessing extenuating circumstances than it does for other types of cases. Second, the negative direction of the coefficient demonstrates that the effect of ideology is significantly related to reversals in cases possessing extenuating circumstances. Therefore, the findings are consistent with theoretical expectations and illustrate that there is a significant difference between liberal and conservative panels for cases involving extenuating circumstances and, specifically, that liberal panels were significantly more likely than conservative panels to overturn the sentence of death.

A similar relationship does not seem to exist in cases of murder without extenuating circumstances. The insignificant coefficient of PANLIB*MURDER reveals that ideology does not have a significantly different effect for these types of cases, suggesting that perhaps liberal panels were neither more nor less likely than conservative

panels to overturn the sentence of death in these specific cases. Furthermore, the insignificant coefficient of MURDER indicates that the absence of extenuating circumstances in cases of murder was unrelated to the Court's decisions.

Another interesting finding consistent with theoretical expectations is that the Court was more likely to overturn the sentence of death for less serious crimes, which is indicated by the negative and highly significant (at the .01 level) coefficient of OTHER. One puzzling finding, however, concerns the interaction between other serious crimes and ideology. The results reveal a *positive* coefficient for PANLIB*OTHER, which seems to indicate that more *liberal* panels were more likely to *affirm* the sentence of death for cases involving other serious crimes. Theoretically, this relationship makes no sense. However, this measure only reveals whether or not a significant difference in the effect of ideology exists for cases involving other serious crimes in comparison to cases without extenuating circumstances. It does not demonstrate whether or not the Court was actually more likely to affirm the sentence of death in these cases. Therefore, it is possible that liberal judges were *not* significantly more likely to affirm the sentence of death. In order to examine this possibility, a model for each legal factor is needed to assess their individual effects on ideology.

Table 2 presents the logistic regression estimates for three separate models of the Court's decisions filtered by each of the three specified legal factors. These models not only allow for in-group examinations of the exact influence of ideology, but they also permit the remaining variables to vary across groups since they are no longer held constant against the legal variables as they were in the previous models.

The findings are fairly consistent with those in the full (interaction) model. The first model, murder with no extenuating circumstances, again reveals no relationship between ideology and the Court's decision to either affirm or overturn the sentence of death. It does, however, indicate a *positive* relationship between the presence of *pro deo* counsel and the Court's affirmation of the death sentence. Although the coefficient of PRODEO is in its expected positive direction, it is only significant at the .10 level, indicating a modest relationship between *pro deo* counsel and the Court's decisions.

Table 2. Legal Models of Death Penalty Decisions in the South African Appellate Division, 1950-1990

	Murder No Extenuating		**Murder With Extenuating**		**Other Serious Crimes**	
Variable	**b**	**s.e.**	**b**	**s.e.**	**b**	**s.e.**
PANLIB	-0.289	4.331	-4.915**	2.253	16.189^{+}	8.736
DEFRACE	-0.116	0.662	-1.119^{+++}	0.456	-1.532	2.151
DEFMALE	6.519	22.246	8.271	20.489	--------	--------
VICFEM	0.171	0.994	1.320*	0.845	10.115	65.992
VICMALE	-0.650	0.939	0.612	0.786	8.900	66.013
PRODEO	1.101*	0.586	-0.767	0.495	-2.396	1.950
TRIAL	-1.440	1.214	-0.372	0.710	0.976	1.641
ADGRANT	-0.952	1.295	-1.295*	0.797	-3.011	2.661
Intercept	-4.999	22.353	-4.916	20.521	-12.775	66.041
Pseudo R^2	0.125		0.193		0.407	
Chi Square	9.044		26.974***		11.485*	
N	68		126		22	

*** prob. <0.01, using a 1-tailed test; $^{+++}$ prob. <0.01, using a 2-tailed test
** prob. <0.05, using a 1-tailed test; $^{++}$ prob. <0.05, using a 2-tailed test
* prob. <0.10, using a 1-tailed test; $^{+}$ prob. <0.10, using a 2-tailed test

The second model, murder with extenuating circumstances, is perhaps the most important set of findings. First, the ideology coefficient is highly significant (at the .01 level) and in its expected negative direction. Consistent with theoretical expectations, the Court was more likely to overturn the sentence of death in cases wherein judicial discretion was statutorily permitted. The effect of race is particularly pronounced within this model as well, as is evidenced by the highly significant (at the .01 level) negative coefficient of DEFRACE. Similar to previous findings, this relationship again suggests that the Court was more likely to *overturn* the death sentence for nonwhite defendants.

Other interesting findings include the effects of both the status of the victim and the leave of appeal granted by the Appellate Division. The positive coefficient of the VICFEML variable is consistent with theoretical expectations that the Court would be more likely to affirm the death penalty in cases in which the victim was either a child or female. The negative coefficient of ADGRANT (significant at the .10 level) reveals that the Court was more likely to overturn the death sentence when it granted the leave to appeal than when the trial court granted the appeal.

The third and final model, "other serious crimes," reveals one critical finding, which is that a significant relationship may not exist between ideology and the Court's decision to affirm the death penalty in this particular set of cases. In the full (interactive) model the interaction between panel ideology and other serious crimes (PANLIB*OTHER) was both positive and highly significant, indicating that liberal panels might have been more likely to *affirm* the death penalty. Within this final model the coefficient for PANLIB is again in a positive direction, but now it is only significant at the .10 level, suggesting a modest relationship between ideology and the Court's

decision in other serious cases. While this finding is theoretically perplexing, it does not necessarily exist given the instability of the model. There are only 22 OTHER cases out of a total of 216 death penalty cases included within the various analyses. Therefore, it may be that this anomaly is simply a result of a small sample size, which makes the model unstable and the finding particularly questionable.[22]

[22] GENDER drops out of the analysis because of a lack of variation within this set of cases.

DISCUSSION

So what do these various findings suggest? First of all, the significant effect of ideology reveals that extralegal factors were indeed at play within the decision-making process of the Appellate Division. Thus the attitudinal model posited by scholars of the American courts is certainly applicable to the South African legal system. But as also demonstrated by the American context, ideology is merely one facet of a more complex process, and the various other findings to emerge from the analyses are indicative of this complexity.

For instance, the effect of ideology was modest within the initial analysis but became more prevalent once the cases were filtered by the specified legal factors. Moreover, ideology had a particularly strong and significant effect in murder cases involving extenuating circumstances and was only marginally related to the other legal stimuli. What are the implications of these findings? South Africa's provision of extenuating circumstances provided a built-in mechanism for judicial discretion, so it is clear why ideology was particularly significant within this given context. One implication then is that ideology had a more pronounced effect where discretion was statutorily permitted—in the presence of extenuating circumstances—but had less of an effect given the institutional constraints of the law—in the absence of extenuating circumstances. A second implication is that the findings are consistent with the attitudinal model supporting its generalizability to other legal contexts.

Another key finding to emerge from the results is that death penalty sentencing in the Appellate Division may have been contingent upon the race of the victim, particularly if the defendant was nonwhite. The results indicate that the death penalty was more likely

to have been overturned for nonwhite defendants—a finding that is clearly inconsistent with theoretical expectations. So why did this opposite effect occur? There are several possible explanations.

First, little is known about the origin or background of each particular death penalty case. Applying yet another theory derived from the American context, it may be that race was used as a factor in the disposition of the case and that nonwhites were more likely to be both indicted for and convicted of capital murder (Redelet 1981; Paternoster 1984; Haynie and Dover 1994). If this is true, the Appellate Division may have been more likely to overturn the death sentence in attempt to remedy an egregious bias based upon race found in the court below. Conversely, it may be that racism is evident in the Court's decisions because white judges held white defendants to be more culpable than the less "cultured" and therefore less culpable "native." This colonial paternalism could also potentially explain the results. In order to fully assess these potential relationships, future research should attempt to focus on the effects of race within the lower court systems.

Another possibility is that courts in authoritarian systems may function differently than those in democratic systems. Yet in either type of system, judges generally reside within a political context, and in the case of South Africa, one that was deeply entrenched in apartheid. It is possible then that the judges of the Appellate Division, recognizing the inevitable demise of a regime based on this system, chose to utilize their powers of

judicial discretion to challenge the authoritarian regime and status quo of apartheid by consistently ruling in favor of the nonwhite defendants.[23]

Similarly, the Court may have ruled in favor of the political "underdog" in an attempt to both exhibit its independence from the authoritarian regime and defend its legitimacy to the world (Haynie 1994; 1995).[24] How might have this occurred? The Appellate Division, although structurally weakened and clearly plagued by the political influences of the National Party, often served as the final authority in the implementation of the government's repressive apartheid policies. It may be that the Court used its limited power of review to thwart the government's advances in the apartheid policy area. Based on its previous collisions with the government, however, this defiance would have had to be limited. As a result, the negative effect of race demonstrates that cases involving the death penalty may have been one area of the Court's docket subtly used to exert its independence from the government

Several of the expected relationships do not, however, materialize within the analyses. For instance, a significant relationship was not fully established between litigant resources, as operationalized by *pro deo* counsel, and death penalty outcomes. In light of this finding, can it be concluded that the American theories of litigant resources

[23] Relatedly, Helmke's (2002) research on the Argentine Supreme Court provides evidence that courts in authoritarian systems function differently than those in democratic systems. She posits a theory of "strategic defection," whereby the Court, motivated by its lack of independence from the dictatorship, will attempt to distance itself from a failing regime—or when faced by "institutional insecurity"—by consistently ruling against it throughout its demise (300).

[24] This assumption is based on the findings of Haynie (1994; 1995) who discovered that the Philippine Supreme Court, a Court also embedded within an authoritarian system, was less likely to defer to the regime and more likely to find in favor of the "underdog." One possibility raised is that the Court was concerned with the perception of its legitimacy and was willing to assert its independence from the regime in order to enhance its perceived legitimacy.

are not applicable to the South African legal system? This study suggests that perhaps they are not, or at least not in terms of appointed counsel.

Yet the failure to determine the role of litigant resources may be indicative of a much larger theoretical concern. Theoretically, it may be that some *pro deo* advocates are consistently appointed as counsel in death penalty cases before the Court, thus enabling them to overcome their purported "one-shotter" status within the legal profession and, concomitantly, achieve "repeat player" status within the context of the Court. The implication of this argument is that the effect of litigant resources derived from either *pro deo* or non-appointed counsel in the Court's decisions would have been equalized, thus resulting in the lack of significant differences among the case outcomes. To test this possibility, however, future research should include a more systematic analysis of the individual advocates participating in each case.

Furthermore, the victim and defendant characteristics did not seem to play a significant role within the judicial decision-making process of the Appellate Division. Unlike the American context, no effects of either the defendants' gender or the status of the victim were evident overall within the Court's decisions. However, these results must be tempered for several reasons.

First, it is difficult to ascertain the degree to which victim characteristics matter within the sentencing process, given the available data required to test these effects. Studies of the American courts have successfully demonstrated the significant influences of victim characteristics through the use of additional measures such as age, race and income. Others have even measured the effects of victim characteristics coupled with defendant characteristics (e.g., Haynie and Dover 1992). Yet similar types of

examinations are not feasible within the context of South Africa, because these data are not consistently provided within the Appellate Division's decisions. Therefore, future research should attempt to incorporate additional information likely to be included in the decisions of the lower or trial courts.

Similar concerns arise with respect to the defendants' gender. Methodologically, it may be that there is not sufficient variation among the cases to accurately test the relationship between gender and death penalty sentencing. On the other hand, it may be that females are, at least theoretically, less violent than males and thus less likely to commit acts that warrant the death penalty. Therefore, it may be methodologically impossible or perhaps even theoretically irrelevant to test the effects of gender on the death penalty sentencing in South Africa. Nevertheless, future research should attempt to focus on an issue area of law that may be more conducive to capturing the effects of gender within the sentencing process.

A final hypothesis tested was the source from which the leave to appeal to the Appellate Division was granted. The type of appeal seems to be somewhat related to cases involving murder with extenuating circumstances, since it appears that the Court was more willing overturn the sentence of death when it granted the leave to appeal. This may have occurred because these types of cases included a clear basis for which the reversal could be justified—extenuating circumstances—in contrast to cases deemed more difficult to overturn, i.e., those where the death penalty was statutorily mandated.

CONCLUSION

The purpose of this study has been to examine the impact of political influences within the judicial decision-making process of South Africa's highest court, the Appellate Division. In order to accomplish this goal, several theories of judicial behavior developed within the American context have been extrapolated to and tested within the legal system of South Africa. Consequently, the results have yielded several interesting findings regarding the role of the law and politics within this comparative framework.

What can be concluded then about judicial decision making in South Africa's Appellate Division and, further, about our theoretical understanding of judicial behavior? First, while this study certainly does not depict the full account upon which the Appellate Division based its decisions, it does provide a preliminary insight into the functioning of judicial decision making within South Africa's formerly authoritarian regime. The findings reveal that the Appellate Division's sentencing process was certainly susceptible to extralegal factors or, more broadly, the politics that have been similarly found to exist within the U.S. legal system. Yet the findings also reveal that judicial decision making within South Africa is constrained to some extent by the institutional constraints of the law.

Finally, this study suggests that the U.S. legal system is not simply an anomaly within a larger comparative context and that theories derived from studies of the U.S. courts can be exported and applied to other court systems as well. Yet it is only through the continual exportation of these theories to broader comparative frameworks that scholars can begin to fully generalize about judicial behavior.

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APPENDIX A

DESCRIPTIVE STATISTICS

Variable	N	Minimum	Maximum	Mean	Standard Deviation
MURDER	220	0	1	0.314	0.465
MURDEXT	220	0	1	0.577	0.495
OTHER	220	0	1	0.109	0.313
PANLIB	220	0.29	0.79	0.424	0.086
DEFRACE	217	0	1	0.073	0.440
GENDER	219	0	1	0.980	0.130
VICFEML	220	0	1	0.390	0.490
VICMALE	220	0	1	0.520	0.500
PRODEO	220	0	1	0.700	0.460
TRIAL	220	0	1	0.659	0.475
ADGRANT	220	0	1	0.236	0.426
Valid N (listwise)	216				

APPENDIX B

FREQUENCY DISTRIBUTIONS

Variable		Frequency	Percent
MURDER	No Extenuating Circumstances	69	68.6
	Otherwise	151	31.4
	System Missing	0	0
	Total	220	100
MURDEXT	Extenuating Circumstances	127	42.3
	Otherwise	93	57.7
	System Missing	0	0
	Total	220	100
OTHER	Other Serious Crimes	24	89.1
	Otherwise	196	10.9
	System Missing	0	0
	Total	220	100
DEFRACE	White	58	26.4
	Non-White	159	72.3
	System Missing	3	1.4
	Total	220	100

Variable		Frequency	Percent
GENDER	Male	215	97.7
	Female	4	1.8
	System Missing	1	0.5
	Total	220	100.0
VICFEMAL	Female or Child	85	38.6
	Otherwise (male or missing)	135	61.4
	System Missing	0	0
	Total	220	100
VICMALE	Male	115	52.3
	Otherwise (female, child or missing)	105	47.7
	System Missing	0	0
	Total	220	100
PRODEO	*Pro Deo* Counsel	154	70.0
	Private Counsel	66	30.0
	System Missing	0	0
	Total	220	100
TRIGRANT	Trial Court Grants Leave	145	34.1
	Otherwise (A.D. Grant or missing)	75	65.9
	System Missing	0	0
	Total	220	100

Variable		Frequency	Percent
ADGRANT	A.D. Grants Leave	52	23.6
	Otherwise (Trial Court Grant or missing)	168	76.4
	System Missing	0	0
	Total	220	100

APPENDIX C

LIST OF ALL DEATH PENALTY DECISIONS, 1950-1990

CITATION Year, Volume, Page (e.g., 5810616 = 1958, Volume 1, p. 616)	**DATE** Year, Month & Date (e.g., June 19, 1950 = 500619)
5810616	500619
6040723	500815
5130028	510518
5130158	510521
5310382	521212
5330303	530528
5340523	531003
5340552	531003
5410370	531211
5410455	531211
5420320	540308
5520152	550302
5530274	550516
5530284	550524
5540196	550822
5630411	560611
5710399	561111
5710458	561213
5720223	570304
5730772	570726
5740265	570912
5740642	570927
5740727	571230
5820273	580310
5830102	580512
5830107	580508
5840353	580924
5840461	581002
5840471	580930
5910894	581202
5920227	590309
5920322	590302
5920352	590324
5920448	590326
5930376	590612
5940483	590924

CITATION Year, Volume, Page (e.g., 5810616 = 1958, Volume 1, p. 616)	**DATE** Year, Month & Date (e.g., June 19, 1950 = 500619)
6010752	591217
6030535	600530
6040776	600930
6110460	601206
6120209	601202
6210312	611120
6220380	620305
6240533	620910
6310692	620827
6330188	630328
6330631	630527
6340856	630923
6340877	630926
6420783	631206
6510082	640929
6510209	641001
6510215	641001
6610831	641108
6520340	650301
6540688	650602
6540692	650930
6610507	651215
6620297	660304
6620433	660324
6630140	660512
6710387	661125
6710435	661125
6710440	661124
6740566	670930
6810495	671204
6810545	671201
6810666	671208
6820576	680308
6830250	680521
6840708	681001
6910561	681203
6920637	681121
6920632	690331
6940085	690711
6940421	690923
7010430	691125

CITATION Year, Volume, Page (e.g., 5810616 = 1958, Volume 1, p. 616)	**DATE** Year, Month & Date (e.g., June 19, 1950 = 500619)
7020654	700326
7030476	700518
7030529	700518
7110798	701214
7130769	710527
7140646	710921
7220839	720321
7220898	720316
7230331	720404
7230611	720601
7240551	720828
7310148	721002
7310796	721111
7440204	740401
7440732	740917
7530208	750326
7540553	750723
7540564	750722
7540567	750722
7610496	750724
7620580	760309
7620587	760304
7630644	760525
7640721	760903
7710754	761208
7720348	761123
7730510	770516
7730807	770601
7740240	770823
7810523	771114
7820069	771129
7930308	770330
7820410	780223
7820424	780227
7820607	780316
7820891	780321
7830767	780602
7840075	780511
7840560	780818
7840684	780831

CITATION Year, Volume, Page (e.g., 5810616 = 1958, Volume 1, p. 616)	**DATE** Year, Month & Date (e.g., June 19, 1950 = 500619)
7910461	780929
7910478	781106
7920656	780330
7920933	781201
7920938	790302
7930047	790320
8010001	791001
8010149	790827
8010938	791203
8020741	800228
8030745	800519
8030755	800516
8030824	800602
8030825	800602
8030829	800530
8030860	800523
8040559	800903
8040604	800911
8040613	800911
8110056	800923
8110959	801130
8120738	800602
8120744	800829
8130011	810316
8130172	810319
8130204	810324
8130353	810331
8130377	810331
8140614	810524
8140851	810831
8210030	810910
8210036	810908
8230113	820407
8230678	820308
8240736	820831
8240744	820827
8330275	830331
8330532	830519
8330610	830530
8330662	830530

CITATION Year, Volume, Page (e.g., 5810616 = 1958, Volume 1, p. 616)	**DATE** Year, Month & Date (e.g., June 19, 1950 = 500619)
8330717	830530
8410091	830929
8410556	831117
8410583	831117
8420868	840322
8430524	840511
8430666	840525
8440629	840903
8510001	840925
8510009	840925
8510236	840928
8510625	841129
8510805	841130
8520806	850307
8530029	850326
8530222	850328
8530881	850529
8530908	850530
8540767	850916
8630196	860326
8640734	860828
8641188	860930
8720307	861128
8720620	860313
8720663	870312
8730014	870326
8730097	870331
8730490	870527
8730717	870521
8740351	870525
8810037	870922
8810120	870922
8810868	871201
8820151	871126
8820485	870825
8820779	880311
8830190	880329
8830926	880525
8840005	880329
8840010	880330

CITATION Year, Volume, Page (e.g., 5810616 = 1958, Volume 1, p. 616)	**DATE** Year, Month & Date (e.g., June 19, 1950 = 500619)
8910268	880930
8910669	880527
8910687	880930
8910821	881123
8910939	881125
8920022	881117
8920043	881124
8920096	881122
8930420	881129
8920863	890321
8930695	890601
8930712	890524
8930720	890529
8940356	890530
8941013	890905
9010032	890918
9010832	891130
9030185	900326
9040709	900913
9040727	900917
9040735	900918
9110169	900928
9110517	901116
9120093	901130

VITA

Stephenie Elisha Franks was born in Jacksonville, Arkansas, but lived in several different places throughout the south before finally settling in Louisiana. She is a 1996 honors graduate from East Ascension High School in Gonzales, Louisiana. In May of 2001, she graduated *magna cum laude* from Louisiana State University, earning her Bachelor of Arts degree in sociology with a concentration in criminology and a minor in political science. Three weeks upon graduating, she began her graduate studies at Louisiana State University and expects to be awarded her Master of Arts degree in political science in May of 2003.