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Judges in an Unjust Society: The Case of South Africa

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Judges in an Unjust Society: The Case of South Africa

JOE W. ("CHIP") PITTS II*

INTRODUCTION

What should a judge do when confronted with the problem of applying unjust law? Grant Gilmore noted some of the options that the judge has:

He can resign his judgeship. Or he can offer himself as a candidate for impeachment by saying: I regard this law as immoral and refuse to enforce it in my court. Or he can evade the issue by seizing on minor technical lapses (usually procedural) and dismissing the case. Or he can enforce the law, with death in his heart—because it is the law, duly established by the constituted authorities, and because, as a judge, he has no other choice.¹

The recurring dilemma is not merely an abstract problem of jurisprudence, though it is occasionally broached as such.² It is also a practical and immediate problem for judges, lawyers, legal officials, and (to some degree) everyone else, particularly in legal systems like that of South Africa. As Dante observed, "the charge of complicity does not discriminate: the hottest places in hell are reserved for those who, in a period of moral crisis, do nothing."

Although it has been called "*the most unjust society in the world*,"³ one could debate whether South Africa's legal system is unjust. The widely perceived tension between law and morality in that country leads

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1. G. GILMORE, *THE AGES OF AMERICAN LAW* 37-38 (1977).

2. See, e.g., the Hart-Fuller exchange on law and morality: Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593, at 614-629 (1958); Fuller, *Positivism and Fidelity to Law - A Reply to Professor Hart*, 71 *HARV. L. REV.* 630, 659 (1958). See also, the Hand-Frank exchange on the role of courts in wicked societies: L. Hand, *The Contribution of an Independent Judiciary to Civilization*, in *THE SPIRIT OF LIBERTY*, 164 (1953) (a society so riven that the spirit of moderation is gone, no court can save); Frank, *Some Reflections on Judge Learned Hand*, 24 *U. CHI. L. REV.* 667, 697-8 (1957) (courts should do what they can). A recent formulaic description of the Critical Legal Studies movement has noted its tendency to characterize U.S. law as fundamentally unjust and an instrument of repression. *TIME*, Nov. 18, 1985, at 87. See, e.g., Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 *MINN. L. REV.* 1049 (1978).

3. Barry, *Injustice as Reciprocity*, in *JUSTICE* at 75 (E. Kamenka & A. Soon Tay eds. 1979).

one to ask the larger question of whether an unjust law is, in a sense, no law at all. Anti-egalitarian elements in some formulaic descriptions of justice might actually accord with South Africa's system: Anaximander's stress on the importance of reconciling opposites in strife⁴ does not preclude the possibility of one opposite dominating the reconciliation. Aristotle's "distributive justice" based on social status may tolerate insensitivity to those at the bottom of the social ladder. Justinian's concept of "giving everyone his due" may be perverted if rights "due" are narrowly defined. And Plato's vision of each person performing an appropriate social function can easily lead to complacency about inherent inequality. Not surprisingly then, current thinkers tend to emphasize the concept of "equality" as an essential component of justice.⁵ No effort is made in this article to define justice or morality. Although undefined, they will serve for the purposes of this article as somewhat utopian standards by which man-made, often unjust laws, may be judged. In keeping with jurisprudential tradition on this subject, I merely assume that the man-made laws of South Africa are largely unjust.⁶

Part I of this article contains an overview of South Africa's legal system: its common law, legislation, adherence to parliamentary sovereignty, and lack of judicial review. A comment on the nature and role of South Africa's courts concludes this section. In Part II, the positivist and natural-law models of law and adjudication are considered for the (ultimately inadequate) light they shed on the theoretical problem of the judge in an unjust system. Part III describes how these theoretical inadequacies affected the judicial responses of America under slavery and twentieth-century South Africa under apartheid. The conclusion ventures some thoughts toward a new theory of law and adjudication as interpretation. This new approach could frame a more appropriate role for judges who encounter unjust law, whether in South Africa or elsewhere.

I. THE SOUTH AFRICAN LEGAL SYSTEM

South Africa is a fascinating, if appalling society. The country presents an incomparable laboratory for study of jurisprudential issues because of the extremity of its social (largely racial) problems, and the extremely divergent perspectives on those problems. The social order both reflects and is shaped by the legal order: apartheid is appalling because it is the only institutionalized system of legal racial discrimination in the world. To the extent that revolution is a real possibility, the health and legitimacy of the legal system are implicated at the core. It has often

4. 1 PHILOSOPHIC CLASSICS 8 (W. Kaufmann 2d ed. 1968).

5. See, e.g., Dworkin, *Why Liberals Should Believe in Equality*, N.Y. REV. BOOKS, Feb. 3, 1983, at 32; *What Liberalism Isn't*, N.Y. REV. BOOKS, June 20, 1983, at 47; *What is Equality?* (Pts. 1 & 2), 10 PHIL. & PUB. AFF. 185, 283, 314 (1981); J. RAWLS, *A THEORY OF JUSTICE* 73-74 (1971).

6. E.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 326-7, 343 (1977) (though South Africa and Nazi Germany are examples, the idea of a wicked legal system is assumed).

been often said that the common law of South Africa recognizes most basic individual liberties and the concept of equality before the law. Yet the plethora of repressive and racially discriminatory statutes in South Africa calls into question the viability of liberal precedent and tradition. In practice, courts are extremely circumscribed by parliamentary sovereignty and judicial review. These features have resulted in a legal system with a very poor image, especially among South African blacks. The following is a brief overview of the South African legal system.

A. Common Law

The common law of South Africa is predominantly Roman-Dutch law transplanted from Holland in 1652 when the settlers of the Dutch East India Company arrived at the Cape of Good Hope. British rule (especially from 1806) resulted in substantial influence, if not direct imposition, of English common law. Not only were the courts and the English law of criminal evidence and procedure introduced in 1827-1834, but also the mandatory training of advocates in England combined with the appointment of English judges to yield constant recourse to English precedent and modes of legal thought. Thus, Hahlo and Kahn have written that the old "two layer cake" of Roman-Dutch law has now acquired a "third layer," English law.⁷ While English common law has a tremendous historic "status" component, the tradition of formal (especially procedural) equality before the law has always been potent. In theory, therefore, South African judges could appeal to a precedent like *Somerset's Case*⁸ as compelling persuasive authority. The thrust of Lord Mansfield's 1722 holding, which freed the Virginia slave Somerset who deserted his master in England, was that slavery was odious and against natural law. After the Nationalist Party came to power in 1948, legal sentiment for a purification of South African law gradually built up, culminating in Appellate Division Chief Justice L.C. Steyn's repudiation of "unjustified reliance" on English sources.⁹ Unfortunately, the largely Afrikaans "purists" were notoriously insensitive to civil liberties.¹⁰ Greater sensitivity has normally been shown by a group of largely English lawyers who see a veritable charter of human rights at the core of Roman-Dutch law. Lawyers and academics like Anthony Mathews, John Dugard, and Sydney Kentridge, for example, clearly see liberal rules, principles, and canons of construction in the Roman-Dutch common law. At times, perhaps, their enthusiasm has approached overstatement.¹¹ Yet, these distinguished and pas-

7. H.R. HAHLO & E. KAHN, *THE SOUTH AFRICAN LEGAL SYSTEM AND ITS BACKGROUND*, 584 (1968).

8. Lofft, 1 Lofft's Rep. 1; 20 Howell's State Trials 1; 98 Eng. Rep. 499 (1722).

9. See, e.g., *Regal v. African Superslate (Pty.) Ltd.*, 1963 (1) S.A. 102 (A); *Trust Bank van Afrika Bpk. v. Eksteen*, 1964 (3) S.A. 402 (A).

10. Blerk, *The Irony of Labels*, 99 S. AFR. L.J. 365, 377 (1982).

11. E.g., "The South African common law is color blind . . . [c]onsequently courts have not discriminated between white and black in the allocation of civil rights." J. DUGARD, *HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER*, 71-2, 382-3, 393 (1978) (hereinafter

sionately committed lawyers are under no illusions about the repressive character of South Africa's legal system; they merely place the blame on statutes in derogation of the common law. They have thus adopted the "liberal" model of South African common law for clearly reformist reasons.

Nevertheless, an issue—partly empirical, partly theoretical—remains as to the nature of South African common law. Can it be optimistically characterized as containing liberal principles? Or does the tincture of realism force one to see the heart of darkness in the tradition? As will become evident, the issue is crucial both to the characterization of the legal order as just or unjust and to consideration of the appropriate judicial response. Even after the empirical question is answered by recognition that South African common law is a mixed bag of "progressive" and "regressive" decisions, the judge is faced with the theoretical question of the scope for creativity and law-making in interpretation of the common law.

B. Legislation

In contemporary South Africa, the significance of the debate regarding the liberality of the common law fades in light of the many repressive and racially discriminatory statutes in derogation of the common law. Today, there are so many discriminatory statutes on the books that it would be misleading to ignore the fact that South African law is primarily directed against blacks. It has not always been quite so bad: reforms under British rule elevated the ideal of "the rule of law" and the notion of at least formal equality before the law. "Coloreds" were recognized as formally equal in 1828, and all slaves were freed in 1834. These liberalizations were largely responsible for the "Great Trek" of Afrikaners inland from the Cape in 1835-1837. Yet black Africans have never really been seen as persons with full civil and political rights, and other blacks (including coloreds and Indians)¹² have only been seen thus far as second-class citizens at best. The following account of the highlights of apartheid legislation does not aim at the comprehensiveness and specificity attempted elsewhere,¹³ but briefly introduces some of the main statutes relied on by the government.

cited as DUGARD, HUMAN RIGHTS); see also, A.S. MATHEWS, LAW, ORDER AND LIBERTY IN SOUTH AFRICA (1972); Mathews & Albino, *The Permanence of the Temporary — An Examination of the 90- and 180- Day Detention Laws*, 83 S. AFR.L.J. 16, 37-8 (1966); Kentridge, *The Theories and Realities of the Protection of Human Rights Under South African Law*, 56 TUL. L. REV. 227, 229-31 (1981); Hahlo & Maisels, *The Rule of Law in South Africa*, 52 VA. L. REV. 1, 13 (1966); Centlivres, *The South African Constitution and the Rule of Law*, 1956 BUTTERWORTH'S S. AFR. L. REV. 3, at 12.

12. "Blacks" throughout most of this paper will be used in this expansive sense urged by those fighting for equal civil rights in South Africa. When a more restrictive reference is needed, black Africans will be referred to as such.

13. Most admirably in DUGARD, HUMAN RIGHTS, *supra* note 11, at 53-201; Landis, *South African Apartheid Legislation*, 71 YALE L.J. 437 (1961).

1. Before 1948

Before 1948, when the Nationalists came to power, a number of statutes reflected the racist attitudes that fed the stepped-up campaign of the Nationalists to separate the races in 1948.¹⁴ Among these early segregation laws was the Immorality Act.¹⁵ This statute allowed the government to intervene in the most personal areas of life by prohibiting interracial intercourse. Section 16 of the expanded 1957 version of this Act was repealed by the Nationalists in 1985, along with the Prohibition of Mixed Marriages Act of 1949.¹⁶ The repeal of these Acts had been expected for some time, both because of the difficult and sordid investigation needed for enforcement and the recognition that black women are much more in need of protection from white men than are white women from black men. Thus, the Badenhorst Select Committee of 1984 decided that repeal of the anachronistic laws could allow the South African government some relief from international pressure without threatening the remaining legislative structure of apartheid.

Other pre-1948 restrictive laws were the "pass laws" which governed the movement of Africans within South Africa, and laws reserving jobs for whites and prohibiting blacks from joining recognized trade unions. These two areas, influx control and labor law, are two chief areas of legislative activity by the Nationalists. The Bantu Land Act 27 of 1913 and the Bantu Trust and Land Act 18 of 1936 set aside approximately 87 percent of the country's most desirable territory for whites, leaving 13 percent of the most arid and undesirable land for Africans. This grossly inequitable distribution is exacerbated by the fact that the population ratio of whites and blacks is almost inversely proportional to the amounts of land received through these early Acts: the 23 million blacks make up about 75 percent of the country's population.

2. Post-1948

Since 1948, the process of racial discrimination has intensified and been systematized and institutionalized by the Nationalists. The cornerstone Population Registration Act 30 of 1950 requires classification and registration of the entire South African population on the basis of race. Every person must fit into one of four racial categories: White, Indian, Colored, or African. The "separate but equal" approach that was rejected in the United States by *Brown v. Board of Education*¹⁷ was ironically

14. These laws are fully described in Suzman, *Race Classification and Definition in the Legislation of the Unions of South Africa*, 1960 ACTA JURIDICA 339.

15. Act 5 of 1927.

16. The Immorality Act of 1927 was expanded by Act 23 of 1957; the Prohibition of Mixed Marriages Act was Act 55 of 1949. Repeal of these two Acts was announced by South African Home Affairs Minister F.W. de Klerk on April 15, 1985, effective as of June 1, 1985. See also, *New York Times*, Tues., April 16, 1985, at 1, col. 6.

17. 347 U.S. 483 (1954).

taken a step further by the South African government at the same time *Brown* was being argued. Under the Reservation of Separate Amenities Act of 1953¹⁸ the implicit contemplation of blacks as separate but unequal was explicitly recognized in the realm of public facilities. Though much petty apartheid has been eliminated, much persists in the provision of separate restrooms, train cars, entrances, and so on. Separate and inferior educational facilities have existed for blacks since the Extension of University Education Act.¹⁹

Influx control was tightened up under the Group Areas Act²⁰ and the Urban Areas Act,²¹ which together classified geographic and living areas as white or non-white. These Acts allowed ownership and occupation in certain areas only by designated racial groups. The pass laws governing movement between racial areas were consolidated and expanded under the inaptly named Abolition of Passes and Coordination of Documents Act.²² Despite the recent repeal of the pass laws, the legislative requirement that Africans apply for new identity documents means that the vast majority of Africans must continue to carry the much-hated reference books that identify them by name and race, where they have worked, what taxes they have paid, and whether they have permission to be in the white areas.

Influx control legislation also formed the basis for the government's denationalization strategy, which involves giving the "homelands" set aside by the early Land Acts mentioned above gradual "independence" as separate sovereign states. This Kafkaesque political fantasy of the South African government has not been shared by the other nations of the world, none of whom have extended recognition to the fictionally "independent" states thus created. But the real impact of the government's fantasy is severe. Because the government has been striving until recently toward creation of a "white" South Africa without a single black African citizen,²³ the security of Africans (who have been considered aliens in the land of their birth) has been fragile indeed. The result has been the tragedy of state-ordered forced removals of blacks from white areas to the homelands, where jobs and housing are usually unavailable and starvation is rampant.²⁴

18. Act 49 of 1953. On October 1, 1986, President P.W. Botha confirmed the long-awaited intent to repeal this anachronistic legislation. See, Wall St. J., Oct. 8, 1986, at 32, col. 3.

19. Act 45 of 1959.

20. Act 41 of 1950, consolidated through Act 77 of 1957 and Act 36 of 1966.

21. Act 25 of 1945, § 10 inserted by § 27 of the Black Laws Amendment Act 54 of 1952. The government announced repeal of the Urban Areas Act, the pass laws and related influx control legislation in April, 1986, effective as of July 1, 1986. The Abolition of Influx Control Act 73 of 1986.

22. Act 67 of 1952.

23. Dr. C.P. Mulder, then Minister of Information, stated this government goal in House of Assembly Debates, col. 579 (Feb. 7, 1978).

24. For an overview of the whole process, see Dugard, *South Africa's "Independent"*

Labor law was not immune from Nationalist legislative activity, and job reservation for whites was expanded as a total prohibition on the right of Africans to strike was imposed.²⁵ A tension between labor law and influx control has existed historically, primarily because whites want blacks in white areas when cheap labor is needed, but not when management purposes are not being served.²⁶ Those conflicting demands persist today, despite the formal repeal of much of the influx control legislation.

Security legislation is so arbitrary and repressive that it is frequently cited as illustrating the erosion or collapse of the rule of law in South Africa.²⁷ As discrimination intensified after 1948, so did black resistance and then further repression. This cycle of repression was initially justified by cold war rhetoric invoking fears of a communist onslaught, and the early statutes in conception and application associated black liberation movements with communism. The Suppression of Communism Act,²⁸ now known as the Internal Security Act, was originally directed at communist subversion. Because the Act included within the definition of communism *any* doctrine "which aims at bringing about any political, industrial, social or economic change,"²⁹ the Act was vigorously enforced against noncommunist black and white activists.

In 1976, the legitimacy of proceedings against even anticommunist subversives was recognized by amending the name of the Act and extending its coverage to any organizations or individuals who "endanger the security of the state."³⁰ The Internal Security Act allows severe intrusions on freedoms of speech, movement, assembly, and association, usually without any recourse to judicial review. Moreover, the recent trend is for the sphere of unchecked executive discretion in the security area to increase rather than decrease. The current version of the Act allows detention without trial and "banning" of persons deemed to be security risks.³¹

Following the Sharpsville massacre of 1960, security legislation was introduced that banned the chief black liberation organizations (the African National Congress and the Pan-Africanist Congress), and declared a

Homelands: An Exercise in Denationalization, 10 DEN. J. INT'L. L. & POL'Y 11 (1980).

25. *E.g.*, Black Building Workers Act 27 of 1951; Industrial Conciliation Act 28 of 1956, 77 (job reservation); Black Labor (settlement of disputes) Act 48 of 1953 (prohibition on strikes).

26. See Budlender, *Incorporation and Exclusion: Recent Development in Labor Law and Influx Control*, S. AFR. J. HUM. RTS. 3 (1985).

27. Suzman, *South Africa and the Rule of Law*, 85 S. AFR. L.J. 261 (1968); Mathews, *The South African Judiciary and the Security System*, 1 S. AFR. J. HUM. RTS. 199, 200 (1985). For an excellent overview of security legislation in general, see DUGARD, *HUMAN RIGHTS*, *supra* note 11, at 146-365.

28. Act 44 of 1950.

29. *Id.* at § 1.

30. Internal Security Amendment Act 79 of 1976, inserting § 2(2)(A) of Act 44 of 1950.

31. The Internal Security Act 74 of 1982, §§ 18-29.

state of emergency.³² The South African government's reaction to the most recent spate of unrest has also included declarations of states of emergency.³³ After attempts to amend other security laws, the government finally introduced the sweeping detention-without-trial provisions of The Terrorism Act.³⁴ This Act allows a person to be indefinitely detained in solitary confinement, without trial, for purposes of interrogation. Courts are denied ability to review the validity of the detention.³⁵

3. Recent Reforms

Much attention has been given to recent "reforms" of the South African government. These include the 1979 amendments to South African labor law resulting from the recommendations of the Wiehan Commission,³⁶ the recent pronouncements accepting the permanency of urban blacks and the "restoration of South African citizenship", the new constitution adopted in 1984, and the repeal of the Prohibition of Political Interference Act,³⁷ the Mixed Marriage Act,³⁸ and section sixteen of the Immorality Act and the pass laws.³⁹ The government also has committees "examining" other discriminatory legislation to determine whether repeal or "adaptation" is possible or necessary.

The 1979 amendments to the Industrial Conciliation Act⁴⁰ did open a new era in South African labor law by allowing the registration of black unions and an industrial court with an equitable jurisdiction to consider unfair labor practices. Yet strikes are still "extremely circumscribed," meetings and picket lines are outlawed, and union leaders are often detained or banned.⁴¹ Recent legislation, in fact, has expanded the ability of the state to proceed against the emergent unions by prohibiting their ability to affiliate or assist political parties, or to "influence" members regarding political positions.⁴² The recently formed Congress of South Af-

32. Unlawful Organizations Act 34 of 1960.

33. *E.g.*, N. Y. Times, July 21, 1985, at 1, col. 6; N. Y. Times, Oct. 26, 1985, at 1, col. 3; The latest state of emergency was imposed on June 12, 1986, by Proclamation R. 109 on President Botha.

34. Section 6 of Act 83 of 1967.

35. *Id.* at 6 (5).

36. Commission of Inquiry into Labor Legislation, RP 47 (1979).

37. Act of 1968; repeal announced May 25, 1985. N. Y. Times, May 26, 1985, § 1, pt. 1, at 3, col. 4.

38. Act 55 of 1949; repeal announced May 25, 1985. N. Y. Times, May 26, 1985, § 1, pt. 1, at 3, col. 4.

39. Act 5 of 1927, expanded by Act 23 of 1957; repeal of 16 announced April 15, 1985. N. Y. Times, Apr. 16, 1985, at 1, col. 6. On repeal of the pass laws, *see supra* note 21.

40. Act 94 of 1979.

41. Gould, *Black Unions in South Africa: Labor Law Reform and Apartheid*, 17 STAN. J. INT'L L. 99, 147 (1981).

42. Labor Relations Amendment Act 57 of 1981, § 8(6) and § (7), read with § 4(5)(a)(iii). *See also*, The Labor Relations Amendment Act 81 of 1984, § 3, inserting § 31(a) in the principal act, and providing for non-enforcement of union-employer agreements which do not follow the requirements of the old legislation.

rican Trade Unions (COSATU) is thus risking prosecution for its strong political stands. The decisions of the industrial court, though initially greeted with enthusiasm, took a more restrictive turn in 1984-85.⁴³ In light of the recent unrest in South Africa, which is inevitably tied to labor and economic grievances of urban blacks, one can only conclude that the Wiehan strategy of transferring industrial unrest from the streets and shop floors to the formal statutory dispute-resolution machinery has failed.

Reform of influx control laws was considered in the Riekert report of 1979,⁴⁴ and the Act itself was repealed with the pass laws in 1986.⁴⁵ Amendments to the Urban Areas Act were made in July 1985. Yet the new hope for reform which emerged in late 1985 and early 1986 when President Botha announced that the policy of stripping black Africans of South African citizenship would be discontinued has been dashed by the form of the legislation providing for issuance of new identity documents and "restoring" South African citizenship.⁴⁶ The new "identity documents" will serve many of the same purposes as the old "reference books," and will not be issued unless an application is made. Similarly, citizenship will be restored only to those who go through the cumbersome process of administrative application, a process effectively unavailable to those who are ignorant of their right to apply. Although difficult to understand, the Restoration of Citizenship Act seems to apply only to "urban" blacks — those "lawfully and permanently resident" in the "white" South Africa that remains after certain homelands were granted independent state status. The meaning of "permanent residence" in the Act is unclear, but seems to refer to the control concept of the new-repealed Urban Areas Act. This indicates that the government has simply instituted a new sort of influx control, with passports taking the place of passes.⁴⁷ Significantly, the legislative structure of homelands as "separate states," which developed from influx control concepts of "separate areas," remains a core principle of apartheid.⁴⁸ Riekert's recommendations have

43. See, e.g., *Nat'l Union of Mineworkers & Others v. Driefontein Consolidated, Ltd.*, 5 INDUS. L.J. 107 (1984) (worker-protective test governing status quo orders rejected); *Vetsak v. Peter Ngobeni and Others*, 5 INDUS. L.J. 205 (1984) (contractual theory allows mass dismissal and discriminatory selective reinstatement).

44. P. J. Riekert, *Commission of Inquiry into Legislation Affecting the Utilization of Manpower*, RP 47 (1979) (hereinafter cited as *Riekert Report*).

45. Section 10 of Act 25 of 1945 (amendments decreasing the time period that foreign workers must remain in urban areas to qualify for residence rights, from 15 years to 10 years, and allowing residence in multiple towns to meet the requirements); effective July 3, 1985; Acat repealed in its entirety on July 1, 1986. See *supra* note 21.

46. See Identification Act of 1986, and the Restoration of South African Citizenship Act of 1986.

47. Budlender, *Influx Control in the Western Cape: From Pass Laws to Passports* (Aug. 21, 1986) (unpublished manuscript on file at the *Denver Journal of International Law & Policy*.)

48. N. Y. Times, Oct. 1, 1985, at A6, col. 3. Four homelands: the Transkei; Bophuthatswana; Venda; and the Ciskei have taken independence, with Kwa Ndebele was expected to

led to restrictions on migrant workers, including those from the supposedly "independent" homelands. Increased fines on employers found to employ illegal migrants have resulted in thousands of newly unemployed migrants, with repercussions extending to the migrant laborers' dependents in the homelands.

The new Constitution adopted by South Africa in 1984 is in keeping with the shift in ideology from *baaskap* (white domination) to separate development. The new Constitution accepts Indians and coloreds as worthy of representation in racially segregated houses of Parliament, but African blacks are still wholly excluded from national political participation. They do not possess the right to vote or any other form of representation. Even the coloreds and Indians have only illusory power, for they are a minority in "white" South Africa, and their consideration of matters is subject to the discretion of the Executive State President. Today the Executive State President has vastly expanded powers, and the white house of Parliament retains a veto over legislation passed by the other two houses. Cosmetic reforms and anti-discriminatory rhetoric may be tolerated in "white" South Africa, because Indians and coloreds are seen as a new, co-opted black middle class. In short, because the government's terms of reference have changed, the labor reforms and legislative repeals are utterly meaningless for the black majority of South Africa. Such "reforms" merely give the Nationalists an opportunity to gain a public relations advantage while bringing some of the most overtly discriminating legislation in line with current realities.⁴⁹ The essential legislative structure of apartheid, justified on grounds of separate development, remains intact.

C. *Parliamentary Sovereignty*

The repressive legislation of apartheid exists because the South African Parliament, as in England, is supreme. Also as in England, party discipline is strong, so the Nationalists have little trouble implementing their legislative program. Parliamentary sovereignty on the Blackstone-Dicey English model dates back to British occupation of the Cape in 1806. It was the form of government in the Republic of South Africa (the Transvaal), and has been rather uncritically accepted since South Africa became a Union in 1910. Federalism, which might have resulted in increased protection for human rights, was rejected. When South Africa became a formal "Republic" in 1961, the Westminster style of parliamentary sovereignty continued to give great play to the powers of a strong cabinet. At the time the American Constitution was drafted, the idea of a fundamental law binding Parliament was potent. But Dugard has written

do so in 1986; but popular protest led the legislative assembly to vote in late August, 1986, to delay independence indefinitely.

49. As Rep. Stephen Solarz wrote in a recent New York Times editorial, whites see the changes as cosmic, but blacks feel they are merely cosmetic. N. Y. Times, Oct. 8, 1985, at A31, col. 1.

that by the time "of English influence on South African law, the concept of parliamentary sovereignty was unchallenged wherever the Union Jack flew. South African lawyers and politicians grew up under a totally different English tradition from that of their American counterparts."⁵⁰

The South African version of parliamentary sovereignty differs not only from the American form of government; it also drastically differs from its British parent. Unlike the British emphasis on the notion of the rule of law, with its values of equality before the law and freedom from arbitrary government action, any idea in South Africa of a Parliament bound by law has evaporated.⁵¹ The basic premise of representation in a democratically elected legislature is denied. There is no effective legal opposition in South Africa. Additionally, the concept of Parliament as existing to protect common-law rights against encroachment by the executive is foreign to South Africa. The result is "a poor imitation of Westminster," a sovereign Parliament stripped "of all conventional restraints founded upon the historically based destiny and representative composition of its English counterpart."⁵² Dugard concludes that loyalty to the principle of parliamentary sovereignty, "more than any other legal factor, brought about the debasement of the South Africa legal system."⁵³

The new tricameral Parliament does not change matters. One party, the Nationalist party, continues to monopolize effective power. The Executive State president has vastly expanded powers, including the power to determine which matters Parliament's houses will consider. The State President also has final say over whether he wants the advice of the President's Council, made up from Parliament's members, at all.

Naturally, a sovereign Parliament that considers itself above the law has little patience for an institution like judicial review. Challenges to the restrictive legislation sketched above become difficult at best, as Judge Didcott of Durban has remarked: "Parliament has the power to pass the statutes it likes, and there is nothing the courts can do about that. The result is law. But that is not always the same thing as justice. The only way that Parliament can ever make legislation just is by making just legislation."⁵⁴

D. *The Traditional Lack of Judicial Review*

Parliamentary (and increasingly, executive) sovereignty thus implies a very limited scope for judicial review in South Africa. Again, it was not always this way; South African judges were overwhelmingly selected from

50. DUGARD, HUMAN RIGHTS, *supra* note 11, at 16.

51. Van der Vyver, *Parliamentary Sovereignty, Fundamental Freedoms and a Bill of Rights*, 99 S. AFR. L.J. 557, 572 (1982) (citing the constitutional crisis over the colored vote in the 1950's as evidence that Parliament assumed it was above the law).

52. *Id.* at 558.

53. DUGARD, HUMAN RIGHTS, *supra* note 11, at 36.

54. *In re Dube*, 1979(3) S. A. 820, 821 (N); *See also*, *S. v. Adams*, 1979(4) S.A. 793, 801 (T)(King, J.).

advocates who had been trained in England, so they were at least aware of *Bonham's Case*,⁵⁵ containing the dictum in which Chief Justice Edward Coke asserted the right to judicial review. But *Bonham's Case* had even less success in South Africa than it did in England.

In the constitutional crisis of 1897, Chief Justice Kotze in the Orange Free State asserted a right of judicial review. President Kruger (of Krugeraand and Kruger Park fame) reacted by pushing through legislation denying any such right. Kotze was dismissed from office. Swearing in the successor Chief Justice (Gregorowski), Kruger said that "the testing right is a principle of the Devil."⁵⁶ Kruger's statement reverberates throughout contemporary South Africa; a relatively impotent judiciary can be granted some independence at no risk to the supremacy of a powerful and unrepresentative legislature.

Yet South African judges did not give up. A second constitutional crisis in the 1950's was tied to the most substantial object of protection of judicial review: the constitutionally entrenched⁵⁷ colored right to vote. In the original compromise that resulted in the Union of South Africa's four provinces (the Cape, Natal, Transvaal, and the Orange Free State), the Cape was allowed to retain its qualified franchise for coloreds. The Nationalists passed the Separate Representation of Voters Act in 1951 to remove the colored right to vote. But the entrenched section 35 of the Constitution required the procedure of a two-thirds vote of both houses sitting together to remove the entrenched right. Exercising a form of judicial review, the Appellate Division in *Harris v. Minister of the Interior*⁵⁸ struck down the Act because the constitutional procedure had not been followed. The court thus overruled *Ndlawana v. Hofmeyr*, which had upheld parliamentary sovereignty.⁵⁹ Parliament responded with the "High Court of Parliament" Act which provided for *legislative* review of any judicial decision purporting to invalidate an act of Parliament. That Act was invalidated in *Minister of the Interior v. Harris*,⁶⁰ on the grounds that the high court was really no court at all, but a sham for Parliament itself.

The battle was not over yet. Parliament responded with a court packing plan that would have been the envy of Roosevelt. Under the Appellate Division Quorum Act,⁶¹ eleven judges were substituted for the previously existing five when an act of Parliament was in issue. The Senate Act,⁶² which followed, almost doubled the size of the Senate and changed

55. *Bonham v. Atkins*, 8 Co. Rep. 1136, 118a, 77 Eng. Rep. 646, 652 (1610).

56. DUGARD, *HUMAN RIGHTS*, *supra* note 11, at 24.

57. An "entrenched" provision of the South African Constitution is one that requires a two-thirds vote of Parliament to be disregarded.

58. 1952 (2) S.A. 428 (A.D.).

59. 1937 A.D. 229.

60. 1952 (4) S.A. 769 (A.D.).

61. Act 27 of 1955.

62. Act 53 of 1955.

the mode of electing senators to favor the Nationalist party. This legislative plan was upheld by the newly renovated Appellate Division on the grounds that neither Act, considered alone, was invalid. Mr. Justice O. D. Schreiner was the sole dissenter, noting the improper and unconstitutional purpose and effect of the legislation. The South Africa Act Amendment Act⁶³ was then passed by a two-thirds majority, to give retrospective validity to legislative denial of the vote to Cape coloreds. This Act also expressly denied the power of judicial review over the validity of acts of Parliament (except over the entrenched provisions guaranteeing equality of the two official languages, English and Afrikaans), a provision that was repeated in the constitution of 1961.⁶⁴ The new Constitution of 1983 has a comparable provision which provides *for* review, "subject to" an intricate set of cross- and cross-cross-referenced provisions that give only vitiated review. The Constitution further provides that, except for that limited review, "no court of law shall be competent to inquire into or pronounce upon the validity of an Act of Parliament."⁶⁵ The limited review allowed divisions of the Supreme Court relates to whether the state President has complied with certain procedures in deciding whether a specific matter is a general affair or an "own" affair of one of the represented population groups.⁶⁶ This is a weak review of what is a weak requirement of formal consultation with Parliament before certifying matters. Moreover, the legislative history of the new Constitution indicates that expanded powers of judicial review were not intended by the government.⁶⁷ Thus, the lack of an explicit reference to any entrenched clauses of the new Constitution may be read by analogy to the 1961 Constitution as limiting review to the entrenched amendment procedures (two-thirds of each house) required for derogating the equality of the two official languages,⁶⁸ or to the less entrenched and less stringent amendment procedures (a simple majority vote of each house) for many other provisions.⁶⁹

A strong argument clearly exists, however, for an expansive reading of the new Constitution to allow review even of nonentrenched provisions. The omission of the previous reference to entrenched sections may be read with the general grant of review to trump any restrictive reading suggested by legislative history. The issue would then arise whether the power of review would be limited (as before) to procedural sections or would go to substantive provisions. And, unfortunately, the tough issue of the proper external standards for reviewing the constitutionality of legislation would also inevitably arise.

63. Act 9 of 1956.

64. REPUBLIC OF SOUTH AFRICA CONST. Act 32 of 1961, § 59 (2) (no judicial review); § 108 (language rights).

65. REPUBLIC OF SOUTH AFRICA CONST. Act 110 of 1983, 34 § 34(2).

66. *Id.* at § 18, referring to subsections 17(2) and 16(1).

67. House of Assembly Debates, Aug. 29 - Sept. 2, 1983, cols. 12891, 12892.

68. Act 110 of 1983, § 99(2), referring to § 89.

69. *Id.* at § 99 (3). These provisions notably include many clauses affecting the powers of the State President and the Houses of Parliament, as well as the franchise.

The problem of standards is particularly acute in a country with no bill of rights, a Constitution viewed primarily as a mere tool for structuring government, and a history of repressive legislation. Positive law has granted few rights to those most in need of rights, and natural-law standards of justice, morality, or general reasonableness have never been successfully invoked for substantive, as opposed to procedural, protection. Other standards for quasi-natural-law review, such as humanitarian values, consensus, policy, "the rule of law," utilitarianism, or international law values are possibilities, but only possibilities. These will be discussed in more detail in Part II below. Suffice it to say that all sides agree on the characterization of South African courts as positivistic.

The materials for asserting a new and expanded right of judicial review thus exist, and should be used by the South African courts. Otherwise, the judiciary will be limited to the weak power of inherent common-law review of subordinate legislation and administrative action. This type of review does not extend to consideration of the substantive merits of legislation. Subordinate legislation includes the ordinances, regulations and the like issued by local government organizations with delegated authority from Parliament. The limited review on certain grounds over administrative actions is primarily to determine whether regular procedural requirements, such as impartiality, proper attention applied to the matter, and at least a good-faith effort at fairness, have been met. Yet even unreasonableness per se is not regarded as an irregularity. Only "grossly unreasonable" decisions amounting to a "recognized irregularity" warrant court intervention.⁷⁰ Until the recent decision in *Everett v. Minister of the Interior*,⁷¹ it was assumed that an opportunity to be heard had to be granted. Limited use of the statutory presumption in favor of liberty has, however, been employed to good effect, if only rarely.⁷²

Thus, the scope for judicial review had traditionally been circumscribed by rigid parliamentary sovereignty. The situation is not improved by jurisdiction-curtailing measures⁷³ such as that under the Prohibition of Interdicts Act,⁷⁴ which prohibits interdicts against banishment from a white area pending resolution of an attack on such an order; the Reservation of Separate Amenities Act,⁷⁵ which ousts court jurisdiction to review the validity of reservations; and the Terrorism Act,⁷⁶ which effectively excludes court review of any matter other than the rare "illegal" police in-

70. *Nat'l Transport Comm. v. Chetty's Motor Transport*, 1972 (3) S.A. 727, 735, 727 (A.D.); *Goldberg and Others v. Minister of Persons*, 1979 (1) S.A. 14 (A.D.) at 38.

71. 1981 (2) C.P.D. B 1 453.

72. *See, Dadoo Ltd. v. Krugersdorp Mun. Council*, 1920 A.D. 530, 552.

73. On the American experience with jurisdiction stripping measures, see Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 26 *STAN. L. REV.* 895 (1984).

74. Act 64 of 1956 (prohibiting issuance of interdicts in the influx control area).

75. Act 49 of 1953, expected to be repealed in 1987.; *See also supra* note 18.

76. Act 83 of 1967, § 6(5). *See also* the exclusion of court review of bannings and detentions under the Internal Security Act 74 of 1982, § 29.

terrogation that comes to light. The limited common-law power of reviewing delegated authority to determine whether it is unreasonable per se or ultra vires is not very helpful. And even a court that successfully grasps the opportunity under the new Constitution to assert an expanded power of judicial review will not be able to reach injustices perpetrated against the majority of African blacks, who have not been legally considered citizens of South Africa subject to South African legislation. The deportation of these denationalized aliens, is, of course, excluded from judicial review.⁷⁷

E. *The Courts in South Africa*

The lack of a bill of rights, coupled with the relative lack of judicial review, makes it all the more important that the South African judiciary be independent from the other branches of government. South African courts have been glowingly applauded on all sides for their unassailable independence.⁷⁸ Yet increasing criticism of the judiciary has cautiously called that independence into question. The caution springs from the strategic consideration that the myth of independence has a liberal effect: the courts in South Africa are, after all, the only legal institution in which black Africans have anything approaching effective political power. Thus, memories of the courageous stand of the Appellate Division in the constitutional crisis of the 1950's linger and the fiction of political neutrality is maintained, to preserve the "best chance" that blacks have. Underlying much of the new criticism is the perception that the myth of an independent judiciary legitimates the unjust legal order by indicating that the legal system provides free and equal individuals access to courts.⁷⁹ Respect for the system is misplaced, for only whites are really considered free and equal under South African law. The illusion of a flexible and just procedural system that occasionally does justice obscures the substantive lack of justice in most cases.

Increasingly, the South African press notes the grossly disparate sentencing in cases involving blacks and whites. Lawyers and academics like Sydney Kentridge and John Dugard write of the occasional sensitivity to human rights, but conclude that the courts have at best a mixed record in race and security cases.⁸⁰ Aloofness in race relations, says Dugard, is "but one of the many judicial myths of South Africa."⁸¹

77. Admission of Persons to the Republic Regulation Act 59 of 1972, § 45.

78. See, e.g., Hahlo & Maisels, *supra* note 11, at 10-12; Final Rep't of the Const. Comm. of the Pres. Council on the Adaptation of Constitutional Structures in South Africa, P.C. 4 (1984), at 115-117 (hereinafter Final Rep't).

79. See generally, J. HABERMAS, *LEGITIMATION CRISIS*, Pt. 3 (1973).

80. See Kentridge, *supra* note 11 at 231; Kentridge, *The Pathology of a Legal System: Criminal Justice in South Africa* 128 U. PA. L. REV. 603, 615 (1980); Kentridge, *Telling the Truth About Law*, 99 S. AFR. L.J. 648, 649 (1982); DUGARD, *HUMAN RIGHTS*, *supra* note 11 at 387.

81. DUGARD, *HUMAN RIGHTS*, *supra* note 11, at 324.

Why is this so? The primary reason must be that the judges are exclusively and uniformly white, and thus inevitably subject to all of the contradictory fears and prejudices of white South Africa. In addition, though, judges have been (and will continue to be under the new Constitution)⁸² appointed by the Executive President. Proposals for a multiracial appointments commission were considered, but rejected by the constitutional committee. Appointments are traditionally from the senior members of the bar (advocates as opposed to attorneys). Political considerations nonetheless play a huge role, and the security of tenure granted the judges, who need not retire until age 70, and none of whom has ever been impeached by Parliamentary request under the applicable procedure,⁸³ yields only a tenuous form of independence. Under the new Constitution as under the old, judicial security can be repealed by ordinary legislative process. Most judges support the Nationalist Party. The government can, moreover, afford to appoint more liberal judges because of the jurisdiction-stripping measures and limited judicial review that have governed since the 1950's. Judges politically opposed to the Nationalists also tend in practice to get politically uncontroversial cases.⁸⁴

The Supreme Court of South Africa is made up of the Appellate Division, which is the highest court in the land, and seven provincial divisions ranging from three to twenty-nine judges.⁸⁵ There are also magistrates courts, which deal with the vast majority of apartheid-related civil cases, but especially with criminal cases. Magistrates are often civil servants without a legal education who also exercise administrative functions. The somewhat unrepresentative decisions of judges are the focus of this article, however, because a right of appeal exists to the Supreme Court, and the reported decisions of judges are much more reflective of both the tougher social problems and the official attitudes of the legal system than unreported magistrates' decisions.

For most judges in South Africa, then, the fact that they are part of the system gives rise to no moral dilemma. The few judges who do feel a moral dilemma in applying the unjust laws of apartheid arguably experience a feeling that should not have arisen, precisely because they are part of the system and could not expect much real independence when they were appointed. The fact that the judge accepted an obligation under oath to apply the law and customs of South Africa compounds the sense of obligation.⁸⁶ The acceptance of such an obligation, however, does not preclude the possibility that a person accepting a judicial appointment

82. REPUBLIC OF SOUTH AFRICA CONST. Act 110 of 1983, § 10(1).

83. *Id.* at § 10(7).

84. *E.g.*, Kentridge, *Telling the Truth About Law*, *supra* note 80 at 649, 653 .

85. Republic of South Africa Constitution Act 110 of 1983, § 68.

86. The Supreme Court Act 59 of 1959 § 10(2)(a) (Judge's oath "to administer justice to all persons alike without fear, favour or prejudice, and, as the circumstances of any particular case may require, in accordance with the law and customs of the Republic of South Africa").

has a genuine desire to do justice to all persons alike — also part of the oath — in accordance with law. Although it is almost inconceivable that anyone would submerge strong reformist desires enough to become the sort of establishment figure considered for a judicial appointment, it is conceivable that a judge who becomes part of the judicial system will see more, perhaps be repulsed at some tasks, and grasp the need for confronting the problem of unjust law. Not all the judges who awaken to the moral dilemma will have undergone a moral conversion, but such conversions may be prompted by increased awareness of government policy, or a particularly heinous example of forceful repression, or a piece of legislation. Whether the moral dilemma arises gradually through increased sensitivity or suddenly through a reaction to a jurisdiction-stripping measure or other specific law that drives home the sense of injustice, the judge will seek ways to reconcile his perceived moral obligation with his judicial obligations to those who appointed him and those who seek justice in his court.⁸⁷ The following Part discusses the dominant theories of law and adjudication available in South Africa and elsewhere for that purpose.

II. THEORIES OF LAW AND ADJUDICATION

Various theories of the nature of law have attempted to clarify the relationship between law and morality and the implications of the particular theory of law for a theory of adjudication. Jurisprudence has only tangentially raised the problem of judges in unjust societies in the course of discussing how to handle hard cases, in which no clear law applies, as opposed to easy cases, in which legal answers are readily available. This is in part because legal theory concerns itself with the normal legal system, in which most laws are considered essentially just. But in either category, hard or easy cases, the dilemma of the moral judge may assert itself.

Neither of the traditional models of law and judicial obligation — positivist and natural law — seems to enthusiastically embrace the reality of the judicial function: the law-making, creative role that judges inevitably play. The ambivalence of both the positive and natural-law schools about the law-making function of judges reflects an understandable fear of nonaccountable judges making law in free-wheeling fashion. But constraints such as precedent, legal theory, self-respect and popular tolerance always exist in any society, and we have seen that in South Africa the constraints are particularly severe. The South African government wants to avoid “political” judicial review such as that in the United States. It is almost absurd to speak of the central problem of judicial review (non-accountable judges) when the society is characterized by drastically attenuated judicial review and a repressive sovereign Parliament totally unac-

87. The apparently sexist use of “his” in this and the following discussion is adopted not only for facility of style but because there are no female judges in South Africa. The society is almost as sexist as it is racist. What Paul Brest has said of American judges is especially true of South African judges: they are “mostly white, male, professional, and relatively wealthy.” Brest, *Interpretation and Interest*, 34 *STAN. L. REV.* 765, 771 (1982).

countable to the majority of the population.

The positivist model of law has come to be associated with a mechanistic view of the judicial process,⁸⁸ and even the natural-law model may lead to a mechanistic notion of the judicial role as merely 'declaring' the law (although the law so declared usually hovers rather mysteriously above or deep within the fabric of positive law). On the other hand, many positivists have recognized the role of judicial legislation in "hard cases," and the association of natural law with divine law, morality, or justice leads to the conclusion that a judicial appeal to natural law is more creative than simple application of positive law.

A. *Positivism*

The dominant legal theory in most of the world today, and especially in South Africa, is positivism.⁸⁹ The foremost contemporary positivist is H.L.A. Hart.⁹⁰ Hart has isolated three distinctive strands of positivism originally set out by the utilitarians Bentham and Austin. First is the insistence on the separation of law and morals. Second is the need for a purely analytical study of legal concepts. Third is the imperative theory of law as rules (Hart) or a command (Austin).⁹¹

Human fallibility and the limited purview of law make it counterintuitive today to assume that there is a necessary connection between law and justice. Hart first clarifies the misconception that the positivists endorse complacency about existing law. Positivists need not deny the relevance of morality to the development of the legal system and specific laws, nor deny the impact of law in shaping moral attitudes. Bentham, for example, was a zealous reformer.⁹² Clearer thought is promoted, Hart says, by remembering Austin's formula that "[t]he existence of law is one thing; its merit or demerit is another."⁹³ He concludes that there is no necessary moral minimum content that a rule of law must satisfy in order to be a law, beyond certain "fundamental" rules required for there to be a point in having other rules (for example, those against free violence, and for minimum guarantees of property).⁹⁴ Hart believes with Bentham that a law may be a bad law and thus raise a dilemma of personal obedience, but it is still a law.⁹⁵

88. D. LLOYD, *THE IDEA OF LAW*, 261-62 (1970).

89. South Africa has repeatedly been described as possessing an extremely positivistic legal order. See, e.g., Final Rep't, *supra* note 78 at 125; DUGARD, *HUMAN RIGHTS*, *supra* note 11, at 378; Dugard, *The Judicial Process, Positivism & Civil Liberty*, 88 S. AFR. L.J. 181 (1971); McWhinney, *Race Relations and the Courts in the Union of South Africa*, 32 CAN. B. REV. 44, 45 (1954); Mathews, *supra* note 27, at 207.

90. See, Hart, *supra* note 2; H.L.A. HART, *THE CONCEPT OF LAW* (1961). Another influential modern positivist is Dennis Lloyd, *supra* note 88.

91. Hart, *supra* note 2, at 601.

92. *Id.* at 595.

93. *Id.* at 596.

94. *Id.* at 623.

95. *Id.* at 620. Dennis Lloyd has noted that in anomalous situations where power super-

The positivist theory of adjudication that follows from the idea of law as rules distinct from morality would not be characterized by Hart as a "mechanical" process of "finding" law.⁹⁶ The judicial process is seen as somewhat scientific research of the rules laid down by the legislature or common law precedent. (The secular empirical metaphysics underlying positivism come into play here.) Judges apply these rules even if harsh. This ideal of "applying rules" is what has led to a vulgarization of positivism as mechanical. But because there can never be rules comprehensive enough to cover every fact situation, judges inevitably engage in law-making. Judges fill in the gaps and interstitially "legislate" where there is no clear rule or where the "open texture" inherent in vague and ambiguous general language leaves room for discretionary interpretation.⁹⁷ Moral conceptions of what law ought to be *do* play a part when the judge makes choices in the penumbras of hard cases. The Legal Realists' insights that courts often turn to their own values and predispositions are relevant and accurate on this point.⁹⁸ Those values, policies or predispositions, however, are not "law." Justice Holmes, a positivist who adhered to the law/morality distinction⁹⁹ and significantly influenced Realism, summarized the position: "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."¹⁰⁰

One problem with advising the moral judge in South Africa to seek guidance in the positivist model is that the judges' motions are, at best, molecular. Considering the special potency of positivism in a system of strong parliamentary sovereignty, the motions might be practically confined to the sub-molecular realm. Judges in South Africa cling to the vulgar version of positivism that deprecates making law. Even if judges are granted limited ability to effect interstitial relief, much of the vast legislative apparatus of apartheid is invulnerable from attack. And with South Africa's form of parliamentary sovereignty, there are fewer gaps to be closed and a greater risk that parliament will overturn an exercise of liberal discretion between gaps.

The nature and role of the discretion to be exercised by the judge in hard cases is also important. Dugard, Mathews, Kentridge, and other liberal South African lawyers stress an expansive concept of strong discretion in which "the judicial function is essentially an exercise in choice."¹⁰¹

sedes law, the realities of power must be considered in determining legal validity. LLOYD, *supra* note 88, at 182-3.

96. Hart explicitly rejects the mechanical view and agrees with Austin's characterization of this view as a "childish fiction." See *supra* note 2, at 609, n. 34, 610.

97. *Id.* at 608-615; see also HART, *supra* note 90. Dworkin describes the model in much the same way. See DWORKIN, *supra* note 6, at 81-82.

98. Hart, *supra* note 2, at 605-608.

99. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

100. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1916)(dictum).

101. DUGARD, HUMAN RIGHTS, *supra* note 11, at 303; see also Mathews, *supra* note 27, at 208.

They do not deny the severe constraints that exist in the South African context, but urge judges to interpret those constraints in light of liberal legal principles, which oppose these constraints. This expansive power of interpretation will enable the judge to see the spaces between the rules as quite large indeed. To put it another way, one might imagine that this group of liberal lawyers would, perhaps properly, see fewer cases governed by "settled meaning" than most positivists, including Hart.

Another problem with positivism in South Africa is the problematic quest for legislative intent. This quest is problematic because, as Realist Max Radin noted, legislative intent is frequently elusive or non-existent.¹⁰² Of course, the real problem with the quest for legislative intent in South Africa is that the intent is likely to be malevolent. For this reason, Dugard and others are understandably critical of the positivist approach, which treats legislative intent as closer to the core sources of law than to the penumbras. South African judges have indeed been (perhaps too) solicitous in the search for "true legislative intent," and have steadfastly purported to "declare" the law illuminated by legislative intent.¹⁰³ Dugard calls for greater reliance on rules of interpretation "to moderate the law's inequities," acceptance of "legal values" and "policy considerations" as well as positive legal rules and recognition and denial of concealed and inarticulate prejudices, such as the premise of loyalty to the white status quo.¹⁰⁴ Although he calls his new approach to law a "realist-cum-value oriented approach"¹⁰⁵ which is close to natural law and rejects positivism, Dugard is trying to modify rather than eliminate the influential positivist model. The idea of the judge legislating between statutory gaps is preserved. At the same time, Dugard urges greater creativity in statutory interpretation by liberating the judge's discretion from legislative intent to more humanistic, value-oriented standards.

The flaw with even this version of positivism is that there is no method of guaranteeing that the "legal values" or "policies" interpreted by South African judges will advance human rights, particularly in light of Dugard's recognition that background prejudices are difficult to eradicate, even once they are laid bare. Dugard presumes that there is a tradition of accepted liberal legal values at the heart of Roman-Dutch common law,¹⁰⁶ but it is doubtful that consensus on such values runs high in South Africa. Values such as "racial purity" and "separate development" would

102. Dugard, *The Judicial Process, Positivism and Civil Liberty*, 88 S. Afr. L.J. 181, 183 (1971), citing Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 871-2 (1930).

103. See, e.g., Remarks of Chief Justice Ogilvie Thompson, *Centenary Celebrations of the Northern Cape Division*, 89 S. Afr. L.J. 30, 33 (1972) (a judge is bound by legislative intent, and must "administer the law, not as he perhaps would like it to be, or as he might consider it ought to be, but as set out in the relevant statutory provisions as interpreted."). See also the judicial invocations of positivism in *R. v. Koenig*, 1917 C.P.D. 225, 242; *Byers v. Chinn*, 1928 A.D. 433, 329; *R. v. Christian*, 1924 A.D. 101, 124.

104. DUGARD, HUMAN RIGHTS, *supra* note 11, at 366-388.

105. *Id.* at 400.

106. See *supra* note 11.

probably have more persuasive force. Hence, if it is a "fiction" for judges to seek to discover legislative intent, it is also a fiction for them to ignore a clearly evil legislative intent and an overwhelmingly repressive statutory context.

Nevertheless, Dugard has brilliantly sketched the inadequacies of the positivist model. In answer to Hart's question about whether the practical consequences of stressing the distinction between law and morality have been bad,¹⁰⁷ Dugard resoundingly answers "yes!" The formulaic distinction has made it easier for the South African government to manipulate the concept of law for unjust ends, and to enlist the support of judges in perpetuating injustice. Judges are able to evade responsibility for the laws they apply by deferring to Parliament and precedent and avoiding the moral dilemma implicit in such activity. The situation in Dugard's eyes is not unlike that in Nazi Germany, where Hitler exploited the distinction so as to completely debase the German legal system.¹⁰⁸ Hart might answer that, in theory, there is no reason why a judge might not take some sort of moral action in response to his moral predicament, such as refusing to apply the unjust law, or resigning. But the objection still stands that the practical consequences of the distinction have been bad.

B. *Natural Law*

Natural law theory is the most potent historical alternative to positivism, because it manifests our constant striving for objective and universal values natural to all men. Natural law is a popular vessel for our aspirations because it is such a flexible concept. From early on, the Greek notion of natural law exploited the ambiguity of the term "nature." Nature could at once refer to the natural order decreed by divine law, and to the natural capabilities of man to live a virtuous and just life. Aristotle's conception of natural law ambiguously involved both the idea of natural rules universally binding men (though unequally, since some men he considered natural slaves), and the idea of man as a naturally social being who could fulfill his potential in society. Cicero and the Stoics further developed the dichotomy so that man could live a just life by ascertaining the universal laws of nature through reason. In the Middle Ages, the scholastics stressed the transcendent version of natural law, only to be followed by humanist concepts of virtue in the Renaissance. Locke's version of natural rights strongly influenced the leaders of the American Revolution. After being submerged by positivism in the nineteenth century, natural law experienced a revival after World War II as the world sought standards by which to condemn the brutal and widespread fascist violations of human rights. Although the legal philosophy of Ronald Dworkin may be distinguished from the Aristotelian-Thomistic tradition of natural law, it is his continuity with this tradition that makes him the

107. Hart, *supra* note 2, at 595.

108. DUGARD, *HUMAN RIGHTS*, *supra* note 11, at 395.

chief representative of this school today.

Dworkin's theories of law and adjudication emphasize the essential link between law and moral principles. Yet, despite stressing the relationship between law and morality, Dworkin would disagree with the strong or subtractive tradition of Catholic "higher" natural law, which holds that "an unjust law is no law at all." He recognizes that law has moral dimension, because sometimes

the answer to the question of what the law is may depend on (though it is never identical with) the question of what background morality requires . . . This is so not only in cases in which some legislative source deliberately embeds moral tests in legal rules, but also in cases where it is controversial what the law requires because no legislative source has said anything decisive at all. It is so not only when legal principles embodying moral concepts are concededly decisive of legal arguments, but also when the question in play is just the question of what principles are to be taken as decisive.¹⁰⁹

Dworkin thus accepts the role of "moral reasoning" in adjudication, but rejects the "absurd view"¹¹⁰ that an immoral or unjust law is not a law, because laws exist that are "in fact unjust."¹¹¹

Dworkin's natural justice theory of adjudication differs drastically from the positivist model of rules sketched by Hart. Emphasizing the protection of individual rights, Dworkin identifies the distinctive materials of judicial reasoning — moral principles — with rights. Principles are defined early on as standards observed because they are requirements of "justice or fairness or some other dimension of morality."¹¹² Later the focus is narrowed to arguments of principle, which "justify a political decision by showing that the decision respects or secures some group right."¹¹³ Adjudication, which deals with principles, is distinguished from legislation, which is characteristically about policies (instrumental goals). Dworkin's "rights thesis" is that judicial decisions are and should be governed by principle, not policy, even in "hard cases."¹¹⁴ Additionally, Dworkin attempts to satisfy the yearning for objectivity by providing that "right answers" exist even in hard cases, although right answers cannot be proved and may be controversial.¹¹⁵

This view of the nature and role of judicial discretion differs from that of traditional positivists and the liberal South African supporters of strong discretion. Dworkin believes that judges have no discretion in any "strong" sense.¹¹⁶ Rather than an exercise of free choice, the interpreta-

109. DWORKIN, *supra* note 6, at 342.

110. *Id.* at 341.

111. *See, e.g., id.* at 122-3.

112. *Id.* at 22.

113. *Id.* at 82.

114. *Id.* at 84.

115. *Id.* at 81.

116. *Id.* at 31-39, 68-71.

tive function is viewed as bounded by objective legal texts. Background considerations from the judge's life will inevitably play some role, but they have no independent force and should be resisted. What results is thus not a "choice" between competing texts and principles, but "judgment" leading to a decision required by law. In short, Dworkin ties adjudication to the judges' job of seeking justice, and law is expanded (and elevated above politics) so that judges may "discover" just law and not legislate, like the positivists' judges.¹¹⁷

In many ways, Dworkin's model sounds ideal for South Africa. The thrust of positivism is order, whereas the thrust of natural law is toward justice. Natural law was once strong in the country's jurisprudence. The Dutch scholar Voet said that laws "must be just and reasonable." Grotius, of course, was also in the natural law tradition. But positivism replaced natural law in nineteenth-century South Africa.¹¹⁸ Dworkin's model avoids the tendency of positivism to subordinate the judge to the legislature even when the judge is making law, as if he were a deputy legislator who enacts law that the legislature "would enact" if confronting the problem. Where political power is denied to blacks, an envelope of protection provided by just law declared by judges sounds attractive. The fact that judges are seen as having no strong discretion — they only "discover" rather than "make" law — would make liberal decisions more politically palatable in a country like South Africa. One of Dworkin's normative goals seems to be enhancement of judicial power; that is important in a system where blacks have access to power only in the courts. And the injection of justice and morality into the distinctive activist judicial role contemplated by Dworkin could not fail to help blacks gain their individual and group rights. Or could it?

When the model is applied to South Africa, several worrisome problems arise. The first is that Dworkin assumes a liberal democratic system with a majoritarian representative legislature and shared egalitarian values, an assumption woefully inapposite for South Africa. The fear of unconstrained anti-democratic discretion that prompts Dworkin seems at best irrelevant and at worst defeatist in South Africa. In his Introduction to *Taking Rights Seriously*, Dworkin sets out to "define and defend a liberal theory of law."¹¹⁹ Most of his theory is descriptive, but the normative aspects conservatively seek a "political justification" for the "present structure."¹²⁰ Dworkin's focus is presumably on the Anglo-American tradition, but especially on the United States with its Constitution and powerful Supreme Court. He certainly would not try to justify an authoritarian and anti-egalitarian political structure like that of South Africa, which denies political rights to the majority of its people.

117. *Id.* at 82.

118. See DUGARD, HUMAN RIGHTS, *supra* note 11, at 393; H. HAHLO & E. KAHN, SOUTH AFRICA: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION 205-06 (1960).

119. DWORKIN, *supra* note 6, at vii.

120. *Id.* at 123.

The distortions following from this initial assumption are clearly evident at the adjudicative level, where Dworkin assumes that judgments about political rights merely reflect "political decisions of the past."¹²¹ The sources of rights (and, thus, of "principles") are identified variously as institutional history such as cases and statutes, as well as personal and community morality.¹²² Judges are therefore bound to be affected by unjust precedent by the overriding requirement of consistency. Yet Dworkin is ambivalent about morality. It sometimes seems to be akin to positive morality (the specific customs and mores of a given community), and at other times to critical morality (by which community morality is judged and criticized). For example, "background" rights are defined as those that provide a justification for political decisions of "society in the abstract."¹²³ But with society left undefined in size, this could be either the positive morality of white South Africa or the critical morality of world society. Confusion is compounded, but then dispelled, when Dworkin illustrates the ideal judicial process in hard cases by having his superhuman "Hercules" appeal to the "community's moral traditions," or "popular morality."¹²⁴ These formulations indicate that Dworkin is referring to positive community morality. Of course, the fact that the white community has a monopoly over legal and political power means that it will probably be defined as the relevant "community." And appeal to white community morality in South Africa is far more likely to restrict blacks' rights than protect or expand those rights.

General difficulties with Dworkin's judicial principle/legislative policy dichotomy are also exaggerated in the South African context. His position that judges do not deal with policy arguments forces him into a strained account that allows the substitution of principle for policy arguments.¹²⁵ Particularly in the extreme situation of South Africa, arguments of principle about the rights of the white minority or the black majority tend to blur with arguments of policy that segregation reduces social tension or increases long-term social unrest. Apartheid, or separate development, is usually seen as a collective community goal and thus as a policy, although the black community would not share this goal. South African judges who invoke apartheid policy must presumably be understood to refer to the competing rights of the white minority. Dworkin's theory is unconcerned with this, because the principled argument — here, the competing right of the white minority — will not always be as strong when balanced against other rights as the policy argument here, apartheid. In the extreme circumstances of South Africa, however, the competing rights of

121. *Id.* at 87.

122. *Id.*

123. *Id.* at 93.

124. *Id.* at 123-4.

125. "If a judge appeals to public safety or the scarcity of some vital resource, for example, as a ground for limiting some abstract right, then his appeal might be understood as an appeal to the competing rights of those whose security will be sacrificed, or whose just share of that resource will be threatened if the abstract right is made concrete." *Id.* at 100.

the white minority are overwhelmingly strong both in legal theory and in power politics. Dworkin's answer to the substitution problem is thus not responsive to the specific problems presented by a system like South Africa's, or to the general problems of how to phrase, set the level of generalization, or weigh competing rights or principles. As apartheid is seen by many South Africans as part of the moral or religious order, it is hard to say that racial discrimination is not a moral principle.¹²⁶

A final aspect of Dworkin's theory that would bode ill for South African blacks is his approach to statutory interpretation. As we have seen, many positivists view narrow legislative "intent" as close to the core concept of law, but follow Hart in tending to exclude "purposes" attributed to statutory rules from "law."¹²⁷ Dworkin, on the other hand, tends to view the "purposes" of rules as law.¹²⁸ The same tendency on the part of many South African judges is criticized perceptively by Dugard as posing a threat to recognition of rights for blacks.

C. *Positivism v. Natural Law on the Dilemma of the Moral Judge*

Neither the positivist nor the natural-law model provides clear guidance for the moral judge in an immoral system. But each suggests a tentative approach. Recall that the positivist distinction between law and morality suggests that existing laws may be unjust, but are still law. It is after one notes that law exists and is unjust that the moral dilemma of personal obedience arises.¹²⁹ The task of the judge is complicated by the addition of judicial obligation to legal and moral obligations. Positivism thus may result in a judge's either applying the law because it is his obligation to do so, or not applying the law because personal moral obligation defeats judicial obligation and prohibits obeying or applying an unjust law. Hart merely wants to make certain that the problem is not concealed in an illusion that laws always accord with morality.

Yet this apparently prudential focus on confronting the moral dilemma — without discussion of judicial obligation — may, in effect, foreclose alternatives between the extremes of applying or not applying the law. Evading the issue by avoiding it, for example, is opposed to confronting the moral dilemma. Significantly, Hart's attack on the doctrine that unjust laws are not laws begins only after noting that the "doctrine meant that every lawyer and judge should denounce statutes that trans-

126. Dworkin admits that there "is no persuasive analysis . . . that insures that the principle that blacks are less worthy than whites can be rejected as not a principle at all." *Id.*, at 343. Dworkin's original definition of principles, which requires that they be requirements of "morality" leaves ambiguous the distinction between what is good and what is accepted as good. *See id.* at 83.

127. Hart, *supra* note 2, at 614-15.

128. DWORKIN, *supra* note 6, at 105-108.

129. "Surely the truly liberal answer to any sinister use of the slogan 'law is law' or of the distinction between law and morals is, 'Very well, but that does not conclude the question. Law is not morality. Do not let it supplant morality.'" Hart, *supra* note 2, at 618.

gressed the fundamental principles not as merely immoral or wrong but as having no legal character." Whether or not the option of in-court or out-of-court protest on other grounds remains open, Hart clearly disfavors such methods even as rhetorical tools. Similarly, one would think that lying about the law would be condemned for not confronting the moral issue, for evading the imperative aspect of legal positivism, and for distorting the analytical rigor of the law's vocabulary.

Moreover, the practical consequences of the positivist's distinction between law and morality may lead to concealment rather than to exposure of the moral dilemma, because judges, especially in easy cases, can take refuge in the concept of "merely applying the law." Whether or not positivism is the chief factor in debasement of legal systems like that of Nazi Germany or South Africa, it seems fair to say that it is at least a significant factor.¹³⁰ If judges are able to use positivism to evade responsibility in easy cases, think how much more tempting it will be to do so in hard cases, despite the theoretical existence of strong law-making discretion.

The natural law approach to the problem of the judge in the wicked legal system remains undeveloped, and points in contradictory directions. On one hand, some natural law theorists suggest that an unjust law is no law at all. On the other hand, theorists such as Dworkin would incorporate community moral principles as part of law. The consequent emphasis on the judge's political responsibility, lack of discretion, the duty to be consistent, and the "right answer" thesis pushes the judge in the direction of applying unjust law, even if it is in fact unjust or inconsistent with the judge's personal moral views.¹³¹ Judges cannot decide hard cases using background rights, but are limited to institutional rights. "Institutional autonomy insulates an official's institutional duty from the greater part of background political morality."¹³² Although the judge's own moral convictions and beliefs will inevitably enter into his decision to a degree,¹³³ the judge is not free to give them independent force in his judgment. For example, if two coherent justifications can be given for earlier Supreme Court decisions enforcing the due process clause, with one containing an extremely liberal principle that cannot be reconciled with the criminal law of most states, and the other containing no such principle, "Hercules cannot seize upon the former justification as license for deciding the abortion cases in favor of abortion, even if he is himself an extreme liberal."¹³⁴

Two other elements of Dworkin's theory may loosen this rigid con-

130. As several writers would imply. See Fuller, *Positivism and Fidelity to Law*, *supra* note 2, at 657; DUGARD, *HUMAN RIGHTS*, *supra* note 11, at 374; R. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 1* (1975) [hereinafter cited as COVER].

131. DWORKIN, *supra* note 6, at 87-89.

132. *Id.* at 101.

133. *Id.* at 123-124.

134. *Id.* at 126 (emphasis added).

ception of judicial duty. The first is the largely semantic distinction made between the "choice" or "discretion" recognized by the positivists and the "judgment" stressed by Dworkin. While denying that judges have discretion, Dworkin may let choices or discretion in through the back door by recognizing that interpretation and judgment are required in determining what the relevant moral principles are. As Dworkin's famous example of Tal's smile in the chess game between the Russian grandmaster and Fischer illustrates, the referee (like the judge) must interpret contested conceptions such as "the character of the game" (or the character of the legal system).¹³⁵ Despite Dworkin's protestations, this function could provide a loophole for judicial originality.

Dworkin never adopts the extreme natural law position that unjust law may not be applied because it is not "law." But a second element of Dworkin's theory that may increase the flexibility of the moral judge in an immoral system links Dworkin to more traditional natural law thought: the passion for justice, for infusing law with a moral dimension. This passion is what drives Dworkin to defend the present American liberal structure as essentially just. His initial approach thus tended to bind the judge to apply these essentially just legal principles, certainly in easy cases, but also in hard cases. Little treatment is given to the problem of his "fairness" requirement of judicial consistency yielding unfair results: the primary answer Dworkin gives is that only the community's conception of fairness may override the argument for consistency so as to result in disposing of unjust precedent, for example, as a "mistake."¹³⁶ Yet even in easy cases, legal rights may conflict with background moral rights. And in hard cases, background moral rights of the particular community may not be very "moral" (in a critical sense).

In his Reply to Critics, Dworkin's response is close to the positivists' distinction between legal and judicial duty as opposed to moral duty.¹³⁷ He reiterates his idea that certain allegedly "moral" principles must meet a threshold adequacy of "fit" with institutional history before they can count as a justification, and amongst those principles . . . the morally soundest must be preferred."¹³⁸ Morality here is clearly used in a new way, as a critical morality external to the wicked system. Dworkin continues: "it may be that no principle we would find acceptable on grounds of morality could pass the threshold test," in which case "the general theory must endorse some unattractive principle as providing the best justification of institutional history, presenting the judge with a legal decision and also, perhaps, a moral problem."¹³⁹ This is the situation in South Africa,

135. *Id.* at 102-3.

136. *Id.* at 122-23.

137. *See id.* at 327 ("We might want to describe the moral conflict a judge faces in such a case by distinguishing his 'legal' duty which is to find for legal rights, from his 'moral' or 'overall' or 'final' duty, which may require him to ignore legal rights.")

138. *Id.*, at 342.

139. *Id.*

where liberal principles would not provide an adequate fit because of the high number of decisions that would have to be thrown out as mistakes. The key issue then would be "whether the principle is so unjust that it would be wrong for the judge to enforce any legal right it supplies, and right to him to lie in order to avoid doing so."¹⁴⁰ Dworkin concludes that "it may be that he must lie, because he cannot be of any help unless he is understood as saying, in his official role, that the legal rights are different from what he believes they are."¹⁴¹ The alternatives of resigning or protesting on moral grounds are discounted as probably ineffective.

It is interesting that Dworkin chose to endorse the judicial lie as an alternative, because it seems so inconsistent with his right-answer thesis, which carries normative "gravity" calling for its application because it is "right", and with his ideal of judicial consistency, which he has come to call "integrity" in later works. Perhaps the solution is not surprising, however, in light of Dworkin's constant identification of legal rhetoric with reality. The right-answer thesis is defended as reflecting the way in which lawyers and judges talk, and the moral judge's "lie" can similarly be defended on normative grounds as encouraging "the beneficial and unifying assumption that justice is always relevant."¹⁴² With Hart, however, Dworkin agrees that it would be misleading and therefore "unwise to make this lie a matter of jurisprudential theory."¹⁴³

Both the positivist and the natural-law models give ambivalent guidance to the moral judge in a wicked system. Sophisticated positivists want to expose the moral problem, which leaves open the possibility that the judge will choose to follow moral duty rather than legal duty. Positivism also tends to emphasize legal duty, and the rules binding judges to apply the law are positive legal as well as moral rules. Natural law similarly contains contradictory elements. Competing interpretations of natural law may result in the application of immorality as morality in the wicked legal system, and this fact compels even sophisticated natural-law scholars to lean toward the idea that judges may not apply unjust law, or must lie in order to avoid doing so. The following section examines the actual response of two wicked legal systems to the dilemma of the moral judge.

III. THE DILEMMA OF THE MORAL JUDGE

A. *The American Experience*

The dilemma of the antislavery judge in America under slavery presented many of the same problems faced by South African judges today. Laws treating slaves as property, and a Constitution that in part sanctioned slavery confronted judges with a system of unjust laws on a daily basis. The passage of the Fugitive Slave Act in 1850 created new

140. *Id.* at 343.

141. *Id.* at 327.

142. *Id.* at 338.

143. *Id.* at 327.

opportunities to question the constitutionality of slavery and align the law with growing antislavery sentiment, but these opportunities were for the most part missed. Much scholarship has treated the issue of how confirmed antislavery judges like Joseph Story, Lemuel Shaw, and John McLean adhered to their roles as judges and applied slavery laws, but none has been as lucid, comprehensive, and thoughtful as that of Professor Robert Cover in *Justice Accused*.¹⁴⁴

Cover begins by sketching the background traditions of natural law and positivism in eighteenth-century America. The sources of the natural-law tradition were many (ranging from the Bible and philosophy to Grotius and *Somerset's Case*),¹⁴⁵ and some of the sources justified slavery as natural. But most of the more recent and authoritative natural-law sources (including *Somerset's Case*, which confirmed Blackstone's natural-law condemnation of slavery)¹⁴⁶ supplied a framework for arguments attacking slavery laws. The natural-rights rhetoric of the American revolution strengthened the arguments. Natural law persisted in conflict-of-laws, international law, and state constitutional contexts. Yet, at the time the nation was founded, constitutional positivism, which included natural law phrases within a written constitution, asserted itself. What Cover calls a "pattern of moral-formal conflict" thus emerged, and influenced the judiciary.¹⁴⁷

The first instance of judicial construction Cover examines involves cases falling under the natural-law "free and equal" clauses of positive law state constitutions. South Africa, of course, has no such documents. These were adopted as part of the "first emancipation" of slaves in the northern states in the years following the Revolution. In Vermont, on the one hand, construction was easy, because the 1777 constitution specifically called for the prohibition of slavery.¹⁴⁸ In Virginia, on the other hand, no one thought that the clause adopted in 1776 freed the state's dominant labor system: its quarter-million slaves. Judicial construction depended on the extra-judicial climate, including the presence of anti-slavery pressure groups, and prior trends toward freedom. What is interesting is that often the most forthright opponents of slavery, like St. George Tucker of Virginia, could write opinions sanctioning slavery. A prominent opponent of slavery, and Tucker's teacher and predecessor at William and Mary, George Wythe had written the opinion of the Richmond District Court of Chancery in *Hudgins v. Wright*¹⁴⁹ holding that an Indian family that showed no negroid features was presumptively free on the basis of appearance and the free and equal clause. Tucker felt obligated to affirm the case merely on the racial ground with explicit dis-

144. COVER, *supra* note 130.

145. See *supra* note 8.

146. COVER, *supra* note 130, at 15-17.

147. *Id.* at 29.

148. *Id.* at 43.

149. 11 Va. (1 Hen. & M.) 133 (Va. 1806), cited in COVER, *id.* at 51.

approval of Wythe's expansive presumption of freedom. Tucker's opinion must have been painful to write, because Wythe had just been murdered for providing that Michael Brown, a former slave protegee, be named beneficiary of Wythe's estate.

Other judges at later times, in states where abolitionist rhetoric was fiery and slavery was no longer a fact of life, were nonetheless constrained by a "thoroughgoing judicial positivism."¹⁵⁰ Instead of capitalizing on the opportunity presented by the antislavery climate, Judges Randolph and Nevius of the New Jersey Supreme Court relegated the free and equal clause to a mere abstract, legally inoperative "preamble." Their chief justification was that an existing gradual scheme of emancipation rendered the clause moot.¹⁵¹ Thus they refused to free slaves petitioning their court in the *Post* and *Van Buren* cases¹⁵² in the absence of a clearly expressed legislative intent to do so. Cover attributes the harsh tone and intolerant approach of Randolph and Nevius to their reaction to the demands made on them by the opportunity presented for emancipation through judicial law-making, the merely imitative aspects of New Jersey's adoption of the clause in 1844, the perceived need to downgrade the constitutional utopian rhetoric of the ideological antislavery advocate in the case, and the perception that the gap between law and morality was closing on its own accord.¹⁵³

The second instance of judicial construction that Cover examines involves statutory interpretation of emancipation and private manumission acts. Not surprisingly, the same positivism and role fidelity he discovered in the context of broad and vague state constitutional language is also present in interpretation of the narrow language of such statutes. Statutory interpretation *in favorem libertatis* was a possible approach in America under slavery, as it is in present-day South Africa. A statutory presumption in favor of liberty can be applied in any of several ways:

(1) always; (2) only if the statute itself is held to have a liberal purpose; (3) only if competing counterlibertarian interests do not outweigh the liberal purpose; (4) only in areas of doubt not covered by express statutory language; or (5) never.

The presumption in *favorem libertatis* was not always applied in the United States under slavery, but it was applied occasionally. Judge William Tilghman of Pennsylvania applied it in the second way mentioned above: only when the statute itself had a liberal purpose. In *Miller v. Dwilling*¹⁵⁴ Tilghman noted the silence of the Pennsylvania Emancipation Act of 1780 on the issue of whether a child born to a servant inden-

150. COVER, *supra* note 130, at 60.

151. *Id.* at 58. Compare the arguments of some South African judges that the government's program of gradual reform renders liberal interpretations unnecessary.

152. *State v. Post, State v. Van Buren*, 20 N.J.L. 368 (1845), *cited in* COVER, at 55.

153. COVER, *supra* note 130, at 59-61.

154. 14 Serg. & Rawle 442, 443 (Pa. 1826), *cited in* COVER *supra* note 130, at 66.

tured for a term of years (as opposed to a slave for life) would be free. Finding no "clear expression" to this effect in the statute, Tilghman found such bondage too "contrary to the general spirit of the act."¹⁵⁵ Such a tepid application of a presumption in favor of liberty is related to the third approach mentioned above, for even if a statute has liberal purpose, it may be seen to balance competing counterlibertarian interests, such as property or security. The judge may rationalize that it is "unfair" to favor either side in the balance. In any event, Cover notes that the presumption in favor of liberty was never applied as a presumption that operated of its own force, without regard to legislative intent.¹⁵⁶

By far the most common approach to statutory interpretation, and one for which South African judges have been rightly criticized, is a positivistic inquiry into what the law is. As the civil war grew closer, Virginia courts interpreted a private manumission statute in this way, so as not to grant freedom to the child born to the manumitted slave. In *Maria v. Surbaugh*¹⁵⁷ and *Gregory v. Baugh*¹⁵⁸ the interpretative process was described as a simple positivistic task of ascertaining and applying the law. Because it is the legislature's task to resolve moral and political issues prior to judicial treatment, previous cases applying the presumption in favor of liberty were said to have relaxed the rules of law "too much."¹⁵⁹

Cover summarizes the sporadic use of libertarian presumptions:

Because formal principles do not decide all cases, because there remained areas of doubt as to what the legislature intended, how to characterize the broader spirit of legislation, or which of the uses of context were more significant, there remained a fair ground for difference of opinion between men of equally good faith but unequal libertarian convictions.¹⁶⁰

The final cases Cover stresses arose under the fugitive slave clause of the Constitution, and after 1850, the Fugitive Slave Act. The American experience under the fugitive slave clause is now well known. Positivism bound the Supreme Court and even confirmed opponents of slavery like Justice Story and Judge Lemuel Shaw. Deferring to the importance of the constitutional compromise, the judges almost uniformly felt duty-bound to adhere to the clause and not to consider natural law.¹⁶¹ From 1850 until the outbreak of the Civil War, new constitutional issues regarding the Fugitive Slave Act were raised and resolved. The statutory structure established arguably violated due process by excluding the fugitive's testimony and providing pecuniary incentives for the commission's resolution of cases against the fugitives. Yet Chief Justice Shaw of the Massachu-

155. *Id.*

156. *Id.* at 80.

157. 23 Va. 287 (2 Rand.) (1824), cited in COVER, *supra* note 130, at 74-75.

158. 29 Va. (2) (Leigh) 665, 680 (1831), cited in COVER, *supra* note 130, at 74-75.

159. *Id.*

160. *Id.* at 81.

161. *Id.* at 171.

sets Supreme Court held the act free from constitutional doubt in *Sims Case*.¹⁶² The West soon followed suit when Justice John McLean of Ohio also upheld the constitutionality of the Act.¹⁶³ Finally, the Supreme Court of the United States, in *Abelman v. Booth*, dealt "the last and greatest blow of the Taney court against antislavery."¹⁶⁴ The Supreme Court denied states the habeas corpus power to reach the restraint of one held pursuant to federal process. The constitutionality of the 1850 Act was also, incidentally, upheld.

Applying cognitive dissonance theory to the decisions of the United States under slavery, Cover isolates several typical judicial responses: (1) elevating the stakes of formal adherence to law, (2) emphasizing a mechanistic view of the obligation to apply law and only "law," and (3) ascribing responsibility for the decision to other groups like the legislature.¹⁶⁵ One might expect these characteristic responses from a moral judge in any immoral legal system. As we shall see in the next section, they show up in twentieth-century South Africa as well.

B. *The South African Experience*

The most thoughtful examination of the judicial process in South Africa is that of John Dugard. In *Human Rights and the South African Legal Order*¹⁶⁶ he discusses the judicial techniques used in some of the more famous cases. As in the United States, liberal judges are easier to identify than liberal decisions. Like Cover, Dugard concludes that positivism contributed to abdication of judicial duty to protect human rights.

Some early decisions, however, showed that judges were trying to err on the side of human rights. In 1882, Judge Kotze decided *In re Marechane*¹⁶⁷ in which he held that all persons are regarded as equals under common law in the absence of an express statute to the contrary. This is equivalent to applying a presumption in favor of liberty, like that discussed by Cover. *Marechane* is Dugard's Brown, because its abstract rhetoric suggests that there are liberal principles inherent in the hybrid common law of South Africa. Unfortunately, other pre-Nationalist decisions of South Africa after the Union of 1910 gave the imprimatur of judges to racial segregation of the sort condemned in *Brown*. In the infamous case of *Moller v. Kemioes School Committee*,¹⁶⁸ a Cape statute that did not require school segregation was applied to the action of the Kemioes School Committee requiring such segregation. Sir James Rose

162. 61 Mass. (7 Cush.) 285 (1851), cited in COVER, *supra* note 130, at 175-78.

163. *Miller v. McQuerry*, 17 F.Cas. 332 (C.C.D. Ohio, 1853) (No. 9, 583), cited in COVER *supra* note 130, at 183.

164. COVER, *supra* note 130, at 187, citing *Abelman v. Booth*, 62 U.S. (21 How.) 506 (1859).

165. COVER, *supra* note 130, at 229-238.

166. See note 11, *supra*.

167. 1 S.A.R. 27, 31 (1882).

168. 1911 A.D. 635.

Innes of the Cape Provincial Division read the statute restrictively and would not assume discriminatory legislative intent in the absence of a clear expression to the contrary. Some of the most distinguished judges of South Africa, including Chief Justice De Villiers and Justice Koetze of the Appellate Division, reversed. Some of the justices suggested that perhaps the separate facilities were unequal; others suggested that the inequality did not matter. The thrust of the decision was that the probable intent of the legislators — who, being from Holland, regarded natives as inferior — and the political morality of the community made it difficult to ignore the malevolent legislative intent, even if the court could not “from a philosophical or humanitarian view be able to approve of this prevalent sentiment.”¹⁶⁹

The same approach of recognizing or reading discriminatory legislative intent into a neutral statute guided the majority in *R. v. Padsha*.¹⁷⁰ There, a three-judge majority, over two dissenters including Sir James Rose Innes, reversed a lower court holding that an immigration statute authorizing exclusion on economic grounds could not be used as a blanket racial prohibition against all Asians.

Nevertheless, a relatively liberal undercurrent of decisions persisted until 1934. In *Dadoo Ltd. and Others v. Krugersdorp Municipal Council*¹⁷¹ a statute denying Asians the right to hold property was strictly construed to allow their non-Asian corporation to do so. *R. v. Dedtody*¹⁷² involved the very strict construction of a statute providing that “any native” without a pass was guilty of a crime. In an opinion very sensitive to liberty, the court looked at the history of the Transvaal and determined that the harm the legislation was aimed at was male violation of the pass laws. The court refused to “extend” the pass laws to African women. Other pre-1934 decisions involving “neutral” statutes that did not authorize discrimination tended more toward *Brown* than toward *Plessy v. Ferguson*.¹⁷³ In *R v. Plaatjies*,¹⁷⁴ for example, the court held that a city could not set aside an “exclusively white” section of a stream for swimming. Similarly, *Williams & Adendorff v. Johannesburg Municipality*¹⁷⁵ defeated a municipal attempt to provide separate trams for “coloreds.”

In 1934, the basic legal structure changed when South Africa decided its *Plessy: Minister of Posts & Telegraphs v. Rasool*.¹⁷⁶ The statute at issue in *Rasool* was silent on the existence or validity of racially segregated post-office counters. In a three-to-one decision of the Appellate Division, a majority held not only that “separate but equal” regulatory dis-

169. *Id.*, at 643-4.

170. Cited in DUGARD, HUMAN RIGHTS, *supra* note 11, at 309.

171. 1920 A.D. 530.

172. 1926 A.D. 198.

173. 103 U.S. 537 (1896) (separate but equal facilities are constitutional).

174. 1910 E.D.L. 63.

175. 1915 F.P.D. 106.

176. 1934 A.D. 167.

crimination is legally "reasonable," but that separate post offices accorded with the history of the Transvaal, "accepted principles and good sense."¹⁷⁷ Dugard is quick to point out that the court in *Rasool* was actually *making* law, rather than merely declaring and applying it,¹⁷⁸ because the court overruled prior precedent (e.g. *Williams & Adendorff*) and the trend of the law toward at least formal equality. The case went even further than *Moller* in that it sanctioned racial segregation as reasonable and respectable.

Even after the Nationalists came to office in 1948 and "separate but equal" doctrine was clearly established in South Africa through *Rasool*, some courts struck down regulations where *substantially* unequal facilities were provided. "Mere technical inequality," however, was insufficient grounds to do so. In *R. v. Abdurahman*,¹⁷⁹ and *R. v. Lusu*,¹⁸⁰ situations in which no first class railway coaches were reserved for non-Europeans, or were reserved but not substantially equal, were struck down by the Appellate Division. Unfortunately, these decisions resulted in legislative codification of the separate but unequal doctrine in the Reservation of Separate Amenities Act.¹⁸¹ The fact that judges remained on the bench who were unsympathetic with the early "white domination" form of apartheid precipitated not only this legislative rebuke, but the constitutional crisis of the 1950's described above.¹⁸² Unlike the situation in the United States, therefore, where Congress took over the enlightened libertarian role played by the Supreme Court, the South African legislature took a reactionary and regressive approach.

With the success of its court-packing plan, the government joined in the paeans of praise about judicial independence as a spate of executive-minded race and security decisions was handed down. In the field of race relations, a number of decisions failed to apply *Abdurahman*, even though no statute directly addressed the factual situation at issue. *Mustapha and Another v. Receiver of Revenue, Lichtenburg, and Others*¹⁸³ involved the termination of Indians' trading permits on racial grounds. The court upheld the termination, although the statute did not expressly authorize unequal administrative treatment. A black lawyer held in contempt for refusing to sit at a separate courtroom table got no relief in *R. v. Pitje*,¹⁸⁴ although courtroom tables were not reserved for whites only under the Reservation of Separate Amenities Act or any other authority. In *Minister of Interior v. Lockhat and Others*,¹⁸⁵ the removal of a group

177. *Id.*, at 175-177.

178. DUGARD, HUMAN RIGHTS, *supra* note 11, at 314.

179. 1950 (3) S.A. 136 (A.D.).

180. 1953 (2) S.A. 484 (A.D.). *See also*, 1943 C.P.D. 242, 251 (test is manifestly oppressive or unjust "equality").

181. Act 49 of 1953; *see*, n. 18, *supra*.

182. *See* notes 57-64 and accompanying text *supra*.

183. 1958 (3) S.A. 343 (A.D.).

184. 1960 (4) S.A. 709 (A.D.).

185. 1961 (2) S.A. 587, 602 (A.D.).

of Durban Indians under the authority of the Group Areas Act was challenged. Though the Group Areas Act did not authorize the unequal treatment that resulted, the court held that Parliament "envisioned" such unequal treatment, and it was not for the court to decide whether such treatment was ultimately for the state's good. A similar trilogy of 1960's cases in the security area illustrates the refusal of South African courts to carefully scrutinize challenges to the ideal of individual liberty. In *Loza v. Police Station Commander, Durbanville*,¹⁸⁶ the court could have strictly construed the new security laws to limit police powers. But instead the Appellate Division held that a detainee can be re-arrested and detained again after the expiration of the 190-day period provided for by statute. In *Schermbucker v. Klindt, N.O.*,¹⁸⁷ the wife of a detainee got news of the inhumane torture her husband was experiencing. She urgently applied for an injunction to stop the police brutality. The police denied the charges. The court read the purposes of the detention statute broadly, refused to apply a presumption that the legislature does not intend to interfere with the judiciary and held, over two strong dissents, that it had no power to allow a detainee's testimony (i.e., a detainee had no power to testify) in an application to prevent wrongful interrogation. Finally, one of the most widely criticized South African opinions, *Rossouw v. Sachs*,¹⁸⁸ found an intent on the part of the legislature to deny reading and writing matter to detainees, although the security statute involved did not expressly remove such rights.

Dugard rightly concludes that the response of the South African judiciary to race and security cases such as those sketched above has been inadequate, and (with Cover) he places significant blame on the vulgar positivism that declares the law "as is" and takes the search for "true" legislative intent as a definitive guide. "This enables judges," Dugard writes, "to apply the harshest of laws obediently with an easy conscience and may result in a failure to realize the extent to which technical rules of interpretation may be involved to moderate the laws' inequities."¹⁸⁹ Cover's other two observations are also relevant to the many South African decisions discussed here: the stakes of formal adherence to the law were elevated, which is not too difficult to do in volatile South Africa, and responsibility for the decision was usually ascribed elsewhere, to the legislature. Dugard is correct about the importance of the search for intent in these and more recent cases, but he may be somewhat artificial or unrealistic in playing down the fact that an "evil" intent in many apartheid laws is often discernible, and in assuming that most South African judges would want to invoke rules of interpretation to moderate the laws' inequities. While Cover focused only on the antislavery judge, Dugard looked at

186. 1964 (2) S.A. 545 (A.D.).

187. 1965 (4) S.A. 606 (A.D.); See Dugard, *The Courts and Section 6 of the Terrorism Act*, 87 S. AFR. L.J. 289 (1970).

188. 1964 (2) S.A. 551 (A.D.).

189. DUGARD, *HUMAN RIGHTS*, *supra* note 11, at 374.

all judges ("moral" and "immoral"). Dugard's study shows us that subjective values do play a greater role in immoral systems than we might think. Some judges — at least until the court packing plan of the 50's succeeded — were able to ameliorate the evils of apartheid somewhat.

Since Dugard wrote *Human Rights and the South African Legal Order*, several cases continue to exhibit the flaws of excessive deference to the legislature and executive to which he refers.¹⁹⁰ Other cases continue the minority position of ameliorist sensitivity to liberty wherever possible.¹⁹¹ The decisions and out-of-court statements of Judges Didcott, Shearer,¹⁹² Milne,¹⁹³ and Corbett¹⁹⁴ are particularly noteworthy in this regard. All in all, the room for creative statutory interpretation is limited in South Africa because of malevolent legislative intent. Before the problems of such malevolent intent can be remedied, they must be fully recognized. Recognizing the harsh realities underlying South Africa's repressive laws should not be an impediment to change; it should be the first step to change.

IV. WHAT'S A JUDGE TO DO?

Judges in South Africa are unquestionably part of the system. On one level, everyone within a system of unjust laws is tainted. This may be especially true of judges, for one may safely assume that they would not be judges if they saw the whole system as utterly unjust. But such a blanket condemnation is useful only as abstract rhetoric. On a more realistic

190. See, e.g., *Goldberg v. Minister of Prisons*, 1979 (1) S.A. 14 (A) (no enforceable legal right of prisoners to read news; courts cannot question commissioner's decisions); *S. v. Adams, S. v. Werner*, 1981 (1) S.A. 187 (A) (offense to live in white areas even though no accommodation in Indian/colored areas and substantial inequality, unauthorized by statute, would result). These cases are discussed in Dugard, *Some Realism About the Judicial Process and Positivism—A Reply*, 98 S. AFR. L.J. 372, 384-387 (1981). See also *Gumede v. Minister of Justice*, 1985 (2) S.A. 529 (N) (accepting Minister's casual "reasons" required to be given by detention statute). Mathews says "[i]t is time for the South African appeal court to review the earlier cases and modify, if not abandon, the principle that 'reason to believe' and like clauses preclude it from any investigation whatever of the grounds for official decisions." *Supra* note 27, at 205.

191. See, e.g., *Komani N.O. v. Bantu Affairs Administration Board*, Peninsula Area, 1980 (4) S.A. 448 (A); *Ndabeni v. Minister of Law and Order*, 1984 (3) S.A. 500 (D) (Didcott, J.).

192. See, e.g., *S. v. Meer*, 1981 (1) S.A. 739 (N) (Shearer and Didcott, JJ.) (Orders banning meetings under Internal Security Act held "incurably obscure" and "void for uncertainty"); *In Re Dube*, 1979 (3) S.A. 820 (N) (Didcott, J.); *In Re Duma*, 1983 (4) S.A. 469 (N) (Didcott, J.). See also *Christian Science Monitor*, Aug. 12, 1986, at 2, col. 3. (Natal Supreme Court invalidates key clause in state of emergency regulations on grounds that the government must prove that detention would help and the state of emergency).

193. E.g., *S. v. Gibson, N.O.*, 1979 (4) S.A. 115 (N) (Milne, J.) (contempt of court and defamation charges regarding press article critical of security police dismissed). See also, Milne, *Equal Access to Free & Independent Courts*, 100 S. AFR. L.J. 681 (1983).

194. E.g., *Goldberg v. Minister of Prisons*, 1979 (1) S.A. 14 (A) (Corbett, J., dissenting) (common law rights retained unless taken away by statute). See also Corbett, *Human Rights: the Road Ahead*, 96 S. AFR. L.J. 192 (1979).

level, not everyone can be tainted. Distinctions that cut both ways can be drawn. The judge's role is harder to justify than that of other actors in the system, because the dilemma arises not only in obedience but in application and enforcement of the laws as well. As Cover says, "the attorney's role within a system of law assumed to be immoral is much easier to justify than that of the judge."¹⁹⁵ Yet if the judge hopes to work within the system to change it, his role is potentially easier to justify. Many judges and lawyers in South Africa have opted for such a role. The general philosophical problem is familiar; many of us decide that participating in an organization or activity we disapprove of is worthwhile because of the possibility of change. Is it better to do nothing at all? Sydney Kentridge has put it well: "if one participates in a system that distorts justice, truisms about the limited functions of a judge will not necessarily save one's soul."¹⁹⁶ The dilemma is not just a legal dilemma; it is a moral dilemma.¹⁹⁷ As such, the choice will involve compromises between competing conceptions of what is good, or bad.

A. *Apply the Law*

Assuming a moral dilemma exists in South Africa, this is one resolution of the problem, but hardly a moral one. Those most affected by the unjust laws have had no say in enacting the laws. Most judges in South Africa, however, like most judges in the United States under slavery, will resolve the dilemma in this way. Judges, after all, have not only been trained in the law; they have come to live the law. It is understandably hard for a judge to deviate from the dictates even of unjust law. An outsider is thus a bit presumptuous to criticize South African judges. In addition to the potent pressures pushing the judge toward role-fidelity we have already encountered, such as positivism, parliamentary sovereignty, and a bias toward the white status quo, rationalizations that allow the judge to apply a law he has moral doubts about could come from various other sources.

The political climate of South Africa is hot indeed, and the judge may feel that the very security of the state or the order of being itself is threatened by the slightest crack in the dike of apartheid. "Order" was a justification for the maintenance of slavery, and it is a powerful justification for "separate development" in South Africa. But liberty as well as order is supposed to be guaranteed by law.

A different rationalization occasionally offered in South Africa takes the empty antidiscrimination rhetoric of the government seriously. According to this view, the gap between law and morality is temporary and

195. COVER, *supra* note 130, at 159.

196. Kentridge, *Criminal Justice in South Africa*, *supra* note 80, at 619.

197. As Cover said of the antislavery judges, "[m]ore and more, it appeared the question ought not to be put, 'How should a judge of integrity decide these cases?' but rather 'How can a man of integrity decide these cases?'" COVER, *supra* note 130 at 178.

closing. The pressure on the judge to effect change is concomitantly reduced. Several assumptions within this gradualist approach are subject to question, such as whether real change is coming and whether the overall system is thus truly benevolent. Also, gradualists tend to forget that they are part of the system, and that an antilibertarian ruling in one case may reverberate to retard progress in other cases. An even more tenuous rationalization available is that conservative application of repressive laws will yield a revolutionary reaction ultimately serving justice for all.¹⁹⁸ This approach would not be seriously considered by most South African judges actually sitting. It also suffers from a failure to recognize the positive benefits that successful litigation can achieve, quite apart from any considerations of whether violent revolution is a moral or wise alternative or whether applying repressive laws could realistically further that alternative. In any event, the conclusion that those who participate in the system are morally responsible for that participation is hard to resist.

Evading the issue through docket control or procedural niceties only delays the ultimate application of unjust law. Gilmore says that both evading the issue and applying the law formalistically exalts procedure over substance, and a "sort of Platonic" idea of law over reality.¹⁹⁹ The reality that Gilmore refers to is the real need for tempering law with mercy in systems like South Africa's. In the final analysis, the alternative of applying unjust law cannot be a satisfactory solution to the moral dilemma, because applying the law ignores the dilemma itself.

B. Resignation

Once a judge experiences a moral crisis, the alternative of resignation must loom large. A lively debate on the morality and utility of judicial resignation has been carried on in South Africa for some time.²⁰⁰ Some judges have actually said that resignation is the proper response to truly unjust legislation.²⁰¹ The basic argument for resignation is that the system has become so pervasively unjust that remaining in it, especially in a judicial capacity, confers legitimacy upon it. Resignation is the only honorable alternative, and may have some impact.

Resignation has impeccable theoretical credentials: Gandhi called on the judge who was condemning him to obey the law and apply the maxi-

198. This is the position of the "Celestial Curia" in the recent Foreword to the Harvard Law Review's discussion of the United States Supreme Court's 1984 term. Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 17-20 (1985).

199. GILMORE, *supra* note 1, at 38.

200. See, e.g., Wacks, *Judges and Injustice*, 101 S. AFR. L.J. 266 (1984) (South African legal system is unjust; judges can do little about it; judges should resign); Dugard, *Should Judges Resign?—A Reply to Professor Wacks*, 101 S. AFR. L.J. 286 (1984) (Room and materials for liberal judgments still exist; judges cannot help by resigning, so should stay on); Wacks, *Judging Judges: A Brief Rejoinder to Professor Dugard*, 101 S. AFR. L.J. 295 (1984) (Legal system repressive; resignation may have some impact).

201. E.g., *S. v. van Niekerk*, (Fannin, J.), quoted in Dugard, *Judges, Academics and Unjust Laws: The Van Niekerk Contempt Case*, 89 S. AFR. L.J. 271, 283 (1972).

mum possible sentence, or resign.²⁰² Gandhi, of course, joined Socrates in accepting the penalty bestowed by positive law. But both adopted that position for a reason: to expose the injustice of the system. Calls for resignation serve primarily to expose the moral dilemma facing the judge. If judges are duty-bound to apply law, and the law is unjust or immoral, then it follows that the moral thing for the judge to do is resign. This syllogism was put to antislavery judges in America,²⁰³ and it has been put in the same form to South African judges. As Cover notes, the call for resignation pushes judges "beyond the stage of reiteration of role definition."²⁰⁴ When someone says "you must resign," it does not do to answer, "but I am a judge."

The practical problem with resignation is that it is probably going to be an ineffective means of helping those victimized by unjust laws. On the contrary, unless massive resignations could be coordinated—a wholly unrealistic scenario in South Africa, given the composition of the judiciary—moral judges' resignations would eliminate any current hope of getting a moral judge at trial. Calls for judicial activism have had some effect; calls for resignation have not. Dugard describes the situation:

All the one hundred or so judges who presently sit on the South African Supreme Court accepted office in the knowledge that they would be required to apply the laws of apartheid. Any isolated resignation or handful of resignations would, therefore, inevitably be discounted and ascribed to some ulterior motive. Only a substantial number of resignations would have the impact desired by Wacks, but such a possibility is so fanciful as to be completely eliminated. The sad truth is that judges have missed the boat. Had they resigned in large numbers in (say) 1955, when the Appellate Division was packed, or in 1967, when the principle of indefinite detention without trial was first introduced, there is little doubt that such resignations would have had considerable effect. But today, absent widespread resignations in protest over some new horrendous legislative measure, resignations would fall into the category of 'too little and too late.'²⁰⁵

If the virtue of resignation is that it avoids both the violation of the judicial oath and the application of oppressive law, the vice is that it probably will be ineffective, because other judges will apply that law. Resignation is not morally pure, either.

202. Gandhi, *A Plea for the Severest Penalty Upon His Conviction for Sedition*, in *THE LAW AS LITERATURE* 465 (E. London ed. 1960).

203. COVER, *supra* note 130, at 151, citing W. PHILLIPS, *A REVIEW OF LYSANDER SPOONER'S UNCONSTITUTIONALITY OF SLAVERY* (1847).

204. COVER, *supra* note 130, at 215.

205. Dugard, *Should Judges Resign? A Reply to Professor Wacks*, *supra* note 200, at 292.

C. *Protest or Civil Disobedience*

Common to both protest and outright civil disobedience is the factor of risk. Whether one protests in court or out of court, or engages in more radical activity such as civil disobedience, sanctions can range from reversal on appeal to criminal charges on contempt or more serious offenses.

Protest can be in court or out of court, and can be mere rationalization designed to avoid confronting the moral dilemma or a genuine attempt to spur change. Occasionally, as we saw in *Moller*²⁰⁶ judges may make a perfunctory homage to justice in an otherwise unjust decision. Sometimes, as in *S. v. Adams*,²⁰⁷ stern disapproval of a racially discriminatory statute accompanies a decision upholding the statute. There, the judge said "speaking for myself and if I were sitting as a court of equity, I would have come to the assistance of appellant. Unfortunately, and on an intellectually honest approach, I am compelled to conclude that the appeal must fail."²⁰⁸ Such disclaimers and hints of disapproval do little more than highlight the injustice of the system, and not with much hope of yielding substantial change.

The risks of protest are well-illustrated by the *van Niekerk* cases.²⁰⁹ Durban Professor Barend van Niekerk was dismayed at the diminution of the rule of law in South Africa, and made several speeches in which he criticized specific laws and judicial decisions in South Africa. The criticism was trenchant but accurate. His first prosecution arose from an empirical study of discrimination in the imposition of the death penalty. After he was prosecuted unsuccessfully for contempt of court, he made a speech in which he called on judges to protest the Terrorism Act, or at least exercise their discretion in excluding evidence obtained through indefinite detention in solitary confinement.²¹⁰ Underlying his criticism was a strong natural-law approach in which he asked whether there was not a point at which unjust laws cease to be laws at all. At his second trial, van Niekerk was convicted for attempting to obstruct the course of justice and improperly attempting to influence judicial decisions,²¹¹ this despite the temperate nature of his criticism and the omission of specific reference to any pending cases.

Although van Niekerk was an academician, not a judge, his prosecution has undoubtedly stifled criticism of the judiciary from within as well as without. In-court criticism of the system by judges may result in sanctions if it is powerful and effective, and is meaningless if it is weak or limited. In-court protests are all too often rationalizations that sidestep

206. See note 168 and accompanying text *supra*.

207. 1979 (4) S.A. 793 (T).

208. *Id.* at 801.

209. *S. v. van Niekerk*, 1970 (3) S.A. 655 (T); *S. v. van Niekerk*, 1972 (3) S.A. 711 (A).

210. Address by Prof. van Niekerk at Durban City Hall (Nov. 9, 1971), quoted in *S. v. van Niekerk*, 1972 (3) S.A. 711, 716 (A.D.).

211. *Id.* at 711.

the moral-formal dilemma and attempt to explain the judges' failure to do justice. Out-of-court protests are even more risky,²¹² but most would agree that some point can be posited where they are necessary.²¹³ As Gustav Radbruch said, the failure of German lawyers and judges to speak out against the Nazi regime was a dereliction of duty.²¹⁴ Protest is strategically limited, however. Explicit characterization of the whole system as unjust might limit the protestor's ability to change it. Protest is also substantively limited. Unless coupled with a just result, protest achieves little.

D. Applying Conscience Through the Judicial Lie

Applying the law, resigning, and protesting are all flawed morally in that all may be analogized to "honor among thieves." But applying conscience through the judicial lie is a moral use of legal power against immoral law. Merely applying conscience alone is a version of judicial protest subject to reversal or more severe sanctions. Although the judicial lie is also a form of protest, it is less visible and thus more likely to be effective. Dworkin thus tepidly endorsed the lie as the most attractive solution to the moral-formal dilemma.

The difficulties with the "lie" solution are both practical and theoretical. The solution has the virtue of responding to the only significant flaw in Dugard's approach, which involves playing down the realities of oppressive law in South Africa via manipulation of liberal principles and rules of construction. The lie recognizes evil legislative intent and consciously mischaracterizes it. Unfortunately, unless other actors in the legal system share the implicit assumption of Dugard and Dworkin that positive law is identified in some intimate way with morality or natural law, at least in the absence of a clear legislative statement to the contrary, the less visible lie will not thereby be less controversial. The practical difficulty is that the lie is perceived as dishonest, and requires "constant battle over formal principles"²¹⁵ such as jurisdiction, appellate authority, and the bounds of the judicial and legislative functions. The theoretical difficulty is twofold. A "lie" is a morally tainted thing, and to describe what liberal judges in South Africa have done as a lie both misdescribes and demeans their efforts. Thus Dworkin and Hart would not make the "lie" option a matter of jurisprudence. Dugard denies the lie by saying that the strange duality of South Africa's legal system, including both liberal common-law principles and repressive legislation, allows the judge merely to apply positive law.

While the need to infuse morality into an unjust legal system is so great that results like those achieved by the judicial lie must be pre-

212. *But see supra* notes 192-194 and accompanying text.

213. *See* DUGARD, *HUMAN RIGHTS supra* note 11, at 294-5 (quoting van Niekerk).

214. *See* Hart, *supra* note 2, at 616-17.

215. COVER, *supra* note 130, at 198.

served, a new explanation for those results that is more responsive to the practical and theoretical dilemmas of the lie and more acceptable to jurisprudence is needed. The following section attempts such an explanation.

E. Law and Judging as Interpretation

The central need for the moral judge in an immoral system like South Africa is for a jurisprudential explanation that allows the judge to change the unjust law and make new, just law. Moreover, this need exists in a system which does not recognize any significant power of judicial review. As discussed in Part II above, the positivist and natural-law models are both ambivalent about the judge's law-making function. Dugard recognizes an interstitial law-making role nominally similar to that advanced by Hart and other sophisticated positivists, but Dugard deviates from them in denying positive-law status to evil legislative intent. With Dworkin, Dugard would inject quasi-natural law values from this world into the judicial process, and these are characterized as positive law. Such approaches have an aura of illusion about them. Illusion is not necessarily a bad thing, as we shall see. But illusion that masks what the law is to focus on what it could be runs the risk of being empty romanticism.

An alternative approach that may never become official or popular also makes use of illusion, but to emphasize the illusion of thinking one can ever know what the law "is." This skeptical alternative recognizes that the law sometimes seems clear, as when a statute exactly addresses a situation or a case "on all fours" with the case at hand exists. Nevertheless, this approach emphasizes that the law is constantly in flux, never completely certain, and always indeterminate to some degree. All cases are hard cases. After all, even easy cases are there because someone thought they were worth litigating, often for purposes other than delay. Because the trend of the law, the international and domestic political climate, and other factors all bear on the current interpretation of what the law has been and will be, this approach recognizes that the law has been unjust and could be just.

Before the charge of "empty romanticism" is leveled once again, note that there is evidence from both the positivistic and natural-law schools that this approach accurately describes law and judging. Dworkin, like Hamilton in *The Federalist* No. 78, speaks of the "judgment" of the judge between competing "wills" expressed in the legislature. Hart, while speaking of "discretion," also denies the judge power to exert "mere" will as the determinative factor in law-making. Yet *both* characterize the process of judging as essentially one of "interpretation." Interpretation subsumes both "discretion" and "judgment," and more accurately describes the judicial process. Interpretation by judges does not exceed the legitimate limits of the judicial function; it is the essence of that function. In this sense, interpretation need not be seen as "lying."

If not only judging but the law itself is interpretation, a more expansive and activist conception of the judicial role is possible. Dworkin has

advanced a theory of the "law as interpretation" that envisions the law as a description of how legal officials perform their tasks.²¹⁶ He also believes that interpretation has a prescriptive, normative side which aims at maximizing political and moral value.²¹⁷ Dworkin's theory, which focuses on judges, relates to my emphasis (one could hardly call it a theory) on law itself as interpretation. The concepts of law and legal texts of whatever kind are abstractions from reality before they are anything else. Like other modes of art and language, such as religion, science, philosophy or literature, legal structures are, at least initially, fictional structures. Such interpretative frameworks are designed to help humankind come to terms with experience and conceive different possibilities for the good life. While law often crystallizes into an unjust framework for experience, the fact that law is a fictional creation suggests that it can be malleable for the many as well as the few, for South African blacks as well as whites.

Take the imaginative creations we call "rights," for example. Moral lawyers in wicked legal systems are often forced to argue as if pre-existing rights should be given effect, when they (and the judges) know that, to date, the rights have not yet "existed" in the sense of having been recognized by the dominant legal texts subject to interpretation. Yet if the judge, and thus the legal system, interprets the law so as to recognize that right, the fiction will solidify and "real" existence will have been retroactively conferred on the right.

This version of law as interpretation differs from that of Dworkin in three respects other than its more flexible view of law and the rights that are to be taken seriously. First, it recognizes the subjectivity that Dworkin's legal philosophy tends to deny.²¹⁸ If justice is an ideal toward which law should strive and by which it is judged, each judge's personal sense of justice must play a role. But justice will not come from unrestrained subjectivity, or selfishness. Justice demands that judges be receptive to points of view other than their own. The impetus toward beneficial interpretation must come from a vision of law as affirmatively advancing justice, as opposed to merely mediating conflict through judicial compromise. Secondly, this view recognizes the real relativity of law at any given place or time. The reason Dworkin has problems with the wicked legal system is that the unjust laws in it are so pervasive that, so to speak, "something is rotten" and "time is out of joint." Moral judges and moral lawyers in South Africa must reject any "right answer" thesis grounded in existing law because they know that the right answer will probably vitiate rights rather than guarantee rights in their system. Yet once the anachronistic relativity of systems is recognized, the temporary analytical separa-

216. Dworkin, *Law As Interpretation*, in *THE POLITICS OF INTERPRETATION* (W.J.T. Mitchell ed. 1983).

217. *Id.* at 266.

218. As when he says that judges' background moral convictions enter into a decision but have no independent force. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 6 at 118, 124-25.

tion of "is" and "ought" can be obliterated, as it has been by the Realists, and arguments of value as to the "right interpretation," as opposed to the historically-determined "right answer," can play their part. Finally, this version of law recognizes and actually celebrates the creative, law-making role of the judge. The law-making role of the judge may be enthusiastically embraced because interpretation is always subject to constraints such as plausibility, personality, social context and prior law. In other words, there are both subjective and objective elements to interpretation, as we always suspected there were. Unfortunately, activist creativity could result in change for the worse as well as for the better; thus, the recognition of the law-making powers of the judicial system must be aligned with emphasis on the moral duty of the judge to guide the system toward moral progress.

The "instructive" function of courts, their role as "moral tutor," is tied to their duty to promote justice. Formation of values is a social function, but it is internalized through law.²¹⁹ At its best, the role is exemplified by decisions such as *Brown* in the United States and *Marechane* in South Africa.²²⁰ The problem in evaluative interpretation is the source of values. The fear of such "inarticulate premises" as adherence to the white status quo is what had prompted Hamilton and others to articulate limits to the judicial "will." Although positivism may not result in application of the "proper" value, and natural law may provide too many (possibly contradictory) values, the place of apartheid outside any such value structure should be clear. Most white South Africans may continue to be racist, but there is clearly sympathy against apartheid in the country as a whole. Even the government formally condemns racial discrimination, and thus implicitly concedes the extent to which such condemnation approaches a universally objective value. Although one can legitimately be skeptical about the possibility of a consensus existing or being discernible in any community,²²¹ the broad international consensus is that the institutionalized system of racism known as apartheid is evil. If broad consensus is the best test for objectivity we have, anti-apartheid sentiment is one of the most objective values in the world. For this reason, judges in South Africa should legitimately be able to appeal to this value in evaluative interpretation. Judges in the United States or other legal systems with closer questions of just versus unjust law, and even South African judges (on other issues), will continue to face the problem of standards for defining laws as just or unjust. Something like Dworkin's moral principles or Hart's policies would have to provide the answer.

The view of law as interpretation, in the meantime, does no more than provide an explanation for just results that South African judges may use to help solve their moral dilemma by establishing their own

219. See TUSSMAN, *GOVERNMENT AND THE MIND* (1977).

220. See *supra* notes 166-67 and accompanying text.

221. See, e.g., Brest, *The Fundamental Contradictions of Normative Constitutional Law Scholarship*, 90 *YALE L.J.* 1063, 1109 (1981).

"Grand Style."²²² The results could be the same under the "lying" theory advocated by Dworkin, or the realism-cum-value oriented approach of Dugard. Yet the interpretative explanation reveals the flaws of describing the creative, law-making function as a "lie" or "wrong answer" because it reveals the excess simplicity in the view that legal "truth" is determinate. The process of interpretation of law is only a mischaracterization of precedent when one accepts that there is an indisputably "correct" characterization of *all* the relevant legal factors. The search for "truth" or a right answer in South Africa will probably yield a fascist "truth." The explanation also avoids the pitfalls of underestimating the significance of evil laws and evil legislative intent. Recognizing that interpretation is evaluative, the explanation urges that judges have a duty to shape the law in the direction of justice. Of course, once the blithe assumption (at the heart of this article) that a law is unjust is removed, and genuine debate over the meaning of justice is reinstated, the moral judge will have less guidance as to how to fulfill his duty. That is why this sketch of law as interpretation works for South Africa, but would have to respond to the central problem of judicial review — the search for standards of value — in order to work in the United States.

In South Africa, judges are subject to the possibility of reversal on appeal, reactionary legislative response, or even more severe sanctions. For this reason the jurisprudential approach to law as interpretation should be mentioned, but the subjective aspect should not be extensively elaborated or publicized in the judge's decisions. Although the extent to which the creative, interpretative function should be acknowledged is a difficult issue, the potential for repressive reaction in South Africa is so great that detailed treatment of the process of interpretation is best left undeveloped. This is not to say that arguments for more expansive judicial review under the new South African Constitution should not be made. But at present the chances afforded justice in already weak South African courts should not be jeopardized. The myth of strictly objective interpretation — the illusion referred to above — plays a necessary role in protecting the scanty judicial independence that exists in South Africa.

Allowing judicial rhetoric denying the law-making function to continue as rhetoric, rather than making reality rise to the level of rhetoric (a la Dworkin) or vice-versa (a la the Realists) serves a political purpose. To my knowledge, the significance of the fact that some of the most liberal South African judges employ the myth of objectivity in liberal decisions has been overlooked by commentators.²²³ Yet the rhetoric of merely objective "interpretation" provides flexibility for implementing justice in

222. See K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960) (on the "grand style" of judicial creativity in mid-19th century commercial cases, as opposed to the "formal style" of the 1890's).

223. See, e.g., *Harris v. Minister of the Interior*, 1952 (2) S.A. 428 (A.D.), (Centlivres, C.J.); *Nxasana v. Minister of Justice*, 1976 (3) S.A. 745, 747 (N) (Didcott, J.) (Courts constitutionally powerless to veto legislation; they can only "interpret" it.)

South Africa.

V. CONCLUSION

South African judges, not the author, live within that country's system of unjust laws. The liberal principles of the common law have been seriously subverted by repressive laws that rigidly divide society and often prevent the feelings that give content to justice from developing. Consequently, many judges do not believe the system is unjust, or believe that institutions like parliamentary sovereignty make it necessary to acquiesce in the system's justice. Expanded judicial review is possible under the new Constitution, but has yet to be asserted.

The reigning schools of Anglo-American legal thought, which have residual influence in South Africa, give the moral judge in such a system little guidance. Both positivism and natural law are ambivalent about the law-making powers of the judge. Not unexpectedly, the judicial response of twentieth-century South Africa is thus comparable to the judicial response in America under slavery. By and large, most judges apply the law.

Yet an undercurrent of liberal decisions has occasionally but persistently flowed in the direction of justice. Without being unrealistic about the possibilities for drastic social change through South African courts, one can say that there are avenues available to moral judges in South Africa. Applying the law is an evasion rather than a recognition of the moral dilemma. Resignation not only fails to promote justice, but may promote further injustices. Protest and civil disobedience are not only ineffective but dangerous as well.

The judicial lie is thus the most attractive option for the moral judge. Yet seeing libertarian results as "lies" may be counterproductive and ineffective. Recognizing the essentially interpretative nature of law and judging avoids these pitfalls and provides the most legitimate and valuable role for the moral judge in an immoral system.