LEGAL TEXT AND LAWYERS' CULTURE IN SOUTH AFRICA

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INTRODUCTION

Consider Notice R. 873.[1] Issued by the Commissioner of the South African Police, this notice expanded the category of "subversive statements" set out, and forbidden, in regulations earlier promulgated to enforce the state of emergency in South Africa. As the Notice reflects, its object was to enable the state to silence campaigns for the release of people being held in detention without trial. Under the Notice and the regulations, any statement inciting or encouraging, or calculated to have the effect of inciting or encouraging, anyone to commit any of the acts specified in the Notice, acts that supported the release of detainees, became a subversive statement.

It is not difficult to understand why the South African government would want to quash opposition to its use of detention without trial. Notice R. 873, therefore, is interesting not so much for what it does — though that retains a grotesque fascination — as for how it does it. This notice exemplifies a princi-

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1. Notice R. 873, 262 Gov't Gazette No. 10713 (Apr. 10, 1987) [hereinafter Notice R. 873]. A copy of the English text of this notice (arranged to fit on one page instead of on the original two) is appended to this Article.

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pal South African method of achieving this and other unattractive objectives: the use of law. Compared to other tyrants, Joseph Lelyveld writes, "South Africa's white rulers have been unusually conscientious about securing statutory authority for their abuses."[2] In the words of the historian Martin Chanock, "[t]he oppressions of apartheid have, until the beginnings of its disintegration, characteristically been imposed not by the random terror of the death squad, but by the routine and systematic processes of courts and bureaucrats."[3]

It would be a mistake, however, to think of South African law simply as a tool of the government. On the contrary, the role of law in South African oppression is a continually contested one, for not only the government but also its opponents seek to invoke law on their behalf. It does not seem inevitable that the law would become such a field of struggle. An unjust state might dispense with legal forms more totally than South Africa has done, or on the other hand, might arm itself with the irresistible legal authority of a leviathan. This Article seeks to explain why the government has chosen to rely so heavily on legal regulation to maintain its power over an oppressed black majority, why those who oppose the government have been able to muster a significant legal response, and how the conflicting forces of the state and its opposition have shaped the law and the legal culture of South Africa. These are large questions, to which I will offer only tentative answers, but I believe that a close examination of the wording and the effects of one legal text, Notice R. 873, against the background of South African life will help us understand the ambiguous role of law in South African society.

I will begin, in Section I of this Article, by sketching the government's reasons for using the law as a method of social control. Among these, undoubtedly, is the sheer effectiveness of legal regulation. In South Africa, however, the rule of law is not only a tool but also a value, and I will suggest that South Africa's use of the law reflects the desire of South African whites to seem, and even to be, faithful to this value.

A general understanding of the government's reasons for using the law does not in itself tell us what sorts of laws the government will choose to enact, and in Section II, I will look closely at Notice R. 873 in order to outline several salient features of the laws the government adopts and suggest the purposes which those features serve. As we will see, Notice R. 873's distortion of language and its convolution may in part grow out of the government's desire to mask its enterprise as much as possible. Yet the Notice's elaborate detail undercuts such masking, and I will argue that this detail both expresses the government's deep apprehension of popular onslaught and reflects its anticipation of legal challenge.

Because the laws employed by the government thus reflect not only its

2. J. LELYVELD, MOVE YOUR SHADOW—SOUTH AFRICA, BLACK AND WHITE 81 (1985).

3. Chanock, *Writing South African Legal History: A Prospectus*, 30 J. AFR. HIST. 265, 265 (1989).

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own desires but its anticipation of opposition, we must understand the opposition to understand the law. The rise of popular mobilization against apartheid, however, is not my focus here. Instead, in Section III, I will seek to explain why anti-apartheid forces in South Africa have been able to make considerable use of the law against the government. I will argue that South African law provides lawyers with surprisingly supple doctrinal support for limiting government oppression. I will also suggest that the structure and traditions of the legal profession and of the courts have supplied important buttresses for individual lawyers' courageous decisions to use the law against the government as well as for the willingness of some judges to render decisions vindicating such positions. The upshot of the availability of useful doctrines and of lawyers ready to use them has been that legal challenges to the government's efforts to use the law are widespread. While these challenges are often unsuccessful, we will see through the example of Notice R. 873 itself that their results can still be significant.

While the law is shaped by the conflict between the government and the anti-apartheid opposition, that conflict is hardly confined to the courts. The force of the idea of law can be measured in part by the force of principles or practices that deny the obligation to obey the law, and in Section IV, I will argue that such challenges to legality have considerable support on both sides of South Africa's ideological and racial divide. In this light, I will suggest that the political struggle underway in South Africa not only shapes its law but also imports into the legal culture itself the claims of illegality.[4]

As this Article goes to press, blacks and whites in South Africa are moving towards the formal start of negotiations which may lead to the transformation of much of the legal system and legal culture I describe here. I write, therefore, as the ice of South Africa's winter cracks, but there is still much to be done before summer comes. It remains important for us to understand the ways in which law can be bent to the service of oppression, and yet also invoked on behalf of liberty, in South Africa and elsewhere.

I.

THE ROOTS OF THE GOVERNMENT'S RELIANCE ON LAW

South Africa has erected an immense edifice of discriminatory and oppressive law.[5] For example, South African statutes classify each South African by race,[6] specify the "group area" in which she must reside,[7] and specify that whites, so-called "Coloureds" (of mixed race), and Indians, but not the

4. The "law" that I discuss in this Article is the dominant legal system in South Africa, a system refined in Africa but rooted in Roman-Dutch and English law. I do not address here the continuing significance of African customary law, though this source of law retains considerable importance for many of South Africa's people.

5. For a comprehensive, though already somewhat dated, overview of this body of law, see J. DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER (1978).

6. Population Registration Act No. 30 of 1950.

7. Group Areas Act No. 36 of 1966.

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African majority of the population, have the right to vote in national elections.[8] Other statutes authorize detention without trial;[9] permit the government to ban organizations,[10] to forbid indoor and outdoor gatherings and to bar particular citizens from their normal work or social lives;[11] and empower the government to declare a state of emergency during which still greater intrusions on civil liberties are permissible.[12] Notice R. 873 is, in fact, an exercise of this emergency authority, under a state of emergency first declared in 1985 and then, after one interruption, repeatedly renewed until June, 1990 — and in effect in parts of South Africa almost to the present day.[13]

One explanation for the government's apparent desire to work its will largely through legal rather than extralegal coercion is deeply and properly cynical. Legal regulation can be effective.[14] Law is the characteristic mode of regulation in a complex, industrial, modern nation. South Africa has a sophisticated legal system in place for the direction and resolution of a wide array of nonpolitical matters, and using similar mechanisms to deal with the enormous tasks of establishing and defending apartheid must have seemed, and may well have been, natural and efficient. From this perspective, what is unusual about South Africa is not that it achieves its governmental objectives through the

8. Republic of South Africa Constitution Act No. 110 of 1983, § 52.

9. *See, e.g.*, Internal Security Act No. 74 of 1982, §§ 28-29.

10. *Id.* § 4.

11. *Id.* §§ 18-22, 46; *see* A. MATHEWS, FREEDOM, STATE SECURITY AND THE RULE OF LAW 124-25, 141 (1986).

12. Public Safety Act No. 3 of 1953.

13. The state of emergency declared on July 21, 1985 was applicable only to certain areas of South Africa, and was lifted on March 7, 1986. *See Human Rights Index*, 2 S. AFR. J. HUM. RTS. 252, 252 (1986). A new state of emergency covering the entire country took effect on June 12, 1986, however, and with annual renewals remained in place until June 1990. *See Human Rights Index*, 5 S. AFR. J. HUM. RTS. 261, 261 (1989).

As part of the recent opening in South African politics, the government early in 1990 cut back on its emergency powers. *See* Security Amendment Emergency Regulations 1990, Proc. R. 18, 296 Gov't Gazette No. 12287 (Feb. 3, 1990). Among other changes, the government withdrew the emergency media regulations which had contained the prohibition on "subversive statements," the prohibition to which Notice R. 873 had been linked. *See* Proc. R. 19, 296 Gov't Gazette No. 12287 (Feb. 3, 1990). Then in June 1990 the state of emergency was renewed again, but this time in only one province of South Africa, Natal. *See* Proc. R. 97, 300 Gov't Gazette No. 12524 (June 8, 1990) (declaring state of emergency in Natal, and promulgating emergency regulations).

A little over two months later, however, in response to fierce fighting among South African blacks, the government declared the existence of "unrest areas" in a sizable number of localities elsewhere in South Africa. At the same time it promulgated "unrest regulations" which closely resemble past "emergency" regulations. *See* Notice R. 2062, 302 Gov't Gazette No. 12722 (Aug. 24, 1990) (designating unrest areas and setting out unrest regulations). The government continues to use its "unrest area" powers, but it has now ended the state of emergency in Natal. *See* Proc. R. 186, 304 Gov't Gazette No. 12802 (Oct. 18, 1990); Wren, *De Klerk Lifts Emergency Rules in Natal Province*, N.Y. Times, Oct. 19, 1990, at A3, col. 1. Meanwhile, however, the "independent homeland" of Bophuthatswana maintains its own state of emergency. Human Rights Commission, 3 HUM. RTS. UPDATE (No. 9), at 1 (October 1990).

14. For Martin Chanock, "in the South African state law is a way of creating, extending and exercising power rather than limiting and controlling it." Chanock, *supra* note 3, at 267.

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elaborate use of law — many nations do that — but rather that its objectives are so repellent.

South African law may be particularly efficient, from the point of view of the state, because it tends to confer such broad discretion on state officials. For example, the elaborate array of laws which until recently governed blacks' right to live and work in urban areas was "designed to create a system of government by administration rather than by rules of law."[15] The law that governed blacks conferred broad discretion on the officials who did the governing;[16] all the more reason to find resort to the law convenient. The essence of the emergency security machinery has also been said to be "an attempt to confer upon the police the capacity to operate in the grey areas between an (extended) legality and wanton illegality, to impose order without law."[17] Taken to this extreme, South Africa's use of law verges on the legalization of illegality.

Law's efficacy, however, is not the only reason for its embrace by the government. In addition, South Africa's reliance on the law enables it to assert its fidelity to the principle of the rule of law, an ideal that seeks to guarantee that the power of government is restrained by the staying hand of legal rights. South Africa does in fact make this claim.[18] As one South African judge has commented,

> I know that it is popular, particularly for South African politicians and diplomats, to proclaim with considerable pride (vicarious pride, I should say) that whatever else can be said about South Africa, its legal system and its system of courts and justice is above criticism.[19]

This image of fidelity to the rule of law is of value for three distinct reasons. First, the claim to moral standing may help to make law an efficient method of controlling people, for if they accept the rightness of the controls then they will obey by choice rather than only by coercion. The use of law, on this account, legitimizes the government's enterprise.[20] Even under the weight

15. Dean, *The Legal Regime Governing Urban Africans in South Africa—An Administrative-Law Perspective*, 1984 ACTA JURIDICA 105, 129 (1985). The hateful "pass laws" and other aspects — though by no means all — of the legal apparatus regulating blacks' right to live and work in urban areas were repealed in 1986. For an early appraisal of the new legal regime, see generally Schoombee & Davis, *Abolishing Influx Control—Fundamental Or Cosmetic Change?*, 2 S. AFR. J. HUM. RTS. 208 (1986).

16. *See* Dean, *supra* note 15, at 120-23.

17. Haysom, *Legal Intervention & the State of Emergency*, in DEVELOPMENTS IN EMERGENCY LAW 1, 2 (N. Haysom & C. Plasket eds. 1989).

18. *See* J. DUGARD, *supra* note 5, at 42 (describing "a sixty-eight page booklet" published in 1968 by South Africa's Department of Foreign Affairs "with the purpose of showing that the Rule of Law had not been discarded in South Africa").

19. Kriegler, *Extracts of an Address Delivered By Mr. Justice J. C. Kriegler At The Annual General Meeting Of Lawyers For Human Rights, Pretoria, 16 November 1985*, 2 S. AFR. J. HUM. RTS. 204, 205 (1986).

20. There is, Alan Hyde comments, "a large body of theory that rests on the supposedly significant contribution of law and legal institutions to popular belief in legitimacy and hence to political action or nonaction of various types." Hyde, *The Concept of Legitimation in the Sociol-*

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of oppression, there is some evidence that black South Africans do accord some respect to the laws that oppress them.[21] There are also, however, frequent suggestions that blacks have lost respect for the law because of its injustice.[22] Whether or not blacks can still be impressed by South African legal forms, it is possible that the government believes that they can be—and so the hope of inducing black obedience may be one motive for the use of law.[23]

Second, the use of law may also reassure South African whites about the fairness of the power being exercised by the government. Some whites might otherwise be more likely to challenge the government's acts; others might simply lose heart and so give less firm support to the government's policies. Both groups may be quicker to accept the propriety of oppression carried out through the forms of the legal process than they would be to approve of wholly extralegal government action.

But why would South African whites be more disposed to endorse oppression if it is implemented through the law? The most straightforward reason would be simply that South African whites, or many of them, genuinely value the law. Their feelings might have quite diverse roots. Surely many white South Africans, even government supporters, put some stock in the ideal of the rule of law. The ideal of a government of laws and not of men is too widespread in Western culture for it to be likely that this principle has no force in South Africa; indeed, the frequency with which the rule of law is invoked by South Africans critical of government policies itself suggests that it is part of South African culture.[24]

At the same time, many South Africans, who set little store by the notions of human rights often implicit in the idea of the rule of law, may still

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ogy of Law, 1983 WIS. L. REV. 379, 383-85. Hyde himself has great doubts about the validity of this theory, but I will not enter this theoretical debate here.

21. For one such piece of evidence of South African blacks' possible respect for South African laws, see White, *To Learn & Teach: Lessons from Driefontein on Lawyering & Power*, 1988 WIS. L. REV. 699, 728 & n.118. White thoughtfully considers whether the Driefontein villagers' expressions of deference to the authority of South African law were sincere or not. *Id.* If they were sincere, White does not suggest that they reflected a belief on the part of blacks that apartheid laws were *just*. Rather, she sees attitudes towards these laws as being, perhaps, a form of "ideological static," blunting people's perception of the possibility and rightfulness of political challenge. *See* Letter from Lucie White to Stephen Ellmann (Mar. 8, 1990) (on file with author).

22. *See, e.g.*, Kriegler, *supra* note 19, at 205; Chanock, *supra* note 3, at 267-68. Nelson Mandela, himself an attorney, challenged the right of the Court to try him for criminal charges in 1962, and told the presiding magistrate that he felt that he was "a black man in a white man's court." N. MANDELA, *"Black Man in a White Court," First Court Statement, 1962*, in THE STRUGGLE IS MY LIFE 125, 129 (1978).

23. Such a motive may underlie the 1988 decision by the South African Commissioner of Police to ban a protest meeting related to the judgment in a major treason trial then underway. The Commissioner observed "that the manner in which the judgment was being attacked had the effect of heightening emotions and making the administration of justice 'suspect.'" Cameron, Marcus & van Zyl Smit, *The Administration of Justice, Law Reform & Jurisprudence*, in ANNUAL SURVEY OF SOUTH AFRICAN LAW — 1988, at 500, 521-22 (1989) (quoting The Citizen, Dec. 7, 1988).

24. *See* J. DUGARD, *supra* note 5, at 37.

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want their government to act in accordance with law, because they see rule *by* law as part of an appropriate system for ordering society.[25] John Dugard suggests that many Afrikaner lawyers would draw from their Dutch-Reformed religious heritage and from the Roman-Dutch legal tradition a rejection of "the notion of 'fundamental rights' accruing to the individual [as] against ([s]tate, government) authority" and would instead embrace "Christian government, necessarily including juridical ordering."[26] The use of law permits or constitutes this juridical ordering. Joseph Lelyveld captures the flavor of this reason for the employment of law:

> Most whites are uncomprehending of the argument that law is brought into disrepute when it is used to destroy habeas corpus, the presumption of innocence, equality before the law, and various other basic freedoms. Law is law. It's the principle of order and therefore of civilization, the antithesis advanced by the white man to what he knows as a matter of tribal lore, his own, to be Africa's fundamental thesis: anarchy. Excessive liberty, in his view, is what threatens civilization; law is what preserves it.[27]

Third, the claim of adherence to the rule of law speaks to international concerns. South African policymakers must consider the reactions and the potential sanctions of foreign observers, and this audience may be impressed by government according to law. Moreover, the risk of international reaction also has a significance for South Africans that goes beyond political or economic considerations. Many South Africans of all political stripes are very conscious of the world beyond their borders. Many South African whites, especially, want to consider themselves part of the Western world, faithful to its traditions and sharing in its aspirations and achievements.[28] The international boycott of South African sport has been so painful to some in part because it denied white South Africans membership in the club. Similarly the cultural boycott of South Africa has been painful even (perhaps particularly) for opponents of apartheid, and has now been modified in order to permit progressive, anti-apartheid artists to share in the world's cultural develop-

25. Among the possible reasons why South Africans might see the use of law as appropriate, as Richard Abel suggests, is simply that South Africa has used this method for so long that it has now itself acquired the status of a tradition. *See* Letter from Richard Abel to Stephen Ellmann (Sept. 5, 1989) (on file with the author).

26. J. DUGARD, *supra* note 5, at 41 (quoting Venter, *The Withering of the "Rule of Law,"* 8 SPECULUM JURIS 69, 86-87 (1973)).

27. J. LELYVELD, *supra* note 2, at 81.

28. Joseph Lelyveld describes an issue of *Fair Lady*, a popular South African magazine read mainly by whites, which featured a series of photographs taken in Spain, of a black South African model. " 'The Fair Lady team' had been flown to Madrid from Johannesburg, a caption said, by Iberia Airways. . . . To do it justice, *Fair Lady* has a social conscience that periodically permits it to slip in an article about hunger in the black rural areas. But when it hands an Iberia ticket to a black model, it is imitating *Vogue*, showing its readers that *they* have risen above apartheid and joined a wider world." *Id.* at 38-39.

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ments.[29] Lawyers too are subject to this desire for a place in the sun of the Western world: we can hear its reverberations in the 1970 boast of a South African judge that he was "told on good authority that the English judges, who are undoubtedly the most eminent judges in the world, consider only the South African judges as their equals."[30] Each interference with the ideal of the rule of law takes a certain toll on this international cultural affiliation, and I suggest that South Africa oppresses by law in part to stake a claim to sharing in the Western tradition of the rule of law.

For all these reasons, the resort to law as an instrument of policy has deep roots in South Africa, and could not be completely abandoned without great difficulty — though as we will see, it certainly can be substantially undercut. As this discussion has already indicated, however, South Africa is distinctive not only for its use of the law but for certain features of the laws it has chosen to adopt. To understand how South African law is shaped by the concerns and even fears of its drafters, let us turn to the text of Notice R. 873.

II.
THE PRESSURES THAT SHAPE SOUTH AFRICAN LAW

Notice R. 873 is designed to quell campaigns for the release of detainees, in the following, rather intricate way. In Proclamation R. 224 of December 11, 1986, the South African State President had declared that any statement which "incited or encouraged or which is calculated to have the effect of inciting or encouraging members of the public" to commit a wide range of acts in opposition to the government was a subversive statement. These acts were listed in the Proclamation, but the State President also declared that the Commissioner of Police could add to the list "any other act or omission identified by the Commissioner by notice . . . as an act or omission which has the effect of threatening the safety of the public or the maintenance of public order or of delaying the termination of the state of emergency."[31]

In Notice R. 873 the Commissioner of Police adds to this grim category an astonishing range of peaceful conduct aimed to urge the state to release people being held in detention without trial. This conduct itself may also be illegal, but the Notice does not make it so; what the Notice does is to make any statement encouraging such conduct "subversive." Conviction for the offense of uttering a subversive statement carries a penalty of up to ten years in

29. For a discussion of the "selective boycott," see Powell, *The 'desk' has put the bad old days behind now*, Weekly Mail, July 21-27, 1989, at 25, col. 4.

30. Claassen, *Retain the Bar and Side-Bar*, 87 S. AFR. L.J. 25, 25 (1970). A similar sentiment was captured by Sydney Kentridge, one of South Africa's most eminent anti-apartheid lawyers, in his account of a speech he gave "at a law dinner at which some Supreme Court judges were present. . . . I said that I believed that we still had the best judiciary in Africa. It was clear that those most immediately concerned thought this compliment wholly inadequate." Kentridge, *Telling the Truth About Law*, 99 S. AFR. L.J. 648, 651 (1982).

31. Proclamation R. 224, Regulation 1(1) (definition of "subversive statement," part (a)(ix)), 258 Gov't Gazette No. 10541, at 5 (Dec. 11, 1986).

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prison.[32] To illustrate: by virtue of the Notice, if a South African urged a friend to wear a T-shirt calling for the release of detainees, the person doing the urging could be sentenced to ten years' imprisonment.[33]

Notice R. 873 is an egregious violation of principles of freedom of speech. What it does is remarkable; how it does it is also striking. We will see later that Notice R. 873's prohibitions are so inclusively phrased that they could have been read to prohibit even more than the government claimed it meant to reach.[34] Here let us consider three other salient features of the Notice: its misuse of language, its convolution, and its detail.[35] Although not every South African legal provision shares these characteristics, what we find in Notice R. 873 will illuminate broader reaches of South African law as well.

First, the misuse of language is Orwellian, almost classically so, and no doubt serves the familiar Orwellian purposes of coverup and propaganda. Who but the Ministry of Love would label it "subversive" to urge someone to sign a petition asking for the release of a person being held indefinitely without trial? Even if we grant that the government's fears are so nightmarish that it might sincerely see such peaceful advocacy as subversive, unmistakable instances of Newspeak do exist. An example is the 1952 "Bantu (Abolition of Passes and Co-ordination of Documents) Act," which in John Dugard's words "did not in fact repeal the pass laws, but rather coordinated them by providing for the carrying of 'reference books' instead of 'passes' and extended the existing laws by requiring women to carry reference books (passes) as well."[36]

Occasionally the government shrinks from altogether spelling out what it is doing, although the laws remain designed to convey their meaning to those who know their context. The statute granting "independence" to the so-called homeland of Transkei, for example, defines the citizenship of the new country in language that on its face transforms all or almost all South African whites into Transkeians.[37] Needless to say, the reader is expected to interpolate "black" into the definition of Transkeian citizenship so as to avoid this result.

Second, the convolution of Notice R. 873 is striking. Though the Notice

32. *Id.* at 8, 10 (Regulations 5 & 8).

33. *See* Notice R. 873, *supra* note 1, at 2 (Schedule, paragraph (e)).

34. *See infra* text accompanying note 103.

35. It is also noteworthy that the text of the Notice, like "all bills, laws and notices of general public importance or interest," appears in both English and Afrikaans. *See* Republic of South Africa Constitution Act No. 110 of 1983, § 89(2). The use of these two languages is at once an expression of the government's failure to accord African languages equal status with those of European origin, and a reflection of the intense struggle waged by the Afrikaners to secure the equality of their language with English.

36. J. DUGARD, *supra* note 5, at 75 (footnote omitted).

37. For example, the citizens of the newly independent Transkei include "every South African citizen who is not a citizen of a territory within the Republic of South Africa, [and] is not a citizen of Transkei" on one of the other grounds enumerated in the statute. Status of Transkei Act No. 100 of 1976, Schedule B, paragraph (f). Since South African whites are citizens of South Africa and are highly unlikely to be citizens of the "territories," that is to say the black territories, the plain language of this section makes them Transkeians. *See* Ellmann, *Who Are the Citizens of South Africa & Transkei?*, 4 S. AFR. J. HUM. RTS. 76 (1988).

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reflects a remarkably broad understanding of "subversive statements," this understanding is not explicitly acknowledged in the Notice itself. Instead, the Notice achieves its effects in an awkward, even obscure, fashion. The Notice does not define the term "subversive statements" itself, or say that statements urging the forms of conduct specified in the Notice are subversive, or say that those forms of conduct are themselves illegal. From the Notice we learn only that for purposes of the definition of subversive statements contained in a separate regulation, the conduct identified here is "an act which has the effect of threatening the safety of the public [etc.]." Only in the regulation to which the Notice refers, and not in the Notice itself, do we learn that if an act is so identified, then a statement encouraging it is subversive.[38]

Why so convoluted? Surely one reason is simply habit, a habit by no means unique to South African legal drafters. A second reason is actually precision; to a professional lawyer the legal effect of this language may be quite clear. Indeed, if the Commissioner had ventured an explanation of the legal effect of the Notice, he might inadvertently have injected fresh legal complications that would have undercut the clarity and effect of what he meant to achieve.[39] Here, the Notice and its cross-reference may have been designed to convey all, and only, that which the drafters intended.[40]

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38. Albie Sachs provides a particularly elaborate example of such convolution in the charge sheet in a case in which an Indian was convicted for swimming at a whites-only beach. As Sachs writes:

> The charge alleged that the accused was guilty of contravention of regulation 19(a) read with regulations 18(b) and 23 of the regulations made by the Minister of Lands published on 2nd February, 1962, in Government Gazette No. 169 under Notice No. R. 168, further read with Government Notice No. 1090 dated 6th July, 1962, published in Government Gazette No. 285 of 1962, further read with Provincial Notice No. 37 of 1946, dated 1st August 1946, such regulations being made under section 10(1) of the Sea-shore Act, No. 21 of 1935, as amended, and as read with regulation 424 of Government Notice No. 201 published in the Government Gazette of 16th March, 1962.

A. SACHS, JUSTICE IN SOUTH AFRICA 148-49 (1973).

39. For an example of the potential pitfalls of the imprecise use of legal language in South Africa, see State President and Others v. United Democratic Front and Others, 1989 (1) S.A. 766 (A). This case dealt with the decision by the South African government to prohibit the United Democratic Front from receiving money from abroad. Such a prohibition, according to the relevant statute, could only be issued if the Minister of Justice had taken certain steps first; here, those steps had been taken by a different Minister, the Minister of Law and Order. Another statute, however, permitted the State President to "assign" functions of one Minister to another, and the State President had in fact issued a proclamation in which he "hereby approve[d]" the transfer of the responsibilities at issue here. The lower court held that a proclamation *approving* a transfer of responsibilities was not a proclamation actually *assigning* these responsibilities, and so determined that the prohibition issued against the United Democratic Front was invalid. While this ruling was overturned on appeal, it illustrates the reasons for the recurrent lawyerly concern about the risks of loose language.

40. On occasion, however, the complexity of cross-reference seems to overwhelm even the legislators who vote for these provisions. Thus, in the 1986 Restoration of South African Citizenship Act, by virtue of which South Africa appeared to restore citizenship to some of the millions of Africans who had lost their citizenship when their "homelands" became independent, South African citizenship was offered to various groups of people who were permanently resident in South Africa despite their loss of citizenship. *See* Restoration of South African

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A third reason for this complexity may be its subdivision, and so its diminution, of responsibility. The Commissioner of Police in Notice R. 873 does not define "subversive statements," but only identifies certain acts as threatening to public order. What happens to people who urge others to commit those acts has been decided elsewhere, in regulations promulgated by the State President. This is a familiar mechanism to blunt criticism or even to shunt away guilt.

Such devices are useful to any government, and should be especially valuable to governments with a lot about which to feel guilty. We can see a similar effort underway in the bland responses, or even "predictable . . . distortions and denials of the truth,"[41] from government agencies challenged by reports of wrongdoing. For example, the South African Prisons Service, addressing reports of the death of a young woman prisoner who allegedly had been straitjacketed for twenty-four hours before being hospitalized, told the *Weekly Mail* (a leading anti-apartheid newspaper) that "[t]he assurance can be given that, as is customary of the Prisons Service, everything possible will be done to have the matter clarified and properly dealt with."[42]

But if legal complexity sometimes serves to mask responsibility, the cumbersome process of definition reflected in Notice R. 873 fails in this task. The effect of the Commissioner's action is clear enough, and the coordination between the State President and the Commissioner is equally evident.

This observation brings us to the third striking feature of Notice R. 873 — the fact that the Notice is remarkably detailed in its delineation of the conduct it intends to prohibit South Africans from encouraging. Since the Notice begins by making it a "subversive statement" to urge anyone "[t]o participate in any campaign, project or action aimed at accomplishing the release of persons," it is not immediately obvious why all the subsidiary detail is necessary. From one perspective, moreover, the detail is counterproductive, for it exposes the government to equally detailed criticism, and thus hardly serves

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Citizenship Act No. 73 of 1986, §§ 2, 3, 4, 5(1)(b) (requiring permanent residence for restoration of citizenship); *id.* § 5(1)(c) (requiring compliance with provisions of section 10 of the South African Citizenship Act No. 44 of 1949, which include lawful admission into South Africa "for permanent residence" as a condition of grant of citizenship).

But another statute which went into effect just a few days before the Restoration Act, the Matters Concerning Admission to and Residence in the Republic Amendment Act No. 53 of 1986, seemingly had just deprived all of these people of their right of permanent residence! If these people were therefore ineligible for restoration of their citizenship, then the "Restoration Act" was a bizarre and cruel joke. If, as seems more likely, the legislature did not intend to enact such a Catch-22 into law, then the ambiguity of the language it did enact may reflect that the legislators themselves had lost track of their own laws. For a detailed discussion of the Restoration Act and the other laws with which it must somehow mesh, see Budlender, *On Citizenship & Residence Rights: Taking Words Seriously*, 5 S. AFR. J. HUM. RTS. 37 (1989).

41. Paul Gaston uses this phrase in his report of the brave criticism of the government by Helen Suzman, a member of the opposition Progressive Federal Party, during debate in the South African parliament. Gaston, *A Southerner in South Africa*, 8 SOUTHERN CHANGES 9, 12 (1986).

42. Davis, *Woman prisoner dies after "straitjacket ordeal,"* Weekly Mail, July 14-20, 1989, at 3.

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the goals of blurring responsibility or of covering up what is afoot. Why not, then, just ban all participation in all such campaigns?

It is not enough to say that the bureaucrats who drafted Notice R. 873 were pedantic and repressive people who provided such detail simply as a mechanical explication of the full measure of their intentions. Rather, legal language becomes detailed and repetitive for another reason as well. Lawyers are paid to head off problems, and they write as they do in part for that purpose.

The problems that the government's drafters confront are of two types. First, the government faces a popular opposition that is creative and widespread. Speeches may have to be controlled; so may rallies, petitions, mail-in coupons, T-shirts, and "the performance of any act as a symbolic token of solidarity with or in honour of" detainees.[43] All of these acts — in themselves just forms of peaceful political expression — may be part of the "total onslaught" against South Africa that the government has claimed is under way.[44] In the words of a judge who reflected "the siege mentality which dominates white politics,"[45] the country faces "domestic turbulence . . . accompanied and intensified by a mounting political, psychological, socio-economic and terror onslaught upon the Republic of South Africa from beyond its borders . . . . And the South African community has already been gravely hurt by this domestic turbulence and foreign onslaught."[46]

To some extent, the government's use of such rhetoric has probably been propaganda cynically designed to whip up the fears of white voters, but this rhetoric has also reflected the government's perception of reality.[47] Certainly the government does believe that the opposition exists. Blacks outnumber whites in South Africa by more than five to one.[48] Black opposition can be and has been punished again and again,[49] but since the development of the

43. Each of these forms of protest is covered in the Schedule included in Notice R. 873. For the quoted language, see Notice R. 873, *supra* note 1 (Schedule, paragraph (g)).

44. Dennis Davis wrote in 1987 that "it has now become almost standard practice for the state to defend the emergency regulations in court applications by producing replying affidavits containing lengthy descriptions and analyses of the 'total onslaught' against South Africa." Davis, *The Chief Justice & the Total Onslaught*, 3 S. AFR. J. HUM. RTS. 229, 229 (1987).

45. Cameron, *Judicial Endorsement of Apartheid Propaganda: An Enquiry Into An Acute Case*, 3 S. AFR. J. HUM. RTS. 223, 228 (1987).

46. Bloem and Another v. State President and Others, 1986 (4) S.A. 1064 (O) at 1068B-C (judgment of M.T. Steyn, J.).

47. Dennis Davis emphasizes the government's acceptance of this perspective. Letter from Dennis Davis to Stephen Ellmann (June 22, 1990) (on file with author); A. SPARKS, THE MIND OF SOUTH AFRICA 309-15, 354-60 (1990).

48. The South African Institute of Race Relations estimates the total 1987 population of South Africa (including the so-called "independent homelands" of Transkei, Bophuthatswana, Venda, and Ciskei) as 35,206,898 people, including 26,313,898 Africans (74.7% of the total), 913,000 Asians (2.6%), 3,069,000 "Coloureds" (8.7%), and 4,911,000 whites (14.0%). S. AFR. INST. RACE REL., RACE RELATIONS SURVEY 1987/88, at 10-11 (1988).

49. Leaders of the African National Congress, the Pan Africanist Congress, the South African Students Organization, and the United Democratic Front, as well as many other less prominent people, have suffered severe penalties for their acts in the struggle against apartheid.

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black consciousness movement led by Steve Biko, beginning in the late 1960s, new movements have arisen repeatedly from the ashes of the old.[50] In every walk of South African life, from education to music to drama to medicine to law, and of course in politics, opposition to the government is vibrantly expressed.[51]

The South African government sees itself engulfed, and fears the deluge.[52] For those who seek to stop such a tide, there can be no innocent, peaceful forms of political expression. Every stand against the government in greater or lesser measure challenges the shaky equilibrium on which the state now rests. All must be controlled, and yet the very effort to multiply and elaborate controls bespeaks the government's fear that all its work is no more than a house of cards. We can read Notice R. 873 as an attempt to prohibit each of the government's nightmares, and the state's decision not to rely on some concise and sweeping prohibition as an indicator of the extent of its anxiety and anger. As Joseph Lelyveld put it in describing the law of race in South Africa, the writers of such laws are "[h]eedless of overkill."[53]

But there is also a second, quite different reason for the elaborate detail of Notice R. 873. The government's task of suppression requires unceasing vigilance, not only in response to the incessant flowering of popular opposition, but also against a second difficulty as well: the legal obstacles that lawyers opposed to apartheid seek to erect against the government's abuse of its power. South African law admits few, if any, absolute impediments to the power of the state, but, as we will see in Part III, it hems in this power in ways that create a genuine risk of legal challenge to putatively authorized government acts.

The government turns to precision in part because language that is unmistakably clear may be needed to head off the sorts of legal challenges that can be brought. For example, ambiguous statutory language may be interpreted in light of common law principles favoring human rights so that it does not prohibit as much as its Parliamentary supporters intended. Regulations or notices purporting to rest on statutory authority may be worded either too loosely (so that they are void for vagueness) or too narrowly (so that again they do not reach as far as their drafters had planned). For such ills as these,

50. The most striking recent example was the emergence of the "Mass Democratic Movement," an amorphous but prominent grouping which filled part of the gap created by the government's use of its emergency powers virtually to ban the United Democratic Front in February of 1988.

51. For examples of the diverse fields of anti-apartheid struggle, see Molefe, *NECC meets to discuss "education for all,"* Weekly Mail, Dec. 15-20, 1989, at 4, col. 2 (education); Mkhwanazi, *Sweet potato freedom*, Weekly Mail, Dec. 15-20, 1989, at 27, col. 4 (anti-apartheid nursery rhymes); Dobson, *The musical's revitalized—but not the district*, Weekly Mail, Dec. 8-14, 1989, at 23, col. 1 (musical); *Snubbed SACOS links up with PAC*, Weekly Mail, Dec. 1-7, 1989, at 35, col. 1 (sport).

52. Nelson Mandela has taken note of "[t]he fears of whites about their rights and place in a South Africa they do not control exclusively." *See Excerpts From the Speech by Mandela in Soweto*, N.Y. Times, Feb. 14, 1990, at A14, col. 1.

53. J. LELYVELD, *supra* note 2, at 88.

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elaborate detail may be the cure. To understand the significance of these pressures for the character of the government's lawmaking, however, we need to understand more fully the ways in which lawyers use the law against the government.

III.
THE PRACTICE OF ANTI-APARTHEID LAW

If there were no massive popular struggle against apartheid, there would surely be no massive legal struggle either. It is possible, however, to imagine a mass political movement that operates entirely in political arenas rather than in courtrooms, because the relevant laws are so unshakeably hostile to the movement's aspirations, or because the lawyers who would have to press the movement's cause are unwilling to take their cases, or because the movement's members choose not to pursue judicial remedies. In South Africa, however, legal challenges to the state's use of the law have a long history, and today these efforts are widespread. Two distinctively legal factors contribute to the vitality of this lawyerly struggle against apartheid: South African legal doctrine and the South African legal community. As we will see in this Section, legal doctrine in South Africa provides the basis for substantial arguments against many of the state's undertakings, while the structure and traditions of the legal community provide strong social support for lawyers who take on the task of making these arguments, as well as for judges who find them persuasive. As a result, legal opposition can pose a significant constraint on the government's use of law.

A. Doctrine

South Africa's constitutional thinking was shaped in large part by the British. Britain has no written constitution, but it certainly has constitutional principles. Perhaps the single most important of these has been the concept of parliamentary sovereignty — a sovereignty so vast that Parliament can do virtually anything it wishes. South Africa has embraced this concept.[54]

Such sovereignty is not automatically abused. Great Britain for much of this century secured the liberty of its subjects quite well without any written constitutional limitations such as the United States relies upon (and of course even written constitutional provisions are not perfect).[55] But the effect of granting such power to the lawmaking bodies of government is that unless some political or moral restraint checks their hand, these agencies can trample on the rights of the people. In a world of complete Parliamentary sovereignty

54. For an account of the development of South Africa's stance on parliamentary supremacy, see J. DUGARD, *supra* note 5, at 14-36.

55. Since 1953, the rights of British subjects have also been protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221. Since 1966, Britain has accepted "the right of individual petition to the [European] Commission [on Human Rights] and the compulsory jurisdiction of the [European] Court [of Human Rights]." A. ROBERTSON, HUMAN RIGHTS IN EUROPE 16 & 24 n.40 (2d ed. 1977).

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courts have no power to overturn acts of Parliament as "unconstitutional."[56] In theory, the courts' role is merely to give effect to the laws Parliament has enacted, however repellent.

But courts in England — and in South Africa — have not acted quite the way this theoretical account might suggest. Instead of passively enforcing the various designs of Parliament, the courts have shaped rules of common law so as to interpret the statutes Parliament enacts in (sometimes) decidedly humane ways. So, in South Africa, a country in which white oppression of blacks has never ceased, the common law makes it:

> the duty of the Courts to hold the scales evenly between the different classes of the community and to declare invalid any practice which, in the absence of the authority of an Act of Parliament, results in partial and unequal treatment to a substantial degree between different sections of the community.[57]

So, too, in a country where detention without trial has been widespread, common law principle obliges the state to give a hearing to those whose rights it proposes to impair.[58] And in a land so long and ferociously committed to repression, a dissenting judge recently catalogued a number of benign canons of construction, for each of which he cited prior authority:

> that where a statute is reasonably capable of more than one meaning, a Court will give it the meaning which least interferes with the liberty of the individual . . . , that a strict construction is placed on statutory provisions which interfere with elementary rights . . . , that a statute is not presumed to take away prior existing rights . . . and that an interpretation which avoids harshness and injustice will, if possible, be adopted.[59]

Perhaps the best-known instance of this creative judicial interpretation of Parliamentary intention in recent years is the *Hurley* case.[60] *Hurley* dealt with a statutory "ouster" clause, which denied the courts any "jurisdiction to pronounce upon the validity of any action taken in terms of this section [which authorized detention without trial in specified circumstances], or to order the release of any person detained in terms of the provisions of this section."[61] The court in *Hurley* decided that a detention ordered without the justification required by the statute was not an "action taken in terms of this section," and

56. While South Africa's Constitution does not altogether exclude judicial review of the constitutionality of Acts of Parliament, that power is expressly and seemingly narrowly circumscribed. *See* Republic of South Africa Constitution Act No. 110 of 1983, § 34.

57. Rex v. Abdurahman, 1950 (3) S.A. 136 (A) at 145C.

58. South Africa's highest court has agreed that this principle, expressed in the maxim *audi alteram partem*, "embodies a fundamental right." Omar and Others v. Minister of Law and Order and Others, 1987 (3) S.A. 859 (A) at 893E-F.

59. Tshwete v. Minister of Home Affairs, 1988 (4) S.A. 586 (A) at 612F-H (Nestadt JA, dissenting) (citations omitted).

60. Minister of Law and Order and Others v. Hurley and Another, 1986 (3) S.A. 568 (A).

61. Internal Security Act No. 74 of 1982, § 29(6).

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so the courts were not deprived of their power to pronounce upon it or to order the release of the person unlawfully detained.[62] In other words, the ouster clause ousted little or nothing.

Parliament can override any of these common law principles, to be sure, but it must do so clearly. The requisite clarity is not always easy to achieve, especially if the courts are sufficiently determined to hold a statute's meaning to a benignly narrow reading of its words. Moreover, clarity may come at a price — for what has been set out clearly cannot be so easily obscured from scrutiny and criticism. In Notice R. 873, we can see how far the government may have to go if it is to escape ambiguity.

Let us take one example. Merely to bar advocacy of "participat[ion] in any campaign, project or action aimed at accomplishing the release of persons" might not be enough to make it an offense to encourage others to sign a petition. Signing a petition, after all, might not be the kind of involvement that amounts to "participation." A petition might not amount to a "campaign," for that term might be read to refer to political mobilization much more intense than the collection of individual signatures on a petition, and a petition might not even be a "project or action" if those two terms were construed as referring only to conduct approaching a "campaign."

Perhaps these arguments seem strained. But the Acting Chief Justice of South Africa's highest court ruled in 1988 that "[i]n the context in which 'action' is used in the notice [R. 873] with the words 'campaign' and 'project,' it implies more than an 'act' and has, in my opinion, the wider meaning of an organized action."[63] And so, although the government does not abandon broad language in Notice R. 873, the Notice still prohibits "the performance of any act as a symbolic token of solidarity with" a detainee, it has good reason to spell out everything it can.

The government would not need to go into such detail simply because various doctrines favoring human rights are on the books. The legal details become necessary only if there are people who will point out their absence, and make that absence matter. This is not a task exclusively for lawyers and judges, but it is one for which they are specially trained.

To be blunt, lawyers are experts at technicalities. South African human rights lawyers are, I think, even more expert in this respect than their American counterparts, precisely because South African lawyers cannot invoke broad constitutional principles to override repellent legislation, but must instead channel their advocacy into the "interpretation" of Parliamentary commands. Notice R. 873's ponderous detail, then, is partly a defense against the

62. *Hurley*, 1986 (3) S.A. 568 (A) at 584A-586I.

63. State President and Others v. Release Mandela Campaign and Others, 1988 (4) S.A. 903 (A) at 908I-909A. I rely, in citations to this case, primarily on a translation done from the manuscript (typed) judgment by Ms. Nadine Havenga. (The Afrikaans title of this case is "Staatspresident en Andere v. Release Mandela Campaign en Andere.")

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intricate web of technical reasoning in which the government's adversaries might ensnare it.

Not only "might" ensnare it, but would. Lawyering against the government is not another grim fantasy of those in power, but rather an everyday reality in South Africa. Some of the lawyers doing this work are black; black people in South Africa are unrepresented in Parliament but they can represent clients of any race in court.[64] Others are white, "Coloured" (mixed-race), or Indian. In the National Association of Democratic Lawyers, in Lawyers for Human Rights, in the Black Lawyers Association, and in other groupings, lawyers have come together to express their revulsion against apartheid. In case after case, individual lawyers have worked to limit the government's power by invoking common law doctrines to limit the scope and impact of repressive statutes.[65] In some of these cases, though by no means all, their arguments have been vindicated by the courts. We should now explore the features of the legal community that encourage lawyers and judges to use the law against apartheid.

B. The Structure and Traditions of the Legal Community

The fact that legal tools are available does not mean that lawyers will employ them. The decision to use legal tools against apartheid is, in an important sense, an individual decision, and I will briefly sketch the grounds on which lawyers might reach it. But the likelihood that individuals will make this choice is also affected by social and institutional factors that render this decision harder or easier to stand by, and my principal focus in this Section will be on identifying these underlying factors that help sustain anti-apartheid law in South Africa.

Why would a lawyer decide to use law against the state? The answer to this question may seem obvious, and can be put in the form of another question: what else can lawyers do but use the tools of the law? This response is too easy, for lawyers can leave the practice of law and opponents of apartheid

64. The text uses "black" in a narrow sense, to refer only to "Africans" and not to others, classified by South Africa as "Coloureds" or "Indians," who might well also consider themselves black. According to a 1987 article, slightly less than a seventh of South Africa's lawyers were black (*including* "Coloureds" and Indians). Mokgatle, *The Exclusion of Blacks from the South African Judicial System*, 3 S. AFR. J. HUM. RTS. 44, 46 (1987). This presence of black lawyers is at once a testimony to the efforts of black South Africans and a reflection of the difficulties that blacks contemplating a legal career still face.

65. The cases which they have handled have covered a wide range of issues, including challenges to provisions issued under the state of emergency, such as the challenge to Notice R. 873 itself; the defense of individuals charged with political crimes against the state, *see, e.g.*, Karis, *The South African Treason Trial*, 76 POL. SCI. Q. 217 (1961); and advocacy on behalf of communities facing forced removal, *see* White, *supra* note 21.

While anti-apartheid lawyering characteristically invokes the common law to constrain statutes, it should be mentioned that in one important sphere — labor law — a reformist statute has been used to secure for black workers rights considerably more substantial than those they might otherwise have been able to claim under the common law. *See, e.g.*, Marievale Consolidated Mines v. President, Industrial Court, 1986 (2) S.A. 485 (T) at 498D-499I.

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who are still choosing careers can avoid the legal profession. But it is quite possible that many of those who practice anti-apartheid law do so because they have assessed the tactical options open to those opposed to apartheid, taken account of their own particular abilities and training, and decided that working within the legal system is as attractive and effective a tactic as any — at least for them. Lawyers could hold this view without in any way denying the realities of South Africa. They need not claim that law is likely to be the central force in changing South Africa, for they might well conclude that lawyers' work can help a broader political mobilization to gather strength. They can even acknowledge (with good reason) that their efforts will often be unsuccessful. There are no simple ways to defeat apartheid, after all. Even a courtroom defeat may be significant politically for the glimpse of South African reality that it offers to the public; defeats, as well as victories, may undercut the very legitimacy the government may hope to achieve through its reliance on law. Moreover, as we will see, lawyers against the state *can* sometimes win meaningful victories, victories that at least help individual clients and may have broader impact as well. The fact that victims of apartheid so consistently welcome legal representation confirms that these considerations should not be dismissed.

It might be hard, however, to sustain a commitment nourished only by such somber tactical judgments. Many lawyers, I think, see other value to their work as well. Some believe that the effort to give meaning to the law's ideals is important because it will help give those ideals credibility in a post-apartheid South Africa. Others may feel that even if they rarely can secure judgments in their clients' favor, their efforts nonetheless amount to a moral witness against injustice. Still others may see the fact that clients ask for their help as itself sufficient justification for their efforts. And (since lawyers working against apartheid are human too) there may be some who are in it partly for such selfish reasons as "the money." In any event, there are many South African lawyers who struggle against their nation's legal oppression.

These lawyers have made decisions growing out of their own personal values and desires, but particular features of the South African legal community encourage lawyers to use the law against the state. In focusing here on aspects of this professional environment, I do not mean to suggest that lawyers exist apart from the larger society. On the contrary, the growing sentiment for change among most South Africans undoubtedly has catalyzed the growing efforts of anti-apartheid lawyers. Here, however, I want to focus on three features of the legal community which also contribute to the vigor of today's anti-apartheid lawyering: the great prestige of many of the individual lawyers who have undertaken this role, the institution of the independent bar, and the tradition of judicial independence.

First, the prestige of individual lawyers who have opposed apartheid is of institutional importance because their presence and status lend protection — indeed, even the weight of tradition — to less prominent men and women who

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hope to undertake similar work.[66] In some societies, perhaps, lawyers who adopt an anti-government stance tend to become outcasts within their own profession: generally tolerated, occasionally able to be obstructive, but rarely enjoying open respect from their peers. In South Africa, however, some of the most successful and prestigious lawyers have also been firmly opposed to aspects of government policies.[67]

While the fact that such highly regarded lawyers are involved in challenges to apartheid surely helps others to join in the struggle, we must also ask why opposition to the government has not destroyed the prestige of even these prominent lawyers. The answer to this question lies partly in the historic independence of the bar and the judiciary, to which we will turn in a moment. The echoes of other conflicts in South African society, however, may also play a role. In particular, many of these eminent lawyers have been English-, rather than Afrikaans-speaking, and it may be that the historic, multi-faceted division within the white community between the English and the Afrikaners — a division with class, cultural, and political ramifications — has helped fuel lawyers' opposition to the state.[68] Yet this is not a complete explanation. Indeed, perhaps the most celebrated of all anti-apartheid lawyers was an Afrikaner, Abram Fischer.[69]

Fischer's life illustrates not only the extent of some lawyers' commitment against apartheid but also the almost tangible quality of the prestige which an anti-apartheid lawyer can enjoy in South Africa. Fischer was a prominent advocate, so highly regarded by his fellow lawyers that after his indictment in 1964 for membership in and support of the Communist Party, he was granted bail and allowed to leave South Africa to argue a case in England — despite the obvious possibility that he would escape trial by failing to return. His lawyer told the court "that Mr. Fischer's colleagues at the Bar are confident of the fact that Mr. Fischer, no matter what he is charged with here, is the sort of man that will stand his trial and they equally would put up any sum of money

66. Albie Sachs speaks of "a liberal tradition in the legal profession." A. SACHS, *supra* note 38, at 136.

67. Two examples from earlier in this century will suffice. The second Chief Justice of South Africa, Sir James Rose-Innes, "[b]efore his elevation to the Bench . . . had been well known as a liberal in Cape politics, and after his retirement he spoke out strongly against attempts to deprive Africans of their limited franchise rights in the Cape." *Id.* In the 1950's, "Chief Justice Centlivres was a conservative liberal from the Cape Bar, who was not particularly active in politics before he became a judge but who on his retirement was to be a vigorous critic of the effects of apartheid on the Rule of Law." *Id.* at 143.

68. Gail Gerhart has pointed out to me how many of these lawyers were not only English-speaking but Jewish. As she suggests, Jews in South Africa after World War II may well have found the policies of the Nationalist government particularly unattractive because the National Party included people who had sided with the Nazis during World War II or had sharp anti-Semitic views. On this aspect of Afrikaner politics, see D. HARRISON, THE WHITE TRIBE OF AFRICA 114-32 (1985).

69. Fischer was an inspiration for the character of Dr. Burger in Nadine Gordimer's novel, *Burger's Daughter*. *Cf.* Sampson, *Heroism in South Africa*, N.Y. Times, Aug. 19, 1979, § 7 (Book Review), at 1 (reviewing N. GORDIMER, BURGER'S DAUGHTER (1979)). For a poignant memory of his life, see Benson, *A True Afrikaner*, 19 GRANTA 197 (1986).

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at all, no matter how large it is, to guarantee his return."[70]

Such prestige is a tribute to anti-apartheid lawyers' ability and integrity, but it is also, I believe, a product of the second aspect of the South African legal community that we need to address: the structure of the legal profession. That structure has highly traditional and elitist features; I will suggest that these very features provide insulation for lawyers who take up the cause of challenging apartheid.

We must first understand the basic contours of the South African legal profession. In the United States, the bar is formally an egalitarian institution: in general, any duly admitted lawyer can handle any case in or out of court. By contrast, South Africa, like England, has a divided bar — divided, that is, between 900 advocates, who alone are empowered to argue cases in South Africa's highest courts (the Supreme Courts),[71] and 6700 attorneys, who can and do appear in lower courts but otherwise are limited to out-of-court work and to "briefing" advocates for Supreme Court cases.[72] Because the advocates' profession seems to have provided particularly fertile soil for anti-apartheid lawyering, let us focus on it first.

Advocates are at once subdivided and united in important ways; both of these aspects of the structure of the profession may well contribute to the strength of anti-apartheid lawyering. On the one hand, even advocates are stratified. Junior advocates may be "led" by senior advocates in court. The most respected members of the bar (advocates comprise "the bar") can, after screening by the bar and the judiciary and ultimate approval by the government, be designated as Senior Counsel, who command higher fees for the ability and prestige they bring to the most difficult cases. Those who rise to become senior counsel have so far almost all been white, and they are likely to share habits of mind acquired through the socialization process at the bar. If they are far from representative of South African society as a whole, however, they do hold a wide range of political views. Whether or not the process of appointment of senior counsel generally escapes political distortion, it is beyond question that the Nationalist white government has approved the Senior Counsel title for a number of determined opponents of apartheid. The result is that in an institution in which hierarchy is rather firmly entrenched, some of

70. Society of Advocates v. Fischer, 1966 (1) S.A. 133 (T) at 134E. Fischer did return to South Africa, but ultimately chose to go underground. After his capture he was sentenced to life imprisonment. Before his sentencing he told the court that "[i]t was to keep faith with all those dispossessed by apartheid that I broke my undertaking to the court, separated myself from my family, pretended I was someone else, and accepted the life of a fugitive. I owed it to the political prisoners, to the banished, to the silenced and those under house arrest, not to remain a spectator, but to act." Benson, *supra* note 69, at 221 (quoting Fischer's words to the court).

71. The Supreme Courts try certain cases, and exercise appellate jurisdiction over trials held before magistrates. South Africa's counterpart to the United States Supreme Court is the "Appellate Division" of its Supreme Court.

72. The statistics on the numbers of advocates and attorneys are drawn from Benson, *The Future of the Legal Profession in South Africa: Is Fusion the Answer? The English Experience*, 105 S. AFR. L.J. 421, 422, 425 (1988).

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those who reap the prestige of the top rung of the ladder are leading anti-apartheid lawyers.

At the same time, all advocates are heirs to a tradition of independence from outside control. In the United States, lawyers join corporate firms, or work for unions, or do plaintiffs' personal injury cases, or represent criminal defendants. Switching sides is relatively infrequent. In South Africa, each member of the bar is, in principle, a sole practitioner. In theory, moreover, every advocate is normally bound to take cases in the order of their arrival in her chambers. There are, however, exceptions to this requirement,[73] and, even aside from these exceptions, in practice cases no doubt tend to come to those advocates who have evinced an interest in doing them. Thus, the professional neutrality of advocates is by no means a complete reality. Yet the ideal which this institutional structure suggests — that it is an advocate's responsibility, and pride, to represent any litigant — remains significant. Men and women schooled to independence from the pressures of clients may also be prepared for independence from the broader pressures of white society and its government. Even if this ideal does not directly inspire anti-apartheid lawyering, it offers a shield against criticism of those advocates who do in fact take cases challenging the government.

Free (in theory) of indebtedness to any single client or interest, advocates battle each other, but also are bound to each other. This tradition of fraternity within their own ranks may well provide a further protection for those members of the club whose conduct outsiders might attack.[74] At one time, advocates would all have been white, almost all male, and most probably English-speaking. But I think the traditional fraternity among advocates has not spent its force, even though their ranks have come to include more Afrikaners, as well as some women and blacks.[75] I spent time one day in 1988 with a black

73. Perhaps the most important is that advocates may accept a retainer lasting up to one year from a client, and when they do so they do give up some of the independence they would otherwise possess. *See* Uniform Rules of Professional Ethics of the General Council of the Bar as Adopted by the Johannesburg Bar, Rule 5.2, in RULES OF PROFESSIONAL ETHICS OF THE JOHANNESBURG BAR (1986) [hereinafter Uniform Rules of Professional Ethics]. Exceptions are also sometimes made to allow advocates to be employed by public interest law organizations. *See* Annexure to Uniform Rules of Professional Ethics, Local Rules and Practice of the Johannesburg Bar, Rule 3, in RULES OF PROFESSIONAL ETHICS OF THE JOHANNESBURG BAR (1986).

74. Saint Paul is said to have protected himself from whipping at the hands of his jailers by invoking his status as a Roman citizen. *Acts* 22:25-29. As Roman citizenship shielded even an apostle of a reviled religion, so bar membership may have helped protect the advocates of the anti-apartheid cause.

75. In fact, certain elements of this fellowship are enjoined upon advocates by rule. According to a Note to Rule 1.3 of the Uniform Rules of Professional Ethics:

> A new member should introduce himself or herself to every other member of the Bar. This should be done by visiting each member in his or her chambers.... One member must not address or refer to another male member as "Mr." Surnames should be used except in those cases where members are on first names relationship. In the case of female members the usual rules of courtesy apply and they should be addressed and referred to as "Miss" or ["]Mrs" as the case may be.

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advocate in South Africa. During the course of the day we took a drive — in his BMW — through the parts of town where his parents had lived, but lived no longer because they had been forced out when these areas were restricted to whites. Later, in his chambers, he entertained the white advocate down the hall, whose father had signed the order years earlier that had "banned" my friend from normal life.[76] And on our way out of the parking garage, he exchanged pleasantries with a white advocate who had vigorously sought to keep blacks out of the ranks of advocates.

The notion of a small elite group of lawyers beholden to no one but themselves (and the judges) is not an entirely attractive one. Nor do I mean to say that this structure by any means insures that an advocate will adopt an anti-apartheid role. Though the tradition of independence may encourage some advocates to see injustices they would otherwise ignore, much of lawyers' lives may also dispose them to conservatism. South African observers have noted "[t]he part played, in parliament and out, by practising or formerly practising advocates in the enervation of the principles of justice and the rule of law in this country over the past decades."[77] I do mean to argue, however, that South African advocates who *are* opposed to apartheid, whether as a result of experience at the bar or for other reasons, benefit from the traditional elite independence of the bar, just as they make use of the technicalities of the law. The prestige and the protection against outside criticism which this hierarchical and exclusive structure confers, I suggest, contributes to fostering the "indomitability in the pursuit of justice" that some members of the bar display.[78]

But what of the attorneys who do not have the special institutional arrangements and status of advocates but *do* handle a great deal of important legal work in South Africa? Historically, it appears that attorneys have been a more conservative group than advocates. In part, this difference may reflect that attorneys have had neither such strong structural self-protection nor so many prominent individual exemplars of liberal opposition to government policies as advocates have enjoyed. Other political and cultural differences between the two sets of lawyers have probably also played a role. Nonetheless there have been anti-apartheid attorneys, as well as advocates, for many years,[79] and today their numbers are significant.[80] No doubt these attorneys' anti-apartheid beliefs and efforts have many sources. It does seem reasonable to infer, however, that the strength of the anti-apartheid bar has provided in-

76. It was no accident that another advocate was down the hall, for almost all advocates' "chambers" or offices are in just one or two buildings in any given city. This, in itself, may contribute to the bonding of the bar. For a romantic expression of this view, see Claassen, *supra* note 30, at 26.

77. Cameron, Rudolph & van Zyl Smit, *Judicial Appointments — Public Confidence and the Court Structure: Proposals for a New Approach*, DE REBUS, Sept. 1980, at 430.

78. *Id.*

79. Perhaps the most famous anti-apartheid attorney is Nelson Mandela, who practiced law with his partner Oliver Tambo.

80. This sketch of the position of attorneys in South Africa owes much to comments from attorney Geoff Budlender of the Legal Resources Centre in Johannesburg.

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spiration and protection to anti-apartheid attorneys, whose professional structure by itself might not have encouraged independence so well. Ironically, then, the elitist nature of the bar — whose claims of superiority must often be grating to attorneys — indirectly may have helped to foster anti-apartheid efforts among attorneys as well.[81]

The third source of support in the South African legal community for anti-apartheid lawyering is the independence of the Supreme Court judiciary.[82] As we will see, the traditions and institutional position of the judiciary have resulted in the presence on the bench of a significant number of relatively liberal judges. Their role is a morally difficult one, for they may feel constrained by fidelity to the law to enforce laws that are part and parcel of the injustice of apartheid. Nonetheless, the presence of liberal judges is significant and valuable for the viability of anti-apartheid law, not only because it means that claims against the state have more chance of prevailing, but also because the potential for a receptive hearing encourages anti-apartheid lawyers to continue their efforts. The result is that the state must write such laws as Notice R. 873 with the judges, as well as the lawyers, in mind.

The presence on the bench of people opposed to aspects, or even all, of apartheid is at first blush paradoxical. The government, after all, appoints every judge, and the National Party, the party of apartheid, has been in power since 1948! Yet by no means can every judge be relied upon to vote with the government. In fact, as many as a quarter of the 120 Supreme Court judges may be "troubled by their office and seem to be determined to dissociate them-

81. In making this argument, I do not mean to take a position on the desirability of maintaining a divided bar. My purpose, rather, is to explore the ways that the institutional structures now in place have contributed to the flowering of anti-apartheid legal practice.

An account of the structure of the legal profession would not be complete without some mention of money. If lawyers are surprisingly independent of the government, after all, they are not independent of the need to earn a living. Opponents of apartheid who are unlucky enough to be snared in the government's enforcement machinery are not likely to be able to afford a full-throttle legal defense. South Africa, however, does not exist in a vacuum. South African lawyers have adapted models of public interest law developed elsewhere, and have looked abroad for much of the funding for their efforts as well. These efforts have sustained a substantial volume of legal work, though far less than what South Africa's black citizens could use. The availability of foreign support may also have helped anti-apartheid lawyers to feel less isolated and beleaguered than they otherwise would. And while the government could block the foreign funding, that step could have costs for the state in terms of both domestic politics and international reaction.

82. It is important to remember that a wide range of legal matters are handled initially by magistrates, subject to appellate oversight by the Supreme Court. A member of the Appellate Division of the Supreme Court has commented quite bluntly on the conditions that call the independence of the magistrates into question. For example, they "are appointed from within the personnel of the Department of Justice — usually from amongst the ranks of the prosecutors" — rather than from the independent bar. Milne, *Speech by the Honourable Mr. Justice A. J. Milne to the Natal Law Society*, 97 S. AFR. L.J. 453, 457 (1980). "Moreover, while no doubt some magistrates can and do resist it, there is insidious pressure built into the promotion system to please those who promote one to higher status and salary." *Id.* at 458. The work of anti-apartheid lawyers before the magistrates *can* bear fruit all the same, but the Supreme Court is a more welcoming forum.

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selves from the executive or, at least, to maintain a decent distance from the executive."[83]

Three aspects of the judiciary help explain this state of affairs. First, almost every judge comes from the ranks of senior counsel.[84] Judges, in other words, are likely to be deeply imbued with the ethos of the bar, and the bar's spirit, as we have seen, is both independent and somewhat liberal. Even so, the impact of the practice of selecting judges from among the senior counsel should not be exaggerated. Not every liberal senior counsel may be prepared to accept the potential moral compromises entailed in enforcing the present laws of South Africa, however benignly she might read them. The government, for its part, can engineer a designation as senior counsel, and can select less illustrious, but more conservative, senior counsel for elevation to the bench. One prominent advocate has concluded "that over the past thirty years political factors have been placed above merit — not only in appointments to the Bench but in promotions to the Appeals Court. This has undoubtedly led in many cases to better qualified people being passed over in favour of others less worthy of appointment or promotion."[85] Yet the very force of this criticism suggests that the principle of appointment on merit retains considerable vitality.[86] Perhaps to avoid such criticism from the bar, perhaps out of a belief that it can write its laws so as to neutralize liberal judges' impact,[87] perhaps even out of some degree of adherence to the bar's traditions, the government does appoint or promote judges whom it must expect to render distinctly liberal judgments.

Second, the judges have virtually life tenure once they are appointed. They are subject to removal only by the State President in response to "an address from each of the respective Houses of Parliament in the same session praying for such removal on the ground of misbehaviour or incapacity."[88] No judge has ever been removed in this way.[89] Life tenure, in South Africa as in the United States, gives judges the security to throw off whatever political entanglements might otherwise cloud their vision.

Third, the bench has its own tradition of independence. In John

83. Dugard, *The Judiciary in a State of National Crisis—with Special Reference to the South African Experience*, 44 WASH. & LEE L. REV. 477, 487 (1987).

84. *See* G. CARPENTER, INTRODUCTION TO SOUTH AFRICAN CONSTITUTIONAL LAW 257 & n.15 (1987) (describing the general practice, and citing a "notable exception," L. C. Steyn, a very influential and pro-Government Afrikaner judge).

85. Kentridge, *supra* note 30, at 652.

86. Indeed, Kentridge maintains that "we are entitled to expect" that the executive will avoid purely political appointments. *Id.* at 651.

87. *See The judiciary: A new liberal era*, Financial Mail, Aug. 8, 1986, at 59, col. 1 (suggesting that John Vorster, then Minister of Justice and later Prime Minister and State President, took this cynical view in the 1960s).

88. Supreme Court Act No. 59 of 1959, § 10(7).

89. Milne, *supra* note 82, at 456. Milne notes that occasionally judges have agreed to resign rather than face the scandal of the removal process. I know of no case, however, in which the threat of removal stemmed from the government's desire to silence an anti-apartheid judge.

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Dugard's words, the judiciary "prides itself on its independence and professes allegiance to the legal traditions of the Western world."[90] As early as the 1820s the courts began to play a role, albeit a limited one, as protectors of blacks' rights.[91] In colonial days, judges of the Cape Supreme Court "frequently handed down rulings which embarrassed the administration or the police, and by so doing earned for themselves a reputation for independence and impartiality."[92] In the 1930s, one of South Africa's most respected chief justices declared "that people of all races realise that when a man takes a seat on our Bench, he strips himself of all predelictions and endeavours only to do right to all manner of men according to Law."[93] Clothed in this tradition, even judges who might agree with many aspects of government programs have held particular elements of the government's policies unlawful.[94]

C. *The Efficacy of Legal Challenges to the Government's Use of Law*

Because of the availability of viable arguments, lawyers prepared to make them, and judges prepared to hear them, those who seek to use the law against the government sometimes *win*. Defendants charged with political crimes, for example, are acquitted, and, at least recently, not only in exceptional cases. According to data from a compilation of South African political trials that concluded between October 1988 and February 1989, in fact, approximately two-thirds of those charged either were acquitted or had the charges against them withdrawn.[95]

Sometimes the effect of lawyers' work and judges' decisions is even more far-reaching. The demise of the hated, and hateful, pass laws can be traced, in

90. Dugard, *supra* note 83, at 487.

91. A. SACHS, *supra* note 38, at 36.

92. *Id.* at 66.

93. *A Memorial to Sir William Solomon*, 48 S. AFR. L.J. 150, 153 (1931) (address by Sir James Rose-Innes).

94. One of the most striking examples may be the decision by Chief Justice Rumpff in Komani N.O. v. Bantu Affairs Admin. Bd., Peninsula Area, 1980 (4) S.A. 448 (A), a case which rejected part of the government's system of "influx control" over blacks' right to live in urban areas.

95. *See* Human Rights Commission, 2 HUM. RTS. UPDATE (No. 1), at 7-17 (May 1989) [hereinafter HUM. RTS. UPDATE]. The UPDATE does not record whether the defendants in these cases had legal representation. I suspect that most did, because the severity of the charges and the political significance of the cases likely would have prompted legal efforts. If some of these acquittals or withdrawals of charges took place without lawyers, however, that may underline the importance of the role played by vigilant judges (and perhaps by some magistrates as well).

Though these figures are striking, their significance should not be exaggerated. The state's rate of success during this period may have been unusually low. Moreover, the data cited in the text include cases in the so-called independent homelands, and one of these cases was extremely large and (from the state's point of view) unsuccessful. Without these cases, the proportion of failed prosecutions drops substantially, from two-thirds to about two-fifths (although even this level is not low). Finally, it is important to note that when charges are withdrawn the government may later file new charges. Only slightly less than one-seventh of all those charged were actually acquitted (and even those acquitted might face further prosecution for other alleged misdeeds).

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part, to successful court challenges to aspects of these laws.[96] Court decisions and lawyers' efforts have helped protect the *de facto* residential integration of certain officially all-white areas.[97] And in the mid-1980s there were heady days when it appeared the courts would substantially restrict the government's emergency powers — such as those exercised in Notice R. 873. In fact, on April 28, 1987, eighteen days after it was promulgated, Notice R. 873 was declared invalid by a South African court.[98]

The promise of the judicial challenge to the emergency, unfortunately, was subsequently undercut by conservative votes and manipulations of the Appellate Division, the country's highest court.[99] The attack on Notice R. 873, in particular, ultimately failed on appeal. The case, *State President and Others v. Release Mandela Campaign and Others*,[100] is one of several decisions by the Appellate Division that dealt major blows to legal challenges to the state of emergency.

While there recently have been encouraging signs of a return to closer judicial scrutiny of state power,[101] it should not surprise us that South Africa's courts fall short of the mark as opponents of government policies. To say that opponents of apartheid can sometimes win, and that the courts have a tradition of independence, is not to gainsay the fact that courts in every country, the United States included, are courts *of* that country and are not likely to be its sharpest critics.

Yet in the course of rejecting the legal challenge to Notice R. 873, the Appellate Division also endorsed a somewhat tempered, though still very broad, understanding of the range of conduct which the Notice proscribed. The advocate attacking the Notice asked whether a minister who prayed with a detainee as an act of solidarity might be guilty of a subversive statement because his prayer was likely to encourage the detainee's family to do the same (and, presumably, their prayer in solidarity would constitute an act proscribed by subsection (g) of Notice R. 873). The court's answer was that so long as the minister did not intend this result, the fact that his prayer encouraged the family's prayers would not make him guilty of a subversive statement.[102] This interpretation kept open a sizable loophole, for many seemingly subversive statements might escape punishment on the ground that they were not uttered with the requisite intent.

In fact, Notice R. 873 meant still less than that — though it still meant a

96. *See, e.g., Komani*, 1980 (4) S.A. 448 (A).

97. *See* Gqubele, *Vote CP, the posters urge the locals. But wait . . . the locals are mostly black*, Weekly Mail, Oct. 14-20, 1988, at 11, col. 1.

98. *See* State President and Others v. Release Mandela Campaign and Others, 1988 (4) S.A. 903 (A) at 906E-G.

99. *See* Haysom & Plasket, *The War Against Law: Judicial Activism and the Appellate Division*, 4 S. AFR. J. HUM. RTS. 303 (1988).

100. 1988 (4) S.A. 903 (A).

101. Rickard, *The Corbett court brings back first principles*, Weekly Mail, Dec. 21, 1989 - Jan. 18, 1990, at 10, col. 1.

102. *Release Mandela Campaign*, 1988 (4) S.A. at 909D-G.

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great deal. In response to media reports even before the legal challenge, the Commissioner of Police had explained to the press that Notice R. 873 did not prohibit any "interested party" from making representations for a detainee's release, including but not limited to bringing court actions seeking the release; did not prohibit prayers for a detainee's release in a *bona fide* religious gathering; and did not prohibit people at political campaign rallies "from adopting a standpoint in regard to the release of detainees."[103] The broad phrasing of Notice R. 873 could have been read to prohibit most, if not all, of these activities. Perhaps the drafters adopted this phrasing because they simply were incapable of finding more precisely honed language. Or perhaps the government was quite content to issue a notice written so broadly that its "chilling effect" would be pervasive, and backed off only in the face of political opposition.

It is no tribute to the South African Appellate Division, in any event, that this court let language stand that *could* have prohibited such conduct. But it is a sign of the political and legal force of ideas of a right to petition, of a right to religious succor, and of a right to political freedom, that even in the midst of the state of emergency, the government found itself giving its own notice a narrowing interpretation.

There is a further irony to the decision in this case. Notice R. 873 was promulgated on April 10, 1987 and held invalid on April 28, 1987. The Appellate Division did not overturn the lower court judgment until September 13, 1988. In the meantime, however, Notice R. 873 had presumably expired, since the state of emergency under which it was issued ended in June of 1987. The government renewed the state of emergency for another year, and did so again the following year and the year after that. But it did not choose to reissue and resuscitate Notice R. 873, even after the Appellate Division's decision.[104]

Perhaps the government mistakenly believed that the Appellate Division would not endorse Notice R. 873. Perhaps the government simply felt that it could better accomplish its goals by other means. These methods were no less drastic. The most sweeping was probably the order, issued early in 1988, prohibiting the Release Mandela Campaign, the Detainees Parents Support Committee, and fifteen other organizations "from carrying on or performing any activities or acts whatsoever."[105] Nevertheless, as we will see in a moment, the absence of Notice R. 873 may have made a difference to the eventual

103. *Id.* at 910E-G.

104. I am grateful to Gilbert Marcus and Lydia Levin of the Centre for Applied Legal Studies at the University of the Witwatersrand, Johannesburg, for explaining Notice R. 873's ultimate fate to me, and to Gilbert Marcus and George Bizos for describing the government's later effort to ban gatherings in support of detainees, *see infra* text accompanying notes 117-19.

105. Order No. 334, 272 Gov't Gazette No. 11157 (Feb. 24, 1988). On the same day, in Order No. 335, *id.*, the government barred the Congress of South African Trade Unions, the country's largest trade union group, from a variety of political actions, including "the stirring-up, by way of publicity campaigns, of opposition among members of the public or members of a section of the public to . . . the detention of a person, or of persons belonging to a category of persons . . . or towards the system of detention." *Id.* § 2(b)(i).

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fate of detainees. To understand the effect that lawyers' use of the law may have had, we must now consider the extent to which South Africa's legal culture overlaps with a domain of illegality.

IV.
THE DOMAINS OF LEGALITY AND ILLEGALITY

I have tried to sketch here a picture of a country in which oppression acquires a grotesque explicitness through its embodiment in law, but in which the very forces that press the government to work its will through law also modestly constrain what the government can do. In South Africa, law is a contested territory. So it may be in many nations, but in South Africa the stakes and the intensity of the struggle are especially high. For the government, the law is a source of power and legitimizes the use of that power, while for the opponents of apartheid, the law is also a device for restraining that very power and casting doubt on its legitimacy. Precisely because many of those involved in this struggle over law see their efforts as part of a much more fundamental struggle, however, a complete picture of the role of law in the South African racial order cannot stop with what is legal.

Certainly those who wish to preserve or even intensify racial oppression have not always stayed within the bounds of the law. Many Americans are aware of Steven Biko's degrading death while in police custody. Since his death, there has been strong evidence that torture of detainees has continued to be widespread. Lawyers have been able to restrain this abuse in part, and at times, but never completely. Perhaps even more alarming, South Africa has recently seen a rash of unmistakably criminal attacks on anti-apartheid activists, whose buildings have been bombed and whose lives have been taken.[106] Though there have been many such incidents, the authorities have reported very little success in finding the perpetrators.[107]

In other words, the law does not exercise a hypnotic hold upon the law-enforcers or their extralegal allies. For those who see the law solely as a tool of control, it must be easy to decide to use other, more effective tools instead. Even those pro-apartheid whites who do genuinely respect the ideal of the rule of law may consider it necessary to qualify that respect.

106. For a compilation of such incidents, see D. WEBSTER & M. FRIEDMAN, SUPPRESSING APARTHEID'S OPPONENTS: REPRESSION AND THE STATE OF EMERGENCY JUNE 1987 - MARCH 1989, at 24-31 (1989). This pamphlet was published in memory of one of its authors, David Webster, who was himself assassinated on May 1, 1989.

107. In late 1989, a man on South Africa's death row forestalled his execution with the sensational confession that he had been part of a police hit squad responsible for political killings. Powell, *Death-Row policeman tells of SB "hit-squad,"* Weekly Mail, Oct. 20-26, 1989, at 1, col. 1. Other revelations soon followed, and commissions of inquiry were appointed. Unfortunately, although the recent report of the Harms Commission, established to investigate much of this violence, was sharply critical of the Civil Cooperation Bureau, a euphemistically named government agency suspected of such crimes, it only found evidence justifying prosecution in two of the "more than 70" murders within its purview. Ottaway, *South African Judicial Inquiry Fails to Find Blame in Activists' Murders*, Washington Post, Nov. 14, 1990, at A21, col. 1.

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Such ideological twists should not be surprising. Western ideals have real significance in South Africa, but South African apartheid flies in the face of those ideals (at least as they have come to be understood since the defeat of Hitler, the demise of legal segregation in the United States and the decolonization of the Third World). Those who find no support for their racist beliefs in a framework of human rights and the rule of law may choose to abandon the framework rather than the beliefs — and those who do not honor the framework in the first place will be even less restrained. In addition, self-defense and national security are potent reasons for abridging human rights even in standard Western thinking; extreme conditions breed extreme state conduct. From this perspective, lawyers opposed to apartheid play a dangerous game. The more effective they are in challenging apartheid law from within, the more some proponents of apartheid may be tempted to resort to extra-legal means to defend their power.

Those who oppose apartheid also have not always accepted the constraints of law. The African National Congress ["ANC"], for example, mounted a modest, but evident, armed struggle against the government over a period of almost three decades until it agreed in August 1990 to suspend this aspect of its struggle.[108] Many other people refuse to accept the government's restrictions on *nonviolent* opposition. One of the cascading events that preceded the freeing of Nelson Mandela, for example, was the campaign of nonviolent civil disobedience launched by the "mass democratic movement." The first target of this campaign was the segregation of health care;[109] other targets included segregated buses[110] and beaches.[111] At the same time, organizations restricted under the state of emergency began to "unban" themselves.[112] Dullah Omar, an advocate and a leader of the United Democratic Front, one of the restricted organizations, declared that "[i]t is now irrelevant whether (State President) de Klerk lifts [the state of emergency] or not."[113]

The aftermath of Notice R. 873 reflects the uncertainty of the government's legal grip on the men and women of South Africa. Early in 1989 the great majority of the people detained under the state of emergency were released (though many or most were then placed under difficult, and even dangerous, government-imposed restrictions).[114] What led to their release was

108. *See* Lawyers' Committee for Civil Rights Under Law, *Update on the Transition Process — Paper III: The Pretoria Minute and Working Group Report of August 6, 1990* 5-7 (Aug. 14, 1990).

109. *After this week, white hospitals can never be the same*, Weekly Mail, Aug. 4-10, 1989, at 1, col. 2.

110. Gunene, *Price of a defier's bus fare: charges of conspiracy*, Weekly Mail, Sept. 1-7, 1989, at 8, col. 1.

111. Brown, Evans & Davis, *The next defiance step: the banned 'unban' themselves*, Weekly Mail, Aug. 18-24, 1989, at 3, col. 1.

112. *Id.*

113. Davis, *Western Cape has some quiet before the storm*, Weekly Mail, Sept. 22-28, 1989, at 7, col. 5.

114. *See* Gunene, *Detainees go free, but trials on increase*, Weekly Mail, Dec. 21, 1989 - Jan. 18, 1990, at 11, col. 1.

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not court action or government initiative, but hunger strikes.[115]

Starting on January 23, 1989, detainees began going on hunger strikes, arguably violating the regulations governing their conduct in prison.[116] The hunger strikes, in turn, generated a great deal of public support in South Africa and abroad, support which buttressed the detainees' struggle.

This outpouring of support suggests that the case challenging Notice R. 873 may have won a victory after all, even though the Appellate Division defeated the challengers' legal arguments. For although the state had adopted other harsh steps to control agitation in favor of detainees' release, the demise of Notice R. 873 meant that the Notice's express, specific provisions making it a subversive statement to urge a "campaign, project, or action" in support of the detainees' release, or to encourage others to act in "symbolic token of solidarity with or in honour of" the detainees, were no longer on the books.

Although other portions of the emergency regulations' definition of "subversive statements" (or other legislation) might have been pressed into service, the abandonment of Notice R. 873 weakened the state's potential argument that these alternative provisions should be read to do what Notice R. 873 no longer did. Hence it was legal, or at least arguably legal, to incite the wave of sympathy fasts that became a highly visible expression of support for the detainees. Even the state's ban on all gatherings in protest against detention or in solidarity with detainees — a ban issued the day after the first fast began — did not quench the movement's fire, as one fast after another took place in the days and weeks following this new prohibition.[117]

As it happens the first fast in solidarity was apparently the one undertaken on February 9, 1989 by a group of 42 lawyers.[118] Lawyers were also the immediate target of the government's ban on gatherings in support of detainees, for this ban singled out a meeting "to be held under the banner of 'Lawyers in Protest' " the next day.[119] In their fast and plans for this gathering, lawyers took advantage of the legal space to which the absence of Notice R. 873 had contributed. But in moving so far beyond conventional legal tactics,

115. For a description of the hunger strikes through March 1989, see HUM. RTS. UPDATE, *supra* note 95, at 48-59.

116. In 1987, it was forbidden for an emergency detainee to "commit[] an act with the intention of endangering his life, injuring his health or otherwise conduct[] himself to the prejudice of good order and discipline." Notice R. 1300, § 20(1)(r), 264 Gov't Gazette No. 10775 (June 11, 1987). Each detainee was also barred from "caus[ing] discontent, agitation or insubordination among his fellow detainees or participat[ing] in any conspiracy." *Id.* § 20(1)(n). These specific provisions did not appear in the "Prison Emergency Regulations" issued in 1988, but similar requirements would still have been in force by virtue of other, almost identical provisions of the general prison regulations. *See* Prisons Regulations [under Prisons Act No. 8 of 1959, § 94], §§ 99(1)(n), (s) (Centre for Applied Legal Studies compilation) (undated). (I appreciate the assistance of Gilbert Marcus and Lydia Levin on the post-1987 rules.)

117. The ban was announced in Order No. 255, 284 Gov't Gazette No. 11705 (Feb. 10, 1989) [hereinafter Order No. 255]. For a chronology of sympathy fasts after the ban, see HUM. RTS. UPDATE, *supra* note 93, at 53.

118. *See* HUM. RTS. UPDATE, *supra* note 95, at 53.

119. Order No. 255, *supra* note 117, § (a).

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these lawyers also signalled their recognition of the limits on what traditional legal work by itself can accomplish. Lawyers in many countries share this understanding, but in South Africa the fragility of law's claim to embody or promote justice is always a part of the legal culture.

CONCLUSION: THE LAW OF A NEW SOUTH AFRICA

There is no better example of the intertwining of the legal and the illegal in South Africa than the recent release of Nelson Mandela. Mandela, a practicing attorney in the 1950s who continued his legal studies while in prison, was sentenced to life imprisonment in 1964 for trying to overthrow white rule as a leader of the nascent military operations of the ANC. He emerged from prison in 1990 a free man, ready to resume the leadership of the ANC — now legalized for the first time in 30 years — and in his first public speech declared his continued support for the ANC's armed struggle.[120] In unbanning the ANC and freeing its most revered leader, South Africa's new State President, F.W. de Klerk, has in effect acknowledged that only by legalizing the illegal can South Africa's ruling white minority hope to achieve a lasting, just racial peace. In that possible future society, the law might cease to be a mere weapon of opposing social forces and, instead, become a vehicle for arguing over, and building, a new South Africa.

120. *See Transcript of Mandela's Speech at Cape Town City Hall: "Africa It Is Ours![']*, N.Y. Times, Feb. 12, 1990, at A15, col. 1; McFadden, *Man in the News: Nelson Mandela*, N.Y. Times, Feb. 12, 1990, at A16, col. 1.

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APPENDIX

REPUBLIC OF SOUTH AFRICA

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GOVERNMENT NOTICE

MINISTRY OF LAW AND ORDER

No. R. 873 10 April 1987

NOTICE BY THE COMMISSIONER OF THE SOUTH AFRICAN POLICE.—PUBLIC SAFETY ACT, 1953

Under the powers vested in me by paragraph (a) (ix) of the definition of "subversive statement" in regulation 1 of the regulations published under the Public Safety Act, 1953 (Act 3 of 1953), by Proclamation R. 224 of 11 December 1986, as amended, I, Petrus Johannes Coetzee, Commissioner of the South African Police, hereby identify for the purposes of the said definition the act specified in the Schedule hereto as an act which has the effect of threatening the safety of the public or the maintenance of public order or of delaying the termination of the state of emergency.

I further determine that, unless the context otherwise indicates, a word to which a meaning has been assigned in the said regulations shall, where used in the said Schedule, have a corresponding meaning.

Signed at Pretoria on 10 April 1987.

P. J. COETZEE,
Commisioner of the South African Police.

SCHEDULE

To participate in any campaign, project or action aimed at accomplishing the release of persons, or of persons belonging to a particular category of persons or of a particular person, detained under section 28 or 29 of the Internal Security Act, 1982 (Act 74 of 1982), or regulation 3 of the Security Regulations, in so far as such participation in any such campaign, project or action consists of any one or more of the following acts, namely—

(a) the signing of, subscribing to or other act in support of a petition or other similar document in which the Government or a member or representative of the Government is called or is purported to be called upon by the signatories, subscribers or supporters thereof or thereto to release the said persons or person from such detention;

(b) the calling, either orally, in writing, by telegram or in any other way whatsoever, upon the Government or upon a member or representative of the Government to release the said persons or person from such detention;

(c) the signing of, subscribing to or other act in support of, a document in which the detention of the said persons or person is protested against or disapproved;

(d) the filling in of a coupon or other similar document intended to be used for purposes or in support of a call upon the Government or upon a member or representative of the Government to release the said persons or person from such detention;

(e) the wearing in public of a sticker or any article of clothing or the exhibition in public of a poster or sticker depicting a slogan protesting against or disapproving of the detention of the said persons or person or supporting the release of the said persons or person from such detention;

(f) the attending of a gathering held in protest against the detention of the said persons or person or in honour of the said persons or person or in support of the release of the said persons or person from such detention; or

(g) the performance of any act as a symbolic token of solidarity with or in honour of the said persons or person.

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