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# TO LIVE OUTSIDE THE LAW YOU MUST BE HONEST: BRAM FISCHER AND THE MEANING OF INTEGRITY\*

STEPHEN ELLMANN\*\*

## ABSTRACT

It is often suggested that anti-apartheid South Africans' use of the old order's courts in the course of their struggle contributed to the new South Africa's commitment to the rule of law. At the same time, it is widely felt that apartheid South Africa's laws were so illegitimate that moral citizens were not obliged to obey them, and indeed were entitled to take up arms against them. Could a lawyer who chose to break the law at the same time contribute to the ideal of the rule of law? Bram Fischer, whose life has recently been compellingly recounted in a full-length biography by Stephen Clingman, followed a moral path that eventually brought his ethical duty as a lawyer and his moral duty to end apartheid into conflict, and in the end chose to breach his duties as a lawyer in order to meet his responsibility as a human being. This article argues that although it is impossible to know with certainty how Fischer's choices affected other anti-apartheid lawyers, or how those other lawyers' choices to obey or disobey the law affected the strength of the rule of law in post-apartheid South Africa, still we have reason to think that his example taught the ultimate importance of achieving a legal system to which men and women, black and white, could be faithful. Fischer's honesty, his commitment to principle, even as he broke the law resonates across the decades that have passed since he made his choices.

\* '[T]o live outside the law, you must be honest' is from Bob Dylan, 'Absolutely Sweet Marie' on *Blonde on Blonde* (Sony/Columbia Records 1966). Thanks to my colleague Michael Perlin for the citation and discussion of Dylan's meaning.

\*\* Associate Dean for Faculty Development and Professor of Law, New York Law School. I thank the participants in the Symposium on *Apartheid to Democracy in South Africa: A Symposium in Honor of Kenneth S. Broun* (26 January 2001) for their comments on these issues and I also want to thank the University of North Carolina School of Law faculty and students who organised the Symposium for all their work to make the Symposium a pleasure to be a part of. In addition, I appreciate the comments of George Bizos, Geoff Budlender, Arthur Chaskalson, Stephen Clingman, Robert Condlin, Tom Karis, Louis Raveson, Nancy Rosenbloom, Abbe Smith, Stuart Woolman and the students in Professor Woolman's class at Columbia Law School, with whom I discussed these issues, as well as the participants in faculty colloquia at the University of Cape Town (Politics/Law), Rutgers Law School (Newark) and at New York Law School, to whom I presented this paper, and two anonymous referees for this journal. Responsibility for the views expressed here, however, is solely my own. Finally, I thank New York Law School for financial support of this work. This article grew out of a presentation made at the University of North Carolina Symposium, and was published under the same title in (2001) 26 *North Carolina J Int L and Com Reg* 767. It is reprinted here (with some revisions) with the kind permission of the editors of that journal. I hope that South African readers will indulge the occasional exposition of facts which are common knowledge here, but not in the United States.

Bram Fischer could 'charm the birds out of the trees'.<sup>1</sup> He was beloved by many, respected by his colleagues at the bar and even by political enemies.<sup>2</sup> He was an expert on gold law and water rights, represented Sir Ernest Oppenheimer, the most prominent capitalist in the land, and was appointed a King's Counsel by the National Party government, which was simultaneously shaping the system of apartheid.<sup>3</sup> He was also a Communist, who died under sentence of life imprisonment.

Responding to his introduction at the *From Apartheid to Democracy in South Africa* Symposium, Justice Albie Sachs<sup>4</sup> resisted the notion of 'heroes,' but Bram Fischer was surely heroic. Yet it is no exaggeration to say that during his life Bram Fischer, this most respected of lawyers, violated many laws, sometimes openly and sometimes covertly. I want to tell this aspect of Fischer's story in some detail, not to impugn his memory, but rather in the hope of understanding the moral decisions faced by a lawyer of both great integrity and passionate opposition to apartheid during the long decades of that oppressive system. I never had the honour of knowing Bram Fischer, but I have had the great fortune to know some South African lawyers for fifteen years now, and I have been impressed by their courage and integrity, which I rather think owe something to Fischer's legacy. While the choices he made were his choices, and represent only one of the ways that lawyers honourably responded to the evil of apartheid, in speaking about Fischer I seek to speak about the meaning of integrity in a world where integrity and justice are surrounded and beset by evil. That was the world of South Africa over much of the last fifty years, but of course not a world whose boundaries were ever confined to South Africa's.

Let me add one more word before I begin. I could not have written this essay if I did not have on my desk the extraordinary and definitive biography of Bram Fischer by Stephen Clingman.<sup>5</sup> Clingman's concern is with Fischer's life as a whole, rather than the particular dilemmas Fischer faced as a lawyer. My concerns begin with those lawyer's dilemmas, though ultimately I too want to speak of Fischer's life and heart. In doing so, to a very large extent I am reading Stephen Clingman and through him, I hope, Bram Fischer.

## I ANTI-APARTHEID LAWYERING AND THE LAW

While South African lawyers who opposed apartheid knew that they faced great obstacles in the cases they brought and defended against the

1 S Clingman *Bram Fischer: Afrikaner Revolutionary* (1998) 175 (quoting South African attorney Charlie Johnson).

2 Ibid 117, 163, 230.

3 Ibid 117, 195, 217, 289.

4 Justice Albie Sachs is a member of the Constitutional Court of South Africa and a man who, like Bram Fischer, endured a great deal in the struggle against apartheid. After detention without trial and exile, he lost an arm when South African agents bombed his car on 7 April 1988. A Sachs *The Soft Vengeance of a Freedom Fighter* 2 ed (2000) 51.

5 Clingman (note 1 above).

state, they – or at least many of them, black and white – continued to work within the legal system to obtain there what victories they could. In many ways, therefore, they embraced a strategy of playing within the rules. But this decision by no means reflected any concession that the system was actually a just one. For many of these lawyers, this choice was accompanied by other choices, choices that involved at least some violations of the law. Bram Fischer followed this path especially far, but many other lawyers walked it as well.

Indeed, for many black South African lawyers, lawbreaking was almost the first step in their practice of the profession. Under apartheid laws, black lawyers were prohibited from setting up offices in the downtown areas where the courts were located without special government permits. Nelson Mandela, for example, tells us in his autobiography that, in the early 1950s, '[t]he authorities refused to renew' the permit that temporarily had allowed Mandela and his partner, Oliver Tambo, to set up an office in Johannesburg.<sup>6</sup> They 'insist[ed] that we move our offices to an African location many miles away and virtually unreachable for our clients. We interpreted this as an effort by the authorities to put us out of business, and occupied our premises illegally, with threats of eviction constantly hanging over our heads.'<sup>7</sup> In Kenneth Broun's unique and illuminating book,<sup>8</sup> which we rightly celebrated at the *From Apartheid to Democracy* Symposium, Dullah Omar, later the Minister of Justice in the first post-apartheid government, remembers starting an illegal partnership with an African lawyer:

I filled in my application forms. I lied about our relationship, and I said he was working for me. I lied under oath about a number of things. I, too, had to apply for a Group Areas permit because I could not practice in the city without a permit. So we had to tell a few lies on my permit as well.<sup>9</sup>

Similarly, Ismail Mahomed, the late Chief Justice of South Africa's Supreme Court of Appeal, told Broun that he could not legally have chambers as an advocate in Johannesburg. Camping in sympathetic colleagues' offices for years,<sup>10</sup> Mahomed and the lawyers whose offices he used may all have violated the law. Some years later, Dikgang Moseneke, who would one day play an important part in South Africa's peaceful transition to democracy, hoped that he and his partners would be charged for setting up their office despite the law. At the time they thought:

6 N Mandela *Long Walk to Freedom* (1995) 151.

7 Ibid 132.

8 KS Broun *Black Lawyers, White Courts: The Soul of South African Law* (2000).

9 Ibid 224.

10 Ibid 162-64. Mahomed's situation was not unique. George Bizos has pointed out, in a personal communication to me, that '[t]he Johannesburg Bar Council itself defied the law by arranging with [Bizos] to share Chambers with Duma Nokwe between 1956 and 1962.' See I Maisels *AA Life at Law* (1998) 72-74.

'There will be a hell of a case. It will be all over in the papers: New Black Law Firm Resists the Group Areas Act. What more fun can you have than that?' In the end, they didn't charge us. For some reason they just backed off from charging us. And we were dying to be charged.<sup>11</sup>

Another kind of lawbreaking was also far from unknown to South African lawyers opposed to apartheid. The careers of Nelson Mandela and Oliver Tambo illustrate this point. These two men, at one time the partners of the only African law firm in South Africa,<sup>12</sup> were also leaders of the African National Congress (ANC). In 1953, Nelson Mandela was the 'volunteer-in-chief' for the Defiance Campaign, in which he and thousands of others committed a range of acts of civil disobedience. Mandela was convicted for his actions, but a South African judge held that this was no ground for Mandela to be disbarred.<sup>13</sup> Later, Mandela went underground and became 'the leader of a nascent guerilla army,'<sup>14</sup> uMkhonto we Sizwe, in effect the military arm of the ANC.<sup>15</sup> Tambo went into exile and led the ANC from outside South Africa for almost three decades. Probably everything Mandela and Tambo did in those capacities was illegal.

Bram Fischer also engaged in lawbreaking of this sort. His office was one of those that Ismail Mohamed used.<sup>16</sup> During and shortly after World War II, both Fischer and his wife, Molly, took part in Communist party 'food raids'. In these raids, party members took grocery goods that the merchants were hoarding or selling at above the prices set by war regulations and sold them at the lawfully fixed prices.<sup>17</sup> At best this conduct was of 'marginal legality'.<sup>18</sup> In 1948, Fischer pled guilty to aiding and abetting an unlawful strike by African miners.<sup>19</sup> Within a few years of the 1950 ban of the Communist Party, Fischer became part of its resuscitation as an underground, illegal organisation.<sup>20</sup> In response to these actions, Bram and Molly Fischer faced constant governmental pressure throughout the 1950s and early 1960s. Bram Fischer was officially listed as a Communist, both Fischers received banning orders,

11 Clingman (note 1 above) 98.

12 Mandela (note 6 above) 145.

13 See *ibid* 126-40, 162-63; see *Incorporated Law Society, Transvaal v Mandela* 1954 (3) SA 102 (T).

14 Mandela (note 6 above) 282.

15 *Ibid* 270-74. 'uMkhonto we Sizwe' means 'The Spear of the Nation'. *Ibid* 274.

16 Broun (note 8 above) 162-63; Clingman (note 1 above) 348.

17 Clingman (note 1 above) 160, 167.

18 See *ibid* 167.

19 *Ibid* 182.

20 It is not clear exactly when Fischer and his wife, Molly, became part of the underground organisation. Clingman reports, however, that the Party had re-established itself by 1953 (*ibid* 193), and specifically mentions that, '[g]iven the South African Communist Party's recent reconstitution, it is hard to believe that Molly's trip [to China in 1954] did not have any clandestine purposes' (*ibid* 203). Lionel 'Rusty' Bernstein recalls Fischer playing an integral role in the resuscitation of the Communist Party, apparently beginning in 1951. See R Bernstein *Memory Against Forgetting: Memoirs from a Life in South African Politics 1938-1964* (1999) 114-30.

and they were subjected to police searches and wiretapping.<sup>21</sup> In 1960, Molly Fischer, though not her husband, was detained without trial under a State of Emergency.<sup>22</sup>

It is one thing to violate the obviously unjust laws of racial segregation that blocked black South Africans from practising law, or even to engage in unlawful political activities 'at night' outside the sphere of legal work. It is perhaps another matter to violate the law in the course of one's legal practice itself, for here the grounds for finding an obligation to obey the law are particularly substantial.<sup>23</sup> This too, however, was not unheard of in apartheid South Africa, although for obvious reasons it was probably little spoken of at the time. Dullah Omar told Kenneth Broun that he had carried messages between prison inmates whom he represented.<sup>24</sup> Omar used his access to the individual inmates as their attorney to pass from

21 Ibid 194, 209-10, 267.

22 Clingman (note 1 above) 265.

23 The possibility that lawyers are specially obliged to obey the rules of their own profession stems from at least three sources: the oath of admission lawyers take, the daily interactions lawyers have with each other, and the lawyers' continued participation in the legal system. I will not explore these moral arguments in detail, but it is important to sketch them briefly.

The oath of admission, whatever its exact language, surely implies to others that the oath-taker will obey the rules that directly govern the lawyer's professional activity. A lawyer might maintain that an oath calling, say, for fidelity to the Republic of South Africa bound him or her only to the laws of the just nation that was waiting to be born. (For an example of a somewhat similar understanding of the oath, see D Dyzenhaus *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (1998) 114 (quoting a comment by a speaker from the National Association of Democratic Lawyers, at the Truth and Reconciliation Commission's hearings on the legal profession).) But unless the lawyer announced this interpretation, it would no doubt come as a surprise to many other members of the profession. A lawyer might also maintain that a promise or oath offered to an evil antagonist had no moral force, but this position seems hard to sustain as a general proposition. Finally, lawyers might contend that their decision to take the oath of admission was coerced because they could not otherwise challenge the injustice of apartheid through the courts. This point has force, but not every lawyer who came to oppose apartheid could really have said that he or she was 'coerced' into becoming a lawyer.

The daily interactions that lawyers have with each other also may generate moral obligations. If lawyers and judges tend to trust each other, perhaps warily but still meaningfully, because of their shared membership in the legal profession and their presumed adherence to its norms, then each lawyer who receives that professional trust from others while in fact not living by those norms is engaged in a form of deception. The deception, moreover, is not abstract, but personal – directed at the particular men and women with whom the lawyer interacts and whose trust he or she seeks to manipulate.

Finally, lawyers' participation in the legal system may also generate moral claims. Participation may imply some measure of consent, confirming the apparent meaning of the oath of admission. In addition, participation may sometimes lead to victories, and then the lawyer who rejects the obligations of the profession is in the position of seeking and obtaining benefits while refusing to acknowledge reciprocal duties.

I do not mean to suggest that any of these sources of professional obligation generate claims that always trump the other ethical duties resulting from the right and obligation to oppose injustice. Moreover, these grounds of professional obligation may have less force in some contexts than in others; the norms of the courtroom may have more claim on lawyers than those of the prison, for example, where shared trust and decent treatment may be in scant supply. My point is only that even in an unjust society where, in general, law does not deserve obedience, the obligations of the legal profession itself will often still have special, moral weight.

24 Broun (note 8 above) 228.

one to another what they could not communicate directly.<sup>25</sup> This conduct clearly violated prison rules. Nelson Mandela confirmed that Robben Island inmates relied on their lawyers to smuggle letters out of prison – ‘[l]awyers were not searched’ – and to carry messages to the ANC in exile in Lusaka.<sup>26</sup>

Some lawyers who were also determined political opponents of apartheid might even have been willing to lie for the sake of their cause. Godfrey Pitje, who was admitted as an attorney in 1959, remembered telling the security police that he was not in touch with Nelson Mandela, who was then underground. In fact Pitje ‘used to meet him [Mandela] in disguise.’<sup>27</sup> Perhaps men and women prepared to take these steps in their private lives were also prepared to take similar steps *as lawyers*: to violate the obligations of legal ethics, and of the criminal law, in their legal practice. As we shall see, this is the terrain that Bram Fischer arrived at after a career dedicated to the law.

## II BRAM FISCHER AND THE LAW

Bram Fischer is perhaps best remembered for one remarkable act of courage and self-sacrifice, which grew out of his own arrest. In June 1964, Fischer had finished his work as lead counsel for Nelson Mandela and the other leaders of uMkhonto we Sizwe at the Rivonia trial. The trial ended with sentences of life imprisonment, an outcome that was seen as a victory against the possibility of the death penalty.<sup>28</sup> This victory preserved the lives of Mandela and his co-defendants, and made it possible for them eventually to return to the stage of South African and world history. Just three months after the trial, in September 1964, Fischer himself was arrested and charged with Communist activities.<sup>29</sup> He applied for bail. A co-defendant, who had faced charges twice before and not fled, was denied bail, while Fischer’s request was granted.<sup>30</sup> Bail enabled him not only to leave jail, but also, as the magistrate granting it understood, to leave the country; and leave the country he did.<sup>31</sup>

Two details of this story are important here. First, the legal profession supported Fischer’s application for bail with great intensity. One lawyer

25 Ibid.

26 Mandela (note 6 above) 421.

27 Broun (note 8 above) 21.

28 Clingman (note 1 above) 319–22. Walter Sisulu, perhaps Mandela’s closest comrade, said of this verdict: ‘Our Movement should have been broken, without leaders and without hope. But instead it was alive, singing, marching in procession right there around the court, with ANC colours flying. It was not just our celebration, but had become a world celebration with ANC colours waving. We were expecting death and now we were all alive preparing for the next phase of the struggle... Now we were a central part of a worldwide movement.’ W Sisulu *I Will Go Singing* (2001) 150–51 (an interview/biography of Sisulu, ‘[i]n conversation with George M. Houser and Herbert Shore’) (punctuation modified).

29 Clingman (note 1 above) 337, 348.

30 Ibid 338–39.

31 Ibid 339–40.

named Rissik, who ultimately put up the substantial bail himself, testified, as Clingman writes, that 'he was prepared to underwrite Bram's bail for any amount: "I have absolute faith in his integrity. I would accept his word unhesitatingly, confident that he would carry it out."' <sup>32</sup> Second, Fischer did not leave the country to escape trial, although it is conceivable that the government hoped he would depart the scene for exile. <sup>33</sup> Rather, Fischer left South Africa to argue an appeal before the British Privy Council on behalf of a Rhodesian manufacturing company. <sup>34</sup> Throughout much of his career, Fischer was on retainer to some of South Africa's largest companies, just as he was almost always on the Johannesburg Bar Council, the governing body of advocates. <sup>35</sup> He was at the center of South Africa's legal elite. Indeed, he had practically been born to the role – his father became the Judge President of the Orange Free State division of the Supreme Court, one level below the highest South African court of his time. <sup>36</sup> From his arrival in Johannesburg to begin his law practice, Fischer 'almost in some pre-assigned way . . . became ensconced among the Bar's elite social circle'. <sup>37</sup>

When he applied for his passport, which was suddenly approved just before his arrest, <sup>38</sup> Fischer 'conveyed a message to the Minister via the chairman of the [Bar] Council that he would refrain from political activity in England'. <sup>39</sup> He perhaps violated this promise, since he met with the Communist Party in exile precisely to discuss whether he should return to South Africa. Fischer did, however, argue his case before the Privy Council as planned (and won it), and then returned home to face trial. <sup>40</sup> Up to this point, Fischer's story is more or less that of a favoured son of the Afrikaner establishment, unaccountably gone astray, but still ultimately staying within the rules.

That soon ceased to be true. After his trial resumed, Fischer estreated, or, to use cruder American language, jumped bail. Rissik was repaid the bail money he had put forward, <sup>41</sup> but Fischer had still unmistakably violated his implicit, and arguably express, undertaking to the court that he would stand trial. <sup>42</sup> Harold Hanson, Fischer's lawyer, read out to the

32 Ibid 339 (quoting Peter Ulrich Rissik).

33 Ibid 340.

34 Ibid 337.

35 See notes 2-3 above and accompanying text.

36 Clingman (note 1 above) 334.

37 Ibid 108.

38 Ibid 337-38.

39 Ibid 370. He later maintained that this statement bore on the grant of his passport, but not his getting bail. Ibid.

40 Ibid 342-46.

41 Ibid 358.

42 At his bail hearing, Fischer testified: 'I have no intention of avoiding a political prosecution. I fully believe I can establish my innocence. I am an Afrikaner. My home is South Africa. I will not leave South Africa because my political beliefs conflict with those of the Government ruling the country' (ibid 338). Even if this declaration falls short of a promise to stand trial to the end, as distinguished from a promise only to return to South Africa (as Clingman suggests,



court a letter that he said was delivered to him that day.<sup>43</sup> In the letter Fischer told Hanson, 'I wish you to inform the Court that my absence, though deliberate, is not intended in any way to be disrespectful.'<sup>44</sup> Instead, he explained his reasons for believing his action was morally required, and concluded by saying: 'I can no longer serve justice in the way I have attempted to do during the past thirty years. I can do it only in the way I have now chosen.'<sup>45</sup> Despite the certainty that his actions would subject him to harsher criminal charges and longer punishment if he were caught, he saw this step as 'a supreme duty'.<sup>46</sup> It was a matter of special anguish to him that, two days after he fled his trial, the Johannesburg bar, of which he had been so prominent a member, filed proceedings to strike him from the roll of advocates, or in other words to disbar him.<sup>47</sup> Fischer was disbarred, by the same judge who had presided over the Rivonia trial, and his name has never been restored to the roll.<sup>48</sup>

No other public step Fischer ever took divided him so totally from the world to which he had been born.<sup>49</sup> Fischer's 294 days underground were very difficult.<sup>50</sup> The political work he had hoped to do came to little, although the symbolic consequences may have been important, in particular to the Rivonia prisoners on Robben Island.<sup>51</sup> The pain of hiding and being cut off from most of those whom he knew was acute.<sup>52</sup> After ingeniously transforming his physical appearance, he indiscreetly resumed contact with people he felt he could not be apart from.<sup>53</sup> Within the tremendous constraints of secrecy, Fischer was 'surrounded by women',<sup>54</sup> but he was without his wife, because she had died just after the Rivonia trial, in a freak automobile accident that took place while Fischer was driving.<sup>55</sup> His daughters felt that he would never have gone underground had she been alive,<sup>56</sup> and now he was losing even more. After he was captured, having failed to act decisively to flee the country when he might have,<sup>57</sup> Fischer paid the price he had expected: he was

ibid 370), it is obvious that a criminal defendant seeking bail implicitly represents that he will continue to attend his trial.

43 Ibid 355. Hanson was not telling the truth. He had gone to Fischer's house the previous day to pick up the letter, and Clingman writes that '[i]n fact when Bram told Hanson what he planned to do, Hanson had said he would do anything to help him' (ibid 364). Hanson's acts surely put him too in breach of ordinary legal ethics.

44 Ibid 355.

45 Ibid 356.

46 Ibid.

47 Ibid 368-72, 389-91.

48 Ibid 389-90, 454.

49 See ibid 390.

50 Ibid 401.

51 Ibid 375-76.

52 Ibid 379.

53 Ibid 365-68, 379.

54 Ibid 379.

55 Ibid 323-28.

56 Ibid 357.

57 Ibid 382, 388, 392, 398-99.

now tried on more extensive charges than he had confronted at his original trial, including sabotage.<sup>58</sup> In the end, the price was even worse than he had anticipated, because he had hoped and even believed that apartheid would end soon.<sup>59</sup>

Fischer was sentenced to life imprisonment. Nine years later he died after succumbing to cancer, which may have been aggravated by gross malpractice by his prison doctor. After he died in his brother's house, legally still a prisoner, his ashes were claimed by the Department of Prisons.<sup>60</sup> Among the many hardships he endured, perhaps the worst was the death of his son Paul, who had suffered from cystic fibrosis from birth.<sup>61</sup> Arthur Chaskalson, now the Chief Justice of South Africa's Constitutional Court, gave the eulogy for Paul because his father was locked behind prison walls.<sup>62</sup>

It is less widely known how far Bram Fischer had departed from the normal rules of lawyering before he shocked his colleagues at the Johannesburg bar by fleeing his trial. To understand how far he had already gone, we need to return to the Rivonia trial, in which Fischer led the defense of Nelson Mandela and other leaders of uMkhonto we Sizwe. It was natural that he should be the lead counsel for the accused in this case, for he was a senior counsel who had helped win the great ANC Treason Trial only a few years before.<sup>63</sup> But Fischer was reluctant to take the case. The young lawyers who joined him on the case did not initially understand why and Fischer evidently did not tell them. It was only in the course of their case preparation that they examined documents collected by the prosecution and found Bram Fischer's handwriting on them.<sup>64</sup> Fischer's handwriting was there because, although he 'was never a member of uMkhonto we Sizwe, ... he was deeply involved at Rivonia, attending meetings, discussing policy, drafting documents'.<sup>65</sup>

He was, in other words, probably already a co-conspirator in the case he was defending. Certainly he was an accessory after the fact, for after the Rivonia arrests he was personally involved in getting rid of a car that one of the accused had been using.<sup>66</sup> He also helped another lawyer involved in uMkhonto's work to flee the country after the lawyer, 'quite possibly' with Fischer's prior approval, had bribed a guard in order to successfully escape from jail.<sup>67</sup> He avoided being in court and left some

58 Ibid 406.

59 Ibid 392, 418, 427.

60 Ibid 432-41.

61 Ibid 217-18, 427-28.

62 Ibid 428.

63 Ibid 301. For more information on Fischer's role in the Treason Trial of the 1950s, see *ibid* 228-64.

64 Ibid 304-05.

65 Ibid 287.

66 Ibid 293. The car needed to be disposed of to prevent its being discovered at a cottage being used as a 'safe haven' (*ibid*).

67 Ibid 295.

early witnesses for his co-counsel, purportedly on the ground that he had to handle another case; actually, these witnesses could have identified him as a visitor to the uMkhonto headquarters in Rivonia. Even so, he wound up cross-examining another witness who, as Clingman writes, at any moment could have answered: 'But you know about this, Bram, because you were at the meeting.'<sup>68</sup> On one occasion in court, the prosecutor offered into evidence a document with handwriting on it, and the writing was identified as belonging to the brother-in-law of one of the accused. Fischer looked at it, didn't blink, and passed it to his co-counsel. No doubt they did their best not to blink too – but the handwriting belonged to Fischer.<sup>69</sup>

Obviously, these acts took Fischer some distance from conventional legal ethics. He did no injustice to his clients; they *knew* where matters stood and admired his bravery in taking the case.<sup>70</sup> But when a lawyer, in the course of defending his clients, faces evidence that actually implicates him, he has what in normal circumstances would be seen as a conflict of interest. When a lawyer cannot tell his co-counsel that he is himself at peril in the case they are working on, we would ordinarily say that he has also, in some sense, breached faith with them and perhaps endangered the effectiveness of their work.

Fischer's clearest departure from the world of ordinary legal obligation, however, took another form. Here is Stephen Clingman's description:

UMkhonto we Sizwe had been all but destroyed at Rivonia, and it was necessary to reconstitute it, even if in minimal form: this occurred while the Rivonia Trial proceeded. A new National High Command was established: Wilton Mkwayi was seconded from the ANC, and Dave Kitson from the Communist Party; they were joined by a comrade called Chiba. Following precepts all the more stringent now, each of them had to cease active membership within his home organisation, but at the same time there had to be links. Accordingly, Bram Fischer became Dave Kitson's liaison with the Communist Party, and they kept up regular contact.... Bram brought Kitson money in large amounts, smuggled in from overseas, and fairly soon, Kitson recalled, they had reactivated the uMkhonto structures, with some 600 members in the Transvaal alone, as well as acquiring cars, vans and other equipment.

Bram also brought along exhibits from the trial, now a repository that was proving surprisingly useful. For handed in among all the documents were maps of likely targets for sabotage, as well as plans for blowing them up – and Bram gave them to Kitson to pore over. Perhaps, given the machinations of the prosecution, Bram took the dry view that documents, once submitted as exhibits, were in the public domain; or he may have been able, to this extent, to separate his various commitments and responsibilities in competing areas of his life. Still, there was a certain flagrancy, if not an outright contradiction of his normal fealty to the ethics of the court. Bram was not so naive after all: with the trial on in full force, and under the fierce onslaught of the state, there was no need to retain an absolute purity; legal imperatives had been subordinated to the political.... As long as the trial proceeded there was a moratorium on all sabotage

68 Ibid 304, 312.

69 Ibid 305.

70 Ibid 304.

activity (it was crucial to avoid any provocation that might reinforce the possibility of death sentences), and other organisations observed the moratorium as well. But as soon as it ended the new leadership clearly had it in mind to re-initiate their campaign. Even some of the accused, remarked Kitson, relayed suggestions via Bram of what to blow up and how.<sup>71</sup>

This is a remarkable passage. Assuming the recollections on which it is based were accurate, Bram Fischer, while defending the Rivonia accused against charges of sabotage, was in fact conspiring to commit more sabotage. He conspired with the defendants in his case to continue committing the crimes for which they were on trial. He took advantage of his access to the accused in jail to relay information that would further this conspiracy. And he used documents to which he had easy access, due to his position in the case, to promote these same crimes.<sup>72</sup> It must be said, in light of these acts, that when Fischer later told the Court that he had absented himself from his trial because he could no longer serve justice in the way he had for the past thirty years,<sup>73</sup> he was not being altogether candid. He had already stopped trying to serve justice within the bounds of the law, and was already trying to serve justice in quite another way, by becoming what might be called a guerrilla or a spy within the legal system.

### III INTEGRITY AND LAW BREAKING

We might ask, in response to all this, whether Bram Fischer's conduct was justified. For those who are convinced that violent action, even violent action directed only against property,<sup>74</sup> is never a just response to oppression, his actions were wrong. For those who accept the legitimacy of violence as a tool to end intolerable abuse when other means have failed – and anyone who considers the American revolution or the Union's military struggle in the Civil War justified is such a person – it is evident that violence was a justifiable response to the stunning oppression of apartheid South Africa. Whether violence was the wisest course of

71 Ibid 310-11. This and all other excerpts from S Clingman *Bram Fischer: Afrikaner Revolutionary* (copyright ©1998 by Stephen Clingman) are reprinted by permission of the publisher, the University of Massachusetts Press.

72 Ibid. Clingman mentions that another lawyer and Communist 'had given evidence (under instruction from Bram) when subpoenaed in the Rivonia Trial' (ibid 366). It is not clear from this brief reference whether Fischer influenced this lawyer's testimony in ways that would have been unlawful. When Fischer himself was tried, however, he smuggled messages to a jailed former Communist Party colleague, Piet Beyleveld, who was preparing to testify against him. Fischer wrote to 'Beyleveld that the threat of ten years [imprisonment] meant nothing, and that he must not give evidence under any circumstances' (ibid 349). Bernstein appears to assume that Fischer urged a potential witness against the Rivonia accused, Bob Hepple, to flee the country after Hepple's release from detention. Hepple did escape. Bernstein (note 20 above) 293, 296.

73 Clingman (note 1 above) 356.

74 In 'the first stage of armed struggle, uMkhonto took care to avoid any loss of life' (ibid 280). Even in 1963, at the time of the Rivonia arrests, uMkhonto apparently had not yet embraced 'guerrilla warfare' (ibid 300, 312-13), although Umkhonto's leadership may have been pressing the ANC and the Communist Party to approve this step. Bernstein (note 20 above) 249-52.

action can still be debated, but, even if it was not the best strategy, it was surely a justifiable choice.

Once it is accepted that lives could ethically be taken in the struggle against apartheid, it might seem difficult to muster an argument that the rules of legal ethics could not be violated. Breaching the rules of legal ethics may be a form of lying and a violation of the promise of obedience entailed in the oath of admission.<sup>75</sup> Lies and breaches of promise, however, are not such grave acts as killing. The greater includes the lesser, and if killing was justified, so was Fischer's departure from legal ethics.

But this is too neat. Killing may not always be worse than breaking faith. The soldier who kills an enemy soldier in the heat of battle may have less to answer for than the spy who takes advantage of human trust to steal military secrets. A lawyer trusted implicitly by his professional colleagues breaks faith with many people in a way that the rifleman does not. Spies are rarely held in high esteem, because they live a life of falsehood, and we are in some ways more troubled by that than by frank, lethal contest.

There might be two other costs of making this choice. First, following Fischer's path risked sacrificing whatever gains could be won in the South African courts. I have argued elsewhere that these gains, from outright courtroom victories to valuable opportunities to address a watching world, were real.<sup>76</sup> Obviously any lawyer who went as far as Fischer was abandoning his legal career and thus his chance to contribute to the anti-apartheid movement *as a lawyer*. But even if lawyers followed Fischer only part of the way – by breaking the rules of ethics when they saw that as necessary, but always trying to escape detection – they risked not only personal disaster, but also the gradual deterioration of the perception of anti-apartheid lawyers as fellow members of the legal fraternity. That perception may have protected and encouraged anti-apartheid legal advocacy by lending it the mantle of the traditions of the bar, and forfeiting this mantle might have had profound costs. In the end, however, while anti-apartheid lawyers may in fact have come under some suspicion,<sup>77</sup> my sense is that they did not forfeit the credibility and leverage they had as legal professionals. Whether this was because they scrupulously and consistently adhered to the rules of the game, or

75 See note 23 above and accompanying text.

76 S Ellmann *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency* (1992) 248-74.

77 In 1987, the Appellate Division (then South Africa's highest court) upheld a state of emergency regulation barring emergency detainees from access to their lawyers (except with government permission). The court rejected an argument that the possibility of adopting case-by-case measures to avoid the 'security risks arising from contact between a detainee and his legal adviser' made the regulations' broad-brush approach so unreasonable as to be beyond the state's authority (*Omar v Minister of Law and Order; Fani v Minister of Law and Order; State President v Bill* 1987 (3) SA 857 (A) 859). See Ellmann (note 76 above) 94-97.

because their departures from the rules did not become widely known, ultimately this first concern is not an acute one.

The second cost raises a longer-range issue. When wars end, armies are demobilised or even merged, as in South Africa today. Courts may be another matter. If they have been used as mere tools by all those concerned – with judges being told how to rule by the government, prosecutors working in league with brutal security police, and defense counsel and defendants lying and cheating whenever they could get away with it – then which institutions will provide justice after the struggle is over? Kenneth Broun suggests, as have others (including me), that the remarkable struggle by black and white lawyers to extract justice from the courts of apartheid South Africa taught those involved in the struggle the value of the rule of law and helped make South Africa a country governed by law today.<sup>78</sup> But if Bram Fischer, the paragon of anti-apartheid lawyers, was actually engaged in breaking the law, in court, with his clients, what could any of them have learned, or later taught, about the rule of law?

Even if lawbreaking by anti-apartheid lawyers did undercut the hold of the rule of law on South African life, it might have been justified. Certainly the possible acts of these lawyers were far less egregious assaults on the rule of law than the ferocious violations of legal order committed by apartheid's supporters.<sup>79</sup> What harm these lawyers may have done, moreover, might well be outweighed by the contributions they made to the ultimate victory over apartheid, perhaps precisely by virtue of law-breaking in the service of the struggle. But the moral calculations that these suggestions point to may not have to be undertaken; we must first try to measure whether some harm was actually done to the rule of law.

I will not immediately answer these questions of the moral significance of breaking faith, and its long-term impact on the rule of law. Instead, I want to pose another question: How did Bram Fischer come to do these things? I don't mean by this to ask another question, which one might utter in tones of outrage: 'How could Bram Fischer have done these things?' The ferocity of apartheid explains, as an intellectual matter, how a lawyer could come to believe that obedience to the law was impossible. Nelson Mandela and others reached similar conclusions. What I want to ask, rather, is how Bram Fischer in particular came to take the steps he did. When we understand better who Bram Fischer was, we will be in a better position to return to the larger moral questions that I have left unresolved for now.

78 Broun (note 8 above) 255-56; Ellmann (note 76 above) 266-67. Dikgang Moseneke makes a similar point in Broun (note 8 above) 108-09.

79 South Africa has struggled to identify and respond to the stunning violence of apartheid (and sometimes of its opponents) through the work of the Truth and Reconciliation Commission. For a wrenching and moving account of this Commission's efforts, see A Krog *Country of My Skull: Guilt, Sorrow, and the Limits of Forgiveness in the New South Africa* (1999).

Let me start this way. Bram Fischer was 'to the manor born.' He was a member of the Afrikaner elite and the grandson of Abraham Fischer, an Afrikaner leader during the years of resistance to the British and afterwards.<sup>80</sup> He was the son of Percy Fischer, who would become the Judge President of the Orange Free State division of the South African Supreme Court.<sup>81</sup> He was an outstanding athlete, a Rhodes Scholar, and someone who might easily have lived a life of privilege and power.<sup>82</sup> Fischer had an ease that reflected the confidence such an upbringing could produce.<sup>83</sup> Yet he seems also to have had the anxiety that such an upbringing could produce too, the nagging doubt that he was really all that he wanted to seem.<sup>84</sup> Moreover, Bram Fischer came from a very unusual elite – an elite that had known bitter defeat in the Boer War and in an abortive Afrikaner rebellion during World War I, an elite with a tradition of resistance.<sup>85</sup> He was a person who could see grandeur in what the world might call ignominy.

Fischer was also an utterly charming man. In the words of Ismail Mahomed, Bram Fischer 'was gifted with a personality which conquered all who had the privilege to know him', reflected in 'a dignity and a courtesy which was unfailing, an integrity which was unbending, a warmth and a gentility which was rich and infectious.'<sup>86</sup> He respected others, was slow to condemn anyone,<sup>87</sup> and built connections all around.<sup>88</sup> The Fischer home was filled with guests; their parties were key events in the social life of the left. The swimming pool at their home, perhaps built first to help combat the young Paul Fischer's cystic fibrosis, became an oasis of interracial harmony in the midst of apartheid.<sup>89</sup> When his underground Communist colleagues were urgently consumed with issues of tactics and manoeuvre, Fischer's focus seemed rather to be on

80 See Clingman (note 1 above) 6-28.

81 Ibid 334.

82 Ibid 40, 67-68 (detailing Fischer's athleticism); 101 (noting his success as a Rhodes Scholar); 48-49, 78-79, 105, 109 (chronicling his early promise).

83 Ibid 39, 58, 97, 109.

84 Ibid 38, 40-41, 107-09, 224, 291.

85 Ibid 29-31.

86 I Mahomed 'The Bram Fischer Memorial Lecture' (1998) 14 *SAJHR* 209, 209-10.

87 Clingman (note 1 above) 353.

88 Ibid 98-99, 165, 247, 292, 429. In a letter to her husband, Molly Fischer told him, 'Someone else said that from the time you took over [to argue for the accused in the Treason Trial], kindness descended over the whole court!' (ibid 262). After being sentenced to life imprisonment, '[e]ven across the borderlines of prison enmity Bram managed to make the kinds of connections that defined him' (ibid 425). Similarly, Hugh Lewin, a fellow prisoner (and opponent of apartheid), describes Fischer's suffering at the hands of one abusive jailer, but says that, even with this man, Fischer was 'irrevocably polite and courteous' (H Lewin *Bandiet: Seven Years in a South African Prison* 213 (1974)).

89 Ibid 171, 220-21, 224, 252.

which comrades had which personal problems or needs.<sup>90</sup> Even a state witness, testifying at Fischer's trial, agreed that Fischer had a 'saint-like quality'.<sup>91</sup> Arthur Chaskalson wrote recently that Fischer displayed respect for human dignity 'in every aspect of his life'.<sup>92</sup>

In modern terms, Fischer, though by conviction a very faithful Communist, may more fundamentally have been responding to his sense of a web of human connection, a morality more of need and care than of rules or ineluctable social processes.<sup>93</sup> If this morality of connection is more characteristic of women than of men,<sup>94</sup> it seems fair to add that Fischer combined characteristics that might stereotypically be called masculine and feminine. A quite small man, he was a very good rugby player, yet surely one of the few rugby players of his day to seriously contemplate missing a match to attend a garden show.<sup>95</sup> He could also *use* his capacity to charm others to his advantage. In cross-examination, he won admissions from witnesses not by browbeating them, but by winning them over so fully that they told him things because they wanted to please him.<sup>96</sup>

Fischer was, moreover, a person of overwhelming integrity. This didn't mean he was '[in]capable of concealment',<sup>97</sup> at least not by the time he took the steps I have already described. His cross-examination techniques suggest a capacity to be strategically charming and self-effacing. So does a story Clingman repeatedly alludes to, about a tennis match Fischer played as a young man, in which he lost the first set badly because he devoted it to feeling out his opponent's weaknesses, and then came back to take the match. As Clingman puts it, Fischer could be 'disarmingly congenial'.<sup>98</sup>

Fischer's integrity, as his biographer sees it, lay instead in a determination to achieve consistency in his principles and to realise his principles in his own life.<sup>99</sup> In a crucial turning point as a young man of Afrikaner nationalist sentiments and Afrikaner racial prejudices, Fischer found himself called upon to shake hands with a black man. Clingman

90 Ibid 282-83; see ibid 452 (quoting Joe Slovo – lawyer, Communist, leader of uMkhonto, and later, Minister of Housing in the first post-apartheid government): '[Fischer] wasn't a communist in the sense that we used to understand the way a communist operated. And in that sense he laid the basis for the future. . . . In his personal relationships with people he had a sort of humanistic approach to the way people should operate in a political party' (ibid).

91 Ibid 351.

92 A Chaskalson 'The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of Our Constitutional Order' (2000) 16 *SAJHR* 193, 195.

93 See generally C Gilligan *In a Different Voice: Psychological Theory and Women's Development* (1982).

94 For references to the debate on this question, see S Ellmann 'The Ethic of Care as an Ethic for Lawyers' (1993) 81 *Geo LJ* 2665, 2665-66 n3.

95 Clingman (note 1 above) 40, 47.

96 Ibid 116, 247-49.

97 Ibid 248.

98 Ibid 249; see ibid 46-47, 423.

99 Ibid 50.



writes that 'Bram found himself suddenly overcome by an instinctive feeling of revulsion which he had to force himself to suppress.'<sup>100</sup> More than thirty years after the fact, Fischer related his feelings about the incident to the court that was sentencing him. Remembering that he had grown up with black children as playmates on his farm, he saw 'that it was I who had changed, and not the black man. . . I had developed . . . an antagonism for which I could find no rational basis whatsoever.'<sup>101</sup> He set himself to change, and what he set himself to do he was relentless about.<sup>102</sup> Perhaps he was all the more relentless because he always carried within himself the sense that he was not the person he ought to be.

He was immensely loyal as well.<sup>103</sup> Bram Fischer considered family profoundly important, and his comrades in the Communist Party became a larger family.<sup>104</sup> He remained a faithful Communist even after Khrushchev revealed some of the truth about Stalin.<sup>105</sup> His biographer writes that once Fischer committed himself to the woman he later married, he never wavered.<sup>106</sup> He wrote to her that he would be 'as honest as it's possible for a human being to be'.<sup>107</sup> And yet, oddly, in calling Fischer 'unwavering' toward Molly, Clingman seems to overlook some of the story he himself tells. Long after Fischer and his wife had professed love for each other, each of them wavered; Fischer himself may even have become engaged to another woman.<sup>108</sup> Later he said that he had 'nearly ruined all the future' in the process.<sup>109</sup> Still later, from prison, Fischer wrote to his daughter Ruth 'that many marriages underwent such things' as infidelities, and included as examples his own marriage and that of his parents.<sup>110</sup>

100 Ibid 51.

101 Ibid.

102 See *ibid*.

103 Ibid 224.

104 Ibid 226. Moreover, he shared his political convictions, and to some extent the peril to which his politics had brought him, with his family members. Molly Fischer was a longtime member of the party and was detained without trial during the 1960 state of emergency (*ibid* 265-75). Their daughter Ilse was also a Communist, and apparently (Clingman does not quite specify the chronology) her father 'brought her on to the central committee' while he was a fugitive (*ibid* 397). Ilse also drove the car while her father hid on the floor, when he fled from their family home to begin his months underground (*ibid* 362-65). Other members of the Fischer family, without necessarily sharing all of Bram Fischer's beliefs, assisted him in hiding information or delivering clandestine messages. See *ibid* 326-27, 329, 357. To share peril with one's family may seem startling, but, as Clingman observes, Fischer was always pragmatic (*ibid* 357). It seems right to say that his loyalty to his family was one that encompassed them in his world, rather than trying to shield them from it. In somewhat the same way, Bram and Molly Fischer regarded their ill son Paul's 'sense of independence as having as absolute a value as his health', and 'they had long decided that part of Paul's normality had to be the moral and political engagement of his parents' (*ibid* 272).

105 Ibid 211-13. Even in prison 'Bram would brook little criticism of the Soviet Union' (*ibid* 424).

106 Ibid 60.

107 Ibid 94.

108 Ibid 103, 112.

109 Ibid 103.

110 Ibid 431.

Whatever Fischer might have actually had in mind as he wrote this letter to a daughter in anguish, it is not startling that even as strong a marriage as Bram and Molly Fischer's could have had human weaknesses. But Bram Fischer judged his own weaknesses rigorously. Did he not, perhaps, worry that his loyalty to his comrades in the anti-apartheid struggle would be equally incomplete? Or that he might not live up to the saint-like image others had of him? 'Fuck my career,' he said as he contemplated returning to South Africa to face trial and going underground,<sup>111</sup> but this comment sounds more desperate than saintly. A similar hint of uncertainty and anguish emerges in Fischer's explanation of his decision to go underground, in his first letter to his daughter Ilse from hiding: 'I suppose it was worth doing – at any rate, I felt I just had to, and that was that.'<sup>112</sup>

Bram Fischer was also a believer, not in God, but in theories.<sup>113</sup> He was much taken with a theory of physical and mental conditioning that his physician brothers viewed as preposterous; they took his engagement with it as a sign of his naiveté.<sup>114</sup> He was no less taken with scientific explanations of history, which he began mentioning as much as twenty years before he finally joined the Communist Party.<sup>115</sup> When he visited the Soviet Union in the 1930s, he saw railway stations filled with peasants and thought this was proof of the lazy peasant mentality that Communism was combating. In fact, the peasants were fleeing the famine to which Stalin had subjected them.<sup>116</sup> As World War II approached, Fischer was able to maintain that the victims of Stalin's show trials were actually guilty.<sup>117</sup> Various observers, Nelson Mandela and Fischer's own daughter Ruth among them, felt that Fischer the person was greater than his Communist ideology, but he himself adhered to the party line.<sup>118</sup> He may not have been terribly good at tolerating uncertainty; his strength was relentless systematising. In the face of intensifying repression by the National Party in the 1950s and 1960s, Fischer's need to hold onto his ideological and human commitments may have intensified.<sup>119</sup> In prison debates (like Nelson Mandela, Fischer became an eminent figure among his fellow political prisoners) he took the position, perhaps surprising for a lawyer, 'that conceptual terms

111 Ibid 341. In any event, he knew that the government planned to ban Communists from practicing law, so 'he had little prospect of anything, by way of a legal career, to protect' (ibid 342).

112 Ibid 382.

113 Ibid 27.

114 Ibid 228-29.

115 Ibid 59, 92.

116 Ibid 81.

117 Ibid 150.

118 Ibid 190, 291.

119 See ibid 212.

could have only one meaning'.<sup>120</sup> As Clingman notes, 'that, after all, was how he had lived his whole life.'<sup>121</sup>

Finally, he had seen a lot of history. He was the child of a family that sought to bridge the great divide of white South Africa, the gap between Afrikaner and English.<sup>122</sup> He was in Europe in the years when fascism was building towards war.<sup>123</sup> Then he returned to South Africa and was present during the step-by-step escalation of oppression by his fellow Afrikaners in the National Party, a resurgence with overtones of fascism.<sup>124</sup> Democratic and nonviolent means of resistance had been tried for years, but the state's oppression was worse, not better.<sup>125</sup> The legislation outlawing the Communist Party had been enacted in 1950,<sup>126</sup> and after the Sharpeville massacre of black demonstrators in 1960, the state banned the ANC and other anti-apartheid groups.<sup>127</sup> Many of his comrades, including Nelson Mandela and Walter Sisulu, were in prison.<sup>128</sup> Mandela, Sisulu and no doubt others had endured the risks and deprivations involved in leading a life underground.<sup>129</sup> If Africans were to suffer this way, how could Fischer hold himself back? Especially if, in some part of himself, he feared that he might not have the courage and commitment he owed to his moral family? As Clingman writes, after Fischer was captured, George Bizos, a close colleague and himself a dedicated anti-apartheid lawyer, asked Fischer if it had been

worth sacrificing his family, his profession and everything else? Bram's response was again angry and clear-cut. He wanted to know if George had asked Nelson Mandela that question: didn't Nelson have a practice and a family? George confessed that he had not asked Mandela. 'Well then, don't ask me,' Bram replied.<sup>130</sup>

120 Ibid 423. On Fischer's leadership role in prison, see note 137 below.

121 Clingman (note 1 above) 423.

122 Fischer's father and grandfather both were part of Afrikaner struggles against the British. See notes 80-85 above and accompanying text. But Fischer's grandfather, Abraham, married a woman whose native language was English, named Bram's father Percy, and advised Percy to stay in college in Cambridge, England during the Boer War (ibid 9, 15). Percy in turn married a woman who spoke no Afrikaans (ibid 33). In their home, the children spoke English with their mother and Afrikaans with their father (ibid).

123 Ibid 87-93.

124 Ibid 92. See also D Harrison *The White Tribe of Africa* (1985) 117-30 (examining the pro-German and pro-Nazi sympathies of many Afrikaner nationalists during World War II). Clingman emphasises Fischer's dismay that an Afrikaner 'had caved in' quickly and become a witness against him at his trial; '[s]urely,' Clingman writes, 'it was now up to at least one Afrikaner to prove his good faith.' Fischer did that by going underground (Clingman (note 1 above) 353).

125 Clingman (note 1 above) 253-54, 264, 278-79.

126 Ibid 185.

127 Ibid 185-88, 253. See also J Dugard *Human Rights and the South African Legal Order* (1978) 163-64.

128 See Mandela (note 6 above) 372-378.

129 Ibid 265-318; Sisulu (note 28 above) 81, 235.

130 Clingman (note 1 above) 401. Geoff Budlender has emphasised that Fischer's response is an expression of his solidarity with African victims of apartheid. G Budlender 'Book Review' (1999) 15 SAJHR 413, 415. Yet it is also, interestingly, not an *answer* to Bizos's question. Did Fischer, on that terrible day, feel more certain of his commitment than of the value of his sacrifice?

So this is how Bram Fischer came to violate his obligations as a lawyer. To become a just person, he committed himself to the political struggle against apartheid, to the ideological tenets of Communism, and to the personal bonds he shared with his comrades. He took these commitments very, very seriously. Throughout his years of political action, Fischer never permitted himself to shirk duties that others were performing, from selling subscriptions to the Communist Party paper to meeting with his underground colleagues while maintaining an above-ground existence as a lawyer.<sup>131</sup> He hardened in the struggle.<sup>132</sup>

For many years, Fischer led two lives simultaneously – a life of professional achievement, elite status, and powerful corporate clients, meshed imperfectly but tenably with a life of radical political struggle. At home he and Molly took a black child into their household; yet they also had black servants, including the aunt of the little girl whom they had taken into their home almost as a member of their family.<sup>133</sup> Clingman writes that the grace with which Fischer could join his different lives was part of the promise he represented to those who knew him.<sup>134</sup> His communism was a communism of unification.<sup>135</sup> In prison later, Fischer insisted on maintaining contact even with a fellow prisoner who was clearly ‘dangerous, lashing out at his co-prisoners, alternately betraying them and trying to win their confidence’.<sup>136</sup> Fischer felt that ‘they could not be responsible for driving a man into madness.’<sup>137</sup>

But the country hardened alongside Fischer and the space within which it was possible to lead two such different lives contracted. Fischer could not withhold himself from the underground Communist Party; he could not withhold himself from its participation in the decision to form uMkhonto we Sizwe; he could not protect himself from exposure by staying out of the Rivonia case; he could not abstain from the

131 Clingman (note 1 above) 166-67, 283.

132 When he returned to Europe for a Communist-linked ‘Congress of the Peoples for Peace’, he disdained London’s West End plays as ‘bourgeois and neurotic’, and ‘it was evident that his political and aesthetic tastes had hardened from twenty years before’ (ibid 198-99).

133 Clingman comments that ‘[t]here is no doubt that [taking in the little girl, Nora Mlambo,] was in many respects a remarkable gesture for those times, especially for an Afrikaner’, but notes that this act was later seen by some as ‘Bram Fischer’s unholy communist “experiment”’ (ibid 171). Clingman suggests, however, that the Fischers acted at least as much out of their ‘clear sense of human reciprocity’ as out of any political principle (ibid 171-72).

134 Ibid 226.

135 See ibid 59-60, 286-87, 375, 413, 456.

136 Ibid 424.

137 Ibid. One fellow political prisoner viewed him as rigid and Stalinist, but this man may have been almost alone in his harsh reaction. ‘[B]y common consent [Fischer] was the presiding and guiding figure in prison. Everyone came to him with their needs and their troubles, and no decision of any import was ever taken without hearing his views’ (ibid 424-25). Baruch Hirson, a fellow prisoner and sharp critic of Fischer’s Communist political thinking, wrote that Fischer ‘towered over [the prison authorities] (despite his size!) as he towered over the political prisoners’ and recalled that Fischer’s ‘lack of personal rancour, his even-handed treatment of everyone, and his compassion’ ‘endeared Bram to everyone in the prison yard’. B Hirson *Revolutions in My Life* (1995) 247. For other instances of Fischer’s role in prison, see Lewin (note 88 above) 184, 187, 215-16.

resurrection of uMkhonto during that trial; and in the end, perhaps impelled further by the terrible loss of his wife, he could not hold back from following Nelson Mandela's example and going underground.<sup>138</sup> He broke the law out of despair, out of determination, out of self-doubt, out of care and love, out of loyalty, and out of integrity. As he wrote to his lawyer in response to the Johannesburg bar's court action to strike him from the roll of advocates:

When an advocate does what I have done . . . it requires an act of will to overcome his deeply rooted respect of legality, and he takes the step only when he feels that, whatever the consequences to himself, his political conscience no longer permits him to do otherwise. He does it not because of a desire to be immoral, but because to act otherwise would, for him, be immoral.<sup>139</sup>

In this light it is possible to answer the troubling questions I raised earlier about the morality of Fischer's actions.<sup>140</sup> Was Fischer's breach of obligation worse than killing? In light of Fischer's life, this question no longer seems so difficult. Though he violated many of his obligations under the law, he did so out of obligation rather than out of indifference to it. In countless ways, he honoured the bonds between people, and the obligations of humanity; his rigorous understanding of those ties led him to his fate. In this important sense, he always remained honest – faced with excruciating choices, he was prepared to take steps that were illegal and covert but only in the service of principle, in a lifelong effort to be, in his own qualified but determined words, 'as honest as it's possible for a human being to be'.<sup>141</sup>

To answer the second question posed earlier, whether his conduct undermined the meaning of the rule of law for others and for future generations, requires more than a moral response to Fischer himself. We know that South Africa embraced the rule of law, and in particular the value of enforceable constitutional law, in making its remarkable transition to democracy. We do not yet know, however, exactly how firmly the rule of law has become ingrained in the new South Africa. In a real sense, the lessons of Bram Fischer's life are still being learned and

138 Bernstein describes the frame of mind of the activists connected to Rivonia as arrest approached: 'There was, I suppose, a measure of recklessness in us all, which kept us going even while things were patently falling apart. We were living dangerously in the constant shadow of disaster . . . We had come too far and given too much to pull back now even if we wanted to. There was only one way to go – onward.' Bernstein (note 20 above) 249.

139 Clingman (note 1 above) 369-70. This statement is not unlike a comment by Gandhi, who wrote that a Satyagrahi, a person challenging injustice through nonviolent 'truth force', 'obeys the laws of society intelligently and of his own free will, because he considers it to be his sacred duty to do so. It is only when a person has thus obeyed the laws of society scrupulously that he is in a position to judge as to which particular rules are good and just and which unjust and iniquitous. Only then does the right accrue to him of the civil disobedience of certain laws in well-defined circumstances' (MK Gandhi *An Autobiography; or the Story of My Experiment with Truth* (1957) trans M Desai (1993) 575-76, quoted in J Leubsdorf 'Gandhi's Legal Ethics' (1999) 51 *Rutgers LR* 923, 939).

140 See notes 75-79 above and accompanying text.

141 See text at note 107 above.

still being applied; their ultimate impact will be the result of what today's and tomorrow's South African lawyers and citizens say and do.

It would be tempting to say that Fischer's decision to sacrifice his own well-being and go underground ultimately taught respect for moral principle and for just law, because it was, after all, a public moral witness quite akin to civil disobedience. But this decision, as we have seen, was not the only one Fischer made. Some people, though not many, knew he had gone further: some of his political comrades, who might have taken his choices as guidance for their own later decisions, and presumably some of his adversaries within the South African security state, who might have seen in his conduct a confirmation of the immorality of their opponents.<sup>142</sup> Moreover, if others, anti-apartheid lawyers or South African citizens, had known of his active contributions to sabotage during the Rivonia trial, some of them might have deeply disapproved of his lawbreaking.

On the other hand, many South African citizens – quite possibly *most*, since most South Africans were black people oppressed by apartheid and its laws – might have been impressed and moved by his bravery. Moreover, while I have been at pains to identify those respects, until recently not widely known, in which Fischer for the sake of conscience breached his obligations *as a lawyer*, what the public did know about Fischer was remarkable enough. Even in 1965 all of South Africa knew that Fischer had set himself wholly against the state. He himself told the court at his trial for sabotage that he 'had become aware of the existence of uMkhonto after it was formed, and I did not disapprove'.<sup>143</sup> All of this was enough, no doubt, to raise in others' minds, in particular in the minds of anti-apartheid lawyers, the question of whether they too could no longer adhere to the rules of behavior of a legal system so compromised by injustice.<sup>144</sup>

We simply do not know, and probably never will know, how many South African anti-apartheid lawyers, ostensibly working within the limits of the law, chose to violate the rules of legal practice in the course of the struggle. We can say, however, that if Fischer's logic had been applied relentlessly and indiscriminatingly – and not limited to the tremendously

142 Action promotes, or at least provides a cover for, reaction. Fischer himself worried about the ANC's entry into armed struggle; Joe Slovo recalled that Fischer was 'anxious to avoid a step from which there could be little turning back for South Africa'. Clingman (note 1 above) 285. Cf Dyzenhaus (note 23 above) 133 (arguing that the ANC's move, however fully justified, provided a pretext for the state's ferocious repression). It is, of course, ultimately a truism that human encounters are interactive, and to recognise this is not at all to excuse the horrors of the apartheid state's response to the liberation struggle.

143 Clingman (note 1 above) 414. He denied various other connections to uMkhonto, including 'any knowledge of its financial sources' (ibid), although Clingman reports that Fischer 'brought Kitson [a member of uMkhonto] money in large amounts, smuggled in from overseas' (ibid 311).

144 David Dyzenhaus, in his thoughtful and admiring discussion of Fischer, emphasises the challenge he posed to his colleagues (Dyzenhaus (note 23 above) 99).

wrenching circumstances in which he himself had to act – the result would have been legal lawbreaking on a wide scale. This lawbreaking would have gone far beyond the limited contexts, discussed earlier in this article, in which it is now public knowledge that lawyers broke the law.<sup>145</sup> By the 1980s, South Africa's legal system presented a host of occasions for anti-apartheid lawyering, from work akin to American poverty legal services to labour law to the defence of anti-apartheid activists both prominent and obscure. In all of these settings it might have been convenient to break the normal bounds of legal ethics for the sake of clients or (not necessarily the same thing) for the sake of the cause.

If Fischer's choices were widely, though covertly, imitated, we would not easily be able to say whether the result was to undermine the rule of law for the future, or only to undermine the rule of apartheid then and there. The ravaging injustice of apartheid pervaded South African law, yet even so its courts ordinarily remained open and sometimes did justice in the face of apartheid's logic. In the words of Walter Sisulu, a determined revolutionary and no stranger to South Africa's courts, 'there is a certain amount of justice in the judiciary.'<sup>146</sup> It could be that disrespect for the rules of even so gravely flawed a legal system would teach disregard forever.<sup>147</sup> Like other human behaviour, lawbreaking is, no doubt, partly a matter of habit, and a habit once acquired as a part of ardent political struggle might find expression in other, less admirable moments as well. On this ground, I feel that the possibility that a part of the heritage of South Africa's anti-apartheid lawyering might have been a norm of widespread lawbreaking is a troubling one. On the other hand, men and women go to war and come home to peace. South African lawyers, similarly, might have disregarded the rules of ethics in a racist authoritarian state, and come home to honour those same rules as part of a democratic order. And perhaps each of these patterns may have held true for some South African lawyers.

My own perception, however, is that many anti-apartheid lawyers, even in the midst of apartheid's rule, remained deeply convinced of the moral significance and value of law. For these lawyers, Fischer's life surely did not teach the lesson that law could be casually dispensed with in order someday to restore law. I suspect that, just as his gentle, self-effacing style of lawyering may have helped shape a generation of South African anti-

<sup>145</sup> See notes 6-27 above and accompanying text.

<sup>146</sup> Sisulu (note 28 above) 118.

<sup>147</sup> As David Dyzenhaus observes, 'right can never be entirely on the side of one who decides to overthrow an order which still contains vestiges of the rule of law' (Dyzenhaus (note 23 above) 134). John Leubsdorf comments that 'Gandhi never treated the existing system as a mere power structure that lacked any legitimacy, so that revolutionaries should manipulate or disregard it at will. He would have regarded such an attitude as fatal to the moral growth of both the manipulators and the manipulated, and he believed that growth was essential to any real or lasting improvement' (Leubsdorf (note 139 above) 937).

apartheid lawyers' courtroom tactics,<sup>148</sup> so his decisions to violate the law out of principle contributed to many principled lawyers' determination, not to disregard the obligations of legal ethics, but to fight relentlessly and courageously to overturn the world of apartheid. Whether or not lawyers like this ever felt themselves obliged to depart from the law – not widely and habitually but only, as Fischer did himself, in circumstances of surpassing moral crisis<sup>149</sup> – the lesson they brought to the new South Africa would not have been disrespect for legal order. Rather, they would have sought, and did seek, a Bill of Rights, as Albie Sachs writes in his remarkable memoir, to eliminate the horrors that 'compelled the most honest amongst us to become the biggest dissemblers'.<sup>150</sup>

148 On Fischer's style, see Clingman (note 1 above) 116, 247, 255, 299-300. For an instance of 'unusual emotion,' see *ibid* 308. On Fischer's impact on other lawyers, see *ibid* 454-55. For an account of the comparable style of advocacy that seems to have been characteristic at least of many anti-apartheid South African lawyers, see Ellmann (note 76 above) 238-41.

149 Lawyers who chose not to violate the law might nevertheless have also chosen to stretch it. A lawyer who would not knowingly lie in court, for example, might have structured his or her inquiries of the client so as not to come to know intolerably damaging facts. I have argued that such conduct can be justified, in limited circumstances, even in the United States, a society whose legal system is obviously far less flawed than that of apartheid South Africa. See S Ellmann 'Truth and Consequences' (2000) 69 *Fordham LR* 895, 905-09 (2000). Conduct of this sort does stay within the bounds of the law, albeit uncomfortably within them. As such, it may be less disrespectful and less threatening to the values of the rule of law than blunt (and covert) disobedience.

150 Sachs (note 4 above) 208. The Johannesburg bar has come to recognise that "a grave injustice" was done to Fischer when his name was taken off the roll of advocates (Dyzenhaus (note 23 above) 99 (quoting the General Council of the Bar's submission to the Truth and Reconciliation Commission hearings on the legal profession)). His name has not been restored to the roll. Clingman writes that the reason is that '[o]nly practising advocates may appear on the roll; someone who is no longer alive can no longer practise; therefore Bram could not be reinstated' (Clingman (note 1 above) 454). Surely this is a requirement that could be made waivable, and should now be waived. Happily, Fischer's reinstatement now appears imminent, under the Restoration of Enrolment of Certain Legal Practitioners Bill, which has been approved by South Africa's cabinet and will be before Parliament early in 2002. W Hartley 'Bill Seeks to Reinstates the Lawyers Who Fell Victim to Apartheid' *Business Day* (29 November 2001).

Candour compels the acknowledgment that Fischer had by 1965, overtly and covertly, gone far beyond the bounds of normal legal ethics. (His actions as a lawyer in the Rivonia trial were not then known, however, and the sole basis for his disbarment appears to have been his breach of his bail.) See notes 63-72 above and accompanying text. A lawyer who systematically acts on the principle that the rules of legal ethics are not binding can hardly continue to act as a lawyer. Even so, it was not necessary to remove Fischer from the roll, for he was already on a trajectory that would send him to prison or at the very least keep him far from the work of legal advocacy. Moreover, the government had already announced its intention to bar all communists, in or out of prison, from practising. See Clingman (note 1 above) 342, 369. (Nelson Mandela, imprisoned for life, was never struck from the roll of attorneys. See Mandela (note 6 above) 426-27.) Nor, ultimately, was it just to strike Fischer from the roll. Fischer, the moralist who turned to illegality in an immoral society, did not deserve to be cast out as dishonourable. As his lawyer Sydney Kentridge urged in court at the time, 'It was doubtful ... if there were any member of the Bar that had known Bram who would be prepared to stand up and say, "He is a less honourable man than I am"' (Clingman (note 1 above) 389).

Ironically, South Africa, with its history of internal division, also had a history of distinguishing to some extent between crimes committed out of political conviction and crimes that made a lawyer unfit to practise law. See *Incorporated Law Society, Transvaal v Mandela* 1954 (3) SA 102 (T) 107-09; *Ex parte Krause* 1905 TS 221. Fischer himself invoked



We do, therefore, have reason to think that Fischer's actions ultimately affirmed, rather than undercut, the rule of law in a future South Africa. But we do not, and in fact cannot, know this with certainty. Our efforts to calculate the ripples of someone's actions over a span of thirty years and more must always be somewhat speculative. Fischer himself, as he decided what to do, could not have known exactly what the results of his choices would be.<sup>151</sup> In the end we must judge the rightness of actions in part by understanding the person who took them, and all the more so because the impacts that actions have are in part the product of the moral quality of the person who acted. Choices recklessly and callously made resonate differently over the years than those made with a full heart. Fischer acted with a tremendously full heart. Others might have chosen differently, and I do not say that Fischer's choices were necessarily the best ones. I do say that they were the morally justified choices of a remarkable man.

#### IV CONCLUSION

Bram Fischer offered himself as a sacrifice, as Clingman emphasises.<sup>152</sup> In a life that initially might seem quite removed from Fischer's, and more frivolous than his, Oscar Wilde similarly became a sacrifice. Wilde sacrificed himself for a life of artistic and sexual freedom. Bram Fischer may once have flirted with this version of human liberty,<sup>153</sup> but seems largely to have cast it aside in favour of political earnestness. Yet the two

this distinction in his response to the Johannesburg bar's proceeding against him. See *Society of Advocates of South Africa (Witwatersrand Division) v Fischer* 1966 (1) SA 133 (O) 135H. The precedents may not have encompassed all that we now know Fischer had done; indeed, in one further irony, Fischer's own father was apparently the lawyer in an unsuccessful attempt to forestall the disbarment of an Afrikaner rebel convicted of high treason (*Incorporated Law Society v De Villiers* 1915 OPD 98). It is still sad that Fischer was not treated with the generosity South Africa sometimes accorded its erstwhile adversaries.

151 Dyzenhaus (note 23 above) 134.

152 See Clingman (note 1 above) 456.

153 Fischer wrote to his future wife from Europe in 1932 to express, or confess, his thoughts about sexuality: 'For me the only thing that is wrong is that which impedes the development of intellectual life on this planet' (ibid 93). As Clingman writes, Fischer 'told Molly he had not actually put his sexual philosophy into practice – "just why is difficult to say"' (ibid). Molly disagreed in principle, but also pointed out in her letter back that 'You have such 'frightfully loose moral standards' and then you never do a thing to be ashamed of' (ibid 94). Her insight reflected not only Fischer's own rectitude, but also his tendency to work for others' well-being while almost never being able to ask for help for himself (ibid 425, 428-29). (People often value in others what they hope to find in themselves, and Gillian Slovo observes that Bram Fischer, mourning for his wife Molly, praised her for having 'the rare quality, supposed to belong to judges, of being able to exclude entirely from her mind what the consequences of a decision might be to her and – what was perhaps even more remarkable – what such consequences might be to her family.' She is struck by 'that almost biblical conviction that what matters is not the person but the cause. And yet Bram was the least impersonal of men. . . He was one of the most heroic of men and the kindest and here is his accolade for the dead wife he had adored: that she thought not of herself, or of her family, but of others, less well off than them.' G Slovo *Every Secret Thing: My Family, My Country* (1997) 99.) Both aspects of his personality helped bring him to the radical, even desperate, steps of his last years of freedom.

men shared lives filled with early promise, graced by personal kindness, and drawn almost ineluctably towards terrible loss.

The routes they took towards their final suffering were not, after all, entirely different. Fischer's choices were more political than Wilde's, but both were certainly fuelled by deep emotion. Wilde's decision to file a baseless libel suit against his lover's father, a suit he could only pursue through perjury and that ultimately his perjury was insufficient to sustain, sent him to prison at the height of his success, and cut him away from the society that had briefly acclaimed him. It might be said that he did all this to satisfy his vengeful lover, yet these decisions also grew out of the fundamental impulse toward self-expression that Wilde exemplifies even today.

Wilde's life teaches lessons of personal liberation and its costs, and his actions do not reflect the burdens of power and responsibility that lawyers often undertake. The sense that Wilde stood for principle even as he violated the law, however, resonates with the life that Fischer led, and each became an avatar of a liberation he would not live to see. Moreover, Wilde, who was a socialist as well as an artist, may in his own way have had a moral rigour quite comparable to Fischer's. As my father, Richard Ellmann, wrote in the biography of Wilde he completed just before his death:

Essentially Wilde was conducting, in the most civilized way, an anatomy of his society, and a radical reconsideration of its ethics. He knew all the secrets and could expose all the pretense. Along with Blake and Nietzsche, he was proposing that good and evil are not what they seem, that moral tabs cannot cope with the complexity of behavior. His greatness as a writer is partly the result of the enlargement of sympathy which he demanded for society's victims.<sup>154</sup>

Wilde himself wrote, in words that describe both him and Bram Fischer, that:

Personality is a very mysterious thing. A man cannot always be estimated by what he does. He may keep the law and yet be worthless. He may break the law, and yet be fine. He may be bad, without ever doing anything bad. He may commit a sin against society, and yet realize through that sin his own perfection.<sup>155</sup>

In writing about Bram Fischer I have tried to offer an appreciation of Fischer akin to my father's appreciation of Oscar Wilde. It is not necessary to agree with Bram Fischer's choices to understand that they were moral choices. It is also not necessary to ignore the role that personal loss or anguished self-examination played in his choices to recognise that they were principled decisions – the kind that human, emotional beings make. Perhaps, though, it is necessary to understand how impressive a man Bram Fischer was in order to accept, even

154 R Ellmann *Oscar Wilde* (1987) xiv.

155 O Wilde 'The Soul of Man Under Socialism' in O Wilde *The Artist as Critic: Critical Writings of Oscar Wilde* ed R Ellmann (1969) 255, 265.

somewhat comfortably, the reality that if one lawyer can break the law out of principle, so can others. We cannot stop this, and we cannot doubt that some of the lawyers who do this will do so mistakenly or that others will claim the mantle of principle when in fact they are merely corrupt. We can only say that we should seek to educate our students, and to strengthen ourselves, to live, as Bram Fischer did, with integrity, because it is certainly true that to live justly outside the law, you must be honest.