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Stephen Ellmann

New York Law School, stephen.ellmann@nyls.edu

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TO RESIGN OR NOT TO RESIGN

*Stephen Ellmann**

I am honored to have the chance to wrestle with these issues in conjunction with the other speakers. I will start by talking about South Africa, and then attempt to draw somewhat broader conclusions from the South African experience about the circumstances in which judges can rightly choose to remain on the bench despite the injustice of many or most of the laws that they apply.

As all of you know, South Africa under apartheid was a nation of tremendous injustice. Its laws had virtually no democratic legitimacy. Even after the paltry constitutional reforms of the early 1980s, Africans in South Africa—almost three-quarters of the total population of the nation—could not vote in the national elections.¹

Meanwhile, the whites who controlled the South African state, led by the National Party, took their power under the then-reigning doctrine of parliamentary supremacy very seriously. Essentially free to legislate as they wished, whites chose to promulgate the regime of grotesque racial discrimination and oppressive security legislation known as apartheid. They pressed this agenda most intensely after the National Party took power shortly after World War II, but they had legislated similarly, if less systematically, throughout South Africa's history.

The result was a stunning array of remarkably detailed and pernicious laws. Judges were absolutely bound to enforce these provisions if they were enacted by the Parliament or faithful to what Parliament had done. The same doctrine of parliamentary supremacy that gave such vast legislative power to the Parliament in the same breath took power away from the judges. South Africa embraced this doctrine with a vengeance, notably in response to

* Professor of Law, New York Law School. I want to thank Norman Greene and Justice Priscilla Hall for guiding this panel's work, Nancy Rosenbloom for her helpful comments on a draft of this essay, and New York Law School for financial support.

¹ See DONALD L. HOROWITZ, *A DEMOCRATIC SOUTH AFRICA? CONSTITUTIONAL ENGINEERING IN A DIVIDED SOCIETY* 48 (1991) (24 million of South Africa's estimated 1986 population of 33 million were Africans). I include, as does Horowitz, the residents of the so-called "homelands," even though, under South African law at that time, those Africans who were citizens of putatively independent homelands no longer would have counted as South African citizens.

efforts by liberal judges in the 1950s to imply for themselves some power of constitutional review.²

Moreover, not only were judges bound to apply elaborate and unjust laws, but the government was also interested in cloaking the overall system of apartheid in an aura of legitimacy that might be conferred on the system by judges who enjoyed a reputation for independence and integrity.³ Now it might be answered that although the government wanted to gain legitimacy, no one would ever accord it this recognition. However, the fact is—although this does not seem to have been widely recognized while apartheid was still a fact of life—there is substantial survey research evidence that even black South Africans did actually accord a measure of legitimacy to their legal system.⁴ So it is not at all *implausible* to say that the efforts of anti-apartheid lawyers and anti-apartheid judges to add a little bit of decency to this fundamentally indecent system would have resulted in mere band-aid effects on injustice, at the price of rather profound costs in terms of legitimation.

It would seem to follow that in South Africa, as in the painful United States context of capital punishment, a judge with integrity had only one option—and that was resignation. My impression is that some South African judges did toy with this idea, and perhaps even threatened it in private. Moreover, some extremely eminent lawyers probably made clear that they would not accept appointment to the bench, out of political or moral conviction. During the apartheid era, however, no one sitting on the bench ever chose to leave it for overtly political reasons.⁵ This held true even for those judges—and there were some—who were opposed to apartheid. It is these anti-apartheid judges on whom I will focus, and whose decisions to remain on the bench I will explain and defend, for I think they were right not to resign.

² For the story of these grim events, see JOHN DUGARD, *HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER* 14-36 (1978).

³ I describe the government's aspirations in STEPHEN ELLMANN, *IN A TIME OF TROUBLE: LAW AND LIBERTY IN SOUTH AFRICA'S STATE OF EMERGENCY* 176-86 (1992).

⁴ See Stephen Ellmann, *Law and Legitimacy in South Africa*, 20 L. & SOC. INQUIRY 407 (1995).

⁵ Some resignations that were not expressly motivated by political considerations may actually have been. See John Dugard, *Should Judges Resign?—A Reply to Professor Wacks*, 101 S. AFR. L.J. 286, 292 n.34 (1984) [hereinafter Dugard, *Reply*]. Ironically, since the end of apartheid one South African judge *has* resigned for political reasons, "because of what he saw as affirmative action's erosion of the integrity of the bench." *South Africa; SA Begins Moulding a Rechtstaat in Year of Constitution*, MAIL AND GUARDIAN (JOHANNESBURG), Dec. 27, 1996, available in LEXIS, News Library, CURNWS File.

I seek to explain why by offering you three factors that bear on the moral calculus leading toward, or away from, resignation. Although abstracted from the situations we have heard about from the other panelists, I hope these factors will at least point toward many of the considerations which have been identified by the other speakers and thus will help us to see why in one circumstance a judge might properly feel obliged to resign, while in another situation of even greater injustice, a judge might choose—rightly decide—to remain on the bench.

The first of these criteria we can simply call “taint.” The judge who weighs whether or not to resign will surely consider how dirty his or her hands are getting. There is a limit to how much evil people can bear to perpetrate, or wade in, in order to do some modest good. In some countries at some times, moreover, the judge’s hands may be getting covered with filth. For example, this taint might well have been too great for an anti-Nazi judge in Nazi Germany, even one who by continuing to serve on the German bench could occasionally have saved a Jew’s life by finding that this particular Jew was not a Jew, and therefore not subject to execution for sexual relations with a non-Jewish woman. The sense of taint would have been all the more compelling because the rationale that saved this Jew might well have laid the groundwork for condemning others who did not fit the terms of the benign decision the judge had managed to render.

But not every unjust country relentlessly confronts its judges with such tainted situations. In South Africa, in particular, there were at least some occasions when benign decisions could be rendered that did not carry the seeds of fresh oppression within them. Consider the example of *S v. Govender*,⁶ a decision from 1982, when apartheid was still very much in force. This case dealt with the penalty to be imposed on someone convicted of violating the infamous Group Areas Act—one of the principal legislative instruments of business and residential segregation by race under apartheid.⁷ Ms. Govender, a South African of Indian descent, was convicted in a magistrate’s court of living in a “White group area.” She apparently did not even attempt to appeal this conviction. Instead she asked the Supreme Court’s Transvaal Provincial Division—roughly the equivalent of one of our federal district courts—

⁶ *S v. Govender*, 1986 (3) SA 969 (T). Although not officially reported until 1986, the decision was rendered in 1982.

⁷ For background on the Group Areas Act, see DUGARD, *supra* note 2, at 79-83.

to overturn the eviction order that had been issued in conjunction with her conviction.

The judge who wrote the decision was Richard Goldstone, who was then a member of the Supreme Court bench.⁸ In the years that followed, Judge Goldstone went on to make many other valuable contributions to South Africa's transition to democracy and to serve as the first chief prosecutor at the International War Crimes Tribunal. Today, Goldstone is a member of post-apartheid South Africa's new Constitutional Court, but in 1982 he faced, as any other South African judge dismayed by apartheid faced, the question of what good he could do on the bench. He could not, of course, hold the Group Areas Act unconstitutional. However, he could and did rule that "the practice which has grown up in these cases" of automatically ordering eviction in tandem with conviction should cease and "the sooner . . . the better."⁹ For this, Goldstone had quite clear statutory authorization, because the relevant provision, enacted in 1966, stated that the convicting court "may" order eviction, not—as in the previous version of the Group Areas Act—that it "shall" do so. Clear as the import of this statutory change appeared to Judge Goldstone, though, it apparently had escaped the attention of bench and bar for the preceding sixteen years, as reflected in the practice of automatic eviction.

Judge Goldstone also could and did order that magistrates considering the issuance of eviction orders make "the fullest enquiry" into whether such orders are appropriate. He also declared that in doing this assessment the magistrates might need to consider, among other factors, "the personal hardship which such an order may cause and the availability of alternative accommodation."¹⁰ For this ruling, he cited no direct statutory authority, but he pointed out the profound consequences of eviction orders and concluded that such orders should not be issued lightly. Nothing in the statute prohibited this line of reasoning, though nothing mandated it either.

If the case had done no more than this, it surely would have been benign. In effect, however, it was even more important, because the case came to stand for a broader proposition, namely that eviction orders could not be made unless there actually were available alternative accommodations. The impact of this was ti-

⁸ The other judge on the two-judge panel, Judge Le Grange, concurred with Goldstone.

⁹ *Govender*, 1986 (3) SA at 971.

¹⁰ *Id.*

tanic, because there were very few alternative accommodations to be had. In Johannesburg, at that time apparently, the place where the Group Areas Act was being most frequently violated, prosecutions under the Act ceased. Far from being placed in the position of preserving one litigant by condemning others, Judge Goldstone had rendered a decision that benefited many victims of the Group Areas Act, and, it would seem, harmed none. This case, at least, carried no taint.¹¹

A second consideration, already implicated in my discussion of *S v. Govender*, is just how much good the judge can actually do. To what extent can judges render decisions that do justice in the midst of a complex of unjust laws?

Let me begin by saying that although I intend to focus primarily, as I think everyone up until now has, on what judges can do while remaining faithful to their oath of office, it ought to be recognized that the oath of office is not always the highest moral obligation that a judge is under. I do not think we would criticize a judge in Nazi Germany for having devised a way to render consciously false verdicts that preserved the lives of persecuted Jews—for example, by finding, untruthfully, that the Jews before him were not Jews, and therefore were not to be executed. Doing so would have been a breach of the judge's oath (at least unless that oath was interpreted very vigorously), and oath-breaking is a moral wrong. But that moral wrong would be outweighed by the moral right the judge was doing.

The term used for this in a leading South African debate on these issues was "judicial lying."¹² Obviously, we are none of us enthusiastic about such a practice. But most of us probably agree that the conditions in Nazi Germany, and no doubt those in a number of other oppressive regimes around the world, justified *killing* to correct them. If that is right, then it is hard to say that these conditions could never justify lying.

A more palatable form of oath-breaking is civil disobedience. As Judge Sweet has explained, a judge who forthrightly announces his or her refusal to apply the law in a particular case is presumably violating the oath of office (again, unless that oath is interpreted

¹¹ I am grateful to Geoff Budlender, a long-time anti-apartheid lawyer, for identifying this case for me and explaining its significance.

¹² See Raymond Wacks, *Judges and Injustice*, 101 S. AFR. L.J. 266, 278 (1984); see also Dugard, *Reply*, *supra* note 5; Raymond Wacks, *Judging Judges: A Brief Rejoinder to Professor Dugard*, 101 S. AFR. L.J. 295 (1984).

dramatically).¹³ But the civil disobedient judge does not conceal this conduct. Instead, like lay people who engage in comparable activity, this judge declares it and knowingly and openly subjects himself or herself to potential penalty. Ideally, the result is to test the consciences of those who would impose the penalty—in the United States, potentially, as would those members of Congress who might have to consider the judge's impeachment. Moreover, part of the power of the test is precisely that the person engaging in civil disobedience is being so open and is risking so much.

Nonetheless, as I have said, my main focus is not on the justifications for deliberate departure from the law, overt or covert. Rather, my main focus is on how much the judge can do within the bounds of the system in which he or she is operating. Now, on that score, South Africa, as I portrayed it to you earlier, sounds like a place where almost nothing could be done—but it was not such a place.¹⁴

¹³ A questioner during this panel raised the issue of whether failure to follow a binding precedent actually is an impeachable offense. Whether such conduct amounts to either a "high crime and misdemeanor" for which any civil officer can be impeached, *see* U.S. CONST. art. II, § 4, or to a breach of the arguably stricter requirement of "good behavior" to which federal judges are subject, *see id.* art. III, § 1, is a question that courts apparently have not addressed. For a concise discussion of the Constitution's standards for removal or discipline of judges, *see* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 64 n.7, 289 (2d ed. 1988). Moreover, it must be admitted that the oath of office taken by United States judges says nothing specific about following precedent. *See* 28 U.S.C. § 453 (1994). Indeed, whether such an oath really imposes meaningful obligations has long been a matter of debate. *Compare* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803), *with* *Eakin v. Raub*, 12 Serg. & Rawle 330, 353 (Pa. 1825) (Gibson J., dissenting).

Yet I think that we would not want to accept an understanding of the judge's oath that permitted judges to simply reject otherwise-binding precedents when they felt the moral stakes were so high as to justify their doing so. As this panel indicated, there are several life-or-death issues before our courts today, including capital punishment, abortion and the possible "right to die"; any or all of these might seem to some judges important enough to justify rejecting precedents. Moreover, other issues could readily be added to the list that are not life-or-death, but are arguably so integral to a good life that they too justify departures from the usual rules. If judges can ignore precedent in any one of these areas without violating their oath, it is hard to see why they could not legitimately do so in the others as well. At that point, it would be hard to see in what sense we had a system of judicial hierarchy and precedent at all.

These arguments against accepting the deliberate flouting of binding precedent as consistent with the judge's oath are all the more powerful because our system allows judges a great deal of room to manipulate precedent short of absolutely flouting it. In addition, of course, in some circumstances no precedent is absolutely binding; the Supreme Court, in particular, is entitled to revisit its past constitutional holdings. With all of this room already for the legitimate infusion of conscience into decisionmaking, it would not be wise to allow more.

¹⁴ I discuss the surprisingly benign aspects of South African law in much more detail in ELLMANN, *supra* note 3, at 26-56.

In fact, although South African statutory law was abysmal, South Africa still had as part of its law common law, borrowed largely from England but also developed in part from other sources. This common law was strikingly different from the statutory law with which it uneasily coexisted. For example, it remained part of the common law of South Africa, in the heyday of apartheid, that:

[I]t is 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 community¹⁵

Certainly it remained possible for Parliament to legislate whatever it wanted, and often Parliament did not shrink from doing so. Yet even legislation was not necessarily a simple way of achieving Parliament's goals. After all, the question of whether a statute seemingly in conflict with the common law actually overrides it is itself a question for the courts, and South African case law asserted a striking reluctance to find such overriding. Moreover, even where a statute is unquestionably the source of the relevant law on a subject, that statute itself must be interpreted, and here South African judges had at their disposal a number of tools of interpretation, some of them notably liberal, with which to approach the legislators' words. For example, a dissenting judge in 1988, after forty years of apartheid, was able to assert 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."¹⁶

Much as South Africa has gained from at last having a humane Constitution, in a sense it can be said that one reason the law of the old South Africa was not worse was because the nation did not have a constitution worthy of the name.¹⁷ I say this even though the lack of a constitution that meaningfully protected human rights was of course a terrible problem for the victims of apartheid. But at least South Africans seeking to make inroads against apartheid

¹⁵ R. v. Abdurahman, 1950 (3) SA 136, 145 (A).

¹⁶ Tshwete v. Minister of Home Affairs (RSA), 1988 (4) SA 586, 612 (A) (Nestadt, JA., dissenting) (citing R. v. Sachs, 1953 (1) SA 392, 399 (A)).

¹⁷ Apartheid South Africa *did* have a constitution (actually three different ones, at different stages of its history). Essentially, however, these constitutions were simply statutes, amendable or repealable by Parliament at any time. Certainly none of them, as applied, established more than a marginal authority for judicial review of the substance of Parliament's acts.

in the courts did not have to confront the authority of a revered constitution that simultaneously protected the institutions they sought to challenge—as American anti-slavery litigants did in the years before the Civil War.

In short, the result in South Africa was that if you worked the rules of the game right, you could accomplish a good deal. Sometimes important victories were won, and on other occasions less visible but still beneficial results could be secured in part through efforts in the courts. This is not to say that all judges did work the rules of the game right, or with great conviction. Indeed, in the period I have studied most closely, the state of emergency of the late 1980s, some very important and very bad decisions were rendered by what was then South Africa's highest court, the Appellate Division of the Supreme Court. But those particular decisions also turned out to be the work of a small group of justices within the Appellate Division whom I have elsewhere labeled the "emergency team." For a number of years, under one particular Chief (later, Acting Chief) Justice, these justices made up a majority of every one of the five-justice panels that heard these cases. This stacking of the panels was far from consistent with South Africa's own ideals of neutral justice, and when a new Chief Justice took office and ended the special role of the emergency team in these cases, the tenor of the Appellate Division's decisions improved significantly. And even the members of the emergency team occasionally rendered decisions in favor of the victims of emergency power.¹⁸

In understanding how South Africa, in the midst of apartheid, could have been a place where anti-apartheid judges and lawyers could make a difference, it may be helpful to further explore the contrast I alluded to earlier, between South Africa's situation in those years and the situation in the United States in the years before the Civil War. Comparing two very different countries in two very different centuries is of course a delicate business, but I hope this comparison will be illuminating. What we need to understand is why some South African judges were willing and able to exploit the legal resources at their disposal for limiting apartheid's injustices, whereas American judges opposed to slavery may have been more reluctant. Whether or not the overall performance of the South African judiciary was better than that of the American judges, we may be able to learn from a consideration of what pro-

¹⁸ I discuss these decisions in detail in my book, ELLMANN, *supra* note 3. For analysis of the particular role played by the justices of the "emergency team," see *id.* at 57-69.

moted judicial vigilance in South Africa and what undercut it in the United States.

Professor Gates suggested in his panel presentation that those American judges who were personally opposed to slavery failed to render anti-slavery decisions because had they done so, they would have had to confront issues that challenged the legitimacy of the entire legal system. This may well be right, but I would like to consider the situation of American judges and lawyers in the antebellum years, and the somewhat different situation of South Africans under apartheid, in more prosaic terms as well.

The late Robert Cover, in his thoughtful study *Justice Accused*,¹⁹ examined the work of the anti-slavery judges in the antebellum years, and found that whenever these judges confronted a conflict of purely moral duties and institutional obligations, "they almost uniformly applied the legal rules. Moreover, they seemed very reluctant to resort to, and thus legitimate, substantial doctrinal innovations that might have made certain cases less a choice between law and morality and more a choice between alternative legal formulations."²⁰

Why would these judges have done less than they could have? Perhaps, as Professor Gates suggests, they found the issues unbearable. But another possibility is that these issues were not necessarily intrinsically unbearable, but rather (or in addition) they were unbearably, that is to say confrontationally, litigated.²¹ Professor Cover's account suggests two different respects in which the litigation tactics of abolitionist lawyers were indeed confrontational. The first is doctrinal. According to Cover, even the "most complete" of those "utopian" abolitionist legal arguments that claimed fidelity to the Constitution displayed "the haphazard ingenuity of rule and phrase manipulation ignoring the 'method' of the judge in any real sense."²² This was hardly surprising, since the Constitution's protection of slavery, though euphemistic, was quite plain. While it no doubt was possible to make many arguments in particular cases that did not rest on the utopian breach of acceptable legal method, this weakness at the foundation, in the Constitution itself, may have undercut the persuasive force of even more modest assertions.

¹⁹ ROBERT M. COVER, *JUSTICE ACCUSED* (1975).

²⁰ *Id.* at 199.

²¹ I explore these possibilities at greater length in ELLMANN, *supra* note 3, at 232-44.

²² COVER, *supra* note 19, at 156-57.

The second confrontational aspect of antebellum litigation was the stance of the abolitionist lawyers towards the judges. As Cover writes, "[i]t is one thing to be begged to act in a particular way by appeal to the presumed magnanimity of the man and the institution, quite another to be threatened with scorn and damnation for being a gutless sycophant."²³ Even in court, the efforts of the "ideological bar" sometimes "seemed to have no basis except the hope of a stroke of the lawless mob effecting a rescue."²⁴

Surely, if you were a judge considering what to do, and you were presented with arguments that did not hold water in the terms that you accepted, and arguments made by people whose motivations you began to consider deeply suspect, you would not likely be persuaded! And all of this is in quite sharp contrast to what I take to have been the pattern of South African anti-apartheid litigation. I do not want to suggest that there were no signs of judicial suspicion directed towards anti-apartheid lawyers, or that those lawyers never stretched their arguments and never severely criticized the judges. I do think, however, that the fact that South African lawyers were able to develop their legal arguments, however extreme, without confronting the moral authority of a hostile constitution, and the fact that in general these lawyers apparently chose to present those arguments in court in the comparatively deferential style customary in the South African courts, increased their chances of victory.

In saying that the judge who must decide whether to resign will consider how much he or she can accomplish by staying on the bench, therefore, we should not think of the judge's decision as an abstract one. What the judge believes can be accomplished will depend in part on the legal resources available to him or her. It will also depend on the way that the bar develops and presents those legal resources to the judge.

But neither laws nor lawyers nor judges exist outside of society. It is important to understand that the judge's, or the lawyer's, assessment of what good can be done will surely be affected by an assessment of what is happening elsewhere in the society. In South Africa, it turned out that change could be achieved without a full-scale, violent revolution; perhaps, indeed, apartheid could only have been ended in the foreseeable future through negotiation. Judges may have seen this; as change began to accelerate, some may have taken a lead from the political leaders of the country. In

²³ *Id.* at 212.

²⁴ *Id.*

the United States, on the other hand, it may be that slavery would not have ended in the 1860s, or for decades thereafter, without the Civil War. In that case, the abolitionists' legal tactics, though they may have been ill-suited to winning courtroom victories, may have been well aimed at producing the polarization of opinion and feeling that would be required to bring the country to a grim, but morally necessary, Civil War.

The judge's calculus, however, is not yet complete. Besides weighing the personal taint involved in remaining on the bench, and the social good to be done by staying there, the judge should also consider what social harm he or she might do in the process. There are various ways that good judges might actually cause harm. For example, their presence on the bench might encourage victims of injustice to seek judicial solutions rather than political mobilization, and that choice might be a great mistake. Perhaps most troublesome, good judges might actually undercut opposition to injustice by lending a veneer of legitimacy to a fundamentally unjust enterprise. I think we heard this concern when Judge Utter expressed his belief that even in dissenting, he was still lending support to the notion that the death penalty could be made workable.

The possibility of such legitimation deserves to be taken very seriously. Determining when it actually does occur, however, is not easy.²⁵ My own sense is that this kind of legitimation is by no means inevitable. This, I believe, is the lesson of South Africa's experience on this score. Happily, in saying this I have the benefit of hindsight, as we all do in looking back at the system of apartheid. From this vantage point it seems quite clear that, however much the government hoped for some broad legitimation-through-law to take place, it did not. As one anti-apartheid lawyer, now a judge, emphasized to me, no court decision stopped the flood of opposition to apartheid. Most black South Africans surely disliked apartheid, and no amount of litigation—especially anti-apartheid litigation in which very nasty things were being said about apartheid along the way—was going to cause them to think: "My goodness, we have a court system so benign that actually the whole system must be okay after all." It just was not going to happen.²⁶

What may well have happened, however, is that the efforts of anti-apartheid lawyers and judges in South Africa did help to legiti-

²⁵ See generally Symposium, *Lawyering in Repressive States*, 20 L. & Soc. INQUIRY 339 (1995).

²⁶ See ELLMANN, *supra* note 3, at 257-68.

mize one aspect of this system—namely the legal system itself. As I have mentioned, the legal system does appear to have enjoyed a surprising degree of legitimacy in the minds of black South Africans. Moreover, the efforts of anti-apartheid lawyers and judges may in a number of ways have lent a measure of credibility to the operations and the aspirations of the South African legal system, by winning modest—but not negligible—victories for ordinary people on such prosaic matters as pension benefits or similar problems, by providing a forum for apartheid's victims to speak and be heard, and even by achieving what may have been quite a surprising degree of success in political trials, which lent a measure of credibility to the system.²⁷

At one time, some might have counted this degree of legitimation of the legal system as a cost. But even before the end of apartheid, before the end of any system of injustice, we should always keep in mind the question of what will come next. Moreover, we should be aware that the answer will always be, at best, that what will follow will be another human, imperfect social system. The new regime may be better, or it may be worse, but it will surely need a legal system and a people who adhere to legal ideals. As a result, we always know that it is important for those who hope to bring about the new regime to try to act in a way that fosters a better future, rather than a worse one.

The work of anti-apartheid lawyers and judges may be having such a benign effect, for the degree of legitimation that the South African legal system may have earned from their efforts may now be contributing to the institutionalization of a democratic rule of law in post-apartheid South Africa. When I spoke on these matters at this panel in June 1996, South Africa's Constitutional Assembly had recently finished drafting a final Constitution. But that Constitution did not automatically take effect, regardless of its contents. Instead, in a step apparently unprecedented in the world's development of constitutional order, South Africa had previously decided that its Constitutional Court would have the authority to say whether the draft constitution complied with a set of constitutional principles that had been agreed on as part of the interim Constitution that was the country's first post-apartheid framework of government.²⁸ Nor was this grant of power to the Constitutional Court

²⁷ I develop these and other possibilities in Ellmann, *supra* note 4, in particular at 471-73.

²⁸ See CONST. OF S. AFR. § 71 (1993 as amended) (on the role of the Constitutional Court); *id.* sched. 4 (Constitutional Principles).

pro forma. In fact, the Constitutional Court refused to certify the draft Constitution as complying with those principles,²⁹ and it was only after further revisions by the Constitutional Assembly that the Court was ultimately satisfied.³⁰ South Africa's new Constitution, surely a testament to the power of legal institutions and ideals as well as to the determination of South Africa's people to overcome injustice, is now in effect.³¹

The three factors I have discussed—the taint, the benefit, and the cost of remaining on the bench—do not exhaust the issues the judge confronting legal injustice will need to consider. Even while such a judge weighs the impact of remaining on the bench, he or she will also have to assess what the symbolic and practical results of resignation may be. Evaluating the efficacy of resignation is a complex matter in its own right.³² But I hope this brief discussion has helped to explain why judges in truly unjust states might rightly conclude that they should continue to serve, even as other judges confronting a different moral calculus might rightly leave the bench of a democratic nation that aspires to justice.

²⁹ See *Ex parte* Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996, 1996 (4) SA 744 (CC).

³⁰ See *Ex parte* Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996, 1997 (2) SA 97 (CC).

³¹ See CONST. OF S. AFR. (1996). The new Constitution went into effect as a whole at midnight on Monday, February 3, 1997. See *New Constitution Comes into Effect, Marks End of Transition*, AGENCE FRANCE PRESSE, Feb. 3, 1997, available in LEXIS, News Library, CURNWS File.

³² *But cf.* CONST. OF S. AFR. § 243 (1996) (authorizing President to put parts of the Constitution into effect earlier than the Constitution as a whole, and providing that specified provisions do not come into effect until Jan. 1, 1998). In South Africa, the eminent anti-apartheid scholar John Dugard argued emphatically that isolated resignations would be meaningless, and that the possibility of more than a handful of resignations taking place was “fanciful.” Dugard, *Reply*, *supra* note 5, at 292.

