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Marking the Path of the Law

Stephen Ellmann

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

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Marking the Path of the Law

**By
Stephen J. Ellmann**

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MARKING THE PATH OF THE LAW

*Stephen Ellmann**

1 Introduction

In *Pharmaceutical Manufacturers*, Chaskalson P said for the Court:

There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.¹

In 15 years, South Africa's Constitutional Court – and the judges of the Supreme Court of Appeal and the High Courts – have traversed most of the history of US constitutional law, a history that took us two centuries to compile, and have marked out new ground of their own: abolition of the death penalty; recognition of free speech; judicial intervention in foreign relations; administrative justice; equal rights under law for blacks and whites, gays and straights, men and women; rights of public participation in legislative processes; and the progressive realisation of socioeconomic rights. To an American observer, it is a remarkable list: and to an American liberal observer, not much short of miraculous.

We have arrived at an important moment in this already illustrious constitutional tradition. Four distinguished justices have just left the

* Professor of Law and Associate Dean for Faculty Development and Collaborative Learning, New York Law School. This article was first presented as a keynote address to the Society of Law Teachers of Southern Africa conference in Pietermaritzburg, in July 2009, and I thank Michael Kidd, Managay Reddi and the other organisers and participants in that conference. I'm also grateful to Chris Mbazira for his comments, and to the other participants in the *Constitutional Court Review* conference in December 2009; and to the colleagues and students who attended a New York Law School faculty workshop in January 2010 at which I presented the paper as well. I also thank Judge Azhar Cachalia for his thoughtful comments, and Keith Harden for valuable research assistance. Finally, Robert Blecker's extensive written comments were a gift exemplifying collegiality.

¹ *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* 2002 2 SA 674 (CC) para 44.

2 *Marking the path of the law*

Constitutional Court, and the President who appointed their replacements came to office amidst controversy and litigation that certainly raised concerns about the future position of the judiciary. It seems right for us to use this moment to consider what it is that South Africans (and Americans) should seek and value in constitutional judges, and how we, as law professors, can contribute to finding what we seek.

Just over a hundred years ago, one of the great justices of the United States Supreme Court, Oliver Wendell Holmes, Junior, addressed such questions. Holmes remains a powerful influence in US constitutional law, known above all for his resistance to the Supreme Court's efforts to block modernising social reform legislation in the early 20th Century and for his contributions to the beginnings of our free speech jurisprudence. But when he gave his speech on 'The path of the law,' in 1897, he had not yet begun that great work.²

He began with words whose skeptical tone can still be felt today. He had no patience with the idea that law was the ineluctable logical conclusion from some simple set of moral propositions, and instead he said that 'the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law.'³ If law is nothing more than some predictions about judicial behavior, we have no basis to say that some lawmaking is better than other lawmaking – we must just get busy on making our predictions.

But that clearly is not Holmes' ultimate position.⁴ After suggesting that it would be 'a gain if every word of moral significance could be banished from the law altogether,'⁵ and pointing to the 'danger' of 'the notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct,'⁶ he makes plain that he views judicial decisions as resting on 'a judgment as to the relative worth and importance of competing legislative grounds.'⁷ What he would like judges to do, therefore, is to acknowledge that they are making such judgments,⁸ and to make them on the basis of a better knowledge of society – notably, statistics and economics⁹ – than they had till then possessed.

² OW Holmes 'The path of the law' (1897) 110 *Harvard Law Review* 991 (first published 1897).

³ Holmes (n 3 above) at 994.

⁴ See RW Gordon 'The path of the lawyer' (1897) 110 *Harvard Law Review* 1013, 1014.

⁵ Holmes (n 3 above) 997.

⁶ Holmes (n 3 above).

⁷ Holmes (n 3 above).

⁸ Holmes (n 3 above) 999.

⁹ Holmes (n 3 above) 1001, 1005.

This is a picture of the judge as social policymaker, and indeed that image captured the imagination of many American lawyers and judges in the ensuing decades. Yet it is not, after all, quite what Holmes is describing. Here is his explanation of '[t]he way to gain a liberal view of your subject' – 'not to read something else, but to get to the bottom of the subject itself.'

The means of doing that are, in the first place, to follow the existing body of dogma into its highest generalisation by the help of jurisprudence; next, to discover from history how it has come to be what it is; and, finally, so far as you can, to consider the ends which the several rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the price.¹⁰

From such work – very much the work of the scholar rather than the practitioner, as another reader of Holmes, William Simon, has pointed out¹¹ – will come, presumably, better decisions and better law. But something more as well:

The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.¹²

It does not seem unfair to say that in this final passage Holmes is aspiring not just to tremendous intellectual mastery but to wisdom as well. When Holmes wrote those words, US constitutional tradition was more than a century old, but the rise of a human rights-focused constitutional law, to which Holmes himself would contribute, still lay in the future. We now, and you now, live in a constitutional world shaped by jurists who have built the sphere of constitutional liberties far beyond what their predecessors might have envisaged. My task is to discuss the path of the law today. I hope to catch an echo of the infinite, or at least of the vastly rich and valuable finite – though we will not follow the same path as the one that Justice Holmes proposed.

2 The path of constitutional law

Let us begin with *Brown v Board of Education*.¹³ In a sense, modern American constitutional law as a whole begins with *Brown*; to reject

¹⁰ Holmes (n 3 above) 1007.

¹¹ See WH Simon *The practice of justice: A theory of lawyers' ethics* (1998) 120-21, 128.

¹² Holmes (n 3 above) 1009.

¹³ *Brown v Board of Education* (1954) 347 US 483.

Brown is simply to reject modern US constitutional law. Indeed, to reject *Brown* is to reject the understanding of racial equality that is now, more or less, the view of the entire world.

To understand *Brown*'s significance, however, we need to do more than recognise the centrality of its result to the world we know today. We also need to consider the way the Supreme Court reached its decision.

The central problem facing the Supreme Court was that neither precedent, text, nor original intentions clearly supported the result. As to precedent, *Brown* had to overrule a 50-year-old Supreme Court decision approving what came to be known as 'separate but equal' racial segregation.¹⁴ As to text, the Fourteenth Amendment secures the 'equal protection' of the laws,¹⁵ but it could be argued – it had been the law – that the races are equally protected if each is segregated from the other. And, most importantly, as to original intention: the point has since been contested,¹⁶ but there is at least considerable evidence that that the people who adopted the Fourteenth Amendment were not as anti-racist as one might like to believe. It is possible to view the intentions of the amendment's adopters broadly and abstractly, as a repudiation of unjust racial discrimination. Concretely and specifically, however, the great American law scholar Alexander Bickel, fresh from clerking for Justice Felix Frankfurter during the term in which *Brown* was first argued, in 1955 came to what he called the 'obvious conclusion' that

section 1 of the fourteenth amendment ... carried out the relatively narrow objectives of the Moderates [in Congress], and hence, as originally understood, was meant to apply neither to jury service, nor suffrage, nor anti-miscegenation statutes, nor segregation.¹⁷

Thus the task for the *Brown* Court – the task as the Court seems to have seen it – was not the careful marshalling of the conventional materials of legal analysis. If anything, the task was the opposite – to explain the appropriateness of making a decision on a fundamentally different ground. The Court did so, as Bickel says, first by arguing that

¹⁴ *Plessy v Ferguson* (1896) 163 US 537.

¹⁵ '[N]or shall any State ... deny to any person within its jurisdiction the equal protection of the laws.' US Constitution Amendment XIV.

¹⁶ See MW McConnell 'Originalism and the desegregation decisions' (1995) 81 *Virginia Law Review* 947; MJ Klarman '*Brown*, originalism, and constitutional theory: A response to Professor McConnell' (1995) 81 *Virginia L Rev* 1881; MW McConnell 'The originalist justification for *Brown*: A reply to Professor Klarman' (1995) 81 *Virginia Law Review* 1937 (1995).

¹⁷ AM Bickel 'The original understanding and the segregation decision' (1955) 69 *Harvard Law Review* 1, 58.

the original intentions of the adopters were unclear and then by saying they were irrelevant.¹⁸ Chief Justice Warren wrote:

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the nation.¹⁹

Then the Court offered, very much as Justice Holmes had urged in 'The path of the law', a sociological/psychological assessment of the central role of education in American life and the harm that segregation of schools did to black children.²⁰

It soon turned out, however, that the central role of education in American life was not the ultimate basis for the Court's rejection of segregation. We know this 'truth' about the judgment because within a few years other cases, decided without elaboration, applied the *Brown* rule to segregation in other parts of American life that clearly were not equally central to the shaping of young lives, eg, parks and buses.²¹ It seems plain in hindsight that the Court's statement that 'in the field of public education the doctrine of "separate but equal" has no place'²² was not the whole of what the Court had come to believe: they decided, in fact, that 'separate but equal' had no place in American public life whatsoever.

In short, *Brown* did not rest on careful elaboration of doctrinal legal arguments. Nor, indeed, did it rest on elaborate argument at all – the unanimous opinion is just over 10 pages long. Yet it is the touchstone of American constitutional law. It is deeply, morally right. But the decision is settled law, I believe, because the Court felt and somewhat imprecisely gave voice to a fundamental judgment of value – a judgment that came to be accepted by the American people (I do not think it is clear at all that the American people would have embraced it in 1954) and that we are the fortunate inheritors thereof.

Brown is a very special case, and what is true of *Brown* may not be true of all constitutional law, American or South African. But if it is, as *Brown* suggests, a central task of constitutional judges to articulate and give effect to the values that should govern a society, then, as we will see, we can say quite a bit about what the distinctive virtues of the judges performing this task ought to be.

¹⁸ Bickel (n 18 above) 1-2.

¹⁹ *Brown* (n 14 above) 492-93.

²⁰ Holmes (n 18 above) 493-94.

²¹ See, eg, *Mayor and City Council of Baltimore v Dawson* 350 US 877 (1955) (public beaches and bathhouses).

²² *Brown* (n 14 above) 495.

I propose to discuss the following questions that begin from this starting point:

First, what are the respective roles of lawyerly skills, and constitutional values, in constitutional judging?

Second, can we specify the values to which judges should be committed?

Third, can the presence of emotion, linked to values, in decision-making jeopardise impartial judgment?

Fourth, can empathy insure fair judging? Or can we turn to practical wisdom, conceived as a melding of sympathy and detachment? Or should we emphasise the converse of empathy, independence?

And, fifth, if constitutional judging is inevitably and rightly shaped by commitments to values which may vary widely, and by emotions that inevitably both support committed decision-making and risk over-commitment, what can judges do to stay this difficult course?

This essay seeks to understand the nature of judging, as understood by the Constitutional Court, rather than to critique particular doctrinal decisions handed down by the Constitutional Court in 2008. As we will see, many of the cases decided by the Court in 2008 do shed light on the answers to these questions. I will look to these cases repeatedly, but above all I will try to fully take account of the striking perspectives revealed in the Constitutional Court's decision in perhaps its most politically fraught case of the year, *Thint v National Director of Public Prosecutions and Others*.²³

First, what is the relation of skills to values?

It has been some years now, but I recall attending another conference in South African law at which I think a speaker, a very incisive and perceptive one, asserted that the highest virtue of a constitutional law judge was technical skill. This proposition, I believe, is mistaken.

Certainly technical skill is a great asset, probably an essential one. But let us imagine a judge who is the acknowledged, preeminent master of every tool of legal reasoning but who believes that the fundamental premises of the legal system which he or she serves are bankrupt. Is it possible that such a judge would be the best choice to render decisions about how those premises apply to particular

²³ *Thint (Pty) Ltd v National Director of Public Prosecutions and Others* 2008 12 BCLR 1197 (CC).

controversies? We know that the framers of the post-apartheid constitutions thought not; that, after all, was why they created the Constitutional Court, and staffed it with judges who shared a *passionate* rejection of the values of apartheid. Surely the architects of the new Court wanted judges who would not only seem, but also be, supporters of the new order.

This decision rested on a sound intuition.²⁴ I mean to cast no aspersion on any particular judge, and I don't assume at all that judges who took office before the end of apartheid necessarily rejected the premises of the post-apartheid constitution. My point is a different one: we simply would not feel confident that a judge who shared none of our values could apply those values soundly. How would this judge know what really mattered to us, if none of it mattered to him?

But don't lawyers routinely argue for positions they don't themselves endorse? And don't all of us sometimes help others to make choices by suggesting what might make most sense on the basis of the values of the person we are assisting, rather than our own preferences? These familiar actions reflect that it is certainly not necessary to share *all* the values of another person in order to reason according to those values. But it is another matter, I think, to weigh values with which one has no sympathy whatsoever. It may well be another matter, as well, to make decisions based on such values (as a judge does) rather than simply to employ these values to argue or to advise another person who will make the final judgment. Even so, I do not need to deny altogether the possibility that a judge could accomplish this leap of reasoning and commitment. It is enough to say that such an achievement would be remarkable, and that we have good reason to feel, in general, that those who judge based on our values need to actually hold them.

As it happens, neurological evidence confirms what seems like a truism about human nature. Recent study of human decision-making suggests that we do not, in fact, make decisions in an unemotional manner. Antonio Damasio, in *Descartes' error*,²⁵ offers evidence that those human beings unfortunate enough to suffer the kinds of brain damage that cut off their cognitive processes from the neural circuitry of emotion often wind up unable to make life decisions, or

²⁴ Anthony Kronman urges, similarly, that lawyers cannot succeed in their necessary task of predicting how judges will rule in their cases unless the lawyers themselves 'care, like a civic-minded judge, about the law's well-being,' for 'the accuracy of [the lawyer's] predictions is in part a function of his own interest in the good of the law itself.' AT Kronman *The lost lawyer: Failing ideals of the legal profession* (1993) 139.

²⁵ A Damasio *Descartes' error: emotion, reason, and the human brain* (2005).

at least life decisions that shape a meaningful life.²⁶ Presumably the reason is that without emotions to add weight to the scale for some arguments as against others, logic alone does not produce coherent decisions from human minds.²⁷ When we say that constitutional judges should embrace the values of the constitution, the word ‘embrace’ is not entirely metaphorical: to hold a value, it appears, is to be emotionally attached to it, and this emotional component will be important to much of what I am about to argue. I suspect that the judges of every era have similarly needed to base their decisions on emotional commitments – to the rule of law, say, if no constitution existed to bind their nation – and so I do not actually think that the role of emotion in judging is a new development. It is to some extent a new perception, or a newly confirmed perception. But it is, in any event, a critical feature of constitutional judging.

What we’ve said so far, though, is simply that pure technical skill cannot suffice to enable a judge to perform her role well. Let me take the point a little further. Let us imagine a choice between two candidates for judicial office. One is a superlative legal reasoner who accepts the values of our legal system, but with little enthusiasm – a citizen of a republic, say, who regarded popular self-government as only faintly preferable to monarchical rule. The other is an adequate but uninspired legal reasoner, who embodies the values of our system in his or her life’s commitments and achievements. I would be more comfortable, and I suspect most readers would too, with the second candidate for the judgeship, the one we could trust to be trying with all his heart to give effect to the values he or she shared with us. This judge has ‘a passion for justice’ – a phrase notable for the intensity of the emotional commitment it describes.²⁸ The more you agree with me on this choice, the more you are saying, as I would, that technical skill is not the highest virtue of the judge.

Certainly *Brown* is evidence for the centrality of values to constitutional judging. Some members of the 1954 Supreme Court were superb legal reasoners, but the *Brown* decision makes little show of interpretive brilliance. It rests on a judgment of morality and social policy, and it is central to modern American constitutional law because that judgment won acceptance from the country as a whole.

²⁶ Damasio (n 26 above) 34-51.

²⁷ As Judge Posner has commented: ‘Reason is not (*pace* Kant) motivational; knowing what is the right thing to do must be conjoined with a desire to do the right thing for action to result.’ RA Posner ‘Emotion versus emotionalism in law in SA Bandes (ed) *The Passions of Law* 309, 310 (1999). On the role of emotions, see D Gewirtzman ‘Our founding feelings: Emotion, commitment, and imagination in constitutional culture’ 43 *University of Richmond Law Review* 623 (2009).

²⁸ On the ‘passion for justice,’ see SH Pillsbury ‘Harlan, Holmes, and the passions of justice’ in SA Bandes (ed) *The passions of law* 330 (1999); A Sachs *The strange alchemy of life and law* (2010).

Now one might respond, and with reason, by saying that the brief opinion in *Brown* bears little resemblance to some of the long and scholarly decisions of the Constitutional Court in particular. One might also say, again with reason, that the brief, and mostly centuries-old, words of the US constitution demand more value-laden interpretation than the much more elaborately specified provisions of South Africa's constitution. Cases such as *Weare*, in which the Court had to decide whether 'Ordinances' should be classified as 'provincial Acts,'²⁹ or *Chagi*, which in part focused on parsing earlier pleadings to determine who actually was the defendant against whom the case had been brought,³⁰ reflect this difference.³¹ One might also say that much US constitutional interpretation is far more focused on the application of the interpretive tools of the lawyers' trade than *Brown* was. All of this may be right, but none of it, I think, alters the basic point: technical skill is certainly important, but it is not the highest virtue of the constitutional judge. At the very least, sincere commitment to the values of the legal system is also essential.

It is worth emphasising what I am *not* arguing here. I am not defending imprecise reasoning. Nor am I defending reasoning that puts aside focused legal questions in favour of broad inferences from loosely defined constitutional values.³² Recognising the importance, indeed the centrality, of values to constitutional judging does not imply an embrace of values instead of arguments, or values instead of text. Instead, my thesis is simply that as judges examine and articulate the law, as they work through whatever issues of definition and logic that task entails, the values they bring to the process will make a crucial difference.

It might be maintained, however, that issues of legal precision mark out boundaries on the legitimate play of values. Where the text is clear, one might say, the role of the judge is to discern that, and then proceed from there. I do not deny that the meaning of texts can

²⁹ *Weare and Another v Ndebele NO and Others* 2009 4 BCLR 370 (CC).

³⁰ *Chagi and 29 Others v Special Investigating Unit* 2009 3 BCLR 227 (CC) (interpreting the meaning of a presidential proclamation).

³¹ See also *Kruger v President of the Republic of South Africa and Others* 2009 3 BCLR 268 (CC) (on whether the President could amend a mistakenly issued Proclamation), and *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others* 2008 11 BCLR 1123 (CC) (on the meaning of a proviso inserted into law by the President as part of the constitutional transition). The adoption of statutes meant precisely to implement constitutional requirements, such as the Promotion of Administrative Justice Act 3 of 2000, brings even more elaborate textual material into the process of constitutional adjudication in South Africa.

³² On whether the Constitutional Court has fallen into reasoning of this sort, compare S Woolman 'The amazing, vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762 with FI Michelman 'On the uses of interpretive "charity": Some notes on application, avoidance, equality and objective unconstitutionality from the 2007 term of the Constitutional Court of South Africa' (2008) 1 *Constitutional Court Review* 1.

be clear (at least as a practical matter). But similar sources of meaning are not, in the end, anything like a tight boundary on the role of values. If texts are to be interpreted purposively (as we will discuss further in a moment), then their purposes must be discerned. To some extent, at least, this act of discernment is better described as a process of imputation or infusion. Statutes' purposes should be presumed, where reasonably possible, to be the purposes of the constitution as well, and describing constitutional purposes is an act of constitutional valuation. So, for instance, in *Gumede*, Moseneke DCJ offers a purposive meaning of s 8(4)(a) of the Recognition of Customary Marriages Act 120 of 1998, and explains that

the Recognition Act must be given a meaning that extends optimal protection to a category of vulnerable people who, in this case, are women married under customary law, in order to give effect to the equality and dignity guarantees of the Constitution. That, after all, is the primary purpose of the Recognition Act.³³

Section 39(2) of the Constitution, which calls for such value-based interpretation of statutes, applies the same standard to development of the common law and customary law.³⁴ So, in *Shilubana*, Van der Westhuizen J concluded that a customary law community 'must be empowered to itself act so as to bring its customs into line with the norms and values of the Constitution.'³⁵ It seems to me, in short, that values are part of adjudication, through and through, and that we cannot mark out any clear or general rules that would confine and subordinate their role.³⁶

Second, can we specify the values to which a constitutional judge should be committed?

South African cases declare that the constitution is to be interpreted purposively, and that the purpose is to be discerned from a consideration of a set of factors. A constitutional right, in particular,

must not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of

³³ *Gumede v President of Republic of South Africa and Others* 2009 3 SA 152 (CC) para 43.

³⁴ Section 39(2).

³⁵ *Shilubana and Others v Nwamitwa* 2008 9 BCLR 914 (CC) para 73.

³⁶ My focus here is on constitutional values. Particularly with a constitution whose value aspirations are as sweeping as South Africa's, a judge's constitutional values surely overlap with her broader moral and political convictions. There is, not surprisingly, evidence that judges' values, taken in this broader sense, influence their decisions. See RA Posner *How judges think* (2008) 19-29.

Chapter 3 of which it is part. It must also be construed in a way which secures for 'individuals the full measure' of its protection.³⁷

In addition, the Constitutional Court maintains that the Constitution embodies an 'objective, normative value system.'³⁸

If there is an objective, normative value system that should guide the purposive interpretation of the constitution, then it is obviously essential that constitutional judges should be committed to that value system. This raises three questions. First, is there such a thing as an objective, normative value system? Second, if there is such a system, should it bind South Africa's judges? Third, if such a system exists and is binding, how much does it specify?³⁹

I wish to answer the first two questions in a decidedly nonphilosophical way. I am not certain that there exist objective, normative values that all people can or should adhere to – at least beyond some very modest range. But that is not the question facing South Africa's judges. Rather, the question is whether they have been authoritatively directed, by the constitution, to adhere to a set of values. This question is, as you can see, a positivist one. Positivism in South Africa rightly got a bad name in the years of apartheid, but to the extent that it asserts that a constitution is binding because those who adopted it were entitled to choose how to govern themselves, and did so, I think positivism expresses a fundamental democratic truth. South Africa's constitution leaves no doubt that it enjoins on the courts and on everyone in the nation a commitment to certain founding values, broadly reflected in the Preamble and spelled out in some detail in Section 1. It is a wonderful thing to live under a constitution whose text contains such clear and humane and transformative guidance, and no cause for regret that positivism confirms that this guidance is binding law.

There is a further reason to see these values as binding. Perhaps in two hundred years South Africans will look at parts of their constitution, as originally enacted, and feel that it is essential to reinterpret them so as to infuse them with the values of that future day. That has certainly been a recurrent experience in the United States, very much reflected in *Brown*: our constitution is extremely

³⁷ *S v Makwanyane and Another* 1995 3 SA 391 (CC).

³⁸ *Carmichele v Minister of Safety and Security and Another* 2001 10 BCLR 995 (CC) para 54; *Thint* (n 26 above) para 375 (dissenting judgment of Ngcobo J).

³⁹ For evidence of radically different uses of the phrase in the High Court, the Supreme Court of Appeal and the Constitutional Court, and an argument that the notion of an 'objective, normative value system' serves primarily to block charges of judicial 'subjectivity' (much as it does under Germany's Basic Law), but that it lacks discernable content, see S Woolman 'Application' in S Woolman, et al (eds) *Constitutional law of South Africa* (2nd Edition, OS, December 2005) Chapter 31.

hard to amend, and since no set of rules or principles can encompass the infinite possibilities of the future, many constitutional interpreters in the US have felt that the specific original intentions of the Framers or Adopters of the constitution should not be treated as binding. That's a feeling that also becomes ever more attractive as the actual contours of those original intentions become increasingly lost in history. With uncertain historical reference points and changing conditions, there is good reason for constitutional interpreters to look elsewhere for guidance in their task.

But South Africa is still much, much closer to its founding moment. The memory of man and woman runneth easily back to 1994, or 1996. In a broad sense, you know what you meant when you uttered a constitution. Moreover, for better or worse, your constitution is more readily amendable than ours, and in fact it has been amended a number of times. The text that has stood the test of the past 15 years can fairly be said to still mean what it was intended to mean when it was adopted – at least as a first cut – and what was intended can still very often be discerned. Moreover, these intentions can matter to the decision of cases. Thus, in *Mphela*, Mpati AJ wrote for the Constitutional Court that

[i]t seems to me ... that where land which was the subject of a dispossession as a result of past discriminatory laws is claimed ... the starting point is that the whole of the land should be restored, save where restoration is not possible due to compelling public interest considerations.⁴⁰

The 'starting point,' drawn from constitutional values, can determine the ending point as well.

In short, on grounds of positivist authority and accessible basis in original intention, South Africa does have an objective, normative value system to guide its constitutional interpretation. The problem is not that there is no basis for discerning such a system – the problem is that the contours of the system are so broad. 'Human dignity, the achievement of equality and the advancement of human rights and freedoms'⁴¹ are capacious values; sincere men and women can surely hold, and reasonably hold, many different specific understandings of these terms. If we seek to find particular values that are the most fundamental – human dignity, perhaps, or equality, or

⁴⁰ *Mphela and 217 Others v Haakdoornbult Boerdery CC and 6 Others* [2008] ZACC 5 para 32.

⁴¹ Section 1(a).

transformation – still the breadth of reasonable conceptions of these concepts is still immense.⁴²

We can see the presence, and impact, of differing understandings of these values in a number of the Constitutional Court's 2008 decisions. Some involve issues that on their face are quite prosaic and technical. So, for example, in *CUSA v Tao Ying Metal Industries*,⁴³ the Constitutional Court had to decide whether an exemption that Tao Ying had received from wage requirements and other aspects of the then-applicable 'industrial council agreement' remained in effect even after a 'bargaining council agreement' made under a new law, the Labour Relations Act 66 of 1995, went into operation. Answering this question required interpretation of the exact meaning of the terms of the exemption at issue, a matter technical enough that one might not expect it to have constitutional content. But Justice Ngcobo maintained, for the Court, that even if the exemption could reasonably be read to have the meaning Tao Ying asserted (a proposition he argued at length against), it could also reasonably be read otherwise, and should be, because

the meaning preferred in this judgment accords better with the values of our Constitution. This is so because, on the facts of this case, a labour regime that enabled the greater exploitation of black people in the homelands as part of the apartheid scheme, to the detriment of the workers in these areas, would, on the employer's interpretation, be kept in force for longer than the interpretation preferred in this judgment.⁴⁴

In dissent, O'Regan J sharply criticised this argument. She argued that the exemption had in fact been issued as a result of the Department of Labour's concern that without such an exemption companies would close and jobs would be lost, and said that:

This Court should be slow to base its reasoning on such arguments [as Ngcobo J's], particularly when they have not been raised either by the union or the employer, and when they are likely to mask complex social

⁴² Thus Marius Pieterse writes that '[i]n legal circles especially, the word 'transformation' is used to denote a wide array of processes or programmes, ranging from affirmative action and black economic empowerment to the complete overhaul of South African legal culture.' M Pieterse 'What do we mean when we talk about transformative constitutionalism?' (2005) 20 *SAPR/PL* 155, 155. He himself goes on to offer a conception of transformation, but is careful not to 'pretend that my understanding is the only tenable one, or that it is necessarily correct ... That said, I nevertheless believe it useful to present an explicit and integrated formulation of 'constitutional transformation', if only constructively to inform debates on the content of its terms and on the appropriate role for constitutional interpreters in its achievement.' Pieterse (n 43 above) 156. Such debate is certainly constructive, but the need for it reflects the expansive nature of the constitution's values.

⁴³ 2009 1 *BCLR* 1 (CC).

⁴⁴ *CUSA* (n 44 above) para 103.

and economic realities, possibly with harmful consequences, such as job losses.⁴⁵

The disagreement between Justices Ngcobo and O'Regan may not have been about values, to be sure, but rather only⁴⁶ about the application of those values to a concrete situation. But it is also possible that the two jurists were responding to different elements of the Constitution's values: Ngcobo J to its repudiation of apartheid, O'Regan J to its protection of disadvantaged people. These values frequently coincide, but *CUSA* is a case where, perhaps, they did not.

Values play a striking role in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* as well. I've already referred to *Wary* as an example of a case that raises the kinds of technical issues that are much more like to arise under South Africa's detailed constitution than under the very brief US constitution.⁴⁷ But *Wary* demonstrates that even an intensely technical question may, in the end, involve differing views of the constitution's values. *Wary* was a dispute over the meaning of a proviso to the Agricultural Land Act's definition of 'agricultural land', a proviso added by President Mandela in 1995, pursuant to his transitional constitutional authority.⁴⁸

On one reading, the majority's, the proviso meant that land classified as agricultural prior to the first election of local transitional councils would remain so until reclassified by the national Minister of Agriculture. This reading saw the proviso as aimed at meeting

the need to provide for the continued efficient carrying out of the functional area of agriculture assigned to the Minister and the anticipated future acquisition by a provincial government of the ability to assume responsibility for the administration of laws falling within the functional sphere of agriculture.⁴⁹

Kroon AJ defended this interpretation as 'attribut[ing] to the legislature the intention to retain the national government's role in effectively formulating national policy on these and related issues,'⁵⁰

⁴⁵ *CUSA* (n 44 above) para 148 (dissenting judgment of O'Regan J).

⁴⁶ Not that the application of values to a concrete situation is a minor matter. Stu Woolman cites O'Regan J's comments on this score as 'unmistakably identify[ing] the dangers of "thinly reasoned" reliance on the "values" – whatever they might be – to be found in FC s 39(2).' S Woolman 'Between charity and clarity: Kibitzing with Frank Michelman on how to best read the Constitutional Court' (2010) – *SAPL/PR* – (forthcoming)(Paper presented at the South Africa Reading Group, 20 November 2009, at New York Law School, on file with author). See also F Michelman 'Old kibitzes never die' (2010) – *SAPL/PR* – (forthcoming).

⁴⁷ [2008] ZACC 12.

⁴⁸ *Wary* (n 48 above) para 12, n7. The transitional authority was conferred by s 235(9) of the Interim Constitution Act 200 of 1993.

⁴⁹ *Wary* (n 48 above) para 66.

⁵⁰ *Wary* (n 48 above) para 80.

and argued that this interpretation ‘would promote the spirit, purport and objects of the Bill of Rights,’⁵¹ specifically the right to food.⁵²

On the dissent’s reading, land classified as agricultural under this proviso remained in that classification only until permanent local authority was established. Though Yacoob J maintained that the statutory language was so plain that no constitutional issue even arose,⁵³ he too found constitutional significance in the case. In his view, to interpret the proviso to mean that the Minister retained power over each and every sale of land within a municipality, long after permanent local authorities had been created, was ‘inconsistent with the restructuring, decentralisation and democratisation of power that our Constitution requires.’⁵⁴ Both judgments’ statutory interpretations, in short, ultimately drew on constitutional understandings, and reflected different appraisals of the constitution’s methods, or priorities, in the achievement of social justice.

If differences over constitutional values inform even decisions about the interpretation of labour exemptions and agricultural statutes, it is not surprising that such differences infuse decisions that are more directly about the demands of the constitution. Thus the debate over national security-based secrecy in *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* clearly reflected different stances about the constitutional concerns at stake. For the majority, the correct approach was that

a court should be alive to the fact that it is confronted by competing constitutional claims. The one claim is for open justice and the other relates to the government’s obligation to pursue national security.⁵⁵

On the other hand, Justice Sachs in dissent called for ‘special attention ... to the importance of openness, a theme that until now has not been given much attention in our jurisprudence.’⁵⁶

The government’s power to search the property and possessions of its people as part of a criminal investigation equally clearly involves profound constitutional values, and the judgments in *Thint (Pty) Ltd v National Director of Public Prosecutions*, dealing with the propriety of a search of Jacob Zuma’s lawyer’s office, reflect decidedly different appreciations of those principles. The justices of the majority reject the proposition that searches under the National

⁵¹ Section 39(2).

⁵² *Wary* (n 48 above) paras 84-85.

⁵³ *Wary* (n 48 above) para 108 (Yacoob J, dissenting).

⁵⁴ *Wary* (n 48 above) para 138 (Yacoob J, dissenting).

⁵⁵ 2008 8 BCLR 771 (CC) para 56 (Moseneke DCJ).

⁵⁶ *Thint* (n 24 above) para 153 (dissenting judgment of Sachs J).

Prosecuting Authority Act 32 of 1998 must be prohibited 'if there are other, less drastic means [such as the use of a summons] available to the investigating authority which may succeed.' Langa CJ argues that this approach

would inevitably provide accused persons who are dishonest with an opportunity to cover their tracks. This does not reflect an appropriate balance between the constitutional imperative to prevent crime and the duty to respect, promote, protect and fulfill the rights in the Bill of Rights.⁵⁷

He holds instead that the correct test is whether it is 'reasonable in the circumstances for the state to seek a search warrant and not to employ other less invasive means.'⁵⁸ For the majority, constitutional protection must not be turned into an invitation to circumvent the enforcement of the criminal law. As Langa CJ writes:

In my view, this approach takes into account not only the need to protect constitutional rights, but also the practicalities and difficulties of law enforcement in the context of combating serious and organised crime. The test I propose makes the destruction or concealment of this material [sought by the government] more difficult and is a justifiable limitation of the right to privacy. I cannot accept that privacy must be upheld even if that entails a real risk of the disappearance of evidence in serious corruption cases.⁵⁹

Ngcobo J, in dissent, appraises the values at stake very differently. He endorses the least restrictive alternative test, agreeing with a lower court judge that 'it cannot be reasonable' to conduct a search under the statute 'if there are other less drastic means available to the investigating officer which may succeed.'⁶⁰ Ngcobo J asserts that

⁵⁷ *Thint* (n 24 above) paras 119, 125 (Langa CJ)

⁵⁸ *Thint* (n 24 above) para 126. This standard "will require a judicial officer to consider whether there is an appreciable risk, to be judged objectively, that the state will not be able to obtain the evidence by following a less invasive route." *Thint* (n 24 above).

⁵⁹ *Thint* (n 24 above) para 128.

⁶⁰ *Thint* (n 24 above) para 294 (dissenting judgment of Ngcobo J). He goes on to emphasise the words 'which may succeed,' and appears to say that if a less drastic means 'would probably not result in the evidence being obtained,' then a search would be appropriate. Thus the difference between the majority and dissent may be measured as the difference between there being an 'appreciable risk' of not obtaining the evidence by less drastic means, see n X above, and that outcome being 'probable.' Earlier in his judgment, however, Ngcobo J wrote that 'if following the ... summons procedure would involve the risk of frustrating the investigation, resorting to the search and seizure would be reasonable.' *Thint* (n 24 above) para 280 (emphasis added). This formulation seems less demanding than the test he states in *Thint* (n 24 above) para 292, and so the exact extent of the difference between the two judgments on this score is not perfectly clear.

But there may also be a deeper distinction. Ngcobo J says that '[t]here should therefore be evidence under oath' to demonstrate that less drastic means will probably fail, though he does not require that there be

‘to proceed on the premise that suspects, in particular those who are accused of crimes involving dishonesty, cannot be trusted to cooperate in response to a ... summons’ is

inconsistent with our constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms for all. They are indeed inconsistent with the right to be presumed innocent until proven guilty.⁶¹

He responds to the clash of crime prevention and constitutional protection in very different terms from Langa CJ:

The need to fight organised crime and, in particular corruption, cannot be gainsaid. That fight, however, should not be fought at the expense of the unwarranted limitation of constitutional rights. A nation that considers itself under siege can be a danger unto itself. Constitutional rights are invariably the first casualty in a nation which considers itself to be under siege, whether the siege comes from the prevalence of crime or some other source. It is precisely at such times that courts ought to be vigilant and act as a bulwark against unwarranted invasion of constitutional rights.⁶²

It is not to be wondered at that South Africans differ in their understanding of their own constitutional values. These values were always capacious, and it is hard to imagine articulating fundamental constitutional values that would not be capacious. Indeed, part of the point of constitutional principles is probably to invite reflection, over the years and generations, about the implications and meaning of the principles articulated at the founding. That reflection began as soon as the constitution was in place (really, it began long before that), and has undoubtedly continued. By now, South Africans have been thinking about their constitutional values for 15 years, and that is

evidence of ‘specific concerns about the likelihood of concealment or destruction in a particular case.’ *Thint* (n 24 above) para 371. In contrast, the majority maintains that ‘to ask the state to establish that a summons [an available less drastic means under the statute] ... would not result in the production of the incriminating items would effectively require the state to prove something that could hardly ever be proved.’ *Thint* (n 56 above) para 125 (majority judgment of Langa CJ). Instead, the majority emphasises that the judicial officer determining whether there is an ‘appreciable risk’ that less drastic means would not be successful may take into account broad considerations, such as that ‘it is generally not improbable, given that serious crime which bears heavy penalties is under investigation, that those implicated in the crime might well not produce incriminating evidence when requested to do so.’ *Thint* (n 56 above) para 127. Ngcobo J grants that such ‘general concerns ... are of some general relevance,’ *Thint* (n 56 above) para 371 (dissenting judgment of Ngcobo J), but he goes on to cast sharp constitutional doubt on their weight. The net result is that the majority’s test seems meant to be deferential in application, the dissent’s to be more sceptical.

⁶¹ *Thint* (n 56 above) para 374 (dissenting judgment of Ngcobo J).

⁶² *Thint* (n 24 above) para 369.

more than enough time for people to conclude that their own values, long-held, call for different conclusions than they would once have argued for. In the United States, for example, the commitment to equal protection of the laws, by no means completely affirmed even as to race in 1954, within decades took quite firm hold as to race, came to be applied to gender, and now is increasingly, though painfully incompletely, applied to sexual orientation as well. South Africa's founding values are still its values, but South Africans' understanding of them surely has been evolving over these years of rapid constitutional development.

Is there anything more that can be said, then, about what values constitutional judges should hold? Certainly one can say, 'judges should believe in such-and-such a vision of transformation.' And perhaps they should. One can even make arguments for such a vision that draw on the Constitution, and thus might be characterised as legal arguments. But if law can be employed to argue for such choices, I do not think we can deny that we are simultaneously in the realm of politics. On grounds of politics you prefer one understanding of the constitution's values, someone else prefers another.

If the choice of judges depends in part on their commitment to the best conception of the constitution's values, who is to say what the best conception is? That's not an easy question to answer, and it isn't my object to answer it. What is fair to say is that the system of appointment of judges in South Africa seeks, in the Judicial Services Commission, to mix together considerations of professional expertise and political choice. Political actors make up much of the JSC's membership, but not all; and the President's discretion is at its greatest in the appointments to the Constitutional Court.⁶³ Whether that system opens the appointment process to too much political influence, or whether it is not open enough to the political preferences of the country whose judges are being chosen, are questions I leave to you. What is important for my purposes is that I do not think the law itself supplies some criterion by which we can avoid recognising that many different views of the meaning of the South African constitution's normative, objective value system are legitimate. If, in the end, the meaning of the Constitution is the meaning the people of the country assign to it – as I suggested earlier in explaining why *Brown v Board of Education* is binding law in the United States – then the struggle over those meanings is a permanent part of constitutionalism.

⁶³ Sections 174 and 178.

Third, will the presence in decision-making of emotion, linked to values, jeopardise impartial judgment?

If it is essential to constitutional judging to be emotionally attached to the values of the constitution, how can judges render decisions without fear or favour – without being influenced improperly by the emotions that they necessarily and rightly feel? If judges were rendering decisions based solely on technical skill, then mastery of the skill would insure fair judgment, but we have seen that that is not how constitutional judges (or, really, any judges) decide. If they were rendering decisions based on a precisely defined and constraining system of values, then too we might be able to count on fair judgment, but once again we have seen that this recourse is not available, because the legitimate range of values judges may hold is too broad.⁶⁴ What we must ask is whether judges, holding emotionally charged commitments to a variety of conceptions of South Africa's values, can render impartial decisions.

Let us start with this: the judges I have described are *not*, and should not be, impartial about the founding values of the South African constitutional order (or the US constitutional system). One can scarcely imagine what 'impartiality' about these founding values could be or what sort of person could hold such a position – one in which, say, he is neither for nor against free speech. On the contrary, judges should be profoundly, emotionally committed to those values.

*Njongi v. Member of the Executive Council, Department of Welfare, Eastern Cape*⁶⁵ exemplifies this kind of commitment. Yacoob J, for the Court, describes the treatment of pensioners by the Eastern Cape government as a 'disaster'⁶⁶ and 'unthinkably cruel and utterly at odds with the constitutional vision to the achievement of which that Government ought to have been committed.'⁶⁷ When he comes to the question of the Eastern Cape's decision to contest its liability for full repayment in court, he is even more emphatic, asking, for example, 'What about the wasteful expenditure incurred by attempting to defend the morally indefensible?' and characterising another argument as 'a cynical position devoid of all humanity.'⁶⁸ What Yacoob J expresses on behalf of the Court is not simply anger,

⁶⁴ In truth, once we recognise, as this section argues, that attachment to values can distort judgment, we must acknowledge that even if all South African judges did hold identical values, their commitments might undercut their ability to judge fairly. A striking finding from studies of deliberation in groups is that like-minded sets of people who reason together grow more extreme in their views. See D Schkade *et al* 'What happened on deliberation day?' (2007) 95 *California Law Review* 915, 917 (2007).

⁶⁵ 2008 6 BCLR 571 (CC).

⁶⁶ *Njongi* (n 66 above) para 9.

⁶⁷ *Njongi* (n 66 above) para 17.

⁶⁸ *Njongi* (n 66 above) para 90.

but what might be called constitutional anger, stemming directly from a deep commitment to constitutional values. What is remarkable about the case is not that the justices feel this deep commitment, or that it plays a role in their decision. Rather, what is most striking is that the judgment expresses so plainly not only the thinking but also the feeling that went into it (perhaps because the egregious behavior of the Eastern Cape government triggered especially strong feelings among the justices).

But could a profound, emotional commitment to the values of the South African constitutional order ever lead to an unfair decision? Surely we know that the answer to this question must be yes. We know this on the basis of our everyday understanding of human nature. People become committed to particular ideas, and it becomes impossible to persuade them to depart from those commitments. Our predispositions shape what we perceive, and how we recall and assess what we have already perceived.⁶⁹ Equally commonly, people become overwhelmed by emotions – hate, love, fear, all of the normal range – and as a result they make judgments that are unreasonable, unwise, unfair. This is just human nature.

Again, if judging could really be carried out by skill alone, then we could respond to this reality of human nature by asking judges to free themselves of the influence of emotion. It is not easy to understand how people can really free themselves of the influence of emotion altogether, but once we agree that emotion is integral to judging, this ‘solution’ becomes not only implausible but simply incoherent. One might as well do logic without reasoning as do judging without feeling.

Years ago I wrote about the role of the ‘emergency team’ of Appellate Division justices in the decision of cases dealing with the regulations and actions of the state under its emergency powers in the 1980s.⁷⁰ I criticised the selection of the panels of judges who heard these cases, because, so I found, a majority of every panel came from

⁶⁹ J Dowie & A Elstein ‘Introduction’ in J Dowie & A Elstein (eds) *Professional judgment: A reader in clinical decision making* (1988) 1, 20: ‘The most common error in processing data is to interpret data which should be non-contributory to a particular hypothesis, and which even suggest that an alternative be considered, as consistent with hypotheses already under consideration. The data best remembered tend to be those that fit the hypotheses generated. Where findings are distorted in recall, it is generally in the direction of making the facts more consistent with typical clinical pictures. Positive findings tend to be overemphasised and negative findings discounted and there is a tendency to seek information that would confirm a hypothesis rather than the information that would permit testing of two or more competing hypotheses.’ Cf. A Tversky & D Kahneman, ‘Judgment under uncertainty: Heuristics and biases’ (1974) 185 *Science* 1124, reprinted in *Judgment under uncertainty: Heuristics and biases* in D Kahneman *et al* (eds) (1982) 3-20 (On ‘judgmental heuristics’ people use, and the risks of error these heuristics generate.)

⁷⁰ S Ellmann *In a time of trouble: Law and liberty in South Africa’s state of emergency* (1992).

a small group of judges who never disagreed with each other's results – and whose results predominantly favoured the state.⁷¹ But those judges no doubt sought to decide each case according to their lights, which is to say, as we can now recognise, in light of the values to which they were emotionally committed. The results were sad.⁷²

Yet the same processes are at work in judges of a just social order as well. So, concretely, consider the judge who believes, for instance, that Parliament is rightly vested with extensive policymaking discretion in the harmonisation of customary law rules with changing social conditions (subject of course to the constitution).⁷³ She will naturally tend to affirm the lawfulness of exercises of this discretion by the government. Without being indifferent to the situation of the individual men and women who challenge legislation as depriving them of rights protected by customary law – or by the constitution – she will tend to favour the legislature's decisions. In that sense, she will tend to 'favour' the government. A judge passionately committed to eliminating the discriminatory features of all law, by contrast, will tend to 'favour' those who are the victims of such discrimination. The emotional commitments that are a central part of constitutional judging seem inevitably to push judges towards partiality towards some litigants as against others. And if these emotional commitments are linked to factors such as race or gender, then we can expect that judges of different demographics will tend – not by orders of magnitude, of course, but by matters of degree – to judge differently.⁷⁴ Indeed, the fact that this is so is surely a major part of the reason for the Constitution's emphasis on the 'need for the judiciary to reflect broadly the racial and gender composition of South Africa.'⁷⁵

⁷¹ Ellmann (n 71 above) 56-71.

⁷² See also E Cameron 'When judges fail justice' (2004) 121 *South African Law Journal* 580, 593-94. Samuel Pillsbury cites the egregious decision in *Dred Scott, Dred Scott v Sandford* 60 US (19 How) 393 (1857), as an illustration of the proposition that '[a] passion for justice can inspire extraordinarily bad decisions that more dispassionate judges would avoid.' Pillsbury (n 28 above) 350 & 361 n 41. In analysing one of the decisions of the state of emergency, *Van der Westhuizen NO v United Democratic Front* 1989 2 SA 242 (A), I concluded that Rabie ACJ's judgment on a crucial point 'simply does not contain an argument. The only explanation he musters is the pained statement that to encompass vagueness within *ultra vires* is 'to my mind artificial and impure'. This is a *cri de cœur* and no more.' Ellmann (n 71 above) 105. Surely the failure of argument is a mark of the presence and impact of emotion. But I also felt that there were some signs that the Rabie Court's infection by passion, 'severe as it may have been, was not so virulent as the disease that assailed the United States Supreme Court when it decided the *Dred Scott* case.' Ellmann (n 71 above) 203.

⁷³ Section 211.

⁷⁴ Judge Posner writes that '[r]ace, religion, and gender have also been found ... to be significant predictors of judges' votes in cases that raise issues relating to those characteristics.' Posner *How judges think* (n 37 above) 96 & n 6 (citing studies).

⁷⁵ Section 174(2).

Now one might respond, simply, that this isn't the kind of partiality that we expect judges to be free of. As a general proposition, indeed, we do not consider firm views about the law – views that are by definition unlikely, perhaps extremely unlikely, to change – to be disqualifying. But this response isn't quite satisfactory. A judge who always ruled in favour of litigants who claimed to be the victims of discrimination, because she was so passionately committed to uprooting unconstitutional discrimination that she could not bring herself to believe that a person claiming discrimination might be mistaken or deceitful, would obviously not be someone we would call impartial. A judge who rejected all arguments contrary to his predispositions, sometimes on grounds that seemed notably unpersuasive, might still count as impartial, but he would also be well on the road to being closed-minded, and if that trait is not disqualifying it is certainly not desirable either. All of these dangers, moreover, are likely at their greatest in close cases; if the cases are clear, after all, no distortion of judgment is likely.⁷⁶ Commitment to a value *can* lead to such distortions of judgment: the question I want to ask is, given how integral emotion is to judging, how can judges avoid falling into this peril?

Fourth, can empathy, or practical wisdom, or independence - insure fair judging?

Empathy: If emotional commitments to constitutional values pose a threat to impartiality, we might hope to 'fight fire with fire' – to call on judges to resist the power of their emotion-laden constitutional commitments with another emotion that would encourage them to feel a connection to every litigant. This is the promise of empathy, which I'll define very roughly as the capacity to understand the situation and the feelings of others. (There are complex questions about whether empathy involves just intellectual understanding or also emotional connection; and about the differences, if any, between empathy and related emotions such as identification or sympathy; but none of those are central to our inquiry now.)⁷⁷ Empathy was briefly in vogue – and as quickly fell into disfavour – in American constitutional politics, as President Obama embraced it as a critical virtue of constitutional judging. Figures as diverse as Justice Sotomayor, whose capacity for empathy President Obama praised, and Justices Alito and Thomas – two of the more conservative members of our Supreme Court – have all pointed to their own

⁷⁶ Posner 'Emotionalism' (n 28 above) 321.

⁷⁷ See S Ellman *et al* *Lawyers and clients: Critical issues in interviewing and counseling* (2009) 31, 69 n 22.

backgrounds as helping them to keep in mind the real impact of the decisions that they will make as judges on the lives of actual people.⁷⁸

It does, indeed, make sense that a judge who can empathise with a litigant will be more likely to take seriously the litigant's testimony about the facts, and her counsel's argument about the law, than will a judge who is unable to make an empathetic connection with that litigant. So we might say that a judge who, while holding deep constitutional commitments, is also able to empathise with every person who comes before her is an impartial judge.

The Constitutional Court has, in fact, embraced the value of empathy or sympathy. In *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others*,⁷⁹ one of a series of cases in which the Constitutional Court has tried to give meaning to the right of access to housing,⁸⁰ Yacoob J builds on the Court's developing endorsement of the distinctly empathetic idea of 'engagement' between government and those facing or enduring homelessness. He writes:

Engagement has the potential to contribute towards the resolution of disputes and to increased *understanding and sympathetic care* if both sides are willing to participate in the process ... It is precisely to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people that the engagement process should preferably be managed by careful and sensitive people on its side.⁸¹

The idea of engagement – both its limits and its reach – also echoes in *Merafong Demarcation Forum v President of the Republic of South Africa*.⁸² There the Court had to decide whether the Gauteng provincial legislature's interaction with the people of Merafong was or was not in compliance with the legislature's constitutional duty to receive public input on the proposed transfer of Merafong from Gauteng to North West Province. To do so, the justices debated the significance of the legislators' failure to 'report back' to the Merafong community. For the majority, as Van der Westhuizen J concluded, this failure was reasonable, though 'possibly disrespectful.'⁸³ For Sachs J

⁷⁸ See SA Bades, *Empathetic judging and the rule of law*, available at <http://ssrn.com/abstract=1431230>, 2-3.

⁷⁹ *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others* 2008 5 BCLR 475 (CC).

⁸⁰ Section 26.

⁸¹ *Occupiers of 51 Olivia Road* (n 80 above) para 15 (emphasis added).

⁸² *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 10 BCLR 969 (CC). For a reading of this case as an articulation of the 'listening constitution,' see Michael Bishop 'Vampire or prince? The listening constitution and *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others*' (2009) 2 Constitutional Court Review - (Forthcoming)

⁸³ *Merafong Demarcation Forum* (n 83 above) paras 55-56.

in dissent, this failure amounted to ‘an interrupted dialogue, when expectations of candour and open-dealing have been established and certain unambiguous commitments have been made,’ and so could be ‘more disruptive of a relationship than silence from the start might have been.’⁸⁴

In urging empathetic relationships between others, the Court is bearing witness to the value of this quality for its own decision-making as well. Justice Sachs has written about essentially this same quality from off the bench. Discussing the danger of ‘too much subjectivity’ in judging, and the need for controls against it, he observes:

A crucial element of control is created by calling upon the judge to have what Jennifer Nedelsky calls an ‘enlarged mentality’, that is an active vision that enables him or her to rise above individual idiosyncrasy to cover the standpoint of others belonging to the community to be persuaded.⁸⁵

I agree with this call, and with the aspiration to meet it. But while it is admirable to empathise with everyone, few of us find everyone equally easy to empathise with. In fact, it appears to be the case that most of us empathise more easily with those who are like us. Moreover, some people may really be a lot harder to empathise with than others. That means that if empathy is essential, all we can really demand is some basic quantum of empathy; we cannot expect equal empathy for every person. As Susan Bandes has observed, ‘[s]elective empathy is inevitable.’⁸⁶

Just as the Constitutional Court has affirmed the value of empathy, it has on occasion made clear that it does not feel equal sympathy for all who come before it. In the 2008 term, the Court vividly conveyed this message in *Njongi*. In *Njongi*, the question arose of whether a *de bonis propriis* costs order should be made in light of the Eastern Cape’s seemingly abusive use of litigation to stave off its rightful liabilities to the citizens whose grants it had cut off. Justice Yacoob wrote for the Court:

I must at the outset make it plain that I have reluctantly come to the conclusion that it would not be just to make a *de bonis propriis* order for costs against anyone in the circumstances of this case. I do not therefore intend to traverse those averments and contentions aimed at avoiding that result. It must however not be understood that there is *any agreement with or sympathy for* these averments or contentions.⁸⁷

⁸⁴ *Merafong Demarcation Forum* (n 83 above) para 291 (dissenting judgment of Sachs J) (emphasis added).

⁸⁵ A Sachs *The strange alchemy of life and law* (2009) 143.

⁸⁶ Bandes (n 79 above) 14.

⁸⁷ *Njongi* (n 66 above) para 63 (Yacoob J, emphasis added).

Justice Sachs joined this judgment and in his book, though he eloquently urges ‘civilised conversation rather than rude discourse between the three branches’ of government, he also recognises that ‘[t]here might be times when the judiciary feels that the particular way in which the Constitution has been violated calls for appropriately pointed language.’⁸⁸

Perhaps there is a trace of a similar decision that one side, but not the other, rightly merits sympathy in *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration*,⁸⁹ which dealt with how long a period of back pay could be awarded as part of an order to reinstate an employee. In the course of resolving the case in the employee’s favour, Nkabinde J observes that

it is a matter of great concern that the system of expedited adjudication of unfair dismissal disputes which the LRA sought to establish often operates far from expeditiously. The case at hand [in which the Commission issued its decision in 2002] is a good example of how labour disputes are taking far too long to reach finality.⁹⁰

While Nkabinde J observed in the next sentence that such delays burden both employers and workers, she later invokes this same concern in rejecting the employer’s effort to obtain a remittal to allow it to raise further arguments against the full award. Here she observes that to permit remittal ‘will afford Equity a second bite at the cherry. That will be unfair to Mr. Mawelele [the employee] and, needless to say, this Court cannot sanction that result.’⁹¹ The emphatic tone of this comment may reflect an emotional as well as legal response to Equity’s litigation maneuvers.

Should the incompleteness of empathy trouble us? We should expect that the inequality of the empathetic connections judges (and everyone else) make will tend to guide results as well. In general, that observation is not a reason to perceive injustice in what the judges decide, just as the fact that judges are emotionally attached to constitutional values is not, in general, a reason to believe their decisions are unjust. It is possible, in fact, that judges will make their strongest empathetic connections precisely with those people whose cases most embody the values of the Constitution. If so, then these two forms of emotional response may coincide. But just as with constitutional passion, so with empathy: we must acknowledge the

⁸⁸ Sachs (n 86 above) 147.

⁸⁹ 2009 2 BCLR 111 (CC).

⁹⁰ *Equity* (n 90 above) para 52.

⁹¹ *Equity* (n 90 above) para 56.

possibility that the connection, like the conviction, will be too strong.⁹²

In that case, we certainly should not rely simply on the judge's instinctive tendency to empathise as a check on this risk, precisely because that instinctive tendency will likely be uneven and inequitable. We might say that a judge should decline to hear a case in which she feels absolutely no empathetic connection to one side - in which, for instance, she cannot feel even a glimmer of understanding of the fear or rage that motivated an accused person's participation in a crime. But these cases will likely be few and far between, and 'even a glimmer of understanding' may not be very much.

Instead, if we want judges to employ empathy as a way to maintain the kind of openness that we can accept as the mark of impartiality, we need them to learn to do so.⁹³ Like many interpersonal attributes, a disposition to empathy is no doubt hard to create out of nothing, but there are probably few people with no disposition to empathy at all, and for those who have this capacity, exercising it, practicing it, likely can make it more natural and automatic.

And yet judges must not learn empathy too well. For if we assume a judge who empathises profoundly with all those who come before him, we may have also described a judge who cannot render decisions. Judicial decisions are meant to take account of the lawful interests of all who come before the court, but they are also meant to resolve conflicts in favour of one side and against another. The party, the people, decided against will be harmed; the empathetic

⁹² As Toni Massaro has written, '[m]isplaced empathy, like misplaced disgust, can produce normatively poor decisions - as in the tendency of some judges or juries to excuse offenders whose negative emotional response to homosexuality prompts them to engage in violent acts against gays and lesbians. Again, *no* emotion is normatively transfixed.' TM Massaro 'Show (some) emotions' in SA Bandes (ed) *The passions of law* (1999) 80, 120 n 33.

⁹³ Even this is likely not enough. Bandes comments that 'We all use empathy, and despite our best intentions, it is always selective and riddled with blind spots. We can try to correct for this partiality if we are self-aware. But those who study cognitive psychology and decision-making find that we aren't all that good at identifying and critiquing our own background assumptions. A better way to encourage this sort of correction is through debate with others who hold differing viewpoints.' Bandes (n 93 above) 16 (footnote omitted). This essay focuses on *each* judge - but Bandes' observation reflects that the justice of a Court's decisions deeply reflects the contributions, legal and emotional, of all its members.

judge will feel that harm; the judge who feels it too fully may be unable to inflict it.⁹⁴

In *Thint*, for example, the validity of the searches turned on whether there was an ‘appreciable risk’ that other less drastic methods would have sufficed. To answer that question entailed deciding whether the targets of the search, including the Thint company and Jacob Zuma, would have cooperated. The Constitutional Court determined that ‘[t]here is ... reason to believe that the full, voluntary co-operation of Mr Zuma may not have been forthcoming,’ and that

[t]here must at the very least be a real risk that a person who is suspected to have been involved in corruption and who is, on reasonable grounds, believed to have provided false information in response to questions by the state, would not preserve the integrity of incriminating documents if he knew that the documents were being sought.⁹⁵

These words are measured, but they necessarily inflicted harm.

Legal decisions may also harm people who are not even suspected of fault. The justices of the Constitutional Court undoubtedly empathised with Mr Soobramoney. As Chaskalson CJ wrote,

One cannot but have sympathy for the appellant and his family, who face the cruel dilemma of having to impoverish themselves in order to secure the treatment that the appellant seeks in order to prolong his life.⁹⁶

But if the justices had empathised too intensely, they could not have decided against his claim. Health care resources, however, were not ‘co-extensive with compassion,’ and so the Court decided, with compassion, to deny his claim.⁹⁷ Here, vividly, we see the importance of another judicial virtue, the quality of detachment.

⁹⁴ Judge Posner says that ‘most judges are (surprisingly to nonjudges) unmoved by the equities of the individual case,’ and quotes *Hamlet*: ‘The hand of little employment hath the daintier sense.’ Posner *How judges think* (n 37 above) 119, quoting William Shakespeare, *Hamlet*, act 5, sc. 1, l. 66. Posner continues: ‘Just as doctors tend to be callous about sick people, judges tend to be callous about pathetic litigants because they have seen so many of them.’ Posner *How judges think* (n 37 above) 119. I would hope that ‘callous’ is an overstatement.

⁹⁵ *Thint* (n 56 above) para 133 (majority judgment of Langa CJ).

⁹⁶ *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 12 BCLR 1696 (CC) para 31.

⁹⁷ I borrow here from Justice Sachs’ concurring judgment, in which he praises the understanding that Mr Soobramoney himself showed of the conflicting claims in his case, and concludes, ‘If resources were co-extensive with compassion, I have no doubt as to what my decision would have been. Unfortunately, the resources are limited, and I can find no reason to interfere with the allocation undertaken by those better equipped than I to deal with the agonising choices that had to be made.’ *Soobramoney* (n 97 above) para 59.

Practical wisdom: Could we say that the central quality judges need is a combination of sympathy and detachment, together forming the distinctive practical wisdom that should (along with public-spiritedness) mark the work of judges?⁹⁸ Anthony Kronman has eloquently argued for this view, in his book *The Lost Lawyer: Failing Ideals of the Legal Profession*.⁹⁹ Here he develops an account of ‘the values embodied in the figure of the lawyer-statesman,’ values which he sees as also quintessentially judicial.¹⁰⁰ The lawyer-statesman’s skill, and virtue (for Kronman sees this as a character trait rather than simply an expertise), is deliberation, and ‘[j]udging is a paradigm of deliberation.’¹⁰¹

Deliberation, in turn, requires both compassion and detachment. Compassion, or sympathy (both terms whose meaning seems quite comparable to that of empathy) is a form of ‘feeling with,’¹⁰² which ‘goes beyond mere observation, ... [but] also falls short of outright acceptance.’¹⁰³ Kronman explains, in the context of describing deliberation about one’s own life choices, that

when an individual is deliberating about an important personal choice, it is essential that he preserve some distance between his present point of view and those of the alternatives before him ... The attitude of sympathy for which the process of personal deliberation calls might therefore be described as one of suspended identification, less disinterested than the attitude of the observer but more detached than love.¹⁰⁴

I don’t question the importance of the two virtues of sympathy and detachment – and Kronman fully recognises how difficult it can be to achieve both of these virtues at once.¹⁰⁵ But how should these virtues coalesce? Kronman’s answer is reflected in his account of the impact of the case method in law school instruction, a method he sees as giving ‘priority’ to ‘the judicial point of view.’¹⁰⁶ He writes:

⁹⁸ Judge Posner offers a much more prosaic account of ‘good judgment,’ which he treats as a ‘cousin of intuition and another major factor in judicial decisions’ not bounded by ‘techniques of exact inquiry.’ He characterises ‘good judgment’ as ‘an elusive faculty best understood as a compound of empathy, modesty, maturity, a sense of proportion, balance, a recognition of human limitations, sanity, prudence, a sense of reality, and common sense.’ Posner *How judges think* (n 37 above) 117. It would be hard to deny the value of any of these components of judgment (nor would I quarrel with their ‘pragmatic’ bent), but in this essay I focus on trying to make certain aspects of this quality less ‘elusive.’

⁹⁹ Kronman (n 25 above). For a thoughtful discussion and development of Kronman’s views, see B Scharffs ‘The role of humility in exercising practical wisdom’ (1998) 32 *University of California Davis Law Review* 127, 142-44.

¹⁰⁰ Kronman (n 25 above) 317.

¹⁰¹ Kronman (n 25 above) 319.

¹⁰² Kronman (n 25 above) 70.

¹⁰³ Kronman (n 25 above) 71.

¹⁰⁴ Kronman (n 25 above) 71-72.

¹⁰⁵ Kronman (n 25 above) 72.

¹⁰⁶ Kronman (n 25 above) 117.

[W]hat the case method really robs [students] of is their faith in large ideas, and what it puts in place of this faith is a form of skepticism – the tendency to look with suspicion on broad generalisations, to search for the qualifying exception to every abstraction, to insist on the importance of details. Students who become skeptics in this sense are likely, in time, to find complexity more congenial than simplicity, and though their skepticism may at first extend only to the usefulness of abstractions in the law, there will be a natural tendency for their doubts to grow into a generalised pragmatism that views with suspicion any political program inspired by their old faith in the power of ideas.¹⁰⁷

The result will be

a broad familiarity with diverse and irreconcilable human goods coupled with an indefatigable willingness to enter the fray, hear the arguments, render judgment, and articulate the reasons that support it, even when all hope of moral certainty is gone. At war with itself, this complex set of attitudes nonetheless describes a recognisable moral ideal, an ideal closest, perhaps, to the public-spirited stoicism implied by the Roman term *gravitas*.¹⁰⁸

Kronman is, I think, profoundly right to emphasise how tremendously the views, and wishes, of members of a single society may differ from each other, and how hard it can be to encompass such differences in a humane community. But at the same time, Kronman's description of the lawyer-statesman seems incomplete. To me, it simply does not grasp the essence of a political leader and lawyer such as Abraham Lincoln or of a judge such as Earl Warren, the author of the *Brown* decision. To be sure, Kronman is not saying that we should abandon trying to distinguish rights from wrongs, or acting on the distinction. He writes, for instance, that in '[r]ecognising the moral imperative for change, the lawyer who embraces this ideal [of the lawyer-statesman] will nevertheless prefer to move slowly and by small degrees.'¹⁰⁹ Again, this characterisation seems to miss something crucial about Lincoln, who waged a Civil War, and Warren, whose landmark judgment in *Brown v Board of Education* hypothesises a nonexistent state of material equality between segregated white and black schools in order to say that, as a matter of sheer constitutional principle, segregation is inherently unequal and unconstitutional.

In a way what is most startling, however, is what the lawyer-statesman ideal, understood as intrinsically conservative, does not honor. John Adams and Thomas Jefferson, revolutionaries, must stand outside this ideal. So must Nelson Mandela and Oliver Tambo and Bram Fischer. I think that Kronman would say that the virtues required

¹⁰⁷ Kronman (n 25 above) 159.

¹⁰⁸ Kronman (n 25 above) 117-18.

¹⁰⁹ Kronman (n 25 above) 161.

for revolutions are different from those required for a society that does not seek its own death and rebirth.¹¹⁰ There's force to that, but it overstates the difference between stability and change. Passionate leadership against injustice is an integral part of everyday life in the United States, and in a broad sense our stability consists in our capacity to make the values of these passionate reformers part of the ever-changing fabric of the country. A major part of what American lawyers pride themselves on is their passionate commitment to justice, even in opposition to entrenched and powerful authority. And surely this struggle for justice is even more integral to the life of the law in South Africa, a nation committed to transformation of its own history of injustice.

In short, it seems to me that Kronman's valuation of the conservative lawyer-statesman misses part of what is admirable, and admired about lawyers – their engagement in passionate calls for justice and change. Perhaps few lawyers or people can fully meld together the capacity for sympathetic detachment and the determination to make a vision of justice real. But I would say that the ideal of the lawyer-statesman is not the stoic harmoniser of others' passions, but the person who both feels passion and understands how to make his or her ideals real in a world where many others, inevitably and profoundly, see the world differently. Doing that takes sympathy and detachment, and I think Kronman is right to identify these values and to focus on how to elicit them. But they are not all that lawyers need.

Independence: Could the missing ingredient be independence? If judges must achieve a difficult balance of sympathy and detachment fueled by underlying passion for constitutional justice, could the solution be for judges to jealously guard their independence so as to avoid being pulled away from the balance they have struck? Independence is an old answer to the problem of judging fairly, and entitled to respect for that reason. It is not too much to say that one of the finest legacies of the old legal order was its tradition of judicial independence – even though the discrimination and oppression of the old order undercut the strength of this legacy. The fact that independence is a part of South African legal heritage, and that it has come under threat again in the new South Africa, confirms its importance. Moreover, it does make sense to think that one way a judge might protect herself against losing her emotional balance is to

¹¹⁰ He writes that those who 'celebrate ... the liberating worldlessness of revolution fail to see that politics is always the pursuit of order, and that its inherent conservatism implies a continuing affirmation of the value of political fraternity, in all but those transitional episodes of birth and death that mark the limits of political life. In this sense it is right to say that my account of statesmanship, with its emphasis on the value of political fraternity, entails a commitment to order and the status quo.' Kronman (n 25 above) 108.

commit herself to the principle that she must chart her own course. Yet independence is not a sufficient answer to the problem of the power of emotion in judging.

It is, first of all, not self-evident how independent judges should be. Of course judges should not participate in telephone justice – where the party official phones in the decision to the judge – and should not be subjected to bribes or threats. But should judges view the government’s policies with suspicion or welcome? The answer may depend on the field of policy – restrictions on free speech might get one response, efforts to provide counsel to unrepresented people accused of crimes quite another.

To take an example from the 2008 Term, in *President of the Republic of South Africa and Others v Quagliani, and Two Similar Cases*, the Constitutional Court considered challenges to the validity of South Africa’s extradition agreement with the United States.¹¹¹ The relevant statute gave the President power to enter into such agreements, but the President had delegated the power to sign the agreements to the Minister of Justice. Sachs J read the statute against the background of the Constitution’s vesting the national executive with responsibility for making treaties, and concluded that ‘[i]t is important that these provisions should not be applied in a formalistic manner that will impair the ability of the national executive to function.’¹¹² This conclusion might be characterised as deferential, and perhaps one could quarrel with it; but its roots in an appraisal of the relevant constitutional considerations seem plain.

Similarly, *Walele v City of Cape Town and Others* may be seen as involving a question of the proper degree of deference to be paid to the administrative necessities of the building approval process at issue in that case.¹¹³ O’Regan ADCJ, in dissent, maintained that

[r]equiring that not only plans and approval documents, but also a report from the Building Control Officer setting out the factors favourable and adverse to the approval of the plans, be placed before the ultimate decision-maker would impose a heavy burden on municipalities. It is not an interpretation of the legislation which one would adopt unless one were persuaded that written reports would serve an important function ...¹¹⁴

Jafta AJ, however, wrote for the Court that despite the ‘salutary procedure’ which Cape Town had adopted, ‘no matter how impressive

¹¹¹ 2009 2 SA 466 (CC).

¹¹² *Quagliani* (n 112 above) para 25.

¹¹³ 2008 11 BCLR 1067 (CC).

¹¹⁴ *Walele* (n 114 above) para 70 (dissenting judgment of O’Regan ADCJ).

the process might be, it is no substitute for the mandatory requirements of the Building Standards Act.’¹¹⁵

The answer may also depend on the particular reading of the constitution’s values to which the judge is committed (including the judge’s view of the role of the people in determining the meaning of their constitution). Justice Holmes eloquently advocated for the people’s right to govern themselves, and that stance might call for vigilance in protecting democratic liberties but deference to the policy choices democracy produces.¹¹⁶ Members of the American legal process school, who can be seen as inheritors of Holmes’ wish that judges take account of social realities, might well have said that fundamentally judges and other government officials are engaged in the same enterprise of good governance, and should be disposed to see each other as engaged in a cooperative enterprise, and I think myself that in a just society there is force to this view.¹¹⁷ Certainly courts cannot help but recall that they have no armies, and rely ultimately on the consent of the governed (and of the other governors) to carry their judgments into effect.

But more fundamentally, independence is not an escape from emotion. A judge committed to independence will no doubt be committed to other values as well; independence does not shield her from the effects of her own emotions, and perhaps actually makes her more susceptible to them, since she is so indifferent to persuasion by others.¹¹⁸ Independence itself is a value, to which a judge may be emotionally committed – and that emotion may have its own impact on the judge’s decision-making. It is quite possible to imagine judges who fall so much into an emotional attachment to independence as a value that they imagine themselves above the society of which they are in fact a part. An emotional attachment to skill in legal reasoning, it might be added, could have similar pitfalls.

¹¹⁵ *Walele* (n 114 above) para 70 (majority judgment of Jafta AJ).

¹¹⁶ *Lochner v New York* 198 US 45, 74-76 (1905) (Holmes, J, dissenting). John Hart Ely built his conception of ‘representation-reinforcing’ constitutional review around this fundamental theme. See JH Ely, *Democracy and distrust: A theory of judicial review* (1980).

¹¹⁷ In an unjust society, such as apartheid South Africa, there was much to be gained by resisting the notion that courts should take such a cooperative stance towards Parliament. See Ellmann (n 71 above) at 49-50.

¹¹⁸ As one observer has said, ‘judicial independence may liberate judges to act on their individual biases without fear of reprisal, to the detriment of impartiality.’ C Gardner Geyh, *Straddling the fence between truth and pretence: The Role of law and preference in judicial decision-making and the future of judicial independence*, Indiana University Maurer School of Law-Bloomington Legal Studies Research Paper Series, available at <http://ssrn.com/abstract=1497004>.

Fifth: The bottom line – so what is a judge to do?

I think we can find guidance in answering this question in the words of the Constitutional Court in *Thint*. *Thint* is, of course, a remarkable case. It is remarkable enough for a court to have to rule on issues affecting the potential criminal trial of someone in position to become President of the country. But *Thint* moved from difficult to nightmarish with the reported intervention of another judge in the Constitutional Court's decision-making. In the midst of the legal fracas that ensued and has not yet ended, the justices of the Constitutional Court had to finish deciding the questions raised by the search at issue in *Thint* itself. In the words of the majority judgment by Langa CJ:

All the members of the Court ... have considered their position in the light of the events mentioned above and their responsibilities as Judges of this Court. We are satisfied that the alleged acts that form the basis of the complaint to the JSC by Judges of this Court have had no effect or influence on the consideration by the Court of the issues in these cases and in the judgments given. It is recorded in the statement of complaint that there is no suggestion that any of the parties in these cases have had anything to do with the alleged conduct that forms the basis of the complaint by the Judges of the Court. The issues relating to the complaint have accordingly been kept strictly separate from the adjudication process in these cases. It is however important to emphasise that the cases have been considered and decided in the normal way, in accordance with the dictates of our Oath of Office and in terms of the Constitution and the law, without any fear, favour or prejudice.¹¹⁹

I believe the justices were entirely correct in concluding that they could still judge the case before them fairly. To say this, however, is to say quite a lot about the role of emotion and values in judging. The members of the Constitutional Court surely felt many strong emotions as a result of the events that led them to file a complaint with the Judicial Service Commission. Even without this extraordinary feature, the case would have prompted emotion on its own, involving as it did the fate of a potential President, and ultimately the well-being of the country itself. It was, moreover, by no means the only case the Court confronted in 2008 that carried such significance; five of the Court's 23 judgments in 2008 arose from one aspect or another of the country's ongoing political crisis.¹²⁰

¹¹⁹ *Thint* (n 56 above) para 6.

¹²⁰ The two *Thint* decisions dealt, respectively, with a search of the offices of Jacob Zuma's lawyer, *Thint (Pty) Ltd v National Director of Public Prosecutions* 2008 12 BCLR 1197 (CC) and with a request for evidence bearing on the Zuma case from a foreign country, *Thint Holdings (Southern Africa) (Pty) Ltd and Another v National Director of Public Prosecutions* 2009 (3) BCLR 309 (CC). In Independent

When the members of the Constitutional Court concluded that they could fairly decide the search case, therefore, they were surely not saying that they were unemotional – which would have been to say that they were inhuman. What they were saying was that their emotions were properly cabined.

What does it mean to ‘properly cabin’ – while still feeling – one’s emotions? I don’t think that we yet have a clear psychological account of what it means to be an emotional, yet fair, decision-maker – but this is what constitutional judges (and probably all other judges too) must be, and so it is important to try to characterise what it is we seek in judges now.

It makes sense to begin with the answers we have already reached. It is important for judges to be committed to the values of the constitution; if they do not have this basic commitment, they will still be emotional decision-makers but their emotions will be turned in some other direction. It is also important for judges to be empathetic towards all the parties before them, while also maintaining a measure of detachment; and for them to be insistent on their own independence as decision-makers, again to a degree.

But the human reality is that judges’ emotions, like ours, are complex and ambivalent. Did no tremor of anger, frustration or sorrow cross any of the judges’ minds as they considered the *Thint* case? Perhaps not – but the justices were unusual people if that was so. More likely, like the rest of us, they felt at various moments emotions that in sufficient force might easily have disrupted their decision-making. No judge is free of troubling emotions, we can safely assume – though it does matter which emotions dominate a judge’s heart. The judge with a passion for fairness is much more likely to be fair than the judge with a passion for revenge.¹²¹ Everything we know

Newspapers v. Minister for Intelligence Services, the Court had to decide whether it would require the disclosure of secret information held by the government bearing on the politically-charged dismissal of the head of Intelligence. *Glenister v President of the Republic of South Africa and Others* was an attempt by Mr Glenister, a private citizen, to block the proposed legislation to place the ‘Scorpions,’ a law enforcement unit with a reputation for political independence, under the potentially less independent control of the South African Police Service. [2008] ZACC 19. Finally, *Shaik and Others v State* 2008 8 BCLR 834 (CC) dealt with the forfeiture of some of Mr. Shaik’s assets as a result of his conviction for corruption. The person he was convicted of bribing, as is well known, was Jacob Zuma. O’Regan ADCJ emphasised, for the Court, that Zuma’s state of mind was not at issue in the case (para 47), but nonetheless found it necessary to say that ‘it must be accepted for the purpose of these proceedings that Mr Shaik did pay bribes to Mr Zuma’ (para 26).

¹²¹ Posner suggests that emotions that tend to make us feel more certain of our conclusions also make us ‘disinclined to engage in systematic analysis, especially of a taxing sort’ – obviously an impediment to carefully reasoned decision making. Posner *How judges think* (n 37 above) 106. But he also considers ‘overconfidence ... an occupational risk of all judges.’ Posner *How judges think* (n 37 above) 120.

about psychology says that the troubling feelings a fair judge nevertheless feels cannot be completely suppressed. Since suppression is impossible, the judge who recognises his or her own impulses and can accept them without horror is much more likely to handle those feelings well than the judge who denies their existence while they course through him or her.

Yet the judge must not give free rein to those emotions. We come, then, to objectivity. In TS Eliot's words, we arrive at this familiar place and 'know it for the first time'.¹²² By 'objective' judgment I don't mean judgment somehow from outside the bounds of one's society and its many predispositions and assumptions; none of us can get that far outside ourselves. We cannot even free ourselves of our own predispositions and values; they are us. Yet we know that people say, quite routinely, things like 'I really don't want to do such-and-such, but I think it's the right thing to do.' Those statements reflect that we are capable of sorting among our own thoughts and feelings, and concluding that some are entitled to greater weight than others. Objectivity in law, then, is the ability to guide one's own thoughts towards the issues posed by the law and by the facts of the particular case at hand rather than those generated by other claims upon us.¹²³

Objectivity is, in part, an individual capacity. Others have sought to catalog the judicial virtues, perhaps above all the virtue of 'practical wisdom'. I don't seek to add to that account here, other than to say that I agree that individual judicial character matters.¹²⁴ My focus is not on individual traits, however, but on the social structure within which they are nurtured – specifically, on an institutional practice that helps sustain the individual capacity for objectivity. That practice is something quite old: the *discipline* of the law. It may be, in our intellectual world, that law's foundation is ultimately incomplete. But if its foundations are not entirely solid, nevertheless the edifice of the law is immense. Law is like a planet; its sheer size generates a massive internal gravity, and a guiding

¹²² TS Eliot 'Little Gidding' *Four Quartets* (1943) (poem first published in 1942).

¹²³ Posner, somewhat similarly, says that 'a person's judgment is distorted by 'emotionalism' if 'that person has given undue salience to one feature of the situation and its associated emotional stimulus, neglecting other important features.' Posner, *Emotion versus emotionalism* (n 38 above) 311.

¹²⁴ On the judicial virtues, see P Horwitz, 'Judicial character (and does it matter)' – *Constitutional Commentary* – (forthcoming), available at <http://ssrn.com/abstract=1444970>; LB Solum 'The aretaic turn in constitutional theory' (2004-05) 70 *Brooklyn Law Review* 475, 502-22. See also MN Aaronson 'We ask you to consider: Learning about practical judgment in lawyering (1998) 4 *Clinical Law Review* 247. Here, as in most aspects of life, I doubt that there is one and only one set of desirable qualities, which each judge ideally should have. As Samuel Pillsbury writes, 'Perhaps there is no perfect judge for all cases, no single individual with the ideal blend of qualities to resolve all cases ... We are left with a sobering reminder of the humanity of law and the importance of emotive diversity in judicial ranks.' Pillsbury (n 28 above) 351-52.

discipline. I do not suggest that practicing this discipline confines judges to any one set of results (or anything close to that);¹²⁵ my point, rather, is that it helps judges, shaped as they inevitably and rightly are by their values and emotions, to be judicious as well.

We can see this discipline at work in *Glenister v President of the Republic of South Africa and Others*, another politically charged case. Glenister, as mentioned already, asked for judicial intervention to block proposed legislation so as to preserve the independence of the law enforcement unit known as the ‘Scorpions.’ The Constitutional Court by no means always adopts the language of emotion. In his judgment for the Court, Langa CJ comments that the arguments for the need for judicial action to preserve the independence of the Scorpions

were presented with a great deal of passion, no doubt because of the important and emotive debates in the country about the unacceptable levels of crime, its prevention and the measures that are being, or should be, employed to combat it.¹²⁶

Langa CJ’s response, however, seems to aim to put passion aside: ‘The reasons advanced, however, require close examination.’¹²⁷ I think that Langa CJ’s words here, and in his description of the justices’ approach to *Thint*, reflect a characteristic tone of the judgments of the Constitutional Court. I take that measured tone not to indicate (or even to assert) the absence of emotion, but to reflect the discipline, the self-discipline, of the law.

What does the discipline of the law entail? Its elements, certainly not always honored in the past, are at the core of South Africa’s post-apartheid culture. It has always called for transparency – public arguments, to which judges are obliged to listen, and to which they are expected to respond.¹²⁸ Judicial process is uniquely designed to foster focused and extensive argument. Judges, more than any other actors in democratic states, work in a process that fosters consideration of what is said and calls for their engagement with and response to the arguments that are made before them. Politicians

¹²⁵ Horwitz (n 125 above) at 43-48, carefully critiques arguments that what I am calling the discipline of the law much constrains the decisions judges make.

¹²⁶ *Glenister* (n 121 above) para 48.

¹²⁷ *Glenister* (n 121 above) para 49.

¹²⁸ *Response* is required. But judges on a multi-judge court may have legitimate reasons to join in decisions which do not precisely, and conceivably do not even loosely, express their views. For one exploration of these issues, see S Ellmann ‘The rule of law and the achievement of unanimity in *Brown*’ (2004-05) 49 *New York Law School Law Review* 741. Moreover, the response that is called for by the discipline of law is *legal reasoning*. It may be appropriate, even profoundly valuable, for a judge to give open expression to his or her emotions in a judgment, but those are not the principal subject – important as those emotions may have been to the shaping of the judge’s legal reasoning.

may hear less – in part because they need to speak more loudly. It is not necessary to endorse each decision of the Constitutional Court in 2008 to say that overall these cases reflect the Court's effort to provide such disciplined, attentive response to legal claims – perhaps nowhere more so than in the *Thint* judgments, whose detailed, thoughtful arguments typify such discipline (whether or not one agrees with all of the points either of the judgments urges).

The discipline of law has also always called for justification – judges' views, and lawyers' arguments, must offer reasoned explanation for their decisions. The obligation to justify in turn puts a value on deliberation, through which judges can encounter each other's differing perspectives.¹²⁹ Justification also calls for a connection to the body of other law – not always an incremental connection (and incrementalism, I know, may not be the best approach in the midst of transformation), but still a connection. Politicians may respond more ideologically, more abruptly, more pragmatically and imprecisely; judges make their decisions in a more constrained structure.

In speaking of the discipline of the law, we might equally speak of the 'rule of law.' 2008 was a year when the rule of law was no doubt much on the mind of the Constitutional Court. The series of cases from the country's ongoing Presidential crisis raised, again and again, the question of whether the country's judicial and legal institutions could function with integrity in the midst of brutal political strife. But other cases raised rule of law issues as well: *Njongi*, in which the Constitutional Court confronted the Eastern Cape's abuse of the social grant system; *Nyathi v Member of Executive Council*, in which the Constitutional Court responded to the difficulties litigants faced in enforcing judgments against the state by deciding that a ban on execution on such judgments was unconstitutional;¹³⁰ and *Merafong Demarcation Forum*, in which the proceedings that a majority of the justices upheld were subject to, in Justice Sachs' words,

a strong perception ... that the legislative process had been a sham because an irreversible deal had already been struck at a political level outside the confines of the legislative process in terms of which, come what may, Merafong was going to go to North West.¹³¹

At the same time, 2008's decisions reflect the breadth of the power of the Constitutional Court. Its jurisdiction is limited to

¹²⁹ See Horwitz (n 125 above) at 32. It is dispiriting to read that 'the fact that [judges] do not deliberate (by which I mean deliberate *collectively*) is the real secret.' Posner *How judges think* (n 37 above) 2, n5. The Constitutional Court's internal practice, happily, appears to be quite different. Sachs (n 86 above).

¹³⁰ 2008 9 BCLR 865 (CC).

¹³¹ *Merafong* (n 125 above) para 292 (judgment of Sachs J).

‘constitutional matters, and issues connected with decisions on constitutional matters.’¹³² However, *Pharmaceutical Manufacturers* made clear how very wide that resulting jurisdiction is. Its remedial power is also vast, as (like lower courts, but with the final say) the Constitutional Court ‘must’ declare laws invalid if they are inconsistent with the Constitution, but are free to ‘make any order that is just and equitable.’¹³³

These are broad powers indeed, and 2008 saw striking examples of this authority in action. *Nyathi v Member of the Executive Council* is an explicit expression of the Court’s willingness not just to order action by other branches of government but to involve itself in overseeing the process of compliance with those orders. Responding to a pattern of government failure to comply with judgments against it, Madala J observes that ‘we now have some officials who have become a law unto themselves and openly violate people’s rights in a manner that shows disdain for the law.’¹³⁴ In response to what he sees as a challenge to the courts¹³⁵ and the rule of law,¹³⁶ the Court orders Parliament to revise the execution of judgment statute and decides that ‘[i]t has become necessary for this Court to oversee the process of compliance with court orders and to ensure ultimately that compliance is both lasting and effective.’¹³⁷

Kruger v President of the Republic of South Africa and Others is also a potentially important case, not so much for the correction of problems in bringing into effect a new system of automobile insurance, but for the judgments the Court makes about the President’s ability and its own ability to correct the problem.¹³⁸ President Mbeki, clearly as a result of oversight, issued a proclamation which brought into effect the wrong sections of the Road Accident Fund Amendment Act 19 of 2005. He then issued another proclamation amending the first one so as to correct the mistake. The Court concludes that the President could have withdrawn, but had no power to amend, his own prior, erroneous proclamation so as to avoid the many legal complications that the first proclamation would have generated.¹³⁹ The President’s effort to amend the first proclamation would have involved such legal unclarity, in fact, as to be ‘inconsistent with the rule of law.’¹⁴⁰ The Court then itself declares both of the President’s proclamations

¹³² Section 167.

¹³³ Section 172.

¹³⁴ *Nyathi* (n 131 above) para 63.

¹³⁵ *Nyathi* (n 131 above) para 43.

¹³⁶ *Nyathi* (n 131 above) para 48.

¹³⁷ *Nyathi* (n 131 above) paras 83 and para 92.

¹³⁸ [2008] ZACC 17.

¹³⁹ *Kruger* (n 139 above) paras 60-68.

¹⁴⁰ *Kruger* (n 139 above) para 64.

invalid, and orders the President to issue a new one. But what about all the complications that would have resulted if the right sections of the Act weren't treated as having come into effect at the right time, as the President's two proclamations sought to accomplish? Those problems the Court deals with by directing that the President's new order will have retrospective effect back to 31 July 2006,¹⁴¹ and by itself preserving the validity of everything done under the earlier, invalid proclamations.¹⁴² The President's authority to act is circumscribed. The Court's power to fix what has happened is much freer.

Finally, in *Weare and Another v Ndebele NO & Others*, the Court decided that an apartheid-era 'Ordinance' (dealing, as it happened, with gambling in KwaZulu-Natal) constituted a 'provincial Act' which could only be finally held invalid under the Constitution by the Constitutional Court itself.¹⁴³ The Court recognised that its decision about the legal status of this Ordinance might call into question the process by which other Ordinances had been invalidated over the years since 1996 - since apparently no such invalidations had been confirmed by the Constitutional Court. Nevertheless the Court chose to make no general order on the subject, in light of the 'cogent reasons of good government against making an order that may render proceedings which to all intents and purposes have been concluded, subject to further challenges and investigation.'¹⁴⁴ To refrain from extending the logic of its own decisions surely made sense here, and furthermore is an exercise of judicial restraint rather than overreaching. Still, the power not to follow one's logic to its ultimate potential conclusions is an authority that can be used for arbitrariness as well as for equity.

It seems to me that the Court is still in the process of deciding how to regulate its own use of its remedial powers - how, in other words, to best embody the rule of law in its exercise of its own authority. The broad conception of constitutional power suggested in the cases I've traversed may echo as well in the Court's inclination, at least on occasion, to employ constitutional 'values' rather than to parse the dimensions of constitutional rights.¹⁴⁵ But Langa CJ struck quite a different note in *Glenister*, when he addressed an argument by the UDM 'that, having regard to what it refers to as "the relative marginalisation of the legislature" and the dangers of one-party domination, the Court should act because no-one else will.' For the Court, the Chief Justice answered, in part, 'I cannot agree. The role

¹⁴¹ *Kruger* (n 139 above) para 73.

¹⁴² *Kruger* (n 139 above) para 80, section (h).

¹⁴³ Section 167(5).

¹⁴⁴ *Weare* (n 30 above) paras 44-45.

¹⁴⁵ See Woolman (n 33 above); Michelman (n 33 above).

of this Court is established in the Constitution. It may not assume powers that are not conferred upon it.¹⁴⁶ The debate among the justices in *Merafong Demarcation Forum* on the dimensions of rationality review, a debate in which less demanding interpretations of rationality prevailed, reflects a similar hesitation.¹⁴⁷ I do not mean to take sides in these debates. Rather, their importance points also to the importance of the discipline of decision that I have emphasised here. This discipline is far from the whole of the rule of law, but it is part of what makes law something other than the free play of personal preference. In a time when the rule of law broadly understood has come under such painful challenge from elsewhere in South African life, the rule of law writ small is also of particular importance.

The discipline of the law is a practice, a habit, a set of dispositions. No doubt it can only fully be acquired through experience. But when it is acquired, it provides judges a resource that is somewhat more than their personal emotional capacity and balance. The committed performance of the long-marked-out steps of judging is, even in a world where we recognise the complexity of human judgment and the urgency of transformative decisions, a critical part of the path of the law. I think that this path, in its quotidian fidelity and its generative potential, does enable us to catch an echo of the infinite.

¹⁴⁶ *Glenister* (n 121 above) para 55.

¹⁴⁷ Moseneke DCJ acknowledges that '[a]s a general rule courts should not attempt to second guess the legislature on the wisdom or otherwise of legislation properly adopted, nor should they speculate about the motives of the legislators or the understanding the legislators might have had of the legal consequences of a law they adopt.' But in light of the particular events of this case, he concludes that 'in this case, this Court has the power, and indeed the obligation, to investigate the reason for' the Gauteng legislature's decision. *Merafong Demarcation Forum* (n 83 above) paras 171-72. In contrast, Van der Westhuizen J is prepared only to assume '[f]or the purposes of this judgment ... that an enquiry into the question of the Gauteng Provincial Legislature's appreciation of its constitutional role may be legitimate and useful.' *Merafong Demarcation Forum* (n 83 above) para 74. While Van der Westhuizen J (for a majority) and Moseneke DCJ (for 4 dissenters) debate whether or not the legislature correctly understood its constitutional options in the demarcation dispute, Ngcobo J concludes that 'this debate is not germane to the outcome of this case.' *Merafong Demarcation Forum* (n 83 above) para 270. In his view, 'the fact that one of the considerations that the [legislative] Committee had regard to may have been unsound, does not detract from the fact that' the legislature's purposes were legitimate and its means 'rationally related to these purposes.' *Merafong Demarcation Forum* (n 83 above) para 275. It may be a mark of the Court's struggle with these questions that Van der Westhuizen J and Ngcobo J join each other's judgments, even though they appear to adopt somewhat different approaches to the rationality issue.

2 Preparing students for constitutional responsibility

Which leads us to the question of what law professors can do to help our students to become the kind of lawyers who can be such judges. In a broad sense, the answer is, undoubtedly, that everything we can teach students about the law contributes to their becoming such people. But while that answer is reassuring, since it says that each course we now teach, however structured, contributes something to the shaping of lawyers and judges for a constitutional state, we should not be too reassured since even if all our work is of value, it may not all be as valuable as it should be.

I take the question of how to prepare students to someday become judges as being, broadly speaking, the same question as the question of how to prepare students to become lawyers. Why? Partly because it is lawyers who become judges – and probably primarily practicing lawyers as well. In today's South Africa, academic lawyers can also become judges, and can and do serve with distinction. I certainly do not maintain that only practicing lawyers can acquire the qualities needed for constitutional judging. In fact, it may well be that academic lawyers and practicing lawyers each, by reason of the different experience and responsibilities they have had, contribute distinctive strengths (and weaknesses) to the bench. But it seems almost inevitable, if only because academic lawyers are not numerous, that most judges will be drawn from the ranks of practitioners, and so it is critical that practitioners be ready to judge.

If lawyers are well qualified to become judges, as I think both our countries believe, then there must be something about the attributes of lawyers that is very close to the attributes of judges. Indeed, there is something, more than one something. Lawyers and judges both practice legal reasoning, certainly, and legal writing, and so it is training in judging to teach lawyers these skills. But I've already argued that technical skill is not the highest virtue of constitutional judging (though it's certainly an important one).

I think it is reasonable to say that the set of virtues that I have described constitutional judges as having are all related to, perhaps can be summed up as, this: constitutional judges take responsibility for all the litigants before them, and ultimately for the nation, when they render decisions. They shoulder a huge responsibility. Lawyers do not have the same responsibility for the other side and for the country. But lawyers, one might say, are all in apprenticeship to be judges in this sense: they too must take responsibility, for their clients but not just their clients – lawyers take responsibility for their clients within the law and their duties to it, in short with a measure of

responsibility for the nation as well. An insightful American ethics scholar has argued that lawyers in fact should take responsibility for the justice of their actions in something like the way that judges do – declining to take steps on behalf of a client if, in context, to do so would be unjust.¹⁴⁸ I don't go so far as that but still it is evident that a lawyers' responsibility is not to their client alone and without qualification.

There is another sense in which the work of lawyers constitutes training in constitutional practice. Since, in South Africa, there is only one law, all of it founded on the constitution, it follows that the law governing lawyers' responsibilities to their clients is, equally, founded on the constitution. It's also possible that constitutional rights are directly applicable to individual lawyers. Rights might bind lawyers by virtue of section 8(1) – since lawyers arguably are organs of state, functionaries exercising a public power or performing a public function in terms of any legislation (judges and judicial officers are excluded from this definition, but not lawyers). Or rights might constrain lawyers because, under section 8(2), they are 'applicable, taking into account the nature of the right and the nature of any duty imposed by the right.' It seems clear, regardless of the direct application question, that the law governing lawyers must comply with section 34 by facilitating access to courts; that it must respect human dignity, protected by section 10; that it must honor the privacy of clients' communications with lawyers, under section 14; that it must be free of unfair discrimination that section 9 would bar; and ultimately that it must contribute to respect, protect, promote and fulfil the rights in the Bill of Rights, as section 7(2) mandates – all subject to such limitations as section 36 might support as reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

In short, the practice of law is a function shaped by the constitution. But is there really any serious constitutional question to be posed about how lawyers should practice law? I think the answer is that there are many. Let me offer an example.

Let us suppose that a lawyer is speaking with a client. Under South African law, as under US law, what clients tell their lawyers is, in general, confidential.¹⁴⁹ *Thint* itself involves the legal professional privilege; Langa CJ notes that

[t]he applicants did not assert that the Constitution itself protects legal professional privilege and I therefore do not need to explore that

¹⁴⁸ W Simon *The practice of justice: A theory of lawyers' ethics* (1998) 138-169.

¹⁴⁹ General Council of the Bar of South Africa, Uniform Rules of Professional Conduct, Rule 3.2

question now. We are thus primarily concerned with the common-law right to legal professional privilege, and with how that right is protected by the statute.¹⁵⁰ But he also notes, in a footnote, ‘the possibility that the right to legal professional privilege has crystallised into an implicit constitutional right.’¹⁵¹ We need not resolve the question of whether this ‘privilege’ is now a constitutional right. It is enough to consider how the privilege will affect what are, unquestionably, constitutional rights.

We know, again, that what clients tell their lawyers is, in general, confidential. In general, but not always. Let’s focus on criminal cases, just to put the point as starkly as possible. The General Council of the Bar devotes an entire Rule, Rule 4.11, to the ‘Position of Counsel briefed in a criminal case who is informed by his client that he is guilty of the offence charged.’¹⁵² As the Rule explains, an advocate who has received such a confession is seriously constrained in the defence he can present.

He may appropriately argue that the evidence offered by the prosecution is insufficient to support a conviction and may take advantage of any legal matter which might relieve the accused of criminal liability.

But:

Counsel may not in the proceedings assert that which he knows to be untrue nor may he connive at or attempt to substantiate a fraud or an untruth.

Now this raises a question: What does the lawyer say to the client about this possibility? This question Rule 4.11 answers only in part. It says that

[w]here a client makes a confession to his counsel either before or during criminal proceedings, counsel should explain to the client the basis on which counsel may continue with the case.

Then the client gets to decide, after hearing about that ‘basis,’ whether to continue with the counsel or not. At least as far as the Rules indicate, the client who wants a more wholehearted defense is perfectly free to discharge that counsel, and then go on to hire another and this time falsely maintain his innocence. It is not, as far as I know, a crime to lie to your lawyer. As long as the client stayed off the witness stand he would not be guilty of perjury – and might

¹⁵⁰ *Thint* (n 56 above) para 183 (footnote omitted).

¹⁵¹ *Thint* (n 56 above) para 183 n123 (judgment of Langa CJ).

¹⁵² General Council of the Bar of South Africa, Uniform Rules of Professional Conduct, Rule 4.11.

get a stronger defense. Clients dependent on state-funded counsel may not be able to shop for a new lawyer in this fashion – but richer accused might well find it worth their while. (Whether this outcome should be seen as engaging the right of access to the courts – via that second counsel – or as generating unfair discrimination between rich and poor accused is beyond the scope of this article.)

Such problems arise, however, only after the client has confessed. The Rule does not tell us whether counsel should explain the provisions of Rule 4.11 *before* the client utters his indiscreet confession. What *should* the lawyer say at that stage? Does she say, ‘Please tell me about the charges against you? Remember that whatever you tell me is confidential?’ If she does, and the client admits his guilt, and the lawyer informs him that she will now be able to defend him only in a constrained way, he might well feel that the confidentiality he enjoyed was less complete than advertised. He might, indeed, feel deceived. Perhaps it would be fair to say that this series of events amounted to a breach of his dignity.

Or does she say, instead, ‘Please tell me about the charges against you. Remember that whatever you tell me is confidential, but keep in mind that if you tell me you are guilty, I won’t be able to argue that you are actually innocent.’ Though an accurate (though incomplete) statement of the law, surely a client’s dignity requires the lawyer to explain the law governing his situation. Another Rule, Rule 4.6, seems to endorse this proposition, though not particularly comprehensively. It says that

[c]ounsel is entitled to advise his client whether any proposed conduct will contravene the law ... [but] is clearly not entitled to devise a scheme which involves his client in the commission of any offence.¹⁵³

Explaining the limits on confidentiality before they come into play doesn’t seem to me to amount to ‘devising a scheme’ to involve the client in an offence. It does, however, invite the client to manufacture a false story so as to be able to offer a more vigorous defense. That hardly seems to serve the interest in justice, and may in fact lead to the lawyer putting on testimony which is false - though she will not know it.

Now this warning about the dangers of telling the truth would clearly be unlawful if lawyers are duty-bound to seek and obtain the truth from their clients. But are they? We can take for granted that

¹⁵³ General Council of the Bar of South Africa, Uniform Rules of Professional Conduct, Rule 4.6.

lawyers are not permitted to lie to courts.¹⁵⁴ But are they obliged to seek the truth? I don't find that statement, in so many words, in the rules of the bar. Suppose we infer, however, that lawyers should seek the truth from their clients, in the service of what Rule 3.2 calls their 'overriding duty not to mislead the Court.'¹⁵⁵ How hard are they supposed to look for the truth? The answer surely isn't that each lawyer is to adopt the perspective of the prosecutor with respect to her own client. Prosecutors, or in civil cases the lawyers for the other side, play that function. The lawyer dealing with her own client may want to learn the truth from him, but she must decide when she has done so, and surely she should lean towards accepting the truth of what her client tells her rather than adopting the stance of the opposing advocate. And so, presumably, there are degrees of inquisition that the lawyer ordinarily ought not to adopt; a benefit of the doubt that each lawyer should ordinarily give her own client. Why? Perhaps as a matter of dignity; perhaps as a matter of promoting access to the courts; perhaps in the service of other constitutional values.

Suppose, now, that in some way the lawyer views what the client faces as unjust. Suppose the lawyer knows, for example, that a client faces cut-off of her already very small government benefits if it turns out that the client is receiving any income at all 'on the side.' This may not be an issue under South African benefits law; it assuredly is in the US. How far should the lawyer probe to find out if the client is receiving such income? What if the lawyer knows that as a practical matter no one can survive on the benefits available, and so everyone is likely to be scrabbling together some scraps of additional income on the side? What if the application for benefits that the lawyer will assist the client in filling out must affirm complete disclosure of all income? How hard should the lawyer push to find out every bit of income? Does the injustice she perceives justify her not pushing all that hard, perhaps carefully avoiding learning what she suspects she might hear if she asked the wrong question? Should she explain the law to the client so that the client can work out for himself what the right answer is, and provide it? Should she (as a colleague of mine, Kate Kruse, has suggested) ask the client to reason with her about the justice of the law in question?

In answering all of these questions, the lawyer is, essentially, practicing the constitutional law of lawyering. Or, rather, the lawyer perhaps should be seen to be *making* the constitutional law of

¹⁵⁴ General Council of the Bar of South Africa, Uniform Rules of Professional Conduct, Rule 3.2.

¹⁵⁵ General Council of the Bar of South Africa, Uniform Rules of Professional Conduct, Rule 3.2.

lawyering. The reflective practice of law, understood this way, is very much a training in the tasks of constitutional judging.

The issues I've just described are, I hope, ones that intrigue you as subjects for scholarship. They have intrigued me as subjects for scholarship; I've written at length on the issues of what lawyers should say to their clients, as have many other clinical scholars in the United States.¹⁵⁶ Writing about these issues, and teaching about them to our students, are contributions to the constitutional practice of law.

But to ask students to think about issues is not the same as asking them to take responsibility for resolving them. The task of the judge is not to decide matters in the abstract, but in the concrete and particular. The task of the lawyer is not to reflect as a philosopher on morality and law, nor (contrary to the injunction of Justice Holmes that I quoted early in this essay) 'to follow the existing body of dogma into its highest generalisation by the help of jurisprudence,'¹⁵⁷ but to make lawful, moral decisions in the representation of clients. In short, the ultimate training ground for law students as they prepare to be lawyers and judges is the practice of law itself. This is, of course, an argument for clinics and similar teaching approaches.¹⁵⁸ It is not an argument for South Africa only; on the contrary, the same considerations point in the same way in the United States. Over the past few years, legal educators in the US have expressed greater concern that they are not yet contributing as much as they should to the preparation of their students for the practice of law as they should. Recognising the strength of law schools' training in what it calls the 'cognitive apprenticeship' for lawyering, the Carnegie Foundation for the Advancement of Teaching has recently urged in a volume on legal education that law schools must do much more to contribute to their students' apprenticeship in the 'skills' of lawyering and, perhaps most pertinently, in the 'values' of lawyering as well.¹⁵⁹

¹⁵⁶ Many of the issues just sketched in the text are addressed, at length, in a chapter entitled 'Truth and consequences' in Ellmann *et al* (n 78 above) 227-78.

¹⁵⁷ Much of Holmes' own passion seems to have been directed to exactly this quest for 'legal insight and intellectual achievement,' Pillsbury (n 28 above) 338. But it is striking that his perception of 'the infinite' as immanent in the path of the law may have grown from 'the discovery of some deep—and previously unfulfilled—love' for another person. Pillsbury (n 28 above) 361 n 45 quoting MJ Horwitz *The transformation of American law, 1870-1960* (1992) 143.

¹⁵⁸ On South Africa's law clinics, see W de Klerk 'University law clinics in South Africa' (2005) 122 *South African Law Journal* 929.

¹⁵⁹ WM Sullivan *et al Educating lawyers: Preparation for the profession of law* (2007). See also Roy Stuckey *et al Best practices for legal education: A vision and a road map* (2007), available at http://www.cleaweb.org/documents/best_practices/best_practices-full.pdf. For an argument that one way to prepare students for the practice of law is to make one year of law school the legal

The upshot of this argument is that South African law schools, like American ones, may well need to focus somewhat less on the accumulation of doctrinal instruction and somewhat more on the step-by-step engagement of students in apprenticeship for practice. I do not want to offer specific suggestions on this score. However; it is difficult enough to envision how to reshape American legal education – which is graduate education, and which leads directly to practice – and I do not want to pretend to have a blueprint for analogous efforts here. But I hope I have shown you that constitutional judging is bound up with the values and the character of those who do it; that constitutional lawyering is training for constitutional judging; and accordingly that preparation for constitutional lawyering must be a key focus of legal education in a constitutional state. To that degree, I've sought to mark the path of the law.

equivalent of the 'rotations' through practice settings that are an integral part of medical school, see S Ellmann 'The clinical year' 53 *New York Law School Law Review* 877 (2009).