

TWO SOUTH AFRICAN MEN OF THE LAW

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I. INTRODUCTION

I write to celebrate two great South Africans who have recently left us: Nelson Mandela and Arthur Chaskalson. I never met Nelson Mandela—though I did hear him speak in Yankee Stadium—but I had the great privilege to be a friend of Arthur Chaskalson for twenty-five years, and some of what I will say about him comes only from my own memories.

Nelson Mandela—as all the world knows—was the heroic leader of the African National Congress (ANC) who became post-apartheid South Africa’s first president. He was also a lawyer, and I will argue that his connections to law were deeply important. Fewer people recall Arthur Chaskalson, who was not a politician, but, like Mandela, was a lawyer—though among lawyers and constitutionalists he was well known and immensely admired. He was a leader of anti-apartheid lawyering in the old South Africa and became the first president of the Constitutional Court created as part of the founding of a democratic nation.¹

I wish to tell here a part of the story of Nelson Mandela and Arthur Chaskalson. One cannot describe a life fully in a few pages, but I will try to give a sense of the remarkable achievements of these two men, to illuminate the profound role that law played in their lives and their achievements, and to mark the ways in which their lives were profoundly connected to each other.

It may seem startling to say that law was integral to the work of Nelson Mandela, who spent decades in prison as a rebel and a violator of South Africa’s laws. Despite this, I will begin by focusing on the deep connection to law that Mandela had. It is less surprising to suggest that law was integral to the work of Arthur Chaskalson, who practiced law for many decades and then became an outstanding jurist. In remembering him, however, I will emphasize that

* Professor of Law, New York Law School. This essay grows out of a presentation I made at the joint session of the sections on African and South Asian law at the Association of American Law Schools Annual Meeting in 2014. I also had the chance to speak about Nelson Mandela at a celebration of his life at New York Law School; a symposium at Rutgers Law School-Newark, sponsored by the *Rutgers Race and the Law Review*; and a plenary session on “Nelson Mandela: Law and the Quest for Equality,” at the Law and Society Association Annual Meeting in 2014. I spoke about Arthur Chaskalson at memorials for him in 2013 at American University, Washington College of Law, and at the Cornell Club in New York City (sponsored by the Southern Africa Legal Services Foundation). My thanks to the presenters and attendees at each of these events for their thoughtful comments and to the organizers for the opportunities to talk about these two remarkable people; to Carolyn Schoepe of the Mendik Law Library at New York Law School for helpful research support; and to my wife Teresa Delcorso.

1. Douglas Martin, *Arthur Chaskalson, Chief South African Jurist, Dies*, N.Y. TIMES, Dec. 4, 2012, at A23, available at http://www.nytimes.com/2012/12/04/world/africa/arthur-chaskalson-south-african-chief-justice-dies-at-81.html?_r=0.

Chaskalson's commitment to law was forged in years when law was the source of tremendous injustice. That reality deeply affected him, just as it deeply affected Nelson Mandela. Finally, I will discuss briefly the lessons that these lives suggest for our understanding of what lawyers can bring to wrenching struggles for social justice.

II. NELSON MANDELA: LAWYER AND LAWBREAKER

In the early 1950s, Nelson Mandela and Oliver Tambo, who went on to lead the ANC in exile,² founded “the only firm of African lawyers” in South Africa.³ Mandela writes in his autobiography—a public man's autobiography, published while he was the president of South Africa, but nevertheless a vivid expression of his thoughts—that:

I realized quickly what [the law firm] Mandela and Tambo meant to ordinary Africans. It was a place where they could come and find a sympathetic ear and a competent ally, a place where they might actually feel proud to be represented by men of their own skin color. This was the reason I had become a lawyer in the first place, and my work often made me feel I had made the right decision.⁴

He was, in short, a “cause lawyer”—a lawyer who practices law not for personal benefit, but for a cause.⁵ Perhaps some cause lawyers see the law simply as the path by which they serve their cause and do not deeply care about the law as such. But Nelson Mandela was a man devoted to the law even though he frequently broke it and insisted on the moral rightness and necessity of doing so.

We can begin to get a sense of Mandela's connection to law from his second-most famous courtroom moment. The most famous came in the “Rivonia trial,” when Mandela and other ANC leaders stood trial for their lives.⁶ Arthur Chaskalson, as we will see later, was one of Mandela's lawyers in the Rivonia trial.⁷ Mandela told the court in 1964, fifty years ago, that:

During my lifetime I have dedicated myself to this struggle of the African people. I have fought against white domination, and I have fought against black domination. I have cherished the ideal of a democratic and free society in which all persons live together in harmony and with equal opportunities. It is an ideal which I hope to live for and to achieve. But if needs be, it is an ideal for which I am prepared

2. *Oliver Reginald Tambo*, S. AFR. HIST. ONLINE, <http://www.sahistory.org.za/people/oliver-reginald-tambo> (last visited Jan. 19, 2015).

3. NELSON MANDELA, *LONG WALK TO FREEDOM: THE AUTOBIOGRAPHY OF NELSON MANDELA* 149 (1995) [hereinafter *MANDELA, LONG WALK TO FREEDOM*].

4. *Id.* at 150.

5. See Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 3, 3 (Austin Sarat & Stuart Scheingold eds., 1998) (describing cause lawyers as “committed to using their professional work as a vehicle to build the good society”).

6. *MANDELA, LONG WALK TO FREEDOM*, *supra* note 3, at 351–78.

7. See *infra* note 96 and accompanying text.

to die.⁸

When Mandela spoke those words while on trial for sabotage, however, he was already a prisoner.⁹ After becoming the first head of the ANC's military wing, Umkhonto we Sizwe, he had left the country illegally and stayed underground when he returned.¹⁰ He was captured and put on trial in late 1962 for the relatively modest offenses of "inciting people to strike and . . . leaving the country without a passport"—for which he would be sentenced to five years without parole.¹¹

In his 1962 trial—Mandela's second-most famous courtroom moment—Mandela appeared in court dressed in African aristocratic clothes.¹² The effect would have been all the more striking because he was a notably stylish Western dresser.¹³ In court, representing himself, he declared to the magistrate:

Why is it that in this courtroom I am facing a white magistrate, confronted by a white prosecutor, escorted by white orderlies? . . . Why is it that no African in the history of this country has ever had the honor of being tried by his own kith and kin, by his own flesh and blood? I will tell Your Worship why: the real purpose of this rigid color bar is to ensure that the justice dispensed by the courts should conform to the policy of the country, however much that policy might be in conflict with the norms of justice accepted in judiciaries throughout the civilized world. . . . I detest most intensely the set-up that surrounds me here. It makes me feel that I am a black man in a white man's court.¹⁴

This is a powerful statement, but we should not miss the attention to law that is part of this denunciation of structural racism. Mandela invokes "the norms of justice accepted in judiciaries throughout the civilized world," and he addresses the magistrate, as South African convention required, as "Your Worship." He also said to the court, "I hold Your Worship in high esteem and I do not for one single moment doubt your sense of fairness and justice."¹⁵

Why does he speak in these terms? One answer is, of course, strategy. Mandela was a courtroom lawyer and knew how to maneuver in court. But people gravitate to the strategies with which they are comfortable, and Nelson Mandela's attachment to law had deep roots. Adam Sitze, in an insightful essay on "Mandela and the Law," points out that Mandela actually studied law for *fifty years*.¹⁶ His

8. MANDELA, LONG WALK TO FREEDOM, *supra* note 3, at 368.

9. *Id.* at 362.

10. BOB HEPPLE, YOUNG MAN WITH A RED TIE: A MEMOIR OF MANDELA AND THE FAILED REVOLUTION, 1960–1963 37–40 (2013).

11. MANDELA, LONG WALK TO FREEDOM, *supra* note 3, at 332–33.

12. *Id.* at 324.

13. Bob Hepple, who assisted (but did not represent) Mandela in this trial, recalls that Mandela "was a smart dresser, wearing tailor-made three-piece suits in court and at public meetings." HEPPLE, *supra* note 10, at 35–36.

14. MANDELA, LONG WALK TO FREEDOM, *supra* note 3, at 326.

15. NELSON MANDELA, THE STRUGGLE IS MY LIFE 125 (1978) (reprinting transcript excerpts from this trial of Mandela, which was held in Pretoria from Oct. 15 to Nov. 7, 1962).

16. Adam Sitze, *Mandela and the Law*, in THE CAMBRIDGE COMPANION TO NELSON

decades of study are all the more striking because he did not actually practice law for very long;¹⁷ he started in 1951, went underground in 1961, and in between spent much of his time in politics and as an accused on trial for treason, of which he was acquitted.¹⁸ What did he learn from the law books? Mandela answers:

As a student, I had been taught that South Africa was a place where the rule of law was paramount and applied to all persons, regardless of their social status or official position. I sincerely believed this and planned my life based on that assumption. But my career as a lawyer and activist removed the scales from my eyes.¹⁹

Sitze emphasizes that Mandela's first college law courses at Fort Hare University would likely have been infused with admiration for the British idea of the rule of law—and with criticism of South African law for its departures from that ideal—and we can hear all of that in these comments.²⁰ Mandela himself continues in words that, in a sense, sum up the role of law in South Africa: “I never expected justice in court, however much I fought for it, and though I sometimes received it.”²¹

None of this is to say that Nelson Mandela felt obliged to obey the laws of apartheid. He did not. Indeed, he considered disobeying them morally obligatory and did so repeatedly.²² As the leader of Umkhonto we Sizwe, he was in fact guilty of sabotage,²³ and he had rejected nonviolence as an ineffective strategy for overthrowing apartheid.²⁴ He may also have been a Communist—like many other dedicated opponents of apartheid.²⁵ During the Rivonia trial, Mandela told the

MANDELA 134, 134 (Rita Barnard ed., 2014).

17. Justin Hansford of St. Louis University School of Law is studying Mandela's law practice, about which relatively little seems to be known.

18. Heinz Klug pointed out the brevity of Mandela's law practice career in his comments at the Law and Society Association session.

19. MANDELA, LONG WALK TO FREEDOM, *supra* note 3, at 260.

20. Sitze, *supra* note 16, at 137–39.

21. MANDELA, LONG WALK TO FREEDOM, *supra* note 3, at 260.

22. Sitze points out us that lawbreaking was part of Mandela from the start—in the form of his original, Xhosa first name—Rolihlalha—which Sitze explains “means ‘pulling the branch of a tree’ or ‘troublemaker’ or, as Derrida will slyly note, ‘uprooting [déracinement].’” Sitze, *supra* note 16, at 156. Sitze urges that Mandela's relation to the law went beyond

a synthesis of the various models of conscience we've already come to expect from the Western tradition (such as the one that is obedient to a “higher law” than the law of the state or the one that follows the dictates of an “inner voice” more compelling than any external command).

Id. at 155–56. Here, however, I am inclined to disagree. To my mind, Mandela's achievement as a lawyer was precisely to insist on taking the best aspirations of the legal tradition, Western and African, to their logical conclusion—the demand for an end to the injustice of apartheid.

23. MANDELA, LONG WALK TO FREEDOM, *supra* note 3, at 360.

24. *Id.* at 360–61.

25. See General Secretary Comrade Blade Nzimande, SACP Official Tribute to Madiba, SACP (Dec. 13, 2013), <http://www.sacp.org.za/main.php?ID=4158> (discussing the relationship both Mandela and ANC had with the South African Communist Party); see also Bob Hepple, *Was he or wasn't he?*, LONDON REVIEW OF BOOKS, Jan. 23, 2014, available at <http://www.lrb.co.uk/v36/n02/letters>. Amazingly, Mandela apparently remained on a “U.S. terrorism watch list” until

court, “I would say that the whole life of any thinking African in this country drives him continuously to a conflict between his conscience on the one hand and the law on the other.”²⁶ Later in this speech, he went on to declare:

But there comes a time, as it came in my life, when a man is denied the right to live a normal life, when he can only live the life of an outlaw because the government has so decreed to use the law to impose a state of outlawry upon him.²⁷

None of this is the language of someone indifferent to law. Rather, it is the language of someone deeply attached to, and deeply disappointed by, law—almost a lover’s complaint. “I was driven to this situation,” he emphasizes.²⁸ Mandela, it seems, saw and embraced the ideals of law, even as he found them honored in South Africa only in the breach. He was a lawbreaker *because of* the law.

Nelson Mandela’s connection to law was not only a matter of political or moral evaluation but also of personal engagement. Mandela describes his courtroom work as “rather flamboyant.”²⁹ He says, “I did not act as though I were a black man in a white man’s court, but as if everyone else—white and black—was a guest in my court.”³⁰ He acknowledges not being immune to flattery,³¹ and as he recounts his appearance in court after his arrest, he is cheered by the “deference and professional courtesy” he received as a lawyer.³² Elsewhere in his autobiography, he acknowledges that he was always prone to believe that he could persuade anyone if he could just talk to them “face-to-face.”³³ He writes that “we believed that all men . . . were capable of change,”³⁴ and again and again notes the decent aspects of people whom he encountered, including lawyers,³⁵ judges,³⁶ police officers,³⁷ and jailers.³⁸ Such a person could flourish in court, where the

2008—truly a reflection not of “intelligence” at work but of its opposite. See Caitlin Dewey, *Why Nelson Mandela was on a terrorism watch list in 2008*, WASH. POST, Dec. 7, 2013, <http://www.washingtonpost.com/blogs/the-fix/wp/2013/12/07/why-nelson-mandela-was-on-a-terrorism-watch-list-in-2008/> (discussing Mandela’s relationship with communism and the United States).

26. MANDELA, *LONG WALK TO FREEDOM*, *supra* note 3, at 330.

27. *Id.* at 331.

28. *Id.*

29. *Id.* at 153.

30. *Id.*

31. *Id.* at 317.

32. MANDELA, *LONG WALK TO FREEDOM*, *supra* note 3, at 317.

33. *Id.* at 508.

34. *Id.* at 418.

35. *See id.* at 163 (recalling “offers of help from a number of well-known Afrikaner lawyers” in his 1954 disbarment case), 233 (remembering Oswald Pirow, the prosecutor in Mandela’s treason trial, as “a humane man without the virulent personal racism of the government he was acting for”).

36. *See id.* at 224 (describing the judge in Mandela’s treason case as someone who “always stood for law, no matter what his own political opinions might be”).

37. *See id.* at 268 (“[W]e had the loyalty of many African policemen”), 314 (referring to a police officer who, despite testifying against the ANC, had “accurately explained the policy of the

chance to speak in an environment of deference and professional courtesy might be found.

In other words, Mandela seems to have discerned in the law not only formal values that he admired but also style and a particular form of order. Here again are his words:

I confess to being something of an Anglophile. When I thought of Western democracy and freedom, I thought of the British parliamentary system. In so many ways, the very model of the gentleman for me was an Englishman While I abhorred the notion of British imperialism, I never rejected the trappings of British style and manners.³⁹

These trappings are quite evident in the processes of South Africa's courts. If they are in some measure the trappings of an aristocracy, we should remember that Mandela himself was a member of the Thembu royal elite.⁴⁰ The Thembu in turn are part of the Xhosa, whom Mandela introduces as "a proud and patrilineal people with an expressive and euphonious language and an abiding belief in the importance of laws, education, and courtesy."⁴¹

Even as Mandela stood trial for his life, and afterwards when he went to Robben Island under a sentence of life imprisonment, the law played a prominent part in his life. While he waited to hear the sentence in the Rivonia trial—death or life imprisonment—he took and passed exams in law courses that he was taking by correspondence at London University, part of his long and ultimately successful effort to earn his LL.B.⁴²

Then, after he reached Robben Island, the authorities moved to disbar him, or in South African terms, to strike him from the roll of practicing attorneys.⁴³ Mandela resisted. "It is not easy for a prisoner on Robben Island to defend himself in court, but that is precisely what I intended to do."⁴⁴ So, for example, Mandela writes:

I informed the authorities that I planned to contest the action and would prepare my own defense. I told prison officials that in order to prepare adequately, I would need to be exempt from going to the quarry and would also require a proper table, chair, and reading light to work on my brief. I said I needed access to a law library and demanded to be taken to Pretoria.

My strategy was to overwhelm the prison authorities and the courts with legitimate requests, which I knew they would have a difficult time

ANC, and had not exaggerated or lied").

38. See MANDELA, LONG WALK TO FREEDOM, *supra* note 3, at 562 (recounting Mandela's warm farewells to two of his jailers).

39. *Id.* at 302.

40. See *id.* at 507 (explaining that Mandela "had been groomed to be a counselor to the king of the Thembu").

41. *Id.* at 4.

42. *Id.* at 372.

43. See *id.* at 426 (commenting that the state's attempt to disbar him was a form of harassment).

44. MANDELA, LONG WALK TO FREEDOM, *supra* note 3, at 426.

satisfying.⁴⁵

The deft manipulation of the available legal tools—a characteristic strategy of South Africa’s anti-apartheid lawyers—in due course took its toll: “I continued to bedevil the Law Society and registrar [of court] with demands, which they continued to deflect. Finally, several months and many letters later, without any fanfare and with just a cursory notification to me, they dropped the entire matter.”⁴⁶ The result was that although Nelson Mandela spent almost three decades in prison, he was never disbarred!⁴⁷

Mandela’s readiness to use the law against South Africa’s rulers remained a theme of his years in prison. When trouble arose of one sort or another while he was on Robben Island, Mandela repeatedly called on his lawyer—often to good effect.⁴⁸ It is not in the least inconsistent with his readiness to use the legal remedies at hand that he also used one lawyer, George Bizos, to smuggle messages to the ANC in exile.⁴⁹ Meanwhile, Mandela himself practiced law. He writes: “I sometimes considered hanging a shingle outside my cell, because I was spending many hours a week preparing judicial appeals for other prisoners, though this was forbidden under prison service regulations.”⁵⁰

We can hear his affection for order and law again in a speech he made after his release from prison in 1990.⁵¹ Speaking to a Soweto Stadium rally of 120,000 people, he offered them criticism as well as fellowship:

I expressed my delight to be back among them, but I then scolded the people for some of the crippling problems of urban black life. Students, I said, must return to school. Crime must be brought under control. I told them that I had heard of criminals masquerading as freedom fighters, harassing innocent people and setting alight vehicles; these rogues had no place in the struggle. Freedom without civility, freedom without the ability to live in peace, was not true freedom at all.⁵²

45. *Id.* at 426–27.

46. *Id.* at 427.

47. Nelson Mandela, Opening address to the Law Society of the Transvaal delivered by the President of the ANC (Oct. 29, 1993), *available at* <http://www.anc.org.za/show.php?id=4106>.

48. *See* MANDELA, LONG WALK TO FREEDOM, *supra* note 3, at 472–74 (resisting disciplinary charges against him), 494 (seeking “interdict [injunction] against the local Brandfort security police to restrain them from harassing [Mandela’s] daughter”), 508–09 (recounting an “urgent application for [Mandela’s] attorney to visit [him]” when prison authorities refused to give Mandela information about his wife’s health after she was in an auto accident), 521 (noting that after President Botha offered Mandela release if he renounced violence, Mandela “made a request to the commander of the prison for an urgent visit by [his] wife and [his] lawyer . . . so that [he] could dictate [his] response”).

49. *Id.* at 474.

50. *Id.* at 468.

51. *Id.* at 570.

52. *Id.* For a transcript of the speech itself, see *Nelson Mandela’s Address to Rally in Soweto*, S. AFR. HIST. ONLINE, <http://www.sahistory.org.za/topic/nelson-mandelas-address-rally-soweto> (last visited Sept. 7, 2014); *see also* Community Video Education Trust, “Today, my return to Soweto fills my heart with joy. At the same time I also return with a deep sense of

Once out of prison, Mandela and the ANC faced the tremendously delicate task of leading a country teetering on the brink of civil war to a resolution that would end apartheid without even worse suffering. Though it would be hard to mark directly the lines of cause and effect, it seems natural to infer that Nelson Mandela's love of the law and his comfort with it played a part in the shaping of the South African transition from apartheid to democracy.

That transition, though it was far from completely peaceful, may have been the most legalistic transfer of power of our times. South Africa's last apartheid Parliament itself formally enacted the Interim Constitution that had been negotiated—to be sure, well outside of Parliament's walls—to end apartheid.⁵³ The Interim Constitution was to be replaced by a final constitution framed by the Parliament elected in South Africa's first nonracial election in 1994.⁵⁴ But the democratic Parliament's choices were partially constrained in advance. The Interim Constitution included a set of constitutional principles and entrusted a new court, the Constitutional Court, with the authority to review the draft of the final constitution and block it from going into effect if the court found that the draft departed from those principles—as it subsequently did.⁵⁵ The final constitution that emerged enumerates rights and regulates powers in tremendous detail.⁵⁶ All this was the work of law-minded men and women, and in this period, as I will discuss more fully later, Arthur Chaskalson joined the ANC's Constitutional Committee and played a central role in the negotiations.⁵⁷ Mandela, himself a veteran user of legal technicalities, surely was comfortable with the prominent role of law in the implementation of South Africa's transition. To see the potential for an agreement—a transition made up of hundreds or thousands of small points rather than one very large point of total surrender or war—is a lawyerly move.

But the role of law was not only to provide the terms of settlement; negotiating about those terms also became a central part of the *process* of settlement. It seems clear that Nelson Mandela played a significant part in shaping that process,⁵⁸ and in doing so, brought to bear the approach and methods of law. It is not inappropriate to describe the negotiated end to apartheid as a national exercise in alternative dispute resolution. More prosaically, we can say that this process reflected an embrace of talk as a way to a settlement rather than, or more accurately, in addition to, force and pressure. Mandela writes: “In prison, my anger toward whites decreased, but my hatred for the system grew.”⁵⁹ “Lose your head

sadness” (Feb. 13, 1990), www.cvet.org.za/displayvideo.php?vid=2D-F5-2A.

53. S. AFR. (INTERIM) CONST., 1993. This constitution was enacted as Act 200 of 1993.

54. *See id.* at §§ 68–74.

55. *Id.* at § 71(1)(a). For the constitutional principles themselves, see *id.* at Schedule 4. The court's decisions reviewing the draft constitutional text are discussed briefly below. See *infra* note 170 and accompanying text.

56. *See* S. AFR. CONST., 1996. See, for example, the Bill of Rights (Chapter 2), with 33 separate sections, some of them in turn containing elaborate subparts.

57. *See infra* notes 145–48 and accompanying text.

58. MANDELA, LONG WALK TO FREEDOM, *supra* note 3, at 418 (stating that Mandela was heavily involved in shaping the negotiation process and the end of apartheid).

59. *Id.* at 568.

and lose your case,” Charles Hamilton Houston, one of the first of the path-breaking NAACP lawyers, used to say⁶⁰—and Mandela mastered that dispassionate lawyerly virtue.

In prison, Mandela also acquired many hard years’ worth of experience confirming the lawyers’ notion that talk can matter.⁶¹ Talking to warders was a matter both of pragmatics and principle, as Mandela explains:

I always tried to be decent to the warders in my section; hostility was self-defeating. There was no point in having a permanent enemy among the warders. It was ANC policy to try to educate all people, even our enemies: we believed that all men, even prison service warders, were capable of change, and we did our utmost to try to sway them.⁶²

He found confirmation of his beliefs over the years. The prisoners at Robben Island eventually achieved the end of the harsh regime of hard labor to which they had been subjected—even though in theory the warders held all the power and the inmates none.⁶³ As Mandela describes his departure from prison, he observes that several individual prison officers “reinforced my belief in the essential humanity even of those who had kept me behind bars for the previous twenty-seven and a half years.”⁶⁴

Finally, law was more than either a source of settlement terms or a guide to settlement process. I said earlier that Nelson Mandela’s response to South African law had almost the flavor of a lover’s complaint. Many South Africans, I think, believed both that South African law was deeply unjust and that law could and should be different. South Africa’s transition was so legalistic not just because law provided a useful substantive and procedural mechanism, but because the desire for a just rule of law was so strongly felt by Mandela himself and by many others. Mandela tells us that he “never expected justice in court, however much I fought for it, and though I sometimes received it”⁶⁵—but he yearned for a world in which

60. So Justice Thurgood Marshall remembered in a tribute reprinted in *College Honors Charles Houston '15*, AMHERST, Spring 1978, at 12, 13, available at <http://msa.maryland.gov/megafile/msa/speccol/sc2200/sc2221/000011/000016/pdf/i004097a.pdf>.

61. See generally Joseph Farrell & Robert Gibbons, *Cheap Talk Can Matter in Negotiations*, 48 J. ECON. THEORY 221 (1989).

62. MANDELA, *LONG WALK TO FREEDOM*, *supra* note 3, at 418.

63. For illuminating moments in this process, see *id.* at 428 (explaining how a Robben Island prisoner was able to blackmail a prison guard to get newspapers), 431 (stating that the prisoners treated a “tolerant” guard with mutual respect), 451 (“We had won a host of small battles that added up to a change in the atmosphere of the island”), 458 (describing the appointment of a new prison commanding officer, “reputed to be one of the most brutal and authoritarian officers in the entire prison service”), 463 (recounting that under the next commanding officer, Mandela and the other prisoners were allowed to hold a meeting outside the guards’ presence, and “[w]e decided that we would at least appear to be working, but what work we did would be at a pace that suited us. From then on, that is what we did, and we heard no more complaints from the commanding officer”), 488 (describing the authorities’ “capitulation” and announcement of “the end of manual labor” early in 1977).

64. *Id.* at 562.

65. *Id.* at 260.

justice would be exactly what he and other South Africans could expect and in which courts would be a central institution in providing it.

The question that South Africa faced after apartheid had been disestablished, however, was how to establish a genuine rule of law in its place. Actually, this question was an element of an even larger one: how to reconcile South Africa's deeply divided citizens with each other. Mandela, of course, demonstrated an extraordinary grace in finding ways to lead this process of reconciliation.⁶⁶ Meanwhile, the task of affirming the rule of law had its own importance. South Africans might have longed for law, but many of them, out of necessity, had also often violated the laws that apartheid put in place.⁶⁷ Moreover, in turning to a campaign of sabotage against the South African state, men and women like Nelson Mandela had come to refuse to grant apartheid law the degree of legitimacy that is entailed in acts of civil disobedience. Unlike those who pursue civil disobedience, they were quite prepared to break laws covertly rather than publicly, and they did not feel obliged to accept punishment, though they endured it with courage when it came. The task of reclaiming the potential of law was all the more complex since the Truth and Reconciliation Commission, a crucial element of the peaceful transition to democracy, sought to restore moral connection to South Africans, but in return provided amnesty from the retributive processes of the law.⁶⁸

Mandela had even, on occasion, bent the rules of the ANC because of what he saw as the urgent need to move the liberation struggle, and then the negotiation process, forward. For example, he raised public questions about the ANC's policy of nonviolence in the 1950s; he writes: "I was criticized by our executive for making that remark before it was discussed by the organization, but sometimes one must go public with an idea to push a reluctant organization in the direction you want it to go."⁶⁹ Later, while Mandela was in prison, he took steps to initiate negotiations with the government without having first been authorized by the ANC to do so. After meeting with the minister of justice, he recalls:

I told no one of my encounter. I wanted the process to be under way before I informed anyone. Sometimes it is necessary to present one's colleagues with a policy that is already a fait accompli. I knew that once they examined the situation carefully, my colleagues at Pollsmoor [Prison] and in Lusaka [where the ANC was in exile] would support

66. See Bill Keller, *Nelson Mandela, South Africa's Liberator as Prisoner and President, Dies at 95*, N.Y. TIMES (Dec. 5, 2013), http://www.nytimes.com/2013/12/06/world/africa/nelson-mandela_obit.html?pagewanted=all&_r=0. As South Africa's first post-apartheid president, he was, it seems, less engaged in day-to-day administration and the tasks of addressing South Africa's many social problems than in the broad effort at reconciliation that he exemplified so remarkably. *Id.*

67. See, e.g., MANDELA, LONG WALK TO FREEDOM, *supra* note 3, at 132 (describing how 250 people around South Africa violated unjust laws on the first day of the "Defiance Campaign").

68. See *Truth and Reconciliation Commission (TRC)*, S. AFR. HIST. ONLINE, <http://www.sahistory.org.za/topic/truth-and-reconciliation-commission-trc> (last visited Sept. 7, 2014) (describing the workings of the TRC).

69. MANDELA, LONG WALK TO FREEDOM, *supra* note 3, at 270.

me.⁷⁰

So how, after all that, was the rule of law to be reestablished?

In part, the rule of law could be reestablished by bringing new legal institutions into action, including, though not limited to, the new Constitutional Court. To create a court was one thing, to choose justices who could lead the process of giving life to a post-apartheid constitution was another. Mandela picked Arthur Chaskalson—who had represented him almost thirty years earlier at the Rivonia trial—to be the president of the new court, and the next section will detail why.⁷¹ What remained to be seen, however, was how the ANC government would respond if and when the court found some action of the new government unconstitutional.

That moment came quite soon in a case called *Executive Council of the Western Cape Legislature v. President of the Republic of South Africa*.⁷² The issue was whether two proclamations issued by President Nelson Mandela—affecting the process of establishing local government election districts in the Western Cape province—were outside his constitutional authority. The Constitutional Court held by a vote of nine to two that they were.⁷³ Mandela accepted the decision without hesitation, and, in a speech a year later commemorating the Sharpeville massacre, he said that “[w]e owe thanks to the Constitutional Court which has proved a true and fearless custodian of our constitutional commitments.”⁷⁴ I think that Nelson Mandela felt that the court’s decision was not an affront by the judiciary to the executive, but an instance of the two branches, each contributing—along with Parliament—to the freedom and equality of the people of South Africa by performing their own assigned roles. That was the South Africa Nelson Mandela had anticipated and hoped for, and his vision of that nation was, in important part, shaped by his commitment to the law.

III. ARTHUR CHASKALSON, ANTI-APARTHEID LEADER OF THE SOUTH AFRICAN BAR

George Bizos, a longtime friend of Arthur Chaskalson as well as lawyer and friend of Nelson Mandela,⁷⁵ tells a story from the early 1950s of what may have been his first encounter with Arthur.⁷⁶ As a student at the University of

70. *Id.* at 531.

71. See *infra* notes 151–53 and accompanying text.

72. 1995 (4) SA 877 (CC) (S. Afr.).

73. *Id.*

74. Pierre de Vos, *Lest We Forget*, CONSTITUTIONALLY SPEAKING, (Dec. 8, 2011), <http://constitutionallyspeaking.co.za/lest-we-forget/>.

75. See generally Rebecca Lowe, *Friend, client, confidant: George Bizos on 65 years of friendship with Nelson Mandela*, INT’L BAR ASS’N (Dec. 24, 2013), <http://www.ibanet.org/Article/Detail.aspx?ArticleUId=515d7b65-e271-4d56-82af-743491dd2ba0>.

76. See GEORGE BIZOS, ODYSSEY TO FREEDOM 91 (2007) (recounting a speech made by then-law student Arthur Chaskalson). In this part of the paper, I refer to Arthur Chaskalson as “Arthur,” as I was a friend of his for many years and cannot comfortably adopt the convention of referring to him only by his last name.

Witwatersrand's law school, Bizos was one of two candidates for the Student Representative Council. The candidates spoke at a public meeting where many questions raised the issue of the school's tradition of staying out of politics.⁷⁷ This was a difficult matter because the dominant politics of the time consisted of the establishment of the system of apartheid, to which Bizos was passionately opposed, and staying out of these issues might mean acquiescing to what was happening.⁷⁸ Bizos recounts:

At the end of the debate a tall first-year student [whom Bizos did not then know] made the shortest and most effective speech of the meeting, and one which swung the vote in my favour. He said, 'Mr. Chairman, we have for too long spoken about the university's tradition. The correct question to ask ourselves before we vote is surely: What is right and what is wrong?'⁷⁹

Arthur asked that question throughout his life. What is striking about his life is that he fully recognized that much of South African law was not right at all; nevertheless, he worked for decades within that system—and we must look at his life to understand why.

Committed to asking the questions of right and wrong, he must have come to be recognized in the 1950s as one of the critics of apartheid among the young advocates (the term for “barristers” in South Africa's divided bar). No doubt, his moral intensity and his intellectual ability contributed to his growing friendship with another advocate, Bram Fischer. Fischer was a pillar of the Johannesburg Bar, with a successful corporate practice, and a man of such personal warmth that it was said that he could “charm the birds out of the trees.”⁸⁰ He was also a Communist. He had been a leader of the Communist Party of South Africa when it was a legal entity, and after it was banned by statute, he became a leader of the underground South African Communist Party.⁸¹ South African Communists stood bravely against apartheid,⁸² and it seems safe to say that many people who joined the party did so first and foremost because it was so clearly right on this issue.

Arthur opposed apartheid too, and he profoundly respected Bram Fischer—he later wrote that Bram Fischer displayed “the foundational value of respect for human dignity . . . in every aspect of his life”⁸³—but he did not join Bram Fischer in the Communist Party.⁸⁴ Instead, Arthur made the decision, while still a student in

77. *See id.*

78. *See id.* at 90–91.

79. *Id.* at 91.

80. STEPHEN CLINGMAN, BRAM FISCHER: AFRIKANER REVOLUTIONARY 175 (1st. ed. 2000) (quoting a Johannesburg lawyer named Charlie Johnson describing Fischer).

81. *Id.*

82. *See, e.g., id.* (“[Communist] boycotters won their concessions without violence or dramatic confrontation.”).

83. Arthur Chaskalson, *The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of Our Constitutional Order*, 16 S. AFR. J. HUM. RTS. 193, 195 (2000).

84. Bizarrely, after Arthur's death, the South African Communist Party, now a part of the ANC alliance ruling the country, issued a press release asserting that he had been a member. Geoff Budlender, *Letter: Tony Leon Wrong on Many Fronts*, BUSINESS DAY (Dec. 11, 2012, 7:13

the 1950s, not to be a member of any political party.⁸⁵ I think he had found his path—he would stand in defense of principle, but he would do so as a lawyer rather than as a political activist. As he explained in another article years later:

If this restraining influence [created by the law and by those who pressed for a moral interpretation of that law] had not been there, there would have been no control whatever over the use or abuse of power; no restraint whatever of arbitrary or extralegal action. In such a situation the most oppressed section of the population would have been the most vulnerable. As [the anti-apartheid law scholar Etienne] Mureinik observed at the time . . . , “if we argue . . . that moral judges should resign, we can no longer pray, when we go into court as defence counsel, or even as the accused, that we find a moral judge on the bench.”⁸⁶

This decision, however, did not lead to a parting of the ways between Fischer and Arthur.⁸⁷ Quite the contrary, Arthur ultimately inherited from Fischer his desk—which Arthur decades later would bring to his chambers in the Constitutional Court—his law books, and even his advocate’s robe.⁸⁸

In the same years, Nelson Mandela, also a lawyer, was choosing quite a different course, as we have already seen.⁸⁹ After the Sharpeville killings in 1960, Mandela would decide to go underground and begin the creation of the ANC’s military wing.⁹⁰ Then, as previously discussed, he would be arrested, tried, and sentenced.⁹¹ When Mandela was already on Robben Island, he would be brought back for a second trial, the Rivonia trial, where he would be charged with sabotage.⁹² And at that trial, his legal team would be led by Bram Fischer, whom

AM), <http://www.bdlive.co.za/opinion/letters/2012/12/11/letter-tony-leon-wrong-on-many-fronts> [hereinafter Budlender, *Letter*]. Geoff Budlender, a leading South African advocate who had been a colleague and friend of Arthur for many years, cogently pointed out that this assertion contradicted Arthur’s explicit declaration as a member of the Constitutional Court in a case in which his impartiality had been challenged and rejected the possibility that a person so committed to integrity as Arthur Chaskalson was would have lied in such a declaration. *Id.* The Communist Party subsequently withdrew its claim. *Id.*

85. See *President of the Republic of S. Afr. v. South African Rugby Football Union*, 1999 (4) SA 147 (CC) at para. 23, 86 (S. Afr.) (rejecting application to recuse Chaskalson from the case, since (*inter alia*) Chaskalson was never a member of the ANC “or any related organisation”); Budlender, *Letter*, *supra* note 84 (quoting Chaskalson’s statement, in the course of the same case, that “for a brief period while I was a student I was a member of the Liberal Party. Apart from that I am not and have never been a member of any political party.”).

86. Arthur Chaskalson, *From Wickedness to Equality: The Moral Transformation of South African law*, 1 INT’L J. CONST’L L. 590, 598–99 (2003) (internal citation omitted) [hereinafter Chaskalson, *From Wickedness to Equality*].

87. See CLINGMAN, *supra* note 80, at 455.

88. *Id.*

89. See *supra* notes 6–11, 23–27, and accompanying text.

90. *Id.* For Mandela’s account of the police shootings of at least sixty-nine unarmed black demonstrators at Sharpeville in 1960, see MANDELA, *LONG WALK TO FREEDOM*, *supra* note 3, at 238.

91. See *supra* notes 7–11 and accompanying text.

92. See *supra* notes 6–11, 23–27, and accompanying text.

Mandela had known for more than a decade,⁹³ assisted by the young advocates Arthur Chaskalson, George Bizos, and others.⁹⁴

That trial ended in sentences of life imprisonment⁹⁵—a victory, and a great good fortune for South Africa, since it meant that Nelson Mandela would survive to later play the part he did, but a dreadful outcome all the same. Within a year, Bram Fischer himself would be charged with crimes, go underground, be captured and convicted, and be sentenced to life imprisonment.⁹⁶ Fischer died of cancer contracted while he was imprisoned.⁹⁷ Before Fischer died, his son, who suffered from cystic fibrosis, passed away; the father was not permitted to attend his son's funeral, and Arthur Chaskalson gave the eulogy.⁹⁸

The years that followed the Rivonia trial were grim ones. Mandela and other senior leaders were imprisoned on Robben Island.⁹⁹ The ANC and other leading anti-apartheid organizations had been banned, and efforts to reinvigorate them were harshly punished.¹⁰⁰ The international opposition that would gradually rise against apartheid had not yet gathered force.¹⁰¹ Meanwhile, the government tightened the screws of internal security law—notably by permitting detention without trial for renewable ninety-day periods, an authority that became a license to torture and kill detainees.¹⁰² Courts seemed all too willing to read these laws aggressively.¹⁰³ In other respects as well, the law appeared to be in the service of apartheid; in one notable example in 1961, well before the Rivonia trial, a decision

93. Fischer had been one of the defense lawyers for Mandela and other ANC leaders when they were tried in late 1952 for their acts of civil disobedience in the “Defiance Campaign.” See CLINGMAN, *supra* note 80, at 196. Fischer and Mandela likely knew each other even before that, because both were active in opposing apartheid in Johannesburg through the postwar years.

94. *Id.* at 301–04.

95. *Id.* at 321.

96. Drawing on CLINGMAN, *supra* note 80, I wrote about Fischer's decisions to violate the law. See Stephen Ellmann, *To Live Outside the Law You Must Be Honest: Bram Fischer and the Meaning of Integrity*, 17 S. AFR. J. HUM. RTS. 451 (2001).

97. See CLINGMAN, *supra* note 80, at 432–41 (explaining that Fischer was released to spend his last days in his brother's home, but remained legally a prisoner, and the Prisons Department reclaimed his ashes after his cremation).

98. *Id.* at 428.

99. *The Long Walk of Nelson Mandela: Chronology*, PBS–FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/mandela/etc/cron.html> (last visited Sept. 23, 2014).

100. See MANDELA, *LONG WALK TO FREEDOM*, *supra* note 3, at 438 (“The first few years on [Robben Island] were difficult times both for the organization outside and those of us in prison.”).

101. See CLINGMAN, *supra* note 80, at 446 (noting that for some years after Fischer's death in 1975, “the ANC in exile languished relatively ineffectively for all its efforts”); *The Long Walk of Nelson Mandela: Chronology*, *supra* note 99 (providing information on growing international pressure against apartheid over time).

102. See generally STEPHEN ELLMANN, *IN A TIME OF TROUBLE: LAW AND LIBERTY IN SOUTH AFRICA'S STATE OF EMERGENCY 15–25* (1992) (providing an overview of apartheid South Africa's internal security statutes).

103. See, e.g., *Rossouw v. Sachs*, 1964 (2) SA 551 (A) (S. Afr.) (dealing with the conditions of detention without trial, as applied to detainee Albie Sachs—later a justice of the Constitutional Court).

of the country's highest court, the Appellate Division, upheld the segregationist Group Areas Act, which one judge called a "colossal social experiment."¹⁰⁴

Arthur continued to practice law. In Geoff Budlender's words, "[h]e had a stellar commercial practice."¹⁰⁵ He wrote a number of articles on developments in insurance law.¹⁰⁶ He became a leader of the Johannesburg Bar, like Bram Fischer before him; he was conscientious about obeying the advocates' rules of ethics;¹⁰⁷ and his *South African History Online* biography reports:

He was a member of the Johannesburg Bar Council from 1967 to 1971 and from 1973 to 1984, the Chairman of the Johannesburg Bar in 1976 and again in 1982, a member and later Governor of the National Bar Examination Board (1979-1991), and the Vice Chairman of the General Council of the Bar of South Africa.¹⁰⁸

Meanwhile, Arthur did not give up. As he told a film interviewer not long before his death, "I believed the change would come . . . I always believed; the question was just how and when it would happen."¹⁰⁹ He continued to handle sensitive political cases, often with his good friend George Bizos. For example, he represented Winnie Mandela after she was charged, in late 1969 or early 1970, "under the Suppression of Communism Act for attempting to revive the ANC."¹¹⁰ Then, in 1978, Arthur and his wife Lorraine had dinner with the distinguished anti-apartheid lawyers Sydney and Felicia Kentridge and a project officer from the

104. *Minister of the Interior v. Lockhat*, 1961 (2) SA 587 (A) at 602 (S. Afr.).

105. *See generally* Geoff Budlender, Funeral Eulogy for Arthur Chaskalson (Dec. 3, 2012) [hereinafter Budlender, Funeral Eulogy] (transcript available at <http://ohrh.law.ox.ac.uk/he-believed-in-people-remembering-arthur-chaskalson/>).

106. *See, e.g.*, A. Chaskalson, *Insurance Law*, 1964 ANN. SURV. OF S. AFR. L. 262, 262–73 (1964) (discussing developments in this commercial field in the year that the Rivonia trial came to its conclusion).

107. George Bizos, *The Arthur Chaskalson I Knew* (Dec. 6, 2012), available at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=345454&sn=Detail&pid=71619>.

108. *Chief Justice Arthur Chaskalson*, S. AFR. HIST. ONLINE, <http://www.sahistory.org.za/people/chief-justice-arthur-chaskalson>. From 1988–93 he was also Chairman of the Rhodes Scholarship Selection Committee for South Africa. *Id.*

109. *SOFT VENGEANCE: ALBIE SACHS AND THE NEW SOUTH AFRICA* (Ginzberg Productions forthcoming 2014).

110. *MANDELA, LONG WALK TO FREEDOM*, *supra* note 3, at 446. Chaskalson represented Winnie Mandela twice in cases that went to the Appellate Division, then South Africa's highest court. *S v. Mandela*, 1972 (3) SA 231 (A) (S. Afr.); *S v. Mandela and Another*, 1974 (4) SA 878 (A) (S. Afr.). He also represented people charged with terrorism, *see, e.g.*, *S v. Hosey*, 1974 (1) SA 667 (A) (S. Afr.); *S v. Sexwale and Others*, 1978 (2) SA 363 (T) (S. Afr.), and a student charged with the crime of producing undesirable publications (two issues of a college newspaper), *S v. Moroney*, 1978 (4) SA 489 (A) (S. Afr.). Earlier, after Bram Fischer was sent to prison, Chaskalson represented Fischer in an effort to prevent his disbarment. *Society of Advocates of South Africa (Witwatersrand Division) v. Fischer*, 1966 (1) SA 133 (T) (S. Afr.). He and Bizos also represented five leaders of the National Union of South African Students who, as Bizos has written, were charged with furthering communism essentially because they advocated changes in South Africa like those urged by the banned ANC. *BIZOS*, *supra* note 76, at 384–97. That trial ended in acquittal. *Id.*

Carnegie Foundation named David Hood.¹¹¹ The Chaskalsons learned from the others about the idea of creating a South African public interest law firm, modeled on the NAACP Legal Defense & Education Fund in the United States.¹¹² They returned home that evening to discuss this—Geoff Budlender said in his eulogy of Arthur that he and his wife “supported each other in everything which they did. They took care of each other when they were in trouble, they gave each other advice when they did not know what to do, they acted together, in unison. They were a team.”¹¹³ They were raising their two young sons—both now lawyers in South Africa—at the time.¹¹⁴ The following day, Arthur called Felicia Kentridge and said that “if there was a place for me in the project, I’d be very interested in joining it.”¹¹⁵

The Legal Resources Centre (LRC), which Arthur led from its inception in 1979,¹¹⁶ was a remarkable organization. It remains a remarkable organization, I should add, still at the forefront of a range of constitutional rights litigation in the new South Africa.¹¹⁷ Arthur was a member of the legal establishment, and he built the LRC as an organization with establishment protection in the form of a well-connected Board of Trustees.¹¹⁸ That protection turned out to be critical, as he had thought it might be; after the end of apartheid, the Truth and Reconciliation Commission unearthed evidence that the state had drawn up papers to ban the LRC.¹¹⁹ He shaped a practice that was precise and careful—he once told me that their papers never included an unnecessary adjective.¹²⁰ He inhabited the conventions of the bar, and it was a major step when, years later, he and his co-counsel in the Delmas treason trial moved to recuse the judge,¹²¹ and decided they

111. Interview by Legal Resources Centre Oral History Project with Arthur Chaskalson, transcript at 4 (Dec. 4, 2007) *available at* http://www.historicalpapers.wits.ac.za/inventories/inv_pdf/AG3298/AG3298-1-025-text.pdf [hereinafter Chaskalson LRC Oral History].

112. *Id.*

113. Budlender, Funeral Eulogy, *supra* note 105, at 8.

114. *See* Interview by Len Morris, Carnegie Corp. Oral History Project, with Arthur Chaskalson, in Johannesburg, S. Afr., transcript at 11 (Aug. 7, 1999) [hereinafter Chaskalson Carnegie Corporation Oral History] (transcript available at http://www.columbia.edu/cu/lweb/digital/collections/oral_hist/carnegie/pdfs/arthur-chaskalson.pdf) (describing their life at the time of their work on apartheid).

115. Chaskalson LRC Oral History, *supra* note 111, at 4.

116. *See id.* at 4–5 (discussing organizational and leadership changes from original conception of LRC and delay of its start date).

117. For information on the LRC’s current work, see *Welcome to Legal Resources Centre*, LEGAL RES. CTR., <http://www.lrc.org.za/> (last visited Jan. 23, 2015).

118. *See* Chaskalson LRC Oral History, *supra* note 111, at 11–12 (discussing the protection of the LRC through the Board of Trustees).

119. *See id.* (describing the threat of banning and informal pressure against the LRC).

120. *See* Stephen Ellmann, *Cause Lawyering in the Third World*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 349, 367 (Austin Sarat & Stuart Scheingold eds., 1998) (quoting Arthur).

121. Stephen Clingman recalled the recusal motion in the Delmas trial—a high-profile treason trial—in his talk at the remembrance of Arthur Chaskalson held at American University, Washington College of Law in 2013. *See* Stephen Clingman, Arthur Chaskalson Memorial at American University, Washington College of Law (Mar. 4, 2013) (transcript available at

could no longer take tea with him.¹²² Yet this organization, painstakingly constructed to take advantage of each crack in the edifice of apartheid's legal system, existed not to be circumspect, but to challenge the laws of apartheid in apartheid's own courts.

Arthur challenged apartheid, and did so by wielding precision and principle. He was a scrupulous lawyer. Representing Dullah Omar—later Minister of Justice—in a challenge to Omar's detention under the state of emergency in the mid-80s, Arthur raised an argument about a possible interpretive limit on emergency power, but apparently also indicated to the trial court that he did not have too much confidence in the argument.¹²³ Who ever heard of an American lawyer saying he lacked confidence in his own argument? But in the Appellate Division, Arthur went on to say that he now had more confidence in this same argument¹²⁴—and whoever heard of that either? Arthur did not win that case,¹²⁵ but I think the arguments he and other detainees' lawyers made still operated to preserve rule of law principles as a part, a sadly constrained part, of South African law.

Sometimes, amazingly, they won. As Arthur himself wrote in 2003:

There was a small but vigorous human rights bar within South Africa that continually brought issues pertaining to apartheid laws before the courts and demanded decisions regarding them. Although their powers were curtailed, the courts remained an independent source of authority within the white power structure and an important institution within which infringement of rights could be challenged. Challenges were brought and not infrequently succeeded.¹²⁶

So, for example, Arthur and the LRC challenged aspects of the vile “pass laws,” meant to keep black South Africans from enjoying the legal right to remain in South Africa's cities.¹²⁷ One such challenge, *Komani NO v. Bantu Affairs Administration Board, Peninsula Area*,¹²⁸ dealt with a regulation under which, as Arthur later put it, a “wife had been prosecuted for living with her husband in Cape Town.”¹²⁹ Arthur argued the case challenging this practice and succeeded in convincing the Appellate Division that the pass laws—laws never meant to have

<http://www.lrc.org.za/publications/papers/item/arthur-chaskalson-memorial-speech-by-professor-stephen-clingman-american-university-washington-college-of-law-washington-dc-4-march-2013>).

122. I believe Arthur told me about the decision not to continue taking tea with the judge.

123. *Omar v. Minister of Law and Order* 1987 (3) SA 859 (A) at 891 (S. Afr.).

124. *Id.*

125. I wrote a book about the state of emergency, part of the point of which was to show that every important state of emergency case in the Appellate Division upheld the state's powers. See generally ELLMANN, *supra* note 102.

126. Chaskalson, *From Wickedness to Equality*, *supra* note 86, at 595.

127. See Chaskalson Carnegie Corporation Oral History, *supra* note 114, at 17–28 (describing various LRC challenges to the pass laws, which regulated the movement and residence of Africans in South Africa).

128. 1980 (4) SA 448 (A) (S. Afr.).

129. Chaskalson Carnegie Corporation Oral History, *supra* note 114, at 17.

benign effects for black people—actually invalidated this regulation.¹³⁰ As his LRC colleague and friend, Geoff Budlender, said in his eulogy for Arthur:

Chief Justice Rumpff – no friend of Mr[.] and Mrs[.] Komani [the couple in question] – became frustrated. “I think you are leading us down the garden path”, he said to Arthur. But he could not find the flaw in the argument, because there was none. Ultimately, the Appellate Division unanimously decided in favour of Mr[.] and Mrs[.] Komani. It was the result of the most brilliant advocacy I have ever heard.¹³¹

The court could not resist the sheer intellectual force of Arthur’s argument, even though its import was completely counterintuitive—and no doubt part of what convinced the court was that the judges knew that what Arthur said, he believed.

These victories had meaning. Sometimes they contributed to undercutting some of apartheid’s institutions.¹³² Because South Africa’s constitution essentially allowed Parliament to do whatever it wanted, it could have overturned any of these victories. That turned out not to be as politically easy as might have been imagined, however, at a time when apartheid was under pressure domestically and internationally, so some of these victories stood.¹³³ But the challenges and the victories had another significance as well, as Arthur recalled:

[A]s soon as people start asserting themselves and demanding rights at any level, it has a very important impact upon their own psyche, upon their own living, if they can do something. Nothing is worse than feeling absolutely helpless in a situation. . . . [I]t was important to start generating, as it were, a culture of asserting yourself against powerful institutions.¹³⁴

He returned to this thought later in this interview, to say that:

[T]o me it’s absolutely crucial that people claim the rights that they have and that people stand up to the abuse of power. And if you claim your rights and you stand up to the abuse of power, you change your own society. And I think the LRC gave people the opportunity to do that, but the people who were really the brave people were the people who came to the LRC to ask for that to be done, because they were the people who were being victimized. They were the people who ran the repercussions if something went wrong. I think if you’re looking at the story of the LRC, the client communities were the real heroes of the whole story.¹³⁵

In those years, there was sometimes debate about whether using the law against apartheid actually wound up legitimizing apartheid by giving it the veneer of Western legality.¹³⁶ Arthur rejected this argument against using the law:

130. *Komani*, 1980 (4) SA 448 (A).

131. Budlender, Funeral Eulogy, *supra* note 105, at 1.

132. *See, e.g.*, Chaskalson Carnegie Corporation Oral History, *supra* note 114, at 24 (describing the string of LRC challenges beginning with *Konami* as contributing to the breakdown of the pass law system).

133. *See id.* at 19–20, 24–25 (describing legislative ability, but ultimate unwillingness, to counteract LRC court victories).

134. *Id.* at 16.

135. *Id.* at 55.

136. *See id.* at 46 (weighing the risk of validating the existing legal structure through

I never agreed with that at all. I always thought that to challenge power and to assert your own position as an individual was in itself a valuable and essential part of any struggle, and that so much could be achieved by doing that, and that as long as there were people who wanted you to do that, you should make your services available to them.¹³⁷

I mentioned earlier that Nelson Mandela repeatedly turned to his lawyers for aid during the long years of his imprisonment.¹³⁸ Mandela—and a great many other black South Africans on the front lines of the struggle against apartheid—felt that law and lawyers could aid their cause, and in this sense, throughout the long years of apartheid’s decline, Mandela’s efforts and Arthur’s were intertwined.¹³⁹

In all of this, Arthur was under no illusions about the injustice of apartheid. In the 1980s, it was sometimes possible, from across an ocean, to confuse legal struggle against apartheid with a failure to really understand that apartheid had to end. Arthur had no such confusion. I remember talking with Arthur one day during those years, as we looked out at Johannesburg, and me saying something about how strange a combination of achievement and injustice South Africa was. Arthur’s reply was to the effect that it all had to be destroyed. That didn’t mean that he sought violence—not at all. Every bit of his legal work was a witness and an exemplar of the possibilities of achieving justice through reason. But he must have thought then, as he later put it, that the end of apartheid “would come much more with the society running down slowly, with the infrastructure going slowly, with everything eroding until there was really very little left, and the thing would then fall apart and would have to be built from nothing.”¹⁴⁰ Like most people, he was surprised when South Africa changed so fast, even as he worked to bring that change into being.

Arthur undertook this work despite its evident risk. He was a pillar of the Johannesburg Bar, but in the summer of 1988, when he invited me to his home in South Africa, phone service at their house went out one weekend afternoon while Arthur was monitoring an LRC investigation into a possible burial ground for security force victims. I assume that the Arthur and Lorraine took for granted that their lives were constantly subject to surveillance, interference, and the possibility of worse. It was completely fitting that when Arthur Chaskalson and George Bizos were among the honorees at the Soweto rally welcoming Nelson Mandela back to freedom, the crowd chanted: “Viva democratic lawyers viva!”¹⁴¹

Arthur Chaskalson used South African law against itself, and he did not despair because of its many failings, although he was fully aware of them. He honored South African law, despite its deep injustices, for the potential it still

participation).

137. *Id.*

138. See *supra* note 48 and accompanying text.

139. I argued for the value of anti-apartheid lawyers’ efforts in a chapter on “Lawyers Against the Emergency,” in ELLMANN, *supra* note 102, at 248–74.

140. Chaskalson Carnegie Corporation Oral History, *supra* note 114, at 35.

141. George Bizos recalls the chants praising the lawyers by name, in BIZOS, *supra* note 76, at 482.

contained to be something better. That was a potential that existed not just in the far future, but also in the here and now, in the bravery of clients who dared to challenge the oppression to which they were subjected, and in the courage and creativity of lawyers who fashioned arguments on those clients' behalf that sometimes compelled judges' assent. I think that he believed in what law *should* be and committed himself to doing everything he could so that the law would be that as well. In the process, he and his colleagues helped South African law to hold onto the ideal of justice and that in turn helped make law a part of the framework of the new South Africa as well. Years later, Arthur would quote the view of the Truth and Reconciliation Commission, which praised the efforts of the "few lawyers (including judges, teachers and students) who were prepared to break with the norm."¹⁴² These lawyers, the Truth and Reconciliation Commission said, "were influential enough to be part of the reason why the ideal of a constitutional democracy as the favored form of government for a future South Africa continued to burn brightly throughout the darkness of the apartheid era."¹⁴³

Then came the constitutional negotiations. As I have already mentioned, Arthur joined the ANC Constitutional Committee (though not the ANC itself), and as he recalled, "I worked on the Constitutional Committee from 1990 right the way through. But I also, at the time of the negotiations, I got drawn into the negotiations."¹⁴⁴ Indeed, he was "very deeply involved at that stage from 1990 right the way through to the end of 1993"¹⁴⁵ and the conclusion of the drafting of the first post-apartheid constitution, the Interim Constitution.¹⁴⁶ Geoff Budlender said in his eulogy for Arthur that:

His hand is clearly visible in the text which was finally approved: his fingerprints are all over the document. You see them in the care, precision, and attention to detail; and you see them in the Constitution's recognition that we need to go beyond a typical liberal constitution, which aims to limit the power of the state. Arthur understood that we needed . . . a constitution which recognizes the need to empower the state to address and redress the consequences of centuries of dispossession and discrimination. We needed a constitution which would provide a framework for the democratic transformation which was yet to come.¹⁴⁷

He also recognized the necessity for compromise in the constitutional negotiations, which were miraculous, but also hard and sometimes controversial. The Interim Constitution contained some notable concessions to white anxieties, including provisions for a right to vote in local elections not only for residents but

142. Chaskalson, *From Wickedness to Equality*, *supra* note 86, at 597 (quoting 4 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 104 (Truth and Reconciliation Comm'n of S. Afr. 1998), *available at* <http://www.justice.gov.za/trc/report/finalreport/Volume%204.pdf>).

143. *Id.* at 598.

144. Chaskalson LRC Oral History, *supra* note 111, at 21.

145. *Id.*

146. *See generally* S. AFR. (INTERIM) CONST., 1993.

147. Budlender, Funeral Eulogy, *supra* note 105, at 4.

also for the holders of real property in the jurisdiction in question.¹⁴⁸ But that was part of the price of a negotiated transition. I am sure Arthur did not relish paying this price or others like it—most notably, the agreement to offer amnesty in exchange for acknowledgment of crimes committed during the years of apartheid¹⁴⁹—but he understood that the path to be followed, the path of law and of truth, had to also be a path that led forward.

Then, of course, President Mandela selected Arthur Chaskalson as the first president of the Constitutional Court.¹⁵⁰ Later, as a result of a constitutional amendment, the head of the court became the chief justice of South Africa, and Arthur held that position until 2005.¹⁵¹ As the Interim Constitution prescribed,¹⁵² President Mandela consulted with Arthur about the selection of six of the other ten members of the court,¹⁵³ so Arthur not only led, but also contributed to the makeup of the new institution. The court's inaugural ceremony took place on February 14, 1995; President Mandela spoke at the occasion, and began with words that must have few parallels in judicial history:

The last time I appeared in court was to hear whether or not I was going to be sentenced to death. Fortunately for myself and my colleagues we were not. Today I rise not as an accused but, on behalf of the people of South Africa, to inaugurate a court South Africa has never had, a court on which hinges the future of our democracy.¹⁵⁴

This new court—almost an “assembly of demigods,” as Thomas Jefferson said of our Constitutional Convention¹⁵⁵—set out to build a body of jurisprudence that was

148. See S. AFR. (INTERIM) CONST., 1993 § 179(3)(a) (granting the right to vote in local elections to those “under law liable for the payment of property rates, rent, service charges or levies to that local government”).

149. See S. AFR. (INTERIM) CONST., 1993 (epilogue, “National Unity and Reconciliation”). Chaskalson told an oral history interviewer that the amnesty provision was negotiated outside the regular negotiation channels. Chaskalson LRC Oral History, *supra* note 111, at 21–22. Along with a “senior government law advisor,” Chaskalson was to provide final review for any last-minute changes in the negotiated constitution, but: “they gave it to us . . . and I remember Mac [Maharaj, a senior ANC negotiator,] saying, you’re not to change a single word. They’d been negotiating this for a very long time and ultimately they had reached agreement on it.” *Id.* The Constitutional Court upheld the resulting amnesty statute in *Azanian Peoples Org. (AZAPO) v. President of S. Afr.* 1996 (4) SA 672 (CC) (S. Afr.).

150. See Chaskalson LRC Oral History, *supra* note 111, at 39 (recalling the meeting at which Mandela told Chaskalson he wanted to appoint him president of the Constitutional Court); *Chief Justice Arthur Chaskalson*, S. AFR. HIST. ONLINE, <http://www.sahistory.org.za/people/chief-justice-arthur-chaskalson> (noting that in 1994 Chaskalson became the first president of the Constitutional Court).

151. See *Chief Justice Arthur Chaskalson*, S. AFR. HIST. ONLINE, <http://www.sahistory.org.za/people/chief-justice-arthur-chaskalson> (last visited Sept. 7, 2014).

152. S. AFR. (INTERIM) CONST., 1993 § 99(5).

153. Chaskalson LRC Oral History, *supra* note 111, at 40.

154. Nelson Mandela, Address by President Nelson Mandela at the inauguration of the Constitutional Court, Johannesburg, S. Afr. (Feb. 14, 1995), *available at* http://mandela.gov.za/mandela_speeches/1995/950214_concourt.htm.

155. THE PAPERS OF THOMAS JEFFERSON, VOLUME 12: 7 AUGUST 1787 TO 31 MARCH

at the same time intellectually rigorous, grounded in fundamental legal aspirations, and committed to the humane transformation of South Africa.¹⁵⁶ Arthur led that process and shaped the internal community of a court that was notable for its care and frequent unanimity.¹⁵⁷

The decisions that resulted made up an extraordinary body of judicial work. The court's decisions clearly sought to lay out the intellectual framework for a comprehensive body of constitutional doctrine. In one prominent case, Arthur clarified that all law in South Africa now comes from the constitution,¹⁵⁸ and others confirmed that all governmental action, by whatever branch, is subject to constitutional review.¹⁵⁹ The judgments were also notably, and intentionally, comparative. As Arthur wrote, South Africa had “no history of human rights; we started with an absolutely clean slate. We have to shape the new jurisprudence, and it is helpful to see what other countries have done.”¹⁶⁰

But South Africa also meant to take its place in the world development of constitutional law and brilliantly succeeded. The new Constitutional Court's decisions were wide-ranging, traversing in just a few years the breadth of constitutional concerns characteristic of the world's democracies. South African cases addressed familiar constitutional issues such as the death penalty, held unconstitutional despite its considerable popularity;¹⁶¹ applied long-establishing principles of equality in new areas, such as gay and lesbian rights¹⁶² and the development of customary law;¹⁶³ and rendered path-breaking decisions in new

1788, at 169 (Julian P. Boyd, ed. 2d prtg. 1966).

156. *See, e.g.*, Nelson Mandela, Address by President Nelson Mandela at the inauguration of the Constitutional Court, Johannesburg, S. Afr. (Feb. 14, 1995), *available at* http://mandela.gov.za/mandela_speeches/1995/950214_concourt.htm (stating that the Constitutional Court has the “lofty” duty to protect “the fundamental rights and freedoms for which we have fought so hard”).

157. *See* Chaskalson LRC Oral History, *supra* note 111, at 42 (discussing the collegiality and supportiveness of the court).

158. *See* Pharm. Manufacturers Ass'n of S. Afr.: In re Ex parte President of the Republic of S. Afr., 2002 (2) SA 674 (CC) at para. 44 (S. Afr.) (“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.”).

159. *See, e.g.*, Fedsure Life Assurance Ltd. v. Greater Johannesburg Transitional Metro. Council, 1999 (1) SA 374 (CC) at para. 58 (S. Afr.) (“It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law”—the “principle of legality.”).

160. Arthur Chaskalson, *The Transition to Democracy in South Africa*, 29 N.Y.U. J. INT'L L. & POL. 285, 290 (1997) [hereinafter Chaskalson, *Transition to Democracy*].

161. *See* State v. Makwanyane, 1995 (3) SA 391 (CC) at para. 87–89 (S. Afr.) (“Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour.”).

162. *See* Minister of Home Affairs v. Fourie, 2006 (1) SA 524 (CC) at para. 162 (S. Afr.) (holding that the constitution protects the right of same-sex couples to marry). This case was decided after Chaskalson's retirement from the court.

163. *See* Bhe v. Khayelitsha Magistrate, 2005 (1) SA 580 (CC) at para. 136 (S. Afr.) (holding “[t]he rule of male primogeniture as it applies in customary law to the inheritance of

dimensions of socioeconomic rights.¹⁶⁴ They were in some ways circumspect; not every decision came out as rights advocates wanted, and Arthur himself said that the court was “trying as far as possible to say no more than is necessary for the decision of the case before it.”¹⁶⁵ No doubt, Arthur and his fellow justices were sensitive to the need to build and preserve their new court’s institutional capital, as constitutional judges need to be.¹⁶⁶ And yet, they said so much!

Moreover, these decisions did more than just eliminate injustices left over from the old regime. To be sure, eliminating those products of apartheid was an important part of the court’s work, often fully supported by the new government. The death penalty, for example, was a heritage of the old regime, reviled by the ANC in part because it had so often been used against its members.¹⁶⁷ But as we have already seen, the court was prepared to disagree with the new government.¹⁶⁸ Early on, the Constitutional Court had the remarkable task—assigned to it by the Interim Constitution—of essentially judging the constitutionality of the draft text of what would become the final constitution; in fact, the court rejected the first draft, and Parliament duly revised it to meet the court’s concerns.¹⁶⁹ Even before that, in 1995, it struck down election proclamations issued by Nelson Mandela as unconstitutional and Mandela unhesitatingly obeyed.¹⁷⁰ Later, after Thabo Mbeki had succeeded Nelson Mandela as president, the court overturned the government’s resistance to the use of nevirapine to prevent mother-to-child transmission of HIV.¹⁷¹ While this controversy was much more fraught than the

property” inconsistent with the constitution).

164. *See, e.g., Gov’t of the Republic of S. Afr. v. Grootboom*, 2001 (1) SA 46 (CC) at para. 99 (S. Afr.) (concerning constitutional right of access to housing).

165. Chaskalson, *Transition to Democracy*, *supra* note 160, at 293.

166. *See* Stephen Ellmann, *Book Review*, 120 SO. AFR. L.J. 707, 709–10 (2014) (reviewing THEUNIS ROUX, *THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995–2005* (2013)) (discussing the court’s likely sensitivity to building institutional legitimacy).

167. *See* ROUX, *supra* note 166, at 239–40 (describing the ANC’s opposition to the death penalty).

168. *See supra* notes 74–76 and accompanying text.

169. *See* Certification of the Constitution of the Republic of S. Afr., 1996 (4) SA 744 (CC) (S. Afr.) (assessing the constitutionality of the proposed new constitution); Certification of the Amended Text of the Constitution of the Republic of South Africa, 1997 (2) SA 97 (CC) 120 at para. 205 (S. Afr.) (certifying that the amended constitutional text complies with the required constitutional principles). For an account of the oral argument in these cases, see Carmel Rickard, *The Certification of the Constitution of South Africa*, in *THE POST-APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH AFRICA’S BASIC LAW 224* (Penelope Andrews & Stephen Ellmann, eds., 2001). Through the good offices of George Bizos, this volume also includes a foreword contributed by Nelson Mandela. *Id.* at vii.

170. *See* Exec. Council of the W. Cape Leg. v. President of the Republic of S. Afr., 1995 (4) SA 877 (CC) at para. 124 (S. Afr.), discussed in *supra* text accompanying notes 74–76.

171. *Minister of Health v. Treatment Action Campaign* (No. 2), 2002 (5) SA 721 (CC) at para. 135 (S. Afr.) (holding that the constitution “require[d] the government to devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV”).

1995 case—Mbeki, though not an AIDS denialist, deeply questioned much of the scientific consensus about the disease¹⁷²—the government again, though grudgingly, complied.¹⁷³

Arthur Chaskalson's contributions also rested—as Nelson Mandela's did—on a remarkable belief in the power of talk. Dennis Davis, a distinguished opponent of apartheid and today a South African judge, has written movingly of the attention Arthur paid to a young black student's criticism of the law at a student conference he attended well after his retirement; Arthur's response was not to take offense, but to engage in conversation.¹⁷⁴ Geoff Budlender, similarly, wrote that “[i]t was his respect for people that made him such a brilliant teacher.”¹⁷⁵

Here is another, more startling story. In 1995, I believe, the Chaskalsons were carjacked at the entrance to their home. That was at a time of extremely frightening and violent crime, in which—as Jonathan Klaaren, a professor at the University of the Witwatersrand, once explained to me—the micro-politics of every encounter shaped how the event would play out. The Chaskalsons, of course, did not resist the robbery, but Arthur Chaskalson did explain to the robbers that the papers in the back of their car were from the Constitutional Court's case on the certification of the draft South African constitution, and he asked them to leave those papers behind—which I believe they did. Can there ever have been a micro-political moment quite like that, with the president of a country's Constitutional Court politely persuading armed robbers not to interfere with the development of the country's constitutional law?

IV. CONCLUSION

Nelson Mandela was South Africa's Moses, who lived to lead his people to the Promised Land. Arthur Chaskalson's forerunners are more secular—he was South Africa's John Adams, vindicating the values of law in an unjust system; James Madison, shaping a new constitution; and John Marshall, forging the new country's constitutional jurisprudence. Both Mandela and Chaskalson lived lives shaped by law, but Mandela decided that to seek justice he had to violate South African law while Arthur believed he could help achieve justice from within that unjust legal system. Though their strategies were different, their goals were fundamentally similar, and I do not think either would have criticized the other's choice.

Neither ended his work with his official retirement. Nelson Mandela, whose

172. For a nuanced account of President Mbeki's skeptical approach to the conventional wisdom about AIDS—including the link between the HIV virus and the disease—see MARK GEVISSER, *A LEGACY OF LIBERATION: THABO MBEKI AND THE FUTURE OF THE SOUTH AFRICAN DREAM* 276–96 (2009).

173. See ROUX, *supra* note 166, at 292–303 (discussing the political context of *Minister of Health v. Treatment Action Campaign* (No. 2)).

174. Dennis Davis, *Arthur Chaskalson 1931–2012: Lifetime devoted to justice*, MAIL & GUARDIAN (Dec. 7, 2012), <http://mg.co.za/article/2012-12-07-arthur-chaskalson-1931-2012-lifetime-devoted-to-justice>.

175. Budlender, *Funeral Eulogy*, *supra* note 105, at 7.

retirement was in itself important as a personal rejection of the temptations of holding onto power,¹⁷⁶ largely stepped back from politics, but ultimately he could not remain silent in the face of the suffering of South Africa's AIDS victims and spoke out about this issue.¹⁷⁷ Arthur Chaskalson too continued to play an important role in South African life as an advocate for the rule of law; his last public speech was a sharp critique of proposed legislation that threatened the independence of the legal profession and the courts.¹⁷⁸ He was well aware that the end of apartheid had not meant the end of suffering in South Africa and, in one of his later speeches, declared:

If we do not become a more caring society than we presently are, and do not press our government to address the widespread poverty and deplorable conditions in which so many of our fellow citizens are compelled to live, we will have only ourselves to blame for the consequences that will be the inevitable result. In doing so we must be conscious of two dangers which have to be confronted. Corruption, and the fragility of rights.¹⁷⁹

He was an equally firm and courageous advocate for the rule of law worldwide, most prominently as the president of the International Commission of Jurists.¹⁸⁰ In that role, he led a critical examination of U.S. anti-terrorism policies.¹⁸¹ He could

176. See Richard Stengel, *Nelson Mandela*, TIME (Apr. 26, 2004), available at http://content.time.com/time/specials/packages/article/0,28804,1970858_1970910_1971727,00.html (explaining that one of Mandela's greatest contributions may have been "something he didn't do: run for a second term as South Africa's leader").

177. See Keller, *supra* note 66, at 15 (reporting that Mandela "spoke up on the need for protected sex and cheaper medicines").

178. See Arthur Chaskalson, Address to the Cape Law Society on 9 November 2012: The Rule of Law: The importance of independent courts and legal professions (Nov. 12, 2012), available at <http://www.inyathelo.org.za/images/docs/theruleoflaw.pdf> (speaking about the importance of an independent legal profession in protecting constitutional democracy and the damage the proposed Legal Practice Bill would do to that independence); see also Arthur Chaskalson, Without fear, favour or prejudice: the courts, the constitution and transformation, Speech at the University of Cape Town conference: the Challenges Facing Administrative Justice (Jan. 26, 2012), available at <http://constitutionallyspeaking.co.za/former-chief-justice-arthur-chaskalson-without-fear-favour-or-prejudice-the-courts-the-constitution-and-transformation/> (criticizing arguments, advanced by some political figures, that the courts and the constitution were interfering with the needed transformation of post-apartheid South Africa).

179. Arthur Chaskalson, *The Fragility of Rights*, in UNDER THE BAOBAB: ESSAYS TO HONOUR STUART SAUNDERS ON HIS EIGHTIETH BIRTHDAY 5, 10 (Philippe-Joseph Salazar ed., 2011), available at <http://www.africanrhetoric.org/pdf/D%20%20Chaskalson.pdf>.

180. *Arthur Chaskalson Mourned*, INT'L COMMISSION OF JURISTS (Dec. 3, 2012), <http://www.icj.org/arthur-chaskalson-mourned/>. Arthur also spoke on human rights issues in gatherings around the world. World Justice Project, *The Honorable Arthur Chaskalson*, <http://worldjusticeproject.org/bio/honorary-chair/honorable-arthur-chaskalson> (last visited Feb. 7, 2015). On a recent trip to Israel, I learned from human rights lawyers there about the profound connections he made with them.

181. See Mark W. Vorkink & Erin M. Scheick, *The "War on Terror" and the Erosion of the Rule of Law: The U.S. Hearings of the ICJ Eminent Jurist Panel*, 14 AM. U. HUM. RTS. BRIEF 2, 2-6 (2006), available at <http://www.wcl.american.edu/hrbrief/14/1vorkink.pdf> (discussing the issues raised regarding the U.S. "war on terror" by the Eminent Jurists Panel chaired by

not bear the idea—so immanent in some of our policies and actions after 9/11—that there might in today's world be anyone who was somehow entirely outside of the law, and he did not hesitate to say so.¹⁸² He was, like Nelson Mandela, part of a worldwide community aspiring to freedom.

Surely, both Nelson Mandela and Arthur Chaskalson can rightly be called statesmen. A lawyer might earn the title of statesman for reasons that have no relation to his or her legal training; however, for each of these men, law was a significant component of their statesmanship. They are, in other words, “lawyer-statesmen.”

But how well do we understand what a lawyer-statesman is? Anthony Kronman wrote about the lawyer-statesman in *The Lost Lawyer* twenty years ago.¹⁸³ At one point Kronman characterizes this figure as having:

[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 recognizable moral ideal, an ideal closest, perhaps, to the public-spirited stoicism implied by the Roman term *gravitas*¹⁸⁴

Gravitas, indeed, was a virtue that both Mandela and Arthur deeply embodied. Yet Kronman's account, with its implication that statesmanship exchanges moral certainty for wisdom and forbearance, might seem to suggest that lawyers, or at least lawyer-statesmen, have little to contribute at times when men and women must confront sharp moral challenges. But lawyers like Thomas Jefferson, John Adams, and Mahatma Gandhi are not people whose statesmanship seems to have rested on a recognition that “all hope of moral certainty is gone.” Nor are Nelson Mandela and Arthur Chaskalson, who are, instead, exemplars of the proposition that a lawyer-statesman may be a man or woman of iron moral convictions and may in fact be a committed rebel.

There are, no doubt, many kinds of statesmen and lawyer-statesmen. Kronman's account portrays an important kind of statesmanship, the work of men and women in reasonably stable and reasonably just societies. But not all societies meet those criteria; indeed, most societies sometimes fall into instability or injustice. There a different kind of lawyer-statesmanship, a more radical form, may

Chaskalson and created by the International Commission of Jurists); *see also* Nick Cumming-Bruce, *International Jurists Bewail Damage to Law by U.S. War on Terrorism*, N.Y. TIMES (Feb. 16, 2009), <http://www.nytimes.com/2009/02/16/world/europe/16iht-jurists.4.20226228.html> (discussing the Eminent Jurists Panel's subsequent report).

182. *See* Arthur Chaskalson, Remarks at Assessing Damage, Urging Action: Report of the ICJ Eminent Jurists Panel on Terrorism, Counterterrorism and Human Rights at The Brookings Institution (Feb. 27, 2009), *available at* http://www.brookings.edu/~media/events/2009/2/27%20icj/0227_icj.pdf at 12, (“[I]f you put people out of sight, give them no access to the outside world, give[] them no access to lawyers, to doctors, friends and family, put them at the mercy of their captors, inevitably, torture follows.”).

183. ANTHONY KRONMAN, *THE LOST LAWYER* (1993).

184. *Id.* at 117–18.

be what we seek and need. Statesmen of this sort, like Mandela and Chaskalson, have a commitment to reason, a respect or even reverence for just law, and perhaps even some measure of conservatism—all of which they may share with their counterparts in less fraught societies. They must also be brave and determined—perhaps even more so than those in other lands. But above all, they are not people for whom all hope of moral certainty is gone, but instead are people of radical conviction, people who see injustice and are prepared to devote their lives to overcoming it. That was the work Nelson Mandela and Arthur Chaskalson did.