MARKING THE PATH OF THE LAW

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In Pharmaceutical Manufacturers, Chaskalson P said for the Court (¶ 44):

> 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.

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. The death penalty; free speech; 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 socioeconomic rights – to an American observer it is a remarkable list, and to an American liberal observer, not much short of miraculous.

We meet today at an important moment in this already illustrious constitutional tradition. Four distinguished justices are about to leave the Constitutional Court, and the President who will appoint 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, Jr., addressed questions like these. Holmes remains a powerful influence in US constitutional law, known above all for his resistance to the Supreme Court's efforts to block modernizing 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.

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." (994) 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. After suggesting that it would be "a gain if every word of moral significance could be banished from the law altogether" (997), 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" (998), he makes plain that he views judicial decisions as resting on "a judgment as to the relative worth and importance of competing legislative grounds" (998) and that what he would like judges to do is to acknowledge that they are making such judgments (999) and to make them on the basis of a better knowledge of society – notably, statistics and economics (1001, 1005) – than they had till then possessed.

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 generalization 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. (1007)

From such work – very much the work of the scholar rather than the practitioner, as another reader of Holmes (William Simon) pointed out -- 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. (1009)

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, was still 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 today is to discuss the path of the law today. I hope with you 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.

A. The Path of Constitutional Law

Let us begin with Brown v. Board of Education. In a sense, modern American constitutional law as a whole begins with Brown; to reject 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 recognize 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. As to text, the Fourteenth Amendment secures the "equal protection" of the laws, but it could be argued 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, 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. 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 antimiscegenation statutes, nor segregation." (69 Harv. L. Rev. at 58)

Thus the task for the Brown court – the task as it 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 the original intentions of the adopters were unclear and then by saying they were irrelevant. 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." (347 US 483, 492-93 (1954)). 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.

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 because within a few years other decisions, 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,

such as parks and buses. It seems clear in hindsight that the Court's statement that "in the field of public education the doctrine of 'separate but equal' has no place" was not the whole of what the Court was coming to believe, and that it was in fact deciding 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 that, 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 of.

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 will be.

I propose to discuss the following questions:

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, will the presence of emotion, linked to values, in decisionmaking jeopardize impartial judgment?

Fourth, can empathy insure fair judging? Or what might be called its converse, independence?

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

First, what is the relation of skills to values?

It's 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 am convinced, 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 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 this decision rested on a sound intuition. I mean 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?

As it happens, neurological evidence confirms what seems like a truism about human nature. Recent study of human decisionmaking suggests that we do not, in fact, make decisions in an unemotional manner. Antonio Damasio, in *Descartes' Error*, tells us 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 wind up unable to make life decisions, or at least life decisions that shape a meaningful life – presumably because without emotions to add weight to the scale for some arguments as against others, logic alone does not produce coherent decisions from human minds. 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 we will see in the coming minutes. 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 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 reasoned, 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 of you 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. 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 this proposition. 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.

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 U.S. constitution demand more value-laden interpretation than the much more elaborately specified provisions of South Africa's constitution.[1] One might also say that much US constitutional interpretation is far more focused on the application of the interpretive tools of 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's worth emphasizing what I am not arguing here. I am not defending imprecise reasoning. Nor am I defending reasoning that puts aside focused legal questions in favor of broad inferences from loosely defined constitutional values. Recognizing 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 be clear (at least as a practical matter). But this or 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. But to some

[1] *E.g.*, Weare v Ndebele NO (on whether Ordinances constitute "provincial Acts"); Kruger v President of the Republic of South Africa (on whether the President could amend a mistakenly issued Proclamation); Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd (on the meaning of a proviso inserted into law by the President as part of the constitutional transition); Chagi v Special Investigating Unit (on the meaning of another presidential proclamation, and on who the lawsuit was actually filed against).

extent, at least, this discernment is better described as a process of imputation or infusion. 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."[2] FC s 39(2), which calls for such value-based interpretation of statutes, applies the same standard to development of the common law and customary law. 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."[3] 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.

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 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. (Makwanyane)

In addition, the Constitutional Court maintains that the Constitution embodies an "objective, normative value system." (Carmichele, Par 54; Thint dissent)

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; and third, if such a system exists and is binding, how much does it specify.

I wish to answer the first two questions in a decidedly nonphilosophical way. I am not at all certain that there exist objective, normative values that all people can or should adhere to –

[2] Gumede v. President of Republic of South Africa and Others, 2009 (3) SA 152 (CC) (para 43).

[3] Shilubana and others v Nwamitwa, para 73.

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 is, as you can see, a positivist question. 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.

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 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.[4]

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

[4] And can matter to the decision of cases. E.g., Mphela and 217 Others v Haakdoornbult Boerdery CC and 6 Others (Mpati AJ, para 32: "It 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.")

equality and the advancement of human rights and freedoms" 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 transformation – still the breadth of reasonable conceptions of these concepts is still immense.[5]

And even if, broadly speaking, South Africans today still hold the values that South Africans held when the Constitution was adopted, you have been thinking about those values for 15 years, and that is 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 characterized 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

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[5] Compare the majority and dissenting judgments in CUSA v Tao Ying Metal Industries (disagreeing on whether one textual interpretation or another will best comport with "the values of our Constitution," paras 103 & 148); in Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd (disagreeing over whether a transitional statutory proviso was meant to preserve national power or to facilitate the establishment of local authority – either seeming a plausible account of the Constitution's vision of the interplay of different levels of government); and in Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (considering whether claim of national security-based secrecy should be evaluated on the basis 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" (Moseneke DCJ para 56), or (to take one dissenter's suggestion) with "special attention … to the importance of openness, a theme that until now has not been given much attention in our jurisprudence" (Sachs J, para 153); and in Thint (Pty) Ltd v National Director of Public Prosecutions (majority, per Langa CJ, arguing that prohibiting searches under a particular statute "'if there are other, less drastic means available to the investigating authority which may succeed'" would "not reflect an appropriate balance between the constitutional imperative to prevent crime and the duty to respect, promote, protect and fulfil the rights in the Bill of Rights" (paras 119, 125); Ngcobo J, in dissent, arguing that "to proceed on the premise that suspects, in particular those who are accused of crimes involving dishonesty, cannot be trusted to co-operate 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" (para 371).

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 today 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. (Ss 174, 178) 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 recognizing that many different views of the meaning of the South African constitution's normative, objective value system are legitimate.

<u>Third, will the presence of emotion, linked to values, in decisionmaking jeopardize impartial judgment?</u>

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. 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 <u>not</u>, 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, they should be profoundly, emotionally committed to those values.[6]

[6] <u>Njongi v. Member of the Executive Council, Department of Welfare, Eastern Cape</u> exemplifies this kind of commitment. Yacoob J describes the treatment of pensioners by the Eastern Cape government as a "disaster" (para 9) and "unthinkably cruel and utterly at odds with the constitutional vision to the achievement of which that

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. 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. I criticized the selection of the panels of judges who heard these cases, because, so I felt, a majority of every panel came from a small group of judges who never disagreed with each other's results – and whose results predominantly favored the state. But those judges no doubt sought to decide each case according to their lights, which is to say, as we can now recognize, in light of the values to which they were emotionally committed. The results were sad.

But 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 harmonization of customary law rules with changing social conditions (subject of course to the constitution). 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

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Government ought to have been committed" (para 17). 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 characterizing another argument as "a cynical position devoid of all humanity." (para 90)

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 any means absolutely, of course, but as a matter of degree – to judge differently. 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." (S 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. Commitment to a value <u>can</u> lead to such distortion of judgment as to amount to a loss of impartiality; the question I mean to ask is, given how integral emotion is to judging, how can judges avoid falling into this peril?

<u>Fourth, can empathy – or independence – insure fair judging?</u>

<u>Empathy</u>: 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.) Empathy, as you may know, was briefly in vogue in American constitutional politics, as President Obama embraced it as a critical virtue of constitutional judging. Figures as diverse as Judge Sotomayor and Justices Alito and Thomas – two of the more conservative members of our Supreme Court, as you no doubt know – have all pointed to their own 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.

It does, indeed, make sense that a judge who can empathize 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, also is able to empathize with every person who comes before her is an impartial judge.[7]

I think this proposition has much to recommend it, but not quite as much as might meet the eye. It is admirable to empathize with everyone, but few of us find everyone equally easy to empathize with. In fact, it appears to be the case that most of us empathize more easily with those who are like us. Moreover, some people may really be a lot harder to empathize 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, and on the contrary we should expect that the inequality of the empathetic connections judges (and everyone else) make will tend to produce disparities in results as well.[8]

We certainly should not rely simply on the judge's instinctive tendency to empathize since that instinctive tendency will likely be uneven and inequitable, tilting the judge towards those she sees as most like herself. 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.

[7] Cf. Occupiers of 51 Olivia Road, in which Yacoob J builds on earlier Constitutional Court endorsement of the distinctly empathetic idea of "engagement" to say: "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." (para 15; emphasis added). *See also* Merafong Demarcation Forum v President of the Republic of South Africa (debating whether legislators' failure to "report back" to the Merafong community was reasonable, though "possibly disrespectful," as Van der Westhuizen J concluded (paras 55-56), or 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," as Sachs J contended (para 291, emphasis added)).

[8] Njongi ¶ 63 ("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.") (Yacoob J; emphasis added.); Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration (para 56: 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."; para 58: "Mr Mawalele has had to suffer at the instance of Equity…. In my view, considerations of the interests of justice and fairness dictate that Equity should pay Mr Mawalele's costs on the appeal to this Court.")

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. Like many interpersonal attributes, a disposition to empathy probably is 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 empathizes 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 favor of one side and against another. The party, the people, decided against will be harmed; the empathetic judge will feel that harm; the judge who feels it too fully may be unable to inflict it. The justices of the Constitutional Court undoubtedly empathized with Mr. Soobramoney; but if they had empathized too intensely, they could not have decided against his claim.

<u>Independence:</u> Could the solution instead be for judges to jealously guard their independence so as to steel themselves against emotional connection? This 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 that tradition was not always honored. The fact that this is a part of South African legal heritage, and that it has come under threat again in the new South Africa, confirms its importance. Yet it 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. The answer may also depend on the particular reading of the constitution's values to which the judge is committed. Justice Holmes, or his successors in the American legal process school, 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 there is force to this view.

But more fundamentally, independence is not an escape from emotion. A judge committed to independence will no doubt have 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 the persuasions of others. And 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 decisionmaking. 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.[9]

Fifth, to put the bottom line question bluntly: 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. This was, of course, a remarkable case. It was 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 of course the case moved from difficult to nightmarish with the reported intervention of another judge in the Constitutional Court's decisionmaking. 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 issues involved in the search at issue in Thint itself. In the words of the majority judgment by Chief Justice Pius Langa (paragraph 6):

> 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.

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,

[9] Emotional attachment to skill in legal reasoning has similar potential pitfalls.

involving as it did the fate of a potential President, hence ultimately the well-being of the country itself.[10]

When the members of the Constitutional Court concluded that they could fairly decide the search case, therefore, they were 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 we yet have a clear psychological account of what it means to be an emotional, yet fair, decisionmaker – but this is what constitutional judges (and probably all other judges too) must be, and so it is important to try to characterize what it is we seek in judges now.

It makes sense to begin with the answers we have already traversed. 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 decisionmakers 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, to a degree; and for them to be insistent on their own independence as decisionmakers, 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 decisionmaking. Everything we know about psychology says that these troubling feelings cannot be effectively suppressed into nonexistence, and that therefore the judge who recognizes 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 T.S. Eliot's words, we arrive at this familiar place and "know it for the first time." 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, and quite routinely, things like "I really don't want to do such-

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[10] Many of the cases in 2008 were connected in one way or another to the country's ongoing political crisis. In addition to the two Thint decisions: Glenister,, Shaik v State, Independent Newspapers v Minister for Intelligence Services.

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.

This is an individual capacity but it is a capacity sustained by an institutional practice. 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 discipline.

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. 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 and response to the arguments that are made before them. Politicians 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. It has always called 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, 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; 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." (para 292)[11]

At the same time, 2008's decisions reflect the breadth of the power of the Constitutional Court. Its jurisdiction is limited to "constitutional matters, and issues connected with decisions on constitutional matters" (FC 167), but cases such as Pharmaceutical Manufacturers have made clear how very wide the 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 then "may make any order that is just and equitable." (FC 172)[12] These are broad powers indeed, and it seems to me that the Court is still in the process of deciding how to regulate its own use of them – how, in other words, to best embody the rule of law in its exercise of its own authority.[13] The discipline of decision that I have emphasized here is far from the whole of the rule of law, but this discipline is part of what makes law something other than the free play of personal preference, and in a

[11] Cf. Glenister, in which Chief Justice Langa 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," and responded, in part, "I cannot agree. The role of this Court is established in the Constitution. It may not assume powers that are not conferred upon it." (Para 55)

[12] Striking examples of the breadth of the Constitutional Court's remedial powers appear in Weare (which recognized that its decision about the legal status of old order "Ordinances" might call into question the process by which other Ordinances had been invalidated over the years since 1996, but 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," paras 44-45); Kruger (which concludes that the President could have withdrawn, but could not amend, his own prior, erroneous proclamation so as to avoid the many legal complications that the first proclamation would have generated; and then itself declares both of the President's proclamations invalid, orders the President to issue a new one, and preserves the validity of everything done under those proclamations, see paras 72-74, 80); and Nyathi (in which 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" (para 63), and in response to this challenge to the courts (para 43) and the rule of law (para 48) 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" (para 83, see para 92 sections 3 and 4).

[13] See Merafong Demarcation Forum v President of the Republic of South Africa (judgments of Van der Westhuizen J, Ngcobo J and Moseneke J, debating the requirements of rationality in legislative decisionmaking); compare Woolman & Michelman.

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 recognize 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, does enable us to catch an echo of the infinite.

B. 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 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. 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 one of the highest virtues). 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. This is 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; I don't go so far as that but still it is evident that lawyers' responsibility is not to their client alone and without qualification.

There is another sense in which the work of lawyers is a 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, either under s 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 under s 8(2). It seems clear, regardless of the direct application question, that the law governing lawyers must comply with s 34 by facilitating access to courts; that it must respect human dignity, protected by s 10; that it must honor the privacy of clients' communications with lawyers, under s 14; that it must be free of unfair discrimination that s 9 would bar; and ultimately that it must contribute to respect, protect, promote and fulfil the rights in the Bill of Rights, as s 7(2) mandates – all subject to such limitations as s 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. (General Council of the Bar of South Africa, Uniform Rules of Professional Conduct, Rule 3.2) 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 to the "Position of Counsel briefed in a criminal case who is informed by his client that he is guilty of the offence charged." (Rule 4.11). 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.

Well, 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 "Where 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, moreover, the client who wanted a more wholehearted defense would be perfectly free to discharge that counsel, and then 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, and as long as the client stayed off the witness stand he would not be guilty of perjury – and might get a stronger defense. This probably won't work for clients dependent on state-funded counsel – but richer accused might well find it worth their while. Whether this outcome should be seen as implementing the right of access to the courts – via that second counsel – or as creating an unfair discrimination between rich and poor accused is debatable. There's also another discrimination issue – whether the rule's unequal treatment of those accused people experienced enough to know in advance that they should deny the crime, and those too naïve to grasp this point – is appropriate or not.)

These 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 <u>should</u> 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 he 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, you will have to plead guilty." This is full disclosure of the law, and surely it is a part of dignity that a client should understand the law governing his situation. Rule 4.6 seems to endorse this, though not quite comprehensively; it says that "Counsel 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." 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, but it obviously invites the client to manufacture a false story so as to avoid having to plead guilty. 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 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 lawyers are not permitted to lie to courts. (Rule 3.2.) 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." How hard are they supposed to look for the truth? The answer surely isn't that each lawyer is to be a prosecutor to her own client. Prosecutors, or 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 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 <u>making</u> the constitutional law of 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. (In fact the issues of interviewing and counseling and ethics that I've been

discussing with you are issues I've written about, with the help of four co-authors, in a book, *Lawyers and Clients: Critical Issues in Interviewing and Counseling*, coming out this fall.) 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 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 on morality and law 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. It is not an argument for South Africa only; on the contrary, the same considerations point in the same way in the United States. There, indeed, the past few years have seen an intensification of legal educators' concern that they are not yet contributing to the preparation of their students for the practice of law as they should. Recognizing 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.

I suspect that this means that South African law schools, like American ones, 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 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.