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RACISM IN AMERICAN AND SOUTH AFRICAN COURTS: SIMILARITIES AND DIFFERENCES

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With the freeing of Nelson Mandela and negotiations underway between dissident political groups and the white government, South Africa appears poised at least to begin the implementation of democratic and human rights reforms. This is a critical time to consider the role that South African courts have played in maintaining the system of apartheid and to reflect on their ability, or inability, to effect racial justice through law. Judge Higginbotham addresses these issues by means of a comparison between instances of racism in the courts of South Africa and the United States. Judge Higginbotham first details the multifarious forms of court-sanctioned racism as it has appeared in the judicial systems of both countries. He then considers the Warren and Burger Courts' responses to racist law in America and evaluates the importance of the constitutional protections of the Bill of Rights and the Civil War Amendments as bases for their decisions. Judge Higginbotham concludes that, although a constitutional system of government and a vigilant judiciary can provide the foundations for a just social order, the full realization of racial equality in the United States and South Africa will ***480** *require the additional impetuses of enlightened statesmanship and broad-based civil rights activism.*

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*482 INTRODUCTION

More than a century ago, William Goodell observed that: "No people ... were ever yet found who were better than their laws, though many have been known to be worse."[1] Similarly, I submit that in the United States and in South Africa, the justice that blacks, the powerless, and the near powerless encounter in the daily events of their lives is no better, and is probably worse, than the experiences they encounter in their courts.[2]

In this Article,[3] I have chosen the issue of racism[4] in the courts ***483** because the courts, in any society, should exemplify the nation's best and most just virtues. "'Equal justice under the law"' is what most civilized societies claim to offer their citizens. Yet if there is racism-patent or implicit-present in the very courts that dispense justice, the probability is that the entire society is far more oppressive than the racism revealed in their adjudicatory processes. Courts enforce racism in two different factual contexts: (1) those in which the judge chooses to act in a racist fashion in making discretionary decisions in areas that have not been preempted by any command of statute or precedent; and (2) those instances where the judge is applying substantive law that requires the court to treat a person in a racially adverse fashion, that is, in areas where even a nonracist judge is imposing racial oppression mandated by the state. While analytically each of these contexts is somewhat different, the consequence to the victim is just as pernicious whether the racism is that of the judge, the legislature, or binding precedent.

There are several areas of official injustice in South Africa and the United States that lend themselves to comparative analysis.[5] In this Article, ***484** I will focus primarily on racism in the South African and American courts in order to consider how the two judicial systems reflect or reject the ideologies of apartheid and Jim Crow respectively. My study also aims to assess the importance of the Bill of Rights and of constitutional supremacy as mechanisms for combating racism.

My analysis of both the South African and United States courts will reveal numerous cases where trial judges have practiced or tolerated racist behavior in their courtrooms. In relatively few instances in the United States, and in even fewer instances in

South Africa, have racially tainted trial court convictions or judgments been reversed. There are also many cases where appellate courts in the United States and in South Africa sanctioned racist behavior by using appellate shibboleths such as: the trial court's judgment was "not unreasonable"' or "not clearly erroneous,"' or was merely "harmless error."' In addition, the appellate courts set up a series of barriers that denied parties standing to challenge explicit racist conduct.

After discussing how these specific instances of judicial racism are ***485** symbols, symptoms, and signals of racism in the broader context of South African and American society, I consider how these decisions reveal both the virtues and the inadequacies of a Bill of Rights as a means of eradicating some forms of racism in courts. Unlike in South Africa, with its doctrine of parliamentary supremacy, blacks could appeal to the Constitution when racism appeared in the American courts. On occasion, these appeals have been successful, even at a time when the Southern states, where these cases generally arose, were not willing to give up any other portions of the reign of Jim Crow. However, I conclude that constitutional protections are ultimately of limited efficacy. Where the general society is racist, the courts will generally reflect this racism. Thus, while I maintain that the constitutional protection of a viable Bill of Rights is significant and important, and that it would improve significantly the human rights situation in South Africa, I also emphasize the necessity of combatting racism in society at large, through individual and governmental action. The courts can serve as the vanguard for social change and as a beacon in dark times, but used as the sole tool, they cannot eradicate societal racism.[6]

During most of the eight years that I have been researching the issues in this Article, there were practically no visible rays of hope suggesting that apartheid could be dismantled in a nonviolent fashion, at least in this century. Since F.W. de Klerk was elected President of South Africa in September of 1989, however, some significant preliminary changes have occurred, including most importantly, the legalization of the African National Congress (ANC) and other formerly outlawed or severely restricted political parties,[7] and the release of Nelson Mandela and some other political prisoners.[8]

Amid the current media blitz, it is easy to become too optimistic and thereby overestimate the long-term consequences of these events. The task of abolishing apartheid is a journey of a thousand miles over mountainous and treacherous ravines. We have seen merely the start of a trek that has never before been undertaken. Its members do not know what the long-term pace will be, nor do they know how many barriers they have yet to confront and overcome. In his historic address to a joint meeting of the United States Congress on June 26, 1990, Nelson Mandela said: "[W]e would be fools to believe that the road ahead of us is without major hurdles. Too many among our white compatriots are steeped in the ideology of racism to admit easily that change must come."'[9]

***486** Thus, the recent changes must be understood as the start of an extremely long journey toward a nonracial society. They do not mean that racism no longer exists in the South African courts, nor that apartheid has been dismantled. They merely indicate that there has been a crack in the doors that heretofore blocked all negotiations between the National Party Government, the African National Congress, and other opposition parties and organizations.

The dawn of a free, nonracial South Africa is still some distance away. Ultimately, apartheid must be dismantled. An effective bill of rights that applies to all South Africans must be enacted. The judiciary must be truly independent, and obligated to enforce nonracist laws and to treat blacks not as inferior but as equal. And every citizen, regardless of race, skin color, or ethnicity, must have an equal vote. Just how distant that future is remains to be seen. South Africa's challenge will be, in Goodell's words, to create a society that is far "better than [its *current*] laws"' and not worse than its anticipated human rights laws. Regardless of what happens, President de Klerk's new government will inherit a body of jurisprudence and judges who have been immersed in a racist judicial system for decades. The sooner they recognize the implications of their past actions, the sooner they will be able to move toward a nonracial system that is fair to all.

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I

THE DIFFICULTY IN COMPARING THE RACIAL HISTORIES OF THE UNITED STATES AND SOUTH AFRICA

Making valid comparisons between the experiences of any two countries is never easy, especially when the comparisons involve different time periods. When analyzing two countries with histories, economic and political structures, populations, demographics, cultures, and religions as dissimilar as South Africa and the United States, the task becomes quite difficult. However, the similarity between the institutions of apartheid and Jim Crow, as interlocking systems of oppression of blacks in both the public and private spheres, allows for the drawing of valid comparisons between South African courts from the 1930s to the present and American courts prior to the 1970s, the point at which the shift in political ***487** power produced by the civil rights movement and the Voting Rights Act began to be felt.[10]

Before discussing the similarities between the institutions of Jim Crow and post-*Plessy v. Ferguson*[11] segregation in the United States and apartheid in South Africa-similarities which make cross-cultural, cross-temporal comparison fruitful-I will briefly summarize the structure of apartheid in South Africa. Since I can assume that most readers are familiar with the system of apartheid from the tremendous media attention that it has received in recent years, I will review only its most salient features.

Apartheid is a system of racial segregation, discrimination, or oppression in housing, employment, public accommodation, health care, freedom of association, freedom of speech, and education. As in the United States before *Brown v. Board of Education*[12] and its attendant changes, these forms of segregation serve, among other functions, as ways to stigmatize black people as less than fully human.[13]

In addition, apartheid involves the systematic deprivation of political power and the economic opportunity that forms its basis.[14] In South Africa, blacks are deprived of the right to vote,[15] and, until this year, many black political parties and organizations were either banned outright or had their activities severely restricted.[16] Furthermore, the existence of a government-imposed state of emergency[17] from June 1986 to ***488** June 1990, marked by mass detentions and police beatings of demonstrators and detainees, prevented grassroots political action. Beginning in September of 1989, peaceful, anti-apartheid demonstrations were allowed by de Klerk in contravention of the emergency decree.[18] The state of emergency was lifted by de Klerk on June 7, 1990 for all provinces except Natal.[19]

Even with the partial lifting of the state of emergency, however, the government still has broad powers at its disposal under the Public Security Act of 1953,[20] which enables it to suppress opposition gatherings, rallies, or meetings, to outlaw or restrict opposition parties, and to ban publications.[21] Under the Internal Security Act,[22] the government can still detain political opponents for a substantial period of time.[23] Moreover, government soldiers continue to occupy black townships,[24] and one commentator has suggested that political opponents continue to be arrested and political trials still occur at the same rate as in 1989.[25] The plight of black South Africans was demonstrated dramatically as Nelson Mandela became "'the third recent revolutionary leader and former political prisoner to address Congress-after President Vaclav Havel of Czechoslovakia and Lech Walesa of Poland.'"[26] While both Havel and Walesa can vote in their countries, Mandela and all other black South Africans cannot and must negotiate to obtain that fundamental right, essential in any democratic society.

Apartheid also severely limits blacks' economic opportunities, further constricting their political power. Widespread job discrimination, in addition to residence laws, substantially restricts the work options of ***489** blacks.[27] The provision of substandard education to nonwhites further insures continued economic deprivation in a technological society.[28] As in the system of Jim Crow, where most blacks were restricted to menial jobs and to the debt-slavery of sharecropping, the deprivation of economic power is central to the denial of political power.

Before focusing on the specifics of racism in the courts of the United States and South Africa, I must acknowledge the inherent difficulties in comparing the racial histories of the two countries. The American race relations experience is and has been a complex phenomenon, and the race issues in South Africa may be even more complex.[29] Many historians prefer a nice fit for comparative analysis. They want to compare apples with apples and oranges with oranges. However, the histories of the United States and of South Africa do not constitute a perfect fit. It is as if one must compare thirty-four apples and sixteen oranges from the United States with three oranges and a pear from South Africa.[30]

Admittedly, there is a high risk of superficiality in comparing two separate countries during different eras. Indeed, to

compare race issues in the United States and South Africa over the course of two hundred years is to enter a potential quagmire that few scholars have been willing to explore. Though there are similarities in the racial experiences of the two countries, these similarities must be viewed in light of the differences between the populations, demographics, economics, religions, cultures, and histories of the United States and South Africa.[31] Professor Fredrickson ***490** has wisely admonished that "the profound differences in the larger national and social context must be borne in mind in making the comparison."'[32]

Most significantly, in the United States whites have always been dominant in number as well as in economic and political power; blacks have constituted a minority of generally less than fifteen percent in number[33] and substantially less than that in power.[34] In his famous dissent ***491** denouncing the "separate but equal"' doctrine set forth in *Plessy v. Ferguson,*[35] Justice Harlan stressed the fact that blacks were no threat to whites. He asserted: "Sixty millions of whites are in no danger from the presence here of eight millions of blacks."'[36] Indeed, given the secure political, economic, and numerical dominance of the American white population, accommodation of the legitimate demands of blacks would not result in a substantial diminution of white power in the United States.[37]

In contrast, whites in South Africa have always been a distinct numerical minority, constituting only sixteen percent of the population, whereas Africans[38] constitute approximately seventy-four percent of the ***492** population.[39] Nevertheless, with the current turmoil in South Africa, whites retain political, military, and economic control of the country: whites run the government, establish social policy, and dominate business as well as the economy as a whole. Despite their numbers, Africans are a disenfranchised majority that remains virtually powerless.[40] Still, ***493** one cannot ignore the significance of the potential power in numbers. Indeed, in dramatic contrast to the sentiments expressed by Justice Harlan stands the comment of Justice Bekker of the Supreme Court of South Africa during the trial of Nelson Mandela,[41] Deputy President of the ANC,[42] on treason charges. Speaking to Mandela from the bench, Justice Bekker asked rhetorically, " w ell, as a matter of fact, isn't your freedom a direct threat to the European whites in South Africa ?"[43]

The variations in government policies concerning race relations over the past two centuries present another major difficulty in comparing the United States and South Africa. Unlike South Africa, where the government has a uniform policy of apartheid, the United States has not had a national policy on race relations. It is impossible to speak of a monolithic policy applied in all the states because of the different degrees of ***494** oppression that have existed in the fifty states.[44] During the twentieth century, for example, some states have had civil rights acts prohibiting certain aspects of racial discrimination, while at the same time, other states have had comprehensive laws requiring segregation.[45] Prior to 1965, blacks in most states had complete de jure freedom to vote, while at the same time there were many repressive practices in most of the southern states designed to stop or discourage blacks from voting. Despite these differences between South Africa and the United States, many overarching similarities between the institutions of apartheid and those of Jim Crow and post-*Plessy*[46] segregation allow for valid and instructive comparisons between the South African courts of the past sixty years and American courts prior to the 1970s.[47] The forces which have enforced the systemic oppression of blacks in both countries at these different time periods have been similar enough to make for a useful cross-cultural, cross-temporal comparison.

The similarities between the countries are most distinct if we compare the plight of free blacks in the United States from the Reconstruction period to the 1970s to the plight of blacks in contemporary South Africa.[48] Of course, these similarities are not limited to the conduct of ***495** the courts and the legislatures; rather these institutional differences are indicative of a racism embedded in the public political culture of both societies. In both countries, blacks are or were denied voting rights; in South Africa by law, and in the American South by practice.[49] In South Africa, blacks are denied the right to vote, and in the United States ***496** blacks were effectively denied the right to vote in the South. Blacks in ***497** both countries suffered from the overtly racist attitudes of public officials who appointed judges who undoubtedly shared their racist attitudes.

Indeed, Chief Justice Roger Brook Taney's pre-Civil War assertion that American blacks "had no rights which the white man was bound to respect,"'[50] accurately describes the plight of most blacks in contemporary South Africa. Because *all* blacks of African descent are denied the right to vote, one must conclude that, in South Africa, blacks have few, if any, fundamental rights which the white government is bound to respect, and that, for the present,[51] blacks are almost impotent to eliminate the racist cruelties which have been mandated by the South African Parliament. Today, South African blacks, as much as postbellum American blacks, are dominated by a white government which has written the laws and chosen the judges.

Another overarching similarity in South African and United States race relations makes comparison possible. From approximately the time when significant numbers of whites first arrived in South Africa and the time when blacks first arrived in colonial America, blacks in both nations sought to be treated with parity and equality in their respective nations by struggling against institutions and rules of law which treated them as separate and inferior.[52]

However, analyzing both the judicial cases and the rules of law in each country reveals similarities and differences in the administration of law in each country. One probes only the similarities, or only the differences, at his or her peril.[53] Thus, this Article seeks to provide enough ***498** data on judicial cases and the specifics of the countries' legal processes to insure that such one-dimensional analysis can be avoided.[54]

Some may wonder, even if comparisons between American racism and South African apartheid may be made validly, what use can they serve? The history of America's past racism is grim and white Americans may hesitate to confront it,[55] wondering why I summon up this "ancient"' anguish, now a generation or even two old. In this regard, we do well to recall George Santayana's admonishment, now chiseled on a memorial wall in Auschwitz: "Those who cannot remember the past are condemned to repeat it."'[56] This comparative analysis offers an opportunity to better understand the lessons of history so that we can avoid repeating our worst mistakes.[57]

Such an analysis also reminds us that the legal process reflects both the human penchant of some members of a society to dominate others and the desire of others to use the law as a powerful vehicle on the "road ***499** to freedom"' for all.[58] The history of the effort to eradicate discrimination and injustice in the United States is replete with examples of how the law can be used both to perpetuate and eliminate racial injustice.[59] Such examples will be instructive for those in both America and South Africa who seek to create more just societies.[60]

***500** Moreover, the South African experience has much to teach us. Many Americans seem to be interested in South Africa solely from the standpoint of exporting our more humane American values and democratic legal concepts to South Africa. Undoubtedly, there is much that South Africa can learn from the American experience. Nelson Mandela has acknowledged that the rhetoric of the founding fathers themselves, in search of freedom, and of the American abolitionists and later heroes, in the struggle for the eradication of racism in America, have inspired and served as role models for him and his fellow South Africans fighting to end apartheid:

We fight for and visualize a future in which all shall, without regard to race, color, creed or sex, have the right to vote and to be voted into all elective organs of state. We are engaged in struggle to ensure that the rights of every individual are guaranteed and protected, through a democratic constitution, the rule of law, an entrenched bill of rights, which should be enforced by an independent judiciary, as well as a multi-party political system.

We could not have made an acquaintance through literature with ***501** human giants such as George Washington, Abraham Lincoln and Thomas Jefferson and not been moved to act as they were moved to act. We could not have heard of and admired John Brown, Sojourner Truth, Frederick Douglass, W.E.B. DuBois, Marcus Garvey, Martin Luther King, Jr., and others-we could not have heard of these and not be moved to act as they were moved to act. We could not have known of your Declaration of Independence and not elected to join in the struggle to guarantee the people's life, liberty, and the pursuit of happiness.[61]

But the study of South Africa can be beneficial for Americans as well. Such a study provides us with a frightening picture of the paths we might have followed and, more importantly, a warning of what could occur in the future if we fail to preserve the fundamental civil rights and egalitarian philosophy incorporated in our Bill of Rights, the fourteenth and fifteenth amendments, our civil rights laws,[62] and the critical human rights decisions of the United States Supreme Court.[63] A comparison of the legal processes of these two countries will help us to recognize some of the United States' most important virtues, and thereby avoid undermining the potential and actual strengths of the American federal constitutional ***502** system.[64] Thus, I hope that the analysis which follows will put to rest the mistaken, but commonly held, notion that study of the South African experience sheds no light on the American experience.