

# Nelson Mandela and the Role of the Lawyer

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*Abstract: Can a good lawyer also be a good person? In answering in the affirmative, it is helpful to note the life and career of Nelson Mandela—a lawyer—and also a person recognized the world over as being a good person of ethical and moral excellence. The development of Mandela’s professional identity unfolded in the midst of his engagement with the core moral questions that all lawyers must face. Observing Mandela’s engagement with these ethical and moral questions is informative for law students and young attorneys also seeking to lead a professional life in the law that provides inspiration and moral substance. By retelling the story of the development of Nelson Mandela’s professional identity, I hope to demonstrate that a good lawyer can be a good person, as Nelson Mandela was, through the pursuit of a number of different ideals.*

## Introduction

Twenty years ago, Anthony Kronman, Dean of Yale Law School, argued in his book *The Lost Lawyer* that the legal profession faced a crisis—it stood in danger of “losing its soul.”<sup>2</sup> This danger arose out of the loss of an inspiring professional ideal that had assured the legal community that the lawyer’s role had moral content and significance. Many people work simply to earn a living and find meaning in their lives through their family and community life, whereas lawyers have historically found additional meaning through their contribution to society in the law. However, without any clear understanding of how a life in the law contributes either to society or to their own lives in a morally meaningful way, lawyers have been left “wandering amidst the ruins of those [past] understandings.”<sup>3</sup>

What is needed, according to Kronman, is an ideal that gives young lawyers “a model to emulate, a standard for judging their own professional development, and a source of pride in being a lawyer.”<sup>4</sup> In the past that ideal had been the “Lawyer-Statesman,” but because

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<sup>2</sup> Anthony Kronman, *The Lost Lawyer* 1 (1994).

<sup>3</sup> Mary Ann Glendon, *A Nation under Lawyers: How the Crisis in the Legal Profession is Transforming American Society* 37 (1994).

<sup>4</sup> James Altman, *Modern Litigators and Lawyer-Statesmen*, 103 Yale L.J. 1031 (1994).

of the changing nature of legal education, legal practice, and the courts, that ideal could likely not be revived, and there were no plausible successors to it.

Today, twenty years later, the profession still searches in vain for an overarching ideal that has moral substance and that can inspire. As outlined in the most recent widespread study of legal education conducted by the Carnegie Foundation, *Educating Lawyers*, legal education continues to struggle to inculcate aspiring lawyers with a morally substantive sense of professional identity, resulting in “both declining public trust in the profession and the erosion of morale among attorneys.”<sup>5</sup> If practitioners were at one point expected to fill this gap, changes in the legal marketplace have lessened the likelihood of on-the-job training in professionalism.<sup>6</sup> And as the changing marketplace has led students to no longer feel confident that they will emerge from law school to make six figure salaries in their first year, it seems like an opportune moment to reinvigorate non-pecuniary based motivations to join the legal profession.

Instead of continuing the push to reinvigorate one single ideal, I believe that a better alternative for the profession is to embrace the ideal that a lawyer, at their best, could embrace many different ideals. Tangible ideals of excellence help in the effort to instill the core ethical and moral values of the profession.

It is helpful to ground the theory in biography because, as *Educating Lawyers* notes, “biographies of notable figures in the law are valuable as concrete manifestations of the principles under discussion.”<sup>7</sup> Mandela manifested an exemplary instance of both personal and professional moral excellence. In fact, he even embodied the contradictory aspects of professional identity ideals by encapsulating the public service and prudence-centered ideals of the lawyer statesman, the adversary system rooted notion of the neutral partisan lawyer, and the social change oriented concept of the cause lawyer.

Part I provides a short overview of some of the applicable moral and ethical theories that are relevant to lawyers in the construction of their professional identities and the quest to become both a good person and a good lawyer. Part II discusses this theory in relation to some of the key aspects of Mandela’s legal career and his tenure in law school. During this period a number of influences combined to shape his professional identity, and the resulting complexity of his ethical choices endured as he became both a full-time attorney and a full-time leader in the African National Congress, as we learn in Part III. By the time he became a full time defendant and no longer had the opportunity to practice law in the traditional sense, in Part IV, Mandela’s engagement with core questions of legal ethics raises a number of intriguing questions.

As we struggle to understand the intricate, vast, and ultimately glorious moral journey of Nelson Mandela, it seems clear that Nelson Mandela embodied a number of ideals.

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<sup>5</sup> William M. Sullivan, et. al, *Educating Lawyers* 30 (2007).

<sup>6</sup> See Patrick E. Longan, *Teaching Professionalism*, 60 Mercer L. Rev. 659, 660 (2009)(describing how these skills were once “learned on the job” but more recently practitioners have begun urging law schools to teach these skills).

<sup>7</sup> William M. Sullivan, et. al, *Educating Lawyers* 32 (2007).

## Part I. Moral Theory and Professional Identity

When most law students enroll in their *Legal Ethics* or *Professional Responsibility* class, they expect to engage primarily with the Model Rules of Professional Conduct, learning what they need to know in order to pass the MPRE or their bar exam. Only a few brave souls will take the time to consider in depth questions of right and wrong that are not regulated by the state bar disciplinary committees. When members of the legal community discuss the crisis in lack of professionalism, they often voice concern about the failure of new lawyers to manifest an understanding of the need to adhere to these types of unenforceable norms of professional comportment—norms like civility, promptness, and the avoidance of vulgarity.<sup>8</sup> A separate set of non-regulated ethics questions concerns decisions about one’s advocacy, and whether one is acting a moral way in relation to the court, the client, and opposing counsel, when one has room for discretion under the ethics rules. These choices might involve the selection of which types of cases to undertake, which tactics to use in court, and when and to what extent to consider the public good in one’s calculus.

Within the umbrella of questions not enforceable by ethics rules is the question of definition and purpose. “Who am I” or “Who are we” as lawyers?<sup>9</sup> What part do we play in society? What is our unique contribution to society as a profession? What is an excellent lawyer excellent at, besides finding a legal opinion in Westlaw or Lexis? Why is it a good and honorable choice for a young person to decide to join the legal profession? The question of definition is key—the Model Rules of Professional Conduct, before describing any practice rules, opens with a statement of definition.<sup>10</sup> This definitional question hovers over a lawyer’s career continuously; it will affect a lawyer’s position on key questions including zealous advocacy, confidentiality at the expense of third parties, and client selection. And also, it will color how lawyers see themselves, whether they take pride in their profession, and whether society admires them or greets them with ridicule. However, young lawyers are seldom given any affirmative guidance on how to answer this question. There are major costs to the avoidance of this question, including that “the legal profession is educated in such a way that eschews systematic study of the moral ideal that might guide its exercise of professional judgment.”<sup>11</sup> If exposed to these ideals early on, young lawyers would learn that there are a variety of ways that one can fulfill the lawyer’s role.

### *Understanding the Lawyer’s role*

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<sup>8</sup> See eg. Nicole A. Boothe-Perry, *Professionalism’s Triple E Query: Is Legal Academia Enhancing, Eluding, or Evading Professionalism*, 55 Loy. L. Rev. 517, 519 (2009).

<sup>9</sup> Anthony Kronman, *Legal Professionalism*, 27 Florida State University Law Review 1 (1999).

<sup>10</sup> Model Rules of Prof’l Conduct (2013).

<sup>11</sup> See Robin West, *Teaching Law: Justice, Politics, and the Demands of Professionalism* 23 (2014) (Another cost of this avoidance to address issues of identity including the view of legal education as amoral and the subsequent loss of morale and public esteem).

In the vacuum of instruction on identity, many law students learn the definition of what it means to be a lawyer through popular understanding. Perhaps the most popular definition of the lawyer's role is the "neutral partisanship" definition, colloquially known as the lawyer as a "hired gun." Partisanship in this context involves a lawyer's belief that the proper functioning of our legal system depends on the advocate's commitment to represent a client "zealously within the bounds of the law."<sup>12</sup> This prescribes that the lawyer will even go so far as to "employ means on behalf of his client which he would not consider proper in a non-professional context even to advance his own ends."<sup>13</sup> This includes the ancient dictate that "An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client . . . in performing this duty he must not regard he alarm, the torments, the destruction which he may bring upon others."<sup>14</sup> "Neutrality" here means that a lawyer will agree to represent a client "regardless of [the lawyer's] opinion of the justice of [the client's] ends."<sup>15</sup> As long as the client's goals fall within the bounds of the law, the "neutral partisan" lawyer should not stand in moral judgment of the client. One could infer from this second principle a third—non-accountability. As long as the lawyer acts within the bounds of the law to fulfill his role as a legal advocate, the lawyer's actions should not be evaluated as unethical, even if the actions inflict damage on innocent third parties in the broader community.<sup>16</sup>

Proponents of this theory justify their approach because of a third idea, the principle of procedural justice.<sup>17</sup> This principle holds that a lawyer is not ethically accountable for the consequences of extreme zealous neutral partisan advocacy because the adversarial system, which depends on it, is the most effective system of truth seeking that we have. Scholars describe this as a type of "role morality" where lawyers have ethical duties in their role as lawyers that exempt them from duties they might have in the same situation if they were not a lawyer.<sup>18</sup>

In sharp contrast, others argue that role morality in this context should not apply, and lawyers should be held to the standards of ordinary morality.<sup>19</sup> Because other systems of

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<sup>12</sup> MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1980).

<sup>13</sup> William Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 36 (1978).

<sup>14</sup> *The Trial of Queen Caroline* 8 (J. Nightingale ed. 1820-21).

<sup>15</sup> *Id.*

<sup>16</sup> The "Buried Bodies" case is a classic example of this problem in legal ethics. *People v. Belge*, 372 N.Y.S.2d 798 (N.Y. 1975), *aff'd*, 50 A.D.2d 1088 (N.Y. App. Div. 1975), *aff'd*, 359 N.E.2d 377 (N.Y. 1976).

<sup>17</sup> William Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 38 (1978).

<sup>18</sup> See Richard Wasserstrom, *Roles and Morality*, in *The Good Lawyer: Lawyers' Role and Lawyers' Ethics* 28 (David Luban ed. 1983).

<sup>19</sup> David Luban, *Legal Ethics and Human Dignity* at 63 (2007).

justice could help our society seek truth in effective ways as well, “the adversary system is too weakly justified to support a role morality that diverges widely from non-professional morality.”<sup>20</sup> Pursuant to the rejection of role morality, for example, if intimidating injured women into dropping legitimate lawsuits by forcing them to answer humiliating questions about their personal affairs is wrong for a non-lawyer to do, it is wrong for a lawyer to do as well.<sup>21</sup>

A rejection of the standard conception would involve an approach to lawyering that embraces a “moral activist” role, allowing the lawyer to actively engage his or her own moral capacities when representing and selecting clients.<sup>22</sup> Lawyers who actively engage as principled moral activists and who identify with a particular political cause often define their practice as Cause Lawyering.<sup>23</sup> Cause lawyers make their moral commitments the animating factors of their professional lives. They do not confine themselves to the more limited conception of the lawyer’s role imposed by the standard conception. They tend to reject the principle of non-accountability, and their moral commitment to the broader community often manifests itself through political or policy positions that their legal work supports. For most of their peers at the bar, commitment to a higher cause plays at best a marginal role in their sense of what it means to do their job as a lawyer day after day.<sup>24</sup> For cause lawyers, “lawyering is ... attractive precisely because it is a deeply moral or political activity, a kind of work that encourages pursuit of their vision of the right, the good, or the just.”<sup>25</sup> Cause lawyering can be understood as a specific genre of morally activist lawyering, one that focuses on moral commitments that affect the broader polity.<sup>26</sup> The traditional image of the cause lawyer involves a person with a pre-existing commitment to a cause who brings that commitment to their legal work from the outset. This can include situations where “a lawyer’s ideals are awakened by service undertaken for other reasons,” including passions awakened by work on a case or through exposure to causes through political or social volunteer work.<sup>27</sup>

Whether a lawyer decides to take a neutral partisan or cause lawyer approach to law practice influences how that lawyer will approach many ethical problems in legal

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<sup>20</sup> *Id.*

<sup>21</sup> See Deborah Rhode, David Luban, *Legal Ethics* 179 (2009).

<sup>22</sup> David Luban, *Lawyers and Justice: An Ethical Study*, 148-174 (1988)

<sup>23</sup> This discussion of Cause Lawyering Builds off of Justin Hansford, *Cause Judging*, 27 *Georgetown Journal of Legal Ethics* 1 (2014).

<sup>24</sup> STUART SCHEINGOLD & AUSTIN SARAT, *SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING* 2 (2004).

<sup>25</sup> *Id.*

<sup>26</sup> See Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 *J. CRIM. L. & CRIMINOLOGY* 1195 (2004); Michell N. Meyer, Note, *The Plaintiff as Person: Cause Lawyering, Human Subject Research, and the Secret Agent Problem*, 119 *HARV. L. REV.* 1510 (2006). “Moral Activist” lawyering is a term which refers to lawyers who refuse to engage in the type of role based morality that the standard conception of legal practice implicates as part of the “neutral partisan” idea. See generally RHODE ET AL., *supra* note 20.

<sup>27</sup> STUART SCHEINGOLD & AUSTIN SARAT, *SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING* 4 (2004).

practice, including problems which the model rules fail to provide guidance for. However, regardless of how the lawyer defines their duties to the client, the court, or the opponent, the larger question remains—why become a lawyer to begin with?

To an extent, these approaches have ready answers for the social good that they can provide—the neutral partisan lawyer promotes the public good by extending the autonomy of the client, and the cause lawyer promotes the public good by supporting the social cause in question

## Part II: Mandela as Law Student

### A. *Law Firm Clerkship*

We do not know if any of these ideals informed Nelson Mandela’s dream of becoming a lawyer in 1941. To the extent simple ambition informed his decision making, becoming a lawyer would have made him a member of a tiny black elite in South Africa. The 1946 census enumerated just 18 African lawyers and only 13 African articulated clerks in South Africa.<sup>28</sup> In a community of millions of Black South Africans “lawyers enjoyed especial public esteem and would continue to do so for decades.”<sup>29</sup>

When Mandela told his friend and mentor Walter Sisulu that he wanted to become a lawyer, Sisulu took him to see Lazar Sidelsky, one of the lawyers Sisulu referred his black real estate clients to.<sup>30</sup> Sidelsky, then in his mid-thirties, was a partner at Witkin, Sidelsky, and Eidelman. Sidelsky was one of only a few lawyers in Johannesburg who took on black clients, treated them fairly, and helped them obtain mortgages.<sup>31</sup> Mandela and Sisulu told Sidelsky about Mandela’s dream to become a lawyer. Sidelsky empathized with Mandela’s attempt to enter the profession in spite of prejudice and discrimination, and agreed to allow Mandela to work at his firm as a law clerk.

In South Africa, in addition to passing the requisite examinations, in order to practice law as an attorney one has to undergo several years of apprenticeship, which is known as serving articles. However, in order for Mandela to serve articles, he would first have to receive his Bachelor of Arts degree. Sidelsky employed him in various office duties, as a messenger and document filer, for example, until Mandela earned his B.A. through studying at night school at the University of South Africa in December of 1942. Mandela then began “serving his articles” with Sidelsky.

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<sup>28</sup> Union of South Africa, *Population Census*, 7 May, 1946, Volume 5, *Occupational and Industrial*. Pretoria: UG 41/1954, pp. 184-7. (1954); as cited in Tom Lodge, *Mandela: A Critical Life* 28 (2006).

<sup>29</sup> Tom Lodge, *Mandela: A Critical Life* 28 (2006).

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<sup>31</sup> Tom Lodge, *Mandela: A Critical Life* 20 (2006).

Sidelsky fully embraced Mandela. Law firms in South Africa during this period rarely offered articles to blacks; according to Mandela, it was “almost unheard of.”<sup>32</sup> Not only did Sidelsky allow Mandela to serve his articles with him, without charging Mandela a fee, but Sidelsky lent Mandela money when needed, and gave Mandela an old suit of his to wear, which Mandela would continue to use for five years until he could afford to buy his own.<sup>33</sup>

Like Sisulu, Sidelsky took on Mandela as a mentee. As Mandela would later recall, Sidelsky was “a patient and generous teacher, and sought to impart not only the details of the law but the philosophy behind it.”<sup>34</sup> But “While Mr. Sidelsky imparted his views of the law, he warned me against politics. Politics, he said, brings out the worst in men. It was the source of trouble and corruption, and should be avoided at all costs.”<sup>35</sup> Sidelsky said, “if you get into politics, your practice will suffer. You will get into trouble with the authorities who are often your allies in your work. You will lose all your clients, you will go bankrupt, you will break your family, and you will end up in jail. That is what will happen if you go into politics.”<sup>36</sup> Instead, “he told me over and over again that becoming a successful attorney and thereby a model of achievement for my people was the most worthwhile path that I could follow.”<sup>37</sup> Mandela ultimately decided not to follow Sidelsky’s affirmatively apolitical model of professional identity.

Sidelsky’s overarching approach to the law seems to fit the description of the neutral partisan attorney who believes that law and politics should exist in separate spheres. Although Mandela did mention that Sidelsky held a view of the law that was “broad rather than narrow,” and that Sidelsky believed that the law was “a tool that could be used to change society,” one can only surmise that Sidelsky believed in only gradual, incremental change, the types that could take place through the impact of the simple presence of black lawyers in the courtroom. Professor Kenneth Mack has most recently articulated this theory in *Representing the Race*, explaining that, in the context of segregation in the United States, many believed that the simple presence of black attorneys in the courtroom was enough to promote social change in society.<sup>38</sup> The politics of this “representation” involves the lawyer serving as the stand in for the race as a whole, both demonstrating the futility of negative stereotypes and increasing the dignity of the entire community through the black lawyer’s existence, as a

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<sup>32</sup> Nelson Mandela, *Long Walk To Freedom* 71 (1994).

<sup>33</sup> Tom Lodge, at 21; Ralph Sampson, *Mandela* 31 (1999).

<sup>34</sup> *Long Walk* at 71.

<sup>35</sup> *Long Walk* at 73.

<sup>36</sup> *Long Walk* at 89.

<sup>37</sup> *Long Walk* at 71.

<sup>38</sup> Kenneth Mack, *Representing the Race* (2012).

competent practitioner of law.<sup>39</sup> In this complex dynamic, a lawyer could practice in a neutral partisan fashion, appearing completely apolitical, while in a subtle way serving the purposes of the social movement for equality in the tradition of the most radical of cause lawyers.

### *b. Law School*

Between the years of 1943 and 1949, Mandela would be enrolled at the University of Witswatersrand in an effort to obtain his LLB, the equivalent of a law degree in South Africa at the time. He attended classes during the evenings, while working as a law clerk during the day, helping to support his young wife, Evelyn Muse, whom he married in October 1944, and their son Thembi who was born in February 1946. Mandela was the only black student in the law school at this time; and he was attempting to become the first black advocate in the history of South Africa.

In addition to these time and social pressures, Mandela had begun to proceed contrary to the advice of his mentor Sidelsky, and found himself joining the youth leadership of the ANC. In the construction of his professional identity, Mandela would never view the law as a completely apolitical endeavor. As Mandela reflected during the time of his graduation and receipt of his B.A., “having a successful career and a comfortable salary were no longer my ultimate goals. I found myself being drawn into the world of politics because I was not content with my old beliefs.”<sup>40</sup> This is not to suggest that, by the time he received his B.A. in late 1942, Mandela was already a militant activist. This happened over a period of time. Mandela states:

I had no epiphany, no singular revelation, no moment of truth, but a steady accumulation of a thousand slights, a thousand indignities, a thousand unremembered moments, produced in me an anger, a rebelliousness, a desire to fight the system that imprisoned my people. There was no particular day on which I said, From henceforth I will devote myself to the liberation of my people; instead, I simply found myself doing so, and could not do otherwise.<sup>41</sup>

Perhaps the greatest influence on Nelson Mandela’s politicization was Walter Sisulu, who slowly but surely initiated Mandela into the ANC. The details of that initiation go beyond the scope of this article. But in addition to Mandela’s ANC influences, his experiences at law school also had a large impact on his future approach to the practice of law.

Mandela would not receive his LLB from Wits during these years. The first black advocate—a lawyer to receive their LLB and complete the process for becoming an advocate—was Duma Nokwe, who was called to the bar in 1956. Mandela ultimately earned his LLB from correspondence courses he completed while he was in prison—painstakingly over the course of 27 years. During this time, “his studies were interrupted

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<sup>39</sup> *Id.*

<sup>40</sup> *Long Walk* at 89.

<sup>41</sup> *Long Walk* at 165.

by the vindictiveness of his prison guards (who punished him for clandestinely producing an autobiography) and the obstinacy of the UNISA (University of South Africa) registrar who did not regard his liver and kidney surgery as any excuse for missing one of his examinations).”<sup>42</sup>

But even during his initial attempt to receive his degree, Mandela had barriers to overcome. Chief among these was Professor Herman Robert Hahlo. Hahlo was vocal about his belief that “law was a social science and that women and Africans were not disciplined enough to master its intricacies.”<sup>43</sup> In a law review published in 1966 in the *Virginia Law Review*, Halo engaged in a vigorous defense of Apartheid, arguing that the white population could “hardly be blamed” for instituting Apartheid, and presenting it as a system that “conforms to the highest standards traditional in the Western world.”<sup>44</sup> Halo would later tell Mandela’s classmate George Bizos that Halo’s hope was that Mandela would drop his ambitions for obtaining an LLB, because becoming an advocate was beyond black people.<sup>45</sup> In his “Law of Persons and Corporations” class, Halo emphasized the validity of Apartheid legal doctrine as a faithful manifestation of Roman and Dutch law—and as such a perfectly valid approach to law. This was something that Mandela virulently rejected.<sup>46</sup> When Mandela failed to master these demeaning concepts, Halo gave him a failing grade and refused to allow him to re-take a supplementary examination, even when Mandela had passed all of the other intermediate LLB courses except Halo’s.<sup>47</sup>

In addition to racist jurisprudence and professors, Mandela’s experiences with racism among students and the broader community while in law school surely politicized him even more, making him more likely to pursue a “cause lawyer” oriented approach to law. “When he sat at a table in the law library, a white student moved away. When he went to a café with some white students, they were kept out because there was a ‘kaffir’ among them . . .”<sup>48</sup> In one particularly extreme instance, Mandela and two of his fellow students, who were Indian, boarded a tram together in a rush, despite the fact that while Indians were allowed on Trams, Africans were not. The conductor turned to Mandela’s friends and said that their “Kaffir friend” was not allowed on. When his friends protested, the conductor hailed a policeman who arrested all of them, and they had to appear in court the next day to defend themselves. When their friend, the later to be highly regarded lawyer Bram Fisher, appeared in court in their defense, the magistrate acquitted them, seemingly “in awe of Bram’s family connections.”<sup>49</sup> Mandela would later reflect that “I saw firsthand that justice was not at all blind.”<sup>50</sup>

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<sup>42</sup> Adam Sitze, *Mandela and the Law*, in *The Cambridge Companion to Nelson Mandela* 135 (2014).

<sup>43</sup> *Long Walk*, at 90.

<sup>44</sup> H.R. Halo and I.A. Maisels, *The Rule of Law in South Africa*, 52 *Virginia Law Review* 1, 17, 30 (1966).

<sup>45</sup> David James Smith, *Young Mandela* 87 (2010).

<sup>46</sup> Adam Sitze, *Mandela and the Law*, in *The Cambridge Companion to Nelson Mandela* 140-142 (2014).

<sup>47</sup> Adam Sitze, *Mandela and the Law*, in *The Cambridge Companion to Nelson Mandela* 143 (2014).

<sup>48</sup> Sampson, at 35.

<sup>49</sup> *Long Walk* at 92.

<sup>50</sup> *Id.*

All of these experiences surely must have been included in the “thousand slights” that Mandela referenced above. Mandela found his outlet in activism with other students at the university—students of all ethnic backgrounds. This would include future lawyers for social change in South Africa, such as: Bram Fisher, an Afrikaner South African; Joe Slovo, a Jewish South African; George Bizos, a Greek South African; and Ishmael Meer, an Indian South African. All of these men would go on to become legendary attorneys, known for their commitment to fighting against apartheid in South Africa through their law practice, and lifelong friendship and support of Nelson Mandela.

### Part III: Mandela as Practicing Lawyer

As the 1940’s came to a close, Mandela continued to stay active both academically and politically. After finishing his articles at Sidelsky, Mandela worked for the law firm of Terblanche & Briggish for about one year, then joined the firm of Helman and Michel as a law clerk for a few months while continuing to study for his entrance exams.<sup>51</sup> Mandela would later insist that he joined the Helman firm primarily because “the firm prided itself on its devotion to African education, towards which they donated handsomely. Mr. Helman, the firm’s senior partner, was involved with African causes long before they became popular or fashionable.”<sup>52</sup> South Africa adheres to a bifurcated structure of law practice. In a structure somewhat similar to the way the UK legal profession is divided between barristers and solicitors, the bar of South Africa contains advocates and attorneys. Although an LLB is necessary to become an advocate, an attorney could at the time practice law with only a B.A., provided that they finished their articles and passed their bar entrance examination. On March 27, 1952 Mandela was admitted to practice as a full-fledged attorney by taking a final qualifying exam and joining the Transvaal Law Society.<sup>53</sup>

Mandela’s first job as a lawyer was working for the law firm of H.M. Basner.<sup>54</sup> By that time, it seems that Mandela’s practice experience had primarily consisted of helping Lazar Sidelsky draw up real estate contracts. In contrast, Hyman Miriam Basner had already become a prominent cause lawyer, using his law practice to fight for his beliefs, which included fighting for the equal treatment for African people.<sup>55</sup> Basner, a former member of the communist party, often put his moral and political commitments above all other considerations. He had served as a representative of black South African’s interests in the Senate, and a contemporary noted that “A strike, a boycott, a clash between Africans and the police—where such a thing happened, there would Basner arrive at speed prepared to speak and, as a lawyer, to defend Africans in court.”<sup>56</sup> Basner often selected clients whose political beliefs he championed, including trade unionists and black leaders.<sup>57</sup> Mandela recounts that “For the months that I worked there, I was often

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<sup>51</sup> Nelson Mandela, *A Long Walk to Freedom* 147 (1994).

<sup>52</sup> Nelson Rolihlahla Mandela, Certificate of Enrollment as an Attorney, Signed by the Honorable Justice Steyn, Nelson Mandela Foundation, Johannesburg, South Africa.

<sup>53</sup> Peter Limb, *Nelson Mandela: A Biography* 54 (2008).

<sup>54</sup> Smith, at 109.

<sup>55</sup> See Generally, Miriam Basner, *Am I an African? The political Memiors of H.M. Basner* (1993).

<sup>56</sup> *Id.*

<sup>57</sup> *Long Walk* at 148.

in court representing the firm's many African clients . . . as long as I got my work done at the firm he encouraged my political work."<sup>58</sup>

It seems that by this time in his life, Mandela had had exposure to vastly different conceptions of the lawyer's role—the apolitical Lazar Sidelsky, who believed that lawyers should stay away from politics altogether, and H.M. Basner, the “radical lawyer” who made the causes in which he believed an important part of his professional identity.<sup>59</sup> When Mandela opened his own law office in August of 1952, he had to choose what type of lawyer he would be. How would he balance his passionate devotion to the cause of racial justice with his desire to become a successful attorney? Luckily, at age 34, he had multiple models to choose from, and he could pursue more than one.

By the time Mandela opened his own law office, there was no longer any ambivalence as to whether he would involve himself in some way in the struggle against Apartheid. In 1947, he was elected to the Executive Committee of the Transvaal ANC. From the moment of his election, he says “I came to identify myself with the (ANC) as a whole, with its hopes and despairs, its successes and failures; I was now bound heart and soul.”<sup>60</sup> By 1952 he was regarded as young a leader in the organization. When in 1952 the ANC and the South African Indian Congress launched a non-cooperation campaign against racially unjust laws in South Africa that would eventually result in the conviction of over 8,000 protesters, Mandela was named as Volunteer-in-Chief.<sup>61</sup>

Nelson Mandela was good friends with another young African lawyer who was a member of the ANC, Oliver Tambo. In fact, Tambo had been a member of the ANC's national executive committee since 1947.<sup>62</sup> They often shared lunch together, along with their experiences in the practice of law. They agreed that:

[As] Technically proficient as white attorneys might be, black clients were severely hampered in communicating their difficulties to them . . . language was a barrier, even when good translators were at hand. White lawyers' lack of familiarity with African culture, tradition, and values impeded communication and therefore the course of justice. Removing these obstacles by providing black legal representation might give black people an outside chance in the law courts.<sup>63</sup>

Within a few months of the opening of Mandela's law office, Tambo joined. The law firm, located at Chancellor House just across the street from the courthouse, was in the same building as the ANC headquarters run by Sisulu.<sup>64</sup> Together Mandela and Tambo would form the first all-African law firm in South African history, a general practice law firm that handled criminal, civil, and political cases.

*a. Sidelsky's Approach: Neutral Partisanship and Representing the Race*

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<sup>58</sup> *Id.*

<sup>59</sup> Martin Meredith, *Mandela: A Biography* 95 (2011).

<sup>60</sup> Mandela, at 108.

<sup>61</sup> Albie Sachs, *Justice in South Africa* 213 (1973).

<sup>62</sup> John Allen, *Growing up White in Apartheid South Africa* 152 (2002).

<sup>63</sup> Luli Callinicos, *Oliver Tambo: Beyond the Engeli Mountains* 174 (2004).

<sup>64</sup> Sampson, at 77.

By all accounts, the law practice was overrun with clients from its inception. Mandela later reflected that that “To reach our offices each morning, we had to move through a crowd of people in the hallways, on the stairs, and in our small waiting room.”<sup>65</sup> Tambo would confirm that “To reach our desks each morning, Nelson and I ran the gauntlet of patient queues of people overflowing from the chairs in the waiting room into the corridors.”<sup>66</sup> Winnie Mandela would later recall how she would have to wait to see him, shoulder to shoulder with clients, in the lobby area when she came to visit.<sup>67</sup> Black clients came from all over the country to see Mandela & Tambo, the only black law firm at the time. “‘They came from Natal, the Cape, the Free State and from the Northern Transvaal,’ recalled Tambo, ‘and of course from Johannesburg and the areas next to Johannesburg.’”<sup>68</sup>

Why was the law firm of Mandela & Tambo so popular? As the only black law firm in South Africa, this was a place where black clients would not feel intimidated by cultural or language barriers. Also, it was apparently common practice by white South African lawyers at the time to charge blacks higher rates for the same legal work. In contrast, Mandela & Tambo “was a place where [clients] could find a sympathetic ear and a competent ally, a place where they would not be either turned away or cheated, a place where they might actually feel proud to be represented by men of their own skin color.”<sup>69</sup> Mandela, by serving as a neutral partisan or “hired gun,” could increase the autonomy of these African clients who, under apartheid rule, had little autonomy to spare.

In their criminal practice Mandela & Tambo, a law firm comprised of two ANC leaders, was the first choice and last resort for Africans who ran afoul of Apartheid laws. Finding one self in such a predicament was not a challenge. The 1913 Black Land Act severely limited the amount of land that Blacks could own; the 1923 Urban Areas Act forced blacks into slum areas; the 1926 Colour Bar Act banned Blacks from many skilled trades; and the 1936 Representation of Natives Act denied Blacks the right to vote.<sup>70</sup> All of these laws were simply a precursor to the increasingly harsh laws passed after Apartheid formally became the law of the land in 1948. From that point forward:

it was a crime to walk through a Whites Only door, a crime to ride a Whites Only bus, a crime to use a Whites Only drinking fountain, a crime to walk on a Whites Only beach, a crime to be on the streets past eleven, a crime not to have a pass book and a crime to have the wrong signature in that book, a crime to be unemployed and a crime to be employed in the wrong place, a crime to live in certain places and a crime to have no place to live.”<sup>71</sup>

In these types of cases, representing African clients victimized by Apartheid law, Mandela could practice as a traditional neutral partisan attorney and still promote the fight against apartheid. For example, black Africans, but not whites, had to carry a pass around at all times stating the areas that they were authorized to be in, and to

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<sup>65</sup> *Long Walk*, at 149.

<sup>66</sup> Luli Callinicos, *Oliver Tambo: Beyond the Engeli Mountains* 173 (2004).

<sup>67</sup> David James Smith, *Young Mandela* 111 (2010).

<sup>68</sup> Luli Callinicos, *Oliver Tambo: Beyond the Engeli Mountains* 174 (2004).

<sup>69</sup> *Long Walk* at 150.

<sup>70</sup> Marian Pallister, *Nelson Mandela* (2010).

<sup>71</sup> *Mandela*, at 149.

stray from that area could land one in jail. In 1959, the Black South African population of South Africa was approximately 10 million in number, the ruling white minority was around 2 million in number, and there were 1.8 million prosecutions against blacks for pass offenses, for being in an unauthorized area, and for similar violations.<sup>72</sup> Apartheid criminalized ordinary Blacks trying to go about their lives. Tambo would later write, “Our buff files carried thousands of these stories and if, when we started our law partnership, we had not been rebels against apartheid, our experiences in our offices would have remedied the deficiency.”<sup>73</sup>

b. Representing the Race

Mandela also could fight Apartheid symbolically as an attorney in court, “Representing the race” and demonstrating that a black person could compete in a court of law and achieve as much success for their client as any white person could. In court Mandela “cultivated an assertive, theatrical style with sweeping gestures.”<sup>74</sup> He seemed to consciously pursue a dominant presence in the courtroom, hoping to strike a blow for African dignity through his simple presence: “As an attorney, I could be rather flamboyant in court. I did not act as though I were a black man in a white man’s court, but as if everyone else—white and black—was a guest in my court.”<sup>75</sup> He knew his people were watching: “The spectators’ gallery was usually crowded, because people from the township attended court as a form of entertainment.”<sup>76</sup>

This is very similar to the attempts to represent the race by Charles Hamilton Houston in the United States in the 1920’s.<sup>77</sup> Tambo recognized this strategy by Mandela, later reflecting that there was “a hint of arrogance around him, which wasn’t really arrogance, I think it was for him an instrument to hit at this system. To say, ‘Look, I am as equal with you as anybody else in this courtroom. We speak the same language; we are addressing the same issues. I am not inferior to you.’”<sup>78</sup>

In spite of Mandela’s efforts to demonstrate equality through representation, he often faced racism from South African whites even in the courtroom. For example, white witnesses often refused to answer questions from a black attorney, and the magistrates would ask the question themselves instead of forcing the witness to respond to Mandela.<sup>79</sup> Once, as Mandela began an argument, the Magistrate demanded for him to produce his diploma that certified his right to appear in court (the type of diploma one usually hangs on a wall in the office). When Mandela replied that he did not bring his diploma with him to court, the Magistrate spoke disrespectfully to Mandela, shouting at him and deriding him, and refusing to hear the case. However, Mandela held his own, calmly telling the court reporter to record the Magistrate’s words, and explaining to the

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<sup>72</sup> Smith, at 112.

<sup>73</sup> *Id.* at 113

<sup>74</sup> *Sampson*, at 78.

<sup>75</sup> *Long Walk*, at 153.

<sup>76</sup> *Id.*

<sup>77</sup> Kenneth Mack, *Representing the Race* (2012).

<sup>78</sup> Luli Callinicos, *Oliver Tambo: Beyond the Engeli Mountains* 178 (2004).

<sup>79</sup> *Id.* at 150.

judge “In view of Your Worship’s attitude I find it impossible to proceed with the case for the following reasons . . .” until Mandela was cut off by another shout.<sup>80</sup> Mandela then appealed to a higher court, with George Bizos serving as his lawyer, and had the magistrate recused from the case.

In addition to cases involving the violation of apartheid laws, Mandela & Tambo handled normal criminal and civil cases, murder, robbery, and theft, for example, in which they charged full rates.<sup>81</sup> As the only Black law firm in the country, their practice quickly blossomed, growing as the small but tight knit black middle class in South Africa looked to them for representation. The Manhattan Brothers, a prominent singing group, would go to Mandela & Tambo if they were arrested for giving a concert in town without their passes.<sup>82</sup> Richard Maponya, later Soweto’s most prominent businessman and the progenitor of the Maponya Shopping Mall, was a close friend as well as a client.<sup>83</sup> Mandela & Tambo also had many rural clients, often handling disputes between local chiefs and the Apartheid authorities.<sup>84</sup>

In these cases, Mandela & Tambo seemed to practice in a neutral partisan tradition, not seeking to impose their values on their clients, but instead giving them access to the full range of their talents without judging the morality of their ends. For example, Mandela once recalled the story of a high profile murder trial that “rocked the black community.”<sup>85</sup> As retold by Oliver Tambo biographer Luli Callinicos, who interviewed Mandela, after a night of partying, the son of a highly respected black academic had irresponsibly let off a couple of shots in the car going home. One of the passengers, a fourth-year medical student, was killed. The black community was indignant, and there was pressure on the firm not to defend the reckless young man because, even though he came from a reputable family, the young man was regarded as a *tsotsi*, a thug. “But it was my duty as a lawyer to defend him,” commented Mandela.<sup>86</sup> Ultimately, the young man received a suspended sentence.

In another case where the ends of the client were of suspicious merit, Mandela represented a man who had failed to pay child support to a child he had had with a woman outside of marriage.<sup>87</sup> Under customary law in the man’s tribal ethnic heritage, a man was not legally liable to give child support payments on a regular basis to the mother—his responsibilities were extinguished with the payment of what amounted to the value of three head of cattle.<sup>88</sup> After that, it was up to the village “Kraalhead” to pay for the child’s support. However under the British Crown’s common law applied by the

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<sup>80</sup> George Bizos, *Odyssey to Freedom* 123-129 (2007).

<sup>81</sup> Luli Callinicos, *Oliver Tambo: Beyond the Engeli Mountains* 179 (2004).

<sup>82</sup> Sampson, at 78.

<sup>83</sup> Tom Lodge, *Mandela: A Critical Life* at 75 (2006).

<sup>84</sup> See eg. George Bizos, *Odyssey to Freedom* 145 (2007),

<sup>85</sup> Luli Callinicos, *Oliver Tambo: Beyond the Engeli Mountains* 179 (2004).

<sup>86</sup> *Id.*

<sup>87</sup> Regina v. Mofekeng, (Located with the help of the Nelson Mandela Foundation and the Johannesburg Law Society. On file with author).

<sup>88</sup> *Id.*

court, the man was liable. In this case Mandela & Tambo's client lost and had to pay child support, setting precedent for future child support issues involving Black South Africans.<sup>89</sup>

Many of Mandela & Tambo's civil cases included domestic issues, possibly because of the pressures that the apartheid system placed on the Black South African family structure.<sup>90</sup> In addition these domestic relations clients, local ANC officials, clergymen, and others would send all manner of distressed people to Mandela & Tambo for help.<sup>91</sup> It seems that Mandela, in these situations, adhered to neutral partisan principles and continued to represent the client regardless of the morality of the client's ends.

c. *The H.M. Basner Approach: Cause Lawyering and Representing Activists*

The large number of cases that Mandela & Tambo argued allowed them the financial freedom to take on political cases free of charge. As mass protests against Apartheid became more prevalent, "they increasingly took on cases of activists arrested for not carrying passes, for defiance, for demonstrations, for strikes and stayaways," and they did so on a pro bono basis.<sup>92</sup> This may not have resulted in them becoming rich financially, but they seemed to be able to remain solvent while doing legal work which both helped ordinary people and their fellow activists, a path that seemed to enrich them in other substantive ways. As Mandela would say later, "This was the reason I had become a lawyer in the first place, and my work often made me feel I had made the right decision."<sup>93</sup>

For example, Mandela became engaged in a case arising out of a law passed in an attempt to stop the spread of the ANC. The law banned meetings of more than "ten natives" in the reserved areas until the white "native commissioner" had given permission first.<sup>94</sup> In one case retold by George Bizos, who worked with Mandela on these cases, five men had been convicted of attending or presiding at a meeting where more than ten "natives" were present.<sup>95</sup> It had indeed been a protest meeting. However, Mandela and Bizos appealed the conviction on two grounds, one of which was that the notice issued under the law did not prohibit gatherings or assemblies "of natives," but rather gatherings at which more than ten natives "were present." Properly construed, it meant that if ten natives walked into a meeting of whites, that entire meeting was illegal, and the whites who presided over the meeting could themselves be arrested. Fearing that the law could affect whites negatively, the court overturned the convictions, and the activists were freed and were able to return to organizing.<sup>96</sup>

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<sup>89</sup> *Id.*

<sup>90</sup> Luli Callinicos, *Oliver Tambo: Beyond the Engeli Mountains* 180 (2004).

<sup>91</sup> George Bizos, *Odyssey to Freedom* 145 (2007).

<sup>92</sup> Luli Callinicos, *Oliver Tambo: Beyond the Engeli Mountains* 179 (2004).

<sup>93</sup> *Long Walk* at 150.

<sup>94</sup> George Bizos, *Odyssey to Freedom* 147 (2007)

<sup>95</sup> George Bizos, *Odyssey to Freedom* 155 (2007)

<sup>96</sup> *Id.* at 156

### *Moral Jigsaw Puzzles*

Some of Mandela's cases involved what he called "moral jigsaw puzzles" that forced him to think hard about questions of professional identity, morality and ethics. A few representative cases will demonstrate this.

- "*Am I my Client?*"

In the case of Timothy Fefo Rampai, Mandela, who had been banned in the waning months of 1952 for his work with the ANC, had the interesting experience of representing a man who had been declared an "undesirable" person in his home area of Germinston for similar grassroots organizing with the ANC.<sup>97</sup> It must have been *deja vu* for Mandela. As George Bizos relates in his memoir, the government had arrested Rampai, sentenced him to three weeks imprisonment with compulsory labor, and tried to evict Rampai from his house because they argued that he was an agitator. The local authorities claimed that Rampai had "shown opposition to the law" and had organized a protest.

Mandela, as a leader in the ANC, had a number of reasons to take interest in this case. Mandela certainly was concerned about the outcome because if the government could effectively neutralize the ANC's local organizers with this law, it would have struck a serious blow to the ANC's efforts. Not incidentally, Mandela himself could have been considered an "undesirable agitator" by the apartheid government at that point as well.

When Rampai lost, Mandela and Bizos appealed. They argued that the local authorities had "misunderstood" the law; that under the law, when the decision was made to declare someone "undesirable," the onus rested on the local authority to establish the merit of the allegations. The problem was, the decision as to whether a person was "undesirable," or detrimental to the maintenance of peace in the area, was mostly subjective. And if any investigation resulted in this conclusion, the person designated as undesirable should at least have had an opportunity to reply on appeal, which Rampai did not have.<sup>98</sup>

On appeal, the judges set aside Rampai's eviction on the grounds that the local authority "misunderstood the legislation it was administering" and therefore, its decision was invalid.<sup>99</sup> After that "not much use was made of the iniquitous provision" apparently because having a full open hearing on whether someone was "undesirable" was an exercise that the apartheid government did not want to engage in.

Mandela's representation of an activist in his own movement could potentially have led to the problems raised by Nancy D. Polikoff in *Am I my Client? The Role Confusion of a Lawyer Activist*.<sup>100</sup> In this article, Polikoff suggests that, when a lawyer is an activist in the same movement as their client, the risk arises that the lawyer will impose their own will on the client's decisions in regards to the representation, causing the lawyer to fail to

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<sup>97</sup> George Bizos, *Odyssey to Freedom* 154 (2007)

<sup>98</sup> *Id.* at 155.

<sup>99</sup> *Id.*

<sup>100</sup> Nancy D. Polikoff, *Am I My Client?: The Role Confusion of a Lawyer Activist* 31 Harv. C.R.-C.L.L. Rev. 443 (1996).

fully practice in a “client centered” fashion that is the hallmark of the neutral partisan approach to law practice.<sup>101</sup> In this case, Mandela was certainly interested in the outcome for his own reasons—if Rampai had wanted to plead guilty for a lesser charge, for example, what would Mandela have done? Would Mandela have imposed his own desire to appeal on Rampai?

In Mandela’s case, because he served as a member of the ANC leadership during this period, even if in an unofficial position, he may have viewed his situation differently in one crucial respect. As a leader in the ANC, it is likely that he would have felt justified in directing Rampai to appeal his case anyway, as a matter of ANC policy. It was a matter that arose out of Rampai’s ANC activities, and Mandela and the ANC leadership would have wanted Rampai to continue to use his representation to help the movement by making sure that this law could not continue to hamper local activists. Mandela might in this sense be able to avoid Polikoff’s dilemma because of his status as a leader in the movement.

However, Mandela the lawyer would know that Rampai still had a right to make a different choice. What if Rampai had decided to leave the ANC as a result of his conviction, and he wanted to pursue a different course? Did he have that right? Wouldn’t Mandela have put Rampai at a disadvantage if, once Rampai left the ANC, Mandela refused to represent him any further? Could Rampai afford another lawyer, or any lawyer, for that matter, if Mandela hadn’t provided free representation? How many options did Rampai have in this situation, especially since Mandela and Tambo ran the only black law firm in the country at that time?

- “*Dirty Questions*”

Mandela also engaged in legal tactics that stretched the bounds of ethical behavior, and that other lawyers might have elected not to pursue. In one especially harrowing story, as retold by Denis Goldberg and relayed by David James Smith in *Young Mandela*, Mandela represented a black man accused of rape by cross-examining his alleged victim in deliberate detail. “Was there penetration, did he remove your underwear, did he actually put his penis in your vagina?”<sup>102</sup> She couldn’t answer because he was a black lawyer and for a racist white woman that would be a renewed violation. Mandela’s client went free.<sup>103</sup>

The use of embarrassing questions to dissuade a woman from moving forward in a rape case seems unethical from most perspectives based in ordinary morality. Some have even suggested that this line of questioning victimizes the rape victim.<sup>104</sup> Only by adhering sharply to the neutral partisan standard would it seem to be justified. Or it is possible that Mandela may have reasoned here that it would be selfish to consider his own moral self-interest when his client’s life was on the line in this rape case, and he had

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<sup>101</sup> *Id.*

<sup>102</sup> David James Smith, *Young Mandela* 140 (2010)

<sup>103</sup> *Id.*

<sup>104</sup>

to fulfill his duty as his client's advocate? This idea that a lawyer representing a client should filter out his own moral judgment has been hotly debated.<sup>105</sup>

Another possibility is, just as Mandela felt it was his duty to represent the murder suspect mentioned above, he might have felt it was his obligation to use any and all lawful tactics he could to help his client, including "dirty questions." This idea that morality requires that lawyers obey the rules of the lawyer's role, regardless of the ethical consequences in terms of ordinary morality, is another highly controversial aspect of the neutral partisan theory.<sup>106</sup>

Finally, one might argue that, because the embarrassment may have been based on racial hostility, as much or as more as it was on feminine modesty, this comeuppance was a sort of justice that the woman deserved in light of her racist attitudes. We don't know whether the client was actually guilty or not, but if so, it is highly doubtful from an ordinary ethical perspective that it is just to advocate for a rape to go unpunished because of the racism of the victim.

#### *-Using Unjust Laws*

Another case of Mandela's that raised ethical questions is his representation of a colored man who ran afoul of the Population Registration Act. Under the act, a person who is registered as "Colored" for instance, could be reclassified as "African" based on the opinion of some bureaucrat who deems it so, resulting in the loss of the ability to hold certain jobs, and the loss of other civil rights that people designated as colored could receive that Africans could not.

Mandela defended an ex-soldier who had run afoul of this law. He had fought for South Africa during World War II in North Africa and Italy in a "colored" regiment, but upon his return had been reclassified as African.<sup>107</sup> He wanted to be reclassified as colored so, for example, he did not have to carry a pass.

Mandela tells the story of how he appealed to Classification Board, which held a hearing in which Mandela presented his client's light skinned sister, his client's birth certificates, and other solid pieces of evidence on his client's behalf. The evidence was so strong that the prosecutor indicated that he would not oppose the appeal. In Mandela's words,

. . .the magistrate seemed uninterested in both my evidence and the prosecutor's demurral. He stared at my client and gruffly asked him to turn around so that his back faced the bench. After scrutinizing my client's shoulders, which sloped down sharply, he nodded to the other officials and upheld the appeal. In the view of the white authorities those days, sloping shoulders were one stereotype of the Coloured physique. And so it came about that the course of this man's life was decided purely on a magistrate's opinion about the structure of his shoulders.

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<sup>105</sup> Arthur Isak Applbaum, *Ethics for Adversaries: The Morality of Roles in Public and Professional Life* 4 (1999).

<sup>106</sup> *Id.*

<sup>107</sup> See *Long Walk* at 151; Tom Lodge, *Mandela: A Critical Life* 73 (2006).

Mandela admits later that “I did not support or recognize the principles in the Population Registration Act, but my client needed representation, and he had been classified as something he was not.”<sup>108</sup> Mandela uses this example as his quintessential “Moral jigsaw puzzle.”<sup>109</sup> Is it wrong to use an unjust law to gain an advantage for your client?

From a pragmatic perspective, Mandela may have reasoned that if he could use this unjust law to help his client, it would have been wrong to fail to use all of the tools available to him, as a lawyer, to do so. To fail to use the unjust law would have been an unethical failure to engage in the zealous advocacy that lawyers have an ethical duty to pursue. Conversely, moral reasoning that is removed from legal ethics might suggest that, my using the law to help his client, Mandela actually furthered apartheid. One could argue that this litigation helped to legitimize the law as opposed to undermining it. True, Mandela’s narrative about the law in his autobiography undermines it by noting how arbitrarily the law was enforced on dubious grounds based in a type of eugenics based philosophy. However, this deconstruction took place years after the fact, and leaves the question unanswered—what would have been the most ethical course for Mandela to take in that situation?

## Part IV: Mandela as Defendant

Even before his time as a practicing attorney, Mandela had begun to play prominent roles in the ANC. At the end of 1947 Mandela was elected onto the Transvaal Provincial executive board of the ANC, and in 1948 he was also the secretary of the ANC Youth League.<sup>110</sup> In June 1952, he “took center stage for the first time and tasted the potency of leadership” when he became volunteer in chief of the Defiance of Unjust Laws Campaign.<sup>111</sup> This historic campaign involved organizing strategic civil disobedience of Apartheid laws. The ANC reached out to other social change movements around the world, and there was global support—some of these tactics would influence activists in other parts of India, Africa, and the civil rights movement in the United States.<sup>112</sup> The campaign began on June 26<sup>th</sup> with a group of Black South Africans arrested for going through a whites-only entrance at a train station.<sup>113</sup> This day is now celebrated every year in South Africa as “Freedom Day.” In total, over the next five months over 8,000 people would be arrested during the campaign.<sup>114</sup>

Mandela was arrested on June 27<sup>th</sup> 1952 for violating an Apartheid law, as he planned, and was charged with violating the Suppression of Communism Act, even though he was not a communist. He opened his own law practice two months later in August 1952. But in December 1952, he was “banned” by the South African government.<sup>115</sup> This odd and harsh form of penalty by the Apartheid government was designed to create a “social

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<sup>108</sup> *Long Walk* at 151.

<sup>109</sup> *Id.*

<sup>110</sup> Tom Lodge, *Mandela: A Critical Life* 37 (2006).

<sup>111</sup> *Young Mandela* at 101.

<sup>112</sup> *Id.* at 99.

<sup>113</sup> *Id.* at 100

<sup>114</sup> *Sampson* at 69.

<sup>115</sup> *Sitze*, at 147

death” for a Mandela—he could not speak with more than one person at a time, he could not have his speech or writing quoted, and he could not be a member of the ANC.<sup>116</sup> This presaged the next decade of Mandela’s life, as his career as a lawyer and a leader in the ANC coincided with repeated acts of Apartheid government suppression.

After his 1952 banning ended, Mandela’s next public speech that could be quoted in the newspapers did not come until 1960.<sup>117</sup> He continued his law practice and remained clandestinely active in the ANC, but he also continued to face arrest. He and 155 other anti-Apartheid activists were arrested and charged with Treason in 1956; the trial began on December 5, 1956, and ended on March 29, 1961 with everyone discharged and innocent.<sup>118</sup> It was during this time that Mandela most prominently demonstrated his burgeoning lawyer-statesmanship, particularly in two scenarios-- helping the ANC form partnerships with other organizations, and founding Umkontwo We Size (Spear of the Nation).

*-The Lawyer Statesman*

The statesmanship Mandela would exercise during the early 90’s during the period of South Africa’s transition to democracy is legendary, and often this is seen as his signal contribution. However, even before his 27 year stint as a political prisoner, Mandela’s statesmanship first emerged through his leadership of the ANC.

In Kronman’s book, *The Lost Lawyer*, the lawyer-statesman almost by definition occupies a leadership position in the community, and often must make “identity-determinative” decisions. In doing so he helps to define the values of a political community, and must choose between “incommensurable goods” on behalf of a diverse group of people.<sup>119</sup> The lawyer-statesman engages in group deliberation about the public good when making these decisions. The lawyer-statesman is willing to entertain opposing positions using a combination of “sympathy and detachment” that refuses to prioritize any particular cause over the interests of the lawyer-statesman’s client: the political community which he or she leads.

Mandela demonstrated this ability through partnerships he brokered, helping to bring together people of very diverse social, ethnic, and political backgrounds in one united fight against Apartheid. Mandela was not always the lawyer-statesman—quite the opposite. He had to grow into that role. Before the Campaign for Defiance Against Unjust Laws in 1952, Mandela was suspicious of working with Indian anti-apartheid activists and White Communists, fearing their alliance with the ANC in protest would result in their domination the movement, because of their superior access to resources.<sup>120</sup> In fact, Mandela not only opposed partnering with these groups in his youth, but took a leading role in heckling them at their rallies, on one occasion “physically dragging” the Indian leader Yusef Cachilia from the platform at a communist rally.<sup>121</sup> To some, before the Defiance Campaign he seemed to be “heckler and disrupter-in-chief” when dealing with these other groups.

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<sup>116</sup> *Id.*

<sup>117</sup> Sampson, at 142.

<sup>118</sup> *Id.*

<sup>119</sup> *Kronman* at 60, 69.

<sup>120</sup> *Young Mandela* at 82, *Sampson* at 47.

<sup>121</sup> *Sampson* at 61.

However, after seeing the commitment that the Indian activists showed in their nonviolent protests, he began reading Gandhi and Nehru; and also as communist protests against Apartheid gained in steam, he spent time with *The Communist Manifesto* and biographies of South African Marxists.<sup>122</sup> By the time of the successful defiance campaign, in which people of multiple ethnicities participated, Mandela would announce that unity between the struggles had “become a living reality.”<sup>123</sup> The same people he once heckled were now political allies.

To what do we owe this change in Mandela during this time period? Mandela by 1955 had been practicing law for three years, and had been engaged in the study of law and clerking for a total of twelve. According to Kronman, the traditional approach to lawyer training, which Mandela experienced, emphasized “apprenticeship and broad humanistic learning,” seeking to instill the lawyer-statesman disposition in young lawyers.<sup>124</sup> In addition to his apprenticeships and study of law, Mandela had studied Western philosophers as part of his training, including Harold Laski, Bernard Shaw, and Bertrand Russell, whom he would later quote in his public addresses. Additionally, according to Kronman, the general practice of law helps to create the breadth of mind and experience to help develop practical wisdom in lawyers.<sup>125</sup> Mandela and Tambo had by this point spent three years in general practice—possibly not enough time to instill a full measure of prudence, but enough to push Mandela’s mode of thinking towards lawyer-statesmanship.

When lawyer-statesmen make judgments in situations characterized by value pluralism, environments like nation-states or community political activists communities such as the one that Mandela navigated in the 1950’s, the risk of disintegration always lingers. Lawyer-statesmen seek to avoid this by promoting a value that Kronman calls “political fraternity,” a concept that suggests the creation of “a measure of cohesion” in a political community in which “the members of a community are joined by bonds of sympathy despite the differences of opinion that set them apart on questions concerning . . . the identity of their community.”<sup>126</sup> This level of cohesion goes beyond simple tolerance, and implicates “a willingness to entertain the views of others, to make the positive effort that is required to see their values in the best possible light, the light in which they appear to their own defenders, even when rejecting those values and the political consequences flowing from them.”<sup>127</sup>

Mandela’s efforts to build cohesion went beyond domestic borders. As a true statesman, Mandela went on a tour of Africa in 1961 to meet with foreign leaders and gain support for the ANC. He went to Dar-es-Salaam to meet with the President of Tanzania, Julius Nyerere; Cairo, Egypt to meet with Egyptian Officials; Tunis, where he met President Bourguiba; Morocco, where he met Dr. Mustafai, the head of the Algerian mission in Morocco, and Ben Bella, President of Algeria; Mali, where he met defense Minister Madeira Keita, and Senegal,

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<sup>122</sup> *Sampson* at 65.

<sup>123</sup> *Sampson* at 68.

<sup>124</sup> *Kronman* at 154,

<sup>125</sup> James Altman, *Modern Litigators and Lawyer-Statesman*, 103 *Yale L.J.* 1031, 1044 (1994).

<sup>126</sup> *Kronman*, at 93.

<sup>127</sup> *Id.* at 94.

where he met with President Leopold Senghor.<sup>128</sup> In all of these meetings, he sought to build bridges between African freedom movements who, at this time in the early 1960's, were involved in a huge push for anti-colonization. When he attended the 1961 Pan African Freedom Conference in Addis Ababa, Ethiopia, he worked to soothe the tensions between other African leaders, particularly the East and Central Africans who were refusing to admit Arab dominated North African delegates into their political organization that would later come to be known as the Organization for African Unity.<sup>129</sup>

Another key decision made by Mandela during this period is the founding of Umkonkwo we Sizwe (MK), or "Spear of the Nation," vaunted as the military wing of the ANC. It was the type of identity determining decision that lawyer-statesmen often have to make, forever altering the shape of the movement against apartheid. In this situation, Mandela would have to lean on the core competency of the lawyer-statesman, practical wisdom or "prudence." For example, although Mandela's MK made the life altering decision to enter into a period of armed resistance, Mandela's prudential approach may have influenced the decision to begin with sabotage that would not result in the loss of life, and in a lawyerly, systematic way pursue armed resistance primarily as a negotiation tactic. This contrasts sharply with the tactics pursued by other African revolutionaries at the time with similar orientations to Mandela who were not lawyers, such as Julius Nyerere in Tanzania or Kwame Nkrumah in Ghana.

When the lawyer-statesman is described in the literature, the defining trait most often referred to is "practical wisdom." Kronman describes practical wisdom as a character trait, and "affective habit," that is not a skill that can be learned intellectually, but instead must be instilled through consistent practice.<sup>130</sup> The affective habit focuses on one's "powers of sympathetic appreciation," the ability to have compassion for other people's position by seeing the world from their eyes, and thus taking their arguments seriously and sympathizing with them.<sup>131</sup> This other directed sympathy is primarily a tool of one's imagination, and thus a person's reasoning powers alone cannot help them accomplish the practical wisdom task.<sup>132</sup>

The reason this character trait plays such a major role in the life and career of the lawyer statesman is that, as a leader, the lawyer statesman is often called upon to make judgments about "the most important choices a community makes," including choices that help to establish a community's "defining values" that ultimately determine the boundaries of its identity.<sup>133</sup> These judgments close off other possibilities, and often the path chosen is not demonstrably better or worse

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<sup>128</sup> *Sampson*, 163-166.

<sup>129</sup> *Sampson*, at 164.

<sup>130</sup> Kronman, at 75.

<sup>131</sup> James Altman, *Modern Litigators and Lawyer-Statesmen*, 103 *Yale L.J.* 1031, 1044 (1994).

<sup>132</sup> *Anthony v. Alfieri, Denaturalizing the Lawyer-Statesman*, 93 *Mich. L. Rev.* 1204 (1995).

<sup>133</sup> Kronman, at 60.

than the alternative, but simply the alternatives appeal to different, incommensurable values.<sup>134</sup> Because the determination of whether the answer is right or wrong depends on the values of the observer, simple calculation or either inductive or deductive reasoning will not provide a sufficient answer. The decision to pursue “armed struggle” was a decision of this type.

The decision to move to armed struggle was in part influenced by the Apartheid government’s decision to activate its military, and make mass arrests, in order to prevent a three day stay-at-home strike organized by Mandela on May 31, 1961.<sup>135</sup> The government changed the law, allowing prisoners to be held for 48 hours without charge, and detained all of the known African activists until the conclusion of the planned protest.<sup>136</sup> A warrant was issued for Mandela’s arrest for organizing the strike. In response, Mandela sent out a press release, saying that in the present conditions “to seek for cheap martyrdom by handing myself to the police is naïve and criminal.”<sup>137</sup> He also said that the ANC would pursue “other forms of mass pressure.”<sup>138</sup>

This decision to continue to engage in civil disobedience would prove pivotal. Shortly after his return to South Africa, on August 5, 1962, Mandela was arrested while disguised a chauffeur. He was charged with incitement to strike and leaving the country without a passport. His hearings began in October, and by November, he was convicted on both charges and sentenced to five years in prison.<sup>139</sup> Later, while he was incarcerated, the police raided the activists’ center of operations at Lilesleaf farm in Rovonia, a small suburb about an hour outside of Johannesburg. There they found evidence of the armed struggle, and in 1964 Mandela and eight codefendants were sentenced to life imprisonment and transferred to Robben Island. In the short run, Mandela’s fateful decision to pursue armed struggle did not seem to be particularly fruitful. However, in the long term the saga of the political prisoners on Robben Island, and Mandela as the key figure in that narrative, captured the imagination of the world and helped to mobilize the global political and economic pressure needed to topple the Apartheid Regime.

#### *Lawyers and Mandela’s Theory of Civil Disobedience*

When Mandela addressed the court on November 7, 1962, after being convicted on both charges, he issued a rigorous, thoughtful, and elegant defense of his actions of civil disobedience that perhaps presaged Dr. Martin Luther King’s *Letter from Birmingham Jail* shortly thereafter.<sup>140</sup> His “speech from the dock” asserts that Mandela’s actions here were morally justifiable on numerous grounds.

Mandela begins by reminding the court that, “I am charged with inciting people to commit an offence by way of protest against the law, a law which neither I nor any of my

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<sup>134</sup> *Id.* at 56.

<sup>135</sup> *Sampson* at 147

<sup>136</sup> International Defense and Aid Fund, *Nelson Mandela: The Struggle is My Life* 155 (1986).

<sup>137</sup> *Sampson* at 152.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 173.

<sup>140</sup> International Defense and Aid Fund, *Nelson Mandela: The Struggle is My Life* 148 -160 (1986).

people had any say in preparing.”<sup>141</sup> To the extent that Mandela’s defiance of Apartheid law took place in a context where black South Africans did not have the right to vote, Mandela argued that he had no duty of obedience to Apartheid laws. The apartheid government did not rest on any theory of popular sovereignty that recognized blacks as fully human.<sup>142</sup>

If one follows Professor Halo’s argument that the South African state was legitimate, Mandela’s actions still fit withstand analysis. Civil disobedience has historically been considered to be morally justified form of law-breaking—this has been the conclusion of scholars going as far back as Socrates’ trial for corrupting the youth and up until the present.<sup>143</sup>

Mandela seems to advocate an approach to civil disobedience that requires that an act must have a political goal, entail an act of conscience, take place publically, include an exhaustion of legal means, demand only the risk of, not necessarily the acceptance of, guilt, and inflicting minimal injury to the community, not necessarily involving non-violence.<sup>144</sup>

Mandela’s civil disobedience sought to “provoke change through the public debate and decision,” because the goal he sought was always one person one vote, as opposed to simply to end the disfavored apartheid laws.<sup>145</sup> Even so, his activism entailed an act of conscience in that it was “borne out of a deeply held belief in the injustice of a law or policy.”<sup>146</sup> Mandela’s stated “I hate the practice of race discrimination, and I am in sustained by the fact that the overwhelming majority of mankind hate it equally.”<sup>147</sup> Any more demanding ethical standard arguing that a person’s conscientious stand should also conform to “common morality” would also be met by Mandela. The immorality of the clear and unambiguous racism of apartheid law should violate any common standard of morals.<sup>148</sup> Finally, by engaging in the act publically and notifying the press and the

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<sup>141</sup> International Defense and Aid Fund, *Nelson Mandela: The Struggle is My Life* 148 (1986).

<sup>142</sup> See generally Daniel Markovits, Essay, *Democratic Disobedience*, 114 Yale L.J. 1897, 1936 (2005)(Disobedience against illegitimate regimes is justified, “but that conclusion is uninteresting, because it is built into the characterization of the regimes as illegitimate.”)

<sup>143</sup> Eg, See Generally, John Rawls, *A Theory of Justice* (1971); Cass Sunstein, *Why Societies Need Dissent* (2003); Kimberley Brownlee, *Conscience and Conviction: The Case for Civil Disobedience* (2013)

<sup>144</sup> Matthew Hall, *Guilty But Civilly Disobedient: Reconciling Civil Disobedience and the Rule of Law*, 28 Cardozo L. Rev. 2083, 2087-2092 (2007). I am substantially in agreement with Hall’s definition, with one major disagreement.

<sup>145</sup> *Id.* at 2087.

<sup>146</sup> *Id.* at 2088.

<sup>147</sup> International Defense and Aid Fund, *Nelson Mandela: The Struggle is My Life* 159 (1986).

<sup>148</sup> David Wilkin, *In Defense of Law and Morality: Why Lawyers Should Have a Prima Facie Duty to Obey the Law*, 38 Wm. & Mary L. Rev. 269, 272 (1996)(concludes that “common morality” should be implicated in civil disobedience.)

government of the action before engaging in it, Mandela ensured the public and political nature of the act.<sup>149</sup>

It has been argued that there must be an “exhaustion of legal means” before civil disobedience can be morally justified.<sup>150</sup> Mandela’s actions satisfy that standard. Before taking action, he wrote a letter to the prime minister informing him of his intention to strike, and calling on him to convene a resolution that included all races so that they could discuss the issues in question. Unfortunately, “No reply, no response whatsoever, was received to our letter, no indication was even given that it had received any consideration whatsoever.”<sup>151</sup> He also asserts that the people were moved to strike only after “every means of demonstrating that opposition [to the law in question] had been closed to them by prior legislation, and by government administrative action.”<sup>152</sup>

Many believe that a third requirement of civil disobedience is the requirement that the protester accept full punishment for their illegal act, or plead guilty. Some argue that the guilty plea indicates depth of commitment, demonstrates belief in and respect for the law, and minimizes the possibility that the disobedience will inspire other acts of illegality.<sup>153</sup>

Gandhi seemed to hold this belief in particular.<sup>154</sup> However, Mandela seems to reject this idea. He pled “not guilty” to both the charges in his 1962 trial, as well as to his charges in the 1964 Rivonia trial that would result in his lengthy prison term. But here a contradiction emerges. After pleading not guilty in both cases, Mandela then goes on to essentially admit to the crimes in long, detailed explanations. Mandela also appears to invite his punishments. In his 1962 case in which he faced a five year prison sentence, he says “Not just I alone, but all of us are willing to pay the penalties which we may have to pay, which I may have to pay for having followed my conscience in pursuit of what I believe is right . . . Whatever sentence your worship sees fit to impose . . . may it rest assured that when my sentence has been completed I will still be moved, as men are always moved, by their consciences. . . .”<sup>155</sup> And also, famously, in the Rivonia trial when all expected a death sentence, he states that his belief in a nonracial south Africa is “an ideal for which I am prepared to die.”<sup>156</sup>

Perhaps Mandela pleaded not guilty only to allow himself the opportunity to engage in a more full explanation of his conduct than would have been provided by a simply not-guilty plea. Alternatively, Mandela could have supported the proposition that a protester

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<sup>149</sup> See Oren Gross, *Are Torture Warrants Warranted?: Pragmatic Absolutism and Official Disobedience*, 88 Minn. L. Rev. 1481, 1526 (2004)(describing publication of disobedience as a “critical component in the moral and legal choice” that engages and allows an ensuing “public justificatory exercise.”)

<sup>150</sup> Robert T. Hall, *The Morality of Civil Disobedience* 50 (1971).

<sup>151</sup> International Defense and Aid Fund, *Nelson Mandela: The Struggle is My Life* 153 (1986).

<sup>152</sup> *Id.* at 148.

<sup>153</sup> Matthew Lippman, *Towards a Recognition of the Necessity Defense for Political Prisoners*, 48 Was. & Lee L. Rev. 235, 242 (1991).

<sup>154</sup> M.K. Gandhi, *Non-Violent Resistance* 79, 81-82 (1969).

<sup>155</sup> International Defense and Aid Fund, *Nelson Mandela: The Struggle is My Life* 153 (1986)

<sup>156</sup> *Id.* at 181.

bears no more responsibility for the crime than the authorities who created the injustice of the predicament itself.<sup>157</sup> Mandela states in his trial for incitement to strike that “the court must take into account the question of responsibility, whether it is I who is responsible or whether, in fact, a large measure of the responsibility does not lie on the shoulders of the government which promulgated that law, knowing that my people, who constitute the majority of the population, were opposed to that law, and knowing further that every legal means of demonstrating that opposition had been closed . . .”<sup>158</sup> Similarly, in the Rivonia trial he plead innocent, saying “the government should be in the dock, not me.”<sup>159</sup> Under this theory, admitting to the conduct does not necessarily mean admitting to guilt.

Another moral question remains, specific to Mandela in relation to his professional identity. Is it wrong for lawyers specifically to engage in civil disobedience? Some have argued that there is far more at stake when lawyers break the law than for average people. Critics of attorney disobedience have claimed that attorney attitudes “rub off” on non-lawyers, and if lawyers begin showing “disrespect for the law” through civil disobedience, clients will too.<sup>160</sup> The counter argument to this is quite effective, however—civil disobedience does not manifest a disrespect of the law, on the contrary it “affords the state an opportunity to strengthen its normative power.”<sup>161</sup> It allows the judge to punish the protester and affirm the value of the rule, acknowledge the mistake in the rule and change it, or disassociate the rule from the system by overturning it on grounds of its injustice.<sup>162</sup> This act helps the rule of law, as opposed to harming it. As Dr. Martin Luther King Jr. wrote in his *Letter from Birmingham Jail*, “an individual who breaks [a] law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for the law.”<sup>163</sup>

In the United States, although there seems to be an unwritten rule that states will not impose professional penalties on lawyers for engaging in acts of civil disobedience; currently the rules do not address the issue directly. In South Africa, however, there was one famous case that addressed this issue, *Incorporated Law Society, Transvaal v. Mandela* (1954). In this case, the law society attempted to disbar Mandela after he was arrested for his efforts organizing the Campaign against Unjust Law. Not only did Mandela break the law, and do so deliberately, but by serving as an organizer of the protest, he encouraged others to break the law as well, they argued.

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<sup>157</sup> See eg, Burton M. Leiser, *Liberty, Justice and Morals: Contemporary Values Conflicts* 340 (1973).

<sup>158</sup> International Defense and Aid Fund, *Nelson Mandela: The Struggle is My Life* 148 (1986).

<sup>159</sup> *Young Mandela* at 347.

<sup>160</sup> David Wilkins, *In Defense of Law and Morality: Why Lawyers Should Have a Prima Facie Duty to Obey the Law*, 38 Wm. & Mary L. Rev. 269, 292 (1996).

<sup>161</sup> Robert M. Palumbos, *Within Each Lawyer's Conscience a Touchstone: Law, Morality, and Attorney Civil Disobedience*. 153 U. Pa. L. Rev. 1057, 1075(2005)

<sup>162</sup> *Id.*

<sup>163</sup> Martin Luther King Jr., *Letter From Birmingham Jail*, in *Why We Can't Wait* 83, 84 (1964).

However, the court refused to disbar Mandela. Under the act alleged, the court would have disbarred him only if his conduct was held to be “dishonest, disgraceful or dishonorable” or if it involved his practice as an attorney.<sup>164</sup> The court found that neither of these applied in this case. The court reasoned that “in suspending an attorney who has been convicted of a crime the Court is not punishing him for his offence; for that he has already been sentenced . . . the sole question [is whether the crime for] which the respondent was convicted shows him to be of such character that he is not worthy to remain in the rank of an honorable profession.”<sup>165</sup> For Mandela’s civil disobedience the Court concluded “the respondent was obviously motivated by a desire to serve his fellow non-Europeans. The intention was to bring about the repeal of certain laws which the respondent regarded as unjust . . . there is nothing in his conduct which, in my judgment, makes him unfit to be an attorney.”<sup>166</sup>

### CONCLUSION

Mandela in his final speech before being incarcerated for 27 years cited the Universal Declaration of Human Rights, championed the importance of democratic self-government, and stated “The Magna Carta, the Petition of Rights, the Bill of Rights are documents which are held in veneration by democrats throughout the world . . . I regard the British parliament as the most democratic institution in the world, and the independence and impartiality of its judiciary never fail to arouse my admiration. The American Congress, that country’s doctrine of separation of powers, as well as the independence of its judiciary, arouse in me similar sentiments.” On these grounds, Mandela compellingly argued that the injustice of apartheid justified his protests and action in attempting to topple it.

Mandela’s dual commitment to equal justice under law and to a liberation movement based in equal dignity for all elevated Mandela’s to the status of moral leader in several ways. It allowed him to gain the respect, fear, and even admiration of his opponents, steeped as they were in Western liberal thought. Mandela fully grasped their own values and embodied them in a more authentic form than his own government did. Mandela’s admiration of the western legal tradition created a crisis of reflection—Mandela forced apartheid officials to look at themselves in the mirror and find themselves wanting, according to their own most deeply held values. As the philosopher Jacques Derrida so aptly stated in his homage to Mandela, *Mandela, in admiration*, Mandela “respects the logic of the (legal) legacy enough to turn it upon occasion against those who claim to be its guardians, enough to reveal, despite and against the usurpers, what has never been seen in the inheritance: enough to give birth, by the unheard-of *act* of a reflection, to what had never seen the light of day.”<sup>167</sup>

Indeed, for the lawyer as statesman, moral duties and moral laws outweigh legal duties and legal laws, and peace becomes more important than justice.<sup>168</sup> For the neutral

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<sup>164</sup> **Incorporated Law Society, Transvaal v Mandela 1954** (3) SA 102 (T)

<sup>165</sup> *Id.* at 107.

<sup>166</sup> *Id.*

<sup>167</sup> FOR NELSON MANDELA 17 (Jacques Derrida et al. eds., 1987).

<sup>168</sup> Kronman, *The Lost Lawyer* 106 (1994).

partisan, a lawyer's duty is to advocate for the client with warm zeal even though it may alarm, torment, and destruction upon others. And for the cause lawyer, making his own moral commitments the animating factor of his professional life is the best way to live out one's vocation.

Nelson Mandela combined all of these different approaches to the practice of law, and more. He embodied the ideal of an ultimate commitment to justice, one that most of us will never reach but what all of us can always admire, and which was most memorably encapsulated by Mandela in his most famous words:

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