Law as a Tool of Social Engineering: The Case of the Republic of South Africa

by Lee W. Potts

I. INTRODUCTION

In South Africa, the National Party came to power in 1948. The National Party's electoral campaign platform consisted of little more than a single word: apartheid. But they advanced no precise definition of the word. Literally, apartheid meant apartness; but racial segregation was already the hallmark of South African society. White domination of the social, political and economic life of South Africa continues to the present day.

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1. Boer War general J.B.M. Herzog founded the National Party in 1913. Its formation, by Afrikaners for the protection of Afrikaner interests, is best explained in the context of the white race's history in South Africa. White settlements in South Africa date back to the mid-seventeenth century, when the Dutch East India Company was in need of a refreshment station for vessels engaged in trade with the Far East. Hence, the Dutch sent a contingent of Dutch farmers and their families to settle the Cape of Good Hope. Subsequently, their numbers increased through additional immigration by French, German and Scandinavian citizens, most of whom assimilated with the dominant Dutch stock.

By the close of the seventeenth century, the Afrikaners' reliance upon slaves as a source of labor became a major factor in their successful economic buildup of the area. However, in the early part of the nineteenth century, the British abolished the slave trade in the British Empire and extended this policy to Cape Colony. During the following years, the Afrikaners pushed into the interior wilderness, clashing with black Africans along the way and establishing two republics.

Although the British recognized the new Afrikaner republics for a time, the discovery of massive diamond and gold deposits on their land in 1867 shattered their treasured isolation. This discovery increased British interest in controlling South Africa, resulting, at century's end, in a concurrent guerrilla war against the British by the Afrikaners: the Boer War.

It took the better-equipped, better-trained and more numerous British troops two years to defeat the Boers, or Afrikaners. The British ridiculed the Afrikaners, after a humiliating and destructive skirmish, for their poverty, country ways and language. The British denied them jobs and instead employed black Africans who were willing to work more cheaply. Thus, Herzog formed the National Party to restore Afrikaners to their former place in South African society.

Different elements of the National Party practiced varying degrees of cooperation with their non-Afrikaner countrymen. However, a political pact made between that party and the English-speaking Labour Party resulted in objections by many Afrikaners and thus the formation of the "Purified National Party"; that is, purified of non-Afrikaner elements. It was that party which came to power in 1948. See generally J. Hoagland, SOUTH AFRICA: CIVILIZATIONS IN CONFLICT (1972); B. Sacks, SOUTH AFRICA: AN IMPERIAL DILEMMA (1967) [hereinafter cited as Sacks]; H. Strydom & I. Wilkins, THE BROEDERBOND (1979) [hereinafter cited as Strydom & Wilkins]; A. Vandenbosch, SOUTH AFRICA AND THE WORLD (1970) [hereinafter cited as Vandenbosch].

2. D.F. Malan, founder of the Purified National Party first used the term apartheid in the South African Parliament on June 24, 1944. He spoke of a policy "to ensure the safety of the white race and of
the country was firmly established and was not in danger of dissolution, irrespective of which party was in power. Thus, apartheid had to mean more than either segregation or white domination (baasskap).

The message of the apartheid platform was clear to the Afrikaner segment of white society. After a century-and-a-half of British rule, the descendants of the original Dutch and French Hugenot settlers of South Africa had regained control of their country. They had overcome the British liberalism which had interfered with the order of society. The white man intended to reestablish the primacy of his traditional social values and to reassume unequivocal dominance over his racially and culturally inferior countrymen.

This article examines the process by which the National Party regime has used law as a tool of social engineering to achieve these goals. The author discusses the process by which the National Party has adapted the legal system to the demands of the apartheid ideal and by which the legal system contributes to realization of Afrikaner social ideals. The major premise of the article is that the legal system

Christian civilization by the honest maintenance of the principles of apartheid and guardianship.” G.W. Sheperd, Anti-Apartheid 3 (1977).

Apartheid is an Afrikaans term meaning “apartness” or “segregation.” Apartheid is a system of racial discrimination created, maintained, and intended to be perpetuated by government design. Feimpong & Treivel, Can Apartheid Successfully Defy the International Legal System?, 5 BLACK L.J. 287 (1977). Apartheid is composed of both a slavery and a caste system, persons being identified by birth and parentage. M. McDougal, Human Rights and World Public Order 521-22 (1980).

The policy of apartheid has two aspects, “little” or “ petty,” and “big” apartheid. The former refers to social segregation and the denial of most ordinary civil and political rights to non-Europeans. The latter encompasses territorial segregation of the races. “As the South African whites see it, any policy other than segregation would lead to their political and ultimate biogenetic extinction, either by force or assimilation.” VANDENBOSCH, supra note 1, at 24-25. See also M. BALLINGER, FROM UNION TO Apartheid (1969) [hereinafter cited as BALLINGER]: Landis, South African Apartheid Legislation 1: Fundamental Structure, 71 YALE L.J. 1 (1961).

3. For the history and background of white domination in South Africa, see generally BALLINGER, supra note 2; SACKS, supra note 1.

4. The term baasskap, usually defined literally as “supremacy,” can connote any of a number of political positions with regard to the relationship between the “superior” white and “inferior” other races in South Africa. See generally BALLINGER, supra note 2, at 334. For example, J.G. Strydom, D.F. Malan’s successor to the office of South African Prime Minister, advocated “master and servant baasskap” in the 1948 general election campaign. Id. at 318. In the more “liberal” view, some members of the dominant white class advocate separate areas of domicile for the races:

My view is this: all these areas can become self-governing, and in this sense they can have baasskap (supremacy) over their own fate; but all these areas will be within the geographic and economic unit of the Union of South Africa and dependant on it. Also in respect of any international relations concerning the defence of this country. It speaks for itself that South Africa is the trustee and the ruler of the whole. We have always said that the white man must rule in South Africa, but the National Party favours local self-government for the Native in his own areas.

Id. at 319-20.

5. See note 1 supra, for a general background of white domination in South Africa. This domination has extended to all non-white races, including both indigenous tribes and slaves imported from Malaysia as prisoners to expiate acts of crime. “On the one hand, an expansion of the white communities created a demand for more labor; on the other, the decimation of the indigenous people as a result of war and smallpox reduced the available supply.” SACKS, supra note 1, at 1-3.
fosters a set of behavioral norms which tightly structure interracial contacts and which lead to the acquiescence of a large portion of the non-white population in its own subjugation. The ultimate result of such behavioral norms is the perpetuation of a system of gross racial inequality. Yet, at the same time, these norms also facilitate the effective management of the tension engendered by the inequality.

II. THE THEORETICAL CONTEXT OF THE STUDY

A. A Challenge to the Traditional Perspective

The concept of law as a tool of social engineering has not been explicitly addressed by public policy makers in South Africa. Nevertheless, a study of the National Party's program of restructuring society while formally maintaining fealty to the rule of law demonstrates the potential for conscious use of law as a vehicle of directed social change. Although the Republic of South Africa is not unique in using law either for social engineering or as an element in enforcing racial stratification, the South African case is notable because it both challenges and affirms various scholarly perspectives of the linkages between law and social change. This case also provides insight into the factors which contribute to the efficacy of law as a tool of social engineering. Further, the South African case is illuminating because of its scope and because of the coherence of the social engineering focus of Nationalist legal policy.

The idea that law can be used to secure a self-reinforcing system of racial subjugation of the majority of the population directly challenges the traditional anthropological perspective of law and society. According to the traditional perspective, law is a dependent variable in the nexus of social processes. Law, in other words, emerges as a product of other social processes. Anthropologists, such as Malinowski and Sumner, as well as the pioneering sociologist Durkheim, have maintained that law represents the authoritative distillation of community consensus on both the need and the acceptable procedures for conflict resolution. They saw the primary service of law as being a mechanism for preserving community integrity in the face of differences arising over both conflicting interpretations of proper and improper conduct and individual incidents of purposeful norm violation. In their view, in either type of conflict, the social norm precedes and legitimizes the legal strictures or procedures. In general,
under the traditional perspective on law and society "the law derives its working principles from postulates previously developed in the non-legal spheres of action." Accordingly, legal change follows, but does not initiate, social change. The apartheid program directly challenged this perspective because it envisions law as a molder of norms and as a catalyst for social change.

Insofar as the Nationalists accept the potential utility of law as a tool of social engineering, they are within the mainstream of contemporary socio-legal thinking. Scholars of law and social change now generally assert that legal change and social change may flow in either direction. They recognize that social change produces changes in substantive law, legal institutions and legal processes, and that law can be an agent of directed social change. The Nationalists are also in line with public policy makers in other countries. The rise of the welfare state in the West, the establishment of socialism in the East and the emphasis on development politics in much of the Third World indicate that public policy in almost every contemporary society tacitly upholds the legitimacy and efficacy of social engineering.

The general acceptance of the fact that law can be used to shape social processes does not necessarily indicate the existence of firm bases for acceptance. The precise contribution of law to programmed social change is not easily discernible. An examination of the South African experience contributes to the study of law and society by illustrating the factors which facilitate successful use of the law as a tool of social engineering.

B. The Evidence of Law as a Tool of Social Engineering

Western scholars generally agree that law can be used to direct social change. But the initial question is one of evidence. One major work presents 115 essays, comprising 1019 pages of text, on "[t]he ways in which the legal system affects society and in which society affects the legal system." The authors admitted that "there are no classic answers [sic] or even serious attempts at [an answer]," to the classic question of the limits on the effectiveness of law, which they equate with the question of the impact of law on society. Similarly, another widely read

10. Hoebel, supra note 8, at 276.
12. Dror, supra note 11, at 797. Law shapes social institutions such as education, which indirectly effects social change. Id.
13. See, e.g., Dror, supra note 11, at 796 & n. 25. In Russia, Soviet jurists use law to bring about social change. Id.
15. Id. at viii.
work presents 25 essays and excerpts of court decisions, comprising 204 pages of text, on the capacity of the law to affect social behavior. They were unable to show directly intended social effects of legal change. More recently, an entire issue of *Law and Society Review* presented European studies in law and society. These essays covered bankruptcy law in Germany, family law in Italy and Belgium, drug law in Germany and the Netherlands, and statutes prescribing worker participation in management in Poland. The editor pointed out that the articles disclosed the inefficacy of law as a tool of social engineering.

The evidence brings into question the usefulness of the general assumption of most modern legal sociologists that law "influences other parts of the social system." The basic sociological definition of "social system," that various parts of the social system influence various other parts, underlies this assumption. Before law can be considered a viable mechanism of directed social change, the effects of law on such change must be demonstrated. The studies in the West do not make this demonstration. Although the law and development movement sought to facilitate modernization in the late developing countries by importing western legal codes and principles, that movement has virtually faded away.

Even the peoples' democracies have not demonstrated that law is a viable tool of directed social change. In Russia, the Soviet regime attempted to alter Muslim culture in South-Central Asia by using law designed for programmed social change. However, the primary tools of large-scale societal change were terror and extermination. The Russian answer to non-conformance norms among

17. Id. at 425-29.
Kulaks,29 and the Chinese answer to non-conformance norms among landlords,30 was elimination of the non-conforming groups en masse. While the South Africans have been accused of manipulation of the legal process to deal with opponents of the regime, they have relied primarily on law to shape norms and behaviors so that potential opponents are induced to acquiesce in the system.

The primary approach to law as a tool of social engineering in the peoples' democracies has been much closer to the traditional law-as-dependant-variable orientation.31 These legal systems view man as malleable and as subject to attitudinal change through social conditioning.32 But this view came into being only after the governments had destroyed the irreconcilable enemies of the people. In China, for example, during the early years of the Communist regime, 1949-1953, mass trials by ad hoc tribunals functioned, without any standardized charges or procedures, "to wipe out reactionaries and intimidate the potentially undesirable."33 Only after the most threatening enemies of the people had been purged from the law enforcement system did efforts turn to development of regular courts and standardized procedures34 such as those under the judicial reform movement in 195235 and the Constitution of 1954.36 Once purged of its enemies the Chinese government focused on specific transgressions by individuals who were in essential agreement with the regime. The regime's legal system was primarily concerned with adjustment of individual situations rather than

Soviets created the secret police less than a month-and-a-half after the October Revolution of 1917. "It did not judge the foes of the regime, it destroyed them." Id. at 3. Lenin foresaw the transition from capitalism to communism as an inevitable period of unprecedented class struggle. Id. at 5. See F. Beck & W. Godin, Russian Purge and the Extraction of Confession (1951) [hereinafter cited as Beck & Godin]; C. Friedrich & Z. Brzezinski, Totalitarian Dictatorship and Autocracy 172-79 (2d ed. 1965).

29. See Gerson, supra note 28, at 83-85. Kulaks were the small minority of rich peasants in Russia. The Soviets blamed the peasant uprisings during the early years of Lenin's regimes on the cunning promises, slander and threats of the Kulaks which were said to have incited the ordinary Russian peasant to revolt. The policy of the secret police was to eliminate the leaders and Kulaks, but not to harm the peasants who had been fooled or intimidated by them. Id. The collectivization of millions of peasant holdings was accompanied by liquidation of the Kulaks who refused or hesitated to enter the collective economy. Liquidation included arrest and deportation to Siberia. Beck & Godin, supra note 28, at 15.


31. See note 6 and accompanying text supra.

32. See notes 34 & 39 infra. See, e.g., Tao, supra note 30, at 720-29. The Chinese used mass trials to solidify the masses by awakening a political consciousness and rallying support for the regime. Berman, The Use of Law to Guide People to Virtue, in LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY 77 (J. Tapp & F. Levine eds. 1977) [hereinafter cited as Berman].

33. Tao, supra note 30, at 717.

34. See generally id. at 720-29.


broad social engineering.\textsuperscript{37} This is similar to the approach of western legal systems.

In a discussion of "vospitatel'naiia rol' sovetskogo prava" (the nurturing role of Soviet law),\textsuperscript{38} one authority asserts that the Soviet legal system rejects the use of law as a tool of coercion. Instead, he claims that the Soviet system focuses on educating, guiding and training citizens with officially prescribed moral principles, social values and legal tenets.\textsuperscript{39} This approach to legal processes is directed at attitudinal and behavioral change, which are aspects of social change.\textsuperscript{40} Nevertheless, the Soviet state recognizes the desirability, if not the necessity, of adapting officially promulgated law rather than allowing basic values and intuitive concepts of justice to shape the social system.\textsuperscript{41}

In its nurturing role, a legal system will apply sanctions to a violator of certain prescribed norms. The system aims to persuade the violator of the official wrongfulness of his actions and to induce him not to repeat these actions. At the same time, this approach demonstrates to others that official procedures are consonant with unofficial perceptions of justice.\textsuperscript{42} The Soviet experience implies that, although law may in fact be an instrument of social change, only incremental change is produced. Large-scale social change takes place through overt exercise of political power.\textsuperscript{43} Accordingly, the legal process is effective in social engineering only when the legal processes are accepted by the citizenry because these processes are compatible with preexisting concepts of justice.\textsuperscript{44}

C. The Factors Which Contribute to Successful Use of Law in Social Engineering

In general, scholars have not effectively evaluated the factors which account for successful use of law as a tool of social engineering. Systematic knowledge of how to use law to achieve social goals and of the practical state of the art in so doing "approximate zero."\textsuperscript{45} Examination of the South African experience demonstrates that the effective use of law in social engineering is a legitimate idea. Most other studies have attempted to relate social factors to causative legal change.\textsuperscript{46} The author, in studying the South African experience, focuses instead


\textsuperscript{38} Berman, supra note 32, at 76-77.

\textsuperscript{39} Id.

\textsuperscript{40} Id. at 81-83.

\textsuperscript{41} Id. at 76. Intuitive concepts of justice are essentially the moral sentiments and sense of justice of the citizenry. Id.

\textsuperscript{42} Id. at 84.

\textsuperscript{43} See Massel, supra note 27.

\textsuperscript{44} Berman, supra note 32, at 76.

\textsuperscript{45} Dror, Law as a Tool of Directed Social Change, in LAW AND SOCIAL CHANGE 75 (S. Nagel ed. 1970) [hereinafter cited as Dror, Law as a Tool].

\textsuperscript{46} See Aubert, Some Social Functions of Legislation, 10 Acta Sociologica 98 (1966); Dror, supra note
on the process through which the National regime has adapted the legal system to its ideological premises and has then used the legal system to control the normative basis of the society. The resulting control has been far more pervasive than that which would follow from any individual legal enactment.

This examination is based on the theory that law should be viewed as a commonplace phenomenon that categorizes experiences and establishes a meaningful structure for social action. Analytically, a "meaningful structure" exists prior to specific actions, although the structure may be recognized only by patterns of social action. From a heuristic perspective, an examination of the nexus between law and society must treat legal propositions as both created and creative. Thus for the purpose of this article, meaningful social action must be explained in respect to legal phenomena. This approach is not intended to answer questions about the nature of law. It is designed to examine how meaningful legal systems arise and what societal consequences result from such systems.

This study demonstrates the success of using law as a tool of social engineering in South Africa. This success emanates from several factors which together constitute the infrastructure of social engineering and create meaningful structure on social action. These factors are: (1) the existence of a relatively coherent view of the ideal normative basis of social action; (2) a legal culture that facilitates the imposition of the social engineering program; and (3) the specific elements of the social engineering program itself.

III. THE INFRASTRUCTURE OF SOCIAL ENGINEERING

A. Afrikan Social Ideals

A political program to order and control social processes cannot be successful if it is devised without reference to pre-existing conditions. The basic values of the society have an impact on the potential effectiveness of legal social engineering. Before legal sanctions can have an effect on social norms a compatible cultural foundation must exist upon which to build the body of legal prescription and proscription. Many attempts to effect social change through legal sanction have failed because policymakers did not recognize that legal social engineering requires two phases: the pre-engagement phase and the working phase. Only

11. Gorecki, Divorce in Poland: A Sociological Study, 10 Acta Sociologica 68 (1968); see also notes 18-23 supra.
48. Id.
49. Id. at 190.
50. Id.
51. Id.
52. Beckstrom, supra note 26, at 699.
when the two phases are synchronous and mutually reinforcing can law actually control social processes.

In South Africa, the requisite infrastructure was fairly well established. The Afrikaner\(^{53}\) had a coherent image of the proper configuration of South African society. The image was based in part on history, in part on historical myth, and in part on a vision of natural social order. The Afrikaner desired to recapture the Golden Age of 1652 to 1806.\(^{54}\) During that period, the social order was clear and was in conformance with Calvinistic natural law.\(^{55}\)

In the retrospective Afrikaner view of the Golden Age, the white man was the undisputed lord and master over the indigenous Cape people\(^{56}\) as well as over the imported African and Malay slaves. Interracial contact was mostly limited to paternalistic master-servant relationships. Society expected the white master to reign as a benign despot over his black and brown servants.\(^{57}\) He was to provide

53. Approximately sixty per cent of the dominant white population in South Africa claims to be essentially African, both culturally and emotionally:

This is a claim reflected in the name which it has assumed for itself, that of Afrikaner, and for the language which it speaks, Afrikaans. However, even as Afrikanerdom claims to be a product of Africa, and has resented the use of the word African to denote the black population group in the country, it claims also to be the torch-bearer of Western Christian Civilisation on the continent of Africa. Diverse in origin, Hollanders, refugee French Huguenots, and Germans seeking a livelihood and adventure in the service of the great Dutch East India Company which founded the first settlement at the Cape in the mid-seventeenth century, in the isolation of the days of slow travel and communication and over the wide spaces of this sparsely populated land, these early settlers did in fact develop a character and a culture of their own, and a language to express them. This, under various influences and at various times, has encouraged a sense of separateness from all the other groups that has been of profound political significance.

BALLINGER, supra note 2, at 16.

54. White domination was at its “best” in South Africa during the period from 1652, when white settlers established Capetown, until the early 1800’s, after which time the British abolished the slave trade in the British Empire and extended this policy to Capetown. See SACKS, supra note 1; STRYDOM & WILKINS, supra note 1; VANDENBOSCH, supra note 1.

55. P. van den Berghe, South Africa: A Study in Conflict 14-26 (1975) [hereinafter cited as van den Berghe].

56. The two primary indigenous tribes encountered by the first white settlers of South Africa were the Bushmen, “a pigmy race of aboriginals” and the Hottentots. SACKS, supra note 1, at 1-2. The former group were nomads, seeming to the naive whites to be “utterly devoid of human sensibilities.” Id. at 1. The Bushmen regarded the cattle of the Europeans as fair game and, with their poisoned arrows, made life precarious for the white settlers. The Boer policy toward the Bushmen was one of extermination, driving the latter deep into neighboring mountains and beyond into desert country. Id. The Hottentots were taller in stature and seemingly more culturally advanced than the Bushmen. They forged implements of copper and tended domesticated cattle and sheep. They too preyed upon the white settlements but fell easy victims to the Boers and their superior arms:

The fate of the Hottentots was not extermination for, unlike the Bushmen, they submitted quickly to white domination. Left to shift for themselves, the Hottentots became detribalized hangers-on, bartering away their cattle for beads, tobacco, and liquor. The Boers reduced them to humble dependency, exploiting their labor to the point of servitude and describing them contemptuously as “dull, stupid, lazy, and stinking.”

Id. at 2.

57. Take it all round, slavery at the Cape was not cruel. In Capetown, skilled slaves were allowed to hire themselves out in their spare time and thus earn money with which to buy a substitute and win their own freedom. There was, of course, the crop of crime which always flourishes on
basic sustenance and support, including moral education, in return for dutiful service. If the service was inadequate or if the servant breached social etiquette, the social system expected the master to exact swift and, if necessary, harsh punishment. The servant had only the right to labor for the master.\textsuperscript{58}

The master-servant relationship clearly did not rest on physical segregation of the races. White and non-white lived in close proximity.\textsuperscript{59} Well ordered racial integration was the mode of interracial interaction. Integration was premised on entrenched white hegemony.\textsuperscript{60} The key to maintenance of the social order was the pattern of internalized behavioral norms which guided interracial contact. From the Nationalist’s perspective, these behavioral norms functioned to institutionalize various social obligations.\textsuperscript{61}

Thus, according to the Nationalist view, in the Golden Age the system expected all black people to accept the superiority of all white people in all situations. Moreover, all white people accepted the inferiority of all black people in all situations. In every instance of interracial contact, individuals had to dismiss personal interests and inclinations. Social status and role positions were based solely on racial group membership.\textsuperscript{62} Each individual related to each other

servile soil; there were the usual escapes, sometimes of groups of men who obtained arms, pillaged outlying farms, and had to be hunted down by commandos; sometimes there was trouble with the Hottentot clans for harbouring runaways. Slave law, the product of fear, was harsh even by the fierce seventeenth century standards; the whip, chains, branding and the loss of ears were the penalties for such crimes as stealing cabbages from a garden; murderers and rapers were either broken at the wheel or hanged as high as Haman; the High Court did not shrink from torturing slaves if necessary. On the other hand, though [the High Commissioner] permitted owners to administer ‘moderate punishment,’ that is, an ordinary beating at discretion, he forbade them to trice up a slave and flog him without permission of the Fiscal or Governor; burgurers were punished for ill-using slaves, and the Company ordered the public sale of a slave who had accused his master of crime as the best means of saving him from domestic vengeance.

E. \textsc{Walker}, A \textit{History of Southern Africa} 71 (3d. ed. 1957) [hereinafter cited as \textsc{Walker}].

\textsuperscript{58} A. \textsc{Sachs}, \textit{Justice in South Africa} 17-20 (1975).

\textsuperscript{59} The passage of the Land Act of 1913 marked the beginning of the territorial separation of Africans from whites in South Africa. \textsc{Vandenbosh}, \textit{supra} note 1, at 25. Until that time, apartheid was practiced as a means of social segregation through the denial of ordinary civil and political rights to non-Europeans. \textit{Id.} at 24-25.

\textsuperscript{60} “Hegemony” usually describes leadership status or dominance in relations between sovereign states. Inequalities in economic strength, military power and size induce nations to form hegemonic alignments within the international community. \textit{See generally} M. \textsc{Whiteman}, \textit{Digest of International Law} 146 (1974). Hegemony is a counterposition to equality. It is held by a major power or central executive which maintains preeminence and influence over one or more weaker states, or in this case, people. \textit{Id.} at 144-45.

\textsuperscript{61} J. \textsc{Marais}, \textit{The Cape Coloured People}, 1652-1937, at 162-72 (1939).

\textsuperscript{62} One author has distinguished three types of racial segregation that have occurred in South Africa since the infusion of whites in the mid-seventeenth century. At first, the ruling white class stressed “micro-segregation,” or the segregation in public and private facilities (such as waiting rooms, railway carriages, post office counters and washrooms) located in areas inhabited by members of several racial groups. Van den Berghe, \textit{Racial Segregation in South Africa: Degrees and Kinds}, in \textit{South Africa: Sociological Perspectives} 37 (H. Adam ed. 1971) [hereinafter cited as \textit{Degrees and Kinds}]. During the nineteenth century, a shift towards “meso-segregation,” or the maintenance of racial ghettos occurred. This arose “as a way of making the non-white helotry as invisible as possible to [the whites], and of
individual on generalized terms that applied to all members of respective groups.63

From the perspective of the Nationalists when they came to power in 1948,64 the pre-British Cape society was a stable racial oligarchy in which the non-whites accepted their station without question. In reality, however, such a rigid system of formalized interpersonal contact never existed.65 Complete unequivocal acceptance of inferior status did not exist either. Still, the historical myth of the Golden Age provided the ideological basis for the apartheid program. The Nationalists did not base the apartheid program on simple subjugation of the non-whites. Rather, the objective of the new regime was to reestablish a self-perpetuating social order characterized by domination by whites and passive cooperation of the non-whites.66 This program involved the use of public power to create the proper environment in which to re-assert the old internalized norms.

B. The Legal Culture

The law became an integral factor in effecting desired social change because of the pre-existing South African legal culture. The Nationalists could look back over a century-and-a-half of British domination and see the steady erosion of the foundations of the natural social order.67 But when the Nationalists looked back, they responded to rather superficial indications of change.

The foundation for social engineering law existed before 1948. More importantly, the pre-1948 legal culture provided legitimization for the introduction of the many laws unknown to either English common law or Roman-Dutch law.

preserving the latter from the moral and physical contamination of congested, unhygienic slums.” Id. at 39. Finally, the ruling whites shifted towards “macro-segregation,” or the segregation of racial groups into discrete territorial units. Id. at 37.

Van den Berghe has explained this shift from micro- to macro-segregation, although the former form of segregation is still strongly maintained, as follows:

There are two apparent reasons why the South African government has increasingly stressed macro-segregation. First, if one accepts the Government’s premises that interracial contact promotes conflict and that Apartheid is the only salvation for the albinocracy, then it follows that maximization of physical distance between racial groups is desirable. Second, macro-segregation . . . can be presented, for purposes of international apologetics, as an attempt at equitable partition between separate but equal nations within a happy commonwealth. Indeed, a favourite argument of the apostles of Apartheid is that their policy substitutes vertical, non-hierarchical barriers between ethnic groups for a horizontal, discriminatory colour bar. Id. at 38.

63. VAN DEN BERGHE, supra note 55, at 19-21.
64. See note 1 supra.
66. See § IV infra.
67. Strydom and Wilkins provide an insight into National Party feelings toward the Afrikaners’ lot in life prior to that party’s coming to power in 1948: “In the slums we are permitted, but in those parts which rightly belong to us admission is refused.” STRYDOM & WILKINS, supra note 1, at 101 (quoting a prominent Afrikaner named M.C. van Schoor). The time had come when the Afrikaners would no longer be strangers in the land that had been dearly bought with the blood of their ancestors. “While the Afrikaner is working with the pick and shovel, the stranger is occupying the offices.” Id.
Although these two great traditions of European law provided the procedural and substantive bases for the South African legal system, the spirit of these laws had not penetrated deeply enough into basic values of the South African society to prevent the establishment of the apartheid legal system.68

Both English common law and Roman-Dutch law promote equality of all persons. In these systems, the courts serve as protectors of personal rights.69 Yet, the role of equity, which is important in other countries with common law roots, had long been missing from the South African legal system. The willingness of the courts to uphold racial discrimination, as long as it conformed with written law, was a clearly marked feature of South African judicial decisions before the Nationalists came to power.70

In 1934, the Court of Appeal, in Minister of Posts and Telegraphs v. Rasool71 upheld the Postmaster-General’s decision to provide separate postal facilities for whites and non-whites. In so doing, the court overturned the lower Transvaal Provincial Division which had held that separation based on race or color was illicit discrimination.72 The court decided by a three to one vote. The lone dissenter, Acting Judge of Appeal F.G. Gardiner, lamented that the court had rejected the “fundamental principle of our law that in the eyes of the law all men are equal.”73

Gardiner's sentiment was, however, at odds with the reality of South African law. He, himself, could offer only lower court decisions as precedent for disallowing racial discrimination and conceded that the court was not bound by those precedents.75 The other judges hearing the case,76 upheld discrimination based on race for two different reasons. Acting Chief Justice Stratford and Judge de Villiers, felt that racially separate facilities and services were legal as

69. See Hahlo & Maisels, supra note 68, at 12-14. See also Schreiner, supra note 68.
70. See notes 16-28 and accompanying text infra.
72. Id. at 172.
73. Id. at 187 (Gardiner, J., dissenting).
74. See Williams & Adendorff v. Johannesburg Municipality, [1915] Transvaal Provincial Div. [T.P.D.] 106 (holding, without considering the issue of equal treatment, that the government could not set apart separate trams for Europeans and non-Europeans on the basis of color distinction); Rex v. Plaatjes, [1910] Eastern District [E.D.L.] 63 (holding that the government could not make non-European use of a European bathing area criminal on the basis of color only); Ebrahim v. Licensing Officer Pietermaritzburg, [1925] Natal Provincial Div. [N.P.D.] 222 (holding that a municipality could not refuse to issue an establishment a food and drink license on the grounds that the establishment intended to serve non-Europeans).
76. The justices hearing the case were J. Stratford, A.C.J., E. deVilliers, F. Byers, and F. Gardiner.
long as they were essentially equal in quality.\textsuperscript{77} For the fourth judge, Judge Beyers, the issue was much easier to settle. He found Gardiner's insistence that all people are equal in the eyes of the law (and implicitly, Stratford and de Villiers' "separate but equal" proviso) irrelevant. From his point of view, in the Transvaal, white and non-white had never been equal in the eyes of the law.\textsuperscript{78}

Rasool, in effect, highlights the salience of legal culture in socio-legal change. Gardiner had stressed that equality before the law was a fundamental principle of South African law.\textsuperscript{79} But earlier in the same term, the court had articulated a conflicting fundamental principle of the administration of justice: "[P]arliament may make any encroachment it chooses upon the life, liberty or property of any individual subject to its sway, and . . . it is the function of courts of law to enforce its will."\textsuperscript{80} In Rasool, however, the Postmaster-General's action had not been based specifically on an Act of Parliament.\textsuperscript{81} For this reason, the Transvaal Division had declared the Postmaster-General's action ultra vires. The Transvaal court had relied on earlier decisions which nullified racial discrimination in municipal by-laws where the facilities were separate but equal.\textsuperscript{82} These earlier decisions had been based on an English decision which held that discriminatory legislation was null and void unless discrimination had been specifically authorized by an Act of Parliament.\textsuperscript{83}

However, Judge Beyers reasoned that the requirement of Parliamentary authorization for discrimination was not relevant to South Africa. To Beyers, the paramount consideration was that social reality impelled the court to uphold racial discrimination.\textsuperscript{84} In fact, it appears that social reality, and not legal precedent, was Beyers' paramount concern, especially considering that his legal reasoning was fallacious. For example, he stated that in the Transvaal, Europeans and non-Europeans were never equal in the eyes of the law.\textsuperscript{85} In reality, however, sixteen years before Lord Russell wrote his decision in Kruse, the High Court of the South African Republic (\textit{i.e.}, the Transvaal) held that the courts

\begin{itemize}
\item \textsuperscript{77} Rasool, [1934] App. Div. at 175. (Stratford, J., concurring). For Stratford, racial classification was valid if it served a useful purpose. Id. at 182 (deVilliers, J., concurring). According to deVilliers, discrimination with equality could conceivably be unreasonable, although no court would hold such discrimination unreasonable per se. The burden of proof would be on the objecting party to show unreasonableness. Id.
\item \textsuperscript{78} Id. at 176-78.
\item \textsuperscript{79} Id. at 187 (Gardiner, J., dissenting).
\item \textsuperscript{80} Sachs v. Minister of Justice, [1934] App. Div. 11, 37.
\item \textsuperscript{81} See Rasool, [1934] App. Div. 167. Parliament did empower the Postmaster General "[t]o issue such instructions as he may deem necessary for the conduct and guidance of officers in carrying out the provisions of the Act." Post Office Administration and Shipping Combinations Discouragement Act, No. 10 of 1911, § 3.
\item \textsuperscript{83} Kruse v. Johnson, [1898] 2 Q.B. 91, 99.
\item \textsuperscript{84} See note 78 supra.
\item \textsuperscript{85} Id.
\end{itemize}
were obliged to be color blind in the administration of justice except where discrimination is expressly allowed. 86

The Rasool decision did not end judicial controversy over the legitimacy of separate but equal. But it did signal the court's willingness to uphold any discrimination authorized by Parliament. It forcefully indicated the inclination of jurists to base judicial decisions on white public opinion rather than on the letter of the law. The Appellate Division, in its second year of existence, had already deferred to white public opinion in determining the racial status of children enrolling in white-only schools. 87 Rasool simply extended the policy to administrative actions.

The emphasis on baasskap, 88 in the early period of the National regime, left no room for concern with separate but equal. White domination and white preference was the overriding consideration which Nationalists intended to extend to all areas of life. 89 Judicial attempts to block the implementation of any aspect of the apartheid program had no place in the Nationalist scheme. The court did try to perpetuate the separate but equal doctrine to the consternation of the government. 90 But the court's success in this regard was short-lived. The government secured passage of the Reservation of Separate Amenities Act 91 which empowered local authorities to provide racially separate and unequal or racially exclusive facilities and services. The Act specifically prohibited the courts from ruling on the validity of such actions. It also denied courts the power to rule that separate was not equal or to require that authorities provide facilities for all racial groups. 92

By 1961, the court of appeal had fallen clearly into line with the government's objectives. A number of Indian residents of Durban brought suit to nullify a proclamation that the Indians claimed would result in substantial inequality for Indians. The residents argued that the proclamation was void because Parliament had not specifically authorized inequality

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88. See note 4 supra.
89. When the National Party achieved power in 1948, a systematic withdrawal of all non-white rights took place, culminating in 1968 when Prime Minister Vorster withdrew the last vestiges of colored representation from the South African Parliament. "At last the dream embodied in the organisation's earliest constitutions had been realised, i.e., 'the segregation of all coloured races domiciled in South Africa with provision for their independent development under the trusteeship of whites.' " STRYDOM & WILKINS, supra note 1, at 162 (quoting The Rand Daily Mail, December 15, 1944).
91. Reservation of Separate Amenities Act, No. 49 of 1953.
92. Id. § 3.
in conformance with the doctrine of *R. v. Abdurahman*. The court declared that if, as a matter of fact, the proclamation had been issued without fulfilling certain prerequisites with respect to equal treatment, then the proclamation itself would be void. This decision was, however, reversed on appeal. The Appellate Division held that Parliament must have known that proclamations under the Group Area Act would result in substantial inequalities and therefore, Parliament had impliedly authorized such inequalities.

In less than thirty years, South African courts had moved from rejection of segregation unless expressly authorized by Parliament, to acceptance of segregation without Parliamentary authorization only if treatment or facilities were separate and not substantially unequal, to acceptance of gross inequality without Parliamentary authorization. In *Lockhat*, the court, in upholding the proclamation, found an implied authorization by Parliament for unequal treatment. The court stated that the Group Areas Act was a "colossal social experiment" which so obviously would involve "substantial inequalities" that Parliament must have recognized the results which would occur.

Thus, the South African legal culture was fully compatible with the program of social engineering inaugurated by the National Party regime. The courts, at no point, had the power to block Parliamentarily endorsed racial discrimination. They were able to restrict other forms of racial discrimination only to a limited extent. Legal authority even existed for the proposition that the fundamental legal principle of equality before the law did not apply to non-white South Africans.

*93. The Abdurahman doctrine states:*

[It is the duty of the courts to hold the scales evenly between the different classes of the community and to declare invalid any practice which, in the absence of the authority of an Act of Parliament, results in partial and unequal treatment to a substantial degree between different sections of the community.]


*94. Lockhat v. Minister of the Interior [1960] 3 S.A. 765, 790 (Durban and Coast Local Div.).*

*95. Group Areas Act, No. 41 of 1950. See § V.B infra.*


*97. See note 82 and accompanying text supra.*

*98. See note 71 and accompanying text supra.*


*100. In Ndlwana v. Hofmeyr N.O., [1957] App. Div. 229, the Appellate Division held that Parliament’s will, as expressed in an Act, could not “be questioned by a Court of Law whose function it is to enforce that will not to question it.” Id. at 238. A unanimous judgment by the Appellate Division in Harris v. Minister of the Interior [1952] 2 S.A. 428 (App. Div.) overturned Ndlwana, but Parliament invalidated the decision with the South Africa Act Amendment Act, No. 9 of 1956. Section 2 of the Act stated: “No Court of Law shall be competent to enquire into or pronounce upon the validity of any law passed by Parliament. . . .” This provision was repealed by the South Africa Act Amendment Act, No. 50 of 1968. The present South African Constitution affirms Parliamentary supremacy. See note 148 infra.*

*101. See note 78 and accompanying text supra.*
gram had existed, in large measure, before the Nationalists actually had developed the program itself.

IV. The Social Engineering Program

A. The Basic Foundation

When the Nationalist regime was inaugurated, Party leaders had a coherent picture of the social order they wished to establish. They desired to secure a self-perpetuating social order characterized by white domination and non-white acquiescence. The National Party had grown and thrived on the basis of its depiction as the vanguard of Afrikanerdom, not as a political party. It did come to power, however, in a parliamentary democracy and, unlike other vanguard parties, it had accepted the prevailing rules of the political process. Therefore, the Party could not resort to massive political action against its opponents in the manner of the Bolsheviks or the Chinese Communists. The alternative was to use the legal system as a tool for social engineering. Ironically, the legal culture of pre-1948 South Africa both limited the Nationalists' options.

102. In the period preceding the 1948 election, different political views on South Africa's relationship with England, women's rights and union rights, among other issues, emerged. Yet, with the exception of the Communist Party, every organized party in the land clung to the "color bar." Walker, supra note 57, at 748-50. When D.F. Malan, 1948 National Party victor, was campaigning he showed that his main aim was to succeed where [the opposition] had failed by achieving apartheid, that is, segregation writ large, the permanent physical, mental and, as far as might be, spiritual separation of the four great racial groups in the Union each from the other, partly to preserve the racial purity of each, partly to do away with the friction that arose from intermingling and partly to give each the chance of developing along its own lines in its own appointed place.

The apartheid policy had been summarised for election purposes in a pamphlet, whose authors recommended the idea as a product of "the experience of the established European population . . . based on the Christian principles of justice and reasonableness," and proposed to prohibit mixed marriages, to set up a body of experts in non-European affairs, and to empower the authorities to supervise "the moulding of the youth" and forbid "destructive propaganda" carried on by outsiders against the Union's handling of its racial problems. They laid special stress on the position of the Cape Coloured Folk midway between the Europeans and the Bantu, urging that, on the one hand, they be protected against Bantu competition and encouraged to make Christianity "the basis of their lives" and that, on the other, they be segregated in every possible way.

104. The triumph of the National and allied Afrikaner parties in the parliamentary election of 1948 came as a surprise to everybody, including the Nationalists. From the point of view of popular votes, the National Party actually had no victory, receiving less than forty percent compared to fifty percent for the United Party. But from the point of view of parliamentary seats won, the results were different. The National Party won seventy seats compared to only sixty-five seats for the United Party. Inequality in population between the urban and rural districts made this result possible. The National Party carried the less populous rural and urban districts by a narrow margin while the United Party won the larger city districts by substantial majorities. VANDENBOSCH, supra note 1, at 127-28.
and facilitated their programatic objectives. On the one hand, the principle of the rule of law was well entrenched. Both English common law and Roman-Dutch law prescribed equality before the law, due process of law, judicial action in favorem libertatis, and other basic tenets of European democratic legal systems. On the other hand, the specific South African version of European law rejected the concept of equity and significantly limited the concept of equality before the law by confining it to white South Africans only. Furthermore, since the beginning of the Union of South Africa, the court had been quite willing to allow public racial prejudices to influence its decisions by accepting implications of Parliamentary intent even when Parliament had not directly stated such intent.

The apartheid program was aimed at total separation of the races. The Nationalists intended to convert the Native Reserves, which existed for the various African tribal groups, into National Homelands. Those Africans residing in the white areas were to be repatriated to their traditional homelands. Twenty-six years before 1948, the Nationalists outlined strictly controlled terms with respect to permitting Africans in white areas: "The Native should only be allowed to enter the urban areas, which are essentially the whiteman's creation, when he is willing to enter and minister to the needs of the whiteman, and should depart therefrom when he ceases to minister." Carried to its logical


106. See § III.B supra.

107. Because of their dissatisfaction with British rule in the early nineteenth century, see note 1 supra, the Afrikaners undertook what is called the Great Trek during the middle years of that century. VANDENBOSCH, supra note 1, at 6; SACKS, supra note 1, at 7. As a result of this Afrikaner push into the African interior, two republics, the Orange Free State and the South African Republic (generally called the Transvaal), emerged. Britain, for many years, practiced a contradictory policy with regard to these states, annexing them and then restoring internal self-government, restoring the right to conduct their own foreign relations and then reserving a veto on treaty-making powers. With the discovery of gold and diamonds in 1870, however, Britain determined to establish her supremacy over all of South Africa. The conflict between the newly reimposed leadership and its subjects' intense desire to do as they pleased resulted in the Boer War, known by the Afrikaners as "The Second War for Freedom." Britain succeeded in annexing the two republics in 1902. VANDENBOSCH, supra note 1, at 7.


109. Native Reserves are lands set aside for exclusive ownership by designated tribal groups under the Native Land Act, No. 27 of 1913, § 1, and the Native Trust and Land Act, No. 18 of 1936.

110. See Promotion of Black Self-Government Act, No. 46 of 1959, preamble.

111. REPORT OF THE TRANSVAAL LOCAL GOVERNMENT COMMISSION, reprinted in 1 TRANSVAAL PAPERS 42 (1922).
conclusion, the program would transform South Africa into a collection of racially homogeneous, self-sufficient, mutually exclusive communities.

In fact, such communities are a fanciful goal. The tribal homelands established for the African population provide only 14% of the land area for 70% of the population. The intermediate racial groups (the Coloured and Asian groups) do not have homelands. Instead of separate development, the program marks the intermediate groups for "parallel development" in the white areas. But more significantly, total separation actually conflicts with the social ideal because both white hegemony and non-white ministering to whites would require interracial contact.

B. The Basic Plan

1. Reinstitutionalization of Old Social Norms

The South African social engineering program has been a program of integration, not segregation. When the Nationalists came to power, the patterns of interracial contact which had characterized the pre-British era rested on diffuse institutionalized social obligations. The object of the Nationalist social engineering program was to reinstitutionalize those social norms which upheld the Afrikaner vision of the ideal social order, through the use of law. The primary purpose of law, in this regard, was to insure that the essential foundation for preservation of diffuse obligations was securely established. The essential foundation necessary, in the case of apartheid, was broadly accepted racial stereotyping.

The Nationalists, through control of public policy, were determined to create the proper environment for reinstitutionalization of the old norms. They

112. See note 109 supra. See also POLITICAL HANDBOOK, supra note 107, at 395-94.
113. See Rhoodie, The Coloured Policy of South Africa: Parallelism as a Socio-Political Device to Regulate White-Coloured Integration, 72 AFR. AFF. 46, 47 (1973) [hereinafter cited as Rhoodie].
114. Id. "Parallel development" has been the method by which the Nationalists have carried out a policy of non-integration and non-domination of these groups. The National Party recognizes the coloured group as a minority partner sharing a common motherland with the whites. Id. at 48.
115. See id. at 47.
116. Dr. D. Malan, the first National Party Prime Minister, told the House of Assembly that apartheid did not aim at territorial separation. 71 REPUB. S. AFR. HOUSE OF ASS. DEB., col. 4250-51 (1950).
117. Although the Nationalists saw their 1948 legal program in this light, they took the initial steps toward apartheid during the 1930's under General Hertzog, the founder of the National Party: The Native Trust and Land Act of 1936 almost doubled the amount of land set aside [for natives] ... to 17,660,290 [morgen] or from 7.3 per cent to 12.3 per cent for 8,000,000 natives against 125,000,000 morgen for 2,000,000 Europeans. The expectation was that besides 3,000,000 natives already living in the reserves, another 3,000,000 currently employed also could be settled there. As for the 2,000,000 living in urban centers and engaged industrially by white employers, they would be housed in locations. The Natives Representation Act of 1936 removed native voters in Cape Colony and Natal from the common role. A vote of one hundred sixty-nine to eleven fulfilled the constitutional requirement of a two-thirds majority of the combined two houses. Henceforth, natives meeting property and educational qualifica-
intended to use the legal system to preserve and reinforce racial stereotyping by blocking interpersonal relationships across racial lines.\textsuperscript{118} The Nationalists theorized that if individuals had no direct knowledge of the personal qualities of members of other groups, they would be left with few, if any, alternatives to government-defined stereotypes. Conversely, the government-defined stereotypes could condition the interracial encounters that did occur.

2. Use of Coherent Legislative Plan

According to the Nationalists, the prevailing racial segregation system in 1948 was so full of loopholes that it encouraged non-whites to forget their place in society.\textsuperscript{119} In place of the piecemeal approach to racial separation that characterized segregation prior to the Nationalist regime,\textsuperscript{120} the National Party developed a coherent body of social legislation to regulate racial interaction\textsuperscript{121} and to sanction behavioral norms that uphold the racial hierarchy.\textsuperscript{122} The laws attempt to limit most interracial contact to situations which do not provide the opportu-

\textsuperscript{118} Specifically, the government enacted severe penalties against mixed marriages and illicit physical relations between the races. An elaborate system of permits and passes was contained in a "so-called reference book," which the law required each Bantu to keep on his person at all times. An amenities act called for separate facilities in all public buildings and areas.

The crowning feature was the creation of the Department of Bantu Administration and Development to replace the Department Native Affairs. It would be responsible for administration of reserves, recruitment of labor, and the municipal locations. In this connection, the Bantu Laws Amendment of 1964 set up a state-controlled system of labor bureaus empowered to determine the admission of natives into white areas for work and permission could be withheld on such varied grounds as undesirability or the existence of a labor surplus.

\textsuperscript{119} For example, upon their election, the National Party refused to honor the promise of General Hertzog to the Cape coloured population that they would have political rights, residential areas, and educational and job opportunities detached from the environment of the Bantu.\textsuperscript{120} The Department Native Affairs, comprised of several generations of intermarriage and irregular physical relations between Bushmen, Hottentots, slaves and Europeans, had a pre-1948 history of attempts to link themselves with the white community.\textsuperscript{121} The Cape coloured population, however, only those who can pass the test of a white person by appearance and by general repute and acceptance are allowed to enjoy white rights. Those who pass this test must sever all bonds with their blacker relatives "or else risk detection and transfer to a non-European register."\textsuperscript{122} See § V infra.
nity for deviation from desired patterns. Since the Afrikaner social ideal is dependent on anonymous and impersonal interracial interaction,\textsuperscript{123} the primary intent of the legislation is to block affective ties between racial lines.\textsuperscript{124}

The Nationalists have structured the legal system to allow racial intermixture for the purpose of securing non-white labor and service, while concurrently prohibiting personal involvements that could undermine racial stereotyping. More importantly, the system works to secure acquiescence of the non-whites to their subjugation. Whites and non-whites do interact; but the law insures that they interact only in conformance with regime values.

V. The Social Engineering Legislation

The specific social engineering legislative package consists of four groups of laws which discourage, or ban outright, affective ties between members of different racial groups: The Population Registration Act blocks social fraternization;\textsuperscript{125} the residential segregation laws block neighborhood affiliation;\textsuperscript{126} the pass laws block self-actualization;\textsuperscript{127} and the anti-miscegenation laws block sexual intimacy.\textsuperscript{128} Each of the four groups of laws effects desired behavioral norms from a different perspective. Together, they amount to a coherent program of social engineering.

A. The Population Registration Act

1. Introduction

The Population Registration Act\textsuperscript{129} has a primarily declaratory function. The Act provides for identification of each individual's racial group membership. The effect of this Act is to insure that each individual has a societal status, on a group basis,\textsuperscript{130} and that he does not move from his "natural" group into a higher group on the socio-racial scale.\textsuperscript{131} The Nationalists did not invent the racially based hierarchy. They did not invent race group differentiation. But the Nationalists did initiate an effort to fortify the boundaries of the groups. The underlying assumption of the Population Registration Act is that the state must

\textsuperscript{123} See note 62 supra.
\textsuperscript{124} See § V infra.
\textsuperscript{125} See § V.A infra.
\textsuperscript{126} See § V.B infra.
\textsuperscript{127} See § V.D infra.
\textsuperscript{128} See § V.C infra.
\textsuperscript{129} Population Registration Act, No. 30 of 1950.
\textsuperscript{130} Id. § 3.
\textsuperscript{131} See § V.A.2 infra.
keep members of the subordinate groups in their place in order to protect the racial hierarchy.\textsuperscript{132}

The Population Registration Act is more than just declaratory; it is also expressive. It requires every citizen and every resident alien to register with the census bureau.\textsuperscript{133} The bureau then assigns each person a number and a racial classification.\textsuperscript{134} The Population Registration Act expresses the overriding importance of group membership by, in effect, depersonalizing the individual and fixing his place in the social system. The Act identifies a person’s privileges and obligations,\textsuperscript{135} it makes race an essential element of his self-definition, and it reinforces the social color bar. Ultimately, the Population Registration Act facilitates acquiescence to the system by limiting interpersonal relationships across the color line to acceptable forms. Further, The Act forms a basis for the operation of the other discriminatory measures which comprise the apartheid program.

2. Classifications Under the Population Registration Act

The Population Registration Act identifies four broad racial groups. Individuals become members of a group on the basis of physical appearance and social status. The Act states that:

1. “white person” means a person who a) in appearance obviously is a white person and who is not generally accepted as a coloured person; b) is generally accepted as a white person and is not in appearance obviously not a white person.

2. “black” means a person who is, or is generally accepted as, a member of any aboriginal race or tribe of Africa.

3. “Coloured person” means a person who is not a white person, or a black.\textsuperscript{136}

\textsuperscript{132} The National Party’s position on the need to impose rigid boundaries between the racial groups is set out in the House of Assembly debates on the Population Registration Act. 71 Repub. S. Afr. House of Ass. Deb., cols. 2498-3159, 5666-6100 (1950). The debates are summarized in G. Carter, The Politics of Inequality 81-84 (1959) [hereinafter cited as Carter]. That the courts have accepted the implications of the Population Registration Act is clear from the statement that “[a] person’s classification . . . affects his status in practically all fields of life, social, economic, and political.” Mohamood v. Secretary for the Interior [1974] 2 S.A. 402, 407 (Cape Provincial Div.).

\textsuperscript{133} Population Registration Act, No. 30 of 1950, § 2.

\textsuperscript{134} Id. § 6, amended by Population Registration Amendment Act, No. 29 of 1970.

\textsuperscript{135} All South African citizens have the obligation to obtain identification cards and to furnish information. Blacks have the additional obligation to carry the cards at all times and to show the cards on demand in order to receive the privileges of traveling to certain restricted areas and obtaining employment. See Population Registration Act, No. 30 of 1950. See also § V.D.4 infra.

\textsuperscript{136} Population Registration Act, No. 30 of 1950, § 1, amended by Population Registration Amendment Act, No. 106 of 1969, § 1(a) and Population Registration Amendment Act, No. 61 of 1962, § 1. See also Population Registration Act, No. 30 of 1950 § 5(5), amended by Population Registration Amendment Act, No. 106 of 1969, § 2(c).
To further accentuate fragmentation in the subordinate groups, the program further classifies Africans by tribe and coloureds by subgroup (e.g., Cape Coloured, Malay, Griqua, Indian, Chinese, etc.).

Once a person has been classified, he has the right to appeal his classification. He can make his appeal, in the first instance, to one of the two classification appeal boards which are located in Cape Town and Pretoria. Further appeal lies with the courts and ultimately with the Appellate Division of the Supreme Court. However, the appellate process offers scant relief to aggrieved individuals. An individual has only thirty days in which to initiate the appeal process. The census bureau, on the other hand, can re-open a case at any time. A case may be reopened for any reason, including anonymous information that a person has been "passing." However, reclassification of an individual may only occur after giving him both prior notice and an opportunity to be heard.

Redress to the courts is of dubious value to misclassified individuals. The courts have recognized that an individual's official racial classification is of paramount importance to him and that misclassification or malicious investigation of his lineage can have "devastating effects" on his life. Nevertheless, since the courts may not pass judgement on acts of Parliament, and since the legal system does not recognize equitable relief, there is little a court can do. Appeals to the court may be based only on ultra vires issues, acts by the classification appeal board or incorrect classification. Neither basis is open to significant judicial intervention.

137. Africans and Blacks are used interchangeably for the purposes of this article.
139. Id. § 5(2). Coloured sub-groups were defined by S. Afr. Gov't Proc. No. 46 of 1959. See INT'L COMM. JURISTS, SOUTH AFRICA AND THE RULE OF LAW 22 (1960).
141. Id. § 11(4), amended by Population Registration Amendment Act, No. 64 of 1967, § 4.
142. Id. § 11(8), amended by Population Registration Amendment Act, No. 64 of 1967, § 4.
145. See id. "The classification may be changed at any time it appears to the Secretary that it is incorrect." (emphasis added) Id.
146. Id. § 11(4), substituted by Population Registration Amendment Act, No. 64 of 1967, § 4. If the aggrieved person appeals the classification to the courts, he has an opportunity to present evidence on his behalf and to cross-examine witnesses. Id.
148. "No court of law shall be competent to inquire into or to pronounce upon the validity of any Act passed by Parliament." Republic of South Africa Constitution Act, No. 32 of 1961, § 59(2).
149. See Sachs v. Minister of Justice, [1952] App. Div. 11, 57. "Parliament may make any encroachment it chooses upon the life, liberty or property of any individual subject. . . . It is the function of the courts of law to enforce its will." Id.
Procedurally, in all cases before the bureau, the burden of proof is on the individual and not the officials. The individual must prove that the classification is wrong, whereas the government need not prove it is right. In contested cases, the government asks detailed questions about the individual's life and carefully scrutinizes his physical features as well as the physical features and backgrounds of his relatives.

With respect to judicial determination of the correctness of classification, the courts have continued the traditional practice of relying on popular opinion to define racial classifications. In the Appellate Division's second term, the court had to settle the issue of whether a child with three white grandparents had the right to attend a school reserved for whites only. The court ruled, in an opinion written by Chief Justice de Villiers, that "[i]n construing a vague expression . . . like that of 'European parentage or extraction or descent,' the Court should endeavor to ascertain its popular sense." The court, accordingly, upheld the decision of the school committee to prevent enrollment of the student who was not entirely European. Later, in R. v. Radebe the court indicated that in cases of mixed parentage involving exclusively non-white parents, a person should be classified in the higher status group unless there was "an appreciable, substantial or overwhelming preponderance of native blood." The court was guided by the principle that "ordinary use of language does not permit us to describe a person who has one Indian and one native or African parent as a native with Indian blood in him."

The court has continually upheld the amorphous (and from an anthropological or genetic perspective, spurious) definitions of racial groups included in the Population Registration Act on the grounds that these definitions reflect common usage. Moreover, once the census bureau has classified an individual, the burden is on that individual to produce conclusive evidence of pedigree different from the government assigned classification. The court's willingness to
uphold the government defined racial classifications, together with the practices of the census bureau, serve to legitimize the classification scheme.

A person's classification is always subject to change.\textsuperscript{160} For an individual assigned to any group higher than the status of black, the Population Registration Act discourages an individual to do anything that would jeopardize his position. A white person is especially vulnerable. A white person can maintain his classification only if he is both white in appearance and accepted as white by the white community at large.\textsuperscript{161} No matter how obviously white he may be in appearance, if he has too many non-white friends, or if he spends too much time associating with non-whites, the government can reclassify him. Because of the extreme consequences of being relegated to a subordinate group, the Population Registration Act deters friendships across the color line.\textsuperscript{162}

B. Residential Segregation Statutes

1. Introduction

The Group Areas Act\textsuperscript{163} and the other statutes governing residential patterns\textsuperscript{164} provide the mechanism for differential distribution of social benefits according to race. In contrast to the indirect approach of the Population Registration Act, the Group Areas Act directly blocks affective ties between racial lines by preventing interpersonal bonds derived from neighborhood affiliation.

As in the case of the Population Registration Act, the Nationalists did not invent a new area of discrimination with the Group Areas Act. Long before the current regime came to power, the official governmental policy had been to confine Africans to special locations in the urban areas. One of the first projects undertaken at the Cape settlement of 1652 was to plant a hedge of bitter almonds to separate the Dutch garrison from the coloured population.\textsuperscript{165} In the Orange Free State,\textsuperscript{166} whites excluded Asians from residence and real property


\textsuperscript{161}. Id. §§ 1, 2 amended by Population Registration Amendment Act, No. 61 of 1962, § 1 and Population Registration Amendment Act, No. 64 of 1967, § 1 and Population Registration Amendment Act, No. 106 of 1969, § 1(c).

\textsuperscript{162}. See note 119 supra.

\textsuperscript{163}. Group Areas Act, No. 36 of 1966 (amending Group Areas Act, No. 41 of 1950 and Group Areas Act, No. 77 of 1957).

\textsuperscript{164}. These include the Group Areas Act, No. 36 of 1966; the Natives' (Urban Areas) Consolidation Act, No. 25 of 1945; the Black Administration Act, No. 38 of 1927; and the Black Resettlement Act, No. 19 of 1954.

\textsuperscript{165}. 2 LETTERS RECEIVED BY THE EAST INDIA COMPANY: 1649-1662, 274, 309, 340 (1899), cited in WALKER, supra note 57, at 41 n. 3.

\textsuperscript{166}. See note 107 supra.
ownership. On a larger scale, the Union Parliament set aside approximately 14% of the land area of South Africa for the exclusive ownership by the African population via the Native's Land Act and the Native's Trust and Land Act. The Nationalists made residential segregation all-encompassing by applying it to all racial groups and by making it mandatory.

2. History of Residential Segregation

The public policy of residential segregation was firmly established by the middle of the Nineteenth Century. The white settlers, both Dutch and English, wanted an easily accessible reservoir of cheap labor as slavery had been abolished in the British Empire in 1833. The whites also wanted the Africans separated from the white community. The last Dutch Governor of the Cape had ordered that special areas be set aside for detribalized Africans. But not until 1844, at Uitenhage, did the whites force the removal of the Fingoes (detribalized Africans) and the Khoi Khoi (Hottentots) to separate locations outside of town. In 1849, the British Colonial Secretary ordered the Governor of Cape Colony, Sir Harry Smith, to take the next logical step, i.e., to establish permanent African locations near each European settlement. Since that time, each major municipality in South Africa has consisted of two linked, but separate, towns: a white city and a black satellite township.

Not until 1923, however, did the white government form an explicit national policy on residential patterns. In that year, Parliament passed the first Natives (Urban Areas) Consolidation Act. The Act allowed cities in all four provinces to require Africans to live in either official locations or employer provided lodgings. This act also empowered local authorities to expel unemployed and undesirable Africans from these official locations. A companion act, the Black

167. Law to Provide against the Influx of Asiatics, ORANGE RIVER COLONY, STAT. LAWS, ch. 33 (1891).
168. For a discussion of the formation of the Union and Union Parliament by the Orange Free State and other republics, see note 107 supra.
171. The Slavery Abolition Act, 1833, 3 & 4 Will. 4, ch. 73. See 25 HALSbury's STATUTES OF ENGLAND, at 989-1020 (2d ed. 1951) for a complete statutory history of Great Britain's abolition of the slave trade.
172. C. DEKiewiet, A HISTORY OF SOUTH AFRICA 34 (1941) [hereinafter cited as DEKiewiet].
174. Id.
175. For a discussion of the history and recent status of residential segregation in South Africa, see generally Degrees and Kinds, supra note 62.
177. Native's Land Act, No. 21 of 1923, § 17(1).
Administration Act,\textsuperscript{178} empowered the Governor-General to order, without prior notice, any tribe, portion of a tribe or individual to reside in a designated place.\textsuperscript{179} Thus, when the Nationalists took power, a clear precedent already existed for enforcing residential racial segregation. For them, however, the existing legislation was too limited. The Nationalists considered a new body of statutes necessary to control residential patterns in conformity with official ideology.\textsuperscript{180} The Nationalists recognized that neighborhood affiliation was a potential source of interracial contact that could undermine official racial stereotypes.\textsuperscript{181} They felt that unacceptable interracial contact needed to be outlawed between white and black, between white and coloured, and between the various non-white groups. The Natives (Urban Areas) Consolidation Act was inadequate because it applied only to blacks.\textsuperscript{182} The Group Areas Act extended residential controls to all racial groups.\textsuperscript{183}

3. Current Segregation Under the Group Areas Act

The Group Areas Act empowers the Government to reserve any area for the exclusive residence, ownership or occupation of a specific group. Such areas are designated as “group areas.”\textsuperscript{184} This act also allows the Government to declare

\textsuperscript{178} Black Administration Act, No. 38 of 1927.
\textsuperscript{179} Id. § 5(1).
\textsuperscript{180} The theory of apartheid was worked out in 1947 by a group, consisting mainly of professors, at Stellenbosch, “the heart of [South African] intellectual nationalism.” \textit{Walker, supra} note 57, at 770. There, future ministers of the National Party government undertook to conduct research into racial problems and to advise thereon:

Taking it for granted that white prejudice on the score of colour was unalterable, they worked out a well-reasoned case for apartheid based on European supremacy. It was no mere blueprint for oppression, but in many ways an idealistic programme for the protection of the interests of each racial group and the fostering of goodwill and co-operation between them by the complete segregation of each group, including, of course, the white folk.

\textit{Id.}

In his election manifesto, D.H. Malan called upon the white people to save themselves “without oppression and with [due regard] to the natural rights of non-Europeans to a proper living and their right to their own development in accordance with their own requirements and capabilities.” \textit{Id.} at 771-72. He proposed that, for a start, the Bantu be deprived of all representation in Parliament and the Cape Provincial Council. \textit{Id. See also} notes 117-118 \textit{supra}. The National Party’s position on the need for comprehensive residential racial segregation is presented in the House of Assembly debates on the Group Areas Act. 75 \textit{Rep. S. Afr. House of Ass. Deb.}, cols. 7433-7826, 8773-8830 (1950). The debates are summarized in \textit{Carter, supra} note 132, at 85-91.

\textsuperscript{181} A legal advisor to the Group Areas Board has said that “the clashes and difficulties between persons of different races which other countries have experienced had their origins almost entirely in undesirable occupation.” F. Rousseau, \textit{Handbook on the Group Areas Act} 8-9 (1960).

\textsuperscript{182} Native’s (Urban Areas) Consolidation Act, No. 25 of 1945, § 43. This section exempts coloured from the requirement of Pass laws except in the Orange Free State.

\textsuperscript{183} Group Areas Act, No. 36 of 1966, Section 12 of this Act established and defined groups for all races; Section 23 empowered the state president to declare an area a group area.

\textsuperscript{184} Id. § 23.
any area as a "controlled area," i.e., an area in which existing patterns of multiracial ownership and/or residence are to be held constant pending proclamation of group area status. Under further provisions, no one may own immovable property within a group area in which he does not have the right of residence. The Group Areas Act also grants the state president the power to define any ethnic, linguistic, cultural or other non-white group as a designated group to be accorded treatment under the terms of the Act.

Aside from custom, coloureds and Asians did not live separately from either whites or Africans. The coloureds and Asians who were very poor lived among the Africans. Those with more money lived among the poorer whites. The Nationalists considered this situation unacceptable for a number of reasons. Such intermixing of Africans and coloureds could weaken the feelings of isolation on the part of each group. According to this theory, merely keeping whites separate from non-whites is not enough. Further, affective bonds between members of the subordinate groups could result in monolithic, rather than fragmented opposition against whites.

The intermixing of coloureds and Indians with the poor whites was of special concern. The Nationalists saw the poor whites as on the border in the racial hierarchy between the white and coloured racial blocs. The Nationalists feared that propinquity was an invitation to fellowship. They especially feared that, notwithstanding the antimiscegenation laws, the poor whites might become

185. Id. § 1.
186. Id. §§ 13, 14, 30.
187. Id. § 12(2).
188. The "poor white problem" permeated racial segregation in South Africa as early as the turn of the twentieth century. See generally Doxey, Enforced Racial Stratification in the South African Labour Market, in SOUTH AFRICA: SOCIOLOGICAL PERSPECTIVES 273 (H. Adam ed. 1971).

Many of the whites who chose to try their luck in Kimberley or Johannesburg were largely backward subsistence farmers who had no acquaintance with a money economy and who had little or no formal education. Essentially they were equipped for little else than the "Kaffir" work which they despised as beneath the dignity of the white man. . . . It was not simply a problem of poverty but of the state of mind which accompanied it. How could one be expected to compete with people whom the dictates of tradition designated inferior?

189. The Minister of Bantu Administration and Development presented an official statement on the problem of racial intermixing on the traditional pattern. S. Afr. Bureau of Racial Aff., INTEGRATION OR SEPARATE DEVELOPMENT (1952). For an earlier discussion of the issue, which is considered to have been extremely influential in shaping policy once the Nationalists came to power, see G. Cronje, 'N TUINTE VIR DIE NAGESLAG (1952). For an English language discussion of this book and its influence, see W. DeKlerk, THE PURITANS IN AFRICA 199-229 (1976). See also notes 119 & 188 supra.

190. The fact that in 1934 a Volkskongres (council of the people) was convened to discuss the issue, demonstrates the extreme importance which the Afrikaners attached to the poor-white problem. A four-day meeting took place in Kimberley in October 1934. Hendrik Verwoerd, the youngest of the twelve organizers, made the first major speech after the opening preliminaries. He argued that the problem required a racial solution. Verwoerd's role in the kongres set the stage for his predominant role in shaping the slogan of apartheid into a political program. The Volkskongres and Verwoerd's role in it are discussed in A. Hepple, VERWOERD 24-34, 27 (1967). See also note 188 supra.
a funnel through which would "pour a debasing stream of uncivilized blood." The racial integrity of the white group, as well as the racial hierarchy, was, therefore, a major concern.

The Group Areas Act provides for more than just the designation of separate residential areas. It also provides for the removal, by force, if necessary, of any person from a designated area who is not entitled to be in that area. The result of enforcement of the Group Areas Act, the Natives' (Urban Areas) Consolidation Act, and the Bantu Resettlement Act, which provides for segregation by tribe in African areas, has been a massive shift in the population and the transformation of South African urban areas into patchworks of racially homogeneous neighborhoods and ghettos. It is difficult to ascertain exactly how many individuals or families the Nationalists have forced to move as a result of these acts as no figures are available for resettlement of blacks. Table 1 does show, however, the effect of Group Areas proclamation on resettlement of the non-black groups.

As in the case of the Population Registration Act, the law affords little protection to victims of the residential control laws. As was discussed above, the protection of South African citizens from unauthorized racial discrimination received a severe setback in Minister of Posts and Telegraphs v. Rasool, when the Appellate Division held that separate facilities did not constitute illegitimate discrimination if the facilities were not substantially unequal. Whatever protection survived Rasool was severely undermined by the court in Minister of the Interior v. Lockhat.

In Lockhat, a number of Indians contested the validity of a removal order based on a group area proclamation. The order required the Indians to leave a traditionally Indian section of Durban and to settle in a patently inferior

191. DEKIEWIET, supra note 172, at 221.
192. Group Areas Act, No. 36 of 1966, § 46(2)(a). When a person is convicted of occupying premises from which he is excluded, the court may order his ejectment and confer sufficient authority to carry out the order. Id.
195. On the eve of the 1948 victory, Dr. Verwoerd, then a National Party leader, enunciated the "group areas principle" to be applied through up-and-coming Party legislation: "Just as I want to have the situation that the Bantu must live apart from the Whites, so I want to separate the Indian from the Bantu and the Coloured from both." BALLINGER, supra note 2, at 209. For a discussion of the history and recent status of residential segregation in South Africa, see generally Degrees and Kinds, supra note 62.
196. See § V.A.2 supra.
197. See § III.B supra.
TABLE 1
RESETTLEMENT IN GROUP AREAS 1950-1979

<table>
<thead>
<tr>
<th>Group</th>
<th>Residential</th>
<th>Commercial</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Designated Areas</td>
<td>Families Resettled</td>
</tr>
<tr>
<td>White</td>
<td>834</td>
<td>2225</td>
</tr>
<tr>
<td>Coloured</td>
<td>541</td>
<td>72392</td>
</tr>
<tr>
<td>Indian</td>
<td>230</td>
<td>34294</td>
</tr>
<tr>
<td>Total</td>
<td>1605</td>
<td>108911</td>
</tr>
</tbody>
</table>


location. The lower court had relied on the precedent of R. v. Abdurahman in which the Appellate Division had unanimously ruled that differential treatment based on race was illegitimate if not specifically authorized by Parliament. The lower court held that because the Group Areas Act did not specifically authorize unequal treatment and because the Reservation of Separate Amenities Act authorized unequal treatment but did not include residential controls, the removal order was unauthorized by Parliament and therefore was ultra vires. The Appellate Division reversed the lower court. In an opinion written by Judge of Appeal Holmes, the court held that the Group Areas Act was a “colossal social experiment” and that “Parliament must have envisaged . . . substantial inequalities.” In other words, because the Act contemplates discrimination and inequality on a massive scale, any administrative action under the Act which results in discrimination and inequality on a small scale is legitimate and consistent with the will, if not the express intent, of Parliament. The courts are likely to declare a removal order under the Group Areas Act invalid only when no alternative residential accommodations are available at a site to which the government orders an individual to be removed.

201. The plaintiff-respondent complained that there was “a striking disparity between the accommodation, housing and amenities available in areas [open to Blacks] as compared with that available in areas [that were restricted to Whites].” Minister of Interior v. Lockhat, [1961] 2 S.A. 587, 601 (App. Div.).
204. Separate Amenities Act, No. 49 of 1953. See § III.B supra.
205. Lockhat v. Minister of the Interior, [1960] 3 S.A. 765 (Durban & Coast Local Div.).
207. Id.
208. See S. v. Variawa, [1968] 1 S.A. 711 (Transvaal Provincial Div.) (each case must be determined individually).
4. Segregation Under the Other Residential Segregation Statutes

For Africans, the residential segregation statutes provide even less opportunity for redress of grievances than the Group Areas Act. As early as 1935, the Transvaal Provincial Division of the Supreme Court held that the power of the state president to order the removal, under the Black Administration Act, of an African to a location with no facilities, was valid. The Black Administration Act, as originally passed, provided Africans with the right to a hearing before execution of a removal order. When the court voided an order because of the denial of such a hearing, the government responded as it had in other situations where court decisions had limited the power of government authority. Parliament passed the Black Administration Amendment Act. This amendment explicitly terminated the right to a hearing in removal cases.

The court, thereafter, took a harder anti-African position on the residual right of an individual to request a statement of the reasons for a removal order. In Mabe v. Minister for Native Affairs, the court held that an order was not invalid merely because the reasons provided in the statement were untrue, as long as the enforcing officer acted in good faith. Later, the court abandoned the use of requests for reasons as a procedural safeguard. The court subsequently interpreted the statutory right of the government to withhold reasons on the grounds of national security, to mean that the government had full discretion to determine the security implications of any order.

Later in 1956, the Nationalist Government took action to preclude judicial interference in orders arising under the Natives (Urban Areas) Consolidation Act. The Bantu (Prohibition of Interdicts) Act prevents a court from granting a stay of a removal order for the purpose of hearing a judicial challenge to the validity of the order. The South African courts' interpretation of this Act further eroded the procedural rights of non-whites. In R. v. Rampai, the Transvaal Division ruled that no appeal from a removal order is available if the government authority issuing the order is satisfied that the person ordered to resettle is a threat to peace and order.

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211. Black Administration Act, No. 38 of 1927.
214. Id. § 5(b) states that the governor general may, "[w]henever he deems it expedient in the general public interest without prior notice to any person concerned order that . . . any tribe, portion of tribe, black community or black shall be withdrawn from any place to any other place. . . ."
218. Bantu (Prohibition of Interdicts) Act, No. 64 of 1956, § 2.
219. [1957] 4 S.A. 561 (Transvaal Provincial Div.).
220. Id.
5. Positive Inducements of Residential Segregation Policy

Developments in the area of residential segregation law have been similar to developments in the Population Registration Act area. Before 1948, the legal culture, as reflected in both statute and case law, was compatible with the Nationalist program.\(^{221}\) Once in power, the Nationalists then extended the ambit of their legal controls. Nevertheless, the policy of residential segregation differs in a significant respect from the policy in other areas of the apartheid program. In addition to the negative inducements to acquiescence, the residential segregation policy also includes positive inducements.

These positive inducements take the form of partial compensation for strict residential segregation. The government has employed two specific devices to blunt non-white resentment of white affluence: (1) the government has offered an improved quality of life for the residents of the separate areas, and (2) the government has conferred tangible side-benefits on certain segments of the subjugated population.

With regard to the first device, the Report of the Commission on Native Education warned that peace could not be preserved in South Africa unless Africans had tolerable conditions in the areas where they were forced to live.\(^ {222}\) This call to make the designated areas more habitable presented a formidable problem. When the Nationalists came to power, a shortage of at least 150,000 housing units for Africans, alone, already existed.\(^ {223}\) One study described the urban African population as being scattered about in shacks, basements, cellars, outbuildings, garages, dormitories and “undefined and possibly undefinable quarters.”\(^ {224}\) Another study described the coloured section of East London, Korsten, as “the worst slum in the world.”\(^ {225}\)

As a result of the recommendations of the Commission, the government enacted two Acts. First, the Black Building Workers Act\(^ {226}\) authorized the training of African construction workers for projects to provide new and renovated buildings for use by members of their group. This Act established a system of technical and vocational schools for Africans. Second, the Native Services Levy Act\(^ {227}\) provided a mechanism for financing construction projects. This Act

\(^{221}\) See § III.B supra.


\(^{223}\) South Africa Institute of Race Relations, Handbook on Race Relations in South Africa 244 (E. Hellman ed. 1949) [hereinafter cited as Hellman].

\(^{224}\) University of Natal, The African Factory Worker, in Social Implications of Industrialization and Urbanization in Africa South of the Sahara 198 (1954) [hereinafter cited as University of Natal].

\(^{225}\) Stocker, Slums and Housing Schemes, in Africa in Transition 90 (P. Smith ed. 1958) [hereinafter cited as Stocker].

\(^{226}\) Black Building Workers Act, No. 27 of 1951, § 10.

\(^{227}\) Native Services Levy Act, No. 64 of 1952, repeated by Laws on Plural Relations and Development Act, No. 16 of 1979.
required all employers to pay a levy of two shillings and sixpence per week for each African employee not housed on the employers’ premises. The money collected was then to be used by the government to cover the cost of providing water, sanitation, street lighting, road maintenance, and bond repayment for transport services in black areas. The Native Services Levy Act also established a Natives Services Committee to coordinate the activities of a nationwide network of local advisory committees which were to draw up proposals for their particular areas.

These measures spawned entirely new approaches to African urban-areas housing schemes. Many cities abandoned the traditional practice of simply designating an area for African residence and allowing it to develop uncontrolled. Instead, cities made planning and community development efforts. Later, the Community Development Act and the Housing Act enabled the national government to prescribe population densities, boundary lines, proper zoning and housing construction standards. The Community Development Act also enabled the national government to assume direct development responsibility when the local advisory committees failed to operate adequately. These positive inducements have produced significant improvements in the quality of the urban environment for many Africans. The government has provided good quality housing in the new designated areas and has eliminated the worst, although not all, of the slums.

In addition to the incentives provided by an improved quality of life, there are also side-benefits to individual members of the subjugated groups which secure their acquiescence in the system. Non-white construction workers benefit by

228. Id. § 9.
229. Id. §§ 5, 10(d).
230. Id. § 7.
231. For a description of the traditional system of uncontrolled development in African sections of urban areas see Hellman, supra note 223; University of Natal, supra note 224; Stocker, supra note 225; EISELEN COMMISSION, supra note 222. For accounts of patterns of development in studies of specific areas see also D. READER, THE BLACKMAN’S PORTION (1961) (East London); UNIVERSITY OF NATAL INSTITUTE OF SOCIAL RESEARCH, BAUMANVILLE (1959) (Durban); van Heerden, New Life for a Dark Town, 17 J. OF RACIAL AFF. 7 (1966) (Johannesburg’s Alexandra Township) [hereinafter cited as van Heerden]; M. WILSON & A. MAPEJE, LANGA (1963) (Cape Town).
232. The urban improvement programs and attempts to provide coordination and direction to development are described in Mocke, The Native Services Act Bantu/Bantu, Feb. 1956, at 33; Heald, Urban Bantu Housing Bantu/Bantu, June 1956, at 2; Yeld, Housing, 14 J. OF RACIAL AFF. 178 (1963); Moolman, The Resettlement of Urban Bantu in the Bantu Homelands, 15 J. OF RACIAL AFF. 54 (1964); van Heerden supra note 231; Penny, Town Planning Urban Renewal and Economy, 36 S. Afr. J. OF ECON. 168 (1968).
234. Housing Act, No. 10 of 1957.
235. See id. §§ 42(1)(d)-(e), 81; Community Development Act, No. 3 of 1966, §§ 27-28, 49.
236. Community Development Act, No. 3 of 1966, § 17.
237. See note 292 supra.
obtaining employment. However, the non-white middle classes are the more significant beneficiaries. The Group Areas Act prohibits any person from owning any immovable property in an area closed to his group.238 For the African group, elimination of white and Indian competition has meant the emergence of an entrepreneurial class.239 Although they have lost many shops and small businesses under this system, the coloured and Indian groups have gained many new opportunities in manufacturing, retailing and banking.240 Coloured and Indian groups may also own their own homes.241 As an additional incentive, since 1978, Africans have been able to acquire ninety-nine year leaseholds on land in their areas with full rights to ownership of improvements.242 Thus, for those individuals who receive better housing, for those who can own their own homes, for those who obtain positions in the racially stratified bureaucracy, and for those who secure protected retail markets, acquiescence in apartheid is easy. The government encourages their acquiescence in apartheid by giving these individuals a stake in the system which oppresses them.

C. Anti-Miscegenation Statutes

1. Introduction

The anti-miscegenation statutes are, on their face, regulative.243 At a deeper level, however, they are primarily expressive because they articulate the extreme repugnance of the Afrikaner (and the English speaking white South African) for interracial sexual intimacy.

The Population Registration Act indirectly reduces the potential for cross-racial affective ties. The Group Areas Act implicitly blocks formation of such ties by regulating residential patterns. But the anti-miscegenation statutes explicitly and directly prohibit interracial sexual intimacy. As in the other areas of racial
segregation, the Nationalists did not invent penalties for interracial sexual relations. However, the Nationalists significantly expanded the purview of such penalties. Thus, the statutes in this area are quite similar in their development to population registration and residential segregation. Once again, the pre-1948 legal culture has had an emphatic impact on the implementation of social engineering.

2. Development of the Anti-Miscegenation Laws

Before formation of the Union of South Africa, in 1911, all four provinces prohibited sexual intercourse between white women and African men. In 1927, the Union Government passed the original Immorality Act. The Immorality Act made sexual intercourse between unmarried Europeans and Africans illegal.

In the first decade after coming to power in 1948, the Nationalists moved to close the loopholes in the existing legislation. The Immorality Act applied only to non-marital relationships. Interracial sexual relations in a mixed marriage were, therefore, fully legal. Therefore, the Nationalists passed the Prohibition of Mixed Marriages Act which prevented future marriages between Europeans and non-Europeans. The Mixed Marriages Act not only nullifies such marriages, it also makes the individual performing the wedding ceremony subject to criminal prosecution and “liable to a fine not exceeding 50 pounds.” Closing a loophole in the Mixed Marriages Act, the Prohibition of Mixed Marriages Amendment Act voids marriages performed outside of South Africa between male South African citizens and women of other racial groups.

The Nationalists also made an effort to punish those individuals who had already legally consummated interracial marriages. The Group Areas Act includes a proviso that a woman married to a member of another racial group

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244. See §§ V.A.1, B.1 supra.
245. See note 107 supra.
246. One author points out the similarity between the extreme segregation practiced in South Africa in the late nineteenth and early twentieth centuries, and the racism prevalent at that time in the American South.

White civilization ... faced the prospect of being destroyed from within if it allowed itself to be associated with nonwhite races. The influence of the pseudoscience of eugenics, then very popular in the United States, led to fears of increased biological “contamination” through intermarriage with non-Aryans and the creation of a “mongoloid” race.


247. Immorality Act, No. 5 of 1927.
248. Id. Sections 1-3 of the Immorality Act describe the prohibited acts of intercourse between Europeans and Natives; sections 4-6 describe the punishment.
249. Id. § 7.
251. Id. § 2.
belongs to her husband's group. However, if the man were white, he would assume his wife's classification and his wife would retain her former status. Therefore, a white man who marries outside his race faces the severe penalty of reclassification. A curious effect of the operation of these laws is that since a white person married to a non-white person ceases to be white, by official logic, sexual relations between a white and a non-white cannot occur within a marriage.

A second major loophole in the Immorality Act was the restriction of its scope to whites and Africans. In 1950, the Nationalists amended the Immorality Act to prohibit sexual intercourse between whites and coloured persons. "Coloured person" is defined, for purposes of the Amendment, as any person who is not a white person. The Nationalists again amended the Immorality Act in 1957 to outlaw all sexual contact between whites and non-whites and to make solicitation (explicit or implied) to such contact subject to the same penalties as actual contact.

Although the miscegenation laws have been developed through several steps, the final version of the package of Acts is not historically unique. In fact, the South African court had already anticipated the Nationalist version of interracial sex laws in the dictum of an earlier opinion. In Moller v. Keimoes School Committee, Chief Justice Lord de Villiers of the Appellate Division recognized that the "first civilised legislators in South Africa . . . [believed], as these Whites did, that intimacy with the black or yellow races would lower the Whites without raising the supposed inferior races in the scale of civilisation, [and thus] they condemned intermarriage or illicit intercourse between persons of the two races."

3. Enforcement of the Anti-Miscegenation Laws

The anti-miscegenation statutes are among the most difficult apartheid laws to enforce. Unless individuals are caught in flagrante delicto or unless someone chooses to report an illicit solicitation, little likelihood of prosecution exists.

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254. Id. § 10(1)(b)(ii).
255. Id.
256. Immorality Amendment Act, No. 21 of 1950.
257. Id. § 3.
258. Immorality Amendment Act, No. 23 of 1957, § 1.
259. Id. §§ 2(a)(iii), 16(1a)(iii).
261. Of course, the police do conduct investigations based upon complaints from the public; but given the nature of the offense such investigations must resort to dubious tactics. The South African Institute of Race Relations reported that five police officers were guilty of trespass and searching without a warrant when they entered a white woman's apartment to investigate an immorality complaint. Survey of Race Relations, supra note 242, at 23.
However, the primary importance of the laws is their expressive function. These statutes officially condemn interracial sex and attach a severe penalty to it.\footnote{Interracial sexual contact can result in seven years in prison plus a flogging. Immorality Act, No. 25 of 1957, §§ 16, 22.}

The Prohibition of Mixed Marriages Act is particularly expressive. Even without the Act, interracial marriages would probably be quite rare: The Immorality Act prohibits interracial sexual intercourse between unmarried individuals; the Population Registration Act makes one's associates a primary element in the classification or reclassification of an individual's racial group membership; and the Group Areas Act precludes interracial cohabitation. In fact, regardless of these legal factors, interracial marriage would be unlikely for whites simply because of the social stigma. Evidence shows that even before Parliament promulgated the Prohibition of Mixed Marriages Act, mixed marriages were unusual. Van den Berghe reports, for example, that in 1946, only one white in 714 (0.14%) married outside his group and only 1.38% of all registered marriages were racially exogamous.\footnote{\textit{Van den Berghe}, supra note 55, at 55.}

The transition from social to legal controls of miscegenation has been a long-term process. The Nationalists have been primarily responsible for intensifying the legal controls. They have used the law both to articulate traditional mores and to control social processes. The Nationalists have broadened the kinds of sexual relationships which are forbidden by law and which are subject to severe penalties.\footnote{See § V.C.2 supra.} Both the severity of the penalties and the breadth of the forbidden conduct emphasize the Nationalists' concern with preventing action which might undermine the racial stratification system.

D. The Pass Laws

1. Introduction

On the surface, the Population Registration Act, the Group Areas Act and the anti-miscegenation laws are non-discriminatory. They discriminate only in operation. The Group Areas Act even provides some benefits to the disadvantaged groups, which gives this legislation a relatively benign facade. The Pass Laws, on the other hand, offer no subtle benefits to soften the use of coercive power to keep white, black and brown separate. The Pass Laws aim at maintaining the racial hierarchy. These laws clearly demonstrate the power of the white regime and the subjugation of the non-white masses.

The Pass Laws fit into the general pattern of the apartheid social engineering program. The Pass Laws conform to the scheme of social reformation through social fragmentation. As in the areas addressed above, this legislation has a
component directed at blocking the affective ties that might operate to break down the norms of interracial contact desired by the Nationalists. But these laws may be even more malevolent than the others. The Pass Laws go beyond simply expressing the inferiority of the non-white groups. These laws undermine the potential of non-whites to achieve self-actualization and depersonalize the individual. As a result of the Pass Laws, members of the subordinate groups see themselves almost exclusively in terms of group membership. Thus, the Pass Laws underpin and energize all the other laws which control interracial behavioral patterns.

2. Development of the Pass Law System

As in the cases of the racial legislation discussed above, the Nationalists did not invent a new tool of subjugation with the Pass Laws. Rather, the Nationalists extended an existing system and adapted it to new circumstances.

Vagrancy Laws of 1809 represent the initiation of the pass system in South Africa.\textsuperscript{265} These laws required each non-slave, non-white to carry a permit when travelling from place to place. Although the Vagrancy Laws, themselves, became invalid in 1828,\textsuperscript{266} for almost all of South African history since 1809, the law has required African males to have passes from their home jurisdictions while in white areas.\textsuperscript{267}

When the Nationalists came to power, a number of loopholes existed in the pass system. The system focused only on one racial group, the blacks, and it did not even fully encompass that group. The law did not require coloured persons or Indians to carry passes. Neither did it require these groups to obtain travel permits (although the law did oblige Indians to secure permission for interprovincial travel).\textsuperscript{268} African women were also exempt from pass requirements, except for transit from their tribal homelands to destinations in the white areas.\textsuperscript{269} Later, male members of the nascent African middle class, those with European educations, and those in professional occupations could acquire letters

\textsuperscript{265.} See The Cambridge History of the British Empire 280-81 (A. Newton, E. Benians, E. Walker eds. 1936) [hereinafter cited as Cambridge History].

\textsuperscript{266.} Cape Colony, XXXIV Records of the Cape Colony, Ordinance 50 (1828). For commentary on this ordinance, see Cambridge History, supra note 265, at 290.

\textsuperscript{267.} Since 1809, the various South African Pass Laws have operated as a substitute for the slave trade, which the British disallowed. See notes 1 and 171 supra. "As landless men, bound by the pass system to work where they dwelt, [non-whites] had no opportunity of improving their lot and thereby added to the prosperity of ... [Cape] Colony," Walker, supra note 57, at 169. See generally Ballinger, supra note 2.

\textsuperscript{268.} Admission of Persons to the Union Act, No. 22 of 1913.

\textsuperscript{269.} Natives' (Urban Areas) Act, No. 25 of 1930. Section 7 required native females to have authorization to travel to cities. Section 19 authorized municipal authorities to require native men and women to have written permits during night hours. Id.
of exemption for the pass requirements. The provinces of the Natal and the Cape of Good Hope allowed these so-called "civilized" Africans nearly complete freedom of movement.

In 1952, the Nationalists moved to close up the loopholes in the pass system. The Bantu (Abolition of Passes and Coordination of Documents) Act provides that every native, resident alien and foreign contract worker must obtain a reference book upon reaching the age of sixteen. In the front of the book is an identity card issued by the census bureau. The card contains all the information recorded in the Population Register along with the holder’s current address. The holder must obtain validations by his employers in his reference book to prove that he has the right to be where he is or to do what he is doing.

The Bantu (Abolition of Passes and Coordination of Documents) Act provides that failure to produce the reference book on the demand of a responsible official or policeman subjects an individual to a fine of up to ten pounds and/or up to 30 days in jail. If such an individual is in a white area illegally, he is subject to repatriation to his tribal area and a fine of R100 or 90 days imprisonment.

In general, South African criminal procedure with regard to arrest power is similar to that of common law countries. The Criminal Procedure Act provides for arrest on warrants issued by a judge or magistrate upon affidavit of a police officer or prosecutor. An officer may also make an arrest without warrant when an offense occurs in the presence of the officer or if he has probable cause to believe a crime has been or is being committed. The Bantu (Urban Areas) Consolidation Act, however, allows a police officer, without a warrant, to arrest...
any African in an urban area, if the officer has reason to believe that the African is an idle or undesirable person.282 Accordingly, police execute routine pass raids in which the police round up Africans to check the individual's pass for validation of his right to be in a particular area.283 The Criminal Procedure Act provides further that police officers may enter and search any premises where illegal Africans may be domiciled or employed.284 The law, therefore, does not restrict raids to Africans on the street.

3. The Impact of Court Decisions on the Pass Laws

The courts have had little impact on limiting the operation of the Pass Laws. Just as the high court upheld discrimination in public facilities if authorized by Parliament,285 it has stated that Parliament may impose the burden of proof on the defendant in a criminal trial.286 When the court attempted to mitigate the pernicious effects of the Pass Laws, the government instituted legislation which limited the court's power to do so.

When, in the area of search and seizure, the court took a narrow view of the police right to enter private premises,287 the government promptly enacted the Criminal Procedure Act.288 This Act allows a police officer to enter any premises without a warrant when he has reasonable grounds to suspect that any offense is being committed, is about to be committed, or is being prepared to be committed.289

4. The Results of Enforcement of the Pass Laws

The result of all the legal latitude given to the police in enforcing the Pass Laws is that, unlike the Immorality Act, the Pass Laws are vigorously enforced. Police make frequent sweeps through African residential areas and work sites to check documents.290 Between 1966 and 1975, the government, under the Na-

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283. The year 1979 was characterized by an increase in the number of such raids. The public reported many complaints about "extreme arrogance, obstructiveness and authoritarianism" displayed by the authorities. SURVEY OF RACE RELATIONS, supra note 242, at 391.
285. See note 90 supra.
289. Id. § 44.
290. The concern for internal national security has forced the South African government to even further extremes since 1948.

With mounting unrest among Africans, military and police control becomes increasingly crucial. The older nonwhite shanty-towns with their maze of narrow, tortuous alleys were often located close to white residential or business districts; [in the 1960's they were] ... systematically being razed as a major military hazard. They [were] ... replaced with "model townships"
TABLE 2

COSTS OF ENFORCING PASS LAWS

<table>
<thead>
<tr>
<th>Activity</th>
<th>Cost in Rand*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arrests and Summons</td>
<td>1,150,116</td>
</tr>
<tr>
<td>Patrol and Police Checks</td>
<td>11,501,160</td>
</tr>
<tr>
<td>Prosecution</td>
<td>1,714,526</td>
</tr>
<tr>
<td>Loss of Production</td>
<td>7,667,445</td>
</tr>
<tr>
<td>Imprisonment</td>
<td>18,749,312</td>
</tr>
<tr>
<td>Issuing and Updating Documents</td>
<td>24,051,568</td>
</tr>
<tr>
<td>Labour Bureau</td>
<td>47,160,000</td>
</tr>
<tr>
<td>Aid Centres</td>
<td>331,110</td>
</tr>
<tr>
<td>Transit Camps</td>
<td>500,000</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>112,825,237</strong></td>
</tr>
</tbody>
</table>

*One Rand = U.S. $1.15

**Source:** M. Savage, Costs of Enforcing Apartheid and Problems of Change, 76 AFRICAN AFFAIRS 287 (1976).

...nationalist regime, pursued nearly 5.8 million prosecutions of Africans for violations of the various statutes related to the pass system — an average of approximately 1154 prosecutions per day.291 According to a conservative estimate, enforcement of the Pass Laws costs about R 112,825,237 (U.S. $129,749,023) per year.292

In South Africa, every adult member of the society must have an identity card to prove his identity.293 Unlike identification cards which exist in other countries, the South African identity cards prove identity to the persons who hold them as well as to those who ask for them. The problem is especially acute for Africans. Whites, coloureds and Indians must produce their identity cards and supporting documentation to a magistrate within seven days upon demand by a government official.291 Africans must have their passes in their possession at all times.293 If an African does not have his pass when confronted by the police, he is subject to arrest and imprisonment or to repatriation to his tribal homeland.296

A good example of the extent to which the Pass Laws have accomplished the depersonalization necessary to structure interracial interaction is found in an...
account by an African journalist, Lewis Nkosi, of the deaths of two Soweto men. The men had died when they crawled into a burning building to rescue their reference books.

It is not heroism — and nothing like bravado — that can make a man go to his death in an attempt to save a Pass Book.

The motive is simply FEAR — the realisation of what life will be worth without a reference book.

For a reference book has ceased to be a mere form of identification. It is interchangeable with the man himself.

I do not live apart from my own reference book any more. In fact, I have decided I AM THE REFERENCE BOOK.297

In his identity card or passbook, every South African has a constant reminder that his place in society depends on his racial classification. Therefore, he finds his classification to be the most important aspect of his social life. The Pass Laws cut individuals off from their own selves. People subject to the Pass Laws act, think and feel, not as autonomous human beings, but as components of their officially and legally defined racial groups within the racial hierarchy. Thus, the pass system solidifies the structure of the entire apartheid system of government.

VI. RECENT DEVELOPMENTS IN THE PROGRAM

A. Political Developments

Recent events in South Africa emphasize the salient position of the laws regulating interpersonal interracial contact under the National Party regime. On September 29, 1978, Defense Minister P. W. Botha became the fifth National Party Prime Minister.298 Within a year, many black leaders and the English language opposition press were hailing him as a champion of reform. Following a ten-day visit by Mr. Botha to the black homelands and Soweto (the black suburb of Johannesburg), the Chief Minister of Lebowa, Dr. Cedric Phatudi commented that “the winds of change are now blowing in the right direction.”299 Qwa Qwa Chief Minister, T.K. Mopeli, congratulated the Prime Minister for setting out a new direction for ethnic relations and for his “determination to create a better South Africa for its different peoples.”300 By November of 1979, Botha had accomplished the previously unthinkable feat of having a majority (57%) of the urban black population record a positive evaluation of his leadership of the country, whereas his predecessor had only received positive ratings of 4 to 6%
from the same group. A near majority of the urban black population (49%) even recorded a positive evaluation of his handling of race relations. Furthermore, Botha was able to secure this increased black support without significant loss of white support.301

Mr. Botha had won these plaudits as a result of statements by himself, his cabinet and the state president. In his first public statement, in June of 1979, the new state president302 said that South Africa would bring justice to its oppressed minorities and would devise a formula to provide democratic rights to all of the country’s minorities.303 The Minister of Cooperation and Development, Dr. Piet Koornhof, speaking to the National Press Club of America in Washington, D.C. declared that a new era of reform had dawned in South Africa in which real changes would take place to end discriminatory practices and policies.304 Later, back in South Africa, Koornhof opened the annual conference of the National African Federation of Chambers of Commerce by saying that he believed in equality before the law, full human rights, and full participation in decision making in a government set up for everyone, regardless of race.305 Similarly, the Minister of Finance, Senator Owen Horwood, stated, in a speech in Antwerp, that the government intended to eliminate discrimination on the basis of color.306

Mr. Botha, himself, played the leading role in raising hopes for change. He told an interviewer in Die Transvaal that South Africa had to either adjust or die, and that although he had been put into office by the whites, he also recognized his responsibility to the other racial groups.307 Shortly thereafter, Botha presented a twelve-point plan of principles for his government.308 Among the principles he presented were the acceptance of a multi-racial society, the acceptance of minority rights, the greatest possible consolidation of the black homelands, a division of power including consultation on matters of common concern, and the elimination of unnecessary discrimination. During his tour of the homelands and Soweto, Botha indicated that he was willing to accept a status for urban blacks which would be independent of the homelands.309 In September 1979, he told the Cape National Party Youth Congress that a policy where one group rules over another was fruitless and had become extinct.310

302. Mavais Viljoen was the state president.
In his advocacy of a new dispensation for the non-white groups, Mr. Botha had been strongly influenced by South African military opinion. In his previous capacity as Minister of Defense, Botha had close relations with leaders of the military complex. Significantly, government members and military leaders were espousing change at the same time. In August 1979, Brigadier C.J. Loyd of the Natal Command commented that the government of South Africa needed to give its military a country which it could feel proud to defend and that force could not provide a lasting solution for internal problems. Loyd's superior, General Magnus Malan, was even more blunt. Malan said that it was of strategic importance to gain the trust and faith of all the population and that this would require moving away from discrimination.

B. Substantive Development

1. Separating Politics from Substance

In spite of the statements by members of the government and the military, little substantive change in the interracial contact laws has occurred. One must question whether any prospect of such change in the immediate future exists. When the new session of Parliament opened in February 1980, the state president announced that the government was committed to a decade of reform, renewal and development. Mr. Botha had raised hopes about his being a reformist prime minister, committed to new constitutional proposals, homeland consolidation, narrowing the wage gap between white and black, and improving the life of the urban black. At the same time, Botha indicated that he had to protect the identity of his people, the very policy which originally had motivated implementation of the apartheid program.

For some observers, this apparent turnabout was a cruel blow to hopes for an improved racial climate. The Cape Times, in an editorial, complained that public expectations raised in 1979 would not be realized. The Argus lamented that those South Africans looking forward to changes designed to diminish racial tensions would be disappointed. Mr. Vause Raw, leader of the New Republic Party, told Parliament that, after eighteen months of promises of a new dispensation, the Botha book had no more than a title, a prologue and blank pages.

311. Botha had been Minister of Defense since 1966.
317. The no confidence debate of February 4, 1980 is discussed in Decade of Reform [1980] S. Afr. Dig. 3, col. 2 (Feb. 8, 1980). Realistically, no one should have been surprised at the course of events. Botha had based his springtime of hope on wishful thinking. Botha's change in perception was quite
2. The Question of Real Change

On May 8, 1979, Parliament discussed the Report of the Riekert Commission of Inquiry into Legislation Affecting Utilisation of Manpower. The report recommended extensive changes in the pass system. The report recommended, for example, the elimination of the influx control measure limiting African work-seekers to a seventy-two hour stay in an urban area and elimination of the criminal penalties for unlawfully working in an urban area. Minister of Cooperation and Development Koornhof announced that the influx control and reference book system would be made more humane. Parliament, however, refused to accept the recommended changes in the system. Not only did Parliament reject the recommendation to eliminate criminal penalties for illegal black workers, but it introduced heavy new penalties (R 500 minimum fine) for employers of illegal workers. In his speech to the National Press Club of America, in which he proclaimed a new era of reform, Minister Koornhof stated that influx controls actually helped blacks. Koornhof announced later that passes would be eliminated and replaced by documents, similar to those used by the other groups, which were more convenient to carry.

With regard to the anti-miscegenation laws, a pattern similar to that of the pass system became evident. In September of 1979, Mr. Botha told the National Party Congress in Cape Town that he would not tolerate laws that insult people. He stated that although mixed marriages are inherently undesirable, preventing people in love from marrying is difficult. Botha also stated that although the Immorality Act was open to some criticism, any immorality had to be opposed. Thus, he favored improvement in the acts, but preservation of important values.

In the area of residential segregation, the government made some improvement. Mr. Botha's visit to Soweto in August 1979 was the first official recognition by a National Party prime minister of the urban black population as a political
different than that of the non-whites, the English press and the opposition. Throughout the initial year-and-a-half of his term as prime minister, Botha and his cabinet always hedged their pronounce­ments of change. With regard to each of the four areas of social engineering legislation, the Botha government either circumscribed any apparent amelioration of the legislation's deleterious impact on non-whites, or merely extended the Nationalist's previous policy.

318. REPORT OF MANPOWER, supra note 239.
319. SURVEY OF RACE RELATIONS, supra note 242, at 394-95.
322. See note 280 supra.
323. Laws on Plural Relations and Development Second Amendment Act, No. 98 of 1979. For commentary on this act, see SURVEY OF RACE RELATIONS, supra note 242, at 391.
324. See note 304 and accompanying text supra.
327. Id.
entity. Botha went so far as to say that he saw a place for the urban blacks in the constellation of southern African states independent of the homelands. Dr. Koornhof, a short time later, told a banquet for South Africa's top one hundred companies, that the government would turn over the whole gamut of professional, technical and administrative positions required to run a big city to Africans in order to bring decision-making and decision-implementing power to Soweto. In December 1979, the Minister of Community Development, Marais Steyn, announced that the Government had decided to stop building small square box-type housing for blacks and would, instead, construct the same type of housing for all racial groups. The government also took steps to improve commercial life for non-whites. Probably as a result of the Riekert Commission study, the government decided to allow local authorities to open central business districts to Indian and colored traders. The government also allowed white businessmen to enter into minority shareholding partnerships with Africans in the black areas in order to improve African access to capital.

The government has initiated some measures which are of benefit to the non-white groups. Community opposition prevented elimination of the black area of Alexandra. The government announced that the traditionally colored community of Sir Lowry's Pass, which had been formerly proclaimed a white area would be reclassified as a colored area, thus relieving the city's two thousand citizens of ten years of apprehension. The government has also allowed Chinese, although still formally subject to coloured status, to buy homes in white areas if the white residents do not object. For the most part, however, the changes which occurred were pragmatic adjustments rather than substantive alteration of social policy.

The concessions on Alexandra and Sir Lowry's Pass were the result of ad hoc Afrikaner efforts. For instance, the regime revealed the change in Chinese residential policy only after South Africa and the Republic of China had signed an R 400 million six-year uranium purchase plan agreement in March

331. Under Section 19 of the Group Areas Act, No. 36 of 1966, eight such areas have been authorized. ANNUAL REPORT OF THE SECRETARY FOR COMMUNITY DEVELOPMENT (Republican Pub. No. 24/1979, 1979). The allocation of those areas is as follows: in Cape Province — Port Elizabeth, East London, Vryburg; in Transvaal — Pretoria, Roodsport; in Natal — Newcastle, Ladysmith, Pinetown.
332. SURVEY OF RACE RELATIONS, supra note 242, at 248.
333. Id. at 418-20.
336. See note 280 supra.
Opening central business districts to Indians was, at least partially, a legitimization of the numerous Indian-owned firms fronted by whites. Turning over municipal administrative posts in African locations to blacks, introducing ninety-nine year leaseholds in the African locations, improving access to capital for African traders and designing more attractive housing, all fall within the policy of partial compensation inducements for segregation. But as The Star commented in an editorial, the real problem confronting Soweto is unemployment and desperation. City status alone makes little difference. Soweto's real problems are that it has no tax base, no freehold property owners, no industry, no central business district, and a tremendous need for subsidization of transport.

The situation with regard to the anti-miscegenation and pass laws is far less ambiguous. Although Mr. Botha has expressed concern with removing unnecessary discrimination, his perception of "unnecessary" is narrow. His underlying premise is still that Afrikaner identity must be protected and preserved. Thus, the government may improve group areas but it has no intention to eliminate them. Similarly, the Prime Minister has said that he wants to improve the Immorality and Mixed Marriages Acts. Mr. Koornhof said the Pass Laws would be made more humane. But the Daily News rightly asks: "How does one improve something as bad as this?"

In spite of some loosening of controls in the system, the apartheid program remains intact. The Population Registration Act, the Group Areas Act and the Pass Laws are likely to remain essentially unchanged because they contribute directly to the maintenance of the power position of the Afrikaner. Much less vital to this power position are the Prohibition of Mixed Marriages Act and the Immorality Act. The Nationalists can probably achieve the purpose of both of these acts through social pressure and the operational effect of the Group Areas Act. However, the Nationalists are also unlikely to abolish these acts, pointing up the extreme importance which the Nationalists place on manipulation of social processes. The Afrikaner newspaper, Die Volksblad, identified the core issue when it said that the Government could not eliminate the Acts because the Acts really are "more of a protective than a discriminatory nature."

338. See Republic's Future, supra note 308.
340. Id.
341. See Republic's Future, supra note 308, point 6.
342. See note 326 and accompanying text supra.
343. See note 320 and accompanying text supra.
345. Die Volksblad, Sept. 27, 1979, reprinted in [1979] S. Afr. Dig. 22, col. 3 (Oct. 5, 1979). The Afrikaner paper Hoofstad found the plight of Mrs. Susan Green a cause for concern with respect to the need for flexibility in race classification decision-making. Mrs. Green was forty-six years old when she
The present Government is definitely not in the process of dismantling apartheid. The opposition reacted in the 1980 opening of Parliament with bitter discontent, but such disappointment should have been anticipated. As the Cape Times had stated a year earlier, Mr. Botha's proposed reforms remained well within the Verwoerdian ideology. Nationalist supporters had believed all along that the government was fine-tuning the essential infrastructure of the socio-legal system, but not substantially altering it. As the Afrikaans paper, Rapport, noted in October 1979, Mr. Botha was stressing elimination of sticky points, not abandoning National Party tenets, in order to create a climate for more interracial cooperation. After all, Mr. Botha had, himself, said during the peak of his national popularity, that South Africa had to adapt and adjust or otherwise die. He added that his government would work out a plan for adapting without changing the National Party's basic principles. The Prime Minister's twelve point plan was "not so much a blueprint for the next decade as a rewriting in present day parlance of the aims and policy goals of the National Government."

In spite of the talk of change and reform following Mr. Botha's assumption of the premiership in September 1978, the legal complex supporting the apartheid program remains intact. The prospects are that it will continue its present form.

decided to remarry. When she and her fiancé applied for a marriage license, they found that the government had changed her racial status from white to coloured two years earlier. She had two children in white schools and a daughter married to a white man. The paper lamented that little could be done about Mrs. Green's case. It noted that the case demonstrated the need for better administrative procedure and more careful decision-making. Hoofstad, Feb. 16, 1980, reprinted in [1980] S. Afr. Dig. 26, col. 3 (Feb. 22, 1980).

346. Cape Times, Feb. 9, 1979, reprinted in [1979] S. Afr. Dig. 2, col. 1 (Feb. 16, 1979). From the beginning and continuously, Verwoerd's ideal was total separation of the races. To him and other National Party leaders, however, this was an impractical ideal for the prevailing circumstances. In his earliest speeches in Parliament, he repudiated the Opposition's contention that his interpretation of apartheid... meant... the fragmentation of South Africa both economically and politically. He denied forcefully that it implied the creation of autonomous states with power to enter into hostile alliances against White South Africa if they wished to do so, and with independent economies to support them, which the sincere apostles of apartheid would have to help them create, involving inevitably an implicit threat to the "White" community. Neither he nor his Party had ever suggested anything that could justify this contention. He had indeed [said]... that "in their own areas" the Bantu might develop to the highest degree of self-government, but he went on to explain that this was local self-government. ... On the subject of international relations, [Verwoerd later stated that]... the white man would not only enjoy supremacy in his own part of the country, but also "as trustee in respect of the outside world and of the interests of South Africa as a whole."

BALLINGER, supra note 2, at 519-20.

After he became Prime Minister in 1959, Verwoerd did commit himself to the possibility of ultimate African independence, "no doubt under the necessity to justify his decision to abolish all African representation in Parliament, and under pressure of events in the world outside." Id. at 321. History has shown that he never took this commitment seriously. See generally id. at 318-33.


349. Id.

The Population Registration Act and the Group Areas Act are the basis of the regime's claim to the allegiance of the Afrikaner population. The government may loosen the Pass Laws but the government will not eliminate these laws because they are necessary for upholding the Group Areas Act. Of all the basic apartheid legislation, the anti-miscegenation laws are discardable since these laws are the least vital to the system. However, even the anti-miscegenation laws have an important symbolic function. Therefore, any alteration will be gradual, if at all.

VII. CONCLUSION

The Republic of South Africa has used law as a tool of social engineering and as a mechanism to preserve a stratified society. Although neither use is unique, the South African case is especially noteworthy because of the extensive use of legal sanctions in its social engineering programs.

Most studies of law and social change attempt to relate either one piece of legislation, one court decision or one judicial doctrine to subsequent social effects. Examination of the apartheid program in South Africa demonstrates the limitations of such an approach. The social engineering process is effected by the interaction of several complex factors, and no one factor, examined in isolation, can fully explain the dynamics of this process.

The South African experience demonstrates, in particular, the paramount role played by the legal culture in any attempt to use law to effect social change. Research, in the West, for example, has shown that direct efforts to reduce discrimination lead to long-term reduction of prejudice. This result is attributable to a process similar to cognitive dissonance in that "[c]oncrete conditions produced through the laws' implementation may, over time, lead to changes in personal attitudes." A similar process of dissonance reduction exists in South Africa.

In both the United States and in South Africa, however, a second, more critical factor is also at work: in both countries a normative basis underlies the program of legal social engineering. The law effects social change not only through direct implementation (i.e., through enforcement), but also through an "educative function, reinforcing the norm of equality [or inequality]." The putative success of anti-discrimination laws on social change in the United States depends

351. Dwyer, Law, Actual and Perceived: The Sexual Politics of Law in Morocco, 13 L. & SOC'Y REV. 739, 742 (1979). Legal sanctions have also been applied to women in Morocco. A recent study of these sanctions found that "subordination, seclusion, surveillance and ideological denigration join in forming a web of limitations that curtail women's life options." This observation is analogous to the life of non-whites in the South African case. Id.
352. See notes 14-18 and accompanying text supra.
354. Id.
upon the historical existence of the norm of equality. Whereas Americans may have had legal support for racial discrimination and even for slavery, the predominant value system of the nation supported equality. In fact, the struggle to eliminate legitimized racial discrimination is probably the longest running political issue in the United States, dating back to the Constitutional Convention itself.

On the other hand, in South Africa, the value system of the dominant interests in society has always sanctioned inequality. The Afrikaners looked back over one hundred and fifty years of British rule and saw a steady erosion of the social values they cherished. The reality of social life was such, however, that "liberal" policy on racial issues failed to penetrate popular consciousness.

In South Africa, the seventeenth century Cape society established a set of norms for interracial interaction. The legal system which developed between 1806 and 1948 was manifestly an extension of the two great European legal traditions: common law and civil law. However, neither tradition was sufficiently rooted in the local milieu to afford resistance to the National Party's social policy. As a result, the pre-Nationalist legal culture was compatible with the apartheid program.

When the National Party came to power in South Africa in 1948, it represented the organized expression of Afrikaner nationalism. The National Party preserved Afrikaner identity through ethnic solidarity and ethnic mobilization, and it used public power to shape society according to social ideals passed from many Afrikaner generations. Although the legal system was based formally on the principles inherited from English common law and Roman-Dutch civil law, such as equality before the law, due process of law and judicial protection of individual rights, several well-established principles of the South African legal culture were also important ingredients. Among these principles were that the courts would not interfere in discriminatory practices sanctioned by Parliament, that the courts would decide ultra vires questions on the side of the executive, that white popular opinion on race questions would inform judicial interpretations of ambiguous race legislation, and that South African courts would not sit as courts of equity. The National Party's platform represented a promise to the Afrikaner that he would regain his rightful preeminence in society. The law would be the keystone of the effort to fulfill that promise.

Therefore, the Nationalists could proscribe political actions against the regime, remove the formal legal protections for violators of the proscriptions, and

356. The reader should not take the emphasis on Afrikaner social ideals and the role of the National Party as vanguard of Afrikanerdom to mean that legalized racism is not accepted by the English-speaking White South Africans. English speakers, for the most part, accept White domination and accept most social aspects of segregation. The Nationalists produced the development of a coherent program of rigid racially-based social controls on the basis of traditional Afrikaner values.
develop a legal framework for racial subjugation that would service the reestablishment of the idealized social order. The formal commitment to western tenets of legalism might interfere, from time to time, with the National Party's program and individual judges might persist in ruling in favorem libertatis.357 But on the whole, the system has allowed the government to secure whatever it desires in the legal sphere. As a result, the South African experiment in manipulation of social processes through use of the legal sanction is one of the clearest examples of the potential effectiveness of law as a tool of social engineering.

Scholars consider the concept of law as a tool of social engineering to be a ubiquitous feature of modern politics; but systematic knowledge of the operation of this concept to date has been deficient.358 In spite of the apparent failure of a specific piece of legislation to directly produce a desired outcome, law is an important component of a successful social engineering process. The continuing process of promulgation and enforcement of various laws produces social change. Each new piece of legislation adds to the perception that state intervention into social processes is legitimate.

The social engineering program in South Africa does not follow the concept of social engineering proposed by other studies. The program clearly does not aim at achieving the highest values of Western civilization.359 It is not primarily concerned with changing customary behavior.360 The National Party did not design the program to demonstrate official regard for popular conceptions of justice,361 nor to reduce behavior that might break down community integrity.362 The system is founded precisely on the premise that the society is a constellation of diverse communities. The social engineering program in South Africa uses law to shape the meaning structure of social life. If social engineering is to have any utility as a broad concept in comparative law scholars must view the concept as a method to impose meaning structures on social processes. The South African case proves this point.

357. The courts have generally interpreted the law in favor of the executive when the law is ambiguous. In some cases, however, individual jurists have followed the dictum of Justice Gardiner in Nkoweni v. Bezuidenhout, [1927] Cape Town Provincial Div. [C.P.D.] 130. "The rules of procedure of this court are devised for the purpose of administering justice and not of hampering it and where the rules are deficient I shall go as far as I can in granting orders which would help to further the administration of justice." Id.

358. See Droit, Law as a Tool, supra note 45.

When a principle important to the government is at issue, the government has been able to undercut court decisions favoring the individual. See notes 90, 208 & 212 and accompanying text supra. Yet, the Nationalists still perceived judicial protection of individual rights as a threat to the Afrikaner social order. See Oggenblad, Jan. 21, 1980, reprinted in [1980] S. Afr. Dig. 22, col. 5 (Jan. 25, 1980). The paper asserted that lawyers who accept judgeships knowing that they have conscientious objections to existing legislation do the judicial system an injustice. Id.


361. See Berman, supra note 32.