

JOURNAL OF A TRIP TO SOUTH AFRICA, AUGUST 1988

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DIARY
South Africa - August 1988

INTRODUCTION

In June and July, 1987, I was finishing a book on federal appellate jurisdiction and practice. It seemed wise to hole up far away from my Austin office and plow through the indexing, table of authorities and other tedious tasks. I had improvidently left these until last, thinking to finish the "creative" part of book-writing first.

So for six weeks I divided my time between Chapel Hill, North Carolina and a palatial beach house on the North Carolina coast. At Chapel Hill I taught trial advocacy as a summer visitor and raided the law library. Mornings at my in-laws lovely beach house I hammered away at my lap-top computer. (Afternoons, most days, I played on the beach with my three-year-old daughter.)

One night in Chapel Hill, Dean Ken Broun kindly invited me to dinner. He told me about his trip to South Africa, where he had taught trial advocacy at the invitation of the Black Lawyers Association of South Africa. He had gone with Jim Ferguson, a Black lawyer from Charlotte, and other veterans of the National Institute for Trial Advocacy (NITA) program.

Their trip had been arranged through USSALEP (the United States-South Africa Leadership Exchange Program), an organization largely funded by the Ford Foundation and deeply involved in programs to promote a multiracial future in South Africa.

Ken described exciting teaching of criminal trial techniques that are as valid in the English/Dutch-Roman legal system of South Africa as in an American courtroom. After all, cross-examination of a police officer, or the tactics to challenge admissibility of a confession, or the means of preparing a witness to testify, all involve the same goals of persuasion no matter what legal system one is in.

Broun was already planning another trip for the Summer of 1988. I volunteered, and said I thought the Section of Litigation of the American Bar Association should participate by sponsoring my going and by raising money for the project.

I reasoned this way: I knew of all the criticism of South Africa's legal system. I talked to Ken at length about it and vowed to read more deeply. But black residents of South Africa charged with political offenses do not have the option of refusing to participate in their country's legal system. They are in court because the state has brought them there.

Second, the Black Lawyers Association of South Africa had determined that teaching trial advocacy, and training trial advocacy teachers, are important tasks.

It seemed to me that disapproval of South Africa's legal system would no more justify refusing to help strengthen the corps of concerned lawyers than disapproval of Mississippi's legal system in 1964 would have justified refusing to help the few lawyers in that state who were willing to take civil rights cases. More broadly, I had already written about the role of advocates in our own history as a people and as a nation. In all times and places, advocates may express claims for justice. In troubled times and places, great advocates have not only defended their clients but arraigned the system of state power against new-honed principles of freedom and fairness. To take a famous example, Andrew Hamilton's defense of the colonial editor John Peter Zenger in 1735 was termed by Constitution-framer Gouverneur Morris "that morning star that lighted the way of liberty." So to strengthen the hands and skills of advocates in South Africa seemed worthy work.

Third, the experience we had gained teaching at our own schools and in NITA programs would serve us well. Ken had already developed case problems reflecting situations encountered by lawyers in criminal cases in South Africa.

Fourth, I looked forward to being Vice-Chairman, the Chairman-Elect and Chairman of the 50,000 member American Bar Association Litigation Section. I wanted to exercise leadership by example in bringing and improving legal representation to people and places where there was need. The Section, led by Jack Curtin and with the aid of Rory FitzPatrick and Seth Waxman, had done great work in the pro bono area. Ben Civiletti had recruited more than 1000 Section members to provide post-conviction representation in capitol cases. Judd Best had reaffirmed the Section's support for these principles. So I thought it right that the Section support this effort.

Fifth, I was excited at the prospect of visiting South Africa.

At the January 1988 meeting of the Section Council, we approved my going to South Africa as the Section's representative, not only to teach but to explore ways in which our participation might be expanded. The Section decided to ask the ABA Board of Governors for authority to raise money for the project.

Meanwhile, Ken and I spent hours on the telephone figuring out how to complete the paperwork to obtain visas for our group. Dan Matthews and Sally Scott of USSALEP were of great help.

We decided to go in two groups. Ken and Jim Ferguson would go from August 2 to 14; Charles Becton and I would arrive on the 10th and 11th and stay until the 22nd. We would thus have one Black and one white lawyer on each teaching team.

Charles "Bec" Becton was an old friend from NITA days. He is one of the greatest teachers of trial advocacy I have

ever met. Today, he sits as judge of the North Carolina Court of Appeals.

Dean Mark Yudof of my school, Texas, agreed to make a research grant available for the trip. We would still need \$5000.00 for Becton's expenses, though.

So as of May, we had three problems: visas, Board of Governors' approval to raise money, and the money itself.

VISAS

Ken had managed to obtain visas for the previous trip, but increased tension in South Africa caused worry about this trip. The South African Consulate also required us to submit a letter of invitation from the Black Lawyers Association. Delays in the mail held up receipt of the letter until late May. The visa application forms were long and detailed. We filled them out and waited.

When I returned to Austin from vacation in late June, a message awaited me. Call "Monique" at the South African Consulate, for the oral interview portion of the visa application. I called Ken. He had never heard of the oral interview requirement, and none of the other participants had been interviewed.

I called Monique, who explained that her last name was unpronounceable and so she would not tell me what it was. She wanted to know how I was chosen to go to South Africa? The Black Lawyers Association had no doubt heard of me through Ken Broun. Why did I think South Africa needed Americans to teach trial advocacy there? In my experience, advocacy techniques are remarkably similar from country to country, despite differences in legal systems. In any case, I was sure I would learn as much or more than I would teach. It is always that way when I teach in trial advocacy programs. Also, the determination of need was not mine: I was responding to an invitation. Did I have a point of view critical of the South African legal system or government? Well, I have studied a lot of legal systems, including my own and never found one yet that couldn't be changed to make it better and fairer. Didn't she agree with that? This seemed to put her on the defensive, but she allowed that nobody's system was perfect. Well, I said, I have tried to apply consistent principles of criticism to every legal system, and to try to be informed before I made a judgment. That is one reason why I was looking forward to this trip.

Monique thanked me and said that all this information would be relayed by telex to South Africa.

That was late June. My application had been submitted in May.

We waited. By mid-July, we were worried. Plane tickets needed to be bought, land arrangements made. USSALEP communicated its concern to the South African Embassy. Ken Broun considered calling Senator Helms.

My father-in-law, George Birrell, wrote to friends and business associates of his in South Africa, telling them I would be coming. George had been a director and general counsel of Mobil for many years. Eventually, he spoke to

the South African Embassy and a lawyer-friend of his spoke to the Department of Home Affairs in Pretoria. Monique, when called, put all blame for delay on inevitable bureaucratic slowness. George confirmed that even a routine tourist visa can be delayed for weeks.

I like to think, however, that it was no coincidence that our visas came through within 24 hours after George's second call to the South African embassy and the South African lawyer's call to the Home Affairs department. We had our visas.

ABA

The ABA Board of Governors approval proved more difficult than I had thought. Don Haskell, the Litigation Section's representative on the Board, steered our proposal through the right Board committee. After all, we were only looking for authority to raise money. Had the Litigation Section not decided to raise outside funds, no Board approval would have been necessary.

We ran into problems, though, because our proposal was perceived as conflicting with plans by other ABA entities to visit South Africa.

The Sections of International Law and Individual Rights and Responsibilities (IL & IRR) had plans to send a delegation to South Africa to conduct a "needs assessment." Visa requests for this project had been turned down three times by the South African government. Most people thought the proposed delegation's perceived political views, and its announced intentions of seeking publicity for criticisms of South Africa, accounted for the visa problem.

Rather than welcome our modest proposal as a way to begin an ABA presence in South Africa, IRR and IL derided and opposed it at the Board of Governors' June 10-11 meeting.

They predicted we would not get visas. They trivialized the importance of our going. In the end, the Board approval was by a divided vote and the IL/IRR folks carried away some resentments.

Indeed, one of them stopped my son Jon in the hall of Morrison and Foerster's San Francisco office, where he was a summer clerk, to complain of my "go-it-alone" strategy.

At the ABA Annual Meeting in Toronto, Judd Best (incoming Section Chair), David Brent (our Staff Director), Don Haskell and I worked hard to mend fences. Jill Wine-Banks, ABA Chief Operating Officer, and I spoke together and patched things up.

Indeed, we left it that I would report to all on my return from South Africa, and advise on how one might smooth out the visa process. The 1987 program piloted by Brown and Ferguson featured an impressive array of South African legal talent and the ABA needs to be identified with these forces. Change is inevitable in South Africa. We can help in the current movement and build ties to those who will make and influence change. At the same time, we reaffirm the dignity and worth of advocacy and of due process.

MONEY

Early on, Carol Bernstein Ferry gave \$1000.00 routed through USSALEP. Once we had Board of Governors approval, I called David Hunter. David, an old friend who advises many small foundations, came up with \$2000.00 more. From the ABA Annual Meeting in Toronto, on August 5, I called Philip M. Stern of Washington, D.C. and he made a \$1000.00 challenge grant.

Judd Best agreed to match the money immediately from his firm Debevoise and Plimpton. Judd ably persuaded four other firms to share in the match.

At Judd's first section luncheon on August 9, he announced the trip to loud applause. Geoff Hazard, my old civil procedure professor was the speaker and he added his good wishes.

AUGUST 9, TUESDAY

I left Toronto at 8:00 p.m. on BA72 to London, arriving the next morning.

I sat next to Richard Eaton of Skadden Arps's Wilmington, DE office. He told me of Skadden Arps's creation of a pro bono endowment. We talked about his corporate practice and about my ABA work, practice and teaching. I read a history of the Boer-English armed conflict and began to read a history of apartheid.

AUGUST 10, WEDNESDAY

I awoke as dawn broke over London and we landed at Heathrow. BA had arranged a day room at the Excelsior, A THF hotel near the airport.

I showered, slept, pressed my pants, ate, walked and slept some more. It is now 6:10 p.m. local time and I am fairly rested.

I reviewed the case file for our teaching sessions. Last year, the lawyers suggested focusing on a coerced confession problem. This year, the case problem features a prosecution of two Black police officers under the internal security laws for allegedly selling information to the ANC, a proscribed organization. The two suspects claim that their confession is inadmissible because it was coerced or obtained by such undue influence as promises or threats.

The South African internal security law is terrifyingly broad. It combines all the elements of:

1. conspiracy principles;
2. guilt by adherence to a prohibited organization;
3. broad prohibitions on support activities (including speech) that effectively trivialize the crotus recis requirement;
4. a broad range of "protected" state interests that may not be challenged, including maintenance of the system of apartheid and its components; and
5. engrafted on to this, a system of secrecy for all papers and information of the State, protected by a series of legal provisions that greatly resemble American espionage laws taken in their broadest sense to include 18 U.S.C. §641 thefts of

information and the 50 U.S.C. provision on information transmitted. The South African provisions are, however, much broader.

Our confession problem will be difficult because the police took the accused to a magistrate to repeat the confession. This effectively shifts the burden of proof on the admissibility issue under South African law, although the preponderance standard is still used. That is, the magistrates' interventions and warnings are thought sufficiently protective so that the accused must thereafter prove coercion or undue influence.

Another line of defense may be that the confession does not supply all elements of the offense. For example, the statement, "I murdered my husband with arsenic" does fulfill this requirement, while "I poisoned my husband" would not.

In addition, there must be some evidence extrinsic to the confession to sustain a finding of guilt. Quaere whether the receipt for funds will provide this.

Tonight I am in the lounge at Heathrow. When I put this book down, I will finish my apartheid book, read a detective novel and then tomorrow review background material on the South African legal system.

LATER

The literature on South Africa's legal system shows outlines of a Roman-Dutch legal culture with overlays of British civil and criminal procedure. The Dutch, of course, adopted the Code Napoleon in 1804 and a Civil Code of their own in 1838, so the South African system was released from its tethers at that point.

The court system is familiar to a common law lawyer, with a distinction between barristers and solicitors. Jury trial used to exist for criminal cases but was seldom requested by defendants. They preferred the predictability of the judge. Today, a felony case will typically -- though not normally -- take place before a judge flanked by two assessors. The latter may be retired magistrates or professionals such as lawyers, doctors or accountants.

The State has the burden of proof in criminal cases, but there are many burden-shifting presumptions based upon "incriminating" acts. I gather this is like the presumption of knowledge from possession of recently-stolen goods in the U.S., but on a much greater and increasing scale.

The Roman-Dutch heritage is obviously overlain with statutes, but I wondered whether a combination of Pothier, Grotius and new consumer legislation could be used to argue that a confession should not be admissible on facts that would not sustain an ordinary commercial contract.

I get the sense that lawyers are needed as teachers, but also that we could usefully put lawyers to work in legal services programs as "officer lawyers" doing legal research for motions and client counseling. This could be an ongoing project.

There are, to be sure, separate courts in black areas, with varying jurisdictions and with authority to apply black custom in certain matters.

But blacks are subject to the full force of South African law in criminal matters and to trial in the regular courts.

AUGUST 11, THURSDAY

At 5:15 a.m. Kenya time (Austin plus 8) I awoke as we descended toward Nairobi. There was no telephone in the airport capable of handling a long-distance call home, so I browsed the duty-free and bought a lion for ET, a spoon for AGB, a spoon for GAB and two sets of salad servers. I probably paid too much, but not to worry.

Not much view of Nairobi from the airport windows. We arrived at 6:10 a.m. and then pushed off the gate again at 7:10 a.m.

As we climbed out of Nairobi, I reset my watch to Austin +7, Johannesburg time, shaved and put on a tie.

Off the left wing, Mt. Kilimanjaro rose out of the clouds, and maybe someday Griz and I and assorted kids can walk it. My guidebook deals only with Southern Africa, so I cannot read up on Kenya.

I was met at the airport by Mr. J. Moloto, head of the Black Lawyers Association Fiduciary Center, a tall South African lawyer. He took me to the teacher training program, which had begun that morning. Ken Broun, Jim Ferguson and Charles Becton were already hard at work. A video camera was set up and a group of 20 students assembled. The case was Jones v. Minister of Police.

On the way, I learned there are about 650 black Solicitors and 40 black barristers in South Africa. There are 6500 white solicitors and 100 or so white barristers. Black young have trouble -- financial and scholastic -- getting into law school. And there is clear evidence that the white bar examiners discriminate.

There is a quota system at work apparently. For example, in Durban this time, nearly all white candidates passed and none of the black candidates.

Moloto is very glad to know that we can provide as many United States teachers as they need, perhaps to come on a regular basis to team teach with black lawyers.

We discussed the legal system as well and criminal law.

The Centre helps black lawyers and law students as well. The latter need this support. The Centre needs financial support.

Despite my jet lag, I had shaved on the plane and used a hot towel. So I jumped right in and began with the teaching, jointly critiquing a direct in the Jones v. Minister of Police file. It is fun to be in a NITA setting. Becton is awesome, as are Broun and Ferguson.

The idea of having the American team consist of one black lawyer and one white lawyer is important to the perceived legitimacy of the project. For future trips,

perhaps each United States firm would pay its lawyer's expenses.

Moloto told me that the planned expedition to the University of the North had been cancelled because the black students there (in Northern Transvaal) believed that the United States participation is culturally wrong. This political position is understandable but regrettable.

Moloto's first name is Justice.

Our main case for the day was a lawsuit brought by a white woman apartment caretaker who was arrested and manhandled by the police for trying to intercede in a pass-book investigation of a black employee in the building.

Tomorrow we deal with Mofokeng v. I. M. Farmer, a classic case of a black paroled laborer who was beaten by his employer. The Boer undertones of "Farmer" are clear.

True story: Broun was in Durban and took a walk to the seashore. He asked a passerby, "Is this the Indian Ocean?" The reply, "No, man, this is the white ocean. The Indian ocean is 400 yards that way."

At dawn, Fergie and I had a long conversation with Justice Moloto about the BLA. BLA is one of two organizations for black lawyers. The other is NADL (National Association of Democratic Lawyers) with ties to UDF.

BLA is more strictly "professional," but no less political. It would welcome the ABA visit that has been proposed by Jill Wine-Banks and the IRR-International Law group. It welcomes the chance to make friendships that will survive into the period after a majority of South Africans achieve control of the country's future.

We talked until late about politics, lawyering and the future.

Most black lawyers over 40 had been jailed or banned at some time. While banned, they could not attend university or law school and were often sent to a remote place to live. Many, therefore, achieved their law degrees by correspondence.

A banned person is a nonperson and may not be quoted in the press or have her or his picture shown publicly.

On my arrival, a cordial note from Charles Friedman awaited me. I will call him tomorrow.

Also at dinner was the black lawyer longest in practice in South Africa. He spent 8 years in jail with Mandela, but was eventually readmitted by the Law Society.

I did a mini-demo on cross of a cop in the Jones case. Fun!! "The animal act rides again."

AUGUST 12, FRIDAY

Teacher training continues at St. Peter's Priory Rosettenville.

Last week's Weekly Mail (newspaper) was confiscated because it reported on a soldier shooting a student in Soweto, contrary to the Emergency Powers prohibition on reporting of security services actions to quell unrest.

Today we began with a medical expert problem in Mofokeng. We focussed on the problem of smoothly handling documents, authenticity, relevance, best evidence, hearsay. The young lawyers have the same problem with this as in the U.S.

We also suggested demonstrative evidence techniques. Surprising how similar the rules of evidence are on these points. We are feeling we are being helpful.

The group we are teaching is 20-25 lawyers and law students--5% of the black lawyers in S.A.

I did a mini-demo on direct of an expert, showing how to bring out prior work with activist organizations in a positive way, to deprive the cross-examiner of the advantage.

I spoke with Charles Friedman, who was most cordial. He invited me to dinner for Monday, August 15. He warns against walking in Johannesburg at night, in the area north of the hotel--risk of mugging. He regrets I cannot go to his farm for the weekend, but says please bring any of my colleagues to dinner. He says Justice Goldstone, "one of our top justices," will be with us this weekend in our training program here. So, Friedman knows what we are doing and apparently approves.

He inquired about our visas and reported that he sent a telefax directly to the Minister for Home Affairs on our behalf, "telling him to get moving on this."

Ken Broun and Jim Ferguson did a superb demonstration on direct and cross of the Doctor in Mofokeng v. Farmer.

It is clear from the interaction today that we are helpful in instilling confidence, in talking frankly about how to confront authority in an authoritarian structure.

Today we are joined by several additional lawyers, including Nona Goso (University of Transkei, P/B X1, Umtata, Transkei), who teaches part time at a law school in Transkei and practices part time. We should correspond with her about the law school.

There is a neighborhood in Johannesburg (north of the hotel) called Hillbrow, where blacks have been renting and leasing apartments. The law provides the area is for whites only, but it is enforced selectively against those disliked by the regime or by landlords. The area is rent-controlled, but obviously this is only for whites. Blacks have no standing to complain, and are therefore charged double or triple the controlled rental. Hillbrow is the only such area in Johannesburg.

Becton, who arrived on August 10, was driven around Soweto and was severely affected by his experience.

I try at every turn to talk about courtroom control, presence and confidence.

In the closing arguments for Jones v. Minister, I did a mini-demo as part of the critique. I wanted to show structure, introduction and a strong start. I borrowed from the Irish, British, Canadian, South African tradition of setting out the points to be made as an overview of the

argument. I stressed reliance upon "the law," the stated expectation that the judge will obey the law, as being a promise the regime makes to the people. Fergie was quite complimentary about the force and structure of this 2-minute introductory argument.

Ken Broun seconds the observation that we see enormous strides in these classes. The two post-demo arguments were not only a marked contrast with the earlier ones, but were poised and persuasive.

In informal conversation, I discussed theories of cross-examination of the informer, stressing the "what would you lie for" riff and the use of prior statements from a turncoat.

That night, we went to the home of one of the lawyers for a "braai," or barbecue. This black lawyer and her husband live in a house in a white neighborhood in the suburb of Kelvin. They are one of about 20 black families who live there in violation of the Group Areas Act. They purchased the house through a close corporation of which they are 98% shareholders, to evade the prohibition on blacks owning any real property.

This family is typical of the black middle class that apartheid tried to destroy, but which is called into being by the scarcity of whites for middle-level jobs and by ceaseless black pressure for change. This pressure makes itself felt in the large corporations, who employ a number of blacks. By "number" is meant anywhere from a token to a few, in recognition of international pressure on these multinational entities.

The fact is that in Johannesburg, the situation is out of control in many respects, a high-crime, high-density, high-anger place.

AUGUST 13, SATURDAY

Trial Advocacy Program Begins

At breakfast, Ken said that many South Africans have agreed that blacks here are amazingly patient and have a surprising reservoir of good will about the prospect for change. It seems possible--though less so with each passing month--that change can come without wholesale violence. The matter is of course in the hands of South Africans. All we can do is respond to stated needs.

*The flight from Capetown lands at Jan Smits Airport. Pilot: Welcome to Jan Smits Airport, serving Johannesburg and Pretoria. For those of you going to Pretoria, set your watches back 30 years.

*Amazing that the Weekly Mail republished the offending material from last week's banned edition by way of reporting on the ban and seizure.

One of our participants was an articulated clerk in the law firm of Mandela and Tambo. He carried on when Tambo went into exile and Mandela was betrayed and jailed. He was the first black lawyer to refuse to sit at the separate counsel table for blacks. He won an appeal from his contempt citation. Godfrey Pitje is his name.

Last night, Justice drove us to the party in Kelvin. He promised he knew the house and that it was an easy ten-minute drive from Johannesburg. He drove at his usual 140 KM. When we got to Kelvin, he slowed down and we cruised the streets to look for the house. "I bet my bottom dollar we'll find it. . . .OK. that's it."

"But, Justice, that one has a large 'vicious dog' sign, and it's in Afrikaans."

Undeterred, Justice pulled into the driveway, blocking the gate and with the car lights shining into the windows of the house. The other car in our convoy stood by. Moloto honked the horn loudly. We could see people in the house. They were large and white. Moloto got out of the car. Becton, in the front seat, threatened to drive off at the first sign of trouble.

I was sure the owner would come out with a sidearm or shotgun and blow us away.

Instead, he came out and talked to Moloto. No, he did not know the house we were looking for.

* * * *

Cross: Mild to the Mild
Shrewd to the Crafty
Merciful to the Young, Frail & Weak
Rough to the Ruffian
Thunderbolt to the Liar.

(Becton added: Confiding to the honest 8/18/88.)

Today, Justice Goldstone is there to preside. He will be at USSALEP in September and for six months at the Harvard Center of International affairs from January 1989 on. He would enjoy visiting Texas. He was at the Aspen Institute with Judge Justice several years ago, and knows Judge Godbold. He also has read "Unlikely Heros," a story of the "Old Fifth."

Goldstone will be working on a research project on affirmative action, which he feels will be an important issue in South Africa.

Justice Goldstone sat recently in N. Transvaal with a Black woman attorney as lay assessor. He says that assessors must be law-trained, whether practicing lawyers or legal academics. His actions caused a stir in this right-wing Afrikaaner community.

The case involved a white policeman, shot by a black defendant.

Goldstone notes that more than half of the judges in South Africa have been to the U.S. or have had significant contact with American lawyers. This has had a significant liberalizing effect in increasing sensitivity to human rights issues.

Some have said to Goldstone that he should resign. He replies that ANC and related organizations still use the courts and he feels he is useful.

Six months ago, he set aside 3 convictions because the magistrate had not informed the accused they should seek

counsel -- "failure of justice" was the ground. Another justice has gone even farther. In serious cases, most judges (though not all) try to see that the accused are represented.

Human rights groups, public interest law, and the Legal Resources Center are a decade old now. They have some effect.

However, things have gotten worse in the last year. Some right-wingers purport to be hardening their positions because of sanctions.

AID is encouraging some liberalizing through judges' seminars. One wonders how futile this is, and how much AID is seeking to use this as a cover to get information. AID's reputation precedes it.

Today, I will do a cross-examination in a trial of black cops for funnelling information to the ANC. I will cross the white cop who investigated the case and extracted confessions from the two accused. I want to structure my examination to develop the themes I believe can be applied in all such cases. In this way I can provide the greatest help to these young lawyers -- and maybe even older ones -- who are all involved in political cases. I also want to develop themes that have a larger political significance. This significance is of course decreased when trials are held in camera, as are many political cases. (Justice Goldstone, however, routinely permits visitors when cases are nominally "in camera." He believes it important to try and get around the in camera procedure.)

CROSS--BROUN'S 10:

1. HAVE A POINT
2. CONTROL
3. AGREEMENT NOT ARGUMENT
4. SIMPLICITY
5. SHORT
6. STOP
7. NO WHY QUESTIONS
8. KNOW THE ANSWER
9. BEGIN AND END STRONG
10. DON'T ASK ONE QUESTION TOO MANY

Goldstone has been contacted by the ABA office in Chicago, earlier this year.

Ferguson's introduction of me this morning was effusively complimentary about my role in political trials.

Questions must be definite: In a noncontested divorce proceeding, counsel for the wife-applicant wanted to bring out that the couple had not had sexual relations for many months. But he asked, "When did you last have sexual relations?" The answer, "This morning." Surprised, "With whom?" "With a lawyer in your office." Becton promises to steal the story and put it in North Carolina.

Today, I shared a theory on cross of witnesses in an espionage case -- themes would be to develop the way in which the information is spread around in the government.

Second, there is the staleness point: What would you pay me for yesterday's paper?

In the afternoon, I did a demo cross of Capt. Jones in the criminal case. I put in my theme of defense and showed how the officer is motivated to lie. It was as good a demo as I have ever done. See cards for outline detail.

I will also talk about (as noted above) the cross of a turncoat -- playing the role of former assistant to O.

Tambo.

Later

Well, I did it. Began with -

Q: Ms. Lemin, are you a South African citizen?

A: Yes

Q: You have admitted, in your examination-in-chief, that you committed treason against your country, haven't you?

A: Yes

Q: And what is the penalty for traitors?

(softly) A: It would be death.

Q: I am sorry. What did you say?

A: Death.

Q: Do you expect to be put to death?

A: No.

And so on

Later Fergie did a mini-demo. We focus on fear and reward. Paid informers and threats. The atmosphere as we crossed the "former ANC-present snitch" was the most electric I have seen in a trial ad program. We were going over the brutal tactics of the Security Forces and the political atmosphere.

Justice Goldstone eloquently summed up what one needed to do. "Ask her why she joined the ANC - because of the terrible condition of blacks in South Africa, right? Have things improved?" If she says yes, make her say how. In fact, the only thing that has changed is now she is being alternatively paid and threatened."

I have to think this is not too fruitful a line of cross, but it is a powerful statement of belief.

Another remarkable thing is that many of these recently-admitted lawyers are in their 30's or older. They have struggled for so many years, first to get schooling, then to get legal education, then to find their way into the profession through "articles" or pupillage. Every one of their lives is a testament to personal determination.

Tonight there was a party that was to begin at 7:30, at the home of the Legal Resources Center president, in Kelvin. We left at 7:15 and arrived at 7:45. The President and Vice President of BLA were there.

The ethical choices that confront us in America now seem clearer.

AUGUST 14, SUNDAY

Trial Ad Program Continues at Rosettenville

I did not sleep well last night. Becton and I are both noticing the combined effect of jet lag and the rich food at the "braais" we have been to. Too much meat. My bronchial

passages hurt, the mucous membranes of my nose are dry. This is the effect of altitude and dry air: 2000 meters.

Today was the final day of the Johannesburg program and we focussed upon closing arguments. We did mini-demos. I set out some theory of argument as evocative. Justice Goldstone was there again with good questions and a sympathetic ear. (We created a mechanism to report on incidents of judges being overtly racist to witnesses, defendants or lawyers, so that Goldstone could continue to write opinions about this.)

G. F. Pitje is there today, and not only speaks about tactics but speaks of programs in the judicial system in his 35+ years at the bar. He is the embodiment of an elder statesman.

We learn that the State's burden of proof is beyond a reasonable doubt, and Becton and I discuss means to drive that home.

Goldstone reports a recent decision of his criticizing a magistrate for not calling all witnesses, lawyers and the accused by their surnames.

Vignette: Goldstone questions prosecutor at argument: "Why is it, do you suppose, that people go into Kompol insisting on their innocence and come out having confessed? Why do people get so cooperative when they get to Kompol building?"

At day's end, I am tired and ill. Fergie and Becton have gone with Pitje to a township where I should not be after dark. Just as well. I nap, eat and read to regain strength for the rest of the trip.

AUGUST 15, MONDAY

The township was appalling. GMP did ask Becton and Fergie what they thought of black lawyers being in white areas where they could be expropriated at any time.

GM Pitje was banned for 12 years and under house arrest. He was forbidden to be with more than one person, even in his own home. He would have a meal with his wife at one time, then with a child, and so on.

The townships are rife with violence and poverty. Details need not be provided here. They are in the media. Soweto does contain some nice houses, such as Pitje's.

Tonight, Charles Friedman picked me up and we had dinner at his home with a retired Justice, David Malamet, and Mrs. Friedman and Mrs. Malamet.

While acceptance of racial separation in many ways is part of their basic view, they recognize that the world is changing. They support BLA efforts in legal education.

There is obviously great division among different elements of the black leadership on such questions as the prospect for change. Justice Goldstone had asked Becton to sit with him as assessor. Justice Moloto had approved. But some black lawyers objected, saying that if a black is to sit--a first for Johannesburg--it should be a local person.

AUGUST 16, TUESDAY

What a day! In the morning, Becton, Mojanku, Moloto and I visited a trial ad class at "Wits." Thirty students, of whom 3 were black. The atmosphere was excellent. The students did direct and cross of Frida Jones in our case file. Bec, Moloto and I critiqued and answered questions. We then did a mini-demo and a mini-lecture. The truly remarkable thing--and the political importance of it--was that the BLA was presenting this program at Wits. That is, said Moloto, blacks were bringing knowledge and instruction to whites. There is a great deal to be learned from this experience.

We then went to the law courts where J. Goldstone greeted us. We saw a morning motions session and found it no different than in the U.S. "Well, my lord, if I can't have it returnable in 3 days, how about 5?"

Then we had tea with the judges, and polite conversation, and went to hear a vehicle accident case. Black plaintiff, black plaintiff's lawyer, Afrikaaner insurance defense lawyer. The witness on cross was speaking in Zulu so all questions were put through an interpreter. One can quickly see how alienating the entire experience is for blacks. The witness hunched over in the witness box and had a huddled exchange with the interpreter, accompanied by many questions. Then the interpreter's answer would come.

This interpreter appeared really to want to help the witness understand and communicate. But in a political trial, one could imagine a hostile interpreter decimating the witness's credibility.

The use of interpreters also should influence examination technique. One cannot do rapid-fire examination, but one needs especially to keep the questions short and "single-bit" or "single-fact."

The "isn't that right" question may not work because the court knows that the witness may be agreeing out of "good form." You've got to make the witness say it. You cannot "put words in the witness's mouth," and the judge can protect a witness from that. In fact, it puts control over form into the judge's hands.

After lunch at the Bar Council (like Inns of Court) Common room, we sat in on the Alexandra people's court political trial, now 2 1/2 years in progress. Summations are going on, and we heard defense counsel. These people are on trial for treason. The chief evidence consists of leaflets about people's power and the class struggle, found in a house where they were arrested. The leaflets were the sort of stuff Becton and I wrote regularly in the 60's. Defense counsel was seeking to minimize the effect of these documents, but the argument had neither force, nor direction, nor consistent theme. He did not state a point and then prove it. He rambled on, punctuating with "my lord" every fifth word--instead of "um" or "ah."

There were only two spectators in Court. I asked Dolly at BLA, why not fill the courtroom? Get law students,

church people. She said there is a lot of alienation and fear of going to court, but she will bring that up.

At lunch we met Ismael Mohamed. He should have been a judge years ago, but he is black. The tragedy now, according to Goldstone, is that if he were appointed he might decline because black political sentiment has lost all confidence in the prospects for reform.

That, Becton remarked, is far worse a state of affairs than existed in the U.S.

Tonight we dined at Justice Goldstone's home.

I sat on a moot panel at Wits on a criminal law issue, for third year students. Not so good. But presiding was Ismael Mohamed. He was called to the Bar in 1957, but for 12 years could not have chambers in the only place where barristers may have them. It was a white area under the Group Areas Act and he is black. Then he had to wait a further five years to be permitted to dine in the Bar Common Room. He would borrow offices from friends for an hour or so and wander the corridors so as to be available for briefs.

He now does mainly political cases. South Africa, he says, is a blend of tyranny and legalism as exists nowhere else. The tyranny is plain, but the government wants it to have a legal "justification." This is compounded by the fact that there is only one entrenched clause left in the South Africa Constitution--the one providing for 2 official languages--English and Afrikaans.

After the moots, the associate dean thanked "Mr. Tigar and Judge 'Blackett'" (referring to Becton) for their help. Ah, well.

AUGUST 17, WEDNESDAY

I did not fall asleep until 3:30 or so and as I was dozing off at last, I heard a guard dog bark and shouts. Becton confessed this a.m. that he too was awakened by this. We both had the same reaction, since our hotel is directly across from a guard barracks and there are lots of young soldiers with Uzis on the streets.

After breakfast we checked out. Moloto drove us through Soweto, where we saw a few small but nice homes, many many more tiny three and four room cinder block structures to house entire families, and then countless corrugated shanties. Unpaved roads, no sewage system, no trash pickup. Garbage is piled up every few hundred yards, then raked up and burned. All the pictures of common water spigots and great poverty are real. In one area there is a dormitory complex for "single" men, many of whom have families but who are forbidden to bring them to the white areas where the men's labor is needed.

We then drove to George Malaleke's office. I learned things that give me a new perspective on his fine house in Kelvin and his fancy cars. He has made his money as a PI lawyer for black plaintiffs where the system is stacked against him. I may disagree with his choices of how to spend the money, but that is not my choice to make.

George drove us to Soweto Airport, where Justice, Becton, Faith, Mojanku, Dolly and I boarded the one-hour flight to Durban.

From Durban Airport, military helicopters take off every few minutes, part of the frontier wars to the north (where Swaziland and Mozambique are). Durban is beautiful, the hotel is exquisite and early to bed. Tomorrow to Zululand bright and early.

Becton and I have had a lot of chances just to be together, and with Justice. This day has been altogether special because I feel that a theme of my life is being replayed for my special benefit.

I do not need to try and prove things as an angry "I'll show you" response. Things are happening. It is right.

The poverty of Soweto is perhaps less significant than the origin and meaning of it. It was created by uprooting black families. It was a measure to enforce apartheid. It did not just happen; it is a deliberate act and thus a specific rebuke to apartheid. It exists near Johannesburg--as all such townships exist near major cities--to provide cheap black labor. And many of its residents can be ordered back to their "homelands" at any time when there is no work for them.

Alexandra, an all-male (mostly) township, is far worse. No paved roads, much less electrical service. Becton confirms this. But no white can now safely go there.

I learned that Dallas and Dynasty are favorite South Africa TV shows, though Cosby and Woody Allen have blocked their work from appearing here. All British shows are off because Equity contracts exclude South Africa.

AUGUST 18, THURSDAY - University of Zululand, Empangeni, Natal

Early up and breakfast to drive to Zululand, where the University awaits us. The urban and resort aspect of Durban gives way to fields and forests. Past a pulp mill, over a makeshift bridge (the real one washed out last year in a flood) and into Zulu country. We see farm huts in traditional style, round, made of twigs and straw, with thatch roofs. Zulu and African cattle of varying states of health are in the fields. This is one of the autonomous areas, very controversial.

The University rises out of a farm area, a group of new brick and concrete buildings of which folks are very proud. We are greeted by Chris Johnson (English speaking white South African professor) and Carol Baekey (American-trained law teacher who has done a great deal of Eskimo-Imut law and Native American law and who is now doing a year here in Zululand). We also met the director of the legal aid clinic. There is a lot of emphasis on street law teaching of school kids as a way of reaching parents on what their rights are.

A welcome speech is made by Director of Legal Clinic Charles Dlanmini, who emphasizes the practical values of the NITA method.

NOTE - The theory of minimal contradiction.

DIRECT EXAMINATION:

1. Introduce and accredit
2. Make comfortable, visible and audible
3. Set a scene
4. Chop it down into bite size chunks of action
5. narrative breeds discontrol

These people could use a full scale NITA program for a week with 100 students. If BLA invited we could really do a job.

Our spectators numbered 150 (overflowing) in this all-black law school. The level of interest was extremely high.

It is early spring but the weather is already steamy. We are only 200 km from Swaziland, where border clashes are frequent and there are incursions by South African police to abduct ANC and Umkhonto members. Justice suggested we might go and visit across the border but better sense prevailed.

Becton's mnemonic - I HAD DAD

Introduce

Humanize

Accredit

Describe parties

Describe scene

Action overview

Details

Becton and I are good teachers together. He has a fund of mnemonics and we both have examples and stories.

As Becton and I do a cross-examination demo, the audience is enthusiastic about our presentation. It is electric to see witness control as an exam technique.

In the afternoon, the students completed the full Jones v. Commissioner of Police trial. The plaintiff made use of the fact that Luthule was called "Kaffir" by Mrs. Truth.

At lunch, a discussion of the need to introduce more moot court and clinical programs in the law curriculum. There is also a dire need for books for the black law schools.

Mrs. Jones is played by Carol Baekey. Ben Luthule is played by a black law student who is clearly Zulu in size and features.

Again, Moloto presides, assisted by other BLA members. He is quite rightly a stickler for "procedure."

CROSS-EXCERPT

Q: Mr. Luthule, what do you do?

A: Bus boy.

Q: Bus boy?

A: That's what I am called (shrugs).

(Much laughter from law students)

* * *

Q: Well, what were your cleaning there?

A: Obviously the dirt. (More laughter)

Students enjoy the image of "lay" witness foxing counsel. The "Ben Luthule" is doing his best to play a real Ben Luthule, and he pulls it off magnificently.

(Listen and be ready for gifts given by the witness.)

There is a visible sense of pride and elation at meeting Judge Becton here.

NOTE: There is no reason to be hurt on cross-examination. They have already hurt you on direct as much as they can. Unless you step back in the fire, by getting them to repeat the direct, you cannot be hurt.

By 4:30 p.m., the moot is over with extensive critique and demos. The response here is overwhelming.

Zululand is a "homeland" and the Chief Minister is also University Chancellor. He is affiliated with Nkata, a right-wing paramilitary black outfit that supports the National Party. Nkata "troops" mowed down some University of Zululand students five years ago.

Many faculty are Afrikaaner incompetents who lecture away in the traditional mode and who resist change with a vengeance. They are present tonight at Ms. Baekey's party. What a group.

We arrive back in Durban at 10:30 tired, but glad to be back on track. Dolly drove back at a sedate 100 kmph. Justice stayed in Zululand.

AUGUST 19, FRIDAY

I slept until 7:00 and then dozed back off until 8:30 or so. After I showered, Becton called and we had breakfast and a walk before going to join the others (Faith, Tom, Les, Dolly, Mojanku) for a drive to the old railway station, which has been converted into a shopping mall. After an hour of wandering in the mall I took leave. I walked back to the hotel, napped, bathed and read until 5:00 p.m.

Becton and I then took another brisk walk up the beach. This morning we sure enough did discover that this is the White Ocean. Signs on the main beach all along Marine Parade proclaim that this beach is reserved for the "White Race Group." This is not, we think, the name of a rock band.

Reflection: I found myself vowing to resist God-centered visions of the world, despite my at-times deep longing for comfort and certitude.

Outside personal relationships and family, comfort is hard to come by honestly. Certitude is a delusion, or a prescription for tyranny; these are not mutually exclusive.

The Earth and all its people will not long survive unless we observe certain ways of dealing with one another and with the Earth itself. That truth must be coupled with a frank recognition of technological and evolutionary change, and of our inevitable power to understand more. You could render the whole thing in terms of potentia and potestas but it would not add anything. All we can say is here is a starting point: details at 11. Or in the meantime, the answers to some concrete problems appear clear. Like here in South Africa.

Mandela is ill. Botha refuses permission for a special team of doctors. Mandela is in a prison hospital. Should

he die while we are here, I wonder if we stand a chance of getting out on schedule. Becton is worried, too.

AUGUST 20, SATURDAY

It hit Becton and me at the same time today. These students are elated, yet afraid of their power. The courtroom is the last public place in South Africa where the security forces may be challenged, criticized and condemned. It takes courage to do it, skill to do it right, but it can be done. As I finished my cross of the cop today, Justice Didcott said - "Even more than wanting Tigar and Becton to teach trial advocacy here, I wish we had them defending political trials."

Law and the Rise of Capitalism is in the Howard College School of Law (University of Natal) library and students wanted to ask how the theories there related to current issues on South Africa. Apparently the book has been the subject of a lot of faculty and student discussion. The Dean says one of his colleagues has had high praise for it.

Today's course follows the familiar pattern, but BLA members are increasingly able to take the lead in critique. The big problem is to get folks to ask leading questions on cross. At days end, they are getting the message.

An interesting development in South African criminal law is the use of "common" purpose to extend liability for violence in mass uprisings. See Sharpeville 6, e.g.

Cross examination? Well, as they say is Zulu: Basobha ingozi? Izozhaya wena? Noma ufakazi? It is a boomerang. Will it strike you? Or will it strike the witness?

Justice Didcott and Dean McQuoid-Mason are valuable additions.

This evening we go to a braai at Louis's home in the township of Uermont. This is a fine house, but in the center of a dirt-road area with incomplete water and electric service. Justice explains that blacks can hold freeholds here and there is no pressure in the town council to improve the place at all. The council is white.

AUGUST 21, SUNDAY

Today Bec gave a moving speech/demo on closing. I (at his request) did an imitation of a bad closing and a better one. I also did a mini-demo on theory of closing.

Again our task is to get these folks over the fear of expressing commitment, outrage and emotion. One needs logic, of course, and attention to detail, and preparation. But one needs also to insist on speaking the truth, and not in a purely technical and legalistic sense.

Bec and I are products of the 60's struggles, and so we have grown used to this way of speaking. But these kids (and even the older advocates) are so terribly scared. They have reason to be of course, but this must be confronted.

There is a limit to our ability as Americans to carry this message.

Today at the break, more discussion of "reformism," "open spaces," and legal ideology. David McQuoid-Mason

presented me with a book on race and law. I must reciprocate.

We said our goodbyes at several reprises--In Durban, on the plane to Johannesburg, and in the Johannesburg airport. Now I am in the lounge with Becton and we are relaxing. I wish the flight were nonstop. Next year, the program should provide for only one week of visit and nonstop flight.

I still cannot sort out all the images, but time will provide. Now, I just want to be in London, and then home.