REVIEW OF *COURTS, LIBERALISM, AND RIGHTS: GAY LAW AND POLITICS IN THE UNITED STATES AND CANADA* BY JASON PIERCESON

Miriam Smith*

Courts, Liberalism and Rights: Gay Law and Politics in the United States and Canada by Jason Pierceson (Philadelphia: Temple University Press, 2005), 264 pp.

This book is an interesting contribution to the nascent empirical literature on lesbian and gay rights, and one of the few American books on the topic that attempts to come to grips with the implications of the Canadian experience. Although I disagree with Pierceson, there is no doubt that his work lays out one side of the debate on the role of lesbian and gay litigation in the United States (U.S.) and Canada, and he is to be commended for the range of material he covers and for his comparative perspective on the American experience.

Although a large number of books are published on "gay rights" in the U.S. each year, the vast majority focus almost exclusively on the normative and jurisprudential aspects of public policies in this area, especially on the question of same-sex marriage.[1] This literature is immense; in my own research, I turned up five hundred U.S. articles in legal periodicals on lesbian and gay rights, published over the last decade. There are also a number of more popular recent works that tell the story of the battles for same-sex marriage in the states,[2] as well as studies that explore the sociological meanings of same-sex unions in the U.S.[3]

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1 See for example, Andrew Koppelman, *Same-sex, Different States: When Same-Sex Marriages Cross State Lines* (New Haven, CT: Yale University Press, 2006).

2 See for example, Daniel R. Pinello *America's Struggle for Same-Sex Marriage* (Cambridge: Cambridge University Press, 2006).

3 See for example, Kathleen E. Hull, *Same-Sex Marriage: The Cultural Politics of Love and Law* (Cambridge: Cambridge University Press, 2006).

Nonetheless, there are few works that explore the empirical and historical evolution of lesbian and gay legal struggles. Pierceson's book, along with Ellen Andersen's 2005 study of Lambda Legal,[4] and Patricia Cain's work on the earlier period,[5] should top the list for political scientists and legal scholars who wish to move beyond the stereotype of "God versus the gays" in American politics to understand the political strategies and political process surrounding this litigation. After all, the U.S. is the home of strategic political litigation on behalf of politically marginalized citizens. The civil rights movement and the women's movement were deemed to have won major legal and political victories in *Brown v. Board of Education*,[6] and *Roe v. Wade*[7] respectively. Does the U.S. Supreme Court's decision in *Lawrence v. Texas*[8] hold the same promise for lesbian and gay Americans?

Pierceson's answer to this question is that, although the *Lawrence* decision which struck down state sodomy statutes as unconstitutional was a victory for gay rights, the process has moved much more slowly on same-sex marriage. Comparing the U.S. to Canada in this respect, Pierceson argues that the political culture of Canada is more open to positive liberalism while the political culture of the U.S. is more strongly attached to negative liberalism. The U.S. has been able to move forward in eliminating sodomy laws but not same-sex marriage. The elimination of sodomy laws requires that the state refrain from interfering in the private realm (negative liberalism), while the recognition of same-sex relationships in law and policy is an affirmative recognition of differences (positive liberalism). Therefore, in Pierceson's view, differences in Canadian and American political culture account for Canada's move to same-sex marriage.

At the same time, however, Pierceson does not think that lesbian and gay litigation in the U.S. is a waste of time for stakeholder groups. On the contrary, Pierceson takes on the critics of political litigation in the U.S., notably Gerald Rosenberg, whose 1991 book *The Hollow Hope*[9] is a classic in the field of law and politics. Rosenberg argued that courts in the U.S. are constrained, conservative institutions, and that they are not able to produce social change that challenges majority views or dominant social power. At most, courts can

4 Ellen A. Anderson, *Out of the Closets and Into the Courts: Legal Opportunity and Gay Rights Litigation* (Ann Arbor: University of Michigan Press, 2005).

5 Patricia A. Cain, *Rainbow Rights: The Role of Lawyers and Courts in the Lesbian and Gay Civil Rights Movement* (Boulder, CO: Westview, 2000).

6 347 U.S. 483 (1954) [*Brown*].

7 410 U.S. 113 (1973).

8 539 U.S. 558 (2003).

9 *The Hollow Hope* (Chicago: University of Chicago Press, 1991).

ratify changes that have already been set in train by the other branches of government, or by changes in society. In particular, Rosenberg demonstrated that the implementation of the *Brown* decision in relation to segregation was halting and protracted, given the many other actors who had to cooperate in bringing about desegregation in the U.S. Rosenberg also emphasized that political litigation can cause a backlash against progressive social movements, thus precluding the achievement of the movement's policy goals.

In contrast, Pierceson points out that courts can produce social change, although not in the direct way posited by Rosenberg. Pierceson reviews the extensive critiques of Rosenberg's view and argues that, in the case of lesbian and gay rights, litigation has played a positive role, and has brought gains for lesbian and gay citizenship. Strategic litigation by an engaged social movement can produce important direct and indirect effects. This type of litigation is almost never undertaken in isolation; rather, it is usually part of a broader political strategy for the achievement of social change and, in drawing on the template of rights-based liberalism, strategic litigation can have a range of indirect effects on social movements and public policy. Pierceson emphasizes the extent to which courts can cue public opinion through their decisions, describing the ways in which U.S. public opinion has moved to an acceptance of civil union and domestic partner arrangements for same-sex couples through years of battling over same-sex marriage. Same-sex marriage litigation might appear to be a failed political project given the substantial backlash against it, the passage of the federal *Defense of Marriage Act*[10] in 1996 (prohibiting the recognition of same-sex marriage in federal jurisdiction and protecting the right of states to refuse to recognize same-sex marriages from other states), and the passage of state *DOMA*s, some of which roll back domestic partner benefits that predated the same-sex marriage debate. On the other hand, Pierceson argues that the same-sex marriage litigation has moved U.S. public opinion to accept same-sex partnerships, even if only as far as domestic partner arrangements. In the Canadian case, Pierceson points out the substantial shift in Canadian public opinion that occurred after the same-sex marriage decisions of the early 2000s.[11] Therefore, litigation can have indirect effects on public policy change. These effects are not measured by wins and losses before the courts, but must be considered in the broader lens of public opinion change and social change over time.

10 *Defense of Marriage Act*. Pub. L. 104-199, Sept. 21, 1996, 110 Stat. 2419 [*DOMA*].

11 See also J. Scott. Matthews, "The Political Foundations of Support for Same-Sex Marriage in Canada" (2006) 38 Canadian J. of Political Science 841.

Pierceson's account of Canadian developments is solid, although it is based on limited sources such as newspaper accounts of recent developments. I would have liked to have seen Pierceson pay more attention to the substantial Canadian secondary literature on these developments, especially from the disciplines of law,[12] political science,[13] and history.[14] Much of this work would have supported some of his arguments; in particular, work by legal academics would have provided Canadian examples of the critiques of liberalism he discusses in the early chapters, and work by historians in the new human rights history would have indicated the depth of rights-claiming in Canadian politics, prior to the *Charter*.[15] Nonetheless, Pierceson has the essence of the Canadian story right and he is to be commended for shedding a comparative light on U.S. developments.

In the end, I am not sure that differences in the dominant form of liberalism in Canada and the U.S. can explain differences in lesbian and gay rights legal outcomes in the two countries, or even between the two main areas of litigation in the U.S. — sodomy laws and same-sex marriage. State courts in the U.S. have played a progressive role in gay rights litigation. In assigning causality to political culture, there is always a danger of overgeneralizing. In fact, the story told by Pierceson is very complex, as political actors contend across multiple arenas over a relatively long time period. These legal struggles continue in the U.S. and since Pierceson published his book, there have been important legislative debates on same-sex marriage in California and New York. These debates show that there is much support in certain states in the U.S. for lesbian and gay rights protections. At the same time, it seems that political cultural approaches cannot effectively account for changes in litigation patterns.

12 See for example, Susan Boyd & Claire F. L. Young, "From Same-Sex to No Sex? Trends towards Recognition of Same-Sex Relationships in Canada" (2003) 3 *Seattle J. of Social Justice* 757; and Brenda Cossman, "Lesbians, Gay Men, and the Canadian Charter of Rights and Freedoms" (2002) 40 Osgoode Hall Law J. 223.

13 See for example, David Rayside, "The Structuring of Sexual Minority Activist Opportunities in the Political Mainstream: Britain, Canada, and the United States" in Mark Blasius, ed., *Sexual Identities, Queer Politics* (Princeton: Princeton University Press, 2001), 23; Miriam Smith, *Lesbian and Gay Rights in Canada: Social Movements and Equality-Seeking, 1971-1995* (Toronto: University of Toronto Press, 1999); and Miriam Smith, "Political Activism, Litigation and Public Policy: The Charter Revolution and Lesbian and Gay Rights in Canada, 1985-1999" (2000) 21 International J. of Canadian Studies 81.

14 See for example, Ross Lambertson, *Repression and Resistance: Canadian Human Rights Activists, 1930-1960* (Toronto: University of Toronto Press, 2005); Christopher MacLennan, *Toward the Charter: Canadians and the Demand for a National Bill of Rights, 1920-1960* (Montreal and Kinston: McGill-Queen's University Press, 2003); Tom Warner, *Never Looking Back: A History of Queer Activism in Canada* (Toronto: University of Toronto Press, 2002).

15 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

While the U.S. Supreme Court ruled in favour of gay rights in the *Lawrence* decision in 2003, recent retirements (especially of Sandra Day O'Connor) and the appointments of John Roberts and Samuel Alito seem to portend a more conservative court.[16] The fact that the U.S. state courts produced quite radical same-sex marriage decisions as early as 1993 in the *Baehr*[17] case in Hawaii, while the Ontario Court of Justice turned down the constitutional challenge on same-sex marriage in 1993,[18] suggests that political culture is not the whole story.

Despite my disagreements with Pierceson, he has written an interesting comparative study, one that should be read by those interested in lesbian and gay legal issues in the U.S., and especially by students of comparative law and politics.

16 On judicial attitudes and gay rights litigation, see Daniel R. Pinello, *America's Struggle for Same-Sex Marriage* (Cambridge: Cambridge University Press, 2004).

17 *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

18 *Layland v. Ontario (Ministry of Consumer and Commercial Relations)* (1993), 14 O.R. (3d) 658 (Ont. Div. Ct.).

REVIEW OF *THE JUDGE IN A DEMOCRACY: BARAK'S JUDICIAL PHILOSOPHY*

Gregory R. Hagen*

Aharon Barak, *The Judge in a Democracy: Barak's Judicial Philosophy* (Princeton: Princeton University Press, 2006), 332 pp.

In his recent book *The Judge in a Democracy*, Aharon Barak, former president of the Supreme Court of Israel, relates that in his twenty-six years of service on that court, he has written thousands of opinions.[1] "But," he asks, "am I a 'good' judge?"[2] This personal question motivates Barak to "examine the judicial philosophy underlying our role as judges in our democracies."[3] Barak concludes:[4]

> a good judge is a judge who, within the bounds of the legitimate possibilities at his disposal, makes the law that, more than other law he is authorized to make, best bridges the gap between law and society and best protects the constitution and its values.

These twin goals represent the core of Barak's judicial philosophy, and much of the book is devoted to an elaboration of their meaning and the means to attain them. In order to illustrate their meaning, Barak draws on his own judgments, as well as judgments of supreme courts in other common law jurisdictions, including the United States, Australia, and Canada. In a number of chapters, he discusses various means of attaining these goals, including balancing and weighing, interpreting, comparison with foreign law, and constitutional judicial review. A central motivation for his examination of judg-

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1 Aharon Barak, *The Judge in a Democracy* (Princeton: Princeton University Press, 2006) at ix.

2 *Ibid.* It is not clear why Barak uses quotation marks around "good" but it is evidence that he is aware of the difficulty of interpreting "good" in this context.

3 *Ibid.* at xv.

4 *Ibid.* at 307.

ing in democracies is the threat to democracy that has arisen from terrorism.[5] For Barak, the "supreme test"[6] for a judge occurs in the context of terrorism because it intensifies the conflict between the needs of the state and the rights of individuals.[7] Barak devotes a chapter to this matter, in which he discusses legal issues related to the Israeli occupation of the Palestinian Territories. The context of terrorism raises the difficult issue of the duty of a good judge when judicially reviewing a law generally regarded as bad.

As Barak admits, the issue of the proper role of the judge is not a new one. In his view, however, it is worth re-examining it in the light of our better understanding of adjudication, which is the result of post-Second World War debate over positivism, legal realism, natural law, legal process theory, and critical legal theory.[8] As a result, one of the most interesting facets of the book is that Barak explicitly grounds his theory of adjudication in philosophy, saying that "a good philosophy is a very practical matter."[9] Moreover, "judges should try to develop their judicial philosophy. This philosophy is the most practical tool that judges have."[10] Barak limits the application of judicial philosophy to "hard cases," which he defines as cases in which a judge has the power to choose between two alternatives, both of which are lawful.[11] Thus, he says, "[j]udicial philosophy is a system of considerations that the judge takes into account when exercising judicial discretion."[12] Furthermore, "[i]t is the principal compass that directs the judge (consciously or unconsciously) in discovering the solution to the hard cases with which he is confronted."[13] Narrowing the scope of the application of judicial philosophy to situations in which a judge's alternatives are equally lawful, however, raises the issue of how a good judge, on Barak's judicial philosophy, could ever strike down a bad law if it is democratically enacted.

The fact that bad laws can exist in a democracy is a key reason Barak cites for examining the role of judges in a democracy.[14] For Barak, a central lesson of the Jewish Holocaust is that "the people, through their representatives,

5 *Ibid.* at xi.
6 *Ibid.* at 285.
7 *Ibid.* at xi.
8 *Ibid.*
9 *Ibid.* at 116.
10 *Ibid.* at 308.
11 *Ibid.* at xiii.
12 *Ibid.* at 118.
13 *Ibid.* at 120.
14 *Ibid.* at x-xi.

can destroy democracy and human rights."[15] Thus, he reasons, despite the victory of democratic ideology over Nazism, Communism, and fascism, the protection of human rights cannot be left to legislatures or executives, which reflect majority opinion. On Barak's view, human rights need protection in a democracy, but they require the protection of the judiciary.[16] Judicial protection includes judicial review of statutes and executive decisions for conformity with human rights, and other fundamental moral values embodied in a constitution.[17] Judicial review is, therefore, one of the means by which a judge fulfills one of the conditions of a good judge.

Barak's theory of judicial review has come under substantial criticism because the outcome of an exercise of judicial review might come into conflict with the will of the majority.[18] Barak recognizes this tension when he say that "[d]emocracy is a delicate balance between majority rule and the fundamental values of society that rule the majority"[19] On Barak's view, democracy is not merely a formal condition of majority rule,[20] but also the substantive "rule of basic values and human rights as they have taken form in the constitution."[21] In applying these values, Barak says, judges must remember that "[d]emocracy is not just a law of rules and legislative supremacy...It is based upon legislative supremacy and on the supremacy of values, principles, and human rights."[22] These fundamental constitutional values include the separation of powers, the rule of law, and the independence of the judiciary, as well as tolerance, good faith, justice, reasonableness, public order, and human rights.[23] Of course, the main difficulty with such a view of the importance of fundamental values is that they are highly contestable and contested, and are, therefore, sometimes interpreted differently even by judges on the same court. From an epistemological point of view, it is not clear how a judge is to determine the proper

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15 *Ibid.* at xi.

16 *Ibid.*

17 *Ibid.* at 93. Here Barak quotes from C.A. 6821/93, *United Mizrahi Bank Ltd. V. Migdal Coop. Vill.*, 49(4) P.D. 221, 423-24 [*Mizrahi Bank*], as follows: "Judicial review of the constitutionality of statutes allows society to be honest with itself and to respect its fundamental tenets. This is the basis for the substantive legitimacy of judicial review...[T]hrough judicial review we are faithful to the fundamental values that we imposed on ourselves in the past, that reflect our essence in the present, that that will guide us in our national development as a society."

18 See for example, Richard Posner, "Enlightened Despot" (2007) 236 New Republic 53. Also, see Robert Bork, "Barak's Rule" (2007) 27 Azure 125, in which Bork castigates Barak's book as "a textbook for judicial activists."

19 *Supra* note 1 at 93, quoting *Mizrahi Bank*, *supra* note 17 at 423-24.

20 *Ibid.* at 141.

21 *Ibid.* at 25.

22 *Ibid.* at 33.

23 *Ibid.*

interpretation or application of these values in particular cases. A judge might simply apply his or her personal view of the morally right course of action, irrespective of the proper interpretation of the law. Such a judge might be considered an "enlightened despot," a label that Richard Posner applies to Barak, rather than a judge who applies the law.[24]

Posner's view that a good judge should not be an enlightened despot might be taken to imply that a good judge would never strike down or fail to apply a law, no matter how bad it is. On this matter, Barak's decision to examine judging in a democracy in light of various legal philosophies of the twentieth century is apt, since a central component of the legal philosophy of that period was the debate between proponents of positivism and their critics over the role of morality in law. But the positivist point of view, according to which the validity of a law need not depend upon its moral validity,[25] presents a challenge for the role of judicial review in protecting morality. While judicial review of statutes and decisions for conformity with constitutional values helps to ensure that the moral norms that are incorporated into the constitution are not violated, there is always the possibility that a law could be immoral — even after constitutional judicial review — since constitutional norms might also fall short of moral requirements.[26] Thus, on a positivist view, constitutional judicial review solves the problem of the potential for immoral law only insofar as constitutional norms are not themselves immoral, and only to the extent to which they can provide all relevant moral answers. The question that still faces a good judge is how to proceed when morality and law diverge? Here Barak says that, despite the rule of law, a judge should not, when engaging in judicial review, uphold legislation that gives the government the power to violate human rights.[27] Nevertheless, in such a situation one might still wonder on what basis a good judge can be seen to uphold the rule of law if she strikes down a validly enacted statute that violates human rights, yet complies with all constitutional requirements.

This sort of question was a staple of the post-Second World War philo-

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24 See Posner, *supra* note 18.

25 H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961, 1994). On Hart's view, moral values may be incorporated into law, but the fact of incorporation depends on social facts which are not themselves moral facts. For more recent defences of positivism, see Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979); Matthew Kramer, *In Defense of Legal Positivism: Law Without Trimmings* (Oxford: Clarendon Press, 1999) and Jules Coleman, *The Practice of Principle* (Oxford: Clarendon Press, 2001).

26 For an account of judicial review explicitly based upon positivist premises, see Wilfrid Waluchow, *A Common Law Theory of Judicial Review* (Cambridge: Cambridge University Press, 2007).

27 *Supra* note 1 at 51-56.

sophical context addressed by Barak. What would a good judge do, finding himself in Germany during the time of the Nazi regime, when faced with a validly enacted statute that violates human rights? A positivist might take the position that in such a case a judge has no moral duty to apply an immoral law and should therefore abandon his legal duty as a judge.[28] Reflecting upon the tyranny of the Nazis, the German jurist Gustav Radbruch, who had been a positivist prior to the Second World War, came to believe that legal positivism contributed to the willingness of German judges to enforce unjust laws, and of Germans to obey them. In Radbruch's view, the assumption that judges owe a duty to apply the law, together with the idea that the validity of law is not dependent upon its moral validity, made it relatively easy for a positivist to assert that immoral laws should be applied by judges.[29] According to H.L.A. Hart, Radbruch believed — contrary to the positivist viewpoint — that judges should denounce statutes that violate fundamental moral principles as lacking legal character.[30] Radbruch's view was echoed by Haim Cohen, a judge of the Supreme Court of Israel who is cited with approval by Barak. As Cohen puts it, the Nazis "came to power lawfully and committed most of their crimes by virtue of explicit legal authority."[31] Nevertheless, Cohen concludes that "*no one* would say that 'rule of law' reigned in Nazi Germany, and *no one* would dispute that what reigned there was the rule of crime."[32]

So, on this view, Barak could say that a good judge would strike down an immoral rule because it is not law, even if it is validly enacted. Furthermore, one might think that this places Barak firmly in the camp of natural law theorists, but the difficulty with such a categorization is that most proponents of natural law would interpret Cohen's claim as emphasizing merely that Nazi law is too immoral to be obeyed rather than that it is not law at all.[33] In this regard, natural law theorists do not deny the necessity that valid law be posited, but rather set for themselves the task of explaining how positive law creates a moral obligation to obey it, which did not exist prior to its making.[34] On the

28 See H.L.A. Hart's discussion of Bentham and Austin's view on this position in is "Positivism and the Separation of Laws and Morals" (1958) 71 Harvard Law Rev. 4 at 616-17.

29 *Ibid* at 617. Here Hart says that Radbruch believes the Nazi regime had exploited "subservience to mere law."

30 *Ibid.* at 616-17. This account is based upon Hart. Barak cites Radbruch, but only in relation to Radbruch's views on interpretation.

31 *Supra* note 1 at 55.

32 *Ibid.* [emphasis added].

33 John Finnis, "Natural Law Theories" in Edward N. Zalta, ed., *The Stanford Encyclopedia of Philosophy* (Spring 2007 Edition), online: <http://plato.stanford.edu/archives/spr2007/entries/natural-law-theories/>.

34 See John Finnis, "Natural Law: the Classical Tradition" in Jules Coleman, Scott Shapiro and Kenneth Himma, eds., *Oxford Handbook of Jurisprudence of Philosophy of Law* (Oxford: Oxford

natural law view, deliberating agents accept only moral authority as the basis for the authority of law, and so an immoral law lacks legal authority.[35]

Unfortunately, Barak's scattered discussion of the nature of law sheds little light on his interpretation of Cohen's remark. Barak cites Ronald Dworkin to argue that we should not be satisfied with a "rule book conception" of the rule of law, and concludes that we must instead have the "right conception of the rule of law."[36] The right conception of the rule of law, according to Barak, begins by understanding that "[the law] reflects the values of society. The role of the judge is to understand the purpose of law in society and to help the law achieve its purpose."[37] As to its purpose, Barak offers that "[t]he law exists to ensure proper social life. Social life is not a goal in itself but a means to allow the individual to live in dignity and develop himself."[38] The rule of law, then, "means guaranteeing fundamental values of *morality, justice and human rights*, with a proper balance between these and the other needs of society."[39] These remarks are admittedly ambiguous. Must law be moral to provide authoritative rules for the governance of individuals, or is it merely contingently required because such values happen to be contained in the Israeli Basic Law against which other laws are to be measured?[40] Arguably, it is the former, since Barak says that "[l]aw is inseparably connected to society's values and principles [rather than contingently connected thereto]."[41] Perhaps Barak's remarks support a natural law interpretation of his position, yet he eschews the label of natural law, saying instead that his views are merely an eclectic mix of different legal philosophies, all of which have an element of truth.[42]

Having cited Cohen's view as crucial to understanding his own, Barak's position appears open to a criticism made by Hart in his famous 1957 Oliver

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University Press, 2002) 1 at 20.

35 *Ibid.* at 22.

36 *Supra* note 1 at 55.

37 *Ibid.* at 3.

38 *Ibid.* at 56.

39 *Ibid.* at 55 [emphasis added].

40 The latter view is that of inclusive positivism according to which law can incorporate moral values it but need not in order to be valid. See Wilfrid Waluchow, *Inclusive Legal Positivism* (Oxford: Oxford University Press, 1994).

41 *Supra* note 1 at 309.

42 *Ibid.* at 117. This interpretation of Cohen's remark is supported by the fact that Barak knew that *some* legal theorists, such as Hart, believed that the rule of law applied in Nazi Germany. Regarding Hart's view, Barak made personal acquaintance with Hart as his host in Israel in 1964, at which time Hart delivered the Lionel Cohen lectures on the morality of criminal law. See Nicola Lacey, *The Nightmare and the Noble Dream* (Oxford: Oxford University Press, 2004) at pp. 265-66.

Wendell Holmes lecture.[43] Hart remarked that many Nazi laws, though deeply immoral, were nonetheless lawful. In light of this, Hart's diagnosis of Radbruch's point of view, a view taken up by Cohen, was that it was based upon an enormous overvaluation of the moral force of a valid law, clouding the possibility of its immorality.[44] For Hart, but not natural law theorists, law does not necessarily require any moral force to be legally valid.[45] If Hart is correct that the presumption of moral force behind a particular enacted law clouds a judge's ability to determine whether or not it is immoral, then this presumption would make it more difficult for a judge to strike down a law as a result of constitutional judicial review, especially where the constitutional rules are considered to embody fundamental moral norms.

From a practical point of view, the most pressing problem with Barak's view comes with the application of his philosophy of adjudication to matters relating to the Occupied Palestinian Territories. Barak does not distinguish between the application of his adjudicative philosophy in the Palestinian and domestic contexts, saying that "the protection of every individual's human rights is a much more formidable duty in times of terrorism than in times of peace and security."[46] Barak goes on to declare that "[i]f we fail in our role in times of terrorism, we will be unable to fulfill our role in times of peace and security."[47] Nevertheless, the Supreme Court of Israel has come under extensive criticism for its judgments concerning the Occupied Palestinian Territories. David Kretzmer, to whom Barak makes reference, has observed that "[i]n its jurisprudence relating to Israel itself, the Supreme Court of Israel has earned a well-deserved reputation as a rights-minded court [however] ... [t]he rights-minded approach is generally conspicuous by its absence in decisions relating to the Occupied Territories."[48] In this context, the record of the Court has been described as "overwhelmingly disappointing."[49]

One of the many issues that Barak briefly considers is the demolition and sealing of Palestinian homes by Israeli Defense Forces.[50] The legal basis for

43 *Supra* note 28.

44 *Ibid.* at 618-21.

45 See for example, *ibid.* at 620 where Hart declares: "laws may be law, but too evil to be obeyed."

46 *Ibid.* at 285.

47 *Ibid.*.

48 David Kretzmer, *The Occupation of Justice: The Supreme Court and the Occupied Territories* (New York: SUNY Press, 2002) at 188. Unfortunately, Barak barely responds to Kretzmer's detailed and insightful points.

49 Nimer Sultany, "The Legacy of Justice Aharon Barak: A Critical Review", online: (2007) 48 Harvard International Law J. at p. 83 <http://www.harvardilj.org/online/113>.

50 *Supra* note 1 at 295.

these demolitions is found in section 119 of the Defense Regulations (State of Emergency) of 1945,[51] pursuant to which a military commander may, by order, direct the forfeiture and destruction of any house, structure, or land, where he is satisfied that some of the inhabitants have committed; attempted to commit, or abetted the commission of; or have been accessories after the fact to the commission of any offence against the regulations involving violence. According to Amnesty International, the underlying reasons for the demolition and sealing of Palestinian homes include the appropriation of large areas of Palestinian land, the expansion of Israeli settlements built for the sole benefit of Jewish Israeli citizens, the creation of buffer zones around Israeli settlements and settlers' roads, and the construction of the security fence.[52] According to Human Rights Watch, the evidence suggests that Israeli forces demolish entire homes, regardless of whether they pose a specific threat, in violation of international law and in the absence of military necessity.[53] Finally, according to B'Tselem, in only 3 percent of the cases were occupants given prior notification of the Israeli Defense Force's intention to demolish their homes.[54] The harm inflicted upon the families and neighbours of suspected wrongdoers by house demolition has been extensive. Of the 628 housing units demolished since the beginning of the al-Aqsa intifada up to 2004, 295 were located next to the unit in which the targeted suspect lived.[55] As a result, the primary substantive concern with demolition and sealing is that it may authorize extrajudicial, collective punishment, which many would argue is contrary to international human rights, humanitarian law, the Israeli Basic Law, and morality.[56]

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51 [1945] Palestine Gazette (No. 1442), Supp. No. 2, 1055. See also Kretzmer, *supra* note 48 at 145-6.

52 Amnesty International, "Update to Comments by Amnesty International on Israel's compliance with its obligations under the International Convention on the Elimination of all Forms of Racial Discrimination", online: Amnesty International <http://web.amnesty.org/library/Index/ENGMDE150072007?open&of=ENG-310>.

53 Fred Abrahams, Marc Garlasco & Darryl Li, *Razing Rafah: Mass Home Demolitions in the Gaza Strip* (October 2004), online: Human Rights Watch <http://www.hrw.org/reports/2004/rafah1004/index.htm>.

54 Ronen Shnayderman, *Through No Fault of Their Own: Israel's Punitive House Demolitions in the al-Aqsa Intifada* (November 2004), online: B'Tselem: The Israeli Information Center for Human Rights in the Occupied Territories <http://www.btselem.org/download/200411_Punitive_House_Demolitions_Eng.pdf>.

55 *Ibid* at 21. 1,286 persons lived in these 295 housing units.

56 Shane Darcy, *Israel's Punitive House Demolition Policy: Collective Punishment in Violation of International Law* (2003), online: Al-Haq: West Bank affiliate of the International Commission of Jurists - Geneva <http://www.alhaq.org/pdfs/Israels%20Punitive%20House%20Demolition%20Policy.pdf>. Indeed, according to Amnesty International, collective punishment is one of the goals of the demolition and sealing of Palestinian homes.

Given Barak's view that a judge's role in a democracy is to protect constitutional values, morality, and human rights, and to balance those considerations against the needs of society, one might have expected Barak to consider the demolition of houses under section 119 to be both morally and legally invalid. He does not, however, come to this conclusion, relying instead on the reasoning in his decision in *Turkeman v. Minister of Def.*[57] In that case Turkeman, who shot a couple, was sentenced to life imprisonment plus fifty years. In addition to this sentence, authorities demolished the three-room house in which Turkeman, his mother, and seven unmarried siblings lived. When the Supreme Court of Israel reviewed the case, Barak held that the demolition of the entire house was disproportionate to Turkeman's crime, but that the authorities could seal two of the rooms, leaving a third room available for the married brother and his family. Barak said that demolition is permissible for purposes of deterrence when it is proportionate to the harm caused, and provided that "the goal of the destruction...not be collective punishment."[58] While Barak offers this decision as an illustration of the protection of the rights of the Palestinians, the problem is that Barak's proviso introduces a morally insignificant distinction. In effect, Barak permits some house demolitions that knowingly result in harm to innocent persons, provided that punishing them is not the intended goal of the demolition. But there is no morally significant difference between harming the innocent for deterrence purposes and unjustifiably punishing them. In Dan Simon's scathing assessment, "[t]he Supreme Court's approach of demolitions in the face of legal and moral challenges has corrupted Israeli law and has undermined the legitimacy of the Court itself."[59]

Why does Barak uphold the validity of the law permiting housing demolitions, when it has been both condemned by numerous human rights groups and appears contrary to his own judicial philosophy of protecting human rights and morality? To be clear, Barak does not maintain that human rights are irrelevant to the families and neighbours of those whose houses are demolished or sealed.[60] Indeed, he holds firmly that the laws are not silent in this international context and, in fact, many petitions for judicial review have

57 48(1) P.D. 217.

58 *Supra* note 1 at 295.

59 See Dan Simon, "The Demolition of Homes in the Israeli Occupied Territories" (1994) 19 Yale J. of International Law 1 at 4, quoted in Sultany, *supra* note 49 at 87. More recently, David Kretzmer has concluded that the housing demolition decisions of the Supreme Court of Israel typify the fact that it "has accepted and legitimized policies and actions the legality of which is highly dubious and has interpreted the law in favour of the authorities." See Kretzmer, *supra* note 48 at 163.

60 *Supra* note 1 at 287ff.

been heard by the Israeli Supreme Court concerning matters related to the Occupied Palestinian Territories.[61] One possible answer is that Barak's legal and moral judgment of the situation simply differs from mainstream human rights groups. He may disagree with the interpretation of most human rights groups regarding the scope of the limitations to human rights that support security needs in the face of the threat of terrorism. One might still argue that Barak is morally myopic and that his judgment is biased in favour of government. On Kretzmer's view, for instance, although it is independent of the executive actually carrying out the illegal actions, the judiciary is still a branch of the Israeli government[62] and while the Supreme Court of Israel may be able to act as a neutral party between authorities and individuals within the Israeli state, this stance of neutrality cannot be maintained when the dispute is perceived to be an external challenge to the authority of the state.[63] Consequently, "[i]n the struggle between government policies and Palestinian arguments of rights based on justice, international legal standards, or lofty legal principles, the Court has shown a marked preference for 'state arguments.'"[64]

Alternatively, or perhaps in addition, one might argue that Barak's apparent misjudgment regarding the status of housing demolitions is a result of his legal philosophy. If one accepts Hart's assessment of Radbruch's position, it could be maintained that Barak's viewpoint succumbs to the Hartian criticism that a legal philosophy like Barak's makes it more difficult to recognize the immorality of Israeli laws concerning Palestinian housing demolitions, and also concerning many other aspects of the occupation of the Palestinian Territories. Indeed, both Barak and the Israeli government have characterized the State of Israel and Palestinians as engaged in a conflict between a law-abiding nation and law-violating terrorists.[65] If law's authority is viewed as moral authority, however, striking down the law concerning housing demolitions would dilute the moral force of the Israeli government's claim that it is fighting lawlessness with law. On a Hartian view, Barak's legal philosophy reinforces, and is reinforced by, the position of the Israeli government regarding the occupation of the Palestinian Territories. Even Hart himself might approve of this point as a critic of the Israeli occupation.[66]

Barak begins his book with the remark that he is a judge, not a philoso-

61 *Ibid.* at 287-91.

62 See Kretzmer, *supra* note 48 at 187-93.

63 *Ibid.* at 191-2.

64 *Ibid.* at 196.

65 *Supra* note 1 at 288-90, quoting H.C. 3451/02, *Almadani v. Minister of Def.*, 56 (3) P.D. 30.

66 Lacey, *supra* note 42 at 346.

pher.[67] To his credit, Barak develops his judicial philosophy within a practical context, whereas much legal philosophy tends to be highly abstract and detached from the relevant factual and legal context. Indeed, it is remarkable to read a judge of the supreme court of a democratic country attempting to develop a philosophical justification of his own judgments. The most obvious theoretical shortcoming of the exposition is an insufficient engagement with the writings of legal theorists who have discussed the same issues Barak raises. Because of this, Barak fails to sufficiently appreciate the tension between a good judge's allegiance to the law and to morality. Further, it is a disappointment that, as a judge, Barak does not use the judicial philosophy he develops to sufficiently answer the substantial criticisms leveled at his judgments concerning the Occupied Palestinian Territories. While it may be that Barak was simply unable to overcome the difficulties involved in ruling against his own government, it may also be that Barak's legal theory compounds the difficulties of judging. If one accepts the Hartian point that the validity of law is not conclusive of its morality, then striking down the law permitting housing demolitions would significantly undermine the moral advantage that Barak and the Israeli government perceive themselves to have over the Palestinians on this issue. From such a point of view, Barak's legal philosophy and the position of the Israeli government regarding the Palestinian occupation are mutually reinforcing. In sum, Barak's effort is noteworthy, even if the exposition of his judicial philosophy and its relationship to his own decisions as a judge is ultimately unsatisfactory.

67 *Supra* note 1 at ix.