

Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice

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“We’ve heard the truth. There is even talk about reconciliation. But where’s the justice?” This, according to the *Final Report* issued in November 1998 by South Africa’s Truth and Reconciliation Commission (TRC), was a “common refrain” among observers of the commission’s work. . . .²

If justice requires the prosecution and punishment of those who commit gross human rights violations—which the South African Parliament defined as “killing, abduction, torture, or severe ill-treatment”—then the amnesty offered by the TRC violates justice.³ Can the TRC be defended against, or in spite of, this criticism? . . .

Truth commissions are a recent invention, designed to provide societies in transition with a way to deal with their legacies of mass violence, abuse, and injustice.⁴ They are authoritative bodies given a mandate to develop an official account of past brutalities, in the hopes that doing so will help prevent a recurrence of such violations. In most cases, transitional regimes emerge under difficult and unstable conditions, con-

strained by limited resources and threatened by the continued presence of former elites who still possess considerable military, judicial, and economic power. This is certainly as true in South Africa as it was, for instance, in Chile, where former dictator Augusto Pinochet remained head of the armed forces, and in Argentina, where civilian president Raul Alfonsín needed to placate the same military establishment that had waged the dirty war. These conditions place severe constraints on what truth commissions can do. As a result, almost all commissions have exhibited some features—grants of amnesty to perpetrators, selective investigation of crimes, or a failure to “name names”—that revealed them to be, in Weschler’s vivid phrase, “mired in the muck of forced compromise.”⁵

But there is another side to the story. In their efforts to fulfill their mandates under these difficult circumstances, truth commissions have struggled with basic questions about what justice requires in relation to survivors, perpetrators, and

entire nations scarred by a brutal past. Out of these struggles are emerging new vocabularies of truth and justice as well as a new institutional repertoire for pursuing them. Developed through a remarkable learning process involving participants from around the world, especially from Latin America, Eastern Europe, and Africa, this repertoire encompasses multiple tasks and aims.⁶ Truth commissions generate authoritative historical accounts, issue recommendations for institutional change, and direct a national morality play that places victims of injustice on center stage. They combine investigative, judicial, political, educational, therapeutic, and even spiritual functions. This proliferation of functions and aims reflects what I call the *moral ambition* of truth commissions, their determination to honor multiple moral considerations and to pursue profound and nuanced moral ends. In the process, truth commissioners have affirmed the value of “narrative” as well as of “forensic” forms of truth, and have come to speak of justice as reconciliation, national healing, and moral reconstruction. More to the point, they have developed concrete practices aimed at furthering these goals, practices that stretch the conventional limits of judicial and political action. All of these features of truth commissions are clearly discernible in the South African TRC, the most morally ambitious commission to date. And they are dramatically encapsulated in the commission’s efforts to promote what it calls “restorative justice.”

Is such moral ambition legitimate or wise? In particular, is restorative justice truly a distinctive type or dimension of justice, one that is different from, and in some cases more important than, retributive justice? If so, can restorative justice

be promoted through a truth commission? Or, as some critics charge, is restorative justice both conceptually muddled and politically illegitimate? I defend restorative justice as a coherent and legitimate, though risky, framework for seeking to rectify profound injustice. Although it cannot refute the legitimacy of retributive justice, restorative justice presents an ambitious and inspiring alternative. It is important, however, that its proponents be mindful of the risks involved in pursuing restorative justice, and of the limitations of truth commissions as instruments for accomplishing such a project.

THE ROLE OF TRUTH: ACKNOWLEDGMENT, THERAPY, AND JUSTICE

The “essence” of a commitment to restorative justice, according to the TRC’s report, is an effort to restore and affirm the human and civil dignity of victims.⁷ When truth commissions were first established two decades ago, this was not envisaged as an important, or even necessarily relevant, aspect of their purpose. Instead, it has emerged out of reflection on the actual experiences of truth commissions.

As their name implies, truth commissions are created, first and foremost, to establish the truth about past injustices. Sometimes this requires unearthing information that has been hidden from the public. The TRC for example, succeeded in exhuming the bodies of almost fifty activists who had been abducted, killed, and buried in unmarked graves.⁸ But even when most of the facts about a crime or atrocity are well known, it is vital to a society’s prospects for justice that they be publicly and officially acknowledged.⁹

Establishing the truth is instrumental to justice in at least two ways. Truth serves justice in a basic sense stressed by the Argentinian truth commission in its report *Nunca Mas*: without truth one cannot distinguish the innocent from the guilty.¹⁰ Less directly, truth serves justice by overcoming fear and distrust and by breaking the cycles of violence and oppression that characterize profoundly unjust societies. As the TRC report put it,

The Commission was founded in the belief that, in order to build the “historic bridge” of which the interim Constitution speaks [between “a deeply divided past of untold suffering and injustice” and “a future founded on the recognition of human rights”], one must establish “as complete a picture as possible” of the injustices committed in the past. This must be coupled with a public, official acknowledgement of the “untold suffering” which resulted from those injustices.¹¹

Some have cast doubt on the value of revealing such truths, worrying that there is already too much fixation on past wounds and that, as Elon put it, “A little forgetfulness might be in order.”¹² The past, they warn, can become an indulgence and an obsession, playing into our capacity for what Breytenbach has called “scab-picking curiosity.”¹³ There may well be some wisdom in these warnings. But a policy of enforced amnesia is simply not a viable alternative for fledgling democracies emerging from a period of gross human rights violations. Moreover, many people have concluded that, just as wounds fester when they are not exposed to the open air, so unacknowledged injustice can poison societies and produce the cycles of distrust, hatred, and violence we have witnessed in many parts of the world, including the Balkans, Rwanda, and the Middle East.

Even more dangerous, perhaps, than ignored injustices are distortions and disinformation. The TRC made a special point of emphasizing how its work has decisively discredited some widely circulated accusations and counteraccusations.¹⁴ In addition, “partisan” or “selective” accounts of past conflicts can “easily provide the basis for mobilisation towards further conflicts.”¹⁵ For instance, selective narratives of suffering can lead previously victimized groups to victimize others in turn. Krog has speculated that the atrocities suffered by Afrikaners at the hands of the British in the Anglo-Boer War (1899–1902) helped to shape the brutalities of apartheid.¹⁶ A similar argument might be made about Israeli behavior toward Palestinians. What is needed to counteract these tendencies is “an inclusive remembering of painful truths about the past.”¹⁷ Thus, while Archbishop Desmond Tutu’s assertion that there is “no healing without truth” is more of a working hypothesis than a demonstrated fact, it is reasonable, on the available evidence, to believe that truth-gathering can help to prevent a recurrence of the injustices of the past.¹⁸

Truth commissions originally gathered victim testimony in order to construct an official account of past abuses. However, a growing number of commission participants have begun to find value in the process of listening to such testimony. Some highlight the therapeutic value of giving testimony; for others, it represents a form of doing justice to victims. Both views signal important shifts in the theory and practice of truth commissions.

Many survivors of human rights violations—whether in Chile, Sri Lanka, or South Africa—attest to the healing power of telling their story to an official commission after a lifetime of being ignored,

disrespected, and abused by state officials.¹⁹ For instance, when asked by a commissioner how he felt after testifying before the TRC, one South African man, blinded as the result of an assault by a police officer, replied, "I feel what has been making me sick all the time is the fact that I couldn't tell my story. But now . . . it feels like I got my sight back by coming here."²⁰ Telling the truth about their wounds can heal the wounded—and perhaps listening to such stories can help heal societies.²¹

Of course, the therapeutic aspects of the work of truth commissions can be viewed as incidental to their core mission of establishing the truth. Indeed, some critics have referred dismissively to the TRC's Human Rights Violations Committee as a "kleenex commission."²² Others, more thoughtfully, warn that an overemphasis on the therapeutic does a disservice to survivors who regard themselves not as patients in need of healing but as citizens entitled to justice.²³ While such warnings are important, healing deserves attention as an important part of what truth commissions can accomplish.

But the taking of survivor testimony has another dimension beyond, and independent of, its potential as a source of healing: it is an important means of doing justice to victims. In an article entitled "Truth as Justice," Popkin and Roht-Arriaza contend that providing a platform for victims is one of the core tasks of truth commissions, not merely as a way of obtaining information but also from the standpoint of justice.²⁴ Truth and justice are intrinsically, and not just instrumentally, connected. Those whose lives were shattered are entitled to have their suffering acknowledged and their dignity affirmed, to know that their "pain is real and worthy of attention."²⁵ We have an obliga-

tion to tell them, in the words of TRC commissioner Pumla Gobodo-Madikizela, "You are right, you were damaged, and *it was wrong*."²⁶ More important, we have an obligation to listen, to "give them an opportunity to relate their own accounts of the violations of which they are the victim."²⁷ Justice requires that we treat people as ends in themselves. We affirm the dignity and agency of those who have been brutalized by attending to their voices and making their stories a part of the historical record. . . .

Moreover, in its effort to develop as complete a picture as possible of past injustices, the TRC was not only concerned with victims' perspectives; its mandate also extended to an effort to understand "the motives and perspectives of the persons responsible" for gross human rights violations.²⁸ This meant that the commission gave amnesty applicants opportunities to explain themselves, and regarded the testimony of perpetrators as an important feature of what it called "social, or dialogue truth."²⁹ In his foreword to the commission's report, Tutu provided a striking illustration of this spirit of understanding when he noted that, although he firmly believed that "apartheid was an intrinsically evil system," he tried to understand the "insights and perspectives" of its supporters and believed that some of them "were not driven by malicious motives," but "genuinely believed" that apartheid offered "the best solution to the complexities of a multiracial land with citizens at very different levels of economic, social, and educational development."³⁰

While perpetrators deserved a fair hearing, the commission sought, not to excuse them, but to assign "political accountability and moral responsibility" to those who had committed some of apartheid's

most egregious crimes.³¹ Whether truth commissions that lack the power of prosecution can achieve such accountability is one of the most difficult questions confronting defenders of restorative justice.

JUSTICE AND ACCOUNTABILITY: THE PROBLEM OF AMNESTY

If truth commissions have a moral Achilles' heel, it is the issue of amnesty. Doing justice to the past and to its victims entails holding those who committed abuses accountable. Accountability, in turn, evokes the idea of retributive justice, of legal prosecution and punishment. In principle, truth commissions are compatible with, and indeed can be precursors to, judicial prosecutions. This was in fact the assumption underlying the work of the Argentinian Truth Commission in the early 1980s: that its findings would subsequently be used by the Argentinian judiciary to prosecute members of the military junta who had committed gross human rights violations. Five hundred officers were indeed tried on the basis of the truth commission's report. In the end, however, the effort to punish perpetrators of the dirty war foundered on legal and political obstacles. Faced with judicial chaos and the threat of a coup, the government halted the prosecutions and issued a blanket amnesty for soldiers and police. Since then, truth commissions have come to be viewed more as alternatives to trials than as precursors to them. . . .

Even as they have continued to be shaped by these constraints and compromises, however, truth commissions have sought to reach beyond them in order to achieve some degree of accountability. For instance, commissions have sought to iden-

tify those responsible for human rights violations even in circumstances in which they could not publish this information, much less use it as the basis for legal prosecutions. Thus, for instance, the Chilean Truth Commission submitted a list of alleged perpetrators to the country's president. In addition, most truth commissions prepare a report offering specific recommendations for legislative, political, institutional, educational, or other changes that are needed to ensure that abuses do not recur. While attenuated, this, too, provides a measure of accountability, for it establishes as a matter of public record the institutional mechanisms responsible for past abuses. By identifying structural causes of human rights violations, commission reports reveal systematic patterns of accountability that may be a valuable resource for future political mobilization.

The South African TRC presents the most striking example of an innovative attempt to establish mechanisms of accountability in the face of severe political constraints. With a commitment to amnesty guaranteed by the interim constitution, the new government needed to determine the exact form amnesty would take. After extensive parliamentary and public debate, a policy was drafted that made amnesty individual rather than collective, and conditional on full, public, disclosure by perpetrators. This novel approach to amnesty was morally innovative in three ways. First, it upheld the principle usually repudiated by amnesties, the principle of individual moral accountability. As the TRC's final report rightly stresses, the amnesty provisions did not give perpetrators impunity but provided "a considerable degree of accountability."³² Perpetrators had to disclose publicly what they had done. The TRC firmly upheld this principle

over the objections of some in the ANC who argued that antiapartheid activists were involved in a just war and therefore should not be held accountable for gross human rights violations.³³

The second moral innovation accomplished by South Africa's amnesty provisions was that applicants for amnesty were tried in the court of public opinion. Previous truth commissions had met in private. In South Africa, public hearings and extensive coverage by the media ensured that perpetrators could not hide behind the wall of silence and anonymity that has protected the torturers and murderers of so many regimes. Victims had a right to confront their abusers during amnesty hearings, holding them accountable in an especially powerful way. These confrontations sometimes achieved what the TRC characterizes as one of the key elements of restorative justice, the idea that crimes and offenses are injuries done to another person, violations against individual human beings rather than against "faceless" institutions.³⁴ So, for instance, Ashley Forbes was able to confront his torturer, policeman Jeffrey Benzien, and compel him to "demonstrate" his torture techniques at the amnesty hearing. Forbes then asked Benzien, "What kind of a man does this to another human being?"³⁵

South Africa's third moral innovation was that its amnesty law created incentives for truth-telling, so that applications for amnesty became vehicles for uncovering truths about past abuses. Those who failed to apply for amnesty remained vulnerable to criminal or civil charges. Persons named as perpetrators in testimony given to the Committee on Human Rights were contacted and invited to apply for amnesty. Perpetrators could be denied amnesty if they failed to make full disclo-

sure of their participation in gross human rights violations, or if they failed to persuade the commission that they had acted out of political motives.³⁶ Given the requirements of "full disclosure," the incentive to close ranks was eroded and a substantial number of perpetrators sought to explain or excuse themselves by naming those who had ordered them to act. For instance, five officers who had killed unarmed demonstrators implicated General Johan van der Merwe as the one who had given them orders to fire. The general applied for amnesty in turn, and implicated two of his superiors. In this way accountability could be established along a chain of command, a feat that has proved almost impossible to accomplish through trials.³⁷ This model of individual amnesty represents an important innovation and a positive precedent for future truth commissions.

These accomplishments of the South African amnesty provisions do not alter the fact that some people who had committed brutal crimes were granted amnesty and allowed to continue with their lives. In this sense, as the TRC report rightly acknowledges, retributive justice was not done. For some human rights advocates this amounts to the failure to uphold an absolute moral and legal imperative to prosecute those who have committed gross human rights violations.³⁸ Many critics also noted that, while the commission's Amnesty Committee was empowered to grant or deny amnesty, victims who testified before the commission would wait for years to receive reparations. The TRC came in for particular criticism for its failure to obtain more substantial interim reparations for victims.³⁹ Moreover, since amnesty was not contingent on expressions of remorse or contrition, on the

grounds that these could be feigned so easily, some applicants pointedly refused to apologize and adopted a self-righteous and supercilious tone. Others, seemingly untouched by the process, mechanically confessed only the bare minimum to satisfy the requirements of disclosure and sought to excuse their own conduct by portraying themselves as obedient functionaries or victims of “ideological brainwashing.” Small wonder that some victims and their families were frustrated or enraged by the TRC process.⁴⁰

On the other hand, the case of General Magnus Malan, former army chief and defense minister, is instructive. While the TRC was doing its work, Malan was prosecuted for authorizing hit squads and assassinations. After eighteen months and twelve million rand in taxpayer-supported court costs, he was acquitted. Later, however, Malan appeared before the commission and told his own story, denying some allegations but admitting to much more than his trial had disclosed.⁴¹

While the TRC’s encounters with the highest-ranking leaders of apartheid, former prime ministers/presidents Pieter W. Botha and Frederik W. de Klerk, were frustratingly inconclusive, it is clear that the truth commission process led to the identification of many more perpetrators than would have been revealed through prosecutions. Two large, high-profile post-apartheid trials yielded only one conviction. By contrast, the TRC received amnesty applications from more than 7,000 people, an astonishing number given initial estimates that about 200 would apply.⁴² . . .

As part of its effort to “establish as complete a picture as possible of the causes, nature and extent of the gross vio-

lations of human rights” and of the “antecedents, circumstances, factors and context of such violations,” the TRC organized hearings on the roles of the media, the medical profession, business, political parties, the churches, and the legal system under apartheid.⁴³ These hearings attempted to establish the extent to which these institutions collaborated with both the extralegal and legal violence of apartheid. While the hearings were decidedly a mixed success—with the legal hearings, in particular, thwarted by the refusal of judges to appear before the commission—they nevertheless prompted a national debate about broader questions of what the TRC called “direct and indirect, individual and shared responsibility” for human rights violations.⁴⁴

The TRC also encouraged ordinary South Africans to consider their accountability in upholding apartheid. For instance, it created a Register of Reconciliation, inviting people who were neither victims of gross human rights violations nor applicants for amnesty to send personal reflections.⁴⁵ People were encouraged to recognize “the little perpetrator in each one of us” and to acknowledge their “direct or indirect responsibility” for the “mundane but nonetheless traumatizing dimensions of apartheid life that had affected every single black South African.”⁴⁶

In the end, the TRC’s ability to overcome the culture of impunity that has plagued so many countries in transition depends on the overall pattern of its own grants and denials of amnesty as well as on how the debate over whether to prosecute alleged perpetrators who were denied amnesty or who declined to apply for it is ultimately resolved. The TRC took a clear stand in this debate in 1999, when it pre-

sented to the National Director of Public Prosecutions a list of over one hundred names of persons it recommended for prosecution.⁴⁷ However, questions over the wisdom of post-TRC prosecutions continue to divide human rights advocates both inside and outside South Africa.⁴⁸

Justice, whether retributive or restorative, demands full and fair accountability. In practice, such accountability is difficult to achieve in transitional situations like postapartheid South Africa. Nevertheless, despite the severe constraints of a politically imposed amnesty process, the TRC achieved a robust degree of accountability and reinforced the links between justice, accountability, and truth.

RECONCILIATION, REPARATION, AND RESTORATIVE JUSTICE

Restorative justice includes a three-fold commitment (1) to affirm and restore the dignity of those whose human rights have been violated; (2) to hold perpetrators accountable, emphasizing the harm that they have done to individual human beings; and (3) to create social conditions in which human rights will be respected. As yet, all of these features are perfectly compatible with retributive justice. To be sure, trials rarely do justice to victims' voices in the way truth commissions have the capacity to do, and traditional conceptions of retributive justice place relatively little emphasis on restoring victims' dignity. Nevertheless, legal punishment of rights violators remains a powerful way of affirming the dignity of victims. Thus far, the difference between retributive and restorative justice appears to be one in emphasis and degree rather than in kind. It becomes

much sharper when we consider a fourth aspect of restorative justice, its commitment to reconciliation. For while retributive justice demands that the guilty be punished, restorative justice, in Tutu's words, "is concerned not so much with punishment as with correcting imbalances, restoring broken relationships—with healing, harmony and reconciliation."⁴⁹ Thus, a key defining element of restorative justice is its privileging of reconciliation over retribution. . . .

The transformative aspirations of truth commissions have been articulated more fully by Zalaquett, a lawyer and Chilean truth commissioner. Zalaquett argues that the ultimate goal of truth commissions, and indeed of any attempt to deal systematically with past human rights abuses, is "to put back in place a moral order that has broken down or has been severely undermined, or to build up a just political order if none existed in historical memory."⁵⁰ The task of creating a just society is one of moral reconstruction. It entails efforts to repair the broken quality of human relationships throughout a society, including those between the former oppressor and the oppressed, and sets as its overriding goal the creation of conditions in which all citizens are accorded dignity and respect.

Moral reconstruction cannot be accomplished through judicial means alone; it is at once political, legal, cultural, moral, psychological, and spiritual. Many of those who participated in deliberations about a possible South African truth commission shared this expansive vision of the work a truth commission needed to do to contribute to such moral reconstruction. For instance, Justice Goldstone commented that he hoped the commission would

merge two "streams," the "vital legal underpinning . . . without which such a commission could not succeed" and the "philosophical, religious and moral aspects without which the commission would be an empty legal vessel which would do a great deal of harm and achieve nothing."⁵¹ And Justice Sachs noted with approval that the commission was being envisioned as an enterprise "that is primarily moral, cultural, psychological and human rather than one which is solely legal or instrumental."⁵² He argued that the commission represented "what we have spent our whole lives fighting for. . . . It is the creation of a nation."⁵³

Restorative justice does not *preclude* punishing the guilty. Indeed, punishment can be justified as a way of restoring moral order. Arendt characterized punishment and forgiveness as alternatives but not opposites, because both were "ways of attempting to put an end" to a cycle of vengeance, of action and reaction that "without interference could go on endlessly."⁵⁴ Nevertheless, proponents of restorative justice tend to privilege forgiveness or reconciliation over punishment, to emphasize the humanity of both victim and offender, and to seek personal and institutional transformation ahead of retribution.⁵⁵ As Zalaquett put it,

There is a long-standing tradition, both religious and humanistic, that establishes a moral superiority of forgiveness and reconciliation over punishment. This is not a pious renunciation of justice. Rather, it means that if the reestablishment of a moral order may be similarly achieved through either path, the road of forgiveness and reconciliation should be preferred.⁵⁶

The reason for this preference is that forgiveness is "more conducive to re-establishing the broken moral order because it

presupposes the perpetrator's voluntary submission to the values that were violated. Such a solution is a better solution than to have to subdue the . . . perpetrator by punishing him."⁵⁷ Zalaquett makes clear that forgiveness and reconciliation require that past injustices be uncovered and acknowledged, that perpetrators be held accountable, and that reparations be provided to those who were harmed. Thus justice as truth and accountability are essential elements of his vision of restorative justice. But he prefers the path of forgiveness and reconciliation because he believes it opens up moral possibilities for reconstructing a just society that are harder to achieve via the path of punishment.

During the South African transition, the priority of reconciliation over retribution was powerfully expressed through the exemplary magnanimity of President Nelson Mandela and through the ANC's willingness, unprecedented on the part of a victorious liberation movement, to acknowledge officially that there were victims and perpetrators on all sides. Indeed, the ANC appointed three commissions prior to the establishment of the TRC specifically to investigate allegations of human rights violations in ANC camps and detention centers. To be sure, subsequent relations between the ANC and the TRC were frequently stormy, and the ANC even mounted a court challenge to the *Final Report*. But it was a credit to both parties that these tensions never derailed the TRC process.

The postamble to the interim constitution set the tone for the TRC's work when it proclaimed "a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimization," invoking the African concept of *ubuntu*, or humane-

ness. As the commission's name indicated, its "overarching task" was not only to seek the truth but also to promote "national unity and reconciliation."⁵⁸ In his foreword to the TRC report, Tutu pointed to the necessity of reconciliation by invoking an image of South Africa "soaked in the blood of her children of all races and of all political persuasions."⁵⁹ The pervasive violence of apartheid and of the brutal struggles that it spawned had left South Africans bitterly divided by hatred and fear. The country's prospects for a more just and peaceful future depended on a willingness to reconcile and move forward. Reconciliation was not, however, a policy of "forgive and forget." As the TRC motto ("Truth . . . the Road to Reconciliation") emphasized, its vision of reconciliation was premised on reconstructing as complete a picture as possible of the injustices of the past. Nor did reconciliation involve impunity or moral amnesty, for the commission sought to establish accountability for the crimes of the apartheid period. What was required was a renunciation of vengeance and violence in favor of a willingness to work together as South Africans.

As the commission's work proceeded, reconciliation and restorative justice became more and more explicitly its animating moral vision.⁶⁰ Its rhetoric and practice persistently championed reconciliation at the personal, interpersonal, community, and national levels in ways that were breathtakingly ambitious in a society emerging from years of brutal repression and communal violence. While the amnesty process did not require perpetrators to apologize for their actions, commission hearings created an opportunity for repentance and forgiveness. The most extraordinary, and publicly celebrated, moments of those hearings occurred when individual

victims and perpetrators reached out to one another and achieved some measure of reconciliation. Commissioners applauded those who repented and forgave, exhorted white South Africans to acknowledge their complicity in apartheid, and called on all South Africans to "forego bitterness, renounce resentment," "move past old hurt," and approach one another in a spirit of "generosity" and "magnanimity."⁶¹ The TRC thus became an advocate and facilitator of reconciliation, challenging conventional models of judicial proceedings and commissions of inquiry.

Some people, both within and outside of the commission, were uneasy about this ambitious vision of reconciliation and argued that a more limited notion of peaceful coexistence was all that could and should be promoted. The commission's report acknowledged this concern and noted that it was also shared by some of those who gave testimony at the victims hearings.⁶² Yet even those who most vigorously advocate criminal prosecutions in the aftermath of the TRC acknowledge that the participation of perpetrators within the TRC process had transformative significance for South Africa. In calling for the prosecution of rights violators who "snubbed" the TRC, human rights groups emphasized that perpetrators who came before the TRC and accepted "public shaming or accountability" thereby contributed to the creation of "a culture of human rights and respect for . . . institutions of justice."⁶³

By privileging reconciliation over punishment, restorative justice seeks to transcend the traditional dichotomy between justice and mercy, incorporating dimensions of mercy into justice.⁶⁴ Yet the reconciliation sought through restorative justice does not come cheaply, either for perpetrators or for victims. Because neither re-

morse nor forgiveness can be demanded, or even expected, in South Africa's deeply divided and grossly unequal society, restorative justice requires a difficult balancing act between an insistence on accountability and a readiness to reconcile.⁶⁵ It also demands a recognition that reconciliation will be a lengthy and difficult project.

Three points emphasized in the *Final Report* serve as a useful corrective to any temptation to overstate the commission's success in achieving reconciliation. First, the report repeatedly stresses that reconciliation is a long-term goal and vision, and that the TRC can be no more than one part of a much larger process.⁶⁶ Second, the commission acknowledged that its task of promoting truth and reconciliation proved to be "riddled with tension." Disclosure of painful truths sometimes evoked anger and alienation rather than reconciliation, and the commission's efforts exacerbated some community conflicts even as they moderated others.⁶⁷ Finally, the report emphasizes that genuine reconciliation cannot occur without material reparations and redistribution of resources. The reparations proposed by the TRC, which include monetary payments to individuals as well as collective and symbolic reparations such as clinics to provide medical and counseling services, monuments, and the renaming of parks and schools to honor the victims of repression, are inadequate in themselves.⁶⁸ Only a commitment to mitigate the pervasive inequities of apartheid and to provide social justice for black South Africans can sustain progress on the "road to reconciliation." A spirit of reconciliation, while necessary, is insufficient; "wide-ranging structural and institutional transformation" has to occur.⁶⁹ Ultimately, therefore, the TRC sought to honor its ambitious vision of reconciliation

by emphasizing its own limitations and pointing beyond itself to the many tasks still left to be done in the name of restorative justice.

Notes

1. I would like to thank the organizers and participants of two meetings on truth commissions, one at Harvard Law School in May 1996 organized by the World Peace Foundation, the Harvard Human Rights Program, and the Harvard Program in Ethics and the Professions, and one in Somerset West, South Africa, in May 1998 organized by the World Peace Foundation and attended by commissioners and staff of the Truth and Reconciliation Commission. It was a privilege to be present at both of these gatherings. I especially wish to thank Amy Gutmann, Martha Minow, Robert Rotberg, Graeme Simpson, Dennis Thompson, and Wilhelm Verwoerd for their responses to my paper. I also presented the paper to the University of Toronto Department of Political Science in December 1999, and I am grateful to all present for their stimulating questions and comments, most especially to David Dyzenhaus, Ran Hirschl, Cheryl Misak, Edward Morgan, Jennifer Nedelsky, Ayelet Shachar, and Melissa Williams. My thanks also to Lincoln Hancock for exceptional research assistance; to students in my class, Human Rights in Theory and Practice, for lively discussions about truth commissions; to my colleague Sheridan Johns for an excellent presentation to my class on the subject—and, as always, to Jeff Holzgrefe for his invaluable editorial and moral support.
2. TRC, *Final Report* (Cape Town, 1998), I, chap. 5, par. 3.
3. Promotion of the National Unity and Reconciliation Act of 1995, section 1(1)(xix). This act established the TRC.
4. For a useful comparative study, see Priscilla B. Hayner, "Fifteen Truth Commission—1974 to 1994: A Comparative Study," in Neil J. Kritz (ed.), *Transitional Justice* (Washington, D.C., 1995), I, 225–261.
5. Lawrence Weschler, "Afterword," *A Miracle, A Universe: Settling Accounts with Torturers* (New York, 1990).
6. For a vivid description of this process see the forewords and introductions to Alex Boraine, Janet Levy, and Ronel Scheffer (eds.), *Dealing with the Past: Truth and Reconciliation in South Africa* (Cape Town, 1994); and Alex Boraine and Janet Levy (eds.), *The Healing of a Nation?* (Cape Town, 1995).

7. *Final Report*, I, chap. 5, par. 89.
8. *Ibid.*, chap. 1, par. 29.
9. This crucial difference between knowledge and acknowledgment, which is stressed in most of the literature on truth commissions, has been attributed to Thomas Nagel. See Weschler, *A Miracle, A Universe*, 4.
10. Ernesto Sabato, "Prologue," to *Nunca Mas* (New York, 1986), 5.
11. *Final Report*, I, chap. 5, par. 2.
12. Amos Elon, "The Politics of Memory," *New York Review of Books*, 7 October 1995, 5.
13. Breyten Breytenbach, "Appendix," in Boraine, Levy, and Scheffer, *Dealing with the Past*, 162.
14. *Final Report*, I, ch. 5, par. 34.
15. *Ibid.*, 51.
16. Antjie Krog, "The South African Road," in Boraine and Levy, *Healing of a Nation?* 112–119.
17. *Final Report*, I, chap. 5, par. 51.
18. *Ibid.*, chap. 1, par. 16.
19. See Henry J. Steiner (ed.), *Truth Commissions: A Comparative Assessment* (Cambridge, Mass., 1997), especially comments by José Zalaquett and Manouri Muttetuwegama.
20. Testimony of Lucas Baba Sikwepere, quoted in Martha Minow, *Between Vengeance and Forgiveness* (Boston, 1998), 67.
21. For an insightful discussion of the capacity of truth commissions to heal individuals and collectivities, see *ibid.*, 61–79.
22. This criticism is cited by TRC member Pumla Gobodo-Madikizela, in "On Reconciliation: Reflecting on the Truth Commission," December 1996, on the official website of the Truth and Reconciliation Commission at <http://www.truth.org.za>.
23. For arguments for and against the therapeutic value of truth commissions, see Steiner, *Truth Commissions*.
24. Margaret Popkin and Naomi Roht-Arriaza, "Truth as Justice: Investigatory Commissions in Latin America," in Kritz, *Transitional Justice*, I, 262.
25. *Final Report*, I, chap. 5, par. 22, 45.
26. Comments of Gobodo-Madikizela, quoted in Minow, *Between Vengeance and Forgiveness*, 60; emphasis added.
27. *Final Report*, I, chap. 5, par. 89.
28. *Ibid.*, par. 97.
29. *Ibid.*, par. 39–42.
30. *Ibid.*, chap. 1, par. 56.
31. *Ibid.*, chap. 5, par. 96.
32. *Ibid.*, par. 57–61.
33. *Ibid.*, chap. 1, par. 41, and chap. 4, par. 64–81.
34. *Ibid.*, chap. 5, par. 89, 82.
35. Lindy Wilson, "Can Truth Bring Reconciliation?" a public lecture at the Center for Documentary Studies, Duke University, 21 April 1998.
36. For an example of a finding denying amnesty on grounds of failure to make full disclosure, see "Amnesty Decision: Gerhardus Johannes Nieuwoudt (AM3920/96)"; <http://www.truth.org.za/amnesty/45.html>.
37. Minow, *Between Vengeance and Forgiveness*, 59.
38. Aryeh Neier is among the most vocal advocates of an imperative to prosecute violators of human rights. For a good summary of his arguments and his ongoing debate with José Zalaquett, see Boraine, Levy, and Scheffer, *Dealing with the Past*, 2–15. See also Diane Orentlicher, "The Duty to Prosecute Human Rights Violations of a Prior Regime," *Yale Law Journal* C (1991): 2537–2615.
39. Antjie Krog, *Country of My Skull* (Johannesburg, 1998), 278.
40. David Dyzenhaus, *Judging the Judges, Judging Ourselves* (Oxford, 1998), 10.
41. *Final Report*, I, chap. 5, par. 73; Minow, *Between Vengeance and Forgiveness*, 89–90.
42. Krog, *Country of My Skull*, 121.
43. Dyzenhaus, *Judging the Judges*, 25–26.
44. Dyzenhaus, *Judging the Judges*, is an excellent analysis of the hearing on the legal profession. See also *Final Report*, I, chap. 5, par. 110.
45. Minow, *Between Vengeance and Forgiveness*, 75.
46. *Final Report*, I, chap. 5, par. 107–108.
47. "TRC Urges that Scores Be Charged," *The Star*, 25 May 1999 (available at <http://archive.iol.co.za/Archives/1999/9905/25/freedom3day4.htm>).
48. See, for instance, the *Call for Prosecutions* issued by a coalition of nongovernmental organizations in November 1998, as well as the heated public debate between Barney Pitso, chair of the South African Human Rights Commission, and human rights organizations and other commentators in July 1999. The text of the *Call for Prosecutions* and further information about these debates may be found at the website of the Centre for the Study of Violence and Reconciliation, <http://www.wits.ac.za/csvr/press.htm>. See also Piers Pigo, "No Reconciliation Possible without Investigation," *Daily Mail and Guardian*, 4 August 1999 (available at <http://www.mg.co.za/mg/news/99aug1/4augboipatong.html>), and "South Africa: No Impunity for Perpetrators of Human Rights Abuses," Amnesty International Press Release, 30 July 1999 (http://www.amnesty.org.uk/news/press/releases/30_july_1999-2.shtml).
49. *Final Report*, chap. 1, par. 36.
50. José Zalaquett in Boraine and Levy, *The Healing of a Nation?* 45.
51. Comments by Richard Goldstone, in *ibid.*, 120.
52. Comments by Albie Sachs, in *ibid.*, 103.
53. Comments by Albie Sachs, in Boraine, Levy, and Scheffer, *Dealing with the Past*, 146.

54. Hannah Arendt, *The Human Condition* (Chicago, 1958), 241.
 55. Minow, *Between Vengeance and Forgiveness*, 92; Dyzenhaus, *Judging the Judges*, 6.
 56. Zalaquett, in Boraine and Levy, *The Healing of Nation?* 46.
 57. *Ibid.*, 46–47.
 58. *Final Report*, I, chap. 5, par. 10.
 59. *Ibid.*, chap. 1, par. 1.
 60. See, for instance, the press club speech by Archbishop Tutu on 21 October 1997 and Howard Zehr, “South Africa’s Truth and Reconciliation Commission Is an Unprecedented Experiment of Breathtaking Stakes,” *Mennonite Central Committee News Service*, 7 March 1997; both on <http://www.truth.org.za>.
 61. *Final Report*, I, chap. 5, par. 50–52, and chap. 1, par. 67, 71.
 62. *Ibid.*, chap. 5, par. 20.
 63. “NGO Response to Dr. Barney Pitso’s Call to Stop Apartheid Prosecutions,” 30 July 1999 (<http://www.wits.ac.za/csvr/press.htm>).
 64. My thanks to Robert Keohane for a discussion that helped me formulate this point. The dichotomy between justice and mercy is one of the archetypal “right versus right” dilemmas discussed in Rushworth Kidder, *How Good People Make Tough Choices* (New York, 1995), 109–126. See also 13–29.
 65. Jonathan Allen offers an acute analysis of this balancing act as a principled compromise between justice and reconciliation in “Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission,” *University of Toronto, Law Journal* XLIX (1999): 320, 325, 338.
 66. *Final Report*, par. 1, 6, 27, and chap. 4, par. 42–59.
 67. *Ibid.*, par. 3, 14, 18.
 68. Minow, *Between Vengeance and Forgiveness*, 92–93. Reparations continue to be an unfinished item on the South African government’s agenda. See “One Year Since the TRC Report: Where Are the Reparations?” (<http://www.wits.ac.za/csvr/press.htm>).
 69. *Final Report*, I, chap. 5, par. 26, 52.
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