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INSTITUTIONS FOR RESTORATIVE JUSTICE: THE SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION†

I *Introduction*

It is widely believed that dealing with inter-group conflicts of the past is critical to building tolerant societies in countries that have been torn by violent struggle. Such struggle has often involved gross violations of human rights. Thus, the challenge of dealing with the past has often been articulated through the powerful moral intuition that for 'closure' to occur the perpetrators of such violations must be punished. For most international lawyers and much of the Western public the criminal trials in The Hague exemplify the appropriate response. The practical difficulties of the apprehension of the perpetrators, proof of offences, identification of witnesses and victims, and their protection are widely acknowledged, even by supporters of this kind of process. Yet it is thought, as one observer recently wrote in *The New Republic*, that war crimes tribunals 'work much better than anything else statesmen have come up with at the end of a war. A well-run legal process is superior – both practically and morally – to apathy or vengeance.'[1]

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1 G.J. Bass, 'Due Processes: Why We Need International War Crimes Trials' *The New Republic* (30 March 1998) 19.

(1999), 49 UNIVERSITY OF TORONTO LAW JOURNAL 355

The belief that inaction or inter-group vendettas are the only alternatives in the absence of war crimes tribunals stands in wilful ignorance of the existence of a very different approach to dealing with the conflicts of the past – that exemplified by the truth commissions that have been established in countries such as Chile and South Africa. Most recently, the South African Truth and Reconciliation Commission (TRC) addressed gross human rights violations in the country's past through a process aimed, not at the punishment of guilty individuals, but at determining what happened and why. Through its process, the TRC provided the opportunity for victims to tell their stories, to be heard and acknowledged, and, eventually (to some extent), to be compensated.[2]

This essay suggests that much more careful examination of the truth commission alternative is needed to assess adequately the strengths and weaknesses of the mainstream approach of the international community to dealing with conflicts of the past in transitional societies. The major obstacle to such an examination and the reason the truth commission approach has figured so peripherally in the debate over the desirability of war crimes prosecutions are connected to the most controversial feature of the TRC – granting amnesty to perpetrators in return for disclosure of offences. Sophisticated observers are quick to concede the pragmatic political reasons behind such a choice, including the particular demands of a negotiated transition to majority rule. Justice, however, is often thought to necessitate punishment, not acknowledgement and dialogue. Thus, the TRC is seen, even by those sympathetic to South Africa's choices, as an uneasy compromise with justice.

In this essay, we propose a fundamentally different view of the TRC – one that suggests the possibility that this may be a first best solution, not an ineffective bromide where criminal prosecutions are inadequate, politically risky, or undesirable. This alternative view directly challenges the conception of justice that underlies criminal trials. It implies a radical reassessment of the means by which justice is done and the respective merits and drawbacks of the various techniques of dealing with the past.

2 *Truth and Reconciliation Commission of South Africa Report* (Cape Town: Truth and Reconciliation Commission, 1998) [hereinafter *Report*]. It consists of five volumes: the first deals with the guiding concepts of the TRC and the political and legislative background to its establishment; the second deals with gross violations of human rights; the third addresses gross human rights violations from the perspective of the victim; the fourth examines the broader social, politicial, and economic context of gross human rights violations, including accounts and analysis of hearings that that deal with particular institutions and groups, including women, children, military conscripts, the legal and medical professions, the media, and business; the fifth, contains analyses, conclusions, and recommendations of the TRC.

The view of justice we propose is restorative not retributive. Our claim is that retributivism is a distortion of the underlying intuition about justice at stake in addressing these offences – the notion that a social equality or equilibrium has been disrupted (or further disrupted) by the offence and that it must be restored through social action. We argue that the identification of punishment with the righting of the wrong or the re-establishment of the disrupted equality is arbitrary and historically contingent. It is based upon conflating the social challenge at issue with various notions of private or family vendetta and divine or poetic justice. The idea of justice as restorative opens up the possibility of a rich contextual exploration of what, at a given juncture in the evolution of society, both victims and perpetrators need for equality to be established or re-established in light of the offences that have occurred. The emphasis is on reintegrative measures that build or rebuild social bonds, as opposed to measures such as imprisonment and the death penalty that isolate and alienate the perpetrator from society.[3]

From this reconceptualization of the idea of justice as a response to past offences, we propose taking a fresh look at of the strengths and weaknesses of the TRC – considering the essential institutional features of the Commission, not as compromises with the demands of justice, but as the means to restorative justice.

II *The limits of criminal trials*

Assuming that dealing with gross human rights violations in conflicts of the past is necessary for the construction or reconstruction of a liberal

3 At the time of submission of this article for publication, an important book appeared which also challenges the notion that truth commissions are necessarily a politically expedient 'second best' to criminal prosecutions. See M. Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998). A full engagement with this work was not possible given the late point in the publication process for this article. We note, however, that while Minow claims that truth commissions can be a 'first best' in terms of many of the goals that criminal trials purport to serve, such as social reconciliation, she expresses doubts about whether in the deepest sense they produce 'justice' or 'closure': 'A truth commission, severed from prosecutions, avoids vengeance and even retribution. It fails to create the potential closure afforded by criminal trials that end in punishment' (ibid. at 127). While Minow often seems to find restorative justice more attractive in many respects than retributive justice, she nevertheless appears to think that something has been lost in terms of justice ('closure') if one simply gives up on retribution. This is related to her tendency to identify restorative justice with an idea of compensation or restitution (see ibid. c. 5) and thus as the articulation of one kind of just practice, rather than a different understanding of justice *tout court*. It is in these respects that our theoretical framework clearly differs from that of Minow.

democratic society, it is criminal prosecution of perpetrators that has seemed the most obvious avenue, especially to western human rights activists or international lawyers. Following the examples of Nuremberg and Tokyo, these elites have managed, for example, in the case of the Balkans and Rwanda, to impose this model on other societies. Plans are underway for a permanent international criminal tribunal empowered to prosecute gross human rights violations wherever they may occur.

Criminal trials respond to a powerful, if not overwhelming, moral intuition – especially that of outside spectators to the conflict – that the 'monsters' responsible for the acts in question must be punished. This has led to a lack of intellectual clarity about whether such trials actually serve the goal of building a more just and tolerant future. Indeed, the tendency among public international lawyers is to argue for a *duty* to prosecute and punish crimes against humanity – an argument that was invoked in constitutional proceedings aimed at blocking South Africa's alternative approach to dealing with the conflicts of the past.

There is nevertheless a small but important body of literature that questions whether criminal trials are a desirable or useful means of social reconciliation or healing. Two of the leading political philosophers of the post-war period, Judith Shklar and Hannah Arendt, critiqued what they viewed as inflated claims about the healing or pedagogical impact of Nazi war criminals trials. That many of their concerns and observations overlap is the more remarkable given that, while Judith Shklar was a determined and unwavering advocate of liberalism, Arendt was and continues to be an important source of inspiration for liberalism's non-Marxist critics, known crudely as communitarians.[4] Their works were widely criticized, it being falsely assumed that the authors were trivializing Nazi guilt or mitigating it (in fact, both were themselves Jews who had fled the Nazis; and Arendt was accused of Jewish self-hatred). More recently, in response to what has happened in Latin America, the Balkans, and Rwanda, several law professors have made penetrating criticisms of the use of criminal trials for dealing with conflicts of the past.[5]

4 H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York and London: Penguin, 1977); J. Shklar, *Legalism* (Cambridge: Harvard University Press, 1964).

5 C.S. Nino, *Radical Evil on Trial* (New Haven: Yale University Press, 1996); M. Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick, NJ: Transaction, 1997); J. Alvarez, 'Rush to Closure: Lessons of the Tadic Judgment' (1998) 96 *Mich. L.J.* 2031. Osiel and Nino, however, appear nevertheless to give cautious support to the use of criminal trials in some transitional situations, despite their own criticisms, and Alvarez seems not unfavourable to such trials where they are based on the a process indigenous to the country concerned, rather than imposed by the international community. See also Minow, supra note 3.

The advocates of criminal prosecutions claim that trials serve a range of purposes related to the overall goal of building a tolerant, more just society.[6] First of all, trials promote the value of legality or the rule of law, which is critical to the building of a pluralistic, tolerant, and free society. Second, by attributing individual rather than group responsibility to the worst human rights abuses produced by the conflicts of the past, it is believed that such trials can produce 'closure' on the cycle of vengeance between groups. Third, trials supposedly allow for disclosure of what actually happened, facilitating understanding of how civil order broke down and human beings became 'monsters.' Fourth, trials give victims an opportunity to tell their stories, confront those who harmed them, and begin the process of healing; trials are an alternative to both passive suffering and random vengeance. Fifth, trials may deter those who might be inclined to commit such human rights violations in the future.

A. THE RULE OF LAW

The prosecution and punishment of perpetrators of gross violations of human rights signifies, particularly for many international lawyers, that the limits imposed on justice by politics and even war are not intractable – no individual, however powerful, is beyond the reach of law. Might simply never makes right, whatever the context. Thus, in the Balkans, for example, there has been an emphasis on attempting to indict, apprehend, and bring to trial the political leaders who are assumed to be the 'masterminds' of atrocities.[7]

Yet the powerful *can* often elude criminal prosecution, except in a situation like at Nuremberg where the occupying powers are also the prosecuting powers, or domestically where there has been a complete change of regime. But in these situations a different challenge to the rule of law occurs – the justice in question is 'victors' justice.' Avoiding the perception or reality of 'victors' justice' was, as Shklar and others have noted, a key concern of the architects of the Nuremberg process, but important criticisms were nevertheless levelled against these trials. Even though the risk of the Nuremberg trials being perceived as less than even-handed was greatly reduced by the existence of millions of pages of Nazi documents that recorded in detail the acts in question, the documents' authenticity was in most cases beyond serious question.

6 See, *e.g.*, P. Akhavan, Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal (The Hague, n.d.) [unpublished].

7 See J. Llewellyn & S. Raponi, 'The Protection of Human Rights Through International Criminal Law: A Conversation with Madam Justice Louise Arbour, Chief Prosecutor for the International Criminal Tribunals for the former Yugoslavia and Rwanda,' 57 U.T. Fac. L. Rev. Winter 1999 at 83.

The response to the 'victors' justice' concern in the Balkans situation was embodied in a supposedly neutral international tribunal. Neutrality, although itself a complex idea, is, of course, related in some way to the ideal of the rule of law. Osiel has in fact argued that what is required to deal with conflicts of the past is not neutrality at all, but, at least at the outset, a forum for the civil, that is, non-violent airing of grievances and accusations of members of the various conflicting groups.[8]

But there is a deeper problem involved in avoiding the objection of 'victors' justice' through the use of an international tribunal. Such a tribunal imposes law on *others* who are assumed to be unable to impose it on themselves. Because international lawyers deal with a kind of law that is not directly the product of any democratic community,[9] it is easy for them to lose touch with a crucial dimension in the rule of law: the idea of a community governing *itself* under law. This is as much an element in the *liberal* ideal of the rule of law, as espoused by Kant, Mill, and Constant, as in a communitarian or radical democratic perspective, such as that of Rousseau and his heirs; thus, in *the Perpetual Peace* Kant conceived the rule of *transnational* law as based on the union of *constitutional republics*, self-governing free societies, a step that liberal internationalists today often seek to skip on the way to international order.[10] Societies for whom it is now a challenge to develop a strong conception of, and commitment to, the rule of law have never been lacking in the imposition of law on them from outside, from the top down, or both. The international tribunal solution, from a rule of law perspective, is based on ignorance of how, historically, the imposition of order from the outside or from the top down has *complicated* or *frustrated* the evolution of the rule of law, perhaps becoming a contributing cause of the conflicts themselves.[11]

B. INDIVIDUAL VERSUS GROUP CULPABILITY

The idea that criminal trials, by emphasizing individual culpability, can overcome group recriminations and therefore support the development

8 Osiel, supra note 5, especially c. 8 and Conclusion.

9 See on this issue, Nino, supra note 5, c. 5 'Legal Problems of Trials for Human Rights Violations,' and particularly the reference to 'elitist moral epistemology' at 159.

10 I. Kant, 'Perpetual Peace' in H. Reiss ed., *Kant's Political Writings*, trans. H.B. Nisbet (Cambridge: Cambridge University Press, 1972).

11 See some of the historical perspectives in P. Akhavan & R. Howse, eds., *Yugoslavia the Former and Future: Essays of Scholars from the Region* (Washington: Brookings Institution, 1995) and also the introduction by R. Howse. See also D. Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford: Hart Publishing, 1998).

of tolerance is on its surface highly attractive. But, certainly in the case of the Balkans, the authorities of the international tribunal have undermined this advantage by attempting to prosecute, for reasons discussed above, not just 'ordinary' individuals, but the heroes or leaders of the various groups in conflict. Of course, if these individuals were indeed masterminds of the atrocities, then this is at one level entirely justified. On another level, it seems an absurd fiction that using the procedural and symbolic apparatus of the criminal trial can transform such persons into common criminals or even extraordinary psychopaths whose acts are traceable largely, if not entirely, to idiosyncratic mental deviance. They remain, depending on one's group perspective, either monsters or martyrs.

It is not surprising, however, that the idea (in our view, illusory) of using individual responsibility to overcome the problem of group culpability would be attractive in the West. Having seen the images of concentration camps and torture on their television screens, people too weary to engage in some complex exercise of political and historical judgement seek a solution that reflects life on television: the bad guys – the monsters – get caught, the moral order is restored, and peace and security prevail.

Individual responsibility is important, but not for these reasons or motivations. Individual responsibility affirms the possibility of free will: Even in the most inhumane circumstances, human beings have choices of ultimate moral significance.[12] The exploration of these margins of choice is fundamental to envisioning persons as not being simply driven by the demands of inherent group membership or group conflict. It is an antidote to what Hannah Arendt has described as 'theories, based on specific, abstract, hypothetical assumptions – from the *Zeitgeist* down to the Oedipus complex – which are so general that they explain and justify every event and every deed: no alternative to what happened is even considered and no person could have acted differently from the way they did act.'[13]

War crimes trials, however, are not well suited to exploring the margins of individual moral choice. There are scarce resources available to prosecute, and so the cases likely to come to trial are those of obviously monstrous behaviour. Thus, the examination of hard choices, for example, about obedience to orders and passive versus active resistance; the perception and its reasonableness of one's self as threatened by

12 See the important work of T. Todorov, *Facing the Extreme. Moral Life in the Concentration Camps*, trans. A. Denner & A. Pollack, (New York: Henry Holt, 1996).

13 Arendt, supra note 4 at 297.

another group; and all the moral complexity of the exercise of free will in conditions of violent conflict are very unlikely to be explored adequately in criminal trials. Even less do war crimes trials provide, generally speaking, a means of identifying and telling the stories of those who did make positive or admirable moral choices in these situations. This, however, is crucial to demonstrating that such choices are more than hypothetical and are, in fact, within the moral compass of human beings.

C. DISCLOSURE AND LEARNING FROM THE PAST

The supporters of war crimes trials rightly emphasize the dangers of sweeping the past under the table – the perpetuation of inter-group hatred and fear and an inability to learn about the kinds of conditions and circumstances that engender gross human rights violations. Trials, through criminal procedure, offer the possibility of a verified, impartial account of the events of the past that should be acceptable and credible to all groups. As Payam Akhavan, a prosecutor at the Hague Tribunal, claims

> [the] contribution to reconciliation depends on the establishment of facts, hard and inescapable facts, which become part of a 'shared truth' for all peoples in the former Yugoslavia. It is the unifying power of an indisputable historical record, established before an impartial judicial forum, with the sanction of the world community, that can allow for former foes to come to terms with the past so that it is no longer part of the future.[14]

As an empirical matter, this simply has not occurred in the case of the Hague prosecutions, as Alvarez notes in his study of the Tadic trial.[15] The proof of events often depends upon the testimony of witnesses from one group against another, since there are no incentives (for example, the prospect of amnesty) for perpetrators to testify about other perpetrators. The tribunal in the Tadic case made enormous efforts to appear neutral to both defence and prosecution witnesses – yet, where it counts, it would always be possible to attribute the content of testimony to the group membership of the witness.[16] Again, the Nuremberg experience, in which an enormous documentary record was available, may likely have caused the architects of the Hague process to underestimate this defect of war crimes trials.

14 Akhavan, supra note 6 at 38.

15 Alvarez, supra note 5 at 2100.

16 Difficulties of this kind have been noted by Michael Ignatieff, whose doubts are actually cited by Akhvan himself. See M. Ignatieff, 'Articles of Faith' (1996) *Index Censor*, September–October, n.p. See also, Alvarez, supra note 5 at 2058–60.

Further, and this is a major element in Osiel's work, there is much morally and socially relevant 'truth' that can *only* be disclosed[17] through the narratives of victims, perpetrators, and others that *are* highly subjective, related to perceptions influenced by the individual's affiliations, and so forth. The pretence of legal objectivity actually makes it a priority of war crimes tribunals and their prosecutors to exclude or minimize such statements. This points to an inherent tension between the adversarial criminal process, which is ultimately aimed not at the determination of truth but of guilt, and at the goal of full or complete understanding concerning the conflicts of the past.

Moreover, the de-linkage of gross human rights violations from what Judith Shklar calls 'complex social events' may lead, not only to a distorted understanding of the past, but to learning essentially nothing about which political, social, and economic choices could, in the future, prevent such mass atrocities. As Shklar suggests, '[a] criminal trial demands *mens rea*, and there is often no *mens rea* to be found in the development of socially complex events such as a war.'[18]

In the case of the Hague tribunal, the attempt to skirt this difficulty resulted in the avoidance of putting the war itself on trial, that is, trying to de-couple the gross human rights violations from the fundamental conflict itself. However, in the Tadic trial, it was deemed necessary to preface the questioning of witnesses about the facts of the case by a long investigation of Balkan history. Yet, since here the tribunal is not performing the functions of a criminal court, why should its findings have any credibility?

D. ADDRESSING THE NEEDS OF VICTIMS

Nino argues that criminal trials may 'enable the victims of human rights abuses to recover their self-respect as holders of human rights.'[19] This self-respect may allow victims and their group to live with others from the perpetrator group with a sense of legal security that promotes tolerance and the resolution of differences in the future by civil means. However, as Nino also emphasizes, what is crucial is not the retributivist outcome of punishment, but rather 'what contributes to re-establishing [victims'] self-respect is the fact that their suffering is listened to in the trials with respect and sympathy.'[20]

17 Alvarez, supra note 5 at 2068–73.
18 Shklar, supra note 4 at 172.
19 Nino, supra note 5 at 147.
20 Ibid.

Yet criminal prosecutions, particularly of the kind being undertaken at The Hague, in fact offer very limited opportunity for victims to tell their stories and be heard with respect and sympathy. First of all, the demand for 'objectivity' or 'neutrality' between groups as a legitimating principle of the whole exercise and the constraints of criminal procedure (even adjusted) as well as the prosecutors' emphasis on the goals of conviction greatly limits what victims may be allowed to say or at least what they will be encouraged to say by the prosecutor. Second, as has already been noted more generally, there is an irreducibly subjective and emotive dimension in the experience of being victimized on the basis of group membership or identity. As Alvarez underlines, the process precisely attempts to curtail just such expressions to avoid the appearance that victims are partial or are testifying in order to further the cause of one particular side in the conflict. Victims are encouraged to present calm, deadpan recitations of 'facts.' It is hard to imagine that a process which by its very nature and aspirations makes these demands can lead victims to believe that they have been able to express their suffering and find understanding and sympathy for their experiences.

E. DETERRENCE

The deterrent effect of criminal trials clearly depends upon the practical ability to bring perpetrators to justice and then to convict them based upon credible testimony. Supporters of war crimes trials express indignation at the difficulty of apprehending perpetrators and frustration at the elusiveness and reluctance of witnesses. This should tell us something about the unlikely deterrent effect of such initiatives: deterrence is impeded by the likelihood that perpetrators will not be caught and convicted because of the absence of convincing witnesses.

Perhaps more fundamentally, if 'complex social events,' to use Shklar's expression, are a major factor in the occurrence of gross human rights violations, the concern for deterrence may rationally focus on the forces that produce these complex social events as much as on the agents who perpetrate gross human rights violations. In Nino's words, borrowing from the work of Jaime Malamud Goti,

> radical evil requires an evil political and legal framework in which to flourish. Without that framework, it is unlikely that massive state-sponsored human rights violations will ensue regardless of whether punishment for previous violations takes place. With that framework in place and given certain antecedent circumstances, however, violations are highly likely even with previous convictions and punishment for human rights violations.[21]

21 Nino, supra note 2 at 145. See J.M. Goti, 'Punishment and a Rights-Based Democracy' (1991) 10 Crim. Just. Ethics. 3.

In some cases, criminal trials may create perverse incentives to maintain the framework of evil – holding on to political, social, and economic power is perhaps the most effective means of eluding apprehension and prosecution.

III *South Africa: An alternative model for dealing with conflicts of the past?*

In the last section, we examined the limits of criminal trials as a method of 'dealing with the past.' The criminal model has certainly dominated the scene this century (Nuremberg, Tokyo, The Hague). Recently, however, another method has developed. As the introduction to a discussion on the topic at Harvard Law School states, '[i]n a brief fifteen years, "truth commission" has become a familiar conception and institution for a state dealing with its recent past.'[22] Using South Africa as a case study, in this section we will examine the possibilities and problems of the truth commission model. This model offers a new lens through which to view the task of dealing with the past. It is rooted in a concept of justice – restorative justice – different from that of the criminal trials considered in the previous section. Does the truth commission process offer a promising alternative to criminal trials in transitional contexts? In other words, does the truth commission model better serve the purported goals of criminal trials while avoiding the various difficulties and contradictions discussed in the first section of this paper?

South Africa, if not the clearest example, is certainly one of the most familiar contemporary examples of a transitional context. The system of apartheid introduced by the National Party (NP) government in 1948 was maintained and perpetuated by acts of manipulation, coercion, and violence. The result was a country premised on lies, secrecy, and the abuse of basic human rights. South Africa endured decades of war waged for liberation from this racial oppression. Apartheid was an all-pervasive system seemingly secure and unstoppable. Thus, it surprised even those closest to the inner workings of this system when, at the opening of Parliament in 1990, F.W. De Klerk, then president of the NP government, announced the systematic dismantling of apartheid. The living symbol of

22 *Truth Commissions: A Comparative Assessment – An Interdisciplinary Discussion Held at Harvard Law School in May 1996* (Cambridge: Harvard University Human Rights Program, 1997) at 7. The introduction also notes 'the historical analogies to today's truth commissions range from international commissions of inquiry to many forms of national investigative bodies. Nonetheless, in major respects we witness today an institution that is distinctive: the number of counties utilizing it within so brief a period, its popular appeal and powerful political effects, and the ambitious scope of its work;' ibid. at 10.

its imminent demise was the release of South Africa's most famous political prisoner – Nelson Mandela. What followed his release was transformation swifter than anyone had dared to imagine. The world watched in awe as South Africa negotiated the transfer of power resulting in the first ever truly democratic elections. The magnitude of the transition will be forever represented by the results of these elections – Nelson Mandela, once prisoner, would now be president. He would lead a transitional government, the Government of National Unity, until the next elections in 1999.

The election of a government of national unity was not enough, however, to make such unity a reality. The transition from a past marred by mass human rights abuses to one based on the principles of democracy and respect for human rights could not be had simply by a transition in government. In the words of the interim Constitution, South Africa faces the challenge of building a bridge 'between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence.'[23] This bridge was named unity and reconciliation, reflecting what it is intended to provide. One of the crucial tasks South Africa had to attend to, if it is to begin this construction, is dealing with the past.

After much national and international consultation and consideration, the government established the TRC[24] to fulfill this role in the transition. The Commission was charged with the difficult task of establishing 'as complete a picture as possible of the causes, nature and extent of gross violations of human rights[25] which occurred between 1 March 1960 and 10 May 1994.'[26] The Commission consisted of three committees with different responsibilities pertaining to this mandate:

23 Constitution Act of 1993 (Interim Constitution), section 232(4).

24 The Truth and Reconciliation Commission has come to be known by many names throughout its life. We tend to use several of them interchangeably for the sake of literary convenience. Most common among these is the 'TRC,' the 'Commission,' and the 'Truth Commission.'

25 Section 1(1)(ix) of the *Promotion of National Unity and Reconciliation Act* which governs the TRC defines gross violations of human rights as: the violation of human rights through –

(a) the killing , abduction, torture or severe ill-treatment of any person; or
(b) any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a), which emanated from the conflicts of the past and which was committed during the period 1 March 1960 to the cut-off date within or outside the Republic, and the commission of which was advised, planned, directed, commanded or ordered, by any person acting with a political motive.

26 *Promotion of National Unity and Reconciliation Act* , The Republic of South Africa, Act No. 34 of 1995, as am. by the *Promotion of National Unity and Reconciliation Amendment*

1. The Human Rights Violation (HRV) Committee was responsible for conferring victim status on those individuals who qualified under the Act[27] and came forward to the Commission to make a statement. Victim status will be used to determine eligibility for government reparations. The HRV Committee also held hearings to receive public testimony on a representative number of cases and special hearings concerning certain events or incidents.
2. The Amnesty Committee (which at the time of publication of this article remains in existence pending the completion of its work) is responsible for fulfilling the imperative contained in the interim Constitution that 'amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past.'[28] While the interim Constitution mandated the provision of amnesty, it left open the mechanisms, criteria, and procedures by which amnesty might be granted. By embedding the amnesty provision in the process of the TRC, the government provided accountability in amnesty, rather than a blanket amnesty. Thus, *individuals* had to apply for amnesty in respect to *specific acts.* Such acts must have been committed in pursuit of a political objective; must have occurred before the cut-off date provided for in the Act; application must have been made before the deadline; and individuals were required to offer full disclosure to the Commission. Amnesty is located in the context of the mandate of the Commission – amnesty is provided in exchange for truth.[29]

Act No. 84 of 1995 (hereinafter 'the *Act*'). This act was amended to extend the latter of these two dates. The date was initially 10 December 1993, but was changed in an effort to include the events leading up to the elections in 1994.

27 Under 'the *Act*,' s. 1(xix), victim includes –

(a) persons who, individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights –
  (i) as a result of a gross violation of human rights; or
  (ii as a result of an act associated with a political objective for which amnesty has been granted
(b) persons who, individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights, as a result of such person intervening to assist persons contemplated in paragraph (a) who were in distress or to prevent victimization as may be prescribed.
(c) Such relatives or dependants of victims as may be prescribed.

28 Interim Constitution, supra note 18.

29 Thousands of individuals applied for amnesty, and this volume has led to delays in the final report of the Amnesty Committee; for the interim report, see *Report*, supra note 2 at vol. 5, c. 3. The amnesty deal is credited by the Commission and almost all observers with being crucial to the Commission's ability to develop a profound

3. The Reparation and Rehabilitation (R&R) Committee was responsible for making recommendations to the government regarding the provision of reparations and rehabilitation to victims.[30] It also made recommendations concerning the prevention of future abuses and the steps necessary to create a culture of human rights respectfulness in South Africa. Such recommendations included institutional, administrative, and legislative initiatives aimed at these objectives.[31]

In addition to the work of the specific committees, the Commission itself (pursuant to the powers of the HRV Committee) undertook certain investigations and held hearings on matters related to the overall objective of establishing a picture of the past. It solicited submissions from the political parties, held hearings on the role of various institutions (i.e., the health, business, and legal sectors,[32] etc.), and compiled chronologies and histories of particular phenomena under apartheid (i.e., massacres, commissions of inquiry, apartheid legislation, etc.).[33]

Given the preceding description, one might ask why the Commission was not simply called the 'Truth' Commission. In fact, this common reference for the Commission may reflect the public perception that the Commission focused on truth, but had little or nothing to do with reconciliation. The Commission's slogan 'Truth the road to reconciliation' might offer some explanation. The attainment of truth is seen as a prerequisite for reconciliation.[34] The questions posed by one of the first

understanding of the operations of the South African security services during apartheid. Details of the amnesties are to be found in *Report*, supra note 2 at vol. 1, c. 10.

30 *Report*, supra note 2, vol. 5, c. 5: the measures recommended included an individual reparation grant for victims and their families, payable over a six-year period; symbolic measures such as monuments, memorial days, and the establishment of museums; and community rehabilitation, including health care to deal with psychological and physical needs of victims and their families and resettlement of displaced persons, skills training, and other educational assistance. The formula to be used to calculate the individual reparation grants is contained in paras. 69–74 and is based on amounts to acknowledge suffering; facilitate access to services; and subsidize daily living. Rates differ between urban and rural victims, reflecting the limits on access to services in the latter case.

31 *Report*, supra note 2, vol. 5, c. 8: recommendations included the establishment of human rights curricula in formal education, consolidation and strengthening of human rights commissions in South Africa, increasing resources to human rights bureaus and ombuds-type institutions within government, and wide dissemination of the report itself (para. 21).

32 See Dyzenhaus, supra note 11.

33 These are reported and analysed in *Report*, supra note 2, vol. 4.

34 In the chapter of the *Report* on reconciliation, there is an extended consideration of the extent to which truth may be a necessary, but not sufficient, condition for

witnesses to testify in front of the HRV Committee are a poignant reminder of this fact. She asked how we can forgive when we do not know whom we are to forgive and for what. The Commission has attempted to provide answers to these questions. It has sought the truth about the past, working towards reconciliation. The Commission must be understood as one path towards reconciliation.[35]

While this answer may satisfy those who express concern that the Commission fails to offer reconciliation, it does not meet the concerns of others. A deeper concern is that the Commission itself is harmful to the aim of reconciliation. For example, Fred Rundle, a political analyst and member of the AWB (a militant right wing Afrikaner movement), commentating on the South African television program *Two Way*, suggested that the Commission should be called the TRC for 'Total Revenge Commission.' Mr. Rundle, while perhaps slightly more extreme than most, has not been alone in this criticism. Some suggested that the Commission would simply rip open old wounds that should be left to heal. Others are concerned less with unleashing skeletons, as with the haunting impact of the release on victims. At the root of all of these concerns and complaints is a perception that the Commission has failed to do justice.

The perceived lack of justice in the TRC has presented itself in the media, in court, and on the street, in the pointed call for 'No Amnesty, No Amnesia, Just Justice.' It is clear that 'just justice' is a call for retributive justice. It means catch, prosecute, and punish (by imprisonment or worse) the perpetrators. This position is typically an uneasy hybrid of the view that justice, in this sense, must be done regardless of the impact on the transition and a more instrumental view that this justice is necessary to achieve the very goal of reconciliation. The Commission, it is argued, fails on both these terms to offer justice. Further, it actually denies justice, since by granting amnesty it robs victims of their right to seek their own justice through either the criminal or civil courts.[36]

reconciliation, including many passages of victims' statements and testimony before the Commission about their own understandings of the processes of healing and reconciliation; see ibid. at vol. 5, c. 9.

35 The other obvious components of the journey towards reconciliation are the Land Claims Commission, the Reconstruction and Development Plan (RDP), and the pending reparation program for victims.

36 This very argument was in fact the subject of a court challenge to the amnesty provision in the new South African constitutional court see *Azanian People's Organization (AZAPO) and Others* v. *President of the Republic of South Africa and Others* (1996) 8 B.C.L.R. 1015 (CC). The challenge, brought by a few prominent victims families, failed on the grounds that the Constitution allowed for the limiation of rights in the interest of national unity and reconciliation. It is interesting to note that these families are not typical of victims in South Africa. They were very prominent cases and

This is a cutting condemnation of the Commission. If the work of the Commission is to be appreciated and have an influence on the public, such accusations must be countered by adequate responses.

A. THE JUSTICE QUESTION: THREE POSSIBLE RESPONSES

Three responses seem possible. The first is to concede that if justice does mean, as it normally does in the context of gross violations of human rights, retributive justice, then one must openly acknowledge that granting amnesty is unjust (and therefore, perhaps the TRC is also). The second alternative is to argue that the Commission offers justice to the extent possible, given the transitional context. The third option is to re-examine our assumptions about the meaning of justice. The Commission may in fact offer justice, if justice is understood as restorative, not retributive, in nature.[37]

We shall give a brief overview of the first two options. But it is the explanation and exploration of the third option that will occupy the remainder of the paper. The third option, restorative justice, not only appears to hold the most promise for offering a full response to opponents of the Commission, but it might in fact provide a more appropriate means of conceptualizing the ambitions of the TRC.

It is important to turn to the first two options for a sense of the dialogue into which restorative justice enters. Conceding that the TRC is unjust is perhaps a misstatement of the first option. More accurately, this position admits that *amnesty* is unjust, and as a result, the Commission cannot achieve justice. This does not, however, render it impossible to defend the TRC. Justice, one might argue, does not encompass the whole of the moral universe. Other values may exist against which justice may be weighed in deciding what is the right or wrong thing to do. Thus, one might respond to the accusation that the TRC fails to do justice by admitting this fact and claiming that its work is not about justice. The Commission might still claim that its work is justified because in the context of the transition, justice may need to be sacrificed to ensure instrumental goals such as peace, stability and avoidance of civil war. This response can answer only the non-instrumental or absolutist dimension of the claim for punishment. Moreover, it does so merely by asserting an opposing moral perspective – one that does not give absolute priority to

as such might have had access to enough information to contemplate legal action. Most victims however, do not have any information concerning their cases and come to the commission in search of it.

37 See C. Villa-Vicencio, 'A Different Kind of Justice: The South African Truth and Reconciliation Commission' [unpublished]. See also W. Verwoerd, 'Reflections from within the TRC' (1996) *Current Writing: Text and Reception in South Africa*, 8(2) at 66–85 See also *Report*, supra note 2, vol. 1, c. 5..

the Right over the Good. Most significant, perhaps, such an approach sacrifices the Commission's understanding of its reconciliation objective as including justice. Thus, in its treatment of 'Concepts and Principles,' the *Report* stresses that '[t]he road to reconciliation requires more than forgiveness and respectful remembrance ... [but also] individual ... and social justice.'[38]

The second option seems to accept the proposition that justice does have some pull on the Commission, but puts into question the very possibility of realizing justice ('just justice,' i.e., retributive/criminal justice) in a situation like South Africa. Two factors are important according to this argument: the transitional context and the political nature of the crimes committed. Combined, these two factors make the likelihood of 'just justice' minimal, at best. Given these realities, amnesty in exchange for truth may be a second best option and the only option for South Africa. Thus, under the circumstances, one may have to be content with 'justice to the extent possible,'[39] namely that which the Commission can offer. The problem with this option from the retributivist point of view is the converse of that plaguing the first option. The second option, while appealing to the instrumentalist concern that justice must be realized, at least in some sense, does not address the non-instrumentalist view that it is the attempt to do retributive justice that matters above all.

This second option, however, opens the door for consideration of the third. It raises the questions: What do we mean by justice in a transitional context and how can it best be achieved? We want to suggest that a restorative understanding of justice is more appropriate both theoretically and practically in the South African context.[40] Further, under this understanding, the TRC, rather than being devoid of justice, is, in fact, a model of justice.

38 *Report*, supra note 2 at vol. 1, c. 5, para. 52.

39 This was the suggestion from the Chilean Truth and Reconciliation Commission. See N. Kritz, ed., *Transitional Justice II, Country Studies* (Washington: United States Institute of Peace Press, 1995) at 487.

40 In more recent work, we have explored the possibility that the restorative understanding of justice may be superior *simpliciter* to competing understandings (particularly the retributive or corrective theories), not only in transitional contexts. See J. Llewellyn & R. Howse, *Restorative Justice: A Conceptual Framework* (Ottawa: Law Commission of Canada, 1998). The possibility that the nature of justice as such may come to light more fully or easily through reflection on exceptional situations such as regime change or creation is, however, not a new suggestion; this possibility is already exemplified in the argumentative structure, for instance, of Plato's *Republic*. See, however, the 'reflective equilibrium' method employed in J. Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard Belknap, 1971).

Let us turn, then, to this model and the conception of justice appropriate to it and consider the assistance it might offer in responding to critics of the TRC.

B. RESTORATIVE JUSTICE: OLD SOLUTION, NEW PROBLEMS[41]

Archbishop Desmond Tutu, chairperson of the TRC, has explicitly stated that he understands the Commission to be an exercise in restorative justice.[42] Braithwaite, in his review essay on the subject,[43] notes the restorative nature of justice in ancient Arab, Greek, Roman, Indian Hindu, Buddhist, Taoist, and Confucian traditions.[44] He goes on to suggest that '[r]estorative justice has been the dominant model of criminal justice throughout most of human history for all the world's peoples.'[45]

Many of the sources of inspiration and guidance for contemporary restorative justice initiatives have come from aboriginal communities. Restorative justice has come back into favour in a number of western countries, at least as an experimental alternative. The first program to model the approach in the West was in Kitchener, Ontario, in 1974. Since that time, Braithwaite notes the existence of approximately 300 programs in North America and over 500 in Europe.[46]

C. WHAT IS RESTORATIVE JUSTICE?

'[R]estorative justice is most commonly defined by what it is an alternative to.'[47] Braithwaite himself goes on to articulate both immodest and pessimistic theories of restorative justice practices that set this model apart from the achievements of criminal practices. Tony Marshall, during a recent conference on the subject, offered a workable description of restorative justice in practice that does seem to stand on its own: 'Restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the

41 We engage in much more detailed articulation of the theory of restorative justice in J. Llewellyn & R. Howse, supra note 40 [draft submitted for publication].

42 J. Braithwaite, *Restorative Justice: Assessing an Immodest Theory and a Pessimistic Theory.* (Review essay prepared for University of Toronto law course, 'Restorative Justice: Theory and Practice in Criminal Law and Business Regulation,' 1997) at 1–100 (also available on the World Wide Web, Australian Institute of Criminology Home Page – www.aic.gov.au) and in conversations with the author.

43 Ibid. at 4.

44 Ibid. at 3.

45 Ibid.

46 Ibid. See also B. Galaway & J. Hudson, eds., *Restorative Justice: International Persepctives* (New York: Criminal Justice Press, 1996).

47 Ibid. at 4.

aftermath of the offence and its implications for the future.'[48] This description leaves open the questions of who is to be restored and to what they are to be restored. Braithwaite refers to this as a limitation in defining restorative justice. However, this 'failure' may actually result from the very strength of restorative justice. Restorative justice does not force a situation to fit the theory. Rather, as a theory, it is open and flexible enough to apply at various levels and contextual imperatives. Braithwaite recognizes this in his replies to restorative justice's two questions. To the *who* question, he replies, 'restorative justice is about restoring victims, restoring offenders and restoring communities.' To the *what* inquiry, he suggests 'whatever dimensions of restoration matter to the victims, offenders and communities affected by the crime.'[49] In this way, restorative justice is sensitive to context and thus appropriate to a variety of situations. A restorative justice approach, in his account, is not limited to the individual level (although this is where it is most common at present, i.e., juvenile justice) but can be applied to the institutional level (as in recent programs aimed at corporations and in the case of the TRC). Braithwaite's approach, however, in simply posing restorative justice as an alternative to retributive justice, risks losing sight of the unifying concept that explains and legitimates this alternative as *justice.* It fails to articulate a genuine theory of restorative justice.

In the absence of an attempt to articulate the unifying concept of restorative justice, restorative practices come to be understood merely as superior means of achieving the various ends or goods posited by utilitarian theories of criminal law, such as rehabilitation, social protection, and deterrence. In this paper, we argue, in fact, that restorative justice practices associated with the TRC do achieve the various instrumental goals in question better than do criminal trails and punishment. However, what is also at stake in the common moral intuition that it is unjust that wrongdoers, whether in South Africa or the former Yugoslavia, go unpunished is the sense that (regardless of the best instrumental choices to attain the various 'utilitarian' ends in question) punishment is an intrinsic requirement for restoration of the moral order.

In this crucial sense, restorative justice has more in common with retributive justice, powered by this moral intuition, than with various 'utilitarian' views of the appropriate response to criminal behaviour. Both restorative and retributive theories are concerned with the restoration of equality, equivalence, or equilibrium that has been disturbed by a wrongful act.

48 As quoted in ibid. at 5.
49 Ibid. at 5.

This equality must be a *social* equality – the equality between victim and perpetrator as members of society. In a modern liberal democratic society, this means equality or equivalence in rights and duties corresponding to the status of membership.[50] What distinguishes crime as a legitimate preoccupation of society, and not merely a matter for private 'evening of scores' or even the corrective justice of tort law, is precisely the need to establish or re-establish an equality *in* society. Indeed, if justice were a matter of restoring the abstract equality of victim and perpetrator as juridical persons, then it would be manifestly *un*just to demand anything more than the compensation provided by tort law, which disgorges the wrongful gain to the perpetrator and returns it to the victim.[51] By punishing the perpetrator, that is, demanding more than compensation, we would in fact not be making the perpetrator equal again with the victim but something *less.*

Because in crime the attack on the victim is not only an attack on the individual as a subject of abstract Right, but also an attack on the status of the victim as equal member of society, crime demands not simply the restoration of an abstract relationship of equality between two juridical persons; rather, it requires the restoration of a social equilibrium as well. The demand for restoration, therefore, ultimately implies asking what must be done so that victim *and* perpetrator can live as equal members of the society in question. This, in turn, means that the practices of restorative justice will take on a different shape depending on social context; different societies will hold to different conceptions of what relational equality among its members means.

Here, it is important to note a crucial element in the idea of restoration often obscured by understanding the word particularly in the private law context. In private law, the restoration in question assumes that *only* the isolated wrongful act has disturbed the abstract juridical equality between victim and perpetrator – that is, that the *status quo ante* was consistent with Right. With respect to equality in society as conceived by restorative justice theory, the offence that invokes the demand for justice must surely have at least *increased* or *worsened* inequality, but intervention

50 In articulating the theory developed below, we have been influenced by some of the formulations in the relational theory of Christine Koggel. See C. Koggel, *Perspectives on Equality: Constructing a Relational Theory* (Maryland: Rowman & Littlefield, 1998) and the theory of penal right elaborated by Alexandre Kojève in A. Kojève, *Esquisse d'une phenomenology du droit* (Paris: Gallimard, 1981). English translation forthcoming, B-P. Frost and R. Howse, *Outline for a Phenomenology of Right,* Lanham, MD: Rowman & Littlefield, 1999.

51 See generally E. Weinrib, *The Idea of Private Law* (Cambridge: Harvard University Press, 1995).

in response to the offence does not thereby assume that full or adequate equality in society constituted the *status quo ante*. Therefore, restorative justice, unlike criminal justice, does not legitimate the *status quo ante* as consistent with the relevant conception of Right.

This is crucial to unpacking the debate over the TRC. One view holds that the real wrong was the *apartheid* system itself; a focus on individual offences or crimes abstracts from this overwhelming reality and risks moral arbitrariness. However, once we understand the concept of restoration at play here not as that of re-establishing the *status quo ante*, it is possible to appreciate how restoration will *ultimately* depend on a broader social transformation to create full equality in society among victims and perpetrators, *while at the same time* addressing particular offences such as gross human rights violations. The offences may require special measures that address the *particular* way in which they disrupted the ideal possibility of victims and perpetrators living as equal members or citizens of society. In sum, restoration of social equality entails neither the *isolation* of each individual wrong as a source of disequilibrium nor *submerging* each wrong to social equality more generally. Just as corrective justice abstracts the wrong from context restorative justice places it in context without thereby making its distinctiveness and the distinctive demands it makes for restoration disappear.

Once we understand the challenge that crime poses for justice as that of restoration of social equality, we can begin to grasp how restorative justice theory and retributive theory diverge from their common conceptual ground. Retributive theory imposes the goal or purpose of restoration of social equality on a particular set of historical practices (typical of a wide range of societies) often known as 'punishment.' It identifies the very idea of restoration with these particular practices. Restorative theory, by contrast, problematizes the issue of which set of practices can or should in a given context achieve the goal of restoration of equality in society. The identification of these practices requires social dialogue that includes victims and perpetrators and involves concrete consideration of the needs of each for restoration.[52] The practices may vary widely, from place to place and from time to time, including therapy for victims, apology or acceptance of responsibility, community service, what Braithwaite calls 'reintegrative shaming' or financial compensation for victims.

52 For an example of the role of social dialogue in the realization of social equality see J. Nedelsky & C. Scott, 'Constitutional Dialogue' in J. Bakan & D. Schneiderman, eds., *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992) at 59.

As we have suggested, there may well be a burden on the perpetrator – in some of these practices. But this is a matter of context and social dialogue about the actual requirements of restoration in context. However, such a burden does not constitute 'punishment' in the sense understood in retributive theory or practice – there is no positive value for justice in the *very fact* of the perpetrator's suffering or sacrifice of well-being.[53]

How does retributive theory, in contrast to restorative theory, come to *identify* punishment with the restoration of equality in society? In effect, as Nietzsche suggests in his *Genealogy of Morals*, retributive theory grafts the idea of restoration of social equilibrium onto practices that actually originated prior to criminal justice and that have multiple and complex historical purposes.

At one level, this is explicable through the application of the private law corrective justice idea of a transfer between victim and perpetrator to the challenge of restoring *social* equilibrium (as opposed to the abstract equality of the victim and perpetrator as juridical persons) or the related private law image of the offender as a 'debtor' owing something to the victim and/or society.[54] At another level, it can be understood through the historical evolution of certain kinds of practices. As Kojève and Villa-Vicencio point out, the notion of restoring *social* equality may have had its origin in the consciousness that a wrong not only, or even most importantly, disrupted equality between victim and perpetrator, but between the families or tribes to which they belonged.[55] When the constituent elements of society were such families or tribes, it was easy to conceive restoration of social equality as entailing the sacrifice of a member of the perpetrator's tribe B in order to restore equality after the murder by the perpetrator from B of a victim in tribe A. The execution or banishment of a member of tribe B would now restore social equality, that is, the equilibrium between family A and family B. Each family would now be diminished by one member and therefore would be putatively equal in society (the bean-counting view of restoration of equality).

53 A hard case might seem to be posed where the victim claims that for her situation to be restored, this requires the knowledge that the perpetrator is suffering. What the victim is arguably seeking here is, however, not restoration to social equality with the perpetrator, but the *reversal* of domination, the capacity to have the perpetrator put in the position of submission to suffering/violation that the victim herself had been put in by the perpetrator. Perhaps such reversal may give some victims a sense of empowerment or even healing – but it does not constitute the restoration of equality. Instead it is a compensatory experience of domination.

54 See F. Nietzsche, *On the Genealogy of Morals*, trans. W. Kaufmann & R.J. Hollingdale in W. Kaufman, ed., *On the Genealogy of Morals and Ecce Homo* (New York: Vintage, 1967) II, 8: the debtor-creditor relationship is so primordial or primitive that it could not but have a heavy influence on thinking about justice generally.

55 See Kojève, supra note 50 and Villa-Vicencio, supra note 37.

With the emerging consciousness of individual rights and responsibility, punishing the family no longer seemed justifiable. It is here that retributive theory proper emerges to explain how social equality might be restored by inflicting on the individual perpetrator what might previously have been inflicted on his family.

It must be recalled that in the case of the families or tribes the restoration of social equality entailed the isolation or permanent loss for society of a member of the perpetrator's family. This would create social equality by producing, as we have said, an equal *loss* between two families or tribes. But if one treated the member of the perpetrator's family as an *individual*, then the justification as to why this member should suffer to restore social equality becomes extremely problematic. However, this would not be true with respect to the perpetrator himself (as opposed to any given member of the perpetrator's family). Because the perpetrator has *chosen* to isolate himself from society through offending, making the isolated subject the absolute end, the isolating penalty of banishment, death, or eventually, imprisonment could be justified.[56] Indeed, the paradigmatic kinds of punishment are for retributive theory isolating, or as Nietzsche puts it, alienating.[57]

However, once society is understood as a web of relationships between individuals as constitutive elements of families or tribes or other collectivities, retributive theory encounters a new set of difficulties. The powerful moral intuition that the offence requires the restoration of a social equilibrium remains valid, but now – almost by definition – this equilibrium is not an equilibrium in the first instance between collectivities. Rather, it is between the perpetrator and other citizens, including the victim, as equal members of one society. Now, the paradigmatic, isolating, or alienating methods of retribution seem totally self-defeating – for one cannot restore a relation of equality between the members of society by removing one party in the relationship (the perpetrator) from society altogether, whether by execution, banishment, or imprisonment. Thus, if the intuition is that restoration of equality is required, it will have to be vindicated by practices that do not isolate or remove the perpetrator

56 See, for example, the contemporary retributive theory of A. Brudner, in A. Brudner *The Unity of The Common Law: Studies in Hegelian Jurisprudence* (Berkeley: University of California Press, 1995) at 232–4.

57 'Punishment is supposed to possess the value of awakening the *feeling of guilt* in the guilty persons; one seeks in it the actual *instrumentum* of that psychical reaction called 'bad conscience,' 'sting of conscience.' Thus one misunderstands psychology and the reality of conscience even as they apply today: how much more as they applied during the greater part of man's history, his prehistory!... Generally speaking, punishment makes men hard and cold; it concentrates; it sharpens the feeling of alienation; it strengthens the power of resistance.' Nietzche, supra note 54 at 14.

from society, but rather, *reintegrate* him as a citizen in a relation of social equality with all citizens in the society, including the victim.[58]

This fundamental difficulty within retributive theory, as applied to a society of equal citizens, has led in two directions. One is the tendency for retributive theory to collapse into instrumental, social welfare justifications for punishment.[59] The other is for retributive theory to sublimate the human social justice sought by retribution to poetic or divine justice. In the trans-social or metaphysical moral universe of poetic justice, the punished perpetrator remains a 'member' isolated from society, but still in relationship with the victim and other members of his own society because all are members of this *trans-social* moral universe.[60]

While the former move gives up on the idea of justice as *Right*, the latter distorts the precise moral intuition at issue, namely, that *society* needs to concern itself with responding to the offence. However, if the justice at issue is poetic or divine and not social, why then cannot it be left to the poets or to God: 'Vengeance is mine, saith the Lord.' The few retributive theorists who make neither move, Brudner, for instance, admit to difficulty in explaining the actual practice of punishment in terms of the theory.[61] When they attempt to do so, they fall back on the notion that the criminal, by making, or purporting to make, his act into a law, justifies the exercise of the same social violence against him. But this only goes so far as to explain why the actual practice of punishment can be justified as consistent with the criminal's rights. It does not tell us how this *actual practice* is necessary to restore a *social* equilibrium, that is, how it is necessary to doing justice, as opposed to merely being justified (i.e., legitimate, where needed to serve other ends).[62]

58 See Braithwaite's discussion of reintegrative shaming, supra note 42.

59 Thus, for instance, the criminology of James Q. Wilson, while presenting itself initially as a moral theory of punishment, ends up emphasizing instrumental grounds for 'retribution'; see R. Howse, 'Review of James Q. Wilson & R.J. Hernnstein, *Crime and Human Nature*' (1987) 45 U. Toronto Fac. L. Rev. at 193. See also, on the covert instrumentalism of much retributive theory, D. Markel, 'South Africa and the Justice of Clemency' (Paper presented to Law and Philosophy Society, Harvard Law School, October, 1997).

60 Thus, among the most theoretically powerful defences of capital punishment in our times, that of Walter Berns ultimately transforms itself into an argument about poetic and divine justice, relying heavily on Shakespeare. W. Berns, *For Capital Punishment: Crime and the Morality of the Death Penalty* (New York: Basic Books, 1979) at 164–6.

61 See Brudner, supra note 56.

62 This is often blurred because the expression that the criminal wills his punishment can be read as suggesting that the criminals' own will *requires* punishment. But what he is supposed to will is, in fact, not actual punishment but the logical possibility of being punished consistent with moral personality; he wills as a law the permissibility of treating another human being this way.

Restorative justice theory seeks to save justice as *Right*, while avoiding these difficulties. Especially, it preserves the intrinsically *social* dimension in the moral intuition that 'something must be done' in response to the offence. The equality or equilibrium that must be restored is an equality or equilibrium in relationships *within* society, with one of the parties in the relationship being the perpetrator. This leads to the *precise* contrast between restorative and retributive theory in terms of the social practices they justify and generate – not the crude contrast between punishment and everything else, but rather between paradigmatically isolating measures and paradigmatically reintegrative ones. What restorative justice theory asserts is not the preferability of the latter from some external point of view, such as that of social welfare or social self-protection. Rather, it asserts the logical necessity of reintegrative measures. This necessity derives from the understanding of society as comprised ideally of equal individual citizens in relationship. The restoration of social equality after the offence is thus related to the restoration of equality in the relationship between the perpetrator of the offence and other members of society, including the victim.

D. THEORY IN PRACTICE: RESTORATIVE JUSTICE FOR SOUTH AFRICA?

Given this understanding of restorative justice we are now in a position to explore how this model of justice is at work in South Africa. After decades of violent human rights abuses, oppression, and essentially, civil war, South Africa needs transformation and reconciliation;[63] it needs restoration. In contrast to the alternative 'retributive' model, restorative justice does not seek to avenge the wrongs of the past. Restorative justice looks backward in order to look forward and build a different future.[64] It is thus inherently oriented towards transformation. The establishment of the TRC reflects the commitment to create a new society mindful of the lessons of the past. As such, it is best served by a theory of justice that is not purely retrospective or concerned with the re-establishment of the *status quo ante*.

63 Reconciliation in this context is not some idyllic notion of forgive and forget. Rather, what is sought in terms of reconciliation (as described in the interim Constitution) is peaceful co-existence. This may be more difficult than it sounds. Reconciliation requires the very opposite from forgetting; it demands remembering so that each citizen can know the history of the abuses of the past and commit to live together in a different way. This notion of reconciliation seems to offer content to the idea of restoration in South Africa.

64 See in the previous section the discussion of why restorative justice does not require simply the return to the *status quo ante*.

For restorative justice, community is both subject and object; restorative justice is realized in community and, at the same time, is transformative of that very community. Under this model, justice can only be achieved when all those with a stake in the situation come together to collectively resolve the problem. This dimension of restorative justice has many advantages for a transitional situation like that in South Africa. First, much of the abuse in South Africa was perpetrated, supported, and maintained in a systematic manner implicating most, if not all, of the population in some way. Thus, in order for any real transformation to occur, the process must include not just the individuals who were perpetrators and victims in the conventional sense, but those in their communities who were supporters and silent witnesses and those painfully affected by the incident.[65] The involvement of the community is also important in the transitional process, as the transformation by definition involves the creation or rebuilding of community, that is, the restoration of an inherently social equilibrium. Restorative justice involves different communities in resolution and requires them to assist in building the bridge to the future. Having been a part of the process, these communities have a stake in its successful outcome.[66]

The final reason for the importance of community involvement is the possibility that communities can learn and reconstitute themselves through commitment to the justice process itself. As discussed in Part I, one of the main arguments for the necessity of criminal trials to deal with past human rights abuses is that conducting trials creates respect for the rule of law, which is necessary for developing a law-abiding society. However, it is difficult to see how these trials would (or how they indeed in practice) guarantee respect for the rule of law. Under apartheid, there was no lack of trials, no absence of a legal order. While it is clear that this order was not in line with natural law principles, the fact remains that it was a legal order, and it did rule the country. The apartheid government held trials and inquests, struck commissions, and imprisoned those who did not follow the law.[67] It is difficult to understand how more trials now would suddenly imbue the society with respect for the rule of law. This can only happen, it would seem, after the transition has taken place, and a rule of law has been established. Only then can the courts uphold this rule; they cannot be its source. To effectively establish this new law

65 It is clear how this contrasts with the model of retributive justice at work in criminal trials, which permits only isolated individual perpetrators to be implicated in the process of reckoning with the past.

66 See the evidence from restorative justice programs that there is a much higher rate of performance of reparations than orders given by the courts.

67 Dyzenhaus, supra note 11.

respecting society, the people must be part of the process that created it.[68] Restorative justice facilitates this involvement by bringing communities into the process. Thus, the rule of law will be established and respected by the very people who will live under it. It seems clear that for the existing institutions to be mechanisms of justice they too must be transformed through restorative justice.

Restorative justice is not simply a theory, a lens through which to understand the process of transition. It responds to many of the practical exigencies of the South African situation. For many reasons, as alluded to earlier in this paper, retributive justice (in the form of criminal trials) is not a viable option for South Africa.[69] A primary consideration has to do with the nature of the crimes committed in the past. As is the case in most transitional contexts, the abuses of the past that demand attention are political in nature. By definition, political crimes are not the result of purely individual action. They are rooted in some collective conviction about the way that the country should be run. The criminal system (and the retributive model of justice more generally) understands and deals with crime as a purely individual-based phenomenon. Consider, for example, the complexity and difficulty with which the idea of 'conspiracy' is deployed in criminal law or the applicability of the criminal model to the corporation. The nature of the crimes in South Africa does not fit this individualist model. This was vividly displayed in the recent trial of former South African minister of Defense, General Magnus Malan. Malan was tried criminally for several murders committed during apartheid. Despite overwhelming evidence that he was involved in these deaths, Malan was found not guilty on all counts. The problem was not a tainted jury or incompetent prosecutor but rather the criminal justice process itself. The system could not accommodate the political nature of Malan's crimes. Instead, the chain of command and the lack of personal involvement in the act itself or with those who did the killing served to create a reasonable doubt.

68 See generally J. Habermas, *Between Facts and Norms*, trans. W. Rehg (Cambridge: MIT Press, 1995).

69 Note here that the similarity between this suggestion and the second responds to the question of justice and the TRC – namely that the TRC achieved justice to the extent possible. We think that this response is connected to the restorative justice option in that it opens the question, What does justice mean in a transitional context? However, these responses differ in that the second response concedes retributive justice (criminal trials, etc.) to be a first best option, and it is only in its absence that the TRC is justified as the next best thing. The restorative justice option maintains that even if it were possible to have criminal trials they would not be appropriate to the transitional situation. The argument here is that restorative is a first best option for transitional contexts, not because of the difficulties in mounting criminal trials.

Given the incentive amnesty provides for disclosure the TRC *could* address these concerns and actually prompt the discovery or confession of the 'right' people better than the criminal justice system. In the criminal system, very often the evidence will point to the individual who 'pulled the trigger.' However, in the case of political crimes, these parties are often low-level actors, in a way 'less guilty' than those who chose the target, arranged, and ordered the crime.[70] In the criminal justice system, those higher up in the process actually enjoy protection from the layers of the regime they controlled. Under the approach of the TRC, these layers become liabilities. Those lower down are able to come forward and expose the chain of command, ultimately facilitating recognition of accountability of those at the top. It is interesting to note as well that in the case of South Africa – as is probably typical – it is those at the top who believe themselves to be untouchable and who thus do not apply for amnesty. Therefore, the TRC approach may actually result in the best of all possible worlds. Those at the lower levels and those higher up who admit guilt and come before society to apply for amnesty will be dealt with in public but allowed to reintegrate. On the other hand, those who do not admit their acts and fail to come before society to request amnesty will be offered up by those who carried out their orders and could be called to account based on this evidence.[71]

Another obvious problem with criminal trials as they pertain to political crimes is the cloak of secrecy that often exists around the crimes. In most cases, there will be much suspicion but little evidence. People involved who are themselves perpetrators will not testify for fear of being exposed (or suffering worse fates), and any material evidence that might have existed is usually destroyed in anticipation of the new regime. This is true even in cases where the transition is peaceful, or perhaps particularly in these cases, as there is ample warning time to hide the abuses and atrocities of the past.[72] Given this lack of evidence, it is likely that none but the most notorious of cases will be strong enough to lay charges or mount a trial.[73]

70 See Arendt, supra note 1.

71 We are grateful to John Braithwaite for helping to make this point clear.

72 For example, in South Africa, sales of paper shredders are rumoured to have raised 200 per cent in the six months preceding the election of the new government. There is also anecdotal evidence of people removing boxes full of documents from government offices during the same period.

73 Interestingly, the constitutional challenge to the amnesty provision in South Africa came from prominent victims' families (the Biko, Mxenge, and Robeiro families). The ruling of the court highlighted the fact that these families stand in a privileged position as compared to most of the victims of apartheid. The court pointed to the

Even if these obstacles to discovery and prosecution of perpetrators could be overcome, the criminal justice option would still fail to serve the needs of the transition. The response of the criminal justice system is punishment. The serious nature of the crimes committed under the apartheid regime would demand punishment by imprisonment, banishment, or the death penalty. Let us avoid the additional problems generated by the latter of these punishments by taking the less controversial option (imprisonment) for consideration.[74] How would imprisonment of perpetrators serve the interests of the South African transition? The instrumentalist retributivists make three claims in support of punishment: protection, deterrence, and rehabilitation. It is worth examining briefly these claims in the South African context in order to assess the instrumental value of punishment here.

1. Protection

There may well be cases where a country in transition is under constant threat from powerful members of the old regime. This, however, is not the case in South Africa. The transfer of power in South Africa was negotiated and, thus, does not remain threatened by the continued participation of former actors in society. Further, the crimes were committed in the context of the political system of the past. Thus, it is unlikely, given the dismantling of this system, that these perpetrators would commit similar crimes. In other words, society does not need protection from these individuals. Even if this were true, however, it seems unlikely that criminal trials would serve to protect. Since avoiding apprehension and prosecution becomes a key objective for powerful enemies of the transition, the result may in fact be increased violence and ruthlessness.

2. Deterrence

There is a specific and a general argument to be made regarding the deterrence value of imprisonment. The specific argument is concerned with whether the particular individual will commit this act again. As argued above, given the political nature of the crime and the end to the

Amnesty provision in the Constitution and held that it suspended the rights of these individuals to seek redress through the courts so that many others would have the chance to know what happened to their loved ones. Implicit in the courts ruling was the understanding that justice as meted out by the criminal and civil systems would be accessible to very few and would leave most victims of apartheid without any knowledge of the past.

74 This would be the only option available in South Africa, since one of the first decisions of the new constitutional court was the unconstitutionality of the death penalty.

political order under which it was committed, it is unlikely these crimes will recur. However, beyond the fact that such deterrence is unnecessary, there is another reason that specific deterrence does not serve as a justification of punishment in the context of South Africa. Again, it has to do with the political nature of the crimes. These crimes are motivated by ideologies, and there is evidence to suggest that imprisonment actually strengthens ideological convictions, encouraging, rather than deterring, further acts in expression of such commitments.

General deterrence is perhaps the strongest argument in favour of imprisonment. In terms of the South African society itself, general deterrence is less persuasive because the apartheid system has been dismantled, and it is not likely that other individuals in society are going to commit these political crimes. General deterrence in a broader context may be served by imprisonment of perpetrators of 'war crimes.' It may set a precedent and send a message out to the international community that those considering such acts will suffer repercussions for their acts. However, it is not clear that imprisonment is the only, or even the best, way to send this message. The very destruction of the apartheid system, public exposure, and being called to account in front of the nation and the world may serve as more effective deterrents.

3. Rehabilitation

The response to this value claim for imprisonment in South Africa is closely linked to the argument about the effectiveness of specific deterrence. As suggested above, it is important in evaluating these claims to bear in mind the specific political nature of the crimes under consideration. Just as prison is unlikely to dissuade an individual from acting on ideological commitments, it is unlikely to rehabilitate him from these commitments. It seems counterintuitive to suggest that the way to change ideological commitments created under the former apartheid regime (in support of or opposition to) is to remove the individual from the new society and its process of transforming ideologies. Political ideology is an inherently collective phenomenon and would, thus, seem to demand a collective response for change to occur.

The final pragmatic point in favour of the TRC as a restorative approach for South Africa is that the transition itself (at least in the manner and time it took place) required amnesty and thus precluded the possibility of criminal trials. Had criminal trials been an open possibility, we think there is little doubt that the apartheid government would have refused to turn over power, and the country would have been plunged into civil war. The fact that even those closest to the regime were shocked by the transition and had not foreseen an end to apartheid in the near

future makes it questionable whether the transition would have occurred (at least any time soon) through means other than peaceful negotiation. It seems clear, then, given the South African realities, that the raging debate over amnesty is misplaced. The real question, then, is how amnesty can serve as an instrument of restorative justice.

IV *Conclusion: TRC as a restorative process*

As we suggested above, there is no single institutional model for restorative justice. Thus, it is not possible to test the TRC process against some abstract procedural ideal of restorative justice. Each restorative justice process may be fundamentally different and still be entirely restorative in nature. For that matter, one might have two restorative approaches to political transformation that are considerably different in form but still informed and guided by the same restorative commitments. The reason for this, as discussed in an earlier section, is that restorative justice pays attention to, and is informed by, context. It allows for different answers to the questions: Restore whom? and Restore what? Thus, there is room for – indeed it is necessary – to develop different processes depending on context.

Underlying these varied forms, however, is a common commitment, a commitment to restoration over retribution, a commitment to understanding communities as an integral part in the creation and solution of the social phenomenon of crime. Thus, whether the focus is on restoring the victim, the perpetrator, or the community, it is always broader than the individual. Further, these processes have a commitment to be prospective – to look at the implications of offences for the future and to bring together all those who have a stake in the development of that future.

It is clear, then, how the TRC attempts a restorative approach to dealing with South Africa's past. The Commission embeds the granting of amnesty in a process that seeks the truth of the past in order to build a different future. A comprehensive analysis of the ways in which the TRC lives out these restorative commitments is beyond the scope of this paper. However, a brief examination offers some suggestion of how it fulfils these aims:

1. The process of the TRC implicated a wide spectrum of the society. The Commission itself was drawn from many different segments of society. The selection of Commissioners was a public process driven by public nominations, resulting in the appointment of individuals from several different communities and segments of society. The work of the

Commission was public: it was broadcast on television and radio, drawing an even wider audience than would be possible in person. This commitment to transparency took the work of the Commission into the public arena for debate and discussion.

2. The Commission was clearly committed to the restoration of victims. It was by its own identification a victim-centred process. The Commission attempted to listen to the victims and address their needs. The *Report* contains the stories of many victims in their own words and is sensitive to the distinctive perspectives and needs of different kinds and classes of victims: women, conscientious objectors, children, and so forth.
3. The Commission and its *Report* are forward looking and focused on restoration of communities. At its core, the Commission has been motivated by the goal of nation building and reconciliation. Its work is done in this spirit and mindful of this goal.
4. The focus of the Commission and its *Report* is not centred solely on individual responsibility (as it is in the criminal system) but rather, places responsibility in social and institutional context. An entire chapter of the *Report* is dedicated to understanding the motives and perspectives of perpetrators; the subtle and refined analyses in this chapter stand in stark contrast to what has ever been revealed about such persons in criminal prosecutions that may disclose little more than in Hannah Arendt's famous phrase, 'the banality of evil.' These insights may be of use not only in South Africa but throughout the world in identifying the specific social, psychological, and political pathologies that lead to gross violations of human rights.[75]
5. Through the amnesty process, perpetrators have been called to account for their actions. They are freed, however, to re-enter the community and rebuild relationships towards a better future. The *Report* recommends that '[s]trategies be devised for reintegrating perpetrators into society. In this regard they may assist in community-based projects involving the communities who were wronged, offering either donations or their skills and time.'[76]

Viewing the Commission through the lens of restorative justice is indeed helpful in fending off those who would condemn its lack of justice. However, this perspective also raises challenges for the way in which the Commission attempts to provide restorative justice. If the TRC is about

75 *Report*, supra note 2 at vol. 5, c. 7, 250–962–3242.

76 *Report*, supra note 2 at vol. 5, c. 8, para. 16. See also vol. 5, c. 9, paras. 33–37 and vol. 5, c. 9, paras. 62ff. The last section contains concrete examples of how reintegration into the community works as part of reconciliation.

restorative justice, then this model of justice must also serve as an evaluative tool. Thus, we want to highlight one of the challenges a restorative justice model, taken seriously, might pose to the TRC.[77]

The problem is the lack of connection between the perpetrators and the victim in the TRC. This separation causes problems for addressing the restorative needs of both. Structurally, the victim and the perpetrator are dealt with separately by the TRC. The HRV Committee deals with the victims and the Amnesty Committee with the perpetrators. While there is some provision made for victims to face the perpetrators in an amnesty hearing, there is no room for dialogue between the two and their respective communities.[78] In fact, the question of reparations is taken out of this process altogether and has no relationship to amnesty. The rationale behind this move is that it is the state that is granting amnesty (and thereby taking the victim's right to choose to seek redress through the courts[79]); thus it is the state's responsibility to repay the victim. What this precludes in the process, however, is any question or possibility of the offender making reparation to the victim.

77 Another example of a challenge, which is perhaps less specific to the South African TRC than to restorative justice processes in general, is the need for an 'axe' (or whip) to motivate people to participate in the process. There is a tension about whether using punishment as this 'axe' in fact goes outside a restorative justice approach to a retributive one or if it can be accommodated within a restorative justice theory. We want to suggest that it is in fact entirely consistent with a restorative justice theory, such as the one we are proposing, to admit the necessity of some 'axe' in order to motivate people to participate. Another way to conceive of this problem is to ask the question, What if a person refuses to participate or for some reason cannot participate in a processes of restorative justice? In short, the concern is if restorative justice replaces retributive justice entirely, then what reason would there be for people to participate in the process if the alternative is freedom? Quite simply, our response is that an 'axe' must exist. However, this is not inconsistent with a conception of justice as restorative because the 'axe' is outside the realm of justice. The purpose of the 'axe' (which might involve types of measures we would class as non-reintegrative) is not justice but social protection. In order to protect relationships from further disruption and to protect the restorative process itself, it is necessary to remove those who, owing to their unwillingness to participate in the restorative process, pose a threat. However, the claim that what one is doing here is outside the scope of justice does not mean that anything goes, that justice (restorative justice) holds no sway here, for the overarching *goal* in all of these activities is still justice. Thus, whatever measures are used as an 'axe' cannot lose sight of this goal. In other words, they cannot preclude justice. Therefore, even measures taken in the name of social protection must leave the door open to the restorative process – or even work towards bringing perpetrators into the restorative process.

78 It is important to note that the failure to make room for dialogue in the amnesty setting is contrasted in other areas of the Commission, in particular some of the special event hearings held by the HRV Committee, where dialogue and the meeting of different communities was central.

79 Amnesty includes immunity from both criminal prosecution and civil actions.

This has implications on all levels – for the victim, the perpetrator, and the community. Removing reparation from the amnesty process seriously limits the connection between amnesty and restoring the victim. It restricts this connection solely to that restoration achieved through hearing and knowing the truth of the past. Practically, the victim sees the offender go free and still receives no direct reparations until the government considers proposals for reparation at some later date.[80] As far as the perpetrator is concerned, amnesty without any way to make amends for one's actions could result in what Braithwaite refers to as a 'shaming machine,' serving to stigmatize, rather than reintegrate, perpetrators. Without at least the possibility of reparations, perpetrators are left with no way to re-enter the community to try to 'make things right.'[81] Further, this separation ignores the large role that reparations can play in rehabilitation. By focusing on reparations and rehabilitation only with regard to victims, the Commission forgets the importance of reintegrating perpetrators in order to heal or reconcile society. Ironically, while leaving a role for perpetrators out of its overall reparation and rehabilitation policy, the Commission acknowledges the importance of perpetrator reparations, either through donations or contributions of skill and time, at the community level.[82]

In both its strengths and limitations, the South African TRC stands as a compelling example of restorative justice as a model for transitional contexts. Viewed through this lens the TRC does not lack justice – quite the contrary: the TRC serves as a powerful example of what justice means in a transitional context and offers lessons on how it might better be achieved.

80 It was contemplated to provide urgent interim reparations to victims with immediate and pressing needs; however as is acknowledged in The *Report*, provision of such Reparations was delayed and did not begin to occur until July 1998, long after the bulk of amnesty applications had been entertained or disposed of. See *Report*, supra note 2 at vol. 5, c. 5, paras. 58–60.

81 For example, the case of Brian Victor Mitchell who was granted amnesty with respect to the Trust Feeds Massacre – *Amnesty Application No. 2586/96.*

82 See supra note 74 and accompanying text.