Memory and Politics:
Three Theories of Justice in Regime Transitions
Jonathan Allen
Department of Political Science
University of Illinois at Urbana-Champaign
Jonallen@uiuc.edu

1. Memory and Injustice: a New Moral Sensibility

In his essay, “The Contest of the Faculties”, published in 1798, Immanuel Kant presents an intriguing reflection on the French Revolution. The moral significance of the revolution, he suggests, is to be found, not in any event directly connected to it, but in the reaction of “disinterested sympathy” towards the revolutionary cause on the part of onlookers. Because this response was potentially hazardous and had nothing to do with self-interest, Kant sees it as the result of a “moral disposition within the human race”, and thus as a moral phenomenon that can never be forgotten. Presumably for Kant, this serves as grounds for hope of moral progress in the form of movement towards a global “federal union” of independent republics, a union that would secure universal peace.

Though I am no latter-day Kant, my central aim in this paper is to identify a novel moral phenomenon that is surely as significant, though considerably less exhilarating, than the circumstances noted by Kant in 1798. I am referring here to the remarkable rise of a series of practices and institutions operating at both the national and global level, designed to respond to war crimes, atrocities, human rights abuses, and grave injustices committed by states or political movements against minorities and individuals. Arguably, this is a development that takes its inception in the Nuremberg Trials and the passage of the United Nations Genocide Convention in 1948. The Eichmann Trial of 1961 also played an important role in alerting people to the idea that past human rights abuses require a response in the present; indeed, most of the manifestations of memory politics that concern me here have occurred since this trial. In the last three decades, there has been an explosion of demands for official apologies for past injustices, calls for compensation or restitution of stolen land or property, the appearance of more than twenty truth commissions, the creation of the tribunals for the former Yugoslavia and for Rwanda, and various other attempts to scrutinize past injustices, including “lustration”, talk of “universal jurisdiction”, etc. Michael Ignatieff refers to this, rather optimistically, as a global human rights revolution.

Others talk of an “Age of Apology”, or a neo-Enlightenment international morality of “restitution”. However one labels these changes, they have certainly introduced a novel attitude into politics.

Let me emphasize that I do not assume that this change, however we understand it, is either permanent or unambiguously progressive. On the contrary, it is fragile, reversible, vulnerable to manipulation, and ambiguous in its significance. The pressures unleashed by the 9/11 attacks and by America’s chosen response to them – “the War Against Terror” – threaten a full-scale reversion to America’s Cold War habits of overlooking human rights abuses as long as they are committed by friends. The “humanitarian intervention” in Iraq (one of the many belated second-string justifications for the war) also indicates that the language of human rights may easily serve as a cover for the exercise of power. More seriously still, threats of global climate change, struggles over scarce resources, depletion of fossil fuels, etc., all have the potential to reverse the current concern over human rights and redressing past wrongs.
Still, for the time being, the new moral sensibility remains important. The mere fact that the Bush administration calculated that they could gain political capital from an appeal to humanitarian considerations and from creating a tribunal to try Saddam Hussein suggests that the new politics of memory is an ideological force to be reckoned with. If this is so, then it is important to take note of this development and to place some of the prevailing attempts to make sense of it under critical scrutiny.

The altered moral sensibility I am concerned with here arises from a number of different political struggles – the demands of indigenous or decolonized peoples for official apologies and restitution, African-American calls for reparations for slavery, demands arising out of the twentieth century’s major wars, or from ethnic conflicts and regime transitions. The new memory politics also manifests itself on at least three different levels: the symbolic level, the level of criminal justice, and the redistributive or compensatory level. In this paper, I am going to confine my attention to the implications of the new memory politics at the level of criminal justice, as this emerges in the aftermath of regime transitions. I will also address some aspects of the symbolic dimension of memory politics, as I take this to be the moral core of the new sensibility.

In the context of regime transitions, the central challenge confronting new democracies concerns the dilemma of how to deal with injustices and atrocities committed by authoritarian or totalitarian predecessors or by agents of a liberation struggle, a dilemma usually faced in the context of societal division and alienation from state institutions, especially the institutions of justice. There are in principle at least seven different options open to new democracies: amnesia or inaction; pardons; full amnesty; prosecution and trials (either domestic or international); lustration (disqualifying collaborators from public office); publicity (the opening of the Stasi files in Germany is the key example here); conditional amnesty or truth commissions. The truth commission option has been identified by many as an especially appropriate response to the problems posed by political transitions, and I shall concentrate on this here, though this by no means precludes reflection on prosecution or full amnesty. I also propose to devote most of my attention to claims made about the South African Truth and Reconciliation Commission (TRC), as this has been identified as a model of sorts for subsequent attempts to deal with transitions.

There is a great deal that can be said about the politics of truth commissions and the practical challenges that they face. My focus here is on the claim that truth commissions provide a model of “transitional justice”, and in particular, on two prominent attempts to articulate the moral significance of truth commissions – the contextualist, or “transitional justice” argument, and the “restorative justice” model. I hope also to defend an alternative way of thinking about the TRC as a remedial attempt to achieve a “principled compromise” between the values of justice and “reconciliation” or social unity, or in more practical terms, as a complement to prosecution rather than an alternative to it.

2. Challenging and Defending Conditional Amnesty: Moral Compromise or Transitional Justice?

Truth commissions have emerged over the last two and a half decades in the wake of regime transitions from totalitarian and authoritarian rule. Advocates of these institutions have typically viewed them, on the one hand, as an alternative to the politically unfeasible option of full prosecution of human rights offenses. On the other hand, they have been reluctant to accept calls for a blanket amnesty for offenders, regarding such a course of

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action as degrading to victims and their families or as threatening to the ideal of achieving a more just society; here, what I described above as the “new moral sensibility” has made its presence felt. Truth commissions have thus emerged gradually, in the contested space between full prosecution and amnesty. Although their mandates and institutional design have varied considerably, they have all shared the goal of uncovering and making public information about past abuses and they have all been seen as a response to a situation in which either amnesty has already been granted to offenders or it is deemed impossible to prosecute offenders for some other reason.

The South African Truth and Reconciliation Commission drew deliberately on the experience of past truth commissions, but also differed from them in important ways. For present purposes, the key difference was that an explicit and deliberate link was made between the proceedings of the TRC and the granting of amnesty. In order to obtain amnesty, an offender had to apply to the TRC, participate in its hearings, and meet with its requirements, including the requirement of full disclosure. It is this deliberate connection between amnesty and the TRC that must be defended if the moral justifiability of the institution is to be established. If, as Robert Rotherberg claims, the “South African commission has become the model for all future commissions”, this is an especially important task (Rotherberg 2000: 6).

Although the TRC had to face many different criticisms in the course of its brief life-span, the fundamental objection is surely that it sacrificed the right of victims and survivors to justice, understood in the sense of *punitive* justice. This is the moral core of the legal case against the TRC brought jointly by the Azanian People’s Organisation and the Biko, Mxenge, and Ribeiro families, a challenge that was, however, rejected by the South African Constitutional Court, on the grounds that the Interim Constitution had made a choice for reconciliation and democratic consolidation over prosecution and punishment. The Court went on to argue that the terms of the Interim Constitution required the removal of civil as well as criminal liability, effectively withdrawing all normal forms of legal redress from victims. Although Archbishop Desmond Tutu and others defended this move by appealing to an ideal of *ubuntu*, or “humaneness”, this line of argument clearly did not persuade all of the critics of the TRC that they had not been required to relinquish rightful claims of justice for a goal whose legitimacy was not obvious to them. For example, Churchill Mxenge, brother of assassinated activist, Griffiths Mxenge, objected, “…Unless justice is done i t’s difficult for any person to think of forgiving” (Rosenberg 1996: 88). Others, at various stages of the hearings, objected to the TRC’s privileging of “reconciliation” over justice in similar terms.

It seems to me that whether we regard the TRC in particular, and the truth commission model in general, as a morally appropriate response to the injustices endured by victims and survivors depends crucially (although not exclusively) on the response we give to these objections. Although I believe that the practice of granting conditional amnesty engaged in by the TRC may indeed be morally defensible, the way in which this is justified has decisive implications for the views we adopt concerning social unity, law, and the standing of individuals in a new democracy.

Defenses of the TRC and the truth commission model against the charge that it unjustifiably sacrifices justice tend to fall into two broad groups. The first cluster of responses concedes that a moral compromise or trade-off of some sort has occurred, but goes on to argue that the particular compromise on which the TRC is founded is morally defensible. My concern here, however, is with the second set of defenses, which denies that the TRC has to be seen as a form of moral compromise at all. Instead, advocates of this view
insist that the idea of the TRC embodies a distinctive and coherent understanding of justice. For some, the TRC promotes “transitional justice” – the justice appropriate to societies undergoing transition. For others, the TRC seeks “restorative justice”, a notion that ought to replace retributivist theories of criminal justice.

The contextualist or “transitional justice” model is most closely associated with Ruti Teitel, who has offered a series of influential defenses of it over the past five years. The central thrust of Teitel’s argument is the claim that the context of a “shift in political orders” pose a series of distinctive jurisprudential, legal, and moral problems, problems that present institutions of law with tasks radically unlike those that they normally carry out in settled democratic orders. In the highly politicized transitional context, institutions must provide some continuity in legal form, but must also facilitate “normative change”. This means that courts must find ways of overcoming problems of “retroactive justice” (prosecuting people for acts that were not crimes at the time, as a matter of positive law), must decide whether to prosecute the leadership or the people who carried out their orders, and must promote social peace as well as justice. Teitel claims that these imperatives indicate that transitional justice has a different set of priorities from conventional practices of justice. Her point seems to be that these priorities – above all, the need to promote and strengthen democratization – allow greater flexibility to the courts in deciding how to sanction past acts. In particular, punishment need not be exercised to the fullest extent if this is likely to threaten the process of democratization. Other responses, such as official apologies, amnesties, and reconciliatory measures may be appropriate measures of transitional justice, if they are more consistent with the goal of promoting stable democracy. Teitel comments that these practices “…point to a fragmentary but shared vision of justice that is, above all, corrective. What is paramount is the visible pursuit of remedy, of return, of wholeness, of political unity – an impetus incorporating values external to those of ideal theories of justice” (Teitel 2000: 225).

In a more recent statement of her position, Teitel associates distinct measures – such as trials and truth commissions – with historical phases of “transitional justice”, suggesting that political actors from the late 1970’s on deemed the “Postwar transitional justice” of the Nuremberg model inappropriate to their concerns, and opted instead for a series of responses in which “justice became a form of dialogue between victims and their perpetrators” (Teitel 2003: 80). In this second phase of transitional justice, she suggests, the forward-looking aims of reconciliation and forgiveness manifested in the practice of truth commissions became central, to the extent that they displaced legal notions of guilt and responsibility. Teitel sees truth commissions as a valuable attempt to incorporate the concern with human rights evident in the postwar phase within a broader, communal framework focused on rebuilding political identity based on local understandings of legitimacy. She also hints that truth commissions were somehow linked to critical responses to globalization, though she does not explain this assertion. However, she is critical of the second phase for emphasizing the goal of peace more than that of democracy, and suggests that we have now entered a new phase of transitional justice in which the expansion of the law of war through the ICC and forms of universal jurisdiction provides the basis for a global rule of law, though she worries that this may “normalize” transitional justice in the service of the war against terror.

I am frankly puzzled by Teitel’s argument(s). In particular, in her most recent statements, it is unclear whether she is simply engaged in describing a historical sequence of imperfect attempts to respond to past injustices or whether she thinks that the different phases of transitional justice have normative force within their historical context (meaning that it would simply be a mistake, in phase two, to promote the forms of prosecution

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pursued in phase one). But this puzzle pervades all of Teitel’s work. She seems to suppose that the distinctive problems of the transitional context necessitate practices and therefore generate a distinctive understanding of justice – “transitional justice”. This view is open to two different kinds of challenge.

First, it is possible to challenge Teitel’s sharp distinction between periods of “transitional” and “normal” justice. In a recent article, Eric Posner and Adrian Vermeule concede that there are differences of degree between regime transitions and intrasystem transitions, but argue that some large-scale intrasystem transitions, such as constitutional amendments, or the passage of controversial landmark legislation such as Brown v. Board of Education involve challenges just as significant as those faced in regime transitions. Posner and Vermeule suggest that the need to balance values of justice, stability, democracy, etc., is a pervasive feature of “normal” systems of justice too. While their main aim in making this argument is to answer criticisms that “transitional justice” practices overburden judicial systems by confronting them with insoluble moral and practical dilemmas, the implication of the argument is that the contrast between a transitional and a normal condition is overdrawn. While the circumstances of regime transition may make it difficult to pursue punitive justice, it is an exaggeration to think that this simply cannot be secured, or that it is a misreading of the situation to call for prosecutions. While the circumstances of transition may be distinctive in some respects, they do not necessarily render calls for punitive justice mistaken or misplaced.

This brings me to the second challenge that can be raised against Teitel’s conception of “transitional justice”. The real issue, I think, is not the dubious claim that the circumstances of transition are unique and have nothing in common with those of established democracies. Rather, defenders of this view of the TRC must demonstrate that the content of transitional justice does indeed constitute a complete, distinctive, and coherent conception of justice. However, although I think there is a great deal to be learned from an examination of the ways in which truth commissions do respect justice, I do not think that the claim that transitional justice forms a unique and complete conception of justice can be sustained.

The South African academic, André du Toit, offers a particularly stimulating attempt to establish the claim that transitional justice is a free-standing and coherent conception of justice, based on distinctive moral principles and responding to distinctive “moral needs” (du Toit 2000: 124; 138). In his view, transitional justice must be understood as a dual commitment to “truth as acknowledgment” and “justice as recognition” (2000: 126-128; 132-139). In circumstances of transition from authoritarian or totalitarian rule, societies typically suffer from a deficit of truth – factual knowledge about past atrocities is lacking, officials resist acknowledging the existence of such events (even when this is a matter of widespread knowledge), and victims seek acknowledgment of their suffering. The crucial point to grasp is that in these circumstances, truth commissions do not simply seek to uncover factual or “forensic” truth, but the acknowledgment of truth, an acknowledgment, which, when it is secured, is experienced by victims as a “restoration of their human and civic dignity” (2000: 133-134).

The conception of justice embodied by truth commissions is closely allied to this sense of truth as acknowledgment; it is “justice as recognition” – that is to say, “the justice involved in the respect for other persons as equal sources of truth and bearers of rights” (2000: 136). More specifically, “transitional justice” amounts to a commitment to the restoration of the human and civic dignity of victims by giving them an opportunity to emerge from a realm of silence and make their experiences audible. In this respect, the TRC

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has of course gone further than other truth commissions, by giving victims a public forum from which to tell their stories of suffering or survival. This is a form of “recognition” that goes beyond abstract (Kantian) moral respect, according to du Toit. Within the TRC, victims are accorded the right to tell their own stories, “framing them from their own perspectives and being recognized as legitimate sources of truth with claims to rights and justice” (2000: 136). In practice, he adds, this “requires a fundamentally different orientation to that of the criminal justice system in the form of victim-centered public hearings – nonadversarial and supportive forums …” (2000: 136). The point of these hearings is not so much to arrive at factual truth, but to allow the “narrative truth” of the victims to be heard and afforded public attention and respect.

I am very much in agreement with du Toit’s proposal that we should see truth commissions as institutions intended to secure a kind of public recognition for victims. Moreover, I think that it is correct to point out that the proceedings of the TRC afford a kind of recognition to victims that is not available through the procedures and institutions of criminal justice. Truth commissions are a remedial response to situations in which respect for justice has been undermined and in which the rule of law and the principle of equality before the law have been eroded. Part of their importance consists in their role as rituals of recognition of the suffering of victims of violence and abuse – hence the emphasis on giving people a chance to tell their stories. This is evidently not a central concern of a court of law, but it is necessitated here by the deliberate attempts on the part of the past regime to exclude these people from moral consideration – to impose a kind of political death on them. Thus, truth commissions serve as public rituals of entry into political life, rituals that reverse the attempt to remove victims from the sphere of moral agency and equal concern by encouraging them to stand up and tell their stories. Courts of law in stable and relatively just societies generally do not have to engage explicitly in this kind of remedial activity.

But although truth commissions provide a form of recognition different from that afforded by courts of law, it would be a great mistake to think of this function as a substitute for, or a fully coherent alternative to, procedures of law and criminal justice. Part of the rationale of truth commissions is that they serve as remedies for situations in which the rule of law has been absent or severely distorted. Their task therefore is not only to focus attention on the stories of victims, but also to signal the restoration of victims to an equal footing with all citizens before the law. The underlying goal is then to vindicate the importance of justice and of the legal recognition previously denied victims.

My concern about the “transitional justice argument” is that it threatens to overlook this connection between truth commissions and legal justice. Defenders of the idea of transitional justice are often quick to express their dissatisfaction with aspects of criminal justice. For example, complaints that courts of law are not “victim-centered” or that the practice of cross-examination is unsatisfactory because it subjects people to added trauma, abound in the literature on truth commissions. No doubt there is considerable truth in these assertions, as well as a need to reform procedures of criminal justice in the light of such criticisms. But I am concerned that this line of argument often signals a lack of appreciation that a system of criminal justice also affords individuals a kind of recognition, and obstructs an understanding of the nature and significance of the recognition provided by law and criminal justice. Thus André du Toit favorably contrasts the “supportive” and “non-adversarial” procedures of truth commissions with the adversarial aspects of trials (cross-examination, for example) and defends the relaxation of rules of evidence and the audi alterem partem rule (2000: 136). Others are quick to applaud the supportive atmosphere of truth commissions from a therapeutic point of view.
However important these considerations are, there seems little awareness of what has been lost when the requirements of law are relaxed. For the rule that the other side must be heard, strict standards of evidence, and practices of cross-examination aimed at detecting inconsistencies in testimony are all part of a form of recognition afforded by law – recognition of all rights-bearers as equal moral agents, able to offer a reliable and rational account of their conduct. Moreover, legal recognition of someone as a rights-bearer amounts to a form of respect, and is conducive to a sense of self-respect on the part of the rights-bearer. It contributes to the sense that he is an active moral agent, able to make claims. But it also means that he is accountable for those claims – hence the emphasis of law on the impartial assessment and adjudication of claims and testimony.

Truth commissions are special institutions aimed at introducing those unjustly excluded from legal recognition into the realm of civic respect. When we see these institutions as remedial or as preparatory, we emphasize the role they may play as rituals of induction into legal recognition. But it is risky to see the relative absence of an adversarial atmosphere from truth commissions as a virtue in its own right – as a complete and superior substitute for the procedures of criminal justice. Victims tell their stories in the TRC in the knowledge that they will not receive all that is due to them, as a matter of justice. This may in fact be damaging to self-respect and the cause of equal respect unless it is made very clear that the purpose of the hearings is to display the injustices of the past and demonstrate the importance of the rule of law and legal recognition. While recognition is indeed the business of truth commissions, it is also the business of law and criminal justice, and the recognition afforded by truth commissions should serve as a complement and auxiliary to legal recognition. Thus, the claim that truth commissions are committed to “truth as acknowledgment” and “justice as recognition” does not demonstrate that they constitute a morally autonomous enterprise.

This leads to a second question that must be answered by defenders of the “transitional justice argument” if their claim that transitional justice constitutes a complete and coherent model of justice is to be sustained. Why is a commitment to punishment not a necessary part of transitional justice? It will not do to reply that transitional justice is concerned with “justice as recognition” whereas criminal justice is concerned with punishment. As we have seen, criminal justice as normally understood also constitutes a form of recognition, so the strong contrast suggested here between justice as recognition and conventional criminal justice cannot be maintained. Moreover, some broadly “retributivist” theories of criminal justice argue that the primary purpose of punishment is expressive, and that its main purpose is to vindicate the innocent. Punishment, in other words, may itself be related to a moral project of recognition – a project that is carried out not only at the symbolic level but also through the imposition of material penalties.

I want to return to this point later. All that I want to emphasize here is that the “transitional justice argument” – even in the very sophisticated form proposed by André du Toit – does not satisfactorily account for the absence of punishment from the TRC. Until advocates of this view of the TRC offer such an account, their claim that truth commissions embody a distinctive and coherent conception of justice must be regarded as incomplete.

It is at this point, however, that the second major defense of truth commissions rises to meet the challenge. Defenders of the “restorative model” of truth commissions do offer a justification of the absence of punishment from the practices and goals of the TRC. According to this view, it is simply a mistake to think that justice requires punishment; rather, the goal of criminal justice is “restoration”. But what does “restorative justice” mean? What implications does this view of justice have for our conception of the goals of the TRC? And

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does it offer an alternative to the view that the TRC is a compromise between justice and reconciliation, or social unity?

3. “Restorative Justice” and Truth Commissions

The idea of restorative justice has emerged through a series of diverse practical initiatives to reform sentencing policies and criminal justice systems in Australia, New Zealand, Canada, and the USA. It has attracted the attention of criminologists, theologians, and legal scholars, and has come to exercise a considerable influence on the thinking of many involved in the TRC. Indeed, the first volume of the Final Report of the TRC devotes a great deal of attention to the idea of restorative justice, and declares that a principal aspect of the TRC’s moral task was to promote “the restorative dimensions of justice.” According to the Final Report, perceptions that the TRC sacrificed justice were mistakenly based on the assumption that justice must be understood as retributive justice and failed to grasp the importance of restorative justice. Restorative justice is then defined as a process aimed at achieving four goals: the redefinition of crime so that it is seen not as an offence against a “faceless state”, but as wrongs or injuries done to other persons; “…the healing and restoration of all concerned – of victims in the first place, but also of offenders, their families, and the larger community”; the encouragement of “victims, offenders and the community to be directly involved in resolving conflict, with the state and legal professionals acting as facilitators”; the promotion of a criminal justice system that “aims at offender accountability, full participation of both the victims and offenders and making good or putting right what is wrong.”

The core commitment of the idea of restorative justice is the idea of a kind of “restoration” made necessary by an act of injury. The restoration that is sought after such a disturbance is understood to mean the restoration of the offender, victim, and community. But what does it mean to “restore” offenders, victims, and community? To what are they to be restored, and how is this to be achieved?

In practice, the distinctive feature of practices and institutions associated with the idea of restorative justice has been an emphasis on victim-offender reconciliation. Advocates of restorative justice place great emphasis on voluntary encounters between victims, offenders, and community representatives. During these meetings, sometimes referred to as “restorative justice conferences”, offenders are forced to confront the implications of their crimes for others, and victims and community members participate, under the guidance of mediators, magistrates, and judges, in arriving at a decision aimed at repairing damaged communal bonds and returning offenders to the community. Advocates of restorative justice see these “reintegrative shaming rituals” as a means of overcoming feelings of humiliation on the part of offenders and feelings of rage and indignation on the part of victims by involving all in a constructive communal initiative.

The ultimate purpose of this initiative is not to punish offenders, but to reintegrate them into the community and to repair damaged communal bonds, in this way “restoring” the dignity of all involved in the process. While some “penalties” may be necessary components of this process of reintegration, they are justified only as steps towards restoration. The process is one of moral transformation, while the goal is the reestablishment of trust and community.

It should be easy to see why this understanding of justice has found favour with some supporters of the TRC. In the first place, proponents of restorative justice emphasize the morally transforming quality of participation in the intimate settings of restorative justice.
“conferences”. According to John Braithwaite, “victims are punitive interlocutors in traditional Western justice systems because they are denied a voice in the outcomes. When they are given voice in a conference, they tend to go in angry and come out more forgiving” (Braithwaite 2000: 123). Offenders, too, are more likely to experience shame and remorse for their crimes when confronted with those who have suffered as a result of their actions and with those whose opinions carry weight with them. For Braithwaite, “Part of the genius of restorative justice institutions is that they induce expectations that we will all try to put our best self forward” (2000: 125). In similar vein, some have seen the (remarkable) capacity of the TRC to produce transformative encounters between victims and perpetrators as its most ambitious and valuable moral contribution.

In the second place, both theorists of restorative justice and many proponents of the TRC model place great emphasis on the value of community. What distinguishes the idea of restorative justice from earlier utilitarian views of criminal law which emphasized the instrumental goods of deterrence or social protection, or the goal of individual rehabilitation, is its focus on the good of community and communal reintegration. Although advocates of restorative justice are often less than clear about what constitutes the relevant “community” in a given case, or how it should be represented, involvement of community representatives is seen as a vital aspect of the sentencing process and the restoration of communal integrity and trust is considered to be the ultimate goal of the criminal justice process. This notion of communal reintegration or healing seems to provide content to the TRC’s goal of social “reconciliation” and to talk about collective healing and catharsis. Moreover, it is readily assimilable to religious and therapeutic discourses within the TRC that tend to understand reconciliation on a model of intimate personal relationships.

It would not be an exaggeration to say that the “restorative justice model” of the TRC redefines criminal justice as a process of social reconciliation, and therefore denies that a moral trade-off between justice and social unity or reconciliation has occurred. Although this view shares with the “transitional justice argument” an insistence that the TRC embodies a morally distinctive and autonomous enterprise, there is an interesting difference between the two positions. Proponents of the “transitional justice argument” who focus on the role of the TRC in promoting “justice as recognition” tend to see the Victims Hearings of the Human Rights Violations Committee as most central to this enterprise and are critical of those aspects of the TRC process that seem to have detracted from this. Proponents of the “restorative justice model”, such as Jennifer Llewellyn and Robert Howse, on the other hand, deplore the structural division between victims and perpetrators – that is to say, between the Human Rights Violations Committee and the Amnesty Committee – and the absence of an opportunity for dialogue between victims and offenders and their respective communities. Moreover, the fact that reparations decisions are taken by yet another committee is seen as a further source of weakness. Llewellyn and Howse worry that this division of functions results in limiting the connection between amnesty and the restoration of the victim, and shames perpetrators without devising strategies for reintegrating them into the community. Their ideal TRC, it seems, would consist of a large “restorative justice conference”, in which the functions separated in the real TRC would be united.

There are three difficulties with this account of the moral significance of the TRC. The first is suggested by the concern to unite the functions of providing victims with an opportunity to speak and deciding on reintegrative “penalties” for offenders, and by so doing, provide an object-lesson that justice is not punitive. Theorists of restorative justice generally emphasize the voluntary character of processes of restorative justice. Offenders and victims must choose to participate in the process if it is to secure restoration. But why
should offenders make this choice, unless they face the threat of some form of punishment? Perhaps the hope is that their moral sensibilities can be aroused without resorting to threats. This may indeed be the case where a crime has been committed in a tight-knit community by a member of the community. In such a case, the offender might want to reestablish standing in the community, and might be genuinely affected by the views expressed by community representatives.

This, however, is where talk about “reconciliation” in the context of the TRC can be deeply misleading. While some amnesty applicants were concerned to be accepted into a community to which they had once belonged but from which their actions had estranged them, many were not. In most cases of human rights violations perpetrated by whites against blacks, or by blacks against whites, it makes little sense to say that there was a breach of trust with a preexisting community or that offenders came forward in order to reestablish standing with the community. Nor is it clear that what Braithwaite calls “reintegrative shaming” can function in this context, because the communities that the offender is affiliated with are quite likely to see nothing shameful about the offense.  

The more general conclusion to draw from this is that restorative justice cannot offer an exhaustive normative model of truth commissions – or indeed of criminal justice. Perpetrators typically came forward, not out of an uncoerced choice, but because of the threat of prosecution through the regular criminal justice system. This gives weight to the view I argued for earlier – viz., that the proceedings of the TRC should be seen not as a substitute for a system of punitive justice (including trials and prosecutions), but as a complement to it.

The second problem with the “restorative justice model” of the TRC is related to the issue of voluntary participation. I think that it can be agreed that restorative justice processes function best where there is a community to which the offender wishes to be restored. In such cases, the idea of reconciliation modelled on intimate personal relationships subscribed to by theorists of restorative justice seems appropriate (although I shall argue that we may still worry about the extent to which it may license community control over recalcitrant individuals). In the case of the TRC, however, the goal of reconciliation is intended for an entire society – for an extremely divided society, moreover. As I have already noted, this suggests that the kind of incentive for reconciliation that exists when offenders are anxious to reestablish ties to a community, is not a resource that can be relied upon in the context of truth commissions (although it may be present in some cases).

But a similar point may be made about the process and goal of reconciliation. While experiences of moral “transformation” and reconciliation may result in the intimate settings of restorative justice conferences, it is surely less reasonable to direct a public, society-wide institution such as the TRC towards securing “thick” reconciliation and communal solidarity. This is not to deny that the TRC hearings have often produced remarkable – possibly transforming – confrontations between offenders and victims. It is simply to insist that this cannot be seen as the chief moral purpose of truth commissions. Restorative justice processes may sometimes secure moral transformation and reconciliation in intimate settings for individuals and communities. They are much less likely to do so when they are transposed to public settings and aimed not only at individuals and clearly defined communities, but at whole societies.

The picture of restorative justice as the achievement of “thick” relationships of communal solidarity, moreover, seems not only inappropriate for complex or divided societies, but also incomplete as an analysis of justice. Richard Rorty has recently argued that the concept of justice is simply the same as the idea of a “larger loyalty” – an expansion of

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the category of who we care about (Rorty 1998: 54-55). There is some truth to this account, but it focuses too much on how members of a dominant group may consider a claim of justice made by someone excluded from that group – as a demand to “join the club”. From the point of view of the excluded or injured, their claim of justice against the dominant group may not express a desire to join the in-group at all. It may simply be a demand for fair treatment and a recognition of basic dignity. Should victims “reconcile with” perpetrators in anything more than the minimal sense that they should recognize them as equal citizens and bearers of rights? They may do so of course, and such reconciliations may be either humbling or troubling (or both). But I do not think that justice requires such a reconciliation. Reconciliation or solidarity is an independent good, when it is a good at all.

Talk of community brings me to the third problem with the “restorative justice model” of the TRC. Advocates of restorative justice sometimes speak as if the promotion of community and communal concord is the chief task of a criminal justice system. Daniel W. van Ness, for example, describes the goal of restorative justice as “the restoration into safe communities of victims and offenders who have resolved their conflicts” (Van Ness, 1993: 258). Other theorists of restorative justice, see the function of law and criminal justice as the peaceful resolution of disputes, or as a form of “conflict resolution” (Cragg 1992: 178). There is nothing intrinsically misleading about such claims. However, when they are presented as a full account of criminal justice, they prove to be deficient. While a criminal justice system may indeed aim to reduce violence and resolve conflicts, this cannot be its sole or even its basic function. For the task of resolving conflict does not distinguish a criminal justice system from processes of civil law. Moreover, processes of conflict resolution do not necessarily have any connection with concerns of justice. One way in which communal conflict is all too often resolved is through the selection of a scapegoat with little attention to the guilt or innocence of the person involved. As I understand it, although it may fail in this regard, criminal justice is aimed at preventing this from happening.

The point is of course not that practices of restorative justice simply encourage the victimization of innocent individuals. Rather, it is that to the extent that theories of restorative justice emphasize the goal of harmony and community restoration to the neglect of other aspects of criminal justice, they prevent us from perceiving the importance of these other functions – especially those of establishing guilt and innocence, and expressing condemnation of the crime in order to “annul” it. This is what disturbs me about the impatience with the “conflictual” or non-restorative aspects of (liberal) criminal justice often evident in the work of restorative justice theorists or in interpretations of the TRC influenced by restorative justice. Such impatience threatens to obscure the importance of stringent procedures designed to establish guilt and innocence as impartially as possible, of making a public statement about the nature of a crime, and of vindicating the innocent in a public forum. In other words, they distract our attention from some of the basic safeguards and goals of liberalism.

This is not to deny that practices of criminal justice need reform with respect to giving greater consideration to victims in the sentencing process, relying less on incarceration as a form of punishment, and integrating offenders into society by encouraging them to take responsibility for their actions – all the usual themes of restorative justice. These valuable criticisms, however, do not amount to a comprehensive theory of criminal justice. They do not demonstrate that we should reject the retributivist idea that punishment is a requirement of criminal justice, but rather that we should moderate it. As far as the TRC is concerned, the account provided by the “restorative model” does not justify treating it as the vanguard of a new understanding of criminal justice completely disconnected from prosecution and
punishment. Nor does it give us reason to think that the failure of the TRC to “reconcile” victims and offenders and secure widespread moral transformation really was a failure.

4. Recognition, Retributivism and Truth Commissions: “Annulling the Crime”

My concern so far has been primarily critical. I have argued, first, that what is due to victims of state-sponsored injustice or political violence is not merely “recognition” and “acknowledgment” – if that is taken to mean purely symbolic recognition. I have argued, second, that the value of justice should not be conflated with that of reconciliation or restoration. The practical point of both theoretical arguments is to insist that truth commissions should not be considered simply as replacements for punitive criminal justice. Rather, truth commissions are somewhat unstable but nevertheless defensible compromises between justice and social unity.

It would be foolish to deny that deeply divided societies need an infusion of trust, or that some form of social reconciliation is morally desirable. The question is: what kind of reconciliation or communal consensus is to be promoted? The answer, I think, is a minimalist consensus about the unacceptability of political cruelty and injustice – a consensus concerning the intolerable. Such a goal retains elements of the values of both justice and reconciliation, without confusing the two. I believe that this is what truth commissions should promote, and they can do so only when they are supportive of the value of criminal justice even in those areas where they fall short of its most stringent requirements. In practice, I think this means that at least some failed amnesty applicants as well as some who never applied for amnesty should be prosecuted or held liable for their actions.

This is perhaps an uncomfortable conclusion. But I think that it follows from a broadly retributivist understanding of the nature of criminal justice which denies that justice can be purely a matter of symbolic recognition or that punishment is not required as a matter of justice. What I want to do now, by way of conclusion, is – very briefly - lay out the basic elements of this positive view of criminal justice which has underlain my more critical observations.

One of the criticisms I made of the theory of restorative justice was that it focused too much on the goal of reconciliation or conflict-resolution. Although theorists of restorative justice often claim that their account of criminal justice is more respectful of the needs of victims than views that portray criminal justice as a matter involving the state, their forward-looking emphasis on communal restoration may actually take the attention away from some of the most pressing needs of victims. Victims may indeed need restitution, as well as a restoration of confidence and a sense of security. But crucially, they need to have their sense of dignity vindicated.

What theories of restorative justice typically omit is an account of the nature of crime as an injury – an assault on the dignity or standing of the victims. Some such account is perhaps implicit in Braithwaite’s emphasis on the need for offenders to be brought to repentance through reintegrative shaming - but it is left largely implicit. Theories of restorative justice rarely focus our attention backwards, on the crime itself. Retributivist theories, on the other hand, whatever their shortcomings in other respects, give explicit attention to the seriousness of crime as an attack on individuals’ dignity.

Retributivist theorists such as Jean Hampton and Jeffrie Murphy build on the insight that a crime is, among other things, an expressive act. What it signals is a claim to superiority

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on the part of the offender – a signal that the perpetrator is of greater worth than the insignificant victim and is not bound by requirements of respect towards the victim. As Murphy notes,

One reason we so deeply resent moral injuries done to us is not simply that they hurt us in some tangible or sensible way; it because such injuries are also messages – symbolic communications. They are ways a wrongdoer has of saying to us, “I count but you do not”, “I can use you for my purposes”, or “I am here up high and you are there down below” (Murphy 1988: 25).

For example, the act of rape sends the message that the victim is nothing more than an object of use for the rapist. The act does not simply involve physical injury and the infliction of pain, but is humiliating or degrading. It may be the intention of the violator to make the victim feel humiliated and demeaned – many of the cases of state-sponsored violence examined by the TRC involved such intentions. But even when such acts are not intended to be demeaning and even when they are not felt to be demeaning, the message that the act conveys to society is one of humiliation. The claim that it makes is a claim that the agent should not be treated like others because he is superior, and that the victim may be treated without respect because she is of inferior standing. The claim, to put the matter in Hegelian terms, is a claim of lordship – and such a claim is a challenge to a society committed to the values of equal citizenship and equality before the law.

Such a challenge requires a response. To use Hampton’s terminology, the challenge must be defeated; in Hegel’s language, the crime must be “annulled” (Hegel: 1967: 69). But how? I think that two components must be present in any morally adequate response – publicity and retribution. Publicity is necessary because the challenge issued by a crime is directed not only against the victim, but also against the values of equal citizenship and equality before the law. Criminal justice rather than recourse through civil law is necessary; the state, as legitimate representative of the citizens, must act to defeat the challenge to equal respect. It is important to avoid misunderstanding on this point – communal shaming is not “public” in the sense that I use the word here. Rather, a public penalty is one authored by a legitimate state.

This is where attention to the ways in which the TRC effects recognition of victims is extremely valuable. The TRC is a public response to human rights violations committed in the course of apartheid rule and the struggle against it. Both the state and the liberation movement committed such violations. Both engaged in actions that denied the worth of the victims - but with a crucial difference. In the case of the liberation movement, attacks were carried out on civilians in a manner inconsistent with the standing of civilians according to just war theory. In addition, those suspected of spying or collaboration were disciplined or killed. Both of these types of action could be construed as threatening to a presumption of moral equality. But in the case of the apartheid state, the threat is much more direct and thorough-going, for the offenses committed were done so from a position of power and in the service of a racist – deliberately and systematically demeaning – ideology and social system.

Recognition in the TRC is aimed at vindicating all victims of humiliation; it amounts to a public commitment to avoiding such events in the future and an affirmation of individual rights. But it also involves more than this. For black South Africans, explicitly excluded from a world of equal concern under apartheid, it serves as a special ritual of entry, and a proclamation of the injustice of their exclusion. It thus functions as a symbolic vindication of those excluded from equal respect, and a vindication of the principles of equal
respect and equality before the law. So, in my view, the TRC’s response to human rights violations passes the test of publicity.

Why is this not a sufficient response to the claims of victims of human rights violations? Why is a public statement or ritual vindicating victims not enough to defeat the challenge of the offense against them? The answer that an expressive theory of retribution gives is that the act of the wrongdoer functions socially as evidence that the victim is of no account. The actual humiliation makes it plausible to believe in the inferior status of the victim. This point may seem excessively metaphorical but perhaps we can understand it in the following way. Repeated acts of humiliation and cruelty, if left unchallenged, create a world in which the victims must live humiliated lives – to take an extreme example, the lives Jews had to eke out in concentration camps. One of the many terrible dangers of such a situation is that an observer may find it easier to conclude that such victims are inferior and deserve to be where they are.

It is therefore not enough simply to deny the truth of the message of humiliation conveyed by the act; the evidence provided by the act must be more powerfully refuted. The repeated acts of lordship on the part of state operatives made their claims to greater worth plausible; to vindicate the victims, the offenders must be put in their place. The offenders cannot be seen to “get away with” their claim of relative superiority. If no significant penalty is imposed on some of the offenders, the victims (and others) may take this as further evidence that their society acquiesces in their humiliation – that it does not value them enough to act against their tormentors.

In the aftermath of the Winnie Madikizela-Mandela hearings, Caroline Sono, the wife of murdered activist Lolo Sono, commented bitterly that the hearings showed that “there is no justice for little people like us in this country”. Hints made in 1998 about the possibility of issuing a blanket amnesty raised the prospect that not only failed amnesty-applicants but also people who had never come forward to the TRC would get off scot-free. Although this possibility has not materialized, there have not yet been any serious attempts to prosecute failed amnesty applicants. The criticism that the TRC process may leave intact and unchallenged the offenders’ sense that they were able to act against victims with impunity thus remains deeply disturbing. It suggests that to the extent that the recognition of victims conveyed by the truth commissions remains purely symbolic, it will not defeat the humiliation of victims conveyed by human rights violations.

Here I want to make a partial concession to the restorative justice model of the TRC. Punishment is a powerful way of defeating the offender’s claim to superiority and the evidence for that claim provided by his ability to get away with it. It actually masters the perpetrator in a manner comparable to the way that he mastered the victim and therefore signals the refutation of his claim to mastery. But this punishment should not degrade the offender or convey the impression that the victim is now the master. In other words, this conception of retribution does not license the lex talionis, and it leaves room for considerable downward discretion in choosing how to punish, while outlawing upward discretion that would result in degrading punishment. Moreover, it recognizes that there are burdensome but non-painful penalties that can defeat the wrongdoer – forms of restitution, community service, etc.

Thus, I think there is a case to be made on behalf of the TRC model, if it is understood as a moral compromise between justice and social unity in the way that I have outlined. The conditional amnesty process of the TRC gives up strict punitive justice, but it does not simply sacrifice individual claims for justice to a conception of national unity or national interest. Rather, the Victims’ Hearings affirm the importance of justice and the rule

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of law, and function to recognize the dignity of victims and the injustice of the racist exclusions of whole categories of people from moral concern. In these ways, while the amnesty process does promote social unity and some degree of mutual understanding in a way that full-scale prosecutions would not have, its symbolic functions of recognition serve also as a tributary to criminal justice. Provided that hard choices are made, and some prosecutions of figures named by the Final Report are conducted, we may also conclude that the retributive goal of vindicating the innocent - the “little people” - has not been betrayed. We should also acknowledge the necessity of the obligation to alert those claimed to be perpetrators of allegations involving them which the courts imposed on the TRC.55 While this may have distracted attention from the victims’ stories, it serves some of the retributivist goals of criminal justice – in particular, the goal of establishing who is an offender, so as to defeat the offender’s claim to superiority successfully. We should, finally, concede the point to restorative theorists that more needs to be done to fully vindicate victims and defeat their humiliation than merely affirming their dignity or punishing some offenders (through incarceration, for example).46 A greater commitment to restitution and social justice is indeed required – although this will have to involve institutions other than truth commissions. Ultimately, truth commissions have to be viewed as part of a larger process, and the final verdict on their role will have to wait. But their focus on human rights abuses is an essential founding element of this process. It begins – but does not end – a societal process of finding an appropriate response to past violence and injustice. Whether the global community will be able to sustain a commitment to such responses under present pressures is now an open question. That such a commitment is a vital resource, however, is clear. Though it is less exhilarating than Kant’s promise of perpetual peace, the new remedial sensibility of memory politics remains necessary in a world haunted by the ghosts of past atrocities and the all-too likely appearance of new injustices.

Notes

1 See Kant 1970 (1798): 182-184.
2 This view is articulated in “Perpetual Peace”. See Kant 1970 (1795): 113-114.
4 Ignatieff 2001: 5.
5 See Brooks 1999: 3 and Barkan 2000: 308-349.
6 On these issues, see the disturbing discussion in Gray 2003: 59-70.
7 This latter concern was of importance in South Africa, though it is not prominent in other transitions.
8 For a slightly different list, see Adam and Adam 2001: 33.
9 For helpful accounts of the TRC’s history and institutional structure, see Boraine and Ntsebeza 2000.
10 By far the best study of the politics surrounding the TRC is to be found in Wilson 2001. This is one of the few assessments of the TRC based on field research. It presents a bracingly skeptical view of the institution. See also Bell 2003.
11 I have advanced this view elsewhere (Allen 1999). In that piece, however, I do not explicitly address the challenge of the “restorative model”.
13 Teitel 2000: 5.
14 Ibid., 21.
Ibid., 66-67.  
Ibid., 225.  
See ibid., 83  
Sanford Levinson makes the valuable point that most societies are undergoing some sort of transition, citing the stumbling attempts of Americans to address their past of racial injustice and slavery. Levinson’s point is not that there are no differences between what have been labeled “transitional” and “nontransitional” societies, but that the difference is typically exaggerated. See Levinson 2000: 211-216. For a related argument, see Valls 2003: 53-71.  
For the idea of “political death”, see Bhargava 2000: 47.  
To avoid confusion, I should emphasize that du Toit emphatically rejects the idea that individual healing was the purpose of the TRC.  
Andrew Ashworth traces the origins of restorative justice reforms to a greater concern with the victims of crime evident in the 1980’s and expressed in the adoption of a charter of victims’ rights in Australia in 1986, and the publication of The Victim’s Charter in Britain. See Ashworth 1993: 278-279. For a sample of work on practical developments associated with restorative justice, see the articles collected in Wright and Galaway 1989.  
For a stimulating discussion of the nature of legal recognition, see Honneth 1996: 107-121. Honneth in fact distinguishes three different forms of recognition – loving recognition afforded by the family (especially the mother-child relation), legal recognition, and social esteem afforded by communities of value and/or the state. I find his arguments for the necessity of the third form of recognition unconvincing, but his analysis of legal recognition is very valuable indeed.  
An excellent account of the connection between making a claim and being a rights-bearer, is presented in Feinberg 1980: 148-151.  
Andrew Ashworth traces the origins of restorative justice reforms to a greater concern with the victims of crime evident in the 1980’s and expressed in the adoption of a charter of victims’ rights in Australia in 1986, and the publication of The Victim’s Charter in Britain. See Ashworth 1993: 278-279. For a sample of work on practical developments associated with restorative justice, see the articles collected in Wright and Galaway 1989.  
This point is made by Archbishop Tutu in his Foreword to the Final Report. See TRC 1998: 9.  
See Braithwaite 2000: 115.  
Theorists of restorative justice differ over whether “punishment” has any place whatsoever in a criminal justice system (although some who reject the very idea of punishment accept the necessity for “penalties” aimed at promoting reintegration). There are also disagreements concerning the centrality of restitution to the process of reintegration. Although these differences are important, I cannot discuss them here. Instead, my aim is to construct a composite picture of the idea of restorative justice, based on what I take to be its most challenging and distinctive claims.  
For a view of this sort, see Kiss 2000: 82.  
Braithwaite describes “conferences” as a “meeting of two communities of care”, rather than as a meeting of individuals (2000: 120).  
Note the tendency to explain the meaning of reconciliation by means of illustrations drawn from personal relationships. See TRC 1998: 18-19. In similar vein, John Braithwaite explains his concept of “reintegrative shaming” with reference to conflicts and forms of reconciliation occurring within families. See Braithwaite 1989: 56-57.  
Hugh Corder points out that the Amnesty Committee of the TRC consisted entirely of lawyers, while the two remaining committees were staffed mainly by non-lawyers. See Corder 2000: 103.  
Their thought is that amnesty should have been accompanied by decisions as to how perpetrators could “make amends”. See Llewellyn and Howse 1999: 387-388.  
This is borne out by a recent empirical survey that suggests that attributions of blame for human rights violations split clearly down racial lines in South Africa. See Gibson and Gouws 1999.  
Cragg, however, does not exclude punishment from criminal justice, and therefore is less vulnerable to these criticisms than other theorists.  
Braithwaite gives some attention to this problem and concludes that the “informality” of the shaming process may sometimes result in injustices (Braithwaite 1989: 157-161). But his response to this is to insist that the threat is diminished if shaming is “reintegrative” rather than “stigmatizing”. While this may avert some of the

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especially unpleasant consequences of shaming. Braithwaite’s assertion does little to address the challenge of avoiding such outcomes in the first place.

39 An important exception to this point is provided by the version of restorative justice offered by Jennifer Llewellyn and Robert Howse, who argue that retributivism and restorative justice share the intuition that crime disturbs a moral equilibrium.


41 For an analysis of the Nazi attempt to create a world of total domination in the concentration camps, see Arendt 1973: 437-457.


43 For a more extended argument, see Hampton 1988: 128.

44 In other words, this account of expressive retributivism weakens the traditional commitment of retributivism to a strict version of the proportionality requirement (that the punishment should “fit” the crime).

45 On this point, see Corder 2000: 103-104.

46 On the issue of social justice, see Llewellyn and Howse 1999: 374 I address this question more fully in Allen 1999: 332-335.

Bibliography


Murphy, J. 1988. “Forgiveness and Resentment”, in Murphy, J. and Hampton, J. Forgiveness and Mercy, 14-34.


