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The Myth of Restorative Justice: Truth,
Reconciliation and the Ethics of
Amnesty

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rampant physical abuse and rape. In a country with an alarming crime rate, and an alarming rate of racial violence and violence against women,¹⁶⁹ sexual harassment is considered a low priority. Accordingly, sexual harassment, especially if it is non-physical, is often tolerated in the workplace.

It has become clear that litigation should not be relied on as the sole, or even the best, method for dealing with sexual harassment. Political and social progress, as well as women's more active participation in economic development, are also necessary to combat sexual harassment. Since the most likely victims of sexual harassment are those with the least amount of power, reliance on the courts means relief for those with the best lawyers, at the exclusion of those who need and deserve representation most. The problem of sexual harassment is one involving ordinary people in ordinary settings, which makes it amenable to ordinary solutions, outside the context of law enforcement agencies, such as greater involvement of unions and other employee organisations. For many women, a shift away from litigation to active engagement of the working community might have greater empowerment value than going to court. The success and utility of the EEA will ultimately depend on the eradication of misperceptions and stereotypes about the nature of sexual harassment and the harm it causes, and its integration into the legal and political discourse on both economic equality and violence against women.

THE MYTH OF RESTORATIVE JUSTICE: TRUTH, RECONCILIATION AND THE ETHICS OF AMNESTY

STUART WILSON*

ABSTRACT

Restorative justice is often held up as a virtue promoted by the South African Truth and Reconciliation Commission (TRC). In granting amnesty and forgoing retributive punishment, it has been argued, the TRC promoted healing, harmony and reconciliation. Restorative justice should instead be understood as a political myth to which some Truth Commissioners mistakenly appealed while grasping for a moral justification for amnesty. No such justification – even in terms of a refined conception of restorative justice – is available. The article takes an analytic approach to retribution, forgiveness and mercy and uses plausible definitions of these concepts to suggest that restorative justice – as conceived by the TRC – failed to take full account of the value of retribution, and the meanings of forgiveness and reconciliation. If we are to make moral sense of what happened when the TRC dispensed amnesty, it cannot be as a serious attempt to promote an alternative form of justice, but as a tense and agonising compromise necessary to maximise the moral gains of transition from apartheid to non-racial democracy. Using the philosophical notion of 'moral remainder', this article sketches out such a re-interpretation.

I POLITICAL DEALS AND MORAL VALUES

*Let guilty men remember their black deeds
Do lean on crutches, made of slender reeds.*¹

This article is about retributive justice in times of transition from authoritarianism to democracy. It takes as its subject matter the amnesty principle applied by the South African Truth and Reconciliation Commission. Over the past two decades, ruling elites in Eastern Europe, South America and sub-Saharan Africa have, with more or less reluctance and procrastination, begun peacefully to loosen their authoritarian grip on power, clearing the way for the establishment of more democratic political systems. Sometimes governments have organised elections, varying in their degree of freedom and fairness, in which rulers themselves have run and lost; other regime changes have been facilitated by the retirement of an autocratic head of state.

¹⁶⁹ Racial attacks are still fairly commonplace in post-apartheid South Africa. See, for example, 'South Africa Police Probing Attack on American' *LA Times* (13 January 2000) 11; SAPA (1

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3017

A number of democratic transitions have been preceded by severe state-sponsored repression and/or violent resistance, which saw widespread violations of human rights. In Chile, by the time General Pinochet stood-down in 1990 after his defeat in a plebiscite meant to legitimate his rule, thousands of opposition activists, academics, students and trade unionists had been detained, tortured or summarily executed by the regime's security forces for actual or suspected political dissidence. Similarly, in Argentina, the military junta, which ran the country between 1976 and 1983, was responsible for torture and murder on a grand scale.

In South Africa, in order to sustain apartheid in the face of growing resistance, the National Party (NP) government adopted a number of draconian 'security measures' which eroded basic political rights. But it was the counter-revolutionary techniques employed by the Nationalist government's security forces during the period between the late 1970s and the early 1990s that saw particularly horrifying violations of human rights. Extra-judicial executions, torture and intimidation in the townships were not new but became commonplace. They were illegal, even in terms of laws and other measures sanctioned by the state.

Amongst the crimes committed in the name of the 'people's war' initiated in the early 1980s by the exiled African National Congress (ANC) were bombings, community intimidation and 'necklacings', where suspected police informants or *Inkatha* operatives had a tyre placed around their necks, were doused in petrol and set alight as a public spectacle meant to ensure community loyalty to the ANC and its ally in South Africa, the United Democratic Front (UDF). Confrontations between the ANC and *Inkatha* in KwaZulu-Natal and around Johannesburg saw a number of bloody incidents from the mid-1980s to the mid-1990s. Anthea Jeffery claims that between 1984 and 1994 South Africa's political turmoil resulted in 20 500 deaths.²

As in Chile and Argentina, the elites who sustained South Africa's authoritarian regime were peacefully removed from the highest political offices. As in Chile and Argentina, South Africa's response was to set up an investigative Commission, charged with the task of finding out as much as possible about gross human rights violations committed in defence of the apartheid system and in the struggle to bring it down. Unlike Chile, where a blanket amnesty had already been granted for those guilty of human rights abuses, or Argentina, where the Commission was supposed to serve as a precursor to prosecutions, the South African Commission was supposed to dispense amnesty in return, amongst other things, for a full disclosure of all the facts relevant to a particular violation. This innovation was meant to ensure that, unlike in Chile and the Argentina,³ some measure of justice would be achieved for the

victims of apartheid-era violations. Whether the South African Commission in fact 'did justice' is the main concern of this article.

Njabulo Ndebele has commented, perceptively, that the Commission⁴ was 'a political agency, driven by a legal instrument, and often assuming the contours of a religious ritual'.⁵ The Commission was perhaps the most complex and ambitious political compromise born out of the negotiations that ended apartheid. The agreement that led to the establishment of the TRC is often attributed to the ANC's eagerness to secure redress for those of its supporters who suffered and died at the hands of apartheid's agents and the NP's desire by to avoid Nuremberg-style trials of those responsible for criminal acts committed under its auspices.⁶ But at the time that the question of how to deal with abuses committed during the struggle was being discussed, the ANC had established the Motsuenyane Commission to investigate allegations of human rights violations in some of the training camps it operated in exile. Motsuenyane was supposed to determine 'the extent of responsibility for transgressions against [the ANC's] code of conduct'⁷ and found that violations had occurred, even naming a few of the perpetrators. The ANC was, therefore, conscious that it would not be left untouched by any investigation of apartheid-era abuses.

Second, there is the quasi-judicial function of the Commission, especially the extraordinary form of jurisprudence and rules of procedure adopted for it. The TRC expounded and attempted to dispense a form of justice far removed from the retributive model. The coherence and appropriateness of this form of justice has been the subject of much controversy, along with the manner in which the Commission dispensed it.

Third, there is the Commission's function of 'ritual healing' and its strong Christian overtones. The Commission sought to present itself as a channel through which an entire nation could acknowledge a 'painful past', the facts of which some had long denied or ignored. The Commission was, on one level, a public forum in which victims of gross human rights violations committed during the struggle could have their experiences listened to sympathetically and their suffering acknowledged. The TRC's Chair, Archbishop Desmond Tutu, also emphasised the Commission's function as a place where perpetrators of human rights violations could confess to their crimes and be forgiven. Tutu's account of his work describes the reaction of Neville Clarence, when the Umkhonto weSizwe (MK)⁸ operatives responsible for planting the bomb that blinded him applied for amnesty:

4 Hereafter referred to as 'the TRC' or 'the Commission'.

5 N Ndebele 'The Truth and Reconciliation Commission' (1998) 3 *Siyaya* 16.

6 See especially L Berat & Y Shain 'Retribution or Truth Telling in South Africa?' 1995 *L and Social Inquiry* 20 for an exposition of this view.

Neville Clarence did not oppose the application. Instead he went over to Mr. Ismail, who had apologised for causing the civilian casualties, shook hands with him and said that he forgave him even if his action cost him his sight and he wanted them to join forces and work for the common good of all.⁹

In Tutu's view, by being forgiven and reconciled with their victims, those responsible for human rights violations were themselves to be healed and absolved from their wrongdoing.

The politics, jurisprudence and ritual of the TRC are tightly bound together. The political settlement spawned the language of 'restorative' justice, an idea that provided the conceptual platform on which the rituals of forgiveness and reconciliation were supposed to take place. As the Commission developed, it was presented in these terms.

There is a growing literature on the political and historical issues raised by the TRC. The importance of the Commission's role in unearthing and interpreting the details of South Africa's sometimes disturbing and sinister recent history should not be underestimated. But there has been little careful analysis of the morality of the TRC's function of granting amnesties. Writers tend to fall into two camps. Some suggest that the TRC had little to do with moral idealism, being the result of a hard-nosed political compromise between the white elite who had (and still have) their hands on the levers of coercion and economic power, and a black elite leading a mass movement capable of destabilising – but not overthrowing – white power. On this account, moral considerations did not figure at all in the TRC's conception, which was the result of simple power calculations.¹⁰ Other writers stress the TRC's 'moral ambition' as an instrument of 'restorative justice' – a form of justice in competition with the usual retributive model. On this account, the TRC was a tool of individual and national forgiveness and reconciliation between victim and violator; white and black, in which amnesty played a vital role.¹¹

This article argues that neither of these interpretations adequately explains or justifies the TRC's amnesty function. Section II argues for inter-linking accounts of retributive justice, forgiveness and mercy in the attempt to build a conceptual framework within which to assess the morality of the amnesty procedure. Section III suggests that, while the TRC's amnesty process was morally justifiable, we have to be careful about the kinds of justification we advance in favour of forgoing retributive responses to apartheid-era crimes. The TRC's notion of

⁹ D Tutu *No Future Without Forgiveness* (1999) 120.

¹⁰ Berat & Shain (note 6 above) conclude that 'the South African case seems to support the view that transitions to democracy have more to do with delicate political crafting, however incongruent with the principles of justice, than with moral idealism' (emphasis added).

¹¹ See E Kiss 'Moral Ambition Within and Beyond Political Constraints' in R Rotberg & D Thompson (eds) *Truth v. Justice: The Morality of Truth Commissions* (2000) 68-98, Tutu (note 9 above), and A Boraine *A Country Unmasked: Inside South Africa's Truth and Reconciliation*

restorative justice, I argue, simply does not make sense of the fundamental motivations behind preferring the amnesty process to prosecutions. The language of restorative justice and societal reconciliation was mere window-dressing for a process meant to help consolidate the political gains of transition for the incoming government by ensuring that there would be no serious attempt to undermine the new dispensation by those, of whatever political hue, keen to avoid prosecution for their apartheid-era crimes.

This does not make amnesty unethical, however. The political stability of a truly democratic regime has a moral value with which other ethical imperatives – such as retributive responses to crimes committed under the auspices of an authoritarian regime – must compete. This article offers a moral interpretation of the TRC that emphasises the enormous tensions between ethics and politics manifest in South Africa's transition to democracy, but which need not entail an all-or-nothing choice between retributive justice and political stability.

II RETRIBUTION, FORGIVENESS AND MERCY

The TRC is ethically controversial. Writings by interested academics and institutional 'insiders' aimed at making moral sense of the Commission have been marred by a failure to attempt seriously to define and argue for the concepts they deploy when evaluating its work. This is especially the case with those studies that concentrate on the morality of the TRC's amnesty principle. Concepts such as retribution, forgiveness, mercy, justice and punishment are introduced in the context of a particular author's critique, but their meanings are hardly ever explicitly examined and validated.

The TRC and the proponents of its particular version of restorative justice operated within a muddled moral universalism that does not stand-up to close conceptual examination. Exploring what is meant by retribution, forgiveness and mercy will equip us with the conceptual tools necessary to expose the crumbling foundations of the TRC's brand of restorative justice. I focus on these three concepts because they emerge most often in the literature on the TRC and seem to support ambitious moral arguments about the Commission's work. The aim is then to take these plausible definitions forward and use them to demonstrate that – even within the terms of its own 'restorative' paradigm – the TRC's brand of justice is inappropriate and unworkable.

(a) Retribution

Arguments about the necessity or desirability of retribution as a response to apartheid-era wrongdoing are mirrored in wider philosophical debates about what justifies legal punishment. Some retributivists urge that, for

only proper response is harsh treatment of the wrongdoer in proportion to the harm caused. Explaining the urgency, efficacy and desirability of this intuition has proven much more difficult than simply defining it. When asked just *why* retribution, with its entailment of harsh treatment, is a morally proper response to wrongdoing, retributivists tend to answer that it is a brute, unanalysable moral urge which needs no further explanation.

Precisely because it entails harsh treatment – through the infliction of pain or the deprivation of liberty – conceptualising retribution as an underived moral intuition, let alone a primeval urge, is empirically and morally dubious. 'Because you did this to someone' or 'because this conforms to primeval intuitions' are not good enough reasons on their own to give to criminals when they ask why the cell door is being closed in their face. The 'intuitive urge' accounts of retribution also depend upon the assumption that most people actually feel more or less the same kinds of retributive urges, and that these urges involve a demand for harsh treatment. If this is the case, the grounds for retribution as a communal response to wrongdoing are weak, since it is not clear that everyone who makes up a community will share the retributive urge. Another defect with the brute intuitive accounts of retribution is that they are open to charges of justifying vengeance. Anti-retributivists will say that there seems to be little in the notion of retribution beyond an appeal to a felt need to 'get back' at the offender. To justify retribution as a satisfactory response to wrongdoing, we need to find something beyond the intuitive to recommend it.

In her essay on *The Retributive Idea*¹² Jean Hampton provides the beginnings of such a theory. By grounding retribution in the ideal of equal dignity of all persons, Hampton makes sense of retribution as the key motivation for punishment (if not its founding intuition) and justifies the entailment of harsh treatment. By taking retribution, she says, a community corrects a wrongdoer's message that the victim of a particular violation was not worthy of basic human respect, which should be afforded by all persons to all persons in equal measure. Through retribution, the community reasserts the truth of a victim's value by inflicting a publicly visible defeat on the wrongdoer.¹³ Retribution is a measured, public response to violations of basic human dignity. Properly carried out, acts of retribution are motivated by a concern to restore a just balance of human dignity and not merely to satisfy an urge. Acts of retribution provide public acknowledgement that a violation was unacceptable – since almost all of us have an interest in living in a community where security of property and person are ensured – and an outlet for otherwise potentially dangerous feelings of resentment on the

12 J Hampton 'The Retributive Idea' in J Hampton & J Murphy *Forgiveness and Mercy* (1994)

part of the victim. This may allow victims to put a painful violation behind them and move on, even to forgive. It also allows wrongdoers to make up for an act or omission they may regret having committed.

By grounding retribution in the concept of equality, we introduce a much-needed public dimension. The justification is no longer an individual's need to get even, but rather a need for the community to nullify the offender's claim to superiority over the victim. In many cases of wrongdoing, it is difficult to see how this can be achieved without harsh treatment. By violating the victim, the wrongdoer either seeks to assert a claim to greater intrinsic worth or fails to take account of the victim's value as a person: in Kant's terms, to treat the victim as an end in himself. To correct this imbalance, the victim's value needs to be reasserted and the wrongdoer's false assertion of his greater value corrected. It is simply not enough then, as Hampton points out, to organise a ticker-tape parade (or a sympathetic TRC hearing) for the victim in order to affirm our commitment to his value. The fact is that the wrongdoer has ridden roughshod over the victim's claim to be just as worthy of moral concern as anyone else. No matter how much the community attempts to build the victim up, the fact of the violation remains as evidence of the wrongdoer's claim to superiority and the victim wants this evidence nullified.¹⁴ Harsh treatment seems to be the best way to do this. Retributive punishment makes the wrongdoer low; it inflicts on him the defeat the victim requires for a revalidation of his basic humanity.

In this way, retribution restores a moral balance between community, victim and violator. It is this notion of moral balance which places vital internal restraints on the concept of retribution itself. The extent of harsh retributive treatment inflicted on an offender will be limited by the extent of the crime he committed. Thus particularly heavy punishments will only be inflicted in a case of a grave infraction.

(b) Forgiveness

Forgiveness entails forswearing resentment:¹⁵ changing the way you feel towards a person who committed an intentional, unexcused wrong against you. To forgive, a victim is required to have eliminated any felt anger against the wrongdoer that was caused by the particular wrong action for which forgiveness is granted, precluding the possibility of responses to the violation which are motivated solely by anger or resentment. A common mistake in the way we ordinarily think of forgiveness is the assumption that it entails forgoing demands for the

14 Ibid 143.

15 J Butler Sermon VII 'Upon Resentment' and Sermon IX 'Upon the Forgiveness of Injuries' in *Fifteen Sermons* (1726). In the following discussions of forgiveness and mercy, I draw on some

punishment of an offender. Since demanding punishment may be motivated not by resentment but by a desire to see a moral balance redressed or have one's dignity restored in the eyes of the community (to use the language of retribution adopted above), forgiving a wrongdoer is perfectly compatible with demanding that he be punished. Thus, I might forgive someone who tortured me for holding a set of political beliefs but still want to see him punished in order to annul the false message of superiority he sent to the wider community about me and my political beliefs when he tortured me.

Forgiveness involves a conscious mastery of anger; it marks a moral transformation on the part of the victim, one that will clearly not be in every victim's power to achieve. It is for this reason that forgiveness cannot be demanded and, once asked by even a truly penitent wrongdoer, it might not be granted.

There are many things to recommend forgiveness. It is a means of guarding against self-importance, which might lead us to overdramatise the extent of the wrong done to us. It is also a way to re-establish a healthy relationship with the wrongdoer, the breakdown of which might have led to the violation in the first place. If it can be achieved, forgiveness can also allow a victim to master strong emotional dispositions that were preventing him from leading a full and happy life after the violation.

However, forgiveness is not always positive. Feeling anger after having been wronged by another is an important assertion of self-worth. Someone who does not feel anger in response to wrong committed against them is almost necessarily lacking in self-respect. Aristotle characterised this failure to feel angry at moral infractions as the vice of servility. Of those who fail to resent injury done to themselves or others he said:

those who do not get angry at things it is right to be angry at are considered foolish ... if a man is never angry he will not stand up for himself; and it is considered servile to put up with an insult to oneself or to suffer one's friends to be insulted.¹⁶

It follows from this that to give up resentment too easily may also be servile. Failing to give a wrong done its due moral weight is to deny our true moral worth and by extension the sanctity of human dignity itself. This is especially the case when the wrongdoer continues to excuse his actions. To forgive him even as he continues to claim that his persecution of me for my political beliefs was justified is surely to fail to be angry at something I should be angry about. What we need, then, is an account of the conditions under which forgiveness is warranted. Jefferie G Murphy suggests five, and I want to look at the three of these that seem to be most relevant to the reasons for forgiveness that have been advanced in the post-apartheid context.

The first of these is that the wrongdoer is sorry. Forgiveness is warranted when the person who violated me has undergone a moral transformation through which he has come to recognise the wrongness of his actions and expresses his regret for having done them. Of such a person it cannot be said that he is now conveying a message that he is worth more than I am. By repenting, a wrongdoer decides to stand with me in condemning the violation he committed. By forgiving, I can endorse his feelings of remorse without fearing my own acquiescence in immorality or in judgements that I lack worth. But genuine remorse should not be taken to create an obligation to forgive. Expressions of remorse on the part of the wrongdoer may be necessary, but need not be a sufficient condition for forgoing resentment. This is particularly so because the mastery of sometimes powerful, internal emotional reactions cannot be directly enabled by utterances on the part of the wrongdoer.

Sometimes people wrong us without meaning to convey that they hold us in contempt or think that we are worth less than they are. Actions such as these are candidates for forgiveness, since there is a morally relevant difference between this category of violations and those which involve intentional infliction of harm. Murphy gives the example of paternalism. 'It is hard', he says, 'to think of a friend who locks my liquor cabinet because he knows I drink too much in the same way as someone who embezzles my funds for his own benefit.'¹⁷ Maybe so, but we need to be careful about accepting well-meaning paternalism as the sole ground on which we forgive. By taking an action which essentially sends the message that I am incapable of looking after myself, does not even a paternalist friend, no matter how well-meaning, fail to respect me as a bearer of human dignity? The very idea that *he knows better* than I do about decisions that are mine to take seems objectionable. The example Murphy gives *does seem* forgivable because preventing a friend from descending into alcoholism would probably be motivated by considerations grounded in his inherent value. But forgivable paternalism has its limits. What if the infliction of *pain* were justified in terms of 'what is best for me'?

A third ground for forgiveness may be that the wrongdoer has 'suffered enough' after committing a violation against me. Murphy suggests that suffering is redemptive. Just as the person who tortured me for holding various political beliefs diminished my dignity by making me suffer, so it might be said that my knowing that the torturer has himself suffered in some way since then may restore a balance of dignity; he has seen me suffer and now, in whatever way, I have seen him. The score has been settled in a way that allows me to stop feeling angry towards my torturer while maintaining my self-respect. But the reason why I feel angry towards my torturer is that he wilfully made me suffer. If, and only

3911

if, his suffering enables him to appreciate and acknowledge that what he did to me was wrong and to express remorse, would I be right to forgive. His misfortune is, on its own, of little relevance unless it is linked directly to the initial violation. In the case of punishment, for example, his suffering is connected to public acknowledgement of the wrong he committed against me. This linkage may enable his suffering to balance out mine and constitute a reasonable ground for forgiving him without my losing self-respect. But the best conditions for forgiveness are provided by what Kolnai has called a *metanoia* ('change of heart') in the wrongdoer's attitude towards the violation he committed. Mere post-violation suffering in itself does not guarantee this.¹⁸

(c) Mercy

The private, internal character of the process that leads to forgiveness is the principal way in which it can be distinguished from mercy. Although mercy as a virtue necessarily involves dispositions of character (such as compassion), it also requires, in a way that forgiveness does not, a public manifestation. Another difference is that the person in a position to bestow mercy (a judge, for example) need not have been personally wronged and need not have any feelings of resentment to overcome through forgiveness.¹⁹

Mercy does not involve mastering resentment, but waiving a right. Recall that we decided that forgiving someone was perfectly compatible with demanding that they be punished. In terms of criminal justice, granting mercy involves treating someone less harshly than retributive proportionality requires or forgoing punishment altogether. Mercy is therefore very closely connected with punishment in a way that forgiveness need not be. But doesn't this mean that mercy is unjust? If we depend for our account of justice on proportionality between offence and punishment aimed at maintaining an equal balance of human dignity, does not lessening a punishment countenance an unjust moral imbalance? A judge in a criminal case is under an obligation to do justice. He is bound by laws that do not derive their authority from him or his office but from the people who elect their representatives to make law. Being merciful requires a judge to accept that there are instances where it would be permissible to frustrate the requirements of even a perfect model of retributive justice.

Earlier we characterised mercy as a virtue. As such any act of mercy must be motivated by character dispositions such as compassion, empathy, generosity or charity. To dispense mercy, a judge must do more than the victim would have to do in order to forgive a wrongdoer.

18 A Kolnai 'Forgiveness' *Proceedings of the Aristotelian Society* (1974) 74.

A merciful judge must empathise with the offender to such an extent that he feels sufficiently compassionate to reduce or completely forgo punishment. Are there any good reasons to do this? There is a danger that a merciful judge might violate his obligations both to the victim and the wider community for whom he is supposed to administer justice. His obligation to the victim is certainly very clear. The victim has brought a case – in most instances with the support of the state – in order to exact retribution from the wrongdoer as a means of restoring his dignity. The judge therefore has an obligation to use the power invested in him to decide on a punishment commensurate with the extent of the wrong committed, once the wrongdoer has been pronounced guilty, in order to redress the moral balance between victim and offender.

A judge's obligation to the community is complex. Considerations such as the need to maintain the rule of law and how far the community's moral conscience has been incensed by a crime could limit judicial discretion. But members of the community do themselves have generous and merciful instincts and so a judge who is merciful in moderation need not be failing to respect the needs of the community – his feelings of compassion stand for those which exist in the community.

What about a judge's obligation to the victim? A community can feel threatened, even violated, by a crime, but the crime affects the victim, and perhaps his loved ones, in a very special, first-person way. The first-hand experience of a crime falls into a different category to anything a community can feel after its commission. Since the aim of retributive punishment is to restore the moral balance between victim, community and violator, the retributive equation will look extremely lopsided if the wishes of the victim are not given some weight. A more difficult requirement must be, then, that a particular victim is willing to see his violator receive mercy. Since mercy involves reducing or forgoing punishment, the only ground for granting mercy which would save the victim from the vice of servility is the expression by the wrongdoer of genuine remorse. But endorsing mercy demands much more of the victim himself.

Rather than merely forgoing anger, a victim must be compassionate and generous towards the offender; he must be willing at least nominally to look at things from the wrongdoer's point of view. He must try to find some commonality with his violator, understand his background and be prepared to accept that people who do bad things, even when they act from bad motives, 'are not simply making a foolish and easily corrigible error, but that they are yielding to pressures, many of them social, which lie deep in the fabric of human life'.²⁰ This does not mean that the wrongdoer is not responsible for his actions and should not be held accountable. But these considerations may call for an attempt, when

presented with a genuinely remorseful wrongdoer, to transcend the indignity of violation committed and to grant mercy.

(d) Conclusions

Retribution is grounded in rational concerns aimed at re-attaining a moral balance between victim, violator and community in the aftermath of a violation. This moral balance may be endangered by granting forgiveness or mercy unless a wrongdoer is, as far as anyone can reasonably tell, genuinely remorseful *and* the victim is capable of transcending the indignity done to him in fairly crucial ways. To forgive, a victim need not forgo his demand for punishment, but must genuinely be prepared to forgo resentment. To endorse legal mercy, which necessitates at least a less harsh punishment than retributive proportionality would demand, a victim must feel compassion for – perhaps even try to identify with – his violator. The granting of forgiveness or mercy does not expunge a wrongdoer's responsibility for his crime and neither forgiveness nor mercy may be granted without the sincere consent of the victim. I now take these conclusions forward and apply them in making moral judgements about amnesty, justice and the TRC.

III POLITICS, JUSTICE AND 'MORAL REMAINDER'

Reconciliation that is not based on justice cannot work.²¹

(a) Problems with justice

Beyond the political elite, large sections of the black community believed that the TRC was a mechanism to allow the agents of apartheid to escape accountability for violent acts of repression. Many whites simply ignored it. Others seemed genuinely shocked at the methods that had been employed to perpetuate the privileges afforded them by apartheid.²² For those whose loved ones had been victims of apartheid-era violence, amnesty proved an uncomfortable prospect. The possibility of some of the struggle's most vicious torturers and murderers evading punishment in the name of reconciliation was both disturbing and perplexing. Although granting amnesty and achieving reconciliation might seem like complementary aims, this section will argue that they are contradictory. This contradiction remains a source of deep concern to those who wish to make moral sense of the TRC.

21 *The Sowetan* (15 April 1996) quoted in Rotberg & Thompson (note 11 above) 22.

22 The very first entry on the TRC's *Register of Reconciliation* reads: 'I am an Afrikaner who has been grossly misled by my peers of the time. I was led to believe that all was well both in the Christian and worldly sense. I now realise that this was not so and will do all in my power to make amends for the wrongs of the past and ensure that those who follow me will be exposed

The objection that the TRC process was insensitive to the moral demands of justice is often made. The Commission was not an entity aimed solely or even primarily at achieving what we would normally consider to be justice for those who suffered under apartheid. Demands for retributive justice lost out in a wider competition against other moral values and political concerns.

What are the demands of justice in a society in transition from tyranny to democracy? Cohen suggests that, minimally, transitional justice must have two components: truth and accountability.²³ In South Africa, much of the violence which took place during the struggle was conducted under a veil of secrecy. Revealing the truth about exactly what was done to whom and by whom was essential if accountability was to be a realistic goal. There is, however, an obvious tension between establishing the truth and achieving accountability if in many cases an important source of truth is the testimony of perpetrators, who have the most to gain from remaining silent. Lines of responsibility for violations which took place in an atmosphere of near impunity would be hard to establish without testimony from those who perpetrated or who were complicit in horrific violence. Perpetrators of human rights violations from all sides were unlikely to confess to wrong-doing if they knew that such a confession would lead to a lengthy gaol term.

Further, important democratic guarantees, such as the right to remain silent, place restrictions on what a new regime can do to establish the details of crimes committed during periods of widespread violence. It would be a cruel irony if a new democratic government was to be the first to breach the basic political rights its members and supporters fought so hard to establish. The foregoing considerations require us to face up to the question: If accountability is an essential requirement of transitional justice, then does this mean that only punishment will do?²⁴ This question becomes even more urgent and intractable if we introduce the restoration of victims' human dignity as a requirement of transitional justice. What does the restoration of human dignity require? Will the truth and minimal accountability do? There are many levels of accountability ranging from mere acknowledgement of the truth through contrition and reparation to punishment. Which of these responses to wrongdoing is most appropriate in a transitional context?²⁵

(b) Restorative justice – TRC style

To some extent, the answer to this question is likely to be case-specific. The TRC's response to the apparently contradictory demands of truth-seeking and retribution in the South African context was the 'third way'

23 S Cohen 'State Crimes of Previous Regimes: Knowledge, Accountability and the Policing of the Past' (1995) 20 *L and Social Inquiry* 11.

of restorative justice. Generally presented as an alternative to retributive punishment, restorative justice aims to repair the relationship between the victim and the wrongdoer. This involves a fourfold commitment: first, a recognition of the damage done by a violation; second, the expression of remorse for the wrong committed; third, a willingness to try to 'make good' the violation – through reparation or restitution; and fourth, to achieve forgiveness and reconciliation between victim and wrongdoer. Thus the TRC in its Final Report acknowledged that it had not done retributive justice, but argued that it had promoted another kind of justice, restorative justice, 'which is not so much concerned with punishment as with correcting moral imbalances, restoring broken relationships – with healing, harmony and reconciliation'.²⁶

The TRC, Elizabeth Kiss asserts, was 'morally ambitious' in its 'determination to honour multiple moral considerations and to pursue profound and nuanced moral ends' even though it operated within limitations set by a potentially fragile political transition.²⁷ This commitment to restorative justice emphasised healing and forgiveness over retribution as morally superior responses to human rights violations.²⁸ Kiss, following Tutu, has sought to cast the TRC as a worthy moral alternative to retribution and not merely the next best thing, adopted because punishing the agents of oppression was thought not to be realistic for practical and political reasons. It was claimed that restoring the dignity of victims of human rights violations was not in tension with creating political stability, since restoring dignity did not entail retributive punishment, which had the potential to create political tensions and resentment. What Wole Soyinka has called the 'Muse of Forgiveness'²⁹ was the main conceptual link between restorative justice and reconciliation. Provision of amnesty in return for a full confession was part of this commitment to forgiveness. Many saw amnesty itself as state-sponsored absolution for perpetrators of human rights violations who had confessed to wrongdoing.

Yet belief in the virtue of restorative justice does not imply belief in the validity of amnesty. First, the claim made by proponents of restorative justice that forgiveness and reconciliation are morally superior to a demand for retribution is unconvincing. True forgiveness and reconciliation may only be possible once retribution has been exacted. Second, it is hard to see how restorative justice can work as a public concept, or how it can be 'administered' by an organ of the state, as it deals with the essentially private concepts of forgiveness and the will to reconcile. Third, in leaving room for the granting of amnesty in the name of restorative

26 D Tutu et al *TRC Final Report* (1999) Volume One, Chapter One, para 36.

27 Kiss (note 11 above) 70.

28 J Zalaquett 'The Healing of a Nation?' in A Boraine & J Levy (eds) *Dealing with the Past:*

justice, the TRC permitted the denial of victims' rights to determine the corrective response to individual human rights violations, even where sufficient evidence existed to mount a successful prosecution.

If we are to make moral sense of the TRC, it cannot be as an institution aimed at promoting a worthy alternative to retributive justice or as an agency of forgiveness and reconciliation. Instead, I offer an interpretation of the Commission's work which emphasises the need to consolidate the moral gains of the South African transition. Such an interpretation highlights the tensions between moral and political requirements of the transition – but it does not obscure moral obligations to retributive and distributive justice in post-apartheid South Africa in the way that the unfettered rhetoric of forgiveness and reconciliation might.

(c) Restoration, retribution and vengeance

Undeniably, the demand for retribution in the wake of any kind of violation is a common and morally respectable one. Visiting retribution on someone who has wronged me is a morally proper concern because I am worthy of the same treatment and respect as anyone else to whom I see an injustice done.

Retribution is not vengeance. A common mistake of proponents of restorative justice is to equate the two in an attempt to diminish the moral value of punishment. Tutu in particular seems to confuse the two concepts, warning against an 'orgy of retribution and revenge'.³⁰ Retribution is a concept which can be refined so that it fits into a different category to revenge. Revenge takes its starting point as a felt need to 'get even' with a perceived wrongdoer. It makes the person wronged the sole arbiter of where, when and how he redresses the violation done to him. A person's need for vengeance can even spring from an imagined injustice and not a real one. Revenge can be unmeasured, instinctive and endlessly destructive, and in many cases arises not from a rational and just moral concern but from psychological damage done by an actual or perceived wrong. The rubrics of proportionality and reason, which apply to any well-judged action, do not apply to vengeful acts.

Vengeance can have catastrophic results. Whipped up into a fearful, vengeful hysteria, militias in Bosnia and Rwanda took 'revenge' in response to often illusory wrongs. Any response of this sort to apartheid-era abuses would be tragic. Retribution, on the other hand, is a measured, reasoned response to violations of basic human dignity. It is of significant moral worth and should not be conflated with revenge and thus ruled out as a response to apartheid-era human rights violations.

30 Tutu (note 9 above) 36. At several points during Chapter Three of his book, Tutu seems to equate retribution with revenge, asking at one point what it was that made South Africa

The needs of victims in the wake of human rights violations are complex and are certainly not met exclusively by the success of retributive processes. But, properly understood, retribution can help by affirming to the victim that his suffering counts enough for the rest of the community to do something about it; by correcting the perpetrator's view, expressed implicitly by the violation, that the victim's freedom and well-being do not matter; and by sending a threefold message to the rest of the community. This message is that the freedom and well-being of all members of the community are of equal value; that violations of this principle will not be tolerated; and that all members of the community can feel safe under the protection of the law.

I can think of no better message to send to the people of South Africa after decades of repression and degradation. By dispensing amnesty, the TRC corrupted this message. It did so in the name of reconciliation. But given that retribution, as I have accounted for it, is about restoring a balance of human dignity – 'levelling the playing field' after the perpetrator's mastery of the victim – there is little reason to believe that retribution could not effectively promote reconciliation. Reconciliation needs equality between the parties to be reconciled. As with forgiveness, there is little value in seeking reconciliation with someone who continues to deny that his actions are worthy of rebuke – claiming (implicitly) that he was within his rights in mastering the victim through his violation. It appears that amnesty applicants did just that by maintaining – through their applications – that their crimes fit into a different category than that of the common criminal. Their crimes became 'political' and therefore beyond the usual legal sanctions. Perhaps a truly penitent wrongdoer would have confessed and accepted the proper punishment or asked for mercy, detailing the circumstances of the violation.

(d) Privacy and justiciability

Retributive justice has the advantage of being an essentially public concept. It is usually possible to assess the gravity of a wrong done to a person and decide on an appropriate punishment using transparent criteria. The everyday administration of justice itself rests on this very claim. Retributive justice limits itself to the task of helping restore dignity to a victim of crime through dealing with the offender and sending the message that infractions of human rights are unacceptable.

The TRC's formulation of restorative justice relies for its success on achieving forgiveness and reconciliation. But because it is dependent on remorse, forgiveness is an essentially private matter. Expressions of remorse and forgiveness are outward signs of changes which are essentially of attitude and therefore inward, so that the mere public

which even a penitent wrongdoer can be *entitled by law* and which can be dispensed according to public criteria.

If restorative justice aims for forgiveness and reconciliation, then it is the kind of justice that cannot be *done* by an institution such as a court or a commission, because it relies for its success on internal moral transformations which cannot be effected and measured by public institutions. The most that bodies such as the TRC can hope to do is to help realise the public conditions which encourage these internal moral transformations.

This leads on to the most serious problem with restorative justice. Because the meanings of forgiveness and reconciliation are fixed by private processes, and because each victim and violation is qualitatively different, it is reasonable to assume that the conditions under which forgiving responses to violations become manifest are likely to vary from person to person. Some victims of human rights abuse may be satisfied with confession and acknowledgement of the wrongs done to them by their violator(s); others may properly demand reparation; still others may require retribution before they can forgive. By forgoing retribution, restorative justice denies victims an important right to determine and engage in morally condonable processes aimed at restoring their dignity. The amnesty on offer from the TRC actually denied victims just this kind of right, and such a denial will inevitably, in an indeterminate but significant number of cases, preclude the restoration of dignity to victims who participated in the Commission's process. Through its denial of the moral value of retribution as instrumental to its own professed ends of forgiveness and reconciliation, restorative justice will have failed.

(e) Pressure to express forgiveness?

Even in punishment situations the state implicitly sets a limit on the value of the crime. The TRC redefined the value of certain crime events, but not certain crimes. I would argue that this is wrong. But if it isn't, maybe the TRC got the new value wrong. By targeting the new value on private emotions, especially of victims, they brought undue pressure on certain victims to express sentiments they did not feel by giving the expression of those sentiments a large and improper significance. Victims should be able to expect their emotions not to be treated as public property.³¹

In his recent book on the TRC, Alex Boraine claims that 'it was not the intention of the Commission to demand forgiveness, to pressurise people to forgive, but to create an opportunity where this could take place for those who were able and ready to do so'.³² Boraine's assertion might be taken as an objection to the account of the TRC's formulation of restorative justice that I have developed above. The TRC never

demanding forgiveness, it just created the space for it to happen 'organically', should victim and perpetrator wish it. How, then, the objection might be pressed, could it possibly hang its success on the achievement of forgiveness and reconciliation? Boraine and I might disagree on what exactly counts as being 'pressurised' to forgive, or we might differ in our understanding of what actually happened at TRC hearings.

Boraine surely could not be suggesting that the TRC created a totally value-neutral space in which victims could decide for themselves whether or not to forgive. The TRC's own rhetoric was immersed in the religious/redemptive values of confession, forgiveness and reconciliation. During the early Human Rights Violations hearings, Commissioners would routinely ask victims, at the end of their testimony, whether or not they forgave the people responsible for their suffering. Coming at the conclusion of what were often accounts of horrific violence and humiliation, such a question can only be seen as outrageously insensitive. In some cases forgiveness appeared on the TRC's agenda even before the given perpetrator had been identified – let alone confessed and given an opportunity to show remorse. The question was also indicative of the Commission's eagerness to hold up an example of forgiveness to the watching media. The TRC itself seemed to realise this and the question was subsequently abandoned for the Human Rights Violations hearings. It continued to be asked, however, in Amnesty hearings where victims were present.

To victims who did indicate a willingness to forgive, the TRC's response was laudatory. Richard Wilson recalls one of many examples of this during a Human Rights Violations Committee hearing in Klerksdorp on 23 September 1996. In response to the 'passive forbearance' of Gardiner Majova, whose son had been abducted in 1985 and who had himself been tortured by the police, Archbishop Tutu praised his lack of 'anger or desire for revenge' and continued 'we pray that God will strengthen you and help the TRC find the truth.'³³

Boraine's claim that victims were not pressurised to express forgiveness is correct in that nobody openly demanded it. But the context in which Human Rights Violations and Amnesty hearings were held and the ostensible – almost fanatical – promotion of forgiveness and reconciliation by the Commissioners could not but give victims the impression that forgiveness was hoped for, perhaps even expected of them. This expectation amounts to pressure, not in the form of a direct demand to forgive, which Boraine rightly points out was never made, but in the form of a subtle loading of the terms and values in which the Commission expressed itself.

(f) Expiation and the elusiveness of reconciliation

The response to human rights violations to which the TRC was committed was not a species of justice at all but – at best – a kind of expiation. Expiation, or atonement for sin, is a religious concept. Like exorcism, it aims to diminish evil by ritually cleaning a person or a place of sin. Through a process of contrition, confession and repentance, violators who come before the Commission are supposed to cleanse themselves by describing the violations they committed and acknowledging that what they did was wrong. Those who failed to show remorse would no doubt be publicly shamed since their crimes of secrecy would now be open to condemnation – which must be a kind of punishment, however inadequate. Such confessions, whether or not they were accompanied by expressions of remorse, were enough to secure public absolution from the TRC and, it was hoped, the forgiveness of victims.

Perhaps seeing their violators confess and having their harrowing stories listened to sympathetically was a cathartic experience for many victims, but the TRC cannot be said to have dealt in any coherent account of justice, restorative or otherwise. It has already been demonstrated that granting amnesty eliminates any possibility of retributive proportionality. There is no comparison between any ordeal endured by an amnesty applicant making a full disclosure to the Commission and the murders and acts of torture they committed. Seeing one's torturer or the person responsible for the death of a loved one walk away, without even having to say sorry for what they did is likely to make real forgiveness and reconciliation less common.

But people did forgive and make attempts to reconcile with their violators. Those who approve of the TRC hearings as instruments aimed at the restoration of victims' dignity point to admittedly extraordinary episodes where victim and violator did seem to be reconciled – one was recalled earlier. However, such evidence is not enough for us to be sure that what happens in the heady confines of a TRC hearing endures once the parties to a violation leave the room. Besides, many victims deliberately withheld forgiveness, even though they took part in the amnesty process. We also do not know how many *really* forgave in the first place.

Dirk Coetzee gave detailed testimony to the Commission, describing how he drugged, murdered and barbecued the body of Sizwe Kondile during June 1981. Kondile was an ANC activist and close associate of Chris Hani, an MK Commander based in Lesotho. Coetzee was a Security Police Officer ordered to kill him and dispose of his body:

The burning of a body on an open fire takes seven hours. Whilst that happened we were drinking and braaing [barbecuing meat] next to the fire. I tell this not to hurt the family, but to show you the callousness with which we did things in those days. The fleshier parts of the body take longer ... That's why we frequently had to turn the buttocks and thighs

(297)

of Kondile. . . . By the morning we raked through the ashes to see that no piece of bone or teeth was left. Then we all went our own ways.³⁴

Upon concluding his testimony, Coetzee turned to Kondile's mother, Charity, and asked for forgiveness, saying he hoped one day to meet her and 'look her in the eye'. Mrs Kondile's lawyer responded to Coetzee and the Commission on her behalf, saying that 'you have said you would like to meet Mrs Kondile. . . . It is an honour she feels you do not deserve. And if you really were remorseful, you wouldn't apply for amnesty, but in fact you would stand trial for what you did.' After the hearing Mrs Kondile told the press that 'it is easy for Mandela and Tutu to forgive. . . . They lead vindicated lives. In my life nothing, not a single thing, has changed since my son was burnt by barbarians . . . nothing. Therefore, I cannot forgive.'³⁵

Worse still, dramatic encounters between former torturers and detainees in TRC hearings were shown to have the opposite effect to restoring dignity. Jeffery Benzien's testimony to the Commission saw him come face to face with his former prisoner, Tony Yengeni, now the ANC Chief Whip in South Africa's National Assembly. Benzien taunted Yengeni by reminding him how, after half an hour of severe torture, Yengeni betrayed one of his comrades, who was subsequently captured and tortured by Benzien himself. This revelation marred Yengeni's political reputation. Benzien was granted amnesty for one count of murder, seven counts of torture and two counts of perjury.³⁶

Whatever the reality, reconciliation can be a transient phenomenon, and to suggest that one hearing is enough to effect it in any strong sense is wishful thinking, especially when, as often must have been the case, the torturer returned to a comfortable white South African lifestyle and the victim, returned to a squatter's shack, a township house or domestic worker's flat, to contemplate the loss of a loved one or to relive the horrors of the interrogation room in the dead of night. Retribution may be cold comfort, but there is a real sense in which it achieves a just and balanced closure in a way that sympathy and amnesty at the TRC along with lofty talk of 'restorative justice' may never do.

If the aim of restorative justice is to reconcile victim with violator, then surely the acid test of this is whether or not the victim is prepared to endorse an amnesty application. While victims were entitled to oppose applications, the legislation governing the TRC left no room for those responsible for dispensing amnesty to take the victim's feelings towards their violator after the amnesty hearing into account. In theory, the TRC allowed for amnesty to be granted to an applicant who gave a clinical, remorseless account of horrific abuse in front of a victim who wanted retribution and had no intention of granting forgiveness. In these cases,

34 Quoted in M Meredith *Coming to Terms: South Africa's Search for Truth* (1999) 84.

even in terms of its own professed commitment to restorative justice, the TRC did little more than exchange immunity for a confession. Victims could be lauded, sympathised with, congratulated, even granted some compensation, but their violators could walk away having done little to earn their absolution.

It is, admittedly, insufficient to argue that the amnesty process did not satisfy the needs of victims, based on anecdotal accounts.³⁷ But broader research has been undertaken. In a paper presented to the TRC in 1998, the Centre for the Study of Violence and Reconciliation surveyed 560 victims' responses to the TRC through the Khulumani Support Group.³⁸ The paper noted that, within the group of participants, 'justice and punishment was still favoured as a way of dealing with the perpetrators over amnesty'.³⁹ If the TRC had failed by this time to sell its programme of restorative justice to a large number of victims, who still wanted retribution, we cannot but have serious doubts about how successful that programme was. Retribution was not, however, the only need expressed by the victims surveyed. As I will suggest below, the best account of restorative justice does emphasise the importance of responding to needs other than retribution, but does not amount to a useful paradigm on which to model responses to apartheid-era violations.

(g) Restorative justice – a reinterpretation

I have suggested that the TRC's interpretation of restorative justice, bound tightly as it is to the concepts of forgiveness and reconciliation, is both inappropriate and has had limited success in responding to victims of apartheid-era human rights violations. But the TRC's formulation of 'restorative justice' gives a bad name to an idea which has growing support amongst criminologists and lawyers in a number of western-style legal systems. Restorative justice, as writers such as Lucia Zedner and Howard Zehr have understood it, has little to say about reconciliation and almost nothing to say about forgiveness.⁴⁰ Proponents of restorative justice take as their point of departure the preoccupation of current criminal procedures with fact-finding and making the punishment fit the crime. They argue that retributive justice ignores some essential needs of crime victims such as mediation, accountability and restitution. Their next move is to investigate an array of possibilities which might achieve these aims, within the framework of a restorative system.

37 For a wealth of detailed individual case studies on victim's encounters with the TRC, which largely support the view that the TRC's version of restorative justice has at best only been partially satisfactory for victims, the reader is advised to consult Wilson (note 33 above).

38 Centre for the Study of Violence and Reconciliation *Survivors' Perceptions of the Truth and Reconciliation Commission and Suggestions for the Final Report* (1998), available at www.csvr.org.za/papers/papkhul.htm.

39 Ibid.

40 Ibid.

Some have argued that the payment of reparations, as envisaged by most accounts of restorative justice, can be an adequate substitute for punishment. Howard Zehr suggests in a different context that 'financial and material losses' experienced by a victim of any crime

may present a real financial burden. Moreover, the symbolic value of losses – their meaning often acknowledged by story telling and public memory – may be as important or more important than the actual material losses. In either case, repayment can assist recovery.⁴¹

Zehr acknowledges the limitations of restitution; no one can give back a murdered loved one. But paying for expenses might ease burdens imposed by any violation and 'at the same time, it may provide a sense of restoration at a symbolic level'.⁴² But it seems that even Zehr recognises the incommensurability between some categories of wrong and the payment of any amount of compensation. 'Some offences,' he admits, 'are so heinous that they require special handling', beyond the scope of restorative justice.⁴³ It would be insulting to suggest that money can ever satisfy the rubrics of just proportionality in cases of unjust internment, brutal torture or the loss of a loved one, even though they may assist a poverty-stricken victim (or victim's family) to live more comfortably. For these reasons, I think, although reparation has its place in the range of responses to political oppression, it ought not to be offered as a *substitute* for retributive justice – rather as a *complement* or as a *consolation* where retribution is not a realistic option.

Another strategy advocated by restorative justice enthusiasts is the engineering of face-to-face meetings between offenders and victims where the violation is discussed and agreements on the form and level of restitution are made. These meetings are meant to assist the offender in 'making good' the violation by apologising and offering some form of practical help or monetary restitution. Underlying this strategy is a conception of a crime not as a serious violation of moral and legal imperatives – such as basic human rights to liberty, property and security of person. The idea is rather of a 'conflict' which needs to be resolved, or a broken relationship which needs to be restored, thus facilitating reconciliation, eliminating the need for retribution and effectively importing civil justice solutions into the criminal law, an area traditionally the preserve of retributive justice.

This conception of crime makes a thoroughgoing restorative justice programme of any kind (not merely the TRC's flawed interpretation) an inappropriate response to apartheid-era violations on at least two levels. First, interpreting any kind of serious violation as a 'conflict of interest' is a dangerous move. To say that Steve Biko's murder in detention, for example, was the result of a conflict between Biko's interest in living and

being treated properly in prison and the police officers' interest in torturing and killing him is to miss the point that some interests are not legitimate. The very idea of human rights – which the TRC was supposed to be promoting – is based on the notion that there are some things that I can have no morally legitimate interest in or reason for doing – namely anything which violates the rights of others. When basic rights are involved, characterising their breach as a result of a conflict of interests is an almost unintelligible thought. The language of rights and the language of restorative justice – so conceived – are antithetical. That which the former characterises as a negation of moral duties, the latter characterises as an unfortunate conflict of interests.

It is interesting and important – but beyond the scope of this article – to consider what the proper fields of civil law, criminal law and arbitration are. But if we do need to treat more crimes as civil conflicts, it is unlikely that the crimes re-categorised will be so serious as murder and torture. When crimes do get this serious, it seems to me that any gap between law and morality closes. 'Do not murder' works just as well as a binding moral imperative and as a legal rule. Characterising breaches of such laws as 'conflicts of interest' does not properly account for the importance we want to attach to them. There is no sense that murderers and torturers have done anything *wrong* if it is all just a conflict of interests.

Second, where restorative justice talks of 'healing broken relationships' it fails to recognise that victim and violator may have never had a relationship to heal. In the context of a crime committed by one neighbour against the other, to speak of repairing the relationship may make sense. But where no prior relationship of friendliness and moral equality existed in the first place – say between torturer and detainee, we cannot sensibly speak of reconciliation. There are simply no broken relationships to repair, merely a period of causing and enduring pain to make sense of.

Of course, these arguments against restorative justice do not amount to arguments for retribution. Proponents of restorative justice make a valuable negative thesis. There is something anaemic about the view that all victims require to recover from a violation is the knowledge that their violator is being punished. Apologies and reparation can help, but they can be quite easily absorbed into an ultimately retributive framework, and the retributive framework has the advantage of being able to make sense of 'moral responsibility' by seeing violations as wrongs rather than conflicts.

(h) Moral dilemmas

How, then, should we think of the TRC, if not as an agency of forgiveness and reconciliation? Are we simply to acknowledge that the

41 Zehr (note 40 above) 26.

(392)

political realities than with responding to human rights violations? I have already suggested that there are many powerful practical arguments which put retributive responses to apartheid wrongdoing beyond the bounds of the possible if truth-seeking is to be a realistic goal. But I am more interested in asking if there are any good moral reasons for forgoing punishment. As I hope I have demonstrated, there is nothing in the concepts of retributive justice, forgiveness and mercy themselves which would justify the TRC amnesty process. But once the myth of restorative justice is disposed of, there are at least two serious moral issues to work through.

The first is that if we can be reasonably sure that prosecutions would not issue in much truth or justice, then the moral emphasis the TRC places on the value of revealing the truth has some purpose. Although the TRC may have devalued justice in the pursuit of truth, trials are not aimed at establishing truths in particular, but at establishing guilt or innocence within a framework which does not require the accused to incriminate himself. Even if violators could be successfully prosecuted, there may be so much about their motivations and the details of their crimes of value which victims would never discover. Like Iago in Shakespeare's *Othello*, the condemned tend to take the details of their crimes with them to prison and to the grave, in a sham of denial or a malevolent, depraved commitment to secrecy. When Iago's guilt is exposed at the play's climax, Othello asks his hitherto loyal servant to explain himself. Iago merely replies:

Demand me nothing; what you know, you know.
From this time forth I will never speak a word.⁴⁴

The nature and scope of the crimes committed under apartheid force us to re-examine the relative values we place on revealing the truth and justice. In so far as there could be a conflict, the latter would usually win out without much deliberation. But the fact that apartheid crimes formed part of a systemic pattern of political repression or anti-state terrorism, replicated across South Africa, and that many of them were committed in secrecy, places a higher than usual value on knowing their details. Couple this with the practical consideration that, in most cases, without confessions from the perpetrators of human rights violations themselves, there would be little evidence on which to base a successful and fair prosecution, and we find ourselves in a moral dilemma. We are forced to pitch two usually complementary values against each other. Further, the value judgement has to be made not just for a small number of cases, but for a whole category of offences, spanning nearly four decades and potentially covering thousands of deaths and incidences of torture.

The political risk of pursuing retribution must also be assessed. Prosecuting members of the police and armed forces at a time when both institutions were extremely hostile to the democratic transition would have risked a coup that might have negated any moral gains made by the achievement of a constitutional settlement. Of course, whether this would actually have happened can never be answered with certainty. Tellingly, the deal resulting in a commitment to some form of amnesty came after negotiations between the NP government, the security forces and the ANC. Amnesty was finally agreed upon in response to a message sent to Nelson Mandela by the Police Commissioner and the recently retired head of the National Intelligence Service. In their message, the two men suggested that in return for amnesty, the security forces would 'guarantee stability' during the transition period. Otherwise, they argued, elements within those forces might find it impossible to support the democratisation process out of fear that their careers would be destroyed by ensuing criminal investigations.⁴⁵ This message gave substance to Mary Burton's later warning that, while the danger in many of the Latin American cases of democratic transition was posed by the *ancien regime* 'dragons on the patio', in the South African case 'the dragons will be right inside the living room'.⁴⁶

Nowhere else is the tension between power politics and moral idealism more apparent than here. If the threat of military intervention is serious, then a relaxation of demands for retributive justice may be necessary in order to create the conditions under which justice and the rule of law can be entrenched in future. Granting immunity from prosecution for terrible crimes seems intolerable, but it forms the substance of an irresolvable political dilemma with distinctively moral dimensions. Whichever path was taken on amnesty, important moral requirements would have been trampled on. The decision to grant even a conditional amnesty disregarded the moral requirements of retributive justice, compliance with which in other circumstances would have been preferred. If prosecutions were initiated, many cases would simply not have been successful and important elements of the truth about human rights violations may never have been known. In addition, there was always the risk that the whole constitutional settlement may have fallen apart.

Some philosophers have suggested that really difficult moral dilemmas cannot be resolved without what Bernard Williams has called 'moral remainder'.⁴⁷ Suppose there are irresolvable moral dilemmas and that we are faced with one. Whatever is done, one faces regret about not having been able to meet the important moral requirements of the path not taken. This regret is called 'moral remainder'. Even when a dilemma can be dealt with, and one requirement clearly overrides the other, we might

want to insist that it is resolvable only 'with remainder' or 'moral residue'. This remainder represents the fact that the secondary requirement, or the path not taken, still retains a moral force such that the expression of regret, or the recognition of a new requirement once the initial decision has been made, are still appropriate. The unconscious assumption that there must be an unequivocally 'right answer' to every moral dilemma is thereby refuted.⁴⁸

I would like to propose an interpretation of the TRC as a product of this 'remainder'. Thinking about the TRC in this way has at least three important consequences. First, it makes moral sense, recognising the Commission as the result of deliberations that, on some level, were distinctively moral in character. Second, it does away with the need felt by some to justify the TRC in terms of grandiose but largely empty notions of restorative justice and helps us to assent to the common sense thought that retribution would have been the preferred response to apartheid wrongdoing, other things being equal. Third, it forces us to recognise that the TRC's obligations to the victims of apartheid go beyond cathartic hearings and are not obliterated by the hard choice made in favour of amnesty.

(i) Making reparation

What might the TRC's surviving obligations be? A reparations policy aimed at providing limited compensation for victims of gross human rights violations has already been developed. Those named as eligible should, the Commission says, be entitled to grants of between R17 000 and R23 000 annually for a period of six years.⁴⁹ When this scheme was conceived it was estimated that 22 000 victims would benefit from such reparations payments. The Commission also proposed the establishment of community-based programmes to address victims' health care, education and housing needs.⁵⁰

Although reparations do not make for a just solution, they do have an extremely important role to play in acknowledging the suffering caused by apartheid-era abuses. They represent a way in which the Commission can make its presence felt in the wider community beyond media coverage of its hearings. They also implicitly acknowledge the idea of 'moral remainder'. Reparations do represent a kind of consolation for victims who have been denied the right to prosecute those responsible for their pain. Yet the need for reparations also forces us to face up to an issue of wider significance. The TRC's policy, in providing for community-based programmes, also acknowledged implicitly that

48 R Hursthouse *On Virtue Ethics* (1999) 44-45.

49 The amounts represent a calculation based on median annual household expenditure in South

victims of human rights violations often lived just above or below the poverty line – a poverty aggravated, if not caused by, apartheid. Once this has been acknowledged, it becomes very difficult to discuss gross human rights violations without discussing the system which made them possible. It has been recognised that reparations in post-apartheid South Africa ought to deal with issues much wider than individual human rights violations themselves.

However, the Commission's proposals have yet to be implemented and it is of great concern that the ANC government is leaning towards not granting individual reparations at all. In 1998, Deputy President Thabo Mbeki was noncommittal about individual reparations in his parliamentary statement on the TRC's Final Report. He gave the impression that the ANC's preference was for community-based reparations that would benefit all victims of apartheid, saying that all South Africans must be 'ready and willing to provide reparations to entire communities, by helping to pull them out of the wretched conditions which are the product of a gross and sustained violation of their rights as human beings'.⁵¹ Finance Minister Trevor Manuel recently suggested that 'reparations are not necessary because the government is making efforts to uplift the poor through its policies', thus talking-down the notion of individual reparations.⁵²

The best indication we have so far is that some limited reparations will be paid. Some modest interim funds have already been released. The timing and nature of final reparations payments have, however, yet to be decided. Worryingly, both of these statements seem to elide the distinction between individual gross human rights violations committed in civil conflicts and the poverty and inequality entrenched by apartheid. The consequences of this for victims of torture and unjust internment are serious. True, it is difficult to discuss apartheid-era human rights violations outside the context of the civil rights violations sanctioned by apartheid itself. But violations of political rights not to be tortured, unjustly interned or deprived of life fit into a different category to apartheid-sanctioned segregation and inequality. Apartheid picked out people by skin colour. The violations committed by apartheid security forces and ANC/UDF and IFP militias had different motivations in that they picked out those, of whatever colour, whose political activity or status made them a target in the eyes of those responsible for their deaths, injury or imprisonment.

The principal benefit of this elision for the government is that it allows them to use the rhetoric of community-based reparations as a political tool to remind the electorate of the injustices of apartheid. This virtually obliterates any reflection in reparations payments of the human rights

51 D. Shea, *The South African Truth Commission: the Politics of Reconciliation* (2000) 34.
52 G. de la Motte, *ibid.* 35.

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violations the ANC itself committed. 'Redressing apartheid's inequality' becomes the slogan attached to reparations policy, rather than 'making reparation for individual human rights violations committed by all sides in the struggle'. In this way, the ANC implicitly advances its contention that human rights violations it committed during the struggle do not carry the same moral weight as those committed by the apartheid regime – an argument that was rejected by the TRC itself.

The ANC defends its position in terms of not wanting to create two classes of victim, compensating one at the expense of the other, since the individual reparations grants represent reasonably substantial sums of money. But this seemingly good intention is misplaced. There simply *were* two classes of victim – those members of racial groups who suffered the structural violence of apartheid and those, of whatever colour, who were killed, tortured or imprisoned during the violent struggle to end it. While reparations for apartheid itself are important, individual reparations grants represent a consoling recognition that victims of torture and detention have been denied rights to legal redress by the TRC. Accordingly, they correspond to important moral requirements which there is no good reason to override or ignore.

(j) Supplementary prosecutions

A second obligation is for the Commission to give victims or their families the option to prosecute those who are denied amnesty, as well as all necessary assistance in doing so. The amnesty process is predicated on the assumption that, unless its requirements are met, prosecutions are a proper response to the violations committed. Indeed, it relies on the threat of prosecution to induce compliance with its procedures. Supplementary prosecutions raise many of the same problems which justified amnesty as the next best thing in the first place. It simply is not possible to tell if reactionary forces in South Africa still represent a destabilising threat in the face of prosecutions, even if the trials were necessitated by their non-compliance with an agreed amnesty procedure. Perhaps we can draw some instruction in this regard from General Pinochet's pending prosecution in Chile. Despite legal wrangles about the General's fitness to plead, it appears that the political will now exists to ensure he finally answers for his crimes. The Pinochet case is also instructive, perhaps, in the sense that it demonstrates that a commitment to justice so long suppressed by political circumstances in Chile is now being honoured. Presumably, the Chilean government believes that the threat of 'the dragons on the patio' is now sufficiently diminished to make prosecution a realistic goal.

Yet, even though the TRC itself has recommended that 'where amnesty has not been sought or has been denied, prosecution should be

gross human rights violation',⁵³ and has passed on to South Africa's National Director of Public Prosecutions, Bulelani Ngcuka, a list of those most heavily implicated, fresh prosecutions have yet to be initiated. Ngcuka has indicated that in the interests of national reconciliation, some cases should not be prosecuted.⁵⁴ This is understandable since many of those eligible for prosecution are connected to the violence in KwaZulu-Natal, where there is a clear danger that state prosecution of prominent IFP members could spark off further political violence in a still volatile province. To prosecute former members of the apartheid security forces, while not initiating procedures against IFP members, would also be substantively unfair.

These considerations have led to a revival of arguments for a politically acceptable post-TRC 'collective' amnesty for formerly high-ranking police officers and IFP leaders alike. This would have grave consequences for the integrity of the 'restorative' interpretation of the TRC process. It lends weight to my proposition that the TRC is more about creating political stability, which is an essential precondition for the development of a just and harmonious society, than about doing justice for particular victims of human rights violations.

(k) Dreaming with reason

We should be careful not to equate political stability in South Africa with genuine reconciliation and we have to be clear about what exactly the TRC was supposed to achieve in terms of reconciliation. A careful and nuanced moral interpretation of the TRC is necessary to really get to grips with the possibilities of reconciliation in post-apartheid South Africa. By recognising that the TRC was not a lofty moral project aimed at achieving some transcendental notion of justice, but the product of a tense and agonising moral and political compromise forged in the context of a democratic transition, we put ourselves in a position better suited to addressing the racial, political and socio-economic fissures in South African society. We ought to be wary of talking too much of forgiveness and reconciliation at the expense of justice and an acknowledgement of the bitter divisions which will remain for some time after the TRC is finally wound down. Such divisions will be aggravated perhaps by the thought that many of those responsible for apartheid-era crimes ultimately got away with it. In South Africa, we must dream of reconciliation only with alert reason.⁵⁵

IV CONCLUSION: THINKING ABOUT THE TRC

This article has touched on three responses to mass violence committed under authoritarian regimes: retribution, conditional amnesty and

53. In Tutu et al. (note 26 above) Volume 5, Section 9, para. 14.

impunity. All of them have long-term goals of reconciliation and nation-building. I have argued that the most promising conditions for individual reconciliation are created by the restoration of a just balance of human dignity, which is best achieved through retributive punishment. Reconciliation requires a sense that there is no more resentment to harbour. Individuals approach each other openly on a level and begin to interact, perhaps even to bond without the weight of past violations bearing down on them.

But when retributive justice itself threatens to undermine a fledgling democratic regime, the lofty goals of perfect justice and full reconciliation must be compromised. The TRC's answer to the problems of retributive punishment in transition was amnesty predicated on truth-telling, which entailed doing an injustice in order to stabilise a minimally decent society. Victims were allowed to tell their stories and violators encouraged to acknowledge the truth. This in itself may give some sense of 'closure', however inadequate when measured against justice, to those scarred by horrific violence. Scores may be left unsettled, however. Detailed knowledge of gross human rights violations, coupled with the feeling that those responsible were absolved with very little trouble, can leave powerful feelings of resentment lingering, especially where there has been neither apology nor adequate reparation.

Where there is neither acknowledgement nor accountability, crimes are remembered and mythologised, they become part of a culture of victimisation embedded in public memory. Thus, after the Anglo-Boer War, Afrikaners who received very little by way of apology or acknowledgement for the thousands who suffered or perished as a result of British war crimes, including the establishment of concentration camps and the operation of a 'scorched earth policy', built the 'alp of unforgiveness' to which Plomer refers in his poem on the Anglo-Boer War.⁵⁶

Great care should be taken to place the TRC in its correct place in the moral hierarchy of responses to gross human rights violations. In order finally to remove the civil injustices of exclusive white power, the ANC was required to qualify its demand that those who tortured or murdered in the name of apartheid be prosecuted. The idea that provision for a conditional amnesty was made because of a desire to promote a set of moral values which were incompatible with retribution is wildly unconvincing.

This article has attempted to show, first, that restorative justice, as constructed by those who wish to defend the TRC on its terms, is hopelessly muddled and that the concept simply does not make sense of much of the TRC's functions and the experiences of victims and

perpetrators who came before it. Second, to really get to grips with the moral and political significance of the TRC, we need to realise that its primary purpose was to sustain an elite consensus, which in turn made viable the South African transition. In order to make moral sense of this, a kind of value pluralism is required. On the one hand, victims properly demanded retribution; on the other, political stability required amnesty. Amnesty conditional on truth-telling was an important innovation which resulted from a mediation between these two values. It should be understood as just that. The fuzzy glow of the TRC's brand of restorative justice obscures this truth and with it a clear idea of the obligations still owed to victims of apartheid-era violations, along with the wider social wrongs still to be righted in South Africa.

In this context, restorative justice itself is based on three confusions. First, retribution is confused with vengeance. Retribution is the law-bound public process of a community affirming the value of a victim, correcting for the actions of a criminal and re-attaining a moral equilibrium. In much of the moral commentary on the TRC, it is unjustifiably conflated with a kind of unconstrained and bloody political vigilantism. This confusion is necessary in order to set up retribution, on the one hand, and forgiveness and reconciliation, on the other, as incompatible moral aims. But if forgiveness is to forswear resentment without losing one's self-respect, then the thought that someone has been punished for their violation of the victim's dignity – and perhaps expressed remorse for what he did – would surely help facilitate it.

Second, forgiveness is confused with mercy. In calling for forgiveness 'instead of' punishment, restorative justice actually seeks a particularly strong version of mercy. The TRC simply cannot deal in forgiveness, first, because public institutions are incapable of assisting victims to master their resentment, which is the essence of forgiveness; and, second, because mercy – not forgiveness – entails the remission of punishment. What amnesty does, on the only coherent account of 'restorative justice', is to proffer public mercy as a reward for confession.

Third, justice is confused with expiation. The TRC exchanged confession for indemnity. In parallel, it encouraged a kind of moral transcendence from both victim and violator. Perpetrators of gross human rights violations were encouraged to acknowledge the violations they committed, express remorse and seek forgiveness; and victims to expel feelings of anger and reconcile with those responsible for their pain. This expiation, which followed the unmistakably Christian rubric of confession, repentance, absolution and reconciliation, should not be mistaken for justice. To mean anything useful, justice must entail some kind of redress for those wronged. In the case of gross human rights violations, the primary wrong is committed against the victim who may properly seek redress. But

⁵⁶ 'Out of the hundred, under the sun, the of unforgiveness' W. Plomer, *Collected Poems*, 1910.

committed also count against communal values such as a general respect for the sanctity of life and the values of liberty and the rule of law.

Retributive justice, in the form I have argued for it, creates the opportunity for redress not just for the victim, but also for the community. Expiation differs from this in that it is aimed not at attaining redress for the victim, but cleansing the wrongdoer of his 'sin'. Redressing moral balances does not really figure in the language of expiation. A second problem is that expiation is a two-way process, between victim and violator. The most the community can do is to look on as it takes place, denied what it requires in order to correct the moral imbalance caused by the violation. There is no reason why expiation and justice cannot exist side-by-side, but the contrast I have drawn here should be enough to prevent us from conflating the two.

The TRC was the result of a series of deliberations between the relative values of truth, justice and political stability and the problems of the ordinary criminal process. The interpretation I have advanced in this article makes sense of forgiveness and reconciliation as essentially private matters between victims and violators and asserts the value of truth. But it also emphasises the moral worth of demands for retribution, and insists that these demands must be measured against competing moral and political concerns.

The approach I have developed places a strong emphasis on the need for supplementary prosecutions and a strong individual reparations policy. South Africa's duties to victims of gross human rights violations remain unfulfilled. Linger concerns about political stability notwithstanding, to fail to prosecute at least some of the 5 392 applicants who had been denied amnesty by November 2000 (excluding those who applied from prison, where they were serving sentences for their offences) would be to make a mockery of the entire process. For the government to neglect to pay reparations to those individuals identified as victims by the TRC would be to deny the depth of the suffering which the TRC was meant to bring to light.

Nothing in this article ought to be taken as a direct criticism of restorative justice in contexts other than the South African transition. There is a growing and respectable literature on the concept and its application to everyday criminology. The point is that, whatever its merits, restorative justice cannot provide a coherent moral foundation for the TRC. The TRC itself was a remarkable innovation and in a few important respects a promising solution to the problems of legal justice in transitional contexts. But how we think of the TRC is just as important as what it actually did. To recognise it as the tense moral compromise it was, is to further our understanding of an extraordinary institution: it is to face the 'new South Africa', and all its problems and opportunities, fully appreciating the moral agonies of its genesis.

SUB JUDICE IN SOUTH AFRICA: TIME FOR A CHANGE

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ABSTRACT

Existing authority on the *sub judice* doctrine dates from the apartheid era, and greatly restricts freedom of expression. The article examines whether *sub judice* really promotes the due administration of justice, and compares South African law with the corresponding law in the United Kingdom, Canada and the United States. After subjecting the *sub judice* doctrine to a limitations analysis under s 36 of the Constitution, the article concludes that *sub judice* in its current form should be revised to provide more protection for freedom of expression.

I INTRODUCTION

One of the central aims of the new South African constitutional order is to create an open and accountable system of government. Yet the comments that may be made about pending civil and criminal proceedings in South Africa are greatly restricted by the *sub judice* doctrine, common law rules that under the apartheid regime were one of many means of suppressing comments critical of the government. This article contends that these rules are inconsistent with the Constitution.¹ The article concentrates on the application of the *sub judice* doctrine to criminal proceedings, because it is in this context (where the fair trial rights of the accused carry special weight)² that the claims in favour of restricting free speech are strongest.

Part II of the article describes the existing position in South Africa and argues that the restrictions on freedom of expression currently permitted are so severe that it is unclear whether the *sub judice* doctrine really promotes its stated purpose, the due administration of justice. Part III supports this contention by considering the comparable law in the United Kingdom, Canada and the United States, each of which provides

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1 The Constitution of the Republic of South Africa Act 108 of 1996 ('the Constitution'). Section 16 states that '[e]veryone has the right to freedom of expression, which includes (a) freedom of the press and other media'. This article's contention is not new. For example, Gilbert Marcus argues that '[p]rejudice to the right to a fair trial is obviously a particularly strong claim and courts are unlikely to be sympathetic to the demands of free expression in this area. Nevertheless, it is questionable whether the current common law test for contempt would survive constitutional challenge'. G Marcus 'Freedom of Expression Under the Constitution' (1994) 10 SAJHR 140, 145.

2 Section 35(3) of the Constitution expressly confers on the accused the right to a fair trial, which