Justice in Transition

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The role of justice in the search for peace is doubly problematic. On the one hand, in the aftermath of large-scale atrocities, or the collapse of violently oppressive regimes, calling perpetrators to account is only one of many objectives; its pursuit may prevent other important aims from being realized. On the other hand, in the context of seeking peace, the retributive model of justice is itself called into question, as ideas of justice in terms of restorative or conciliatory measures, rather than punishment, come to be salient. Several solutions to these political, conceptual and moral puzzles have been offered, in what is by now a very large and thoughtful literature on transitional justice (see Hayner, 2003; Rotberg and Thompson, 2000; Krits, 1995).

Discussion centres on the nature and rationale of the truth commission, the most well known being the South African Truth and Reconciliation Commission (TRC). Under some treatments, the truth commission is offered as an approximation to retributive justice, bringing facts to light and shaming perpetrators—an approximation that is acceptable when full retribution is not available, for one reason or another. Or, truth commissions and amnesties may be considered just in the second-hand sense that, while they do not themselves execute justice, they are means by which a just society may one day be achieved. We may term both of these views realist, as they give weight to practical obstacles that impede the full realization of justice in the here-and-now. More radically, though, a third conception presents the truth commission as neither a second-best, nor a means to justice in its dominant (punitive) sense, but as a

Acknowledgments: Thanks to Chris Pang, Kish Vinayagamoorthy and Kara Wong for discussions.

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Canadian Journal of Political Science / Revue canadienne de science politique
39:1 (March/mars 2006) 117–134
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https://doi.org/10.1017/S0008423906060070 Published online by Cambridge University Press

vehicle of a different idea of justice that is superior, if not overall, then at least in transitional contexts following oppression or atrocity: restorative justice, the view that justice lies not in calling the guilty to account but in repairing damage by reconciling hostile parties (see Spelman, 2002). The South African TRC in particular has been critically interpreted in all these ways (Gutmann and Thompson, 2000: 26–29; Ntsebeza, 2000: 163–64; Kiss, 2000; for an overview, Dyzenhaus, 2000).

Various criticisms have been levelled at all three approaches. The "second-best" view of truth commissions does not acknowledge the sense that many people have: that they embody, rather than merely approximate, just aims. The means-to-an-end view sacrifices strong desires for present justice in the name of a distant and hypothetical future. The restorative justice view, at least to some critics, dresses up pragmatic compromises in high-flown idealism, and not only frustrates but actually delegitimates victims' desires to hold perpetrators to account. This paper, however, offers a different view: truth commissions need not and do not trade off justice for peace; they have more than an instrumental relation to a just society; and they do not require us to adopt paradigms of justice that abandon the standard retributive model as it is understood here. Rather, we may see truth commissions and trials as expressing the same aims of justice, though in a contextually differentiated way that modifies the subordinate principles that the aims of justice require and thus also affects their institutional expression. Our discussion is limited to what may be taken to be the justifying aims of truth commissions, and does not broach the question of their degree of success.

I. Three Views of Retribution

Since this paper sets out to explore the view that there are aims of justice, it must set aside the view that retributive justice is aimless, or that retribution is intrinsically just, requiring no further goals. Kant held that punishment "must always be inflicted upon [a person] only *because he has committed a crime*. For a human being can never be treated merely as a means to the purposes of another, or be put among the objects of rights to things" (1996: 105). He drew from this view a startling and arguably counterintuitive conclusion: if a society knew that it was about to be dissolved, it would be duty-bound to execute condemned prisoners before the catastrophe struck, so that "each has done to him what his deeds deserve" (1996: 106). Kant's argument has more recently been defended by James Rachels, who argues on the basis that there are widely held notions of desert (1997). Suppose someone has done us a favour in the recent past, such as giving us a ride to work. Suppose a time comes when our benefactor in turn needs a ride to work, and that we have to

https://doi.org/10.1017/S0008423906060070 Published online by Cambridge University Press

Abstract. This paper questions both realist and restorative conceptions of truth commissions, to the extent that both of those conceptions neglect the internal links between truth commissions and criminal trials. Interpreting the requirements of retribution, responsibility and truth-telling, the paper argues that trials and truth commissions should be placed at points on a spectrum rather than in distinct categories, and that the circumstances of political transition explain the divergences in their respective practices. We may see truth commissions and trials as expressing the same aims of justice, though in contextually differentiated ways that modify both the subordinate principles required by the aims of justice and also their institutional expression.

Résumé. Cet article remet en question la conception réaliste et la conception réparatrice des commissions de vérité, dans la mesure où toutes les deux négligent les liens internes entre les commissions de vérité et les procès criminels. Interprétant les exigences de rétribution, de responsabilité et de véracité, l'article avance que les procès et les commissions de vérité devraient être situés en divers points du même spectre plutôt que dans des catégories distinctes et que les circonstances de transition politique expliquent les différences entre leurs pratiques respectives. On peut considérer les commissions de vérité et les procès comme traduisant une même «poursuite de la justice», bien que les différences de contexte modifient dans chaque cas les principes subalternes qu'impose la recherche de la justice et, de ce fait, changent aussi leur expression institutionnelle.

choose between helping her out and helping out someone who has never been helpful to us in the past, though they had opportunities; we would certainly—unless very special circumstances applied—decide to help our benefactor. Good should be returned for good, no further reason being called for. If this is the case, why then should bad not be returned for bad, for no further reason?

However, the analogy does not hold, because the burden of justification falls differently. In both cases, what we actually need to justify is doing negative or harmful things to people, not doing beneficial things; when we give a benefit to X, our benefactor, what we must justify is the denial of that benefit to Y, the unhelpful person. In Rachels' first case, denying Y of that benefit is simply a natural consequence of conferring the benefit on X—we cannot give rides to both of them at the same time. But when we speak of returning harm for harm, nothing like that justification applies. Punishment of the malefactor is not a natural consequence of conferring a benefit on someone else, and it therefore requires direct justification in a way in which conferring a benefit does not. That bad is being returned for bad certainly tells us that it would be wrong to "punish" someone who had done no wrong, but does not explain why it is right to punish a wrongdoer (Vernon, 2005: 250–52).

Both Kant and Rachels worry that if we do not accept the idea that intrinsic reasons justify retribution and punishment, we will in turn be committed to a consequentialist view that treats punishment as means to a social end, such as deterrence. For Kant, this is unacceptable, because to treat another person only as a means is to deny their humanity. Rachels adds the further worry that if punishment is a means of deterring future crime, then what matters is that punishment falls on people gen-

https://doi.org/10.1017/S0008423906060070 Published online by Cambridge University Press

erally believed to be wrongdoers, as opposed to the wrongdoers themselves. However, their distinction between intrinsic and consequentialist justifications is not exhaustive; there is an expressive justification that does not raise the worries outlined above.

Jonathan Allen, in a discussion of the TRC, also argues that "we cannot understand [punishment] solely in terms of retribution" (1999: 327). Indeed, the idea that punishment should serve as moral education is almost intuitive, for we might well ask what purpose punishment serves absent the public space in which it is handed down. The belief that justice must be seen to be done is crucial in this respect, for it demonstrates that while the process of trial and punishment is primarily seen to focus on a particular victim and offender, the practice itself necessarily functions at the societal level, in how we perceive our relations with one another. It would be counterintuitive to suggest that the crime of murder is a matter of concern only to the victim's family and those who committed, or conspired to commit, the act. That it is classified as a crime speaks to its public nature, to its role as a public threat. As such, it must be dealt with in such a way as to communicate to the larger society both that the threat has been addressed, and that similar threats are wrong and will not be tolerated.

The above discussion assumes a common understanding of a set of rules governing social interaction. It is when such rules are broken that dispute arises, and adjudication between parties to the dispute becomes necessary. This commonly accepted set of rules constitutes the moral order of a society. This moral order is illuminated by Allen's discussion of justice as recognition; in a court of law, justice as recognition operates insofar as individuals are subjects of law: "legal institutions ... do not recognize everything about the identity and achievement of individuals—simply their equal status as responsible persons capable of making reflective moral decisions" (1999: 329). If status under the law is indeed equal, and understood by the general public to be so, then an individual's calculations concerning his actions would ideally take into account the capacity of others to make equally reflective moral decisions. There is an assumption here that an individual's moral decisions will not be divorced from his understanding of his own moral worth and what that worth entails; consequently, he will treat others as he himself would like to be treated, as the adage goes. A society where every individual operates more or less consistently in this manner gives rise to a set of rules that in turn comes to constitute a moral order to which every member of that society is bound. Insofar as legal institutions recognize the equal status of individuals "as responsible persons capable of making reflective moral decisions," then these institutions likewise function to uphold the moral order.

From this line of thought, and also following Jean Hampton (1988), we can view a criminal act as an implied claim to privilege. When a

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perpetrator harms a victim, he practically implies that his interests count for so much that (at least one of) the victim's interests are simply outweighed. This is inconsistent with their equality of status, as humans or as co-citizens. Punishment, then, expresses the wrong that has been done by striking at the claim to privilege: the damage that is done to the perpetrator is justified as a way of affirming that the victim's interests are of moral account by subtracting from the perpetrator's interests. It is not a case of "returning bad for bad." Although, in an approximate fashion, more or less serious damage to victims will attract more or less heavy penalties, the damage suffered by the perpetrator is not a kind of two-party exchange for the victim's damage (as in the model of private law; see Nickel, 1976: 379–88). Rather, the relation between victim and perpetrator is mediated by the common need to uphold the primary value of their legal equality, and the schemes of relationship that the recognition of equality of status makes possible. Indeed, it is the societal mediation between the perpetrator's act and the victim's loss that is often taken to be a weakness of retributive systems, which regard criminal offences as affronts to order at the cost of classifying the victim's loss as nothing more than evidence, and marginalizing the victim's subjective experience of it. Legally speaking, criminal acts are offences to the Crown or People or State, though the victim has borne the cost. The point of the judicial process is not to repair the cost to them, but to affirm the importance of the moral order that is violated when the equal status that it mandates is violated.

If we return to the considerations of Kant and Rachels, in favour of an intrinsic model of retribution, we are now in a position to evaluate how the expressive model fares in comparison. If a society knew that it was about to be dissolved, this model would not oblige us to punish prisoners while there was still time to give them "what their deeds deserved," for an expressive view naturally implies the survival of a continuing public sphere within which the value in question can be expressed *to* someone. Neither does this model involve using perpetrators (or believed perpetrators) as mere means, for the process is justified as expressing, or truly representing the facts about what was done and suffered, and as declaring its wrongness. Stepping down from a purely conceptual level, one can see this declaratory aspect in the actual practice of trial and punishment. A plea of guilty forgoes the process of determining whether or not evidence points to criminal wrongdoing; indeed, it makes such a process redundant. Conversely, a verdict of guilty counts, of course, as a public acknowledgment of the offender's wrong. Even after a plea of innocence and a verdict of guilty, the offender's own acknowledgment is regularly sought, and "[a] show of remorse by a defendant ... routinely has an impact on sentencing and parole" (Gill, 2002: 115). If punishment was of purely intrinsic value, as opposed to expressive value, it would be difficult to

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understand why acknowledgment and show of remorse would be taken into account: the deed having been done, the offender's just deserts would follow. It would appear, however, that "[t]he power and resources of the system ... are reserved for the unapologetic" (Gill, 2002: 115).

With this proposed expressive view of retribution in mind, let us turn to the question of justice in the aftermath of massive atrocity or oppression, and the distinctive issues that are raised in that context.

II. Transitional Societies and Rule of Law: From Disrespect to Denial

In transitional societies, there are many grimly practical reasons for abandoning retributive processes. Acceptably reliable criminal trials are methodical, time consuming and costly, and simply unworkable when (as in Rwanda at one point) over a hundred thousand suspected génocidaires are in jail awaiting trial. There may be no effective and uncompromised judicial system in existence. In the case of oppressive regimes, significant levels of culpability may fall short of the ordinary criteria for criminal offences. And the threat or fear of retribution may deter leaders from giving up power or lead them to negotiate amnesty in advance. If these are the motivating reasons for adopting alternatives to retribution, then the "second-best" justification applies. We can give victims the chance to be heard, we can document what happened for posterity, we can subject perpetrators to the indignity of public confession—regretting, all the while, that we cannot do more.

But there are also conceptual reasons that weigh against punishment, in addition to practical ones. We can consider these reasons in terms of scope and scale. The view of retribution sketched in the previous section implies a set of background beliefs and practices that constitute a society's public moral order. It implies a society that is for the most part law abiding, and made up of schemes of relations that depend on trust and basic mutual respect. Consequently, criminal offences are rightly viewed as disruptions, and criminal punishments can thus be viewed as reaffirmations of the importance of the background order.

In a society where the rule of law is upheld, and where law itself recognizes the equal moral agency of individuals, the rules constituting the moral order can be considered universal in scope. That is to say, they apply equally to all members of that society; moreover, all members have access to the law in order to secure redress for violations that disrespect their moral worth. When moral order and the rule of law coincide in this manner, a society is able to make accommodation for a relatively low incidence of "rule breaking" that will occur in any case. Trial on an individual basis is feasible in such a situation because the society is capable

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of isolating the rule-breaker from the moral order that he or she sought to undermine through his or her actions. On the isolation of the suspect in a trial, more will be said in the following section. As for the isolating circumstances of punishment, surely imprisonment would have been rejected long ago if the case for it rested on its supposed deterrent or rehabilitative virtues, so weakly supported by evidence. That it survives as a taken-for-granted remedy suggests that it responds to an intuitive idea that offenders must be excluded, even if temporarily, from an order of relations for which their actions are unfitted. Their exclusion is an affirmation of that order's value, as is the understanding that their transgressions must be addressed in some manner before they are permitted to return fully to that order.

The criminal process, then, seeks to isolate, contain and cancel a disrespectful act that violates widely shared norms embedded in a society's practices. But what is wrong with atrocities and oppressive regimes can hardly be captured by this model. Atrocity and oppression play out in an atmosphere wherein respect for the rule of law is lacking, absent, or where the laws themselves are distorted. In cases where respect for rule of law is lacking or absent, the scope of the moral order can no longer be considered universal: although the law may recognize the equal moral agency of individuals, widespread lack of respect operates to nullify such recognition. The wrong to be corrected is not that of disrespect but, still more far-reachingly, that of denial—denial that victims even have a moral claim to be regarded as victims at all. Disrespect is something that occurs against a background of acknowledged practices of respect for other people. But widespread atrocity and systematic oppression constitute practical denials that whole categories of people have any moral weight whatsoever. This is accomplished by denials of the humanity, or membership, or innocence of their victims: they are vermin, cockroaches; they are outsiders, not part of our moral community; they are traitors, they stabbed us in the back, or plan to do so. Or else, this is accomplished by denials of the facts of oppression: there are no death camps; there is no (systematic) torture. It is hardly a mere accident that such denials accompany major evils, which require mass participation (Rwanda) or broadly diffused support (apartheid) and thus depend on the successful mobilization of opinion against their targets. We do not need a particularly sanguine view of human nature to see that, for the most part, people are incapable of sustained participation in causes they themselves regard as straightforwardly criminal in nature. Harm, to be sustained by large numbers of people, must be normalized (see Glover, 2001).

Where the laws themselves are distorted and do not afford all members of society equal moral status, then the model of isolation becomes inappropriate and even radically misleading. The scope of the moral order becomes restricted and particular, and this narrowness of scope allows

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for wide-scale rule breaking. In contrast to the rule breaking in societies where rule of law is respected, "rule breaking" in this second context may not be acknowledged as such. Indeed, what would be considered as rule breaking where rule of law is the norm, may actually be justified on the basis of the narrow moral order: it is a wrong that has entered into the actions or omissions of thousands, perhaps millions, of people, becoming, in effect, a counter-norm of its own. As long as the moral order confirms their actions, the place of these perpetrators remains within that order. And insofar as the laws conform to that order, then there will be no need for isolation of perpetrators because their actions are condoned, even encouraged by the ethos of the law.

It is for this reason that recourse to a court of law, while not without value and a role to play, does not suffice to meet the challenge facing transitional societies. If retribution, as argued earlier, seeks to encourage acknowledgement of wrongdoing at the individual level, and moral education at the societal level, it cannot achieve these goals if acknowledgement of a primary moral order that dictates rules is not first secured. The victims suffered what they suffered because a wrong assumed a systematic, typical and normative character, and it is that character that needs to be uncovered and condemned. This is not inconsistent with calling individual perpetrators to account, whatever practical or political obstacles may obstruct that—the process of uncovering and condemning the larger pattern of wrongdoing may, for example, coexist with a criminal process that takes account of levels of degree and responsibility. To the extent that the truth-recovery process affirms a status that in the victim's case was violently denied, its aim is identical to that of retributive justice, whether it replaces or supplements punitive practice itself. It takes a different form because of the difference—a morally significant difference, not merely an empirical difference—between abnormal disrespect within a system of law and normal denial in a context in which the operation of law itself has become systematically exclusive.

III. Responsibility in Context

Above, we noted that the circumstances of a criminal trial serve to isolate the suspect: her communications with others are curtailed, her actions are subjected to a level of scrutiny to an unparalleled degree, and at the same time entirely exceptional safeguards are extended, in terms of the admissibility of the evidence that may be brought against her. Trials are concerned with facts as they pertain to a particular and negative interaction between particular individuals. Minow points out how trials "interrupt and truncate victim testimony with direct and cross examination and conceptions of relevance framed by the elements of the charges. Judges

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and juries listen to victims with skepticism tied to the presumption of the defendants' innocence" (1998: 238). The suspected offender is taken seriously as an agent; this point is particularly stressed in Rachels' defence of retributivism: in ways that ignore familiar kinds of restraint on agency, she is taken to be the sole authentic author of the actions that the trial process allows to be attributed to her. Any larger context of events is excluded from the attribution of responsibility, even if, as with remorse, it may mitigate sentencing. One person is on trial—not the group that she belonged to, the incentive structure that she was exposed to, or the influences, however powerful, that entered into her motives. The suspected offender is, so to speak, de-contextualized in the name of establishing individual agency, as a prelude to individual acquittal or punishment. All sorts of considerations that, from a purely moral or historical point of view, might be relevant to understanding the offender's acts, are rigorously excluded. All that is included is evidence about what, within narrowly circumscribed parameters, can reliably be attributed to the offender's individual agency.

Clearly, there is a lack of fit between such narrow parameters and what is called for in the case of massive atrocities or oppressive regimes. What is called for may be described, in fact, as *re*contextualization. For in the situations that we are considering here, the place of decontextualized individual agency is extraordinarily problematic. The final report of the South African TRC argued that the narrow focus of the Nuremberg and Tokyo tribunals meant that "many perpetrators and co-conspirators remained in obscurity. The structures of society and its most formative institutions remained unchallenged" (quoted in Dyzenhaus, 2000: 480). Clearly, such a situation would be unacceptable in cases like South Africa, where the apparatus of apartheid was propped up by numerous mechanisms at the disposal of the state.

Hannah Arendt contributed a classical discussion of this issue (1965). Great evils may not necessarily express the aggregate of greatly evil individual acts. They may express an aggregate of banal acts, especially in the context of bureaucratized systems in which power is diffused and accountability rendered impersonal and opaque, in such a way that few individuals can be described as intending the overall result: what they *intended*, or had in mind as a deliberate purpose, may have been quite mundane. Rather different considerations are advanced by David Cooper, who discusses a case in which participants *can* be considered to have intended the overall result, but in which their agency was diminished by what he terms a "cognitive model" (2001: 211). Cooper asks what difference it should make to our judgments, as observers, that we were not in the participants' shoes, and have been lucky enough never to have faced the choices that they faced. The question we must consider, he says, is not whether we, with our existing beliefs and commitments, would have

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done as they did: the question is, rather, "whether I, if brought up in a very different climate of beliefs and values ... would have acted as they did" (2001: 211). He concludes that the cognitive distortions of perpetrators should make a difference to our judgments, even though we may hold the perpetrators themselves morally liable for acknowledging responsibility.

Arendt's and Cooper's approaches bring out different ideas of diminished agency, which we may call causal and cognitive. In the first idea, agency is diminished because causal connections between act and result are so fractured, while in the latter idea agents are submerged in a climate of fear and prejudice that systematically clouds reality. But in both cases, what needs to be done is to recover the social, organizational and ideational context that surrounded agency, and to record its origins and results. This is just what a trial does not do. As before, however, the objective is entirely continuous with that of a trial, in terms of moral education and equilibrium. A social context, it is true, cannot be prosecuted or punished in the way that an individual perpetrator can be, but if we consider the matter in relation to victims, rather than perpetrators, then truth processes and trials more nearly converge. If the aim is to uncover and condemn the violent loss of status inflicted on victims, then in cases of mass atrocity and systematic oppression a contextualized account will accomplish this much better.

We can see a further or related aim of recontextualization. Allen poses the question thus: "What kind of disposition must be widespread if evil and unjust social arrangements are to be identified and resisted?" (1999: 335). The social, organizational and ideational context in which atrocity and systematic oppression occur is not only a matter of diminished agency; it is also, and importantly, a matter of a greatly diminished sense of injustice. Where atrocity and oppression has become systematic, recognition of the consequences as injustice has important implications: "a sense [of injustice] is important if government during a transition is to preserve legitimacy and a commitment to the constraints of the rule of law, constraints which make it possible for citizens to call government to account for injustice" (quoted in Dyzenhaus, 2000: 484).

In this way, then, recontextualization will more accurately represent, and hold up for judgment, the processes from which victims suffered. It will establish that those processes were not, as it were, aggregates of crimes that happened to occur in parallel, but processes directed against people identified and deprived of moral status, on the basis of their group membership, and that fact has to be central to the recovery and condemnation of the wrong that was done. In accomplishing that, truth commissions, unlike trials, can draw in the context in which perpetrators acted, draw out the common elements in victims' experiences, and in some cases, investigate the involvement of whole institutions.

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IV. On Truth

While there is an obvious sense in which criminal trials are concerned with the truth of the matter before them, they can be regarded as truth-seeking processes only in a qualified way. First, they can consider, not all the evidence, but only admissible evidence: since the overriding consideration is the just application of the law to the suspected offender, procedural safeguards stand in the way of constructing what for other purposes would be a true account of the matter, such as a historian's account. So, for example, the accused's previous record—which historians would regard as particularly rich material, indispensable in fact, for constructing an explanation of his acts—is inadmissible, as is evidence gathered by means that are forbidden for reasons that have nothing to do (directly) with the truth-value of what it may reveal. A second qualification, different but related, concerns what may be termed "personal truth," that is, the victim's own subjective experience of events. As Minow points out, the adversarial feature of trials—itself justified as a procedural safeguard of the rights of the accused—does not lend itself at all well to the recounting of narrative that victims often seek (1998: 238). Cross-questioning and procedural challenges interrupt story-telling, reducing evidence to an atomic registry of carefully sifted factual claims; and yet, facts "do not stand alone but have to be understood in order to function in discourse—which is always understanding in a certain way, one that is not necessarily shared by others" (Parlevliet, 1998: 145). In the process both of writing history and of the trial, "[t]he narrator—single or collective—arranges testimonies in an order that seems self-evident, but is necessarily artful" (Maier, 2003: 271). Especially in trial proceedings, although witnesses have stories to tell, their stories are not valued as stories of experienced loss but for their contribution to the larger narrative, which either the defense or prosecution is attempting to produce, in order to establish innocence or guilt respectively.

So truth commissions may differ from trials in those two ways, at least. The former difference is most easily accommodated: where no one is on trial, demands for procedural safeguards can be relaxed. Those safeguards are not based on any view that truth is unimportant: they are based on a principle of over-protection that reflects a moral view that the punishment of the innocent must be avoided even at a high cost in terms of truth. There is, then, a difference of aim, but not a conflict of aims, for the principle of over-protection does not in any way conflict with belief in the importance of truth-recovery. It is the second difference that may seem harder to accommodate, for, as we have already seen, it is the virtual exclusion of the victim's perspective that is often taken to be among the greatest weaknesses of criminal trials. Conceived of as encounters between the accused and the sovereign, they marginalize the victim, whose

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own subjective suffering is implicitly conceptualized as nothing more than a by-product of the offence itself. "Victims' rights" initiatives attempt to remedy this by seeking to give victims the right to have their perspectives made directly present to the court. Such initiatives are, however, very much an add-on to a process which is still at heart Sovereign vs. the Accused; and if truth commissions give a central privilege to victims' narratives, they may well seem to diverge quite radically from the ideal type of a criminal trial.

At a level of abstraction that is only one step higher, however, the difference tends to dissolve. Within a functioning, rights-respecting system of law, victims suffer wrongs that the system takes it upon itself to acknowledge by coercively insisting on the importance to the public of the violated right. The victim can call upon the system to act, and her moral standing is acknowledged in her access to the police and to legal advice. Her subsequently marginal role is a procedural artifact that has nothing to do with a denial of her moral standing. But as we have seen, in post-atrocity contexts it is just that standing that needs to be reaffirmed. It needs to be authoritatively and publicly established that classes of people were wrongly denied standing. And the importance of "personal truth," or the recounting of narrative, in such circumstances, can readily be understood: it expresses the fact that those whose humanity or citizenship was denied were agents and patients with a subjectively experienced view of the world that atrocity or oppression sought to obliterate. As in the case of agency discussed earlier, causality is crucial, for implied in a chain of causality is a judgment as to why the events played out in the fashion they did. We accept this in productions of history and in trials, both of which "presuppose a narrative; that is, a coherent account in which earlier events are cited to account for later ones" (Maier, 2003: 271). Truth commissions also presuppose and seek out such a coherent account, and in this way the purpose of a commission, of a political trial, and of the historian converge: each, in its own ordering of events and rules for admission of evidence, seeks to convey "not just violence or repression or conflict, but a reason for even the most brutal confrontation" (Maier, 2003: 272). In the process of a commission, the narrative of the victim works to dismantle the myths and denials that made widespread atrocity or systematic oppression possible. This very attempt to provide a different narrative, a different reason, is crucial to the idea of reestablishing a moral equilibrium among citizens of a transitional society.

This justification, which builds on the notion of recognition of standing that is implicit in criminal trials, may have advantages that other justifications lack. In particular, it is immune to the problems faced by the once-popular appeal to cathartic effects. That those who have suffered wrongs experience release by re-telling—the "revealing is healing" hypothesis—has a priori elements (or perhaps religious assumptions) that

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experience may not bear out (Shaw, 2005). People may be too different for any such psychological generalization to apply and, in any event, the process of personal recovery is likely far too extended to be accomplished in a single institutional event. The claim advanced here is that the opportunity for personal narration is the exact and appropriately recast equivalent to the enjoyment of legal standing within a functioning system. It looks different, but the affirmative aim of restoring equality is no different.

Truth and Acknowledgment: Establishing a Baseline

In the novel *Red Dust*, the lives and interactions of several fictional characters involved in the South African TRC are chronicled (Slovo, 2000). Sarah, an Afrikaner expatriate practicing law in New York, has returned home at the request of her former mentor Ben in order to represent a man whose former torturer has applied to the commission for amnesty. She is not without her reservations: "'truth' is not neutral ... I'm not trying to say that the law is neutral. I know it works unevenly. But at least the law provides some standards for inequalities to be judged" (Slovo, 2000: 38). Sara's ambivalence towards what the TRC is purporting to achieve strikes at the heart of the debate about truth-seeking mechanisms sanctioned by the state and their relation to different conceptions of what is commonly referred to as "truth."

In her essay on "Truth and Politics," Hannah Arendt considers whether "it [is] in the very essence of truth to be impotent and in the very essence of power to be deceitful? And what kind of reality does truth still possess if it is powerless in the public realm... ?" (1967: 104).

Exercises such as truth commissions are arguably an attempt to valorize truth and give it an incontrovertible status within the very process of transition, and so make truth a potent force in future politics. Trials can assume as given the value of truth-telling: the practice of oath- or affirmation-giving demonstrates that the court can rely on a wider context in which truth-telling is valued, and it draws upon this context in admitting witnesses. But as we have already seen, truth commissions undertake their task in a context in which the value of truth-telling has been fundamentally denied. Truth-denying norms have been enforced, sanctioning those who question either myths about victims or the reality of what is being done to them; for reasons already noted, large-scale atrocity or oppression are possible only on the basis of systematic truth-denial. Therefore, truth commissions are valuable not only because of any truths that they bring to light, but because they represent publicly the value of truth. They are manifestations of a value that lies in the background of criminal trials and without which they would make no moral

https://doi.org/10.1017/S0008423906060070 Published online by Cambridge University Press

sense at all, for they would just be instruments of aggression by one party against another. Truth commissions thus assert a value that is a prerequisite for all future trials: that is not to justify them instrumentally, as means to some future end, but, rather, to justify them as embodying an end that must be made present in future institutions if they are to be something more than instruments of partisanship. They are demonstrations, in much the same way as are criminal trials, of something that demands public affirmation, even if the mode of affirmation is not at all the same in the two institutions.

Consider the case of South Africa, where for over forty years the facts and events of human interaction were regulated by apartheid. When records of arrests, interrogations, "disappearances" and "liquidations" were still actively maintained, the factual truth that these activities formed was subsumed within a narrative prioritizing national security. The ordeal of those whose family members were disappeared, tortured or held indefinitely was couched in talk of the strict measures that the communist threat necessitated. The factual truth of this abuse was concealed by the grander security narrative, until the advent of transition sought to bring it to light again. Arendt wrote: "Even if we admit that every generation has the right to write its own history, we admit no more than that it has the right to rearrange the facts in accordance with its own perspective; we don't admit the right to touch the factual matter itself" (1967: 113). The problem that apartheid officials faced was that the very perspective that dominated their justifying narrative was about to be permanently discredited. And the perspective that would replace it would undoubtedly revive the factual truths about injustice, and consequently give rise to demands for justice to be done.

With some rare exceptions—euthanasia cases come to mind—defence lawyers do not seek to challenge the moral rightness of the laws under which their clients are charged. Rather, they seek to challenge the admissibility of facts that may tell against their client's liability to punishment under the law, and to frame and interpret admitted evidence in ways that favour their client's acquittal. The demonstration of what is right and what is wrong does not normally fall within a court's remit. But it is an important part of a truth commission's work to show, convincingly, that what was once thought to be right is really wrong. This is not a task that belongs to moral philosophy, thus calling for a seminar. Rather, given the various forms of concealment that mass atrocity and oppression necessarily entail, it is a matter of giving public presence to the consequences of cruelty, so that the audience can draw moral conclusions from them. In taking the form of factual revelation, truth commissions imply that we *already know* that what was done was wrong, and that what need to be undone are the various protective devices that prevent us from seeing that the wrong took place.

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This emphatic and declaratory purpose stands outside normal liberal-democratic norms and practices. It stands outside liberal norms in the sense that, abandoning the neutralism that much of mainstream liberal theory recommends, it publicly commits a state or state-sponsored institution to a view of good and evil and to the moral condemnation of one party to a conflict. It stands outside normal democratic practices in the sense that it does not seek to engage rival views and interests on the basis of reasons that all parties can reasonably share. In this respect, the deliberative model proposed by Amy Gutmann and Dennis Thompson may demand both too much and too little (2000). According to Gutmann and Thompson, a truth commission should model the democratic society that it is trying to bring into being (2000: 34–5). However, although democratic perspectives and practices are certainly important to a society's transition, it is unreasonable to expect truth commissions to meet these challenges to the extent that Gutmann and Thompson expect. It is indeed of fundamental importance that "political institutions of a pluralist democracy ... find ways to cope with the persistent disagreement in which no side can be shown to be right or wrong in many relevant respects" (Gutmann and Thompson, 2000: 34). However, a truth commission cannot morally allow for persistent disagreement on the wrongness of the past atrocity that it is trying to address if it wishes to make that definitive break with the past that the authors themselves support. The injustice inherent to systems such as apartheid cannot be up for discussion within a process that itself stands in opposition to the stifled sense of injustice that both nourished and resulted from such systems.

Democracy as a political system cannot be confined to the navigation of controversy, at least not without a compass. The authors themselves establish that "[b]asic to all moral conceptions of democracy is the idea that people should be treated as free and equal citizens, and should be authorized to share as equals in governing their society" (2000: 35). They offer these basic standards to launch a discussion about the value of reciprocity and the deliberative democracy that arises from it. Central to deliberative democracy is the stipulation "that citizens and officials must justify any demands for collective action by giving reasons that can be accepted by those who are bound by the action" (36). Deliberative democracy thus suggests a decision-making process that, in the best of cases, cannot stray too far from a lowest common denominator. On the basis of democratic reciprocity, Gutmann and Thompson support what they term "the economy of moral disagreement" as a governing principle within truth commissions, where "citizens ... justify their political positions by seeking a rationale that minimizes rejection of the positions they oppose ... [they] search for significant points of convergence between their own understanding and those of citizens whose positions, taken in their more comprehensive forms, they must reject (2000: 38). The authors

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conclude that, "[b]y economizing on their disagreements in this way, citizens manifest mutual respect as they continue to disagree about morally important issues on which they need to reach collective decisions" (2000: 38).

While we can well appreciate how such a lowest-common-denominator approach to disagreement functions in established democracies, it is far from clear that it can function in this way in transitional societies such as South Africa, at least not as long as they remain transitional. Moreover, an economy of moral disagreement based on democratic reciprocity can have only limited authority within the functioning of a truth commission, whose mandate arguably encompasses more than the facilitation of reciprocity. As discussed elsewhere in this paper, both the punitive and restorative mechanisms of justice are concerned with re-establishing moral equilibrium, and in so doing, reaffirming a rule of the moral order that was broken. It is precisely because reciprocity has failed that trials and verdicts become necessary in societies where reciprocity is commonly practiced and expected. But systematic oppression such as apartheid explodes the points of reference available within flourishing democracies, where the rule of law is respected; it is the task of a truth commission to overtly (re)establish that framework of comprehensibility.

Democracy does not itself create that framework: it takes shape only through the acknowledgement of the equal moral worth and agency of individuals, and it is only once acknowledgement on these grounds has been secured that democracy and ideas of reciprocity become comprehensible. It is precisely for this reason that truth commissions must seek a verdict or final judgment, in this respect resembling trials, rather than democratic processes in which final judgments are always still to be reached. An economy of moral disagreement can work only after a verdict on the past has publicly secured baseline equality.

That verdict, of course, as noted above, is a verdict about a whole context of relations and beliefs, rather than a verdict on an individual. But, like a trial, a truth commission serves in a sense to isolate—to mark a definitive break and to declare a historical episode over. Although the process involves memory, a feature of it that has been enormously emphasized in the literature on truth commissions, it is an equally important feature of it that represents an episode or an era not from the participant's perspective but, as it were, from the outside—as something that is closed, as a complex of behaviour that is now, or ought to be, unthinkable. These two features, the recovery of victims' memory and the turning of the page, may seem to be in a certain tension, and perhaps, at the experienced level, they are: but the two are connected in at least one important regard. That the victims' point of view is recovered is crucial to a process of moral reversal that is essential to the recognition of equality, for, as we saw, its

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role lies in dramatizing agency and subjectivity that was denied: patients become agents. The baseline creates a context in which the victim can say that she was not merely harmed, but wronged. It is in this way that a truth commission may embody the aims that it seeks to realize; it is unlikely and perhaps even undesirable that it should be as deliberative in its nature as Gutmann and Thompson propose, but by its very nature it may embody and publicly convey the reversal that essentially marks off equality from oppression and serves as the founding principle of a just society. If so, then it escapes the purely instrumental relation to the future that would pose acute moral problems of the means-end variety.

Conclusion

This paper rejects, then, both realist and restorative conceptions of truth commissions, to the extent that both of those conceptions neglect the internal links between truth commissions and criminal trials. This paper has not ignored the important differences between the two institutions, but has argued that they should be placed at points on a spectrum rather than in distinct categories, and that the circumstances of transition sufficiently explain the divergences in their respective practices. They both aim, it was argued, at the idea of a moral equilibrium that needs to be restored when basic equality is violated, and at affirming that equilibrium as a public value. That aim, it was suggested, makes more adequate sense of criminal trials than either "intrinsic" or "instrumental" approaches, and also encompasses what truth commissions set out to do, while in some respects reinterpreting their function. While there may be contexts in which it is valuable to distinguish a restorative conception of justice from the standard retributive model, the context of transitional justice is not among them, for it is important to stress the affirmation of basic equality as the goal of transition.

References

Allen, Jonathan. 1998. "Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission." *University of Toronto Law Journal* 49: 315–353.

Arendt, Hannah. 1965. *Eichmann in Jerusalem: A Report on the Banality of Evil*, rev. ed. New York: Viking.

Arendt, Hannah. 1967. "Truth and Politics." *Philosophy, Politics and Society*, eds. Peter Laslett and W.G. Runciman. Oxford: Basil Blackwell.

Cooper, David. 2001. "Collective Responsibility, 'Moral Luck,' and Reconciliation." In *War Crimes and Collective Wrongdoing*, ed. Aleksandar Jokic. Oxford: Blackwell.

Dyzenhaus, David. 2000. "Justifying the Truth and Reconciliation Commission." *The Journal of Political Philosophy* 8, no. 4: 470–496.

https://doi.org/10.1017/S0008423906060070 Published online by Cambridge University Press

Gill, Kathleen A. 2002. “The Moral Functions of an Apology.” *Injustice and Rectification*, ed. Rodney C. Roberts. New York: Peter Lang.

Glover, Jonathan. 2001. *Humanity: A Moral History of the Twentieth Century*. London: Pimlico.

Gutmann, Amy and Dennis Thompson. 2000. “The Moral Foundations of Truth Commissions.” In *Truth v. Justice: The Morality of Truth Commissions*, eds. Robert I. Rotberg and Dennis Thompson. Princeton: Princeton University Press.

Hayner, Priscilla. 2003. *Unspeakable Truths*. New York: Routledge.

Kant, Immanuel. 1996. *The Metaphysics of Morals*, ed. Mary Gregor. Cambridge: Cambridge University Press.

Kiss, Elizabeth. 2000. “Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice.” In *Truth v. Justice: The Morality of Truth Commissions*, eds. Robert I. Rotberg and Dennis Thompson. Princeton: Princeton University Press.

Krits, Neil J., ed. 1995. *Transitional Justice*. Washington, DC: United States Institute for Peace.

Maier, Charles S. 2000. “Doing History, Doing Justice: The Narrative of the Historian and of the Truth Commission.” In *Truth v. Justice: The Morality of Truth Commissions*, eds. Robert I. Rotberg and Dennis Thompson. Princeton: Princeton University Press.

Murphy, Jeffrie and Jean Hampton. 1988. *Forgiveness and Mercy*. Cambridge: Cambridge University Press.

Nickel, James. 1976. “Justice in Compensation.” *William and Mary Law Review* 18: 379–88.

Ntsebeza, Dumisa B. 2000. “The Uses of Truth Commissions: Lessons for the World.” In *Truth v. Justice: The Morality of Truth Commissions*, eds. Robert I. Rotberg and Dennis Thompson. Princeton: Princeton University Press.

Parlevliet, Michelle. 1998. “Considering Truth: Dealing with a Legacy of Gross Human Rights Violations.” *Netherlands Quarterly of Human Rights* 16, no. 2: 141–174.

Rachels, James. 1997. “Punishment and Desert.” In *Ethics in Practice: An Anthology*, ed. Hugh LaFollette. Tennessee: Blackwell Publishers, 1997.

Rotberg, Robert I. and Dennis Thompson, eds. 2000. *Truth v. Justice: The Morality of Truth Commissions*. Princeton: Princeton University Press.

Shaw, Rosalind. 2005. “Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone.” United States Institute for Peace. www.usip.org/pubs/specialreports/sv130.html (October 7, 2005).

Slovo, Gillian. 2000. *Red Dust*. London: Virago Press.

Spelman, Elizabeth V. 2002. *Repair: The Impulse to Restore in a Fragile World*. Boston: Beacon Press.

Vernon, Richard. 2005. *Friends, Citizens, Strangers: Essays on Where We Belong*. Toronto: University of Toronto Press.

https://doi.org/10.1017/S0008423906060070 Published online by Cambridge University Press