Truth Commissions and Judicial Trials
Complementary or Antagonistic Servants of Public Justice?¹

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The call to punish human rights criminals can present complex and agonizing problems that have no single or simple solution. While the debate over the Nuremberg trials still goes on, that episode — trials of war criminals of a defeated nation — was simplicity itself as compared to the subtle and dangerous issues that can divide a country when it undertakes to punish its own violators. — Judge Marvin Frankel²

That’s what lawyers do, Mark. They twist words. They twist truth. That’s why people hate them. — A recent television drama³

Memories are their own descendants masquerading as the ancestors of the present. — David Mitchell⁴

We expected justice, and we got the rule of law. — Bärbel Bohley⁵

We do not want to see people suffer in the same way that we did suffer... We do not want to return the evil that perpetrators committed to the nation. We want to demonstrate humanness towards them, so that they in turn may restore their own humanity. — Cynthia Ngewu⁶

A little political indigestion has never done any purist too much harm. — Charles Villa-Vicencio⁷

The human world of the twenty-first century will have to work hard to recover from the crimes of the twentieth. Even people born as late as 1980 will have grown up in the midst of massive atrocities that will always be linked to the names Bosnia, Rwanda, and Kosovo. The future-oriented Americans among them will be puzzled, perhaps, by occasional news reports
of agitation by older people who barely survived threats of death in Cambodia, Argentina, Chile, El Salvador, and South Africa. They will be further puzzled that any of their contemporaries seem compelled to keep bringing to public attention accusations of injustice associated with such names as Verdun, Auschwitz, Gulags, the Great Leap Forward, Nanjing, Dresden, Hiroshima, Armenia, Wounded Knee, and the Middle Passage. And they will be absolutely mystified that any national leader on earth could have stirred up support for a new war among his allegedly Christian constituents in 1989 on the basis of their supposed lingering resentment over a defeat in a battle six hundred years before.\(^8\)

How does any society respond to the accusation ‘injustice!’ by any of its citizens? The ordinary answer has been: by appeal to a legal system that requires accusers and accused to confront each other in a court. ‘Normal’ human societies establish norms for what constitutes acceptable behaviour by any citizens. In general, this process of normality goes its settled way until challenged by one or two extraordinary events, either or both: political revolutionists accuse the legal system itself of being illegal, and participants in violent conflict accumulate so many allegations of injustices against each other that the legal system is unable to respond to them all.

A century that has produced an unprecedented number of human deaths by organised violence, has also produced, at century’s end, an array of attempts to respond to this history, attempts intended to hinder its future, murderous repetition. The current name for this variety of attempts is ‘transitional justice’. One of the major assumptions behind transitional justice movements has been that, whatever else has to be done about atrocities, the truth about their occurrence must become a part of public awareness and public culture far into the future.

The particular kind of truth at issue in these events concerns atrocities, massive violations of human rights and human life. Policymakers and ethicists do well to contextualise the search for this truth within a network of four normative purposes: justice, reconciliation, reparation, and institutional reform. This analytical model is interactive, circular, and multi-valued. That is, each of these purposes, concretely pursued, can affect the others both positively and negatively. The ‘truth’ at stake here is not abstract or theoretical, but concrete and practical, so that from the beginning, one has to bracket the well-known judicial aspiration for ‘the truth, the whole truth, and nothing but the truth’. The search here is for relational truth, related to the achievement of justice, reconciliation, and repair of damage; and reform of institutions to conform, in turn, with these norms.\(^9\)

In this paper I want to ask: what are the uses and the limits of two major
social devices – court trials and truth commissions – for finding truth in the context of the above four norms? Drawing on a plethora of writings by persons close to these events, chiefly in the past 10 years, I want to assemble something of a compendium of wisdom for answering the question: What do trials and commissions do for the establishment of new public truth and a new morally important public culture? What does the one institution do that the other cannot? What morally important tasks must these two devices leave to other agencies in a society seeking recovery from a traumatic past? I want to end by exploring several key moral issues that neither trials nor truth commissions seem wholly adequate to confront.

The final report of the South African Truth and Reconciliation Commission (TRC) distinguishes between four dimensions of truth: judicial (‘objective, factual, forensic’), personal (‘narrative’), social (‘dialogical’) and restorative (‘healing’); and it terms this complex an attempt at ‘inclusive truth-telling’ aimed at ‘social and economic transformation’. In all four of these dimensions, truth commissions and trials overlap, contradict, and sometimes compliment each other, a reality this article means to explore.

Post-modernists know many ways to disparage and eliminate claims to truth in all of these dimensions. If history (as assessment of what actually happened) is infinitely malleable at the behest of the powerful, if moral suppositions about what histories are important to recover, are arbitrary, if personal experience has nothing to do with collective acknowledgment of truth, if human suffering is not accessible to moral judgement at the moment or post facto, and if the facts of history cannot be attributed in some tangible way to human agency, then both judicial institutions and truth commissions are philosophically illegitimate. Such illegitimacy would spell the demise of Christian ethics, of course, for the discipline, with Christian theology, has a stake in the truths of history, in vital distinctions between just and unjust suffering, and in the obligations which persons and societies owe to identify, curb, and remedy wrongs suffered by any of our neighbours.

Elaborate inquiry into theories of time, human memory, and historiography will escape the bounds of this essay, but I share the bias of William Faulkner who, in his 1950 Nobel Prize address, remarked: ‘The past is not dead and gone; it isn’t even past.’ That perspective deserves new attention among ethicists, religious and secular, as we all try to cope with the crimes of the twentieth century. Americans, perhaps most of all, need to consider this perspective, for we pride ourselves on being a future-oriented people, ready to treat the past merely as dust stirred up behind a vehicle moving bravely into the future.
1 Courts, War Crimes, and Crimes Against Humanity

A.

Critics of the Nuremberg trials of 1945–6 have often labelled the trials as ‘victors’ justice’. Without doubt, every judicial system, domestic and international, reflects the laws and sanctions of particular societies. Post-modernists and cultural relativists have a point: coercive power backs up the substance and the procedures of the system. But as Gary J. Bass claims in his new book, notions of universally applicable norms were assumed at Nuremberg, and in recent years, those norms have achieved new credibility. Clearer than in the forties is an emerging international consensus on the nature of ‘war crimes’ and ‘crimes against humanity’.11 We are still in the midst of an international struggle to specify these categories, to give them legal definition, and to reduce the definitions to institutional power and regularity, as the recent treaty negotiations to establish an International Criminal Court (ICC) demonstrate. The decisive difference between the idea of an ICC and the ‘show trials’ of the Nazis and the Soviets is the belief that there is some moral truth, applicable worldwide, that is not merely a projection of political power and ideology. The classic attempts of Christian theologians to sustain this claim against the ravages of war in their own times have borne fruit in their proposals about just war and international law. The contemporary struggle for an internationally valid ethic is rather modest compared with these historic precedents, beginning as it does with revulsion against horrors of mass human suffering on the unique scale in a century that now qualities, quantitatively, as the most violent in our history. This revulsion is the leading edge of contemporary world attempts to explore the hope for a genuine, enforceable ius gentium, law of nations.

A negative way of rejecting some theoretical moral modesty with this endeavour is to say: if the massacres of fellow citizens in Rwanda and Cambodia are not wrong, then nothing done in or outside the world of nations can be wrong. The implications for judgement on other events of the twentieth century are many, of course: from the insanity of slaughter in World War I to the city-bombing of World War II to the massacres of the Stalin and Mao regimes, there is no lack of candidate-instances of huge moral culpability in the conflicts of histories that have touched us all. Perhaps the new struggle to nail down internationally the categories of war crimes and crimes against humanity can best be described as an emerging agreement that we may not be able to stop all murders, but it’s time to stop these horrors. Let us begin by doing justice to those who have already suffered in them. And let us invent institutions that hold some promise for
curbing such horrors in our future.' One might call this an indispensable moral minimum for framing a substantive global ethic.

The likely political prerequisites for effecting these intentions should never be overlooked; but not to be overlooked, either, is the moral ‘pull’ that accounts for even so clumsy a precedent as Nuremberg. Behind virtually every internationally sponsored judicial prosecution for war crimes and every domestic establishment of a truth commission usually lies shifts in political power and mandates. But that very shift often owes much to domestic and international pressing of moral claims that precede the invention of new political and judicial institutions. The shifts in South Africa in the 1990s are a vivid illustration, but so also are the increments of change in Eastern Europe in the same decade. Legal change does presuppose political change, but behind both is likely to be a change in the amount of moral consensus a society has developed on what is wrong.

B.

Once those moral changes are in place in a society, courts can undertake some distinct services to the public by uncovering and preserving the truth about ‘administrative massacres.’ These services number at least six:

1. Determining Guilt and Punishment of Individual Perpetrators

Western law tradition assumes that, somewhere in the cluster of conditions and collaborations conducive to crime, there can be located responsible, guilty individuals. We bring to the dock perpetrators one by one. Nuremberg did so, and the ICC will seek to do so. Our laws permit various escapes from charges of individual responsibility – insanity, youth, and (the great source of ambiguity) obedience to law and leadership. These exceptions are least likely to be successfully professed by leaders of collective atrocities. By definition, leaders tell others what to do, and they may be creators of the very laws that defy international moral consensus. So they become the first candidates for legal prosecution. Almost invariably, from Nuremberg on, this means the turning of blind judicial eyes to the vast numbers of agents necessary for carrying out mass murders. Even when, as in the case of post-Nuremberg Germany of the late fifties and early sixties, some thousands of collaborators are brought to domestic trials, the courts scratch lightly the crowd of actual perpetrators.

The compromise of prosecuting leaders is pragmatic but not cynical: better to establish some personal responsibility for the uses of political power than to exempt all such uses, for example, under the rubric of state sovereignty. Some are always more responsible than others, and if even in
2 Lawyers: Expert Maintenance of Precise Implementation of Process and Substance in Law

Once empowered inside the cocoon of official law, lawyers manage courts. They can manage well or poorly according to legal standards, but the standards are always interpreted and applied largely within the profession itself. Western democracies, proud to be ‘governments under law, not men’, can be famously equivocal in this matter; but at their moral best, certain legal standards protect alleged criminals against the rage of damaged majorities who know full well who some of their guilty persecutors are. The Greeks and other ancients knew that courts are devices for taking over the task of just punishment of criminals, lest their victims fall to acts of vengeance at least as horrible as the original crimes.

‘Presumed innocent until found guilty’ is a maxim of justice that accounts for many a long trial and entanglement in what an aggrieved public is likely to see as intolerable concession to a notorious war criminal. But precise protection against too-swift justice is a professional responsibility of the western lawyer. It is not a rule to be set aside lightly.

3 A Protected Legal Enclave: A Quiet Place to Put Horror on View

With the advent of television and other news media, courtroom secrecy is no longer as prevalent as it used to be, and many advocates of war crime trials insist that these events should be public enough to educate a public. ‘To condemn the past by legal judgment [is] . . . also to etch into collective consciousness the memory of that very act of condemnation’. As Tina Rosenberg says, along with truth commissions, trials can ‘provoke a dialogue in society that can crack through victimisation myths, helping people to see those from other ethnic groups as human beings who have also suffered’. The process of reaching that judgment in a court of law requires behaviour that contrasts radically with the behaviour on trial: calm deliberation, weighing of evidence, and distinguishing between the relevant and irrelevant facts of the case. Legal procedure, after war, is a retreat from war. It embodies the hope that, in the wake of unacceptable forms of human conflict, courts can lead the way to more acceptable forms.
4 Narrow Rules of Evidence

'Just the facts, ma'am' is a famous rule of police investigation, and many a witness in western courts is regularly reminded by lawyers and judges that opinion, interpretations, and elaborate references to contexts must be excluded from testimony. Prohibition of hearsay, rumour, muddled inter-generational memory, and even references to previous criminal records can screen out many versions of 'fact'. Experience has taught us that it is hard for any set of witnesses to agree on the details of so much as an auto accident, so the trial system seeks to sift out less from more credible testimonies. In cases involving leaders of autocratic, bureaucratic systems (Nazism, the Bosnian War, apartheid South Africa) evidence of responsibility for the crime can be elusive indeed – otherwise we would not have the spectacle of legal claims by a David Irving that Hitler did not order the Holocaust, or the claim of a P. W. Botha that he did not order the bombing of Khotso House.\(^{18}\) The actions of governments can be hard to ferret out. The greatest atrocities may leave no paper trails.\(^{19}\) Nevertheless, narrow rules of evidence are the tradition in western law; and, if as a result, they sometimes narrow the 'whole truth' about the extent of the perpetrators' guilt, they also protect the innocent against speculative charges.

5 Serving Retributive Justice Without Serving Vengeful Justice

Legal institutions are hedges against both vengeance and impunity. They identify and then punish crime, and they act under rules that distinguish between due and undue punishment. The current special international courts for Bosnia and Rwanda aim at punishing leading perpetrators; but unlike Nuremberg, their rules forbid the death penalty even if the perpetrator has in fact ordered the deaths of thousands. 'Popular will' mandates the harsh punishment of criminals, but western law refuses to bow to that will when it comes to assigning punishments for crime. Finding punishment that fits the crime without repeating it is a task not fit for a public referendum. At most, we let the public in on the process in the tradition of jury trials.

6 Serving Truth by Adversarial Competition

Because professional and financial rewards accrue to the winning side in any court case, attorneys share with their clients some self-interest in obscuring truths damaging to their respective cases. A rule against self-incrimination further frees defendants to let sleeping facts lie so long as a prosecutor has not uncovered them. Both sides of the conventional western criminal trial, then, have an interest in success. Each will bend the evidence in his or her own favour. The irony here is that however sincerely a witness must swear to
tell 'the truth, the whole truth and nothing but the truth', the system invites both sides to slant the evidence, leaving to the presumed fair judgments of juries and judges the power to decide between conflicting versions of fact. The faith that, out of this collision, 'truth' will emerge competes with doubt that two slanted versions of truth can parent a whole truth. Such doubt lays one of the grounds for public hearings and truth commissions as alternatives or supplements to court trials for war criminals. But for service to truth about war crimes, legal trials have other limitations, as well.

C. What Trials Cannot Do

In the face of the mass atrocities of central concern here, courts are often weak, non-existent or antagonistic to the recognition or prosecution of the crimes. In societies such as post-1945 Germany or post-1992 South Africa, the laws and law-enforcers themselves have been major sources of the atrocities. Both must undergo some drastic changes if people are to trust the courts again. Even in an established liberal-democratic order, however, court trials are severely limited in their ability to serve the society with truth about an evil past. The limits have only to be mentioned to be recognised. Court trials cannot:

- prosecute the dead, secure direct testimony from the dead, or repair damages done to the lives of the dead;
- truly match punishments to crime when the crime consists of the murder of many victims;
- put institutions and systems on trial;
- within usual rules against self-incrimination and torture, compel perpetrators to confess;
- summon classes of offenders newly tagged as such without engaging in the ambiguities of ex post facto prosecution – an ambiguity abolishable by legislative grants of general impunity;
- avoid, in most societies, the skewing influence of money and power on the effectiveness of prosecution and defence;20
- always implement distinctions between retribution and vengeance, especially in response to public demand for the latter;
- guarantee 'closure' or satisfaction among victims that justice has been done once a perpetrator has been punished, a problem further exacerbated by the traditional western judicial system which largely keeps victims on the margins of the whole process;
- always avoid adversarial abuse of plaintiffs, defendants, and witnesses;
- avoid scapegoating, especially in trials of leaders who required large constituencies for carrying out their crimes;21 or
escape from the danger, inherent in the adversarial trial system, that the courtroom will become a playing field in which the most skilled, rather than the most truthful, side will win.

Many of these shortcomings exist in the legal systems of even the most democratic of countries. The last shortcoming in particular, accounts for the scepticism that many Americans entertain for the justice that lawyers, judges, and juries mete out. Many African Americans, for example, are sure that the legal system is inclined to lean over backwards to protect the reputation of police accused of brutality. They are glad to see, for a change, that in the O. J. Simpson trial the police, rather than only the defendant, ended up on trial. On the other hand, many white observers of that famous trial went away sure of Simpson’s guilt and resentful of the fact that clever lawyers cast ‘reasonable doubt’ on the truth-claims of the police. When truths about collective human responsibility for wrongdoing come to the fore, a court’s effort to draw clear lines between guilt and innocence confronts yet greater obstacles. Some forms of human injustice are little subject to a ‘guilty’ or ‘not guilty’ verdict. Either decision may leave new injustice in its wake.\(^2\)

Perhaps the best of legal systems will always come to decisions freighted with ambiguous versions of truth. Judges and lawyers are not comfortable with ambiguous evidence leading to ambiguous decisions. A fortiori, for making judgments on the mixtures of guilt and innocence in many an ‘administrative massacre’, ordinary courts are weak determiners of truth. They are notoriously weak in those transitional situations in which the remnants of old unjust law and old unreformed judges still hold sway. In the interim, truth commissions fill a gap that courts cannot.

2 Truth Commissions

A. The Priority for Establishing a New Public, Legal–Political and Moral Culture

The agents of atrocities have a self-interest in keeping their acts invisible, buried, and publicly forgotten. The Nazis meant to plough under every death camp, and Himmler once consoled his SS cohorts that, while the German public would never know the full scope of their service to racial cleansing of the nation, they should always take pride in their work. In South African torture cells, the torturers taunted their victims with the prediction that, just as no one could hear their present screams, no one would
damental to guarantees of justice in any society. Otherwise the society is in
danger of ignoring the wisdom of Psalm 15:4: that the righteous are those
who ‘swear to their own hurt’. But this is rigorous political ethics, and it can
provoke a political crisis. Journalist Antjie Krog describes such a crisis in an
early conflict between the TRC and the ANC:

It is clear that the commission has taken on a moral life of its own and is will-
ing to oppose even the party that gave it birth . . . When the Truth
Commission says, ‘The truth will set us free,’ is the ANC adding, ‘The truth
as determined by us’?

Premier and legal adviser to the ANC, Mathews Phosa, says that ANC
members do not have to apply for amnesty, because the war against apartheid
was just. [Deputy Chair Alex] Bovaine issues a statement: ‘Unjust acts can
be committed within the framework of a just war, no less than just acts in an
unjust war.’ Tutu takes the bull by the horns and announces that he will
resign if the ANC grants itself amnesty. He refuses to be abused by a party
that will not accept equal treatment before a Truth Commission.

Unlike most law courts, truth commissions are free to invoke moral prin-
ciples in contradiction to principles and laws observed in a previous socio-
political order. For the change of a legal culture, such invocation may be
utterly necessary, especially if the commission expects to rebut the defensive
argument of a perpetrator: ‘I was only obeying the law.’

2 Priority Attention to Justice for Victims
The mandate of law courts to try and punish criminals subordinates attention
to the needs of victims. The punishment of their perpetrators doubtless fills
one such need, but numerous cases, in South Africa and elsewhere, testify to
the restorative value to victims of an invitation to tell their story in the pres-
ence of willing ears. Krog is eloquent on this point. In the TRC hearings
witnesses spoke into a microphone which, when active, displayed a small red
light. ‘For me, the Truth Commission microphone with its little red light was
the ultimate symbol of the whole process: here the marginalised voice speaks
to the public ear; the unspeakable is spoken – and translated; the personal
story brought from the innermost depths of the individual binds us anew to
the collective.’ In that speaking, the marginalised achieve some restoration
of their human dignity. Perhaps this is the most important moral gain of the
truth commission process: the truth of unjust suffering is no longer buried in
pain-soaked individual memory. Some healing and deliverance from victim-
hood can result, and a restored certainty of citizenship.
3 Honouring Feeling, Experience, and Personal Stories for Expanding the Bounds of Public Truth

In the South African TRC hearings, no commission member dared to say to a witness, 'just the facts, ma'am.' Instead victims were assured that the audience intended to hear their stories. Accorded initiative for picking and choosing among the facts of their case, and permitted to speak in the language most comfortable for them, victims could take charge of advancing truth as relevant to their life experience. The result was 'inclusive truth-telling', as Boraine says, and 'dialogical truth' little afflicted by adversarial courtroom tactics. For the first time in their lives, victims now had the opportunity of telling a friendly government body the story of their unjust suffering; and the rules of the commission gave wide berth for the telling of these stories in whatever form the victim chose. Tears became evidence, scarcely recoverable feelings, as well as details of family and social connections which, in many court trials, would have been deemed beside the point of proper perpetrator prosecution and defence. In a word, under humane leadership, a truth commission can do justice, not just to facts, but to the lives of whole persons and, indeed, whole communities.

For some time to come South Africans themselves will be asking each other whether or not the personal testimonies of victims to the TRC really result in their healing or the nation's. But some of the most moving incidents from the commission's interviews confirm the positive side of this debate. In the mere act of standing up when victims approached to testify and asking them to sit, commission members embodied a vivid reversal in the usual etiquette of courtrooms. As Nobie Mohapi, widow of a murdered colleague of Steve Biko, put it: in all her years of dealing with officials, she 'had never been asked to sit down'.

4 Bringing Communities, Institutions, and Systems to Moral Judgement

If a truth commission can widen the net of relevant evidence in the experience of individuals, it can likewise widen the net of culpability to include perpetrators of varying degrees of responsibility for unjust acts. Perhaps the central challenge to moral analysis of administrative massacres is this: how can a just system come to a factually true and nuanced account of who was most guilty, who was partly guilty, and who was innocent in groups and systems that carried out atrocity? Catholic theologian John Mahoney calls this the problem of 'responsibility spread thin', and he concedes that, in the long-standing sacramental tradition, 'stress on the individual, with a view to his confession, is one reason why the Church's moral tradition has found it difficult to handle the idea of collective responsibility on a large scale.' Hence:
a more social meaning to sin and an element of sinfulness in institutions, or, indeed, in social circumstances has been systematically neglected, a neglect paralleled in the focus on individual guilt in Protestantism and in most courts of western law.

One of the great services of the South African TRC to the formation of a new national political culture was its back-and-forth dialogue between victims and perpetrators, who together accumulated the evidence of evil in the apartheid system. Even the defence of perpetrators, ‘We were obeying legal orders’, underscored the evils in the law itself and law enforcement agents. For moral indictment of a system that encompassed over forty years of gross injustice involving hundreds of thousands of micro-injustices and tens of thousands of agents, one cannot conclude that the TRC plumbed the injustice of apartheid with anything approaching comprehensive inclusiveness. After all, the evils of racism had haunted the country for 300 years of colonialism. But depositions from some 20,000 victims and 7000 perpetrators in the post-1960 era uncovered for the South African public a range of acknowledged evil that scooped up large proportions of citizenship into some level of responsibility. Needless to say, many a citizen refused to accept any responsibility, and among the most notorious refusals were high government officials of the National Party. But in the sum total of its hearings the TRC put the whole apartheid system on public display; and, as many white South Africans have testified, ‘Prior to the TRC we could say, “We didn’t know.” But now there is no excuse for not knowing.’

5 Public Education

Legal scholar Mark Osiel says that court trials have important public educative functions. Not all legal scholars would agree, fearing that courts can cross the line from investigations of fact into show trials. Again, the South African TRC may be the best current example of a body of citizens committed to finding truth and exposing a public to truth. Commission hearings took place in various regions of the country, facilitating attendance by local people. An army of domestic and international reporters insured daily coverage in the media, and any South African willing to hear stories of human suffering could tune in daily to televised and radio excerpts from the hearings. The impact of these two years of relentless broadcasting to the South African public may as yet be unmeasurable, but one will not easily find in any other country so determined an effort by a government body to open the books of the past to the public. One of Antjie Krog’s journalistic colleagues concluded that receptivity and resistance to the TRC findings hinged on the personal capacity of citizens to acknowledge the reality of
responsibility-spread-thin. People realize instinctively this is the last, the very last opportunity for the majority of people to break into a culture of guilt and individual responsibility. If the majority can do this, then the politicians will never again have such a stranglehold over this country.54

6 Seeing a Truth That Serves Restorative Justice Without Eliminating Retributive Justice

The unique and most controversial rule governing the work of the South African TRC was its formula for confronting individual perpetrators: amnesty for truth. Its acceptance of this rule underscores its priority aim of changing public culture by unveiling truth about the evils of the apartheid past. Was this a just trade-off? Was it a compromise justified by social good? Or was it an offence against principled justice? Here, of course, everything depended upon definitions of justice. A country whose new leaders had already turned away from bloody revolution, and whose new constitution had already rejected capital punishment, was already on a road away from old forms of retribution and moving towards an exploration of a justice aimed at the acceptance of both victims and perpetrators back into society. As western law courts walk a line between vengeful and retributive justice, the commission walked a line between retributive and restorative justice. As Justice Sandra Day O'Connor observes, it encouraged “public accountability without the destabilising effects of a full-fledged trial”.35

This balancing had two expressions in its dealings with perpetrators. On the one hand, in telling the awful truth of their deeds, most perpetrators suffered public opprobrium, a punishment whether or not the individual expressed remorse. On the other hand, grants of amnesty were never automatic, and the threat of future legal prosecution was always standing in the wings for perpetrators who, in the presence of victims, could be shown to be telling less than the truth. The two systems complement each other.

“The threat of the retributive court is necessary, if the truth commission is to be successful.”56

Granting amnesties from victors to losers in violent civil conflicts is an old alternative to mass imprisonment and other stern punishment of the losers. Amnesties usually entail conditions, however, such as pledges of loyalty and disbanding of armies – as in the amnesty granted most Confederate soldiers at the end of the American Civil War.57 Sheer numbers make strict retribution difficult in these post-conflict situations. No one knows yet what the special court for the Rwandan genocide will do for ‘justice’ to 86 000 alleged perpetrators now in jail awaiting judicial trial.58 If they are granted some form of amnesty or a penalty other than prison, they will have suffered
imprisonment already. Advocates of restorative justice, such as Desmond Tutu and an array of Christian South Africans, insist that in the service of social reconciliation, compromises with retribution and formal judicial process are worth making, all under the hope that the leniency of amnesty, combined with confession of wrongdoing, will serve reconciliation from both sides: those victims who want, at minimum, the inscribing of their enemies’ names and crimes in public record, and those perpetrators who, in being welcomed to society rather than prison, have something of their own dignity and worth restored in the eyes of their neighbours.30

When legal scholars ponder these mixtures of moral-legal variables in the work of truth commissions, they may find congenial the observations of Kent Greenawalt on ‘Amnesty’s Justice’. No one in South Africa, he says, suggests that perpetrators should get off with no punishment at all. An evaluation of “restorative justice” is affected by one’s view of the informal sanctions of ostracism, disapproval, and disadvantage. I suggest that the likelihood of these sanctions diminishes to some extent the injustice of not punishing offenders. The application of these sanctions depends on some part of the community not fully forgiving the offender and on an “attitude toward forgiveness that is complex and somewhat ambivalent”.40 Greenawalt’s resort to the italics (his own) is a cautious bow to a philosophy of law that guards against legalism by permitting a diversity of values and interests to condition decisions about defining and implementing justice. This “multi-valued” theory of justice will come under scrutiny below, in ‘Issues for Christian Ethics’.

7 Pointing Society to the Past in a Way That Opens a Door to a Different Future

For both persons and societies, pain can sear memory in two crippling ways: too horrible to remember, too horrible to forget. Down either path lies little health for individuals or societies suffering from great evil. Forgetting often serves the interests of perpetrators, and in unhealthy ways it may also serve victims, who are thereby temporarily more comfortable emotionally. Remembering pain can renew pain in the minds of victims and usher in new outbreaks of revenge in the society. Anyone who had read a detailed account of certain of the TRC hearings will empathise with the horror that audience experienced in hearing the stories of many a victim. Few members of the TRC audience remained emotionally serene while hearing former police tell how they burned bodies of their victims and whiled away the time by enjoying a barbecued pig on the side.

Inevitably, judicial trials have to focus on true and false accounts of something past. And, in concert with the rigorous slogan, ‘Let justice be done
though the heavens fall; the courts are bound to make judgments of guilt or innocence without major concern for the impact on society. Truth commissions, on the other hand, are freighted with major responsibility for the social future. They want to uncover truth that will serve the future — making it different from the past. Their responsibility entails teleological—consequential as well as deontological—principled ethics — a difficult combination that I want to discuss further below. But first, consider some of the limits of this political device, which its experienced proponents will be the first to admit.

C. What Truth Commissions Cannot Do

Truth commissions suffer from some of the limits of court trials, and other limits as well.

Among the measures they cannot take are to:

- confer any more than symbolic honour on the victim-dead or symbolic condemnation of the perpetrator-dead;
- match punishment to the crime in the same proportion as courts try to do;
- make effective fine-grained distinctions between perpetrators, collaborators, and bystanders or bring more than a sample of all three groups to judgement;
- require remorse of perpetrators or forgiveness by victims;
- avoid political tensions within their own membership if their commission already consists of representatives of many political factions in the society;
- hear ‘the full story’ of any victim or perpetrator, much less hear the whole history of the atrocities over time;
- guarantee that a public, dissatisfied with amnesties, will accept ‘truth’ as a sufficient punishment or will revert to new demands for retribution and private revenge;
- guarantee that, after hearings, victims will experience ‘closure’;
- avoid the danger that unrepentant political leaders and their agents will continue to find themselves celebrated by their respective constituencies, thus fuelling continuing alienation;
- correct the injustices of mal-distributed privilege and wealth, for example, in effecting reparations to victims by shifting the cost to the beneficiaries of the previous system, measures that only government can legalise; or
- take more than preliminary steps toward making good on their aim at ‘reconciliation’, which, over against legacies of atrocity, may take generations.
Concerning this limit on their ability to make speedy attempts at reconciliation, there are numerous testimonies to the partial, uncertain contribution of truth to reconciliation. A newspaper columnist in the Orange Free State accused the TRC of bowing to 'untested evidence ... the truth of the “boerehaters.”' A psychiatric response to this accusation, quoted by Krog, sees it as a first stage of engagement with unwelcome truth, in analogy to the stages in which humans accept their deaths. In South Africa and many other countries, the horrors of the past do not issue in public mourning after one season of dramatic victim stories. Says the South African psychiatrist, Sean Kalinski: 'I think people are too impatient. I personally would be very concerned if, overnight, whites could integrate information that turns their whole worldview upside down. It will take decades, generations, and people will assimilate the truths of this country piece by piece.'

In her very positive account of truth commissions, Elizabeth Kiss summarises the wide-angled vision of their creators, none wider than that of South Africa. She notes that the best of the commissions exemplify extraordinary 'moral ambition' in 'their determination to honour multiple moral considerations and to pursue profound and nuanced moral ends'. Theirs is a mandate so inclusive that perhaps one must say its reach — like all robust ethical standards — will always exceed its grasp. To paraphrase Browning, why should not a truth commission's reach exceed its grasp — what's a future for? Of what other arm of government, permanent or temporary, is it likely to be said that its agenda is to:

generate authoritative historical accounts, issue recommendations for institutional change, and direct a national morality play that places victims of injustice on centre stage. [Truth commissions] combine investigative, judicial, political, educational, therapeutic, and even spiritual functions ... In the process, truth commissioners have affirmed the value of 'narrative' as well as 'forensic' forms of truth, and have come to speak of justice as reconciliation, national healing, and moral reconstruction. More to the point, they have developed concrete practices aimed at furthering these goals, practices that stretch the conventional limits of judicial and political action. All of these features of truth commissions are clearly discernable in the South African TRC, the most morally ambitious commission to date. And they are dramatically encapsulated in the commission's efforts to promote what it calls 'restorative justice'.
Three Key Issues for Christian Social Ethics

When Christians participate in institutions and movements for social change, they bring with them certain presuppositions about human beings and normative human behaviour. A crucial claim among these presuppositions is the classic Pauline position that the key to ethical behaviour is not ethical knowledge but ethical capacituation: 'I can will what is right, but I cannot do it' (Romans 7:18). Without arguing this matter - it has been central to ethical argument among Christians across the centuries - one simply has to recall the ministry of Jesus to say that 'the power to become the children of God' (John 1:12) was at the centre of the gospel, just as it was central to his reported dealings with perpetrators high and low in his society. However difficult it may be to make analogy from Jesus' ministry to ailing persons to a ministry to an ailing social system, it remains essential for Christians to remember that the words 'Your sins are forgiven' and 'Go and sin no more' often fell from his lips. We have little evidence that he ever said, 'Go and suffer the consequences of your sins.' Indeed, one of the remarkable aspects of the South African TRC hearings is how often commissioners and the audience rose to a non-judicial expression of shared responsibility for the pervasive evils of apartheid, reflecting a Christian view that 'all have sinned' (Romans 3:23) in some degree. At the end of their description of 'Writing Up the “Truth,”' Charles Villa-Vicencio and Wilhelm Verwoerd say: 'There is a potential perpetrator in each one of us - requiring that the humanity of both the abused and the abuser is ultimately regained.' Elizabeth Kiss similarly summarises the moral integrity of the whole TRC effort when she says:

The image of 'wounded healers' aptly captures the power and ambiguity of restorative justice. In the end, the TRC, by its willingness to pursue an ambitious and generous vision of restorative justice, kept alive the idea of a common humanity and set a tone for the South African transition that can be an invaluable moral and political resource for future generations.

The tone being set here stems from an implicit subjection of all parties to standards of behaviour that, in varying measures, levy moral judgement upon them all. Few if any judges, for example, ever confess that their judgments were skewed by their own proclivities to wrong principles and material self-interests. The Parliament that authorised the TRC exempted judges from having to appear in its hearings out of fear that future commissions would also have the power to call judges to account; but one lawyer on the commission insisted that judges, too, should be rebuked for their large part
in implementing and extending apartheid law without any murmur of protest. 'History will judge the judiciary harshly', said the final TRC report, especially for its stance of moral-legal superiority in pretending that judges must be above criticism. *Quis custodiet custodes?* A society with no answer to that perennial question endangers public respect for law.\(^{47}\)

If they take the whole of the Bible seriously, Christians ought to tilt towards the restorative rather than the retributive side of the spectrum, from vengeance to impunity. Courts and commissions both live in between those poles, but the closer a court comes to the practice of the virtues of truth commissions, the broader is the justice likely to be done. In their view of capital punishment, a majority of American Protestant ministers tilt toward the retributive side; and, with enough support from a dualism of love and judgement, that tilt is perhaps sustainable. But a rejection of that dualism requires an infusion of love with justice and justice with love, which is close to a summary definition of the biblical idea of forgiveness. As Greenawalt concedes, such a definition suggests the inherent complexity of both justice and love: each is multi-dimensional. In Vickers' term, concrete love and justice are each multi-valued and inter-implicated, as are truth and reconciliation. To speak of the ethical issues at stake in discussions of truth commissions and judicial trials, therefore, is to assume that social ethics presuppose a network of principle and value that obviates resort to simple, one-dimensional descriptions of either.

The multi-dimensional nature of justice conditions my choice and treatment of the three issues I briefly explore. It is also pertinent to the perennial question of whether ethical principles are absolute in themselves or relative to situational variables and good or bad results. My argument assumes that ethical principles are multiple and related, first to each other and second to situations that may shift behavioural priorities from one principle to another. If we think of Bonhoeffer's well-known case, at the end of *Ethics*, \(^{48}\) 'On Telling the Truth', we should note that he was in jail for the sake of his obedience to the first commandment and that in service to that command, he engaged in extensive deception that violated the commandment against bearing false witness. In the case of the school child, whose schoolteacher calls upon her to reveal her father's drunkenness, her 'no' is a false witness to the facts but a true witness to 'Honour your father and your mother.' Bonhoeffer's allegiance to truth-telling was relational in a double sense: 'speaking the truth in love' (Ephesians 4:15) means preserving and enhancing certain human relationships; and sometimes love, or one commandment judged to be more loving than another, requires the ordinary, socially indispensable requirement of literal factual truth to be temporarily
set aside. That truth may for the moment be on the side, but it remains there as still authoritative. The best society is one where people know that there are ten commandments, all of which are authoritative even though some may take priority in specific human circumstances. In the Jewish ethical tradition applauded and observed by Jesus, it was mandatory to set aside the law against work on the Sabbath if the lives of humans and animals were at risk. The good, just society is one where none of the commandments is violated but where the argument for violating one may have to be made by invoking the authority of one or more of the others. 

Not to be neglected in this theory is the age-old debate between the ethics of duty and the ethics of responsibility, between the deontologists and the consequentialists. In ways unusual for the legal profession, Kent Greenawalt cuts through this debate when he proposes, as I do, to take principles and consequences with great seriousness in the philosophy undergirding the work of truth commissions. A government that takes no future consequences into consideration as it determines justice in the present can be a very blind government. In the tension between justice in the present (as in imprisoning a perpetrator) and justice in the future (as in preventing a civil war), the decision should bend toward the latter. Here 'some injustices are done to prevent others.' Indeed, Greenawalt continues, 'Any absolute list that governments should never do injustice is mistaken; but governments should not be able easily to justify doing injustice on the basis of predicted social benefits. Ordinarily, justifications based on other social benefits should be less compelling than justifications based on preventing future injustices.' In a choice between the two, quantity as well as quality – the favourite rest of the utilitarians – has to be considered. Numbers count, or as Nikita Khrushchev once remarked about the uniqueness of nuclear war: 'Quantity has its own quality.' Truth commissions, it turns out, can identify and bring to account far more perpetrators than the ordinary judicial system. 'If many more people will be identified than could be convicted [in a trial], the numbers argument is strong.' More justice results. More justice almost always results from decisions that respect the complexity of justice, the mix of principle, consequence and circumstance, and the mutual qualifications of all these dimensions whose very multiplicity protects both law and ethics from all forms of absolutism.

In this context, I would highlight three issues.
A. What Are the Truths That Restore, What Are the Truths That Damage, Social Trust?

If there is one summary of ethical biblical law that one can never stop trying to understand, it is ‘Love your neighbour as yourself.’ At minimum, this half of the Great Commandment is both a start on defining justice and an invitation to consider the possibility that all of our neighbours are as human as ourselves. The command mandates both empathy for, and acceptance of, standards of behaviour that apply equally to our neighbours and ourselves. What was common to apartheid in South Africa, Nazism in Germany, the persecution of Indians in Guatemala, and secret executions in Argentina was a government that demoted the humanity of its opponents to levels below the humanity of its friends. Equality under law evaporated. Society became organised around a master hierarchy that was a direct unethical assault upon many a commandment. In such societies, some citizens, by definition, are not to be believed when they speak; others are the only trustworthy voices of truth; and only some are legitimate participants in a public conversation regarding public good. The result is a vast corruption of human relationships – such as that experienced in East Germany during the heyday of stasi surveillance. There, over time, networks of personal trust shrank or disappeared.31

For the restoration of social-political relationships thus corrupted, does ‘the whole truth’ about the evil past, with its evil-doing people, deserve investigation and publicity? A poignant, conflicted answer was offered in Timothy Garton Ash’s return to East Germany in the nineties to meet persons who had informed on him under the DDR. As the stasi files were opened in a united Germany, human relationships were both restored and damaged.

Two schools of old wisdom face each other across the valley of the files. On the one side, there is the old wisdom of the Jewish tradition: To remember is the secret of redemption . . . On the other side, there is the profound insight of the historian Ernest Renan that every nation is a community of both shared memory and of shared forgetting. ‘Forgetting,’ writes Renan, ‘and I would say even historical error, is an essential factor in the history of a nation’.

‘There is real wisdom on both sides, and the wisdom cannot easily be combined. The closest I can come to it is a prescription stated through time: Find out – record – reflect – but then move on. That is the least bad formula I know for truth and reconciliation.’32

Alex Boraine describes ‘one of the major advantages of a truth commission’ as ‘inclusive truth-telling’, which seeks to ‘restore the moral order . . .
in the context of social and economic transformation. Such transformation
‘challenges myths, half-truths, denials, and lies’.53 The truth that restores the
integrity of an injured citizen, however, may be the truth that greatly dam-
ages a perpetrator. For retributive justice this is no problem, but for a justice
that seeks to restore a social-political relationship between both victims and
perpetrators, it is a problem. Verdicts of guilt in a criminal trial send the
guilty to prison, and ‘that’s that’. Only in recent years have many American
prosecutors worried about the effects of the imprisonment of a spouse on a
family or an entire civic community. The isolating device of prison guaran-
tees that reconciliation between prisoners and the rest of ‘us’ remains far out
of our minds. The case with amnestied perpetrators is different. They remain
visible and unavoidable on the streets. Their very presence raises the daily
question: can the sinning and the sinned-against achieve a new positive
relationship?

For the sake of new social harmony, the motto ‘forget and move on’ has
its utilitarian attraction. But the motto is deceptive. Forgetting is a tricky
business, both psychically and politically. Psychically, Kierkegaard was right
to suggest that real forgetting requires real remembering: ‘When we say that
we consign something to oblivion, we suggest simultaneously that it is to be
forgotten and yet also remembered.’54 In the context of public culture and
public memory, I would prefer to say, less paradoxically, that the intention of
consigning an evil truly to the past in the context of new conditions that inhibit its
repetition makes the remembering both safer and more effective for the construct-
ing of yet better conditions. One can dare to open up the bin of old garbage
when one knows that the coming society means to incinerate future accumu-
lations promptly through new law and new institutional protections.

By working in the shadow of a public urge for retribution, both courts
and commissions can seem to ignore restorative justice. But a truth com-
mission has a more promising overt charter for walking the line between
revenge and impunity. Its mandate directs its concern more surely towards
the future of the society itself than do the narrower concerns of court trials.
Another way of saying this is that a truth commission has a more overt politi-
cal purpose than most court trials. It may not succeed in taking the first
steps towards reconciliation, it may even sow seeds of further alienation. But
the sharp ‘truth’ it means to uncover comes wrapped in a surgeon’s inten-
tion to heal, not in a judge’s threat to punish. The differences between two
such hovering intentions are politically crucial, and only skilled leadership
makes credible that intention to a public for whose future it is trying to be
responsible.
How Much Truth Is Necessary for Healing the Past and Opening a New Door to the Future?

Ernest Renan’s famous dictum is doubly flawed. A patriotism that draws curtains over the slaughters that the ‘fathers’ perpetrated on their way to establishing the power of the nation offends against both truth and politics. It offends survivors of the slaughter who remember crimes against their ancestors which their neighbours are forgetting. Such is surely the case with Native American and African American memory vis-à-vis the typical amnesia of most Euro-Americans.

In conformity with the classic Jewish insistence on memory as the door that must be entered on the way to a different future, the contemporary world Jewish community has functioned as a sort of truth commission, not only on behalf of its own history but on behalf of us all. Images of Auschwitz, Dachau, and Buchenwald bid fair to become permanent acquisitions in the memories that the twentieth century bequeaths to the twenty-first. ‘This is where hate leads’ is the message of the United States Holocaust Museum and numerous public reminders of 1933–1945 spread across modern Germany.

But encultured memory of evil done and evil suffered by the ancestors is never quite secure. In a poignant moment, in 1991, Elie Wiesel raised a doubt about our human ability truly to internalise these prods to public memory. ‘Why haven’t we succeeded – we who have been victims of hate – in transforming that hate into a warning? Why haven’t we – that bothers me – into a warning, into a kind of alarm, saying, “Look, look, hate means Auschwitz.”’

One answer to the question is the resilience of most human minds to facts, images, and the actual sight of horror. In 1945, as the war ended in Germany, Allied generals ordered local Germans to visit the human debris of the concentration camps, evoking in many the cry, ‘We didn’t know!’ For the next fifteen or twenty years in Germany, however, there was little public talk about the Nazi evil. Only with the showing of a 1979 television miniseries Holocaust did buried memory finally surface more impressively in the public culture of Germans. How much truth about horror can we ‘use’ for our future health against our present comfortable resistances? It is not an easy question. In the spring of 1999, after a long classroom discussion of the Nazi past, a German gymnasia student said to us: ‘You should know that our schools treat the history of the Holocaust three times during the course of 13 years. You will hear some people our age saying, “I have had it up to here with the Holocaust!” I think that this is dangerous. Every time we study it, we have to go deeper. I think we should never stop studying it.’ She
is a strong-minded young woman. Not all Germans are so and not all Americans.

Mere time is not an answer to the question – otherwise Milosovic’s exploitation of the Serbian memory of Kosovo would never have been so effective, and the hostility in South Carolina over so old a symbol as a Confederate flag would never have been so sharp. A better answer, again, is that taking steps into a genuinely new present can reassure members of a deeply-damaged society that it is safe now to look the past full in the face. Asked in 1999, ‘Why were Germans like you so free to be vocal about the crimes of Nazism in the 1980s and not much before?’ former Bundespräsident Richard von Weizsäcker replied: ‘I think it was because we were secure enough in our new identity to speak of that past without fear.’

To be recalled here is the coming of new government, new law, and new standards of social justice in South Africa, Central America, and in the United States in recent years. America’s nearest approach to a truth commission was the political process, lasting from 1976 to 1990, that produced official hearings, apologies, and reparations for Japanese Americans interned as dangerous aliens in 1942–5. Not just the passage of time but the coming of the Civil Rights Movement and the passage of new immigration laws account for the readiness of an American Congress and public to revisit this democratically embarrassing past. In the late 1990s, remarkably enough, numerous new visits to such pasts, and local versions of truth commissions, popped up across the country – Florida (the Rosewood burning, 1923), Oklahoma (the 1921 riot), Oregon (1849 racist law) Richmond (its history of slavery), South Dakota (official congressional apology for Wounded Knee), and Connecticut (the Aetna insurance company’s implication in slavery). Common to all these painful public recollections is a certain unexpressed confidence: ‘We can remember this now, for we are beginning to get free from its legacies.’

How much truth is necessary for public healing? A lot, and no statute of limitations must be invoked on new memory and refreshed memory of negative, uncomplimentary history. A fashionable belief among many critics of truth commissions has been: ‘All this digging into the past will only revive old memories and make matters worse.’ To the contrary, reports Priscilla Hayner. Not one among her 15 cases of truth commissions from 1974 through 1994 ‘caused a situation to become worse . . . Even with unexpected explicit and strongly-worded reports, the overall impact of each truth commission has generally been positive, often reducing tension and increasing national reconciliation.’

But it is asking too much of temporary commissions and the legal system
to be the sole carriers of public memory and sole instruments for digging up places where 'your brother's blood is crying . . . from the ground' (Genesis 4:10). One must ask, therefore, what other contributors to public memory must be relied upon as the predecessors, complements and successors of courts and commissions. The process whereby a society reckons with the evils of its past requires other agencies. I conclude by noting a few of them.

C. What Are Other Servants of Restorative Truth and Justice?

We can group the sections into several categories of restorative truth and justice: (1) heroic individual protesters, (2) their collaborators who funnel their rare stories to a wider public, (3) public media, educators, and scholars, (4) public occasions of mourning and memory, and (5) religious bodies and other associations.

All of these witnesses reinforce each other over time. A diary written in an Amsterdam attic makes both Anne Frank and the horror of Nazi anti-semitism vivid to readers around the world in the 1950s. Germans' awareness of Auschwitz becomes progressively less suppressible with the first trickle of survivor memoirs by an Elie Wiesel and a Primo Levi. German courts try some thousands of Nazi officials in the wake of Nuremberg, and student demonstrations in the sixties call loudly for their parents' generation to answer the question: 'What did you do in the Nazi time?' A Social Democratic chancellor, Willy Brandt, falls on his knees before the Warsaw ghetto monument, evoking appreciation among Jews worldwide and rumblings of conscience among German constituents. Meantime, at the behest of their governments and mediated by Church leaders, a group of German and Polish historians consult on the writing of a single agreed-upon version of German-Polish experiences of war. In the eighties, on the fortieth anniversary of the end of that war, a German President publicly catalogues the crimes of the Nazis before a hushed Bundestag, and in the following few years, memorials and days of mourning are established in so many local and national settings that a third generation of young Germans asks wistfully if, in light of all that they do know about administrative massacre, whether they might deserve the privilege of thinking of their country as 'normal' again.

In one sense, this 50-year German experience with coming to terms with its traumatic past has been a spread-out version of a truth commission coming to pass in a rising crescendo of unmistakable witnesses to historical truth. The sum of these influences and their impact on public culture in Germany still entail many an ambivalence among Germans generally, but the German reckoning with an evil past sets some precedents that South Africa
both the histories of trials and truth commissions described in this essay vividly suggests, every country, with its unique history, must craft its own unique way of reckoning with that history. No one measure will suffice for the making and remaking of a public conscience. Installing negative history in public memory is a multi-dimensional project that has to circle back again and again to old facts from new perspectives.

The reshaping of Americans’ grasp of our own history advances every time popular film leaves behind the cowboy-and-Indian tradition for a perspective on the ‘western conquest’ from the standpoint of the conquered (imperfectly but tangibly, Dancing With Wolves was such a film); every time the experience of Japanese Americans in the forties gets similarly person-alised (the novel and the film, Snow Falling On Cedars); and every time an Amistad or a Beloved erodes the images of African American history in a Gone With the Wind, not to speak of a Birth of the Nation. The same advances are embodied in a trial of racist murderers of someone such as James Byrd, signalling a decisive turn in this society from the history of lynching and paralleled in the contemporary work of an Orlando Patterson and public display of the same horror in a series of 60 postcard photographs of the Lynchings. The work of reforming a political culture to conform to new perspectives on the virtues and vices of ancestors is ongoing, long range, never quite complete. History is not so much malleable as still researchable by scholars, educators, and any citizen. Court trials, investigative commissions, investigative journalists, sermons in churches, meetings in church basements, and every democratic forum that hears once-silent voices – all these are servants of justice to victims and their descendants. They are thereby anticipations of a reconciliation that can only be called genuine when it is genuinely grounded in citizens’ comprehension of each other’s pain.

A long-standing opponent of apartheid, Methodist Bishop Peter J. Storey, who was active in the pre-TRC South African debate on terms for its mandate, said recently to me that the real test of the TRC’s impact will be whether or not its processes get taken up and imitated in ongoing, local forums of reckoning with the history of the country.

Churches are the natural setting for citizens of every town and city for continuing to answer the question: ‘How did some of us suffer? How did some of us collaborate?’ So far only a few churches have responded thus in spite of the fact that the charter of the TRC resonates more with the beliefs of Christian ethics than could almost any other governmental activity. It remains to be seen if the TRC can be said to have been successful. The TRC did not fail South Africa. But South Africa may yet fail the TRC.
NOTES


5 Rosenberg, Tina 1999: "Afterword: Confronting the Painful Past" in Meredith, Martin (ed.) *Coming to Terms: South Africa's Search for Truth*, New York: Public Affairs, 339. Bohley was one of the most important of the pre-1990 East German dissidents.


7 TRC *Final Report*, vol. 5, 366.

8 The Battle of Kosovo took place on June 28, 1389. The political surge towards the Bosnian War owed much to the speech which Slobodan Milosevic delivered at the site of the battlefield on the anniversary in 1989. Paul Mojtzes has characterised the Bosnian War as a "religious" war led by irreligious people.

9 The most astute description of a 'multi-valued choice' can be found in the work of the British lawyer who coined the term out of his experience as a civil service administrator. See Vickers, Geoffrey 1968: *Value Systems and Social Process*. Harmondsworth, Sussex: Penguin. Many of the standards we actually implement in social decisions, says Vickers, 'are usually latent in the mind, ready to arise whenever some concrete situation evokes them' (113). Vickers walks a line between deontology and teleology and combines them both. Policy-making as the regulation of relations stresses that the standards by which these relations are judged are not goals to be attained once for all but, like the mariner's course, must constantly be sought anew. I will call them norms' (116). This theory is critically important for asserting the modesty that ought to be accorded the judgments of law courts as well as those of truth commissions. And it is a challenge to the ideology of 'the whole truth'. As Vickers says, 'Only when the "right" information about what is happening is compared with the "right" standard about what ought to be happening is the signal generated, which moves the selector to choose the "right" response' (118). This approach to ethics and policy requires constant conscious learning of 'what is, what to want, and how to do'. One might call it principle-laden pragmatism. See also section 3 of this essay, 'Three Key Issues for Christian Social Ethics'.

10 These distinctions are from Boraine 2000, 288-91. Here and often in the rest of this essay, I owe much to this new book and to conversations with its author.

11 Gary Jonathan Bass's book, *Stay the Hand of Vengeance: The Politics of War Crimes* (Princeton: Princeton University Press 2000), too new to have been read in preparation for this essay, is reviewed in a 2000 issue of *Foreign Affairs* 79(6), 173. Reviewer G. John Ikenberry calls it 'the best work yet on the politics of justice after war'. Bass argues that if the liberal democracies had merely wanted to carry out its victim's justice without resort to definitions of war crimes and crimes against humanity that they hoped, at least, would achieve international recognition, they could easily have court-martialled the Nazi leaders without implementing western notions of a fair trial.
Elazar Barkan, surveying a dozen contemporary cases of formal negotiations over restitution claims, believes that agreement on the criminal nature of certain atrocities is a major, pervasive trend in international affairs, not to be dismissed by old-style theories of realpolitik. See Barkan, Elazar 2000: _The Guilt of Nations: Restitution and Negotiating Historical Injustices_. New York: W.W. Norton, especially the summary chapter 308–49.


13 This is Mark Osiel’s term for the sort of crimes of central concern here. Murders by individuals and deaths in public riots are not usually to be blamed on governmental planning. Not so the atrocities in Bosnia, Cambodia, and Rwanda. There was nothing random about these events. See Osiel, Mark 1995: ‘Ever Again: Legal Remembrance and Administrative Massacre’, _University of Pennsylvania Legal Review_ 144: 463–704.


The Provocations of Amnestey


27 Krog 1998, 311.

28 An illustration now widely quoted is the testimony of Lucas Baba Sikwepere, blinded by police brutality: ‘But I feel what has been making me sick all the time is the fact that I couldn’t tell my story. But now I – it feels like I got my sight back by coming here and telling you the story.’ Krog 1998, 43. But the evidence of healing-through-storytelling is mixed. Some victims re-experience their suffering in the telling, and some stories can fuel renewed public rage as well as public compassion. See below on the problem of amnesty and justice.

29 Boraine 2000, 290–1.


32 Mahoney 1987, 34.


34 Krog 1998, 344. This discussion circled around the famous tension between a ‘culture of guilt’, which warrants individual responsibility, and a ‘culture of shame’, which mandates loyalty to one’s group. Desmond Tutu, says Krog, managed to bridge the two in his understanding of ubuntu (143). The idea of individual responsibility and agency is one way to retain the attribution of humanity to perpetrators as well as victims.

35 O’Connor, Sandra Day in Foreword to Goldstone 2000.


39 That dignity and worth is further restored when, as in a growing number of criminal trials in the United States, the perpetrator is required to render forms of ‘community service’ that include feasible practical services to the victim.

40 Greenawalt, Kent 2000: Amnestsy’s Justice’ in Rothing and Thompson (eds.), 201.

41 Notably enough, during the two years of the TRC virtually no acts of revenge were recorded in South Africa—Boraine 2000, 293. Priscilla Hayner, in her survey of 15 truth commissions worldwide, comments that ‘prosecutions are very rare after a truth commission report’ for ‘the decision whether to prosecute is generally a political one’ Hayner 1994, 604–5. One might conclude that the truth about the perpetrators’ crimes is the minimum requirement of public acceptance of personal amnesties when the latter is perceived as being morally different from blanket amnesty and impunity.


44 Jesus did warn his disciples against letting their conflicts proceed to settlement in courts of law. (Matthew 5:25), and Paul thought it a disgrace to the Church that its
members would take refuge in the secular courts. This is perennial wisdom. For mending broken human relations, forms of restorative justice are more likely to emerge from out-of-court settlements.


Kiss 2000, 90. Her quote is from Krog 1998, 364.

Boraine 2000, 185-186.


Greenawalt 2000, 192-197.

That was how a director of the Stasi Museum in Berlin recently described to me his the growth of mistrust in the DDR in its latter years.


Boraine 2000, 291.


Personal conversation, Berlin, April 1999.

Hayner 1994, 610.

Such re-education has proven too difficult for some public school teachers in the former German Democratic Republic, which trained teachers in perspectives on history and methods of teaching it that contrast radically with that in the West German educational system.

In the old apartheid days, only white people could visit the inside of this famous monument to Boer courage and Boer racial imperialism. Now the officer who permits entry is black, and the most encouraging thought about black visitors now is that the murals of this history, spread around the outside and insides of this ‘shrine’, will educate them to some empathy with the Boer view of history and some inspiration of new counter-narratives and new monuments in South Africa that put on public display the sufferings of the victims of apartheid.

See Hayner 1994, 622-3. In retrospect, says Alex Boraine, the TRC should at least have had the power to order amnestied perpetrators to make personal reparations to their victims within the limits of their personal and other resources (personal communication). See Boraine 2000, 333-6. Seeing them walk away from prison, unencumbered by any obligations to victims, left a new sense of justice denied in the wake of amnesty. Most advocates of restorative justice in the context of criminal convictions make the same claim.

The latter films were not commercial successes, and one of my African American colleagues commented sadly that he sees this as evidence that white audiences find these films too painful to watch. Toni Morrison’s novel, Beloved, remains as the most powerful evocation of the reality of slavery of any literary work to come from America.