

**TRUTH AND RECONCILIATION COMMISSIONS 101:
WHAT TRCs CAN TEACH THE UNITED STATES JUSTICE SYSTEM
ABOUT JUSTICE**

ARTICLE

ROSLYN MYERS*

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I. JUST RESULTS VS. LEGALLY CORRECT OUTCOMES

AS A SOCIETY, WE HAVE AN UNEASY FEELING ABOUT THE CRIMINAL JUSTICE system. We have idealized expectations about what the system is all about and what it can provide. As participants in the justice system, we soon learn that our ideals about the legal process and its mandate to seek

* Roslyn Myers, Esq., is a writer, editor, and professor in the field of criminal justice. She teaches Crime Victims’ Rights and Restorative Justice at Fordham Law School, and courses related to justice and society at John Jay College of Criminal Justice. Her work has appeared in West, Matthew Bender, and other major legal publishers, as well as the criminal justice journals of Civic Research Institute. She is a graduate of the University of California, Berkeley, and Fordham Law School. Special thanks to Alisa Shubb, M.A., Professor of Speech/Communication at American River College and U.C. Davis, for her tireless assistance in preparing this article. This article was written as part of a presentation at “Policing in Diverse Societies,” a conference hosted by John Jay College of Criminal Justice, in San Juan Puerto Rico (June 2008).

justice greatly exceed the reality. From the start, when a crime is reported and law enforcement becomes involved, to the point when a judge or jury hands down a decision, the criminal case takes on a life of its own. Such life is not the inevitable march towards justice, vindication, fair judgment and speedy punishment, that we imagine it will be.

Despite its title, the justice system operates quite separately from the notion of justice. The machinations of the system proceed without regard to the wishes of the parties in it. It unfolds like a factory line, going step by step, with its primary objective to simply close the case; to achieve legally correct outcomes — not necessarily just results.¹

Justice is a word that has been applied too loosely in the criminal justice field. Most people who come before the law do not leave feeling that justice was achieved in their case. The judiciary is content with the dubious resolution that, whatever the outcome in a particular lawsuit, none of the parties walk out of the courtroom feeling victorious. The closest thing to justice that many judges seek is a ruling that is equally unpalatable to everyone. It is *fair* in that it leaves all the parties unhappy. Justice then becomes not a lofty goal worthy of our best minds and methods, but a euphemistic label for a position of mere compromise.

In criminal cases, this failure to achieve a just resolution is even more pronounced. Parties to a criminal trial come to court seeking a remedy for a violation of our most serious and gravely felt societal (and personal) values. Yet, few victims of crime leave the system with a meaningful sense of *resolution*, even when their offender is convicted and sent to prison. As outside observers, members of society are also underwhelmed by the legal system. So, why is it that we don't feel that, in our justice system, justice is being served?

It is because *justice* is a term that speaks to something finer than the blunt remedy of prison time for criminal victimization. Neither society nor victims themselves find lasting satisfaction from seeing a *bad guy* carted off to jail. Like so many other features of American life, it provides immediate relief and perhaps the long-term comfort that one more felon is off the streets, but it fails to address the grander promise of true justice. And, in unwitting collusion with the criminal justice system, we make the mistake of believing that the endgame of a prison sentence is all there is.

The remedies we seek in the aftermath of a crime are more complex than what the criminal justice system strives for. “[T]he desire for a just resolution . . . is precisely what draws people to the law in the first place,”² but it is seldom what they find. The courtroom is the central societal venue for the messy, disordered, often painful and even bloody violations that breach our communal values. It is at trial that we expect to find a complete airing of the chaotic brew that gave rise to the criminal event. And, among the outcomes we anticipate is the

¹ See THANE ROSENBAUM, *THE MYTH OF MORAL JUSTICE* (2004) [hereinafter ROSENBAUM].

² *Id.* at 15.

feeling that both the process and the court's decisions "make sense[;] they should feel right emotionally and morally to those not only on the receiving end of these judgments, but to the rest of us, the outside witnesses to these private proceedings."³

The concept of justice has a moral component;⁴ it is linked to the concepts of right, legality, and truth.⁵ "Doing what's just is the experience of providing, and ultimately receiving, true relief."⁶ As a society, we share a collective expectation that the law is a force for good.⁷ We view courtrooms as places where we can attain the moral rectitude and fair judgment that we cannot find on the street.⁸

Morality requires much more than legally correct outcomes and automaton-like adherence to legal rules. Morality and justice require attention to the human aspect of criminal violations and legal proceedings—emotion, spirit, and dignity. While the law "focuses too ferociously on what is utterly unreliable: the search for the concrete, literal truth"⁹—that is, facts—it fails to realize that facts without the emotional landscape in which they reside reveal little that contributes to a just resolution.

Testimony is the heart of that emotional landscape. Without the subjective, voice-cracking, hesitating, stuttering personal account, whatever facts we employ to come up with a legally correct outcome will render the result meaningless. Moreover, without the community to witness the testimony and a historical record of the events to be preserved for posterity, true justice cannot be achieved. For victims who have been traumatized by violent crime, testifying about their experience in the safe environment of a supportive community is a cornerstone of the healing process. Psychologists and sociologists have long known that people who have been traumatized can benefit from retelling their experience—under certain circumstances.¹⁰ Examples of such oral and written testimony memorializing the individual stories of survivors of historical mass

3 *Id.*

4 "Justice" stems from the Latin *justus*, meaning "right." The root *jus* translates to "law." "Judge" stems from *jus*, a foreshortening of *justus*, and *dictus*: "right" and "speaking," or "speaking truth." THE WINSTON DICTIONARY 534 (Encyclopedic ed. 1945).

5 "Morality" stems from the Latin *moralis*, which means what is "just" and "right" as filtered through what is "customary." *Id.* at 634.

6 ROSENBAUM, *supra* note 1 at 18.

7 ROSENBAUM, *supra* note 1.

8 *Id.* at 12 ("We assume that an exalted sense of rightness, and knowing the proper standards for engaging in the world and dealing with our fellow human beings, is what clergy and judges have in common.").

9 ROSENBAUM, *supra* note 1 at 9.

10 See, e.g., JUDITH HERMAN, *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE--FROM DOMESTIC ABUSE TO POLITICAL TERROR* (1997); EDNA FOA, TERENCE KEANE & MATTHEW FRIEDMAN, *EFFECTIVE TREATMENTS FOR PTSD* 39-59 (2004).

crimes and other victims are plentiful.¹¹ Testimony, and the healing process it can inspire, is fundamental to the concept of justice.

Certain models of justice that deal with serious crimes elevate the human aspect of the violations and incorporate the healing process into their proceedings. Truth and reconciliation commissions (TRCs), which have come into operation around the world in recent decades, are one (1) example of this model of justice. The most widely known TRC is the South African Truth and Reconciliation Commission. It is the grandfather of subsequent TRCs, the model on which later commissions are based. Despite controversies about its basic framework, it is generally lauded as a noble enterprise that launched what was a much-anticipated movement toward a global “politics of grace.”¹²

¹¹ Examples include the videotaped statements of Holocaust survivors collected by the Shoah Foundation and the Fortunoff Video Archive; the public memorialization of the genocide in Rwanda in speeches, books, and museums; articles and speeches given during Crime Victims’ Week in the U.S.; written memoirs; documentary films; and the “state-supported storytelling” at Truth and Reconciliation Commissions that are operating around the world.

¹² See Robin Petersen, *Parable of the Kingdom: Rugby and Grace (South Africa)*, THE CHRISTIAN CENTURY, Jan. 17, 1996. See also RUSSEL H. BOTMAN & ROBIN PETERSEN, THE POLITICS OF GRACE AND THE TRUTH AND RECONCILIATION COMMISSION 57-64 (1996); RUSSEL H. BOTMAN & ROBIN PETERSEN, TO REMEMBER AND TO HEAL: THEOLOGICAL AND PSYCHOLOGICAL REFLECTIONS ON TRUTH AND RECONCILIATION (1996); GEIKO MULLER-FAHRENHOLZ, THE ART OF FORGIVENESS: THEOLOGICAL REFLECTIONS ON HEALING AND RECONCILIATION (1996).

In *Parable of the Kingdom*, Petersen concludes his article with the following statement:

Mandela’s politics of grace is one of the most theologically remarkable political experiments in history. If it succeeds, it will not only have saved the country but will also offer a political model for other countries emerging from bitter strife and division. What will it take for it to succeed? In terms of the analogy of grace, it is clear that what is required from white South Africans is conversion in its full, evangelical form: recognition of sin, confession of sin . . . and a life transformed in attitude and action [to] restore, re-create, recompense and reconstruct all that the previous system had destroyed.

Id.

Although theological in tone rather than legal, what Petersen calls “conversion” carries a parallel conception to the ideal objectives of therapeutic and restorative justice systems. It is the theological equivalent of profound remorse. Such a sensibility is not even hinted at in our legal system, and, indeed, expressions of remorse are treated as admissions of liability in the U.S., and they are harshly cautioned against in most legal matters. See ROSENBAUM, *supra* note 1, at 194.

Whether a global movement toward a “politics of grace” is indeed afoot is still an unanswered question. Certainly the recent tension in South Africa, spurred by Jacob Zuma, leader of the African National Congress, who has adopted the antiapartheid song “Bring Me My Machine Gun” as his “anthem” in his bid for the presidency, does not bode well for the movement or for continued peace. See *South Africa: Party Leader Seeks Dismissal of Charges*, N.Y. TIMES, Aug. 5, 2008, at A10. Nevertheless, the 1996 South African TRC launched a new way of thinking about national healing and restoration. Its success is still widely debated—which itself is a tribute to the TRC’s transparency and democratic nature. Whether invited or not, the undertones of its mission statements suggest that the national leaders expected the TRC to attract worldwide analysis and criticism. Scholars and commentators who have expressed disappointment or skepticism about the TRC’s success in achieving national healing seem to have viewed the enterprise as an end point, rather than the entry point,

This article discusses the features of the South African TRC that illustrate the safeguards and procedures necessary to promote healing in the aftermath of crime, which is fundamental to the concept of justice. Part II briefly summarizes the backdrop to the South African TRC, its mechanisms and its goals, with notes regarding comparative structural choices made in other TRCs. It highlights the features of the TRC that form the safeguards and procedures necessary for victims to meaningfully process their experience of the crime and move toward a sense of true relief.¹³ Part III concludes by suggesting that these features should be integrated into the current U.S. legal system, so that justice is the goal, not a fortuity.

I am aware that nothing short of a major overhaul of the U.S. criminal justice system would be required to align its outcomes with what its name implies. However, I am only proposing in this paper that certain safeguards and procedures that are already in use on much larger scales, can and should be introduced to the U.S. criminal justice system. This will make the system less hostile to crime victims, the most vulnerable parties, and would restore societal trust in a system that is widely regarded as unfair, emotionally and spiritually vapid, and anything but just. In comparison to the national proceedings that address widespread systemic criminal violations, implementing such safeguards and procedures in cases of mere localized crime seems an undertaking that is both practicable and indispensable. For if our legal system does not leave its participants, as well as the general public, feeling that justice prevailed, then what we have is not a “justice” system, indeed not even a legal system, but a system of unsatisfactory compromises that shortchanges the shared values which the system itself is intended to protect.

in what realistically was and is a long arduous task of reassembling a new system, a new national identity, a re-educated culture, using the same damaged “parts.”

¹³ I place special emphasis on those features that echo the sanguine principles of restorative justice and therapeutic justice models. These models of justice recognize different values from the traditional legal system. Although they are distinct from one another, at core they both focus on restorative rather than retributive measures, and recognize that “the complexities of human behavior have made certain types of [legal] cases (substance abuse, domestic violence) particularly difficult to resolve by traditional court procedures.” American Bar Association Coalition for Justice, Problem-solving Courts, Therapeutic Justice, Restorative Justice, <http://www.abanet.org/justice/oisummary/traditionalact/problemsolving.html>. Therapeutic justice uses a holistic approach addressing not just the crime, but also the offender’s overall pattern of behavior. Classic examples are the so-called “problem-solving courts,” such as community courts or drug courts, which deal with specific types of criminal activity and related behavioral issues, such as addiction. Restorative Justice (RJ) principles may be used in therapeutic justice models, but RJ has its own post-adjudication or para-adjudication models, such as victim-offender mediation dialogue or family group conferencing. RJ also takes a victim-oriented approach, which requires serious offender accountability. (For more information on these models of justice, see generally David Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. COOLEY L. REV. 125 (2000); HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* (2002). See, e.g., Jon Wilson, *Crying for Justice*, HOPE MAGAZINE, <http://www.justalternatives.org/CryingforJustice.pdf> (portraying several RJ cases and the work of David Doerfler, a nationally known RJ leader and educator).

II. TRUTH AND RECONCILIATION COMMISSIONS AS INSTRUMENTS OF HEALING AND JUSTICE

A. *Investigating and Memorializing Human Rights Abuses*

A truth and reconciliation commission is a body established to investigate, gather evidence, create a public record, and respond to human rights abuses in a particular country, usually arising from a particular conflict with finite temporal boundaries. Such commissions are typically created when the country has achieved a level of stability; for example, after a peace settlement has been reached.¹⁴ TRCs have specific and well-defined mandates, but their bureaucratic structures are flexible in order to be oriented around their goals. Truth commissions can adopt a variety of organizational formats, which spell out their procedures and processes. The administrative goal of a TRC is to produce and disseminate a final report, which includes a record of the human rights abuses and other crimes that triggered its formation, transcripts of the proceedings, and recommendations for the country to sustain a peaceful future. A commission's existence is finite, usually ceasing when a final report is submitted.

Truth commissions are not courts of law. They are not usually set up as prosecutorial bodies, although a commission's findings may be used in later independent judicial proceedings. "Ultimately, the goals of such commissions are to contribute to an end and account for past abuses of authority, to promote national reconciliation and/or bolster a new political order or legitimize new policies."¹⁵

Through the proceedings, victims and their survivors demand justice that had been previously denied to them. The TRC also assigns blame to the perpe-

¹⁴ Among other things, peace agreements address the society's forward-looking structural framework, including the legal, economic, and political domains. Also among its key concerns, as a nation attempts to rebuild its government and culture, is the delicate question of power. The leadership must agree to the transfer or sharing of power, and that arrangement must be securely in place before further steps toward reconciliation can begin. See, e.g. LUC HUYSE ET AL., RECONCILIATION AFTER VIOLENT CONFLICT, A HANDBOOK 21 (2003).

For a contemporary illustration of the fragile power relationships that TRCs often are built around, see Celia W. Dugger, *In Zimbabwe Power-Sharing Talks, Who Will Get the Real Power?*, N.Y. TIMES, July 27, 2008, at A6 (discussing the fragile power-sharing negotiations between opposition leader, Morgan Tsvangirai, of the Movement for Democratic Change and reelected President Robert Mugabe, who has long used his governing party, ZANU-PF, to reign over the country with targeted attacks and violent intimidation; noting that "[a] collapse of the talks could lead to an accelerating implosion of Zimbabwe's economy . . . potentially destabilizing the region."); Comfort Ero, *Zimbabwe: Talks Must Address Violence, Displacement*, ALLAFRICA.COM, Aug. 1, 2008, <http://allafrica.com/stories/200808010852.html> (arguing that the leaders and "negotiators must address the most immediate consequences of recent political violence," and establish a venue for Zimbabweans "to help address human rights abuses [that have occurred] over an extended period" in the country).

¹⁵ United States Institute for Peace, <http://www.usip.org/library/truth.html> (last visited Oct. 8, 2008) [hereinafter USIP Digital Collection].

trators, determines the appropriate punishment, and establishes a system for carrying out those punishments. But this type of retribution alone does not provide complete relief.

Punishment is not meaningful if it is not linked to other objectives. The bare relief of punishment without context is anathema to the driving feature of TRCs: to seek truth. TRCs provide a forum where victims can give context to the crimes. It is where a community of witnesses is called to hear what happened and an official public account of the totality of the events is made.¹⁶ While every model has a mechanism for dealing with the issue of punishment —what is to be done with those proven to be wrongdoers— the key motivation of the TRC is revelatory. Above all else, commissions seek truth.

Truth and reconciliation commissions are founded on the principle that neither individual victims nor entire communities can move beyond violent criminal events without the public recognition of suffering, the collaborative effort of understanding the complete story of what happened, and gestures of remorse from the ones who caused it. The records of the commission become a repository, in perpetuity, for the stories of those affected by the crimes. Speaking truth leads to reconciliation —but not necessarily between victims and perpetrators. The change is not utopian; the murderers and survivors do not now embrace each other. There is no *happily ever after*. Although leaders view reconciliation as an interpersonal process —one that occurs between the aggrieved and the offenders— I do not believe interpersonal reconciliation should be the focus. In fact, such a goal is too close to forced or coerced forgiveness, which is not only damaging but fleeting. Rather, I suggest that commissions should promote personal reconciliation; that is, reconciling the parties and the society to the horrible fact of the criminal events. Reconciliation between the parties is a fortuity, but cannot be the goal.

Personal reconciliation has to do with the individual's relief from denial, shame, bewilderment; it is an internal process. Supporting individuals, and in turn society, to become reconciled to the terrible events that have occurred and life with these losses should be the commission's objective with regard to its mandate for reconciliation. The process, which usually takes months or even years, dislodges resentments that had been held out of fear or futility; answers questions that were previously unknown; focuses attention on unacknowledged losses; and allows parties to grieve. It makes speak-able that which was unspeakable.

Reconciliation cannot occur without exposing truth. As one commentator noted, acknowledging the reality of past horrors makes peace possible:

In and of itself, no Truth Commission can create reconciliation. Much less can a Truth Commission create peace. However, they do create conditions which make reconciliation and peaceful coexistence possible. They do this by

16 *Id.*

uncovering the reality which embraces the factual truth of the past, and the emotional truth of both the past and of the present. No Truth Commission to date has done more to create such a full picture of reality than the South African TRC. The TRC has made it possible for the citizens of that country to begin to understand why people participated in such grotesque actions, and it has made clear what must be done to prevent such things from happening again.¹⁷

Reconciliation thus becomes a possibility, not an inevitability.

From this deep acceptance among individuals, the country is able to move forward. It does not “get over” what happened, but it carries with it all the memories and pains of the violations. Without these overriding goals of truth-seeking and reconciliation, victims remain victims and even countries no longer at war remain embattled.

B. South Africa's Truth and Reconciliation Commission Sought Truth above Retribution

In 1995, a year after Nelson Mandela was elected President of South Africa¹⁸ and after the demise of the system of apartheid that had dominated the country's governance for fifty (50) years,¹⁹ the new government signed into law the Promotion of National Unity and Reconciliation Act (the “Act”),²⁰ which led to

¹⁷ Colleen Scott, Centre for Conflict Prevention, The South African Truth and Reconciliation Commission: *Harrowing the Ground So That Others May Build* (1999), http://www.gppac.net/documents/pbp_f/11/3_safric.htm

¹⁸ See generally NELSON MANDELA, *LONG WALK TO FREEDOM: THE AUTOBIOGRAPHY OF NELSON MANDELA* (1995) for more information about the life of Nelson Mandela.

¹⁹ See generally, LEONARD THOMPSON, *A HISTORY OF SOUTH AFRICA* (2001); *THE HISTORY OF APARTHEID IN SOUTH AFRICA*, <http://www-cs-students.stanford.edu/~cale/cs201/apartheid.hist.html> (last visited Oct. 8, 2008). The origins of Afrikaner rule and its system of oppression emerged from the country's early settlements. The Dutch were the original colonists who settled in South Africa in the 17th century (known as “Boers”), followed by British, French, and Germans over the proceeding 200 years. Of these formerly European coastal settlers, some groups moved inland and developed their own language and cultural identity as “Afrikaners.” The Afrikaners battled indigenous African peoples to form many independent republics in the interior, and they fought against the British in the two Anglo-Boer Wars. It was not until 1910 that the territories in that southern geographical area were finally united, forming the Union of South Africa. At that time, there were stark divisions between the British-oriented English-speaking South Africans, who were predominantly black, and the white Afrikaners, who, in addition to their own language and culture, shared political and religious affiliations (as members of the Dutch Reformed Church). The real strife began when the Afrikaner-based National Party came to power in 1948, renaming the country the Republic of South Africa, and implemented a strict racist social policy that was mingled with its insular religious philosophy. The National Party passed laws that separated the people of South Africa according to race under apartheid, magnified the socioeconomic differences that already existed between the races, and maintained Afrikaner rule using harsh violence against the blacks. The policies continued until the 1980s, when internal rebellion and external pressure in the form of international sanctions forced the government to begin negotiations with the leaders of the liberation movements.

²⁰ Act 34 of 1995. The full text of the Act is available at Promotion of National Unity and Reconciliation Act, <http://www.doj.gov.za/trc/legal/act9534.htm> (last visited Oct. 8, 2008). The following

the creation of the South African Truth and Reconciliation Commission.²¹ The Act and the Commission were the result of strenuous negotiations, during which military and security chiefs sought blanket amnesty, while many black leaders and some representatives of the liberation forces insisted that punishment be imposed on those —white Afrikaners— who had participated in the killing and repression of thousands of South African blacks during the previous half-century.²² But some black leaders, including Mandela and Desmond Tutu, be-

preamble clearly delineates the leadership's thinking about the nature and intentions of the Truth and Reconciliation Commission as the transformative link between the country's past and its future:

To provide for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed during the period from 1 March 1960 to the cut-off date contemplated in the Constitution, within or outside the Republic, emanating from the conflicts of the past, and the fate or whereabouts of the victims of such violations; the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past during the said period; affording victims an opportunity to relate the violations they suffered; the taking of measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights; reporting to the Nation about such violations and victims; the making of recommendations aimed at the prevention of the commission of gross violations of human rights; and for the said purposes to provide for the establishment of a Truth and Reconciliation Commission, a Committee on Human Rights Violations, a Committee on Amnesty and a Committee on Reparation and Rehabilitation; and to confer certain powers on, assign certain functions to and impose certain duties upon that Commission and those Committees; and to provide for matters connected therewith.

SINCE the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), provides a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence for all South Africans, irrespective of colour, race, class, belief or sex; AND SINCE it is deemed necessary to establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights have occurred, and to make the findings known in order to prevent a repetition of such acts in future; AND SINCE the Constitution states that the pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society; AND SINCE the Constitution states that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimization; AND SINCE the Constitution states that in order to advance such reconciliation and reconstruction amnesty shall be granted in respect of acts, omissions and offences associated with political objectives committed in the course of the conflicts of the past; BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows . . .

Id.

²¹ See, e.g., HUGO VAN DER MERWE, CENTRE FOR THE STUDY OF VIOLENCE AND RECONCILIATION, THE SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION AND COMMUNITY RECONCILIATION: A CASE STUDY OF DUDUZA (1998); Charles Villa-Vicencio, *Getting on With Life: A Move Towards Reconciliation*, in LOOKING BACK, REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA 199-209 (Charles Villa-Vicencio & Willem Verwoerd eds. 2000).

²² Some black representatives pressed for the creation of a war crimes tribunal similar to the one established in Nuremberg, Germany, in 1945, to prosecute those who had committed war crimes

lieved the decision to offer amnesty, although controversial, was necessary to free the nation from its connection to violence and turn the people's attention toward the future.

In April 1996, chaired by the Reverend Desmond Tutu,²³ the South African Truth and Reconciliation Commission began investigating the decades-long practices of racial oppression and barbarity committed against blacks during the era of apartheid. Under the terms of its mandate, it granted amnesty to certain perpetrators who offered a full accounting of their participation in the State-sanctioned crimes.²⁴ As one international organization observed:

When communities have been victimized by the government or by another group during a conflict, underlying feelings of resentment and the desire for revenge cannot be alleviated unless the group is allowed to mourn the tragedy and senses that wrongs have been acknowledged, if not entirely vindicated. In an environment where there is no acknowledgement of or accountability for past violent events, tensions among former disputants persist. Hence, confronting and reckoning with the past is vital to the transition from conflict to democracy.²⁵

during World War II. See HELENA COBBAN, *AMNESTY AFTER ATROCITY: HEALING NATIONS AFTER WAR CRIMES* (2006). There were historical indicators that a prosecutorial tribunal would be the only way to ensure that the harms were not repeated. In Belgium after World War I, many Belgians who had collaborated with the German occupiers were granted amnesty. These collaborators later repeated the same violations during World War II, leading many to believe that the country's leniency encouraged that reprise. LUC HUYSE ET AL., *supra* note 14, at 25.

²³ See, e.g., DESMOND TUTU, *NO FUTURE WITHOUT FORGIVENESS* (2000) (his memoir of his time as chair of the TRC) for more information on the South African TRC and Desmond Tutu; DESMOND TUTU, *GOD HAS A DREAM: A VISION OF HOPE FOR OUR TIME* (2005).

²⁴ The TRC's Amnesty Provision made individuals eligible for amnesty if they disclosed in full all pertinent facts relating to any acts of violence between March 1960 and May 1994 that were shown to be associated with a political purpose. See, *infra*, notes 30-33 and accompanying text.

²⁵ INTERNATIONAL IDEA: INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, *DEMOCRACY AND DEEP-ROOTED CONFLICT: OPTIONS FOR NEGOTIATORS* 281 (2003).

A similar truth-for-amnesty approach was taken in the case in Uganda's civil war, where the rebel group, the Lord's Resistance Army, abducted children to carry out horrendous crimes against humanity, including clubbing newborn babies to pulp, slicing off the lips and ears of the living, using a machete to cut throats—a murderous act that seems almost merciful compared to their other violent tactics. See, e.g., Jeffrey Gettleman, *Uganda Peace Hinges on Amnesty for Brutality*, N.Y. TIMES, Sept. 15, 2006, at A1. Tens of thousands were killed and still more thousands were permanently maimed as a result of the grotesquerie, yet the victims have embraced the truth-for-amnesty formula, some because they believe that “[o]nly god can judge” the wrongdoers (*id.*) and some because the fact that most of the perpetrators were children and were forcibly coerced complicates their responsibility for their actions. See *Wide Angle: Lord's Children* (PBS television broadcast July 29, 2008) (profiling children who were forced to become murdering soldiers for the Lord's Resistance Army). See also, *infra*, notes 81 to 86, discussing culture and forgiveness.

As a contrasting example, the 2002 East Timor TRC, called the Commission for Reception, Truth, and Reconciliation (CAVR), took a different approach. The CAVR was established to publicly record and mourn the widespread human rights abuses committed during the twenty five (25) years

This process was arduous and embattled, as the massive historical record of human rights abuses gradually came under international scrutiny.²⁶ The commission heard over 2,000 accounts from victims about the physical and spiritual crimes that had been perpetrated against them; it received 23,000 written testimonials; and it reviewed thousands of applications for amnesty, granting amnesty in a relatively small percentage of the applications, from those whose acts amounted to human rights violations.²⁷

of ruthless occupation by Indonesian forces between 1975, when Portuguese colonial rule collapsed, and 1999, when the Indonesian forces finally pulled out. During first few years of Indonesian occupation, between 100,000 and 200,000 East Timorese were estimated to have died from fighting, famine, and disease. The territory's struggle and eventual vote for independence in 1999, combined with the trials of 19 officials, including three generals, who were charged with extreme human rights abuses against the Timorese, triggered killing sprees across the country by Indonesian militias, leaving another 1,000 people slaughtered.

The mandate of the East Timor CAVR was parallel to the South African mandate —to expiate the country's violence-riddled past and turn its attention toward the future. See Dean Yates, *Truth Commission Set for Traumatized East Timor*, JOYO INDONESIAN NEWS, Jan. 13-19, 2002, <http://www.etan.org/et2002a/january/13-19/16truth.htm>; *East Timor Launches Truth Commission*, BBC NEWS: WORLD EDITION, Jan. 21, 2002, at <http://news.bbc.co.uk/2/hi/asia-pacific/1773601.stm>. The Commission was established primarily to get a full accounting of the events leading up to and after the ballot giving East Timor independence and the overall impact of Jakarta's presence on the East Timorese. For minor offenses that occurred during the quarter-century of violent rule, such as minor assault, theft, killing livestock, or vandalism, the CAVR sought to reconcile offenders and victims, so that communities could be rebuilt and become productive. In each community, minor offenders were asked to admit wrongdoing and make amends, in the interest of reviving the local area's socioeconomic base. The word "reception" in the title thus refers to the invitation to the Timorese who fled to West Timor after the vote for independence to be received back into their communities. See *id.*

Unlike the South African TRC, the CAVR did not offer amnesty to offenders of serious crimes such as murder or rape. Instead, high-level abuses were prosecuted in the normal courts, and any admissions made before the Commission were passed along to for possible prosecution. See *id.*

²⁶ The reports brought before the South African TRC were challenged, especially in courts of law, and the TRC itself faced repeated threats of litigation by offenders who did not want to be named in hearings held by the Human Rights Violation Committee, as well as political groups that rejected the constitutionality of the TRC process. See USIP Digital Collection, *supra* note 15.

²⁷ See *infra*, note 33 and accompanying text. See also ROSENBAUM, *supra* note 1, at 226.

Below is an excerpt from an application for amnesty (used in the TRC's final report) by a white South African medic, which illustrates the type of human rights violations that occurred during the apartheid era. The statement describes the applicant's acts and omissions that resulted in numerous deaths of South African blacks, either by murder or by neglect. It also recites, with little discernable remorse, his observation of the gross human rights violations undertaken by others and his own failure to intervene to prevent the violations. The applicant claimed that his own proactive conduct never amounted a human rights violation and that he acted under threat of imprisonment: "I was caught up and faced a six years in prison if I refused SADF service. I never did anything which I personally regarded as a violation other than served in an illegitimate force and was as such part of a total oppression strategy." Following is the summary made by the Amnesty Committee on this application:

AC/2001/34 TRUTH AND RECONCILIATION COMMISSION, AMNESTY
COMMITTEE

APPLICATION IN TERMS OF SECTION 18 OF THE PROMOTION OF NATIONAL UNITY AND RECONCILIATION ACT, NO.34 OF 1995.

SEAN MARK CALLAGHAN, APPLICANT

(AM4025/96)

DECISION

....

The Committee on the day of the hearing was handed a supplementary statement, Exhibit A, which formed the basis of [the applicant's] oral evidence. This statement listed ten so-called incidents for which the applicant was seeking amnesty. These are:

1. The fact that his training as a medical at Thembisa and Kathlehong Hospitals allowed him "to practice" on black civilian patients in order to equip him to save lives of SADF members, had racial overtones and so constituted a gross human rights violation.

2. During 1983 whilst at Ongiva in Angola the International Red Cross referred an Angolan woman to "them," who had been diagnosed with breast cancer and enquired whether it was possible to have her transported to South Africa for treatment. He never saw this woman. Applicant made representations to the Base Commander, whose name he cannot remember, and was reprimanded for having spoken to the Red Cross, since acknowledging the patient would be acknowledging the SADF's presence in Angola. The woman probably died and he applies for amnesty for attempted murder.

3. While at Ongiva a conscript shot himself in the foot, "to the best of my (applicant's) knowledge" in an attempt to return to South Africa. Applicant applies for amnesty for his "inability to meet the psychological need" of this person.

4. Whilst on a Koevoet patrol applicant and his colleagues captured two SWAPO members. The "Koevoet members" interrogated, murdered and reported them killed in action. Applicant applies for amnesty for his failure to prevent the torture and killing or to report same.

5. One John Deegan, his unit commander, executed one of the applicant's "patients", a seriously wounded SWAPO Commissar, applicant was attending to. Applicant applies for amnesty for his failure to prevent or report the execution.

6. Applicant had instructions to attend to a patient in a detention cell. He realised that the patient had been interrogated and that boiling water had been poured over his chest and genitals. Koevoet members later realised that the patient had no SWAPO connections at all and asked him to attend to the patient without telling anybody. As he felt helpless and not qualified to do anything to assist he got a doctor to attend to the patient. He seeks amnesty for his silence in the fact of this obvious abuse.

7. During a skirmish with SWAPO, applicant was shooting from the gun-port of a Casspir. After the contact he realised that his gun had jammed and that he had fired only a single shot. He was so angered that someone had tried to kill him that he stood on top of the Casspir and fired shots into the body of a dead SWAPO member. By so doing he "violated the dignity and humanity of this dead SWAPO member," mutilated his body and so "acted beyond the bounds of his duty and rationality."

8. Applicant participated in a practice of tying corpses to bumpers and mudguards of Casspirs. This intimidated the civilian population. It was also done for the purposes of later identification of victims and for the collection of bounty. For his participation in this practice, he seeks amnesty.

9. On the basis of the TRC having found in its Final Report that activities of the SADF and the SAP in the former South West Africa and the military campaign in Angola led to

gross human rights violations on a vast scale, and further that these institutions and their members were accountable, applicant seeks amnesty, him having been a conscript.

10. On the basis of the TRC finding that Koevoet was responsible for gross human rights violations, applicant having participated in Koevoet, applies for amnesty.

Mr. Dehal, on behalf of the applicant, and before applicant commenced with his oral evidence, then asked for certain paragraphs to be deleted from this supplementary statement, Exhibit A. This resulted in the withdrawal of his application for amnesty of incidents 1, 3 (of which no reference was made in his original application) 7 and 8.

The applicant then gave oral testimony. Now it needs to be said that the applicant was not a good witness.

Firstly, the bulk of the incidents for which he applies, relates to alleged crimes of others, where he could remember neither the names of the victims nor the names of alleged perpetrators. His alleged crimes were based on his own failure to prevent or report the crimes of (unknown) others.

Secondly, when he was questioned on material aspects, such as the Red Cross referred cancer-diagnosed Angolan woman, he became rather evasive convoluted and relied on “deduction” made “through the veil of time.”

Dealing with the incidents above:

Incidents 1 and 3: The application for amnesty in relation to these incidents was withdrawn.

Incidents 2, 9 and 10: In none of these incidents does the applicant disclose any act or omission on his part which constitutes an offence or delict as envisaged in the Act and the application for amnesty as far as these incidents are concerned, is REFUSED.

Incident 4: The applicant, in his original statement to the Health Sector hearings, attached to his formal amnesty application, stated that two SWAPO members were captured, tortured and eventually killed by the unit of which he was part, and then reported killed in action. In Annexure A, filed at the hearing, applicant alleged that these members were captured, reported as killed in action and then tortured and killed. When the conflicting versions were put to the applicant and he was asked to offer an explanation, he affirmed the second version. When pressed further to explain the conflicting versions and why they were immediately announced as killed in action, he could not offer an explanation. When further questioned he stated that this was the only occasion when such an incident occurred, yet other medics later informed him that it was common practice in other Koevoet teams.

On further questioning, the applicant tendered as a factor the possibility of a bounty being paid for members of SWAPO captured or killed. When asked to explain, he reverted to a position that the bounty would have been the same, whether these persons were killed or captured. He further stated that his moral guilt only developed later and at the time he accepted and identified with the actions of the team.

He was a regular fighting member of patrols and must have been out at least 12 times in a period of 6 months, each patrol lasting a week. Bounty was paid to the team and not to individuals, but he denies having ever shared in the spoils, at least not in cash and never to his knowledge, in kind.

....

Given the different conflicting statements, both with regard to the sequence of events and the state of mind of the applicant, and given in the circumstances applicant's failure to supply any information relating to the identity of the “real” perpetrators, the Committee is not satisfied that the applicant has made a full and truthful disclosure related to all the

material aspects of his involvement in this (alleged) incident and the application for this incident is therefore REFUSED.

5. Incident 5: On one of the patrols of the unit, they followed a spoor (tracks) of an individual for two days. On the second day this Commissar, not having been able to outrun the Casspirs, took shelter in a kraal. One John Deegan was acting Commander of the team. He ordered that a Casspir be driven over the hut and that the team fire into the rubble of the hut. The Commissar was pulled out of the rubble and handed to applicant for treatment. The fact of his being a Commissar was established at that point from a notebook found in his pocket. He was severely injured and applicant was attending to his wounds, putting up a drip and bandaging the person . . . Deegan wanted to know from this person where his handgun was. He would not give the information as a result of which Deegan shot him in the head while the applicant was putting in a drip.

....

The applicant was then read some of the extracts from a statement by John Deegan, which related the events differently . . . From Deegan's statement, which formed part of the bundle, it is clear that the interrogation by Deegan was about much more than a gun. He wanted to know inter alia where this person's weapon was, where their meeting point was, and even brought a colleague of the captured person to show him that "it's over." When he still denied any knowledge, a terrible rage overcame Deegan and he then shot the Commissar, identified by his captured colleague as "Congo."

Applicant made it clear that he did not at the time feel any remorse. It was "another day's job". As he stated it, he is of the opinion that it concerned him that his patient was killed, but not that a human life was taken. He did not foresee, nor did he expect the killing. What remains of his application, is then his failure to report the incident.

The Committee is of the opinion that given all the inconsistencies in the evidence of the applicant, and despite the corroboration by Deegan in his own statement of the shooting, that the applicant, did not make a truthful disclosure to the Committee and the application is therefore REFUSED.

6. Incident 6: The incident is summarized as above . . . Asked whether he had no need to learn how to treat such serious wounds, he said that he had previously treated more severe burns. Asked to explain why then he regarded himself not to have been qualified to treat the patient on this occasion, he said that the treatment did not extend to healing of the patient but simply to the relieving of pain.

....

The Committee is of the opinion that given the fact that again it has to rely on the evidence of the applicant only, that none of the alleged perpetrators could be mentioned, and given the various contradictions and inconsistencies in the applicant's version, the Committee is not satisfied that the applicant has made a full and truthful disclosure and amnesty is REFUSED.

7. Incidents 7 and 8: The facts relating to these incidents are summarized above . . . It needs to be pointed out that on the first of these two incidents, incident 6, on the testimony of the applicant, after having fired the shots into the body of the corpse of the SWAPO member, he was severely reprimanded by his commander.

Secondly, with regard to the practice of tying bodies to Casspirs, bounty was indeed collected by the team, but he never shared in the spoils.

It is not necessary to deal with further evidence here. The Committee finds that as far as these incidents are concerned, the applicant at least accepted some personal responsibility for his actions and amnesty is GRANTED to him for his involvement.

....

The South African TRC was comprised of three (3) committees: The Human Rights Violations Committee (HRV); the Reparation and Rehabilitation Committee (R&R); and the completely autonomous Amnesty Committee (AC). Each of these committees had the help of the Investigation Unit and the Research Unit, which was also responsible for the creation of the Final Report. Following is a summary of each of their purposes:

- Human Rights Violations Committee: The HRV Committee investigated human rights abuses during the specified period (1960-1994), based on statements made to the TRC. The HRV was active for approximately fifteen (15) months, during which time it heard and recorded testimonials of victims, and oversaw hearings for South African institutions, such as religious organizations, businesses, and the medical profession. The primary information sought by the HRV was the identity of the victim(s); the fate or present whereabouts of the victim(s); the nature and extent of the harm they suffered; and whether the harms were inflicted under the direction and plan of the State or any other organization, group, or individual. After these investigations established the identities of victims of gross human rights violations, they were referred to the Reparation and Rehabilitation Committee.²⁸
- Reparation and Rehabilitation Committee: The R&R Committee was essentially a victims' support entity. But, in addition to the basic service of providing certain interim reparations to victims out of a "President's Fund" —supported by Parliament and private contributions— the R&R's mandate was complex and ambitious. The organizational principle of the Committee was that of restoring victims' dignity. At a minimum, the R&R sought to ensure that the overall Truth Commission processes were oriented around the victims, and, based on what was discovered from the HRV evidence, it made policy proposals and recommendations to address such intangible, immeasurable goals as the rehabilitation and healing —psychic and physical— of survivors and their families, and even entire communities. Thus, one (1) thrust of the R&R Committee's mission was building trust among the people that there would be no repetition of the harms. It enumerated recommendations that highlighted the necessary steps to eventually achieve a peaceful coexistence. It also recommended the disbursement of about three billion South African Rands over a six-year period as restitution for victims.²⁹ As a matter of

SIGNED AT CAPE TOWN THIS THE 29TH DAY OF JANUARY 2001

Amnesty Application of Mark Sean Callaghan, <http://www.doj.gov.za/trc/decisions/2001/ac21034.htm> (last visited Oct. 8, 2008)

²⁸ For more information see Victim Hearings, http://www.doj.gov.za/trc/hrvtrans/ct_victim.htm.

²⁹ For more information see Reparation and Rehabilitation Committee Transcripts, Policies & Articles, <http://www.doj.gov.za/trc/reparations/index.htm> (last visited Oct. 8, 2008).

protocol, the R&R's recommendations were conveyed to the office of the President, and then forwarded to Parliament.

• **Amnesty Committee:** The AC was designed to serve a somewhat bureaucratic function: reviewing applications for amnesty in accordance with the Act. Any application that was granted allowed the perpetrator to avoid prosecution for his or her “act[s], omission[s], or offen[ses] associated with a political objective committed between 1 March 1960 to 6 December 1993.”³⁰ Those most eager to apply for amnesty were employees of the State, including military and Security Forces, as well as liberation forces. Applicants who were accorded amnesty were exempt from prosecution in South Africa's criminal and civil courts for the acts they testified about. However, those who did not apply or who applied but were denied amnesty could have faced either civil or criminal charges or both, provided enough evidence was found to hand down an indictment.³¹ Despite its mechanical role, the AC was the embodiment of the most controversial aspect of the South African TRC. Objectors to its seemingly lenient approach wanted vengeance for themselves and their loved ones.³² In the end, very few applications for amnesty were granted.³³ The fact that many were rejected because the AC found that the perpetrator did not provide a sufficiently detailed account of the applicant's crimes reminded observers that the paramount value of the TRC, and specifically the AC, was obtaining a complete record of the abuses and that amnesty was a practical measure to ensure the widest possible participation.

The TRC delivered its final report, 3,500 pages in length, to President Mandela on October 19, 1998.

Even as the TRC proceeded, there were vocal critiques of its framework, particularly its grant of amnesty for sufficient detailed testimony.³⁴ Many South Africans, including members of the ANC, believed that the Commission was too lenient, especially with regard to the bids for amnesty by the many whites who

³⁰ For more information see TRUTH AND RECONCILIATION COMMISSION, AMNESTY HEARINGS AND DECISIONS, <http://www.doj.gov.za/trc/amntrans/index.htm> (last visited Oct. 8, 2008).

³¹ See SCOTT, *supra* note 17.

³² See *supra* note 22, and accompanying text, regarding some leader's preference for a legal tribunal to address the crimes.

³³ The vast majority of applications for amnesty —approximately 75%— were denied. AMNESTY HEARINGS AND DECISIONS, *supra* note 30.

³⁴ Everyone, even critics and certainly organizers of later TRCs, acknowledge that certain gestures of amnesty were necessary for the practical reason that offenders would not come forth voluntarily without it, and in the absence of their testimony, the overriding value of speaking, hearing and recording the truth of the horrible reality of the apartheid would have been lost. See SCOTT, *supra* note 15.

killed blacks during apartheid.³⁵ As it turned out, few applications for amnesty were granted, and the cases that made their way through the legal system did not result in the sense of vindication that the parties sought.³⁶ Victims' families who did not wish or need to learn about the fate of their loved ones —most often because they already knew what had happened— wanted instead to have their perpetrators subjected to civil or criminal punishment, and many filed lawsuits to pursue their cases.³⁷ The implications and critiques of the South African TRC are still being explored, and depend largely on the perspective of the commentator.³⁸

But the leadership formulated an equation of truth and reprieve, and in doing so it made a bold statement about the value of testimony, historical truth, recordation, and communal grieving.³⁹ The decision to elevate truth-seeking over punishment —punishment that, by any measure, would have been logical, even righteous— was both, an attempt to reclaim the civil dignity of the country and a tacit acknowledgement that no punishment would have been satisfactory and that any retaliation against the formerly ruling forces would ever be adequate as recompense for the half-century of violent oppression.⁴⁰ The words of

35 See USIP Digital Collection, *supra* note 15.

36 Some of the statistics on the number of applications granted and the reason for their disposition can be found in GRAEME SIMPSON, CENTRE FOR THE STUDY OF VIOLENCE AND RECONCILIATION, A BRIEF EVALUATION OF SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION: SOME LESSONS FOR SOCIETIES IN TRANSITION (1998), <http://www.csvr.org.za/wits/papers/paptrce2.htm> (examining TRC as venue for transitional justice; written prior to the publication of the Final Report).

37 *Id.*

38 See, e.g., AUDREY R. CHAPMAN AND HUGO VAN DER MERWE, TRUTH AND RECONCILIATION IN SOUTH AFRICA: DID THE TRC DELIVER (2008); SIMPSON, *supra* note 36. See also *Facing the Truth with Bill Moyers* (PBS documentary broadcast Mar. 30, 1999) (including interviews with Archbishop Desmond Tutu, victims, former State security officers, rebel fighters about the pre- and post-TRC era) <http://www.pbs.org/pov/tv/raceinitiative/facingthetruth/>; LONG NIGHT'S JOURNEY INTO DAY (Reid-Hoffman Productions 2000), <http://www.irisfilms.org/longnight/index.htm> (awarded the Sundance Film Festival Grand Jury Prize for "Best Documentary Film"; explores South Africa's TRC through four cases that came before the Commission).

39 This emphasis on the importance of testimony and national grieving is foundational to the TRC model of justice. In establishing a truth commission in East Timor after the brutal Indonesian occupation ended, the head of the U.N. transitional administration in East Timor (UNTAET), Sergio Vieira de Mello, emphasized the commission's role as an "official ear" to listen to the grievances of the people and acknowledge their past suffering. See Yates *East Timor Launches Truth Commission*, note 23 (statement of Pat Walsh, East Timor CAVR Project Coordinator).

40 *AZAPO v. The President of the Republic of South Africa*, 1996 (8) BCLR 1015 (CC) at 1020 (Mahomed, J.) (S. Afr.).

It was wisely appreciated by those involved in the preceding negotiations that the task of building such a new democratic order was a very difficult task because of the previous history and the deep emotions and indefensible inequities it had generated; and that this could not be achieved without a firm and generous commitment to reconciliation and national unity. It was realized that much of the unjust consequences of the past could never be fully reversed. It might be necessary in crucial areas to close the book on that past.

the Constitutional Court of South Africa delivered a persuasive summary of the overriding concerns of the TRC:

Much of what transpired in this shameful period [of apartheid] is shrouded in secrecy and not easily capable of objective demonstration and proof. Loved ones have disappeared, sometimes mysteriously, and most of them no longer survive to tell their tales . . . The Act seeks to address this massive problem by encouraging these survivors and dependents of the tortured and the wounded, the maimed and the dead to unburden their grief publicly . . . and, crucially, to help them to discover what did in truth happen to their loved ones, where and under what circumstances it did happen, and who was responsible. That truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do this. Without that incentive, there is nothing to encourage [perpetrators] to make the disclosures and to reveal the truth.⁴¹

The process led to tremendous emotional conflict for the country. “The agonizing cascade of information” discovered during the TRC hearings was a kind of spiritual bloodletting. The revelations were shocking to those who claimed to have no knowledge of the violence, and they were almost unbearable for those who had been directly affected by the brutality.

C. Restorative Procedures and Safeguards of TRCs Absent in American Justice System

Although difficult and painful, the national experience of truth and reconciliation proceedings promotes resolution. The focus of a TRC is on restoration, not deterrence; complete narratives, not proof; apology, not jail time. To achieve these objectives, the TRC’s proceedings must observe certain formalities.

These formalities share an underlying goal of restoration. Because truth and reconciliation commissions are implemented after a society has been decimated by the wrenching brutality of civil war or systematized oppression, they are constructed with higher values than mere retribution in mind. TRCs take on the grander ambition of renewing bonds among people whose life and culture were previously oriented around their—often cruel and murderous—opposition.

Yet, the American criminal justice system is as in need of restoration as any ravaged country. There are approximately 2.3 million people in U.S. jails and prisons, some of them wrongly so, and the conviction rates continue to rise.⁴²

Id.

⁴¹ SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION FINAL REPORT (1998), <http://www.polity.org.za/polity/govdocs/commissions/1998/trc/ichap7.htm> [hereinafter TRC FINAL REPORT].

⁴² See U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, BULLETIN: PRISONERS IN 2006 (2007).

Moreover, there are many crime victims who leave the justice system dissatisfied with the false justice that the system supplies. Civilized society demands higher aspirations than simply “correct legal outcomes.”⁴³ Certainly, if South Africa, a nation of 20 million⁴⁴ that suffered widespread systematic and systemic violence, can benefit from the restorative features in its model of justice —features that bring the best possibility for renewed societal relations and true justice— the U.S., a country that is ten times larger⁴⁵ with a constituency that is ten (10) times smaller, can also integrate into its legal systems these restorative features.

1. Truth-seeking, Not Obfuscation

The highest value of any TRC and its most pressing mission is truth-seeking. Discovering and publicizing the full narrative of the criminal events provides the foundation for all other aspirations of the proceedings. The word “Truth” in the title is short-hand for *truth-seeking*, because truth is always a work-in-progress, and it is interpretive. Truth cannot be obtained from the viewpoint of a single individual. It requires the earnest input of everyone involved.

The South African TRC was designed with truth-seeking as its explicit primary objective. Its mandate subverted to a degree certain other values, most notably retribution.⁴⁶ The hearings were the forefront of the undertaking, where individuals gave testimony of the injuries they sustained or the cruelties they witnessed, and where perpetrators confessed to abusive acts or negligent omissions.⁴⁷

In the U.S. criminal justice system, truth is a slippery term. It is not revered as an indispensable ingredient to a fair and just outcome. Instead, it is the damp clay of overzealous lawyers, who can manipulate the facts and discredit witnesses to create an impression of truth —the “truth” that promotes the version of events they want the jury to believe. Evidentiary rules are one tool that lawyers use —and misuse— to manufacture their version of events.

Evidentiary rules are exclusionary; that is, they are designed to keep material out. The rules serve as a filter to prevent certain pieces of information from being admitted during trial and judges are the arbiters of how the rules are applied.

⁴³ This is a phrase borrowed from ROSENBAUM, *supra* note 1.

⁴⁴ This is an approximation of the population during the middle of the apartheid era. See LEONARD THOMPSON, *supra* at note 19 (citing demographics of South African population in 1978, in Figure 1). The current population is close to 45 million, according to the most recent census in 2001. See STATISTICS SOUTH AFRICA, CENSUS 2001, <http://www.statssa.gov.za/census01/html/default.asp>.

⁴⁵ According to the last census in 2000, the approximate U.S. population is 281 million. See U.S. CENSUS BUREAU, UNITED STATES CENSUS 2000, <http://www.census.gov/main/www/cen2000.html>.

⁴⁶ See, *supra* notes 34- 36, discussing the controversy over the decision to grant amnesty for truth.

⁴⁷ But see SIMPSON, *supra* note 36, at n.19 (questioning the level of transparency and full disclosure as “inconsistently applied” and “arbitrarily defined.”).

Once evidence is admitted at trial, it becomes part of the tangible support for the story that each side—the prosecution and the defense—is trying to prove. It is not viewed as problematic in the U.S. criminal justice system that the vast majority of the time neither story is the complete truth.

The U.S. system begins with the presumption that all relevant material is potentially admissible,⁴⁸ and the evidence rules chip away at this mine of information, leaving only what meets standards of relevance, authenticity, verifiability, transparency (e.g., physical purity in the case of forensic evidence; or accurate reiteration in the case of admissible hearsay), and probity (as weighed against the material's sensational quality).⁴⁹ While standards of admissibility are prudent, they rest on a curious supposition—that a judge can know what is relevant to complete the story. The judge hears only what the attorneys present in court; which is only any evidence the lawyers have selected from the larger narrative to support their version of events. None of these legal professionals are expected or motivated to bring before the court or the public the broadest possible scope of information so that the complete truth can be known.

To shape their stories, lawyers draw from the general fund of evidence that is shared according to discovery rules. But the process of “discovery” itself is abused. It is an acceptable and even anticipated strategy for each side to overwhelm the other with piles of data, particularly in the form of documents, computer files, phone records, email exchanges, and other tangible material, so that anything that might be relevant to the story cannot be discerned from the morass of minutiae. Burying significant facts with too much disclosure is among a lawyer's most well-worn tools.

Before evidence is admitted, judges are obligated to weigh the probity of evidence against its sensational quality to avoid “undue prejudice.”⁵⁰ If the evidence is determined to be of such probative value that it must be admitted, the court then attempts to filter out its sensational nature. Tempering provocative evidence is a chief concern. And, motivated by the apprehension of prejudice, the justice system makes two (2) dubious assumptions about juries: one, that their emotional reactions to startling evidence will produce undesirable decisions; and, two, that such emotional reactions can be avoided.

⁴⁸ Federal Rules of Evidence Rule 401: “Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

⁴⁹ For an exhaustive treatise on the Federal Evidence Rules, their history, related cases, and analyses, see PAUL F. ROTHSTEIN, *FEDERAL RULES OF EVIDENCE* (3rd ed. 2008).

⁵⁰ *Id.* Federal Rule 403 excludes evidence that is otherwise relevant if its probative value is substantially outweighed by the dangers of unfair prejudice, confusing or misleading the jury, or wasting the court's time.

Jurors, like all members of society, encounter complex, startling, sensational, even life and death situations in their everyday lives.⁵¹ Yet, in cases that challenge society's most basic values, jurors are shielded from some of the most relevant information. Unlike TRCs, which do not filter, varnish, or euphemize the facts of the story, the justice system attempts to sanitize evidence to tamp down emotional responses. In doing so, the system fails to recognize that strong human reactions to the harsh or brutal aspects of a narrative are in many ways appropriate. Evidence rules should not lend themselves to spin doctoring. Truth that triggers abhorrence, revulsion, and at the same time provokes imposing punitive and restorative measures in accordance with the heightened level of violation, seems entirely aligned with societal standards and the demands of human dignity.

What TRCs recognize about the value of truth in its complete and unfiltered form that U.S. courts do not is that the public airing of those realities is an intrinsic part of the cleansing process, equally necessary to members of a damaged society and to parties in a criminal case. And, when the focus is on knowing the complete truth, the system brings its participants closer to true relief.

2. Victim Orientation, Not Offender Focus

Along with their long-term perspective on the nation's future, TRCs are concerned with victims. They choose a victim-oriented framework wisely, appreciating the obvious point that releasing an entire country from its malignant past will be led by the healing of individual victims. There is an emotional arc that comes with enduring, surviving, and transcending trauma, and sensitivity to that process is one (1) aspect of a victim-orientation.

In the South African TRC, the needs of the victims drove the proceedings: the victims' pursuit of information about what happened to loved ones who disappeared; their need to have their suffering acknowledged by the wider community; their desire to hear perpetrators admit to their abuses; and their hope to have the local and international community react with indignation and empathy. Thus, the hearings were made public, and all citizens were invited to attend, to speak, or to submit a written statement. The transparency of the proceedings relieved the frustration and fear that victims experienced during decades of governmental abuses that occurred in secret. Even its basic mission to seek truth placed victims, for whom a full accounting was most meaningful, at the center of the proceedings.

In contrast, in the U.S. justice system, victims are sidelined from the start. In criminal cases, victims are not even parties to their own case. Instead, the

⁵¹ For a debunking of the wishful theory that jurors are "blank slates" when they are called to serve on jury duty, see DOUGLAS KOSKI, *THE JURY TRIAL IN CRIMINAL JUSTICE* 269 (2003); Douglas Koski, *Jury Decision Making in Rape Trials: A Review and Empirical Assessment*, 38 CRIM. L. BULL. 21 (2002).

system devised a legal fiction in which the State is the named party, leaving victims without formal representation. Even victims of violent interpersonal crime are often treated as inconvenient appendages to a proceeding meant to vindicate a harm that is conjured up as one against the State. In this contrived dissociation, victims are considered to be “witnesses” to the criminal acts that were perpetrated against them. This false formulation is an affront to decency, particularly in cases of severe violence and trauma. The long-standing tradition of mistreating crime victims—which sometimes has amounted to a kind of re-victimization by the criminal justice system—lead to the adoption basic crime victims’ rights in the federal government and every state. The federal act is commonly referred to as a Victims’ Bill of Rights,⁵² intended to ensure respectful treatment in the legal system.⁵³

Notwithstanding these rights, the U.S. Constitution does not even mention crime victims. All the protections conferred on individuals by the supreme law of the land are directed toward defendants. Even the Victims’ Bills of Rights have no remedial effect; if a victim’s rights are violated, she or he has no recourse under the law, and every state’s victims’ rights enactment includes explicit language to that effect just to make sure that no right granted to a victim is mistakenly thought to be protectable.

⁵² ALA. CONST. art. I, § 6.01, ALA. CODE § 15-23-60; ALASKA CONST. art. I, § 24, ALASKA STAT. § 12.61.010; ARIZ. CONST. art. II, § 2.1, ARIZ. REV. STAT. § 8-381, § 13-4401; ARK. CODE ANN. § 16-90-1101; CAL. CONST. art. I, § 28, CAL. PENAL CODE § 679; COLO. CONST. art. II, § 16a, COLO. REV. STAT. § 24-4.1-100.1; CONN. CONST. art. I, § 8(b)(1), CONN. GEN. STAT. § 46a-13b; 11 Del. Ch. § 9402; D.C. CODE ANN. § 23-1901; FLA. CONST. art. I, § 16(b), FLA. STAT. § 960.001; GA. CODE ANN. § 17-17-1; HAW. REV. STAT. § 801D-1; IDAHO CONST. art. I, § 22; ILL. CONST. art. I, § 8.1(a)(1); 725 ILL. COMP. STAT. 120/1; IND. CONST. art. I, § 13(b), IND. CODE ANN. § 35-40-1-1; IOWA CODE § 915.1; KAN. CONST. art. XV, § 15; KY. REV. STAT. ANN. § 421.576; LA. CONST. art. I, § 25, LA. REV. STAT. ANN. 46:1841; 15 ME. REV. STAT. ANN. § 6101, ME. REV. STAT. ANN. tit. 17, § 1171; MD. CONST. art. 47(a), MD. CORR. SERVS. CODE ANN. § 7-801, MD. CRIM. PROC. CODE ANN. § 11-101; MASS. GEN. LAWS ANN. ch. 258B, § 1; MICH. CONST. art. I, § 24(1), MICH. COMP. LAWS SERV. § 780.751; MINN. STAT. § 611A.01; MISS. CONST. ANN. art. 3, § 26A, MISS. CODE ANN. § 99-43-1; MO. CONST. art. I, § 32, MO. REV. STAT. § 595.200; MONT. CODE ANN. § 46-24-203; NEB. CONST. art. I, § 28; NEV. CONST. art. I, § 8(2); N.H. REV. STAT. ANN. § 21-M:8-k; N.J. CONST. art. I, § 22, N.J. STAT. ANN. § 52:4B-34; N.M. CONST. art. II, § 24(A)(1); N.Y. EXEC. § 640 (McKinney); N.C. CONST. art. I, § 37, N.C. GEN. STAT. § 15A-824; N.D. CENT. CODE § 12.1-34-01; OHIO CONST. art. I, § 10a, OHIO REV. CODE ANN. § 2930.01; OKLA. CONST. art. II, § 34, OKLA. STAT. tit. 21, § 142A-1; OR. CONST. art. I, § 42, OR. REV. STAT. § 147.405; 18 PA. STAT. § 11.201; R.I. CONST. art. I, § 23, R.I. GEN. LAWS § 12-28-1; S.C. CONST. art. I, § 24(A); S.D. CODIFIED LAWS § 23A-28C-1; TENN. CONST. art. I, § 35; TENN. CODE ANN. § 40-38-101; TEX. CONST. art. I, § 30(a), TEX. FAM. CODE § 57.001, TEX. CODE CRIM. PROC. art. 56.01; UTAH CONST. art. I, § 28(1), UTAH CODE ANN. § 77-37-1; VT. STAT. tit. 13 § 5301; VA. CONST. art. I, § 8-A, VA. CODE ANN. § 19.2-11.01; WASH. CONST. art. I, § 35; W.VA. CODE § 61-11A-1; WIS. CONST. art. I, § 9m, WIS. STAT. § 950.01; WYO. STAT. § 1-40-201.

⁵³ See, e.g., OFFICE FOR VICTIMS OF CRIME, U.S. DEP’T OF JUST., FINAL REPORT: PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME (1982) (establishing recommendation list to improve crime victims’ experience in the criminal justice system); U.S. Dep’t of Just., *Victim Satisfaction With the Criminal Justice System*, 253 NAT’L INST. OF JUSTICE J. 16 (2006) (hypothesizing that dissatisfaction with the criminal justice system among domestic violence victims was one reason such victims did not report subsequent abuses). See generally, Office for Victims of Crime, U.S. Dep’t of Just., *The History of the Crime Victims’ Movement in the United States*, OVC ORAL HISTORY PROJECT (2004).

The most basic of a defendant's rights —the presumption of innocence— itself leads to the inescapable corollary that certain types of accusations are met with an entrenched skepticism.⁵⁴ Crime victims, especially victims of rape, ironically often find themselves defending against the defense attorney's fervent attempts to tarnish their reputation and discredit their accusations. It is perfectly legal for victims to be viciously maligned during cross-examination, often causing the victim to relive the trauma of the crime in the very proceedings that were intended to vindicate the harm she originally suffered. Like many other damaging aspects of the criminal justice system, this is compelled by the imperative that lawyers represent their clients vigorously. It is the corrupting influence that derives from a system based on zealous advocacy, rather than zealous truth-seeking.

Because the South African TRC was geared toward amnesty, some might mistakenly view it as an offender-oriented process. On that theory, the U.S. criminal justice system, which insists on punishment for offenders, would be misinterpreted as victim-oriented. This is based on the misconception that the overriding concern of crime victims is punishment, when in fact their concerns are varied, complex and are seldom adequately satisfied by the imposition of jail time and fines alone.

Retribution itself is not necessarily a negative element. Punishment serves an important social function. However, the exclusively retributive character of the U.S. justice system places the emphasis in the wrong direction. The justice system is offender-oriented; criminal trials can only lead to punishment. Their "remedies" are made with reference only to the offender. There are no procedures or mechanisms in the criminal justice system that are geared toward restoring the individuals affected by the crime —victims, their families, friends, coworkers— or the community in which the crime took place. The victim plays a minor part in her own case, and this exclusion is unjust. Because the victim's participation in the development of her case does not correlate with the level of

⁵⁴ This is, in some ways, unfortunate, since the concept grew up in U.S. judicial history not in the context of interpersonal crime or accusations by another citizen, but in cases of high treason and indictments citing other inconvenient rebellions against the rulers. See Kenneth Pennington, *Innocent Until Proven Guilty: The Origins of a Legal Maxim*, 63 *THE JURIST* 106 (2003) (enumerating the origins and history of the presumption of innocence as far back as Ancient Rome, and explaining its formal recognition in American law, which has been credited to Justice White's opinion in *Coffin v. U.S.*, 156 U.S. 432 (1895), who "ordained Leonard MacNally as the midwife of 'Innocent Until Proven Guilty's' entrance into the American common law tradition"; MacNally, an Irish barrister, argued the Irish and English forerunner cases that preceded the presumption's American "coming out" party, all of which were trials against Irish revolutionaries accused of high treason —clients whom, not incidentally, MacNally secretly betrayed as an undercover agent for the government; MacNally's writings on the subject were available in print in Philadelphia in 1804, and were therefore thought to have been influential in U.S. judicial thinking at the time). See also David Mannheimer, *A Comparison of the American and Russian Constitutions*, 24 *ALASKA JUSTICE FORUM* 1 (2008) (cautioning against using only a 20th century perspective to understand the presumption). The presumption has since been generalized to apply to all accusations, and, combined with other prejudices prevalent in the culture in a given era, has led to prejudicial skepticism about certain types of accusations.

punishment⁵⁵ and victims are not interested in imprisoning innocent offenders,⁵⁶ their role could be made central in the justice system without diminishing the defendant's rights and protections.⁵⁷ Moreover, the retributive approach

⁵⁵ In a recent policy study of wrongful convictions, their causes and prevalence, and their effects, nowhere were victims' rights, victims' involvement in their case, or other victim influences mentioned. Indeed, the review listed as primary contributing causes false confessions to law enforcement, incorrect eyewitness identification, and the adversarial system itself. See Marvin Zalman, *Criminal Justice System Reform and Wrongful Conviction: A Research Agenda*, 17 CRIM. JUST. POL. REV. 46 (2006).

⁵⁶ See, e.g., Gabrielle Banks, *Pennsylvania Panel to Study Wrongful Convictions*, PITTSBURGH POST-GAZETTE ONLINE, Mar. 31, 2007, <http://www.post-gazette.com/pg/07090/774016-85.stm> (describing project to review possible wrongful convictions and noting that wrongful convictions are anathema to victims' interests).

It has been argued that, in the absence of a clear identification or other evidence of certainty, is not unheard of for a case to be "pinned" on a likely (or even unlikely) suspect simply to have the case closed. *THE EXONERATED*, a movie based on a play of the same name which dramatizes the work of The Innocence Project, explores the personal details of many cases of wrongful convictions. See The Innocence Project, www.InnocenceProject.com; *THE EXONERATED*, (CourtTV 2005). It has also been argued that victim involvement in her case would lead to more such wrongful convictions and to longer sentences. There is simply no evidence to support this theory. (See Edna Erez and Pamela Tontodonado, *The Effect of Victim Participation in Sentencing on Sentence Outcome*, 28 CRIMINOLOGY 474 (1990) (concluding that victim involvement has little effect, if any, on sentence decision-making) Anthony Walsh, *Placebo Justice: Victim Recommendations and Offender Sentences in Sexual Assault Cases*, 77 (4) J. OF CRIM. L. AND CRIMINOLOGY 1126 (1986) (concluding that victim participation increases the seriousness with which law enforcement and prosecutors treat the case (without correlation to wrongful convictions), but that victim participation has no apparent effect on sentences). Generally, victims who erroneously accuse a defendant sincerely believe that the defendant is to blame, and they are quick to back off if there is evidence to the contrary. These wrongful convictions are not correlated to victim involvement in the case or a particular desire by victims to punish someone — anyone — for the crime. Victims, probably more so than anyone, are interested in assigning blame to the actual offender.

Indeed, aside from false accusations, such as the infamous Tawana Brawley case (See *Pagones v. Maddux, Mason and Sharpton, Tawana Brawley Grand Jury Report*, COURTTV.COM (1997), <http://www.courttv.com/archive/legaldocs/newsmakers/tawana/>), it is not victims, but law enforcement and prosecutors who are inclined to wrongly push through a conviction. (See Zalman, *supra* note 55; see, e.g., Roslyn Myers, *Duke Lacrosse Case: Race, Class, and Prosecutorial Misconduct*, 9 (3) SEX OFFENDER L. REP. 33 (2008); Roslyn Myers, *False Arrests and the Fallout in Durham*, 9 (4) SEX OFFENDER L. REP. 49 (2008); *Duke Lacrosse Case*, 9 (5) SEX OFFENDER L. REP. 75 (2008). The Model Code of Professional Responsibility (MCPR), which lawyers are required to follow, contributes to such cases by prohibiting lawyers from breaking client confidences, even confidences that would prevent or correct a wrongful conviction. See, e.g., Assoc. Press, *Confession Revealed, Freeing Prisoner of 26 Years*, N.Y. TIMES, Apr. 20, 2008, at A29. The way that the lawyer's MCPR more broadly leads to injustices is thoroughly explored in *THE MYTH OF MORAL JUSTICE*. See ROSENBAUM, *supra* note 1.

⁵⁷ Memorandum on Crime Victims Rights from Sandra Norman-Eady, Chief Attorney, (Nov. 29, 2000) (on file with the Office of Legislative Research), <http://www.cga.ct.gov/2000/rpt/olr/html/2000-r-1065.htm> (discussing the likely judicial balancing that would take place if a crime victim's right conflicted with the rights of a criminal defendant). But see Barry Boss, *Editorial: Where Victims' Rights Go Wrong*, WASH. POST, Apr. 23, 2007, at A17 (inaccurately linking victims' rights with the popular political tough-on-crime stance, "innocent people on death row," false accusations, and the potential diminishment of defendants' rights, and inaccurately equating victims' sense of "justice" with vengeance; written by a former defense attorney).

coupled with the legal system's adversarial nature misleads victims and the rest of society into thinking that punishment equals success. If the offender "lost," then the victim (and society) must have "won."⁵⁸ "Right" and "truth" be damned. Social values become scrambled. We forget that retribution is meaningful only if it serves the victims and the community by re-establishing balance, rebuilding trust, and honoring shared moral standards.

3. Safety from Physical and Psychological Threat

Physical safety is a basic concern for people who have been subject to violence, especially State-sanctioned violence. Psychological safety is an extension of this. Victims must feel assured that, when they come forward to offer testimony, they will be free from retaliation. Without such basic stability, parties will be too fearful to fully participate in any kind of truth-seeking or reconciliation process.⁵⁹ In the South African example, the basic stability of the country and the authority of the TRC were established by the Promotion of National Unity and Reconciliation Act.⁶⁰

For crime victims, a U.S. courtroom is not a safe environment. While it is rare that physical safety is a concern, spiritual and emotional safety are often in jeopardy. That is because the nature of criminal trials is that of a competition or an extreme sport; advocacy becomes "fierce and unrelenting."⁶¹ "All that matters is securing an ultimate victory —regardless of truth, regardless of honor, regardless of what's right,"⁶² and regardless of who is re-victimized along the way. Lawyers are instructed to "represent a client zealously within the bounds of the law,"⁶³ and some translate this into license to subvert truth, make-over facts until they resemble lies, or divert the issue at trial by waging a campaign against the credibility of witnesses, particularly victims. By the law's own rules and codes, trials are like highly ritualized bar brawls. The American system of justice is more "system" than just. It is not about truth-seeking; it is about winning. It is not revelatory; it is furtive. It is not concerned with the victim's psychological safety or community restoration; it is about winning the case.

If the community believes that the legal system is there to do what's just and to discover the truth —indeed, to provide an official record of the truth— then the sporting theory of justice, where one side is anointed the winner while

⁵⁸ See ROSENBAUM, *supra* note 1, at 114-38 for a thorough discussion of the "zero-sum" nature of the U.S. legal system.

⁵⁹ In the aftermath of a national crisis, this is usually accomplished with a peace agreement. See LUC HUYSE ET AL., *supra* note 14.

⁶⁰ See Promotion of National Unity and Reconciliation Act 34 of 1995.

⁶¹ ROSENBAUM, *supra* note 1, at 130.

⁶² *Id.*

⁶³ *Id.* at 129 (citing the ABA Model Code of Professional Responsibility).

the other is banished as the loser, may not achieve a legitimate sense of justness, or truth.⁶⁴

4. Community Support and Investment in the Proceedings

As part of the sense of safety that makes truth and reconciliation possible, participants —offenders no less than victims— must feel that they have the community's support. The mutuality of testimony as a communal event is an important part of the victim's recovery. For perpetrators, the "accepting climate of community opinion" for their candid statements and their avowal of wrongdoing is critical to eventual reconciliation.⁶⁵ Formal sharing of the traumatic experience with the wider community is a precondition for all participants to regain "a sense of a meaningful world."⁶⁶

The vitality of the TRC depends on the community's commitment to its work. Because TRCs occur in the wake of a national crisis, community investment in the processes is often a given. War-torn countries, eager for peace and unity, usually have no other direction to go. Everyone in society understands the value of restoring order and thus has an interest in revisiting the painful past, contributing to the historical record, and joining the country's peaceful future. And the success of the TRC demands community investment in the proceedings.

Community investment, of course, means more than merely observing the TRC's proceedings. Although bearing witness to the testimony is crucial, TRCs require the emotional involvement of the community. Community members are invited to revisit the events through the eyes of the victims. Public hearings provide opportunities for individuals to share in the experiences and empathize with the speakers. In some instances, the community might find some compassion for the perpetrators. Thus, losses and grief that once belonged to individuals become experienced collectively.

Often, in the aftermath of a nationwide conflict, common suffering means common identity. That is, victims were victims because of some identifying characteristic —race or religion, for example. One major thrust of the South African TRC was to erode the power of racial identity to ignite societal hostilities, thus establishing who were the oppressed and the oppressors in order to institute a national identity that would eventually unify the community.⁶⁷

⁶⁴ *Id.* at 21.

⁶⁵ See HERMAN, *supra* note 10, at 71 (referring to the reintegration of soldiers into civilian life, not felons).

⁶⁶ *Id.* at 70.

⁶⁷ In attempting to construct a new national identity on the remnants of the old, President Mandela and the South African leadership raised a new flag and created a new national anthem out of the former Afrikaans anthem (*Die Stem van Suid-Afrika*, translated as *The Call or The Voice of South Africa*) and the unofficial anthem (*Nkosi Sikelel' iAfrika*, which calls for blessings on South Africa). See Dixie Barlow, *Mandela: Journey of a Nation*, WASH. POST, <http://www.washingtonpost.com/wp->

Without a common enemy, it is difficult to identify what exactly “community” means. In the U.S., the breakdown of community connections once defined by geography or by religious affiliation, traditionally the source of one’s moral code, is nowhere more visible than in the American judicial system. The significance of the local courthouse, like the local church, temple, or town hall, has all but disappeared. Nowadays, the central meeting places that define a community are as likely to be on the main square as online. The concept of community has therefore taken on a more modern flexible meaning.

“Community” is a context-defined term. In the criminal justice system, it comprises those who have been affected by the violations, directly or indirectly, and those who will be affected by the outcome of the proceedings — anyone who is a “stakeholder” in the events. Generally, these include religious leaders, political representatives, teachers, journalists, families and friends of both, the victims and the offenders. In the context of abuses that injure an entire nation, the concept of “community” is likely to include all citizens.⁶⁸ But, for crimes that occur on a smaller scale, the group is less diffuse. In the U.S. juvenile justice system, for example, in addition to the stakeholders, such as the juvenile’s family, teachers, and religious leaders, the “community” might comprise the people living in offender’s neighborhood. In the Oklahoma City Bombing case, the “community” was the entire city, even though the victims were a subset of that larger group. In most criminal cases in the U.S., the community is found in the public gallery of the courtroom and in the jury box. American jurors are our surrogate “judging community.”

But even jurors sitting on a trial are constrained by the legal system’s own rules from being “invested” in their case. They are constrained by the judge’s instructions on how to apply the law to the facts presented. They are not allowed to interpret or use common sense. “All that you learned in kindergarten” applies everywhere except at a criminal trial.⁶⁹ Instead, jurors are akin to eu-

srv/inatl/galleries/mandela/front.htm. A translation of the new anthem is available at <http://www.southafrica.info/about/history/anthem.htm>.)

68 The Peruvian TRC was deliberately populated with members who were representative stakeholders for the general community. But there were few members, and their inclusion was a fitful process. Initially, interim President Valentin Paniagua, who took office after President Fujimori was removed, established a seven-member truth commission to investigate the corruption and human rights abuses that occurred during the violent 20-year struggle between the rebel forces and the state security squads that lead to the murders and abductions of thousands of civilians. Later, President Alejandro Toledo increased the commission’s number to 12 members, reflecting various constituents in the country: jurists; members of the Catholic and evangelical churches; anthropologists and social scientists; a retired air-force general; and a leader in the local human rights community. Although its representation drew broadly from among stakeholders, it was flawed in two important respects. First, the commission included only two female members, and women were not underrepresented among the groups directly affected by the violations. Second, the commission did not include anyone from Peru’s indigenous communities, and it excused this omission by pointing out that certain commission members were fluent in the native tongue. See BRETT, *infra* note 73.

69 The phrase is borrowed from a popular book, *All I Really Need to Know I Learned in Kindergarten*, by Robert Fulghum, which borrowed the phrase from common lexicon and spurred such a wide

nuchs in the dispensation of justice, disempowered by judicial rules and manipulated by lawyers;⁷⁰ it is no wonder Americans loathe to be called to serve on jury duty.

The U.S. system is deaf to the subtleties of community investment in judicial proceedings. The same diffusion that marks our inability to identify our community also makes the possibility of public mourning an almost quaint idea. Nevertheless, the shared loss and collective grieving are necessary for legal proceedings to be meaningful both on a personal level for victims and on a societal level.

5. Full Offender Participation

Of course, offenders too must be invested in the process. The South African TRC did not rely on the persuasive promise of amnesty to inspire offenders to come forward. Participation in the TRC was not entirely a voluntary choice. Under the Act, the Commission was given subpoena power to compel people to attend hearings and give evidence. Anyone refusing to do so was subjected to fines and jail time.⁷¹ Force or coercion to engage perpetrators in a reconciliation process might seem counterproductive, but such measures are essential to ensure a full accounting of the events. Without the authority to compel testimony from perpetrators, “[h]orrible crimes carried out in secret will always remain buried.”⁷²

proliferation of other titles and applications of the phrase, the phrase itself is no longer able to be used in common parlance without suggesting one of its referents. In this application, I use the phrase to speak of the basic sense of right and wrong that we –presumably– all carry, the “morality and conscience” on which Rosenbaum’s critique of the legal system is based (See ROSENBAUM, *supra* note 1, at 14), and the type of right conduct that makes Atticus Finch, the attorney in the classic novel *To Kill a Mockingbird*, by Harper Lee, the iconic “heroic lawyer, the moral attorney, the advocate of uncompromising righteousness.” (THANE ROSENBAUM, *LAW LIT: FROM ATTICUS FINCH TO THE PRACTICE* 3 (2007). Thus, it seems that the very “everyman” quality of juror-citizens that made them the suitable to decide questions of guilt and innocence in a democracy —the fact that they are “peers” to the defendant, sitting in judgment of someone with whom they share the same basic notions of right and wrong— has been usurped by an overly bureaucratic legal system in which common sense has been upstaged by the parade of technicalities and legalistic maneuvers that often frustrate society’s desire for verdicts that “feel right”. See ROSENBAUM, *supra* note 1.

⁷⁰ This is relevant to the worrisome trend of the “dumbing down” of society generally, part of which results in the bureaucratization of people’s decision-making power —even people, like jurors, who are charged with a certain type of authority. In this trend, which surely everyone has experienced in daily encounters, individuals are no longer encouraged or even permitted to exercise their own judgment (common sense or otherwise), and their mental autonomy is replaced by a bureaucratic, flow-chart-style application of rules, which they invoke even when the rules are obviously ill-suited to the situation. Phillip Howard calls this “The Death of Common Sense,” the title of his 1996 book on regulatory rules run amok. The subject is beyond the scope of this paper.

⁷¹ See TRC FINAL REPORT, *supra* note 41.

⁷² See SCOTT, *supra* note 17.

In the U.S. criminal justice system, alleged offenders are never required to speak. They are given constitutional protection for their silence. Yet, of all the participants in the justice system, offenders are usually the ones with the answers. When it comes to the “truth” about a criminal event, offenders hold the mother lode. They carry the critical knowledge.

Yet, it is standard procedure for lawyers to advise a client to remain silent. It is a defendant’s default position —so much so, to “take the Fifth” has become a cliché. Defendants are allowed —even encouraged— to maintain their monopoly on the facts. The defendant’s command over crucial information creates an obstacle to the victim’s relief.⁷³ The right to remain silent frustrates victims’ attempts to have their questions answered —sometimes questions as intimate as their loved one’s last words or the place their body was buried. It also undermines the society’s interests in gaining full knowledge of the crime. Despite the exigency for victims and the community of hearing the narrative of the crime, the moral imperatives of truth-seeking and justice are subverted to the defendant’s right to withhold information. In the context of truth-seeking, defendants wield the greatest power —the power to prevent the total truth from ever being known.

The system cannot be successful when offenders are allowed to choose to sit out. In contrast to TRCs, the American criminal justice system is satisfied to simply mete out punishment —and not even meaningful punishment at that. Fines and prison time, although useful in other ways, do not promote enduring change. Offenders are not asked to be accountable to victims or the community; they are not encouraged to show genuine remorse or undertake the kind of piercing self-evaluation that is a necessary first step towards rehabilitation. The American judicial system is content with its low-brow remedy of sending “bad guys” to prison, which produces nothing of lasting benefit to society in general and produces only one type of lasting change in the offender —that of being a better offender when he gets out.

6. Public Testimony and Historical Record

The most important feature of the truth and reconciliation process is the opportunity for victims, witnesses, as well as perpetrators, to give testimony.

⁷³ One victim, “Liz,” who testified before the Peruvian TRC about her mother’s killing when she was a child, reflects the need for answers:

It’s been like a shadow over my life. There is not a single moment in which I can feel happy. I had my first child when I was fifteen. I was on my own and there was no one to help me. I need to see my mother’s bones so that I can bury her. Everyone has somewhere to go to say farewell to their dead.

Sebastian Brett, *Peru Confronts a Violent Past: The Truth Commission Hearings in Ayacucho*, May 14, 2002, APRODEH, http://www.aprodeh.org.pe/sem_verdad/comision_verdad/14may2002iii.htm.

Providing opportunities to give full and complete testimony was the organizing principle for the TRC's other objectives.

To re-create the reality which existed before, the TRC has demonstrated that one must have the factual truth. But it has also clearly shown the urgent necessity of making room for the emotional truth of the victims, the survivors and the perpetrators. All of these people must tell their stories: if the intention is to foster reconciliation, all of these people must be heard.⁷⁴

The South African TRC maintained an open-door policy in all of its proceedings. South Africa's documentation is preserved and available online for continuing analysis.⁷⁵ Even those living outside the country have access to the transcripts of the proceedings and the final report.⁷⁶ The legacy of the South African TRC has allowed later commissions to adapt its framework to their own circumstances, and it has spurred scholarship and international debate that would not have been possible without its historical records.

Psychologists, sociologists, and indigenous cultures have long known that victims heal through the act of testifying.⁷⁷ South African leaders believed that, in revisiting the painful memories of the years of the apartheid, the thousands of witnesses offering testimony would create a full communal memory, which would stand beyond the community so it would be released to move toward reconciliation.⁷⁸

Testimony in the U.S. criminal justice system is treated as a matter of strategy, not a mechanism for healing. The content and method of giving testimony is orchestrated by the evidence rules, which allow witnesses to speak only responsively, not in an open-ended, fluid way. Witness' responses are circumscribed by the rules to address only the narrow scope of the question asked. If the witness offers qualifications to his or her answer or impromptu additions, they can be stricken from the court's record. Thus, the information given by witnesses at trial is presented in a choppy, highly truncated, unnatural series of statements

⁷⁴ SCOTT, *supra* note 17.

⁷⁵ See, e.g., MICHIGAN STATE UNIVERSITY AFRICAN STUDIES DEPARTMENT, OVERCOMING APARTHEID, <http://overcomingapartheid.msu.edu/multimedia.php?id=24>.

The Peruvian Truth and Reconciliation Commission, which commenced hearings in Huamanga in 2000, followed the South African model in making its proceedings public. In fact, its hearings were the first formal public hearings held by a truth commission in the Americas—a break with regional precedent; the TRCs of neighboring countries, such as the commissions in Argentina and Chile, held their interviews privately, releasing the information in book-length reports only after the proceedings were over. BRETT, *supra* note 73.

⁷⁶ See TRC FINAL REPORT, *supra* note 41.

⁷⁷ See, e.g., HERMAN, *supra* note 10; FOA, *supra* note 10.

⁷⁸ The Peruvian CAVR recognized the value of its “as an act of dignifying and healing for the victims and those who can identify with the cases brought up.” BRETT, *supra* note 73.

that is as free-flowing as a stutter, and more likely to induce frustration than healing.

7. Forgiveness Not Expected; Remorse Encouraged

The second thrust of TRCs, after “truth,” is the hope for reconciliation. The South African model is often lauded as a great experiment in the power of national reconciliation and forgiveness among previously divided peoples. For some South Africans, the process is not complete, and it may take generations before equalization between the races and unity is internalized.

In promoting the efforts of the TRC, the South African leadership spoke of reconciliation and forgiveness as inextricably linked ideas. Although they were absolutely firm about being unwilling to “forget,” they were willing to “forgive,” as part of the evolution toward reconciliation.⁷⁹ And, while the primary debate about the structure of the South African TRC and concomitant dissatisfaction was around the question of amnesty for testimony, a perhaps more troubling feature was this insistence on forgiveness.

There is nothing in the TRC model that requires parties to forgive. Some TRCs recognize that the path to healing will not necessarily lead to forgiveness, but without healing, forgiveness is impossible. The launch point to this process for the victim is the sense that they have been heard, understood, empathized with, and that the community will take action to remedy their suffering.⁸⁰

But victims generally are not required nor could they be required to forgive. That is an internal process that cannot be regulated or compelled by a tribunal, a commission, or a court of law. Moreover, the problem with forgiveness is that it places the onus on the victim. It forces the one aggrieved to lead the way to recovery, rather than one who caused the harm. It fails to hold the offender accountable.

While the offender has a moral duty to [lead the way toward recovery] whether the victim forgives or not, it is matter of accountability and right action, not “conversion.”⁸¹ Offenders cannot be forced to feel remorse, though they can be required to express it. They must use apologetic discourse⁸², and they must feel a moral imperative to make continued efforts toward restoration. In fact, in most types of even retributive proceedings, remorse is one way that the offender’s change is measured. But it must be accompanied by re-education efforts,

⁷⁹ See, e.g., President Nelson Mandela, Speech on leaving office as South African President (Jun. 15, 1999) (“South Africans must recall the terrible past so that we can deal with it, forgiving where forgiveness is necessary but never forgetting.”).

⁸⁰ See Yates, *supra* note 25 (quoting resistance leader Xanana Gusmao’s observation that the East Timor TRC was necessary to allow the people to “start the healing process and close the horrible chapter in their lives”).

⁸¹ See Petersen, *supra* note 12 (likening remorse to a “conversion”).

⁸² ROSENBAUM, *supra* note 1, at 194-211.

which are visible in the aftermath of a TRC, but are distinctly missing in US post-adjudication proceedings.⁸³

Forgiveness is a charged term. It has significant cultural connotations that affect the willingness of people to forgive or employ it, and even what they understand the term to mean. Africans, for whom the notion of forgiveness is woven into the native culture in language, oral history, primary relationships, and especially the concept of *ubuntu*, are often recognized for a cultural predisposition toward forgiveness.⁸⁴ *Ubuntu*, which is so strongly linked to South African⁸⁵ identity that it is used in the country's Constitution, is a concept that is impossible to translate into English in a single word or concise phrase. It has been described as follows:

[It refers to] the very essence of being human . . . It is to say, 'My humanity is caught up, is inextricably bound up, in yours.' We belong in a bundle of life. We say, 'A person is a person through other persons.' It is not, 'I think therefore I am.' It says rather: 'I am human because I belong. I participate, I share.' A person with *ubuntu* is open and available to others, affirming of others, does not feel threatened that others are able and good, for he or she has a proper self-assurance that comes from knowing that he or she belongs in a greater whole and is diminished when others are humiliated or diminished, when others are tortured or oppressed, or treated as if they were less than who they are.⁸⁶

This relational worldview, which emphasizes the collective, was espoused by Mandela in his speeches as the country transitioned from apartheid to a unified government and reflects a deeply rooted history of interdependence among humans required for survival. Because African traditions and thinking are bound up with a concept that centers on one's relationships to others, its people are thought to enjoy a greater predisposition toward forgiveness.⁸⁷

By contrast, Americans, for example, are "[a] people obsessed with personal autonomy and the pursuit of happiness is much more focused on scoring a decisive victory than on restoring moral balance to relationships and achieving repair."⁸⁸ Forgiveness is "not part of our cultural mindset."⁸⁹

⁸³ Wilhelm Verwoerd, *The TRC and Apartheid Beneficiaries in a New Dispensation*, CENTRE FOR THE STUDY OF VIOLENCE AND RECONCILIATION (2000).

⁸⁴ LUC HUYSE ET AL., *supra* note 14, at 46.

⁸⁵ Paula Young, *The Promise of Restorative Justice: Peru's Truth and Reconciliation Commission Issues its Final Report*, ST. LOUIS LAWYER, Oct. 1, 2003, at 11A.

⁸⁶ DESMOND TUTU, *supra* note 23, at 34.

⁸⁷ Other examples of a cultural predisposition toward forgiveness are the Native American healing circles; the Sierra Leone cleansing rituals; and the Aboriginal tribal traditions in New Zealand and Australia. In contrast, Albanian culture is geared toward revenge, rather than forgiveness. See LUC HUYSE ET AL., *supra* note 14.

⁸⁸ ROSENBAUM, *supra* note 1, at 214.

⁸⁹ *Id.*

We are a culture obsessed with time, and we are impatient with our emotions. In response to victims and as victims, we keep our “emotional arc” —the time it takes to process the crime and its attendant losses— on a tight leash. Yet these processes seldom fit into the timeframe of a speedy trial or even the bracketed beginning and ending of an offender’s prison time. Without the necessary time and mindset, healing cannot occur. “True mourning requires time. The healing process is always slow, but it must begin, otherwise the loss will always be front and center, thwarting and intruding on all future relationships and endeavors, never finding its proper, reconciling place.”⁹⁰

III. JUSTICE ITSELF IS HEALING

Although TRCs are formed to address crimes that are more rampant and pervasive than the interpersonal violations that come before a criminal court, the safeguards and procedures that make them conducive to healing are the same. There is a need for victims to be restored; for truth to be told and stories to be heard; for apologies to be given. Our present criminal justice system does none of these things; it is not structured, nor is its overriding aim, to achieve true justice.

“Justice” is concerned not only with outcomes but with processes. When it is expressed in a particular case or crisis, it resonates with our basic notions of right and wrong. Justice is not a simple equation; it is not a matter of “the punishment fitting the crime.” Rather, it is a complex process that emphasizes victim healing, offender accountability, community participation, reparation of losses, and in some cases forgiveness. The focus is on restoration, which might also include restitution and retribution. The difference between venues that promote restoration —for individuals, communities or entire nations— and those that leave aggrieved parties feeling re-victimized lies in the safeguards and procedures that are employed.

The primary element is the pursuit of truth. Our most fundamental understanding of the concept of justice is forged with the idea of truth-seeking. And the truth can only be known when parties —both victims and offenders— are allowed to share their stories openly, uninterrupted and unrestricted, in a supportive forum. Testimony, as the mechanism for truth-seeking, is crucial to healing.

Because victimization triggers the need for a truth commission or legal intervention, the aggrieved parties must be focal point. Victimization and healing are not static events; the effects are long-term and resounding. At a minimum, healing denotes re-establishing a connection to the meaning in life, in such a

90 *Id.*

way that the victims contemplate a future for themselves. They must reconcile themselves to the “catastrophic internal fissures of the soul.”⁹¹

This type of personal reconciliation relies, in part, on the participation of the community. When victims (or offenders) offer testimony, the community serves as an empathic repository for the memories, recording them faithfully. Furthermore, it takes action to ensure that similar harms do not happen again. The collective experience of crimes allows victims to share the burden of the trauma, and it spurs communal grieving. One of the chief objectives of the process must be to develop an honest and accurate record of the abuses, the people who committed them, and the pain and loss of the individuals who suffered those abuses. In doing so, “the truth can be made part of a nation’s common history and the process of national reconciliation can be facilitated.”⁹²

Because reconciliation can be “facilitated” does not mean that it is a given. The system must provide opportunities for reconciliation, using safeguards and procedures that promote healing, and it must send the message in every aspect of its procedures that true justice—justice that corresponds with the compass of our conscience—is the imperative.

Justice is not an objective measure; it is an ongoing sensibility that the outcome was “right.” When justice has been achieved, participants and observers are able to move forward in their lives.

The U.S. criminal justice system falls short of the objective its name implies.⁹³ Lawyers are taught that to act and advise their clients “within the bounds of the law,” without regard to what is just or what is true. Morality and legality are treated as separate ideas. Yet, the features of truth and reconciliation commissions that emphasize the ambitious realignment of these terms can be recreated in the criminal justice system. The human aspect of crime and emotional truth should be given as much consideration as concrete facts. Such an endeavor would in fact bring the system in line with the aspirations and expectations most people already place in the legal system. And, legal processes and outcomes should also be just and healing. The latter must be inherent to the former, or we have lost the point of our system of law.

⁹¹ MARLENE YOUNG, TOWARD A NEW MILLENNIUM IN VICTIM ASSISTANCE 2, <http://www.aic.gov.au/publications/proceedings/27/young.pdf>.

⁹² See RECKONINGS FOR PAST WRONGS: TRUTH COMMISSIONS AND WAR CRIMES TRIBUNALS, *supra* note 25.

⁹³ ROSENBAUM, *supra* note 1, at 15-16:

Justice may be about many things, but the moral complexity of distinguishing between right and wrong, or arriving at the truth of a given situation, is neither its strength nor its ostensible mission. Courts of law are there . . . to ensure the availability of a forum that offers the chance at some relief.