

Punishment, Reconciliation, and Democratic Deliberation

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From Chile to Cambodia to South Africa to the United States, societies and international institutions are deciding how they should reckon with past atrocities—including war crimes, crimes against humanity, genocide, rape, and torture—that may have been committed by a government against its own citizens, by its opponents, or by combatants in an international armed conflict.

In deciding whether and how to address these political crimes, it is commonly believed that trials and punishment, on the one hand, and reconciliation, on the other, are fundamentally at odds with each other, that a nation must choose one or the other, and that reconciliation is morally superior to punishment. For example, in *No Future Without Forgiveness*,¹ Archbishop Desmond Mpilo Tutu evaluates the successes and failures of the South African Truth and Reconciliation Commission (TRC). The chair of the TRC, Tutu defends the Commission's granting of amnesty to wrongdoers who revealed the truth about their

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1. Desmond M. Tutu, *No Future without Forgiveness* (1999).

pasts, and he lauds those victims who forgave their abusers. While recognizing that a country must reckon with its past evils rather than adopt “National Amnesia,”² Tutu nevertheless rejects what he calls the “Nuremberg trial paradigm.”³ He believes that victims should not press charges against those who violated their rights, and the state should not make the accused “run the gauntlet of the normal judicial process”⁴ and impose punishment on those found guilty.

Tutu offers practical and moral arguments against applying the Nuremberg precedent to South Africa. On the practical side, he expresses the familiar view that if trials were the only means of reckoning with past wrongs, then proponents of apartheid would have thwarted efforts to negotiate a transition to democratic rule. The South African court system, moreover, biased as it was toward apartheid, would hardly have reached just verdicts and sentences.⁵ Tutu points out that trials are inordinately expensive, time-consuming, and labor intensive—diverting valuable resources from such tasks as poverty alleviation and educational reforms. In the words of legal theorist Martha Minow, prosecution is “slow, partial, and narrow.”⁶ Rejecting punishment, Tutu favors the TRC’s approach in which rights violators publicly confess the truth while their victims respond with forgiveness.

Powerful practical reasons may explain the decision to spare oppressors from trials and criminal sanctions. Tutu, however, offers two *moral* arguments to justify rejection of the “Nuremberg paradigm”. The first, which I call the

2. *Id.* at 13.

3. *Id.* at 19.

4. *Id.*

5. *Id.* at 24, 180.

6. Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* 9 (1998); see also Paul van Zyl, *Evaluating Justice and Reconciliation Efforts, Perspectives on Ethics and International Affairs* 1, 17-20 (1999); Paul van Zyl, *Justice Without Punishment: Guaranteeing Human Rights in Transitional Societies*, in *Looking Back/Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* 42-57 (Charles Villavicencio & Wilhelm Verwoerd eds., 2000).

“argument against vengeance,” is a nonconsequentialist argument that identifies punishment with retribution, rejects retribution, and concludes that punishment is morally wrong. Tutu’s second argument, which I call the “reconciliation argument,” is consequentialist: it contends that punishing human rights violators is wrong because it only further divides former enemies and impedes social healing. Tutu contends that “reconciliation”—the restoration of social harmony—is best promoted when society grants amnesty and victims forgive their abusers.

This article assesses Tutu’s two arguments.⁷ First, I argue that retribution, properly conceived, is both one appropriate aim of punishment and differs significantly from vengeance. Second, I distinguish three ideals of reconciliation, argue for a democratic conception over Tutu’s social harmony view, and contend that regardless of the meaning given to reconciliation, in reckoning with past wrongs, a society must be wary of *overestimating* the restorative effect of amnesty and forgiveness as well as *underestimating* the reconciling power of justice. In the paper’s concluding section, I contend that although punishment and reconciliation do “pull in different directions”⁸ and sometimes clash, when adequately conceived, they are both morally urgent goals that often can be combined in morally appropriate ways. When such

7. My focus on Tutu’s views and arguments does not mean that I assume that other members of the TRC shared his ideas. In comments on an earlier version of the present paper, Alex Boraine, Deputy Chair of the TRC, remarked that Tutu’s personal contribution to the TRC was enormous and even indispensable, but Tutu’s own opinions should not necessarily be taken to represent the TRC or the opinions of its other members. See Alex Boraine, Comments, Carnegie Council on Ethics and Int’l Aff., (New York City, Mar. 2, 2001). Although Boraine seems to agree with Tutu when Boraine says the African ideal of *ubuntu* includes the concrete principle that “the adjudication process must be conciliatory in order to restore peace, as opposed to an adversarial approach which emphasizes retribution,” Boraine also says “while broadening the concept of justice, the TRC model does not contradict retributive justice.” Alex Boraine, *A Country Unmasked: Inside South Africa’s Truth and Reconciliation Commission* 425, 427-28 (2000)[hereinafter Boraine, *A Country Unmasked*].

8. David Little, *A Different Kind of Justice: Dealing with Human Rights Violations in Transitional Societies*, 13 *Ethics & Int’l Aff.* 79 (1999).

combining is not possible, decisions concerning trade-offs should be arrived at through public deliberation and democratic choice.⁹

I. THE ARGUMENT AGAINST VENGEANCE

In his argument against vengeance, Tutu offers three premises for the conclusion that—at least during South Africa's transition—legal punishment of those who violate human rights is morally wrong. The premises are: (i) punishment is retribution; (ii) retribution is vengeance; and (iii) vengeance is morally wrong.

Although Tutu understands that forgiveness may be appropriate for any injury, at one point he claims that amnesty provides only a *temporary* way for South Africa to reckon with past wrongs. He provides no criteria, however, to determine at what point punishment for crimes should be reinstated, and he also offers no reasons that punishment is justified in normal times. Further, one might wonder on what grounds Tutu would deny exoneration for those who committed human rights violations *after* the fall of apartheid and who now wish to exchange full disclosure of their wrongdoing for amnesty.¹⁰

9. In earlier papers I formulated eight principles or goals to evaluate reckoning with past wrongs and employed them in assessing the merits of various tools, such as trials and truth commissions. These goals, which I merely list here, are: truth; a public platform for victims; punishment; rule of law; compensation to victims; institutional reform and long-term development; reconciliation; and public deliberation. David A. Crocker, *Civil Society and Transitional Justice*, in *Civil Society, Democracy, and Civic Renewal* (Robert K. Fullinwider ed., 1999) [hereinafter *Crocker, Civil Society and Transitional Justice*]; David A. Crocker, *Reckoning with Past Wrongs: A Normative Framework*, 13 *Ethics & Int'l Aff.* 43 (1999) [hereinafter *Crocker, Reckoning with Past Wrongs*]; David A. Crocker, *Truth Commissions, Transitional Justice, and Civil Society*, in *Truth v. Justice: The Morality of Truth Commissions* 99-121 (Robert I. Rotberg & Dennis Thompson, eds., 2000) [hereinafter *Crocker, Truth Commissions, Transitional Justice, and Civil Society*]. In the present paper I focus on three of the eight goals: punishment, reconciliation, and public deliberation.

10. See Ronald C. Slye, *Justice and Amnesty*, in *Villa-Vicencio & Verwoerd*, supra note 6, at 174-83; Ronald C. Slye, *Amnesty, Truth, and Reconciliation: Reflections on the South African Amnesty Process*, in *Rotberg & Thompson*, supra note 9, at 170-88

II. IS PUNISHMENT RETRIBUTION?

Consider the first of Tutu's three premises in his argument against punishment. While Tutu assumes that punishment is no more than retribution, he fails to define what he understands by "punishment." He does not, for example, explicitly identify legal punishment as state-administered and intentional infliction of suffering or deprivation on wrongdoers.¹¹ Tutu also says almost nothing about the nature and aims of legal punishment. He fails to distinguish court-mandated punishment from therapeutic treatment and social shaming, among other societal responses to criminal conduct. Tutu does not consider the various roles that punishment may play—such as to control or denounce crime, isolate the dangerous, rehabilitate perpetrators, or give them their "just deserts"—and whether these roles justify the criminal sanction. He does at one point say that the "chief goal" of "retributive justice" is "to be punitive."¹² Tutu apparently takes it as given that "punishment" means "retribution" and that the nature of legal punishment is retributive.

Tutu does at times concede that trials have two other aims, at least during South Africa's transition: vindicating the rights of the victims and generating truth about the past. Again and again, Tutu states that victims of past wrongs have the right—at least a constitutional right and perhaps also a moral one—to press criminal charges against and seek restitution from those who abused them.¹³ He also extols the "magnanimity" of individuals who, like former South African President Nelson Mandela,¹⁴ have not exercised this right but are willing to forgive and seek harmony (*ubuntu*) with their oppressors. These statements

11. Lawrence Crocker, *The Upper Limit of Just Punishment*, 41 *Emory L.J.* 1059 (1992). Cf. Geoffrey Cupit, *Justice as Fittingness* 139 (1996) (defining (both legal and nonlegal) punishment: "To punish is intentionally to make suffer, intentionally to inflict something disadvantageous, burdensome, and unwelcome. . .").

12. Tutu, *supra* note 1, at 54.

13. *Id.* at 51, 144, 147, 211.

14. *Id.* at 10, 39.

suggest that Tutu regards legal punishment not merely as a means to retribution but also as a way to affirm and promote the rights of victims.¹⁵

Tutu also endorses the credible threat of punishment as a social tool to encourage perpetrators to tell the truth about their wrongdoing. The TRC did not grant a blanket amnesty to human rights violators or pardon all those convicted of rights abuses committed during apartheid. Instead the TRC offered amnesty to *individual* perpetrators *only if* (i) their disclosures were complete and accurate, (ii) their violations were politically motivated, and (iii) their acts of wrongdoing were proportional to the ends violators hoped to achieve. According to Tutu, individuals who fail to fulfill any of the three conditions have a strong incentive to apply for amnesty and reveal the whole truth. It is precisely because violators are threatened with trial and eventual punishment that they realize that making no application for amnesty or lying about their wrongdoing is too risky. Without such a threat of trial and punishment, the TRC is unlikely to have had the number of perpetrators who did come forward to confess gross wrongdoing.

But Tutu cannot have it both ways. He cannot both reject actual punishment and still defend the threat of punishment as efficacious in dispelling lies and generating truth. Hence, Tutu's acceptance of a "threat to punish" practically commits him to a nonretributive and consequentialist role for punishment, since without occasionally making good on the threat to punish, such a threat loses credibility.

Tutu does not bring enough precision to the term "retribution." He seems, at points, simply to identify retribution with legal punishment. Instead, one must understand retribution as one important *rationale* or *justification* for and a constraint upon punishment.

15. Some retributive theories of punishment or mixed theories with a retributive component emphasize respect for the victim and his or her rights. See, e.g., Aryeh Neier, War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice 83, 222 (1998).

Proponents of the retributive theory of punishment offer a variety of competing accounts, but all agree that any retributive theory minimally requires that punishment must be “backward looking in important respects.”¹⁶ That is, justice requires that a crime is punishable as, in the words of lawyer and legal theorist Lawrence Crocker, “a matter of the criminal act, not the future consequences of conviction and punishment.”¹⁷ These future consequences might comprise such good things as deterrence of crime, rehabilitation of criminals, or promotion of reconciliation. For the proponent of retributivism, however, the infliction of suffering or harm, something normally prohibited, is justified because of—and in proportion to—what the criminal *has done antecedently*. Only those found guilty should be punished, and their punishment should fit (but be no more than) their crime.

Some supporters of the retributive theory of punishment, assert, moreover, that only (and perhaps all) wrongdoers *deserve* punishment, and the amount or kind of punishment they deserve must fit the wrong done.¹⁸ Philosopher Robert Nozick explains “desert” in terms of both the degree of wrongness of the act and the criminal’s degree of responsibility for it.¹⁹ Retribution as a justification for punishment requires that wrongdoers should get no more than (and perhaps no less than) their “just deserts.”²⁰

16. Crocker, *supra* note 11, at 1061.

17. *Id.*

18. Mandatory retributivism contends that all and only wrongdoers should be punished and that the punishment should be no less than and no more than what the wrongdoer deserves; limited or permissive retributivism contends that only wrongdoers should be punished and that the punishment should not be more—but may be less—than what is deserved. I owe this distinction to Lawrence Crocker, *Mandatory Retributiveness: A Retributive Theory of Criminal Justice 1-2* (unpublished manuscript, on file with author). Many critics of retributivism unfortunately tend to identify retributivism with the mandatory form. See, e.g., Carlos Nino, *The Duty to Punish Past Abuses of Human Rights Put into Context*, 100 *Yale L.J.* 2619 (1991); T.M. Scanlon, *Punishment and the Rule of Law*, in *Deliberative Democracy and Human Rights* 258 (Harold Hongju Koh & Ronald C. Slye eds., 1999).

19. Robert Nozick, *Philosophical Explanations* 363 (1981).

20. Urgently needed, but beyond the scope of the present paper, is a detailed

III. IS RETRIBUTION VENGEANCE?

The second premise in Tutu's argument against punishment—that retribution is (nothing but) vengeance or revenge—is flawed as well. Given Nozick's understanding of retribution as “punishment inflicted as deserved for a past wrong,”²¹ is Tutu's right to treat retribution and revenge or vengeance as equivalent? Both retribution and revenge share, as Nozick puts it, “a common structure.”²² They inflict harm or deprivation for a reason. Retribution and vengeance harm those who in some sense have it coming to them. Following Nozick's brief but suggestive analysis, I propose that there are at least six ways in which retribution differs from revenge.

A. Retribution Addresses a Wrong

First, as Nozick observes, “retribution is done for a wrong, while revenge may be done for an injury or slight and need not be done for a wrong.”²³ I interpret Nozick to mean retribution metes out punishment for a crime or other wrongdoing while revenge may be exacted for what is

analysis and evaluation—in relation to “transitional justice”—of recent attempts to defend retributivism or a retributive dimension of a mixed theory of punishment and to investigate whether the concept of desert is essential in this defense. These efforts, for example, appeal to intuition (Michael Moore) or employ higher order principles such as fittingness (Geoffrey Cupit), reciprocity (Lawrence Crocker), communication (Jean Hampton, Robert Nozick) or fair distributions of benefits and burdens (Herbert Morris, George Sher, James Rachels). In addition to other essays cited in this article that defend a form of retributivism, see Michael Moore, *Laying Blame* (1997); Jean Hampton, *The Moral Education Theory of Punishment*, 13 *Phil. & Pub. Aff.* 208-38 (1984); Herbert Morris, *Persons and Punishment*, 52 *Monist* 475-501 (1968); George Sher, *Desert* (1987); James Rachels, *Punishment and Desert*, in *Ethics in Practice: An Anthology* (Hugh LaFollette ed., 1997). Important criticisms of retributivism or of the concept of “desert” include Richard W. Burgh, *Do the Guilty Deserve Punishment?*, 79 *J. Phil.* 193-213 (1982); David Dolinko, *Some Thoughts on Retributivism*, 101 *Ethics*, 537-59 (1991); Carlos Nino, *A Consensual Theory of Punishment*, 12 *Phil. & Pub. Aff.* 289-306 (1983); Scanlon, *supra* note 18.

21. Nozick, *supra* note 19, at 366.

22. *Id.* at 368.

23. *Id.* at 366.

merely a slight, an unintended injury, an innocent gaze, or shaming in front of one's friends.

B. Retribution is Constrained

Second, Nozick also correctly sees that in retribution there exists some "internal" upper limit to punishment while revenge is essentially unlimited.²⁴ Lawrence Crocker concurs: "an absolutely central feature of criminal justice" is to place on each offense "an upper limit on the severity of just punishment."²⁵ This limitation "is the soul of retributive justice."²⁶ It is morally repugnant to punish the reluctant foot soldier as severely as the architects, chief implementers, or "middle management"²⁷ of atrocities. Retribution provides both a sword to punish wrongdoers and a shield to protect them from more punishment than they deserve.²⁸ In contrast to punishment, revenge is wild, "insatiable," and unlimited. After killing his victims, an agent of revenge may mutilate them and incinerate their houses. As Nozick observes, if the avenger does restrain himself, it is done for "external" reasons having nothing to do with the rights or dignity of his victims. His rampage may cease, for instance, because he tires, runs out of victims, or intends to exact further vengeance the next day.²⁹

Notably, Martha Minow and others subscribe to a different view. Minow suggests that retribution is a *kind* of vengeance, but curbed by the intervention of neutral parties and bound by the rights of individuals and the principles of proportionality. Seen in this light, in retribution vengeful retaliation is tamed, balanced, and recast. It is now a justifiable, public response that stems

24. Id. at 367.

25. Crocker, *supra* note 11, at 1060.

26. Id.

27. Bill Berkeley, *Aftermath: Genocide, the Pursuit of Justice and the Future of Africa*, Wash. Post Mag., Oct. 11, 1998, at 14, 28.

28. Crocker, *supra* note 11, at 1061.

29. Steve Coll, *Peace Without Justice: A Journey to the Wounded Heart of Africa*, Wash. Post Mag., Jan. 9, 2000, at 8-27.

from the “admirable” self-respect that resents injury by others.

While Minow’s view deserves serious consideration, Nozick, I think, gives us a picture of vengeance—and its fundamental difference from retribution—that better matches our experience. Precisely *because* the agent of revenge is insatiable, limited neither by prudence nor by what the wrongdoer deserves, revenge is not something admirable that goes wrong. The person seeking revenge thirsts for injury that knows no (internal) bounds, has no principles to limit penalties. Retribution, by contrast, seeks not to tame vengeance but to excise it altogether. Retribution insists that the response not be greater than the offense; vengeance insists that it be no less and if possible more. Minow attempts to navigate “between vengeance and forgiveness,” but she does so in a way that makes too many concessions to vengeance. She fails to see unequivocally that retribution has essential limits.³⁰ Vengeance has no place in the courtroom or, in fact, in any venue, public or private.

C. Retribution is Impersonal

Third, vengeance is personal in the sense that the avenger retaliates for something done antecedently to her or her group. In contrast, as Nozick notes, “the agent of retribution need have no special or personal tie to the victim of the wrong for which he exacts retribution.”³¹ Retribution demands impartiality and rejects personal bias, while partiality and personal animus motivate the “thirst for revenge.”

30. Minow rightly claims that “retribution needs constraints” but leaves an open question whether these come from the ideal/practice of retribution itself or from “competing ideals such as mercy and moral decency.” Minow, *supra* note 6, at 12. That only wrongdoers should be punished and that they should get no more than they deserve, builds constraint right into the retributive idea. On the basis of consequentialist and other considerations, such as protecting a fledgling democracy from a military coup, punishment might be further limited, delayed, and even set aside.

31. Nozick, *supra* note 19, at 367.

The figure of Justice blindfolded (so as to remove any prejudicial relation to the perpetrator or victim) embodies the commonplace that justice requires impartiality. Justice is blind—that is, impartial—in the sense that she cannot distinguish between people on the basis of familiarity or personal ties. This not to say, however, that justice is impersonal in the sense that she neglects to consider an individual's traits or conduct relevant to the case. Oddly, Tutu suggests that the impartiality or neutrality of the state detracts from its ability to deal with the crimes of apartheid. He defends the TRC because it is able to take personal factors into account. He writes:

One might go on to say that perhaps justice fails to be done only if the concept we entertain of justice is retributive justice, whose chief goal is to be punitive, so that the wronged party is really the state, something impersonal, which has little consideration for the real victims and almost none for the perpetrator.³²

Although justice eliminates bias from judicial proceedings, it may be fair only if it takes certain personal factors into account. Because Tutu confuses the impersonality or neutrality of the law with an indifference to the personal or unique aspects of a case, Tutu insists that judicial processes and penalties give little regard to “real victims” or their oppressors.

It is true that if victims are called to testify, defense attorneys may treat them disrespectfully. In a deeper sense, however, the trial affirms the dignity of the victim, because the judicial proceeding is the proper forum to denounce the violation of the victim's humanity and vindicate her rights. The state, with its impersonal laws, has pledged to protect, vindicate, and restore the rights of a human being. Further, the impersonal rule of law applies to wrongdoers as well. If and when the accused is found guilty, verdicts and sentencing should take into account reasonable excuses or mitigating circumstances. Hence,

32. Tutu, *supra* note 1, at 54.

retribution's shield protects the culpable from overzealous prosecution and overly severe punishment. There is also room for leniency and even mercy when a judge (or executive), to the extent permitted by law, either reduces the perpetrator's punishment to better match his degree of culpability or takes into account personal conditions as advanced age, dementia, or illness.³³ Fair trials and just punishments, then, consider relevant personal factors. At the same time, however, fairness demands that bias must be eliminated from judicial proceedings themselves.

D. Retribution Takes No Satisfaction

A fourth distinction between retribution and revenge concerns the "emotional tone" that accompanies—or the feelings that motivate—the infliction of harm. Agents of revenge, claims Nozick, get pleasure, or we might say "satisfaction," from their victim's suffering. Agents of retribution may either have no emotional response at all, be distressed by having to inflict pain ("this hurts me more than it hurts you"), or take "pleasure at justice being done."³⁴ Adding to Nozick's account and drawing on the work of political theorists Jeffrie Murphy and Jean Hampton, I add that a "thirst for justice" may—but need not—arise from moral outrage over and hatred of wrongdoing.³⁵

E. Retribution is Principled

Fifth, Nozick claims that what he calls "generality" is essential to retribution but may be absent from revenge. By this term, Nozick means that agents of retribution who inflict deserved punishment for a wrong are "committed to

33. Martha C. Nussbaum, *Sex and Social Justice* 153-83 (1999).

34. Nozick, *supra* note 19, at 367.

35. See Jeffrie G. Murphy & Jean Hampton, *Forgiveness and Mercy* (1988); Jeffrie G. Murphy, *Retributive Hatred: An Essay on Criminal Liability and the Emotions*, in *Liability and Responsibility* 351 (R.G. Frey & Christopher W. Morris eds., 1991).

(the existence of some) general principles (prima facie) mandating punishment in other similar circumstances.”³⁶ If I am a Kosovar committed to retributive justice, I believe that an Albanian who violates the rights of a Serb deserves the same upper limit of punishment—if the act and culpability is the same—as the Serb who violates the rights of a Kosovar. In contrast, the Kosovar seeking revenge is committed to no principles and is motivated solely by the desire to retaliate without limit against his Serbian foe. He has no moral reason to avoid double standards or to urge prosecution of his fellow Kosovars for atrocities committed against Serbs.³⁷

F. Retribution Rejects Collective Guilt

Nozick, I believe, helpfully captures many of the contrasts between retribution and revenge. To these, I add a sixth distinction. Mere *membership* in an opposing or offending group may be the occasion of revenge, but not of retribution. Retributive justice differs from vengeance, in other words, because it extends only to individuals and not to the groups to which they belong. In response to a real or perceived injury, members of one ethnic group might, for instance, take revenge on members of another ethnic group. However, a state or international criminal court could properly mete out retribution only to those *individuals* found guilty of rights abuses, not to *all members* of the offending ethnic group.

In undermining the notion of collective guilt, just retribution has the potential to break the cycle of revenge and counter-revenge. As Neier observes:

Advocates of prosecuting those who committed crimes against humanity in ex-Yugoslavia have argued that the effect is to individualize guilt. What they have in mind, of

36. Nozick, *supra* note 19, at 368.

37. See *infra* notes 40-43 and accompanying text for the way in which traditional Balkan honor codes may present mixed cases of collective guilt and reprisals calibrated to earlier harms.

course, is criminal guilt. Some of the strongest voices advocating this—all strong supporters of the tribunal—have come from inside the former Yugoslavia. They and others have maintained that in a territory where violent ethnic conflict has taken place three times in the twentieth century, it is crucial to break the cycle of the collective attribution of guilt. Serbs, as a people, did not commit mass murder, torture, and rape in Croatia and Bosnia; rather, particular Serbs, and also particular Croats and Muslims, committed particular crimes. If those directly responsible are tried and punished, the burden of blame will not be carried indiscriminately by members of an entire ethnic group. Culpability will not be passed down from generation to generation. Trials will single out the guilty, differentiating them from the innocent.³⁸

No trial, of course, can guarantee that it will find the innocent to be innocent and the guilty to be guilty. Although Tutu finds adversarial cross examination callous and disrespectful of victims called to testify, such procedures minimize the risk that the innocent are convicted and maximize the probability that the guilty receive their just deserts. Only then is justice truly done. Since collective guilt has no place in an understanding of retributive justice, revenge and retribution should not be conceived as equivalent. Tutu makes precisely this mistake.

Following the Hegelian dictum “first distinguish, then unite,” Nozick promptly concedes, as he should, that vengeance and retribution can come together in various ways. Particular judicial and penal institutions may combine elements of retribution and of revenge. The Nuremberg trials, arguably, were retributive in finding guilty and punishing some Nazi leaders, punishing some more than others, and acquitting those whom it found not guilty as charged. But Tutu is right to say that the Nuremberg precedent was contaminated, compromised by revenge or “victor’s justice.” As he notes, Nuremberg used

38. Neier, *supra* note 15, at 211; see also Minow, *supra* note 6, at 40.

exclusively allied judges and failed to put any allied officers in the dock. However, Tutu neglects to affirm the achievements of Nuremberg: it vindicated the notion of individual responsibility for crimes against humanity and defeated the excuse that one was “merely following orders.” One reason that Nuremberg is an ambiguous legacy is that it had both good (retributive) and bad (vengeful) elements.³⁹

Customary practices also may combine both retribution and revenge. Consider, for example, those killings in the Balkans that are said to be due to “blood and vengeance”⁴⁰ and are regulated by a medieval honor code or *kanun*.⁴¹ In some of these cases, one or more members of one group (an extended family or ethnic group, for instance) inflict harms on some member(s) of another group in retaliation for an earlier harm. On the one hand, it seems that the notion of collective guilt motivates vengeful retaliation. For instance, Leka Rrushkadoli, an Albanian villager, explains why he avenged the death of his father by in turn killing the son of his father’s killer: “By the *kanun*, any of the *Lamthis* were equal, just so long as one of them paid. I saw Shtjefen first, so he paid.”⁴² On the other hand, this same honor code does constrain or limit—albeit in ways that appear excessive—the number and kinds of injuries permissibly inflicted on members of an offending group. For example, Leka Rrushkadoli’s two sons assert their interpretation of the *kanun*’s requirements: “By the *kanun*, the very worst crime is to kill someone inside your house, no matter the circumstances or how it started. . . . For killing our father inside their house, they [the *Lamthis*] owe us three deaths.”⁴³

Likewise, both the thirst for retribution and the thirst

39. See David Luban, *The Legacies of Nuremberg*, in *Legal Modernism* 335-37 (1994); Neier, *supra* note 15, at 15-18; Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline and the Law of War* (1999).

40. Chuck Sudetic, *Blood and Vengeance: One Family’s Story of the War in Bosnia* (1998).

41. Scott Anderson, *The Curse of Blood and Vengeance*, *N.Y. Times Mag.*, Dec. 16, 1999, at 1.

42. *Id.* at 15.

43. *Id.*

for vengeance also may motivate those who impose judicial penalties. Suppose a black South African judge, committed to just deserts, correctly finds an Afrikaner defendant guilty of a human rights violation. Then, yielding to vengeance, he unfairly metes out an excessively severe punishment. This is not a case in which the motive “giving what is coming to the wrongdoer” failed to be “curbed” by the rule of law.⁴⁴ Rather, the judge’s commitment to (and desire for) just deserts was not as strong as his thirst for revenge. It is all too common, of course, for talk of retributive justice to disguise vengefulness.

From these various mixtures of retribution and revenge it does not follow that there is no distinction between the two. Judges, juries, and others responsible for justice must exercise virtue, and judicial and penal institutions must be shaped in ways that minimize opportunities to take revenge.

IV. IS VENGEANCE MORALLY WRONG?

What of Tutu’s third premise that vengeance is morally wrong? When I shift the focus from vengeance to the agent of revenge, I accept Tutu’s premise. Unlike the agent of retribution, the agent of revenge does wrong, or at least he is morally blameworthy. He retaliates and inflicts an injury without regard to what the person impartially deserves. If the penalty *happens* to fit the crime, it is by luck; the agent of revenge is still blameworthy since he gave no consideration to desert, impartiality, or generality.⁴⁵ If, as is more likely given the limitless nature

44. Minow, *supra* note 6, at 10, 12.

45. In the film *Eye for an Eye* (Paramount 1996), the character played by Sally Field takes justice into her own hands when a court dismisses (incorrectly, she believes) the case against a man whom she (and we) believe is guilty of raping and killing her teenage daughter. When the police make clear that they have no case against the suspect, even after he rapes and kills again, the Field character lures the (suspected) rapist-murderer to break into her house and then kills him in an act of staged—and then real—self-defense. As we assess the moral character of the agent, we are at least uneasy about her private vengeance and perhaps hold her blameworthy. She has taken justice into her own hands and, by

of revenge, the penalty is more excessive than the crime, the agent of revenge is not only culpable but also his act is morally wrong. Nonetheless, Tutu's overall argument against vengeance is unsound since two of its premises are not acceptable.

V. THE RECONCILIATION ARGUMENT

Tutu proposes a second moral argument against the "Nuremberg trial paradigm" for South Africa's transition and others like it. Tutu rejects judicial justice not only because he alleges it is vengeful and revenge is intrinsically wrong but also because punishment, he claims, prevents or impedes reconciliation. He understands reconciliation as "restorative justice," the highest if not the only goal in South Africa's reckoning with past wrongs. Tutu defends amnesty and forgiveness as the best means to promote reconciliation. In this consequentialist argument, I address both the moral desirability of the end and the practical efficacy of the two sets of means—amnesty and forgiveness, on the one hand, and trial and punishment, on the other.

VI. THREE CONCEPTS OF RECONCILIATION

A. *Ubuntu*

What does Tutu mean by the vague and not infrequently contested term "reconciliation" and its synonym "restorative justice"? Tutu explicitly defines restorative justice (in contrast to retributive justice) as reconciliation of broken relationships between perpetrators

killing the suspect, has perhaps gone beyond the upper limit of punishment. And yet we also judge that the slain killer deserved severe punishment—if not death—or at least that the "pay back" was not wrong. We find the outcome fitting not only because the killer will not kill again, but because severe punishment probably coincides with what the court should have decided. Although not uncomplicated, the case illustrates the idea that an agent of revenge might be morally blameworthy and yet—*pace* Tutu—the vengeful act not clearly wrong.

and victims:

We contend that there is another kind of justice, restorative justice, which was characteristic of traditional African jurisprudence. Here the central concern is not retribution or punishment. In the spirit of *ubuntu*, the central concern is the healing of breaches, the redressing of imbalances, the restoration of broken relationships, a seeking to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community that he has injured by his offense.⁴⁶

Although Tutu in this passage uncharacteristically leaves room for punishment, he understands the “central concern” of restorative justice as the reconciliation of the wrongdoer with his victim and with the society he has injured. The wrongdoing has “ruptured” earlier relationships or failed to realize the ideal of “ubuntu.” *Ubuntu*, a term from the Ngunui group of languages, refers to a kind of “social harmony” in which people are friendly, hospitable, magnanimous, compassionate, open, and nonenvious.⁴⁷ Although Tutu recognizes the difficulty of translating the concept, it seems to combine the Western ideal of mutual beneficence, the disposition to be kind to others, with the ideal of community solidarity. Each benefits when others do well; each “is diminished when others are humiliated or diminished . . . tortured or oppressed, or treated as if they were less than who they

46. Tutu, *supra* note 1, at 54-55.

47. *Id.* at 31. Discussing the sources of Tutu’s theology and the meaning of *ubuntu*, Boraine, cites the following words of Anton Lembede, the founding president of the ANC Youth League:

[The African] regards the universe as one composite whole, an organic entity, progressively driving towards greater harmony and unity whose individual parts exist merely as interdependent aspects of one whole realising their fullest life in the corporate life where communal contentment is the absolute measure of values. His philosophy of life strives towards unity and aggregation, towards greater social responsibility.

Boraine, *A Country Unmasked*, *supra* note 7, at 362 (quoting Peter Dreyer, *Martyrs and Fanatics, South African and Human Destiny* 154 (1980)).

are.”⁴⁸

Tutu regards “social harmony” or “communal harmony” as the summum bonum, or highest good. He concedes that South Africa must in some way “balance” a plurality of important values—“justice, accountability, stability, peace, and reconciliation”.⁴⁹ Whatever “subverts” or corrodes social harmony, however, “is to be avoided like the plague.”⁵⁰ Presumably, whatever maximizes social harmony is morally commendable and even obligatory.

Tutu may believe that *ubuntu* presents so lofty an ideal that no one would question its justification or importance. In any case, he offers little argument for its significance or supremacy. He does seek to support it by calling attention to its African origins. He also remarks that, while altruistic, *ubuntu* is also “the best form of self-interest,” for each individual benefits when the community benefits.

As it stands, neither defense is persuasive. The evil character of apartheid, also a South African concept, is not dependent on its South African origins. Similarly, the geographical origin of *ubuntu* does not ensure its reasonableness. Further, although individuals often benefit from harmonious community relationships, the community also at times demands excessive sacrifices from individuals. Moreover, dissent or moral outrage may be justified even though it disrupts friendliness and social harmony.

Recall that Tutu offers practical objections—as well as moral ones—to seeking retributive justice against former oppressors. He does not consider the practicability of *ubuntu*, however, as a goal of social policy. He does not discuss, for example, what to do with those whose hearts cannot be purged of resentment or vengeance. Nor does he explain how society can test citizens for purity of mind and heart—how it can determine who has succeeded and who has failed to assist society towards this supreme good.

48. Tutu, *supra* note 1, at 31.

49. *Id.* at 23.

50. *Id.* at 31.

B. Nonlethal Coexistence

Tutu's concept of reconciliation can be compared critically to two other versions of social cooperation: (i) "nonlethal coexistence" and (ii) "democratic reciprocity." In the first, reconciliation occurs just in case former enemies no longer kill each other or routinely violate each other's basic rights. This thin sense of reconciliation, attained when cease fires, peace accords, and negotiated settlements begin to take hold, can be a momentous achievement. In Kosovo following NATO intervention, for example, observers agreed that the best that could be hoped for, at least as a medium term goal, was not a socially harmonious "multiethnic society" but 'peaceful coexistence' among largely separated communities.⁵¹ Achieving even this minimal goal in Kosovo in 2000, given both Albanian and Serb thirst for revenge (and counter-revenge) and the complete absence of "an effective structure of law, judges, courts, and prisons,"⁵² was extraordinarily difficult.⁵³

Reconciliation as nonlethal coexistence—however difficult to achieve—demands significantly less and is easier to realize than Tutu's much "thicker" ideal that requires mutuality and forgiveness. Societies rarely, if ever, choose between harmony and mere toleration. Historically, societies have to choose between toleration among contending groups and the war of each against all.

C. Democratic Reciprocity

A more demanding interpretation of reconciliation—but one still significantly less robust than Tutu advocates—is "democratic reciprocity."⁵⁴ In this conception, former

51. Timothy Garton Ash, *Kosovo: Anarchy and Madness*, N.Y. Rev. Books, Feb. 10, 2000, at 50.

52. *Id.*

53. A hopeful sign that reconciliation as peaceful co-existence may be giving way to reconciliation as democratic reciprocity, occurred in the Kosovo elections of November 2001, when a surprising number of Serbs voted and an Albanian was elected who is committed to a pluralistic society.

54. See Crocker, *Civil Society and Transitional Justice*, *supra* note 9; Crocker,

enemies or former perpetrators, victims, and bystanders are reconciled insofar as they respect each other as fellow citizens. Further, all parties play a role in deliberations concerning the past, present, and future of their country. A still-divided society will surely find this ideal of democratic reciprocity difficult enough to attain—although much easier than an ideal defined by mutual compassion and the *requirement* of forgiveness. Some would argue, for instance, that there are unforgivable crimes or point out that a government should not insist on or even encourage forgiveness, since forgiveness is a matter for *victims* to decide.⁵⁵

Not only is Tutu's ideal of social harmony impractical, but it is also problematic because of the way it conceives the relation between the individual and the group. Tutu's formulation of *ubuntu* either threatens the autonomy of each member or unrealistically assumes that each and every individual benefits from the achievements of a larger group. Sometimes individuals do benefit from social solidarity. But life together is often one in which genuinely good things conflict, such as communal harmony and individual freedom, my gain and your gain. In these cases, fair public deliberation and democratic decision making are the best means to resolve differences. A process that allows all sides to be heard, encourages all arguments to be judged on their merits, and forges policies that no one can reasonably reject—such a process respects public well-being, individual freedom, and a plurality of values.⁵⁶

Reckoning with Past Wrongs, *supra* note 9; Crocker, Truth Commissions, Transitional Justice, and Civil Society, *supra* note 9; James Bohman, Public Deliberation: Pluralism, Complexity, and Democracy (1996); Amy Gutmann & Dennis Thompson, Democracy and Disagreement (1996); Amy Gutmann & Dennis Thompson, The Moral Foundations of Truth Commissions, in Rotberg & Thompson, *supra* note 9, at 22-44; Amy Gutmann & Dennis Thompson, Why Deliberative Democracy Is Different, in Democracy 161 (Ellen Frankel Paul et al. eds., 2000); Deliberative Democracy: Essays on Reason and Politics (James Bohman & William Rehg eds., 1997); Deliberative Politics: Essays on Democracy and Disagreement (Stephen Macedo ed., 1999).

55. See Minow, *supra* note 6, at 20-21, 115, 155, n.65.

56. A fourth and "epistemological" ideal of reconciliation should also be mentioned, one that like Tutu's model "social harmony" threatens individual

This analysis of alternative conceptions of reconciliation not only shows that Tutu's ideal is unrealistic but also that it pays insufficient attention to individual freedom, including the freedom to withhold forgiveness. In making social harmony the supreme good, Tutu unfortunately subordinates—without argument—other important values, such as truth, compensation, democracy, and individual accountability. In some contexts, social harmony—if it respects personal freedom and democratic deliberation—should have priority. In other contexts, society may pursue other equally important values, for example, justice, which might require a society to indict, try, sentence, and punish individuals who violated human rights. If social harmony is judged to have priority over other values, that judgment should emerge not from a cultural, theological, or philosophical theory but from the deliberation and democratic determination of citizens.

V. MEANS OF RECONCILIATION

Tutu claims that in South Africa amnesty and forgiveness have maximized the summum bonum of reconciliation as social harmony, while trials and punishment would only have thwarted reconciliation. Even stronger, as the title of his recent volume suggests, without forgiveness (coupled with amnesty), not only is there no reconciliation, there is “no future.” Unless victims offer—and their abusers accept—forgiveness, former enemies will destroy each other and their society. Can these empirical

freedom. Susan Dwyer argues that what we should mean by reconciliation and what a society in transition should aim for is a consensual narrative that settles accounts with past evil by forging a single narrative about what happened and why. Susan Dwyer, *Reconciliation for Realists*, 13 *Ethics & Int'l Aff.* 81 (1999). Truth commissions, historians, and even judicial processes might contribute to such a “reconciliation” with the past. While such interpretative agreement is arguably desirable and might be aspired to, it is unlikely to be realized unless promoted by morally problematic means such as coercion or indoctrination. The most that democratic reciprocity may be able to achieve is an agreement to disagree or certain matters and a mutually respectful compromise on others.

claims stand up to scrutiny?

To answer this question, it is important first to consider the South African tool of amnesty and also what Tutu means by “forgiveness.” Many Latin American governments guilty of human rights abuses have granted unconditioned immunity to many of their leaders, military personnel, and police. South Africa’s Truth and Reconciliation Commission (TRC) has operated under a different model. The TRC’s Amnesty Committee has awarded amnesty to very few human rights violators. Recall that the TRC granted amnesty if and only if the applicant has shown that his act(s) of commission or omission fulfill three conditions: (i) the act was chosen to advance a political objective (for instance, defense of apartheid or destruction of apartheid); (ii) the means employed were proportional to the end; and (iii) the perpetrator fully disclosed to the TRC the truth about the act. The applicant need not express remorse, confess moral guilt, or request to be forgiven.

An (alleged) human rights perpetrator—whether free, in hiding, indicted, sentenced, or serving time—had two options. He could have chosen not to face the TRC, a choice made by many suspected or imprisoned perpetrators. However, he then ran the risk that he would be implicated by the testimony of others and either face prosecution and possible imprisonment, or, if already imprisoned, an even longer prison term. Alternatively, a wrongdoer could have applied for amnesty. Regardless of whether amnesty was granted or refused, his appearance before the TRC likely would have resulted in some kind of social opprobrium. If he lied to the TRC or failed to fulfill one of the other two conditions, then he risked denial of amnesty and the possibility of prosecution and litigation. If, however, the TRC judges that the wrongdoer met all conditions, he would go free (if already imprisoned) and/or receive legal protection from future legal proceedings.

The TRC’s Amnesty Committee received 7,112 amnesty applications, many from police but disappointingly few from political leaders or military

personnel. By November 1, 2000, the Committee had refused amnesty to 5,392 applicants (77 percent) and granted it to only 849 (12 percent). (Two hundred and forty-eight applications were withdrawn, 54 partly refused, 37 were duplicates, 142 are in chamber, and 88 are scheduled for decision).⁵⁷ In its report, the TRC recommended that “prosecution should be considered” for those persons who had not applied for amnesty or were denied amnesty.⁵⁸

Consider now the second element in the “amnesty-forgiveness” complex. Tutu understands personal “forgiveness” in relation to a Reformation concept of divine grace. For him, forgiveness is completely unconditional; the wrongdoer’s desert or merit—contrition, pleas for forgiveness, making amends, transformation—is entirely irrelevant. Forgiveness is also supererogatory. The victim who forgoes his legal rights to press claims and instead grants forgiveness, expresses, according to Tutu, the virtue of “breathtaking magnanimity”⁵⁹ and “remarkable generosity of spirit.”⁶⁰ Tutu repeatedly marvels at those—especially Nelson Mandela—who have willingly waived their right to make legal claims, setting aside their great personal suffering and freely offering the gift of forgiveness. Finally, drawing a distinction between the (divine) hate of the sin but redeeming love for even the worst sinner, Tutu maintains that there are no unforgivable perpetrators, for each has the potential to accept forgiveness.

Given the South African policy of amnesty and Tutu’s ideal of forgiveness, one can ask the extent to which the South African combination of amnesty and forgiveness has contributed to reconciliation. Further, one wonders whether South Africa would have thwarted or advanced

57. See the TRC website, at <http://www.truth.org.za/PR/1999/pr1999/pr991209a.htm>; see also Margaret Popkin & Nehal Bhuta, *Latin American Amnesties in Comparative Perspective: Can the Past be Buried?*, 13 *Ethics & Int’l Aff.* 99 (1999).

58. Popkin & Bhuta, *supra* note 56; see also Truth and Reconciliation Commission, 5 *Final Report* 309 (1998).

59. Tutu, *supra* note 1, at 10.

60. *Id.* at 145.

reconciliation if it had relied more on trial and punishment and less on the TRC. If South Africa prosecutes those who either never applied for amnesty or were refused it, one can only speculate about what effects such efforts will have on reconciliation. Finally, one wonders if reconciliation is best achieved by granting amnesties, or whether national or international tribunals are the better course of action.

These questions are difficult to answer for at least three reasons. First, the empirical evidence with respect to South Africa has been largely anecdotal; little systematic data examines the TRC's use of amnesty and forgiveness in promoting reconciliation. More generally, few empirical studies compare the effects in different countries of the various types and forms of tools—including amnesties, truth commissions, museums, and trials—for reckoning with past wrongs. Second, one must remember that just because repaired relationships might have followed *after* forgiveness was offered and prosecution foregone, this does not prove that forgiveness without trials somehow *caused* whatever healing occurred. Further, since the TRC granted relatively few applications for amnesty and in its report urged prosecution of those denied amnesty, one cannot know the effect the *threat* of future prosecution may have in achieving reconciliation. If victims believe that there is a good chance that justice will be done rather than ignored or denied, they are more open to reconcile with their abusers. Third, to assess—albeit provisionally and speculatively—the relative impacts of amnesty-forgiveness and trial-punishment on reconciliation, we must do so in relation not only to *ubuntu* but also to the two other senses of reconciliation: peaceful coexistence and democratic reciprocity.

A. Means to Peaceful Coexistence

If reconciliation is conceived as no more (and no less) than peaceful, nonlethal coexistence, then the TRC's amnesty device clearly had some initial success. Without the negotiators' agreement on amnesty, the transition from

an apartheid government to democratic elections and an African National Congress (ANC)-controlled successor government likely would not have occurred. If negotiations had broken down and violence had ensued, it was, as Tutu argues, reasonable to suppose that a “blood bath” or “comprehensive catastrophe”⁶¹ would have resulted. Most observers believe that the agreement on conditional amnesty (in exchange for truth) contributed to averting such nightmare scenarios and, perhaps, when coupled with forgiveness, ushered in the “miracle” of South Africa’s relatively peaceful and democratic transition.

The story, however, is more complicated. Although Tutu describes cases in which confessed violators asked for and received amnesty and victims in turn granted forgiveness, he provides no evidence that these strategies themselves reduced racial and class conflict. Furthermore, even if one grants the pacifying effects of amnesty-forgiveness, these beneficial consequences may prove short lived. If either side comes to believe that the other lied in its testimony or was insincere in offering or accepting forgiveness, social peace will deteriorate.

One may question, however, whether the many people *other* than those who offered and received forgiveness ultimately were satisfied. Even Tutu reluctantly admits that many people on both sides of the apartheid divide believe that the state’s failure to achieve retributive justice increases animosity and even justifies taking justice into one’s own hands. Private acts of vengeance are particularly likely when victims or their families believe that justice has not been done. As Richard Goldstone reminded the delegates at the 1998 Rome Conference (which agreed to establish a permanent international criminal court), “only by bringing justice to victims could there be any hope of avoiding calls for revenge and that their hate would sooner or later boil over into renewed violence.”⁶² Although the high crime levels in South Africa undoubtedly have many

61. *Id.* at 20.

62. Richard J. Goldstone, *For Humanity: Reflections of a War Crimes Investigator* 130 (2000).

sources—including extreme and widespread poverty—it is plausible that amnesty coupled with forgiveness has helped to *undermine* peaceful coexistence. When victims, bystanders, and perpetrators believe that killers neither deserve to be forgiven (at least until after they are punished and make reparation) nor maintain their positions of social privilege, then amnesty-forgiveness may deepen social polarization rather than reduce it. By contrast, if perpetrators of human rights violations get something of what they have coming to them, then former enemies have a reason to renounce vengeance and live together peaceably. Aryeh Neier, president of the Open Society Institute, summarizes some evidence from Bosnia:

Peaceful coexistence seems much less likely if those who were victimized see no one called to account for their suffering. In such circumstances, the victims or their ethnic kin may take revenge themselves, in the same way victims of an ordinary crime might respond if they see no effort by the state to prosecute and punish the criminal. . . . Justice provides closure; its absence not only leaves wounds open, but its very denial rubs salt in them. Accordingly, partisans of prosecutions argue, peace without justice is a recipe for further conflict.⁶³

It is important to stress that the reconciling power of justice occurs not as a result of just any trial and punishment but only when both trial *and* punishment are seen as fair. Although international affairs scholar Gary Jonathan Bass, in his recent *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, argues that although the causes of a defeated Germany's transition (after World War II) to a unified democracy and reintegration into the world community were complex, the procedurally-fair Nuremberg Tribunal was an important factor.⁶⁴ In contrast, following World War I, the Allied-mandated but

63. Neier, *supra* note 15, at 212-13.

64. Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* 147-205 (2000).

locally-run war crime trials in Leipzig and Constantinople whitewashed, respectively, alleged German war criminals and Turks accused of massacring Armenians. The Allies rejected both tribunals as farces while Germans and Turks resented the trials as expressions of their enemies' vindictiveness. The trials contributed to an anti-Allies backlash that only deepened the bitterness between former enemies.⁶⁵ The lesson is clear: only when its means and ends are fair does penal justice have the power to reduce conflict.⁶⁶

A more general rejoinder to Tutu's optimism about amnesty coupled with forgiveness is worth mention. When wrongdoers receive amnesty and are offered forgiveness instead of being justly punished, the effect is likely to strengthen what Latin Americans call a "culture of impunity."⁶⁷ The deterrent effect of prosecution and punishment is weakened when people believe they can break the law and get away with it.⁶⁸ In Africa, this lesson

65. *Id.* at 37-146.

66. As this article is being finished in December 2001, there is much public debate in the U.S. (and abroad) as to whether alleged perpetrators of the September 11, 2001 terrorist attack should be tried in U.S. courts or international tribunals and, if the former, whether the courts should be civilian or military. After the Bush administration authorized the use of closed U.S. military tribunals as the jurisdiction to try suspected terrorists, many have challenged the likely fairness, perceived fairness, and conflict-reducing potential of military courts in contrast to either U.S. civilian courts or international tribunals. See, e.g., Anne-Marie Slaughter, *Al Qaeda Should be Tried Before the World*, N.Y. Times, Nov. 17, 2001, at A23; Harold Hongju Koh, *We Have the Right Courts for Bin Laden*, N.Y. Times, Nov. 23, 2001, at A39; William Safire, *Kangaroo Courts*, N.Y. Times, Nov. 26, 2001, at A17; Alberto R. Gonzales, *Marital Justice, Full and Fair*, N.Y. Times, Nov. 30, 2001, at A27. Apparently responding to public debate and criticism of the military court option, Attorney General John Ashcroft announced on December 11, 2001 that the first person indicted as being part of a terrorist conspiracy would be tried in a U.S. civil court. See Don Van Natta Jr. & Benjamin Weiser, *A Nation Challenged: The Legal Venue; Compromise Settles Debate Over Tribunal*, N.Y. Times, Dec. 12, 2001, at B1. For an incisive discussion of the constitutional and moral issues, see Morton H. Halperin, *Stockade Justice*, American Prospect, Dec. 17, 2001, at 13-14.

67. Comisionado Nacional de los Derechos Humanos, *El difícil tránsito hacia la democracia: Informe sobre derechos humanos 20-21* (1996).

68. See Cynthia J. Arnson, *Introduction*, in *Comparative Peace Processes in Latin America* 10-11, (Cynthia J. Arnson ed., 1999); *La Reforma Judicial: Un Reto Para La Democracia* (Ramón Romero & Leticia Salomón eds., 2000).

has had calamitous consequences. In July 1999, the United Nations, seeking to end the civil war in Sierra Leone, arranged peace accords that included amnesty and high government positions for Foday Sankoh, leader of the main rebel group, and three of his lieutenants. Sankoh's forces are responsible for such horrendous crimes as mutilations, gang rape, and forcing children to massacre their own families. This award of amnesty, as Peter Kakirambudde of Africa Human Rights Watch remarks, "shook the concept of accountability to the core"⁶⁹ and paved the way for the worst kinds of atrocities. His prediction is dire: "For the rest of Africa, where there are rebels in the bush, the signal is that atrocities can be committed—especially if they are frightening atrocities. The lesson to other rebels is that half measures will not do."⁷⁰

Sankoh himself learned the lesson well. When Sierra Leone's coalition government collapsed ten months after the amnesty, Sankoh—emboldened by impunity—resumed the slaughter of his countryman and took 500 UN peacekeepers hostage, killing seven of them. Sierra Leone, the UN, and the US have only begun to learn their own lesson. Acknowledging that amnesty only encouraged Sankoh to recommence and widen his atrocities, Sierra Leone's new government arrested him, and the UN approved an international criminal tribunal for Sierra Leone. Yet Sierra Leone's instability continues. We have not yet seen the end of the damage ensuing from an ill-advised amnesty.

Those contemplating crimes against humanity are deterred—if at all—only when they know such acts seriously risk severe punishment. And such results occur only when the international community establishes stronger ad hoc criminal courts or, even better, a permanent international criminal court, as Bass recognizes:

69. Cited in Steve Coll, *Peace without Justice* 27 (1993).

70. *Id.*

At a minimum, long-run deterrence of war crimes would require a relatively credible threat of prosecution: that is, a series of successful war crimes tribunals that became so much an expected part of international affairs that no potential mass murderer could confidently say that he would avoid punishment. The world would have to set up tribunals significantly more intimidating than the UN's two current courts for ex-Yugoslavia and Rwanda. The proposed ICC would likely help, but only if it somehow receives political support from the same great powers who have largely neglected the ex-Yugoslavia and Rwanda tribunals for so long.⁷¹

Neier argues that although amnesty (and forgiveness) may bring about some healing, it is on a moral par with acceding to the demands of terrorists. Giving in to such demands may save many lives, but acquiescing to terrorist demands "only inspire[s] more terrorism."⁷² He concludes that "the way to stop terrorists is to ensure that they derive no profit from their acts."⁷³ The best way to diminish the possibility of a repetition of atrocities is to ensure that perpetrators are punished for their wrongdoing.

Tutu tries to counter this sort of argument with a marital analogy to argue for unconditioned forgiveness. A victimized spouse, maintains Tutu, should forgive the unfaithful spouse when the latter is contrite and asks for forgiveness.⁷⁴ Yet even or, perhaps, especially in the domestic case, I would argue, this sort of grace is too easy unless the adulterer makes amends and reforms his ways. Undemanding forgiveness encourages a repetition of infidelity. Similarly, for the state simply to offer amnesty to perpetrators, and for victims unconditionally to forgive them, is to compromise the message of "never again" and promote a culture of impunity.

Tutu might respond to this argument as follows. It is true that people sometimes resort to violence when they

71. Bass, *supra* note 64, at 295.

72. Neier, *supra* note 15, at 107.

73. *Id.*

74. Tutu, *supra* note 1, at 151.

perceive that justice has not been done, but this unfortunate fact does not count against the view that amnesty-forgiveness is the best way to reconciliation, since these new wrongdoers would be expressing a morally defective motive (vengeance) and, hence, the proponents of amnesty-forgiveness can ignore the lethal effects of revenge.

Two rejoinders are appropriate. First, those who thwart peaceful coexistence might do so not from revenge but (at least partly) from moral outrage that justice has been denied. Although, as I have discussed above, hybrid cases exist in which both motives are present, surely some acts that imperil peaceful coexistence are done from a sense of deserved justice rather than vengeance or reprisal. This is particularly true when the existing judicial system fails to hold the guilty accountable or to punish them appropriately. A second response to the above argument takes a different tack. Even if it were solely vengeance that motivated all acts that destroyed peaceful coexistence, such acts would have to be part of any consequentialist accounting that compared amnesty-forgiveness, on the one hand, and "prosecution-punishment" on the other. What matters is the comparison of the relative effectiveness of these two tools in advancing (and hindering) peaceful coexistence and not merely the motives with which either tool is employed.

C. Means to Democratic Reciprocity

One also can doubt whether South Africa's amnesties coupled with forgiveness contributed to reconciliation in a second and "thicker" sense of "democratic reciprocity." In this conception reconciliation goes beyond peaceful coexistence to include the give-and-take of deliberation and democratic decision-making. One could argue that South Africa's negotiated settlement and amnesty provision made elections possible and thus contributed to democratic reciprocity. Moreover, the TRC, which helped implement the transition from apartheid, employed internal

democratic processes and achieved broad-based popular participation.

It is unclear, however, that South Africa's victims were democratically represented *initially* in the negotiations; more importantly, they might not have agreed freely to an arrangement that gave even the worst rights violators the opportunity to exchange amnesty for truth. Tutu argues that the negotiated agreement should be taken as the will of the victims of apartheid, since many of the negotiators were themselves victims, and the ANC gained a resounding victory in the initial (and subsequent) national election.⁷⁵ But these arguments are flawed.

The fact that some of the negotiators were themselves victims does not guarantee that the victims excluded from the negotiations would have agreed to the same amnesty provisions. As has been the case in Latin America, opponents negotiating a peace accord might postpone the question of amnesty or, were that not possible, exclude particularly heinous crimes or categories of rights violation from the amnesty option.⁷⁶ Even the 1990 agreement between Chile's Pinochet government and its opponents excluded from the self-amnesty law (which the Pinochet government had passed in 1978) those who took part in a 1976 car bombing in Washington, D.C., which killed former Chilean ambassador Orlando Letelier and his U.S. assistant.⁷⁷ Moreover, ANC electoral success does not imply endorsement by victims of the amnesty provision. The ANC might have received even *more* support had provisions for individual amnesty *not* been part of the negotiated agreement, or if conditions for amnesty had been limited even further. What's more, given the other

75. *Id.* at 56-57.

76. For a comparative discussion of various ways in which Latin American countries have limited amnesty for past perpetrators, see Popkin & Bhuta, *supra* note 57.

77. Recently the Chilean courts have further limited the 1978 amnesty law. Those who ordered—including Pinochet himself—the “disappearance” of hundreds of Chileans are liable to prosecution today for torture because in 1998 Chile signed the International Torture Convention and Chilean courts have ruled that the torture of those still unaccounted for continues into the present.

electoral options, some voters might have voted for ANC candidates but not endorsed the amnesty provision. Although the parents of the brutally-murdered Steve Biko may well have voted for the ANC, they also brought an unsuccessful court challenge against the amnesty provision, forcefully arguing that Biko's murderers be brought to trial.

One can also ask how successfully the strategies of amnesty-forgiveness, on the one hand, and prosecution-punishment, on the other, promote the *process* of democratic reciprocity in contrast to whatever *outcomes* issue from deliberative procedures. Again, little empirical evidence is available, and one must rely on anecdote and hypothesis. One can plausibly believe that seeing the guilty escape punishment, let alone resume their official—even judicial—positions diminishes the credibility of a new democracy and reduces citizen commitment to it. Moreover, fair judicial processes and deserved punishment would sharply distinguish past injustice and present justice—with the result that most people would strengthen their commitment to democratic institutions that instituted fair prosecutions and sanctions.

D. Means to Ubuntu

One wonders whether the South African amnesty mechanism and private acts of forgiveness actually promoted reconciliation in Tutu's preferred sense of social healing and harmony. Results so far are mixed. On the one hand, Tutu recounts wonderful stories of hardened killers who confessed their crimes, expressed remorse, and asked for (and received) forgiveness.⁷⁸ In all likelihood, when confessions are sincere, the granting of forgiveness helps repair personal relationships, especially in cases where perpetrators undergo an inner transformation or voluntarily pay restitution to their victims. On the other hand, one should be skeptical about how widespread such

78. Tutu, *supra* note 1, at 150-51.

transformed personal relationships have been. Notably, Nielsen-Market Research Africa found that two-thirds of the 2,500 South Africans questioned believed that the TRC had caused a deterioration of race relations in South Africa.⁷⁹

What might have been the effects on *ubuntu* if the TRC had given a more robust role to prosecution and punishment? Might not national healing be furthered if South Africa conducts trials of those who were denied (or never applied for) amnesty when these individuals are suspected of planning or executing the most egregious crimes? Many hold the view of philosopher Jean Hampton, among others, that a broken relationship cannot be healed until the perpetrator, who arrogantly violated his victim's dignity, is "humbled," and the victim, who has been degraded, returns to something approaching her proper status.⁸⁰ Judicial processes, punishment, and the payment of reparations can both bring down rights abusers and properly elevate their victims. An act of forgiveness that ignores proper rectification results in a relationship in which at least the victim—if not the offender—feels that the new relationship is not deserved. Hence, genuine forgiveness may require trial, penalty, and restitution if strong reconciliation among persons is to be achieved.⁸¹

Moreover, one can find increasing evidence that *fair* indictments, trials, sentences, and punishments "stay the hand of vengeance," diminish the likelihood of a cycle of

79. "Only Half of People Feel TRC is Fair and Unbiased: Survey. . ." Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* 156,30,37 (2001) (quoting South Africa Press Ass'n, Mar. 5, 1998); see also the important research of the Centre for the Study of Violence and Reconciliation, for example Brandon Hamber et al., *Survivors' Perceptions of the Truth and Reconciliation Commission and Suggestions for the Final Report* (1998), at <http://www.csvr.org.2a/papers/papkhul.htm> (last visited May 9, 2002); Hugo Van der Merwe and Lazarus Kgalema, *The Truth and Reconciliation Commission: A Foundation for Community Reconciliation?*, at <http://www.csvr.org.2a/articles/artnch&1.htm> (last visited May 9, 2002)

80. Jean Hampton, *The Retributive Idea, in Forgiveness and Mercy*, supra note 34, at 111. For a view of forgiveness that captures some elements in the retributive idea, see Little, supra note 8.

81. Hamber et al., supra note 79, at 5, 7, 11-14.

reprisals, and thereby both reduce the polarization between adversaries and help unify the nation. Since Pinochet's arrest in England, threatened extradition to Spain, return to Chile, and possible trial in Chile, more than twenty-five of Pinochet's former officers have been arrested for kidnapping. Former Chilean political prisoners, not blocked by something like South Africa's amnesty agreement, have filed more than 177 criminal complaints accusing Pinochet of torture and kidnapping. Not only did complaints and (prospective) prosecutions *not* undermine Chile's January 2000 presidential campaign and election, but both candidates—including Joaquin Lavín, a former official in Pinochet's government—said prior to the election that Chilean courts should have jurisdiction over Pinochet and justice should be done. As a *New York Times* editorial observed: the fact that "none of this has disturbed Chile's fledgling democracy . . . suggests that those who feared the destabilizing power of justice underestimated its healing effect."⁸² Seven months after the election, the Chilean Supreme Court (voting 14-6) stripped Pinochet of his senatorial immunity from prosecution. Although a small band of Chileans desperately search for a strategy to keep him out of the dock, most Chileans believe prosecuting Pinochet would help unify a divided nation as well as consolidate Chile's democracy.

It is undeniable that national or international trials—because of insufficient resources and or a lack of will to arrest those indicted (Yugoslav and Rwandan tribunals), scapegoating (U.S. trials after the My Lai Massacre), politicization (Leipzig, Constantinople, Republika Srpska), or overly ambitious prosecutions (Argentina)—have not always had such healing effects.⁸³ In reckoning with past wrongs, trials must be combined with other tools, such as truth commissions, reparations, and judicial reform, to achieve success—and even then the beneficial results will not come quickly. Nuremberg, however, shows that

82. *New Twist in the Pinochet Case*, *N.Y. Times*, Jan. 15, 2000, at A16.

83. See Bass, *supra* note 63.

reasonably fair trials and deserved punishment of those most responsible for atrocities help dissolve bitterness and rehabilitate a nation.

It might be argued, of course, that the sort of healing that the Times editorialist extols or that Nuremberg achieved is not that of the mutual love and social solidarity enjoyed by family members. Instead, the healing achieved may be the mutual respect and tolerance of fellow citizens who together deliberated and decided on the common good. This kind of reconciliation is a tremendous accomplishment nonetheless. Amnesty—especially conditional amnesty that is democratically approved—and personal forgiveness may play a role in achieving and sustaining this important goal. Yet, as I have argued, in reckoning with past wrongs, a society must be wary of *overestimating* the restorative effect of amnesty and forgiveness as well as *underestimating* the reconciling power of justice.

CONCLUDING REMARKS

If my assessments of Tutu's arguments and possible counter arguments are sound, several conclusions follow concerning judicial justice and reconciliation. First, Tutu correctly distinguishes the goal of reconciliation in a fledgling democracy from the goal of penal justice. However, since Tutu inadequately conceptualizes both, they are for him unalterably at odds. For Tutu, punishment is nothing more than vengeful getting even for the wrongdoer's past wrong, while reconciliation requires that the wrongdoer be immune from punishment and unconditionally forgiven for his past wrong. The only prospects, at least for South Africa, were retribution and "a society in ashes," on the one hand, and amnesty combined with forgiveness and reconciliation, on the other. In contrast, I have argued that punishment and reconciliation not only are distinct, but that they are intrinsic goods that may reinforce each other.

One can view legal punishment, the state's or international tribunal's intentional imposition of some

deprivation, as justified, among other reasons, because it is prima facie just—or, at least, not unjust—to punish the wrongdoer in a way that does not exceed his crime, apart from whatever good consequences also might occur. Further, both moral and practical reasons exist that justify defining reconciliation not as a social harmony—which might threaten individual rights—but as peaceful co-existence or “civic friendship” (these words are John Rawls’). Through public deliberation fellow citizens respect each other’s rights, are tolerant of differences, and try to reduce disagreements and arrive at compromises that all (or most) can reasonably accept.

Considered in this way, each goal also can instrumentally promote the other. Former enemies can agree to live together nonlethally under the rule of law and reduce their remaining differences through public deliberation. This kind of reconciliation can lead to further agreement that it is not wrong to prosecute and punish at least those *on both sides* who are most guilty of the worst crimes. Likewise, punitive justice can have reconciling power in the sense that upon getting (no more than) what they deserve, perpetrators have set things right and can be reintegrated into society. (This rectification may include—as part of and not a substitute for the punishment—court-ordered restitution of victims).

Furthermore, societies and the international community should design institutions in which the ideals of both just punishment and reconciliation are realized simultaneously in various institutions and tools. Fair trials and just punishments not only mete out what wrongdoers deserve and reject a culture of impunity; they also may bring people together as fellow citizens. Unfair trials, unjust verdicts, or excessive punishment, of course, do just the opposite. Adequate truth commissions not only provide the occasion for a society to deliberate about its past but also to recommend prosecution and provide evidence to judicial authorities.

The goals of penal justice and reconciliation, then, can reinforce each other and be jointly realized in or effected by

the same tools. At the same time, these two goods can also create tensions, since (among other things) morally justified punishment is partially oriented toward the past while reconciliation is an ideal for creating a better future. Unfortunately, in this as in many other cases, all good things do not always go together, and morally costly choices must be made.

At least four ways exist to address clashes of these two ideals. First, the creation of new tools can promote the *joint* realization of just punishment and reconciliation. One example, arguably, is the Spanish indictment and request for the extradition of Pinochet, leading to his subsequent house arrest in England, extradition to Chile, and indictments of Pinochet in Chile. Even if Pinochet never stands trial in his native land, the Spanish, British, and Chilean actions have (i) brought him to “moral ruin”;⁸⁴ (ii) shown that “even former heads of state do not enjoy impunity for crimes against humanity, and may be tried outside the country where the crimes were committed”;⁸⁵ and (iii) helped liberate Chileans from some of their former divisions as well as deepened their fragile democracy.

A second way to resolve the clash of ideals is by a division of labor. For example, trials and truth commissions can work cooperatively, each responsible for emphasizing one of the two ideals—punishment and reconciliation—but not completely ignoring the other. It is better if neither tool is overloaded with functions that the other can perform better. For example, the International Criminal Tribunal for the Former Yugoslavia has indicted, is trying, and is punishing some middle-level implementers, some high (not yet the highest) military commanders, former Yugoslav president Slobodan Milosevic and other alleged planners of atrocities in Bosnia. In contrast, a proposed truth and reconciliation commission, comprised of representatives of the Serb, Croat, and Muslim communities, could investigate and

84. Isabel Allende, *Pinochet Without Hatred*, N.Y. Times Mag., Jan. 17, 1999, at 24.

85. *New Twist in the Pinochet Case*, *supra* note 82.

deliberate together concerning the truth about the past. This kind of investigation and a resultant authorized report would partially settle accounts with the great number of rank-and-file rights violators. Such a report would also go beyond the scope of judicial processes—recognize and applaud those from all sides who found ways to aid their ethnically diverse and endangered neighbors.⁸⁶

The relations of trials and truth commissions can be complementary in a stronger sense, since each body may enhance as well as supplement the other. Fair trials and punishment may contribute to the reconciliation and truth sought by truth commissions. On the one hand, if victims believe that their testimony might be used by national or international tribunals to bring perpetrators to justice, this knowledge can satisfy the thirst for justice and lead to healing. Moreover, as Hayner argues, “prospects that its documentation could be used for international prosecutions could add weight to a commission’s work, focus its targeted investigations, and help shape or clarify its evidentiary standards.”⁸⁷ On the other hand, the evidence that truth commissions unearth may have a positive role to play in judicial proceedings. Moreover, truth commissions, after evaluating the fairness and independence of a country’s judicial system, might recommend judicial reform or argue that an international tribunal should have jurisdiction.⁸⁸

Similarly, a third way to deal with a clash of the two ideals is to embody them sequentially. Among other things, reconciliation was most prominent in the initial stages of both Chile’s and South Africa’s transitions to democracy. Since 2000, however, the time has been ripe for

86. See Neil J. Kritz & William A. Steubner, Comment, A Truth Commission for Bosnia and Herzegovina: Why, How, and When? Paper presented at the Victimology Symposium, Sarajevo, Bosnia, May 9-10, 1998.

87. Hayner, *supra* note 76, at 211. This complementarity, of course, is not automatic; for, as Hayner demonstrates, there are “potential areas of tension” as well, for example, the award of amnesty limits the reach of criminal trials and civil litigation. *Id.* at 206-12, especially 208. For a review of Hayner’s fine book, see David A. Crocker, *Unspeakable Truths by Hayner and Transitional Justice* by Ruti G. Teitel, 15 *Ethics & Int’l Aff.*, 152-54 (2001).

88. *Id.* at 210.

Chile to prosecute Pinochet's chief lieutenants, if not Pinochet himself.⁸⁹ Similarly, subsequent to the work of the TRC, one can be hopeful that in the near future South Africa will vigorously indict and bring to trial those who were denied (or never applied for) amnesty.⁹⁰

Each of these approaches avoids a clash and establishes a reasonable and balanced approach to the goals of just punishment and reconciliation. Notably, Tutu himself justifies South Africa's foregoing of justice by appeal to the ideal of balance: "We have had to balance the requirements of justice, accountability, stability, peace, and reconciliation."⁹¹ The trouble is that the balance that Tutu advocates for South Africa and other societies virtually disregards justice. Even with respect to P.W. Botha, the intransigent and unrepentant former South African president who defiantly rejected a court order to appear before the TRC, Tutu disagreed with those who wanted to see "the leaders of the old dispensation getting a dose of retributive justice."⁹²

What should be done when no resolution of the clash of

89. Pablo DeGreiff has objected that this sequencing of the ends of retribution and reconciliation might be embraced retrospectively but runs into problems as a matter of forward-looking policy. DeGreiff remarks, "Announcing to former perpetrators that they will not be prosecuted now, but rather in five years, will not do much to make prosecutions more acceptable to them" or, we might add, to their supporters. E-mail from Pablo DeGreiff, Professor of Philosophy, State University of New York at Buffalo (Feb. 15, 2000, 2:38 p.m. EST/DST) (on file with the author). This point is indeed worrisome because it seems to be changing the rules of the game during the match as well as keeping a potential indictee in limbo with respect to whether or not he will be indicted and tried. There are two possible strategies to meeting this objection. Authorities could either refrain from adopting sequencing as public policy ("first reconcile and then try"), but later seize it when politically feasible, especially if political will is determined by democratic deliberation. Alternatively, the sequencing of reconciliation-retribution could be democratically agreed to as a matter of policy, as arguably occurred in South Africa's policy of making those refused amnesty vulnerable to judicial processes.

90. Of deep concern is the possibility that the South African government will have insufficient funds or political will to carry through with the judicial processes called for upon the TRC's denial of applications for amnesty. I owe this point to discussions with Alex Boraine and David Dyzenhaus.

91. Tutu, *supra* note 1, at 23.

92. *Id.* at 250.

values seems possible? Perhaps there are cases when (civil) conflicts cannot end or democratization begin unless until some sort of amnesty agreement is reached in peace accords or the formation of a new government. Perhaps plans for trials may have to be postponed, abandoned altogether, or restricted to those suspected of the worst crimes. Perhaps nonretributive considerations such as reconciliation or stability will be the basis for imposing less than the punishment deserved. Under circumstances in which a clash of good ends cannot be deferred or avoided, societies and international bodies in a variety of venues should engage in democratic and public deliberation and decide on the best balance or trade off in that particular situation.

The choices are not merely between, as Tutu assumes, the immoral world of politics on the one hand and the moral/religious realm of forgiveness and love on the other. Politics can be a sphere in which fellow citizens reason together and make costly choices when it is clear that, at least for now, all good things do not go together. As Washington Post editorialist Jim Hoagland observes: "There is no more important new subject on the international agenda than the necessity of balancing the human need for justice and retribution with the state's interest in stability and reconciliation."⁹³ I would amend Hoagland's point to say that in reckoning with past evil, nations and the international community must strive to realize (among other things) both penal justice and reconciliation and balance them in morally appropriate ways.

93. Jim Hoagland, *Justice for All*, Wash. Post, Apr. 19, 1998, at C 7.