

Truth Commissions and Transitional Justice

David A. Crocker

Societies that seek a just transition from authoritarian regimes or civil wars to democracy often must reckon with an appalling history of human rights violations. These abuses—which include extra-judicial killing, genocide, crimes against humanity, disappearance, rape, and torture—are committed by a previous government against its own citizens (or those of other countries), by its opponents, or by combatants in a civil or international armed conflict.

Many discussions commonly assume that there are only two possible responses to past wrongs: trial and punishment, or forgetting the past. Cambodia, for instance, although it is now contemplating the establishment of a joint Cambodian-United Nations tribunal, initially made an attempt at national amnesia. The Khmer Rouge is estimated to have killed between 1.5 and 1.7 million people during its control of Cambodia from 1975 to 1979. Yet when a former top

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leader surrendered to the government in 1998, the prime minister at first declared that the leader ought to be welcomed back “with bouquets of flowers, not with prisons and handcuffs.” The prime minister added that “we should dig a hole and bury the past and look ahead to the twenty-first century with a clean slate.”

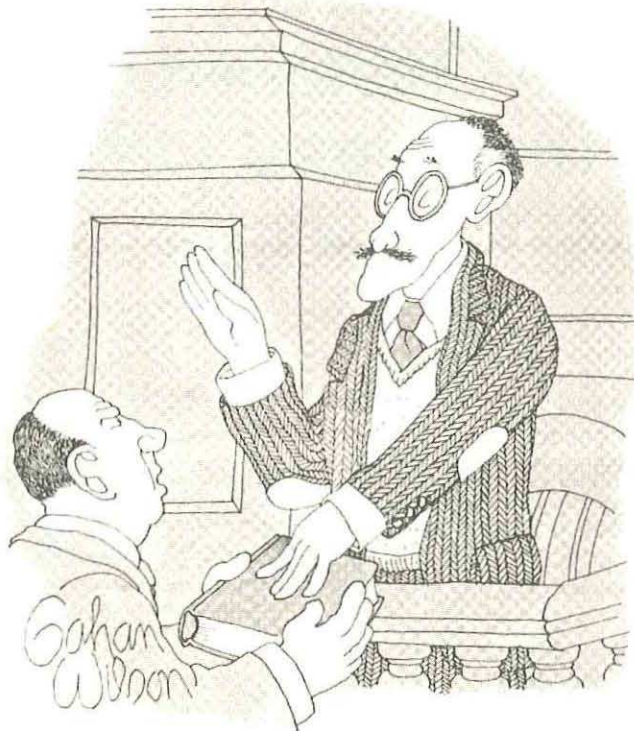
Other societies have rejected this alternative, recognizing that they possess a variety of means to reckon with human rights abuses. These means include domestic trials, international war crime tribunals, investigatory bodies of many types, social shaming, banning of perpetrators from public office (“lustration”), public access to police records, public apologies, memorials to victims, reburial or reparation of victims, literary and historical writing, and the granting of amnesties.

How a fledgling democracy ought to reckon with severe human rights abuses is a question central to the notion of transitional justice. Although “transitional justice” often refers exclusively to prosecution of human rights violators, it is more accurate to apply the term more broadly to cover the possibilities of establishing an accurate account of the past, compensation to victims, fair distribution of goods and opportunities, and the restoration of what has been lost. As a new democracy deals with its “difficult past” by responding appropriately to past evils, it must also take care not to undermine its prospects for future development.

A number of countries recognize that truth commissions are a useful means to achieve transitional justice. At least twenty countries have utilized truth commissions—South Africa and Guatemala most recently—East Timor, Nigeria, and Sierra Leone are currently establishing such bodies, while a dozen or so countries, including Bosnia, Burundi, Indonesia, Kenya, Mexico, Peru, Rwanda, and Yugoslavia are at present considering their use. Although they can further many important goals in societies making their transition to democracy, truth commissions must be supplemented by other measures—such as trials, judicial punishment and reparations—to increase the chance for success of a new, but fragile, democracy. This article explores eight cross-cultural goals that societies and international agencies must achieve to help establish transitional justice and suggests ways truth can contribute to these efforts.

Strengths and Limitations of Truth Commissions

1. Truth. To meet the challenges of transitional justice, a society must investigate, establish, and publicly disseminate the truth about past atrocities. What Alex Boraine, who served as Vice President of South Africa’s Truth and Reconciliation Commission, calls “forensic truth” (or “hard facts”) presents factual information about past atrocities. Most importantly, forensic truth identifies the violators themselves. Despite



"Do you swear to tell the truth, the whole truth, and nothing but the truth, and not in some sneaky relativistic way?"

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the importance of forensic truth, there also exists "emotional truth," that is, knowledge concerning the psychological and physical consequences of the *threat* of abuse. The criterion of truth also requires that more general truths be ascertained—such as the chain of command that led to rights violations and the causal factors that explain them.

Knowledge about the past is important in itself. One way to make this point is to say that victims and their descendents have a moral right to know the truth about human rights abuses. Moreover, without having reasonably complete truth, the other goals of transitional justice cannot be realized. Appropriate sanctions are impossible unless the identity of perpetrators and the nature of their involvement are established. Further, just reparations are possible only if victims are correctly identified and the harms they suffered accurately established. Finally, reconciliation demands agreement about *what* happened and *why*, since former enemies are unlikely to be reconciled if what count as lies for one side constitute verities for the other.

It is not enough for a truth commission to discover the truth about past events. The truth must also be made public and officially acknowledged. Some truth commissions—in order to safeguard witnesses, if not the commissioners themselves—have conducted their hearings and deliberations in private. The South African Truth and Reconciliation Commission (TRC), however, was particularly successful in making its activities public and transparent: it gathered testimony in various locations throughout the nation. Its proceedings were often open to the public and, finally, multilingual media routinely covered such important TRC activities as its hearings on individual human rights violations and its considerations of applications for amnesty.

Although some truth commissions identify publicly specific human rights violators, the most important kind of truth any investigatory body can seek is the discernment of how the commission of atrocities became a matter of policy and, in some cases, a part of the daily life of the society. By taking testimony

directly from the principals—sometimes soon after the violations were investigated—truth commissions can provide a reasonably complete picture of events and their effects on individual lives. Further, unlike traditional judicial bodies, which determine legal guilt or innocence, investigatory bodies such as truth commissions also can profile examples of moral heroism in the face of barbarism. Proponents of a truth commission for Bosnia, for example, stress that such a commission would make public the fact that some Serbs aided their Muslim neighbors (and vice versa): “Against the backdrop of all the evil that has taken place, the tale of the good is a part of the history to be revealed.”

Truth commissions cannot, however, bring *all* truths to light. In order to complete their work within one or two years, truth commissions can investigate thoroughly only several of the many rights violations cases brought before them. Moreover, truth commissions commonly lack the power to subpoena and cross-examine witnesses, search and seize evidence, and independently corroborate witness testimony. Although accurate historical studies have yet to be done, even the relatively incomplete studies that exist are usually more thorough than what is possible for

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truth commissions. Historians typically are far more likely to possess the time and skill in gaining access to documents, sifting through facts, unmasking distortions and lies, assessing explanatory hypotheses, and ascribing responsibility.

Perhaps the most difficult issue a truth commission faces concerns whether there is “one truth or many.” Although most “forensic truths” are relatively uncontroversial, citizens and even members of the truth commission itself will likely disagree strongly about what individual or institution bears most responsibility for the atrocities committed. One can find several approaches to the sensitive subject of ultimate responsibility, a topic that commonly is a central part of a truth commission’s final report. One way, exemplified by Chile’s National Commission on Truth and Reconciliation, is to employ general (and sometimes vague or ambiguous) terms—which achieve unanimity, but at the expense of precision. A second method strives for agreement but also identifies issues that remain matters of contention. In a third approach, which resembles the practice of the United States Supreme Court, unresolved disagreements are formulated as majority and minority judgments in the same

Truth v. Justice: The Morality of Truth Commissions

Robert I. Rotberg and Dennis
Thompson, Editors

The truth commission is an increasingly common fixture of newly democratic states with repressive or strife-ridden pasts. From South Africa to Haiti, truth commissions are at work with varying degrees of support and success. To many, they are the best—or only—way to achieve a full accounting of crimes committed against fellow citizens and to prevent future conflict. Others question whether a restorative justice that sets the guilty free, that cleanses society by words alone, can deter future abuses and allow victims and their families to heal. Here, leading philosophers, lawyers, social scientists, and activists representing several perspectives look at the process of truth commissioning in general and in post-apartheid South Africa. They ask whether the truth commission, as a method of seeking justice after conflict, is fair, moral, and effective in bringing about reconciliation.

“This book discusses the vast and complex range of choices in between blanket amnesty and total accountability through criminal justice, and does so with engaged and critical sympathy.”

—Albie Sachs, Justice of the Constitutional
Court of South Africa

“The case for truth commissions is strongly and persuasively presented in these essays, which bring together a remarkable group of lawyers, political theorists, and historians, all of them intelligently engaged with each other’s concerns.”

—Michael Walzer

In addition to the editors, the contributors are Amy Gutmann, Rajeev Bhargava, Elizabeth Kiss, David A. Crocker, André du Toit, Alex Boraine, Dumisa Ntsebeza, Lisa Kois, Ronald C. Slye, Kent Greenawalt, Sanford Levinson, Martha Minow, Charles S. Maier, Charles Villa-Vicencio, and Wilhelm Verwoerd.

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or even in separate reports. Although these last two approaches to disagreement are respectful of societal pluralism and stimulate further public deliberation, they also suffer the serious disadvantage of undermining the authoritative or collective character the truth commissions intends to convey in issuing a final report.

2. Public Platform for Victims. Any society that hopes to reckon adequately with past political wrongs also must provide a platform for victims and their families to recount their suffering and receive public acknowledgement of their ordeals. Treated with contempt previously, victims who receive public acknowledgement and sympathy are now respected as persons with dignity. The *public* character of the platform is essential, since it is precisely secrecy that made extensive campaigns of terror possible.

Depending on how thoroughly testimony is both gathered and disseminated, truth commissions often succeed in attaining this goal. South Africa's TRC, for instance, took testimony from over 22,000 victims or their families, made its sessions public, encouraged extensive media coverage, including radio broadcasts and nightly and weekly television summaries, and also constructed a useful web site.

3. Accountability and Punishment. Full transitional justice also requires fair ascription of responsibility and appropriate sanctions for abusers. Sanctions commonly include legal imprisonment, fines, reparative payments (punitive damages), public shaming, prohibitions from holding public office, and mandatory community service.

Many questions about responsibility and punishment remain. For instance, assignment of accountability is not always a straightforward matter. It is difficult to agree about the degrees and kinds of responsibility concerning the planning, execution, provision of material support for, and concealment of, atrocities. Some might argue for a greater degree of moral responsibility for "sins of commission" than those "sins of omission." One must also examine to what extent

or, on the other hand, the demonization of all members of an opposing group.

One can also raise difficult questions about sanctions. Transitional societies must decide whether sanctions must be legal ones only, or whether more informal, social sanctions might be effectively used as well. Societies must decide whether the punishment can include a retributive element. If so, safeguards must be in place to assure that retribution does not become

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revenge. It is a difficult matter, finally, to decide how retribution might be balanced against other functions of punishment, such as protection of the public, deterrence, rehabilitation, and moral education.

At first glance it might appear that truth commissions make no contribution to accountability and sanctions. Indeed, Mary Albon, a founder of the Project on Justice in Times of Transition of the Foundation for Civil Society, argues that such bodies are designed precisely as a morally second-best alternative when attributions of guilt and punishment are ruled out because of fears that legal prosecution might divide the society or weaken the new, but incomplete, democracy. Further, societies (such as Chile in the early 1990s) at times choose truth commissions as a last resort, the only response possible when amnesty or other legal maneuvers enacted by the prior regime to protect itself and its functionaries block legal remedies. Alternatively, Archbishop Desmond Tutu, among others, insist that truth commissions—and especially the TRC, which Tutu headed—are not morally second best at all. He insists that they have advanced beyond penal or retributive justice to achieve "restorative justice," a relationship of forgiveness and harmony between human rights violators and their victims.

This view—that the work of truth commissions does not include the search for accountability and the imposition of sanctions—is mistaken on several counts. First, when a truth commission identifies likely violators of human rights, it helps end a culture of impunity in which rights violators get away scot-free. In Argentina, violators identified in that country's truth commission report, *Nunca Mas* [Never Again], have faced social stigma, with fellow citizens shunning former military leaders and expressing their opprobrium by, for instance, cursing and spitting. In South Africa, abusers from many walks of life—including doctors, scientists, clerics, as well as police and military personnel—have had to face their own families who, prior to

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groups—particular police or military units, political parties, or professional groups—are accountable for rights violations. Without a carefully considered view of accountability and responsibility, societies too easily choose the morally objectionable options of, on the one hand, amnesia and uncritical resignation to their past,

truth commission hearings, may have had no idea that spouses or parents took part in horrendous acts.

Sanctions within the power of truth commissions need not be legal in order to impose a burden and control rights abuses. In fact, truth commissions enjoy several advantages over legal prosecution. One advantage is that truth commissions can launch and conclude their work more rapidly than is possible within judicial proceedings. Truth commissions also tend to cost less and address the crimes of more people. Also, in those cases in which a country's judicial system is prone to incompetence or bias, truth commissions may be more effective as well as honest.

Further, as the cases of Argentina, Chile, Guatemala, and South Africa make clear, the work of truth commissions can complement judicial proceedings. In Argentina and Chile, for instance, criminal proceedings followed the publication of each country's truth commission report, while in South Africa, the trial, verdict, sentencing, and imprisonment of police death squad commander and assassin Eugene de Kock took

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place just as the TRC began its proceedings. The information gathered for de Kock's trial subsequently was used by the TRC in its work. Because the courts and TRC worked together, the threat of trial and punishment became a powerful incentive for those suspected of atrocities to apply for amnesty and tell the truth. As an editorial in a South African newspaper observed in 1996, "the perhaps unintended combination of judicial stick and truth commission carrot has emerged as a potent force in flushing out former operatives who have adopted a wait-and-see-attitude."

Truth commissions also often aid the work of the judiciary. The information gathered by truth commissions commonly becomes the basis for legal action against human rights abusers, who ultimately are ordered to pay fines, serve prison terms, pay compensation to victims, perform community service, or accept prohibitions on holding public offices. The Argentine and Chilean truth commissions recommended to their respective judicial authorities that certain individuals be prosecuted, and the commissions provided evidence for judicial processes. Furthermore, the Amnesty Committee of the South African TRC has rejected amnesty requests from—and urged prosecution of—5,392 of 7,112 of those who applied for amnesty. The Committee also advocated prosecution of those it judged to have lied, violated rights with

nonpolitical intent, or caused harm disproportionate to the agent's political aim. And those who never applied for amnesty risk legal prosecution and civil suits.

Finally, recommendations made by truth commissions help remedy the earlier causes of rights violations. Specifically, these recommendations address weaknesses in the judicial system, thereby increasing the possibility of fair judicial processes in the future. Hence, a truth commission's success in getting at the truth is compatible with and often contributes to the assignment of responsibility and imposition of legal and other sanctions. Moreover, unless prosecution accompanies or follows a truth commission, a truth commission by itself might deepen grievances and even incite new violence.

Although truth commissions have particular merit in addressing promptly the causes and consequences of systematic abuses and the problem of collective responsibility, trials are more suitable for holding accountable individual political leaders and the architects of atrocities. The either/or of "truth versus justice" can be avoided, since both truth commissions and trials have distinctive and mutually supplementary roles in achieving the multiple goals of transitional justice.

4. Rule of Law. Transitional societies should comply with the rule of law, which, as legal scholar David Luban argues, is one of the abiding legacies of Nuremberg. The rule of law embodies such principles as respect for due process, evenhanded treatment, and the prohibition against taking private revenge. Rule of law is especially important in new, fragile democracies concerned with distinguishing themselves from prior authoritarianism, institutionalized bias, or the "rule of the gun."

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In some instances, however, truth commissions strengthen the rule of law by publicly investigating all sides in a conflict, recognizing ways in which abusers in some cases also are victims, and adopting measures to reduce bias. One such measure is the appointment of commission members who represent various and opposing political factions and who have a reputation for fairness. Those who write the final report must be vigilant against (but not overcompensate for) unintentional racial, class, or ideological bias. At its best, truth commissions respect both due process in treating persons who come before it and at the same time respect local culture. For instance, South Africa's TRC is notable for its successful avoidance of a "kangaroo

New and Notable:

New Dimensions in Bioethics: Science, Ethics, and the Formulation of Public Policy

edited by

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In the last three decades, bioethics has matured into a field of study with several areas of concentration, including medical ethics, environmental ethics and more recently, genetic ethics. For reasons related to both the developmental history of the subject and to the poignancy of the problems presented, most textbooks and collections of essays have dealt with only a single area, medical ethics. This collection enlarges this restrictive vision of the field. By combining essays relevant to medical ethics with companion essays on environmental ethics and genetic ethics, the book emphasizes similarities in the methods of analysis used in diverse bioethical problems, whether dealing with genes, with people, or with the environment. In this way the book hopes to contribute to the intellectual unity of the subject and to suggest changes in the way bioethics can be taught and studied.

In addition to the editors, contributors are: Robert Burt, Strachen Donnelley, Nina Dudnik, Kelsey A. Hart, William Galston, Jay Katz, Kenneth Kidd, Joshua Lederberg, Carol Levine, Ellen Messer, Dorothy Nelkin, David Pimentel, Robert Socolow, and Arthur Westing.

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truth commission" and for respecting in its own way the rule of law:

Andrew Wilson, a bluff liberal Supreme Court Justice, knows that the hearings, during which the crowd dances around the hall at recess, and people shout abuse at the perpetrators, are not normal courtroom procedure. The hearings are a ritual of empowerment, in which people who, in Desmond Tutu's words, were 'treated like rubbish' all their lives get to be treated like citizens. Wilson knows that they have waited fifty years, in some cases, for this moment, and he lets them have their say. But the hearings must never degenerate into mob justice: when he tells people to put their posters away and sit down, they do. There is discipline here—a complicity between judges and a huge crowd to keep the proceedings fair, even to the perpetrators.

5. Compensation to Victims. Compensation, restitution, or reparation (in the form of income, medical services, or educational and other opportunities) should be paid to individuals whose rights have been violated. Depending on the scope of its mandate and the duration of its existence, a truth commission may contribute to the goal of just compensation. In Chile, a body institutionally separate from the nation's Truth and Reconciliation Commission has compensated the survivors of human rights abuses and the families of

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victims. This division of labor came about because while the truth commission had to complete its work in a relatively short time, a longer period was needed for deciding on criteria for compensation and for identifying and treating harms, some of which emerge years after being inflicted.

In South Africa, the TRC's Reparation and Rehabilitation Committee (R&R) is following the Chilean model. Although it implemented some "Urgent Interim Relief" toward the end of the TRC's life, the R&R's power was almost exclusively that of making recommendations to Parliament. A permanent body, the President's Fund, if accepted, would implement the recommendations themselves. Although truth commissions should not be artificially limited to achieving only one aim—such as truth—they should not be expected to accomplish too much, either. Following Chile's example, South Africa is implementing a refined "reparation and rehabilitation policy" that defends reparation on both moral ("restoration of dignity") and legal grounds and provides several types of individual and communal reparation. Individuals are to be compensated both through monetary packages, which take into account severity of

harm, number of dependents, and access to services, and through services such as reburials and providing of headstones.

6. Institutional Reform and Long-term Development. To reckon fully with past wrongs, an emerging democracy must identify the causes of past abuses and take steps to reform the law and basic institutions to reduce the possibility that such violations will be repeated. Basic institutions include the judiciary, police, military,

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land tenure system, and tax system, and the structure of economic opportunities. One temptation in post-conflict or post-authoritarian societies is to permit the euphoria that arises with the cessation of hostilities and the launching of a new democracy to preempt the hard work needed to remove the fundamental causes of injustice and guard against their repetition. A transitional democratic society must try to remove deeply entrenched causes of human rights abuses—such as poverty, racism, and tribalism—and it must do so in a way that strengthens its democracy and promotes just economic development. The long-term development goal should be that all citizens have opportunities to participate politically and live decently.

A truth commission is well positioned to make recommendations for reforms that enhance civil and economic development. Because of its public prominence, an official investigative body is likely to provoke public debate and encourage national and international efforts to ensure “nunca mas” (never again). Further, a truth commission’s actions can be linked directly to efforts to reduce poverty and racism. For example, confessed human rights violators may make reparations to their victims by contributing time or money to society-wide poverty alleviation. Additionally, the TRC’s “sectoral” approach to institutional reform and long-term development was an important breakthrough in transitional justice. The TRC, for instance, held hearings in such sectors as health, business, the judiciary, the media, prisons, and faith communities, and it encouraged each sector to engage in a process of institutional self-examination and reform. Finally, as political theorists Amy Gutmann and Dennis Thompson argue, a truth commission can contribute to long-term democratization and equal respect for all citizens by practicing in its “process” what it preaches in its “product.”

7. Reconciliation. A newly democratic society in transition from past conflict or repression should aim to

reconcile former enemies and reintegrate them into society. There are at least three meanings of “reconciliation,” ranging from “thinner” to “thicker” conceptions. On the most minimal account, reconciliation is nothing more than “simple coexistence,” which means no more than that former enemies comply with the law instead of killing each other. Although this *modus vivendi* is a momentous achievement and is better than violent conflict, transitional societies should aim for more. While they may continue to disagree and even be adversaries, former enemies must not only live together nonviolently but come to respect each other as fellow citizens as well. Law professor Mark Osiel calls this kind of reconciliation “liberal social solidarity” while Gutmann and Thompson term it “democratic reciprocity.” Among other things, this means that people hear each other out, enter into a give-and-take with each other about matters of public policy, build on areas of common concern, and forge compromises with which all can live.

A third, more robust, “thicker” conception of reconciliation has sometimes been attributed to the truth commissions of Chile and South Africa. Both commissions include the word “reconciliation” in their names, and both understand the term as demanding a shared comprehensive vision, mutual healing and restoration,

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and mutual forgiveness. These “thicker” conceptions of reconciliation are much more difficult to defend than “thinner” notions—which simply require that former adversaries live together peaceably and behave lawfully.

One reason that “thicker” conceptions of reconciliation are unlikely to be realized is that the reduction of enmity between former adversaries—let alone the seeking and granting of forgiveness—is unlikely to occur through the short-term efforts of a truth commission. Transitional justice takes time (often many generations) and goes through several phases; there are limits to what a truth commissions can do in one or two years. True reconciliation is possible only when former enemies work together on common projects over a period of *years*. In fact, the best hope for any form of complete reconciliation lies in a new generation that has not experienced past conflicts.

Further, truth commissions permit—and even encourage—confessions of guilt and mutual forgiveness, especially in a society in which a religious imperative to forgiveness is widely accepted. Yet to prescribe

these acts legally would be to compromise the moral autonomy of both victims and abusers as well as promote feigned professions of guilt and contrition. More generally, it is morally objectionable as well as impractical for a truth commission or any other governmental body to force people to agree about the past, forgive the sins committed against them, or love one another.

8. Public Deliberation. A newly democratic and transitional society that aims at reconciliation should include public debate and deliberation in its goals and strategies for transitional justice. It is unlikely that in any society citizens will agree fully about the aims and means for dealing with past abuses. Moreover, all good things do not always go together, since sometimes achieving one goal comes at the expense of (fully) achieving another. The threat of legal sanctions against human rights abusers, for instance, might abort agreement that would end a civil war, or imperil a fragile democracy in which the military regime responsible for earlier atrocities still wields power. In order to protect witnesses or secure testimony from alleged abusers, truth commissions at times interrogate witnesses or alleged perpetrators behind closed doors. Public testimony, however, may worsen relations—at least in the short run—among former enemies. Or, to cite another example, the resources used by truth commissions to conduct their work might be better employed in alleviating poverty or widening political participation.

Disagreements about ends, trade-offs, and means can be reduced if not eliminated through public deliberation that permits a fair hearing for all and promotes morally acceptable compromises. Investigatory bodies themselves can set a good example. One reason the Argentine, Chilean, and South African truth commissions gained legitimacy was that their respective members represented a wide spectrum of political positions.

Certainly, truth commissions should conduct their activities publicly whenever possible, and their work should be accessible—linguistically and in other ways—to every citizen. Truth commissions have realized this goal of public deliberation and decision making in different ways and to different degrees. The TRC, for example, practiced public deliberation internally, publicly vetted its procedures, stimulated public debate and comment, and responded to public criticism.

Concluding Remarks

Some truth commissions have been more successful than others in achieving these eight goals. Regardless the effectiveness of any one particular truth commission, it is clear that such an investigatory body cannot by itself achieve transitional justice. The most morally adequate societal reckoning with past wrongs occurs in those countries in which the work of truth commissions is combined with other national and international

tools. The publication of a truth commission's work must lead to implementation of its recommendations—the most crucial of these include trials of the most culpable, reparations to victims, and reform of social structures. In short, truth commissions are only the *first* step in a long-term societal effort to reckon with past wrongs. Priscilla B. Hayner, the leading scholar of truth commissions, makes this point well:

A strong truth commission can spark violence if it is not backed up by reasonable and fair institutional responses to gross and widespread human rights crimes. This is most likely to be true where there is intense frustration with the lack of justice, little outlook for change, and no sign of remorse, apology, or even symbolic reparation from former perpetrators and beneficiaries of the abusive rule. . . . The most useful contribution of a truth commission is to open, rather than close, a difficult period of history. Ideally, it should lead to other processes or institutions, such as memorials, museums, new educational curricula, and perhaps other commissions of inquiry or reparations bodies, all of which may better integrate a silenced and conflicted past into a respectful and peaceful memory.

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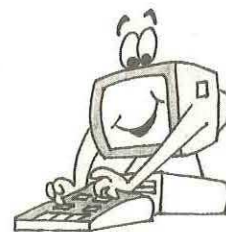
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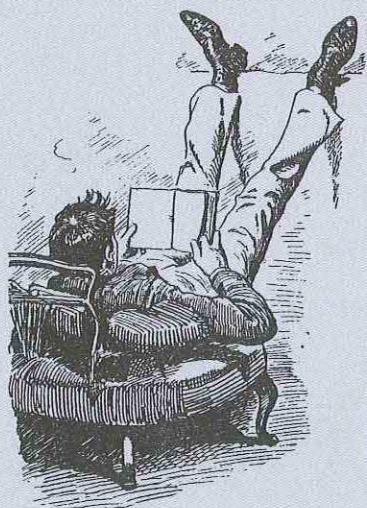
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Announcement— The *Report* to have a new name!

Beginning with the first issue of 2001 (Volume 21, Number 1), the quarterly publication, *Report from the Institute for Philosophy and Public Policy*, will have a new name:

Philosophy & Public Policy Quarterly