

## PART I

*Concepts*

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## CHAPTER 1

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*Making Peace or Doing Justice: Must We Choose?**Nigel Biggar**The Dilemma*

On the afternoon of Saturday 15 August 1998, a bomb planted by a dissident Irish republican group, the self-styled “Real IRA,” exploded in the town center of Omagh in Northern Ireland, injuring hundreds of civilians and killing twenty-nine. The following Friday, the front cover of the British satirical magazine, *Private Eye*, featured Bertie Ahern, the Irish *taoiseach*, and Tony Blair, the British prime minister. Ahern says to Blair, “We’ll hunt the killers down,” to which Blair responds, “And then we’ll let them out.” The words put into Blair’s mouth alluded to the Good Friday Agreement, which had been concluded about four months previously between the British and Irish governments and the representatives of the political parties in Northern Ireland; and according to which paramilitary groups such as the IRA had committed themselves to peace in exchange for the early release from prison of their members.

Strictly, *Private Eye*’s satire was unfair (but then satire usually is). The republican perpetrators of the Omagh atrocity were not covered by the terms of the Good Friday Agreement, which provided for the early release of paramilitary prisoners on condition

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that they belonged to an organization committed to peace. Nevertheless, the satirical exchange between Ahern and Blair nicely captures one of the most controversial issues raised by attempts to find a way forward out of civil conflict—in Northern Ireland, South Africa, or wherever—namely, the tension between the moral demands of justice and the political requirements of peace.

This is not just an academic issue, but one of considerable political importance; for insofar as people regard a political settlement as unjust, they will not support it; and if enough people regard it as unjust, it will cease to be viable. In Northern Ireland, for example, British unionist support for the Good Friday Agreement and the consequent “Peace Process” is precarious; and one of the reasons for this is that many unionists regard as immoral the early release from prison of members of the IRA convicted of terrorist crimes. In South Africa many feel similarly about the Truth and Reconciliation Commission’s granting of amnesty to those guilty of acts of torture and murder, provided only that their deeds were politically motivated and that they made a full public confession of them.

The issue of the tension between making peace and doing justice after civil conflict, then, is of political importance as well as academic interest. It is the main aim of this essay to argue, with special reference to Northern Ireland and South Africa, that the tension is in fact much less severe than some suppose; and that it is a serious misrepresentation of the Good Friday Agreement and of the work of the Truth and Reconciliation Commission (TRC) to describe them simply as trading justice for peace.

*Bypassing the Dilemma: The Policy of Forgetting*

Before I try to make that case, however, I must first address the proposal that the tension between peace and justice is better bypassed than negotiated; that the doing of

justice in the aftermath of civil conflict is impossibly fraught, and should simply be dropped; and that the past and its unredressed grievances are best buried by deliberately forgetting them, by sweeping them under the carpet, by drawing a thick line between past and present, turning around and walking resolutely off into the future.

This policy, were it to work, would have the advantage of not raking over old coals, kindling fading resentments and suspicions, and igniting fresh wrangling over the “truth” about the past and about how much responsibility should rest on whose shoulders. And there is some historical evidence that, at least in certain circumstances, such a policy of forgetting does seem to work. Timothy Garton Ash has offered as instances the examples of post-World War II France and post-Franco Spain.<sup>1</sup>

There is also some evidence that alternatives to the policy of forgetting can be counterproductive. Ash notes, for example, that the current German policy of permitting those informed upon in the former East Germany access to their State Security Service files has resulted in the rupture of relationships and the leveling of unjust accusations. Likewise, in a poll that was published in July 1998, 74 percent of white urban South Africans, and 62 percent of blacks, reckoned that the operations of the Truth and Reconciliation Commission had done more to stir up old resentments than lay them to rest.<sup>2</sup>

Before I try to interpret this evidence, let me declare that I have a strong prejudice against trying to bury the past by deliberate forgetting; and for three reasons. First, some may be able to forget; but not, I think, the victims. Second, if government does not attend to the victims and their injuries, then it fails in one of its most basic political duties; for protecting and upholding victims of injury is one of the basic *raison d'être* of the state. And third, grievances without redress tend to fester. Festering, they help to

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infect future generations with an indiscriminate hatred of the perpetrators and their descendants—and also with an endemic mistrust of the state that, having failed in its duty to vindicate victims past, seems ready to tolerate the injury of victims future. Such hatred and mistrust, then, constitutes an unstable mixture that, under certain conditions, is liable to explode and to rupture the half-forgetful present with the unfinished business of the past. Recent examples of this can readily be found, I think, in Northern Ireland and in Bosnia. And, again, Ash has pointed out the case of postcommunist Poland, where the failure to “purge” high places of former communists suspected of collaborating with the secret police led to the fall of a government and still disturbs Polish politics.<sup>3</sup>

So there are three reasons for my prejudice against a policy of forgetting. But can my prejudice withstand the evidence? How can it make sense of the counterexamples I’ve mentioned?

On South Africa, I could respond to the findings of the recent poll by saying that attempts to dig out the truth are always bound to be disturbing; but they may still be the only way to lay stable long-term foundations for the future. Bringing the truth to light is but the first step in a long process of reconciliation that will take generations to complete. And if that is true of South Africa’s Truth and Reconciliation Commission, it may also be true of Germany’s policy of access to the Stasi files.

But what about the examples of France and Spain? Not being an historian of these countries, I do not have the competence to judge what their historical experiences signify for the issues before us. But if the relevant historical expertise were present, I would interrogate it along these lines. First, how true is it to say that these countries have pursued a policy of forgetting? In France, for example, the end of World War II was

immediately followed by a period of rough reckoning—the *Épuration* (or “Purge”). Surely a policy of forgetting after a period of reckoning is one thing, and a policy of forgetting instead of reckoning quite another.

But even if it were true that a policy simply of forgetting had been pursued, there are still questions to be asked with a view to making important distinctions. What kind of forgetting has been practiced? Presumably, a forgetting of the perpetrators and their crimes. But what of the victims and their injuries—have they been forgotten, too? This distinction is important because remembering the victims and what they have suffered is an important part of doing justice—as I shall explain shortly.

Beyond inquiring about the precise nature of a policy of forgetting, we also have to ask whether or not it is—or was—successful, and what it is that we mean by “success” in this matter. Presumably, we mean a certain level of political stability. But how enduring must this be? On this point, it is notable that Ash himself admits that the policy of forgetting pursued in France was not entirely successful.<sup>4</sup>

If, in the end, we conclude that we have found a case where a policy simply of forgetting has been “successful,” then we have the further task of asking what this implies. Does it imply that a policy of forgetting should always be pursued in the aftermath of civil conflict, or only in certain cases? And, if the latter, then what are the characteristics that differentiate these cases from others?

There, then, are seven questions that I would pose to the example of postwar France and post-Franco Spain or any other case (e.g., post-civil war Ireland) that seems to recommend a policy of forgetting. The rest of what I have to say assumes a negative answer to the sixth question. It assumes that there are at least some cases where the past should not be buried simply by forgetting, where the tension between making peace and

doing justice should not be relaxed by abandoning all attempts at the latter. In these cases, we have to try to bury the past and its lingering grievances, not by sweeping them under the carpet, but by laying them to rest; that is, by doing some kind of justice.

But here, of course, is where the tension arises, and where the attractions of deliberate forgetting seem powerful. For trying to do justice in cases of injury is normally thought to involve punishing the perpetrators. But if the injury has occurred in the political context of a civil conflict, then the perpetrators are likely to see their deeds as justified by their intended service of law and order, or democracy, or national liberation, or socialism, or whatever; and they are likely to regard attempts to punish them as the continuation of war by judicial means. So, at this point, attempts to do justice begin to threaten the negotiated peace, the fragile accommodation that managed to bring civil conflict to an end. What, then, shall we choose? A peace built upon the public suppression of the victim's memories, or a justice that risks bringing war back to life again?

*Negotiating the Dilemma: Reconsidering Justice*

That is the dilemma on which the rest of this essay will dwell. I shall argue that it can be negotiated; that, in fact, it need not present us with a simple choice between peace and justice; and that, in the cases of South Africa and Northern Ireland, the making of peace has involved the doing of some considerable justice. In order to launch this argument I must first open up the question of what we understand criminal justice to be.

My assumption is that it is common to think of criminal justice primarily, even wholly, in terms of the punishment of the perpetrator. My thesis is that this is a mistake, because justice is *primarily* not about the punishment of the perpetrator, but about the

vindication of the victims, both direct and indirect. Before I proceed to argue for this thesis, let me explain it.

First of all, what do I mean by “indirect victims”? When a crime is committed, some people suffer directly from a particular injury, but the whole community suffers indirectly from a general threat. In committing a crime against particular members, the perpetrator at the same time raises himself above the law of the community as a whole. Accordingly, every other member has reason to fear that they might become the criminal’s next victim or the victim of those whom the criminal has inspired. They suffer actual insecurity and anxiety because they are, and perceive themselves to be, potential victims. Therefore, in addition to the direct victims of a crime, there are also indirect ones comprising the rest of the community.

Second, what do I mean by “vindication”? To begin with, I mean the doing of various kinds of non-punitive justice: that is, vindication *apart from* punishment. The basic form that this takes is that of recognising the injury as such, and thereby acknowledging the dignity of the direct victim. To suffer an injury and to have it ignored is to be told, effectively, “What happens to you doesn’t matter, because you don’t matter”. Therefore, to have it acknowledged is to have one’s dignity as an equal member of a human community affirmed. One recent example of the doing of justice through public acknowledgement may be found in the local hearings of the TRC’s Committee on Human Rights Violations, where, as Archbishop Desmond Tutu put it, those who had hitherto been treated like rubbish, could stand up and have their stories heard.<sup>5</sup> Another example would be the publication in 1998 of the report documenting atrocities suffered during Guatemala’s civil war.<sup>6</sup> The first step in vindicating victims—and the first act of

justice—is to give public recognition to the injury and thereby to the dignity of the injured.

The second step, obviously, is to give the direct victims support, material and psychological, and to seek to repair the damage as far as possible.

The third step in vindication is to seek to establish the truth of what happened, why it happened, and who was responsible. The importance to the victims of getting at the truth is something that I have found striking, and rather puzzling. It struck me first when I saw the film version of Ariel Dorfman's play, *Death and the Maiden*. This is set in a South American country (presumably Chile, since Dorfman is Chilean), where a woman, Paulina, realizes that her neighbour, Roberto, is the man who raped and tortured her in prison during the previous, military regime. She kidnaps him and puts him on trial in her living room. The subsequent interrogation reaches this climax:

*Paulina:* ... I'm not going to kill you because you're guilty, Doctor, but because you haven't repented at all. I can only forgive someone who really repents, who stands up amongst those he wronged and says, I did this, I did it, and I'll never do it again.

*Roberto:* What more do you want? You've got more than all the victims in this country will ever get. What more do you want?

*Paulina:* The truth, Doctor. The truth, and I'll let you go.<sup>7</sup>

The importance of getting at the truth also struck me when watching film-footage of the session of the TRC's Committee on Human Rights Violations where Joyce Mthimkulu, whose son, Sipiwo, had been murdered by the police, says this: "If they can just show us the bones of my child, I'll be grateful. Where did they leave the bones of my child? Where did they take him? Who handed him over to them? What did they do to him?"<sup>8</sup>

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The same point struck me again when listening to a relative of one of the victims of the bombing of the PanAm flight over Lockerbie, whose mission in life seemed not so much to get the perpetrators punished as to make the British Government make public what it knew about the case.<sup>9</sup>

In each of these cases, the predominance of the desire for the truth on the part of victims is striking.<sup>10</sup> But it is also puzzling. Because what, exactly, does discovering the truth achieve? What difference does it make?

Here are some suggestions. In a case where the fate of a loved one is uncertain, the discovery of the truth liberates relatives from the excruciating limbo between lingering hope and full-blown grief. The discovery of the truth also helps the victim to understand her suffering, to tie down and delimit its significance—and suffering that we can somewhat comprehend is usually easier to bear. Further, the public identification of the perpetrator subjects him to social pressure to accept responsibility for the injury he committed, and thereby himself to recognize the dignity of the victim.

Further still, if the perpetrator was the servant of a regime wont to violate human rights in pursuit of its political ends, then to make public the truth about his crime will serve to discredit the old regime, and thus help reassure direct and indirect victims that the political future will not be a repeat of the past.<sup>11</sup>

So far, I have asserted that criminal justice is *primarily* about the vindication of victims, and that this vindication may take forms that do not involve the punishment of the perpetrator: namely, recognition of the injury, support of the direct victim, and discovery of the truth.

By this, however, I do not mean to say that punishment has no place in justice at all; nor that retribution has no place in punishment. Punishment is properly retributive in

four respects: first, insofar as it is a response to someone who has committed a crime (and not simply a means of utilitarian social engineering); second, insofar as it asserts the principle of fairness by imposing penalties designed to annul the advantages over others unfairly seized by the criminal through his crime;<sup>12</sup> third, insofar as it expresses the degree of opprobrium with which the community regards the crime; and, therefore, fourth, insofar as there is some conventional or symbolic proportion between it and the penalty.

On the other hand, punishment is not retributive in the sense of annulling the crime itself, because that is impossible. It is true that, in cases of damage to property, reparation or compensation together with “damages” (for the denial of use and mental distress) can go some way toward reversing the effects of the injury; but the victim’s consequently heightened sense of vulnerability, not to mention the breach of trust between the criminal and his community, nonetheless persist. Further, where damage to the person is concerned, the only compensation possible is monetary; in which case, as Sir Walter Moberly put it, “the annulment is *ersatz* . . . .”<sup>13</sup> Nigel Walker, formerly professor of Criminology at Cambridge University, puts it more vigorously: “As anyone who has been mugged or raped is aware, this [the concept of punishment as the annulment of crime] is nonsense. Victims can be compensated, but not unraped or unmugged.”<sup>14</sup> What is true of rape and mugging is, of course, true *a fortiori* of torture and murder.

So, punishment should be considered retributive in certain respects. But retribution is not self-sufficient. Two of its aspects beg the question, To what end? (What is the point of responding to the criminal? What is the purpose of expressing opprobrium?), and two others suffer it (Why try to annul advantages unfairly seized? What is proportionate

punishment intended to symbolise, and to whom?).<sup>15</sup> In other words, within retributive terms punishment is also teleological or goal-oriented—it is intended to realise certain good states of affairs.<sup>16</sup>

Further, of the goals it seeks to realise every one involves—or, depending on the circumstances, *may* involve—the vindication of victims. In responding to the criminal, one goal is certainly to constrain him and another may be to reform him, and through both to protect direct and indirect victims from further injury. In annulling the advantages unfairly seized, one goal may be, where possible, to restore the direct victim's *status quo ante* by compelling the criminal to make proportionate reparation or compensation and to pay damages. In publicly expressing the community's active opprobrium, one goal is to demonstrate solidarity with, and so to reassure, direct and indirect victims. And in conveying that opprobrium in a way that symbolises the damage done, the main goal is to move the criminal to repent and to reform,<sup>17</sup> certainly for the sake of his own moral health, but also for the sake of the future security of his victims.<sup>18</sup>

Before we proceed any further, let me pause to summarise the main features of the account of criminal justice that I have just given. First, criminal justice is primarily, albeit not exclusively, about the vindication of victims, direct and indirect. Second, victims can be somewhat vindicated without punishing the perpetrator at all. Although, third, fuller vindication of victims will require that the perpetrator be subject to a certain kind of punishment. Fourth, within retributive limits this punishment aims considerably at the vindication of victims. And fifth, I have implied that criminal justice is divisible. It has separable parts. One can do some without doing others.<sup>19</sup>

Now that I have explained what I mean when I assert that criminal justice is primarily about the vindication of victims, let me set out some reasons for supposing it to be true.

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One *prima facie* reason why Christians should suppose this is that it is consistently maintained by the body of literature that is fundamental to their religion; namely, the Bible.<sup>20</sup> It is widely recognised that, according to both the Old and the New Testaments, justice is that which defends, restores, and promotes healthy community—its end is *shalom* or social well-being. Accordingly, the primary form of criminal justice is the rescue, deliverance, salvation, or vindication of the oppressed. The punishment of perpetrators is a secondary and subordinate moment in what is basically a reconstructive project.<sup>21</sup> *In nuce*, the biblical concept of criminal justice is eudaimonistic, rather than Kantian.

For non-Christians, of course, that fact that the Bible endorses a certain concept of justice is not so compelling. Nevertheless, insofar as the Bible comprises a tradition of ethical reflection that is the fruit of long experience and multiple historical and cultural points of view, and one which has played a major part in shaping the moral world that the quasi-secularised West still inhabits, even liberal secularists have *prima facie* reason to give this concept their serious and sympathetic attention. However, it is one thing for the biblical tradition to gain our attention, and even to command our provisional assent. It is quite another for it to keep our attention, and to win our considered endorsement. On what grounds, then, might it do that latter? What reasons does critical reflection give us for taking the primarily vindicative<sup>22</sup> concept of criminal justice to be true?

First of all, it would be odd if criminal justice was not at all concerned with repairing the damage done by a crime and removing the threat that it might be repeated. All concepts of doing justice share the basic notion of putting right what is wrong, and the burden of justification lies with those who would restrict justice to one dimension to the exclusion of others. Suppose it were proposed to limit justice to the reform of the

criminal. Why should the repair of the guilty be permitted to eclipse that of his innocent victims? Moreover, how could such a policy be coherent, given that indifference to his victims is one of the very vices of which the perpetrator needs to be cured? Suppose, next, a concept of justice confined to the ‘balancing’ of a crime with a ‘fitting’ punishment. What would be the worth of such a ‘balancing’ abstracted from the concrete work of repairing the damage to real people, relationships, and communities? Why should we prefer the aesthetic pleasure of an abstract symmetry to the achievement of human salvation? If this line of argument is cogent, we may conclude that the vindication of victims should be at least one of the modes of righting wrongs, one of the basic principles of criminal justice, alongside the retributive ‘balancing’ of crime and punishment, and the reform of the criminal for his own sake.

However, although each of these principles is basic in that it is self-standing, the vindication of victims is nevertheless primary. This is not because it informs all of the aspects of retribution to a greater or lesser extent; for the same could be said of the ‘balancing’ of crime and punishment, or of the criminal’s reform *per se*. Rather, it is because the vindication of victims enjoys two kinds of predominance. It is predominant in relation to retributive ‘balancing’, because this can only make itself ultimately intelligible by appealing to goals such as the vindication of victims or the reform of the criminal. And it is predominant in relation to the latter, because victims, not their oppressors, have first claim upon the attention and resources of succour.

Having both explained and argued for the primacy in criminal justice of the vindication of victims, it remains for me to bring this understanding of justice to bear directly on the main issue before us—the extent to which we have to choose between the political demands of making peace and the moral claims of doing justice—and I will

do so in terms of the peace-processes in South Africa and Northern Ireland.

*The Case of South Africa*

In South Africa the chosen route from civil conflict to a peaceful future has been by way of a Truth and Reconciliation Commission. One of the most controversial features of the TRC was its power of granting amnesty to those who made a full public confession of injuries they had perpetrated, and that were politically motivated. Repentance and reparation by perpetrators were not required. This means that many people have been allowed to get away with deeds of torture or illegal killing, without being formally sentenced and punished—and without so much as an apology. To this extent peace has indeed been bought at the price of justice.

On the other hand, the amnesty granted was not a blanket one. The condition of political motivation permitted the commissioners to reject applications in cases where the means used were disproportionate to the declared political end, and which were therefore more reasonably attributable to racism or sadism.

Further, the requirement that amnesty applicants make confession of their deeds in public—and the public here, thanks to broadcasting, was nationwide—subjected them to punishment in the form of exposure to the opprobrium of the national community, and even of their own racial group, albeit not in the ritual form of receiving a judicial sentence. In some cases, the trial of making public confession and suffering public exposure moved applicants to public repentance.

Further still, since the public confessions of agents of the apartheid regime disclosed the state-authorized nature of many of the violations of human rights, they have helped to discredit the regime in the eyes of many of its more passive supporters, to bolster support for a genuinely new regime, and to reassure direct and indirect victims that the

future will not be a repeat of the past. It is true that the granting of amnesty was not made conditional upon the applicant making reparation to his victim; and therefore that this way of bringing home to the perpetrator the damage he had done, and so of encouraging him to repent, was let go. Nevertheless, through its Committee on Reparation and Rehabilitation,<sup>23</sup> the TRC was able to make recommendation to the president for appropriate reparation to victims by the state. At the time of writing (June 2002), however, the South African government continues to be criticised for its slowness to act on the matter of reparations, and for the paucity of the funds it has earmarked for it.

Finally, through its Committee on Human Rights Violations, the TRC offered some victims the opportunity to tell their stories, not only in public, but in the context of a legally authorized, quasi-judicial institution. It thereby gave them a measure of acknowledgment and validation of their dignity by the national community through the state.

#### *The Case of Northern Ireland*

In Northern Ireland, as indicated at the beginning of this essay, one of the most controversial elements of the “Peace Process” has been the provision in the Good Friday Agreement for the early release of paramilitary prisoners. This has been controversial because many in Northern Ireland, especially unionists, regard it as trivializing the victims’ injuries. It should also have been controversial—although, to my knowledge, it has not been—because of its indiscriminate nature: that is, because it applies equally to all members of qualifying organizations, whether or not their crime was the shooting of an armed soldier or the indiscriminate bombing of a pub packed with civilians.

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On the other hand, the injuries suffered by victims are taken seriously by the national community, insofar as the British government has put in place a system of reparation and support. Although whether this system is sufficiently extensive and generous, remains a politically moot point.

Further, in many cases, the perpetrators of their injuries have been convicted and sentenced for their crimes, which means that these have been exposed to public opprobrium. It is true that since this opprobrium has not been forthcoming from the perpetrators' own (republican or loyalist) communities, it will not have been experienced by them as punishment. Nevertheless, its judicial expression will have assured victims, direct and indirect, of the state's support. And in that the Good Friday Agreement provided only for the release of prisoners, and not for their pardon, the public verdict still stands.

Moreover, the perpetrators did serve part of their original sentences, in many cases most of it, before their release. This means that they have paid a considerable price for the unfair liberties they took, though less than the conventionally proportionate one.

In the immediate aftermath of the Good Friday Agreement, there was reason to venture trust that the subscribing paramilitary organisations were sincere in their renunciation of violence and in their commitment to exclusively political activity.<sup>24</sup> Accordingly, it was reasonable to hope that paramilitary prisoners, once released, would not resort to their criminal ways, and that therefore the policy of prisoner-release would not compromise that dimension of justice concerned with the protection of victims—especially since the prisoners were released on a licence that is revocable on evidence of reversion. More than four years on, that trust and hope seem less reasonable, but not yet foolish. For example, the IRA, on the one hand, have ceased to attack security forces in

Northern Ireland and targets on the British mainland, and they have engaged in some token 'decommissioning' of weapons. On the other hand, they have not dismantled their military capability; they have been discovered trying to buy arms in Florida and liaising with guerrillas in Colombia; they have been implicated in sectarian murders; and they have continued to mete out horrendous 'punishment beatings' as a means of maintaining control over local communities for political and racketeering purposes. It still seems unlikely that they will return to a full-scale military campaign, especially now that the American government has been provoked by the attacks on New York and Washington to launch a global crusade against terrorism; but they may well continue to use low-intensity violence at a local level. In that case, the release of paramilitary prisoners will not have compromised the safety of potential victims on the British mainland, or members of the security forces and the middle classes in Northern Ireland. Whether it will have diminished the security of those living in working-class areas subject to paramilitary control, will depend in part on how assiduous the state is in revoking the licenses of released prisoners who have reoffended. It has revoked some.<sup>25</sup>

### *Conclusion*

My conclusion, then, is that thinking of criminal justice primarily in terms, not of retribution, but of the vindication of victims significantly relaxes the tension between it and the politics of making peace. This is because it recognises that the ultimate goal of justice is also to make peace—by repairing damage, protecting victims, and reforming criminals—both apart from, and also through, retributive punishment. In light of this reconception, it becomes apparent that the peace processes in South Africa and Northern Ireland have involved the doing of considerable justice, notwithstanding their suspension or abbreviation of judicial retribution.

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Some might object that justice in both cases has nevertheless been unacceptably compromised. In South Africa persons guilty of committing or authorizing gross violations of human rights have gone unpunished; and retributive punishment, if not the whole of justice, is certainly part of it. To this a two-fold response may be given. First, retributive punishment is not an end in itself; and some of its purposes have been achieved by other means—the informal communication of public opprobrium, the protection of direct and indirect victims, and the repentance of some perpetrators. Second, all actualizations of justice by human beings in the world of time and space are limited, and it is arguable that no other means available in the circumstances would have achieved more justice than the TRC.<sup>26</sup>

In Northern Ireland, some might object, justice was intolerably compromised in that persons guilty of grave crimes have been released from prison after serving only light sentences. A response to this should begin by noting that sentencing is not a science, and that in most cases the fittingness of a sentence to a crime is bound to be crude and largely conventional.<sup>27</sup> Add to this the fact that in all the crimes under consideration political motives played a part, and one then has a reason for treating them differently from normal cases. Nevertheless, it remains true that the excessive and indiscriminate nature of some of the crimes suggest that sectarian hatred, rather than concern for rational political ends, was the predominant motive, in which case the reason for special treatment diminishes and the compromise of justice at this point increases.

#### *A Theological Coda*

This essay is the work of a Christian moral theologian and it has been shaped by Christian belief in at least two main respects. The exposition of its argument will not be complete, therefore, until these have been brought to the surface.

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I have already implied that my predisposition in favor of a constructive, teleological concept of justice owes much to the influence of the Bible, with its concept of justice as the vindication of the oppressed. Correlatively, this influence has inclined me to regard with scepticism a simply retributivist rationale for punishment.

It is true, of course, that there are plenty of Christians who are simple retributivists, regarding retribution as the main or even sole aim of punishment, and conceiving it in terms of the imposition of an equality of suffering. Indeed, one of the reasons why unionist support for the Good Friday Agreement is so equivocal is that many unionists are evangelical Protestants, who subscribe to a Calvinist doctrine of the Atonement, which sanctifies a retributivist concept of punishment.<sup>28</sup> Nevertheless, it seems to me that any retributivist who reads the New Testament with an open mind cannot but be unsettled by the recurrence of the themes of compassion, mercy, forgiveness, and reconciliation, and of the prohibition of vengeful retaliation, and be pressed to think again upon the question, “What, exactly, is the point of retribution?”

The second point at which the argument in this essay bears the impress of Christian belief is in its advocacy of a certain acceptance of the limits of human justice. The notion that human justice is limited is, of course, neither novel nor surprising. But the disturbing severity of those limits becomes all too clear in the context of thinking about doing justice after a civil conflict that has involved gross and widespread violations of human rights. Here the natural fragmentariness of human justice is writ larger. Here the political and economic constraints are much more obvious. Certainly, here as elsewhere one may hope to do some justice for some of the survivors, although none for the dead; but here the numbers of dead are so great as to inhibit our customary oversight.

Further, if the ultimate fulfillment of justice is reconciliation (and I believe it is), and if

reconciliation requires forgiveness (which it does), and if only the victim has the right to forgive her injurer (which is the case), then, within the world of time and space, full justice in cases of murder is impossible, since the victim, being dead, cannot forgive.<sup>29</sup>

The severity of the limitations that constrain the realization of secular justice raises a series of questions. Can we continue to gaze upon the vast sea of unvindicated dead without hope and yet still with care? Or shall we preserve hope by ceasing to care for the hopeless, rationalizing them as the inevitable “refuse of an [emancipating] historical process”?<sup>30</sup> But would not such rationalizing of the unrelieved suffering of others diminish our own humanity with a certain callousness?<sup>31</sup> How, then, can we acknowledge the mountainous horizon of unfinished—and, secularly speaking, unfinishable—judicial business, and still prevent our commitment to justice either from hardening into an uncompromising demand for perfection here and now that only multiplies injustice, or from dissolving into despairing inertia?

One answer to these questions—and one that has informed this essay’s readiness to countenance a measure of provisional compromise—lies in the traditional Christian (and Jewish) notion of eschatological hope—hope that, beyond time and space and by the superhuman power of God, the vast majority of victims who have received no justice in this world and the rest who have received only fragments and tokens of it, will yet be fully vindicated. Now, as Max Horkheimer has rightly pointed out, the “monstrousness” of the thought that there is no final justice, no vindication for the wronged dead, does not amount to a cogent argument for its contrary.<sup>32</sup> Nevertheless, if eschatological hope is necessary to render rational and possible an acceptance of the severe limits of secular justice that is not acquiescent but expectant, not resigned but resolute; and if the rightness of that resoluteness seems to us quite as true as anything else we believe in;

then that is one reason for supposing eschatological hope to be true, too. And there may well be others.

#### *Endnotes*

1. Timothy Garton Ash, "The Truth about Dictatorship," *The New York Review of Books*, 19 February 1998, 35, 40. Ash, perhaps wisely, is equivocal about whether France and Spain furnish us with examples of "successful" policies of forgetting. On the one hand, he judges that "the ancient case for forgetting is much stronger than it is quite comfortable for historians to recall" and cites postwar France as a "successful democracy." But on the other hand he notes that in France the policy of obliviousness followed an initial period of *épuration* (35) and was pursued "at a cost, which often has not shown up until a generation later" (40).

2. Rian Malan, "South Africa's bid to bury its past ends with few truths and little reconciliation," *The Sunday Telegraph*, 2 August 1998, 24.

3. Ash, "The Truth about Dictatorship," 38.

4. See note 1. It is also notable that, after two generations of silence, attempts are now being made in Spain by the Association for the Recovery of Historical Memory to bring the Civil War's atrocities back into public mind by pressing the Spanish government to dig up the mass graves of Franco's victims (Giles Tremlett, "Bringing Franco's Crimes to Light", *the Guardian*, 1 July 2002, p. 15).

5. Recorded in "Getting Away with Murder," a BBC TV documentary about the TRC, which was presented by Michael Ignatieff. Originally broadcast on 1 November 1997 as part of the "Correspondent" series, it subsequently won the Royal Television Society Award and the Golden Nymph and UnDa Awards at Monte Carlo.

6. Oficina de Derechos Humanos del Arzobispado de Guatemala (ODHAG), *Guatemala: Nunca Más*, 4 vols. (Guatemala: ODHAG, 1998); published in English as REMHI/ODHAG, *Guatemala: Never Again!* (London: Catholic Institute for International Relations and Latin American Bureau, 1999). The report was the product of the project for the Recovery of Historical Memory (Recuperación de la Memoria Histórica, REMHI), sponsored by the Human Rights Office of the Catholic Archdiocese of Guatemala.

7. Ariel Dorfmann, *Death and the Maiden* (London: Nick Hern Books, 1991), 44.

8. In “Getting Away with Murder.”

9. On “Thinking Allowed with Laurie Taylor,” BBC Radio 4, 19 August 1998.

10. The desire for truth does not necessarily supplant the desire for retribution. Joyce Mthimkulu later opposed the granting of amnesty to her son’s killers—partly because the political nature of their motivation was dubious, and partly because they showed no remorse.

11. This I take to be implicit in Charles Villa-Vicencio’s evaluation of the TRC: “Suffice it to say, that, for all the failures of the Commission, it is largely as a result of its work that few, if any, South Africans can ever again . . . say, ‘We did not know’” (“Learning to Live Together with Bad Memories,” paper presented at the University of Leeds, 25 November 1999). The point is made explicit in *Reconciliation through Truth*, where Kader Asmal and his coauthors assert that the public establishment of the truth about the old apartheid regime is a vital step toward both bolstering support for the new one and ensuring that it really is different: “In these early years of consolidating democracy, there must be a galvanising and self-critical vision of the goals of our society. And such a

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vision in turn requires a clear-sighted . . . grasp of what was wrong in the past. . . . An important goal of the [Truth and Reconciliation] commission is to act as a catalyst for swift and thorough disclosure of past horrors, in order to . . . end . . . the steady and corrosive drip of past pathologies into the new order” (Kader Asmal, Louise Asmal, and Robert Suresh Roberts, *Reconciliation through Truth: A Reckoning of Apartheid’s Criminal Governance* [Oxford: James Currey; New York: St. Martin’s Press, 1997], 6, 26).

12. This rationale is controversial. John Finnis espouses it (*Natural Law and Natural Rights* [Oxford: Clarendon Press, 1981], 260–64). Nigel Walker rejects it (*Why Punish?* [Oxford: Oxford University Press, 1991], 74–76), noting that Andrew von Hirsch, one of retributivism’s most prominent contemporary advocates, eventually abandoned it (*ibid.*, 150–51, n5). Walker is right to argue that not all crimes can be thought of as the seizing of unfair advantages. It is hard to see, for example, what advantages IRA members could be thought to have gained by their crimes, and which could be “annulled” by a prison sentence. Nevertheless, there are other kinds of crime—for example, those involving material gain—which can be sensibly thought of in these terms.

13. Sir Walter Moberly, *The Ethics of Punishment* (London: Faber and Faber, 1968), 188–89.

14. Nigel Walker, *Why Punish?*, 74.

15. I say that the annulment of advantages unfairly seized and proportionate punishment ‘suffer’ rather than ‘beg’ the question of its end or goal, because their immediate rationale lies in the non-teleological concept of fairness. Nevertheless, the annulment of the criminal’s advantages may sometimes also be ordered to the goal of restoring the victim’s losses; and it is arguable that, in aspiring to proportionality, punishment seeks also to symbolise the destructiveness of the crime and to communicate this to the

criminal, with a view to fostering his repentance, reform, and rehabilitation, thereby promoting the security of his fellow-citizens.

16. I say “teleological” here rather than “utilitarian” because, on this account, while punishment aims to promote the welfare of certain classes of human beings—direct victims, indirect victims, actual criminals, would-be criminals—it does not pretend to be able to calculate, much less advance, “utility” (i.e., the maximal happiness of the maximal number of people).

17. Nigel Walker doubts that the repentance or spiritual improvement of the criminal can be a (or the sole?) reason for punishment, because the latter would lack justification in cases where the offender persists in maintaining the moral rectitude of his action; and he also regards as “feeble” the reply to this, given by some Christian theologians, that one cannot be certain that the offender will persist in this attitude forever (*Why Punish?*, 78). The logic of Walker’s argument, however, does not permit the conclusion that repentance can never be a reason for punishment; it implies only that it cannot always be so and that in those cases there must be other reasons. And where offenders “are most unlikely to be brought to repentance by any punishment that can be inflicted on them” (ibid.), is it really more “feeble” to maintain humility about one’s capacity to predict the ways of the human heart and to persist in granting benefit of doubt to improbable cases, than to let go hope and relax into a certainty to which reason gives one no right?

18. An impenitent criminal remains a threat, unless he is subject to temporally infinite constraint, and except in cases where the rationale for his criminal action has been removed by a change in external circumstances (e.g., where the rationale for “terrorist” activity by members of a paramilitary organization has been removed by the commitment of that organization to peaceful, political means).

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19. The theory of criminal justice that I am proposing is similar to Charles Villa-Vicencio's theory of "restorative" justice, but differs in being less equivocal about the role of retribution. Although Villa-Vicencio recognizes "what may well be a legitimate basic need for censure and punishment," he is inclined to speak of restorative justice as an "alternative" to retributive justice (as the title of his essay indicates: "A Different Kind of Justice: the South African Truth and Reconciliation Commission," *Contemporary Justice Review*, 1 [December 1998]: 407–28). However, what he means by "restorative justice" is, in fact, a form of criminal justice in which retribution is subordinate to constructive ends.

20. Since the Christian Bible contains the ancient Hebrew Scriptures, Jews also have a *prima facie* reason for affirming this concept of criminal justice.

21. It is a measure of the widespread acceptance of this view that it is a commonplace in dictionary articles on biblical and Christian concepts of justice. See, for example: E.R. Achtemeier, "Righteousness in the Old Testament", in G.A. Buttrick (ed.), *The Interpreter's Dictionary of the Bible*, 4 vols. (Nashville: Abingdon Press, 1962), vol. 4, 80-83; P.J. Achtemeier, "Righteousness in the New Testament", in G.A. Buttrick (ed.), *The Interpreter's Dictionary of the Bible*, 4 vols. (Nashville: Abingdon Press, 1962), vol. 4, 91, 92, 98; Duncan Forrester, "Justice", in Adrian Hastings, Alistair Mason, and Hugh Pyper (eds.), *The Oxford Companion to Christian Thought* (Oxford: Oxford University Press, 2000), 360; Nicholas Wolterstorff, "Justice and Peace", in David J. Atkinson and David H. Field (eds.), *The New Dictionary of Christian Ethics and Pastoral Theology* (Leicester: IVP, 1995), 15-19; and William Werpehowski, "Justice", in James F. Childress and John Macquarrie (eds.), *A New Dictionary of Christian Ethics* (London: SCM Press, 1986), 330.

22. Although 'vindicative' may be used as a synonym for 'vindictive', it is clear, I hope,

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that this is not how I am using it here.

23. The work of the TRC was divided into three committees: the Committee on Human Rights Violations, the Committee on Amnesty, and the Committee on Reparation and Rehabilitation. For a succinct description of the aims and structures of the TRC, see *Essays on the Truth and Reconciliation Commission*, South African Embassy Information Series, No. 4 (The Hague: Embassy of South Africa, April 1998), 6–8.

24. There was plenty of evidence that the IRA, for example, had come to the conclusion that they could not win the war against the British and that their violence was politically futile. See, for example, Fionnuala O'Connor, *In Search of a State: Catholics in Northern Ireland* (Belfast: Blackstaff Press, 1993), 83, 133, 369; and Peter Taylor, *Provos: the IRA and Sinn Féin* (London: Bloomsbury, 1997), chapter 22, “Endgame”.

25. For example, the infamous loyalist paramilitary, Johnny ‘Mad Dog’ Adair, who had been released in April 1999 under the Good Friday Agreement after serving less than one third of his 16-year sentence, was sent back to serve the rest of his term in August 2000 upon being found to have broken the terms of his release. He was, however, freed again on 15 May 2002, after been granted “more than 50 per cent remission for good behaviour” (Ted Oliver, “Cheers as loyalist’s Mad Dog leaves jail”, *Daily Telegraph*, 16 May 2002; republished in *New Dialogue News*, Bulletin 111 [June 2002], p. 15).

26. Kader Asmal and his coauthors give an extensive list of “sound reasons” why South Africa preferred a Truth and Reconciliation Commission to the holding of Nuremberg-style trials of the officials of the apartheid regime: (1) there was no certainty that “victors’ justice” could have been imposed in the political circumstances that obtained; besides, (2) such justice would have been selective and politically opportunistic; (3) a judicial process would have focused too much on the perpetrators at the expense of the

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victims; and (4) it would have focused on individuals rather than the regime; (5) the conduct of criminal trials would have placed the prosecutorial bureaucracies of the old order in a position of enormous influence; and (6) “the necessity to prove the minutiae of individual cases beyond a reasonable doubt in an elaborate and formal process can establish an uneven playing field in favour of the perpetrator; and it can constipate historical debate” (*Reconciliation through Truth*, 18–20).

27. Nigel Walker: “[N]obody nowadays regards precise commensurability as an achievable aim” (*Why Punish?*, 101–02).

28. For this reason, many religiously serious unionists are irritated by the naming of the accord reached in Belfast on 10 April (Good Friday) 1998 as the “Good Friday Agreement,” because whereas (in their eyes) the original Good Friday represented the expensive achievement of God’s grace through Jesus’ vicarious suffering of just retribution, the Belfast Agreement has offered cheap grace to impenitent criminals.

29. This is a point made by more than one of the Jewish contributors to Simon Wiesenthal’s book, *The Sunflower: On the Possibilities and Limits of Forgiveness* (New York: Schocken Books, 1997), including Abraham Heschel (164–66) and Dennis Prager (216–20). It is true that the murdered victim’s relatives and friends may forgive the injury done them, and that God may forgive the injury done Him (through the infliction of damage on His creature), but it remains true to say that no one can forgive the injury suffered by the victim except the victim herself. For a fuller discussion of this and related matters, see Nigel Biggar, “Forgiveness in the 20<sup>th</sup> Century: A Review of the Literature, 1901–2001”, in Alistair McFadyen and Marcel Sarot, eds., *Forgiveness and Truth* (Edinburgh and New York: T. & T. Clark, 2001).

30. Helmut Peukert, “Fundamental Theology and Communicative Praxis as the Ethics

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of Universal Solidarity,” in James A. Reimer, ed., *The Influence of the Frankfurt School on Contemporary Theology* (Lampeter: Mellen Press, 1992), 233.

31. Peukert makes a similar point: “How can one retain the memory of the conclusive, irretrievable loss of the victims of the historical process, and still be happy, still find one’s identity? If for the sake of one’s happiness and one’s own identity this memory is banished from consciousness, is this not tantamount to the betrayal of the very solidarity by which alone one is able to discover oneself?” (H. Peukert, *Science, Action, and Fundamental Theology: Toward a Theology of Communicative Action*, trans. James Bohmann (Cambridge, Mass. and London: MIT Press, 1984), 209.

32. Max Horkheimer: “The thought is monstrous that the prayers of the persecuted in their hour of greatest need, that the innocent who must die without explanation of their situation, that the last hopes of a supernatural court of appeals, fall on deaf ears and that the night unilluminated by any human light is also not penetrated by any divine one. The eternal truth without God has as little ground and footing as infinite love; indeed, it becomes an unthinkable concept. But is the monstrousness of an idea any more a cogent argument against the assertion or denial of a state of affairs than does logic contain a law which says that a judgement is simply false that has despair as its consequence?” Quoted by Peukert in *Science, Action, and Fundamental Theology*, 209–10.