

ON LEGITIMACY THEORY AND THE EFFECTIVENESS OF TRUTH COMMISSIONS

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I

INTRODUCTION

The world has clearly registered its opinion about the desirability and effectiveness of truth commissions. From South Korea to Peru, truth commissions (and functionally equivalent institutions) have been established as a means of addressing historical injustices.¹ Indeed, out of the limited list of mechanisms for dealing with historical injustices and preparing a pathway toward a more secure and democratic future, truth commissions stand out as a very common choice of states haunted by their own histories.²

But are truth commissions effective? Of course, the first part of the answer

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1. See, e.g., James L. Gibson, *The Contributions of Truth to Reconciliation: Lessons from South Africa*, 50 J. CONFLICT RESOL. 409, 409–10 (2006) (noting the establishment of about two dozen such commissions).

2. *Id.* (noting its popularity); PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY 251 (2001) (predicting increased use of truth commissions in the future). Hayner documents and compares attributes of all twenty-one truth commissions that had been created by the turn of the century, from the Uganda commission in 1974 to the Sierra Leone Truth and Reconciliation Commission of 2000–2001. *Id.* at 32–71.

to this question requires an answer to an earlier query: Effective at what? Can a truth commission create a democratic political system? Probably not. Can it erase a history of intense political conflict, bringing all sides together in a spirit of mutual respect and cooperation? Surely not. But, to lower our expectations, can a truth commission contribute to a collective memory for a society, providing at least some common understanding of a country's conflictual past, including some appreciation of the motives of "the enemy"? Can a truth commission contribute to the development of a rule-of-law culture that respects human rights and thereby raises the costs of future efforts to violate the human rights of the citizenry? Can a truth commission advance political tolerance, a central component of a democratic political culture and a necessary ingredient for coexistence? The answers to these questions, while still subject to considerable disagreement and debate, are most likely that, under at least some conditions and to at least a limited degree, truth commissions can indeed contribute to societal transformation.

Indeed, rigorous empirical evidence on the effectiveness of the South African truth and reconciliation process supports this conclusion.³ It appears that the South African process generated a truth about the past that is fairly widely accepted. It appears as well that those who buy into that truth tend to be more reconciled with the country's past, their fellow South Africans, and the political institutions of the country's new dispensation. And it seems that this reconciliation has been crucial in buying the South African transition some breathing space during which nascent democratic institutions and processes have been established and nurtured. The truth and reconciliation process in South Africa did not produce a secure, consolidated, democratic political system (in terms of either culture or institutions). But available evidence suggests that some portion of the South African "miracle" can reasonably be attributed to the success of the Commission's efforts to find truth and create reconciliation.⁴

At the same time, however, truth commissions often fail, even when expectations are minimal. Many commissions appear to have had little, if any, impact on societal transformations. Indeed, some view commissions as the *product* of social change rather than the *cause* of it.⁵ Although it is certainly too

3. See generally JAMES L. GIBSON, *OVERCOMING APARTHEID: CAN TRUTH RECONCILE A DIVIDED NATION?* (2004) (reporting on South African survey of views about the effectiveness of the South African TRC for healing and transforming South African society).

4. For a discussion on the South African "miracle," see ALLISTER SPARKS, *BEYOND THE MIRACLE: INSIDE THE NEW SOUTH AFRICA* 4 (2003), which notes that the struggle against apartheid was itself bloody and that few prognosticators expected that the apartheid state would be defeated without anything short of a full-blown civil war. Conventional wisdom is that more South Africans died in the political violence in the 1990–1994 period than in all other periods of South African history.

5. See, e.g., Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT'L SECURITY 5, 31 (2003) (finding that truth commissions are often used by already strong, stable, reformist states to gain cooperation from potential spoilers to the peace).

soon to assess many of the ongoing efforts at truth and reconciliation throughout the world today, it would not be terribly surprising to find that truth commissions more often fail than succeed.

What, then, contributes to success at creating truth and stimulating reconciliation? Few would argue with the assertion that the South African Truth and Reconciliation Commission (TRC) is among the most successful in the world; indeed, the TRC is widely emulated by societies seeking some sort of transition from atrocities in the past to more-peaceful and democratic politics in the future.⁶ But what key elements of the South African process contributed to its success? Are these factors generalizable to other polities, cultures, and circumstances? It is important to determine what lessons can be learned from the South African experience, and to provide some desiderata for those who would use truth as a mean of enhancing reconciliation and democratic change.

The central thesis of this article is that the effectiveness of truth commissions is dependent upon two crucial factors: (1) whether the commission is able to attract the attention of its constituents and (2) whether the commission is perceived as legitimate among members of the mass public. Getting its constituents' attention is determined largely by the type of messages the commission promulgates, with simple messages stressing "human interest" aspects of atrocities being the most effective and with formal trials being the least so. Legitimacy is enhanced by meeting expectations of fairness—especially the principal expectation of evenhandedness—in decisionmaking processes. To the extent that a truth commission is perceived as using fair procedures, its messages will be perceived as objective and the commission itself credible. Credible commissions are persuasive.

In sum, the job of a truth commission is to change beliefs and attitudes as a process of societal transformation. In order to do so, it must capture the attention of ordinary people, and be perceived as a credible source of both information about the past and guidance about political activity in the future.

6. For additional information about the South African Truth and Reconciliation Commission, see generally ALEX BORAINÉ, *A COUNTRY UNMASKED: INSIDE SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION* (2000) (giving the insider's view of the politics of South Africa's TRC); PUMLA GOBODO-MADIKIZELA, *A HUMAN BEING DIED THAT NIGHT: A SOUTH AFRICAN STORY OF FORGIVENESS* (2003) (documenting the transformation of an individual commissioner through the author's meetings with one of apartheid's worst assassins); WENDY ORR, *FROM BIKO TO BASSON: WENDY ORR'S SEARCH FOR THE SOUL OF SOUTH AFRICA AS A COMMISSIONER OF THE TRC* (2000) (providing a personal insider's story that is connected to specific cases before the TRC); CHARLES VILLA-VICENCIO & WILHELM VERWOERD, *LOOKING BACK, REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA* (2000) (providing a highly informative anthology on truth commissions).

II

WHAT OBJECTIVES OUGHT TRUTH COMMISSIONS TO PURSUE?

Truth commissions are often charged with many different responsibilities, ranging from dealing with specific human-rights abuses to transforming whole societies.⁷ The South African case clearly sought broad social changes—a more reconciled society—even while it addressed the complaints of victims and the pleas of perpetrators for amnesty.⁸ The South African emphasis on societal change, however, is perhaps unique among truth commissions throughout the world; more common are truth commissions that focus on victims and perpetrators.⁹

Under most conditions, truth commissions, whose primary concern is to punish perpetrators and appease victims, are unlikely to have broader social influence. Nonetheless, this article is little concerned with the effects of truth commissions on active participants in the transition struggle. Can a truth commission provide a means for either punishing perpetrators or, as in amnesty schemes, trading absolution for information? Probably. Can—and should—a truth commission compensate victims? Certainly. Should a truth commission document atrocities in the past, attempting to develop a record of abuse that most if not all will accept? Undoubtedly.

But truth commissions are most effective when they attempt to transform a society rather than focus primarily on the needs of victims and perpetrators. To transform a society, it is the bystanders—the great mass of most societies—who are crucial, not the active participants. Indeed, these participants—victims and perpetrators—can often detract from these larger objectives of truth commissions. Those directly engaged in the struggle are often “spoilers” in transitional politics, making the necessary compromises more difficult to achieve. Therefore, it is often necessary to provide incentives for these former combatants to disengage from the transformation process so that reconciliation efforts can be focused on the majority of the society.¹⁰ Of course, not all truth commissions claim goals as lofty and as all-encompassing as the TRC—indeed, few do¹¹—but if a truth commission is to be effective at changing a society, it must have as its primary objective the transformation of the society and make secondary attention to victims and perpetrators.

7. HAYNER, *supra*, note 2, at 15–16; MARK FREEMAN, TRUTH COMMISSIONS AND PROCEDURAL FAIRNESS 36–37 (2006).

8. James L. Gibson, *Overcoming Apartheid: Can Truth Reconcile a Divided Nation?*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 82, 86–87 (2006).

9. See, e.g., Tristan Anne Borer, *A Taxonomy of Victims and Perpetrators: Human Rights and Reconciliation in South Africa*, 25 HUM. RTS. Q. 1088, 1088–1116 (2003) (explaining that the distinction between perpetrators and victims is commonly made in South Africa).

10. Of course, in some societies human-rights abuses have been so widespread that nearly everyone is a victim or a perpetrator (for instance, Rwanda). Different strategies are likely necessary under those circumstances.

11. HAYNER, *supra* note 2, at 160.

The single most important attribute of the truth and reconciliation process in South Africa was that the entire process was designed as an effort at *societal* change.¹² According to the TRC, “[r]econciliation requires that *all* South Africans accept moral and political responsibility for nurturing a culture of human rights and democracy within which political and socio-economic conflicts are addressed both seriously and in a non-violent manner.”¹³ In an effort to address this mandate, the Final Report of the TRC included in its recommendations a section on the “promotion of a human rights culture.”¹⁴ Although the TRC was obviously concerned with the fate of victims and perpetrators, its genius was that it defined its ultimate objective in terms of transforming South African society. The target of its activities was thus society at large rather than just the active participants in the struggle over apartheid.

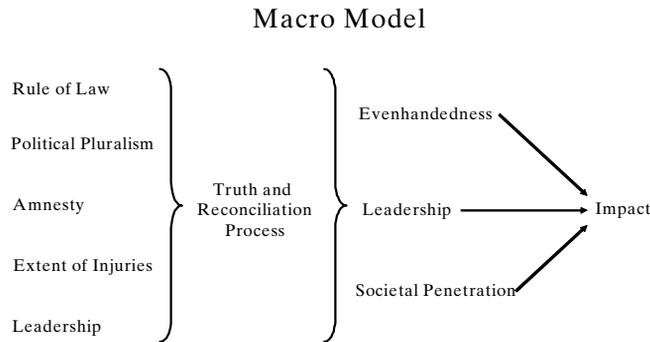


Figure 1: A Macro-Level Model of the Influence of the Truth and Reconciliation Process

This model depicts truth processes as both independent and dependent variables. That is, undoubtedly, truth processes are endogenous—their very existence is a function of the attributes of the broader society in which they are embedded. Not every type of truth process is compatible with every type of political culture, and the selection of types of institutions is not independent of the dominant values within any given political system.

Consider, for example, the South African case, in which relatively few victims were physically harmed or incarcerated during apartheid. In fact, it turns out that a quite small proportion of the population came forth with claims of gross human violations (about 21,000 people).¹⁶ This relatively small number is due in part, of course, to a reasonably restrictive definition of what constitutes a gross human-rights violation. But it is nonetheless certain that there were fewer of these violations under apartheid in South Africa than in many other countries (for example, in Rwanda).¹⁷ And it is also true that surveys have not found that apartheid succeeded in creating a society of self-defined victims.¹⁸ For instance, when asked in a South African national survey whether they had suffered any harm under apartheid, fully sixty-eight percent of the black respondents claimed they had not been injured by apartheid.¹⁹ This is an astounding figure. Of course, when provided with specific examples of injuries, the percentages are higher. At one extreme, only a relatively small proportion of these respondents—ten percent—was actually imprisoned by the

16. 1998 FINAL REPORT, *supra* note 13, at 196.

17. See, e.g., Stephanie Nieuwoudt, *African Justice: Drawing Parallels*, ICC-AFRICA UPDATE, Sept. 5, 2006, http://www.iwpr.net/?p=acr&s=f&o=323668&apc_state=henh.

18. See GIBSON, *supra* note 3, at 37–46 (detailing survey results on experiences of South Africans).

19. See fig. 2, *infra* p. 124.

authorities.²⁰ At the other, forty-four percent claimed harm from not having been permitted to associate with people of different races or colors.²¹ Lack of access to education was another widely experienced harm.²² Still, a large minority of Africans (thirty-nine percent) claimed no specific injuries from this set of comprehensive questions on apartheid injuries.²³ Indeed, only slightly more than one-third claimed to have been subjected to the infamous pass laws.²⁴ This is the context within which South Africa's TRC began its work.

The Injuries of Apartheid

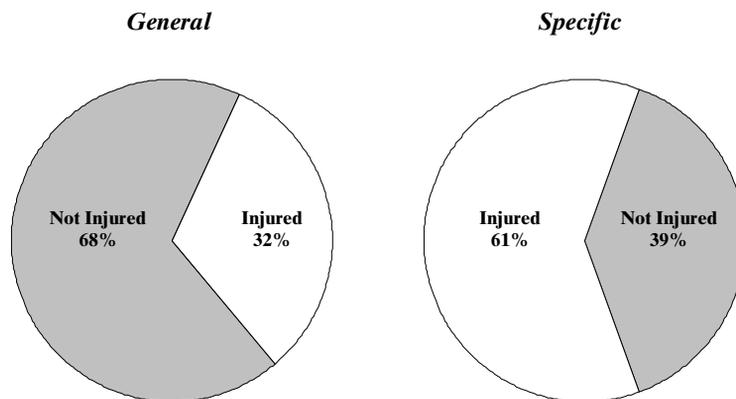


Figure 2: The Injuries of Apartheid

The intention here is not to depreciate the tremendous damage that apartheid did to South Africans, especially black South Africans. Nonetheless, the fact remains that the struggle over apartheid was not a civil war, and the struggle over apartheid did not directly engage or perhaps even directly affect vast proportions of blacks, whites, Coloured²⁵ people, or those of Asian origin. This no doubt makes reconciliation a less demanding task and suggests the

20. *Id.* at 41.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. The term "Coloured" is used here as it is in South Africa to denote people of mixed race.

general hypothesis that the larger the proportion of bystanders during a conflict, the more likely is an attempt at reconciliation. If so, then truth and reconciliation processes might not be so easily created or their goals achieved in polities in which historical grievances are commonplace among a high proportion of the population.

In general, it is reasonable to hypothesize that truth commissions with broad powers of enhancing societal reconciliation are more likely to be formed, and to succeed, in societies in which the size of the victimized population is small. When the victim class becomes large, it becomes politically influential, and it often seeks to transform the truth and reconciliation process into one focused primarily on the needs and aspirations of the victims. Societal reconciliation may be impeded by such influence.

Figure 1 suggests a number of factors influencing truth commissions, each of which deserves and has received detailed consideration.²⁶ But Figure 1 also points to three factors that contribute independently to a truth commission's having an impact on society: (1) evenhandedness, (2) leadership, and (3) societal penetration. Leadership refers to the crucial roles of Nelson Mandela and Desmond Tutu.²⁷ Because neither Mandela nor Tutu is easily replicable in other societies, however, the more interesting factors are evenhandedness and societal penetration. Both of these factors have to do with change in the attitudes of individuals, and therefore a micro-level model is necessary to complement the processes depicted in Figure 1.

IV

A SIMPLE MICRO-LEVEL THEORY OF THE SUCCESS OF TRUTH COMMISSIONS

The model depicted in Figure 1 concerns processes taking place at the macro-level of the polity. For that model to establish its credibility and utility, an understanding of micro-level processes must be added. This micro-level model is essentially one of persuasive communications and attitude change. In this analysis, such attitude change is embedded within a larger theory of the legitimacy of institutions.

Assuming a goal of societal transformation, the question becomes, What makes truth commissions effective? A simple theory helps answer this question:

1. In order to transform a society, individuals must be transformed.
2. This process of transformation is one of individual attitude change.
3. In order for attitudes to change, ordinary people must pay attention to the actions and findings of truth commissions.
4. Attitudes can be changed by new information, but only when the source of that information is credible.

26. See Gibson, *supra* note 1, at 420–31 (discussing factors influencing truth commissions).

27. See Gibson, *supra* note 8, at 104–05 (discussing the persuasiveness of Mandela and Tutu in calling for reconciliation).

5. In the context of truth commissions, credibility is most strongly enhanced by impartiality and evenhandedness.
6. Perceptions of the decisionmaking processes of commissions—in particular, their perceived fairness—contribute mightily to assessments of the credibility of commission outputs.
7. Truth commissions must therefore adopt transparent decisionmaking processes that allow them to be perceived as credible and legitimate among ordinary people in a society.

In short,

EVENHANDEDNESS → FAIRNESS → LEGITIMACY →
CREDIBILITY → ATTITUDE CHANGE

To the extent that a truth commission seeks effective societal change, establishing broad legitimacy within that society is of utmost importance.

Reconciliation is about individual change, and in particular change in beliefs, values, attitudes, and behaviors. Truth processes assume that the infusion of new information (the “truth”) can lead citizens to reassess their views about the past, and especially their beliefs and judgments about those who were formerly their enemies.²⁸ The truth need not concern individual events but instead can be a broader truth about the nature of the *ancien regime*. Some believe this attitude change must involve forgiveness and some sort of redemption, but the minimal requirement of reconciliation is most likely tolerance: the willingness to “put up with” former enemies and to limit political competition to peaceful means within the context of democratic political institutions.²⁹ How can truth commissions contribute to attitude change among the members of a society?

Understanding how citizens’ attitudes change requires a broader theory of persuasive communications and especially a theory of how citizens relate to institutions such as truth commissions. The elaboration–likelihood model (ELM) provides such an understanding.³⁰ Attitude change is a function of four factors: ability, motivations, attentiveness, and analysis. ELM holds that “if receivers are able and properly motivated, they will elaborate, or systematically

28. *Id.* at 89, 101 (discussing the change in views, beliefs, and judgments that make TRCs a success).

29. See GIBSON, *supra* note 3, at 213–14 (offering tolerance as a minimal requirement for reconciliation). For an examination on forces affecting tolerance and the necessity of tolerance for the success of an emerging democracy, see generally JAMES L. GIBSON & AMANDA GOUWS, *OVERCOMING INTOLERANCE IN SOUTH AFRICA: EXPERIMENTS IN DEMOCRATIC PERSUASION* (2003).

30. For an explanation of ELM, see RICHARD E. PETTY & JOHN T. CACIOPPO, *COMMUNICATION AND PERSUASION: CENTRAL AND PERIPHERAL ROUTES TO ATTITUDE CHANGE* 5 (1986). Pablo Briñol & Richard E. Petty, *Fundamental Processes Leading to Attitude Change: Implications for Cancer Prevention Communications*, 56 J. COMM. (SUPPLEMENT) S81, S87 (2006), provides a most useful overview of the ELM and attitude change, focusing on public campaigns concerning cancer prevention. A truth commission can easily be conceptualized as a public-relations campaign selling the “truth” about the past and a plan of action for the future. *Id.*

analyze, persuasive messages. If the message is well reasoned, data based, and logical ([that is], strong), it will persuade; if it is not, it will fail.”³¹ From the foregoing, the basic problems of attitude change in the context of truth and reconciliation processes appear to be, first, getting people to pay attention to the proceedings, and, second, ensuring that the information provided is not dismissed but is instead completely elaborated, thereby making attitude change a possibility. Unfortunately, the factors that often contribute to attentiveness also seem to impede attitude change.

What are the lessons for truth commissions that emerge from the ELM? The answer lies in two crucial aspects of the process of attitude change: (1) getting the attention of the people, and (2) establishing the legitimacy, and thus the credibility, of the truth commission.

A. Attentiveness

Obviously, truth commissions cannot alter the analytical abilities of the citizens of a polity, but this does not render the “ability” portion of this model irrelevant. Truth commissions must speak to their constituents in a language that is understandable. In nearly all societies, this means that messages must be simple and accessible, not legalistic and technical. The most important attribute a simple message can have is personal relevance.³²

More generally, achieving attentiveness comes with two possible problems, determined largely by the degree of cognitive sophistication of the citizen. Among those with low cognitive sophistication, the problem is one of catching their attention. Such citizens may be only occasional consumers of the mass media, and they may lack the cognitive skills necessary to process even fairly simple information. The challenge for a truth commission is to make the costs of acquiring information low enough that unsophisticated people can become attentive and engaged.³³

In the South African case, information was widely available throughout society,³⁴ in part owing to the TRC’s commitment to communicate with all sectors of South African society.

[T]he South African Broadcast Corporation aired special reports on the TRC every Sunday from April 1996 until March of 1998, and the program often scored as among the most popular on South African television. And TV broadcasts were minuscule in comparison to radio exposure, which is crucial since radio is the most widely available

31. William D. Crano & Radmila Prislin, *Attitudes and Persuasion*, 57 ANN. REV. PSYCHOL. 345, 348 (2006).

32. See Briñol & Petty, *supra* note 30, at S83, S84 (pointing also to several other means by which messages can increase thinking, including by “summarizing the major arguments as *questions* rather than as *assertions* . . . by having the individual arguments presented by multiple independent sources rather than just one . . . and by making some aspect of the message surprising or unexpected”) (citations omitted).

33. See Gibson, *supra* note 1, at 416 (discussing the success of the South African TRC in this regard).

34. *Id.*

information medium for most South Africans.³⁵

This effective manner of disseminating information was paired with the emotionally moving quality of the information itself: the public's attention was captured. The process made known, in highly personalized and often excruciating detail, the suffering and sorrow of hundreds if not thousands of individual South Africans. The atrocities committed during the struggle over apartheid were not abstractions, but were instead deeply human losses that resonated with South Africans of every color. Few black South Africans who heard Amy Biehl's father testify to the TRC could have been unmoved. Few white South Africans who heard the stories of the families of the Cradock Four (represented in the movie *Long Night's Journey into Day*³⁶) could have avoided aching for the victims and their families. All were dismayed by Policeman Benzein's demonstration of his notorious "wet bag" method of torture, broadcast widely throughout South Africa.³⁷

Messages that clearly involve emotional arousal get more attention than strictly cognitive ones.³⁸ This type of fare is often addictive to ordinary people, and few in South Africa could have escaped exposure to the reports of the truth and reconciliation process. Through its numerous hearings in all parts of the country, including the hinterland, the TRC pierced the consciousness of nearly all South Africans.³⁹ With such saturation, it seems likely that everyone got the opportunity to judge the TRC's conclusions.

The information propagated by the TRC "typically had no conspicuous ideological content; no obvious message was being sold."⁴⁰ Consequently, reports from the TRC did not necessarily raise the sort of defensive alarms that often prevent new information from bringing about attitude change. This flows in part from the human-interest dimensions of the reports, but also in part from the TRC's conscious desire to reach all segments of society.

Surely the truth and reconciliation process was used by some to launch ideological attacks on either the apartheid system or the liberation movement, but much of what the TRC put before the South African people was simple and subtle; it had to do with bad guys hurting good guys. Without an obvious and explicit ideological veneer, many of the messages and stories of the TRC were attractive and palatable to South Africans of many different ideological persuasions.⁴¹

35. *Id.*

36. A LONG NIGHT'S JOURNEY INTO DAY (Iris Films 2000).

37. See Gibson, *supra* note 8, at 101–02 (describing this method of torture).

38. See GEORGE E. MARCUS, W. RUSSELL NEUMAN & MICHAEL MACKUEEN, AFFECTIVE INTELLIGENCE AND POLITICAL JUDGMENT 10–11 (2000) (describing the surveillance system and its role in calling new stimuli to the attention of a decision maker).

39. See Gibson, *supra* note 8, at 102 (describing the effect of messages on the South African citizenry).

40. *Id.* at 101–02.

41. Gibson, *supra* note 8, at 102. For an example of the comparative value of subtle political messages, see, for example, Shanto Iyengar & Adam F. Simon, *New Perspectives and Evidence on Political Communication and Campaign Effects*, 51 ANN. REV. PSYCHOL. 149, 156 (2000) (observing that the image of President Ford attempting to eat a tamale without first shucking it was an exquisitely

The information presented to South Africans by the TRC was also typically un rebutted, in part because miscreants were coming before the TRC to admit their crimes and to be awarded amnesty. Certainly conflict was occasionally involved—for example, some victims challenged the motives of the perpetrators, arguing for instance that they were economic not political and therefore not covered by the amnesty legislation. But generally the intense denials that often cloud political controversies were limited in the case of the South African truth and reconciliation process.⁴²

Another advantage of the South Africa process was that it largely eschewed formal trials in favor of public hearings in which people were allowed to come forth and “tell their stories.”⁴³ To the extent that one wishes to communicate with the mass public—to tell stories, to get them to understand the nature of their past—trials are unlikely to be effective. Far more compelling is the testimony of ordinary people in their own narratives. And the stories that people tell, in their own words, can have an enormous impact on bystanders. Even the hardest apartheid heart could not help but have been moved by some of the tales of abuse and suffering told by the survivors of apartheid atrocities.⁴⁴ Even the most militant MK operative must have experienced at least a twinge of remorse when learning of the terrible damage done to civilians by liberation explosives.⁴⁵ The theory of a “just war,” in which the ends justify many means, is an abstraction that loses some of its potency when confronted with real people whose lives were destroyed or irrevocably altered during the struggle. If one wishes to ensure that all segments of a society recognize the pain inflicted, often unfairly, on their enemies during the struggle, then these story-telling proceedings can be invaluable.⁴⁶

clear signal to Hispanics in the United States of the U.S. President’s lack of sensitivity to this constituency and explaining that subtle messages are often more effective at social persuasion than more-explicit appeals to attitude change).

42. *Id.*

43. For an account of the destruction of vital files by agents of the apartheid state, see Verne Harris, “*They Should Have Destroyed More*”: *The Destruction of Public Records by the South African State in the Final Years of Apartheid, 1990–94*, 42 *TRANSFORMATION* 29, 38 (2000). In the South African case, formal prosecutions were extremely difficult because the apartheid state was in near-total control of the apparatus and files of government from 1990 to 1994. For an examination of the failed Malan prosecution, see Paul Van Zyl, *Justice Without Punishment: Guaranteeing Human Rights in Transitional Societies*, in *LOOKING BACK REACHING FORWARD*, *supra* note 6, at 42, 46 (2000).

44. For an exceptional collection of stories from apartheid survivors, see ANTIJIE KROG, *COUNTRY OF MY SKULL* (1998).

45. The MK was the military wing of the ANC. “Umkhonto we Sizwe,” *ENCYCLOPEDIA BRITANNICA ONLINE*, <http://www.britannica.com/EBchecked/topic/555568/South-Africa/260110/Resistance-to-apartheid#ref=ref921038>.

46. I do acknowledge that due process suffers under the storytelling format used by the South African TRC (and indeed some due-process issues were litigated in South Africa). One solution to due-process compromises is to minimize the harm done to those who are accused, although some might have little concern for fully protecting those seeking amnesty for gross human-rights violations from due-process compromises. Justice in transitional processes is an aggregate concept, and certain types of injustices can be compensated for by other types of justice. See, e.g., GIBSON, *supra* note 3, at 258–88. In

Many of the factors generally contributing to persuasion in fact reinforce the possibility that the truth and reconciliation process might have created attitude change. The information was salient and interesting, accessible, subtle in its messages, largely un rebutted, and not as threatening as it might have been, thereby avoiding triggering defense mechanisms. These are the conditions likely to give rise to social persuasion, especially among the least sophisticated and attentive portions of a population.

At the other end of the continuum, those with high cognitive sophistication are generally attentive to the mass media and other information sources, but, owing to well-developed belief systems, they are quite resistant to change.⁴⁷ Their reliance on framing, motivated reasoning, and confirmation bias all contribute to their being relatively more difficult to change than their less-sophisticated counterparts.⁴⁸ But the great irony is that those most likely to be exposed to social information are often least like to learn from it.

Mindful of these two constituencies—respondents of low and high cognitive sophistication—truth commissions must take care in tailoring their messages. Perhaps the most effective strategy is one that focuses on the “human interest” dimensions of their findings. More cognitive arguments are likely to bypass the less sophisticated and to be easily refuted by the more sophisticated. When messages are obviously didactic, motivated reasoning is more likely, making persuasion less likely.⁴⁹ On the other hand, when presented as human-interest stories, with no obvious vested interests or clear ideological signal, the messages appear likely to be much more influential.⁵⁰ The essential ingredient for attitude change among sophisticated citizens is to make them willing to rethink their

the end, the criteria by which such processes ought to be judged are surely whether *on balance* more justice than injustice results, and whether the process contributes to the consolidation of democratic reform. For a most useful and insightful analysis of the numerous issues surrounding amnesties, see Ronald Slye, *Justice and Amnesty*, in LOOKING BACK REACHING FORWARD, *supra* note 6, at 174, 177, and Ronald Slye, *Amnesty, Truth, and Reconciliation: Reflections on the South African Amnesty Process*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 170, 171 (Robert I. Rotberg & Dennis Thompson eds., 2000).

47. See JOHN R. ZALLER, THE NATURE AND ORIGINS OF MASS OPINION 121–22 (1992) (explaining the relationship between political awareness and resistance to countervailing messages).

48. Confirmation bias refers to the process “[through which] people, especially those who feel the strongest and know the most . . . seek out confirmatory evidence and avoid what they suspect might be disconfirming evidence.” Charles S. Taber & Milton Lodge, *Motivated Skepticism in the Evaluation of Political Beliefs*, 50 AM. J. POL. SCI. 755, 759 (2006). This bias means that contrary evidence—such as evidence that one’s own side may have engaged in gross human-rights violations during the struggle—battles against preexisting attitudes justifying the old regime and its values. Less-sophisticated and less-committed respondents suffer less from confirmation bias, but are not entirely unaffected by it. *Id.*

49. *Id.* The Taber and Lodge study used didactic messages, which presumably helps explain their relatively strong results regarding bias.

50. To the extent that a social consensus emerges from the findings of truth commissions, processes of motivated reasoning can be undermined. A “collective memory” that is truly collective—widely accepted within a society—is difficult to ignore or discount. However, to the extent that various subcommunities exist within a society, a means of resisting the broader social consensus exists. Subgroup norms may provide succor for minority positions, and to the extent that subgroup social identities are strong, the larger social consensus may be irrelevant.

views and judgments about their country's history, such as those formed in the decades-long struggle against apartheid in South Africa.

Thus, effective truth and reconciliation processes are those that succeed in getting people to question their basic beliefs about good and evil. In terms of South Africa's past and present, the TRC proclaimed that the nature of the information it published loosened the hold of all citizens on their personal, perhaps less-damning versions of the past:

[T]he information in the hands of the [TRC] made it impossible to claim, for example, that: the practice of torture by the state security forces was not systematic and widespread; that only a few "rotten eggs" or "bad apples" committed gross violations of human rights; that the state was not directly and indirectly involved in "black-on-black" violence; that the chemical and biological warfare programme was only of a defensive nature; that slogans by sections of the liberation movement did not contribute to killings of "settlers" or farmers; and that the accounts of gross human rights violations in the African National Congress (ANC) camps were the consequence of state disinformation. Thus, disinformation about the past that had been accepted as truth by some members of society lost much of its credibility.⁵¹

If one accepted the positions of the TRC, one might have come to see the struggle over apartheid as one of pretty-good good against pretty-bad bad, not as absolute good battling with infinite evil. It is difficult to reconcile with infinite evil; it is perhaps easier to reconcile with bad that is not entirely evil (especially if there is some degree of repentance). Truth may have opened the door to reconciliation by encouraging people to abandon their views that South Africa is made of people with world views so distant that they are unreconcilable.

The revelations of the truth and reconciliation process may have encouraged self-reflection and self-criticism, resulting in more-moderate views of one's adversaries in the struggle. "[T]o dismiss perpetrators simply as evildoers and monsters shuts the door to the kind of dialogue that leads to an enduring peace."⁵²

Daring, on the other hand, to look the enemy in the eye and allow oneself to read signs of pain and cues of contrition or regret where one might almost have preferred to continue seeing only hatred is the one possibility we have for steering individuals and societies toward replacing long-standing stalemates out of a nation's past with genuine engagement. Hope is where transformation begins; without it, a society cannot take its first steps toward reconstructing its self-identity as a society of tolerance and coexistence.⁵³

In witnessing the human face of struggle, all sides are given the opportunity to rethink their understandings of good and bad, friend and foe. Such reconsideration can lead to a moderation of views, which opens the door to processes of reconciliation.

51. 1998 FINAL REPORT, *supra* note 13, Vol. I, at 111–12.

52. GOBODO-MADIKIZELA, *supra* note 6, at 125.

53. *Id.* at 125–26.

B. Institutional Legitimacy and Procedural Fairness

The South African truth and reconciliation process succeeded in getting the attention of virtually all South Africans.⁵⁴ But for attitudes to change, people must be able to view the truth commission as a credible source of information. It is at this point that the legitimacy of institutions becomes important, since institutions viewed as legitimate are more effective at persuading citizens.

Legitimacy is “the belief that authorities, institutions, and social arrangements are appropriate, proper, and just.”⁵⁵ It is often examined within the context of citizens’ concerns for mechanisms of voluntary compliance.⁵⁶ The general hypothesis is that institutions viewed as legitimate are more successful at gaining compliance by citizens, even when (or especially when) the citizens disapprove of the decision made by the institution.⁵⁷ Although truth commissions do not typically require that citizens comply with commission actions and findings,⁵⁸ legitimacy is crucial to institutional credibility. And credible institutions are more likely to be persuasive and to succeed in getting citizens to accept their judgments and views.⁵⁹

A key source of institutional legitimacy is procedural fairness.⁶⁰ Truth commissions are like trials in at least one sense: “In a trial . . . the ‘true’ innocence of the defendant is typically unknown, so the legitimacy of the verdict is established by the fairness of the trial procedures.”⁶¹ In institutions like truth commissions, decisionmaking processes are also viewed as fair when citizens are provided opportunities to participate, when citizens are given “voice” to express their views and their concerns.⁶² Another source of

54. Gibson, *supra* note 1, at 416.

55. Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 376, 376 (2006).

56. *Id.* at 383.

57. See, e.g., James L. Gibson et al., *Why Do People Accept Public Policies They Oppose? Testing Legitimacy Theory with a Survey-Based Experiment*, 58 POL. RES. Q. 187, 187 (2005) (arguing that the legitimacy of the U.S. Supreme Court promotes acceptance of its unpopular decisions).

58. FREEMAN, *supra* note 7, at 71.

59. See, e.g., James L. Gibson et al., *The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535, 554 (2003) (pointing to the controversy over the U.S. Supreme Court’s ruling in *Bush v. Gore*, in which the Court determined the winner of the 2000 presidential election, and, because of the Court’s widespread legitimacy, its decision was accepted by both Democrats and Republicans).

60. See Tom R. Tyler, *Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Authorities?* 19 BEHAV. SCI. & L. 215, 233 (2001) (finding that the public’s evaluations of the police and courts are linked primarily to whether individuals perceive these systems to be procedurally fair); see also FREEMAN, *supra* note 7, at 154 (arguing that although tensions exist among various principles of fairness, truth commissions—as human rights bodies—must deliver a maximum amount of procedural fairness both to victims and perpetrators).

61. Tyler, *supra* note 55, at 384.

62. Michael X. Delli Carpini et al., *Public Deliberation, Discursive Participation, and Citizen Engagement: A Review of the Empirical Literature*, 7 ANN. REV. POL. SCI. 314, 327 (2004) (discussing a

procedural fairness is rationality, which “reflects neutrality and factuality in decision-making.”⁶³

In the context of truth commissions, neutrality is probably best understood as involving evenhandedness—the willingness to apply general principles of human rights consistently, and therefore to blame all who violated the human rights of citizens, irrespective of what justifications might be put forth for such violations. (Critics of South Africa’s truth and reconciliation process often referred to this as “poisonous evenhandedness.”)⁶⁴ Experimental research confirms the importance of neutrality. Some, for example, place considerable emphasis on the “perceived (il)legitimacy of an influence attempt.”⁶⁵ As they see it: “A message may be seen as illegitimate because it is discrepant from the recipient’s vested interest, or because the communicator’s intentions are suspect, or because of the context in which the message is encountered.”⁶⁶ This is particularly true of messages generating negative affect (such as revelations of gross human-rights violations). “A recipient who experiences negative affect when encountering a persuasive message and who has no reason to question the message’s legitimacy is likely to interpret [the messenger’s] affect as indicating a problematic issue. This should result in more systematic processing of the persuasive message.”⁶⁷ Those who question the legitimacy of the message are likely to interpret the negative affect as a reaction to an illegitimate attempt at opinion change and are therefore unlikely to engage in a careful consideration of the message itself.⁶⁸ The legitimacy of the source thus influences considerably the effectiveness of the message in producing attitude change.

In the South African case, considerable evidence of the impartiality of the TRC is available. For instance, the TRC was sued by nearly every major political party in South Africa—from the African National Congress (ANC) to the National Party, the party of apartheid. The TRC quite reasonably treats this as evidence of its own evenhandedness.⁶⁹ A strategy of pursuing “victor’s justice”—in which the victors are held to different standards than the vanquished—undermines the legitimacy of truth processes. If a truth-and-reconciliation process is to be recognized as fair, it must be committed to unearthing and documenting human-rights abuses irrespective of the

study finding that when people are given the opportunity to voice their opinions, it increases the perception that the process is fair and the outcome legitimate).

63. Tyler, *supra* note 55, at 384.

64. Gibson, *supra* note 1, at 416.

65. Gerd Bohner & Thomas Weinerth, *Negative Affect Can Increase or Decrease Message Scrutiny: The Affect Interpretation Hypothesis*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 1417, 1419 (2001).

66. *Id.*

67. *Id.*

68. *Id.*

69. See Charles Villa-Vicencio & Wilhelm Verwoerd, *Constructing a Report: Writing Up the “Truth”*, in TRUTH V. JUSTICE, *supra* note 46, at 287 (noting that attacks from opposing sides of the political spectrum countered suggestions that the TRC was biased against the former regime and covered up human-rights violations committed by the ANC).

justifications given for such abuses. Through its willingness to pursue gross human-rights violators irrespective of their ideology, the TRC demonstrated its commitment to a universal conception of the meaning of human rights. One of the factors contributing most to the legitimacy of the process was its willingness to blame all parties in the struggle, rejecting the notion that a “just war” justifies or excuses atrocities.⁷⁰

Crucial to the ability to blame all sides in the struggle was the independence of the TRC, and essential to its independence was the nature of its leadership. Although Archbishop Desmond Tutu has been criticized for injecting his own religious ideology into what many view as a largely secular process,⁷¹ thereby moving “forgiveness” to the forefront of reconciliation,⁷² there can be little doubt that Tutu’s impeccable integrity and commitment to the liberation of South Africa shielded the TRC from many partisan attacks.⁷³

That the TRC was willing to blame all who committed gross human-rights violations points as well to the significance of procedural justice in truth and reconciliation processes. The perception of procedural fairness is perhaps the most important asset of truth processes, since perceived fairness enhances legitimacy.⁷⁴ The TRC blundered several times—as in its decision to grant blanket amnesty to the leaders of the ANC, a decision ultimately overturned by the Constitutional Court—but generally the commission’s willingness to give all parties a voice in the process contributed mightily to its legitimacy and influence.

The most pressing task of a truth commission is to establish legitimacy with the members of a society. Legitimacy typically requires fair and reasonably transparent procedures. For truth commissions, fairness is most clearly demonstrated by evenhandedness. Commissions expressing bias against any

70. Gibson, *supra* note 8, at 96–101.

71. See RICHARD A. WILSON, *THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATES* 107–10 (2001) (noting that the official view of reconciliation was an abstract approach to healing on a national level and juxtaposing it with the religious view advocated by Archbishop Desmond Tutu calling for reconciliation and forgiveness on an individual level).

72. Wilson is especially critical of the religious veneer often associated with the truth and reconciliation process:

[I]t is misguided to delegitimize human rights at the national level by detaching them from a retributive understanding of justice and attaching them to a religious notion of reconciliation—forgiveness, a regrettable amnesty law and an elite project of nation-building. Democratizing regimes should not seek legitimacy through nation-building, efforts to forge a moral unity and communitarian discourses, but on the basis of accountability and justice defined as proportional retribution and procedural fairness. The role of human rights and the rule of law in all this is to create the bedrock of accountability upon which democratic legitimacy is built.

Id. at 230.

73. See Gibson, *supra* note 1, at 426–27 (describing Tutu’s effectiveness).

74. See, e.g., TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* 57 (2002) (finding that by behaving in ways that are perceived as procedurally fair, police officers and courts can gain increased citizen consent and cooperation with decisions).

particular community or political position undermine their position as a credible source of information about the past.

V

CONCLUSION

Survey data from South Africa indicates that the South African people as a whole are quite satisfied with the performance of their truth and reconciliation process.⁷⁵ This finding is important since it shows that granting concessions to the disempowered minority does not necessarily alienate the victorious majority in transitional systems.

The South African example teaches several important and most likely generalizable lessons. Perhaps most crucially, reconciliation ought to focus on the entire society, not just on victims and perpetrators. The experiences of those directly involved in the struggle must be publicized and legitimized so that the bystanders—the overwhelming majority of most conflicted societies—can learn the lessons of reconciliation.

The most potent such lesson is that all sides have legitimate grievances, even if not in equal numbers, nor with equal responsibility or culpability. But the indispensable lesson of transitional justice ought to be that no party to violent conflicts ought to be allowed to violate human rights with impunity, even when the perpetrators have just cause. Even those struggling against a regime as evil as apartheid (or as insidious as the regime of Saddam Hussein) must be bound by basic human-rights principles. To the extent that principles of justice and accountability are applied universally, truth commissions will be seen as fair and impartial, and hence legitimate and credible.

That no side is excused does not mean that retribution is unnecessary. The need for retributive justice is only one component of a large set of justice expectations and demands. Some types of justice are fungible; procedural justice may even substitute for the failure to achieve distributive justice.⁷⁶ Governments must not ignore the justice demands of their citizens, but they should be cognizant that one form of justice can often compensate for the denial of another.

For many reasons, the South African experience should not be replicated lock, stock, and barrel in other parts of the world. The process in South Africa was expensive, perhaps too expensive for many countries attempting to dig themselves out of the mire of civil war. And, as it turns out, a relatively small proportion of the South African population believes itself to have been

75. James L. Gibson, *The Truth About Truth and Reconciliation in South Africa*, 26 INT'L POL. SCI. REV. 341, 356 (2005).

76. See James L. Gibson, *Truth, Justice, and Reconciliation: Judging the Fairness of Amnesty in South Africa*, 46 AM. J. POL. SCI. 540, 540–56 (2002) (arguing that it may be possible to compensate for the inherent injustice of amnesties through other forms of justice, such as procedural, retributive, restorative, and distributive justice).

seriously victimized by apartheid. (In the end, only twenty-one thousand or so official victims of gross human-rights violations were identified.)⁷⁷ Moreover, the South African process was enormously time-consuming, and it relied upon what seems to be the boundless patience of ordinary South Africans. The South African truth and reconciliation process was designed to respond to the specific circumstances of that society, and that is surely the first desideratum for all transitional efforts.

But whatever the local circumstances of those contemplating efforts at reconciliation, the lessons of the South African experience ought to be heeded. In societies torn by a history of violent conflict, the past must be overcome. Those at the helms of transitional systems should never forget that the consolidation of democratic reform is the ultimate objective, and that advancing the cause of democracy cannot prosper without some degree of reconciliation among citizens, groups, and cultures.

Truth is important because it is true. But evenhandedness provides a crucially important resource to truth commissions: institutional legitimacy. Without legitimacy in the eyes of ordinary people, a truth commission cannot effectively promulgate its views about the past. Legitimate institutions are credible, and credible institutions hold the potential to persuade people. To the extent that people can be persuaded to adopt a nuanced view of the struggles of the past, reconciliation itself becomes possible.

77. 1998 FINAL REPORT, *supra* note 13, at 196.