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Nonviolent Law? Linking Nonviolent Social Change and Truth and Reconciliation Commissions

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NONVIOLENT LAW? LINKING NONVIOLENT SOCIAL CHANGE AND TRUTH AND RECONCILIATION COMMISSIONS

*James W. McCarty III**

I.	INTRODUCTION	970
A.	<i>What are Truth and Reconciliation Commissions?</i>	973
B.	<i>The Case of South Africa</i>	976
1.	Why South Africa?	977
2.	Why Desmond Tutu?.....	978
3.	Tutu's Opposition to Apartheid: Political Priest	978
4.	Tutu's Opposition to Apartheid: Public Prophet	979
C.	<i>Tutu and the Foundations of Principled Nonviolence</i>	981
1.	<i>Ubuntu</i> (Interconnectedness).....	981
2.	Human Dignity	984
3.	The Principle of Transfiguration (Responsible Hope).....	985
4.	Civil Disobedience	989
5.	Restorative Justice	990
6.	Linking Nonviolence and Restorative Justice in Tutu's Thought	991
II.	TRCs AND THE INSTITUTIONALIZATION OF NONVIOLENT DEMOCRATIC PRACTICE.....	992
A.	<i>Institutionalizing Democracy, Justice, Truth-telling, and Reconciliation</i>	993
1.	What are Institutions?.....	994
2.	TRCs and their Institutional Function	995
3.	Remaking the Social Imaginary	998
4.	Globalization and Transnational Social Imaginaries.....	999
III.	CONCLUSION	1003

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I. INTRODUCTION

One of the unique features of the twentieth century was the widespread use of organized nonviolent action and civil disobedience in the pursuit of dramatic social and political change around the world. In the West, the most well-known of these movements are the Indian protests against the British imperial government led by Mohandas Gandhi, the Civil Rights Movement in the southern United States led by Martin Luther King, Jr., and the decades-long nonviolent portion of the anti-Apartheid movement in South Africa. These are not the only examples,¹ however, and the so-called “Arab Spring” or “Arab Awakening”² has recently reminded us that nonviolent action can still be effective in bringing about drastic social change towards the creation of just and democratic societies. In reality, nonviolence never ceased being an effective social and political tool for social change. In conjunction with the principled and strategic use of nonviolent tactics in seeking social and political change, the twentieth century birthed a new legal-political³ mechanism and institution: the Truth Commission.⁴ It is no coincidence that these two modern phenomena arrived on the scene within a relatively short span, just a few decades, of one another.

Truth Commissions, and their various forms,⁵ have become a prominent legal-political tool for societies transitioning from violent conflict towards a

¹ See generally PETER ACKERMAN & JACK DUVALL, *A FORCE MORE POWERFUL: A CENTURY OF NONVIOLENT CONFLICT* (2000) (providing an accessible account of twelve of these movements on five continents, including the three mentioned).

² The terms “Arab Spring” and “Arab Awakening” refer to a wave of revolutionary protests that began on December 18, 2010, in Tunisia and have continued through 2012, throughout many parts of the Arab world. These protests are located in Tunisia, Egypt, Syria, Bahrain, and multiple other countries. One of the defining features of many of these protests has been their commitment to nonviolent methods of social change. See generally United States Institute of Peace, *The Arab Awakening*, <http://www.usip.org/programs/initiatives/the-arab-awakening> (last visited March 14, 2012).

³ I use the term “legal-political” to draw attention to the ambiguous and multivalent social-institutional nature of truth commissions. They are usually political mechanisms that function in a similar manner as trials but without the authority of the legal system or the long-standing presence of the rule of law. In addition, they are often intimately tied to civil society initiatives that cooperate with transitional governments in the pursuit of retributive, distributive, and/or restorative justice, and/or social, political, and interpersonal reconciliation. The uniqueness of truth commissions makes them difficult to categorize, but they often have implications in both the political and the legal spheres of society.

⁴ See generally PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS* (2d ed. 2011) (detailing a comprehensive survey of every truth commission in history).

⁵ See Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RIGHTS J. 69, 78–83 (2003) (giving a brief history of the rise of truth commissions and their development in the twentieth century, specifically as they relate to transitional justice mechanisms and international human rights law). The most well-known form of truth commission has been the “Truth and Reconcilia-

functioning democratic society. One particular form of the truth commission, the Truth and Reconciliation Commission (“TRC”), has been especially relevant in nations that have had nonviolent action as an important part of the resistance and/or transition between oppressive and dictatorial societies to relatively democratic societies. South Africa is the most prominent example of this phenomenon, but the recent TRC in Liberia is another.⁶ Why this connection? I argue that it is because certain key philosophical-theological commitments that undergird principled nonviolent social action⁷ also undergird the commitment to pursue reconciliation after violent conflict. In situations such as these, where principled nonviolent social action was vital to the resolution of a violent conflict, TRCs can function as a continuation of the nonviolent revolution these societies experienced. They become an institutionalized legal-political form of the commitments manifested nonviolently in social protest during the times of resistance and transition.

Using the South African transition as a case study, I argue that TRCs can be, and sometimes are, the legal-political extension of the nonviolent arm of a revolutionary social change movement. In making this argument, I will present the reasons given, especially by Archbishop Desmond Tutu, for the use of nonviolent social protest in apartheid South Africa. I focus on Archbishop Tutu because of his key roles as a leader of the nonviolent portion of the anti-apartheid movement and as the Chairperson of the South African TRC. In these leadership roles, he delivered many public and written statements that gave clear expression to the foundational principles of his commitments to nonviolence and reconciliation that motivated his leadership in both of these highly public roles. A close examination of Archbishop Tutu’s arguments for nonviolence *during* the conflict⁸ and for the use of the TRC *after* the conflict⁹ sheds light on

tion Commission.” However, each truth commission is different, and the institution evolves with each new commission. For example, Kenya has recently implemented a “Truth, Justice, and Reconciliation Commission” to address ethnic violence after a contested election at the end of 2007. See generally United States Institute of Peace, *Truth Commission: Kenya*, <http://www.usip.org/publications/truth-commission-kenya> (last visited March 14, 2012).

⁶ See *Pray the Devil Back to Hell* (Fork Films 2008) (providing an accessible history of the nonviolent portion of the Liberian resistance to President Charles Taylor and various rebel groups). See also, generally, Republic of Liberia, Truth and Reconciliation Commission, *Final Report*, <http://trcofliberia.org/reports/final-report> (last visited February 20, 2012).

⁷ Following Maria Stephan and Erica Chenoweth, I distinguish between *principled* and *strategic* nonviolence. Advocates of principled nonviolence argue, from religious and ethical convictions, that the use of violence is always immoral. Advocates of strategic nonviolence argue that in certain contexts nonviolent resistance and coercion are more appropriate and effective tools for achieving social change than violent resistance. These categories are not mutually exclusive, nor do they necessarily go hand-in-hand. Rather, there is a rich diversity of reasons for and forms of nonviolent social action. See Maria J. Stephan & Erica Chenoweth, *Why Civil Resistance Works*, 33 INT’L SEC., Summer 2008, at 7, 10.

⁸ See DESMOND TUTU, THE RAINBOW PEOPLE OF GOD: THE MAKING OF A PEACEFUL REVOLUTION 92–94 (John Allen ed., 1994). See also MICHAEL BATTLE, RECONCILIATION: THE UBUNTU THEOLOGY OF DESMOND TUTU 38–50 (1997) (discussing *ubuntu*).

the consistency of logic between the two mechanisms—nonviolent civil resistance and the TRC—for transitioning from an unjust government to a democratic government.

In making clear this connection between the nonviolent portion of the resistance to the apartheid government and the justifications provided for the TRC after the conflict, I move beyond much of the academic debate about the South African TRC and TRCs in general. These debates have focused on binary and oppositional constructs such as: “truth versus justice,”¹⁰ “forgiveness/reconciliation versus justice,”¹¹ “amnesty versus justice,”¹² and “restorative justice versus retributive justice.”¹³ While I will draw on this literature, my claim moves beyond these arguments because they often seem to function as if the South African TRC was an institution that was developed “out of the blue” rather than in the context of a transition to democracy dependent upon a significant nonviolent movement.¹⁴ The first part of my argument is that in a society where nonviolence has been a key part of a movement towards democracy, a TRC is the legal-political institution most consistent with those commitments that were effective, at least to some extent, in making the early moves towards that democracy.

Truth and Reconciliation Commissions become, then, one way that the values and commitments that undergird nonviolent social change movements, and those values and commitments that undergird just democratic practice, become institutionalized in a newly formed democratic society. TRCs seek to inculcate those values that sustain a principled commitment to nonviolence within the political culture of a nascent democracy and continue to move toward achieving the hoped-for end of principled nonviolent social change movements: namely, a just and reconciled community. Drawing on social-institutional theory¹⁵ and Charles Taylor’s formulation of “social imaginaries,”¹⁶ I claim TRCs can begin the process of institutionalizing certain forms of justice necessary for

⁹ See DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS 91–120 (1999).

¹⁰ See generally TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS (Robert I. Rotberg & Dennis Thompson eds., 2000). See also MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 9 (1998).

¹¹ MINOW, *supra* note 10, at 9–24.

¹² See, e.g., Kent Greenawalt, *Amnesty’s Justice*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS, *supra* note 10, at 189–210.

¹³ See, e.g., TUTU, *supra* note 9, at 54–55.

¹⁴ These arguments also create false dichotomies between values like forgiveness, reconciliation, justice, and order. For a compelling account of the complementary nature of justice to reconciliation, see generally JOHN W. DE GRUCHY, RECONCILIATION: RESTORING JUSTICE 10–42 (2002).

¹⁵ See Roger Friedland & Robert R. Alford, *Bringing Society Back In: Symbols, Practices, and Institutional Contradictions*, in THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 232–63 (Walter W. Powell & Paul J. DiMaggio eds., 1991). See also ROBERT N. BELLAH, RICHARD MADSEN, WILLIAM M. SULLIVAN, ANN SWIDLER & STEVEN M. TIPTON, THE GOOD SOCIETY 3–16, 287–306 (1991).

¹⁶ CHARLES TAYLOR, MODERN SOCIAL IMAGINARIES 23–30 (2004).

a functioning democracy, namely “justice as recognition”¹⁷ and “justice as participation,”¹⁸ while being consistent with the values that sustain and motivate nonviolent social action, *and* that they begin the process of reconstituting a country’s social imaginary to be more in line with the social imaginary of non-violent social activists.

My argument, then, is three-fold. First, TRCs are the natural legal-political extension of those values that undergird nonviolent social change movements in post-conflict societies where nonviolent movements were vital to the resolution of the conflict. Second, TRCs are those legal-political institutions most capable of being consistent with those values that undergird nonviolent social change movements while embodying and institutionalizing democratic forms of justice. Third, TRCs are those legal-political institutions capable of continuing the process of creating a new social imaginary for a society in transition begun by the nonviolent movement. The case of the South African TRC is a helpful case-study for making this argument because of the presence of Archbishop Tutu as a very public figure whose thinking about nonviolent protest and the work of a TRC were central to the implementation of both.

In Part II, I lay the foundation of my comparison and analysis of the foundational principles of nonviolence and TRCs through a historical examination of the case of South Africa. I begin by defining TRCs and then provide brief histories of the nonviolent movement against Apartheid led by Desmond Tutu and the South African TRC. I then explore the key foundational principles that undergirded Tutu’s nonviolent action and his leadership of the TRC, ultimately finding expression in his robust commitment to and defense of restorative justice in the South African context.

A. *What are Truth and Reconciliation Commissions?*

TRCs are usually government-sponsored bodies¹⁹ commissioned with the tasks of discovering the truth about extreme injustices and human rights

¹⁷ See generally NANCY FRASER & AXEL HONNETH, REDISTRIBUTION OR RECOGNITION?: A POLITICAL-PHILOSOPHICAL EXCHANGE (Joel Golb, James Ingram & Christiane Wilke trans., 2003) (providing an account of justice as recognition and how it relates to distributive justice). See also Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, in JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE “POSTSOCIALIST” CONDITION 69–93 (1997) (providing an account of recognition in the public sphere).

¹⁸ See David Hollenbach, *Justice as Participation: Public Moral Discourse and the U.S. Economy*, in JUSTICE, PEACE, AND HUMAN RIGHTS: AMERICAN CATHOLIC SOCIAL ETHICS IN A PLURALISTIC WORLD 71–83 (1988) (providing an account of justice as participation). See also BELLAH ET AL., *supra* note 15, at 135–36 (providing another account of the necessity of democratic participation for a robust political life in American society).

¹⁹ The Greensboro, North Carolina, Truth and Reconciliation Commission was not officially sponsored by any government body. Rather, it was a civil society initiative. However, at this point in their development, non-government sponsored and run TRCs are the exception and not the rule. See generally Greensboro Truth and Reconciliation Commission, *Final Report*,

violations that occurred during a previous government regime, identifying the role of various parties and actors in the conflicts that led to the recent transition to the sponsoring government, “affecting the social understanding and acceptance of the country’s past,”²⁰ and promoting and/or facilitating reconciliation between parties previously at odds.²¹ They are typically instituted in countries at the beginning of a significant political transition, usually to a more democratic form than before,²² but this is not always the case. There have been TRCs instituted many years after a democratic government has been in place, but they are the exception.²³

TRCs are a recent phenomenon; in many ways they were unthinkable even forty years ago. The rise of nonviolent revolutions, a global human rights culture, and the modern expansion of the global public sphere have made it possible for TRCs to exist.²⁴ So, when civil and political conflicts come to an end through a peace agreement, or some other similar treaty, societies often go about the arduous task of constructing a new society defined by justice and respect for human rights in the ashes of one that embodied opposite values.

The progenitors of TRCs were known simply as “truth commissions.” Truth commissions are tasked with investigating human rights abuses committed by the previous government and other groups that often accompany societies in transition. Their purpose is to discover and tell the truth of the past and recognize the experiences of the victims and survivors of the previous regime.²⁵ Priscilla Hayner, the leading historian of truth commissions and TRCs, defines truth commissions in this way:

A truth commission (1) is focused on the past, rather than ongoing, events; (2) investigates a pattern of events that took place over a period of time; (3) engages directly and broadly with the affected population, gathering information on their experiences;

<http://www.greensborortc.org> (last visited February 20, 2012). See also HAYNER, *supra* note 4, at 12, 32.

²⁰ HAYNER, *supra* note 4, at 11.

²¹ *Id.* Hayner points out that there is a growing focus on the promotion of reconciliation in truth commissions but does not include that goal in her definition because so many truth commissions have historically not pursued that goal. However, I believe that TRCs are a significant enough evolution away from the earliest truth commissions that they should be understood as different, though related, mechanisms. In this formulation, it is the promotion of reconciliation that is the defining difference between a TRC and a simple truth commission.

²² See JOHN ELSTER, CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE 54–76 (2004). See also generally HAYNER, *supra* note 4 (analyzing every truth commission through 2010).

²³ For example, the Australian government instituted a TRC to address the forced separation of aboriginal children from their families to attend schools intended to assimilate them into mainstream society over twenty years after this practice ended. See HAYNER, *supra* note 4, at 264.

²⁴ See Teitel, *supra* note 5, at 70–72.

²⁵ See HAYNER, *supra* note 4, at 235–36.

(4) is a temporary body, with the aim of concluding with a final report; and (5) is officially authorized or empowered by the state under review.²⁶

TRCs, while being their political descendants, are different than simple truth commissions.²⁷ While they incorporate the purposes of truth commissions, they are not limited to them. In fact, it is how TRCs go *beyond* truth commissions that constitute their primary and most important purpose. Hayner claims that “the intention of truth commissions is part of what defines them.”²⁸ My claim is that TRCs *intend to do more* than truth commissions do.²⁹ Most simplistically, they also seek to achieve reconciliation; more complexly, I claim that TRCs intend to reconfigure a society’s social imagination, institutionalize democratic and just social and political practices, and establish more robust notions of justice than strictly retributive or distributive models. In doing this, they seek to establish the conditions that make reconciliation an achievable possibility.³⁰ So, whereas truth commissions are primarily concerned with backward-looking concerns, discovering and telling the truth about strongly contested histories and addressing past crimes so that there is some resolution in the social understanding, TRCs are primarily concerned with forward-looking concerns—namely, reconciliation and the institutionalization of nonviolent democratic practice—and use their backward-looking functions to serve those purposes.

To do this, TRCs typically include some form of public forum in which victims and survivors of past atrocities and traumas can tell their stories,³¹ and many TRCs include some forum for victims and survivors to confront those perpetrators who have directly impacted their lives.³² Every TRC also includes

²⁶ *Id.* at 11–12.

²⁷ See Priscilla Hayner, *Same Species, Different Animal: How South Africa Compares to Truth Commissions Worldwide*, in LOOKING BACK, REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA 32–41 (Charles Villa-Vicencio & Wilhelm Verwoerd eds., 2000).

²⁸ HAYNER, *supra* note 4, at 11.

²⁹ *Id.*

³⁰ See Charles Villa-Vicencio, *Getting on with Life: A Move Towards Reconciliation*, in LOOKING BACK, REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA, *supra* note 27, at 199–209. See also *supra* note 15.

³¹ The public nature of testimonies in TRCs is important because truth commissions prior to South Africa typically held their hearings in private settings. See HAYNER, *supra* note 4, at 218–20.

³² For instance, the South African TRC included the possibility for victims and survivors to confront perpetrators in an informal public courtroom setting, and provided the opportunity for perpetrators to apologize to and ask forgiveness from those they harmed. See FIONA C. ROSS, BEARING WITNESS: WOMEN AND THE TRUTH AND RECONCILIATION COMMISSION IN SOUTH AFRICA 27–50 (2003). In a different way, the Liberian TRC provided the space for face-to-face reconciliation between perpetrators, their victims, and the wider community through the use of traditional palava hut ceremonies that occurred in local communities throughout the country. See generally Republic of Liberia: Truth and Reconciliation Commission, *Towards National Reconciliation and*

an extensive list of recommendations³³ that should be implemented for reconciliation to be achieved.³⁴ Finally, TRCs conclude in an extensive written final report, usually well over one thousand pages, that includes a detailed history of the conflict period and points the way forward to a more just society.³⁵

B. *The Case of South Africa*

Scholarship about principled nonviolence and transitional justice mechanisms, especially TRCs, can quickly become too abstract to be applicable in actual contexts of conflict and political transition. Grounding my analysis in a specific context, then, will enable it to have the potential to be applicable while recognizing that no contextual experience of political violence and transition is universally applicable or easily comparable in other contexts experiencing the transition from egregious human rights violations to truly democratic government. I ground my analysis, then, in the experience of South Africa for three reasons. First, it instituted the most influential³⁶ TRC in the twentieth century; second, nonviolent civil resistance was an important part of the movement to end apartheid; and third, Desmond Tutu was a leader of both the nonviolent civil resistance movement and the South African TRC.

Dialogues: The Palava Hut or Peace Forums, Vol. 3 appendices, Title XII, http://trcofliberia.org/resources/reports/final/volume-three-12_layout-1.pdf (last visited February 20, 2012).

³³ It is important to note that most TRCs, partly to motivate the participation of perpetrators in the testimony process, do not have any legal or political authority to prosecute individuals or change public policy. Though they are usually commissioned by governments, they do not often have the power to implement the social changes deemed necessary after their investigation.

³⁴ These recommendations are often quite comprehensive and include multiple social and political suggestions. Recommendations for reparations to victims, some limited form of prosecution for the most egregious violators of human rights, social and economic development, encouragements for perpetrators who do not face prosecution to apologize and accept accountability for their actions, and some form of memorialization are common recommendations of TRCs. The recent TRC in Liberia has included recommendations for medical treatment for those suffering from injuries acquired during the protracted civil war and for counseling and vocational services for former child soldiers. Unfortunately, most countries in transition do not have the infrastructure or material resources to implement every suggestion. Even more unfortunate is the often lacking political will to implement those that *can* be implemented.

³⁵ See Hayner, *supra* note 27, at 35. See also Charles S. Maier, *Doing History, Doing Justice: The Narrative of the Historian and of the Truth Commission*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS, *supra* note 10, at 261, 261–78. See also Charles Villa-Vicencio & Wilhelm Verwoerd, *Constructing a Report: Writing up the “Truth,”* in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS, *supra* note 10, at 279, 279–94.

³⁶ For example, Priscilla Hayner lists the South African TRC first in her list of “The Five Strongest Truth Commissions.” See HAYNER, *supra* note 4, at 27–32.

1. Why South Africa?

The TRC in South Africa was the first Truth and Reconciliation Commission in the world.³⁷ It distinguished itself from previous truth commissions by making explicit its goals of reconciliation and attempting to pave a middle-way between a general amnesty for those who violated human rights norms during the Apartheid regime and Nuremberg-style criminal prosecutions of those who were faithful defenders of the apartheid society.³⁸ They rejected amnesty because of its blatant sense of injustice.³⁹ They rejected Nuremberg-style trials for a variety of reasons,⁴⁰ but the most important one is the inability of such trials to bring together warring factions in a common purpose and promote reconciliation between political opponents.

In addition, South Africa has been one of the most important places in the world for the development of nonviolent social change methods and leaders. The nonviolent portion of the anti-Apartheid movement in South Africa produced two Nobel Peace Prize winners: Albert Luthuli and Desmond Tutu.⁴¹ Mohandas Gandhi first experimented with nonviolent protest there and Nelson Mandela paved the way for reconciliation to be taken seriously as a legitimate goal of politics during his presidency.⁴² Finally, if you include South Africa's

³⁷ Technically, Chile held a "National Commission on Truth and Reconciliation" five years prior to the start of the South African TRC, but the nature of it was more like a "truth commission" than what later came to be known as a "Truth and Reconciliation Commission." Since South Africa, many countries have chosen to call their truth commission a "Truth and Reconciliation Commission" and have modeled their commissions on the South African model. In this sense, South Africa's TRC was truly the first one of what is now popularly referred to as a "TRC." See HAYNER, *supra* note 4, at 256–64.

³⁸ See TUTU, *supra* note 9, at 30 ("Our country's negotiators rejected the two extremes and opted for a 'third way,' a compromise between the extreme of Nuremberg trials and blanket amnesty or national amnesia. And that third way was granting amnesty to individuals in exchange for a full disclosure relating to the crime for which amnesty was being sought."). See also Alex Boraine, *Truth and Reconciliation in South Africa: The Third Way*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS, *supra* note 10, at 141–57.

³⁹ See generally Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2541–46 (1991).

⁴⁰ Many of these reasons were pragmatic: South Africa simply did not have the financial resources, manpower, or legal-political structures after the demise of the apartheid government to put everyone who violated human rights norms on trial. In addition, the amount of documents necessary to have successful persecutions did not exist as they did after the end of World War II. The architects and leaders of the apartheid regime were very careful to destroy as much incriminating evidence as they could when they realized the conflict would not end with their victory. Unfortunately, this is not an uncommon occurrence in transitional societies. See HAYNER, *supra* note 4, at 227.

⁴¹ For the list of all Nobel Peace Prize winners, see *All Nobel Peace Prizes*, NOBELPRIZE.ORG, http://www.nobelprize.org/nobel_prizes/peace/laureates/ (last visited February 20, 2012).

⁴² I recognize that including Mandela in this list is problematic considering his role as the leader of the armed wing of the African National Congress. However, his worldwide legacy is not his role leading violent revolt but his pursuit of forgiveness and reconciliation, rather than revenge and further alienation, after the end of the Apartheid regime.

TRC in South Africa's legacy of nonviolence as a legal-political extension of those movements, South Africa arguably becomes the country from which more important developments in nonviolent social change have come than any other. The political culture of South Africa, from at least the first of Gandhi's protests at the turn of the twentieth century to the completion of the TRC at the end of the twentieth century, has been dramatically shaped by the principled commitments of nonviolent social activists. For all of these reasons, it is quite appropriate to use South Africa as a case study in the political institutionalization of those commitments.

2. Why Desmond Tutu?

During his public career opposing apartheid, Desmond Tutu was a seminary professor,⁴³ parish priest, leader of the South African Council of Churches ("SACC"),⁴⁴ and Archbishop of the Anglican Church in South Africa.⁴⁵ In these roles he was a leading religious voice calling on all people to work towards peaceful social change, reconciliation, and justice. His protests stood out from many others because of his insistence that the appropriate method for achieving such change was nonviolent protests and civil disobedience. Though recognizing the evils of Apartheid as comparable to those of Nazi Germany,⁴⁶ he never advocated violent revolt. Tutu's protests were very influential domestically and internationally, and because of this, Nelson Mandela named him "public enemy number one to the powers-that-be"⁴⁷ in the 1980s. In addition, upon establishing the TRC, Mandela appointed Tutu to be its chairperson. Throughout all of this, Tutu provided philosophical-theological justifications for both nonviolent protest and the TRC, against a multitude of critics. These arguments remained consistent and are intimately linked. Because of his high profile, his experience in both Apartheid and post-Apartheid South Africa, his nuanced philosophical-theological commitments, and his willingness to present them to the public in an accessible way, Tutu is a good case study for examining the relationship of the principles that undergird both nonviolent social action and the pursuit of reconciliation in post-conflict societies, specifically the use of TRCs.

3. Tutu's Opposition to Apartheid: Political Priest

There are three stories that occurred early in Tutu's career that are representative of his leadership roles as political priest and public prophet in the

⁴³ See JOHN ALLEN, *RABBLE-ROUSER FOR PEACE: THE AUTHORIZED BIOGRAPHY OF DESMOND TUTU* 105 (2006).

⁴⁴ See *id.* at 167–74.

⁴⁵ See *id.* at 263–72.

⁴⁶ See TUTU, *supra* note 8, at 58.

⁴⁷ ALLEN, *supra* note 43, at 79.

opposition to apartheid. The first comes from his time as a seminary professor. On September 6, 1968, during a protest over the suspension of 300 students for political protests, police arrived at Federal Theological Seminary of South Africa with dogs and tear gas.⁴⁸ A future Anglican priest, Barney Pityana, remembered Tutu's intervention in the situation in this way:

“We had been surrounded by police, with dogs snarling at us. We were petrified, for nearly two hours. Some people were crying . . . The staff of the university, the white people—some of them armed—these professors were watching and nobody said a word, nobody . . . Desmond [came] almost from nowhere, in a cassock . . . broke the police cordon and came to be among us. I recall moving scenes of young women kneeling to pray with Desmond for blessings. Even today when I recall that I get very emotional. For me that was the greatest example I could think of, of what to be a priest was all about.”⁴⁹

Pityana's reflection is not an uncommon one for many who lived through the apartheid era. Tutu became a symbolic figure of the power of religion, especially Christianity, to both inspire nonviolent public action (in this instance, prayer in the face of impending violence) and to maintain the moral authority commonly associated with the Church. He often used this moral authority, as in the story above, to diffuse volatile, and potentially violent, situations through simple nonviolent means like prayer, song, or sermons. This symbolic role as the embodiment of the moral authority granted by religion was one he maintained even after the end of apartheid.⁵⁰ As his public profile grew, there were multiple other occasions when Tutu placed himself in the middle of a confrontation between protestors and police and acted as a mediating and calming presence.⁵¹

4. Tutu's Opposition to Apartheid: Public Prophet

In addition to being a political priest, Tutu was also a public prophet. His words and actions often challenged the status quo in South Africa and often carried more import than they would appear to carry by a surface reading. He

⁴⁸ See *id.* at 111.

⁴⁹ *Id.*

⁵⁰ See ANTJIE KROG, COUNTRY OF MY SKULL: GUILT, SORROW, AND THE LIMITS OF FORGIVENESS IN THE NEW SOUTH AFRICA 201–10 (1998) (providing a string of similar stories that demonstrate Tutu's ability to use his moral authority to diffuse a potentially violent situation nonviolently). Krog also claims that the functioning of the TRC would have been “unthinkable” and “impossible” without his presence on the TRC because he was its moral “compass.” See *id.* at 201. See also ALEX BORAINÉ, A COUNTY UNMASKED: INSIDE SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION 268–69 (2000) (highlighting the TRC's co-chairperson's claim that Tutu's person was necessary for the success of the TRC).

⁵¹ See, e.g., KROG, *supra* note 50, at 206–07.

was the South African voice that was heard around the world in a way other voices were not heard, and this gave him the ability to make symbolic protests that carried great moral and political weight.

For instance, in March 1975 Tutu was appointed dean of St. Mary's Cathedral, becoming the first black dean of a white congregation in South Africa.⁵² As part of this appointment he was granted permission, contrary to the Group Areas Act,⁵³ to live in the white suburb the church was located in. He refused, however, to live there because he did not want to be treated like an "honorary white" saying, "I do not want to apologise for my blackness."⁵⁴ This action carried great symbolic weight for many black South Africans. By proudly claiming his blackness and standing in solidarity with the majority of South Africans, Tutu symbolically undercut the power and allure of trading in political justice for individual material success.

It was not only Tutu's actions that were prophetic and public, but it was also often his words that changed public opinion and directly challenged apartheid. For instance, on May 6, 1976, Tutu wrote an open letter⁵⁵ to Prime Minister Vorster warning that if the government did not participate in a just and peaceful program of social change, violence was likely to erupt. Six weeks later, the Soweto uprising occurred, in which 140 students were killed by the police during a nonviolent protest march, and people looked back at Tutu's letter as a profoundly prophetic piece.⁵⁶ This public letter, in which he warned the government and made concrete suggestions to move forward peacefully, was the first of several such public letters Tutu wrote. It was a form of social protest he employed multiple times in his career.

Tutu continued, until the election of Nelson Mandela in 1994, to play the role of public prophet and political priest. He led protest marches, called for international economic boycotts of the apartheid government and South African businesses, became the first black Archbishop in the Anglican Church, called on the government to act justly and peacefully, and became a spokesman to the world on behalf of black South Africans. It is appropriate then that after apartheid was dismantled and Mandela became president, Tutu was appointed Chairman of South Africa's Truth and Reconciliation Commission.

⁵² ALLEN, *supra* note 43, at 145.

⁵³ The Group Areas Act was a piece of apartheid legislation that "divided the entire country into geographical areas based on race Under this Act, the government could impose control throughout the country over property rights requiring permits, based on race, for ownership and occupation[,] . . . giving the government the power to 'proclaim' an area as fit for occupation by one group and forcibly removing existing occupants from any other groups." NANCY L. CLARK & WILLIAM H. WORGER, *SOUTH AFRICA: THE RISE AND FALL OF APARTHEID* 51 (2d ed. 2011). In practice, this meant certain areas were legally designated for white residents only, and some for black residents only.

⁵⁴ ALLEN, *supra* note 43, at 145.

⁵⁵ See TUTU, *supra* note 8, at 6–13.

⁵⁶ See *id.* at 13.

C. *Tutu and the Foundations of Principled Nonviolence*

Desmond Tutu was one in a long line of activists to advocate nonviolent social protest and civil disobedience as the preferred means for bringing about social change in a situation of social injustice.⁵⁷ Therefore, it is no surprise that, while unique in their particularly South African expressions, the foundational commitments that motivated and sustained his nonviolent social action are commitments shared by most other advocates of nonviolent social action around the world. In the following sections of the paper, I will highlight the most prominent of these foundational commitments: namely, the interconnectedness of human existence, the inherent human dignity that grounds human rights, the “principle of transfiguration,” the duty of civil disobedience in obedience to a higher law, and a commitment to restorative justice.

1. *Ubuntu* (Interconnectedness)

The southern African concept of *ubuntu* was the foundation of all of Desmond Tutu’s thinking about nonviolence and reconciliation. Tutu’s famous “*ubuntu* theology” is Christian theology grounded in the South African context.⁵⁸ It is unashamedly so and, because it is explicitly “African” as opposed to “Western,” was embraced by many in the struggle against apartheid. Tutu often created space in his writings and speeches to define *ubuntu* and its implications as it was one of the guiding principles of his thought and social activism.⁵⁹ The essence of *ubuntu* theology is the ontological and relational interconnectedness of all persons.

Ubuntu is described by Tutu in this way:

In our African idiom we say: “A person is a person *through* other persons.” . . . The first law of our being is that we are set in a delicate network of interdependence with our fellow human beings and with the rest of God’s creation. In Africa recognition of our interdependence is called *ubuntu*. . . . It is the essence of being human. It speaks of the fact that my humanity is caught up and inextricably bound up in yours. I am human because I belong. . . . A person with *ubuntu* is welcoming, hospitable, warm and generous, willing to share. . . . They know that they are diminished when others are humiliated, diminished when others are oppressed, diminished when others are treated as if they were less than who they are. . . . When we Africans want to give high praise to someone, we say, “*Yu, u nobuntu*”:

⁵⁷ See ACKERMAN & DUVALL, *supra* note 1, at 1–9.

⁵⁸ See BATTLE, *supra* note 8, at 1.

⁵⁹ See TUTU, *supra* note 9, at 31. See also TUTU, *supra* note 8, at 125 (multiple references to *ubuntu*).

“Hey, so-and-so has *ubuntu*.” A person is a person because he recognizes others as persons.⁶⁰

Because of Tutu’s deeply rooted belief in *ubuntu*, his goal in combating apartheid was always reconciliation. He believed his humanity, and the humanity of his fellow black South Africans, was intrinsically tied to the humanity of white South Africans. They were dependent on each other to be truly human.

The metaphor of the family is one Tutu frequently used to demonstrate the way whites and blacks were connected in South Africa.⁶¹ This metaphor had special rhetorical power because the vast majority of the population claimed to be Christians.⁶² He said:

If we could but recognize our common humanity, that we do belong together, that our destinies are bound up with one another’s, that we can be free only together, that we can survive only together, that we can be human only together, then a glorious South Africa would come into being where all of us lived harmoniously together as members of one family, the human family, God’s family. In truth a transfiguration would have taken place.⁶³

Tutu preached this message consistently, and his invitation was always the same, “Come, join us, for when we are free, then all will be free. Until we are all free none is going to be free.”⁶⁴

While the southern African concept of *ubuntu* provided Tutu with an especially powerful philosophical anthropology from which to work, he was not the first advocate of nonviolence to appeal to human interconnectedness as a foundation for nonviolent action.⁶⁵ Human interconnectedness and interdepend-

⁶⁰ DESMOND TUTU, *GOD HAS A DREAM: A VISION OF HOPE FOR OUR TIME* 25–26 (2004).

⁶¹ See BATTLE, *supra* note 8, at 8.

⁶² See TUTU, *supra* note 8, at 119.

You don’t choose your family. They are God’s gift to you, as you are to them. Perhaps if we could, we might have chosen different brothers and sisters. Fortunately or unfortunately we can’t. We have them as they have us. And no matter how your brother may be, you can’t renounce him. He may be a murderer or worse, but he remains forever your brother. Our baptism has made us brothers and sisters. Can you imagine what would happen in this land if we accepted that theological fact about ourselves—that whether we like it or not we are members of one family?

Id.

⁶³ *Id.* at 121.

⁶⁴ *Id.* at 202.

⁶⁵ For instance, Martin Luther King, Jr. often appealed to the global interdependence of all humans as one of the reasons that war is an unthinkable option for creating peace. King was convinced that all of humanity is interconnected and the idea permeates his speeches and writings.

ence are foundational philosophical-theological commitments of many principled advocates of nonviolent social change.⁶⁶ They insist that our ontological connection and dependence to one another makes violence an option that never does more good than harm. To do violence to another is to do violence to oneself and one's community, they claim, and therefore cannot be a tool in bringing about reconciliation, peace, or a sustainable justice. The nature of violence is to beget more violence. This cycle of violence is harmful to all because our interdependence means we are all injured with each new round of violence, whether we are those perpetrating the violence or receiving the violence.

Principled nonviolence, then, rests upon the recognition that when we injure others, we injure ourselves. Within an *ubuntu* framework, when we exclude others from just, peaceable, and loving relationships we actually cut ourselves off from our full humanity. In other words, to do violence to another is to harm all of humanity, including oneself, ontologically and relationally. Within this understanding of the nature of human beings in the world, violence ceases to be a viable option. The interdependence and interconnectedness of all people requires that one choose nonviolence whenever possible.

One fruit of the tree of *ubuntu* and interdependence is a special awareness that what one fights when engaging in nonviolent social protest is not necessarily "evil individuals" or "others" but rather unjust social and political systems.⁶⁷ If one believes that the primary evil one is fighting is not grounded in any individual but in the political arrangements and structures of a society, it makes little or no sense to injure other persons who are negatively affected by those systems as well even if they are affected in a different way than the oppressed.⁶⁸ Those who benefit from unjust social and political systems are negatively affected—in fact, their humanity is diminished—by their participation in

For example, in his famous "Letter from a Birmingham Jail," King said, "Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly." MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* 65 (2000).

This ontological truth informed his understanding of why injustice was so evil and why he should respond to such evil and injustice with love and nonviolence. Injustice is evil and should be opposed because it injures all of humanity. Likewise, it should be opposed nonviolently because even those actions affect all of humanity. *See id.*

One of the most well-known non-Christian principled advocates of nonviolence is Vietnamese Buddhist monk Thich Nhat Hanh. Like Tutu and King, he has a deep appreciation for the interconnectedness of humanity. One of his most famous expressions of this truth is his poem "Please Call Me By My True Names." *See THICH NHAT HANH, BEING PEACE* 83–85 (2d ed. 1996).

So, principled advocates of nonviolence across time, continent, and religion have appealed to human interconnectedness as a foundation for their nonviolent activism.

⁶⁶ *See* HANH, *supra* note 65, at 83–85; MARTIN LUTHER KING, JR., *supra* note 65, at 65.

⁶⁷ *See* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 12–13 (James M. Washington ed., 1986).

⁶⁸ *See* MARTIN LUTHER KING, JR., STRENGTH TO LOVE 53 (1981). *See also* TUTU, *supra* note 9, at 103.

those systems.⁶⁹ By learning to hate and oppress they become malformed people; they are people in need of healing and redemption rather than punishment.

2. Human Dignity

The sister core belief of *ubuntu*'s emphasis on interconnectedness is the fact that all humans have an inherent dignity;⁷⁰ theologically, Tutu consistently spoke of all people as being created in the "image of God."⁷¹ This is why apartheid was so evil; it denied that blacks have the same amount of dignity—bear God's image equally—as whites.

The Bible declares right at the beginning that human beings are created in the image and likeness of God. I showed [earlier in the speech] why this fact endows each person with a unique and infinite value, a person whose very hairs are numbered. And what makes any human being valuable therefore is not any biological characteristic. No, it is the fact that he or she is created in the image of and likeness of God.⁷²

The message that all people are created in the image of God was a common message that Tutu delivered to whites. In his first public letter to Prime Minister Vorster, just weeks before the Soweto uprising in 1976, he wrote, "I am writing to you as one human person to another human person, gloriously created in the image of the selfsame God"⁷³ He continued proclaiming this message to white audiences throughout the struggle against apartheid so that in 1992, two years before Mandela's election, he was still saying, "I hope somewhere, somehow it will sink into the consciousness of most of our white fellow South Africans that we are human beings. Just a simple thing: we are human

⁶⁹ See MARTIN LUTHER KING, JR., *supra* note 68, at 53. See also TUTU, *supra* note 9, at 103.

⁷⁰ See BATTLE, *supra* note 58, at 35–53.

⁷¹ See *id.* at 58. It is important to note that while Tutu's "grounding" of human rights is an explicitly Christian theological conviction, this does not exclude non-Christians from embracing the dignity of all people. There is a growing literature on the grounding/source of the inherent dignity that human rights are said to be based upon. While there are some, like Michael Perry, who argue that human rights are inherently religious, many others believe that there are secular grounds for human dignity as well. I side with Richard Amesbury and others in claiming that there can be multiple grounds for human rights that move across cultural and religious traditions. See MICHAEL J. PERRY, *THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES* 11–41 (1998). See also Richard Amesbury, *Universal Human Rights and Religious Particularity*, in *THE GOD OF LOVE AND HUMAN DIGNITY* 65–83 (Paul Middleton ed., 2007). See generally GRACE Y. KAO, *GROUNDING HUMAN RIGHTS IN A PLURALIST WORLD* (2011).

⁷² TUTU, *supra* note 8, at 64.

⁷³ *Id.* at 7.

beings. . . . Our cry is for you to recognize that God has created us as God has created you.”⁷⁴

Tutu believed that humans carry the image of God with them so deeply that he considered it blasphemy to treat people without dignity and respect.⁷⁵ The inherent human dignity of all persons is so important, claimed Tutu, that violating it is analogous to desecrating a holy place.⁷⁶ Oppression, injustice, racism, and violence are sins—in a social *and* religious sense—because they do harm to those created in God’s image. If this is true, if all people have inherent dignity, the use of violence is a violation of that dignity. Part of what having dignity means, according to many principled nonviolence advocates, is that violating the bodily integrity of another is a violation of that dignity.

What are the implications of this conviction? First, the oppression and social injustice present in societies like Apartheid South Africa is so incredibly wrong that the society must be transformed. Simple reformation will not suffice; revolution is required. Second, this revolution must be nonviolent because it is not only the poor and oppressed or one’s political allies who carry this dignity. One’s political enemies and oppressors also carry this inherent dignity and violence done to them violates their dignity just as the violence done to the poor and oppressed (explicit and systemic) is a violation of their dignity.

3. The Principle of Transfiguration (Responsible Hope)

Another key foundation of Tutu’s advocacy of nonviolence is the “principle of transfiguration.” The “principle of transfiguration” is simply a belief that no person or situation is unredeemable.⁷⁷ Everything can be transformed. Tutu’s belief in the principle of transfiguration has found expression in his anti-apartheid work, his emphasis on reconciliation, and his work with the TRC.

For Tutu, this belief was central to his understanding of the universe. Tutu described the principle of transfiguration as such:

⁷⁴ *Id.* at 246.

⁷⁵ TUTU, *supra* note 60, at 63.

To treat a child of God as if he or she were less than this is not just wrong, which it is; it is not just evil, as it often is; not just painful, as it often must be for the victim; it is veritably blasphemous, for it is to spit in the face of God. Each of us is a “God carrier,” as St. Paul put it. Human beings must not just by rights be respected, but they must be held in awe and reverence.

Id.

⁷⁶ *See id.*

⁷⁷ Technically, Tutu is an adherent of Just War Theory. However, he never advocated the use of violence in South Africa even though he equated Apartheid South Africa with Nazi Germany, of which he believed military intervention was justified. TUTU, *supra* note 8, at 142. I believe this seeming contradiction can be traced back to his belief in the principle of transfiguration. He never believed the situation in South Africa had reached the “last resort” of violence, which is one of the key criterion of Just War Theory.

The principle of transfiguration says nothing, no one and no situation is “untransfigurable,” that the very creation, nature, waits expectantly for its transfiguration when it will be released from its bondage and share in the glorious liberty of the children of God, when it will not be just dry inert matter but will be translucent with a divine glory. The principle of transfiguration avers that an erstwhile persecutor can become the greatest missionary of the truth he once persecuted, that one who denied his Master not once but three times could become the prince of apostles proclaiming boldly faith in a Jesus Christ when only a short while before he was cowering in abject fear behind locked doors. It is the principle of transfiguration at work when an instrument of the most painful and shameful death can become the life-giving Cross which Christians wear with pride and which is traced over them at significant moments in their life . . .

..

....

God calls on us to be his fellow workers. He wants to enlist our support to be his agents of transfiguration, of transformation . . .

.

....

. . . He enlists us to help him transfigure all the ugliness of this world into the beauty of his kingdom.⁷⁸

Advocates of nonviolence are often accused of being naïve, utopian dreamers, and unrealistic about politics.⁷⁹ They continue to claim, however, that they are more “realistic,” meaning “effective” in bringing about social change⁸⁰

⁷⁸ *Id.* at 121–22, 127. This passage is thick with Christian biblical references. Tutu references, in quick succession, the Christian doctrine that God will one day redeem the universe and there will be a “new creation,” the conversion of the apostle Paul who went from being one of Christianity’s earliest opponents to its greatest missionary, the “comeback” of the apostle Peter who denied knowing Jesus on the night of his crucifixion and became Christianity’s first great preacher, and the resurrection of Jesus Christ who overcame the most hopeless of situations, death. *Id.*

⁷⁹ The most famous and damning of such critics in Christian ethics comes from Reinhold Niebuhr. See REINHOLD NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY* 56–58 (Westminster John Knox Press, 2001) (1932); REINHOLD NIEBUHR, *Love and Justice and the Pacifist Issue*, in *LOVE AND JUSTICE: SELECTIONS FROM THE SHORTER WRITINGS OF REINHOLD NIEBUHR* 241–301 (D.B. Robertson ed., 1957); Reinhold Niebuhr, *Why the Christian Church is not Pacifist*, in *THE ESSENTIAL REINHOLD NIEBUHR: SELECTED ESSAYS AND ADDRESSES* 102 (Robert McAfee Brown ed., 1986).

⁸⁰ Erica Chenoweth & Maria J. Stephan, *Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict*, *INT’L SEC.*, Summer 2008, at 8. Chenoweth and Stephan demonstrate that

than those who dismiss nonviolence as ineffective or naïve because of the historic and philosophical power of nonviolent tactics of social change. For instance, long-time peace activist John Dear has reminded us that folksinger Pete Seeger often answers those who question the efficacy of nonviolence by asking the following set of questions:

In the early 1970s . . . did you ever expect to see President Nixon resign because of Watergate? . . . Did you ever expect to see the Pentagon leave Vietnam the way it did? . . . In the 1980s, did you expect to see the Berlin Wall come down so peacefully? . . . In the 1990s, did you expect to see Nelson Mandela released from prison, apartheid abolished, and Mandela become President of South Africa? . . . Did you ever expect the two warring sides of Northern Ireland to sign a peace agreement on Good Friday?⁸¹

We may add, “Did you ever think you would see a string of Arab dictators, including Hosni Mubarak in Egypt, be removed from power through peaceful means?” The answer to each of these questions is always a resounding “No!” “If you can’t predict those things,” Pete concludes, “don’t be so confident that there’s no hope! There’s always hope!”⁸² The point, of course, is that people frequently claim that certain social and political changes are impossible through nonviolent means until, of course, those changes actually come about in large part because of nonviolent means.⁸³ Dear and Seeger call the desire for such changes to occur again in the future “hope.” Tutu agrees with that sentiment. He is often quoted claiming something along the lines of, “I’m not an optimist, I’m a prisoner of hope!”⁸⁴

This distinction is not unlike the “responsible hope”⁸⁵ advocated by ethicist and pacifist Ellen Ott Marshall. Responsible hope is a tenacious grasping

between 1900 and 2006 nonviolent resistance campaigns have succeeded, partially or wholly, at a rate double that of violent resistance campaigns. *Id.*

⁸¹ JOHN DEAR, PUT DOWN YOUR SWORD: ANSWERING THE GOSPEL CALL TO NONVIOLENCE 187–88 (2008).

⁸² *Id.*

⁸³ Chenoweth and Stephan, *supra* note 80, at 8. “Our findings show that major nonviolent campaigns have achieved success 53 percent of the time, compared with 26 percent for violent resistance campaigns.” *Id.*

⁸⁴ See David Frost, *End of Apartheid*, BBC NEWS, (May 29, 2005), http://news.bbc.co.uk/2/hi/programmes/breakfast_with_frost/4591113.stm (last visited Feb. 13, 2012). See also Steve Maynard, *Nobel Peace Prize laureate Desmond Tutu a “prisoner of hope,”* TACOMA NEWS TRIBUNE, (May 13, 2011) <http://www.thenewstribune.com/2011/05/13/1663395/news-brief-13tutup4.html> (last visited Feb. 13, 2012).

⁸⁵ ELLEN OTT MARSHALL, *THOUGH THE FIG TREE DOES NOT BLOSSOM: TOWARD A RESPONSIBLE THEOLOGY OF HOPE*, at xiv (2006). Responsible hope

onto a more just future while remaining grounded in the often despair-producing realities of social injustice and oppression.⁸⁶ Responsible hope takes the “long-view” of history and places its faith in peace and justice rather than violence and division. It is an approach to social change that trusts “relational power”⁸⁷ rather than hierarchical power or the power of the sword. It is a hope that is not surprised when these things actually triumph as they were wont to do in the twentieth century, but it does not necessarily expect to see its goals reached in one lifetime. Philip McManus and Gerald Schlabach remind us that nonviolent movements are often defined by this same attitude, which they call “relentless persistence.”⁸⁸ Whatever you call it—the principle of transfiguration, responsible hope, or relentless persistence—this attitude permeates principled nonviolent movements for social change.

The belief that no person or situation is beyond transformation later led Tutu to defend amnesty from criminal prosecutions for those who testified before the TRC. He did this because he believed that any individual ready to confess their sins was ripe for transfiguration, and whatever horrible situation they described could be transfigured into reconciled community. Speaking of the theological underpinnings of the TRC Tutu said:

Theology reminded me that, however diabolical the act, it did not turn the perpetrator into a demon . . . Theology said they still, despite the awfulness of their deeds, remained children of God with the capacity to repent, to be able to change. . . .

. . . [W]e can never give up on anyone because our God was one who had a particularly soft spot for sinners. . . .

. . . None of us could in my theology ever consign anyone to hell as ultimately irredeemable. . . .

is a disposition that remains accountable to promise and peril. It unearths beauty and faces tragedy. It celebrates goodness and knows cruelty. It buoys the spirit and steels the spine . . . responsible hope remains accountable to the hopes of others and labors to identify common goods rather than pursuing self-interest . . . remains open to wonder and takes joy in mysterious and unreasonable good fortune, but it does not rely on them . . . A responsible hope takes root in a relational concept of power, insisting that human effort is required to realize the possible.

Id.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ RELENTLESS PERSISTENCE: NONVIOLENT ACTION IN LATIN AMERICA (Philip McManus & Gerald Schlabach eds., 1991).

. . . Ultimately no one is an irredeemable cause devoid of all hope. No situation in this theology is irredeemable and devoid of hope.

God does not give up on anyone⁸⁹

4. Civil Disobedience

Part of the call of Christians, according to Tutu, is to partner with God in bringing about transfiguration,⁹⁰ in the South African context that meant civil disobedience to apartheid laws.⁹¹ Tutu said very bluntly, “Our marching orders come from Christ himself and not from any human being When laws are unjust then Christian tradition teaches that they do not oblige obedience.”⁹² On another occasion Tutu said, “This book [the Bible] says when a ruler gives you unjust laws, disobey. You are not disobeying the ruler, you are obeying God . . . [T]he church says, an unjust law does not oblige obedience.”⁹³ In other words, “not to oppose injustice is to disobey God.”⁹⁴

Civil disobedience and non-violent direct action are righteous, for Tutu, because they follow the example of Jesus.⁹⁵ It is the call of all Christians to disobey laws that are unjust because Christians “obey God rather than man.”⁹⁶ This core belief found expression in Tutu’s life when he led protest marches, intervened in police actions, and encouraged economic sanctions of South Africa. He consistently called on people to defy the government in any creative and peaceful way they could.

While Tutu primarily grounded his defense of civil disobedience in the biblical narrative, many other advocates of nonviolence ground their civil disobedience in some version of natural law, higher law, or the nature of the universe. For instance, Martin Luther King, Jr. insisted that he was on the side of the universe when he participated in nonviolent civil disobedience because “the arc of the moral universe is long, but it bends toward justice.”⁹⁷ Nonviolent social action often has, whether it is the divine command of Tutu or the metaphys-

⁸⁹ TUTU, *supra* note 9, at 83–87.

⁹⁰ See *supra* text accompanying note 78.

⁹¹ See Joel A. Nichols & James W. McCarty III, *When the State is Evil: Biblical Civil (Dis)Obedience in South Africa*, 85 ST. JOHN’S L. REV. 593, 593–625 (2011).

⁹² TUTU, *supra* note 8, at 150–51.

⁹³ *Id.* at 171.

⁹⁴ TUTU, *supra* note 60, at 63.

⁹⁵ Nichols & McCarty, *supra* note 91, at 619.

⁹⁶ TUTU, *supra* note 8, at 171.

⁹⁷ MARTIN LUTHER KING, JR., *The Current Crisis in Race Relations, in A TESTAMENT OF HOPE*, *supra* note 67, at 85, 88. “[N]onviolent resistance . . . is based on the conviction that the universe is on the side of justice . . . in his [the non-violent resister’s] struggle for justice he has cosmic companionship.”

ical reality of King and others, some justification of civil disobedience that is grounded in a higher notion of justice than positive law.

5. Restorative Justice

Restorative justice is an alternative approach to criminal justice. Rather than accepting the primarily retributive approaches practiced in modern nation-states, restorative practices move beyond the primarily liberal and Western assumptions that undergird these practices and claim that justice may be better met by “restoration” of goods and relationships than by inflicting physical punishment by confinement or death. Put simply, restorative justice seeks to reframe the conversation of criminal justice in such a way that the contextual needs of victims are taken more seriously and the nature of crime is understood primarily as a violation of persons and relationships rather than as primarily against the state or an abstract notion of universal justice. Justice, then, is the restoration of violated individuals and relationships.⁹⁸

All of the previous themes—*ubuntu*, human dignity, targeting systems rather than individuals, transfiguration and hope, and a “higher” justice that justified civil disobedience—converged in Tutu’s work with the Truth and Reconciliation Commission, which he understood as an exercise in national restorative justice. In this capacity he played a key role in the transition from the apartheid government to a multi-racial, democratic society. It was, at that point, a unique experience in the history of the world.⁹⁹

Describing restorative justice, Tutu says:

[P]erhaps justice fails to be done only if the concept we entertain of justice is retributive justice, whose chief goal is to be punitive, so that the wronged party is really the state, something impersonal, which has little consideration for the real victims and almost none for the perpetrator. We contend that there is another kind of justice, restorative justice, which was characteristic of traditional African jurisprudence. Here the central con-

⁹⁸ See HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND PUNISHMENT* 177–214 (3d ed. 2005); HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 13–18 (2002). For a wide range of essays on restorative justice, see generally *CRITICAL ISSUES IN CRIMINAL JUSTICE* (Howard Zehr & Barb Toews, eds., 2004); *HANDBOOK OF RESTORATIVE JUSTICE* (Dennis Sullivan & Larry Tift eds., 2008) [hereinafter *HANDBOOK 2008*]; *HANDBOOK OF RESTORATIVE JUSTICE* (Gerry Johnstone & Daniel W. Van Ness eds., 2007) [hereinafter *HANDBOOK 2007*].

⁹⁹ The first TRC, in name, was in Chile in 1990–1991, but the first TRC to take the promotion of reconciliation seriously as a stated goal of the commission’s work was South Africa’s TRC begun in 1995. See HAYNER, *supra* note 4, at 257. After the South African TRC, social and political reconciliation (including forgiveness and healing) and restorative justice became important goals—along with retributive justice, truth-finding, and democratization—to be considered in transitional justice processes around the world. For example, since South Africa there have been at least fourteen truth commissions that have included reconciliation in their name. *Id.* at 258–62.

cern is not retribution or punishment. In the spirit of *ubuntu*, the central concern is the healing of breaches, the redressing of imbalances, the restoration of broken relationships, a seeking to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community he has injured by his offense. This is a far more personal approach, regarding the offense as something that has happened to persons and whose consequence is a rupture in relationships. Thus we would claim that justice, restorative justice, is being served when efforts are being made to work for healing, for forgiving, and for reconciliation.¹⁰⁰

6. Linking Nonviolence and Restorative Justice in Tutu's Thought

Tutu's efforts at restorative justice on the national level reflect the central tenets of his thought. In his work with the TRC he converted the external expression of his beliefs from nonviolent social action to the legal-political framework of the TRC. For instance, his insistence that humans are interconnected, grounded in the concept of *ubuntu*, provided part of the foundation for his rejection of violence.¹⁰¹ It also grounded his pursuit of restorative justice in the TRC. Criminal offenses were not treated as primarily offenses against the state. Rather, they were treated as violations against victims, and to do justice in those situations was to restore the relationship, the connection, between victims and offenders. If one begins with an ontology like the one implied by *ubuntu* one, is likely to prefer restorative justice, when possible, over retributive justice.¹⁰²

Restorative justice is also related to a strong commitment to human dignity. Whereas many people assume that the violation of human rights requires prosecutions to do justice, restorative justice advocates insist that such procedures are offender-centered and are more concerned with the rights of the state being defended than the rights of the victim being restored.¹⁰³ In contrast, restorative justice mechanisms take the dignity of individual humans, especially victims, so seriously that they make the restoration of victims' rights their central concern.¹⁰⁴ These rights are not understood in an abstract or universalized way, however. Rather, they are contextualized in light of history, culture, the individual needs of the victim, and the nature of the violation committed.

¹⁰⁰ TUTU, NO FUTURE WITHOUT FORGIVENESS, *supra* note 9, at 54–55.

¹⁰¹ See *infra* Part I.C.1.

¹⁰² Dirk J. Louw, *The African Concept of Ubuntu and Restorative Justice*, in HANDBOOK 2008, *supra* note 98, at 161–73.

¹⁰³ ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE, *supra* note 98, at 20.

¹⁰⁴ *Id.* at 64–69.

Like principled nonviolence, restorative justice mechanisms work under the assumption that individuals and relationships can be restored or transfigured. To work toward the redress of wrongs and the restoration of broken relationships presumes, in a way that purely retributive practices do not, that such violations both can be restored and that it is a worthwhile endeavor to attempt to do so. In this way, restorative justice mechanisms are more “hopeful,” in a realistic and responsible way, than retributive justice mechanisms.

Finally, like Tutu’s justification of civil disobedience by appealing to a higher form of justice than positive law, restorative justice refuses to accept limits on criminal justice that exclude any other approach to redressing wrongdoing other than punishment. The nature of justice is not limited to the prohibitions or punishments prescribed by positive law. There are legitimate notions of justice grounded in contextual considerations that can include compensation, reparation, and even restoration. To limit criminal justice to retribution, restorative justice advocates claim, is to constrain the doing of justice to a too narrow mode of activity.

So, Desmond Tutu’s philosophical-theological grounding for his nonviolent activism grounded his commitment to pursuing reconciliation through the TRC as well. These convictions were: the interconnectedness and interdependence of all people (articulately developed as *ubuntu* in his particular context), the ethical demands of inherent human dignity, the implication of both of these convictions on the treatment of one’s enemies and/or oppressors, the justification of civil disobedience grounded in a concept of justice higher than positive law, and a persistent hope in the future and the possibility of individual and social change towards justice. These foundations for nonviolence ultimately found expression in Tutu’s work with the TRC and its pursuit of national restorative justice. Restorative justice practices, then, can be an attempt to institutionalize the principles of nonviolence in the legal justice system.

II. TRCS AND THE INSTITUTIONALIZATION OF NONVIOLENT DEMOCRATIC PRACTICE

In recent years TRCs have become a regular tool for transitional societies¹⁰⁵ needing to address past injustices and lay the foundation for and give birth to a new society with cultural norms and institutions that support human rights, political equality, and social justice.¹⁰⁶ The most famous of these has been the South African TRC,¹⁰⁷ but they have recently been implemented in

¹⁰⁵ Teitel describes the regular use of TRCs and the creation of the International Criminal Court as the “normalization of transitional jurisprudence.” See Teitel, *supra* note 5, at 89–92.

¹⁰⁶ See HAYNER, *supra* note 4.

¹⁰⁷ See *Infra* Part I.B.

Sierra Leone, Liberia, Rwanda, Timor-Leste, and Greensboro, North Carolina,¹⁰⁸ to name a few.¹⁰⁹

TRCs are a remarkable first step in the attempt to construct a just society and a reconciled citizenry within the boundaries of countries that were often characterized by extreme social and economic injustice, gross violations of human rights, and governmental and revolutionary violence on a mass scale. People who were once enemies are expected to be partners in the construction of a new society. Perhaps even more difficult, murderers are expected to be neighbors with the families of those they murdered, and crooked politicians are expected to be equal citizens with those they oppressed for so long. In the modern world, where civil wars and conflicts often come to an end through a peace agreement rather than military coup or victory, the question of how to move beyond past conflicts to recreate, or create for the first time, a relatively just society is a vital one. For several countries, TRCs have been a pivotal part of the answer.¹¹⁰

A. *Institutionalizing Democracy, Justice, Truth-telling, and Reconciliation*

In this Part, I will delineate the ways in which TRCs contribute to the construction of the foundation for a just and reconciled society in the wake of an evil one. TRCs attempt to do this by reconstituting a society's social imaginary through a retelling of its history, conceiving of justice in restorative and participatory rather than purely retributive and distributive ways, and institutionalizing practices of truth-telling, democratic participation, forgiveness, and reconciliation.

In the case of South Africa, the TRC's attempt to institutionalize these practices can be viewed as growing out of the same foundational principles that sustained the nonviolent social action that was part of bringing about social change in the first place. Critics of TRCs in general, and the South African TRC in particular, overlook this important connection. My goal, then, is to theorize

¹⁰⁸ The Greensboro Truth and Reconciliation Commission was a civil society initiative tasked "to examine the 'context, causes, sequence and consequences,' and to make recommendations for community healing around the tragedy in Greensboro, N.C., on Nov. 3, 1979, which resulted in the deaths of five anti-Klan demonstrators: César Vicente Cauce, 25; Michael Ronald Nathan, M.D., 32; William Evan Sampson, 31; Sandra Neely Smith, 28; and James Michael Waller, M.D., 36; and the wounding of demonstrators Paul Bermanzohn, Claire Butler, Tom Clark, Nelson Johnson, Rand Manzella, Don Pelles, Frankie Powell, Jim Wrenn; Klansman Harold Flowers, and news photographer David Dalton." GREENSBORO TRUTH AND RECONCILIATION COMMISSION REPORT EXECUTIVE SUMMARY, at 2, available at http://www.greensborotrc.org/exec_summary.pdf.

¹⁰⁹ For a list of every truth commission to date through 2010, see HAYNER, *supra* note 4, at 256–62.

¹¹⁰ After South Africa, TRCs have been held in Peru, the former Yugoslavia, Timor-Leste, Sierra Leone, Morocco, Greensboro, North Carolina, Democratic Republic of the Congo, South Korea, Liberia, Solomon Islands, Togo, Canada, and Kenya. *See id.* at 258–62.

TRCs, drawing at times on the South African TRC, as a legal-political mechanism capable of continuing the institutionalization of those values that undergird principled nonviolent action. I will do this by briefly theorizing the ways in which TRCs institutionalize democratic practices, embody robust notions of justice, and remake social imaginaries in such a way as to lay the foundation for reconciled societies. In this way, TRCs attend to the socially differentiated way that persons and societies navigate their social and moral worlds.¹¹¹

1. What are Institutions?

Social theorists have demonstrated that we live through institutions.¹¹² Institutions are the established and expected patterns that permeate the different spheres of our lives and determine the appropriate ways of being in the world.¹¹³ They are both the concrete ways we live our lives, and the meanings symbolized in our material interactions with the world and others.¹¹⁴ Institutions are multiple and they each have multiple, internal logics.¹¹⁵ So, our actual practices and the meaning we give them are always being negotiated.¹¹⁶

While constituting the types of organizations that are found in a society, institutions are not to be equated with organizations.¹¹⁷ Though institutions are a vital part of any culture, they are not simply another name for culture popularly understood.¹¹⁸ An institution can be as varied as the use of the handshake when

¹¹¹ For an exposition of the ways that people navigate the multiple moral logics of a socially differentiated world, see generally Steven M. Tipton, *Social Differentiation and Moral Pluralism*, in *MEANING AND MODERNITY: RELIGION, POLITY, AND SELF* 15 (Richard Madsen et al. eds., 2002).

¹¹² In my opinion, the two most compelling accounts of the ways in which we live through institutions are Roger Friedland & Robert R. Alford, *Bringing Society Back In: Symbols, Practices, and Institutional Contradictions*, in *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* 232–63 (Walter W. Powell & Paul J. DiMaggio eds., 1991) and ROBERT N. BELLAH ET AL., *THE GOOD SOCIETY* 3–16, 287–306 (1991).

¹¹³ Bellah et al. define institutions in this way: “[A]n institution is a pattern of expected action of individuals or groups enforced by social sanctions . . . Institutions are normative patterns embedded in an enforced by laws and mores (informal customs and practices).” BELLAH ET AL., *supra* note 112, at 10–11. Friedland and Alford define institutions in this way:

[I]nstitutions . . . [are]simultaneously material and ideal, systems of signs and symbols, rational and transrational. Institutions are supraorganizational patterns of human activity by which individuals and organizations produce and reproduce their material subsistence and organize time and space. They are also symbolic systems, ways of ordering reality, and thereby rendering experience of time and space meaningful.

Friedland and Alford, *supra* note 112, at 243.

¹¹⁴ *Id.*

¹¹⁵ See Friedland & Alford, *supra* note 112, at 243; Tipton, *supra* note 111, at 15–40.

¹¹⁶ BELLAH ET AL., *supra* note 112, at 11.

¹¹⁷ *Id.*

¹¹⁸ Friedland & Alford, *supra* note 112, at 253.

greeting someone in western cultures—which functions with the internal logics of respect, courtesy and equality (or deference, depending on the situation)—or the treatment of humans primarily as individuals, which denotes a logic of rights like liberty and private property.¹¹⁹ In other words, institutions provide the language, norms, and practices within which it is possible for humans to live a coherent life.

Institutions as a category are neutral since they can promote any virtue or vice, but in practice they are not impartial. Institutions are inevitably moral.¹²⁰ In fact, institutions are the locations and ways in which morals are both shaped and transformed.¹²¹ Understanding this is vital to properly understanding the role of TRCs.

Institutions vary and are often contradictory. For example, Friedland and Alford list the “capitalist market, bureaucratic state, democracy, nuclear family, and Christian religion” as the “central institutions of the contemporary capitalist West.”¹²² Therefore, social institutions are often in competition with one another, and if one institution begins to win over another one its logic begins to be applied in spheres not originally intended.¹²³ The most prevalent way this occurs today is the way in which the logic of the market economy, with its measures of efficiency and rational choice defined as profit maximization, has infiltrated other areas of life.¹²⁴

2. TRCs and their Institutional Function

TRCs are attempts to begin the institutionalization of certain values and practices in societies in which they did not exist. They give public justification to the participation of all in the democratic life of the society through welcoming testimonies from people from every geographic area, class status, religious affiliation, and political commitment in a society. They practice the recognition of the poorest and most vulnerable citizens of a society by giving preference to their testimonies when writing the history of the country in the final report. They encourage the virtue of truth-telling in societies where the truth has often been denied through the use of amnesties and reparations.

The South African TRC also extended those values that sustained the nonviolent portion of the movement for social change by institutionalizing them in the legal and political life of the new country. It practiced the interconnected-

¹¹⁹ *Id.* at 238. Paradoxically, the modern conception of the individual would not be possible without the establishment of certain social institutions in the modern west.

¹²⁰ BELLAH ET AL., *supra* note 112, at 288.

¹²¹ *Id.*

¹²² BELLAH ET AL., *supra* note 112; Friedland & Alford, *supra* note 112, at 232.

¹²³ Tipton, *supra* note 111, at 31–40 (calling the moral logic of institutions “imperialistic”).

¹²⁴ See MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983) for an account of the dangers of the logic of one sphere—though he does not couch it in these terms—infiltrating another, and the way in which this happens with the sphere of money.

ness of people by insisting that perpetrators testify of their crimes in the presence of their victims and having victims testify to the injuries they endured in the presence of their perpetrators. It practiced the recognition of the inherent dignity of all by making it possible for people from every ethnic background and social sphere to participate in its processes. The South African TRC recognized a higher form of justice than positive law by pursuing restorative justice rather than simply retributive justice. In small and large ways, then, the South African TRC attempted to institutionalize justice, democracy, nonviolence, and reconciliation through their multiple processes.

One clear example of the ways in which TRCs are attempts to transform the institutions of a society is seen in their use of amnesties and public testimonies. Nations going through a transitional period are often fighting a “culture of impunity.”¹²⁵ In nations with cultures of impunity, lies, public denials of truths, political secrecy, vigilantism and illegal and immoral quid pro quo—for instance, denying one’s knowledge of illegal events so that one will receive the favor in the future—are institutions that people in power perpetuate. The South African TRC, with its conditional amnesty, attempted to discredit and transform a culture of impunity into one of transparency and truth-telling by making it preferable for a perpetrator to tell the truth rather than cover-up or lie about their human rights violations. No longer are people encouraged to “look the other way” when gross injustices occur. Instead, people are now encouraged to denounce such actions as immoral and impermissible in their society.

In similar ways, TRCs institutionalize democratic justice and reconciliation alongside truth-telling to lay the foundation for a new and different society. For instance, the public testimonies of those black South Africans denied citizenship rights under the apartheid regime were the first opportunity many persons had to participate in the official public discourse of the country. They were literally learning and performing, for the first time, the institutionalized practice of officially recognized democratic discourse. In addition, the acceptance of such voices in the public sphere helped begin to institutionalize the democratic practice of every citizen *listening* to every other citizen’s voice. Two important goals of transitional societies are to institutionalize justice as recognition¹²⁶ and

¹²⁵ Dumisa B. Ntsebeza, *The Uses of Truth Commissions: Lessons for the World*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS, *supra* note 10, at 158, 164–65 (explaining the culture of impunity present in Apartheid South Africa).

¹²⁶ André du Toit, *The Moral Foundations of the South African TRC: Truth as Acknowledgment and Justice as Recognition*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS, *supra* note 10, at 122, 135–38. du Toit says:

We distinguish the specific sense of justice relevant in this context, that of *justice as recognition* involved in the restoration of the human and civic dignity of victims, from both that of *criminal and retributive justice* and that of *social and distributive justice*. . . .

. . . [*J*] *justice as recognition*: the justice involved in the respect for other persons as equal sources of truth and bearers of rights. In practice, this requires a fun-

participation¹²⁷ in order to make democracy and democratic discourse plausible. TRCs are the transitional justice mechanisms most capable of doing this on a large scale.¹²⁸

Also, while the success of the South African TRC in achieving its goals is debated,¹²⁹ it is generally agreed that it was successful in symbolically embodying the social reconciliation it sought to facilitate.¹³⁰ In addition, there were moments of reconciliation between individuals that served as paradigmatic examples of the possibilities for reconciliation in South Africa. Institutions function on both a symbolic and a material level,¹³¹ and the success or failure of a given TRC on one level does not necessarily determine the success or failure of a TRC on the other. Both James Gibson and Eric Wiebelhaus-Brahm argue that the South African TRC was moderately successful in its material pursuit of reconciliation, democracy, and human rights, while Audrey Chapman, Hugo van

damentally different orientation to that of the criminal justice system in the form of victim-centered public hearings. . . .

. . .

. . . In this perspective, justice as recognition must then involve more than just the abstract (Kantian) sense of moral respect, and is this further sense of justice as recognition that requires the special remedies provided by truth commissions as a means to transitional justice.

Id.

¹²⁷ “Basic justice demands the establishment of minimum levels of participation in the life of the human community for all persons. The ultimate injustice is for a person or group to be actively treated or passively abandoned as if they were nonmembers of the human race.” National Conference of Catholic Bishops, *Economic Justice for all: Catholic Social Teaching and the U.S. Economy*, no. 77, quoted in HOLLENBACH, *supra* note 18, at 82.

¹²⁸ For more in-depth accounts of justice as recognition and deliberative democracy, see generally NANCY FRASER, *JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE “POSTSOCIALIST” CONDITION* (1997); NANCY FRASER & AXEL HONNETH, *REDISTRIBUTION OR RECOGNITION? A POLITICAL-PHILOSOPHICAL EXCHANGE* (2003); IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* (2000).

¹²⁹ For generally “negative” accounts of the effectiveness of the South African TRC, see TRUTH AND RECONCILIATION IN SOUTH AFRICA: DID THE TRC DELIVER? (Audrey R. Chapman & Hugo van der Merwe, eds., 2008); RICHARD A. WILSON, *THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE* (2001). For a generally “positive” account of the effectiveness of the South African TRC, see JAMES L. GIBSON, *OVERCOMING APARTHEID: CAN TRUTH RECONCILE A DIVIDED NATION?* (2004). For a moderate account of the effectiveness of the South African TRC and a more ambiguous account of the effectiveness of truth commissions in general, see ERIC WIEBELHAUS-BRAHM, *TRUTH COMMISSIONS AND TRANSITIONAL SOCIETIES: THE IMPACT ON HUMAN RIGHTS AND DEMOCRACY* (2010).

¹³⁰ For instance, Audrey Chapman and Hugo van der Merwe provide a substantial critique of nearly every part of the TRC process and its results. Hugo van der Merwe & Audrey R. Chapman, *Did the TRC Deliver?*, in TRUTH AND RECONCILIATION IN SOUTH AFRICA: DID THE TRC DELIVER?, *supra* note 129, at 278–79. However, even they claim that it was generally successful on a symbolic level. *Id.*

¹³¹ Friedland & Alford, *supra* note 112, at 248–53.

der Merwe, and Richard Wilson disagree.¹³² However, nearly all of them agree that it was successful at the symbolic level by paradigmatically encouraging racial and political reconciliation.¹³³

Simply changing individuals or organizations would not be sufficient to achieve these purposes. Institutions must be transformed for social change to endure through political changes, economic growth and decline, and even generational shifts. It is not enough to change the hearts of individuals, as important as this is, or that organizations make policy changes to limit injustices, as important as this is, to create lasting justice and peace if the social institutions in which those individuals and organizations exist and function are not transformed. Our institutions provide us with the language and practices that we live our lives through. Even the most potentially virtuous person cannot achieve that virtue if the institutions in which they live do not make the achievement of virtue a possibility. For lasting *social* change to occur, *institutions* must be transformed towards justice. TRCs can function as a legal-political mechanism capable of contributing to such a transformation.

3. Remaking the Social Imaginary

While the idea of institutions can be vague and in the “background” of our consciousness, there is another realm of social understanding a step further removed from our daily thoughts, but which has no less an influence over the way we collectively interpret the world and our relationships within it. Philosopher Charles Taylor has called this realm of understanding our “social imaginary.”¹³⁴ Every society has its own social imaginary, parts of it shared with a wider culture—for instance, “Western,” “African,” or “Confucian”—and parts of it unique to that society or culture.

Taylor states that social imaginaries are “the ways people imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations that are normally met, and the deeper normative notions and images that underlie these expectations.”¹³⁵ Social imaginaries are not philosophical theories or “high culture” musings.¹³⁶ Rather, they are the ways that ordinary people “imagine” their social surroundings, their relationships, and their place in the world.¹³⁷ Social imaginaries include understandings of human nature, divine relations with the world, the march of history, what it means to be a “people like us,” whoever “us” may be, and the future of one’s

¹³² See *supra* note 127.

¹³³ See sources cited *supra* note 129.

¹³⁴ See TAYLOR, *supra* note 16, at 23.

¹³⁵ *Id.*

¹³⁶ *Id.* at 24. However, he points out that oftentimes theory “trickles down” into the common social imaginary. *Id.*

¹³⁷ *Id.* at 23.

society and the world.¹³⁸ According to Taylor, a given social imaginary “incorporates a sense of the normal expectations we have of each other, the kind of common understanding that enables us to carry out the collective practices that make up our social life.”¹³⁹

The way we live life together is irrevocably linked with the way we imagine life together. In fact, they reconstitute and reinforce one another in a dialectical back and forth.¹⁴⁰ One imagines how things should or could be done and acts appropriately. In acting, one’s imagination is either confirmed or challenged, and one reimagines appropriately. The process of imagining our world and our society is an ongoing process. The social imaginary is never fully formed or static. The creation and maintenance of the social imaginary is a dynamic process that continually makes and remakes the world as we know it.¹⁴¹

Taylor carefully demonstrates the way in which the modern western social imaginary came to be and how it has changed the western world. Notions of the modern individual, secular space and time, popular sovereignty and natural rights, instrumental rationality, romantic love, scientific truth, and several other driving “imaginings” now determine much of life in the west. Just a few centuries ago these notions were either inconceivable or extremely radical; today they are commonplace, even taken for granted. The sign that something has entered the social imaginary is when it is no longer questioned or consciously thought about. When something is taken as “just the way it is” or the way things naturally are or “the way we’ve always done things” it has firmly established itself in a people’s social imaginary.

4. Globalization and Transnational Social Imaginaries

Generally speaking, the modern phenomenon of globalization is the global exchange of goods, services, capital, resources and people across national borders in an increasingly interdependent global, capitalist economy that has real impacts on the economic, social and cultural lives of people around the

¹³⁸ *Id.* Taylor explains:

I adopt the term imaginary (i) because my focus is on the way ordinary people ‘imagine’ their social surroundings, and this is often not expressed in theoretical terms, but is carried in images, stories, and legends. It is also the case that (ii) theory is often the possession of a small minority, whereas what is interesting in the social imaginary is that it is shared by large groups of people, if not the whole society. Which leads to a third difference: (iii) the social imaginary is that common understanding that makes possible common practices and a widely shared sense of legitimacy.

Id.

¹³⁹ *Id.* at 24.

¹⁴⁰ *Id.* at 25. “If the understanding makes the practice possible, it is also true that it is the practice that largely carries the understanding.” *Id.*

¹⁴¹ *Id.* at 30.

world.¹⁴² One overlooked portion of the globalization process in this definition, however, is the global exchange of ideas that accompanies the exchange of material resources that drives the process. While Taylor makes it clear that there are multiple modern social imaginaries,¹⁴³ and that they look especially different outside of the western context, there is still some intellectual cross-pollination that occurs because of political, economic, cultural, and intellectual reasons.

Many globalized ideas are moral ones. The aforementioned notion of restorative justice is one, universal human rights is another. These categories, to make sense across cultures, are necessarily “thin.”¹⁴⁴ By this, I mean that they are inherently robust moral notions that are talked about in generic ways so that people across cultures can access their meaning. On the other hand, “thick” moral language is embedded in a culture and its meanings.¹⁴⁵ A “thick” moral concept is grounded in a society’s social imaginary. It cannot be fully understood or appreciated outside of its cultural context. For instance, as much as I have tried to delineate the southern African concept of *ubuntu* in this paper, I have failed to convey all of its meaning as understood within its original context. The word is untranslatable in the West because the cultural context is so different from its context of origin.

Both thick and thin moral language, then, can reinforce or contribute to reinventing a society’s social imaginary.¹⁴⁶ For instance, the language of human rights grew out of western traditions of Christianity, natural law, and individual autonomy,¹⁴⁷ but has become globalized in recent decades. People around the

¹⁴² See PAMELA K. BRUBAKER, GLOBALIZATION AT WHAT PRICE? ECONOMIC CHANGE AND DAILY LIFE 21–30 (Revised ed. 2007); REBECCA TODD PETERS, IN SEARCH OF THE GOOD LIFE: THE ETHICS OF GLOBALIZATION 35–39 (2004).

¹⁴³ Taylor *supra* note 16, at 1–2.

¹⁴⁴ For an in-depth analysis of thick and thin moral language and their function in a globalized civil society, see MICHAEL WALZER, THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD 1–19 (1994).

¹⁴⁵ *Id.*

¹⁴⁶ It seems to me that Walzer would disagree with this claim. For him, moral language is always thick before it can become thin, and thin language is never fully translatable but must resonate instead with already thick language present in a culture. While I am sympathetic to this stance, I am not convinced that thin language can *never* be powerful enough to actually cross culture and influence the social imaginary of a culture it was not born in. For instance, it seems to me that the language of human rights has transcended its original context and been translated reasonably well in multiple other contexts, so that it has become thick in cultures where it was originally thin. Another example, in my opinion, is the existence of multiple global religions—like the various expressions of Buddhism, Judaism, Christianity and Islam—that have extended far beyond their cultural birthplace and have had real influence around the world. While remaining recognizably thinly “Buddhist,” for example, no matter where Buddhism is practiced around the world, Buddhism has also become thick in its various cultural settings. See *id.* at 4 (arguing against moral language beginning as thin and becoming thick).

¹⁴⁷ See generally CHRISTIANITY AND HUMAN RIGHTS: AN INTRODUCTION (John Witte, Jr. & Frank S. Alexander eds., 2010); LYNN HUNT, INVENTING HUMAN RIGHTS: A HISTORY (2007); JOHN WITTE, JR., THE REFORMATION OF RIGHTS: LAW, RELIGION AND HUMAN RIGHTS IN EARLY MODERN CALVINISM (2007); NICHOLAS WOLTERSTORFF, JUSTICE: RIGHTS AND WRONGS 19–132 (2008).

world, often in nations that are in the midst of conflict or going through a political transition, have used the language of human rights to justify political action and revolution. To talk about violations of human rights resonates on every inhabited continent on the earth. However, though there is some shared meaning when this language is used, people in different places often mean quite different things when using the same language.

In the United States, for example, appeals to human rights have traditionally meant that people have felt that their liberty has been violated. Usually this violation is in the form of bodily harm or property violation. However, in South Africa many people claimed their human rights were violated because family members disappeared, and mothers, for instance, did not know where their sons were buried. In the context of southern Africa, the right to bury and properly memorialize one's family is of utmost importance. To the surprise of many in the West, when asked what reparations would suffice for people who had family killed, there were some who responded that simply knowing the truth about what happened to their missing family, the location of their dead loved ones, and being provided the resources to give them a proper burial were what was required.¹⁴⁸ Activists around the world talk about human rights, but exactly what they mean by that language is not always the same. However, whether in thick or thin ways, that language can infiltrate and transform a society's social imaginary.

TRCs, then, are attempts to transform a society's social imaginary. They attempt to do this in two ways: by retelling the story of the nation's history and birth and by institutionalizing a culture of democracy and human rights. TRCs are usually a tool used in countries emerging out of some colonial or especially oppressive political context. In these contexts, the history of the indigenous people has often been suppressed, denied, or erased, and new national myths were institutionalized during the oppressive regime.¹⁴⁹ For example, Apartheid South Africa's social imaginary included a story that the land that makes up modern South Africa was a divine gift and blessing upon the Afrikaner people, a biblically grounded racial hierarchy,¹⁵⁰ and a political culture that

¹⁴⁸ For example, see TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, § 2-6, at 129-31 (March 21, 2003), *available at* <http://www.info.gov.za/otherdocs/2003/trc>. *See also* the testimony of Nomsa Monica Mathe, *available at* <http://www.justice.gov.za/trc/hrvtrans/hrvnel/mathe.htm>.

¹⁴⁹ I draw my use of national myths from Richard T. Hughes, who wrote:

[A] myth is a story that speaks of meaning and purpose, and for that reason it speaks truth to those who take it seriously . . . Our national myths, then, are the stories that explain why we love our country and why we have faith in the nation's purposes. Put another way, our national myths are the means by which we affirm the meaning of [the country we live in].

RICHARD T. HUGHES, *MYTHS AMERICA LIVES BY* 2 (2004).

recognized an elite minority as the only legitimate citizens of the modern state of South Africa. Their social imaginary provided a people's identity that could not be extracted from religion, race, ethnicity, or history.

In this context, in which the narrative of the birth of the country and its foundations excluded and marginalized the majority of the population, a new story needed to be told and a new social imaginary made. The South African TRC began this process by retelling the history of South Africa as a country birthed in racial domination, ethnic division, religious hypocrisy, and political subjugation, but one in which such dominant forces were overcome by racial solidarity, democratic political activism, the martyrdom of those fighting for justice for future generations, and charismatic leaders like Nelson Mandela and Desmond Tutu.¹⁵¹ The TRC provided a new South African identity—a new social imaginary—in which those who are most important are those who practice forgiveness, reconciliation, and struggle mightily to establish justice. A new social imaginary cannot be created in the few short years in which TRCs are mandated to work, but they are the first step in their creation by telling a new founding story that emphasizes new values of democracy, human rights, social justice, and reconciliation.¹⁵²

TRCs also attempt to create a new social imaginary by introducing new moral language into a society. In a similar way in which speaking of the prima-

¹⁵⁰ For accounts of the way in which Christian theology and biblical religion informed the social imaginary of Apartheid South Africa, see J.A. LOUBSER, A CRITICAL REVIEW OF RACIAL THEOLOGY IN SOUTH AFRICA: THE APARTHEID BIBLE (1987); SAMUEL A. PAUL, THE UBUNTU GOD: DECONSTRUCTING A SOUTH AFRICAN NARRATIVE OF OPPRESSION 13–57 (2009).

¹⁵¹ Another telling example of the way in which TRCs attempt to reshape social imaginaries by retelling history is the Greensboro, North Carolina, TRC. Popular depictions of the “Greensboro Massacre” have tended to blame both the Ku Klux Klan and the Communist Workers’ Party for the violence that occurred on November 3, 1979. The role of the Greensboro Police in the incident has generally been ignored. However, the TRC’s final report demonstrates rather convincingly that the police are partly responsible for the level of violence reached that day and shows that there has been a pattern of racially motivated negligence in protecting poor blacks in Greensboro’s history. This telling of the story has affected and reshaped the story Greensboro residents have long told themselves about being “better” on race relations than the rest of the American south.

¹⁵² Another way to say this is that TRCs are what André du Toit has termed “historical founding projects.” du Toit says,

They are *historical founding projects* in the transitional context of introducing and consolidating a new democratic dispensation and/or a culture of rights and accountability following massive violations of human rights under the prior regime. They are best understood as responses to the special *moral and political needs* of this kind of historical context; that is, those arising from attempts to found a new democratic order in the aftermath of the political atrocities and/or social injustices of a prior regime. . . . As historical founding projects, truth commissions may be compared to constitution-making . . . the TRC was not a permanent institution, but was meant to facilitate the launching of a new era.

André du Toit, *The Moral Foundations of the South African TRC*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS, *supra* note 10, at 124–25.

cy of the individual in the modern west is a relatively new development in the social imaginary of western nations, transitional societies try to develop the language of democracy, human rights, and sometimes reconciliation in their social imaginaries. These are “thin” languages that, when coupled with a newly narrated national history and culturally specific practices—like the palava hut mediation sessions in Liberia or traditional ceremonial practices in Sierra Leone¹⁵³—are “thickened” through TRC processes and the continual development of a democratic political culture and thriving civil society. Numerous defenders of TRCs claim they are laying the foundation for a “human rights culture” in a society where one did not previously exist.¹⁵⁴

There are numerous ways that the work of TRCs actually begins transforming a society’s social imaginary. One dramatic example was the use of the media in the South African TRC. Testimonies were shown on television and played on radio nearly every night for roughly two years. These public testimonies were regularly on the front page of newspapers and were often the impetus and content of much public discussion in the years immediately following the apartheid years. This popular dissemination of the work, and the copious amounts of scholarship on the process in the years following its conclusion, have done much to reshape the common understanding of what it means to be a South African and the language that is used in public discourse. Another example of how the work of TRCs influences the social imaginary of a country is the public reception of the final report in Argentina. That volume has become one of the best-selling books in Argentina’s history and has had a significant effect on the public understanding of Argentine history and the roots of the human rights abuses and political repression that plagued the country.¹⁵⁵ In some ways, it has become the founding document of a new Argentine society and people.¹⁵⁶

III. CONCLUSION

TRCs, then, have two primary functions relevant to their relationship to nonviolent social change movements: (1) institutionalizing democratic practices, robust notions of justice, and human rights norms, and (2) continuing to reshape a society’s social imaginary in the same direction that principled nonviolent action moves. Neither of these can be achieved fully in the short lifespan that defines the work of TRCs, but they do take early and important steps in these

¹⁵³ Tim Kelsall, *Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone*, 27 HUM. RTS. Q. 361, 361–91 (2005).

¹⁵⁴ See, e.g., Ronald C. Slye, *Amnesty, Truth, and Reconciliation: Reflections on the South African Amnesty Process*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS, *supra* note 10, at 182–84.

¹⁵⁵ *Report of CONADEP (National Commission on the Disappearance of Persons)*, NUNCAMÁS.ORG (1984), http://www.nuncamas.org/english/library/nevagain/nevagain_000.htm (last visited on March 14, 2012).

¹⁵⁶ See HAYNER, *supra* note 4, at 45–47.

directions and lay the necessary foundation for them to be fully achieved later in the life of a transitional society. While reconciliation is an important goal of TRCs, they do not expect to reach it quickly. Rather, they understand the complex nature of reconciliation,¹⁵⁷ especially on the social and political levels, and humbly recognize the impact of their work. However, TRCs still understand that the lofty goal of reconciliation cannot be achieved without such a foundation. A society built on vengeance, lingering prejudices, and the lack of democratic practices or a human rights culture will inevitably fail to achieve any minimal notion of justice, never mind reconciliation. In light of this, then, TRCs are an important tool available to societies in transition that take seriously the long, arduous, and complex task of building a just, dare I say “good,” society.

TRCs are only early, though vital, steps in remaking the social world of a society. They make it possible for people to imagine a world that is just, democratic, and reconciled, and then practice living in that world so that it may one day become a reality. No, they do not achieve this goal immediately, and there are often bumps along the way in the work of TRCs, but the goal is a worthy one, and the alternatives proposed are not often feasible or up to the challenge. Before a society can *be* just it must be able to *imagine* what justice looks like and create the institutions that can sustain such a justice. This is the primary purpose of TRCs. Societies facing transition have found no better tool to use in constructing such a society. To miss this is to misunderstand what it means and what it takes for a society to be good.

Historically, TRCs have often been instituted in nations in which nonviolent social action was a critical component of the resistance or revolution that led to the transition to democracy. This makes sense for several reasons: first, the foundational principles that motivate and sustain prolonged nonviolent social action are the same principles that motivate the desire to pursue restorative rather than retributive justice; second, principled nonviolent social action is usually chosen with an end goal of reconciliation in sight, and the desire to pursue reconciliation rather than revenge can only be sustained in a transitional period if that was a primary goal from the beginning of the resistance; and third, to have the principles that undergird nonviolence be part of a nation’s resistance means that the social imaginary of that society has already had its social imaginary begin to be transformed to include those principles that motivate both non-violence and TRCs.

¹⁵⁷ On the complexity of political reconciliation, see generally TRUDY GOVIER, *TAKING WRONGS SERIOUSLY: ACKNOWLEDGEMENT, RECONCILIATION, AND THE POLITICS OF SUSTAINABLE PEACE* (2006); COLLEEN MURPHY, *A MORAL THEORY OF POLITICAL RECONCILIATION* (2010); ERNESTO VERDEJA, *UNCHOPPING A TREE: RECONCILIATION IN THE AFTERMATH OF POLITICAL VIOLENCE* (2009); RALF K. WÜSTENBERG, *THE POLITICAL DIMENSION OF RECONCILIATION: A THEOLOGICAL ANALYSIS OF WAYS OF DEALING WITH GUILT DURING THE TRANSITION TO DEMOCRACY IN SOUTH AFRICA AND (EAST) GERMANY* (Randi H. Lundell trans., 2009). For case studies of political reconciliation, see *DILEMMAS OF RECONCILIATION: CASES AND CONCEPTS* (Carol A.L. Prager & Trudy Govier eds., 2003); *RECONCILIATION, NATIONS AND CHURCHES IN LATIN AMERICA* (Iain S. Maclean ed., 2006).

Critics of TRCs in such contexts underestimate the important role TRCs can play because they overlook this connection. We should not underestimate the importance of the fact that there are now nations birthed, at least partially, out of nonviolent action. This is a dramatically new development in the world. In these places, there is the potential not only to learn new ways of overthrowing unjust governments but to learn new ways of constructing a society. We now know that imprisoning or killing the majority of a land's previous inhabitants or imposing political policies on one's enemies as oppressive as those thrown off are not the only ways to build a new society. Instead, a society can pursue reconciliation with their enemies because nonviolent revolutions and their legacies on social-political institutions and a people's social imaginary make it a legitimate possibility. This is the potential of TRCs. They are an experiment, that we do not yet know the outcome of, to institutionalize peace, justice, reconciliation, and nonviolence in a society's social and political culture and institutions. I am not convinced that there is as high a probability of success for TRCs in transitional societies that did not have a significant nonviolent aspect to their revolutions (though there is ample room for a truth commission in such a context), and I am not yet convinced that every TRC, even in the "right" context will be "successful," but I do know that it is in such contexts that even hoping for such a way forward is a thinkable possibility. Nonviolence makes reconciliation a possibility in a way that violence and warfare cannot. The work of TRCs proves that reconciliation can be more than a trite phrase, expedient rhetoric, or naïve dream of nonviolent activists. They are serious attempts to institutionalize those values that can sustain nonviolent and democratic social engagement long after the revolution is complete. I have made this argument through a historical analysis of the case of South Africa with an eye toward the implications of that case for TRCs in other contexts. Specifically, I have demonstrated the important connections between the foundational principles of principled, nonviolent social change and the foundational principles of restorative justice processes such as TRCs. South Africa is especially apropos for making this comparison because of the prominent role of Desmond Tutu in leading both the nonviolent arm of the anti-Apartheid movement and the South African TRC. Because TRCs are legal-political mechanisms and institutions, rather than purely civil society initiatives, they are able to institutionalize those shared foundational principles in a way that nonviolent social action is unable. However, principled, nonviolent social action does begin the process of transforming a society's social imaginary. Thus, TRCs can both continue the transformation of a society's social imaginary begun in nonviolent social action and institutionalize those foundational principles of nonviolent social action and restorative justice in the legal and political life of a young country.

