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## Welcoming Remarks

John Ferrick

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NINTH ANNUAL STEIN CENTER SYMPOSIUM ON  
**THE ROLE OF FORGIVENESS IN THE LAW**

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AND

THE LOUIS STEIN CENTER ON LAW AND ETHICS

**NINTH ANNUAL STEIN CENTER SYMPOSIUM ON  
THE ROLE OF FORGIVENESS IN THE LAW**

*Co-Sponsored by  
The Fordham Urban Law Journal  
and  
The Louis Stein Center on Law and Ethics\**

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\* This conference was held at the Fordham University School of Law on January 28, 2000. It has been edited to remove the minor cadences of speech that appear awkward in writing.

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### WELCOMING REMARKS

My assignment this morning is a very brief one. First, I want to thank the keynote speakers, all the participants in the panels and the moderators of panels, for your willingness to participate in this special program.

I want to say to the *Urban Law Journal* and all the students involved this year and last year what an incredible job you have done in assembling the tremendous quality of people who will participate in the program today.

You mentioned the origin of the program as emanating from me, but it has a much deeper involvement that does not involve me, and perhaps it might be relevant to very briefly share that.

In the fall of 1999, during the height of the impeachment proceedings involving President Clinton, I received a call from a student attending a graduate school in California in a discipline other than the law. The student asked me, on behalf of her class, if I could share some views with the class through the student on the subject of forgiveness in the law. The question was: did it have a place in the law, and, if so, what was it?

I was, frankly, dumbfounded by the question. I found myself hesitant about offering any perspective on the subject because it was not one that I had given really any thought to. I realized that the class was a very significant class, indeed, and I should not be irresponsible enough to offer some "two cents" kind of response.

I said to the student that I would like to think about it and then respond. I then sought out the views of three or four members of our faculty here at Fordham Law School, and I was astonished by some of the responses I received. Somehow, I did not feel from the responses any better equipped to respond to the question than I had been when I initially received the telephone call.

One member of the faculty said to me, "Forgiveness has no place in the law, that you go to the law when everything else breaks down, and the law is there when nothing else has worked." He suggested of a writing that I might pursue. I, frankly, threw up my hands and did not return the call. I knew the student who called me and I knew that she would understand my not calling.

Two of the editors of the *Urban Law Journal* must have heard my lament. I was not aware until this morning that I had written a little note, one sentence, I was told by Elizabeth Malang, to the *Urban Law Journal*, asking the question of "is this something that students might have an interest in, in developing a program?" Everything that has taken place since is the work product of our

students and our *Urban Law Journal*, co-sponsored by our Stein Center on Law and Ethics.

I just want to say again to our students thank you for bringing together such a diverse and talented group. I am not sure at the end of the day if I will be in any better position to respond than I would be right now, but I do know I will benefit tremendously, as I am sure all of you will, from the tremendous variety of backgrounds and points of view that are obviously present or will be present today in the room.

A final note would be that we live in a time when social idealism, in my view, is not as clearly present, certainly among the populations that I interface with, as it was at an earlier stage in my life and my early participation in the legal profession. I lament as I see in our society the constant focus on punishment, the constant focus on retribution, and on incapacitation. These are, of course, important values, important goals. I do not see in American society today – at least the parts that I am familiar with, and that is obviously a very small part – much discussion on subjects like forgiveness and the law. I salute you, Elizabeth, and all your colleagues for bringing us together to learn more about this subject.

## KEYNOTE ADDRESS

**FORGIVENESS, RECONCILIATION AND RESPONDING TO EVIL:  
A PHILOSOPHICAL OVERVIEW****Introduction**

PROFESSOR MURPHY: I am honored to be a part of what promises to be a rich and varied symposium on forgiveness. What I have been asked to do is to present a philosophical overview on the topic of forgiveness in order to provide a framework for the day's later discussions. I have also been asked to limit my remarks to thirty minutes. This time limit will, of course, entail that most of what I say will be quite general, since I shall not be able to make the kinds of qualifications and refinements that would be possible if I had more time. Being general is not the same as being shallow, however, and I will do my best to avoid this latter pitfall.

Before getting into the details of my discussion, I would like to make three preliminary points.

First, I should note that most of my thinking and writing on forgiveness and reconciliation has concerned what might be called interpersonal forgiveness and reconciliation — e.g., forgiveness of an unfaithful spouse, a betraying friend, a malicious colleague, a government agent by whom one has been tortured, or a criminal by whom one has been victimized. With respect to law, my focus has been more on criminal than civil law.

I have only recently started to think and write about what might be called group forgiveness and reconciliation as possible responses to such mass violence as genocide and apartheid. My views on this topic are still in a very early stage, and thus I feel very fortunate that I shall be able to join you all this afternoon in listening to the talk by Professor Martha Minow. She is the author of the truly splendid book, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*.<sup>1</sup>

The second preliminary point I want to make concerns my own qualifications to speak on the topic in question. I have been thinking and writing about this topic for many years, and over the years I have developed increasingly positive views about the value of forgiveness. (Indeed, my early views on the topic were perceived as so negative that a colleague once suggested that my chapters in the book *Forgiveness and Mercy* should be subtitled "An Outsider's

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1. MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998).



View.”) However, I want to make it clear that my current views are essentially intellectual and theoretical rather than autobiographical in nature. Although I have over the years suffered my share of petty slights and insults, I have led an astoundingly fortunate life in the realm of victimization. I have experienced some small scale immorality, but nothing that I would identify as evil. I have never to my knowledge been betrayed by a loved one or friend; I have never been tortured; I have never been raped; I have never been violently assaulted or been the victim of any crime more serious than auto theft — nor has anyone close to me. Thus, when I speak of forgiveness as a virtue, I know that I may be open to the charge “easy for you to say.” When those who have been seriously victimized can emerge from their victimization without hate, there is nobility and moral grandeur to be found in their capacity to forgive. Nelson Mandela seems to be such a person. I have no idea, however, if I could rise to this in similar circumstances; and thus I will express my admiration for such people without ever meaning to suggest that I know that I could act in a comparable way.

The third and final preliminary point I want to make concerns the level of precision that one can expect on the topic of forgiveness. With Aristotle, I tend to think that it is generally a mistake in ethics to aim for a level of precision not really allowed by what is in fact a quite messy and conflicted subject matter. Neat theories in ethics generally produce not illumination but rather (in Herbert Hart’s fine phrase) uniformity at the price of distortion.<sup>2</sup> (I am convinced, indeed, that a really insightful book in ethics would not have as a title “The Theory of. . .” but rather something like “Muddling Through” or “Stumbling Along.”<sup>3</sup>) Thus all one can hope to do is to enrich the discussion a bit by exposing some of the value choices at the heart of forgiveness — a point well made by Professor Minow in her book when she says that she will resist “tidiness” and “temptations of closure” in her own thinking and writing about forgiveness.<sup>4</sup>

Preliminaries out of the way, I shall now move to my “philosophical overview.” But what exactly is it that philosophers do? Well, first they draw a lot of distinctions. (Indeed, I think it was J. L. Austin who once suggested that the drawing of distinctions might be the occupation and not just the occupational disease of philoso-

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2. H.L.A. HART, *THE CONCEPT OF LAW* 38 (2d ed. 1994).

3. The second title was suggested to me in conversation by D.Z. Phillips.

4. See MINOW, *supra* note 1, at 4, 24.

phers.) Thus I shall begin by attempting to explain what forgiveness is and, in the process, distinguish it from various other things it is not but with which it has often been confused. After that, I will explore what can be said against forgiveness and then close with a discussion of what can be said in its favor.

### The Nature of Forgiveness

I think that one of the most insightful discussions of forgiveness ever penned is to be found in Bishop Joseph Butler's 1726 sermon "Upon Forgiveness of Injuries."<sup>5</sup> In that sermon, Bishop Butler offers a definition of forgiveness that I have adapted in my own work on the topic.<sup>6</sup> According to Butler, forgiveness is a moral virtue (a virtue of character) that is essentially a matter of the heart, the inner self, and involves a change in inner feeling more than a change in external action. The change in feeling is this: the overcoming, on moral grounds, of the intense negative reactive attitudes — the vindictive passions of resentment, anger, hatred, and the desire for revenge — that are quite naturally occasioned when one has been wronged by another responsible agent. A person who has forgiven has overcome those vindictive attitudes and has overcome them for a morally creditable motive — e.g., being moved by repentance on the part of the person by whom one has been wronged. Of course, such a change in feeling often leads to a change of behavior — reconciliation, for example; but, as our ability to forgive the dead illustrates, it does not always do so.

On this analysis of forgiveness, it is useful initially to distinguish forgiveness from other responses to wrongdoing with which forgiveness is often confused: justification, excuse, mercy, and reconciliation. Although these concepts are to some degree open textured and can bleed into each other, clarity is — I think — served if one at least starts by attempting to separate them. I will discuss each of them briefly.

1. *Justification*: To regard conduct as justified (as in lawful self defense, for example) is to claim that the conduct, though normally wrongful, was — in the given circumstances and all things considered — the right thing to do. If I have suffered because of

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5. See *Sermon IX*, in *SERMONS OF JOSEPH BUTLER* 127-41 (W. E. Gladstone ed., 1897).

6. My adaptation of Butler is free, and I make no pretense that what follows is a solid piece of Butler scholarship. I have been inspired by Butler's discussion; and thus, even when I have modified or added to that discussion, I hope that I have always been loyal to its essential spirit.

conduct that was right — e.g., had my nose bloodied by someone defending himself against my wrongful attack — I have not been wronged, have nothing legitimately to resent, and thus have nothing to forgive.

2. *Excuse*: To regard conduct as excused (as in the insanity defense, for example) is to admit that the conduct was wrong but to claim that the person who engaged in the conduct lacked substantial capacity to conform his conduct to the relevant norms and thus was not a fully responsible agent. Responsible agency is, of course, a matter of degree; but to the degree that the person who injures me is not a responsible agent, resentment of that person would make no more sense than resenting a sudden storm that soaks me. Again, there is nothing here to forgive.

3. *Mercy*: To accord a wrongdoer mercy is to inflict a less harsh consequence on that person than allowed by institutional (usually legal) rules. Mercy is less personal than forgiveness, since the one granting mercy (a sentencing judge, say) typically will not be a victim of wrongdoing and thus will not have any feelings of resentment to overcome. (There is a sense in which only victims of wrongdoing have what might be called standing to forgive.) Mercy also has a public behavioral dimension not necessarily present in forgiveness. I can forgive a person simply in my heart of hearts, but I cannot show mercy simply in my heart of hearts. I can forgive the dead, but I cannot show mercy to the dead. I can forgive myself, but I cannot show mercy to myself.

This distinction between mercy and forgiveness allows us to see why there is no inconsistency in fully forgiving a person for wrongdoing (that is, stop resenting or hating the person for it) but still advocate that the person suffer the legal consequence of criminal punishment. To the degree that criminal punishment is justified in order to secure victim satisfaction, then — of course — the fact that the victim has forgiven will be a relevant argument for reducing the criminal's sentence and the fact that a victim still resents and hates will be a relevant argument for increasing that sentence. It is highly controversial, of course, that criminal punishment should to any degree be harnessed to victim desires.<sup>7</sup> Even if it is, however, it must surely be admitted that the practice serves other values as well — particularly crime control and justice; and, with respect to these goals, victim forgiveness could hardly be dispo-

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7. For a survey of the arguments pro and con, on allowing victim desires to influence criminal sentencing, see the majority and dissenting opinions in *Booth v. Maryland*, 482 U.S. 496 (1987), overruled by *Payne v. Tennessee*, 501 U.S. 808, 825 (1991).

tive. In short: It would indeed be inconsistent for a person to claim that he has forgiven the wrongdoer and still advocate punishment for the wrongdoer in order to satisfy his personal vindictive feelings. (If he still has those feelings, he has not forgiven.) It would not be inconsistent, however, to advocate punishment for other legitimate reasons. Of course, the possibilities for self-deception are enormous here.

4. *Reconciliation.* The vindictive passions (those overcome in forgiveness) are often a major barrier to reconciliation; and thus, since forgiveness often leads to reconciliation, it is easy to confuse the two concepts. I think, however, that it is important also to see how they may differ — how there can be forgiveness without reconciliation and reconciliation without forgiveness.

First let me give an example of forgiveness without reconciliation. Imagine a battered woman who has been repeatedly beaten and raped by her husband or boyfriend. This woman — after a religious conversion, perhaps — might well come to forgive her batterer (i.e., stop hating him) without a willingness to resume her relationship with him. “I forgive you and wish you well” can, in my view, sit quite consistently with “I never want you in this house again.” In short, the fact that one has forgiven does not mean that one must also trust or live again with a person.

As an example of reconciliation without forgiveness, consider the example of the South African Truth and Reconciliation Commission.<sup>8</sup> In order to negotiate a viable transition from apartheid to democratic government with full black participation, all parties had to agree that there would in most cases be no punishment for evil acts that occurred under the previous government. Wrongdoers, by making a full confession and accepting responsibility, would typically be granted amnesty. In this process the wrongdoers would not be required to repent, show remorse, or even apologize.

I can clearly see this process as one of reconciliation — a process that will allow all to work toward a democratic and just future. I do not so easily see this process as one of forgiveness, however. No change of heart was required or even sought from the victims — no overcoming of such vindictive feelings as resentment and hatred. All that was required of them was a willingness to accept this process as a necessary means to the future good of their society.

In my view, this counts as forgiveness only if one embraces what is (to me) a less morally rich definition of forgiveness: forgiveness

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8. For a survey of the operation of the Commission, see MINOW, *supra*, note 1, at 52-90.

merely as the waiving of a right. Examples of this are found in the private law idea of forgiving a debt or in Bishop Desmond Tutu's definition of forgiveness as "waiving one's right to revenge."<sup>9</sup> But surely one can waive one's rights for purely instrumental reasons; reasons having nothing to do with the change of heart that constitutes forgiveness as a moral virtue. One can even waive one's rights for selfish reasons — e.g., the belief that one's future employment prospects will be better if one simply lets bygones be bygones. I am not saying that it is wrong to act for instrumental reasons — indeed, for South Africa, it may have been the only justified course. Neither am I saying that instrumental justifications can never be moral justifications. To attempt reconciliation for the future good of one's society, for example, is surely both instrumental and moral. I am simply saying that, however justified acting instrumentally may sometimes be, it is — absent the extinction of resentment and other vindictive passions — something other than what I understand as the moral virtue of forgiveness. In short: If all we know is that two parties have decided to reconcile, we do not know enough to make a reliable judgment about whether the moral virtue of forgiveness has been realized in the reconciliation.

Another point worth making about the relation between reconciliation and forgiveness is this: If one always delayed reconciliation until forgiveness had taken place, then some vitally important kinds of reconciliation might not be possible. Thus the realization that forgiveness is often a helpful step toward reconciliation should not lead us into the mistaken belief that forgiveness is a necessary condition for reconciliation. Indeed, it is surely sometimes the case that reconciliation, coming first and adopted for instrumental reasons, opens the door to future forgiveness. After learning that one can work with one's victimizer toward a common goal, a sense of common humanity might emerge and one's vindictive passions toward that person might over time begin to soften.

Let me now discuss the evaluation of forgiveness as I — following Bishop Butler — have defined it.

### **The Dangers of Hasty Forgiveness**

In addition to his powerful sermon on forgiveness, Bishop Butler authored an equally powerful sermon with the title "Upon Resent-

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9. Interview by Bill Moyers with Bishop Desmond Tutu, PBS (Apr. 27, 1999).

ment.”<sup>10</sup> In that sermon, Butler started to make a case for the legitimacy of resentment and other vindictive passions — arguing that a just and loving God would not have universally implanted these passions within his creatures unless the passions served some valuable purpose. The danger of resentment, he argued, lies not in having it, but rather in being dominated and consumed by it to such a degree that one can never overcome it and acts irresponsibly on the basis of it. As the initial response to being wronged, however, the passion stands in defense of important values — values that might be compromised by immediate and uncritical forgiveness of wrongs.

What are the values defended by resentment and threatened by hasty and uncritical forgiveness? I would suggest two: respect for self and respect for the moral order. A person who never resented any injuries done to himself might be a saint. It is equally likely, however, that his lack of resentment reveals a servile personality — a personality lacking in respect for himself and respect for his rights and status as a free and equal moral agent. (This is the point behind the famous quip: “To err is human; to forgive, supine.”)<sup>11</sup> Just as indignation or guilt over the mistreatment of others stands as emotional testimony that we care about them and their rights, so does resentment stand as emotional testimony that we care about ourselves and our rights.

Related to this is an instrumental point: Those who have vindictive dispositions toward those who wrong them give potential wrongdoers an incentive not to wrong them. If I were going to set out to oppress other people, I would surely prefer to select for my victims persons whose first response is forgiveness rather than persons whose first response is revenge. As Kant noted in his *Doctrine of Virtue*, “One who makes himself into a worm cannot complain if people step on him.”<sup>12</sup>

Resentment does not simply stand as emotional testimony of self-respect, however. This passion — and the reluctance to hastily transcend it in forgiveness — also stands as testimony to our allegiance to the moral order itself. This is a point made forcefully by Aurel Kolnai in his important essay on forgiveness.<sup>13</sup> According to

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10. See *Sermon VIII*, in *SERMONS OF JOSEPH BUTLER*, *supra* note 5, at 115-126.

11. I have heard this quip attributed to the comic writer S. J. Perelman (who often wrote for the Marx Brothers), but I am not certain if the attribution is accurate.

12. IMMANUEL KANT, *THE DOCTRINE OF VIRTUE*, PART II OF THE *METAPHYSICS OF MORALS* 103, (Mary J. Gregor trans., 1964).

13. See AUREL KOLNAI, *Forgiveness*, in *PROCEEDINGS OF THE ARISTOTELIAN SOCIETY* 91, 95-98 (1973-74).

Kolnai, we all have a duty to support — both intellectually and emotionally — the moral order, an order represented by clear understandings of what constitutes unacceptable treatment of one human being by another. If we do not show some resentment to those who, in victimizing us, flout those understandings, then we run the risk of being “complicitous in evil.”

If I had more time, I could say many more things in defense of the vindictive passions. (Indeed, I am soon to publish an essay with the title “Two Cheers for Vindictiveness.”<sup>14</sup>) I hope I have said enough, however, to support Butler’s claim that these passions have some positive value. Having such value, these passions are unlike, say, malice — pure delight in the misfortunes and sufferings of others. Malice is by no means universal but is, where present, intrinsically evil or diseased or both. Butler essentially wants to apply Aristotle’s idea of the mean to the passion of resentment — developing an account of the circumstances that justify it and the degree to which it is legitimate to feel and be guided by it.<sup>15</sup> But the doctrine of the mean does not apply to malice; for the proper amount of this passion is always zero.

Uncritical boosters for quick forgiveness have a tendency to treat resentment and the other vindictive passions as though, like malice, they are intrinsically evil — passions that no decent person would acknowledge.<sup>16</sup> In this, I think that they are quite mistaken. In the *Oresteia*, Athena rightly made an honorable home for the Furies (representatives of the vindictive passions) — so constraining their excess by due process and the rule of law that they become the Eumenides (the Kindly Ones), protectors of law and social stability.<sup>17</sup> There is no honorable home for malice, however.

Let me summarize what I have argued to this point: The problem with resentment and other vindictive passions is not (as with malice) their very existence. In their proper place, they have an important role to play in the defense of self and of the moral and legal order. The problem with these passions is rather their ten-

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14. See Jeffrie G. Murphy, *Two Cheers for Vindictiveness*, in PUNISHMENT AND SOCIETY (forthcoming).

15. See ARISTOTLE, NICHOMACHEAN ETHICS 1107a, reprinted in NICHOMACHEAN ETHICS 44-46 (Terence Irwin trans., 1985).

16. I sometimes think I find such uncritical boosterism among certain voices within what might be called the “forgiveness movement” in clinical psychology. See JEFFRIE G. MURPHY, *Forgiveness in Counseling: A Philosophical Perspective*, in CHARACTER, LIBERTY AND LAW: KANTIAN ESSAYS IN THEORY AND PRACTICE 223-238 (1998).

17. See AESCHYLUS, ORESTEIA (Robert Fagles trans., 1979).

dency to get out of control — to so dominate the life of a victimized person that the person's own life is soured and, in his revenge seeking, he starts to pose a danger to the very moral and legal order that rightly identifies him as a victim of immorality. It is here — as a limiting and overcoming virtue — that forgiveness has its important role to play.

### Forgiveness as a Virtue

It is, of course, possible to take one's revenge against others in measured and proportional and peaceful ways — ways as simple as a cutting remark before colleagues or a failure to continue issuing lunch invitations.

Very often, however, a victimized person will allow vindictiveness to take over his very self — turning him into a self-righteous fanatic so involved — even joyous — in his outrage that he will be satisfied only with the utter annihilation of the person who has wronged him. Such a person is sometimes even willing to destroy, as symbolic stand-ins, persons who have done him no wrong or who may even be totally innocent.<sup>18</sup> Such a person is a danger to himself — very like, as I think Nietzsche once said, a scorpion stinging itself with its own tail — and poses a threat to the morality and decency of the social order. A person under the power of such vindictiveness can, often unconsciously, even use the language of justice and crime control as a rationalization for what is really sadism and cruelty. I cannot help thinking, for example, that many of the unspeakably brutish conditions that we tolerate in our prisons flow not from the stated legitimate desires for justice and crime control, but rather from a vindictiveness so out of control that it actually becomes a kind of malice.

Against such a background, forgiveness can be seen as a healing virtue that brings with it great blessings — chief among them being its capacity to free us from being consumed by our angers, its capacity to check our tendencies toward cruelty, and its capacity to open the door to the restoration of those relationships in our lives that are worthy of restoration. This last blessing can be seen in the fact that, since each one of us will sometimes wrong the people that mean the most to us, there will be times when we will want to be

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18. The von Kleist story *Michael Kohlhaas* — retold by E. L. Doctorow in his novel, *Ragtime* (1974), is a famous illustration of this. A good English translation of Heinrich von Kleist's 1808 novella *Michael Kohlhaas* may be found in HEINRICH VON KLEIST, *THE MARQUISE OF O AND OTHER STORIES* 114-213 (David Luke & Nigel Reeves trans., 1978).



forgiven by those whom we have wronged. Seeing this, no rational person would desire to live in a world where forgiveness was not seen as a healing virtue. This is, I take it, the secular meaning of the parable of the unforgiving servant.<sup>19</sup>

We are faced, then, with a complex dilemma: How are we to reap the blessings of forgiveness without sacrificing our self respect or our respect for the moral order in the process?

One great help here — and I make no claim that it is the only help or even a necessary condition for forgiveness — is sincere repentance on the part of the wrongdoer. When I am wronged by another, a great part of the injury — over and above any physical harm I may suffer — is the insulting or degrading message that has been given to me by the wrongdoer; the message is that I am less worthy than he is, so unworthy that he may use me merely as a means or object in service to his desires and projects. Thus failing to resent (or hastily forgiving) the wrongdoer runs the risk that I am endorsing that very immoral message for which the wrongdoer stands. If the wrongdoer sincerely repents, however, he now joins me in repudiating the degrading and insulting message — allowing me to relate to him (his new self) as an equal without fear that a failure to resent him will be read as a failure to resent what he has done. In short: It is much easier to follow St. Augustine's counsel that we should "hate the sin but not the sinner" when the sinner (the wrongdoer) repudiates his own wrongdoing through an act of repentance.<sup>20</sup>

My point here is that sincere repentance on the part of the wrongdoer opens the door to forgiveness and often to reconciliation. This is not to suggest, however, that we should always demand repentance as a condition for forgiveness and reconciliation. When a person comes to repentance as a result of his own spiritual growth, we are witness to an inspiring transformation of character. Any repentance that is simply a response to a demand or external incentive, however, is very likely to be fake. In what could be read as a commentary both on certain aspects of the Federal Sentencing Guidelines<sup>21</sup> and on remarks made by some of our current crop of

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19. See *Matthew* 18:21-35.

20. St. Augustine's remark, so often rendered as it is here, more literally reads "with love of mankind and hatred of sins." *THE OXFORD DICTIONARY OF QUOTATIONS* 37 (Angela Partington ed., rev. 4th ed. 1996) (citing *Letter 211*, reprinted in *33 PATROLOGIAE LATINAE* (J. P. Minge ed., 1845)).

21. See U.S. SENTENCING COMMISSION GUIDELINES MANUAL § 3E1.1 (1998) ("If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.").

elected officials, Montaigne wrote: "These men make us believe that they feel great regret and remorse within, but of atonement and correction or interruption they show us no sign . . . . I know of no quality so easy to counterfeit as piety."<sup>22</sup> Montaigne's observation also suggests that the South Africans were perhaps wise in not making repentance a condition for amnesty under their Truth and Reconciliation Commission.

So let us welcome repentance when we find it, and let us do what we can to create a climate where it can flourish and open the door to the moral rebirth of the wrongdoer and to forgiveness by the wronged. But, out of respect for the genuine article, let us not demand or otherwise coerce it. Demanding tends to produce only lying and may even be degrading to the wrongdoer — inviting his further corruption rather than his moral rebirth. David Lurie, the central character in J. M. Coetzee's recent novel *Disgrace*, could save his job if he simply expressed the kind of repentance demanded of him by the university disciplinary board that has authority over him. I find myself sympathizing with the reasons he gives for not giving them what they want when he says:

We went through the repentance business yesterday. I told you what I thought. I won't do it. I appeared before an officially constituted tribunal, before a branch of the law. Before that secular tribunal I pleaded guilty, a secular plea. That plea should suffice. Repentance is neither here nor there. Repentance belongs to another world, to another universe of discourse. . . . [What you are asking] reminds me too much of Mao's China. Recantation, self-criticism, public apology. I'm old fashioned, I would prefer simply to be put against a wall and shot.<sup>23</sup>

There has in recent times been much cheap and shallow chatter about forgiveness and repentance — some of it coming from high political officials and some coming from the kind of psychobabble often found in self-help and recovery books. As a result of this, many people are, I fear, starting to become cynical about both. For reasons I have developed here, repentance may pave the way for forgiveness. It is less likely to do so, however, in a world where we come to believe that too many claims of repentance are insincere and expedient — talking the talk without (so far as we can tell) walking the walk.

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22. MICHEL DE MONTAIGNE, ON REPENTANCE (1588), in *THE COMPLETE ESSAYS OF MONTAIGNE* 617 (Donald Frame trans., 1958).

23. J.M. COETZEE, *DISGRACE* 58, 66 (1999).

I have reached a point where I fear that I have both used up my time and worn out my welcome. So I will now move to bring my remarks to a close by touching briefly on one additional issue.

### Forgiveness and Christianity

At a symposium on forgiveness sponsored by a distinguished Catholic university, it would be fitting for me to close my talk with a few general remarks about the relationship between religion — particularly Christianity — and forgiveness. As someone who is neither devout nor trained in theology, I am hardly the best person to do this — either spiritually or intellectually. However, I will take a brief stab at it none the less.

There are, I think, at least three ways in which a Christian perspective on the world might make the struggle toward forgiveness — not easy, surely — but at least slightly less difficult than it otherwise might be. (Similar perspectives might also be present, of course, in other religions and world views.)<sup>24</sup>

First, I think that Christianity tends to introduce a humbling perspective on one's self and one's personal concerns — attempting to counter our natural tendencies of pride and narcissistic self importance. According to this perspective, we are all fallible and flawed and all stand in deep need of forgiveness. This perspective does not seek to trivialize the wrongs that we suffer, but it does seek to blunt our very human tendency to magnify those wrongs out of all reasonable sense of proportion — the tendency to see ourselves as morally pure while seeing those who wrong us as evil incarnate. By breaking down a sharp us-them dichotomy, such a view should make it easier to follow Auden's counsel to "love your crooked neighbor with your crooked heart."<sup>25</sup> This should make us more open to the possibility of forgiving those who have wronged us and should also help us to keep our justified resentments from turning into malicious hatreds and our demands for just punishment from serving as rationalizations for sadistic cruelty.

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24. See, e.g., the discussion of the background world view that underlies the Judaic conception of forgiveness in Louis E. Newman's *The Quality of Mercy: On the Duty to Forgive in the Judaic Tradition*, 15 JOURNAL OF RELIGIOUS ETHICS 155 (1987). For the context provided by Stoicism, see Seneca, *On Anger and On Mercy*, in 1 MORAL ESSAYS 106-449 (John W. Basore trans., 1994). For a discussion of forgiveness in capital murder cases from an Islamic perspective, see Azizah al-Hibri, *The Muslim Perspective on the Clergy-Penitent Privilege*, 29 LOY. L.A. L. REV. 1723, 1728-29 (1996).

25. W.H. AUDEN, *As I Walked Out One Evening*, in COLLECTED POEMS 135 (1991).

Related to this is a second Christian teaching that might help open the door to forgiveness — a teaching that concerns not the status of the victim, but the status of the wrongdoer. According to Christianity, we are supposed to see the wrongdoer, as we are supposed to see each person, as a child of God, created in His image, and thus as ultimately precious. This vision is beautifully expressed by the writer William Trevor in his novel *Felicia's Journey*. He speaks with compassion and forgiveness even of the serial killer who is a central character of that novel and writes of him: "Lost within a man who murdered, there was a soul like any other soul, purity itself it surely once had been."<sup>26</sup> Viewing the wrongdoer in this way — seeing in him the innocent child he once was — should make it difficult to hate him with the kind of abandon that would make forgiveness of him utterly impossible.

Third and finally, Christianity teaches that the universe is — for all its evil and hardship — ultimately benign, created and sustained by a loving God, and to be met with hope rather than despair. On this view, the world may be falling, but — as Rilke wrote — "there is One who holds this falling/with infinite softness in his hands."<sup>27</sup>

If I could embrace such a view of the universe and our place in it — a view for which there is surely no proof, requiring a faith that is properly called religious — then perhaps I would not so easily think that the struggle against evil — even evil done to me — is my task alone, all up to me.<sup>28</sup> If I think that I alone can and must make things right — including making sure that the people I have branded as evil get exactly what is coming to them — then I take on a kind of self-importance that makes me not only unforgiving but dangerous — becoming the kind of person Nietzsche probably had in mind when he warned that we should "mistrust those in whom the urge to punish is very strong."<sup>29</sup> If I were capable of a

26. WILLIAM TREVOR, *FELICIA'S JOURNEY* 212 (1994).

27. RAINER MARIA RILKE, *Autumn*, in *THE BOOK OF IMAGES* (Edward Snow trans., 1991).

28. I came to see the value of this perspective when it was used by philosopher-theologian Marilyn Adams in her critique of some of my earlier writing on forgiveness. See Marilyn Adams, *Forgiveness: A Christian Model*, 8 *FAITH AND PHILOSOPHY* 277-304 (1991). I have also recently come to see the wisdom in Herbert Morris's use of the thought of Simone Weil on these matters. See Herbert Morris & Jeffrie G. Murphy, *Exchange on Forgiveness*, 7 *CRIMINAL JUSTICE ETHICS* 3, 22 (Summer/Fall 1988).

29. FRIEDRICH NIETZSCHE, *Thus Spoke Zarathustra, Second Part, On the Tarantulas*, in *THE PORTABLE NIETZSCHE* 212 (Walter Kaufmann trans., 1970). I pursue Nietzsche's thoughts on punishment in somewhat greater detail in my *Moral Epistemology, the Retributive Emotions, and the "Clumsy Moral Philosophy" of Jesus Christ*, in *THE PASSIONS OF LAW* 149 (Susan Bandes ed., 1999).

certain kind of faith, then perhaps I could relax a bit the clinched fist with which I try to protect myself, sustain my self respect, avenge myself, and hold my world together all alone.

This brings to a close my brief ruminations on forgiveness — ruminations that have, I hope, helped a bit to provide a framework for the discussion to follow today. As much as I love my own discipline of philosophy, however, I believe that it is the poets and other literary artists who do the best job of providing a vision around which not just our thinking but our sensibilities can be organized. And thus I shall give my last word to the poet Seamus Heaney and simply read to you a brief excerpt from his play, *The Cure at Troy*:

Human beings suffer.  
They torture one another.  
They get hurt and get hard.  
No poem or play or song  
Can fully right a wrong  
Inflicted and endured.

The innocent in goals  
Beat on their bars together.  
A hunger-striker's father  
Stands in the graveyard dumb.  
The police widow in veils  
Faints at the funeral home.

History says, Don't hope  
On this side of the grave.  
But then, once in a lifetime  
The longed-for tidal wave  
Of justice can rise up.  
And hope and history rhyme.

So hope for a great sea-change  
On the far side of revenge.  
Believe that a further shore  
Is reachable from here . . .<sup>30</sup>

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30. SEAMUS HEANEY, *THE CURE AT TROY* 77 (1991). This play is Heaney's performing version of Sophocles's *Philoctetes*.

## FORGIVENESS AND JUSTICE\*

PROFESSOR MURPHY: I was struck by something Linda Meyer said about the way in which crime undermines basic public trust.<sup>31</sup> I think that is a very important insight. On the other hand, it seems to me that it can be a matter of degree, in that I think one of the sad commentaries on our current society is that there is not a terribly high level of public trust. If we had a more communitarian society, the idea that a crime undermines public trust would be an even more powerful argument than in a society as “discommunitarian,” as ours increasingly is.

The example I think of is how deeply upset I get when I hear a crime has been committed as the result of appealing to the rare and precious human quality we think of as generosity. The kind of crimes I am thinking of are when people pretend to be accident victims and a generous, Good Samaritan-type person stops and helps them, and then that person is beaten and robbed. That seems to me to lend extra horror, over and above what was done, because it undermines our increasingly fragile sense of community.

PROFESSOR ZIPURSKY: I have a question as well as a comment. The term “forgiveness” is ambiguous and can refer to an emotion. It can also refer to a disposition to do the opposite of “standing on one’s rights,” as Jeff Murphy put it in his book with regard to mercy.<sup>32</sup> It can refer to the equivalent of loan forgiveness, refraining from enforcing a right that you have. In this sense, there is a certain degree of forgiveness in, one could argue, a prosecutor who does not go for the maximum sentence.

My question is whether there are connections between the disposition to forgive in the sense of not enforcing one’s rights to their full power, on the one hand, and the disposition to feel forgiveness in the way that Jeffrie Murphy and others have described it, on the other.

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\* The presentations of the following panelists are presented in detail in their respective articles or essays written in connection with this Symposium. See Jeffrie G. Murphy, Keynote Address, *Forgiveness, Reconciliation and Responding to Evil: A Philosophical Overview*, 27 *FORDHAM URB. L.J.* 1353 (2000); Susan Bandes, *When Victims Seek Closure: Forgiveness, Vengeance and the Role of Government*, 27 *FORDHAM URB. L.J.* 1599 (2000); Linda Ross Meyer, *Forgiveness and Public Trust*, 27 *FORDHAM URB. L.J.* 1515 (2000); Everett L. Worthington, Jr., *Is There a Place for Forgiveness in the Justice System?*, 27 *FORDHAM URB. L.J.* 1721 (2000). We reprint here the discussion and questions that followed the presentations.

31. See Linda Ross Meyer, *Forgiveness and Public Trust*, 27 *FORDHAM URB. L.J.* 1515 (2000).

32. JEAN HAMPTON & JEFFRIE MURPHY, *FORGIVENESS AND MERCY* (1988).

A closely related question is, how do we want to define the virtue of forgiveness: in terms of the disposition to go through the acts of refraining from enforcing one's rights in a variety of circumstances, or in terms of the disposition to feel forgiveness?

PROFESSOR BANDES: I have a number of questions, if that counts as a response, not just about your comments, Ben, but about a lot of what Linda said as well.

I certainly agree with Linda, for example, that a lot of these forgiveness issues are communitarian issues,<sup>33</sup> issues of what the community is willing to forgive and what kind of vengeance the community needs. I think that raises a host of questions that trouble me about the individual's standing in the criminal justice system.

I guess I have the same question about Ben's question, which is, what do we mean when we say "enforcing one's rights?" If we are talking about criminal law — I don't know if your question was confined to that — the sorts of rights the prosecutor is enforcing are not individual rights, they are community rights.

These are things I am struggling with and I don't have any answers. It seems that the real problem is in the individual's role and not the community role. For example, when does the victim get to object to a prosecutor's decision or a sentencing decision? When Linda talks about a more expansive definition of who gets to forgive, my question is what is the legal implication of that? What should be the legal consequences of saying that only certain people can forgive, when it seems that we are dealing here with a much more collectivized notion of forgiveness?

PROFESSOR MEYER: Maybe my response will answer, or at least partially respond to, both of those thoughts. There is a very deep connection between giving up one's rights, if you will, and the forgiveness idea. I would extend it even to reconceptualizing our understanding of punishment. If we take seriously the idea that a wrong is a breach of trust with the community, and we take seriously the idea that forgiveness is, in a sense, being willing to deal with that offender again, punishment is no longer about just deserts because we have acknowledged that just deserts are impossible.

Punishment then becomes a matter of atonement. Here I would gesture toward Stephen Garvey's recent article, *Punishment as Atonement*,<sup>34</sup> which provides a wonderful transitional view of pun-

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33. See Meyer, *supra* note 31, at 1519-21.

34. STEPHEN P. GARVEY, *Punishment as Atonement*, 46 UCLA L. REV. 1801 (1999).

ishment that says, "look at what we are doing when we are punishing. We are not getting even, we are not doing vengeance, but we are giving the opportunity to a defendant to atone for his crime so that he can then be reconciled."

Atonement avoids the problem that mitigating a punishment seems unjust. Instead, the offender is doing penance, undertaking a sacrifice, in order to demonstrate her sincerity and her desire to move back into the community. Atonement ends up pushing together forgiveness and punishment in a way with which we are not familiar. "Just desserts" drops out of the picture.

PROFESSOR MURPHY: In ordinary language we use the word "forgiveness" to mean two rather different things. It is probably a good idea to try to keep those separate. The idea of simply waiving a right does not necessarily imply that anybody has done any wrong. That is one sense of forgiveness. The other sense of forgiveness is forgiving a wrong.

There is a perfectly legitimate sense in which we might talk about the legitimacy, let's say, of forgiving third-world debt. I would not want it tacitly to be thought that if we talk that way somehow there is wrongdoing on the part of the third world. That is a different sense of forgiveness, it seems to me, than forgiving a wrong. For that reason, it is worth keeping those two concepts separate sometimes.

PROFESSOR WORTHINGTON: It is important to make a distinction between *forgiveness as an intrapersonal event* versus *reconciliation*, which I define as restoration of trust after a breach in trust. Reconciliation involves a lot of talking about the transgression and talking about forgiveness. It is a separate issue than the experience of forgiveness. Although they are related to each other and there is a psychological relationship, they are still different issues.

#### QUESTIONS AND ANSWERS

AUDIENCE: I am interested in forgiveness as a personal transformation and the degree to which the legal system can facilitate that, engender it or encourage it. Professor Murphy talked about the relationship between religion and forgiveness and named, I think, three components of how religion and Christianity can encourage forgiveness. I want to know if he has any ideas about reforms or mechanisms in the law that can encourage or engender forgiveness on the part of victims, to encourage victims to forgive their wrongdoers?



PROFESSOR MURPHY: The one thing I am aware of is the victim/offender mediation family conference model in juvenile justice. An Australian philosopher and politician, named David Moore, has written quite insightfully on this in *Criminal Justice Ethics*.<sup>35</sup>

AUDIENCE: The implicit baseline assumption here is that there is a category of situations in which it is right to inflict human suffering in order to achieve certain goals, such as to feel better or get justice. I am mystified as to the basis for this. Forgiveness is treated as this weird sort of spigot, and sometimes we turn off that thing and take for granted that imposing human suffering is a good thing to do. Why isn't it the other way around, that inflicting human suffering deliberately is a bad thing to do and that forgiveness is the normal thing, and possibly there are situations where, for consequential reasons you still have to punish?

PROFESSOR MEYER: I think you are right, and I think that one of the things that I would like to see changed is our view that justice is what creates community and undergirds our relations with each other. I think that justice is chancy. If you look at the statistics, very few crimes get reported, very few crimes that are reported get prosecuted, very few of the prosecutions result in trials, and so forth.<sup>36</sup> So the ultimate numbers of cases that actually get tried and get "justice" are very few. I think it is very important to recognize that, indeed, forgiveness is the norm and forgiveness is what really binds us together, rather than justice.

PROFESSOR MURPHY: I guess I would slightly disagree in that if you look at all of the philosophical writings on punishment, all the way back to Plato, the underlying assumption has always been that what we do to people in punishing is a bad and terrible thing. It is to hurt people. In our system, it is essentially locking them up in cages or killing them. If you wanted to teach somebody, a little kid, what it means to do something terrible to somebody and to hurt them, you could hardly give two better examples.

So it is not quite right to say that our assumption is that hurting people is okay. I think our assumption is that hurting people is not okay, which is why everybody has always thought that punishment

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35. DAVID B. MOORE, *Shame, Forgiveness & Juvenile Justice*, CRIMINAL JUSTICE ETHICS, Winter/Spring 1993, at 3.

36. See YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 14-35 (8th ed. 1994); cf. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NAT'L CRIME VICTIMIZATION SURVEY (1999) (estimating the number of unreported serious crimes); U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS (1998) (summarizing reported crimes).

requires a justification. Why is it that it is sometimes okay to do something that any decent person would have to admit is normally not okay to do?

AUDIENCE: What happens when we tout forgiveness as a virtue? I like thinking of forgiveness as a virtue. But what happens to us as human beings when we get into, as Professor Worthington said, a place where we want to deny our unforgiveness? What happens then, for example, when you say to your child, "I am angry and I forgive you." How do you get into a place to really be forgiving while you are angry?

To use your example, Professor Worthington, within twenty-four hours of your mother's murder, you say, "I forgive you, the offender."<sup>37</sup> Is the virtue of forgiveness present then, or are we in a place of denying our unforgiveness and wanting to move too quickly to the virtue?

PROFESSOR WORTHINGTON: I wish that I were such a forgiving person that every single thing that I ever had to deal with in life I could just forgive like I was blessed to be able to do with the murder. But, unfortunately, I chair the Department of Psychology at Virginia Commonwealth University, and dealing with the faculty has demonstrated to me that I am not always a very forgiving person. I hate to admit that, and I struggle with it a lot, because I do think forgiveness is a virtue and I do want to practice that virtue.

Some people can forgive horrendous things very quickly, and some people have to struggle for years to forgive the smallest things. I have become reluctant to over-generalize and to say one *always* must take a lot of time to deal with forgiveness or one *always* should be able to forgive instantly. It is very individual within a person as well as across different individuals.

AUDIENCE: I want to go back to Professor Zipursky's comments distinguishing between forgiveness in the sense of ceasing anger, an emotional sense internally, versus forgiving a debt externally. Usually, when we think of what the law does, we think of it in a coercive way; the law is the power to put someone in jail or to order someone to pay damages, or something like that. The latter sense of forgiveness, in terms of relinquishing a right and so on, is something conceivably the law could do. But as to the former sense, in terms of ceasing anger, I wonder whether there the most that one could hope for from legal mechanisms is that they might foster an environment that could promote internal psychological

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37. See Everett L. Worthington, Jr., *Is There a Place for Forgiveness in the Justice System*, 27 *FORDHAM URB. L.J.* 1721 (2000).

transformation rather than command it in some sense, because it is beyond the scope of command.

PROFESSOR ZIPURSKY: I am going to take one other question and then let the panel answer.

AUDIENCE: I have a comment about the idea that we are moving away from a communitarian model. I wonder what everyone thinks about the idea that, through the mass media, we are becoming more and more aware of certain crimes and they become a crime to all of us. So, as much as I hated hearing about the O.J. Simpson trial, it showed that people were completely enamored with the idea of learning what was happening, and it still has not gone away.

PROFESSOR BANDES: One way the law could do that is through the way the law chooses what stories to tell about people. A lot of the comments today show that the more we understand, or try to understand, about people's motives and backgrounds — for example, Everett's very moving story about his mother — the more able we are to forgive them.

There are many ways of telling stories in the court room about defendants, as well as victims, many choices that get made all down the line. I suppose that greater ability to understand will often lead to, although certainly not predictably, greater compassion and empathy, but with the caveat that I think Jeff mentioned earlier, that it is not only impossible to demand, but also impossible to measure, the sincerity of the resulting feelings.

PROFESSOR MURPHY: Also, if we are going to take account of victim feelings, it is important to consider the time at which we take account of them. Professor Worthington, as Susan said, told a story that I think we all probably found deeply moving. But my own personal story, from which I learned an enormous amount, provides a slightly different lesson.

I had my car stereo stolen by teenagers when it was parked at the airport. My immediate response was, "those little sons of bitches, I'd like to kill them. If I had them here, I would . . ." My wife said to me, "Do you hear what you sound like?" Suddenly, I saw myself in an astoundingly unattractive way. I thought maybe I had learned something about how the victim perspective occasionally can be a quite nuts perspective. So that is probably worth keeping in mind, too.

## FORGIVENESS IN THE CRIMINAL LAW

MR. LERMAN:<sup>38</sup> Can the law make room for forgiveness? The short answer is yes. And, is that possible from a prosecutor's office? The answer is yes.

I believe, first, that forgiveness should be seen as flowing from the victim (or a surrogate victim or a victim's representative) or from the neighborhood most affected by a particular crime. To the extent that a prosecutor takes on the mantle of the community to effect justice, then I as a prosecutor may engage in forgiveness.

Otherwise, I think that what I do when I engage in plea bargaining, or lowering a sentence, is compassion or mercy, or *rachmones*,<sup>39</sup> as people ask me for in court; I often hear, "Give me a writ of *rachmones* in this particular case."

Prosecutors are the hub of the system. We control so much of what goes on in the criminal justice system; therefore, I think we play an absolutely vital role in advancing the notion of forgiveness in criminal justice processes. How should we do that? We should allow for practices that advance the possibility of forgiveness. This is what is most helpful to victims, I believe.

There is a natural desire on the part of people to be connected with one another. We heard from one of the earlier panelists about the lack of trust among people. Crime contributes to that. The current system focuses too heavily on punishment, which really only breeds further distrust. Part of that is fueled by the media. Willie Horton ads, for example, but there is a lot of blame to pass around as to why we have a very vindictive and retributive system.

The desire of the people to be connected with one another continues even after a person has been harmed. Victims desire to have some solace from the community around them. Prosecutors' offices are becoming better at providing that service to victims through victims witness units, and there are offices that are engaging social workers in offices. Des Moines is one of them.

These practices fall into the rubric of restorative justice. For a very quick thumbnail definition of restorative justice, I would offer

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38. For further comments, see David M. Lerman, *Forgiveness in the Criminal Justice System: If It Belongs, Why Is It So Hard to Find?*, 27 *FORDHAM URB. L.J.* 1663 (2000).

39. "Rachmones" is Yiddish for "compassion." See LEO ROSTEN, *THE JOYS OF YIDDISH* 304 (1968).

this: it is a general framework for viewing crime and its aftermath.<sup>40</sup> It is not any particular program.

We can compare restorative justice to the traditional system as follows: The traditional system asks three questions: Who is the perpetrator; what law was violated; and how do we punish that person? Restorative justice asks a different set of questions: first and foremost, what is the harm that has been caused; secondly, how do we fix that harm; and third, who is responsible for that repair?

When you ask those questions, you end up with a very different focus for justice seeking. You become future-oriented, which requires, if done properly, turning to the people most affected by the wrong. These people are the individual victims, or in victimless crimes, such as prostitution or drug sales, neighborhoods.

There are practices which allow those harmed parties to participate very readily. Victim/offender conferencing is one of the most viable practices. It goes by different terms, i.e., victim/offender reconciliation or mediation, but the core idea is to bring a victim, or a victim's surrogate, or a neighborhood panel, together with an offender in a safe setting, with a facilitator, to engage in a process. First, you go through the facts of the case. Secondly and most importantly, you discuss what the impacts on the victim and on the offender are, finally what the restitution is, what is the repair that can be had here?

I want to talk quickly about this in terms of the life of a prosecutor. There are standards put out by the National D.A.'s Association that talk about "doing justice."<sup>41</sup> I think in order to arrive at a system where forgiveness plays a role, we prosecutors have to change the way we view justice. Justice is not about getting notches in your belt. That is a hard thing. Young prosecutors go into an office and want to be tough and to be vigilant, and often there is an office culture that suggests that you have got to ask for tough sentences. You do not want to be thought of as being reasonable. You can see a lot of cultural change has to take place within many prosecutors' offices.

A great way to do this is for prosecutors to talk with community members. When you talk with community members, you learn, inevitably, that people do not always want the ten-year sentence on a second burglary. What they want to see is drug treatment. What

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40. See John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1 (1999); Charles W. Colson, *Truth, Justice, Peace: The Foundations of Restorative Justice*, 10 REGENT U. L. REV. 1 (1998).

41. NATIONAL PROSECUTION STANDARDS (National Dist. Attorneys Ass'n 1991).

they want to see is the offender become an active participant in society, somebody who pays taxes. You do not get that by sending people to prison.

There is a recent study, August 1999, by the Council of State Governments Eastern Regional Conference, which has as one of its questions, "Should the public provide victims the opportunity to talk to offenders?"<sup>42</sup> Seventy-seven percent of the public responded yes. That is huge.

Before closing, I want to talk briefly about what forgiveness means by way of example. A couple of years ago, there was a shooting at a high school in Kentucky. The next day, a group of students held a big banner outside the high school: "We forgive you, Michael."<sup>43</sup> In my tradition, in the Jewish tradition, that could not have happened without Michael having done something to arrive at the place where there could be forgiveness. In other words, the offender has to take some affirmative steps to warrant forgiveness.

There is diversity in this room, there is diversity in this country, and therefore, differing ideas on how to arrive at forgiveness. I think defining what forgiveness must be for every individual victim is too difficult and should not be done. But providing the opportunities for meaningful discussion, which may help a victim move towards forgiveness, is imperative if we are to humanize our criminal justice system.

MR. GAY:<sup>44</sup> Two weeks ago tonight, I happened to be at a local Catholic worker house in Des Moines, Iowa. They had asked me to give a little presentation on restorative justice. Earlier that day, I had looked at the mission statement for this Symposium which asked, "Can the law make room for the virtue of forgiveness, and should it?"

I posed those questions to the people at the Catholic worker house. They were staff members, people from the faith community, homeless individuals, and some other people. They did not address the "can it, should it?" question. They said, "Why wouldn't it?" For them, it was unanimous. That is the business that we ought to be about in our criminal justice community.

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42. COUNCIL OF STATE GOVERNMENTS EASTERN REGIONAL CONFERENCE REPORT fig. 36 (Aug. 1999).

43. See Leslie Scanlon, *Coping With Grief*, LOUISVILLE COURIER-J., at A7 (Dec. 6, 1997).

44. For further comments, see Frederick W. Gay, *Restorative Justice and the Prosecutor*, 27 *FORDHAM URB. L.J.* 1651 (2000).

I was heartened, certainly, by those responses and got to thinking about groups I had met with over the years — victim groups, offender groups, church groups, community groups. They always respond the same way: “Why wouldn’t we do this kind of thing?” They are not concerned about the legality. They are concerned about saving human lives. The only time I do not get that kind of response is when I talk to lawyers.

Our experience was that, back in 1990-1991, we began looking at these questions as a result of oftentimes experiencing victims dissatisfied with the process. Our office, the Polk County Attorney’s Office, represents Des Moines, Iowa, a community much smaller than Manhattan, about 450,000 people. It is a typical prosecutor’s office in a mid-sized, Midwestern community. Someone is prosecuted, found guilty, sentenced, goes to prison. Closure has not taken place. What do we do about that?

We looked around and found a program out of Elkhart, Indiana, called the PAC Program; they had a victim/offender reconciliation (“VOR”) program based on restorative justice principles. We thought that it was an isolated program but found out that it was not, that there were programs around the United States, Canada, Western Europe, Belgium, England, Germany, et cetera.<sup>45</sup>

We took what others had done and created a program, called Victim/Offender Reconciliation, whereby victims of crimes meet the offender in a very controlled, safe, mediated session. It started out small, with minor shoplifting crimes. Today we do about 1000 to 1200 cases a year, the minor crimes — harassment, property damage cases — and some major crimes — sexual assault cases, burglaries, robberies, and homicides.

It was tough getting started. The judges thought, “Why would we do this?” Now they accept it. It is part of our process. We do it as a result of a sentencing, we do it between plea and sentencing, and we do it post-plea in some cases.

How does the process work? As David outlined a little bit, there is a discussion of the facts, always questions by the victim as to: “Why me, why me? Why my house? Why my car? Why my

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45. See Mark S. Umbreit & William Bradshaw, *Victim Experience of Meeting Adult vs. Juvenile Offenders: A Cross-National Comparison*, 61 *FED. PROBATION* 33 (1997); see also, e.g., Dieter Rossner, *Mediation as a Basic Element of Crime Control: Theoretical and Empirical Comments*, 3 *BUFF. CRIM. L. REV.* 211, 211-12 (1999) (discussing section 46(a) of the German Penal Code, which contains a provision by which the judge and prosecutor may, at their discretion, refrain from punishment in cases where the maximum penalty is one year in prison and Victim/Offender Reconciliation has taken place).

daughter? Why my son?" Then we discuss the offender's response; finally, we talk about what justice should look like in this case.

I want to talk to you about one specific case. A couple of years ago, two young neo-Nazis in Des Moines did considerable damage to a local synagogue.<sup>46</sup> There was considerable public uproar and support for the Jewish community. After a couple of weeks, the two perpetrators were apprehended. There was a pseudo-lynch mob mentality among the community.

The case ended up on my desk. I called the Rabbi, Rabbi Fink, and asked him about doing a victim/offender reconciliation. "You've got to be kidding me," he said. "Why would we do something like that? I'm so mad I could strangle those two." I asked him to think about it. He called back two days later and said, "That's what we ought to be doing. It is not what my heart says, but I think that is what we ought to be doing."

We had a meeting in the basement of the synagogue with seven members from the synagogue, the two perpetrators, and a trained mediator. We talked about what had happened. It was fascinating. The synagogue members found out about the histories of these two young men and the two young men found out about what this did to the Jewish community. There were several Holocaust survivors in Des Moines that actually went into hiding as a result of the desecration.

Based on the meeting, they reached an agreement. The boys agreed to do community service at the temple, and also to meet with the Rabbi over a period of about six months to study Jewish and Holocaust history. The boys kept their promise. Six months later, I saw a transformation among the offenders, and also among the members of the synagogue. The boys had, in fact, become friends with the people at the synagogue.

At one point in the dialogue, one of the Holocaust survivors said, "What do you want from us?" The young male said, "We want to be forgiven." Her response was, "In our tradition we cannot forgive without atonement." They discussed the Jewish concept of atonement, and what that would look like in this particular case.

About a year after this meeting, the Drake University Law School in Des Moines had a day-long symposium on restorative

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46. See Tom Alex, *D.M. Synagogue Defaced*, DES MOINES REGISTER, Mar. 4, 1994, at 1.



justice.<sup>47</sup> Rabbi Fink spoke about his experience with this and subsequent VOR meetings. At the very end he discussed the Jewish concept of atonement.

Two weeks ago we observed the holiest day of the Jewish year, Yom Kippur, the Day of Atonement. On this day we fast for twenty-four hours. It is literally a twenty-four-hour fast from sunset to sunset, no water, no food of any kind, unless there is great physical need. We do this because we concentrate on making reconciliation with God. But in order to reconcile with God, in order to end the state of alienation that exists between us and God, we need to first ask those whom we have wronged for forgiveness. And, unless we can get up the courage to go and ask these people to forgive us, then God will not forgive us.

There are some crimes that are so heinous that we human beings cannot forgive, and so we leave forgiveness up to God, but for most acts that are done against us, for most wrongs, we can forgive.

We saw this process literally fade out in the secular arena through the VOR proceedings and working with the two perpetrators. We were wronged and they came to us. They made sincere repentance. They were examples of what it means to repent, to make atonement. They really meant it. I don't think they are going to ever do something like this again. So we granted atonement. It wasn't easy, but we did it. We worked through our feelings and, willingly, towards the end, we granted them atonement and gave them our friendship.

We learned an important lesson as well. We learned that in order to make reconciliation with God we must reconcile with God's creation. As we know, we are imperfect human beings, but the VOR process has given us the opportunity to reconcile with one another.

A question that that gives rise to is: Why wouldn't we attempt that all the time?

MR. BARRETT: I am not going to engage in the semantic parsing of forgiveness versus mercy. I just want to flag, with a confession, that I am perhaps bleeding those into each other as I discuss this.

But what I do want to move to is a different idea of the victim role. Much of the previous discussion has focused on cases where crime is perpetrated on an identified individual. A lot of offenses, however, particularly in the federal system, are victimless, in the

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47. See Drake University Law School Restorative Justice Symposium (Oct. 4, 1996) (unpublished).

sense that there is no identifiable individual who has suffered this infraction. Examples in both state and federal law are obviously drug crimes, the classic possession or intent to distribute offenses.

In addition, the whole realm of white-collar crime is very hard to connect up with identified individuals. There are obviously exceptions in the economic fraud context, but much of it does not connect to somebody who has been injured.

Public corruption and integrity offenses are also a realm of criminal law and criminal prosecutions that does not have victims with faces. Think of things like bribery, gratuity, conspiracy, perjury, or obstruction of justice. The victim is the public order. There is no localized neighborhood in which the crime occurred. It is simply public order, as embodied in the law itself, which has been injured. The person of the victim in those cases, frankly, is the government. At the first level it is the aggrieved cop or the aggrieved agent; at a later level in the process — I do not want to say a higher level — the victim is the prosecutor who gets responsibility for that matter as an investigation and the decisions that will follow.

I want to focus on victimless criminal conduct, and prosecutors as actors in that realm. This connects back to some of the themes discussed at last year's *Fordham Urban Law Journal* Symposium on "The Changing Role of the Federal Prosecutor."<sup>48</sup> They are really quite intertwined.

Government, and particularly prosecutorial behavior in those cases, has two characteristics, as I see it. The first is that there is extremely little official guidance about how a prosecutor should behave. There is a realm of enormous discretion on how an offense is viewed, on how an investigation gets conducted, and on how the perpetrator will be treated as that investigation moves forward.

There is, many of you may know, a *United States Attorneys' Manual*, which is a thick publication.<sup>49</sup> In all the clinches where the action actually occurs, however, where decision making counts, the federal government has refrained from making choices. The *Manual* explicitly embodies a lot of discretion for federal prosecutors in

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48. See Symposium, *The Changing Role of the Federal Prosecutor*, 26 *FORDHAM URB. L.J.* 645 (1999).

49. See U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL (1997). A copy of the Manual is also available online, and is updated regularly. See U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL (updated Nov. 12, 1999) <[http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/)>.

deciding “how will I handle this; how will I handle him or her as my investigative activity and my decisions come forward?”<sup>50</sup>

Prosecutors do forgive perpetrators in this realm all the time. They show mercy, or cut slack, or move on. Sometimes they respond to a change of heart. Sometimes they see the prospect of a change of conduct. They show mercy in making decisions like conferring immunity or not, which is technically judicial but is triggered by a prosecutorial decision and is basically mechanical at the judicial level.

Prosecutors engage in cooperation agreements with certain people, simply decline to prosecute or to push the investigation further, make plea offers, write 5(k) letters that allow downward departures in sentencing under the Federal Sentencing Guidelines. All of those are ways individual prosecutors, with relatively little supervision, make mercy/forgiveness decisions.

How does it work? Well, it works the way any interpersonal interaction works. It works at the heart, at the emotion, at the level of person-to-person affinity: “I like this person enough — or I do not hate this person enough — to take the hard path; I choose the easier path.” I want to focus more on that realm of unregulated discretion.

We should officially encourage two processes as we look at forgiveness by federal prosecutors. The first is direct human contact, the face-to-face contact between this person who is going to be the subject of the prosecutorial decision and the prosecutor who will make it. That happens in some cases. It usually is a function of a choice by a criminal defense lawyer.

Obviously, no one has to talk — Fifth Amendment, et cetera — but better lawyers, at least in white-collar or victimless cases of the type I am describing, make the contact. Often they will bring their client in to make the contact, to communicate the human reality of who this person is. Otherwise the person is just the other side of “*United States v.*” and the next statistic that the Assistant U.S. Attorney is contemplating in his or her advancement as a prosecutor. That process is valuable, it is appropriate at the human level, and it is something that the *Manual*, or the U.S. Attorney, or the Attorney General, whatever the right official process, should encourage.

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50. See U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL § 9-2.001 (granting U.S. Attorneys authority and discretionary power in criminal matters).

It also, obviously, connects up to the counsel issue.<sup>51</sup> The lawyering on the criminal defense side — quantity and quality of lawyering and the compensation for the lawyering — are important aspects of this face-to-face meeting and we neglect a key component if we skip over the counsel question.

Human contact is vital. Face the situation, look at it, meet the perpetrator, understand the bigger picture, not just the act, not just the facts, not just the draft indictment. A second thing, however, that we should officially encourage is visibility or transparency in the decision making of forgiveness. Indictments are visible, trials are visible, pleas are visible, but cutting breaks is often invisible. We hurt ourselves by making it invisible. To put it affirmatively, we would benefit by making the process visible and transparent.

On the perpetrator's side we would gain a way of accepting accountability, which is a predicate to forgiveness, has social value, and is part of what I am talking about here. If you can see the person come into the U.S. Attorney's Office but not become a defendant — and have some understanding about what transpired there — you achieve something for that person and for society. Plus, you build a factual record, knowledge in society itself about human conduct, about law enforcement, about this kind of decision making.

You would also help prosecutors in prosecuting. In part, this visibility would combat, a bit, the trend of prosecutors taking on the victim role, of believing that they are assigned to feel aggrieved, that they are assigned to hate the perpetrator. "Because there is no battered person in this case, I am going to do it. I am going to make you pay for what you did to the law. The law is me. See you in court." Some sense of valuing forgiveness and explaining forgiveness would counteract that a little bit.

In addition, it would be at the government level — at the broad level — a good way of showing humanity. It would be a good way of government teaching about, and then perhaps building, the community bonds that we all agree are implicit in this topic.

It is obviously a question of leadership. Federal law enforcement has an incredibly top-down command structure, and so part of what we need is a better, different, fuller audience. This is really partly a pitch to future Attorneys General, to future FBI directors,

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51. Susan Bandes implicitly discusses this in her Essay. See Susan Bandes, *When Victims Seek Closure: Forgiveness, Vengeance and the Role of Government*, 27 *FORDHAM URB. L.J.* 1599 (2000).

and to lots of U.S. Attorneys who need to be part of the conversation.

MS. LOVE:<sup>52</sup> I will pitch it one higher and talk about presidential pardons. Pardon may seem a curious and even vestigial part of the justice system these days, but it is very important to consider the gestures of executive clemency that are the real and symbolic signs of a forgiving or merciful government. In the state system, of course, gubernatorial pardon powers parallel the President's pardon power.

My interest in the subject of forgiveness derives from my experience as Pardon Attorney in the Department of Justice. I was responsible for reviewing and making recommendations on the literally hundreds of petitions that came into the Department of Justice every year. After we had finished looking at them, we sent them to the White House for action by the President.

These applications came from people who were in prison and wanted their sentences commuted. They also came from people who had been convicted many years earlier and were seeking restoration of civil rights or the removal of the stigma of conviction. Sometimes petitioners simply wanted to be forgiven for having broken the law, and they used that word, although now I understand, having prepared for this conference a little bit, that mercy is really what they were looking for. They were asking the President, basically, to dispense a better, or at least a more complete, form of justice than they had heretofore received.

Very few of them got what they were looking for. The process was mysterious, it was slow, it was unpredictable and it resulted in very few grants. This is not always the way it was; until about twenty years ago, twenty-five to forty percent of those who applied for presidential pardon or commutation of sentence got what they wanted.<sup>53</sup> That is literally hundreds of grants every year. These days there are only a handful. I would like to comment on this phenomenon, the atrophy of this most visible sign of official mercy, and what it might reflect and what it might signal. It reflects something very hard about the heart of the government that somehow parallels a hardening of the law. It also sends a negative signal to

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52. For further comments, see Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to be Merciful*, 27 FORDHAM URB. L.J. 1483 (2000).

53. See OFFICE OF THE PARDON ATTORNEY, PRESIDENTIAL CLEMENCY ACTIONS BY FISCAL YEAR, 1900 TO 1945 (1999); OFFICE OF THE PARDON ATTORNEY, PRESIDENTIAL CLEMENCY ACTIONS BY ADMINISTRATION, 1945 TO PRESENT (1999, Supp. Feb. 2000).

those who are responsible for administering the law on a day-to-day basis — line prosecutors — as well as to the public.

The pardon power began to decline about twenty years ago for a number of reasons, not the least of which was that within the Department of Justice prosecutors became responsible for making the recommendations to the White House. The war on crime was going into high gear. One of those prosecutors was your current Mayor; when he was Associate Attorney General, Rudolph Giuliani was responsible for making the decisions as to what cases would go forward to Ronald Reagan. Not very many went forward.

By the time I came to be involved in the pardon process, in the late 1980s, official parsimony had been more or less institutionalized. The fact that there were very few grants by President Bush reflects the fact that there were very few favorable recommendations made by the Department of Justice.

This did not change with the Clinton Administration, although there were a number of encouraging early pronouncements from Attorney General Reno that resulted in an absolute flood of inmate petitions into our office. We did not really know what to do with them.

The FALN cases,<sup>54</sup> in which President Clinton offered to commute the sentences of sixteen Puerto Rican terrorists last summer, therefore came as a pretty big surprise. His decision was greeted, of course, with considerable suspicious and cynicism. The New York press took up the cry, virtually on a daily basis, that this had been done to help Mrs. Clinton's Senate campaign.<sup>55</sup> The President had to defend his action in a very unusual way and he disavowed the fact that political considerations had played any part in it at all.<sup>56</sup>

There is good news and bad news in the FALN cases. The good news is that he did it at all; the kind of political risk now associated with any clemency decision is such that it is very discouraging and is likely to dry up the process entirely. The good news is that he

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54. See Charles Babington, *Puerto Rican Nationalists Freed From Prison; Most Are Heading Home; Controversy Over Clemency Remains*, WASH. POST, Sept. 11, 1999, at A2. "FALN" stands for Fuerzas Armadas de Liberación Nacional (Armed Forces National Liberation).

55. See, e.g., Dick Morris, *PostOpinion: Hillary's Self-Inflicted Wounds - Keeping Secrets Keeps the Home-Loan and FALN Scandals Alive*, N.Y. POST, Sept. 21, 1999, at 43.

56. See Charles Babington, *Carter, Tutu Were Involved On Clemency; Clinton Details His Reasons for Offer*, WASH. POST, Sept. 10, 1999, at A1.

explained his act in retributivist terms that, if they are listened to by those who are administering the process, may have real effect on some of the decisions that are made on a day-to-day basis by line prosecutors. Clinton cited Bishop Tutu and Coretta Scott King as having persuaded him to be merciful, because the sixteen FALN members "had spent over a decade in prison and that they would not see their children grow up."<sup>57</sup> This was a humanitarian reason for commuting their sentences.

The bad news, of course, is that very few people believed him.

I hope there will be some effort to follow up on these cases because I think that there is not only a lot of work to be done at the grassroots level, but that there has to be some work done to penetrate the consciousness of the officials responsible for sending these vindictive and unforgiving signals about the criminal justice system. We have received these signals for so many years now that we are almost inured to any thought that the government could be merciful in a principled and considered fashion. That is a very sad situation.

MR. AMMAR: (*Comments presented in detail in his Essay written in connection with this Symposium.*)<sup>58</sup>

PROFESSOR WEINSTEIN: At what point in the process should forgiveness play a role, and does it matter who is doing the forgiving? If it comes from the victim of the crime, should we think about that at the time a charging decision is made, should we think about that only in relationship to sentence, or should we think about it in relationship to commutation later in the process? Does it make a difference whether it is the victim, or whether it is a surrogate victim like a prosecutor? Does their receiving some forgiveness, or does their feeling some forgiveness, suggest it should be at a different point in the process?

I also wonder if anybody had any reaction to Doug Ammar's suggestion that these ideas of forgiveness work better in some communities than in other communities.<sup>59</sup>

MR. LERMAN: I would like to respond to the last point. In Milwaukee, which is not a homogeneous community, restorative justice practices work in the African-American community. There

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57. Letter from the President to The Honorable Henry Waxman, Ranking Minority Member, Committee on Government Reform, Sept. 21, 1999, at 2 [hereinafter FALN letter].

58. See Douglas B. Ammar, *Forgiveness and the Law: A Redemptive Opportunity*, 27 FORDHAM URB. L.J. 1583 (2000).

59. See *id.* at Part III.

is very intense support from our NAACP chapter and something called the Social Development Commission, which runs community panels for juvenile offenses in four police districts. They are not major crimes, they are ticket cases, but nonetheless it is the practice where you are bringing the community together.

Restorative justice uses the crime as a fuel of sorts with which to engage in community building. It is not just a matter of forgiveness. This goes to the communitarian discussion that we heard earlier. It can take hold. The notion that it cannot take hold in a minority community is wrong.

Doug is right to point out that there are cultural issues in play that might affect how it takes place and how it grows. I would suggest turning to the faith community and asking them to get involved because they inevitably preach these concepts at their services.

MR. GAY: In Des Moines, the capital of Iowa, which is relatively small but not a homogeneous community either, with a large immigrant population in recent years as well as a large African-American community, restorative justice works well within those communities.

In terms of "where in the process," at least in our system, anywhere: post-plea, between plea and sentencing, and post-sentencing. We have brought prisoners back from prison, for example, because victims of sexual assault have said, after three or four years following sentencing, "I have gone through counseling, I have gone through therapy. It hasn't worked. I need to meet this person. I need to be able to confront this person. I need to be able to tell him what this did to me." When that initial dialogue takes place, oftentimes forgiveness is a result.

There is no crime where this is not hypothetically possible. I think when it does not occur you either have an offender or a victim who is not ready. But hypothetically any crime is possible and anywhere in the process is possible.

We have had great results pre-plea. In our system now, all persons who plead guilty to a felony have to have a pre-sentence investigation done by the Department of Corrections. It takes about six to eight weeks. The court, upon accepting a guilty plea, orders that investigation and orders a victim/offender meeting, so that, hopefully, the victim and the offender meet following the plea. The meeting takes place before sentencing so that if they reach agreement we present the agreement to the court at sentencing.



On the non-felony level, because we are pushing people through so quickly, most of the time the victim/offender meeting takes place post-sentencing and agreements then become addenda to the court's sentence.

MR. LERMAN: I just want to quickly say that Des Moines is one of the shining lights in the restorative justice practices, the best place for restorative justice in the country. Milwaukee is years behind.

PROFESSOR BARRETT: Commit your crimes in Des Moines.

PROFESSOR WEINSTEIN: Actually, John, I have a thought that takes off from your joke. We have talked about forgiveness, but it is not immediately obvious to me that that means more lenient sentences. What is the relationship between forgiveness and mercy, if we are to understand mercy as mitigation?

PROFESSOR BARRETT: Particularly in the kind of federal victim list offense category that I am talking about, the decision-making process is really a decision about how serious the infraction is. The decision to forgive, to mitigate, is all the same thing; it is what you think about this person who has violated the law.

The meeting process, the face-to-face engagement, the order I am imagining from some bold U.S. Attorney, that "we won't indict cases where we have not first truly tried to meet and engage the person and offer Queen for a Day immunity and get some kind of conversation and see what the fuller picture might be," is a way of getting to the homogeneous world. It is not a question of locality. The situation is incredibly heterogeneous at the beginning. The meetings I am familiar with start with somebody on the government side of the table and a law breaker, in their view, on the other side of the table. Although they may be of similar race, education, class, whatever, that is all incidental to that fundamental defining difference between the two: "my world" and "your world." If you are not even there, and I have just developed facts about your world, I see you as the "other."

I am trying to advocate something that brings a person into something like a community with a prosecutor, where the time for forgiveness is on a rolling basis as the decision making occurs. There is not one magic moment. Obviously, it can be too late at every stage. I think the more you emphasize it, and the earlier it happens, the more balanced, and more frequent, the mitigation/mercy/forgiveness will be.

MR. GAY: You are exactly right, whether they are victim or victimless crimes. When you have that kind of dialogue, the prose-

cutors tend to look at it as “it’s us versus them” until you have this dialogue, the beginning of a relationship. When you do that, it becomes more of a problem-solving model than a prosecution model.

MS. LOVE: It is also important to restore forgiveness and mercy to some respectable status as responses to crime. I am speaking mostly from my experience in the federal system.

It is also important to bring it out into the open. As it is now, it pretty much operates under the table, and that is a reflection of the harsh and inflexible sentencing law that discourages exceptions. But in order to do justice — and not all prosecutors are hard-hearted — it is very important to make exceptions. So, in a sense, the pardon power that the Framers of the Constitution contemplated would be placed in the President<sup>60</sup> has been effectively delegated on a day-to-day basis to line prosecutors.

But it does not operate in the open; it cannot operate in the open until it is restored to some sort of respectability. That is the key thing.

#### QUESTIONS AND ANSWERS

AUDIENCE: When does it not work? When does restorative justice not work, when does the mercy not work, when does the pardon application not work, when does the community building not work, and why?

MR. GAY: At least in our system, you have less favorable results when you have offenders that are not prepared. But you do not have to have a perfectly prepared offender in order to have a successful meeting resolution because the process itself is transformative. You are not going to have this angel going into the meeting. At least in the meetings we have, you may have an hour, hour-and-a-half, where you have a recalcitrant offender or a very strident victim.

One of the keys, by the way, is very well-trained mediators/facilitators who will allow the process to develop fully. If you have very goal-oriented mediators who want a bottom line and who push the thing through too quickly, you do not get a good result. But if you allow the thing to take place with no time limits, then rarely do you not have a favorable dialogue.

There are certainly offenders who are pathological. There are people who have no conscience who do not belong in those meetings. We try to screen them out through the preparation process if

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60. See U.S. CONST. art. II, § 2, cl.1.

we see that they have no conscience. But there are some times, even with the no-conscience offender, where there is value to a victim still being able to tell the perpetrator what happened to them. There is a value in that, a very strong value. So it is rare, I think, that it does not work at some level that is good for the victim and also for the offender.

MR. AMMAR: I have seen it not work often across racial lines, across class lines, and that is sort of what fuels my observation.

AUDIENCE: I teach undergraduates at Pace University, mostly business law, some law topics. My question is, beyond the dialogue between the parties and the asking for forgiveness and giving the victim's views, what else can the perpetrator do to enhance forgiveness or foster forgiveness? I understand the thing about the desecration of the synagogue, but do other things occur to you?

MR. LERMAN: Yes. We have used victim/offender conferencing in employee theft cases. We have had several employees, who have of course been fired, go back to the store to talk to new employees about the embarrassment and the pain of being arrested and caught. That provides a real service to the stores.

MR. GAY: We have had major embezzlement cases, hundreds of thousands of dollars lost, and they will agree to restitution. Oftentimes they will confess civil judgment so a civil suit is not necessary. And sometimes, when there is an insurance company that is providing coverage, there will be a confession of judgment and assignment of that judgment to the insurance company. So to satisfy perhaps your business interest, that takes place.

MR. AMMAR: Restitution, too. We do a lot of restitution in our office, before it even gets in front of a judge or a D.A.

AUDIENCE: I am from the Center for Court Innovation here in New York City. I would offer a friendly critique that the courts are missing from the panel.<sup>61</sup> That is a perspective that I want to try to fill in quickly and then follow with a question.

There is a huge movement going on in the courts and there is a lot of excitement going on around problem-solving courts. You have mentioned some of that, in particular drug treatment courts, where the court is seen less as an engine of punishment and more as a way to get people who are committing drug offenses treatment as an alternative to a harsh sentencing regime.

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61. For the courts' response to this Symposium, see Derek Denckla, *Forgiveness as a Problem-Solving Tool in the Courts: A Brief Response to the Panel on Forgiveness in Criminal Law*, 27 FORDHAM URB. L.J. 1613 (2000).

There is also a community court model.<sup>62</sup> There is one here in midtown, just a couple of blocks away, which our center started. It has a victim panel and also a community service component, and takes these victimless crimes and puts a face on them. The people whose store was spray painted, let's say, in a graffiti case, would meet with the wrongdoer, describe how it makes them feel, what it did to their business, and how much money they had to spend on it. In some cases the wrongdoer would undo that wrong.

There is a whole movement afoot, and in fact the center is taking part in a national conversation with the Justice Department, which has funded a lot of these courts, in a project called the Justice Project.<sup>63</sup> So the government has done some things. There has been some talk on the panel about how government can do more and government has not done much on this issue, but there is the Drug Court Program Office of the Department of Justice<sup>64</sup> and the State Justice Institute.<sup>65</sup> They have funded very innovative programs that have restorative justice elements.

Another thing that touches upon all these issues is the notion of therapeutic jurisprudence,<sup>66</sup> which connects very nicely up with all this.

My question to the panel is the following: is the whole notion of forgiveness in the law and these other subsets that I have identified — holistic lawyering, therapeutic jurisprudence — aren't all these just new consequentialism, similar to law and economics, new ways to make law more effective? And, if so, does that change the tone from purely forgiveness? Are we talking about something quite different altogether, so that there would not be the conflation between the emotional notion of forgiveness talked about in the first panel and the actual more implementational notion of forgiveness that we are talking about in the criminal justice context? Are we talking about something else when we talk about forgiveness in the

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62. See Hon. Judith S. Kaye, *Rethinking Traditional Approaches*, 62 ALB. L. REV. 1491, 1494 (1999).

63. See Janet Reno, Remarks to the American Association of University Women (June 19, 1999), available at <<http://www.usdoj.gov/ag/speeches/1999/orgwomen-speech.htm>> ("We have funded and encouraged new community strategies — community policing, innovative crime prevention programs, community courts.").

64. See *Office of Justice Programs* (visited Apr. 7, 2000) <<http://www.ojp.usdoj.gov/dcpo>>.

65. See State Justice Institute (visited Apr. 7, 2000) <<http://www.statejustice.org>>.

66. See Robert F. Schopp, *Integrating Restorative Justice and Therapeutic Jurisprudence*, 67 REV. JUR. U.P.R. 665 (1998).

criminal justice context because we are looking at it being more effective, it being more consequentialist?

MR. AMMAR: One quick point. The consequences seem to be pretty good right now, with 1.8 million people in prison.<sup>67</sup> We are really good at being consequential in the criminal justice system. There are, however, some fundamental challenges that are happening a lot of places, like the community courts, et cetera.

One problem with the community court here in Midtown, by the way, is that it is post-sentence, it is post-conviction, so there is not as much incentive, I believe, for the offender to have some ownership in wanting to do that. But that is just a small point. Some of the things we are talking about are before the case is resolved, and those are pretty innovative and revolutionary.

MR. GAY: Going back to your comments earlier about the historical underpinnings of restorative justice, this is not just a new fad. It is a return to a previous way of doing business, quite frankly. If you look at a lot of the indigenous cultures and how they determine justice — Navajos, aboriginal Australians and New Zealanders, native Canadians — this is part of the way that their justice systems have operated for hundreds of years, thousands of years perhaps.<sup>68</sup> So it is not new, it is only new to us.

MR. AMMAR: That's right. In cultures that are much more homogeneous, like Japan and China, the criminal justice system is much more about bringing the offender and the victim together. That is again another challenge to why we do not do it in this country, is our xenophobia or incredible narcissism.

AUDIENCE: I have been a criminal appellate defense attorney for the indigent for twenty years in New York, where prosecutorial decisions are made by twenty-five-year-old prosecutors who do want notches on their gun belts, unfortunately.

I would like to speak to Margaret Love. Most criminal offenses are state offenses, with governors wielding the power. At that level, there are virtually no pardons. For instance, during Gover-

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67. See Jason Zeidenberg & Vincent Schiraldi, *The Punishing Decade: Prison and Jail Estimates at the Millennium* (Justice Policy Institute 1999), available at <<http://www.cjcrj.org/punishingdecade/punishing.htm>>.

68. See, e.g., Robert Yazzie, "Hozho Nahasdlii" — *We Are Now In Good Relations: Navajo Restorative Justice*, 9 ST. THOMAS L. REV. 117 (1996); Donna Coker *Enhancing Autonomy for Battered Women: Lessons From Navajo Peacemaking*, 47 UCLA L. REV. 1, n.6 (1999) (citing Marianne O. Nielsen, *A Comparison of Developmental Ideologies: Navajo Nation Peacemaker Courts and Canadian Native Justice Committees*, in *RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES* 207 (Burt Galaxay & Joe Hudson eds., 1996); Mark S. Umbreit, *Humanistic Mediation: A Transformative Journey of Peacemaking*, 14 MEDIATION Q. 201 (1997)).

nor Bush's five and a half year term, Texas executed 121.<sup>69</sup> Governor Bush has never even used his power to grant a thirty-day stay.<sup>70</sup> What can be done with state governors?

MS. LOVE: You elect them, that is what you do with them. That is kind of a tough answer, but I do not know where else the process of change starts. It has to come from the top. It has to come from some change of heart in those we elect. On the other hand, we are electing people to office who are apparently doing things that they think we want them to do.

The Senate Judiciary Committee is one of the hardest-hearted bodies. When asked to equalize the sentences for crack and powder cocaine, because the sentences for crack were so draconian compared to powder,<sup>71</sup> its response was to increase the sentences for powder to the level of crack.<sup>72</sup> Do we want this? They think we do.

So I am really thrilled to hear so much wonderful process talk, it is so exciting. But at the same time the prison population is still increasing. It is not 1.8 million, it is an estimated 2 million in February, 2 million people in this country in prison.<sup>73</sup> And there are now 137,000 in the federal system, compared to 24,000 federal prisoners in 1980, a figure that had remained about the same for the entire preceding half century.<sup>74</sup> These are really telling numbers.

Something is happening out there. Hopefully the tide will turn, but right now I cannot put these two trends together.

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69. See Michael Graczyk, *Texas Executes Convicted Killer*, 2000 WL 14324030 (Feb. 25, 2000).

70. See Margo Athens, *A Test for Bush's Compassion?*, BALT. SUN, Jan. 21, 2000, at A2.

71. The differential between crack and powder sentences has been the subject of much controversy. See U. S. SENTENCING COMMISSION SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY. See also Judy Mann, *The Harm in Mandatory Sentences*, WASH. POST, Feb. 16, 2000, at C15. The debate in the Senate over the proposal to equalize crack and powder sentences is available at <<http://thomas.loc.gov/cgi-bin/query/D?r106:1:/temp/~r106RoVI8I:e12083>>.

72. See *id.*

73. See Zeidenburg & Schiraldi, *supra* note 67.

74. As of March 6, 2000, the inmate population of the Federal Bureau of Prisons (including contract facilities) stood at 138,842. See OFFICE OF COMMUNICATIONS AND ARCHIVES, FEDERAL BUREAU OF PRISONS ("FBOP"), COMPILATION OF YEAR-END POPULATION FIGURES, (Mar. 6, 2000). For annual population figures between 1930 and the present, see FBOP, MONDAY MORNING HIGHLIGHTS NEWSLETTER (1994 to present); FBOP, STATISTICAL REPORTS (1960 to 1993); ANNUAL REPORT OF THE FEDERAL BUREAU OF PRISONS (1930 to 1960).

MR. GAY: You talk about twenty-five-year-old prosecutors, and they are the problem a lot of times. What preceded that was going to law school. That is the problem we have. We put them on the high-volume dockets and they screw things up because they are so litigation-minded, which is fine. We want young prosecutors to have good litigation skills.

But they can be educated. As an example, in July I spoke with a couple of prosecutors from a particular docket that dealt with lower-level misdemeanors — assaults, property damage — and before they could touch a file they had to go through a two-week restorative justice training course. I was just amazed. Now they pick up a file and say, “What should justice look like in this case?”

The challenge is not governors, it is law schools. You have got to bring the curriculum in to law schools and at least offer it on an elective basis for people who think they want to be defense attorneys or prosecutors.

MR. LERMAN: And you engage in the discussion elsewhere, outside of the legal world. In other words, going back to the faith communities is one obvious place to have this discussion. Certainly, many prosecutors, law enforcement personnel, and system personnel attend houses of worship. And if this discussion is occurring on Saturdays and Sundays then there should be some cognitive dissonance of some sort that goes on, or should be going on, for prosecutors who are simply interested in the notches on the belt.

PROFESSOR WEINSTEIN: Perhaps it should be no surprise to us — and this bit of the discussion brings it out clearly — that we see legislators who have no contact with individual cases and are under strong political pressure who continue to ratchet up sentences. We have assembled a panel of four prosecutors, and one defense attorney, who sound like voices for moderation. I think that is because those who have contact with individuals and individual cases think about things like forgiveness, which operates on an individual level.

Margaret’s comment was that we elect the governor. Well, it is true, but unfortunately mass politics is such that, at least now, our criminal sentences seem to be a one-way ratchet. We need to find a way to make forgiveness a political issue but it is particularly ill-suited to that because it operates on the individual level. This is really quite a problem.

It suggests to me why what John says about bringing some visibility and standards to this process to legitimize it makes so much sense. Margaret reminds us that forgiveness has fallen into disre-

pute and, at least from the legislative point of view, the only good prosecution is a harsh prosecution seeking a maximum sentence. But people who do the work tell us that that is not what should be going on.



## KEYNOTE ADDRESS: FORGIVENESS AND THE LAW

## INTRODUCTION

PROFESSOR MINOW: In one of my favorite cartoons, the first panel shows a letter that says, "Dear Minister: I am sick and tired of your holier-than-thou attitude. Signed, Fed Up."<sup>75</sup> The second frame shows a minister reading the letter, thinking, and then writing one back that says, "Dear Fed Up: I forgive you." In the third frame, the minister says to himself, "Shame on you."<sup>76</sup>

As this cartoon suggests, forgiveness is, in a fundamental way, about power. I am honored to be at this conference that has launched an extraordinarily rich and fascinating set of discussions. I was so intrigued by the fact of the conference, by its existence, by its name, by its timing. It would not have happened twenty years ago, I do not think, although we have long had forgiveness in bankruptcy, clemency in criminal law, Rule 60(b) in civil procedure,<sup>77</sup> amnesty in settings ranging from public library overdue fines to international human rights violations. My quick computer Lexis search for forgiveness "within five of law" turned up over 300 references, the bulk of the first twenty of them concerned loan forgiveness for law students, so I stopped looking.

Each of these and other modes of forgiveness in law have become more salient now, not only because of powerful and valuable scholarly works, such as Jeffrie Murphy's,<sup>78</sup> and not even solely due to notable institutional experiments, such as South Africa's Truth and Reconciliation Commission. I think the depth and breadth of interest in forgiveness among law-types reflects something more.

As we have heard somewhat this morning, for the last twenty-five years or more, scholars and practitioners have generated strikingly convergent alternatives to conventional adversarial litigation in a whole host of areas that otherwise have nothing in common. These alternatives respond to governmentally sponsored atrocities, to local misdemeanors, and to family conflicts. The contemporary infusion of apologies, pardons, amnesties and calls for healing and forgiveness in the wake of inter-group violence, government-sponsored violence, misbehavior by government actors around the world, and private misbehaviors have striking parallels with restor-

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75. Doug Marlette, *Kudzu*, CHI. TRIB., Nov 28, 1988, at 8.

76. *Id.*

77. See FED. R. CIV. P. 60(b) (permitting relief from judgment or order due to "mistakes; inadvertance; excusable neglect; newly discovered evidence; fraud; etc.").

78. See, e.g., JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY (1988).

ative justice community conferences, divorce and child custody mediation hearings, and juvenile justice community hearings.

In each instance, the search for alternatives reflects a critique. Critics find conventional litigious justice isolating, destructive of human ties, inflexible, impersonal. It offers little or only constrained roles for the parties; it permits compromise only in its shadows; and it requires people to put aside their whole identities — their needs, their spirituality, their beliefs — in order to translate the conflict into specifically legal terms.

Alternatives draw upon or help to forge interpersonal ties and social norms, help to reconnect people who have been in conflict, involve people in designing their own unique solutions so that they feel invested in them, and abandon a “winner take all/loser suffer all” approach to human conflict. Alternative methods can invite people to bring their whole selves, including their emotions and religious commitments, their tears and their hopes, as they deal with wrongdoing, conflict, and dereliction of duties.

Crudely put, to critics law is arcane, remote and divisive, even if it is also principled, formal and professional. Jessamyn West writes of law, “It seems to be all Greek and turkey tracks.”<sup>79</sup> In contrast, alternatives — such as mediation, restorative justice circles, truth and reconciliation commissions — depart from precedent, depart from professional scripts, to seem humane, integrative, and healing. No small virtue of the alternatives is that they can promote forgiveness. Forgiveness, writes author Christina Baldwin, “is the act of admitting that we are like other people.”<sup>80</sup>

Admitting that we are like other people, that those who do wrong are like us, that we could be like them — these aspirations strike the keys of compassion and empathy, connection and interdependence. The Lord’s Prayer, variously phrased as “forgiveness as we forgive our trespassers” or “forgive our debtors,”<sup>81</sup> suggests that the Almighty, too, is part of this web of reciprocal forgiveness, although I leave to theologians whether the Supreme Being also needs or can receive forgiveness.

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79. JESSAMYN WEST, *THE FRIENDLY PERSUASION* (1945).

80. CHRISTINA BALDWIN, *LIFE’S COMPANION, JOURNAL WRITING AS A SPIRITUAL QUESTION* (1990).

81. *Matthew* 6:9-13 (King James). See also Phillip Nonet, *Sanction*, 25 CUMB. L. REV. 489, 527 (discussing Hegel’s notion of forgiveness as human comprehending of the necessity that God does God’s work: “The judge himself must fall to the ground and embrace the sinner in confessing to the sin of judging.” (internal citation omitted)).

The aspirations of forgiveness depart from those conventionally guiding Western, democratic, secular, legal systems which are much more at home with the ideals of equal treatment, impartiality, just desserts, and respect for individual autonomy. This sets the stage for my central question: Are these distinctive sets of aspirations compatible? Can compassion join impartiality, interdependence join just desserts, connection join individual autonomy? Can we create a legal world adept at judgment and also comfortable with forgiveness?

I have been struggling with these issues as I examine responses to the situations in Kosovo and in Rwanda. In Rwanda, the justice system there is so overwhelmed by the numbers of people incarcerated following the genocide that they will never be able to prosecute everybody who is incarcerated. So what should happen? Should the thousands who are incarcerated just be let out and sent home? The people I have been consulting with there report that one option they are considering is trying to revive traditional forms of communal justice, which were themselves devastated by the genocide. Traditions of informal, communal justice may provide a sense of accountability without the economic and political costs of prosecutions; perhaps they could promote reconciliation as well, yet the obvious difficulty is finding people steeped in the traditions who remain alive and willing to guide and conduct the process.

My own thoughts have turned back to this country, and especially to hate crimes and domestic violence. Can compassion join impartiality? Can forgiveness join law enforcement and protection of rights? These are hard questions.

So my eye wandered and found the program for this conference. Being a teacher of civil procedure, I focused on the vital words, the conjunctions and prepositions. I noticed that we are here for the Symposium entitled "The Role of Forgiveness *in* the Law," but the first panel this morning addressed "Forgiveness *and* Justice," the second looked at "Forgiveness *in* the Criminal Law," while this afternoon we will hear about "Forgiveness *in* the Civil Law" and "Forgiveness *and* International Amnesty."

Forgive me, please, if I make too much of this contrast. But there is a difference between "in" and "and." We can unearth the dimensions of forgiveness and mercy already present within the formal justice systems and rules, forgiveness that may temper rigidities, or that may reflect pragmatic assessments about how to elicit compliance, or that create settlements with individuals. Yet, for-

giveness also affords something that can only be juxtaposed with the law, by acknowledging a separation, joined only by an “and.”

Forgiveness in this sense signals an outside vantage point enabled by psychological, religious and political perspectives that critique law’s limits. Approaching wrongs with forgiveness in this sense means sustaining alternatives to lawsuits, to prosecutions and to convictions, and thereby confining the instances governed entirely by rules, punishment, and predictability. Forgiveness is a kind of supplement to law’s core, whether it is introduced inside the system or promoted outside the corridors of formal legal institutions. Forgiveness is “in” law, but also one of the “law and’s,” like law and society, law and literature, law and economics, law and justice.

The shifts between “in” and “and” highlight potential questions about what happens to law when forgiveness is available and what happens to forgiveness when law proceeds.

I will explore these questions by comparing the domains of law and forgiveness. When are they separate? When do they overlap? Can forgiveness substitute for law, or law for forgiveness? I will explore these problems by addressing what I will call the moral ambitions at work in forgiveness and in the ordinary rule of law.

In the domains of Law and Forgiveness, Forgiveness does not, and should not, necessarily take the place of a legal process, punishment, or justice. Indeed, their domains could be viewed as entirely separate and also compatible.<sup>82</sup>

One observer put it this way: “Human codes of law establish indispensable rules of life together and standards of relationship. Any attempt to weaken the supremacy of the law thus entails the erosion of the humane. Forgiveness is about renouncing unjustified power, not about weakening the pursuit of justice.”<sup>83</sup> Accordingly, forgiveness marks a change in how the offended feels about the person who committed the injury, to a change in the action to be taken by the legal system. For an individual, forgiveness, many tell us, essentially means the relinquishment of resentment that is otherwise warranted based on an offense or a wrong.

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82. Elizabeth Kiss pursues a related inquiry about the moral ambition of truth commissions. See Elizabeth Kiss, *Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice*, in *TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS* (Robert Rothberg & Dennis Thompson eds., 2000).

83. GEIKO MULLER-FAHRENHOLZ, *ART OF FORGIVENESS: THEOLOGICAL REFLECTIONS ON HEALING AND RECONCILIATION* at viii (1997).

In this view, wrongdoers should be forgiven if they accept responsibility and consequences, or wrongdoers may be forgiven independently of the operation of the formal justice system. Either way, forgiveness need not substitute for punishment or liability.

That we can advocate punishment for a wrongdoer one has forgiven or will forgive shows how potentially separate are the domains of law and forgiveness. Forgiveness operates interpersonally; the legal system operates impersonally. Through forgiveness I forgive my anger and hatred towards someone who has harmed me, but I do not and cannot alter the requirements of just desserts.<sup>84</sup> Those requirements reflect the rule of law's commitments to predictability, neutrality, treating like cases alike, building a factual predicate for decisions, and restraining the personal views and biases of decision makers so that we have a government of rules, not of people. Punishment, in this view, should follow wrongdoing in order to ensure like treatment for factually similar conduct as well as neutral and predictable application of the law.

Supporting punishment can be compatible with forgiveness on an entirely different view that points to rather lofty moral ambitions. Here, forgiveness and legal punishment both partake of the view that offenders should be treated as full members of a community, and that the community demands responsibility by all of its members for their actions.<sup>85</sup> Even the traditional Christian call to forgive rather than to avenge accompanies faith that vengeance will come through the Divine.<sup>86</sup>

Yet, the moral ambitions seem to diverge when law and forgiveness come to be alternatives to one another and people seek to substitute one for the other. This happens in one of two contexts. In the first, a specific victim may wish to forgive an individual wrongdoer. The second, typically involving large numbers of offenders and victims, substitutes for legal process. I will compare these by considering competing moral ambitions.

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84. See Jeffrie G. Murphy, *Forgiveness and Resentment*, in MURPHY & HAMPTON, *supra* note 78, at 33.

85. See Jules Coleman, *Adding Institutional Insult to Personal Injury*, 8 YALE J. ON REG. 223, 224 (1990).

86. See SUSAN JACOBY, *WILD JUSTICE: THE EVOLUTION OF REVENGE* 5 (1983). Of course, the central Christian concern is the reconciliation with God. See VINCENT TAYLOR, *FORGIVENESS AND RECONCILIATION: A STUDY IN NEW TESTAMENT THEOLOGY* (1960).

### A. Substituting Forgiveness for Law Due to High Moral Ambition

When an identifiable victim wants to forgive an individual wrongdoer to substitute for legal action, usually it is because either the wrongdoer has changed or the one who wants to forgive wants to change. These are very ambitious goals. To some, the punishment no longer seems justified if the moral ambition is to change the person who did wrong, even though our legal system usually emphasizes acts, not persons, and retrospective evaluations, not prospective predictions.

Other people hope that the act of forgiving itself may transform the wrongdoer in a way that impersonal punishment cannot. By re-inviting the offender into the moral community of humanity, by demonstrating care and connection, and by offering a relationship some aspire to change the offender and change themselves.<sup>87</sup>

For example, the restorative conferences following criminal charges offer this kind of invitation to the wrongdoer who admits responsibility, but not to one who does not. The process of forgiveness thus transforms a wrongdoer only if the forgiven and the for-giver share a script. John Reed explains: "The forgiven must act likewise and be forgiving. Moreover, to be forgiven one must first acknowledge guilt."<sup>88</sup>

Allowing the legal process to proceed simultaneously could interfere with this script, worsen the offender's sense of isolation and exacerbate his rejection of the norms of decency. If both participants play their parts, however, the process can heal the offender and also restore a sense of dignity and self-respect to the offended person.<sup>89</sup>

But, of course, not everybody shares this script, as admirable as it may be. Indeed, some do not embrace this script even as they promote forgiveness. They do so without expecting a change in the wrongdoer. Instead, they view a change in the one who was wronged as crucial. Rabbi Harold Kushner argues that "the victim should forgive not because the other deserves it, but because the victim does not want to turn into a bitter, resentful person."<sup>90</sup> Vic-

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87. See Jean Hampton, *Forgiveness, Resentment and Hatred*, in MURPHY & HAMPTON, *supra* note 78, at 35, 80-81.

88. JOHN REED, *DICKENS AND THACKERY: PUNISHMENT AND FORGIVENESS* 17 (1955).

89. See Aaron Lazare, *The Healing Process of Apology* 11 (unpublished lecture on file with author) (describing benefits of apology).

90. HAROLD S. KUSHNER, *HOW GOOD DO WE HAVE TO BE: A NEW UNDERSTANDING OF GUILT AND FORGIVENESS* 107 (1996).

tims should forgive not because the other has earned it but to permit victims to reshape themselves as people undistorted by the violation.

Forgiving can afford not only psychological release but also the chance for moral betterment. Trying not to be like the wrongdoer for some means breaking cycles of vengeance and resisting the desire to see the wrongdoer suffer. Forgiving is the stance to reach for precisely when the wrong is incomprehensible. For Doris Lessing, "If you understand something, you don't forgive it, you are the thing itself. Forgiveness is for what you don't understand."<sup>91</sup> The one who forgives, therefore, can stretch herself to deal with what she cannot comprehend or control. By forgiving, she can elevate herself, avoid bitterness, prevent cycles of revenge, and free herself from the kind of preoccupation with a felt wrong that can distort her own life and sensibilities. Forgiving thus involves a script of self-making, with the opportunity for moral self-improvement.

These aspirations to change the survivor and to change the wrongdoer stand in sharp contrast with the more skeptical moral aspirations of the law.

The state's law proceeds with a different script, one that demands accountability whether or not the wrongdoer has changed or could change. In a world of flexible criminal sentencing, contrition and personal transformation might be relevant at some point, but, increasingly, our legislatures mandate flat sentencing. What matters is the prior acts, not personal change.

Accordingly, the role law scripts for victims is confined to supplying inculcating evidence and testimony about their own suffering. This helps stiffen the fact finder's resolve to punish. Victim witness statements are introduced in death penalty proceedings, for example, in order to provide vivid statements of pain and harm caused by horrific acts, not to permit forgiveness and reconnection between victim and offender. Thus, when people choose to substitute forgiveness for law they seek a personal transformation and interpersonal connection, very different moral ambition than the what law seeks or fosters.

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91. DORRIS LESSING, *TO ROOM NINETEEN, A MAN AND TWO WOMEN* (1963).

### B. Substituting "Forgiveness" for Law Due to Political Necessity

When people want to substitute forgiveness for law out of political necessity, they express different moral ambitions. Mass violence strains the will to forgive — if there are survivors who could forgive — but also strains the power to prosecute. The sheer numbers of people murdered in Rwanda, for example — one out of five members of the community were killed in the genocide.<sup>92</sup> It is hard to imagine how many people committed the crime, since it consisted of hand-to-hand killings with machetes. Can a nation prosecute everybody in the society? It is a practical as well as a moral problem.

In addition, political circumstances may press against legal action. The governing political regime may not have changed; the judiciary and the prosecutors may be the same as the ones who committed the abuses in the apartheid regime, which is the current situation in South Africa. The new regime may be relatively powerless, or it may have made a deal to dispense with prosecution in order to gain power. Violations may have occurred over such a long period of time, with reprisals and revenge by victims, that disentangling victims from offenders becomes nearly impossible. Assessing individual responsibility under a rule of law becomes unattainable where you have had systematic violence and wrongdoing. Only a political solution will work.

Amnesty is usually the form it takes. Amnesty for political figures of criminal regimes is much in the news now, as we watch General Pinochet slip away even from the legal accountability outside of Chile. If Chile had not granted him amnesty, we would not need the extraordinary measures of Spanish prosecution and English extradition. If Chile had not granted him amnesty, he and his henchman would still control the country. Amnesty reflects aspiration to restore peace, order and in some instances, democracy.

But official amnesty is not the same as forgiveness. Forgiveness is and must remain the exclusive prerogative of the wronged individual. Forced or pressured to forgive, a victim undergoes a new harm and subordination. Survivors can forgive the wrongdoer for their own suffering but not the suffering of those who did not survive. Government officials may seek to act in the name of victims, but they cannot forgive on their behalf; they can forego legal con-

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92. See Stephen Buckley, *Mass Slaughter was Avoidable, General Says*, WASH. POST, Feb. 26, 1998, at A17 (reporting that at least 500,000 were killed in 100 days).



sequences, not personal, righteous resentment. When amnesties are granted because of fear of reprisals, political pressure, or inadequate resources, these aspirations fall short not only of the loftiest goals of forgiveness but also the legal objectives of accountability, visibility, and impartiality. Public apologies and amnesties following mass oppression elicit objections in the name of justice, understood as prosecutions, punishment or reparations.

Amnesties can be granted as part of a negotiated transition to democracy, as happened in several Eastern European countries, or as part of a process of helping multiple antagonistic parties learn to coexist. Such amnesties relinquish the moral ambitions of law due to *réalpolitik* and a sense of political impotence rather than any competing ambitions of reconciliation and personal transformation.

Where does South Africa's Truth and Reconciliation Commission ("TRC") fit? It is a different, unique effort. Its Chair, Archbishop Desmond Tutu, characterizes it as an institutional enabling of forgiveness. It occasioned encounters between victims and perpetrators but was not a command performance of reconciliation. The TRC did not require individuals to forgive those who tortured them or murdered their loved ones or otherwise committed gross human rights violations. Instead, by gathering testimony from individual survivors, the TRC modeled a form of respect to help restore the dignity of those who were violated.

Its most controversial feature was its provisions permitting amnesty from criminal and civil liability for human rights abuses for perpetrators on all sides of the conflict, including the leaders of the current ANC-led government. Yet, by resisting blanket and unconditional amnesty, the TRC resisted the complete abandonment of moral accountability that so often accompanies political amnesties. Instead, the TRC elicited individual applications and received 9,000 of them from people on all sides of the conflict. In so doing it did fulfill a political bargain. It was the chief condition for peaceful transition to democratic rule. But the amnesty hearings also adhered to the rule-of-law commitments to factual predicates, treating likes alike and predictable decision making.

The TRC's amnesty application requires full disclosure of the facts of the individual's violations of human rights — not avoidance or suppression of those facts. The application requires memory not repression. Thus, it reflects the weighty moral ambitions of overcoming communal denial and secrecy, restoring dignity to the vic-

tims, and acknowledging the wrongs done by individuals on all sides of the Apartheid-era struggles.

One mother whose son was murdered by the governmental agents explained her support for the amnesty process precisely because of the profound moral ambition to humanize victims and perpetrators alike. Thus, she explained: "This thing called reconciliation, if I am understanding it correctly, if it means that this perpetrator, this man who has killed my son, if it means he becomes human again, this man, so that all of us get our humanity back, then I agree, then I support it all."<sup>93</sup>

This ambition could not, in the views of those most directly involved, have been pursued within preexisting legal institutions. The courts in South Africa themselves were so much a part of the process of enforcing apartheid. The police, the judges, the prosecutors, and much of the bar still to this day hold the same roles that they held while the government notoriously violated the human rights of a majority of the nation's citizens. In addition, the impersonality of law particularly seemed ill suited to the tasks of the TRC.

The Amnesty Committee, from the start, gave a special role to victims and authorized them to engage in cross-examination of anyone who applied for amnesty. Reversing roles, then, torturers and murderers faced interrogation by their former victims and family members. That face-to-face confrontation and engagement encouraged some applicants to seek forgiveness and enabled some survivors to forgive, but there were at least as many situations where there was no exchange of apology or forgiveness at all.

The TRC represents a unique effort to forge the preconditions for the rule of law, not an instance of forgiveness. Itself a legal institution, the TRC was duly authorized by the Parliament. It was governed by political appointees. It was not extralegal. Creating and supporting it, the first democratic Parliament sought to prevent cycles of revenge by giving public acknowledgement to past wrongs and by investigating the causes of, and the participants in, the violations of human dignity committed both by the apartheid regime and those who fought against it.

The Commission's hearings and public broadcasts offered occasions for people to make apologies and forgive, but depended upon neither. The amnesty provision, born of political compromise, did not embody the moral ambition of forgiveness, and did not seek to

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93. ANTIJ KROG, *COUNTRY OF MY SKULL* 109 (1998) (quoting TRC participants).

change the individual offender or the victim, but sought to change the country. Indeed, the Amnesty Committee tried to adhere to the features of the rule of law, treating like alike, and treating people with impartiality.

In a country like South Africa, where the trappings of the legal system were so profoundly associated with oppression, institutional innovation was a courageous step to help the nation turn a new page. Rather than serve as a substitute for law, it was a kind of precondition for its reestablishment.

### **C. Can and Should Law Pursue Higher Moral Ambitions?**

Thus, forgiveness can operate when individuals leave law's operations intact. Forgiveness can lead individuals to forgo or prevent formal legal action. Something quite short of forgiveness, some kinds of political and practical assessments, may lead societies or governments to preempt legal action and substitute what they call forgiveness but is better known as amnesty. Something different from forgiveness and the rule of law, but something harmonious with it occurred with the TRC, as it tried to create a predicate for establishing the rule of law.

But what this conference raises is the question not just of forgiveness *and* the law, but forgiveness *in* the law. Should legal institutions, most notably courts, themselves adopt the high moral ambitions that I have associated with forgiveness? Should legal institutions seek to foster forgiveness by victims towards wrongdoers, to seek to encourage contrition by wrongdoers? Should courts try to frame roles for victims and bystanders that would allow them to engage wrongdoers in a sense of common fellowship and mutual recognition?

In this spirit, can legal actors mobilize community? Many prosecutors' offices use the language of community in efforts to mediate or work through violations of rights. The community, not the law, forgives them. What then can the law contribute?

Perhaps the law can promote a sensibility of repair and restoration. But can it do so co-existing with what has to remain the crucial domain of law, that of enforcement, neutrality, objectivity? There is often tension inside an office where restorative justice people vie with other people who seek the notches on their trial belt. Can both attitudes be sustained in the same prosecutor's office? Can both attitudes be sustained in the same court room? Can both attitudes be sustained in the same law school?

I think the answer I want to give is, "Yes, or it's worth a try." Nevertheless, I have three cautions.

The first is that we better be honest and not call things what they are not. Do not call it restorative justice when it is alternative dispute resolution designed as docket cleaning, with timed mediation sessions — you get a half an hour or you get an hour — conducted by people who are not trained to mediate. Boy, you clear those dockets fast. Just do not call it restorative justice.

Second, beware of state power used to try to produce forgiveness or used to try to produce contrition. When it is the state and not the community acting, I think we have to be very much on our guard, not only for people feigning the change, but also for the abuses of government power. Respecting the choice of an individual not to forgive has to be as important as respecting an individual who comes to forgive. Otherwise, respect for individuals does not mean anything.

Third, we should not underestimate the importance of maintaining a straight, formal, legal system, especially in a divided, divisive society. A legal system that does not abandon commitment to impartiality, neutrality, and treating likes alike is itself a remarkable accomplishment and not something to be bypassed in the hopes of human transformation.

I will close with a few comments on this last one. The drive toward the rule of law, launched in the West but spreading around the globe, itself embodied stirring moral ambitions. By elevating respect for each individual over the community, over hierarchy, over inherited status, the rule of law embodied liberalism's commitment to objectivity, to facts, and to a system of governance by law rather than by people — or, to be historically accurate, I should say men.

To embrace the rule of law is to embrace rules and rights as restraints on relationships and power. The movement for the rule of law may have tried to squeeze forgiveness and justice in order to implement equal, objective, and impersonal treatment and to guard against the whims of the powerful and the abuses of power relationships. In nations that do not have it, it is easier to see the moral ambition of the rule of law as the accomplishment that it is.

Consider the situation of the few Serbs remaining in Kosovo today. If they are alive, it is because they have a one-to-one ratio of British and French police and security officials protecting their lives. And if they are ill, there is no place to go because no hospital in Kosovo will treat a Serbian.

From this kind of vantage point, it would be admirable, indeed, to implement the rule of law to ensure that likes be treated alike and that personal biases be restrained in ensuring equal protection. I grant that the movement to the rule of law, even where it is far better established, has never completely succeeded. It never lives up to its reputation. It also remains tricky to know what is a like that should be treated alike. It leaves inadequate discretion to tailor the results to particular persons. It produces unfairness and rigidity.

Therefore, within formal legal rules, judges and lawyers always have invented room for forgiving individual wrongs and wrongdoers. The British King crafted a system of equity, partly as a struggle for gaining political power but also to supplement and override the common law courts of the local lords. Initially, equity permitted flexibility and justice tailored to the circumstances, until it too became rule-bound. Executive power and pardons reflect to this day the conception that stemmed from royal forgiveness overriding the necessary rigidities of law. And, to do justice, it is also important to make exceptions.

Religious authorities, immigrant communities, and, most notably, native traditions that existed in this country, Canada and around the world before liberalism came to colonize, have repeatedly shaped alternatives to formal legal adjudication. They permit face-to-face resolution of conflicts that rely on communal ties and often on chances for forgiveness. Over the past several decades, lawyers, psychologists and others have crafted similar problem-solving methods, such as alternative dispute resolution, mediation, and reintegrative conferences, to bring interpersonal relationships and community and hopes for personal change back into the process of dealing with wrongs and wrongdoers.

Methods to permit apology and forgiveness figure inside and outside of formal legal institutions — and must — but we have to be careful whenever we increase the discretion given to formal legal actors. I will illustrate with another favorite cartoon of mine. There is a judge with an enormous nose and an enormous mustache, sitting up at the bench, looking down at the defendant, who — guess what? — has the same enormous nose and enormous mustache, and the judge says, hammering his gavel, “Obviously not guilty.”<sup>94</sup>

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94. Charles Barsottie, *Untitled*, NEW YORKER, Nov. 21, 1988, at 55.

Who gets the discretion? In a society that is as marked by division and distress as ours, who will be helped by discretion and who will not be?

Methods to permit apologies and forgiveness supplement the insistence on precedent and treating likes alike, they temper the universal, they reintroduce the person, and that is valuable; they also endanger the very predicates of the rule of law. Those committed to advance individual equality, predictability of coercive power, and curbing the vagaries of personal preference and feelings seek, as they should, to shore up the rule of law and formal legal institutions. It is a real accomplishment to establish institutions committed to law rather than the whims of the governors.

But, of course, no less admirable are the generosity and hope associated with forgiveness, with community reintegration. Admirable indeed is the recognition by the Jewish community in Iowa that the two people who had defaced and destroyed parts of the synagogue were people too and they had been objectified by the Jewish community as much as the objectification worked in the other direction.<sup>95</sup> What a story! This is a story about the possibility of the human heart and the possibility of change, the possibility of forgiveness, and the possibility of embrace.

The moral ambitions of law and forgiveness, in short, offer worthy challenges one to the other in our desires for impartiality and compassion, autonomy and connection. Let us just not confuse one for the other.

We will, no doubt, make mistakes as we grasp the ideals of both law and forgiveness. I am reminded of the actress, Tallulah Bankhead. She said late in life, "If I had my past life to live over again, I would make all the same mistakes, only sooner."<sup>96</sup>

What a wonderful place to be in, a wonderful stance of self-forgiveness. I wonder whether the strong retributive feeling in this country has to do with a failure of self-forgiveness. Maybe if we started there, we could make some change. In the meantime, may we admit that we are like other people and forgive where possible. May we also respect what law, untempered by forgiveness, provides for the coexistence of imperfect people.

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95. *See supra* notes 45-47 and accompanying text.

96. ROSALDE MAGGIO, QUOTATIONS BY WOMEN 241 (1992).

## FORGIVENESS IN THE CIVIL LAW

PROFESSOR NOLAN-HALEY: In this panel we are going to consider how we advance this project of forgiveness in the civil law: How do we define forgiveness in the context of civil law? To what extent, if any, should forgiveness play a role in the civil law? Is forgiveness really a corrective to a civil justice system that may too often exclude the human element?

PROFESSOR BLOCK-LIEB: My topic today is the role of forgiveness in consumer bankruptcy law. To receive a bankruptcy discharge means that debt is forgiven. By virtue of the bankruptcy discharge, creditors are enjoined against any act to collect, recover, or offset any such debt as a personal liability of the debtor.<sup>97</sup> That means that, after completion of a bankruptcy proceeding, the debtor need not repay unsecured creditors any amount which remains unpaid.

So, for example, consider an individual debtor who files a voluntary petition under Chapter 7 of the Bankruptcy Code.<sup>98</sup> At the time of the filing, the debtor owns \$100 in non-exempt, unencumbered assets and owes \$1000 in non-priority, unsecured claims. These creditors would receive a pro-rata portion of the proceeds from the sale of the debtor's assets, about ten cents on the dollar. The remaining ninety cents on the dollar would be discharged in the bankruptcy context, forgiven.

It should come as no surprise that an important theoretical justification for the bankruptcy discharge draws on the moral philosophy of forgiveness. And yet, many bankruptcy commentators reject the notion that the bankruptcy policy favoring the debtor's fresh start following bankruptcy should be explained in terms of the philosophy of forgiveness.

I would like to discuss the relevance of forgiveness to consumer bankruptcy law, for I believe that forgiveness provides a controversial, and yet enormously important, metaphor for the bankruptcy discharge. I will first discuss the controversy, and then address the usefulness of this concept of forgiveness to consumer bankruptcy law.

In her book, *Failure and Forgiveness*, Professor Karen Gross argues that the bankruptcy discharge is "how society mandates that creditors forgive non-paying creditors."<sup>99</sup> Drawing on the secular

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97. See 11 U.S.C. § 524(a)(2) (1999).

98. See 11 U.S.C. §§ 301, 701 (1999).

99. KAREN GROSS, *FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM* 93 (1997).

philosophy of forgiveness, she acknowledges that, "forgiveness is appropriate where a wrong is committed, where the wrong harms another, or the wronged party resents what occurred, where the wrongdoer acknowledges the wrong done and takes steps to rectify it."<sup>100</sup> She argues that these conditions exist in the bankruptcy setting:

For debtors, the wrong is the nonpayment of legitimate obligations. That nonpayment provides a panoply of injuries. Creditors who are not paid are damaged economically, and perhaps emotionally. And others who pay for the losses indirectly are also harmed. Many injured creditors are resentful of the debtors' failures because debtors have received a benefit for which payment has not been made. Creditors may also feel resentment because debtors overstated their abilities to succeed. Finally, debtors admit to failure and take steps to redress their wrong by accessing the legal system. The system makes that wrong a matter of public record and requires debtors to submit to judicial scrutiny.<sup>101</sup>

Gross's critics contend that the rhetoric of forgiveness does not satisfactorily explain consumer bankruptcy law. They offer alternative justifications.

For example, Professor Marjorie Girth rejects forgiveness as a rationale in this context on the grounds that "the discharge is mandated by our bankruptcy law, no matter how creditors may feel about that result."<sup>102</sup> As a result, she views forgiveness and discharge as "internally contradictory concepts," and argues that this follows from the notion that a critical aspect of forgiveness is the wronged person's decision to forgive.<sup>103</sup> She, instead, suggests that a more useful concept for the bankruptcy context is one of sympathy.<sup>104</sup>

Philosopher Jukka Kilpi similarly critiques the usefulness of forgiveness in this context: "An institution discharging . . . debt against the creditor's will does not represent forgiveness, which can be a morally meaningful term only in relation to a person's willingness to forgive."<sup>105</sup>

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100. *Id.*

101. *Id.* at 93-94.

102. Marjorie L. Girth, *Rethinking Fairness in Bankruptcy Proceedings*, 73 AMER. BANKR. L.J. 449, 451 (1999).

103. *Id.*

104. *See id.* at 450-53.

105. JUKKA KILPI, *THE ETHICS OF BANKRUPTCY* 68 (1998).



Kilpi also rejects sympathy on roughly the same grounds, for he views sympathy as “a subjective attitude of mind, one which cannot be brought about by decree.”<sup>106</sup> He similarly rejects impossibility, legalism, and utilitarianism as justifications for the bankruptcy discharge.<sup>107</sup> Kilpi, instead, argues that principles of distributive justice, in combination with respect for individual autonomy, provide a strong ethical explanation for providing debtors a fresh start in bankruptcy.<sup>108</sup> In so doing, Kilpi takes issue with the notion that defaulting debtors have acted wrongfully and deserve punishment.<sup>109</sup>

Should forgiveness have any role in consumer bankruptcy policy making? Admittedly, the fit between the secular philosophy of forgiveness and a theory of consumer bankruptcy policy is imperfect. Creditors do not consent to their debtors' discharge. Some would argue that a debtor's financial distress does not constitute wrongful conduct. A discharge in bankruptcy, furthermore, is not today tied in any way to restitution, repentance, or mandatory repayments made through the bankruptcy process. Nonetheless, forgiveness should have an important place in thinking about consumer bankruptcy law and policy. The importance of forgiveness to consumer bankruptcy policy making is as a metaphor — an analogy. It is the idea of forgiveness that should permeate any dialogue about consumer bankruptcy law and its goals.

Bankruptcy policy-making is not unique in its reliance upon forgiveness merely as a metaphor. Indeed, when applied to any litigious or contentious setting, forgiveness can only ever constitute an analogy. Family law, tort law, criminal law — in each of these contexts we talk about forgiveness, knowing full well there may be no voluntary act of forgiveness by the victim. We refer to the notion of forgiveness in these contexts largely as an analogy. And still, forgiveness can be a powerful analogy in this context.

We draw on the metaphor of forgiveness in talking about these areas of contention in the hopes of formulating legal policies that direct or encourage the resolution of litigation on merciful and forgiving grounds. By reference to the metaphor of forgiveness, we consider whether, under certain circumstances, there exists a moral obligation to forgive and create legal rules either to create incen-

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106. *Id.*

107. *See id.* at 68-72.

108. *See id.* at 73-82.

109. *See id.* at 93-125.

tives for forgiveness or, instead, to mandate forgiveness in these circumstances.

Why is it important to analogize the bankruptcy discharge to forgiveness rather than rely on other normative explanations for discharge? What role can the metaphor of forgiveness play when we think about consumer bankruptcy law and policy? There are at least five reasons that forgiveness can play an important role in this context.

First, a focus on forgiveness emphasizes the humanity of debtors. Other normative justifications for the bankruptcy discharge, based on economic or paternalistic concepts, often miss this human element.<sup>110</sup>

Second, the analogy to forgiveness reminds us of the moral dilemma created by a debtor's financial distress and the complexity of the ethical issues involved in the bankruptcy contest.

Third, the concept of forgiveness provides a framework for thinking about bankruptcy, even if it is conceded, whether for purposes of argument or not, that the debtor has behaved wrongfully. Concluding that debtors in financial distress have acted wrongfully need not end the debate about consumer bankruptcy policy. Even if a debtor's conduct has been wrongful, forgiveness may be appropriate — forgiveness through the bankruptcy discharge.

Moreover, an analogy to forgiveness can assist us in focusing our assessment of what constitutes wrongful conduct in this setting. Has the debtor acted wrongfully by borrowing, rather than relying on savings, to purchase goods and services? By borrowing excessively? By becoming over-extended? By defaulting? By failing to cut back on expenses or take on an extra job in order to repay defaulted loans? By filing a voluntary petition under Chapter 7 of the Bankruptcy Code rather than attempting to repay defaulted obligations either outside of bankruptcy or through a Chapter 13 repayment plan?<sup>111</sup> By seeking a discharge from certain hallowed obligations, such as the obligation to support dependent children? By hiding assets from creditors? By misrepresenting financial worth to lenders when obtaining credit?

Thinking more precisely about what counts as a debtor's wrongful conduct is helped by linking forgiveness of the wrongful act to the wrongdoer's repentance and restitution. For example, if a debtor has wronged her creditor by engaging in fraud, then it is

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110. See Susan Block-Lieb, *A Humanistic Vision of Bankruptcy Law*, 6 AM. BANKR. INST. L. REV. 471, 477 (1998).

111. See 11 U.S.C. §§ 1300-1334 (1999).

meaningful to talk in terms of forgiving the fraudulent conduct, on the one hand, but not the obligation to provide restitution for fraud, on the other. That the Bankruptcy Code excepts from discharged debts incurred as a result of fraud<sup>112</sup> can make sense in this way. And yet, if instead the debtor is said to have wronged the creditor by virtue of having borrowed, by virtue of failing to repay, then it is illogical to talk in terms of forgiving the wrongful debt and, at the same time, imposing an obligation to provide restitution for that wrongful act.

Fourth, forgiveness reaffirms the notion that bankruptcy laws should rehabilitate an individual debtor's personal financial life following bankruptcy. Indeed, Professor Gross incorporates notions of forgiveness into the dialogue about consumer bankruptcy law precisely so that she can stress the restorative nature of the bankruptcy process.<sup>113</sup> She refers to bankruptcy in this way as "an opportunity to regain self-esteem and become once again a productive member of our capitalistic economy."<sup>114</sup>

Fifth and finally, framing the debate about consumer bankruptcy policy in terms of a creditor's forgiveness of a debtor's debt also suggests that the conduct of the creditor should be assessed, not simply the conduct of a debtor. Forgiveness implies a bilateral relationship, a give and take, between victim and wrongdoer. As Professor Minow reminded us, the Lord's Prayer refers to forgiving our debtors as they forgive us.<sup>115</sup> In a religious context, then, the focus on forgiveness emphasizes that we are all potentially wrongdoers in need of forgiveness. In psychological and secular philosophical contexts, forgiveness is often said to be conditioned in some sense upon the existence of proper grounds for resentment. But if the victim does not have proper grounds for resentment because the victim, the creditor in this context, has himself acted wrongfully or negligently, then there may be nothing to forgive. It may be inappropriate to talk in terms of forgiveness. Forgiveness theory suggests to me that empathy may be far more important to the dialogue about consumer bankruptcy policy than sympathy.

I would like to conclude by remarking on the relationship between forgiveness theory and pending legislation to rewrite con-

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112. See 11 U.S.C. § 523(a)(2)(A), (a)(4), (a)(11) (1999).

113. See Gross, *supra* note 99, at 104 ("[D]ebtors should be forgiven in order to encourage their rehabilitation — both for their sake and society's.").

114. *Id.* at 94.

115. See Martha Minow, Keynote Address, *Forgiveness and the Law*, *supra* page 1394 [hereinafter Minow Keynote Address].

sumer bankruptcy law, for Congress stands poised today to rewrite consumer bankruptcy law.<sup>116</sup> Wide-ranging proposals are pending in Congress. I would like to focus on one of them, means testing.

Means testing would condition eligibility to Chapter 7 liquidation upon a showing that the individual debtor has insufficient disposable income with which to repay creditors over a sixty-month period.<sup>117</sup> This eligibility requirement would, as a practical matter, force or encourage debtors to repay their obligations either through a Chapter 13 repayment plan or outside of bankruptcy.

This disposable income test starts by presuming that debtors with disposable net current monthly income above the national median could repay their creditors' claims over a five-year period.<sup>118</sup> In determining what counts as net current monthly income, the bill would reduce from a debtor's monthly gross income certain expenses for maintenance of a household — not actual expenses, but those expenses set forth in regulations promulgated by the Internal Revenue Service,<sup>119</sup> regulations which are known for their excessively stingy estimates as to household expenses. The bill also goes on to permit reductions from gross monthly income for any secured obligations the debtor may have incurred prior to bankruptcy.<sup>120</sup> Matrimonial and other priority obligations are similarly reduced from gross income.<sup>121</sup>

The debate about means testing involves disagreement, and possibly even confusion, about the circumstances under which debtors in bankruptcy have acted wrongfully, and the circumstances under which restitution and repayment is appropriate. Much of the debate about means testing has circled around whether it is appropriate to even consider the risks which lenders may have assumed by lending on a negligent basis.<sup>122</sup> These provisions raise important questions regarding the link between a discharge in bankruptcy and a debtor's personal financial rehabilitation.

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116. See S. 625, 106th Cong. (2000); H.R. 833, 106th Cong. (1999).

117. See S. 625, § 102; H.R. 833, § 102.

118. See *id.*

119. See Internal Revenue Service, *Collection Financial Standards, Allowable Living Expenses for Food, Clothing and Other Items, Total Monthly National Standards (Except Alaska and Hawaii)* (last modified Sept. 28, 1999) <[http://www.irs.gov/prod/ind\\_info/coll\\_stds/cfs-other.html](http://www.irs.gov/prod/ind_info/coll_stds/cfs-other.html)>.

120. See S. 625; H.R. 833.

121. See *id.*

122. *Compare Bad Ideas on Bankruptcy*, WASH. POST, Feb. 18, 2000, at A22, with *Winners in Bankruptcy*, Mar. 4, 2000, at A15 (reporting that Representatives George W. Gekas, Rick Baucher and Adam Smith co-sponsored the House's Bankruptcy Reform Act).

In sum, the pending legislation, while it draws on important concepts of forgiveness, is largely an unforgiving bill.

PROFESSOR COHEN:<sup>123</sup> My topic is the role of apology in civil lawsuits. Jeffrey Murphy started our conference by addressing the subject of forgiveness.<sup>124</sup> Apology is, in many respects, the “flip side” of forgiveness, for an apology can often be the trigger that leads to forgiveness. The cases I have in mind are not the life-shattering, criminal events of murder or genocide that some other panelists have considered. Rather I will focus on the role of apology in routine civil cases such as medical malpractice, car accidents, and divorce.

What prompts me to examine this topic? Three motivations are as follows. First, if a child makes a mistake and injures someone while playing, and if the child goes to his or her parent, the parent may respond, “Go apologize for what you have done. Try to make amends.” If an adult makes a mistake and injures another, and if the adult visits a lawyer, the lawyer’s focus may very well be on how to deny responsibility. There is a marked gap between these two responses, and it is a problematic gap.

Morality provides a second reason to examine this topic. Many people believe that apologizing is the right thing to do when one has injured another.

A third motivation for examining this topic is what I would label a “vicious cycle.” Suppose that a doctor commits an error while treating a patient and that the patient suffers harm from it. In such circumstances, many doctors would like to say, “I’m sorry. I made a mistake,” and, from the viewpoint of medical ethics, surely that is usually the proper response.<sup>125</sup> However, many doctors do not apologize out of fear of liability. They are told to remain silent, sometimes explicitly and sometimes implicitly, by their attorneys and insurance companies, their hospitals’ risk management committees, and often their peers too. Conversely, if one examines research on why patients sue physicians, though the statistics are by

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123. For further comments, see Jonathan R. Cohen, *Apology and Organizations*, 27 FORDHAM URB. L.J. 1447 (2000) [hereinafter Cohen, *Apology and Organizations*].

124. See Jeffrie G. Murphy, Keynote Address, *Forgiveness, Reconciliation and Responding To Evil: A Philosophical Overview*, *supra* page 1353 [hereinafter Murphy Keynote Address].

125. See Albert W. Wu et al., *To Tell the Truth: Ethical and Practical Issues in Disclosing Medical Mistakes to Patients*, in *Disclosing Medical Mistakes to Patients*, 12 J. GEN. INTERNAL MED. 770 (1997); Daniel Finkelstein et al., *When a Physician Harms a Patient by Medical Error: Ethical, Legal, and Risk Management Considerations*, 8 J. CLINICAL ETHICS 4, 330 (1997).

no means perfect, perhaps twenty to thirty percent of patients say words to the effect of, "If I had received an apology, I would not have sued."<sup>126</sup> Hence, there may often be a vicious and wasteful cycle where a doctor refrains from apologizing out of fear of liability, and it is precisely the absence of the apology that triggers the lawsuit.

With this in mind, let me pose two questions and offer one example. The first question is whether, under the existing laws, defense attorneys ought to talk with their clients about apology more often. In response, I will argue that they should, i.e., that lawyers should think of apology as a possible response to injury. The second question is whether our laws should be revised to encourage apology. Again, I will argue in the affirmative. After this, I will discuss one hospital's special use of apology. I can only treat each of these matters briefly here, and I direct interested persons elsewhere for more extensive and precise presentations.<sup>127</sup>

Before addressing these questions, let me make clear that I do not view apology as a substitute for compensation. Suppose that, God forbid, you are in a car accident in which you hit a stopped car from behind and the other driver's leg is broken. You should get out of your car and tell the other driver that you are sorry, *and* you should pay for damages to the other driver's leg, car, etc. While sometimes apology may lead the other party to drop suit, mostly what I have in mind is what one might call "subtracting insult from

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126. Twenty to thirty percent of patients say that if they had received an apology, they would not have sued. See, e.g., Gerald B. Hickson et al., *Factors that Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries*, 267 JAMA 1359, 1361 (1992) (studying families who sued their physicians following perinatal injuries, finding that 24% filed medical malpractice claims when they realized that physicians had failed to be completely honest with them about what happened, had allowed them to believe things that were not true or had intentionally misled them). Further, 19% of those filing suit indicated that they did so out of a desire to deter subsequent malpractice by the physician and/or seek revenge. Such filings also may have been prevented by an apology. See *id.*; see also Charles Vincent et al., *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 LANCET 1609, 1612 (1994) (studying British patients and families and finding that 39% may not have brought malpractice suits had there been a full explanation and apology — more significant factors to them than monetary compensation). For other related references, see Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1011 n.7 (1999) [hereinafter Cohen, *Advising Clients to Apologize*].

127. See Cohen, *Advising Clients to Apologize*, *supra* note 126, at 1009 (arguing that lawyers should consider advising clients to apologize more often and that American society should consider legal reforms to encourage apology); Cohen, *Apology and Organizations*, *supra* note 123 (analyzing apology in the organizational context through the lens of one hospital's experience where apology was financially viable, if not beneficial).

injury.” The injurer should apologize, and the injured party may or may not forgive the injurer in the sense of ceasing anger, but the injurer should still pay compensatory damages.

Returning to the first question of whether, under the existing laws, defense attorneys ought to talk with their clients about apology more often, my approach is to examine the benefits and risks to the injurer of apologizing. By so doing, I do not mean to “instrumentalize” apology and suggest that the reason a defendant should apologize is that the plaintiff might drop the case. Apology should be rooted in remorse rather than in economic strategy. However, often injurers do not apologize out of fear of liability without thinking carefully about both the benefits and risks of apology.

What are some possible benefits to the injurer of apologizing?

- the plaintiff might forgo suit;
- the settlement process could be greatly facilitated, reducing legal fees;
- in some cases, punitive damages could be avoided;
- some injurers would benefit psychologically and spiritually (e.g., guilt reduction); or
- an apology could help to repair a damaged relationship.

What are some possible risks to the injurer of apologizing? Some injurers may fear that apologizing will void their insurance coverage. One of my friends received a small, wallet-sized card from his insurance company titled, *What To Do When [You Are] Involved in a Car Accident*. The last line of the card reads, “Keep calm, don’t argue, accuse anyone, or admit guilt.” If my friend were in an accident and apologized to the other driver, would he void his insurance coverage? Could a physician who apologizes to a patient for a medical error void her malpractice coverage? Insurance law and insurance contracts place upon the insured a duty of cooperation in the defense of the claim.<sup>128</sup> Could the insured’s apology be taken as a breach of that duty and thereby void the insurance coverage? The short answer is, “likely not.”<sup>129</sup> However, this risk is worth keeping in mind.

The more substantial risk for many injurers is that the apology will be taken as an admission of liability. “If I apologize, aren’t I

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128. See John A. Appleman & Jean Appleman, 8 *INSURANCE LAW & PRACTICE* 4771 (1999); JEFFREY W. STEMPER, *INTERPRETATION OF INSURANCE CONTRACTS* (1991).

129. See Cohen, *Advising Clients to Apologize*, *supra* note 126, at 1025-28.

giving the other side the ability to prove their case?" This is a serious concern, for evidence law accepts admissions by party opponents.<sup>130</sup> The question thus arises of whether there are ways an injurer can apologize, including fully admitting his fault, such that the apology cannot be used against him as proof of fault.

Note that there is an important class of cases in which simply expressing sympathy for the injury, without admitting fault, would go a great distance toward resolving the dispute. After many accidents, who was at fault and to precisely what degree is unclear. Expressing sympathy through a statement such as, "We had an accident. I don't know who was at fault, but I do want you to know that I am sorry that you are injured and hospitalized," can be quite powerful.

Yet what about the legally most-difficult case in which the injurer wants to say, or the injured party will not be satisfied unless she hears, "I'm sorry. It was my fault." Can the injurer make such a statement "safely," that is, without incurring the risk that it can be used against him in court as an admission?

Under existing law, there is some room, but not much room, for such "safe" apology. One vehicle for "safe" apology is in mediation. Many states have laws providing that statements made within mediation cannot be used as proof in court.<sup>131</sup> These laws vary from state to state, and the confidentiality shielding they provide is not absolute.<sup>132</sup> However, apologizing within mediation can often be one avenue for "safe" apology. Another theoretical possibility is to offer the apology in the course of settlement negotiations. The Federal Rules of Evidence purport to exclude statements made in the course of settlement negotiations from admissibility.<sup>133</sup> However, it turns out that this rule is very "porous" and, in practice, offers little shielding for an apology.<sup>134</sup> While other theoretical possibilities exist, the bottom line is that, under our existing

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130. See FED. R. EVID. 801(d)(2).

131. See Pamela Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. REV. 715, 724 (observing that nearly every jurisdiction in the United States has different statutes or local court rules establishing the parameters of the particular mediation programs. As a result, confidentiality policies differ significantly from one program to another.). Currently, efforts are underway to draft a uniform act to standardize such mediation confidentiality protections.

132. See *id.*; see also Cohen, *Advising Clients to Apologize*, *supra* note 126, at 1036-39.

133. See FED. R. EVID. 408.

134. Cohen, *Advising Clients to Apologize*, *supra* note 126.



laws, if the injurer wants to apologize “safely,” mediation is usually the best vehicle. Yet from a functional perspective, mediation is often inadequate, for mediation typically comes quite late. If you’re in a car accident that you know is your fault, what you want to be able to do — and what our law should encourage, or at least not discourage, you to do — is get out of your car and apologize to the other driver right then.

Could we revise our laws so as to prevent apologies from being used as proof in court? There are different ways we might do this. The simplest is to create an independent evidentiary exclusion for apologies. Other approaches are broadening the concept of subsequent remedial measures (which are inadmissible)<sup>135</sup> to include apologies or plugging some of the holes in Federal Rule of Evidence 408 so as to make that rule less porous. Through such steps our society could encourage apology, and thereby help foster forgiveness.

A basic goal of excluding apologies from use in court is to decouple the act of apology from the liability system. While attaching liability to the act of apologizing helps ensure, though does not completely ensure, that apologies that are made are sincere (for the speaker must “put his money where his mouth is”), such attachment also risks the “vicious cycle” discussed at the outset in which the injurer wants to apologize, but refrains from doing so out of the fear of liability, and it is precisely the absence of the apology that prompts the lawsuit. Further, an apology made in a “safe” haven such as mediation can also be, and be seen as, sincere. Like a conversation with a stranger on an airplane, the fact that there are few consequences can help people speak candidly. Note too that if apologies are excluded from admissibility in court, nothing prevents an injurer from offering compensation with the apology, and the injured party may certainly note the absence of such an offer. At root, creating “safe” havens for apology increases, rather than decreases, the possible modes of communication between the parties.

I shall conclude with an example that focuses on the economics of apology. I present it not because I believe economic considerations should motivate apologies — apologies should be rooted in remorse rather than economics — but because the fear of adverse

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135. See FED. R. EVID. 407.

economic consequences often prevents people from apologizing, and, in my opinion, that fear is overstated.<sup>136</sup>

JUDGE ZUCKERMAN: When I was initially approached about participating in today's Symposium, I was quite taken aback by the realization that, in my twenty years on the Family Court bench, I had given virtually no thought to the question of forgiveness and only very occasional thought to the question of apology, and I was rather stunned by this realization. So I quickly accepted the invitation. I figured it would be a good thing to, albeit belatedly, focus on aspects of forgiveness and apology in the area of family law and family court and see what I thought might be the reason why there had been so little discussion of it amongst lawyers, judges, and, to my knowledge, commentators up to this point.

First, I tried to immerse myself in the literature, and that lasted about three minutes, because I quickly realized that people had been devoting decades to these questions and that I could not possibly do it in a couple of weeks. And so, I propose to share with you some of the peculiar aspects of family law and family court, and to try to figure out what the differences are important. I will look at whether there is room for research and study of some of these differences in order to maximize what can be done to bring the benefits that have been described in the earlier part of this program to the litigants and the parties in interest in Family Court.

There are two basic categories of cases I will talk about: the private cases and the cases that have a public aspect. I am not going to be talking about juvenile delinquency cases today at all because those are very like the criminal proceedings that were addressed at some length this morning.<sup>137</sup> They are essentially criminal cases without juries, albeit with some differences at the equivalent of the sentencing stages.

These cases involve public interest or public involvement. By that I mean public agency involvement through child protective proceedings, i.e. child abuse, child neglect. Also in that category, although they are somewhat different, are termination of parental rights proceedings and proceedings to free children who are in foster care placement for adoption. This is a very large part of the family court's jurisdiction.

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136. Professor Cohen discusses the example of Lexington, Kentucky's Veteran's Administration Hospital in his article. See Cohen, *Apology and Organizations*, *supra* note 123.

137. For a discussion of the role of forgiveness in the criminal law, see the panel discussion *supra* page 1373.

A petitioner in those cases, by definition, will be a social service agency. In New York City, it would be either the Department of Social Services in a child protective proceeding, or the Department of Social Services or a voluntary child care agency in a termination of parental rights case. But the most important aspect of this is that in the child protective cases, it is the child who is the victim of either some action or inaction by a parent or a parental figure, and it is not, as was true of all the other cases we have talked about before, with the exception of some of the criminal cases, cases involving two adults, or an adult and a corporation.

Children figured in some of the criminal cases, but in every Article 10 case, in every child protective case, the child is the victim. The defendants or respondents are in every case either a parent, a legal guardian, or a person legally responsible for the child's care. The person, in other words, who in the criminal matters would act as an advocate for the victim is now accused of mistreating the victim.

In the termination of parental rights cases, it is somewhat different, in that these are less matters of fault as matters of failures to plan for children's futures.

Even within the child protective cases, you have a huge range of behavior by the offender. The behaviors range from the most excruciating cases in which children are tortured, maimed, treated in an utterly inhuman fashion, to cases in which a child is actually murdered by a parent and the child protective proceeding only involves the surviving siblings of the child who is deceased. You have cases of sexual abuse; you have cases in which children are used for child pornography courtesy of their parents; and then you have the cases in which the court is involved because of parental drug abuse, alcohol abuse, or because a parent is incarcerated for murdering the other parent and now the children have no one; or because of domestic violence between the parents. The patterns go on and on. Abuse cases also include those where a parent leaves the child home alone, unattended for days at a time, in charge of the younger children, some of whom are in diapers.

I cannot begin to sketch in the range, but you can see that in some of the cases the children are physically harmed; in others, they are placed in undue risk of harm, physical or emotional; and in other cases, there is a kind of overlying or overhanging neglect which is often a risk of psychological harm.

In a great many of these cases the children are removed, separated from their siblings, separated from the parents. In many of

the cases, the children are not as disaffected with the parents as you might expect, at least at first, because they are so shocked by the separation.

I remember quite vividly a case many years ago in which a child had been kept in a closet for essentially a year and was fed from a bucket. It was only when the priest in the neighborhood church realized that he had not seen the child in a very long time and investigated that this came to light. The child had stopped growing. He was about ten years old when this occurred.

The child was brought to court for the testimony that he had to give and they finally got him talking again. He sat there on the social worker's lap with a court reporter and the attorneys for the parents. This is a civil case, remember. It was very slow going, but the child's exact words I have never forgotten. When he finally could be persuaded to say something, he just looked up and said, "They treated me like a dog. I never want to see them again," and then he said nothing more. That is a stunning kind of case because usually children will not usually be as vehement as that because they are afraid.

What is the point of emphasizing this? If we are going to talk about apology and forgiveness, we should recognize that we are talking now about parents and children who have a unique relationship.

Depending on the age of the child, the child may very well be aware of what has gone on. The child may blame himself or herself in part for what has gone on, either because the child told somebody or the parent has told the child that it is the child's fault. In some cases, the child is furious with the parent because the parent believed a paramour instead of the child who said they were being sexually abused. By the time the parent wises up, it is too late; the damage has been done, at least for the moment.

The other thing that is different about these cases is that these relationships existed before the injury and exist after the injury, so the issue of reconciliation is crucial. If reconciliation is not going to happen, either because the parent is incarcerated on a parallel criminal case for the same activity or, for some other reason, there may still be a necessity for something to happen for the family, even if they are never going to live together again and even if the legal ties are going to be severed, so each person in the family can move on. In other words, the child has to have some form of resolution of the issue, of the betrayal, and the parent, who may end up

having other children or who may regain custody of this child or other children, may need some transformation event.

For example, in the child protective case a child is removed and placed with relatives or in foster care and the parent is offered appropriate services. That often is not what happens for parents who are drug addicted and the like because of the dearth of services. But assume the services are out there and visitation is set up with the child. The parent does not go to drug treatment, the parent does not come for the visits half the time, or comes quite drunk. The child now has a further injury that he has suffered, that the parent is not trying. And again, there is a further problem that stands in the way of the child's development.

The question in this area is: How do you evaluate the prospects and the process of apology and forgiveness when it is a parent and a child? What is different about it? What is the same about it? How do you modify the way you approach this? What are the valid goals that you would articulate?

For this, I think you need to look to psychologists and child development specialists, for a variety of answers, depending on the age of the child and the circumstances that resulted in the injury to the child. As far as I know, this question has not been explored at all in a systematic fashion by anybody.

The private cases are custody and visitation cases. Here there has been some use of mediation, in family court at least. I am not sure about in supreme court, and it is certainly true in New York City and New York State, as well as elsewhere in the country.

Mediation can be tricky for a number of reasons. The cases do not always declare themselves as pure custody or visitation cases, by which I mean cases in which there is no history of child abuse or neglect or no history of domestic violence between the parents. They may appear at first glance to be straightforward cases, but they can be more complicated.

If they are straightforward cases and there is no injury to the child, then we have simply the grownups fighting it out, and the mediation process may help them to reach a rational result without injuring the children in the process of fighting over custody and visitation. These cases sometimes, as time goes on, develop into more problematic cases which have to be taken from mediation and brought back to court.

Depending on what is at issue, though, the people may be able to it work out, without getting into the questions of the redress of old injuries, proper custody and visitation. Certainly, the things that

led to a marital rift in the first place may or may not involve "fault," "injury" or mutual fault.

Another and interesting parallel development is as we move to no-fault divorce, there is a question as to whether an outlet is needed for the moral indignation factor that used to be part and parcel of divorce litigation in order for the people to move on.

An area that has been removed entirely, though, from mediation, and possibly incorrectly so, involves domestic violence. Domestic violence means lots of different things. Now, in family court, for example, domestic violence cases are not limited to husbands versus wives, wives versus husbands or paramour versus paramour who have a child in common even if they are unmarried, or former paramours. It includes feuding siblings, aunts and uncles. The whole family constellation can come into Family Court on a family offense case alleging domestic violence.

Traditionally, where it is the case of husbands and wives or lovers, who have children in common, the fear has been that using mediation is inappropriate because the situation is so volatile. The whole process in a serious domestic violence case involves the escalation of violence, a very violent episode followed by a period of apology, the seeking of forgiveness, and then the process starts again, so that, by definition, if you were looking to apology and forgiveness and so on, you would be feeding into the very syndrome that is causing the risk of harm.

That analysis does not necessarily apply to every case. Quite apart from whether it applies to every husband-wife case or paramour case, it almost certainly does not apply to some of the extended family cases, and those often take on more of the aspect of a neighborhood feud.

MS. LIVINGSTON: When Dean Feerick contacted me, asking me to participate in this Symposium and telling me the topic, I confess I thought initially, not only by myself, but in talking to people with whom I work about the concept of forgiveness in the civil law, that it is not something we focus on. However, it is not something we think of often, and it is not part of what we do. And then, after spending some hours reflecting on it, I decided that my initial impression was wrong.

Forgiveness is really what civil law is all about. We do not talk of punitive damages in civil cases in New York State.<sup>138</sup> It is the rare

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138. The legal standard for maintaining a punitive damages claim is rigorous in New York State. *See, e.g., Taylor v. Dyer*, 593 N.Y.S.2d 122, 123 (App. Div. 1993) (finding that defendant's conduct must be "morally culpable or actuated by evil and

case, I think perhaps there are maybe two or three in the State's history that I know of, that has ever involved punitive damages, so the idea of punishing anybody is something that we know exists out there in other worlds but not in our own.

And so what are we compensating for? We are only compensating to make a person whole. You all remember that, of course, from your first week in torts. That is all damages are. That is what the entire lawsuit is about: somebody has been injured, they have economic losses, they have pain and suffering that must be compensated for, and the wrongdoer, should he or she be judged to be a wrongdoer, must compensate only to make that person whole. There is no punishment, there is no revenge, only allow this person to be compensated, allow them to get back what they had in the only way, of course, that the law can see and understand and actualize on, money.

If you think about that, then it is indeed a very forgiving system. The wrongdoer does not pay. We hear about civil verdicts and you think, "My goodness, look how horrendous that malpractice was," for instance. (I will resort to malpractice throughout my comments because it is the area of the law in which I practice). "Look how large that verdict was." It shocks us sometimes when we read of it, but remember when you hear it that it is only to compensate that person for what they lost. It is only to pay them for what their needs are.

When you read about large verdicts, they are almost exclusively verdicts to pay for the costs, for instance, of the child who has brain damage as the result of an obstetrician's negligence or a hospital's negligence around the time of his or her birth. She has a lifetime of health care needs: a lifetime of costs for therapies, costs for their maintenance, and caregivers because she can never live alone and can never function alone.

So are they large damages? Of course they are. Why are they large damages? Because that is the only thing that can compensate that person to at least give her some semblance of who she would have been before.

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reprehensive [sic] motive"); *Karen S. v. Streitferdt*, 568 N.Y.S.2d 946, 947 (App. Div. 1991) (stating that punitive damages are "awarded in 'singularly rare cases' such as cases involving . . . malice or . . . wrongdoing to the public"); *Lugo v. LJM Toys, Ltd.*, 539 N.Y.S.2d 922, 925 (App. Div. 1989) ("The recovery of punitive damages depends upon the defendant acting with evil and wrongful motive or with a willful and intentional misdoing, or with a reckless indifference equivalent thereto.").

People come to me all the time, because we only represent plaintiffs who are injured, with tales as horrible as you can imagine about situations where they only went in expecting wonderful things. Examples include the birth of a child or a minor medical procedure where a loved one ended up comatose for the rest of their days. They only expected wonderful things to happen. Instead, in a moment or hours, whichever it might be, from carelessness or from negligence, their lives, or the lives of those that they love, were radically altered forever.

Time and again, I hear this. As I look at them and listen to them, they say to me, in words or in substance, "And you know what? He never even said he was sorry." Or, alternatively, we hear the story and then we get the records; the plaintiffs come back and we say, "Do you know that 'X' happened," whatever the particular circumstance might be, and they say, "You know what? They never even told me." Not surprisingly, they are angry.

I have heard, probably in half the cases that come to us, the following: "If they had come in to me and said 'I'm sorry,' or if the doctor had come in and told me what happened, I would not be here." I was not surprised to hear the Lexington, Kentucky story<sup>139</sup> because I have been hearing it for twenty years now.

Forgiveness is one of the most crucial elements of medical malpractice and personal injury. Speaking to a group of physicians, as I have done at times in the past, I say to them: "Do you want to know how to avoid medical malpractice lawsuits? Sit down with the patient afterwards and talk to her, and if something happens, then you tell her. People sue because they are angry at being mistreated, however horrendous their injury."

I could tell you of a hundred different cases of horrendous injuries where nobody would have sued except that, "They didn't tell me. They avoided me. My loved one went for this simple procedure in the emergency room and wound up being in a coma, but for days I would say to people, 'What happened?,' and they would avoid me, no one had an answer. All the nurses would say, 'Ask the doctor,' and all the doctors would say, 'You have to ask somebody else.' I never got an answer."

They never get an answer, so what do they do? Do they seek lawyers because they are money-hungry? Do they come to us because they want revenge? Do they come to us because they hate doctors and this is their chance? No. They come because they

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139. See Cohen, *Apology and Organizations*, *supra* note 123.



want answers; and, if the answers were not sufficient, they also want apologies. They do not get them.

We would all like to say that if medical care was a lot better, then there would be fewer lawsuits. I don't know that that will happen. As many as 98,000 deaths a year in the United States are attributable to medical malpractice, more than almost all major accidents.<sup>140</sup>

Those are the people suing. The people suing are the ones who have not gotten answers, who have not been told.

So where does forgiveness come in? Even if the same negligence occurred, but defendants were schooled to apologize, even once the lawsuit is started, that would help. But the reality of the system is that there is an innate conflict because defendants' lawyers in New York State are hired out on a case-by-case basis by the insurance companies and they are paid on an hourly basis.

Sitting here, I thought of all the cases I have seen in my twenty years of practice where the defendant admitted liability. I thought of two, and that is staggering, because in many cases there is no question of how bad the medical care was. In only two cases pre-jury selection, one of them only happened days before the jury was selected, did anybody say, "We admit responsibility, we were wrong, we are going to try this case only on damages."

Now, that might be a function of people not wanting to admit, hoping against hope that some expert will come into a courtroom and testify on their behalf, however unbelievable that might be. Or it might be a function of the system as it is set up, with lawyers paid by the hour. I am not sure.

The public thinks people are money-hungry, and they are not, as I said. The public has the sense that people are suing because they want to be compensated only, but they are indeed suing for justice.

Juries are rather forgiving, not, I am sorry to say, of plaintiffs, but rather forgiving of defendants. They are forgiving of those who make a mistake, perhaps thinking, "Well, it could have been me doing that" or "It could have been any one of us who ran the red light."

They have been taught, as most of us have, to look up to the medical profession and respect them. Juries look up to doctors, respect them and believe what they say. The public perception is that it is the plaintiffs who exaggerate and lie, it is the plaintiffs who are making things up. I can tell you that I see, time and time again,

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140. See Rick Weiss, *Medical Errors Blamed For Many Deaths*, WASH. POST, Nov. 30, 1999, at A1 (citing a study by the National Academy of Sciences).

doctors who rewrite their office records, hospitals that make parts of records disappear. It happens time and time again.

A recent example is the doctor in a failure to diagnose breast cancer case, with a very believable woman who came in and was telling me this horrible story about why she is so riddled with cancer because of a misdiagnosis. It was so believable. And then we got the doctor's office records; her story was totally different than the records. It just didn't make any sense. We studied and studied the records because we couldn't put the two together, until, at the very bottom, we noticed that the records for this medical malpractice that was supposed to have happened in 1994 were on a form that was first printed in 1996.

A little digression, but juries want to believe that doctors do not do wrong and that it was somehow the fault of the patients who were injured. So they will not forgive the victim, as it often believed, but forgive the wrongdoer when he or she is in that position of authority that they want to believe. It is very hard to overcome.

It contrasts with the public perception that the court system is a give-away. The reality is that it is far more likely that those who deserve to be compensated are turned away.

What does a jury trial do for people? Horrible injuries, lives destroyed. People come to a courtroom for justice. A jury can speak out for justice for those who are injured. As disfigured as they are, when they even cannot stand, they walk away taller because some juror has said they are right. And, should the defendant not have admitted responsibility all along, when it comes to a jury saying they were right, then that plaintiff forgives them, and the defendant as well.

## FORGIVENESS AND INTERNATIONAL AMNESTY

PROFESSOR FLAHERTY: We turn to forgiveness and amnesty in the international context. Today we look at that in at least two regards. The more conventional regard is that as nations come out of human rights nightmares they are confronted with the problem of what to do about past human rights transgressors; the solutions run across the spectrum. One end of the spectrum, to hold transgressors accountable to the fullest extent possible, is motivated largely by concerns of justice. The other end of the spectrum, amnesty, is motivated largely by concerns about peacemaking, and, to an extent, forgiveness. As countries emerged from repressive human rights situations, they fell at different points along the spectrum; we will investigate that in this panel.

We will also investigate an intriguing regard to this subject: forgiveness of loans and debt when it comes to international law. Professor Chantal Thomas, in particular, will speak about this.<sup>141</sup>

This discussion of forgiveness is a sign of progress because it shows that nations are moving beyond repressive regimes to deal with the problem of how to move forward.

MR. CHIPOCO CÁCEDA:<sup>142</sup> Probably one of the most important contributions of the 20th century to humanity has been the notion or conception of human rights. One of the most interesting things in human rights and public international law is the progressive nature and how the law has developed over time with respect to protecting the individual.

One of the most recently recognized human rights is the right to truth. It emerged in the 20th century and really in the last ten years. Among the first jurisprudence on this was the Inter-American Court's *Velasquez Rodriguez* case, where the court found that it was a state responsibility, not only to punish violators, but also to investigate and to prevent violations.<sup>143</sup> I should mention that Juan Méndez tried the *Velasquez* case.

In a number of reports, the Inter-American Human Rights Commission has stated that it is necessary to know not only who has done what, but what has happened, why it happened and the circumstances in which those events and violations occurred. More than twenty-five African and Latin American national truth commissions, occurring in governments or states that have been in

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141. See Thomas, *infra* note 174.

142. Remarks translated by Andrew Kaufman.

143. See *Velasquez Rodriguez* Case, Inter-Am. C.H.R., Ser. C, No. 4 (1988), available at <[http://www1.umn.edu/humanrts/iachr/b\\_11\\_12d.htm](http://www1.umn.edu/humanrts/iachr/b_11_12d.htm)>.

democratic transitions, have stated the need to know the truth of what occurred, the circumstances in which it occurred, and the conditions that led state institutions to violate human rights. But why has the right to truth become a human right?

In the first place, there is a moral obligation to the victims, the family members of the victims, and society, to discover and expose what happened. Perhaps the best example of the need for the right to truth is in the case of disappearances. There have been thousands of cases throughout Latin America, Africa, Asia, and Central America where people have "disappeared," either through state institutions, such as the army or police, and the need for the right to truth is reflected through the families.<sup>144</sup> It has often been said that it is worse to have a relative "disappeared" than to be murdered, because it is the hope and the lack of hope that drives you all the time, that inability to actually ever know what has happened.

A second reason for the right to truth is its preventative nature. To prevent abuses in the future it is transcendental that people know what the circumstances and conditions were that led state institutions to commit abuses, and thereby, with this knowledge, prevent future similar actions. For example, with truth commissions in El Salvador, Guatemala, and Honduras, one of the basic findings is that the lack of accountability is what allowed state institutions to commit serious human rights violations. This lack of accountability allowed police forces, military forces, and secret services to act in a way that they would not have been able to if there were accountability.

With regard to the right to truth, furthermore, truth must have certain characteristics that enable it to reconstruct the circumstances of what happened and, by revealing those circumstances, have a dissuasive effect in the future. The truth must not be a partial, but a complete, truth. In Latin America, there have been a couple of cases, such as in Guatemala, where truth commissions have not individualized responsibility. They just named institutions, such as the army or the guerrillas. For the right to truth to have its desired effect, it needs to reveal not only the circumstances but also the names of the actors involved.

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144. See, e.g., NUNCA MAS: THE REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED (Writers and Scholars Int'l trans. 1986), cited in Terence S. Coonan, *Rescuing History: Legal and Theological Reflections on the Task of Making Former Torturers Accountable*, 20 *FORDHAM INTL. L.J.* 512 n.1 (1996).

The truth must be an official truth, a state-sponsored truth, a public truth, an impartial truth, and a truth to which all have access. Only through access can truth contribute to processes of transition.

Without the truth there can be no forgiveness. Without knowing who has done what, and how they did it, there can be no forgiveness; without the actors, the victimizers, the perpetrators, admitting their responsibility for these acts, and thereby verifying this truth, the conditions for forgiveness will not exist. That said, the right to truth is a powerful instrument for societies or countries that have suffered serious human rights violations to use in their transition processes.

MR. FORTI: I have been requested to talk about the instrument of what Carlos Chipoco has developed, this concept of the right to the truth. In Latin America, within the past two decades, several countries have experienced the emergence and the implementation of truth commissions. These are basically officially endorsed, ad hoc, investigative bodies with the power to examine and inquire into the past. Their findings and conclusions are expected to end impunity by presenting an authoritative, an official, and a so-called "final" truth behind the crimes and grave acts of violence that they investigate.

Truth commissions in Latin America have always been surrounded by the context of transition. Argentina and Chile passed from military dictatorship to democracy. Haiti rehabilitated and reinstalled a democratically elected government. El Salvador and Guatemala reached peace agreements ending internal conflict.

The common element in all of these cases is a strong demand for justice by victims, their relatives, and by civil society in general. In broad terms, these truth commissions have three main core purposes or objectives. The first is to investigate, to elucidate the facts behind the grave acts of violence that remain under impunity, especially, like Carlos mentioned before, human rights violations that are considered crimes against humanity, like disappearances, extrajudicial executions, and massacres. The investigation is expected to reveal the *modus operandi* of government structures and state agents that were involved, sometimes in a clandestine manner, in these massive violations of human rights. The investigation is also expected to identify those individuals or institutions responsible for ordering and implementing those human rights violations.

The second goal is to promote specific measures in order to avoid the future occurrence of such events and keep society from

forgetting the past. This, in Latin America, is done through specific actions and recommendations to honor the memory of the victims, such as the case recently in Guatemala,<sup>145</sup> national monuments; the broad dissemination of the commission's reports; and the incorporation of the commission's findings and conclusions through the public educational system.

A third goal has also been the promotion of national reconciliation. The rationale behind this is that it is possible to forgive only when three elements are present: when the truth is known; when errors are acknowledged by the perpetrators; and when the government implements actions of reparations.

Having said this, my opinion, after personal experience in some of these commissions, is that truth commissions are by no means the ideal solution to bring about truth and justice after human rights violations. The proper way is through state bodies of administration of justice charged with the investigation, prosecution, punishment, and reparation of those crimes. Truth commissions have appeared in Latin America precisely because the justice systems of our countries were unable or unwilling to perform their task. The state's obligation is to find and disclose the truth and bring about justice. Truth commissions have been in Latin America a "last resort" solution.

A final point about this general overview, which Carlos has mentioned, is the issue of controversy surrounding truth commissions. We can identify two major approaches by truth commissions in the implementation of their mandate; some focus on determining the fate of the victims and some emphasize identifying the perpetrators of human rights violations. In other words, some commissions name names and some do not.

Some people argue that naming the individuals responsible for abuses triggers legal processes and produces public debate, which, in turn, generates instability and polarization in societies that need, above all, to be reconciled. This school of thought also argues that truth commissions are not jurisdictional bodies, by definition and by naming names, they are to some extent violating the due process of those persons being named.

On the other hand, abstention from disclosing names of perpetrators constitutes a half or incomplete truth. It fails to meet the expectations of victims, civil society, and the international community. Worst of all, it does not eliminate the possibility of repetition,

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145. See COMISIÓN DE ESCLARECIEMIENT HISTÓRICO, *Guatemala: Memoria del Silencio* (Feb. 25, 1999).

since impunity is maintained for those who commit these crimes. Moreover, not knowing the identity of responsible individuals impedes the ability of those affected ones to forgive and thus to advance the national reconciliation, the very objective given to truth commissions.

I have been asked to develop two case studies on this process of investigation of past human rights violations. I will try to be very brief in describing the cases of El Salvador and Honduras. But, because of the time constraint, I would emphasize that they are very important cases.

In El Salvador, the truth commission was the result of a peace agreement in an internal armed conflict. The commission was made up of three individuals named by the United Nations Secretary-General.<sup>146</sup> All of them were foreigners. The two parties at war established the mandate.<sup>147</sup> In El Salvador's truth commission, even though the mandate did not explicitly call for naming names, the commission interpreted the mandate to require them to name names.

Honduras is very important because it is not necessarily referred to as a case where a truth commission took place. But the Hondurans performed a thorough investigation of the disappearances that occurred throughout the 1980s.<sup>148</sup> A state organ, the Office of the Human Rights Commissioner (known as the Ombudsman), did the investigation.<sup>149</sup> In Honduras, for the first time, the state fulfilled its obligation to investigate itself.

In both cases, the recommendations were partially implemented and accepted by their respective governments. This is evidence that perhaps the greatest weaknesses of truth commissions has been the inability, or the lack of strength or instruments, to make sure that governments implement their recommendations.

In retrospect, the experiences of El Salvador and Honduras were guided by common objectives of ending impunity, consolidating the rule of law, and promoting national reconciliation based on the

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146. The three members were Belisario Betancur, former President of Colombia, Reinaldo Figueredo, former Foreign Minister of Venezuela, and Thomas Buergenthal, former President of the Inter-American Court of Human Rights.

147. See *San Jose Agreement on Human Rights* (July 26, 1990); *Mexican Agreement* at app. (Apr. 27, 1991).

148. See Dr. Leo Valladares Lanza, *Los Hechos Hablan Por Si Mismos* (Nat'l Comm. Protection of Hum. Rts. Dec. 29, 1993).

149. See Hector Fix-Fierro & Sergio Lopez-Ayllon, *The Impact of Globalization on the Reform of the State and the Law in Latin America*, 19 HOUS. J. INT'L L. 785, 798 (1997).

full knowledge of the truth. Something very important, and that applies to other cases in Latin America, is that in both Honduras and El Salvador, not only were the truth commissions independent and autonomous from the government but they also were perceived as such by the population. That is why their reports were a very important element, very important documents that still have a repercussion in those societies.

These two experiences are concrete expressions of the advancement of what was referred to by Carlos and was brilliantly articulated by Juan Méndez,<sup>150</sup> this set of principles known as the right to the truth, which is a right directly related with an obligation, an obligation of the state to investigate these crimes against humanity, to prosecute and punish their perpetrators, to provide reparations for victims, and to find and disclose the truth about what happened.

PROFESSOR ANDREWS: I will talk about South Africa's Truth and Reconciliation Commission ("TRC") and essentially raise the question which Martha Minow touched on in her talk earlier.<sup>151</sup> The question is: Was this a grand exercise in forgiveness, to use her term, a "command performance of reconciliation,"<sup>152</sup> or was this justice held hostage to truth? I will attempt in my brief comments to answer part of this question.

The TRC in South Africa, apart from its substantive provisions, served a highly symbolic purpose and was central to the rituals of transformation, reconciliation and forgiveness playing out in South Africa since 1994 and the first elections there. When the TRC was established in 1996, it was a bold exercise, and it certainly captured the imagination of South Africans, and also people abroad.<sup>153</sup>

It was an ambitious project. Alfredo Forti commented on some of the aims of the truth commissions in Central and South America. Some of those aims are mirrored in the South African TRC: to find the truth; to compensate the victims; to force the nation to pay attention to the suffering of others; to reconcile the victims and the perpetrators; and to close off the past while starting

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150. See Méndez, *Accountability for Past Abuses*, *infra* note 163.

151. See Minow Keynote Address, *supra* note 115.

152. See *id.*

153. For a thoughtful analysis of the Truth and Reconciliation Commission, see KADER ASMAL ET AL., *RECONCILIATION THROUGH TRUTH: A RECKONING OF APARTHEID'S CRIMINAL GOVERNANCE* (1997).



a future with reconciliation strongly in the minds of South Africans.<sup>154</sup>

Of course, the TRC was ultimately a political compromise. It was part of the process of negotiation that took place in the country in the early 1990s. The past had to be dealt with in some way, it could only be dealt with in a way that kept together a very fragile new democracy. Many aspects of the structure and procedures of TRC were consequences of this compromise.

Human rights activists easily accepted a TRC in South Africa, and particularly its legitimacy. Up until the first democratic elections, there had been a universal consensus that apartheid was a crime against humanity. The United Nations passed a Resolution that apartheid was a crime against humanity. In addition, South Africa was one of the first countries that the United Nations Human Rights Commission took action against.<sup>155</sup> And certainly by the time that South Africa started negotiating the shape and substance of the new democracy in the early 1990s, human rights was the language of progressive politics. This emancipatory script of human rights certainly had a great bearing on the TRC and made things easier and smoother.

Now, of course, the language of human rights is a very controversial one, and it is a topic that I cannot deal with here. But this controversy plays out in some of the conflicts in the TRC processes. The TRC was deliberately chosen to be victim-centered, and the choice of Archbishop Desmond Tutu as head of the TRC recognized that the legal processes were not necessarily the best ways to deal with the way that victims tell their stories. And so, to some extent, the rules of evidence and formal legal processes had to be suspended. Of course, the law, and certainly the Constitution, loomed large in the hearings, because as perpetrators began to be named, they started challenging what was happening in the hearings.

Despite this, the TRC certainly gave victims a venue to tell their stories. Telling the stories would restore dignity to the victims. More importantly, the narratives became part of official history, preventing national amnesia.

There were several problems that surfaced from the TRC. One was the designation of "victim." Essentially, what the TRC did was

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154. See Priscilla B. Hayner, *Fifteenth Truth Commissions — 1974 to 1994: A Comparative Study*, 16 HUMAN RIGHTS QUARTERLY 597 (1994).

155. See Michael Humphrey, *Windows into the Nature of Conflict*, XXI, AFRICAN STUDIES REVIEW & NEWSLETTER, Dec. 1999, at 20, 23.

to individualize justice and to distinguish between the extraordinary and the ordinary victims of apartheid.<sup>156</sup> The mandate of the TRC was to investigate gross human rights violations. But of course the people that were systematically humiliated on a daily basis through the whole system of apartheid were not to be included in the definition of victim.<sup>157</sup> For example, the apartheid government moved whole communities of black people as part of designating areas "white."

This is a very important issue. The victims of systemic racism and exploitation see themselves as victims, and there has to be some forum in which they too can tell their stories.<sup>158</sup> But of course in South Africa this was a part of political compromise, and some limitations had to be placed on the process.

The other set of victims ignored in the process were the people of the neighboring countries that the South African Government systematically wreaked havoc against. The South African army engaged in military raids and essentially destabilized Mozambique and Angola; it conducted regular raids into Swaziland, Lesotho and Botswana and in the process destroyed communities.<sup>159</sup> I am sure many of you are aware of the regional political and economic situation at this moment; Angola has been at war for decades and Mozambique is economically crippled. The South African apartheid-era Government is to blame for this legacy. There is no forum, as of yet, for those victims.

A second problem arose as the process unfolded. As South Africans became mesmerized by their television sets at night, and as they listened to their radios to these appalling tales of horror and abuse, it became clear that the process needed to be stage managed. This was essential because the hearings were supposed to generate ideas of reconciliation and forgiveness; soon, however, there was the danger that revenge and resentment began to surface. And so, increasingly, Archbishop Tutu needed to guide the

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156. See David Dyzenhaus, *JUDGING THE JUDGES, JUDGING OURSELVES: TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER* (1998).

157. For an interesting exploration of these matters, see Colin Bundy, *Truth . . . or Reconciliation*, 14 *SOUTHERN AFRICA REP.* 8 (1999).

158. See RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* (2000) (discussing reconciliation and reparations in the United States).

159. See John Daniel, *The Truth About the Region*, 14 *SOUTHERN AFRICA REP.* 8 (Aug. 1999).

hearings in a way to ensure that the TRC would not degenerate into a quagmire of cynicism and skepticism.<sup>160</sup>

Ultimately the TRC was a very important process. Symbolically it was important for South Africans, for the victims of apartheid, albeit a select group, to come and tell their stories. It was important for the perpetrators to come and be cross-examined by their victims; but also substantively I think it provides a model for other societies.

PROFESSOR MÉNDEZ: My theme is basically an announcement of a research project. It is something I do not think we have explored in depth yet. That is, how much deference does the international community owe to domestic arrangements like truth commissions, partial amnesties, or total amnesties, in the interest not only of state sovereignty but also of justice?

Quite frankly, this has been suggested to me by this veritable revolution in international law — the Pinochet case. As you know, the Chilean Government's position — in litigation and in diplomacy — is that the international community must respect, to the letter, to the hilt, everything that the Chilean society and state has decided to do about violations of its recent past.<sup>161</sup> Of course, Judge Baltasar Garzón in Spain and the government of Her Majesty in Britain contest this.<sup>162</sup>

Let me start with an assertion: International Law imposes obligations on states to deal with the past, especially the legacies of recent egregious and serious human rights abuses. I cannot go into the details as to why this is so, but it is what we call an emerging principle — you will not find it in the letter of any particular treaty or multilateral convention. Interestingly, however, there is very little argument about whether this emerging principle is really there, or even on its binding force over all states.<sup>163</sup>

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160. For the most poignant account of the TRC hearings, see ANTJIE KROG, *THE COUNTRY OF MY SKULL* (1998).

161. See Anthony Faiola, *Pinochet Supporters, Critics Cheer Verdict, Both Sides Say Their Causes Will Benefit*, WASH. POST, Mar. 25, 1999, at A27 (reporting Chilean President Eduardo Frei's statement that only Chile has the right to determine Pinochet's fate).

162. See T.R. Reid, *Spaniard Will Press Pursuit of Dictators*, WASH. POST, Jan. 16, 2000, at A29 (describing Judge Garzón's perspective); T.R. Reid, *Pinochet's Arrest Upheld*, WASH. POST, Mar. 25, 1999, at A1 (reporting that Britain's highest court found Pinochet not immune from criminal prosecution for alleged human rights abuses).

163. See Juan Méndez, *Accountability for Past Abuses*, 19 HUM. RTS. Q. 255 (1997); Juan Méndez, *In Defense of Transitional Justice*, in *TRANSITIONAL JUSTICE AND THE ROLE OF LAW IN NEW DEMOCRACIES* (A. James McAdams ed., 1997) [hereinafter Méndez, *Accountability for Past Abuses*]; Diane Orentlicher, *Addressing Gross*

To summarize this principle quickly, what governments have to do about legacies of past abuse is basically a four-fold obligation. First, a government is obligated to do justice. That essentially takes the form of an obligation to investigate, prosecute, and eventually punish perpetrators.

Second is the right to truth mentioned before. It can be fulfilled through truth commissions or by other means, but mostly the practice of nations has been to establish truth commissions.

The third obligation is to provide reparations.

The fourth one is to cleanse the security forces of all those people who, even if they cannot be punished, at least are known to have committed very serious abuses. Newly democratic states cannot afford to keep in the ranks of their security forces people who have perpetrated these crimes.

Now, let me rush to say that these are obligations of means and not of results, in the language of French civil law. States discharge these obligations to the international community as long as they try in good faith to comply with these four steps. We cannot expect, the international community has no right to expect, that every single case will be investigated, prosecuted, the truth disclosed, et cetera, because there would be insurmountable obstacles. But each obligation is to be performed in good faith. I would insist on that.

Further, it is not a menu. Governments cannot pick and choose and say, "We will give them a truth commission but we will not prosecute," or, "We will give them reparations but we will not cleanse the security forces." In this sense, in 1997, the European Court of Human Rights, which finally now has to deal with some of the serious abuses that the Inter-American system has had to deal with, said that in serious cases of torture, destruction of property, and forced eviction, it is not enough to pay reparations; there is something more that the state has to do.<sup>164</sup> This principle emerges from decisions like that.

Forgiveness has been offered as a justification for blanket amnesties, and that is why, in Latin America at least, we do not use "forgiveness" very often. Even the word "reconciliation" does not ring

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*Human Rights Abuses: Punishment and Victim Compensation*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY (Louis Henkin & John Hargrove eds., 1994).

164. See *Aksoy v. Turkey*, 23 Eur. H.R. Rep. 553 (1996); *Akdivar v. Turkey*, 23 Eur. H.R. Rep. 143 (1997).

very true to Latin American victims of human rights abuse, because it has always been no more than a code word for impunity.<sup>165</sup>

It is now clear that blanket amnesties, unconditional amnesties, amnesties that prevent knowledge of the truth, that prevent even any serious inquiry, and that leave the perpetrators not only free but also even ascending through the ranks in the security forces, are inconsistent with the obligations of a state under international law. The kind of reasoning that the Human Rights Committee of the United Nations has used several times to criticize these amnesties, is that they create an "atmosphere of impunity," and are thus inconsistent with a State's obligations under the International Covenants on Civil and Political Rights.<sup>166</sup>

But other arrangements may pass international muster. What we do not know is what will and will not.

In the case of South Africa, I am illuminated here by a recent article by a famous, well-known South African jurist, John Dugard, where, after a very close exploration of the international obligations of South Africa, he comes to the conclusion that at least, in principle, the law that creates the South African Truth and Reconciliation Commission, with its conditional amnesty and leaving open the possibility of prosecutions, seems to be in compliance with international law.<sup>167</sup> But Dugard goes on to criticize the Constitutional Court's decision in the *AZAPO* case.<sup>168</sup> The families of Steve Biko and several others challenged this law and tried to set aside the amnesty part of the law.<sup>169</sup> The Constitutional Court unfortunately, in a very poorly elaborated decision, ruled against the claim of unconstitutionality.<sup>170</sup> Most of us would probably have come to the same result but I criticize it because, for example, it goes to the practice of nations, but it leaves out some practices. It sometimes misquotes or mis-cites the facts of some other practices,

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165. See AMERICA'S WATCH, TRUTH AND PARTIAL JUSTICE IN ARGENTINA, AN UPDATE (1991), cited in Jo M. Pasqualucci, *The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law*, 26 U. MIAMI INTER-AM. L. REV. 297, 326 n.150 (1995).

166. See *Concluding Observations: Argentina*, United Nations Human Rights Commission, U.N. Doc. CCPR/C/79/Add. 96 (1995); *Concluding Observations: Peru*, United Nations Human Rights Commission, U.N. Doc. CCPR/C/79/Add. 72 (1996).

167. See John Dugard, *Reconciliation and Justice: The South Africa Experience*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 277, 301 (1998).

168. *Id.* at 302-03 (criticizing Azanian Peoples Organization v. The President of The Republic of South Africa, 1996 (8) BCLR 1015 (cc), 1996 SACLX LEXIS 20).

169. See Azanian Peoples Organization, 1996 SACLX LEXIS at 28-29.

170. See *id.* at 34.

and it does not, like Dugard says,<sup>171</sup> even mention the *Velasquez*<sup>172</sup> precedent or several decisions by the Inter-American Commission on Human Rights<sup>173</sup> that would go in a different direction.

We are making progress here. The Guatemala amnesty, for example, was passed as a result of the peace accords. It is the first Latin American amnesty law that is not unconditional, that does exclude cases that qualify under what we would call crimes against humanity. But I do not think that that should be the end of the story. Also, Guatemala has an exemplary truth commission, which just published a report that did not mince words and said, in so many words, that what was done to the indigenous community of Guatemala was genocide.

So is that enough? Should the inquiry stop there? I think not. Both in South Africa and in Guatemala, the processes still have not concluded. We do not know whether there will be prosecutions after the selective amnesties. Especially in Guatemala, we are so used to what we call in Latin America "*de facto* impunity," inertia by which prosecutors do not investigate cases, judges look the other way or the military find all kinds of reasons to impose their will. Military code jurisdiction is an infamous mechanism of impunity in Latin America. All of those things can make the effort that is going in the right direction right now be completely trumped in the end.

The point is that, when we have new Pinochet-like cases, and we will have new Pinochet-like cases, fortunately, we have to be able to decide whether what a country has done passes international muster or not. That decision should not rely only on the general scheme of things, but on the facts of the case, on the particular

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171. See Dugard, *supra* note 167, at 306.

172. See *supra* note 143.

173. While AZAPO cites, approvingly, that amnesty laws have been a part of recent Latin American history, the Inter-American Commission on Human Rights has repeatedly said that amnesty laws of a blanket nature are inconsistent with the American Convention on Human Rights. See Cases 10,288 and others, Inter-Am. C.H.R. 28, OEA/ser. L/V/II.83 (1993) (Argentina), available at <<http://www.cidh.oas.org/annualrep/92eng/ch3c.htm>>; Cases 10,029 and others, Inter-Am. C.H.R. 29, OEA/ser. L/V/II.83 (1993) (Uruguay), available at <<http://www.cidh.oas.org/annualrep/92eng/ch3s.htm>>; Cases 11,505 and others, Inter-Am. C.H.R. 61, OEA/ser. L/V/II.98, doc. 7 rev. (1997) (Chile), available at <[http://www.cidh.oas.org/annualrep/97eng/97ench3a41an.htm#REPORT Nº 25/98](http://www.cidh.oas.org/annualrep/97eng/97ench3a41an.htm#REPORT_Nº_25/98)>. The Commission reaffirmed its position this year in the Romero case, which involves the massacre of the Jesuits in El Salvador; the English translation will be available upon publication of this Symposium. See <<http://www.cidh.oas.org/annualrep/99span/De%20Fondo/EI%20Salvador10.488.htm>> (Spanish version); <<http://www.cidh.oas.org/reports.htm>> (English-language site for recent commission reports).

responsibility of the potential defendant that we may have jurisdiction over, on whether the government has tried to comply in good faith with the four obligations. All of those things, unfortunately, are still very much in a state of flux and we still need a lot more theoretical and practical research about them.

PROFESSOR THOMAS: (*Comments presented in detail in her Essay written in connection with this Symposium.*)<sup>174</sup>

PROFESSOR FLAHERTY: We have time for a few questions.

AUDIENCE: I think that a common theme among all the panelists is this question of accountability. It strikes me that, on the question of debt forgiveness, perhaps the strongest argument I heard you allude to is irresponsible lending. In many cases much of the money never got to the people, never got to the public service projects, and so on.

In a sense, forgiveness may not be the right or the most politically powerful rhetoric to use, but, instead, fraudulent lending. The language of fraud and corruption would be much more persuasive politically in the West, and I have heard some Transparency International<sup>175</sup> folks talk about some really interesting ideas on both legal and political mechanisms to get debt forgiveness, such as assigning the debt to plaintiffs' lawyers who then can use legal mechanisms in this country to get it from the expatriate community and so on.

The question of accountability and democratization may be a pretty powerful tool in the debt forgiveness approach.

PROFESSOR THOMAS: I agree with that. I think one thing that Professor Murphy alluded to was the distinction between forgiveness as relinquishing a right and forgiveness as a discussion about moral accountability.<sup>176</sup> Both of those ideas have been invoked in talks about reducing debt.

The most important part is reducing the actual debt obligation, but there has also been a lot of discussion about the moral accountability of irresponsible governments. Often, corruption is used not as a reason for forgiveness but as a reason against forgiveness. People say, "the governments misspent this money, they were wrong." An example is Mobutu Sessese, who in his thirty-year reign stole more from the country of then-Zaire and now the Dem-

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174. See Chantal Thomas, *International Debt Forgiveness and Global Poverty Reduction*, 27 *FORDHAM URB. L.J.* 1711 (2000).

175. Information about Transparency International is available at <<http://www.transparency.de>>.

176. See Murphy Keynote Address, *supra* note 124.

ocratic Republic of Congo than was spent on education, health, and social services combined.<sup>177</sup> That is an argument for holding debtor governments accountable.

The problem is that lenders, as you suggested, have been also somewhat complicitous with this. Mobutu originally took power by wresting power away from the democratically-elected prime minister of the Congo, Patrice Le Mumba, with the support of the U.S. Government,<sup>178</sup> so if there is blame, it must be spread around. I think that has to be taken into consideration, in addition to the fact that to ultimately hold the people of countries responsible for the wrongdoings of their governments is to meet one wrong with another wrong.

There are a lot of initiatives on debt reduction and a lot of research is going on into it.<sup>179</sup>

AUDIENCE: From what I understand, the law that established the TRC did not preclude trials, but it seems that, in practice, trials are a road that South Africa has decided not to take. People like Botha and De Klerk have basically walked away without being held accountable. What is your opinion of that, both sort of existentially in terms of the whole question of justice, and also more practically in terms of the political consequences for the future?

PROFESSOR ANDREWS: I do not think that there will be large numbers of criminal trials. There are practical reasons, the South African criminal justice system just could not accommodate that.

But part of the problem emanates from the TRC hearings themselves because the hearings were not meant to be legal proceedings. This subsequently raises questions about the nature of the evidence presented, particularly since much of the evidence has not been corroborated.

So these are very difficult questions. It is not to say that the perpetrators ought not to be penalized, but I think it raises lots of practical questions.

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177. See Michela Wrong, *The Dinosaur at Bay*, FINANCIAL TIMES, Nov. 2, 1996, at 7, cited in Nora M. Rubin, Note, *A Convergence of 1996 and 1997 Global Efforts to Curb Corruption and Bribery in International Business Transactions: The Legal Implications of the OECD Recommendations and Convention for the United States, Germany, and Switzerland*, 14 AM. U. INT'L L. REV. 257, 320 n.6 (1998).

178. See Christopher B. Jochnick & Josh Zimmer, *The Day of the Dictator: Zaire's Mobutu and United States Foreign Policy*, 4 HARV. HUM. RTS. J. 139, 139-40 (1991).

179. See, e.g., Msgr. Dennis M. Schnurr, *A Jubilee Call for Debt Forgiveness*, available at <<http://www.nccbuscc/sdwp/international/adminstm.htm>>.



In terms of what it does to the process of reconciliation, it is hard to tell. My observations have been that when you went to South Africa three years ago and you sat in on a hearing, or you listened to people talk about the TRC, there was lots of hope and people were optimistic about the process. Today the mood is different, and part of it is because there were two parallel developments in the country.

The first is that the TRC sat between 1996 and 1998 and listened to the tales of horror. At the same time, not confined to that period, certainly starting before and still carrying on today, South Africa has been gripped by violent crime, and some people have argued that particularly the crimes against women constitute violations of their human rights.<sup>180</sup> This discrepancy with what was going on at the TRC and the excessive violence outside, means that the criminal justice system cannot cope with developments with respect to violence in the last few years. Those are very difficult problems, and it is not clear if the TRC has impacted on the way that South Africans deal with each other. The criminal statistics indicate that there is something dreadfully wrong.<sup>181</sup> We can find economic reasons for this, but the nature of the crime raises all kinds of issues.

Personally, I do not know. The TRC was a political compromise, and the government does not have the resources to embark on large numbers of criminal prosecutions, and so blanket amnesty will probably be granted. It is a pity. In an ideal world, all the perpetrators would have been brought either before the TRC or before a court of law, and the victims would have been compensated. But as it stands now, the Reparations Committee, which is one of the committees of the TRC, has been very ineffective in either compensating victims monetarily or in dealing with what the country has to confront as a result of the TRC hearings.

It is a work in progress. In time — it is too early to tell now — the benefits of the TRC will be evaluated and its influence will probably be limited.

And, as you said, it is an existential thing. The problem is I do not live in South Africa. I go back very often and so I can understand why people do not want to pursue the perpetrators. But, on

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180. See HUMAN RIGHTS WATCH, *VIOLENCE AGAINST WOMEN IN SOUTH AFRICA* (1995).

181. See Jon Jeter, *Millions of S. Africans Partake in Peaceful Election*, WASH. POST, June 3, 1999, at A19 (describing South Africa, with an average of 70 killings a day, as "one of the most dangerous places in the world").

the other hand, I think it has meant to some extent that there has been a shortfall in the way the transformation has taken place.

PROFESSOR MÉNDEZ: On the same topic, I think it is important to note that the killers of Steve Biko, for example, have been denied amnesty. This is little known, because Biko's relatives challenged the law and lost, but then the killers were denied amnesty because, among other things, they were untruthful in what they supposedly "confessed." They claimed that he had killed himself, and so the Amnesty Committee decided that they did not get amnesty. The same happened with the killers of Chris Hani, for example, one of the most egregious cases that happened when the peace process was already underway.

I have been reading the web page that Professor Minow mentioned today.<sup>182</sup> Maybe 80 percent of the cases have been denied amnesty, but you have to calculate that many of those are really common crimes, that people who were in custody were trying their luck at asking for amnesty, claiming that they had committed crimes with a political motive. Of the people who were members of the political groupings and of the armed forces, a good 28 or 29 percent, by my calculation, were also denied amnesty. Now, this does not mean that there will be prosecutions for those cases, for the reasons that Ms. Andrews said.

I also understand that the prosecutors in South Africa are the same prosecutors from the apartheid regime, and so even the case of General Magnus Malan, that did go to trial, was very deliberately botched by the prosecutor. The court issued an unusual admonition to the prosecutor on that account.<sup>183</sup>

The stakes are enormous. It is very difficult to predict that there will be prosecutions. But, on the other hand, I think it would be a very serious mistake, and a great disappointment to the rest of the world, if South Africa decided to implement a blanket amnesty policy. I know there are pressures there and I know there will continue to be, but at least the present policy, even if it does not result in a lot of prosecutions, leaves open the possibility of prosecutions. Hopefully it allows the victims to come up with evidence that can stand in court and then eventually, when some new prosecutors are in place — and some new judges, I would say — some justice can be achieved. The present system in South Africa at least constitutes an attempt at a good-faith effort to comply with international

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182. See MINOW, *supra* note 1.

183. See Angus Shaw, *Acquittals Reopen Apartheid Wounds*, WINNEPEG FREE PRESS, Oct. 12, 1996, at A11, available in 1996 WL 17253325.

obligations and with moral obligations to the victims in South Africa. That obligation to the victims is more important than complying with the international community's interests.

PROFESSOR ANDREWS: I agree with Professor Méndez, but I think another problem that is peculiar to South Africa is that the African National Congress ("ANC") was implicated in gross human rights violations, and therefore I think politically this was difficult for the government. When the Truth and Reconciliation Commission report was published, the ANC immediately went to court to try and squash parts of it.<sup>184</sup>

The other thing that concerns me is what I regard as a very punitive turn taken by some groups in the human rights community. I think it is important that perpetrators who commit gross human rights violations be punished. We need to focus on what happens in the long term. South Africa has an official unemployment rate of 48 percent and I think most people in the country would rather obtain housing, water, and education than continue this process. Ultimately, transformation in South Africa is about changing people's economic circumstances.

AUDIENCE: I believe that the right to truth is fundamental for humanity. However, Congressman Chipoco Cáceda mentioned that source institutions should publish the identity of the protagonists of the violations. Wouldn't that be a demonstration of a violation of the human rights for the individuals and wouldn't this open the door for the victims of the families to take justice into their own hands?

PROFESSOR CHIPOCO CÁCEDA: I think that, first, you have to distinguish between judicial processes and reports from truth commissions. Legal processes that involve investigations and prosecutions imply a whole series of procedural rights both to the accused and to the plaintiffs or to the victims. A truth commission report has much more to do with the social and political process that focuses on collecting testimony and describing investigations, as opposed to prosecuting an individual.

Remember that the duty related to the right to truth is to tell all the truth. When I was on the Truth Commission in El Salvador, in

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184. See Wally Mbehele, *ANC, TRC Clash Over Final Report*, WKLY. MAIL & GUARDIAN (S. Africa), Oct. 9, 1998, available at <<http://web.sn.apc.org/wmail/issues/981009/news2.html>>; Wally Mbehele, *Bid To Delay TRC Report*, WKLY. MAIL & GUARDIAN (S. Africa), Oct. 23, 1998, available at <<http://web.sn.apc.org/wmail/issues/981023/news5.html>>.

the case of the assassination of the seven Jesuits,<sup>185</sup> they obtained the names of the army officials who gave the orders to other officers to have the priests killed. The commission members felt that their sources were good and that the evidence they had was valid evidence, but they were faced with a moral dilemma of whether to reveal names in their report, and thereby basically accuse these officers.

The right to truth often revolves around political processes, which often with truth commissions imply amnesties or amnesty laws, such as in Guatemala, Chile, El Salvador, or South Africa. The process of the right to truth is that you need to have this complete, impartial truth to then be able to create conditions for someone to ask for pardon and for that pardon to be granted. So what you get with the right to truth is the moral sanction, and this moral sanction is a necessary component of the transition process.

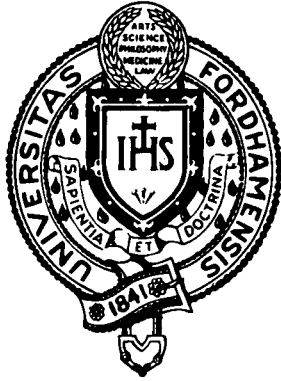
Let me say in English that during the investigation of the truth commission in El Salvador, we respected the due process of the perpetrators. We tried to respect the human rights of the perpetrators, but we had the duty to say the whole truth, and the whole truth means to say the names of the perpetrators.

PROFESSOR MÉNDEZ: On that point, I think if the possibility of prosecutions is a real one, it is preferable that the truth commissions do not name names so as not to taint evidence that can be used in future cases. But if the possibility of prosecution is completely not in the cards, for example because there is a prior amnesty, then of course there is no full truth unless the names are named.

The questioner makes a very good point, that even in the cases where no names are given, there has to be some semblance of due process, and at the very least, the people who are going to be named should be confronted with the evidence and given a chance to tell their side of the story.

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185. See Tina Rosenberg, *Terror, Tribunals and Truth*, WASH. POST, Mar. 14, 1993, at C1.



# APOLOGY AND ORGANIZATIONS: EXPLORING AN EXAMPLE FROM MEDICAL PRACTICE

Jonathan R. Cohen\*

## INTRODUCTION

In previous work, I examined the potential of apology in civil lawsuits. There I argued that to better serve their clients, under existing laws, lawyers should consider discussing the possibility of apology with them more often. For example, many lawyers fail to consider that offering an apology can greatly facilitate settlements and that “safe” apologies, which cannot be used as proof in court, can often be made within mediation. I also argued that in order to encourage apologies after injury, we ought to consider reforming our laws to exclude apologies from admissibility as evidence.<sup>1</sup> In this Article, I focus on injuries committed by members of organizations, such as corporations, and examine distinct issues raised by apology in the organizational setting. In particular, I consider: (i) the process of learning to prevent future errors; (ii) the divergent interests stemming from principal-agent tensions in employment, risk preferences and sources of insurance; (iii) the non-pecuniary benefits to corporate morale, productivity and reputation; (iv) the standing and scope of apologies; and (v) the articulation of policies toward injuries to others.

I begin my analysis with an article published in the *Philadelphia Inquirer* (the “Gerlin article”). The article reports about an atypical, and in some ways revolutionary, approach to instances of medical error that the Veterans Affairs Medical Center in Lexington, Kentucky (the “Lexington VA”) initiated in 1987 and has followed since. This hospital’s approach and its effects have been docu-

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1. See Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1004, 1009 (1999). See also Aviva Orenstein, *Apology Expected: Incorporating A Feminist Analysis Into Evidence Policy Where You Would Least Expect It*, 28 SW. U. L. REV. 221 (1999) (arguing for an independent evidentiary exclusion for apologies).

mented subsequently by recent academic publications.<sup>2</sup> I reprint the newspaper account below, because it simultaneously offers an overview of the hospital's approach and addresses many of the central issues of apology and organizations.<sup>3</sup> After the Gerlin article, I supplement the framework established by her report with further specific information obtained from academic publications and from telephone interviews.<sup>4</sup>

### A. Newspaper Account

#### *Accepting Responsibility, by Policy*<sup>5</sup>

by Andrea Gerlin

The Veterans Affairs Medical Center in Lexington, Ky., handles medical errors differently from most hospitals.

The 400-bed hospital does not simply encourage its staff to tell patients and their families the truth about errors. It has a tough policy that requires giving the information as soon as possible by aggressively seeking out patients and families, even after discharge if necessary. Beyond that, hospital employees persuade the occasional reluctant victim to accept financial compensation.

"Almost every risk manager and attorney says, 'We always tell the truth,'" said Steven Kraman, the hospital's chief of staff and chairman of its risk-management committee. "But I don't know of any other hospital that goes out and calls the family when there's been an error."

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2. See Steven S. Kraman & Ginny Hamm, *Risk Management: Extreme Honesty May Be the Best Policy*, 131 ANNALS OF INTERNAL MED. 963 (Dec. 1999); Albert W. Wu, *Handling Hospital Errors: Is Disclosure the Best Defense?*, 131 ANNALS OF INTERNAL MED. 970 (Dec. 1999).

3. Descriptions of fully-litigated cases are commonly given in judicial opinions and provide the "data" for much legal research. For cases that are settled through negotiation or other non-adjudicatory processes, records are far rarer. Hence, to study non-adjudicatory settlement, descriptions must be found elsewhere. Here we are fortunate that the Lexington VA's experience is well and concisely described by Gerlin's newspaper account and that Gerlin's account is confirmed by subsequent academic publication.

4. I conducted telephone interviews with Dr. Steven Kraman, the hospital's chief of staff and chair of its risk management committee; Attorney Ginny Hamm, the hospital's counsel and a member of its risk management committee; and Nurse Connie Johnson, a quality assurance nurse and a member of its risk management committee, on December 6, 1999. I conducted further telephone interviews with Dr. Kraman and Attorney Hamm on January 14, 2000 [hereinafter Telephone Interviews with Kraman, Hamm & Johnson].

5. Andrea Gerlin, *Accepting Responsibility, by Policy*, PHILADELPHIA INQUIRER, Sept. 14, 1999, at A18. Reprinted with permission from *The Philadelphia Inquirer*, September 14, 1999.

Is the VA Medical Center inviting its patients to sue it into oblivion? Not really, hospital officials say. Rather, they say, they are just accepting responsibility when they are at fault.

"Telling the truth is the right thing to do," said Connie Johnson, a clinical analyst and quality assurance nurse at the hospital.

"The attorneys around here in Lexington used to think we were crazy," said Ginny Hamm, the hospital lawyer. "But we have an ultimate responsibility to the veterans and their families."

The VA hospital in Kentucky has learned that doing the right thing can also mean saving money. By going out of its way to be open and honest with patients and their families, the hospital has found that it is minimizing its legal exposure because families are not as angry when they learn of a medical error.

Leonard J. Marcus, director of the Program for Health Care Negotiation and Conflict Resolution at the Harvard School of Public Health, has analyzed malpractice mediation sessions in an effort to determine what plaintiffs really want.

Marcus concluded that most patients who are harmed by medical errors want three things: an explanation of what happened; an apology from whoever was responsible; and an assurance that changes have been made to prevent harm from being done to someone else. Money seems to be a distant concern.

Lexington VA officials may have found a way out of the litigation thicket using this approach. The hospital's average total payout for settlements has been about \$180,000 a year over the last decade, on eight to 10 cases in a typical year. The hospital has reduced its claims payments from among the highest in the 178-hospital VA system to one of the lowest.

Hospital officials admit that they arrived at that point painfully. In 1986, the hospital lost two malpractice lawsuits at trial, costing it a total of \$1.5 million in awards. For a government facility that primarily treats older patients, whose claims usually result in lower damages, that was an eye-opening sum. Kraman was a defendant in one of the cases and said the outcomes forever changed the hospital's approach.

Hospital officials now begin assembling dossiers and taking testimony soon after incidents. Hamm said that as soon as they determine that a mistake has occurred, they notify the patient or



family members. If they believe harm has been done, rather than evade the truth in an attempt to avoid liability, they advise the family to hire a lawyer and they seek to quickly resolve the problem with a fair settlement.

That is what they are doing with Lloyd Brown, a 77-year-old veteran from Stanford, Ky. Last year, he temporarily lost sight in his right eye. Brown had previously lost most of the vision in his other eye to a cataract. His wife, Martha, said she called the VA's triage hotline and left a message with a receptionist describing the episode. No one ever called the Browns back because some messages were not being relayed by the triage hotline.

Two more episodes and six weeks later, they went to the medical center. A doctor there told them that an artery in the right side of Lloyd Brown's neck had closed due to a stroke and that he would be permanently blind in the affected eye. Worse, none of that had to happen.

"They said that if we'd gotten it within four hours they could have saved the eye," Martha Brown said. "We didn't think about seeing a lawyer."

Three months later they received a letter from the hospital advising them to get a lawyer so they could begin discussing a settlement, which is pending. Kraman said the couple, touched by having been dealt with honestly, became teary-eyed at the meeting during which the hospital acknowledged its mistake.

VA officials have also been helping Lloyd Brown obtain full disability benefits. The Browns are impressed: Lloyd Brown even returned to the medical center this spring for treatment of a heart problem.

"We think a lot of them," Martha Brown said. "They're taking responsibility. I never had experience with it, but I've never heard of a hospital admitting a mistake."

Kraman said the hospital drills its policy into its staff, especially the residents who train there, seeking to create a culture in which mistakes are acknowledged and lead to changes that prevent recurrences. Some of the ethics seminars it has held for employees have featured patients who were injured by treatment at the hospital, explaining how honesty reinforced rather than undermined their trust.

As obvious as this approach seems, there are reasons that a VA hospital can use it and that other hospitals will be slower to follow. As government facilities, the VA's liability is limited under the federal Tort Claims Act. Its hospitals are self-insured and its physicians are employees, and do not pay higher malpractice insurance premiums after a costly settlement.

Still, Kraman and his colleagues argue that their approach should be a model for other institutions.

"If everybody did this nationwide, every patient who was injured would get fair compensation, the lawyers would get nothing, and you wouldn't see \$12 million verdicts," Kraman said.

### B. Further Information

Before 1987, the Lexington VA's response toward instances of medical error was an adversarial combination of little disclosure and much opposition.<sup>6</sup> In 1987, following failed defenses of two malpractice claims that resulted in verdicts totaling \$1.5 million,<sup>7</sup> the Lexington VA implemented a policy of proactively assuming responsibility for medical mistakes.<sup>8</sup> The essence of the policy was to maintain a care-giving relationship toward the patient following medical error rather than adopting an adversarial one.<sup>9</sup>

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6. Telephone Interviews with Kraman, Hamm & Johnson, *supra* note 4.

7. See Kraman & Hamm, *supra* note 2, at 964.

8. Telephone Interviews with Kraman, Hamm & Johnson, *supra* note 4.

9. In 1999, the Lexington VA formally adopted a policy on "Patient Safety (Integrated Risk Management Program)", VAMC Memorandum No. 00-1, VA Medical Center, Lexington, Kentucky, Nov. 4, 1999. Telephone Interviews with Kraman, Hamm & Johnson, *supra* note 4. Posted on easels at the hospital's entrances are excerpts including:

2. **PHILOSOPHY:** Human error is inevitable, even among the most conscientious professionals practicing the highest standard of care. Identification and reporting of adverse events, including those that result from practitioner error, are critical to our efforts to continuously improve patient safety. Likewise, medical managers have a duty to recognize the inevitability of human error and attempt to design systems that make such error less likely; and to avoid punitive reactions to honest errors.

3. **POLICY:** Key components of the patient safety/risk management policy and approach are:

a. All employees and practitioners are responsible for fully cooperating in efforts to improve patient safety and eradicate potential risks. This includes the reporting of events which result in actual or potential injury to a patient.

b. Patients and their families will be informed about injuries resulting from adverse events and the options available to them.

c. The Risk Management Committee is [the] hub of responsibility for patient safety activity. This includes overseeing the investigation, reporting

The policy involved multiple steps. The hospital encouraged workers to report mistakes to its risk management committee, which included Dr. Steven Kraman, the hospital's chief of staff and chair of the risk management committee, and Ginny Hamm, the hospital's in-house counsel. Once a mistake was reported,<sup>10</sup> a typical case proceeded as follows. The committee rapidly investigated the mistake and attempted to determine its root cause. If the root cause was deemed "systemic," efforts at systemic reform were undertaken.<sup>11</sup> If the mistake resulted in harm to the patient, irrespective of whether the patient was aware of it, the patient was informed of the error. In some cases, the patient was not aware nor likely would have become aware of the mistake absent the hospital volunteering the information.<sup>12</sup> The risk management committee then brainstormed about ways to aid the patient through further medical treatment, disability benefits and compensation.<sup>13</sup>

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and analysis of patient safety and adverse event data as well as orchestrating family notifications and interventions when warranted.

While the approach of assuming responsibility for errors was implemented in practice in 1987, the Lexington VA did not formally articulate this policy until November, 1999. See Telephone Interviews with Kraman, Hamm, & Johnson, *supra* note 4. For a discussion of the delay, see *infra* text accompanying notes 114-119.

10. As the policy became established, the prevalence of reporting increased so that often an error was reported by multiple sources. Telephone Interviews with Kraman, Hamm & Johnson, *supra* note 4. Such multiple-source reporting no doubt provides an incentive for the person who has committed the error to report it directly and promptly.

11. A mistake was deemed "systemic" if another individual in the same circumstances would have been likely to have committed the same error. Telephone Interviews with Kraman, Hamm & Johnson, *supra* note 4. For example, on one occasion, after a patient received the wrong dilution of the medication herapin, it was discovered that dilutions of different strengths (1:1000 and 1:10000) were stored in the pharmacy on the same shelf next to one in highly similar bottles. Changes to prevent future confusion (e.g., using differently colored bottles and putting bottles of different dosages on different shelves) were then made. Since the adoption of their new policy, the hospital has "fixed" several systems based upon such analysis. *Id.* See *infra* text accompanying note 79 (discussing a similar instance of poor medication labeling at Kaiser Permanente in Denver); see *infra* text accompanying notes 69 - 80 (on the need for systemic approaches to the prevention of such medical errors).

12. See Kraman & Hamm, *supra* note 2, at 964 ("Since this policy has been in place . . . [f]ive settlements involved incidents that caused permanent injury or death but would probably never have resulted in a claim without voluntary disclosure to the patients or families.").

13. While the hospital fully discloses all errors that cause harm to the patient, after much careful deliberation, the hospital decided that, where the mistake does *not* result in harm to the patient (i.e., "harmless error"), the hospital would not inform the patient of the mistake. Telephone Interviews with Kraman, Hamm & Johnson, *supra* note 4. (The description by Kraman & Hamm of error reporting does not address the harmless error scenario. Kraman & Hamm, *supra* note 2, at 964). Dr. Albert Wu critiques this position suggesting that, "Even if the mistake did not result in an ad-

The committee arranged a meeting between itself, the patient and anyone the patient wished to bring, usually family members and an attorney.<sup>14</sup> If the risk management committee believed that the hospital or its employees had been at fault, Dr. Kraman apologized to the patient at that meeting, including admitting fault verbally and, if the patient desired, subsequently in writing.<sup>15</sup> Members of the committee then discussed further steps the hospital could take to aid the patient medically and any disability benefits to which the patient might be entitled.<sup>16</sup> In cases where the risk management committee believed the hospital or its employees had been at fault, the committee made what it believed to be a fair settlement offer.<sup>17</sup> Typically, settlement ensued rapidly.<sup>18</sup>

From the financial viewpoint, the new approach of assuming responsibility, including apology, passed the Hippocratic test: it appears to have done the hospital no financial harm and may have done some financial good. Recall that in 1985 and 1986 the hospital paid two malpractice verdicts that together totaled \$1.5 million.<sup>19</sup> From 1990 through 1996, the hospital paid an average of only \$190,113 per year in malpractice claims, with an average (mean) payment of \$15,622 per claim.<sup>20</sup> This placed the Lexington VA in the lowest quartile of thirty-six comparable VA hospitals for malpractice payments and in the bottom sixth in terms of average liability payment per claim.<sup>21</sup> As Kraman and Hamm modestly put

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verse outcome, I still recommend that the near miss be disclosed." Wu, *supra* note 2, at 971; see *infra* text accompanying notes 108-113.

14. Dr. Kraman, Attorney Hamm and Nurse Johnson represented the hospital at a typical meeting. The employee who committed the error (e.g., the negligent physician) did not usually appear. For a discussion, see *infra* text accompanying notes 108-113.

15. See Telephone Interviews with Kraman, Hamm & Johnson, *supra* note 4.

16. See *id.*

17. See *id.*

18. Kraman estimated that, following the apology and the settlement offer, "nine out of ten cases settled very rapidly." *Id.*

19. Though I have not seen other pre-1987 data, these two verdicts totaling \$1.5 million may be "outliers," greatly exceeding the average payment in pre-1987 years. Hence, some caution is warranted in comparing the 1990 to 1996 results with those two verdicts.

20. See Kraman & Hamm, *supra* note 2, at 964. In their published study, Kraman & Hamm report on the years 1990 through 1996 because data for comparable VA hospitals was only available for those years. However, the data for the Lexington VA for other years since the adoption of the new policy (i.e., 1987 through 1989 and 1997 through 1999) are similar. Telephone Interviews with Kraman, Hamm & Johnson, *supra* note 4.

21. See Kraman & Hamm, *supra* note 2, at 965 (the latter statistic is derived from a comparison of the tables).

it, “[Under the policy of assuming responsibility], the Lexington facility’s liability payments have been moderate and are comparable to those of similar facilities.”<sup>22</sup>

This may understate the overall financial benefits of the new policy for it overlooks savings in litigation costs. Under the new policy, most cases settled rapidly, and rapid settlement undoubtedly reduced expenses generated by litigation (e.g., legal fees, employee time, expert witness fees). Based upon an accounting of an earlier case,<sup>23</sup> Kraman and Hamm estimated that apart from the ultimate award the hospital incurred roughly \$250,000 in other expenses for a single case litigated through the appellate level.<sup>24</sup> By fostering rapid settlement, the new policy helped avoid such litigation costs. During the period of their study (1990-1996), “[s]even claims proceeded to federal court and were dismissed before trial. One claim proceeded to trial and was won by the government [VA].”<sup>25</sup> If Kraman and Hamm’s estimate that a single case litigated through the appellate level entailed \$250,000 in legal expenses is even roughly accurate, then the decreased expenses through rapid settlement were likely significant sources of savings due to the new policy. In short, it appears that the approach of “assuming responsibility” helped rather than harmed the financial “bottom line” of the Lexington VA.

Other parts of the VA system have begun to take notice. In 1995, the Department of Veterans Affairs adopted a risk management policy toward medical errors resulting in injury. The policy required that, “the medical center will inform the patient and/or the family, . . . [offer appropriate medical treatment] . . . [and further] “inform[ ] the patient and/or family of their right to . . . Application for Compensation and Pension . . . or to file an administrative tort claim.”<sup>26</sup> Within the past few years, two other VA hospitals have adopted the Lexington model.<sup>27</sup>

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22. *Id.* at 965-66.

23. See Telephone Interviews with Kraman, Hamm & Johnson, *supra* note 4.

24. See Kraman & Hamm, *supra* note 2, at 966; see also Henry S. Farber & Michelle J. White, *A Comparison of Formal and Informal Dispute Resolution in Medical Malpractice*, 23 J. LEGAL STUD. 777, 778 (1994) (indicating markedly lower legal expenses for medical complaints settled early within informal processes).

25. Kraman & Hamm, *supra* note 2, at 964.

26. *Id.* (quoting *Patient Safety Improvement*, Department of Veteran Affairs, VHA Manual 1051/1 (1998)).

27. See Telephone Interviews with Kraman, Hamm & Johnson, *supra* note 4.

### C. Preliminary Observations

Before further discussing the Lexington VA's experience, several observations are in order. First, the rules governing liability for VA hospitals and their employees differ from those of their private sector counterparts. As Gerlin's article mentions, VA hospitals are government organizations, and malpractice actions against VA hospitals must be brought under the Federal Tort Claims Act ("FTCA"). There are procedural and substantive differences between such claims and ordinary malpractice actions.<sup>28</sup> Procedurally, claims brought under the FTCA are heard by a federal bench trial, which has no jury, and only after administrative remedies have been exhausted.<sup>29</sup> Substantively, while state law governs the claim, there is no possibility of punitive damages under the FTCA.<sup>30</sup> This substantive bar on punitive damages, along with the distinct procedural rules, certainly reduces the liability exposure of VA hospitals compared to private hospitals.<sup>31</sup> Note, however, that the presence of punitive damages in the private sector may actually help promote the use of apology in that sector. A private sector injurer may apologize in an effort to avert punitive damages.

A physician employed by the VA is also in a very different position from his private sector counterpart. As a VA employee, she has virtually no personal exposure for malpractice.<sup>32</sup> Unlike her private sector counterpart, the VA physician will also experience no increase in her medical malpractice premiums following a successful malpractice suit, because she need not carry any. Her error, however, can be reported for certain licensing purposes and, in repeat or egregious cases, can result in dismissal or the loss of medical license.<sup>33</sup> In short, the VA physician faces far less personal

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28. See Thomas K. Kruppstadt, *Determining Whether a Physician is an Independent Contractor in a Medical Malpractice Action Under the Federal Tort Claims Act*, 47 BAYLOR L. REV. 223, 226 (1995).

29. See 28 U.S.C. § 2402 (1994).

30. See 28 U.S.C. § 2674 (1994).

31. Though admitting the comparison's imprecision, Kraman and Hamm suggest that VA hospitals face roughly half the liability exposure of their private sector counterparts on a given claim. "It is difficult to accurately compare the Veterans Affairs experience with that of the private sector, but [comparisons of U.S. Bureau of Justice Statics reports] indicate[ ] that [in the early 1990's] the average medical malpractice judgment in the private sector (\$1,484,000) is considerably greater than that in the Veterans Affairs system (\$720,000)." Kraman & Hamm, *supra* note 2, at 966.

32. See Kruppstadt, *supra* note 28, at 226.

33. See Kraman & Hamm, *supra* note 2, at 966.

exposure than her private sector counterpart.<sup>34</sup> Note, however, that while the Lexington VA and its employees enjoy certain protections under the FTCA that their private counterparts do not, the Lexington VA is on a level “legal playing field” vis à vis the other VA hospitals in the Kraman and Hamm study.

Second, while apology is an aspect of the Lexington VA’s approach to medical mistakes, it is but one piece of an overall system of response. The overall system might be called “assuming responsibility for errors.” Defense attorneys commonly assist defendants in denying responsibility for their mistakes.<sup>35</sup> By contrast, the Lexington VA embraced responsibility. Beyond the single act of apology, the broader orientation of accepting responsibility was reflected in acts such as offering fair compensation for injuries, attempting to prevent similar mistakes in the future, and developing channels for open, direct communication.<sup>36</sup> This general posture fits with VA’s historical mission and organizational philosophy of caring for veterans.<sup>37</sup>

Third is the matter of equity in patient compensation. Putting aside for the moment the issue of the overall level of liability payments to patients, the Lexington VA’s approach of assuming responsibility may also have produced more equitable results than the “lottery” of litigation that could ensue more often from a combative approach. A critique of our current malpractice liability system is that, as a means for compensating patients for medical errors, litigation is highly sporadic.<sup>38</sup> Most cases of medical malpractice go undetected,<sup>39</sup> and even once detected, jury awards fre-

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34. For an overview of legal and financial incentives in private health care, focusing particularly on limited liability faced by managed care organizations because of ERISA provisions and how such provisions influence patient care, see Bryan A. Liang, *Patient Injury Incentives in Law*, 17 *YALE L. & POL’Y REV.* 1 (1998)[hereinafter Liang, *Patient Injury Incentives in Law*].

35. See Cohen, *supra* note 1, at 1009-10, 1042-46.

36. For an apology to “work,” the injured party generally must perceive it as sincere. See *id.* at 1017-18. By coupling the apology with what it believed was a fair offer of compensation, the Lexington VA “put its money where its mouth was.” Such action no doubt promoted the belief by the injured party that the apology was sincere.

37. See 38 U.S.C. § 7301 (1994).

38. See generally PAUL C. WEILER ET AL., *A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION* (1993). For references to more recent works, see David M. Studdert et al., *Can the United States Afford A “No-Fault” System of Compensation for Medical Injury*, 60 *LAW & CONTEMP. PROBS.* 2 (1997).

39. See, e.g., A. Russell Localio et al., *Relationship Between Malpractice Claims and Adverse Events Due to Negligence: Results of the Harvard Medical Malpractice Study III*, 325 *NEW ENG. J. MED.* 245, 249 (1991) (analyzing a study of 31,429 patient

quently fail to reflect the underlying merits of the case.<sup>40</sup> By contrast, I suspect that the new policy helped produce more equitable results across patient awards and fairer results in terms of tying compensation to the actual merits of the individual case. Not only were patients more likely to learn of medical errors under the new policy,<sup>41</sup> but there was also a high probability of a moderate level of settlement then ensuing. Out of the thirty-six comparable VA hospitals, the Lexington VA was the among the fifth highest in terms of the number of claims against it but among the lowest sixth in terms of liability payment per claim.<sup>42</sup> Compare these results with a litigious model, where the polar outcomes of either a large award or no award commonly ensues. Under the new policy, most cases settled quickly, in Kraman and Hamm's assessment, at moderate levels of compensation based upon "reasonable calculations of actual loss."<sup>43</sup> While one cannot draw definitive conclusions about either the distribution of payments or the merits of individual payments from such aggregate statistics and such a subjective assessment,<sup>44</sup> it is probable that the new approach promoted greater equity between cases and greater fairness in an individual case. If so, then these too are laudable achievements.

A question arises as to whether the Lexington VA's possible cost savings are fairly attributable to their adoption of the assuming responsibility approach. For example, could the statistics placing the Lexington VA in the lowest quartile for total claims payments and the lowest sixth for average payment per claim have resulted from factors other than its approach of assuming responsibility, includ-

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records finding malpractice claims were filled in less than two percent of cases in which medical negligence caused injury to a patient).

40. See, e.g., Troyen A. Brennan et al., *Relation Between Negligent Adverse Events and Outcomes of Medical Malpractice Litigation*, 335 NEW ENG. J. MED. 1963, 1966 (1996) (analyzing a study of 51 malpractice suits finding that malpractice awards were correlated only with the severity of plaintiff's disability and not with the provider's negligence). See generally Bryan A. Liang, *Error in Medicine: Legal Impediments to U.S. Reform*, 24 J. HEALTH POL., POL'Y & L. 1, 28-38 (1999) [hereinafter Liang, *Error in Medicine*] (surveying shortcomings of the American malpractice liability and suggesting alternatives); Bryan A. Liang, *Promoting Patient Safety Through Reducing Medical Error: A Paradigm of Cooperation Between Patient, Physician, and Attorney*, S. ILL. U. L.J. (forthcoming).

41. See Kraman & Hamm, *supra* note 2, at 964.

42. See *id.* at 965.

43. *Id.* at 964.

44. The statistics reported in Kraman & Hamm are aggregate statistics (e.g., showing means and frequencies). While some inferences about the distribution's shape may be drawn from them, as they do not give precise information on the shape of the underlying distribution of data, these are probable inferences, but by no means certainties. See *id.* at 965.



ing apology, for medical errors?<sup>45</sup> Might it simply be that the Lexington VA committed fewer, less serious errors during this period than the other hospitals? These are certainly valid questions. The Lexington VA's experience may have resulted from many possible causes, and, as a single case study, its results are subject to multiple interpretations.<sup>46</sup> Yet, while such concerns should be recognized, they should not be overemphasized. The data appear to show that the Lexington VA's new policy of assuming responsibility, including apology, did not harm and may have helped the hospital financially. One cannot say for certain that this is so, but this seems to be a reasonable conclusion.

Many lawyers see only the obvious economic risks to apology but overlook the possible economic benefits.<sup>47</sup> Stepping back for a moment from the example of the Lexington VA, two reasons apology can be economically beneficial to the apologizer are as follows.<sup>48</sup> First, in some cases injured parties may refrain from suing if they receive an apology. Often a "vicious cycle" exists where following an error, an injurer (e.g., physician) wants to apologize but refrains from doing so out of fear of legal liability, and it is precisely this absence of an apology that triggers the lawsuit.<sup>49</sup> For example, one study found that twenty-four percent of the families who sued their physicians following prenatal injuries filed medical malpractice claims when "they realized that physicians had failed to be completely honest with them about what happened, allowed them to believe things that were not true, or intentionally misled them."<sup>50</sup> While there are some patients who say that they would

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45. *Id.* at 964-66.

46. The Kraman and Hamm study is at root a descriptive study using comparative data, rather than a casual study testing hypothesis through methods such as experimentation. See Kraman & Hamm, *supra* note 2.

47. See Cohen, *supra* note 1, at 1042-46.

48. Some other reasons that apologizing following injury can be economically beneficial to the injurer, such as facilitating error prevention, are discussed below. Note that apologies also can offer non-economic benefits to the apologizer such as helping to repair a damaged relationship or alleviate guilt.

49. See Cohen, *supra* note 1, at 1011-12.

50. Gerald B. Hickson et al., *Factors That Prompted Families to File Medical Malpractice Claims Following Prenatal Injuries*, 267 JAMA 1359, 1361 (1992). In addition, 19% said they filed suit because of the "desire to deter subsequent malpractice by the physician and/or seek revenge," concerns that may also have been met by apology. *Id.* See also Charles Vincent et al., *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 LANCET 1609, 1612 (1994) (finding that 377 British patients and their families might not have brought malpractice suits had there been a full explanation and apology — and arguing that these are more significant factors than monetary compensation in determining whether to file a suit). For other related references, see Cohen, *supra* note 1, at 1011 n.7.

not have sued if they had received an apology but in fact would have, surely there are some patients who can be taken at their word.<sup>51</sup> Second, an apology can greatly facilitate the settlement process and thereby reduce settlement costs.<sup>52</sup> An apology often cannot substitute for compensation for the injury but can be a way of avoiding compounding insult upon the injury—insult that can prevent settlement.

I am not reducing apologies to mere matters of economics or suggesting that parties make insincere apologies solely for strategic advantage. Apology should be rooted in responsibility and remorse rather than in economics and strategy. It is the ethical response to injuring another, irrespective of the economic consequences. However, I think that parties often fail to make apologies out of their fear of adverse economic consequences and thereby fail to seriously consider both the potential risks and benefits of apology.<sup>53</sup> As VA hospital lawyer Ginny Hamm described, "The attorneys around here in Lexington used to think we were crazy [when we initiated our new policy]."<sup>54</sup> As one who studies the possible benefits and risks of apology, I can attest that many attorneys and legal academics greet the idea that apology can financially benefit the apologizer with much skepticism. The Lexington VA's experience helps refute the skeptic's view that apology necessarily entails financial suicide. Rather, it indicates the opposite: apology can be to the apologizer's financial benefit.

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51. The experience of one of my colleagues illustrates this poignantly. His first-born son, who recently died, was born with a rare metabolic disease. When he was fourteen months old, the child suffered a stroke and developed persistent seizures, the prevention of which required very high doses of powerful anti-convulsant medications. Several weeks into the child's hospitalization for the stroke and seizures, my colleague, who was then a law professor, received a telephone call at work from the doctor in charge of his son's care. The doctor instructed my colleague to come to the hospital as soon as possible. When my colleague arrived, the doctor informed him that the child had slipped into a coma and that it probably happened as a result of an accidental overdose of the anti-convulsant medication. He then apologized for the incident. Fortunately, the child survived the mishap. Upon hearing these events, I asked my colleague whether the physician's apology made any difference. His response was simple:

Because the doctor apologized, we would never have sued. Everyone is human. In fact, the fact that he was honest gave us greater confidence in his future evaluations and recommendations concerning my son's care. But if he hadn't been honest — if he had denied the mistake and I had somehow found out later — I would have considered suing him because it would have raised doubt about my son's entire course of care.

52. See Cohen, *supra* note 1, at 1019-23.

53. See *id.* at 1022-23.

54. Gerlin, *supra* note 5.

One may ask whether other organizations, particularly private organizations, can achieve cost savings by adopting this approach of assuming responsibility, including apology and fair offers of compensation. At this point, I think the best one can say is that this is an open question, which is itself a significant statement. As noted above, under the FTCA, the Lexington VA faces reduced liability exposure when apologizing as compared to a private hospital or other private organization, which may in part help explain the willingness of the Lexington VA to apologize. However, even in the private sector, an approach of assuming responsibility by an organizational defendant can yield surprising results.

Consider the experience of the Toro Company ("Toro"), a major manufacturer of lawn care products including power mowers, blowers and trimmers. Toro is subject to many personal injury claims, roughly one hundred and twenty five annually.<sup>55</sup> For years, "Toro handled all lawsuits filed against it by immediately referring them to outside counsel to be aggressively defended. [The strategy, said] Toro's assistant general counsel James Seifert, could be summed up as 'litigate everything'."<sup>56</sup> In 1991, Toro decided instead to respond to claims in a non-confrontational manner by offering to mediate them.<sup>57</sup> In mediation, after exchanging essential information about the claim, Toro's counsel would typically express sympathy for the claimant's injury and then make what Toro saw as a fair offer of settlement. Note, however, that while Toro commonly expressed sympathetic words, it appears that Toro typically did not apologize in the sense of admitting its own fault.<sup>58</sup>

Despite much initial skepticism from the defense bar,<sup>59</sup> the net result was that under this new approach Toro settled claims far more rapidly and at far less cost. Pre-1991, the average lifespan of a claim from filing until settlement or verdict was twenty-four months, whereas from 1992 to 1996, the average lifespan was four

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55. J. Stratton Shartel, *Toro's Mediation Program Challenges Wisdom of Traditional Litigation Model*, 9 INSIDE LITIGATION 10 (June 1995).

56. *Id.*

57. John J. Upchurch, *Pre-Litigation Resolution of Claims through Early Intervention/Mediation*, THE REVOLUTIONIZING LITIGATION MANAGEMENT REPORT, June, 1995, at 9; see also John D. McKinnon, *Cutting Legal Fees*, FLORIDA TREND, May 1996, at 27 (describing Toro's adoption of mediation "as a way of trimming its fast-growing litigation cost"); Miguel A. Olivella, Jr., *The Toro Company's Early Intervention ADR Program* at 3 (Sept. 1999) (unpublished paper on file with *Fordham Urban Law Journal*) (describing the adoption of a "pre-litigation intervention program that featured mediation as the cornerstone of claims disposition").

58. See *infra* notes 59-64 and accompanying text.

59. See Olivella, *supra* note 57, at 4.

months. Pre-1991, the average payout per claim on both verdicts and settlements was \$68,368. From 1992 to 1996, it was only \$18,594. Pre-1991, the average costs and fees per claim were \$47,252. From 1992 to 1996, they were only \$12,023. In sum, Toro's average total cost per claim fell from \$115,620 to \$30,617, saving Toro \$54,329,840 during that period. In addition, Toro saved on insurance costs.<sup>60</sup> Based upon the documented liability savings following the adoption of the new program, Toro's liability insurance premiums were reduced by \$1.8 million per year for three years, after which Toro opted to self-insure.<sup>61</sup> The savings have continued beyond 1996. Toro's counsel Miguel Olivella, Jr. estimates that by 1999, the Toro company saved over \$75 million from the new approach to settlement that it had adopted in 1991.

Several comparisons between Toro's program and that of the Lexington VA should be made. First, Toro attempts to settle their cases within mediation. This setting frequently provides statutory confidentiality protection. Further, Toro insists upon written confidentiality agreements designed to exclude statements made within the mediation from admission in court. As with the Lexington VA, here too is a case where special legal provisions, though of a different sort, help to promote settlement. Second, the cost savings in legal fees per claim were considerable, falling by seventy-four percent from \$47,252 to \$12,023. In the Lexington VA case, the data on decreased litigation costs were far less precise; however, Toro's experience is suggestive of how significant rapid settlement can be in reducing litigation costs. Third, unlike the Lexington VA, Toro does not usually apologize in the sense of admitting fault during the mediation. Consider the words of Mr. Olivella,

Apology to an injured claimant has been something I do from the beginning [of the mediation]. It lets the claimant know that despite the accident's fault, no one takes any pleasure in knowing that a human being has been injured, seemingly putting the claimant more at ease when he discovers that the company is not the cold, cruel evil empire he may have thought we were. In the context of a mediation, it is possible to act in such a fashion without it being a sign of weakness.<sup>62</sup>

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60. *See id.* at 12-13. Based on such remarkable results, Toro's program received in 1994 the Center for Public Resource's Institute for Dispute Resolution Significant Practical Achievement Award. *See Shartel, supra* note 55, at 10.

61. Olivella, *supra* note 57, at 9.

62. Electronic correspondence from Miguel A. Olivella, Jr. to Jonathan R. Cohen (Dec. 3, 1999).

Some may describe this statement as crafty. By strongly expressing sympathy, the statement gives the claimant the feeling of having been apologized to without an actual admission of Toro's fault. I, however, do not see it as fundamentally duplicitous. Unlike the Lexington VA, Toro typically has limited information about the cause(s) of the accident. Whereas the Lexington VA has access to most of the relevant factual information concerning its role in a malpractice claim, Toro often does not. Hence, even if Toro sought to admit its fault fully at the commencement of the mediation, it would be difficult to know exactly what Toro should admit. Rather, I would suggest that Mr. Olivella's statement, though loose in its use of the word "apology," is suggestive of a richer sense of humanity<sup>63</sup> and perhaps a more complex understanding of responsibility<sup>64</sup> than is seen in most litigation.

Professor Owen Fiss has argued that justice is what takes place in a courtroom and that the settlement process is an inferior substitute, "a highly problematic technique for streamlining dockets . . . [and] a capitulation to the conditions of mass society [that] should be neither encouraged nor praised."<sup>65</sup> Yet our current system of litigation is largely based upon parties denying responsibility, and thus forcing the opposing party to prove one's fault rather than directly accepting responsibility and admitting those acts that one understands to be one's fault. By apologizing, parties assume responsibility for their mistakes rather than denying it. If the injurer is willing to apologize, surely this is the preferable path. Further, our legal system usually leads to dichotomized understandings of rights, bifurcating responsibility when it can be more just to apportion the responsibility.<sup>66</sup> Settlement discussions, by contrast, frequently produce understandings of shared and partial responsibility. Perhaps Mr. Olivella's statement, "despite the accident's fault," reflects a more complex understanding of responsibility, and hence of justice; than is found in most litigation.

It is easy to be "hard-nosed" and reflexively conclude without evaluation that approaches of assuming responsibility for injuries,

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63. *Id.* ("[N]o one takes any pleasure in knowing that a human being has been injured, seemingly putting the claimant more at ease when he discovers that the company is not the cold, cruel evil empire he may have thought we were.").

64. *Id.* (observing that, through mediation, Toro acknowledges "despite the accident's fault").

65. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

66. See John E. Coons, *Approaches to Court Imposed Compromise — The Uses of Doubt and Reason*, 58 NW. U. L. REV. 750 (1964); John E. Coons, *Compromise as Precise Justice*, 68 CAL. L. REV. 250 (1980).

including apology, increase legal expenses. The Lexington VA's experience is one striking example where accepting, rather than denying, responsibility for errors, including making a fault-admitting apology, was financially viable, if not beneficial.<sup>67</sup> While Toro does not typically make fault-admitting apologies, its response of accepting financial responsibility in mediation rather than denying it through litigation has produced tremendous economic savings for Toro. Such experiences should make even the most "hard-nosed" skeptic take a second look at the potential economic benefits to the injurer of accepting responsibility for injuries, including apology. While the best motives for responsible approaches, including apology, are not financial, for those driven solely by financial considerations, the question is not whether such approaches can save money, but where and when they can.<sup>68</sup>

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67. Some may question whether the aforementioned reports on the experiences of the Lexington VA and the Toro Corporation could be biased due to the sources of the reports. The main report of the Lexington VA's experience was written by Kraman and Hamm, who were also central in creating and implementing the hospital's new policy. Similarly, some of the reports on Toro come from Miguel Olivella, Jr., who was central in creating and implementing Toro's program. That said, independent sources help confirm both accounts: Kraman and Hamm's article was subject to peer review; both the Lexington VA and Toro were reported in journalistic accounts; and Toro received a national award for its program.

Perhaps the concern about possible bias should be applied to this paper as well. Below, I use the Lexington VA's experience as a springboard for speculating about the possible effects — and generally positive effects — of apology in the organizational setting. In so doing, I have tried to be objective. However, as one who believes in the potential of apology, perhaps what I "see" in the data, especially when some of that data is anecdotal rather than statistical, may too be biased. For example, while Kraman and Hamm believe, based upon their experience, that the hospital's new approach of apology helped reduce future mistakes, they have no "hard data" to confirm this. Rather, they simply mention instances in which systemic reforms were made following investigations of errors. They cannot say for certain that such reforms would not have been made absent the approach of assuming responsibility. See Telephone Interviews with Kraman, Hamm & Johnson, *supra* note 4. Hence, I stress that below I offer *conjectures* about some organizational dimensions of apology. Evaluating the validity of such conjectures awaits further research.

68. Elsewhere, I have argued that we ought to consider reforming our laws to exclude apologies from admissibility as evidence and thus encourage, rather than discourage, apologies after injury. See Cohen, *supra* note 1. See also Orenstein, *supra* note 1. The experiences of the Lexington VA and Toro help to support this argument. The Lexington VA's fault-admitting apologies and the Toro company's apologetic expressions of sympathy both arose in contexts where the liability exposure engendered when making such statements was limited as compared to typical litigation by particular legal rules, viz., the FTCA and mediation confidentiality provisions respectively. This is not to discount the significance of the actions of the Lexington VA or Toro. Rather it is to say that creating more "safe" havens whereby an apology could not be used as evidence in court against the apologizer (e.g., creating an independent eviden-

## I. LEARNING TO PREVENT FUTURE ERRORS

There can be little doubt that organizations are more likely than individuals to commit multiple, serious injuries over time. This is not a statement about the morality or intentions of organizations but simply a reflection of their size. Consider car accidents. Individuals involved in more than twenty accidents over their lifetime are rare. By contrast, a large organization with a fleet of vehicles, such as the U.S. postal service, may be involved in thousands of accidents each year. A doctor may be considered unfortunate if he is sued even once for malpractice in a given year, but the hospital at which he works may expect to receive dozens of such suits annually.

This basic difference raises a possible collateral benefit of apology in the organizational setting: learning to prevent future errors.<sup>69</sup> Both individuals and organizations can learn from their errors, but with organizations, the possibility of preventing future errors and lawsuits is much greater. Errors frequently stem from internal deficiencies and can afford particularly valuable learning experiences.<sup>70</sup> For example, in the nuclear power and aviation industries, extensive investigations of accidents and “near misses” are undertaken with the central aim being to undercover systemic

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tiary exclusion for apologies) would likely help foster apology and thus promote settlement.

How exactly the use of such mechanisms bears upon the sincerity of the apology is a more complex question. See Cohen, *supra* note 1, at 1067-68 (arguing that apologies made within “safe havens” can be both sincere and ethically acceptable, provided that both sides understand that the apology is offered within such a mechanism). Cf. Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135 (2000). While there is merit in the concern that apologizing within a “safe” mechanism may “cheapen” the moral act of apology, it should be noted that, where an apology is offered within a “safe” mechanism, (a) the injured party can and should take note of the context in which the apology is offered, and (b) the apologizer always has the option of making an offer of financial compensation along with the apology. Thus, “safe” mechanisms increase the modes of communication available to the parties. Absent such “safe” mechanisms, we are more likely to witness the vicious cycle discussed above whereby the injurer fails to apologize out of fear of liability and it is precisely the absence of the apology that triggers the lawsuit.

69. The cost of medical errors is tremendous and has recently received much attention. See TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM 1 (Linda T. Kohn et al., eds., 1999)(reporting studies estimating that between 44,000 and 98,000 Americans die each year from medical errors, which is more than from motor vehicle accidents, breast cancer or AIDS).

70. On evaluating the sources of medical error, see *id.* at 42-48 (distinguishing between “active” errors and “latent” or systemic errors stressing the need to reduce the latter); see also Liang, *Error in Medicine*, *supra* note 40.

problems and thereby prevent future errors.<sup>71</sup> As part of its approach of “assuming responsibility,” the Lexington VA undertook a “root cause” analysis once an error was reported and, on multiple occasions, implemented systemic changes to prevent such future errors.<sup>72</sup>

What exactly is the link between apology and preventing future errors? Could an organization fully investigate errors and undertake systemic reforms without embracing an external apology? While such investigation and reform are possible without apology, I believe that they are facilitated by apology. As an act of external honesty, openness and humility, apology can facilitate the same internally and thus promote change. When an organization adopts the stance of assuming responsibility for its errors, its members are likely to be more prompt in reporting errors,<sup>73</sup> more honest in investigating them, and more willing to embrace reform. Common wisdom suggests that “you can’t fix a problem until you admit you have one.” I believe this applies both to individuals and to organizations. The converse may also be true. Organizations that deny or “cover up” problems may face difficulties not only in correcting those errors but in maintaining internally honest communication. Further, they risk damaging corporate morale.

Often members of organizations fail to report the errors they commit internally to their superiors and externally to those they harm. For example, one study found that “[h]ouse officers reported discussing the mistake with the supervising attending physician in only 54% of cases . . . [and] discussed the mistake with the patient or patient’s family in only 24% of cases.”<sup>74</sup> No doubt, part of this failure is motivated by liability concerns. A doctor may correctly think, “If I tell either the patient or my boss about the mistake I made, that admission will just come back to be used against me in court, but if I keep it to myself, I may well get away with it.” Such concerns have led to the arguments that we should consider

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71. See Liang, *Error in Medicine*, *supra* note 40, at 28-31. As with nuclear power and aviation, medical errors arise within complex systems and can result in grave consequences.

72. Telephone Interviews with Kraman, Hamm & Johnson, *supra* note 4.

73. For errors to be properly investigated, prompt reporting is best so that the investigation can begin when people’s memories are fresh and the equipment is still in place.

74. Albert Wu et al., *Do House Officers Learn from Their Mistakes?*, 265 JAMA 2089, 2092 (1991).



excluding both internal reports of medical errors and external apologies from admissibility in court.<sup>75</sup>

Putting aside the question of whether the legal rules about the admissibility of such internal reports and external apologies should be changed, my suspicion is that when an organization expresses its willingness to accept the responsibility for errors, its employees become more willing to report their own errors and those of their co-workers. Just as external denial may breed internal denial, external responsibility may breed internal responsibility. By accepting responsibility for its errors, including apology, the Lexington VA implicitly gave its employees a message that, "It's okay for you to be open when you err, for we will be open with that information. We aren't going to hide it, so you need not either." The hospital's experience reflected this. Since the hospital initiated its new approach in 1987, there has not been, in the risk management committee's assessment, a single non-frivolous malpractice claim against the hospital where the hospital did not first learn of the medical mistake through internal reporting.<sup>76</sup>

Apology may also help enlist the injured party's involvement in the error reduction process. Sometimes injured parties will have information relevant to or ideas about error prevention that they are unwilling to share absent an apology. Suppose that an organization is trying to correct an internal pattern of sexual harassment. While the organization could attempt to correct the problem without input of those who have been harassed, such input would be highly valuable, and absent an apology, that input may be much more difficult to obtain. Just as organizations have an incentive to prevent future injuries, so do those who are injured. Apology can be critical to building a "team" approach to error prevention between the injurer and the injured.

To some, the possibility that openly admitting mistakes and accepting responsibility for them, including apology, could decrease legal costs, or the possibility that the evidentiary immunization of reports of medical error could decrease the level of medical error seems counterintuitive. The key is the difference between short-

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75. On internal reports of medical errors, see Liang, *Error in Medicine*, *supra* note 40, at 39-43 (indicating that such internally reported information will often be discoverable in subsequent litigation despite the peer review privilege and arguing for legal reforms to ensure the confidentiality of such information); see also TO ERR IS HUMAN, *supra* note 69, at 94-113; Cohen, *supra* note 1 (arguing for consideration of evidentiary reforms to exclude apologies from admissibility to prove fault in court); Orenstein, *supra* note 1.

76. Telephone Interviews with Kraman, Hamm & Johnson, *supra* note 4.

run effects and long-run dynamics, dynamics that include the possibility of learning. For example, suppose that society wishes to decrease the incidence of an undesirable event like medical malpractice. How can this best be achieved? Generally speaking, the "legal" approach is to sanction instances of that undesirable event: when a doctor commits an error, punish him. By doing so, the law gives doctors a strong incentive to avoid committing errors. In essence, such reasoning is rooted in a static microeconomic perspective: if one raises the price (i.e., expected cost, including the chance of detection and the level of punishment) of malpractice, doctors will commit less of it.

The world, however, is dynamic. While sanctioning doctors for medical errors gives doctors an incentive to avoid committing errors,<sup>77</sup> it may have other side effects. For example, if doctors become unwilling to share information with one another about their medical errors for fear that such revelations will be used against them in malpractice suits, then medical education, in the broadest sense, and error prevention may become less effective.<sup>78</sup>

In short, external apology can prompt the disclosure and the investigation of errors that is needed for preventive measures. A recent report in the *New York Times* illustrates the relationship between disclosure and error prevention within a private medical practice:

Dr. Michael Leonard, an anesthesiologist and chief of surgery for Kaiser Permanente in Denver, was operating on a cancer patient a few months ago when he reached into a drawer for medicine. Inside were two vials, side by side. Both had yellow labels. Both had yellow caps. One was a paralyzing agent, which Dr. Leonard had correctly administered to keep the patient still during the operation. The other was the reversal agent, which he

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77. Other factors, such as medical ethics and reputation, also give doctors strong incentives to avoid committing errors.

78. A parallel argument has been advanced concerning genetic patenting. In the short run, granting what is in essence a monopoly right for scientific discoveries is a powerful incentive driving such discoveries. However, if the monopoly rightholder is stingy in allowing others to license that discovery (and, if the rightholder is a corporation and its central motive is profits, why shouldn't it be?) or if the transactions costs (e.g., legal fees) involved in obtaining licenses are prohibitive, the long run effects of such a legal regime could be socially suboptimal. See Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 *SCIENCE* 698 (May 1, 1998) (suggesting that excessive patenting can produce an "anticommons" inhibiting overall scientific discovery). See also Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 *HARV. L. REV.* 621 (1998).

needed next. "I grabbed the wrong one," Dr. Leonard recalled. "I used the wrong drug."

It would have been easy for the doctor to keep quiet; the drug wore off and the patient was not harmed. Instead, he talked — to the surgeon and scrub nurses, the patient's wife and the hospital pharmacist, who has since relabeled the paralyzing agents with red stickers and put them in a separate drawer. He also talked to his five partners, whose reaction unnerved him.

"Four of the five of them said, 'You know, I've done the same thing,'" Dr. Leonard said. "One of them said, 'I did the same thing last week.' And I'm thinking, I've been chief of this department for five years. Now I'm chief of surgery. And nobody has ever said to me, 'We have this problem.' A lot of it comes back to this culture of silence."<sup>79</sup>

Until an organization is willing to admit its errors — and apologizing by definition involves admitting error — preventing future errors will be difficult.<sup>80</sup>

## II. DIVERGENT INTERESTS

Divergent interests are a second source of complexity regarding apology in the organizational setting. Below I discuss three salient features: principal-agent tensions between organizations and their employees, differences in risk preferences between organizations and individuals and self-insurance versus third-party insurance by organizations.

### A. Principal-Agent Tensions

An individual who injures another when working as an employee may ask whether revealing the mistake and apologizing for it will be in his best interest. However, for the organization, the relevant utilitarian question is whether apologizing will be in the organization's best interest.<sup>81</sup> Put differently, will the employee/agent do

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79. Sheryl Gay Stolberg, *Do No Harm: Breaking Down Medicine's Culture of Silence*, N.Y. TIMES, Dec. 5, 1999, at D1.

80. See Cohen, *supra* note 1, at 1014-15 (discussing definitions of apology).

81. The best reason to apologize is not a simple utilitarian one. A person should apologize when she has harmed another because it is the right thing to do, rather than because it is in her own self-interest (e.g., leading the other party to drop the case). See Cohen, *supra* note 1, at 1065-67 (discussing ethical concerns regarding apologies made for strategic purposes). However, when analyzing the principal-agent tension, it is simplest to focus upon the utilitarian perspective. For characterizations of the utilitarian model of choice, see Amartya Sen, *Behavior and the Concept of Preference*, in CHOICE, WELFARE AND MEASUREMENT 54 (1982); Amartya Sen, *The Formulation of Rational Choice*, 84 AM. ECON. REV. 385-90 (May 1994). See also Jonathan R. Cohen,

what is in the organization's/principal's best interest? For example, throughout the Monica Lewinsky scandal, Bill Clinton may have refrained from apologizing fully, including fully admitting those acts, for fear that such admissions would have cost him the Presidency. However, from the viewpoint of the Office of the Presidency, it might have been best for him to apologize fully, because irrespective of whether he was replaced, the integrity of the Office would have been upheld.

While principal-agent tensions are prevalent throughout society,<sup>82</sup> they can be particularly acute in the dispute resolution setting.<sup>83</sup> Not only are the interests of agents and principals commonly at odds in dispute resolution, but the strategic possibilities for interacting with the opposing side can also complicate matters further.<sup>84</sup> Moreover, economic theory suggests that such tensions cannot be eliminated fully. We cannot make them disappear, rather the best we can do is address and manage such tensions.<sup>85</sup>

In many hospitals, a doctor will refrain from revealing his error to the patient out of fear of adverse consequences, such as an increase in his experience-rated medical malpractice premiums.<sup>86</sup> Undoubtedly, part of what induces physicians at the Lexington VA to reveal their errors, both to patients and to hospital administrators, is that they are largely shielded from personal financial exposure.<sup>87</sup> While other factors may still weigh against their reporting of a mistake, such as risking their reputation or having the mistake reported to state licensing agencies or the National Practitioner Data Bank,<sup>88</sup> compared to a private physician, a VA physician assumes little personal risk by reporting his own mistakes. At root the VA system, rather than the individual physician, bears the

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*Reasoning Along Different Lines: Some Varied Roles of Rationality in Negotiation and Conflict Resolution*, 3 HARV. NEGOT. L. REV. 111, 111-22 (1998) (arguing that the recognition of the plurality of roles that reasoning plays is central to understanding negotiation and dispute resolution).

82. See PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS (John W. Pratt & Richard J. Zeckhauser eds., 1985).

83. See NEGOTIATION ON BEHALF OF OTHERS (Robert H. Mnookin & Lawrence Susskind eds., 1999).

84. See *id.* at 6-8.

85. See *id.*

86. For a fine overview of incentives in medical care, see Liang, *Patient Injury Incentives in Law*, *supra* note 34.

87. See 28 U.S.C. § 2674 (1994).

88. See Kraman & Hamm, *supra* note 2, at 966. On the National Practitioner's Data Bank, see 42 U.S.C.A. §§ 11101-11152 (1999) (section 11132 discusses the reporting requirement of sanctions taken by Boards of Medical Examiners).

brunt of the cost of the individual physician's mistake. This provides an incentive for VA physicians to reveal their mistakes and apologize for them.

### **B. Risk Preferences**

There are good reasons to suspect that individuals and organizations have different attitudes toward risk. First, organizations usually have far greater financial resources than individuals and are likely to be more risk neutral than individuals toward a given risk. Second, while a doctor may commit only one serious medical error a year, the hospital at which he works at may experience scores of such errors committed by different physicians per year. As a result, the hospital is able to spread the risks of a given legal strategy, such as apology, across multiple cases.<sup>89</sup> Both of these reasons suggest that, vis à vis a particular case, the organization is likely to be more risk neutral than the individual physician.

How does this apply to apology? The implication is not entirely clear. On the one hand, admitting a mistake and apologizing for it is a risky step. If the apology is not offered within a "safe" mechanism, such as certain mediations, then the opposing party can use the admission as proof in court. This suggests that organizations might be more willing to embrace apology than individuals. On the other hand, failing to apologize can also be a risky step, potentially destroying an already damaged relationship and resulting in a prolonged suit or punitive damages that might have been averted through an apology.<sup>90</sup> From an economic perspective, both apologizing and not apologizing can be seen as gambles. If organizations tend to be more risk neutral than individuals, one would expect organizations to embrace apology more often than individuals if apologizing is riskier than not apologizing.

### **C. Self-Insurance versus Third-Party Insurance**

A distinctive feature of the Lexington VA is that it self-insures. In contrast to many private hospitals that carry third-party liability insurance, the VA system does not, but as a large organization directly bears its liability costs. This too has ramifications regarding apology, since organizations and their third-party insurers may have divergent interests concerning apology.

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89. This reasoning also applies to claims, such as many private medical malpractice or automobile accident claims that are ultimately paid by insurance companies, as spreading risks across many cases lies at the heart of the insurance business.

90. See Cohen, *supra* note 1, at 1015-23.

Though at times an organization that has third-party insurance will be more willing to apologize than one that self-insures,<sup>91</sup> I suspect that self-insurance may actually promote apology overall. Third-party insurers may give little weight to some of the benefits of apology that an organization may value. For example, the Lexington VA's embrace of apology helped promote the well-being of its patients, its internal morale, and its reputation as a caring institution — all interests that a third-party insurer might very well disregard.<sup>92</sup>

Self-insurance also gives the Lexington VA greater control over its approach for handling errors, including apology, than would third-party insurance. Most insurance contracts impose upon the insured a general duty of cooperation with the insurance company in defense of the claim.<sup>93</sup> Some insurance contracts specifically prohibit the insured from voluntarily assuming liability, a restriction that some courts have taken as a condition precedent to the contract.<sup>94</sup> Hence, there is an issue of whether a hospital or doctor might void the insurance coverage by apologizing. The short answer to that question is “probably not,”<sup>95</sup> and I know of no case in which an organization's insurance coverage was voided by apologizing. However, this concern may still have a chilling effect on the use of apology by an injurer that carries third-party insurance.<sup>96</sup>

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91. An organization with third-party insurance may think, “It's the insurance company, and not we, who will have to pay for the cost of the mistake.” Consider one example. Following a crash off of Nova Scotia in which 229 people were killed, Swissair was forthcoming in assuming responsibility and seeking a settlement in which it accepted responsibility for compensatory damages provided punitive damages were dropped. See Hope Yen, *Swiss Airline Offers To Pay the Families of 229 Crash Victims*, SUN-SENTINEL (Fort Lauderdale), Aug. 6, 1999. The fact that Swissair carried third-party insurance was likely a factor. As Swissair's Chairman Philippe Bruggisser commented, “We are well insured and able to face [compensation payments.]” AIRLINE FIN. NEWS (Mar. 1, 1999).

92. Similarly, in the case of the individual injurer, he may have interests in apologizing (e.g., protecting his reputation or alleviating his guilt that a third-party insurer may disregard).

93. See JOHN A. APPLEMAN & JEAN APPLEMAN, 8 INSURANCE LAW AND PRACTICE § 4771 (1981); JEFFREY W. STEMPER, INTERPRETATION OF INSURANCE CONTRACTS § 31.9 (1994).

94. See APPLEMAN & APPLEMAN, *supra* note 93, § 4780; 14 COUCH ON INSURANCE 2D § 51: 22 (rev. ed. 1982).

95. See Cohen, *supra* note 1, at 1025-28.

96. See, e.g., Naneen K. Baden, *The Japanese Initiative on the Warsaw Convention*, 61 J. AIR L. & COM. 437, 464 (1995) (indicating that concerns, ungrounded in Baden's view, over increased insurance costs are a factor inhibiting airline companies from assuming responsibility for injuries). The central concern of Baden's article—that Japanese airline companies have sought to have restrictions on their liability for international accidents imposed by the Warsaw Convention removed—is intriguing. While

With the control of the "purse strings," may come some control not only over the litigation but the dispute resolution processes that precede it. I find it noteworthy that in the Toro example, soon after switching to a policy readily accepting responsibility within mediation, Toro switched from third-party insurance to self-insurance.

Third, self-insurance gives an organization a strong incentive to prevent future errors: the organization itself will have to pay for them. Therefore, if adopting a policy of apology will help prevent future errors, a self-insuring organization will be inclined toward it. Now compare this to an organization that carries third-party insurance. While an organization that carries third-party insurance does have an incentive to keep its insurance premiums from rising by preventing errors, having the insurance does reduce the "sting" of such errors.<sup>97</sup> Consider also the interests of the third-party insurance company. After the insurance contract is signed and the premiums are set, reducing future errors is no doubt a good thing. Fewer errors mean fewer claims payments and hence greater profits for the insurance company. Let us call this "incentive one." However, before the contract is signed, the insurance company has no incentive to help reduce future errors. Indeed, if ways could be found to prevent all future errors, the insurance company would be out of business for there would be no need to buy insurance. More generally, if one supposes that an insurance company's profits are tied to the volume of their business and that this volume is tied to underlying levels of errors, then an insurance company has little incentive to promote error reduction.<sup>98</sup> Let us call this "incentive two."

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denial may be a central part of American culture, assuming responsibility for mistakes, including apology, is far more prevalent in Japan. For references to the use of apology internationally, see Cohen, *supra* note 1, at 1013 n.10. See generally NAOMI SUGIMOTO, *JAPANESE APOLOGY ACROSS DISCIPLINES* (1999).

97. See, e.g., ROBERT H. FRANK, *MICROECONOMICS AND BEHAVIOR* 193-94 (1991).

98. A cynic might argue: "To err is human. To make money off of it is the business of lawyers and insurers. Thus, both lawyers and insurers benefit because errors occur." While it goes to far to say that lawyers or insurers actively seek to promote errors from such interests, perhaps it is right to view such passive beneficiaries and the systems within which they work with a critical eye. Recall Lincoln's advice, "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser — in fees, expenses and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough." Abraham Lincoln, *Lecture Notes*, in 2 COLLECTED WORKS OF ABRAHAM LINCOLN 81 (Roy P. Basler ed., 1953). More recently, some scholars have suggested that legal disputes may have a prisoner's dilemma element in which each side is better off getting a lawyer than not, but both sides are

I do not suggest that incentive two outweighs incentive one. Rather, I wonder whether incentive two decreases the desire of insurance companies to pursue approaches to dispute settlement, including apology, that might help prevent future errors as vigorously as self-insuring organizations. In short, a self-insured organization has a clear and direct incentive to prevent future errors and thus has a strong incentive to use mechanisms like apology. In contrast, where an organization buys third-party insurance, the organization's immediate incentive to avoid errors decreases, and the insurer's incentives may be mixed. By spreading the responsibility for errors between the organization and its insurer, some of the responsibility may get lost in the cracks.

### III. NON-PECUNIARY BENEFITS TO CORPORATE MORALE, PRODUCTIVITY AND REPUTATION

From both positive<sup>99</sup> and normative<sup>100</sup> perspectives, it is easy to conceive of organizations, like corporations, in largely economic terms. Yet corporations are more than just economic entities. They are centers of human activity, and as such, are and should be centers of moral activity too.

Though it is a mistake to envision perfect parallels between individual and organizational functioning, limited parallels do exist. An individual injurer who apologizes may relieve his internal sense of guilt and increase his self-esteem. Similarly, an organization that apologizes for errors may bolster its corporate morale. When Connie Johnson, a quality assurance nurse, states that, "Telling the truth is the right thing to do," or when Steven Kraman, the hospi-

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made worse off when both sides get lawyers. For discussions and references, see Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 510 n.7, 524 n.43 (1994) (suggesting lawyers may actually help solve this prisoner's dilemma).

99. See generally OLIVER WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* (1985) (arguing that firms arise because contracting to cover all future contingencies in the production process is impractical). For references to both economic and sociological approaches to understanding organizations and their interaction with the law, see Marc C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 L. & SOC. INQUIRY 903 (1996); Lauren B. Edelman, *The Legal Environments of Organizations*, 23 ANN. REV. SOC. 479 (1997).

100. See, e.g., Milton Friedman, *The Social Responsibility of A Business is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, § 6 (Magazine), at 32 (arguing that fidelity to shareholders requires corporate executives to seek profits and disregard broad conceptions of social responsibility). For a critique of narrow, role-based conceptions of ethical responsibility, see ARTHUR I. APPLBAUM, *ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE* (1999).



tal's chief of staff and chair of its risk management committee, states that, "Almost every risk manager and attorney says, 'We always tell the truth,' . . . But I don't know of any other hospital that goes out and calls the family when there's been an error[.]" the pride these people feel in the Lexington VA is apparent.<sup>101</sup> Such pride fosters organizational loyalty and productivity. Offering an apology after an injury is a matter of respect, and treating others with respect generates self-respect. In the medical setting, the ethical impetus to apologize for error is even stronger than in other organizational settings. Medical ethics require that physicians put the patient's best interests first, and it is hard to imagine many cases where, having been harmed by the doctor's errors, it is not in the patient's best interests for the doctor to apologize.

Some benefits associated with apologizing are external to an organization. For example, offering an apology can enhance an organization's reputation. Although some organizations would rather deny responsibility than admit error, other organizations benefit from embracing responsibility. For example, when the Lexington VA apologized to the Browns, the Browns gladly "came back" for more business.<sup>102</sup> Errors happen, and apologizing to customers following errors can promote greater customer loyalty and hence profitability. Goodwill can be a highly valuable corporate asset. Indeed, non-apology can have a price, and sometimes organizations may offer apologies because failing to do so would be too costly. For example, following reports of racism toward its own employees, Texaco repeatedly apologized publicly for that racism. While one may wonder whether such apologies were motivated primarily by sincere contrition or by the fear of losing customers who might otherwise have perceived Texaco as a racist organization and thus opt for non-Texaco products, the fear of losing customers was likely one motivating factor.<sup>103</sup>

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101. See Gerlin, *supra* note 5.

102. See *id.* (Of course, the Lexington VA may have remained the best financial choice for the Browns, but their attitude toward the hospital reflected more than finances.)

103. See Hanna Rosin, *Cultural Revolution at Texaco*, THE NEW REPUBLIC, Feb. 2, 1998, at 18:

[O]nce the Times story appeared [documenting Texaco's racism], Texaco CEO Peter Bijur quickly adopted a strategy known in public-relations circles as "total contrition." With [a] p.r. maven . . . at his side, Bijur issued a series of tortured apologies. "We care about each and every employee," he said on a satellite broadcast. "I care deeply. . . . I am sorry for our employees and both ashamed and angry that such a thing happened in the Texaco family."

The internal and external benefits to organizations of assuming responsibility often go hand in hand. Although apology was not involved, consider the effects of Johnson & Johnson's responsible response in the Tylenol poisoning episode.<sup>104</sup> Johnson & Johnson reacted to reports of poisoning by rapidly pulling Tylenol from retail shelves at a cost to Johnson & Johnson of over \$50 million.<sup>105</sup> Once it was confident the Tylenol supply was safe, Johnson & Johnson reintroduced the product with added safety features under the same brand name, rather than under a new brand name as many had suggested. John H. Bryan, Jr., chairman and chief executive officer of Sara Lee Corporation, commented,

[C]ommunity responsibility is an important measure of corporate excellence. By enhancing a company's reputation, it makes it easier to hire better people, easier to sell products, and easier to cope with difficult problems. For example, Johnson & Johnson well-deserved reputation as a good corporate citizen undoubtedly helped the Tylenol brands survive in the marketplace, despite the potentially devastating impact of the poisoning scares.<sup>106</sup>

Johnson & Johnson's responsible handling of the Tylenol episode seems to have also enhanced its external reputation. Note too that Johnson & Johnson's response did not occur in an organizational "vacuum." Instead, its response was consonant with its famed corporate credo of making responsibility to those who use its products, rather than its own profits, the corporation's first priority.<sup>107</sup>

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*Id.* Within two weeks, he turned the nightmare into an opportunity for enlightenment. He met with Jesse Jackson and Al Sharpton and asked for their help in making Texaco a "model of diversity." He bravely shouldered the historical burden. "The moment is now, and the responsibility is ours to demonstrate to the nation that discrimination can be eradicated. That true inclusion can exist. And that equal opportunity can be provided to every man and woman," he said, sounding totally contrite at a November 15, 1996, press conference. "We will work ceaselessly and tirelessly, day after day, to build a company of undisputed opportunity for all individuals." *Id.*

104. For descriptions, see *Tylenol's "Miracle" Comeback*, TIME, Oct. 17 1983, at 67 (observing that a year after the poisoning, public confidence was restored); Mark L. Mitchell, *The Impact of External Perilities on Brand-Name Capital: The 1982 Tylenol Poisonings and Subsequent Cases*, ECONOMIC INQUIRY, Oct. 1, 1989, at 601; John B. Cullen et al., *An Ethical Weather Report: Assessing the Organization's Ethical Climate*, ORGANIZATIONAL DYNAMICS, Sept. 22, 1989, at 50.

105. See *Tylenol's "Miracle" Comeback*, *supra* note 104.

106. John H. Bryan, Jr., *The Corporation and the Executive in the Community*, 1987 COLUM. BUS. L. REV. 695, 697-98. For a list of recent awards Johnson & Johnson has received for good corporate citizenship, see Johnson & Johnson, *Awards and Recognition* (visited Mar. 30, 2000) <[http://www.johnsonandjohnson.com/who\\_is\\_jnj/awards.html](http://www.johnsonandjohnson.com/who_is_jnj/awards.html)>.

107. The first paragraph of Johnson & Johnson's credo provides:

Legal expenses paid in compensation of injuries will typically appear on most organizations' balance sheets. However, many of the non-pecuniary benefits of apology (e.g., to organizational morale, loyalty, communication, productivity, reputation, and customer loyalty) will not typically appear on an organization's balance sheet. Hence, organizations that overly focus on short-term profits as reflected in balance sheets may tend to neglect apology. In some ways, a policy of apologizing for errors is like an investment: though the immediate price may be clear, the long run economic benefits, though real, are less defined. If the current CEO cares primarily about short-run profits, he may "underinvest" in an approach of apology that may financially benefit a future CEO.

#### IV. STANDING AND SCOPE

Two issues arising with apology in the organizational setting, but far less in the individual setting, are standing and scope.<sup>108</sup> By standing, I mean who has the moral authority to apologize. By scope, I mean what the apology will cover. When an individual acting on his own commits an injury, generally speaking, both standing and scope are clear: that individual should apologize to the extent that he believes himself to be at fault.<sup>109</sup> In the organi-

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We believe our first responsibility is to the doctors, nurses and patients, to mothers and fathers and all others who use our products and services. In meeting their needs everything we do must be of high quality. We must constantly strive to reduce our costs in order to maintain reasonable prices. Customers' orders must be serviced promptly and accurately. Our suppliers and distributors must have an opportunity to make a fair profit.

Johnson & Johnson, *Our Credo* (visited Mar. 30, 2000) <[http://www.johnsonandjohnson.com/who\\_is\\_jnj/cr\\_usa.html](http://www.johnsonandjohnson.com/who_is_jnj/cr_usa.html)>. The last paragraph of that credo provides, *inter alia*, "Our final responsibility is to our stockholders. Business must make a sound profit." *Id.* For a history of that credo, its significance within the organization, and mention of its influence of the organization's handling of the Tylenol episode, see Johnson & Johnson, *The History of the Johnson & Johnson Credo* (visited Mar. 30, 2000) <[http://www.johnsonandjohnson.com/who\\_is\\_jnj/cr\\_index.html](http://www.johnsonandjohnson.com/who_is_jnj/cr_index.html)>. Discussion of this credo forms an important component of ongoing employee training, especially among executives, and influenced how the Tylenol episode was handled. See Speech of David E. Collins, Formerly Member of Executive Committee and Vice Chairman, Board of Directors, Johnson & Johnson and the employee principally responsible for the management of the Tylenol crisis (Sept. 23, 1999, Notre Dame Center for Ethics and Religious Values in Business, South Bend, IN). Perhaps it is not surprising that Johnson & Johnson, a corporation that had both clearly articulated and regularly addressed its policy of corporate responsibility, acted so responsibly to the Tylenol poisoning episode.

108. For factors to consider when making an apology, including standing and scope, see Cohen, *supra* note 1, at 1047-52.

109. In some cases, a lawyer or other agent might offer an apology on the individual's behalf.

zational setting, standing and scope are less clear. If an employee's error injures a customer, who should apologize, the employee, the head of the organization, or an ombudsperson? What should that person say? In the case of the Lexington VA, Dr. Kraman, the hospital's chief of staff and chair of the risk management committee, offered an apology to the injured patient. Is he the right person? Could one argue that the person who committed the error (e.g., the treating physician) should be the one to apologize? After all, if Dr. Kraman did not make a mistake, what does he have to apologize for?

No doubt much will depend upon the particular facts of a situation, and it is beyond my aim here to fully explore the issues of standing and scope. Rather, let me suggest two levels at which these issues ought to be considered: the theoretical and the practical.

### A. Theoretical Level

At the theoretical level, one would think that standing and scope when making an apology should be tied to an agent's moral culpability. In the individual case, this means that a person who commits an error should apologize for that error to the extent that he believes himself at fault, and that, concomitantly, he has no moral capacity to apologize beyond the extent to which he believes himself to be at fault. The organizational context is more complex. In the organizational context, the injurer's fault can be both multidimensional and overlapping. The individual injurer may place the fault upon himself, "If only I had paid more attention the mistake would not have occurred." The organization may also see itself at fault and think, "We shouldn't have workers on twelve-hour shifts," or "We should have been more careful in screening those we hire," or, most generally, "We are responsible for what happens at our hospital."<sup>110</sup> *Respondeat superior* is not just a legal concept but a moral one: if the individual committed the injury while acting in his scope as an employee, then the organization bears some responsibility. As mentioned above, at the Lexington VA, apologies are typically offered by Dr. Kraman rather than by the individual

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110. The first two statements ("we shouldn't have workers on twelve-hour shifts" and "we should have been more careful in screening who we hired") point to systematic errors. The latter statement ("we are responsible for what happens at our hospital") does not point to a systemic error but simply represents a broad understanding of organizational responsibility.

who made the error. While this practice might be critiqued,<sup>111</sup> perhaps this policy stems in part from a broad understanding of organizational responsibility.

### B. Practical Level

Practical considerations also bear upon who should make an apology. Consider the case where the error is caused by an individual physician's mistake. At the Lexington VA, Dr. Kraman and Attorney Hamm suggest that the main reason to have Dr. Kraman rather than the erring physician apologize is practical: If the individual physician attends the face-to-face meeting with the patient, emotions tend to run very high, both on the part of the patient and on the part of the physician, and easily obstruct settlement.<sup>112</sup> In contrast, if the physician is absent, emotions tend to be much "cooler," thus settlement is facilitated.<sup>113</sup> Consider also the common case where following the injury, the organization discharges the injuring employee. That employee may be unwilling to apologize to the injured party, and if the organization wants to apologize to that party, it must select someone else to offer the apology. The scope and content of that apology will be quite different than had the injurer apologized directly, but the apology may still be of much value.

## V. POLICY ARTICULATION

While many individuals are highly reflective about how they should respond when they have injured another, few ever formally articulate a policy about it.<sup>114</sup> Generally speaking, there is no need. Even if the individual consciously decides on a particular approach,

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111. Albert Wu has critiqued the Lexington VA's practice, suggesting that the individual who made the error should offer the apology. *See* Wu, *supra* note 2, at 971.

112. Some may say that allowing strong emotions such as shame and anger to be released is ultimately helpful and hence that it is good when high emotions accompany apology rather than being buried or avoided. Yet such intense emotions may sometimes interfere with reaching a settlement, and, if reaching settlement is the goal, using agents can be helpful. For barriers to conflict resolution generally, see BARRIERS TO CONFLICT RESOLUTION (Kenneth Arrow et al. eds., 1995). For a discussion of the use of agents to at times overcome such barriers, see NEGOTIATING ON BEHALF OF OTHERS, *supra* note 84; Jeffrey Z. Rubin & Frank E.A. Sander, *When Should We Use Agents? Direct vs. Representative Negotiation*, 4 NEGOTIATION J. 4, 395, 395-401 (1988).

113. Telephone Interviews with Kraman, Hamm & Johnson, *supra* note 4.

114. Some individuals look for advice, such as psychological or religious prescriptions, about how to act when they have injured another, but that is quite different from articulating their own policies.

he can simply follow it without formally expressing it. Yet the situation is different with organizations. Organizations regularly articulate a variety of policies, for unlike individuals, organizations often need to formally articulate policies to implement them. Further, organizations are also more likely than individuals to commit multiple injuries over time, and the policies that they adopt may receive multiple applications.

From the viewpoint of a scholar studying dispute resolution, the ideal scenario would be if an organization formally articulated a policy, implemented that policy, collected data on the effects of that policy, and then formally revised that policy in light of the data. In such an ideal world, policies toward dispute resolution would undergo iterative design and development. Our world, however, is far muddier than that. Consider the experience of the Lexington VA. Following two large, adverse verdicts in 1985 and 1986, and also shortly after hiring Dr. Kraman and Attorney Hamm,<sup>115</sup> the Lexington VA implemented a new approach of assuming responsibility, including apology and a fair offer of settlement. Yet, in part due to bureaucratic complexities of working within the VA, a large government system,<sup>116</sup> this approach was not formally articulated as a hospital policy until 1999. In other words, the reality preceded the writing by more than a decade.

This suggests two questions: (i) to what extent is an organization's actual approach consistent with its articulated policy, and (ii) to what extent does policy articulation influence actual organizational behavior? It is beyond the scope of this paper to try to resolve such questions here. Let me simply suggest several considerations. Regarding the first question, organizations frequently articulate policies that members do not follow. For example, many hospitals have ethical guidelines calling for the reporting of medical errors, but medical errors often go unreported.<sup>117</sup> Second, the fact that policies are not always followed does not mean that the articulation of a policy has no influence. Articulating a policy may help an organization to follow it. For example, part of what influenced Johnson & Johnson to handle the Tylenol poisoning episode so responsibly was its credo.<sup>118</sup> Similarly, the Lexing-

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115. See Telephone Interviews with Kraman, Hamm & Johnson, *supra* note 4.

116. See *id.* Note, too, that the formal policy articulation in November 1999 slightly preceded the publication of Kraman & Hamm's study. See Kraman & Hamm, *supra* note 2.

117. See, e.g., Wu, *supra* note 74; TO ERR IS HUMAN, *supra* note 69, at 74-93 (discussing existing error-reporting systems and recommending reforms).

118. See *supra* note 107 and accompanying text.

ton VA may now feel more bound to follow the approach of assuming responsibility now that it has formally articulated that policy. Articulating a policy can be a form of self-constraint at the institutional level.<sup>119</sup> Though it may not work perfectly, it may still have some bite.

### CONCLUSION

The approach of the Lexington VA to medical errors over the past decade provides a glimpse of the potential of apology in the setting. In this paper, I have discussed the following issues concerning organizational apology: (i) the process of learning to prevent future errors; (ii) the divergent interests related to principal/agent tensions between organizations and their employees, risk preferences and sources of insurance; (iii) the non-pecuniary benefits to corporate morale, productivity and reputation; (iv) the standing and scope when apologizing; and (v) the effects of policy articulation.

Before ending, let me underscore several points. First, I do not suggest that under the current legal and economic arrangements, all organizations can adopt the approach of assuming responsibility for injuries, including apology, with financial consequences similar to the Lexington VA's. The legal and economic arguments governing VA hospitals and their employees, as well as the VA's historical relationship with its members, differ from those typical in the private sector.<sup>120</sup> Further, the medical setting has features,

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119. See THOMAS C. SCHELLING, *The Intimate Contest for Self-Command*, 60 PUB. INTEREST 94-118 (Summer 1980); JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* (1979).

120. Unlike the Lexington VA example, the private sector often presents the complexity of multiple defendants with multiple sources of insurance. Such multifaceted, structural differences between legal and economic incentives within the VA system as compared to private medical practice may help support arguments for multifaceted, structural reform of the latter. For example, if legal and economic incentives discourage private physicians from apologizing when they make errors, a question arises of whether structural reforms should be undertaken to change those incentives. See *TO ERR IS HUMAN*, *supra* note 69, at 3 ("A comprehensive approach to improving patient safety is needed. This approach cannot focus on a single solution since there is no 'magic bullet' that will solve this problem, and indeed, no single recommendation in this report should be considered *the* answer. Rather, large, complex problems require thoughtful, multifaceted responses."). Consider, too, the prevalence of apology under Britain's system of nationalized health coverage. See Frances H. Miller, *Medical Malpractice Litigation: Do the British Have a Better Remedy?* 11 AM. J. L. & MED. 433, 434-35 (1986) (describing how nationalized health care has fostered the markedly lower incidence of malpractice suits and much greater role of apology in cases of medical error in Great Britain); see also Charles Vincent et al., *supra* note 50.

such as pre-existing relationships between doctors and patients and an ethic of care, not found in many other contexts. Rather, experiences of organizations like the Lexington VA, the Toro Company and Johnson & Johnson suggest that, if only from a financial viewpoint, the approach of assuming responsibility for mishaps — at times even including apology — is worthy of much broader organizational consideration. Many lawyers fear that apology will inevitably produce financial ruin. The experience of the Lexington VA helps disprove that claim and thus shifts the discourse. From the financial viewpoint, the question is no longer whether the approach of assuming responsibility including apology can be economically viable, if not profitable, rather the question is where and when.

Second, this Article has considered the economic ramifications of apology, because much of the skepticism toward apology is rooted in economic concerns. I do not suggest, however, that adopting the approach of assuming responsibility, including apology, to injuries should be evaluated solely, or even largely, on economic terms. There is more to life than profits and more to apology than the economics of it. An apology is meant to show regret, and an insincere apology that is motivated by economic factors alone, rather than by internal remorse, is little apology indeed. Whether or not it is profitable to do so, individuals and organizations have moral obligations to apologize when they have injured another. Assuming responsibility is not just a matter of economics but of ethics.

Third, the above discussion of special issues concerning apology in the organizational context is a theoretical exploration. For example, I make no claim that by adopting an approach of assuming responsibility, including apology, an organization will necessarily decrease future errors, bolster corporate morale or ultimately benefit financially. The experience of the Lexington VA is but one “data point.” Rather than drawing deductive conclusions, my goal has been to inspect that “data point” closely and to use it as a lens for offering conjectures about some central dimensions of organizational apology. Evaluating such conjectures awaits future research.

When social systems are awry, it is easy to lose sight of the way things should be. In some respects, our current medical system, so driven by economics and the fear of malpractice liability that doctors are afraid to apologize to patients when they have made er-



rors, is a system gone awry.<sup>121</sup> The Lexington VA took a courageous step in adopting the approach of assuming responsibility, including apology, for errors. There was no doubt that this policy would better serve its patients. How good it is to see that it was also financially sound. Perhaps their experience can serve as an impetus for other organizations to consider embarking on similar paths.

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121. The same can be said of how injuries are handled generally within our society, with injurers frequently focused on avoiding, rather than accepting, responsibility.

# OF PARDONS, POLITICS AND COLLAR BUTTONS: REFLECTIONS ON THE PRESIDENT'S DUTY TO BE MERCIFUL

*Margaret Colgate Love\**

*[Pardon] has never been crystallized into rigid rules. Rather, its function has been to break rules. It has been the safety valve by which harsh, unjust, or unpopular results of formal rules could be corrected.<sup>1</sup>*

## INTRODUCTION

Few provisions in the Constitution are as misunderstood and underestimated as the President's power to pardon.<sup>2</sup> Most people today associate pardons with politics and controversy, and do not know that for much of our nation's history the pardon power was exercised regularly and without fanfare to give relief to ordinary people convicted of garden-variety federal crimes. Once an integral part of the justice system, pardon is considered anachronistic in an age devoted to rules and wary of discretion, a vestige of a simpler time whose occasional exercise is either capricious or pointless, or both. Indeed, until quite recently the prevailing view among criminal justice practitioners and philosophers was that the

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\* Lecturer in Law, Columbus School of Law, The Catholic University of America. I wish to thank Kathleen Dean Moore for her comments on an earlier draft of this article. Many of the opinions expressed in this article and some of its background information are the product of my seven years' service as Pardon Attorney in the Department of Justice, from 1990 to 1997.

1. 3 U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES: PARDON 295 (1939) [hereinafter SURVEY OF RELEASE PROCEDURES].

2. "The President shall . . . have Power to grant Reprieves and Pardons for Offences against the United States, except in cases of Impeachment." U.S. CONST. art. II, § 2, cl. 1. Sixty years ago, the introduction to what is still the only systematic study of the federal pardon power noted that "the vast majority of people have a very hazy idea of the meaning and of the implications of the President's pardoning power. The persistence of erroneous ideas, the lack of exact information, and the absence of publicity concerning the acts of the pardoning authority envelop the power in a veil of mystery." W.H. HUMBERT, THE PARDONING POWER OF THE PRESIDENT 6 (1941). In the intervening years, and notwithstanding episodic scholarly interest in particular sensational grants, the public understanding of the pardon power has changed very little, and constitutional texts devote little space to it. See, e.g., P. SHANE & H. BRUFF, THE LAW OF PRESIDENTIAL POWER (1988) (discussing pardon power on four of 811 pages of text).

time had come for pardon “silently to fade away — like collar buttons, [its] usefulness at an end.”<sup>3</sup>

At the same time, the intense competition for partisan advantage in matters touching on crime control has made pardoning politically problematic. This was brought home to the Clinton Administration in the summer of 1999 by the public furor that greeted the President’s offer of clemency<sup>4</sup> to sixteen members of a Puerto Rican nationalist group (“FALN”) who were serving lengthy prison sentences for terrorist offenses. The President defended his decision in terms of “equity and fairness,”<sup>5</sup> but it was widely criticized as a thinly-veiled attempt to curry favor with Hispanic voters in New York on behalf of his wife’s expected Senate candidacy.<sup>6</sup>

Given the great risk and uncertain return of pardoning, it seems less surprising that the President does it rarely than that he does it at all. But the concern for political risk threatens to become a self-fulfilling prophecy: as the power is exercised less and less frequently and produces fewer and fewer grants, it is more and more likely to be regarded with suspicion and cynicism.

It is unfortunate that the federal pardon power seems to have fallen into disuse and disrepute just when it appears that it might once again prove useful. The harsh inflexibility that has come to

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3. KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 84 (1989); see also Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power From the King*, 69 TEX. L. REV. 569, 604, 611 (1991) [hereinafter Kobil, *Quality of Mercy*] (the clemency power has been “trivialized,” having “failed to evolve with the rest of the judicial system”). Both Moore and Kobil argue for a revitalized role for pardon as an “extrajudicial corrective” for unjust outcomes of the legal system. See *infra* note 70.

4. The term “clemency” is a comprehensive term that has come to be used for all types of relief available pursuant to the pardon power, to avoid confusion with the narrower technical use of the term “pardon” in the Justice Department’s clemency regulations which denotes the limited grant of relief after completion of sentence. See Executive Clemency, 28 C.F.R. § 1.2 (2000). Clemency includes commutation of sentence, reprieve, and remission of fine, as well as full or unconditional pardon. The term “amnesty” is usually used where a grant of clemency is extended by proclamation to a class of individuals. Throughout this paper I have also used the constitutional term “pardon” in this same comprehensive sense, though I have attempted, where appropriate, to distinguish it from the post-sentence relief described in the Justice Department’s clemency regulations.

5. Letter from the President to the Honorable Henry Waxman, Ranking Minority Member, Committee on Government Reform (Sept. 21, 1999) [hereinafter FALN Letter] (copy on file with author).

6. See, e.g., Katherine Q. Seelye, *Ex-Clinton Lawyer Says Politics Had No Role in Clemency*, N.Y. TIMES, Sept. 18, 1999, at A10; Katherine Q. Seelye, *Clinton Says Clemency Plan Was Unrelated to First Lady*, N.Y. TIMES, Sept. 10, 1999, at B4; David Johnston, *Federal Agencies Opposed Leniency for 16 Militants*, N.Y. TIMES, Aug. 27, 1999, at A1.

characterize the federal criminal justice system in the past two decades is becoming a matter of public concern, in part because of "hard cases" in which the legally mandated punishment seems morally wrong, and in part because of a growing crime control infrastructure that reflects poorly on our national humanity. Also, for the first time in many years, questions about the role of clemency in capital cases are being raised at the federal level. There are many who believe that it is time to declare victory in our thirty-year war on crime, assess its costs, and begin the work of reconciliation. In this connection, it seems appropriate to take a fresh look at the presidential pardon power in the constitutional scheme.<sup>7</sup>

The FALN grants, along with several other recent clemency actions by President Clinton, are a hopeful sign that reports of pardon's death are greatly exaggerated. In this Article, I hope to contribute to its recovery by proposing that the President has a duty to pardon, not so much to do justice in particular cases, but to be merciful as a more general obligation of office. As background, I will briefly describe how in recent years the President's pardoning power has come to be neglected. In a final section I will suggest some ways in which the President can revive the power by making a more considered and generous use of it.

### A. The Evolving Role of Federal Pardons

What Alexander Hamilton called the "benign prerogative of pardoning"<sup>8</sup> has two quite different but equally public aspects. The first is to permit the President to dispense "the mercy of the government" where the outcome dictated by law seems harsh or unjust.<sup>9</sup> The second is to enable him to deal expeditiously with

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7. See Editorial, *Wrong Way on Pardons*, WASH. POST, Feb. 10, 2000, at A22 [hereinafter *Wrong Way on Pardons*] ("The Founders envisioned [the pardon power] as a robust political check on a criminal justice system that would inevitably produce excesses. With tremendous growth in the reach of federal criminal law, the need is greater than ever. Yet as this growth has taken place, the practice has withered."); Editorial, *The President's Pardons*, WASH. POST, Dec. 27, 1999, at A24 ("Given the harsh mandatory minimum sentences that govern drug offenses, including nonviolent offenses, there must be many cases where presidential clemency would be a powerful tool for justice. The president should not routinely second-guess the court system. But given the desultory use of this constitutional power over the past 20 years, there seems to be no danger of that. The danger, rather, is that a valuable check on the justice system has wilted into symbolism.").

8. THE FEDERALIST NO. 74, at 422 (Alexander Hamilton) (Penguin Books ed., 1987).

9. *Id.* ("The criminal code of every country partakes so much of necessary severity that, without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel."); James Iredell, *Address in the*

situations involving political upheavals or emergencies.<sup>10</sup> The pardon power is not subject to limitation by Congress<sup>11</sup> or the courts,<sup>12</sup> and the President is held accountable for its exercise only through the political process.<sup>13</sup> It has always been assumed (though evidently never authoritatively decided) that the power to pardon is one of the very few whose exercise the President may not delegate to a subordinate official, and in fact no President has ever tried.<sup>14</sup>

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*North Carolina Ratifying Convention, reprinted in 4 THE FOUNDERS' CONSTITUTION 17* (P. Kurland and R. Lerner, eds., 1987) [hereinafter *Iredell Address*] (“[T]here may be many instances where, though a man offends against the letter of the law, yet peculiar circumstances in his case may entitle him to mercy. It is impossible for any general law to foresee and provide for all possible cases that may arise; and therefore an inflexible adherence to it, in every instance, might frequently be the cause of very great injustice.”).

10. Hamilton considered the utility of pardon in case of domestic disorder: “[I]n seasons of insurrection or rebellion, there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth, and which, if suffered to pass unimproved, it may never be possible afterwards to recall.” *THE FEDERALIST* NO. 74, *supra* note 8, at 423. Iredell also mentioned pardon’s usefulness in time of “civil war,” and added the need to obtain the testimony of accomplices and to protect spies who have proved useful to the government. *See Iredell Address, supra* note 9, at 18.

11. *See In re Garland*, 71 U.S. 333, 380 (1866) (“This [pardon] power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders.”).

12. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 280 (1998) (“Pardon and commutation have not traditionally been the business of courts; as such, they are rarely, if ever, decisions appropriate subjects for judicial review” (quoting *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981))); *In re Grossman*, 267 U.S. 87, 121 (1925) (“[W]hoever is to make [pardon] useful must have full discretion to use it”); *see also Yelvington v. Presidential Pardon and Parole Attorneys*, 211 F.2d 642 (D.C. Cir. 1954) (the court will not compel compliance with internal Justice Department clemency regulations so as to interfere with administration of pardon power).

13. Proposals during the Constitutional Convention that the power be shared with Congress were rejected on grounds of efficiency, and on the theory that the President’s personal accountability to the electorate was a sufficient check on abuses. *See 2 THE RECORDS OF THE FEDERAL CONVENTION 419* (Aug. 25, 1787) (statement of Sherman) (M. Farrand ed., 1937) (rejecting proposals to allow reprieves until the ensuing session of the Senate, and to condition pardon on the consent of the Senate); *id.* at 626-27 (rejecting proposal to vest the power to pardon treason jointly in the President and the Senate); *see also* William F. Duker, *The President’s Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 501-06 (1977) [hereinafter Duker, *President’s Power*]. Hamilton argued that the pardon power was vested in “one man” rather than “a body of men” for two reasons: first, “the sense of responsibility is always strongest in proportion as it is undivided,” and second, “as men generally derive confidence from their numbers, they might often encourage each other in an act of obduracy, and might be less sensible to the apprehension of suspicion or censure for an injudicious or affected clemency.” *THE FEDERALIST* NO. 74, *supra* note 8, at 422-23.

14. *Cf. Terry Sanford, Messages, Addresses and Public Papers of Governor Terry Sanford, 1961-65*, 552 (1966), *quoted in* Elizabeth Rapaport, *Retribu-*

The public is most familiar with the occasions throughout our history when the pardon power was used for purposes of calming and unifying the country after a period of strife, notably the amnesties that have followed almost every one of our wars.<sup>15</sup> President Ford's pardon of Richard Nixon, which cost Ford his own political future, is properly regarded as a legitimate measure to restore what Hamilton called "the tranquility of the commonwealth."<sup>16</sup> Other examples of pardons granted in whole or in part for political purposes are President Jackson's pardon of the Baratavia pirates as a reward for their assistance in defending New Orleans in the War of 1812,<sup>17</sup> President Cleveland's pardon of Mormon settlers in Utah to shield them from prosecution for polygamy,<sup>18</sup> President Nixon's conditional commutation of Jimmy Hoffa's prison sentence barring

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*tion and Redemption in the Operation of Executive Clemency*, 75 CHI. KENT L. REV. (forthcoming 2000) (manuscript at 5-6, on file with author) ("To decide when and where such mercy should be extended is a decision which must be made by the executive. It cannot be delegated even in part to anyone else, and thus the decision is a lonely one. It falls to the Governor to blend mercy with justice as best he can, involving human as well as legal considerations, in the light of all circumstances after the passage of time, but before justice is allowed to overrun mercy in the name of the power of the state.").

15. Perhaps best known are the great Civil War pardon proclamations of Presidents Lincoln and Johnson. See *DUKER*, *supra* note 13, at 509-21. Also well known are the amnesties issued by Presidents Ford and Carter to persons guilty of military and selective service violations following the Vietnam War. See U.S. PRESIDENTIAL CLEMENCY BOARD, REPORT TO THE PRESIDENT (1975) [hereinafter CLEMENCY BOARD REPORT]; Proclamation No. 4483, 3 C.F.R. 4 (1978); see also Kent Greenawalt, *Vietnam Amnesty — Problems of Justice and Line-Drawing*, 11 GA. L. REV. 1 (1976). In addition, Washington used the pardon power to pacify the Whiskey Rebels in 1794-95; see 1 Annals of Congress 1411-1413; Adams also used the pardon power to bring an end to the Tariff Insurrection in 1800, see 1 Annals of Congress 1552-53; and, Madison used it on three separate occasions during the War of 1812 to persuade deserters from the army to return to service. See JAMES D. RICHARDSON, 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENT 413, 497, 528 (1897) [hereinafter RICHARDSON, MESSAGES]; see also BIBLIOGRAPHY OF AMNESTY IN AMERICA 22-24 (Morris Sherman ed., 1974). The pardon power was also used, as it had been in England, to man the military. See 1 Op. Att'y Gen. 341, 342 (1820). Presidents Wilson and Truman both issued a number of pardons to mark the end of the two world wars. See CLEMENCY BOARD REPORT, *supra*, at 374-79.

16. *Murphy v. Ford*, 390 F. Supp. 1372, 1374 (W.D. Mich. 1975) (rejecting challenge to pardon based on both timing and merits). See also Stephen L. Carter, *The Iran-Contra Pardon Mess*, 29 HOUS. L. REV. 883, 887 (1992) ("Although our national anger seemed to demand punishment for Nixon's crimes, Ford believed that in the long run, the national interest would be better served by enabling the ex-President to avoid prosecution, leaving him untouched by legal proceedings that would otherwise have kept alive our national obsession with Watergate, which, in retrospect, it was plainly time to put aside.").

17. RICHARDSON, MESSAGES, *supra* note 15, at 543-45.

18. See JAMES D. RICHARDSON, 13 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENT 5942 (1897).

him from union management after his release from prison,<sup>19</sup> and President Reagan's commutation of a foreign spy's life sentence in contemplation of a "swap" for several of our nationals imprisoned abroad.<sup>20</sup> Considerations of politics also underlay President Bush's Iran-Contra pardons,<sup>21</sup> as they did Jefferson's pardon of those convicted and sentenced during the preceding Federalist period under the Alien and Sedition Act.<sup>22</sup>

What is less well-known is that the pardon power has also been exercised by the President over the years on a more mundane and less visible level, to make exceptions to the law in a wide variety of circumstances. The archival records of clemency actions from George Washington's administration onwards reveal the frequent use of the pardon power to cut short a prison sentence, to delay an execution, to return forfeited property, and to restore civil rights.<sup>23</sup> For much of our history, several hundred pardons or commutations were routinely granted each year, most generating little public interest.<sup>24</sup> While there have been colorful clemency recipients in every period of our history — such as Eugene Debs, Tokyo Rose,

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19. Hoffa was unaware of the condition in the commutation warrant, inserted by White House Counsel John Dean, until after he had been released from prison, and sued to declare it unenforceable. See *Hoffa v. Saxbe*, 378 F. Supp. 1221, 1223-24 (D.C. 1974). His appeal of the district court's decision against him was dismissed after he disappeared and was presumed dead. See Leonard B. Boudin, *The Presidential Pardons of James R. Hoffa and Richard M. Nixon: Have the Limitations on the Pardon Power Been Exceeded?*, 48 U. COLO. L. REV. 1, 21-22 (1976).

20. See U.S. DEP'T OF JUSTICE, OFFICE OF THE PARDON ATTORNEY, WARRANTS OF PARDON, 1935-1999, *Exec. Grant of Clemency to Marian W. Zacharski*, June 7, 1985 [hereinafter WARRANTS OF PARDON].

21. See Proclamation No. 6518, 57 Fed. Reg. 62,145 (1992) (recipients of pardon among "the best and most dedicated of our countrymen," who were motivated by patriotism and not by hope of private gain, and whose prosecution resulted from the "criminalization of policy differences").

22. See Duker, *President's Power*, *supra* note 13, at 530; Kobil, *Quality of Mercy*, *supra* note 3, at 593.

23. Portions of these records from 1794 to 1935 are on microfilm in the Office of the Pardon Attorney. That office also retains the original pardon warrants from the first administration of Franklin Roosevelt until the present, as well as the originals of many pardon recommendations signed by the Attorney General addressed to the President. See WARRANTS OF PARDON, *supra* note 20. While pardon warrants are public records, pardon recommendations are generally not disclosed by the Department of Justice, even where a subject is deceased. Clemency case files are acceded to the National Archives on a regular basis in accordance with established records policies, except for a few involving notorious individuals or issues of special interest, and most are destroyed after a certain period of time.

24. See OFFICE OF THE PARDON ATTORNEY, PRESIDENTIAL CLEMENCY ACTIONS BY FISCAL YEAR, JULY 1, 1900 TO JUNE 20, 1945 (Mar. 24, 1999); PRESIDENTIAL CLEMENCY ACTIONS BY ADMINISTRATION, 1945 TO PRESENT (Feb. 1, 2000) [hereinafter, collectively, OPA CLEMENCY ACTIONS].

George Steinbrenner, Patty Hearst, and Marvin Mandel — the vast majority of pardons have gone unnoticed and unremarked.

Reflecting the pardon power's historically close ties with the operation of the criminal justice system, its administration has been entrusted to the Attorney General since the middle of the nineteenth century.<sup>25</sup> He is assisted by the Pardon Attorney, who is responsible for accepting and reviewing clemency applications and preparing recommendations for their disposition.<sup>26</sup> At least since the beginning of the twentieth century, with only a handful of exceptions, the President has made each clemency grant pursuant to a report and recommendation drafted by the Pardon Attorney and signed by the Attorney General or his designee.<sup>27</sup> In fact, pardon

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25. Until 1853, the Department of State administered the pardon power, perhaps reflecting the power's frequent early use to restore forfeited property and remit fines. A copy of each warrant was kept in longhand, as well as a separate ledger book containing a brief description of the offense being pardoned, and the reasons for the grant. Pardons that had the effect of cutting short a prison sentence were generally made pursuant to the recommendation of the prosecutor or sentencing judge. After 1854 the administration of the pardon power was shifted to the Attorney General, though warrants were still drawn up in the State Department. In 1893 President Cleveland by executive order formally transferred all administrative duties in pardon matters to the Attorney General. See Exec. Order of June 16, 1893 (on file at the Office of the Pardon Attorney). See also Reed Cozart, *Clemency Under the Federal System*, 13 FEDERAL PROBATION 3 & n.1 (1959). The first Justice Department clemency regulations, signed by both the Attorney General and the President, were issued in 1898. A complete set of clemency regulations, from the 1898 McKinley regulations to the current regulations approved by President Clinton in 1993, is on file at the Office of the Pardon Attorney.

26. See 28 C.F.R. §§ 0.35-0.36 (1983). In 1865 Congress appropriated funds to pay a "pardon clerk" to assist the Attorney General, and in 1891 the first Pardon Attorney was appointed. See 13 Stat. 516 (1865); 26 Stat. 946 (1891). The Pardon Attorney reported directly to the Attorney General until the late 1970s, when Attorney General Griffin Bell delegated responsibility for clemency matters, and supervisory authority over the Office of the Pardon Attorney, to the Deputy Attorney General. See Interview with Terrence B. Adamson, Special Assistant to the Attorney General, 1977-1979, in Washington, D.C. (Apr. 2, 2000). Since 1983 the Attorney General's responsibility for providing advice to the President in clemency matters has been delegated to the Pardon Attorney, but recommendations to the President are generally signed by the Deputy Attorney General. See 28 C.F.R. § 0.35 (Attorney General responsibility delegated to Pardon Attorney, whose clemency recommendations are made "through" the Deputy Attorney General). During most of the 1980s, the Associate Attorney General was responsible for supervising the criminal components of the Department, and for approving and signing clemency recommendations; in 1989, this responsibility was returned to the Deputy Attorney General, where it has remained.

27. By the late 1930s, the Attorney General was too busy with other matters to prepare a separate recommendation to the President in any but the most important or controversial clemency cases, and usually simply "endorsed" the recommendation of the Pardon Attorney. See HUBBERT, *supra* note 2, at 90 n.15. At some later point, probably during the Kennedy administration, the practice of having these "letters of



warrants often incorporate a reference to the Justice Department's recommendation. The degree to which the President has historically depended upon the Attorney General's advice in clemency matters is suggested by the fact that, until the Kennedy Administration, most applications that the Attorney General did not support were not even forwarded to the White House, but closed administratively without presidential action in the Pardon Attorney's office.<sup>28</sup>

Until the early 1920s, the pardon power was used most frequently to commute a prison term, often because of some miscarriage of justice or equitable defect in the underlying conviction, but more commonly because the prisoner was simply deemed to have served sufficient time in prison.<sup>29</sup> With the advent of indetermi-

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advice" personally signed by the Attorney General resumed. In addition, during the Kennedy administration, reports in summary form recommending denial of clemency (also signed by the Attorney General) were sent to the President. Previously, most cases in which the Department did not recommend favorable action had been closed administratively by the Pardon Attorney. See 1963 ATT'Y GEN. ANN. REP. 63 [hereinafter 1963 AG ANNUAL REPORT]. The Attorney General personally signed all clemency recommendations until about midway through the Carter Administration, when the Deputy Attorney General assumed this responsibility. See Interview with Terence B. Adamson, *supra* note 26.

28. See 1963 AG ANNUAL REPORT, *supra* note 27, at 63.

29. While in modern times the President has not usually disclosed his reasons for granting a pardon, the early pardon ledger books and the annual reports of the Attorney General between 1885 and 1931 record each clemency grant with the reasons for recommending relief. Many of these involve doubt as to guilt, lack of capacity, or excuse — a reminder of how relatively primitive our early justice system was. Sometimes the reasons for a favorable recommendation involve the prisoner's age or health (fear of contagion was as likely as imminent death to qualify a prisoner for early release) or immigration status (pardon to "avert deportation"); sometimes they reflect operational considerations like reward or immunity; sometimes they depend upon an official recommendation, including that of prison officials; and sometimes they are simply quaint (e.g., "to enable petitioner to catch steamer without delay," "to enable farmer prisoner to save his crops," and "not of criminal type"). See HUBERT, *supra* note 2, at 124-33. The range of reasons reveals the idiosyncratic sense of compassion in the recommending official. For example, Attorney General Charles J. Bonaparte observed in 1908 that:

I have always considered with especial care the possible claims to clemency of unenlightened and apparently friendless criminals, particularly those whose crimes might have been the fruits of sudden and violent passion, ignorance, poverty, or unhappy surroundings and to deal less favorably with applications on behalf of offenders enjoying at the time of the crime good social position, material comforts, the benefits of education, and a happy domestic life.

1908 ATT'Y GEN. ANN. REP. 8. Unfortunately, after 1931 these fascinating records were no longer compiled and published for reasons of efficiency, and they exist now only in the uncatalogued letters of advice signed by the Attorney General on file in the Pardon Attorney's office, a treasure trove for interested scholars. It has been Department policy for many years not to divulge the basis for its clemency recom-

nate sentencing and an administrative parole system, as well as greater opportunity to appeal convictions through the courts, pardon no longer played such a central operational role as a post-conviction remedy.<sup>30</sup>

While there were fewer commutations after 1930, however, post-sentence pardons "to restore civil rights" remained a popular way for the President to recognize and further the rehabilitation of criminals who had served their sentence and returned to a productive life in their communities.<sup>31</sup> Between 1932 and 1980, there were well over a hundred post-sentence pardons granted almost every year; in some years, the President signed more than 300 separate pardon warrants.<sup>32</sup> These grants were generally made on a

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mentations in particular cases, though general standards are set forth in sections 1-2.112 (pardon) and 1-2.113 (commutation) of the U.S. Attorney's Manual.

30. SURVEY OF RELEASE PROCEDURES, *supra* note 1, at 296 ("Are not judicial review and modern release procedures like parole sufficient to do all that pardon ever did — and do it better? To a large extent the answer must be yes.").

31. Under the Justice Department's first clemency rules promulgated in 1898 and continuing to the present, eligibility to apply for a post-sentence pardon depends upon satisfaction of a waiting period after release from prison (originally "a considerable period," and now five years). Unless granted for innocence, a pardon has no implications for the validity of the underlying conviction, and the conviction remains on an individual's record to be reported whenever requested. However, a presidential pardon removes disabilities imposed as a result of conviction under federal or state law. See Memorandum for Margaret Colgate Love, Pardon Attorney, Office of Pardon Attorney, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, U.S. Dep't of Justice, Re: Effect of a Presidential Pardon 1 (June 19, 1995) (presidential pardon relieves a federal offender of state firearms disabilities that attach solely by reason of a federal conviction); cf. *In re Elliott Abrams*, 689 A.2d 6, 9-18 (D.C. 1997) (holding that presidential pardon did not nullify court's authority to impose professional discipline based on conduct underlying the conviction). For some illustrations of the post-sentence benefits sought and gained through the pardon process, see Cozart, *supra* note 25, at 5-6; see also Henry Allen, *Uh, Pardon Me, Mr. President, Caspar & Co. Weren't the Only Ones Let Off the Hook Last Week*, WASH. POST, Jan. 1, 1993, at D1; Ted Gup, *For Seekers of Forgiveness at Lofty Levels, A Presidential Pardon*, WASH. POST, Apr. 17, 1987, at A21.

32. See OPA CLEMENCY ACTIONS, *supra* note 24. Franklin Roosevelt issued a total of 2721 pardons, commuted 491 prison sentences and remitted fines in 475 cases; Truman commuted 133 sentences and issued 1911 pardons. Eisenhower commuted 47 sentences and pardoned 1110 individuals; Kennedy commuted 103 sentences and pardoned 472 individuals; Johnson commuted 228 sentences and granted 959 pardons; Nixon commuted 63 sentences and granted 863 pardons; Ford commuted 27 sentences and granted 381 pardons; and Carter commuted 32 sentences and granted 534 pardons. See *id.* (numbers of commutations include both commutations and fine remissions). Until the Eisenhower Administration, each pardon grant was evidenced by its own separate warrant signed by the President. President Eisenhower began the practice of granting pardons by the batch, through the device of a "master warrant" listing all of the names of those pardoned, which also delegated to the Attorney General (or, later, the Deputy Attorney General or Pardon Attorney) authority to sign individual warrants evidencing the President's action. All but a few pardons today are granted

regular basis through the year, evidence that the business of pardoning was regarded as part of the ordinary housekeeping work of the Presidency.<sup>33</sup> More significantly, the percentage of pardon petitions acted on favorably remained high, approaching or exceeding thirty percent in every administration from Franklin Roosevelt's to Jimmy Carter's.<sup>34</sup> Even the number of commutations remained surprisingly high throughout this period, given the availability of alternative early release mechanisms like parole.<sup>35</sup>

During the Reagan Administration the number of clemency grants each year began to dwindle, both in absolute terms and relative to the total number of applications acted on. President Reagan pardoned a total of 393 individuals in eight years, compared to the 534 pardoned by his predecessor in four, and commuted only thirteen sentences. The percentage of Reagan's favorable actions in pardon cases dipped to a low point for the century of twenty percent, and his overall grant rate to thirteen percent. President

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pursuant to such a master warrant, though commutations are generally evidenced by separate warrants so that the prison warden can satisfy himself of the grant's authenticity.

33. See WARRANTS OF PARDON, *supra* note 20. Until the Bush administration, pardons were granted at periodic intervals throughout the year, with the exception of the Nixon grants which came only at Christmas. President Bush issued very few grants during his four years in office, but none at Christmas until the end of his term. Most of President Clinton's pardons have been granted a day or two before Christmas.

34. See OFFICE OF THE PARDON ATTORNEY, PRESIDENTIAL CLEMENCY ACTIONS BY ADMINISTRATION, 1900-1996 (through Jan. 31, 1996) (Jan. 31, 1996); PRESIDENTIAL CLEMENCY ACTIONS BY ADMINISTRATION AND RELIEF SOUGHT, 1969-1996 (through Jan. 31, 1996) (Jan. 31, 1996) [hereinafter, collectively, 1996 OPA CLEMENCY ACTIONS]. Because statistics on the total number of clemency applications acted upon were not compiled separately for pardons and commutations until 1967, it is impossible to tell exactly what percentage of pardon petitions alone were granted until the Nixon Administration. That said, Franklin Roosevelt granted 27.8% of *all* clemency petitions acted upon during his tenure, Truman granted 41.5%, Eisenhower granted 26.7%, and Kennedy granted 40.9%. (In light of the fact that Eisenhower commuted only 47 sentences in eight years, it is likely that his 1110 pardons represent more than 30% of the total number of pardon petitions acted on during his two terms.) Nixon granted 51% of the pardon petitions acted on during his tenure, and 26.3% of pardon and commutation petitions combined; Ford granted 39% of pardon petitions and 31.2% overall; and Carter granted 34% of pardon petitions and 21.6% overall. See *id.*

35. See *id.* Often the commutation took the form of sentence modification to make the petitioner eligible for parole, leaving the actual release decision up to the Parole Commission. See, e.g., WARRANTS OF PARDON, *supra* note 20 (granting clemency to Eileen Rock Lowe on October 27, 1983, for kidnapping, commuting the life sentence to 21 years' imprisonment, "which will make her immediately eligible for parole consideration"). Sometimes the sentence was reduced so as to make the recipient eligible for mandatory release on parole, thereby ensuring his supervision for at least some period of time after release.

Bush granted even fewer pardons: his sixty-eight grants<sup>36</sup> represented only seven percent of the pardon petitions acted on during his four years in office. Factoring in his three commutations, his overall grant rate is four percent. President Clinton's record at this point in his presidency is about the same as that of President Bush: during the seven years of his presidency, through the end of 1999, he has pardoned 145 individuals, or about thirteen percent of those whose pardon petitions were acted on during that period.<sup>37</sup> His fifteen commutations<sup>38</sup> and two fine remissions bring his overall grant rate through the end of calendar 1999 to about 4.5%.

One might predict that the reduced likelihood of favorable action on a clemency petition since the mid-1980s would be reflected in a corresponding reduction in the number of annual clemency filings. However, it appears that seekers after clemency remain ever hopeful. Since the beginning of the Clinton administration the rate of pardon filings has remained relatively steady at about 225 petitions each year, more than were filed annually during the Bush administration and almost regaining the level of filings during President Reagan's second term.<sup>39</sup> The number of commutation petitions filed annually has increased dramatically during the Clinton administration, up from about 150 each year during the Reagan

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36. This figure does not count the six Iran-Contra grantees, who did not file applications with the Pardon Attorney and were pardoned by proclamation. See 1996 OPA CLEMENCY ACTIONS, *supra* note 34.

37. It is difficult to compare President Clinton's pardon grant rate with that of his predecessors at this point in his term because of the large number of petitions filed during his administration that have not yet been acted on. While in the recent past the number of pardon cases carried over from year to year has tended to remain relatively stable, since 1995 the number of pending pardon cases has grown each year by about one hundred cases, so that 737 pardon cases awaited action in February, 2000. See OPA CLEMENCY ACTIONS, *supra* note 24.

38. Prior to the FALN commutations in 1999, President Clinton had granted only three commutations: one in 1994 to Ernest Krikava, a Nebraska hog farmer sentenced in 1993 to five months' imprisonment for perjury in a bankruptcy proceeding, whose clemency petition had attracted intense media interest and support of family farm groups; and two in 1995 to individuals convicted of drug trafficking offenses who had cooperated with the government. One of these was made to Johnny Palacios, sentenced in 1991 to 71 months' imprisonment for distribution of marijuana, whose cooperation the court refused to recognize for jurisdictional reasons; and the other was made to Jackie Trautman, sentenced in 1992 to 33 months' imprisonment (as reduced) for distribution of cocaine, whose cooperation had already earned her two sentence reductions from the court on motion of the U.S. Attorney. See WARRANTS OF PARDON, *supra* note 20.

39. See OPA CLEMENCY ACTIONS, *supra* note 24.

and Bush administrations, to an average of 500 annually after 1992.<sup>40</sup>

### B. Causes of Pardon's Decline

What lies behind the recent trend towards fewer pardons described in the preceding section? As noted above, statistics on annual clemency filings rule out a decline in demand, for there appears to be no slackening of interest in obtaining either sentence reduction or post-sentence relief. Indeed, there are few alternative early release mechanisms available to most federal inmates,<sup>41</sup> or other means of relieving many of the civil disabilities resulting from a conviction.<sup>42</sup> Finally, the declining rate of pardoning is too pronounced and too persistent to be the result of accident or coincidence. So it is reasonable to conclude that the declining number of clemency actions in recent years is the result of considered executive policy.

It has been suggested that pardon's modern "atrophy" is attributable to changes in penal philosophy: initially, in the early part of the twentieth century, "the rehabilitative ideal reduced the importance of pardons by giving their job to paroles and indeterminate sentencing."<sup>43</sup> Later, in the 1970s, the "new retributivism" rejected pardon as an unprincipled tampering with lawfully determined

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40. Given the negligible number of commutations since 1980, it is fair to assume that the increase in inmate petitions is attributable as much to the growth of the federal prison population and longer determinate sentences as to any realistic hope of favorable action.

41. The Sentencing Reform Act of 1984 abolished parole for persons sentenced after November 1, 1987, and provides only one avenue other than clemency by which an inmate may gain release prior to expiration of sentence. See 18 U.S.C. § 3582(c)(1)(A)(i) (1987) (providing that inmates may seek early release from the sentencing court, on motion of the Bureau of Prisons, "for extraordinary and compelling reasons"). An analogous provision is available for inmates serving paroleable sentences. See 18 U.S.C. § 4205(g) (2000). The Bureau of Prisons uses these provisions only in particularly extraordinary or compelling circumstances which could not reasonably have been foreseen by the court at the time of sentencing, generally interpreted to mean when the inmate is terminally ill and close to death. See 28 C.F.R. § 571.60 (2000).

42. See, e.g., Jamie Fellner & Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, in HUMAN RIGHTS WATCH & THE SENTENCING PROJECT (1998); OFFICE OF THE PARDON ATTORNEY, U.S. DEPARTMENT OF JUSTICE, CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY (1996); see also *Beecham v. United States*, 511 U.S. 368 (1994) (holding that federal felons may regain firearms privileges only through a federal restoration procedure, which currently is limited to a presidential pardon).

43. See MOORE, *supra* note 3, at 83.

penalties (“an unwelcome intrusion on an enlightened process”<sup>44</sup>). However, while it is certainly correct that pardon has not played an important role as a sentence reduction mechanism since the 1930s, the pardon power thrived long afterwards in the federal system as a means of relieving civil disabilities stemming from a conviction, of recognizing and encouraging rehabilitation, and of signaling official “forgiveness.”<sup>45</sup> While retributivism may resist unprincipled adjustments to punishment, it cannot account for an unwillingness to make merciful gestures that are largely symbolic. But now even this “stripped down and hollowed out”<sup>46</sup> form of clemency is threatened with obsolescence, bespeaking an official unwillingness to be merciful quite independent of a retributivist commitment to just deserts and truth in sentencing.

It appears more likely that pardon’s declining incidence since 1980 is attributable to the politics of crime control, a politics that has produced some of the most potent and divisive electoral issues of the last thirty years. Since the early 1980s, Republicans and Democrats have competed for advantage in a “race to incarcerate,”<sup>47</sup> producing a “prison industrial complex” with a powerful institutional constituency.<sup>48</sup> Politicians and bureaucrats alike have been far more interested in feeding the front end of the justice system through enacting more laws, hiring more prosecutors, and building more prisons, than in helping people avoid becoming enmeshed in the system in the first place, creating opportunities for them to earn their way to freedom, or finding ways to encourage

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44. *Id.* at 84; see also Rapaport, *supra* note 14, at 9 (“The neo-retributivist critique of clemency reflects, reinforces and expands upon the impulse to improve if not perfect criminal justice by circumscribing discretion.”).

45. See *supra* note 32.

46. MOORE, *supra* note 3, at 83.

47. Marc Mauer describes the interplay of crime and politics in the 1980s and 1990s. See MARC MAUER & THE SENTENCING PROJECT, *RACE TO INCARCERATE* 56-80 (1999); see also David Dolinko, *The Future of Punishment*, 46 *UCLA L. REV.* 1719 (1999) (discussing the recent growth in U.S. prison populations). In 1997, former President Jimmy Carter recalled that,

as a young Governor of Georgia, he and contemporaries like Reuben Askew in Florida and Dale Bumpers in Arkansas had ‘an intense competition’ over who had the smallest prison population. ‘Now it’s totally opposite, Mr. Carter said. ‘Now the governors brag on how many prisons they’ve built and how many people they can keep in jail and for how long.

*N.Y. TIMES*, Apr. 28, 1997, *quoted in* MAUER, *supra*, at 56.

48. Eric Schlosser describes this phenomenon as “a set of bureaucratic, political and economic interests that encourage increased spending on imprisonment, regardless of the actual need.” Eric Schlosser, *The Prison Industrial Complex*, *ATLANTIC MONTHLY* 51, 54 (Dec. 1998).

their reintegration into the community. It is hard to find a place for pardon in a system with such priorities.

The process by which pardon came to be devalued in the federal justice system was hastened by the Attorney General's decision in the Reagan Administration to delegate authority to approve clemency recommendations to the same subordinate official within the Department of Justice who exercised day-to-day supervisory responsibility over federal prosecutions.<sup>49</sup> This had important consequences for the independence and integrity of the Department's clemency program. Clemency recommendations prepared by the Pardon Attorney no longer carried the symbolic and political weight of the Attorney General's personal imprimatur, or reflected the perspective of the Attorney General's dual role as chief law enforcement officer and political adviser to the President. Rather, they increasingly reflected the perspective of prosecutors, in policy positions in Washington and in the field, who did not always have a clear understanding of or appreciation for clemency.<sup>50</sup> In this environment, it did not take long for the Department's clemency pro-

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49. See *supra* note 26. Since the late 1970s, the functions of reviewing the Department's clemency recommendations and supervising federal prosecutions have been performed by the same official, the Associate Attorney General for most of the 1980s and the Deputy Attorney General since 1989. For most of this time that official has either been a former prosecutor himself, or has had career prosecutors on his staff review the clemency recommendations drafted by the Pardon Attorney. This has tended to reinforce the traditional policy of giving substantial weight to the views of the United States Attorney whose office prosecuted a clemency applicant in deciding whether to recommend a case favorably. See, e.g., HUMBERT, *supra* note 2, at 123-28 n. 42 (citing *Hearings on S.J. Res. 282, 67th Cong., Before the Joint Comm. on the Reorganization of the Admin. Branch of Gov't*, 68th Cong. 1 (1924) (statements of Harry M. Daugherty and Rush L. Holland)); see also U.S. ATTORNEY'S MANUAL § 1-2.111 ("The views of the United States Attorney are given considerable weight in determining what recommendations the Department should make to the President.").

50. See, e.g., Larry Margasak, *Any Pardons Would Come After Election Day, Observers Say*, ASSOC. PRESS, Jan. 18, 1988 ("the administration's use of career prosecutors to screen pardon requests has 'resulted in a natural inclination for tighter scrutiny'" (quoting Deputy Associate Attorney General William Landers)). It may be presumed that the Department's pardon program suffered in the early years of the Reagan administration because of the President's decision, only a few weeks after taking office, to abort through a preemptive pardon the Justice Department's prosecution of two FBI officials convicted of authorizing illegal "black bag jobs," reportedly without notifying the prosecutors or involving the Attorney General. See Pardon for W. Mark Felt & Edward S. Miller, Statement of the President, 17 WEEKLY COMP. PRES. DOC. 437 (Apr. 15, 1981) (generosity due "two men who acted on high principle to bring an end to terrorism that was threatening our nation"); see also REPORT OF THE CRIMINAL LAW COMMITTEE, REC. ASS'N B. N.Y.C., *The Felt-Miller Presidential Pardon*, Oct. 1981, at 411, 414. In 1983, the Office of the Pardon Attorney was relocated from downtown Washington to Chevy Chase, Maryland.

gram to become an extension of its "tough on crime" law enforcement agenda.

Particularly during the latter part of the Bush administration, an unofficial policy of parsimony in pardoning was firmly in place at the Justice Department, as the war on crime went into high gear. The Willie Horton episode was a lively reminder of the possibility of embarrassment or worse if a recipient of clemency turned out to be less than deserving.<sup>51</sup> During the first years of the Clinton Administration, the determination of the White House not to cede anything to the political opposition on crime issues virtually assured prosecutors' continued influence over the pardon program in the Department.<sup>52</sup> Over time, standards for recommending a case for pardon were set higher and the review process became more rigorous,<sup>53</sup> resulting in a corresponding drop in the number of pardon cases sent forward to the White House for favorable action. As for commutation petitions, it was generally anticipated that most would be summarily recommended for denial. In these circumstances, absent an independent interest at the White House in the routine work of pardoning, it was inevitable that the number and frequency of ordinary clemency grants would steadily decline.

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51. See generally DAVID C. ANDERSON, *CRIME AND THE POLITICS OF HYSTERIA: HOW THE WILLIE HORTON STORY CHANGED AMERICAN JUSTICE* (1995). Another danger was that a particular grant might be distorted and give a mistaken impression of the Administration's commitment to crime control. For example, after President Bush pardoned a particularly deserving and well-known individual who had been convicted of a minor marijuana possession offense thirty years before, the grant was characterized as "especially ironic, given the administration's current push to enact tougher penalties on drug offenders . . ." Tom Watson, *In Rare Move, Bush Pardons Drug Offender; Civic Service, Campaign Win Forgiveness for Harlem Globetrotter*, *LEGAL TIMES*, Mar. 18, 1991, at 1; see also *Pardon Me*, *LEGAL TIMES*, Oct. 7, 1996 (quoting Rep. Curt Weldon, R-Pa.: "I don't know how you can champion yourself in the debate on drug use when you pardon drug dealers.").

52. See Stuart Taylor, Jr., *All the President's Pardons: The Real Scandal*, *NAT'L J.*, Oct. 30, 1999, at 3116. ("Clinton's neglect of his pardon power apparently derives from the same determination to out-tough the Republicans on crime that explains his support for draconian mandatory minimum prison sentences.").

53. See, e.g., Pete Earley, *Presidents Set Own Rules on Granting Clemency*, *WASH. POST*, Mar. 19, 1984, at A17 (Pardon Attorney David Stephenson reports that his office has become more "exacting" in its scrutiny of pardon applications, "to better reflect the administration's philosophy toward crime."). Deputy Associate Attorney General William Landers also states that

It's not enough that someone convicted does not commit another offense and is gainfully employed . . . There has to be extraordinary conduct after conviction that shows they contributed to the community in a unique or significant fashion, such as charitable contributions or community volunteer work — something that shows they have gone the extra mile over what an ordinary citizen may do.

Margasak, *supra* note 50.



Based on the number of pardons granted by President Clinton in the first six years of his tenure, one might predict that his overall pardoning record would be about the same as President Bush's. However, there have recently been some hopeful signs that he is interested in exploring both the justice-dispensing and symbolic aspects of clemency. Perhaps most significantly, President Clinton justified his 1999 FALN grants in retributivist terms by reference to the disproportionate prison terms involved.<sup>54</sup> In addition, he issued three pardons in 1999 and early 2000 whose evident purpose was to correct a miscarriage of justice. One of these was an unprecedented posthumous grant to Henry Flipper, the first African-American graduate of West Point, whose 1881 court martial had long been officially acknowledged as unwarranted and unfair.<sup>55</sup>

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54. See FALN Letter, *supra* note 5, at 2 (“[T]he prisoners were serving extremely lengthy sentences — in some cases 90 years — which were out of proportion to their crimes.”); see also *id.* at 3 (“For me, the question . . . was whether the prisoners’ sentences were unduly severe and whether their continuing incarceration served any meaningful purpose.”). This letter also made reference to the “worldwide support” for clemency in the cases on “humanitarian grounds.” *Id.* at 2 (quoting letters from President Jimmy Carter, Archbishop Desmond Tutu and Coretta Scott King). President Carter reportedly had written that each individual recipient of clemency had “spent many years in prison, and no legitimate deterrent or correctional purpose is served by continuing their incarceration.” *Id.* Bishop Tutu and Mrs. King were said to have sought clemency because the prisoners “have spent over a decade in prison, while their children have grown up without them.” *Id.* Cognizant of the political furor stirred up by the grants, President Clinton emphasized that “political considerations played no role” in his decision or in the decision-making process. *Id.* at 4. Documents subsequently released to the Senate Judiciary Committee indicated that law enforcement agencies had opposed clemency, and that the Department of Justice had at least initially recommended against it. See Hearings Before the Senate Judiciary Committee Concerning Clemency for FALN Members, 106th Cong., 2d Sess., 1999 WL 27595875 (Oct. 20, 1999) (statement of Eric Holder, Deputy Att’y Gen.). As noted previously, the clemency decision proved extremely controversial, and its merits were debated in the press for a number of weeks. See, e.g., Editorial, *Puerto Rican Clemency*, WASH. POST, Sept. 10, 1999, at A36 (“It was perhaps inevitable that Mr. Clinton’s action should be assessed through the prism of New York politics, but it is also unfortunate. Whatever the President’s motives, the case for clemency is strong.”).

55. See Darryl W. Jackson et al., *Bending Toward Justice: The Posthumous Pardon of Lieutenant Henry Ossian Flipper*, 74 IND. L.J. 1251 (1999). The Flipper grant was unprecedented because it had long been the Pardon Attorney’s policy not to accept or process posthumous pardon applications, in reliance on Supreme Court precedent analogizing a pardon to a “deed” that must be accepted. However, Deputy Attorney General Eric Holder is reported to have explained that “[t]he Justice Department’s recommendation was up to him . . . and he favored it.” Elizabeth Amon, *The Pro Bono Pardon: How Arnold and Porter Cleared a Man’s Name a Century Later*, NAT’L L. J., June 28, 1999, at A1, col. 2. In their brief in support of the pardon application, lawyers for the Flipper family noted that the stigma of Lt. Flipper’s conviction had discouraged inclusion of his statute in a “Walk of History” under consideration by the City of El Paso. Jackson et al., *supra*, at 1264. They urged that pardon be granted to

Another was a grant to Freddie Meeks, one of two surviving members of a crew of African-American sailors convicted of mutiny in connection with a racially charged incident at the Port Chicago Naval Magazine during World War II.<sup>56</sup> The third significant pardon, also in a case with racial overtones, was granted to Preston King, an African-American who had lived in self-imposed exile for almost four decades after his 1961 conviction in Georgia for draft evasion.<sup>57</sup>

The FALN grants recognize the hardships imposed by prison sentences whose length is disproportionate to the crime, while the three pardons recognize the hardships imposed by the lingering legal disabilities and stigma of a criminal conviction. Perhaps the spirit of humanity and reconciliation that motivated these well-re-

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remove "the unjust blot upon his outstanding reputation and character," for "Lieutenant Flipper and his descendants, for the good of the military justice system, and for the good of our country . . ." *Id.* at 1291. At the White House ceremony at which the pardon was granted, President Clinton stated that "This good man has now completely recovered his good name." *Id.* at 1254. Deputy Attorney General Holder stated in a subsequent interview that "'This has resonance beyond this case, beyond Lt. Flipper . . . What happened to him was really troubling — it was racism.'" Amon, *supra*, at A14.

56. While the pardon warrant in the Meeks case does not explicitly refer to the reason for clemency, it is significant that his case was singled out from other pardons granted on the same day for special treatment in a separate and unusually detailed warrant. See Executive Grant of Clemency to Freddie Meeks (Dec. 23, 1999). Press accounts of the pardon reported that "a legal review of the case by the Navy in 1994 found that the black sailors were the victims of racial prejudice," and that "[l]awmakers, veterans' groups and the NAACP had urged Clinton to grant the pardon." Associated Press, *President Pardons Veteran Convicted in 1944 Mutiny*, WASH. POST, Dec. 24, 1999, at A4. See also Editorial, *The President's Pardons*, WASH. POST, Dec. 27, 1999 ("the pardon is recognition that the conviction was a terrible injustice"). One of the effects of the pardon was to restore Meeks' military benefits. See Associated Press, *President Pardons Veteran*, *supra*.

57. According to press accounts, King refused to report for induction after his all-white draft board in Georgia refused to renew his student deferment, on grounds that the board had treated him in a racially discriminatory fashion. He was sentenced in 1961 to 18 months in prison on a conviction for draft evasion, but fled the country while on bail and returned to England where he had been pursuing graduate studies at the London School of Economics. At the time of his pardon he was a professor of political theory at the University of Lancaster and father of a British Member of Parliament. In support of pardon, the sentencing judge acknowledged that King had been subjected to a "long-lasting, deeply rooted method of racial discrimination," and that he had "followed his conscience just as Rosa Parks had followed hers." Philip Shenon, *Pardon Lets Black Exile Come Home*, N.Y. TIMES, Feb. 22, 2000, at A12; Reuters, *Black Professor Pardoned in 1961 Draft Board Case*, WASH. POST, Feb. 22, 2000, at A2. King's application for pardon was supported by the NAACP and several human rights groups. The White House noted that the clemency process had been expedited to permit Dr. King to return to the United States for his brother's funeral, out of "humanitarian concerns." *Id.*

ceived pardon grants, coupled with optimism over the “lowest crime rate in thirty years,”<sup>58</sup> will inspire the President to look carefully at some of the less visible cases that have historically constituted the vast majority of clemency applicants.

### C. The President’s Duty to Pardon

#### 1. *Pardon as Public Mercy*

The fact that there have been so comparatively few pardons since 1980 invites speculation about whether the President might decide to stop pardoning entirely, simply letting the power lapse. This in turn raises the questions whether the President has any duty to pardon, and what the source of such a duty might be. Judicial precedent is not very helpful in providing answers to these questions: on the one hand, the courts describe pardon as a “part of the Constitutional scheme” to be exercised for the “public welfare;”<sup>59</sup> on the other, they call it “a matter of grace” that need not be justified or defended within the legal system.<sup>60</sup> While pardon’s “public welfare” aspect might support an argument that the President has some obligation to “afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law,”<sup>61</sup> its “grace” aspect points the other way, indicating that an individual is not entitled to a pardon in the same sense that he is entitled to receive a just punishment. Therefore, while the President may not be entirely free of constitutional constraints

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58. Marc Lacey, *Clinton Isn’t Running for Office, But He Has a Lot to Say About the Race*, N.Y. TIMES, Feb. 17, 2000, at A18 (quoting the President at his news conference on February 16, 2000).

59. *Biddle v. Perovich*, 274 U.S. 480, 486 (1927) (“A pardon in our day is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.” (citing *In re Grossman*, 267 U.S. 87, 120, 121 (1925))). In *Perovich*, the Court upheld the President’s authority to commute the death sentence of a convicted murderer, over the objections of the purported beneficiary of the grant: “Just as the original punishment would be imposed without regard to the prisoner’s consent and in the teeth of his will, whether he liked it or not, the public welfare, and not his consent determines what shall be done.” *Perovich*, 274 U.S. at 485.

60. See *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 282, 285 (1998). Where the federal pardon power is concerned, the courts have consistently declined to limit its exercise; see, e.g., *Schick v. Reed*, 419 U.S. 256, 264-66 (1974) (upholding President’s right to commute a death sentence conditional upon service of life without parole); cf. *Burdick v. United States*, 236 U.S. 79, 89-90 (1915) (holding that the Fifth Amendment privilege against self-incrimination may not be overcome by device of preemptive pardon).

61. *Grossman*, 267 U.S. at 120-21.

in his exercise of the power,<sup>62</sup> it seems clear that he cannot be *legally* compelled to grant a pardon even in case of "evident mistake."<sup>63</sup>

Nor would one expect to find much support for a duty to pardon in prevailing theories of punishment, which presume that the law reflects society's judgment about each person's "just deserts." Indeed, the conventional retributivist view of pardon is as something akin to a gift, and thus inconsistent with justice.<sup>64</sup> Recently, however, concern over statutory limitations on flexibility and discretion in sentencing has given rise to new interest in pardon as a necessary (though extraordinary) means of adjusting an imperfect legal system. In her influential 1989 monograph, Kathleen Dean Moore looks to pardon to compensate for the absence of a mechanism in the law whereby punishments can be individualized.<sup>65</sup> She posits a distinction between legal liability and moral desert, urging that punishments be at least partially uncoupled from a legal framework and tested against a set of retributivist categories such as innocence and excuse. In this fashion, she argues, pardon can be applied systematically to make exceptions to the rules "when the

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62. The Supreme Court has recently indicated that the Due Process Clause applies to the clemency process, although the level of protection it provides may be minimal. See *Woodard*, 523 U.S. at 282-85. In *Woodard*, the justices split 5-4 on the issue whether a clemency applicant is constitutionally entitled to due process, with the minority taking the position that clemency is "a matter of grace" entirely outside of the judicial process. *Woodard*, 523 U.S. at 282, 285. Of the five who thought some process was due, four thought it minimal: the governor could not "flip[ ] a coin," or "arbitrarily den[y] a prisoner any access to its clemency process." *Id.* at 289 (O'Connor, J., concurring in part). Justice Stevens, concurring in part and dissenting in part, took the position that Ohio's creation of mandatory clemency application and review procedures made it part of the adjudicative process and thus fully amenable to judicial oversight. See *id.* at 292-93 (Stevens, J., concurring in part and dissenting in part). The Court did not decide the question whether clemency proceedings might be subject to the Equal Protection Clause. See *id.* at 276. Justice Stevens noted, however, that "no one would contend that a governor could . . . use race, religion, or political affiliation as a standard for granting or denying clemency." *Id.* at 292 (Stevens, J., concurring in part and dissenting in part).

63. This is not to say that the President may not have a legally enforceable duty to *consider* granting clemency. It is simply to say that his decision on the merits is not subject to judicial review, except perhaps on Equal Protection grounds. See *id.*

64. Jeffrie Murphy notes Immanuel Kant's view that "[t]he right to pardon a criminal, either by mitigating or by entirely remitting the punishment, is certainly the most slippery of all the rights of the sovereign. By exercising it he can demonstrate the splendor of his majesty and yet thereby wreak injustice to a high degree." IMMANUEL KANT, *METAPHYSICAL ELEMENTS OF JUSTICE* 107-08 (J. Ladd trans., 1965), quoted in Jeffrie Murphy, *Mercy and Legal Justice*, in JEFFRIE MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 174 n.9 (1988).

65. See MOORE, *supra* note 3, at 128-29.

general presumptions are defeated by exceptional circumstances.”<sup>66</sup>

Consistent with her retributivist model, however, Moore conceptualizes pardon as “an act of justice rather than an act of mercy.”<sup>67</sup> If a just system is obligated to punish each person the same as others similarly situated, and pardon is a way of assuring that each person receives the punishment he deserves, then each morally deserving person who has not received a just punishment deserves a pardon. And, if a person deserves a pardon in this sense, then there is a corresponding duty to give him one. Thus, she argues, “pardons are not discretionary.”<sup>68</sup> It follows that, as a matter of fairness, a pardon would have to be given to all similarly situated and presumably equally deserving individuals. In effect, Moore would have pardon function as an adjunct of the legal system, if not to replicate it at least continually to correct its outcomes.

Moore’s effort to justify clemency on retributivist grounds necessarily devalues its historical association with compassion and redemption, making it substantively indistinguishable from justice. This in turn has procedural implications that would convert clemency proceedings into “judicial courts of last resort.”<sup>69</sup> If pardon is a nondiscretionary duty of justice, its administration necessarily requires the establishment of a full-blown executive apparatus for making judgments about “just deserts” in individual cases that parallels the judicial system, and that is grounded in clearly articulated standards and supported by procedural protections, such as the giving of reasons and the right to appeal.<sup>70</sup> At the very least, such a

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66. *Id.*

67. *Id.* at 129. *See also id.* at 213 (“a justified pardon is one that corrects injustice rather than tempers justice with mercy”).

68. *Id.* at 214.

69. Rapaport, *supra* note 14, at 21. Professor Rapaport disagrees with Moore’s reduction of clemency “to a type of remedial justice,” and urges a greater use of “discretionary lenity” in accordance with justice-based norms as well as “the storehouse of traditional nonretributivist justifications for clemency,” like post-conviction rehabilitation and heroism. *Id.* at 19, 27-30. *See also* Michael A. G. Korengold et al., *And Justice for Few: The Collapse of the Capital Clemency System in the United States*, 20 *HAMLIN L. REV.* 349, 366 (1996) (“clemency is necessarily and properly separate from the judicial system” and “may be granted on different factors than those considered in appellate review”).

70. Daniel Kobil develops the administrative implications of Professor Moore’s theory of clemency-as-justice by proposing to place clemency’s “justice-enhancing” functions in “a professional board that is independent of the political pressures which inevitably distort the decisions of elected officials.” Kobil, *supra* note 3, at 622. In making decisions about the mitigation of punishment, his “clemency commission” would be guided by “explicit, internally consistent standards,” and operate pursuant to a full panoply of due process protections, including the giving of reasons and an

duplicative system would be highly inefficient, unless pardon were somehow co-opted into functioning as part of the legal system, as it does in the military and in some states.<sup>71</sup> Of greater concern, this "bureaucratization of the clemency power"<sup>72</sup> would sacrifice exactly those qualities that commended pardon to the framers: quick action, broad discretion, and personal accountability to the electorate.<sup>73</sup>

A sounder philosophical justification for pardon, one that provides support for Moore's notion of executive duty without major revisions in pardon's historical character, has been suggested by Jeffrie Murphy. Murphy grounds pardon squarely and exclusively in the concept of mercy, which in his view is an "autonomous moral virtue" entirely separate from justice.<sup>74</sup> A private individual shows mercy when she voluntarily, out of compassion, waives a right to impose a penalty, a right that could in justice be claimed. Extrapolating from this private law paradigm, Murphy finds a justification for pardon as a collective exercise of mercy by the community as a whole, through its chief executive:

If each citizen can justly exercise mercy individually when his individual interests are at issue, why may not all citizens justly join together and exercise mercy collectively when their collective interests are at issue? And if they may do this by statute, may they not call on the governor to pardon? And if they may

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opportunity to be heard, similar to those applicable in "the analogous release procedure of the parole process." *Id.* at 624, 634. In this fashion "[t]he extrajudicial corrective of clemency provides a safety valve for our criminal justice system, another opportunity for an offender to tell her story more thoroughly, or at least differently, than she could at trial." *Id.* at 613.

71. See Clifford Dorne & Kenneth Gewerth, *Mercy in a Climate of Retributive Justice: Interpretations from a National Survey of Executive Clemency Procedures*, 25 NEW ENG. J. CRIM. & CIV. CONFINEMENT 413 (1999); THE NAT'L GOVERNORS' ASS'N CTR. FOR POLICY RESEARCH, GUIDE TO EXECUTIVE CLEMENCY AMONG THE AMERICAN STATES (1988) [hereinafter GUIDE TO EXECUTIVE CLEMENCY]. In Georgia, for example, an inmate who is not eligible for parole may seek administrative early release by pardon from the State Board of Pardons and Paroles. *See id.*, at 59-61.

72. Rapaport, *supra* note 14, at 37.

73. *See supra* notes 11-13.

74. *See* HAMPTON & MURPHY, *supra* note 64, at 175; *see also* Jean Hampton, *The Retributive Idea*, in HAMPTON & MURPHY, *supra* note 64, at 158-59 ("mercy is the suspension or mitigation of a punishment that would otherwise be deserved as retribution, and which is granted out of pity for the wrongdoer"); *cf.* Carla A.H. Johnson, *Entitled to Clemency: Mercy in the Criminal Law*, 10 LAW & PHIL. 109, 116-17 (1991) ("to eliminate the concept of legal mercy . . . because it is in most cases a means of doing justice is to ignore the message of history . . . . It is precisely because the law defines justice narrowly, limiting power before the law to the institutional power of entitlements and rights, that it can require genuine mercy to achieve genuine justice.").

call on the governor to pardon in a particular case, may they not simply *delegate* to the governor . . . the power to exercise mercy on their behalf whenever he believes that they would, out of love and compassion, so desire — even if they have not petitioned and even if they are not unanimous on the issue?<sup>75</sup>

Murphy does not suggest that an individual is entitled to mercy, or that an official with power to show mercy may be under any obligation to do so. To the contrary, he is careful to distinguish between the discretionary decision to pardon that is reposed in a head of state, usually by some organic document, from the nondiscretionary legal duty of justice owed by a prosecutor, judge, or parole board.<sup>76</sup>

By conceptualizing mercy as separate from, rather than a subset of justice, Murphy avoids most issues of individual entitlement. Yet his mercy is not a “free gift or act of grace.”<sup>77</sup> He argues that mercy “must not be arbitrary or capricious but must rather rest upon some good reason — some morally relevant feature of the situation that made the mercy seem appropriate.”<sup>78</sup> Where public mercy or pardon is concerned, “good reason” may be determined not simply by reference to what an individual morally deserves, but also by what serves the public welfare:

The “job description” [of a chief executive] may . . . involve a concern for the common good or common welfare of the community in the executive’s care. This might mean that, in deciding whether to pardon an individual, the chief executive (unlike a trial judge) might legitimately draw upon values other than the requirements of justice and thus might legitimately ignore the just deserts of an individual and pardon that individual if the good of the community required it.<sup>79</sup>

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75. HAMPTON & MURPHY, *supra* note 64, at 177-78 (emphasis in original).

76. *See id.* at 173-74 (“Judges in criminal cases are obligated to do justice. So too, I would argue, are prosecutors and parole boards in their exercise of discretion. Thus there is simply no room for mercy as an autonomous virtue with which their justice should be tempered.”); *see also id.* at n.8 (“The focus of a judge, either in enforcing a rule or in seeking a way to modify or get around it, is to be on the question of what is required by justice — not on what he may be prompted out of compassion to do.”). Murphy’s rejection of mercy in what he describes as the “criminal law paradigm” has sometimes been misunderstood as a rejection of mercy itself. *See* Joan H. Krause, *Merciful Justice and Justified Mercy: Commuting the Sentences of Battered Women Who Kill*, 46 FLA. L. REV. 699, 748-49 (1994); Rapaport, *supra* note 14, at 20.

77. *See* HAMPTON & MURPHY, *supra* note 64, at 180.

78. *Id.* at 181.

79. *Id.* at 174 n.9.

In short, in making pardon decisions the chief executive may look to "the requirements of justice," but he may also ignore those requirements and grant a pardon for "the good of the community."

Moreover, Murphy argues that mercy is not constrained by principles of fairness in the same way that justice is, because it is entirely voluntary and, in the case of public mercy, because it has a political dimension. For example, mercy "is more likely to be needed by the poor and weak than by the rich and powerful."<sup>80</sup> There is also a pragmatic reason why mercy is not constrained by a conventional obligation to be even-handed: "[I]f rational persons thought that once having shown mercy they would be stuck with making a regular practice of it, they might be inclined never to show it at all."<sup>81</sup>

Murphy does not elaborate on what standards ought to guide the exercise of the pardon power within the general parameters of morality and the common good. It is reasonable to suppose that, with one caveat, he would consider them best left to the discretion of the executive who has been popularly chosen to be the "dispenser of the mercy of the government."<sup>82</sup> The caveat is that it would be inappropriate and perhaps an abuse of power to withhold mercy in a case where moral desert had been established (proof of innocence comes to mind as an obvious example), whatever public sentiment might be. On the other hand, a gesture of mercy could be appropriate simply because it would be popular, thus satisfying a felt need in the community to alleviate a legally determined punishment in a particular case, or across the board.

To summarize, Murphy sees pardon as a manifestation of public mercy that has a legitimate role in a retributivist legal system, to override the law where its outcome is unjust or where the common welfare otherwise requires it. Thus Murphy might elaborate on Hamilton to advise the President that he is empowered to make "exceptions in favor of unfortunate guilt," but ordinarily is not obliged to — except in cases where a compelling moral claim has been established. He might also suggest that pardon decisions will ordinarily be guided by considerations of moral relevance, but

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80. *Id.* at 182.

81. *Id.* at 183.

82. THE FEDERALIST NO. 74, *supra* note 8, at 423. One might predict a certain amount of discomfort with this idea in an age where we tend to distrust both discretionary decision-making and our elected leaders. *See, e.g.,* Kobil, *supra* note 3, at 614 ("Unfortunately, both justice-enhancing and justice-neutral aspects of clemency suffer when the executive has recourse only to her own moral and political sensibilities in making clemency decisions.").



need not be if the welfare of the community provides an alternative justification. Finally, he might tell the President that he ordinarily has no duty to treat like cases alike.<sup>83</sup>

## 2. *The Political Duty to Pardon*

In Murphy's theory of public mercy, there is generally no inconsistency between pardon as an un compelled "matter of grace,"<sup>84</sup> and pardon as an authoritative act that is "part of the constitutional scheme." This theory thus reconciles seemingly contradictory Supreme Court precedent and provides a coherent framework for analyzing particular exercises of the pardon power. It also provides the basis for an argument that the President has a duty to pardon, not just where moral desert has been established in a particular case, but also as a more general obligation of office. This latter aspect of the duty to pardon is neither grounded in nor limited by considerations of law or morality, but is essentially one of politics.

The political duty to be merciful "if the good of the community require[s] it" may be inferred from the several ways in which pardon helps the President carry out his other constitutional duties. First, pardon serves the purpose of checking the legislature when the criminal law is static and inflexible, by signaling the need for changes in the law itself.<sup>85</sup> Thus, for example, the President's deci-

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83. While there is no duty to pardon all similarly situated offenders, absent similarly compelling moral claims, the pardon power may not be exercised arbitrarily or capriciously. See, e.g., *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 292 (1998) (Stevens, J., concurring in part and dissenting in part).

84. Murphy seems to equate an "act of grace" and a "free gift," see Murphy, *supra* note 64, at 180, but I would argue that they should be conceptually distinguished, at least insofar as pardon is concerned. Pardon may be an "act of grace" in the eyes of the law, but it is not a "free gift" as a political matter because it is subject to standards of moral relevance and the public welfare.

85. See SURVEY OF RELEASE PROCEDURES, *supra* note 1, at 295-96:

[Pardon] has been the tool by which many of the most important reforms in the substantive criminal law have been introduced. Ancient law was much more static and rigid than our own. As human judgment came to feel that a given legal rule, subjecting a person to punishment under certain circumstances, was unjust, almost the only available way to avoid this rule was by pardon. . . . Quickly pardons on such grounds became a matter of course; and from there to the recognition of such circumstances as a defense was only a short step. This is what happened with self-defense, insanity, and infancy, to mention only three examples.

*Id.* This law reform function is consistent with the retributivist theory that the need for pardon provides a rough assessment of the moral legitimacy of the law. See MOORE, *supra* note 3, at 129 ("If pardons grew to an unmanageable number, one would have to be suspicious that the legal codes were seriously out of kilter with the moral code."); Rapaport, *supra* note 14, at 39-40 (while clemency is "ill-suited as a

sion to commute a sentence mandated by the terms of a statute, based on his conclusion that the punishment was disproportionately harsh in light of all the circumstances (including some that the law could not take into account), might encourage legislative inquiry into the possible need for changes in the law to allow individual circumstance to be considered.<sup>86</sup> A grant of clemency might also reveal shortcomings in the appeals process that limit a court's ability to consider new evidence or changed circumstance. But, because pardon is a political duty and not a duty of justice, the President would be under no obligation to grant clemency to all offenders with arguably similar equitable claims.

Pardon also serves as an executive check on courts' discretionary decisions.<sup>87</sup> While much of the current interest in federal clemency arises precisely from the limits on judicial discretion imposed by the federal sentencing guidelines and statutory mandatory minimum sentences, it is possible that an act of executive mercy might lead a court to rethink its own discretionary powers and interpret them more broadly.

Within the executive branch, pardon can play an important role in carrying out the President's obligation to take care that the laws are faithfully executed in two ways. First, it enables the President to intercede directly to change the outcome of a case that he believes was wrongly handled by his subordinates, where no judicial remedy is available.<sup>88</sup> Second, it permits him to send a very direct and powerful message to his subordinates about how he wishes the

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means to overcome wholesale legislative failures," it "may play a role in reopening channels of politics to systemic reform").

86. See, e.g., Krause, *supra* note 76, at 719-42 (discussing relationship between gubernatorial clemency actions and legislatively authorized reviews and releases for battered women unable to offer battering defenses at the time of their trials).

87. See *In re Grossman*, 267 U.S. 87, 120-21 (1925) (justifying pardon on grounds, among others, that "[t]he administration of justice by the courts is not always wise or certainly considerate of circumstances which may properly mitigate guilt."). The pardon power also came into play as a check on the power of the court-appointed Independent Counsel in the Iran-Contra cases. See *supra* note 20.

88. See Thomas E. Sharp, *The President's Policy Pardon: A Misunderstood Tool of Presidential Decision-Making* 26-33 (1996) (unpublished manuscript, on file with author). Sharp argues that the pardon power gives the President an ability to control discretionary decisions of prosecutors that become legally irreversible before he is aware of them. See *id.* at 30 (citing Attorney General William Randolph, Am. State Papers, Misc. I, 46, No. 26 (1791)) ("[I]t may frequently arise that the United States may be deeply affected by various proceedings in the inferior courts, which no appeal can rectify."); see also Harold J. Krent, *Executive Control over Criminal Law Enforcement*, 38 AM. U. L. REV. 275, 286-87 (1989). The inherent difficulty of supervising the exercise of prosecutorial discretion has become a matter of greater concern because of the number of federal prosecutions that result in guilty pleas, and the dislocations

law to be enforced in the future, including in particular the manner in which they should exercise their discretion.

Finally, the President's personal intervention in a case through the pardon power reassures the public that the legal system is capable of just and moral application. It enables him to correct legal errors that for one reason or another could not be corrected by the courts, and to make equitable accommodation where a sentence has been imposed according to the strict requirements of the law but nonetheless seems unfair.<sup>89</sup> It is especially important that the public be confident in clemency as the "fail safe" of the justice system in capital cases, which are now moving forward through the federal system for the first time in many years.<sup>90</sup> At the other end of the clemency spectrum, the President can use the opportunity provided by post-sentence pardons to emphasize the rehabilitative goals of the justice system by recognizing criminal justice success stories.

The President's duty to pardon does not arise from any single one of these "public welfare" grounds for pardon, but from a combination of them all. And it is a duty that resists quantification, or enforcement in any court other than that of public opinion. The point is simply that if the President neglects the pardon power, public confidence in it may be so undermined as to make it constructively unavailable to serve the benign purposes the framers envisioned for it. In this way, failure to exercise the power may have the same consequence as abusive exercise. Conversely, a generous and regular exercise of the power in circumstances evidently warranting it, provides the President with an unparalleled opportunity not simply to do justice in particular cases, but also to set an

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in discretionary decision-making that have been produced by the federal sentencing guidelines. See K. STITH & J. CABRANES, *FEAR OF JUDGING* 130-42 (1998).

89. SURVEY OF RELEASE PROCEDURES, *supra* note 1, at 299 (enumerating situations in which clemency in the form of commutation may be appropriate, including those involving "calm second judgment after a period of war hysteria, during which persons were given very severe sentences for political offenses later realized to have been very minor;" "changed public opinion after a period of severe penalties against certain conduct which is later looked upon as much less criminal, or as no crime at all," citing prohibition as an example; and "[t]echnical violations leading to hard results").

90. See Naftali Bendavid, *Clinton Won't Follow Illinois on Executions*, CHI. TRIB., Feb. 17, 2000, at 1; see also *Excerpts from Clinton's Comments at Wide-Ranging News Conference*, N.Y. TIMES, Feb. 17, 2000, at A19 ("We are . . . in the process of developing guidelines for clemency applications [in capital cases] where any individual claims of innocence or question [about] the sentence, even though guilt is not a question, can be pressed.").

example for his appointees in the executive branch, for the other branches of government, and for the public.

#### D. Reviving the Power

In this final section I propose a number of simple ways in which the President can make his exercise of the pardon power more reliable and respectable, and therefore less politically risky. I do not recommend that he attempt to insulate himself from public criticism by establishing advisory boards and elaborate administrative structures, since these tend to defeat the very virtues of the power that the framers most valued: efficiency, discretion, and accountability.<sup>91</sup> Nor do I think he should necessarily feel constrained to explain himself or be consistent, which would be required of a decision-maker within a legal system, for the same reasons.<sup>92</sup> But there are other ways he can reassure the public that the power is being used wisely and for the general welfare.

##### 1. Shore up the Attorney General's Advisory Role

Historically, the President has relied on the Attorney General for advice in pardon cases, and this has afforded him the combined

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91. See SANFORD, *supra* note 14 (discussing the "lonely" situation of the pardoner); see also EDMUND G. (PAT) BROWN, *PUBLIC JUSTICE, PRIVATE MERCY: A GOVERNOR'S EDUCATION ON DEATH ROW* 163 (1989) ("It was an awesome, ultimate power over the lives of others that no person or government should have, or crave."). Professor Rapaport observes that:

most state executives and the national executive are cautious compared to their predecessors earlier in the century . . . . From the beginning of the century through the 1960s, a rhetoric of claiming responsibility for the final decision to execute or commute, to confine or release, came naturally to governors. The governor of today is more likely to portray himself as bound to respect the decision of a jury, the due process of trial and appellate courts, and to heed obdurate victims.

Rapaport, *supra* note 14, at 5-6.

92. Professor Rapaport makes a compelling argument for a requirement that the chief executive explain the reasons for each grant and denial of clemency: "Discretion can give a better or worse account of itself; the body of cases and reasons ought to exercise significant control over future practice. Such a record provides a basis for criticism and even political repudiation of an executive." Rapaport, *supra* note 14, at 41. I do not disagree that full disclosure is often indispensable to full accountability. Nor do I disagree that the executive should consider whether giving reasons for an act of clemency will enhance the beneficial effects of the grant. But I am concerned that there are also disadvantages of requiring the executive to give reasons in every case that may outweigh the advantages, in constraining what Professor Rapaport calls "unruly discretion" and ultimately discouraging its exercise. See also *Wrong Way on Pardons*, *supra* note 7 ("A bill that would diminish executive branch confidentiality within the pardon process will only make presidents more wary of stepping into the minefield that executive clemency has become.").

perspective of law enforcement official and political adviser. The President's acquiescence twenty years ago in the delegation of the Attorney General's clemency-related responsibilities within the Department of Justice meant that the advice he received was less likely to reflect the views of a member of his Cabinet and more likely to reflect those of prosecutors and other law enforcement officials. It also left him without a high-level political appointee to take some responsibility if a particular grant turned out to be ill-advised or politically unpopular.

The Clinton administration also created substantive problems for itself by undercutting the Justice Department's historically central role in the clemency process.<sup>93</sup> If the Attorney General is only one of several possible sources of advice in clemency matters, and the process is no longer a regular one, questions inevitably arise about the relative importance of justice and politics in clemency decision-making, and thus about the accessibility of official mercy to ordinary people.

## 2. *Be Generous and Expect No Credit*

Generosity in extending mercy beyond the strict framework of the law has been called "an important attitude of a healthy society."<sup>94</sup> Purely as a practical matter, a policy of generosity is likely to be more effective than a policy of caution in avoiding unwarranted criticism of particular grants. Until quite recently presidents have been shielded from public criticism in connection with pardoning by the frequency and regularity with which they acted on pardon applications, as well as the sheer volume of their grants. When the President signed a pardon warrant every couple of months, granting relief to dozens of unknown "little people" simply because they had been recommended by the Attorney General, he could credibly distance himself from the merits of any particular

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93. See FALN Letter, *supra* note 5, at 4 (President's decision based on an independent investigation and recommendation of his White House Counsel). In routine responses to inquiries about the clemency process, the White House has stated that it relies on advice from many quarters, including the Department of Justice, in deciding whether to grant clemency. As a result of congressional concern over the FALN grants, legislation was introduced to require the Justice Department to consult with victims of crime and law enforcement agencies in connection with making a clemency recommendation to the President. See § 2042, The Pardon Attorney Reform and Integrity Act, 106th Cong., 2d Sess., 146 Cong. Rec. S538-05, 2000 WL 142206 (Feb. 9, 2000). The editors of the Washington Post opined that this bill might encourage the President "to circumvent the Justice Department entirely." See *Wrong Way on Pardons*, *supra* note 7.

94. SANFORD, *supra* note 14.

case. But so few people have been pardoned in the past twenty years that each new clemency action is regarded with suspicion and subjected to intense scrutiny, no matter how apparently innocuous.

In any event, public criticism goes with the territory, as President Clinton recognized in defending his FALN grants.<sup>95</sup> It is never possible to be absolutely certain about the wisdom of a particular grant or the virtue of particular grantees, particularly given the defining characteristic they share, but it is part of the President's job to take risks in this regard. This means that he should decide cases at a time when he can be held properly accountable for his actions, and not at the very end of his term.<sup>96</sup>

### 3. *Act First, Explain Later*

Presidents have in the past acted on clemency cases without first vetting them publicly, a practice which recent experience has shown tends to bring the progress of a clemency case to a standstill.<sup>97</sup> Where the White House calls attention to a clemency action before it actually occurs or before it becomes final, a host of ques-

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95. See FALN Letter, *supra* note 5, at 4.

Grants of clemency generate passionate views. In vesting the pardon power in the President alone, the framers of our Constitution ensured that clemency could be given even in cases that might be unpopular and controversial. The history of our country is full of examples of clemency with which many disagreed, sometimes fervently.

*Id.*

96. It is perhaps inevitable that a chief executive will be tempted to make pardon grants just prior to leaving office, but it is equally inevitable that giving in to this temptation tends to bring the power into disrepute. See, e.g., Krause, *supra* note 76, at 721-25 (describing the furor resulting from the last-minute clemency actions of Ohio Governor Celeste, which led to a 1995 amendment of the state constitution to make the governor's clemency power subject to regulation). It is also true that there have apparently been few instances of actual corruption in connection with the power. See Rapaport, *supra* note 14, at 10 (noting that there were only two documented pardon-selling scandals in the 20th century — one resulting in the 1920 impeachment of Oklahoma Governor Walton, and the other resulting in the 1980 indictments of several members of the administration of Tennessee Governor Blanton).

97. An example is the extensive media coverage during President Clinton's first consideration of Jonathan Pollard's clemency petition. The Administration's apparent attempt to take the public's pulse on the case back-fired when law enforcement and intelligence agencies opposed to clemency took their own case to the media. See, e.g., Michael Isikoff & Ruth Marcus, *Justice's No. 2 Official May Propose Leniency for Pollard*, WASH. POST, Dec. 23, 1993, at A10; Barton Gellman, *Aspin's Allegation About Pollard Affects Clemency Campaign*, WASH. POST, Dec. 29, 1993, at A6. In the end the public opposition of senior administration officials, as well as the almost uniformly adverse reaction from the media, virtually foreclosed the President's ability to act favorably, had he wished to do so. While clemency applicants and their supporters often take their case to the media, problems of a different order are created when the executive itself "goes public" prior to a grant. See also Krause, *supra* note 76, at 725

tions arise that require prompt and thorough response lest the power itself be compromised in the public eye. These questions are much easier to answer after the fact. While the framers fully anticipated that clemency decisions would take into account popular opinion, they would not likely have favored plebiscites even in this context.

#### 4. *Make Considered Use of the Power in Light of Its Public Purposes*

The pardon power provides the President with an unparalleled bully pulpit from which to speak about criminal law issues, large and small, in the context of a specific fact situation. Issues that come to mind include the harsh inflexibility of the drug sentencing laws, the mandatory deportation of aliens convicted of minor and sometimes dated offenses, the mitigating impact of domestic violence, and legislative curtailment of post-conviction judicial remedies. But there are other less ambitious things that the pardon power can accomplish, like recognizing and rewarding rehabilitation, enabling individuals who have served enough time in prison to return to their communities to make a new start (or, in case of grave illness, to die at home with their families), or simply satisfying an individual's desire for an official gesture of forgiveness. It is, in short, an effective way to shape criminal justice policy and tell good news about the justice system at the same time.

### CONCLUSION

It is unlikely that pardon will ever fade away entirely, even if the criminal justice system could be made to work perfectly. Unlike collar buttons, pardon will always be useful from a political standpoint. But its current underutilization is disturbing, in light of the mounting evidence that the justice system is *not* working perfectly, or even close to it. The underutilization of pardon is disturbing not so much because of its impact on disappointed individuals, but because of what it reflects about the justice system and the message it sends to those who administer it, as well as to the public. A President's pardons say a lot about his priorities and overall goals for the administration of justice. If rehabilitation and reconciliation are aspirations of government, pardon serves an important symbolic purpose in marking a successful law enforcement effort.

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(publicity surrounding Maryland Governor Schaefer's consideration of clemency for battered women "almost stopped the 'mass' clemency in its tracks.").

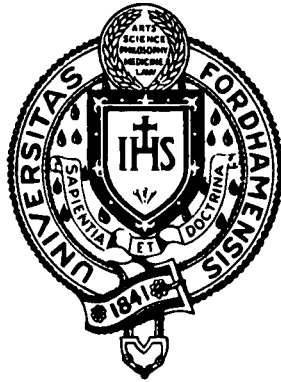
If, however, punishment is the primary objective, then it is unnecessary to be concerned about mercy or redemption, much less to make a point of crediting them.<sup>98</sup>

The Constitution gives the President the power to pardon not as a personal privilege but as an obligation of office. If he is willing and able to use the power in the fashion envisioned by the framers, courageously and creatively, he gains important opportunities to signal the need for changes in the law, to set an example for discretionary decision-making by his subordinates, and to shore up public confidence in the overall morality of the criminal justice system.

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98. Susan Bandes points out that "a legal process devoid of such 'soft' emotions as compassion or mercy is not emotionless; it is simply driven by other passions." *THE PASSIONS OF LAW* 11 (Susan A. Bandes ed., 1999). The essays in this collection describe some of those passions as vengeance, rage, contempt, disgust, and indignation — many of which seem to have gained a certain new legitimacy in the criminal justice system. Perhaps it is not coincidental that mercy and compassion seem at the same time to have lost their place as counterweights. Indeed, it may even be that certain of the "hard" emotions have turned in judgment upon the "soft," so that mercy is held in contempt and compassion looked on with indignation and disgust.





# FORGIVENESS AND PUBLIC TRUST

*Linda Ross Meyer\**

Gentlemen of the jury, if we convict and punish him, he will say to himself: . . . I am even, I owe them nothing now, and owe no one anything forever and ever. . . . But do you want to punish him fearfully, terribly, with the most awful punishment that could be imagined, and at the same time to save him and regenerate his soul? If so, overwhelm him with your mercy! He will be horror-stricken; he will be crushed by remorse and the vast obligation laid upon him henceforth. And he will not say then, "I am even," but will say, "I am guilty in the sight of all men and am more unworthy than all."<sup>1</sup>

Is forgiveness a personal, emotional experience unfitted for the public realm? Many have argued that only victims can forgive, and that justice, respect for victims and equal protection of the laws are sacrificed when forgiveness overflows its smallish province.<sup>2</sup> I respectfully disagree and venture to support the idea that forgiveness is neither just personal, "merely" emotional, nor only private, but that forgiveness grounds the basic trust that makes community possible.

In order to understand why someone other than a direct victim may forgive a wrong, it is important to look closely at our concept of wrong itself, and to see that a wrong is public, not just private or personal. Part I addresses this issue. Once wrong is understood as the breach of a community bond, I undertake some explanation of community, which is the subject of Part II. In Part III, I argue that forgiveness should not only be understood as an emotional experience, but also as including cognitive and speech-act dimensions; hence, forgiveness is not just a subjective emotional experience by a particular victim. I explain why community members not only

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1. FYODOR DOSTOEVSKY, *THE BROTHERS KARAMAZOV* 710 (1976).

2. See, e.g., JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 1-34; 162-86 (1988); Robert C. Solomon, *Justice v. Vengeance, in THE PASSIONS OF LAW* (Susan A. Bandes ed., 1999); LEWIS B. SMEDES, *THE ART OF FORGIVING* 39 (1996).

can, but ought to, forgive. I then sketch briefly the relationship of this community forgiveness to punishment and (human) justice.

### I. WHAT'S WRONG WITH WRONG

Relegating mercy or forgiveness to the private realm results in part from assuming that crime wrongs only its direct victims (those who suffer tangible pain or loss from the crime<sup>3</sup>), and that therefore only those direct victims have standing to seek redress or to forgive. If the wrong of wrong, however, was limited to its tangible effects on the victim — to its harm, that is — several rather strange consequences would follow. First, there would be no wrong to victims who suffered no harm (no mental or physical pain). Even the sense of insult, invasion and betrayal that accompanies otherwise harmless or attempted crime, and hence differentiates crime from misfortunes, would go unfelt by an infant, for example, or a mentally ill person. Taking candy from a baby would not only be easy, it would be morally neutral. Second, wrong would be greater in proportion to the harm done. Momentary negligence that caused serious and permanent physical injury would be a greater wrong than malicious but impotent racial animus.

Of course, we do believe that infants can be wronged, and we grade crimes by the offender's *mens rea*, not the tort measure of damages done. So what is wrong with wrong, if not the physical and mental harm to the victim?

Another common but unworkable suggestion of what's wrong with wrong is that it free-rides on the sacrifices of others.<sup>4</sup> So understood, wrong does wrongs more than the direct victim because it creates unfairness in the distribution of liberty. But this suggestion would mean that the only community members who are wronged are those who restrain their criminal impulses merely in order to get the benefit of others' like restraint. Those who simply have no criminal impulses in the first place would have no standing to complain. In other words, only potential criminals would be wronged by wrong.

The problem with the traditional theories of wrong is that they rest on social contract premises, presuming that right is defined by a social contract that answers the following question: why would equal individuals associate and cooperate with each other? The answer is always in terms of getting goods available only through

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3. For an account of wrong that would ground such a view, see Heidi M. Hurd, *What in the World is Wrong?*, 5 J. CONTEMP. LEGAL ISSUES 157 (1994).

4. See Herbert Morris, *Persons and Punishment*, 52 MONIST 475 (1968).

social cooperation (such as property or safety). Hence, wrong is defined as maldistribution or individual loss. The problem lies with the question, however — it assumes that we are individuals who must be somehow bonded to each other.

If one assumes the other optional default position, i.e., that we are already bonded,<sup>5</sup> the question about wrong is asked differently. The wrong of wrong is not harm to the victim as an individual, but the breaking of trust with one's community and the injury to the victim as a community member. The bonds between members of a community are not tangible as physical injury or property loss, but they are nonetheless real. As Hannah Arendt states:

The physical, worldly in-between along with its interests is overlaid and, as it were, overgrown with an altogether different in-between which consists of deeds and words and owes its origin exclusively to men's acting and speaking directly to one another. This second, subjective in-between is not tangible, since there are no tangible objects into which it could solidify; the process of acting and speaking can leave behind no such results and end products. But for all its intangibility, this in-between is no less real than the world of things we visibly have in common. We call this reality the "web" of human relationships, indicating by the metaphor its somewhat intangible quality.<sup>6</sup>

Accordingly, Nietzsche<sup>7</sup> (as well as Durkheim<sup>8</sup> and Hegel<sup>9</sup>) saw crime as the moment of the individual's emergence as an individ-

5. Other societies may understand this more deeply. For example, Archbishop Desmond Tutu has explained the African concept of *Ubuntu* as the following:

It speaks about the essence of being human: that my humanity is caught up in your humanity because we say a person is a person through other persons. I am a person because I belong. The same is true for you. The solitary human being is a contradiction in terms. That is why God could say to Adam, "It is not good for man to be alone." No one can be fully human unless he or she relates to others in a fair, peaceful, and harmonious way. In our African understanding, we set great store by communal peace and harmony. Anything that subverts this harmony is injurious, not just to the community, but to all of us, and therefore forgiveness is an absolute necessity for continued human existence.

Archbishop Desmond Tutu, *Foreword* to *EXPLORING FORGIVENESS* xiii (Robert D. Enright & Joanna North eds., 1998).

6. HANNAH ARENDT, *THE HUMAN CONDITION* 182-83 (1958) (emphasis omitted).

7. See FRIEDRICH NIETZSCHE, *TWILIGHT OF THE IDOLS* 98-99 (R.J. Hollingdale trans., 1896).

8. See DURKHEIM AND THE LAW 73-75 (Steven Lukes & Andrew Scull eds., 1983); EMILE DURKHEIM, *ON MORALITY AND SOCIETY* 114-33 (Robert N. Bellah ed., 1973).

9. See G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* ¶ 99 (T.M. Knox trans., 1st ed. 1952). For full treatment of Hegel's understanding of punishment/sanction, see Phi-

ual, as an entity separable and separate from the community, an “outlaw,” someone standing outside the law defining the community.<sup>10</sup>

Seeing the wrong of crime as a breach of public trust solves the following puzzles:

1) Why do we care so much about mens rea?

We care because the guilty mind has set itself against, strayed farther from, the norms of the community.

2) Why do we require public prosecutions?

We require them because the guilty person has betrayed us all and broken the communal bonds.

3) Why do we understand wrong “objectively,” as something apart from the subjective experiences of crime victims (and hence something that exists even when the victim is unaware of it)?

We understand wrong “objectively” because the wrong is in part the breaking of the social bond, and the objective (that is, public) disrespect shown to the victim (whether or not the particular victim feels loss or pain, and whether or not the victim understands the wrong as disrespectful).

Indeed, even the individual victim’s experience of being wronged is formed in part by public norms — what counts as insulting or even assaultive behavior, what counts as theft, what counts as rape, what counts as carelessness, what counts as the act of a “guilty mind” rather than a mere misfortune are all public norms (imperfectly embodied in criminal and tort law). It is because the victim is a member of a community that she sees herself as a victim of a malicious or reckless act, rather than as a victim of circumstance or bad fortune. Her trust and security are shattered precisely because another community member has violated the expectations and trust that are so basic to social interaction they become unspoken expectations in any encounter with another.

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lippe Nonet, *Sanction*, 25 CUMB. L. REV. 489 (1995); see also TRISHA OLSON, PUNISHMENT AS COMING HOME (1989) (unpublished paper on file with author, construing Hegelian view of punishment as atonement).

10. See NIETZSCHE, *supra* note 7, at 98-99. Nietzsche celebrates the assertion of free will that is implicit in the criminal act. The deep irony of crime is that it is in rebellion against law/God that we actualize our individuality and experience a sense of free will. We will to be gods unto ourselves — overcoming the conditioned nature of our own finitude. The freedom we achieve, however, is only nihilistic negative freedom — the destruction of the conditions of our being, doing, or thinking anything at all. “The sole and desolate being of the wrong lies in the outcast existence of the broken will, seeking itself in the night of its own self-estrangement, and crying the word of despair in the work of wrong.” Nonet, *supra* note 9, at 514-15.

## II. WHAT COMMUNITY BONDS?

We like to think that in our diverse world, we no longer have community, and hence no basis for talking in terms of community norms. Which community: the suburban, inner-city, African-American, Catholic, gay, skin-head, survivalist or intellectual? We have so many different cross-threads in our culture that we can each define ourselves in myriad ways. I'm white, Midwestern, vegetarian, environmentalist, intellectual, Anglo, WASP, academic, leftist, Lutheran, feminist, pro-family, straight, democratic, upper-middle class, middle-aged, professional, small-town, Irish, married-with-children, pro-gay, etc. There is no one community, and perhaps even these labels describe only interest groups, not true communities.

And yet, deep beneath the all-too obvious differences between us, we share a great deal that goes unnoticed because it is assumed. We speak similar languages that share deep roots and common ancestors. Our common linguistic heritage means that we share many basic concepts, concepts that include understandings of meaningful human action and basic norms of respect. Anthropology would not be possible without these deepest of all commonalities — the ability (even need) to make sense of another's action as intentional and meaningful, to recognize, as Kant would say,<sup>11</sup> that we all are creatures of reason.

The way we make sense of each others' actions lies deep in our language and understanding of the world, given to us by a common past. The post-modern discovery that we are "socially constructed" beings is now commonplace, usually asserted to underscore cultural differences and distinctions, but it also entails that we have a deep connection to each other — we already share language, ways of thinking, ways of feeling, and ways of going on that we were born into and that shape our human world. We may vary in our expressions of respect, in the details of our expectations and our norms, but we still share some bedrock.

From a "communitarian" standpoint, I have described a fairly "thin" or "watered-down" community, a community that still contains deep normative divisions. But this "deep community" is still a very important, if not a very salient one, for it grounds our basic intuitions about right and wrong, what counts as a human goal, what counts as rational, and what counts as intelligible.

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11. See generally IMMANUEL KANT, *FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS* 56-58 (T.K. Abbott trans., 1987).

When we meet a stranger, we assume that stranger will make sense. We must assume this in order to get the process of interpretation off the ground.<sup>12</sup> Part of “making sense” is having goals that we can recognize as human goods, and part of making sense is fitting into cultural “scripts” that we recognize.<sup>13</sup> We assume, at least until we have evidence otherwise, that the stranger is not malicious, is not crazy, and that we can communicate with him or her. This is basic public trust. It is the necessary beginning for any human interaction — buying a cup of coffee at McDonald’s, walking across a street on a green light or taking a seat on a bus. More personal relationships also build special trust, but the basic public trust is necessary for simply leaving the house in the morning.

Do we really trust each other? What about the wary meeting of black and white on a city street?<sup>14</sup> The assumptions of bad faith in a “high crime” area?<sup>15</sup> The discriminatory mistrust shown a black woman by a Benetton store?<sup>16</sup> How can I speak of public trust, or single communities, in such a world?

I can speak of public trust in our world because we still think of these scenarios as “problems” we would like to solve. We notice them and dwell on them precisely because they “stick out” and are salient. The background they stick out from is still trust, the taken-for-granted trust that most of us operate with most of the time, the trust we don’t even notice. Next time you drive on the highway, notice how much you trust the other drivers — to stay in their lane, to go the right direction, to avoid radical changes of speed, not to bump you off the road intentionally, etc.

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12. See DONALD DAVIDSON, *ESSAYS ON ACTIONS AND EVENTS* 221-23 (1980).

13. See generally J.M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* 1-19 (1998).

14. See Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539, 553 (1991) (describing a black-white encounter and calling into question the application of traditional tort law concepts).

15. See *Illinois v. Wardlow*, 120 S. Ct. 673, 676-77 (2000) (upholding a Terry-stop based on “reasonable suspicion” when the police saw the defendant run away from them in a “high crime” area). The Court said that running away in such a setting could be enough for police to reasonably suspect a person of a crime. See *id.* The dissent, by Justice Stevens, countered that those who live in high crime areas may have innocent reasons to fear and flee the police, given the level of police harassment and brutality, and the likelihood of being caught in the cross-fire of a violent situation. See *id.* at 678 (Stevens, J., dissenting). The majority’s assumption that the guilty are more likely to flee the police than the innocent assumes a certain level of public trust; the dissent questions that assumption. See *id.* at 679-80.

16. See PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 44-47 (1991) (telling the story of her exclusion from a Benetton store).

The more deeply a crime breaches basic public trust, the more "strange," "inhuman" and "senseless" it seems. The criminal appears to stand out from the "rest of us" as incomprehensible, inassimilable. We ask, why would anyone do this? The criminal is an individual, an outlaw, a predator,<sup>17</sup> a monster,<sup>18</sup> a barbarian,<sup>19</sup> outside the bounds of human comprehension and community. The breach of public trust creates a chilling shiver of fear and insecurity because it strikes at the very bonds that make it possible for us to live together.

### III. REINTERPRETATION OF FORGIVENESS/MERCY

If a non-victim community member can forgive, forgiveness must be more than the subjective emotional experience of overcoming anger or resentment. I acknowledge that when a victim has the courage and generosity to forgive a wrongdoer, the victim is changing the way she feels about the wrongdoer. To change one's emotions, however, one has to change one's mind. Emotions are cognitive at least in part,<sup>20</sup> otherwise they would not be amenable to conscious change, and forgiveness would be only an event, not a virtue.<sup>21</sup> Hence, forgiveness cannot be "just" a change in how one feels.

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17. See, e.g., N.J. STAT. ANN. 2C, §§ 7-8 (West 1999) (describing New Jersey's enactment of "sexual predator" statutes); Linda Ross Meyer, *Is Practical Reason Mindless?*, 86 GEO. L.J. 647, 669-70 (1998) (discussing the U.S. Supreme Court's decision to uphold Kansas's sexual predator law).

18. See, e.g., Nancy Gibbs, *The Monsters Next Door: A Special Report on the Colorado School Massacre*, TIME, May 3, 1999, at 20; LEWIS B. SMEDES, FORGIVE AND FORGET: HEALING THE HURTS WE DON'T DESERVE 106 (1984) (referring to forgiving "monsters"); Jonathan Simon, *Power Without Parents*, 16 CARDOZO L. REV. 1363, 1421 (1995) (presenting an account of a gangster whose "nom de guerre" is "Monster" Kody).

19. "Barbarian" was the word the Greeks used to refer to those whom they could not understand; whose language sounded like "barbarbar." See WEBSTER'S THIRD INT'L DICTIONARY 174 (1986). Someone who does not make sense is a barbarian. See *id.*

20. For a sampling of this burgeoning literature, see SUSAN BANDES, THE PASSIONS OF LAW (1999); NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS 69-86 (forthcoming May 2000); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996); MARTHA C. NUSSBAUM, THE THERAPY OF DESIRE: THEORY AND PRACTICE IN HELLENISTIC ETHICS 507-10 (1994).

21. See Joanna North, *The "Ideal" of Forgiveness: A Philosopher's Exploration, in EXPLORING FORGIVENESS*, *supra* note 5, at 20 (arguing that for forgiveness to have moral value, it must be an active process, and not a "mere cessation of hostile feelings").



As philosophers, theologians and psychologists have recognized, forgiveness begins<sup>22</sup> from a new vision of the wrongdoer that tries to empathize with him and see him as more than his crime.<sup>23</sup> Understanding the wrongdoer and his action is a way of bringing him back inside the human sense-making community so that he no longer looks like an “inhuman predator” and stands out-law. Making sense of the wrongdoer’s action means looking at him as more than his one act and filling out the picture of the past, as well as acknowledging the possibilities inherent in his future, and seeing him therefore once again inside the sphere of humanity.<sup>24</sup> This expanded frame of reference opens the possibility for the next aspect of forgiveness — its forward-looking and action-oriented part — a

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22. Before forgiveness can come into play, however, we must know much of the truth of what happened and be able to characterize it as a wrong. This “moment of truth” may be a confession followed by apology, see Symposium, *The Role of Forgiveness in the Law*, 27 FORDHAM URB. L.J. 1347, 1414-19 (2000) [hereinafter *Forgiveness Symposium*] (remarks of Jonathan R. Cohen), or the result of a state investigation or truth commission. The importance of saying the truth is rightly emphasized as the beginning of the process of any forgiveness or reconciliation. See *id.* at 1436-40 (remarks of Juan Méndez) (regarding the recognition of a human right to truth); Margaret Walker, *Forgiving: Not One Path, No Single Destination* (forthcoming conference paper to be published with Obert C. and Grace A. Tanner Humanities Lectures, Apr. 13-14, 2000, Univ. of Utah) (emphasizing that a facet of forgiveness is putting the wrong in the past — which requires factualizing it). Truth, of course, may never be complete or undisputed or settled, but some resolution of it is perhaps the beginning of the process. See *Forgiveness Symposium, supra*, at 1375-78 (remarks of Frederick W. Gay) (describing the first part of a victim-offender mediation as often involving a clarification of what happened and why).

23. See G.W.F. Hegel, *Who Thinks Abstractly?*, in TEXTS AND COMMENTARY 116-17 (Walter Kaufmann trans., 1977).

A murderer is led to the place of execution. For the common populace he is nothing but a murderer. Ladies perhaps remark that he is a strong, handsome, interesting man. The populace finds this remark terrible: What? A murderer handsome? How can one think so wickedly and call a murderer handsome; no doubt, you yourselves are something not much better! . . . This is abstract thinking: to see nothing in the murderer except the abstract fact that he is a murderer, and to annul all other human essence in him with this simple quality.

*Id.*

24. See LEWIS SMEDES, FORGIVE AND FORGET 45-49 (1984); North, *supra* note 21, at 26-27; MURPHY & HAMPTON, *supra* note 2, at 84-87; Everett L. Worthington, Jr., *The Pyramid Model of Forgiveness: Some Interdisciplinary Speculations about Unforgiveness and the Promotion of Forgiveness*, in DIMENSIONS OF FORGIVENESS: PSYCHOLOGICAL RESEARCH & THEOLOGICAL PERSPECTIVES 107, 118-23 (Everett L. Worthington, Jr. ed., 1997). This expansion in view also works on the victim as well, making the victim aware that her life, too, is not defined and confined by the crime. She is not just a “victim.” Hence, forgiveness is said to set the victim free from the crime as well. See Smedes, Worthington, *supra*.

commitment to “deal” with the wrongdoer that paves the way for potential reconciliation.

That the victim is committed to deal with the offender does not instantly put the offender back at status quo ante. The battered woman need not welcome her abuser back into the home. It merely places the victim at the table, ready to begin the perhaps painful process of working on a *rapprochement*, and further progress depends on the remorse and return of the offender.

This “commitment to deal” is a necessary part of forgiveness,<sup>25</sup> so that forgiveness is not just an emotional change in the victim. If you say you forgive me, but will not talk to me or interact with me in any way, then I do not believe you have forgiven me. Forgiving may not require forgetting, but our usual use of the term means more than “I’m not actively angry anymore.” I can also imagine someone saying, “I am still angry, but I forgive you anyway.” (I have said so myself, to my children.) Here, “I forgive you” looks like a speech act<sup>26</sup> — a commitment to deal.<sup>27</sup> Emotion may lag behind, but the commitment is the key.

If reconciliation is central to forgiveness, however, how can we forgive the dead, as we say we do? If they are dead, we can no longer have a future relationship with them, can we?<sup>28</sup> On the contrary, the “forgiving of the dead” may also be more than an emotional experience. The public rehabilitation of the deceased’s memory, or a “clearing of her name,” may mean something much more like forgiveness as reconciliation than forgiveness as emotional transition. We honor the dead with medals, remember them with statues, poems, music and art. We read and argue with the dead all the time (especially we philosophers). All of these actions are quite public and much more akin to active reconciliation than subjective emotional experience. The communal remembering that keeps great spirits in our midst, even after their bodies are gone, is

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25. See, e.g., Martin E. Marty, *The Ethos of Christian Forgiveness*, in DIMENSIONS OF FORGIVENESS, *supra* note 23, at 9; Elliot N. Dorff, *The Elements of Forgiveness: A Jewish Approach*, in DIMENSIONS OF FORGIVENESS, *supra* note 23, at 29. Both authors argue that return or reconciliation is at least one facet of forgiveness.

26. See J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 12 (1962) (arguing that one’s statement can also be described as an act).

27. Others have argued, with Murphy, that forgiveness is not performative. See, e.g., R.S. Downie, *Forgiveness*, 15 PHIL. Q. 128, 132 (1965); H.J.N. Horsbrugh, *Forgiveness*, 4 CANADIAN J. PHIL. 269, 270 (1974). But see William R. Neblett, *Forgiveness and Ideals*, 83 MIND 269 (1974) (defending the idea that “I forgive” may sometimes be performative).

28. Jeffrie Murphy makes this objection in his conference remarks. See *Forgiveness Symposium*, *supra* note 22, at 1353-66 (Keynote address of Jeffrie G. Murphy).

part of what it is to be part of community and therefore linked to the past.

We are not, however, any more “at risk” from the dead. They can do no further wrong to us. Or can they? Are we safe from Hitler because he is dead? Or is he, and what he stands for, not still a risk? Does he not still gain admirers and adherents? Though sometimes the forgiveness of the dead is a bit cheap (it is often all too easy to “forgive” when we are safe), the dead do haunt us still. What becomes impossible, however, is for the dead to change, grow, or learn. Hence, they cannot meet forgiveness half-way to complete the reconciliation. We may gain new information about who they were, but we are stuck with the past as best we can know it.

In sum, the victim’s forgiveness means, in part, seeing the offender as a sense-making member of the human community and committing to deal with him again. These actions require that the victim herself be a member of the community, for they employ public norms of what counts as sense-making and what counts as “being a member” again. Hence, it is not the victim as subjective sufferer who forgives, but the victim as member of the public community, the victim as an “Everyman.”

If forgiveness is in part sense-making and committing to deal, then forgiveness is not just a change in “subjective” feelings, and therefore not restricted in principle to victims. In fact, the victim might forgive, while the community may not.<sup>29</sup> Community members who are indignant, shocked and baffled by a criminal’s actions and who have lost their trust in him can also undergo the discipline of sense-making and committing to deal. I argue, indeed, that this is part of the ritual of public punishment (below). The breach of public trust is not just a wrong to the direct victim, but a wrong to all whose security and trust are broken by crime.

Just because non-victims *can* forgive, it does not follow that they have standing to forgive, or *ought to* forgive even when the victim refuses. Isn’t it presumptuous and doesn’t it demean and trivialize the victim’s pain to forgive on the victim’s behalf? How could I

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29. See, e.g., Rachel Gottlieb, *Victims: Megan’s Law Backfires: In Some Family Abuse Cases, Publicity Compounds the Hurt*, HARTFORD COURANT, March 3, 1999, at 1 (reporting that Megan’s law injures a victim’s family when the father-abuser, after years of intensive counseling, reconciles with the family and resides at the same address, but neighbors will not attend the victim’s birthday parties and send hate-mail to the family).

presume, for example, to forgive Hitler or Stalin or the murderer of someone else's child?<sup>30</sup>

Though this is a powerful objection, I believe it makes two mistakes. First, it takes a see-saw view of punishment that understands punishment as a reaffirmation of the victim's value, which the crime has devalued (victim goes up when offender goes down). I explore this further in Part IV. Second, it ignores the fact that the future-looking nature of forgiveness is risky not only for the victim, but also for other potential victims. The community representative is a potential victim and must be willing personally to take the risk of recommitment to dealing with the offender. From this angle, the victim can never forgive only for himself, but must forgive for the future and for the future potential victims.<sup>31</sup>

One problem arises when violence or wrong is done within a subcommunity. Can representatives of a non-minority group forgive a wrong targeted at a minority group only? I would venture that the community doing the forgiving must be the community "at risk" and in relationship with the offender. There is no coming over to the other, and hence, no forgiveness, when one need not "deal" with the offender because one is a stranger and is not at risk.<sup>32</sup>

#### IV. FORGIVENESS AND PUNISHMENT

Many scholars have pointed out that retributive justice is the only morally defensible current theory of punishment; utilitarian theories always have the difficulty that there is no utilitarian reason not to punish the innocent if it will achieve whatever good end is prescribed by the theory (e.g., deterrence, education, victim support, etc.).<sup>33</sup> Yet, even in retributivism's most persuasive guise, it

30. See, e.g., LEWIS B. SMEDES, *THE ART OF FORGIVING* 39 (1996) ("No one — not a president, not a peasant — has a right to forgive anyone for wounds he himself did not suffer. Charity for the mothers of Nazi sons is fine. But no one but their victims can forgive Nazi sons.").

31. See Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 *EMORY L.J.* 1247, 1277-82 (1994) (arguing that victim-offender mediation omits consideration of deterrence and other purposes of the state). That even private forgiveness can have public consequences is exemplified in Jane Austen's *Pride and Prejudice* when Jane and Elizabeth forbear from "exposing" the character of Wickham. See JANE AUSTEN, *PRIDE AND PREJUDICE* 226-27, 277-78 (Oxford Illus. ed. 1813). Their private act of forgiveness for his deceptions, of course, results in his being able to seduce their sister Lydia. See *id.*

32. Punishment between strangers makes no sense either. See HERBERT MORRIS, *ON GUILT AND INNOCENCE* 96 (1976).

33. For excellent arguments against utilitarian theories of punishment, see Michael Moore, *The Moral Worth of Retribution*, in *RESPONSIBILITY, CHARACTER AND THE*

fails in its own aim — to end the cycle of vengeance. Instead, punishment must involve an element of forgiveness and even of mercy (mitigation of just deserts). Hence, I disagree that forgiveness is an optional “add-on” to punishment<sup>34</sup> and also that mercy and forgiveness differ as act versus emotion.

### A. Retribution as a See-Saw

One of the most tempting formulations of retributivism takes seriously the dignitary harm done by crime and understands that wrong is not just tangible harm, but also disrespect. The victim is treated in a demeaning fashion by the criminal act, and even if the victim’s intrinsic worth is untouched, the victim’s self-esteem may be injured.<sup>35</sup> Punishment, then, serves to show society’s respect for the victim by taking away the offender’s wrongfully gained status, honor or mastery and countering the message, implicit in the criminal act, that the victim does not count.<sup>36</sup> I call this the see-saw view of retribution, because it places the victim and offender on a moral see-saw — as the offender goes up, the victim goes down and vice versa. This sort of retribution is ultimately unsatisfying, however, because it falsely ties the victim’s value to the offender’s punishment. Moreover, we cannot “balance” victim and offender without degrading the offender and perpetuating the wrong.

If we believed the victim’s value to be tied to the offender’s punishment, then it would be hard to justify the use of excuses in the criminal law. For example, in a case of mistaken defense of others (or “imperfect” self-defense), the victim is still assaulted intentionally and thereby demeaned — arguably demeaned even more in that the offender unreasonably thought the victim was an aggressor. To excuse the aggression (or even to mitigate the punishment) because of the aggressor’s unreasonable mistake would seem to leave the victim at the low end of the see-saw, unredeemed and undervalued. However, to punish the offender for a negligent act to the same extent as for an intentional wrong also seems unjust.

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EMOTIONS (Ferdinand Schoeman ed., 1987); Herbert Morris, *A Paternalistic Theory of Punishment*, 18 AM. PHIL. Q. 263 (1981).

34. See MURPHY & HAMPTON, *supra* note 2, at 182-83. Mercy is both required and not deserved, a grace we are obligated to extend to offenders. See *id.* This takes some of the “gift” nature away from forgiveness — though no less than the “duty” of charity generally. See *id.* In parallel, one is obligated to be charitable, but no one has a right to receive a gift. See *id.*

35. See David Sachs, *How to Distinguish Self-Respect from Self-Esteem*, 10 PHIL. & PUB. AFF. 346-60 (1981).

36. See MURPHY & HAMPTON, *supra* note 2, at 122-47.

Instead, we must acknowledge that the victim's true worth or dignity is never touched by criminal actions. The more society acknowledges this, refuses to see the victim "as victim only" or as sullied somehow by the crime, the better. Of course, society does not always understand this, but tends to treat victims as pariahs, at fault somehow, out of a reflexive urge to explain crime as something that will happen to others, not oneself.<sup>37</sup> To the extent that the conviction of an offender serves as a public acknowledgment that the offender, not the victim, was wrong, the conviction or guilty plea serves to fix blame and exonerate the victim (as a matter of communal psychology). But the extent of the punishment, while a rough gauge of how seriously we take an offense, should not be calibrated to the worth or redemption of the victim. We have no business "valuing" the victim in the first place — the victim is beyond value, beyond price. Indeed, we often complain that capital punishment, for example, is too likely to reflect a jury's "valuation" of the victim rather than the crime.<sup>38</sup>

More telling, however, it seems that one can never achieve balance between the victim and offender unless the offender gets what he dished out. Raping the rapist, beating up the bully or torturing the torturer, however, only perpetuates the wrong, dehumanizing the offender and the punisher as well.<sup>39</sup> If we accept some "moral equivalent" but humane punishment instead, then the offender is simply not balanced with the victim — reparation is no reparation<sup>40</sup> — because part of the harm the victim suffers is the dignitary harm of being treated offensively and demeaned.<sup>41</sup> We cannot restore balance without demeaning the offender, and demeaning the offender perpetuates the wrong.

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37. See Neal R. Feigenson, *The Rhetoric of Torts: How Advocates Help Jurors Think About Causation, Reasonableness, and Responsibility*, 47 HASTINGS L.J. 61, 136-37 (1995).

38. See THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION 114 (Stephen R. Donziger ed., 1996) (citing statistics that killers of whites are eleven times more likely to get the death penalty than killers of blacks).

39. See James Q. Whitman, *What is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055 (1998). For a contemporary example, see Periscope, *Pakistan*, NEWSWEEK, Mar. 27, 2000, at 5 (reporting the outcry over a murderer who was sentenced to be strangled, cut into 100 pieces and put into acid).

40. See MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 91-92 (1999); MIROSLAV VOLF, EXCLUSION & EMBRACE: A THEOLOGICAL EXPLORATION OF IDENTITY, OTHERNESS, AND RECONCILIATION 122-23 (1996) (agreeing that punishment never repairs or repays the victim).

41. See Paul Campos, *The Paradox of Punishment*, 1992 WIS. L. REV. 1931 (1992).

When we promise victims closure, redemption from pain and complete satisfaction through an offender's punishment, we lie to them. We do not give offenders their just deserts, and if we did, we would be wrong to do so. We must do more to help crime victims than we do, and we should not lead them to expect all their solace from punishment.

### B. Retribution As Just Deserts

Another attractive vision of retribution is the idea that punishment is nothing more than taking the offender seriously as a legislator with free will in the Kantian kingdom of ends and universalizing the maxim of his wrongful act so that it falls on his own head.<sup>42</sup> If I act with reason, then I will my action to be applied in all similar cases. Therefore, if my action is criminal, then I will that I be treated the same way in similar circumstances. Thus, if we respect the offender as a reasonable actor, we should give him his punishment, the punishment he has in a way decreed for himself. To treat him any differently — to mitigate or excuse his act — is to deny him his free will and personhood, to see him as subject to the forces of cause and effect rather than able to act.<sup>43</sup>

Or, to put it at perhaps a deeper level: The criminal has actualized his (negative) freedom by rejecting the moral standards of the community, setting himself up as his own god. In doing so, however, he has negated the possibility of his own positive freedom as a reasonable agent, for in rejecting cultural norms, he rejects the norms that articulate and define reason itself. By rejecting that which makes him what he is, he sets himself at war with himself. He has put himself outside, made an exception of himself (as a

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42. See KANT, *supra* note 11, at 49.

43. See MORRIS, *supra* note 33; HEGEL, *supra* note 9, ¶ 100.

[The penalty] which falls on the criminal is not merely implicitly just — as just, it is *eo ipso* his implicit will, an embodiment of his freedom, his right; on the contrary, it is also a right *established* within the criminal himself, i.e., in his objectively embodied will, in his action. The reason for this is that his action is the action of a rational being and this implies that it is something universal and that by doing it the criminal has laid down a law which he has explicitly recognized in his action and under which in consequence he should be brought as under his right . . . punishment is regarded as containing the criminal's right and hence by being punished he is honoured as a rational being. He does not receive this due of honour unless the concept and measure of his punishment are derived from his own act. Still less does he receive it if he is treated either as a harmful animal who has to be made harmless, or with a view to deterring and reforming him.

HEGEL, *supra* note 9, ¶ 100.

Kantian would put it<sup>44</sup>), by adopting a course of action for others that he would not will for himself. Punishment, by bringing home to him the universalized consequences of his own action, restores him to the human community and makes of him a creature of reason once more. His "will" is broken to the yoke of reason and he is rescued from the oblivion of his rebellion from his own humanity. In his return, the law of reason itself becomes actualized in the world — has power, is at work<sup>45</sup> — and the renewed being together with others becomes a chosen, active expression of positive freedom rather than a mere status quo ante.<sup>46</sup> The bond of community itself is felt, seen, and active in the world, instead of merely inferred from the fact of living alongside one another. The prodigal son's return is cause for celebration; the reunion of father and son is more salient and vivid than the preexisting union because it has been explicitly chosen and longed for, rather than taken for granted.

Again, however, the problem of moral equivalence haunts us. The wrongness of the wrong that the offender committed is in part in its disrespect for and humiliation of others. Yet, to give him "his just deserts," or the full recoil of his own dehumanizing action, would be to disrespect and humiliate him — contrary to the very rule of respect to which we want to bring him home. Hence, he cannot get his just deserts *and* return to the community.

The problem is that the universalization of the offender's maxim (rule of action) is not possible unless the premise of inequality on which that maxim relies is rejected. In assuming that the maxim applies to all "like cases," we must treat the criminal herself as "like us," thereby granting her the respect due a rational being. So, we have already "brought her back to us" in the very act of trying to universalize her action. We cannot then demean her without violating the condition precedent to universalizing her maxim — her own humanity. The very attempt to "give her her just deserts" requires giving her less than her just deserts.

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44. See KANT, *supra* note 11, at 52.

45. See HEGEL, *supra* note 9, ¶ 97.

46. See *id.* ¶ 220 ("Objectively, this is the reconciliation of the law with itself; by the annulment of the crime, the law is restored and its authority is thereby actualized. Subjectively, it is the reconciliation of the criminal with himself, i.e. with the law known by him as his own and as valid for him and his protection; when this law is executed upon him, he finds in this process the satisfaction of justice and nothing save his own act.").



### C. Punishment As Atonement

In the end, it is not the equivalence of punishment to the crime that is important, but the return to community. Hence, punishment is exactly NOT the criminal's due, but a mitigated one — a merciful one. In this view, mercy must be part of every punishment, because punishment is never equal to the crime without being criminal.<sup>47</sup> The criminal does not get her due, but receives grace — and is, as Dostoevsky would say, forever in our debt and therefore forever tied and obligated to us in relationship.<sup>48</sup>

Punishment thought this way looks more like a form of forgiveness — a bringing home of the offender and being again willing to deal with her. Because punishment is bounded by the humanity of the community, it is never equivalent to the crime, but always merciful. Forgiveness, mercy, and punishment become interwoven and inextricable. As Hegel, among others, has articulated, punishment might look more like the religious practice of atonement than the quid pro quo of retribution.<sup>49</sup> Stephen Garvey, following the religious model, suggests that atonement has two steps, expiation and reconciliation.<sup>50</sup> The first involves repentance, apology, reparation and penance by the offender; the second, forgiveness by the victim.<sup>51</sup> As Garvey explains:

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47. Jean Hampton disagrees that the confinement of punishment to the “humane” should be considered mercy. See MURPHY & HAMPTON, *supra* note 2, at 160 (arguing that offender’s moral worth “must always be respected in the construction of a genuinely retributive, rather than vengeful, response[; s]o a judge isn’t being merciful if he refrains from torturing a torturer”).

48. See DOSTOEVSKY, *supra* note 1.

49. See Nonet, *supra* note 9, at 521 (quoting Hegel) (emphasis omitted):

As the fulfillment of this return, die Erinnerung is the at-one-ment of the self with itself, in German die Versöhnung, the return of the son to his filial belonging with the father, that is mortal man’s unity with the godhead. In this return, the self rises again in its Auferstehung, its resurrection to its proper identity with itself in the spirituality of selfhood. Hence it is that the transformation of revenge into punishment accomplishes “the atonement of the law with itself,” as well as that “of the offender with himself,” by which “the law is restored,” and “first known by the offender as his own,” so that he “finds in it the peace of justice.”

HEGEL, *supra* note 9, ¶ 220. For an intriguing vision of punishment as atonement using the Christian paradigm, see Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801 (1999).

50. See Garvey, *supra* note 49, at 1804-05. The parallel in Hegelian terms is die Vernichtung, die Aufopferung, die Erinnerung and die Versöhnung. See Nonet, *supra* note 9, at 521-22. Both authors rightly emphasize the importance of remembering the wrong, even while forgiving the wrongdoer. Forgiveness here is not condonation or amnesia.

51. See Garvey, *supra* note 49, at 1805.

the atonement model provides punishment with an end — the atonement of the wrongdoer and his victim and the restoration of the relationship that existed between them before the wrong — but treats punishment as an intrinsically appropriate way in which to pursue and achieve that end. The ends and means of punishment are thus fused.<sup>52</sup>

If punishment is atonement, and the atonement is with the community, not just the direct victim,<sup>53</sup> then it requires a commitment by the community to reintegrate the offender and be willing to deal with her. In this sense, Arendt is right to say that if we cannot forgive, we cannot punish and if we cannot punish, then we cannot forgive.<sup>54</sup> In traditional communities, it is exile or shunning, not death, that is the “last ditch” expedient for dealing with crime. By contrast, in traditional societies even a death penalty is a moral judgment that recognizes the offender as responsible and human, though perhaps able to atone only in death.<sup>55</sup>

In our day, prisons and mental hospitals are where we “keep” our moral monsters in exile. We talk retributivism and “just deserts,” but the truth is that we don’t really believe that offenders are “equal” again once they have paid their “debt to society.” Instead, we do not care much about what happens to offenders as long as they stay away from us. We “incapacitate” them as though they were mere animals, blaming their keepers, not them, when they escape and reoffend.<sup>56</sup> Reintegration has not been the focus

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52. *Id.* at 1806.

53. Garvey is not so clear about this, but does recognize that victim-offender mediation is not by itself sufficient. *Id.* at 1829-30. He sees a place for public penance, though mostly as a way of expressing the victim’s worth (a characterization I would resist as too close to the see-saw view of retribution) and working out the offender’s self-hatred. *See id.* at 1819. I would just add that the reason penance and not just restitution to the victim is required is because the wrong is a wrong to all. The penance serves as a public, tangible, demonstration of remorse that prepares the defendant to receive the community’s forgiveness. If the offender is not penitent, the reconciliation never is realized. However, the community may nonetheless have the obligation to set the stage and give the offender the opportunity to make his self-imposed exile into a penance. Punishment, then, is the opportunity for penitence, as in the original understanding of the penitentiary.

54. *See ARENDT, supra* note 6, at 241.

55. *See Garvey, supra* note 49, at 1838; *see also MURPHY & HAMPTON, supra* note 2, at 158 (community would hold reconciliation feast with offender who was to be hanged); Plato, *Crito*, in *EUTHYPHRO APOLOGY CRITO PHAEDO PHAEDRUS* 147 (Harold North Fowler trans., 1914) Socrates chooses death over exile, because he cannot leave his community without leaving himself behind. *See Plato, supra.*

56. *See Meyer, supra* note 17, at 668-69; FRANKLIN E. ZIMRING & GORDON HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME* ch. 1 (1995) (noting that incapacitation has, by default, taken a dominant role in justifying punishment).

of most of our current schemes of punishment. On the contrary, we segregate offenders even after they have done their time through Megan's laws, loss of voting rights, sex offender civil commitment statutes<sup>57</sup> and job disqualifications. We have lost the sense of the jury and grand jury as a voice of the community, setting the terms of reintegration. The restorative justice movement, however flawed, that emphasizes reintegration of offenders and offers models for bringing victims and offenders together,<sup>58</sup> offers a note of hope that a new paradigm for punishment will emerge from the demise of retributivism and recapture some older intuitions about criminal justice.<sup>59</sup>

#### D. Ground in Human Finitude

The centrality of forgiveness has its root in the basic condition of human life: we intend, plan and think like gods, but we are finite both in power and duration and we live only one moment at a time. Hence, for example, though we act and intend as though we can control our destinies, we cannot be master of all the consequences of our actions.

Hannah Arendt has written that the human condition requires something like forgiveness in its very basis, because we cannot, as

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57. See Sherry F. Colb, *Insane Fear: The Discriminatory Category of "Mentally Ill and Dangerous,"* 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 341 (1999).

58. See, e.g., MARK S. UMBREIT, VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION (1994); HOWARD ZEHR, CHANGING LENSES (1990). Insofar as the movement leaves out community and puts the burden of reconciliation on the victim exclusively (and it is a heavy burden, see Brown, *supra* note 31), I would suggest amendment. However, some models include community participation. For example, Vermont has a community-based reparative probation board. See Michael Tonry, *U.S. Sentencing Systems Fragmenting*, 10 OVERCROWDED TIMES 1, 10 (1999). We should also not forget that the state itself serves as a community voice, at least with respect to those deeply-agreed-upon norms at the heart of the criminal law. The state, however, has abdicated its obligation to reintegrate and forgive.

59. See DAVID GARLAND, PUNISHMENT AND CULTURE 207 (1990).

Puritan penal rituals — in theory at least — were not intended to isolate offenders and show them to be alien. Instead the arrangements of the ceremony . . . were intended to demonstrate an intimate link between the offender and the community of believers. Onlookers were made to feel that they too could be tempted into sin . . . In other words the sinner-offender was not conceived as "Other" but rather as a kind of Protestant Everyman, a living example of the potential for evil which lies in every heart and against which every soul must be vigilant. In keeping with this conception, the denouement of each public ceremony was aimed not at the vanquishing of the enemy, but instead at the reinclusion of the atoned and repentant sinner.

*Id.*

finite, be responsible for all the consequences of our actions into infinity.<sup>60</sup> She writes:

Without being forgiven, released from the consequences of what we have done, our capacity to act would, as it were, be confined to one single deed from which we could never recover; we would remain the victims of its consequences forever, not unlike the sorcerer's apprentice who lacked the magic formula to break the spell.<sup>61</sup>

Reason would require responsibility, but finitude makes it impossible. Hence, for example, the legal doctrine of proximate cause in both criminal and tort law seems a sort of arbitrary, though necessary, limitation on human responsibility.

Arendt says that the cure for the infinity into which we project ourselves is forgiveness — a commitment to cut off the consequences of past actions in order to make possible a new start,<sup>62</sup> which is action itself. We cannot act unless we are forgiven. Yet one cannot forgive oneself — someone else has to do it. Hence, contrary to Kant,<sup>63</sup> the presence of others is necessary for the very actualization of human reason — community, not individuality, is the ground of human action. As Archbishop Tutu put it, “a person is a person through other persons.”<sup>64</sup>

Heidegger puts the thought the other way around: we are responsible only because we take over being a basis for ourselves<sup>65</sup> — accept responsibility for what we are (and what we did not make or do). What we are is already set out for us by the world and the others in it; we are finite and do not make ourselves. Our place is made before we fill it. Yet, this “self,” to be responsible for its actions, must first take responsibility for being as it is, though no action of the self made the self. Hence, responsibility cannot be only for what we do, and at the same time, cannot be for everything we do. The basic premise of criminal law must be tempered by the recognition of finitude at both ends: we are responsible for more and for less than we do. More needs to be done to work

60. See ARENDT, *supra* note 6, at 240-41.

61. *Id.* at 237.

62. See ARENDT, *supra* note 6, at 237. Martha Minow has explored how forgiveness makes possible a “new start” after a regime of terror. See Minow, *supra* note 40, at 91-92.

63. See KANT, *supra* note 11, at 53-54, 57-63 (deriving duties to others from an analysis of the concept of will).

64. See Tutu, *supra* note 5.

65. See MARTIN HEIDEGGER, *BEING AND TIME* 330 (John Macquarrie & Edward Robinson trans., 1962).

through the underpinnings of human responsibility,<sup>66</sup> but the direction in which we need to go is clear.

If responsibility is itself not a creature of individual will, then punishment need not be the “just deserts” or universalized maxim of that will. The individual cannot be so neatly marked off from the rest of us, either as an actor or as an offender, and hence, the basic condition of being-with-others should focus and undergird the theory of punishment. This opens the door for an understanding of mercy that does not undermine punishment, but completes it.

## V. FORGIVENESS AND PITY

The quotation I began with<sup>67</sup> shows another, less attractive, side of forgiveness — what Nietzsche calls “pity.”<sup>68</sup> “I forgive you” can be condescending, widening the gap between self and offender rather than closing it.<sup>69</sup> The defendant in Dostoevsky’s quotation will be “crushed” by mercy and “horror-stricken” and “more unworthy than all.”<sup>70</sup>

Nietzsche recognized that pity demeans and shames, “an agreeable impulse of the instinct for appropriation at the sight of what is weaker.”<sup>71</sup> It also makes the suffering of another superficial:

But whenever people notice that we suffer, they interpret our suffering superficially. It is the very essence of the emotion of pity that it strips away from the suffering of others whatever is distinctively personal. Our ‘benefactors’ are, more than our enemies, people who make our worth and will smaller.<sup>72</sup>

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66. For attempts at this daunting philosophical task, see Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959 (1992); see also LARRY MAY, *SHARING RESPONSIBILITY* (1992). Also, see the emergence of “character theories” of responsibility. See Sherry F. Colb, *The Character of Freedom*, 52 STAN. L. REV. 235 (1999); Sherry F. Colb, *The Three Faces of Evil*, 86 GEO. L.J. 677 (1998); Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511 (1992). See generally Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719 (1992).

67. See DOSTOEVSKY, *supra* note 1.

68. See *infra* notes 70-74.

69. See MURPHY & HAMPTON, *supra* note 2, at 31.

70. DOSTOEVSKY, *supra* note 1. See also *Romans* 12:19-20 (stating that generosity to an enemy will “heap coals of fire on his head”).

71. FRIEDRICH NIETZSCHE, *THE GAY SCIENCE* 176 (Walter Kaufmann trans., 1974).

72. *Id.* at 269.

And, the power and “richness” to forgive may also accompany a view of offenders as mere “parasite[s],” “incapable of discharging their debt.”<sup>73</sup>

And yet, (for Nietzsche there is always an “and yet”) Nietzsche himself calls for the “self-overcoming of justice: . . . grace”<sup>74</sup> and justice as “love with seeing eyes.”<sup>75</sup> He seems to envision an understanding of grace or love that does not demean others like pity does, but becomes a better justice. He cannot, however, get there: the superman is above all a self-willed willer who cannot love another without destroying the otherness of the other in an imperialistic embrace. The superman can either reject the other, or will the other to be self, resulting in pity-like appropriation, not love. But the superman cannot give over the power to will to another, even in part, i.e., cannot accept another’s authority.<sup>76</sup>

What even Nietzsche, smasher of cultural idols, is unable to do is to give up individualism,<sup>77</sup> our precious enlightenment inheritance. Yet, to cross over to the other is to give up some part of one’s self. The offender must accept more than his due, accept a gift, a reunion he does not deserve, that will not make him “even.” He must also give up his willful selfishness that was the root of his crime, and accept the “yoke” of reason — reason he did not will for himself but must take also as a given. The victim must give up her “rights” to justice and compensation, her injured pride and resentment, her boundaries and security (doubly precious now after being invaded), take a less personal perspective on the offender that replaces repugnance with understanding, and risk “dealing” with the offender.<sup>78</sup> For this, our individualism does not prepare us well. We are not at all sure that we want the “vast obligation” of forgiveness instead of the “I am even” of justice. We are not at all sure

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73. FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS* 72 (Walter Kaufmann trans., 1967).

74. *Id.*

75. Friedrich Wilhelm Nietzsche, *Thus Spake Zarathustra*, in *THE PHILOSOPHY OF NIETZSCHE* 71 (T. Common trans., Modern Library ed. 1937).

76. See Philippe Nonet, *What is Positive Law?*, 100 *YALE L.J.* 667 (1990) (conveying a similar understanding of Nietzsche).

77. Or, perhaps, what we are unable to do, given our philosophical position in history.

78. I will no doubt be chided as anti-feminist for my views here. We are supposed to be raising our consciousnesses and allowing ourselves the self-esteem to feel resentment, anger, and seek retribution. See ROBIN WEST, *CARING FOR JUSTICE* 109-27 (1997). Although men may have much to teach women about self-respect, if I may be so “essentialist,” women may have much to teach men about forgiveness. See *id.* at 22-93. We need not degrade ourselves or consent to abuse, but we must take risks.

that we want our individual boundaries permeated. Again, Nietzsche puts it so well:

There was a time in our lives when we were so close that nothing seemed to obstruct our friendship and brotherhood, and only a small footbridge separated us. Just as you were about to step on it, I asked you: "Do you want to cross the footbridge to me?" — Immediately, you did not want to any more; and when I asked you again, you remained silent. Since then mountains and torrential rivers and whatever separates and alienates have been cast between us, and even if we wanted to get together, we couldn't. But when you now think of that little footbridge, words fail you and you sob and marvel.<sup>79</sup>

To change our understanding of punishment is to change our understanding of community to something we are, and not something we will. Its reverberations require even a new understanding of justice itself.

## VI. REDEFINITION OF JUSTICE

Scholars often separate forgiveness from mercy, defining the former as an emotional change in the victim that may come before or after punishment, and the latter as an act of remission or mitigation of punishment.<sup>80</sup> Scholars have also argued that justice is the staff of political life and mercy should only nibble at the edges lest it overwhelm justice and destroy community.<sup>81</sup>

I have argued, however, that forgiveness and mercy are deeply related and that they are more central to the creation of community than is justice. As a factual matter, justice is not the norm, but the exception. Few crimes are reported, few offenders are arrested, few arrests are prosecuted, and very, very few offenders go to trial to seek "justice" rather than a negotiated settlement. At each stage, some of the offenders are forgiven (by victims, police and/or prosecutors).<sup>82</sup> In civil cases, the same is true: settlement,

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79. GAY SCIENCE, *supra* note 71, at 90; *see also* FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL* 224 (Walter Kaufman trans., 1966).

80. *See supra* note 27.

81. *See* R.J. O'Shaughnessy, *Forgiveness*, 42 *PHIL.* 336 (1967); Joseph Beatty, *FORGIVENESS*, 7 *AMER. PHIL. Q.* 246 (1970); MURPHY & HAMPTON, *supra* note 2, at 161, 162-86; P. Twambley, *Mercy and Forgiveness*, 36 *ANALYSIS* 84 (1976); H.R.T. Roberts, *Mercy*, 46 *PHIL.* 352 (1971); KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* 188-92 (1989).

82. An emphasis on justice may overlook that forgiveness is often not extended as readily to minority offenders. *See* *THE REAL WAR ON CRIME*, *supra* note 38, at 109-13. Though the response to this is usually to call for eliminating "discretion," I believe this is neither realistic nor helpful. Even the rule of law requires rulers who honor it

not justice, is the norm. Although not all failures to prosecute are instances of forgiveness, often the contrition of an offender and restitution to the victim will contribute to a decision to give a case lower priority or to “let bygones be bygones.” Moreover, in everyday life, we give many second chances and even more benefits of the doubt to friends, family members, and associates for the sake of continuing and preserving the relationships.<sup>83</sup> As the quotation from Dostoevsky underscores, equality may also mean anomie, distance and lack of relationship;<sup>84</sup> obligation, on the other hand, is relationship — literally a ligature binding us together.

At a deeper level, however, we have still to answer Anselm’s paradoxes.<sup>85</sup> Mercy seems either irrational or redundant, because if it followed reason, it would be justice.<sup>86</sup> And, mercy seems un-

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and must be trusted not to fiddle around with the rules. Excessive or convenient formalism is also unjust. Instead, we must work harder to fill out the vision of offenders who are not “like us” in order to avoid characterizing them as “outlaws” and “others.” *See id.*

83. Children may be an exception, for their punishments are necessary to moral education. *See Morris, supra* note 33. But neither do they “get what they would deserve” were they adults — I don’t punish my children’s lies as I would adult perjury — and reconciliation is essential.

84. *See* ROBERT H. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985) (arguing that individualism undermines moral commitment and community service); MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982) (same).

85. *See* ANSELM OF CANTERBURY, *PROSLOGION* chs. IX-XI, in *A SCHOLASTIC MISCELLANY: ANSELM TO OCKHAM* 78, 81 (Eugene R. Fairweather ed., 1946); MURPHY & HAMPTON, *supra* note 2, at 168-69 (discussing Anselm’s paradoxes).

But how canst thou spare the wicked if thou art wholly just and supremely just? For how does the wholly and supremely just do something that is not just? But what justice is there in giving eternal life to one who deserves eternal death? O good God, good to the good and to the evil, on what ground dost thou save the evil, if this is not just, and thou doest nothing that is not just? Can it be that thy goodness is incomprehensible, lying hidden in the inaccessible light where thou dwellest? Surely in the deepest and most secret place of thy goodness there lies hidden the source from which the river of thy mercy flows. For though thou art wholly and supremely just, yet thou art kind even to the evil, just because thou art completely and supremely good. For thou wouldest be less good, if thou wert not kind to any evildoer. . . . At the same time, though we may be able to grasp why thou canst will to save the wicked, we can find no reason to explain why, among men who are equally evil, thou does save some, and not others, through thy supreme goodness, and dost condemn the latter, and not the former, through thy supreme justice.

ANSELM OF CANTERBURY, *supra*, chs. IX-XI.

86. *See, e.g.,* MURPHY & HAMPTON, *supra* note 2, at 181; H. Scott Hestevold, *Dijunctive Desert*, 20 *AMER. PHIL. Q.* 357 (1983); James P. Sterba, *Can A Person Deserve Mercy?*, 10 *J. SOC. PHIL.* 11 (1979).



fair, because it treats like cases differently.<sup>87</sup> How can mercy not undermine justice?

I would answer Anselm's paradox this way: it seems a paradox only when applied to God, not when applied to human beings who exist in time.

First, justice is not equality simpliciter, of course,<sup>88</sup> but the treatment of like cases alike. But when are cases alike? We finite creatures see only a few cases at a time, and we are ourselves constantly in motion, changing and growing daily. Each case poses new facts, and as we see the facts in new lights against other facts, justice glimmers differently. We cannot capture it in a code for all time, we can only capture it for a moment, perhaps, in a particular case. As the common law recognizes, justice keeps moving, just around the bend, and the cases of yesterday are distinguished in light of new facts.<sup>89</sup> For finite creatures, justice can never be codified and eternalized, but is a pilgrim's progress.

Second, as our view of the world is finite and in time, so also is our language. True justice is equity not equality,<sup>90</sup> but equity cannot be said in the clumsy generalities that we must use to say it. As human reason and language itself requires generalization and fuzzy family-resemblance sorts of categories, human reason can never fully contain justice. We instead must live by the rough justice of the rule of law, which is of course better than lawlessness, but itself depends on a cultural commitment to justice. Without the guidance of ever-elusive justice, the rule of law would be a senseless and mindless formalism. Without judicial good faith and cultural

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87. For example, Justice Blackmun expressed this frustration with current death penalty jurisprudence, which tries to cabin juror's discretion in order to promote equality at the same time that it allows full exploration of all mitigating evidence, in an eloquent dissent from denial of certiorari in *Callins v. Collins*, 510 U.S. 1141, 114 S. Ct. 1127 (1994). Justice Thomas has also famously argued that the "power to be lenient is [also] the power to discriminate," and argued that capital sentencing jurors should not be allowed to give unfettered effect to mitigating evidence. See *Graham v. Collins*, 506 U.S. 461, 492 (1993) (Thomas, J., concurring).

88. See Kurt Vonnegut, Jr., *Harrison Bergeron*, in *WELCOME TO THE MONKEY HOUSE* 7-13 (1968) (imagining a world of absolute equality, where those born beautiful must disfigure themselves, those born graceful must hobble themselves, etc.)

89. See Linda Ross Meyer, "*Nothing We Say Matters*": *Teague and New Rules*, 61 UNIV. CHI. L. REV. 423, 465-76 (1994) (discussing the temporality of the common law).

90. See ARISTOTLE, 5 NICOMACHEAN ETHICS x. 3-8 (1951).

commitment,<sup>91</sup> the rule of law would be a Kafkaesque farce and pretense.

Third, there is no way to guarantee that equity is not perfidy: the power to give justice is the power to discriminate, to paraphrase Justice Thomas. We never know whether parity or disparity in sentencing is unfairness or better justice, except when we judge roughly by aggregation. We never know all the facts, we never prove all the facts, we never exhaust the possible comparisons and contrasts with other cases, we never perfectly define the rule.

Fourth, people do not exist in an eternal moment, either, but are constantly changing their minds, projecting new actions into the world, learning and growing. We cannot reduce them to one moment only, to one crime<sup>92</sup> or one good deed.<sup>93</sup> Justice for yesterday's action, therefore, may be unjust by the time it is determined and imposed — justice always races ahead and lags behind us.

So, if justice is equity, it cannot be the usual, the modal form of interaction with a few merciful exceptions. Justice itself is at best the exception. (But that does not mean we do not seek it and live with the uncertainty).<sup>94</sup>

### CONCLUSION

We grant ourselves and each other forgiveness and mercy in recognition of the uncertainty of justice and in recognition of our own finitude and need for new beginnings. We must be humble in judging.<sup>95</sup> We cannot rely on justice to arbitrate our relationships; we have to take risks. It is mercy and forgiveness, that lets us get on with living and recognizes that we cannot be litigating *Jarndyce v. Jarndyce*<sup>96</sup> forever. To live is to forgive and to risk and to be uncertain and to outstrip language and reason itself. To use Jean Hamp-

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91. Here, I am thinking of something along the lines of Llewellyn's "steadying factors." See KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 19-61 (1960).

92. See HOWARD ZEHR, *DOING LIFE: REFLECTIONS OF MEN AND WOMEN SERVING LIFE SENTENCES* (1996) (attempting to humanize "lifers" for us through a series of portraits).

93. See *Bergman v. Lefkowitz*, 569 F.2d 705 (2d Cir. 1977) (rejecting plea for leniency based on prior good deeds).

94. We do live with the uncertainty. See Linda Ross Meyer, *When Reasonable Minds Differ*, 71 N.Y.U. L. REV. 1467, 1525-28 (1996); BALKIN, *supra* note 13, 142-70.

95. See Brett Scharffs, *Humility in Exercising Practical Wisdom*, 32 U.C. DAVIS L. REV. 127 (1998); Linda Ross Meyer, *Between Reason and Power: Experiencing Legal Truth*, 67 U. CINN. L. REV. 727, 753 (1999).

96. See CHARLES DICKENS, *BLEAK HOUSE* (George Ford & Sylvere Monod eds., 1977).

ton's term, we can only "morally hate" the dead, but, if we are to continue to see another as human, we must forgive the living.<sup>97</sup>

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97. See MURPHY & HAMPTON, *supra* note 2, at 146-47.

# A DIALOGUE CONCERNING HERESIES

Jack L. Sammons\*

## INTRODUCTION

The editors have asked me to write an introduction to the dialogue that follows connecting it to the conference theme of forgiveness in the law. I am pleased to do so.

The dialogue is based, very, very loosely, on a dialogue with the same title written by St. Thomas More in 1529 and revised in 1531. In addition to moving More into the present, I have, I fear, taken other great liberties with the good St. Thomas. Rather than defending the Catholic faith against the religious zeal of Luther inspired reformers, as he did in his dialogue, I have him defending the legal profession against the moral zeal of certain, forever to be unnamed, legal ethicists. It is my opinion, one that will probably not be shared by all, that the arguments used in these two defenses are much the same. We find Judge Moore, as I call him, a partner in a large law firm just at the point of accepting a governmental appointment, one that we know, from the real More's life, is not going to go well.

And so, then, what does this dialogue have to do with forgiveness in the law? It reminds us, I think, why there is so little room for forgiveness in the law, that is, that More lost the argument with Luther, and then shows us that what remains of the possibilities for forgiveness in the law depend upon lawyers, like Judge Moore, locating their work as lawyers within a certain understanding of our craft.

I think I can make all this clearer by playing off of a recent article by Tom Shaffer on our theme of forgiveness and law entitled "Forgiveness Disrupts Law."<sup>1</sup> Shaffer, by writing a hypothetical midrash from the point of view of the elder brother in the Parable of the Prodigal Son, argues that forgiveness is a threat to the legal order. The elder son can forgive his brother, as his father has done and, according to Shaffer, as his father wants him to do, only at the very high price of the loss of the community's legal order. This legal order is supported by its own theological and moral claims,

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1. Tom Shaffer, *Forgiveness Disrupts Law*, 4 GRAVEN IMAGES 127 (1998).

Shaffer tells us, but it is, ultimately, backed by force. And so, Shaffer continues, forgiveness must disrupt the law by calling us to life in a different community, a community of forgiveness as opposed to our legal (or even moral or even theological) communities of force. Shaffer's community of forgiveness, like Luther's church, is mostly an abstraction, but he does offer us the helpful example of the struggles of sixteen century Anabaptists.

The image of law and of lawyers at work in Shaffer's argument is a rhetorical caricature. It is law, not as a process, but reduced to that force which is necessary to preserve the legal order as a false, though compelling, security against the uncertainties of our lives. In this order, lawyers are those who use the apparent necessity of this force for the benefit of their clients. They can do this because the people of this community depend upon this force for an order in which their lives can have some security, however false it may be, and can make some social moral sense, even if it is only revenge. So, although he does not say it exactly this way, in using the law's force for their clients, lawyers are really preying on the insecurities and the faithlessness of others. About the best Shaffer can say about these lawyers is that they had better practice "selectively" if they want to be good Christians.<sup>2</sup> With Luther, Shaffer might say that "one needs two hundred parsons to starve off one lawyer."<sup>3</sup>

The implicit image of law and lawyers in More's life and work is very different. For him, law and lawyers upheld the legal order of communities, to be sure, but they also worked *against* the force required to do so. They worked most especially against political force, whether exercised by tyrants or by the herd, by hemming it in through the restraints of a structured conversational tradition which, at its best, could nicely balance the preservation of the community with an openness toward the truth of the uncertainties of our lives, the uncertainties that force, as a solution, seeks to deny. More's image of law and lawyers is more like the law we hear in the folk song, *Diamond Joe*: "There is a man you'll hear about most any place you go. And his holdings are in Texas and his name is Diamond Joe. And he carries all his money in a diamond studded jaw. And he never was much bothered by the process of the

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2. See *id.* at 134.

3. RICHARD MARIUS, *MARTIN LUTHER: THE CHRISTIAN BETWEEN GOD AND DEATH* 383 (1999). I have cited to Marius a couple of times in this introduction but this is because his books are close at hand. I cannot, however, recommend his biographies of either Luther and More to you as anything other than interesting.

law."<sup>4</sup> When More saw Henry VIII as a law unto himself, when he saw him as Diamond Joe, if you will, and when Henry demanded More's complicity in this, there was nothing for More to do but die. If this was to be the law, More thought, the practice of it could no longer be God's work, but, like Shaffer's image of it, only the enforcement of a false order, one that denies the uncertainties of our lives, denies our responsibility in the face of these uncertainties, and preys upon those who fear both uncertainties and responsibility.

Of course, More might not have been so theoretical about all this. Man of practical affairs that he was, More might say to Shaffer that even a community of forgiveness, including Shaffer's Anabaptists, is going to need something very analogous to law and lawyers as More understood them, if it is to remain a community of forgiveness. It will need, for example, a communal way of arguing the subtle and difficult distinctions between matters of injustice and matters of misfortune before decisions about such matters, including the decision to forgive, are made. He may have pointed out to Shaffer how the Mennonites, modern descendants of Shaffer's Anabaptist, start with Paul's prohibition in Corinthians about taking people to the law, but end with guidelines on the use of lawyers that could have been written, just as easily, by certain sections of the ABA.<sup>5</sup>

But there is something more important in the difference between More's image of law and lawyers and Shaffer's than just this appreciation of their practicality. After all, we could just say that More was still futilely proclaiming Christendom as encompassing the entire world while Shaffer is very content to find it in small faithful communities, and let their differences be explained by the demographics involved. No, I think we can see a much more basic difference between these images by returning to Shaffer's midrash from the Parable of the Prodigal Son.

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4. HOUSTON, JACK OF DIAMONDS (Sanga Music Co., BMI 1967).

5. See Stanley Hauerwas, *Reconciling the Practice of Reason: Casuistry in a Christian Context*, in STANLEY HAUERWAS, *CHRISTIAN EXISTENCE TODAY: ESSAYS ON CHURCH, WORLD, AND LIVING IN BETWEEN* 199-219 (1988). What I say in the text about Mennonite and lawyers is not what Hauerwas intends to say in the article. I think, however, that lawyer readers will see this evolving from Paul's prohibition to ABA regulations in his description of the Mennonites. In any event, when Hauerwas describes what is required for casuistical reasoning in a Mennonite community, he came so very close to describing a need for something that looks very much like lawyers, that the same point is made.

For More, I bet, the elder son is not asked to forgive his brother, as Shaffer would have it, for that forgiveness is uniquely the province of the father. The elder son is asked, instead, to forgive his father for the harm, the very real harm, his father has done by forgiving the Prodigal Son. This reading, then, for More, would be closer to what it could mean to be a community of forgiveness. It is a community that knows that our lives are uncertain — “contingent” would be the way to say this now — but does not see this uncertainty as something to be feared. Such a community would accept that the world is a tragic place where we often do harm when we seek only to do good and where decisions are very, very difficult to make. Such a community is not at odds with the law or with lawyers. It knows it needs them. Knows, that is, that in a world that is always up for grabs, and one in which tyrannical responses to this truth, even in Anabaptist communities, are always just around the corner, the process of the law or, as More would have it, a structured conversational tradition, is a very good thing. More would think, I believe, that a community of forgiveness is one that knows God forgives us for the tragic nature of our lives, asks that we do the same with each other, and joins us in our best efforts to do the best we can. In such a community forgiveness does not disrupt legal order; it is essential to it.

These arguments, the ones I have imagined between More and Shaffer, are not that far removed from some of More’s arguments with Luther. Luther read Paul on the law in such a way that the law, failing as it must to satisfy the introspective woes of our very private consciences, reveals our need for salvation by other means.<sup>6</sup> Shaffer’s article is a secularized version of the same and he struggles, as Luther did, to describe the Church we turn to for these “other means.” The opposing interpretation of Paul, that is, that the blame for our failings is Sin, “and that in such a way that not only the law but the will and mind of man are declared good and are found to be on the side of God,”<sup>7</sup> is what we would expect to hear from More. In Luther’s reading of Paul, as in Shaffer’s article, there is very little room in the law for forgiveness. For More, however, law is there to help move us toward forgiveness. As I have noted, however, More lost; Luther won,<sup>8</sup> and so, for now, Shaffer is

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6. See KRISTER STENDAHL, *PAUL AMONG THE JEWS AND GENTILES* 78-96 (1976).

7. *Id.* at 94.

8. St. Thomas More was arguing against the Reformation brought on by Luther, so by saying that More lost and Luther won I mean that the Reformation happened, but I also mean to imply that those changes brought on by the Reformation that led

quite right and there is, in fact, very little room for forgiveness in the law.

But More, and his argument, did not just disappear. They left center stage, to be sure, but we can still see them off in the wings patiently awaiting a more public role. When we notice them now, we may be shocked to find that More's argument takes on a radical form. This is because there is no longer any other form it could take. Luther's winning argument was that history, tradition and custom could validate nothing (and so when Shaffer takes Christians out of the legal order nothing of any Christian importance is really lost.) More's position was the extreme opposite. He accepted, for example, in opposition to his friend Erasmus, that "if pious Christians had venerated a supposed relic of a saint for a long time the adored object had to be genuine."<sup>9</sup> Now, almost five hundred years later, when we see *this* argument off in the wings, it is stunning. Remembering that More was committed not to particular propositions about the faith, but to the project of truth by pious Christians within a Church that corrected itself through careful attention to language and to reason (with something very close, he thought, to common law reasoning in Counsel), what we can now see in More's argument is a very direct, and very modern, confrontation with the Platonic distinction between appearance and reality. From this perspective, More starts to look to us, perversely perhaps, like the opposite Enlightenment bookend, Nietzsche, more than he does anyone of his own time.

Most importantly for our purpose, however, the More seen in this confrontation with Plato is very much a rhetorician. What I want you to see in Judge Moore in the dialogue that follows is that lawyers, at least those who still practice the Greek art of judicial rhetoric and turn force into conversation, are what is left of St. Thomas More and his argument for us. They are all that remain of a public version of this most public of men. And, they are, then, what is left of the possibility of a role for forgiveness in law.

The More I have described for you here is not the More you may have come to expect. There are a lot of More's out there, far too many for me to rehearse in a brief introduction, and each reflects its creator as obviously, I suppose, as my More reflects me. I do

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to the Enlightenment were also at stake in the debate. In More's time, and in England, the loss of the argument meant the creation of the Church of England by Henry VIII. Part of what More lost, then, was the claim that there was one true universal church maintained by the traditions, customs and practices of the Catholic Church.

9. MARIUS, *supra* note 3, at 456. Marius describes this argument as "absurd." *Id.*



want to mention one persistent version, however. This one has been described most recently by Professor Robert Bork.<sup>10</sup> Bork's More is a man who is forced, at the crucial moment of his life, to choose between two competing authorities: the legal order and God's order. God, of course, wins the competition. Nothing, I think, could be further from the truth of More's life than this. For Bork has it exactly backwards in seeing More as torn between these two powers. More's life, as I understand it, was instead a living out of their reconciliation through the traditions of the Church. More is, more than anything else, the archetypical one Kingdom man. The latest biography of More, and in my opinion the finest, comes closest to capturing this unity in More's life and death because it is the first to truly recognize how essential the practice of law was to his theology.<sup>11</sup> For other biographers, More's practice of law is either an embarrassment, as it was for Erasmus, or is valued only because it is More's practice. For Ackroyd, it is the central feature of his life and thought.

Of course, More himself can be blamed, at least in part, for such misunderstandings. Often, he was just too clever for his own good. Let me end this introduction, then, with one relevant example of this to help you get a feel for the man. Some of More's final words are very well known: "I die the King's good servant, but God's first."<sup>12</sup> Now surely, one would think, we have in these words strong confirmation of Bork's version of More as a man divided, but actually we do not. More's last words were taken from the directions his client, Henry VIII, gave to him upon his appointment to the King's service as *councillor attendant*<sup>13</sup> and his appointment as Lord Chancellor.<sup>14</sup> Henry told More, in times when Henry was still interested in More acting as a good lawyer: "I want you to

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10. See Robert H. Bork, *Thomas More for Our Season*, 94 FIRST THINGS 17 (1999).

11. See PETER ACKROYD, *THE LIFE OF THOMAS MORE* (1999). The second best source for this view of More's life is co-authored by the author of the article I have played off of here, Thomas Shaffer. See Stanley Hauerwas & Thomas Shaffer, *Hope Faces Power: Thomas More and the King of England* in STANLEY HAUERWAS, *CHRISTIAN EXISTENCE TODAY: ESSAYS ON CHURCH, WORLD, AND LIVING IN BETWEEN* 199-219 (1988). If you plan on doing any research on More, you will want to purchase MICHAEL D. WENTWORTH, *THE ESSENTIAL SIR THOMAS MORE: AN ANNOTATED BIBLIOGRAPHY OF MAJOR MODERN STUDIES* (1995). This is a remarkable resource which, we can hope, Mr. Wentworth will update soon.

12. ACKROYD, *supra* note 11, at 405. See also, JAMES MONTI, *THE KING'S GOOD SERVANT BUT GOD'S FIRST: THE LIFE AND WRITINGS OF ST. THOMAS MORE* (1997).

13. See ACKROYD, *supra* note 11, at 192.

14. See *id.* at 289.

serve God first and your master second.”<sup>15</sup> By repeating this charge from his client at the hour of his death, More was saying to his client: “I am still doing your bidding as a lawyer. I am being faithful to you in the only way a good lawyer can.” My guess is that Henry VIII, even as the tyrant he had become, understood.

I hope you enjoy the dialogue. There are three voices in it. The third voice is in footnotes done by Judge Moore’s unnamed law clerk. The law clerk’s part of the dialogue is often as important, if not more so, than that of the main characters. He offered to me a way of slipping in problems, qualifications, and other thoughts about Judge Moore’s thoughts that would not have been appropriate for the other characters. My own option is that he is the most sensible of three — certainly the one I like the best. In addition to helping with the presentation, however, the law clerk also does the usual job of providing citations, references, and so forth. Because the law clerk’s voice joins the dialogue after this introduction, the numbering of the footnotes starts over again.

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15. *Id.* at 192.

*We open in the study of the law suite of Judge Moore, a partner in a large law firm located in Chelsea, Massachusetts. The title "Judge" is honorific now, a constant reminder of his days on the appellate bench. Judge Moore is in his mid-sixties. He is dressed in what is considered casual attire at the firm: a well-worn corduroy jacket, one size too large, with darker corduroy pants. The image, one of warmth, ease and comfort, is disrupted only by a collar and tie too tight for the Judge's large neck. Both are obviously an annoyance to him and, at first sight, one wonders why the Judge does not loosen the fit. He never does.*

*We find the Judge boxing up books and gathering stacks of papers into files. The process is slow. The Judge pauses over many items, especially the older books.*

*There is a knock on the door.*

JUDGE: Come in.

COURIER: Judge Moore?

JUDGE: Yes?

COURIER: Your secretary said it was all right . . .

JUDGE: And it is. I'm just packing. Now you are a familiar face to me, but . . . I . . . no, wait . . . a courier? Yes! Afraid I don't remember the rest, but I do remember seeing you . . . around the . . . uh . . . .

COURIER: (*Pleased at the recognition*) Yes, I was a courier with Fisher, Pole, and . . .

JUDGE: Oh, yes, yes, yes. Of course. But I haven't seen you in awhile, have I?

COURIER: I'm in law school now.

JUDGE: (*With genuine enthusiasm*) Well, then, congratulations! So we didn't frighten you off?

COURIER: (*Abruptly*) No. No, you didn't. Uh . . . one of my professors sent me to see you.

JUDGE: Oh! And here I am leaving the firm, on my way to troublesome things: a government appointment. Sorry, I won't be able to help you much with our hiring committee.

COURIER: No, Judge. I'm not here for that.

JUDGE: Well, then, let me stop guessing. Why did your professor send you to see *me*?

COURIER: He sent me because he said you were a Christian lawyer.

JUDGE: (*A little too loud*) He did, did he? Don't tell anyone around here; they just think I'm good. (*The Judge laughs. Again a*

*little too loud. The Courier is puzzled; does not join him*) Did he say it that way? Did he say I was a *Christian* lawyer?

COURIER: (*Confused*) Uh . . . I think he said . . . he said . . . he knew you were a Christian and that you were a very good lawyer.

JUDGE: (*More seriously; slightly lowered tone*) How nice. How very nice.

COURIER: He sent me because . . . well, he's my advisor. We went to lunch. I told him that . . . as a Christian . . . I was worried about becoming a lawyer.

JUDGE: Tell me about it.

COURIER: It's pretty much as I said. From what I have learned in law school classes, I'm not sure it is possible for a Christian to be a good lawyer.

JUDGE: What have you learned?

COURIER: I have a professor this semester, Tyndale. He's helping me to see the problem.

JUDGE: What does he teach?

COURIER: Legal ethics.

JUDGE: Hmmm.

COURIER: Yes, well, I see now what troubles me about my other classes.

JUDGE: Yes?

COURIER: There are moral issues in those classes, but no one, especially the professors, seems concerned with them. No one really seems concerned with what is just, good, right or who *should* win. These are not just ignored — they are squelched. We look for legal arguments for either side as if it really doesn't matter who wins. It would be okay, I guess, if there was real substance to the arguments, and the best arguments prevailed, but it doesn't seem like that's the case. You just try to be as persuasive as you can whether you should or not. So we have to make persuasive arguments, as best we can, whether we agree with them or not, and I end up having to argue against things I believe in and argue for people I really wouldn't want to represent. The more I do this it the more I feel my own faith is being . . . well . . . I guess I feel as if it is being left behind.

JUDGE: I certainly hope so. (*The Judge pauses. His unexpected comment does not register with Courier. The Judge let's it go*).

COURIER: In fact, I'm not sure it's good to sue anybody. It doesn't seem to me to be the way Christians should act. So why help other people do something I think is wrong?

JUDGE: Tyndale taught you all this?

COURIER: No, not exactly. What I've learned from him is that we have to be ourselves first and lawyers second. The other courses seem to be about getting ourselves, our true selves, out of the law; Tyndale, I think, tries to put us back in it.

JUDGE: Hmmm.

COURIER: (*Mistaking the Judge's reaction*) Oh, but don't get me wrong. The other professors care about ethics. Don't think they don't. Sometimes they raise ethical issues in class. Things about confidentiality, discovery abuse and so forth. But what they are really *doing* to us, the real ethic I think they are teaching us, never gets examined very much. And that ethic . . . what they are teaching us *to be* . . . whether they mean to or not . . . just seems so . . . so . . . so much totally at odds with what Tyndale is teaching. So you've got ethics in one class working against the ethics of the practice in all the others or, at least, that's how it seems to me. It's unfair. Tyndale has to put who we really are as people, as moral people, back in the practice, but the problem of not being in the practice was caused by the courses we took, as much as by anything else.

JUDGE: So why come to me? This Tyndale seems to be your man.

COURIER: I thought so for a while. It is true that most students, at least the ones who take this seriously, have no trouble with his saying "be true to yourself," but . . . I . . .

JUDGE: Tell me about the ones who don't take it seriously. What do they think?

COURIER: They just dismiss him as preaching. No, not preaching really, since he mostly just gets us to talk about what we think. He wants us to express our *values* and so forth, but it does . . .

JUDGE: (*Sub rosa*) As if having their freedom, they needed nothing else.

COURIER: . . . divide the class.

JUDGE: How's that?

COURIER: We've got . . . uh . . . the *moral* group and we've got the . . . oh, I don't know what to call it, . . . the lawyer group, I guess. is how I'd say it. The lawyer group dismisses the moral group and the moral group thinks the lawyer group is thoughtless.

JUDGE: And you are in the moral group, are you?

COURIER: Yes, but I have trouble with it, Judge. When Tyndale gets to his bottom line . . . that part about being true to yourself, about being a person first and a lawyer second, about recognizing that you are in a role that limits your moral reflections, and the need for true self-reflection, and all the rest of it — (with sudden

enthusiasm) he does this in a lot of interesting, really memorable, ways. It's a good class! We watch videos; talk about movies; read novels . . . (*pauses*) . . . but it all does seem to come down to the same message. Anyhow, for me, being true to myself is not such an easy thing to do. I know I need to learn the context of lawyering, to make the moral connections and rules connections, and somebody like Tyndale can help with this, but, to be *true* to myself? I have to figure out what a Christian should do. It's not just up to me.

JUDGE: (*Sincerely*) Good for you, Courier, good for you.

COURIER: The simple answer some of my friends give me is that I just have to be a Christian lawyer. Only represent the causes I believe in, use the methods I think a Christian should use, and so forth. I imagine I would have to find a Christian law firm or something like that, because nobody else would hire me. Maybe I would have to represent only Christian clients who would understand what I was doing. This makes sense to me. Besides, how could I counsel someone who wasn't a Christian? I wouldn't know what to say. I'm not sure any of this would work, though. Maybe I shouldn't sue people at all. How can you win someone to Christ when you are suing them? Maybe I should just try to help people find peaceful solutions . . . you know, mediate, or something like that. I've heard some of the other students, not just the Christians, saying the same thing. Some said they could only prosecute; some said they could only represent criminal defendants . . . some said they would . . .

JUDGE: (*Speaking to himself*) It sounds as if it is getting worse; the path to war is too well paved. (*Turns back to Courier*) You know, Courier, I think this old man might just be in the wrong place at the wrong time. (*Aside*) What am I to do when the very language we use works against me? (*Pauses*) So what have you concluded?

COURIER: (*Confused*) Uh . . . I think . . . I started to think that the practice Tyndale was describing to me was too much of a temptation, a "near occasion of sin," and, it occurred to me that maybe I was off the path. Maybe I just shouldn't be a lawyer. What's the point? What *is* the point if being a Christian means always watching out for what the practice of law might do to you?

JUDGE: And this is what you said to your advisor, did you?

COURIER: Some of it.

JUDGE: And this is why he sent you to me?

COURIER: Yes, and he asked me to come see him after we talked.

JUDGE: Well, tell me, what do you know about the practice? About the life of a lawyer?

COURIER: Not much.

JUDGE: But your impressions? What are they?

COURIER: I keep hearing . . .

JUDGE: From Tyndale?

COURIER: From Tyndale, but from others sources too. I hear that it's corrupt; driven by greed. There's little sense of community left among lawyers. Morality doesn't matter much; it's just about money. The top lawyers develop narrow specialties — mostly transactional work for corporations — and they look down on the rest of the practice. They denigrate what ordinary lawyers do with ordinary clients. A lot of lawyers are unhappy in their work. They drink too much, don't find it rewarding; don't find meaning in it, and . . . (*obviously ready to continue*).

JUDGE: (*Interrupting*) Let me stop you there. I agree with you! That's good! We can agree that the current practice is becoming corrupt if these are the things we mean by "corrupt." There is, however, going to be a tension between us.

COURIER: Why?

JUDGE: My answer to this corruption is to remind lawyers that they are lawyers and to try to get clearer about what being good at lawyering might mean. You want a revolution, a Christian revolution, maybe just a private one, but what I think is needed is reform. And that's very different. Much harder, really. I take it, though, that this would . . . or, at least from what you have said so far . . . this should puzzle you. Since being a lawyer — an ordinary lawyer representing ordinary clients, some of whom are good and some of whom are not; some whose claims you agree with and some you don't, and always trying to be as persuasive as you can for your client — is suspect, thanks to your Professor Tyndale, you'd have to ask yourself: Why would anyone want to be good at ordinary lawyering? Your revolution has you looking elsewhere for what could be good in the practice of law. That's what you mean, I think, by wanting to be a Christian lawyer. You accused me of the same thing, but, now that we know what it is, I can tell you I am not a Christian lawyer.

COURIER: What are you then?

JUDGE: Just a lawyer. Look, you have come to ask me about this as a fellow Christian so let me answer you in a different way. Did you know I'm a former seminarian?

COURIER: No, I didn't.

JUDGE: Yes, back in my wild youth, before I decided to be a lawyer instead of a priest. Former seminarians love to preach, you know, so you wouldn't mind too much if I imitated your professor and preached a little, would you? You wouldn't deny me this small pleasure, would you?

COURIER: No, of course not, Judge.

JUDGE: Okay, then. The practice of law has a lot to teach you. What your professors, the good ones, not your Tyndale for goodness sake, but the good ones, are doing in class *is* teaching you an ethic. You got that exactly right. They are teaching you *the* ethic of the practice and they are also teaching you *the* theology of the practice, and it is Christian, Courier, whether they know it or not. Take that back to your Tyndale!

COURIER: Judge, half my professors are Jewish!

JUDGE: And thank God for that! It's exactly what you need. (*Calmer*) Look, what I am saying to you is that the practice of law carries a theology just as it carries an ethic. As a Christian, I have to claim that the theology of the practice of law is Christian. I *have* to. If it isn't, if it isn't Christian, you and I should get the hell out now . . . well for me, I guess it's much too late.

COURIER: I don't understand. I really don't. And I've got lots of questions. But, first . . . uh . . . if I said something like that . . . (*pauses hesitantly*) . . . Judge, I know if I said something like that at the law school a lot of people would be offended. Forgive me for this, but isn't that really presumptuous?

JUDGE: If they know you love them, they are not as likely to be offended, so first better be clear that you love them. (*Pauses*) I think the real offense would be to say it any other way. (*Quickly, looking at his watch*) Have you had lunch yet? Some folks here are gathering for a very casual farewell luncheon for me — no speeches — nothing like that. Why don't you join us? Who knows what you . . . and they . . . might learn?

COURIER: Thanks. I'd love to. (*The Judge and the Courier exit*)

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*The Judge and the Courier walk back in the suite, chatting. They are more comfortable with each other now. The Judge goes back to the last box he was working on. It is apparent the Judge has invited the Courier to stay and continue the conversation with him.*

COURIER: Can we come back to the theology of the practice?

JUDGE: (*Walking behind the desk*) Mind if I continue boxing these up while we talk?

COURIER: Can I help?



JUDGE: No, not really. Have a seat.

COURIER: Thanks. Don't Christians just have a theology of practice and Jews, Muslims the same?

JUDGE: They may, but not as good lawyers.

COURIER: What do you mean?

JUDGE: Look, for Christians the world *is* Christian; for Jews the world *is* Jewish, for Muslim . . . well . . . you get the idea. It would certainly sound terribly presumptuous, to return to your concern, to say to a Jew that the truth to be revealed in *halakha*, for example, is in the Kingdom made possible by Christ, but announcing the Kingdom is really nothing other than the Christian version of *tikkun olam*, the repair of the world, that is the responsibility of all Jews. I don't hear *tikkun olam* as presumptuous or as a threat. Do you? To me it's a relief. The reason people, good people, react so negatively to claims like this is out of fear. And with good cause! The history is dreadful. But what should flow from this Christian presumptuousness, if that is what it is, is the conclusion that as a Christian I must want Muslims to be good Muslims and Jews to be good Jews, and . . . here I may lose you . . . even lawyers to be good lawyers. For me, this is part of the message of the Incarnation.

COURIER: But aren't you telling them what their being good means?

JUDGE: No! Just the opposite. The goodness is up to them. It *has* to be. You are right, however, that I will *name* that goodness within my own tradition. Sure, I tell Jews, Muslims, and even lawyers, that they live in the Kingdom too. What else can I do? But you are asking the right question. If what I want of Jews is their goodness as Jews, because Jews are living in the Kingdom too, then surely I cannot, at least without self contradiction as a Christian, attempt try to explain Judaism to a Jew! Or lawyering to a lawyer for that matter! If the Kingdom is what is there to be revealed through Hebraic tradition, then one of the reasons I want Jews to be good Jews is that I doubt that Christians can be good Christians without it. For each of these traditions has the potential to reveal the meaning of the Kingdom to a Christian in ways that a Christian could never understand on her own.

COURIER: I think I understand that, but you said "even lawyers." Does this really work for lawyers? Aren't you making a religion of the practice of law when you talk this way?

JUDGE: (*Laughs*) Yeah, but there is no heresy in that, is there? Don't you know I'm a *humanist*? A Catholic to be sure, but a humanist! I catch hell for it in the Church, but I don't want you mak-

ing it into a heresy. The Church of Lawyering! I like that. (*Louder*) And no place for accountants because the god of lawyering he is a jealous god! No, the heresy, if there is heresy in this, would be to think that I can understand lawyering in the Kingdom without the Church or understand the Church without lawyering in the Kingdom. Don't you think the Church needs the insights offered through the long history of those rhetoricians who have been doomed to plow forever the rocky conversational fields of our disputes?

COURIER: But, Judge, you are talking about two different traditions, like different religions, and, well, as . . . uh . . . lawyers . . . we are in both, aren't we?

JUDGE: Yes, that's good! There is a difference for us, isn't there! But what this means, I believe, is not that as a Christian I can somehow apply my faith to the practice to establish moral standards for it that aren't there in it already. I am sure you have heard . . . I haven't been very subtle about this . . . that I . . . I really do not tolerate well adjectival uses of Christianity, as in "Christian Lawyering," for I must believe that all good lawyering, truthfully understood, *is* Christian. As a Christian and as a lawyer . . . and I hope to be a good one, one of these days, I have . . . potentially now . . . a unique capability and, always, a unique responsibility to be a witness to the Kingdom that is there in the work that we do as lawyers. If I had to say that in a sermon, I guess it would be: "The responsibility of a lawyer as a Christian is to witness to the practice its own truth." I know that's confusing, but I can't think of another concise way of saying it. So, you know, I don't want you telling people I'm a Christian lawyer. I really don't. I want them to see me as just good. They know I'm a Christian. I don't try to hide it.

COURIER: But how do you do that? How do you witness to the practice its own truth?

JUDGE: By being good . . . by being accepted as good . . . and, through that acceptance, having a say in what being a good lawyer means. The claim Christians must make, the claim that good lawyering is their own, has to be made within the tradition of the practice for the theological reasons I have given you. There is no other audience to whom this could be addressed legitimately. The argument must be made in an ongoing internal conversation about the teleology of the practice. So, you look at the way the practice of law carries on this internal conversation about itself, and you join in. And as rhetoricians, we know, or we should ought to know,

that there are good and bad ways of making these arguments persuasively.

COURIER: But Judge . . . and I know you are not going to like me saying this . . . there is still a presumptuousness in your claim about *the* theology of the practice, isn't there?

JUDGE: Courier, you are *very* concerned with presumptuousness! Is there a Church of Non-presumptuousness out there that I have missed? (*Catching himself*) Moore, why do you say things like that? What is it?

COURIER: No, that's okay. It's presumptuous, isn't it, to talk about "the" theology of practice, presumptuous to claim that what one person, one Christian thinks about the purposes of the practice is right. I mean . . . I know you are a good . . .

JUDGE: (*Interrupting*) My goodness, Courier! Did I say that? You'll have to forgive me! I am trying as hard as I can to get the theology right, but I really have no confidence that I have done so, and I can't because I don't know well enough what getting it right means. Look, the purpose in saying "the" theology is to structure the conversation.

COURIER: What do you mean?

JUDGE: Well, the real purpose in talking about "the" theology is . . . I've stopped preaching now and started confessing . . . the real purpose is to make you do it as well. I want you to see that there *is* a theology within the tradition of the practice. It's real. It is really there. And it is that theology that I am trying to describe. Since it is real, it has authority over what I might say about it, how I might describe it. So I describe "the" theology not as a judgment on the efforts of others to do the same, but as a judgment on myself . . . hoping that you will respond in kind; that you, too, will see the need to describe honestly and accurately something that is there and that is not a matter of our choice. I want this to be an argument about what is the case, Courier! (*Pauses*) I'm really just building on your own insight that the practice, the practice taught to you in your classes on torts, contracts, property and all the rest, has an ethic. Your Tyndale wants you to choose an ethic . . . and a theology . . . for your practice. He wants this to be your choice so, of course, you choose a Christian practice. Oh, he wants it well informed, to be sure, but he sees you as free to choose this way. I don't. I believe there really is something called *legal* ethics.

COURIER: I can see that for ethics, but for theology?

JUDGE: It's a little easier to see *the* ethic because it is so clearly justified by any measure of true success in the practice's own terms.

It's functional, in other words. But do we know what true success is so easily? Do we? If not, it shouldn't be that much more difficult to see the theology involved. Should it? At bottom, Courier, perhaps there is no clear division between the two.

COURIER: Perhaps, but I really had not thought about this as theological, and if I didn't, I don't think any other student has. Do you, Judge?

JUDGE: No, maybe not. Nevertheless, in this practice, this practice of law, there has to be an inquiry . . . more than an inquiry . . . an implicit statement about the nature of the world. This is necessary not only for the working of the practice, but to adequately and honestly locate the practice of law among other practices. There is . . . there must be . . . something descriptive about the way the world is . . . even if the description is only implicit in a lived understanding of true success within the practice . . . in any adequate conception of what it means to be a good lawyer. Doesn't there? And, if so, this, then, is a theology carried . . . that's the way I want to say it . . . carried by the practice of law.<sup>1</sup>

COURIER: How does a lawyer go about discovering this theology?

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1. LAW CLERK: My apologies for interrupting. I am supposed to be footnoting this dialogue and I have not had much to do so far, but I cannot help interrupting just a little to warn you about a potential issue here. It could trouble you, as it did me, throughout the dialogue. It would be fair to ask the Judge, at some point in what is to follow, why we cannot derive from practices general virtues, perhaps the virtues that are necessary for the existence and continuation of any practice, and from these general virtues derive a theology and an attendant ethic that is not practiced based, that is, in rhetorical terms, one that could be addressed to a universal audience. The Judge would agree, perhaps, that we could do that, but might argue, if he had thought about this at all which, I can assure you, he has not, that there is no good reason . . . okay, no *really good* reason . . . to give preference to such generalization over the specifications found within the practices from which the generalizations were derived. And it needs a really good reason, he might continue, for the process of applying practice derived generalizations, which are not themselves based within a particular practice, back upon the practices from which they came is an exercise fraught with the potential for great distortion. It may, in fact, and I think the Judge would think it would, jeopardize the very understanding of a life well-lived that one seeks through the generalizations. There is a lot to what the Judge might say and I hope I have got him right here. A friend of mine, Rabbi Michael Goldberg, put it this way in a conversation we had the other day: Often, the way in which we come to know someone as a good person is through initial encounters with that person in their performances within the roles that are defined by the practices that constitute their lives. The later description of the person as a good person adds little to this understanding. That's a nice way of putting it and I hope I remember to tell this to the Judge. And, oh yeah, footnoting . . . the Judge's use of practices here is from Aristotle by way of Wittgenstein by way of MacIntyre. This practice has its own unique tensions with this history, however, because it is a practice of rhetoric.

JUDGE: Carefully! It's creative discovery! I don't mean to be facetious, Courier, but you do have to do it carefully. Temptations abound. What I might describe to you as *the* ethic or *the* theology of the practice could be just wishful thinking on my part.<sup>2</sup> It could be just selective perception; perhaps even self-deception, and so forth: all the problems inherent in examining a tradition you're in, especially examining a tradition in the current context, the one I conceded to you early, of a practice that is becoming more and more corrupt. One whose institutions seem to be forcing it away from its own tradition. That's another way of saying "corrupt," isn't it? You know — I was thinking about this the other day — there may come a difficult time when we have to make descriptive claims about the ethics, the theology, of this tradition — claims about what it requires of us — that are opposed by everyone in the current practice. We may have to claim only the agreement of most who have gone before. But I don't see us in that situation yet.

COURIER: So, if I understand, we witness to the tradition the truth of the tradition, and you see that truth for Christians as having to be Christian?

JUDGE: Yes. I think of this as — but I may have this all wrong, seminary was a long time ago — as a Barthian inquiry. It implies that our first moral task, our first theological task, is to discern the story of which we are a part. There is another theologian, a Baptist, James William McClendon . . . you should read his work sometimes . . . whom I connect with this as well. McClendon teaches that good biography *is* theology.<sup>3</sup> What I want to say is the same. But our biographies are composed, in very large measure, aren't they, of the practices that constitute our lives?

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2. LAW CLERK: The Judge is right to be worried about this for he is very prone towards wishful thinking. (Maybe I shouldn't be telling you this.) I have heard him say before, for example, that the suppression of women and minorities that has been a part of the history of the practice of law, as it has of most practices, was always at odds with its tradition. He said that this was true even in those times when there may have been no one within the tradition who understood it. This suppression always was wrong within the tradition, he said, and wrong because of the requirements of the practice. I cannot remember exactly how he put this, but I do remember that it had something to do with a requirement of equality of voices within good rhetoric and the need the rhetors of this rhetorical culture have to speak for others. Something like that, anyhow.

3. LAW CLERK: The Judge did not give enough information to the Courier to find the book quickly so here it is: JAMES MCCLENDON, *BIOGRAPHY AS THEOLOGY: HOW LIFE STORIES CAN REMAKE TODAY'S THEOLOGY* (1990).

COURIER: But if you are looking at the practice to determine the theology what difference does being a Christian make? I mean, I know you claim . . . you *name* . . . the good within the practice as Christian, but . . .

JUDGE: (*Interrupting*) “Name” is good. It is a question of who will name this, of who will locate it within a story, isn’t it? But I am very troubled by your question.

COURIER: Why, Judge?

JUDGE: This question about “what difference does it make” — a question that seems so sensible to ask these days — is, I believe, a sign of a theological problem. Do you know the Greek term *phronesis*?

COURIER: Yes, practical wisdom or something close.

JUDGE: More like practical judgment. It’s the knowledge fitted to a particular *praxis* or practice, such as the practice of law. Our world lives in almost morbid fear of our need for *phronesis*. I am not exaggerating here.

COURIER: Why?

JUDGE: Because the need we have for *phronesis* reminds us of the contingency and the interdependency of our lives. You can see this fear very much alive and well in all the professions. They don’t credit their own *phronesis*. Don’t credit the forms of *phronesis* that they both create and depend upon for their own excellences! Instead, they all try to move towards *techne*, as if more knowledge, better technique, more *data* for goodness sake, would somehow make the contingency of our lives go away, as if through *techne* somehow we could no longer be dependent upon ourselves. But, of course, contingency never does go away and we are always dependent upon ourselves. You will think I am an ideologue, but I must tell you that it is not unusual that lawyers would see this clearly, perhaps more clearly than others, for the legal practice has always resisted *techne*.

COURIER: But how does this relate to the question I asked, the question about what difference being a Christian makes?

JUDGE: The dominance of *techne* within Christianity produces a question like that.

COURIER: I don’t follow you.

JUDGE: I’m sorry. I don’t mean to be obscure. To accept our need for *phronesis* would mean accepting the contingency and interdependency of our world, but accepting these imposes upon us a daunting responsibility, doesn’t it? And this scares the hell out of people. So they look to *techne* because they see in it a security, a

security *from* responsibility. The way this shows up in Christianity . . . no, wait . . . let me say it this way: The most obvious example of this in Christianity is fundamentalism. Fundamentalism comes from a fear of the human — the same contingency and interdependency . . . or the fear, as I like to describe it, of living in Biblical times. But we do live in Biblical times and fundamentalists just jump out of the frying pan into the fire: the frying pan of the responsibility our faith imposes upon us, the fire of the false security, the lie, of *techne*. They take the God of history out of history and, in doing so, they reject even the possibility of a Christian *phronesis*.

COURIER: It is not just fundamentalists though, is it?

JUDGE: No. Fundamentalism is just the most obvious example. You are right. The problem is truly pervasive. It is there, for example, whenever people turn Christianity into propositions to be applied . . . applied . . . to life. They do this, I think, because they don't trust Christian *phronesis*. Don't see enough in it to maintain the strictures of our faith. And the reason they don't . . . *maybe* the reason they don't . . . is that they have so little faith to begin with. (*Pause; notices reaction of Courier*) Have I gone too far.?

COURIER: You've condemned a large number, Judge! But my reaction was surprise that you could start from where you did and end in the prophet's role!

JUDGE: Oh my! Is that what I have done? Well, there you have it — my own romantic escape.

COURIER: (*Puzzled*) Uh . . . can we go back a bit? I am not sure I understand how this relates to the question again, the one about what difference does it make?

JUDGE: Yes, fair enough. When people ask "what difference does it make" they are often asking the question from the same perspective of fear of the human and with the same retreat to propositions I have been trying to describe. What difference does being a Christian make in the practice of law? How should I know? How could I know in advance of good Christians living their lives to the fullest in the practice of law? And, you know, I look to find the product of these lives in our practice.

COURIER: Isn't that uh . . . what's the word . . . antinomian?

JUDGE: Antinomian? No, not really. It's morally normative. And in the only way, the only true way, that fallen creatures ever are morally normative. Look, the effect of the Eucharist, the effect of the other sacraments, the effect of the Church, when it works as it should, is a transformation of the person. This transformation is one that does not just provide us with a motivation to be moral, to

be holy — motivations for well-lived lives that are already known. Instead, the transformation is one that leaves us fully dependent upon our own goodness.<sup>4</sup> And, I see this dependency as inevitable for there are no propositions that are not also dependent upon our own goodness. You learn this in law school, don't you? Being a Christian . . . we are back to your question now . . . makes all the difference, but I certainly can't tell you what difference it will make for you in advance of your living the difference.

COURIER: I don't know. I'm wondering now what role God plays in this? Is nothing revealed?

JUDGE: (*Suddenly looking at his watch*) What time is it? Oh, no! Look at the time! I have to leave to get ready for a dinner with the Judicial Reform Commission. (*Pauses*) Tell you what. Why don't you join us? I'll tell them you are my law clerk. Come, walk with me, and I'll give you the directions on the way out. (*They leave together hurriedly*)

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*It is several hours later that evening. The Judge and the Courier have come back to the Judge's law suite after the dinner meeting to pick up a few items the Judge needed before going home and, as both are now anxious to do, to try to reach some closure on their dialogue. As they enter the suite, they are chatting about the conversation the Courier heard at the Judicial Reform Commission dinner.*

COURIER: . . . and I saw some of those connections!

JUDGE: Good! That's good to hear. Perhaps I am not too far off then?

COURIER: I wonder, Judge, if you could spell out for me a little more about what the ethic and the theology of the practice are?

JUDGE: (*Returning to his files*) Yes, well, we have talked around the subject, haven't we. But I'm reluctant to do this.

COURIER: Why?

JUDGE: In part because I am likely to make a mess of it, but, in other part, because it will sound too much like a theory to you. This can only be done bottom up. It's not a top down inquiry. The

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4. LAW CLERK: Oh, the Judge is in trouble here! Taken out of this context, he would object strenuously to any description of our lives as dependent upon our own goodness for this is the kind of claim made by those who no longer fear God and only fear each other. What the Judge has in mind here, God fearing man that he is, is something quite different, having more to do with the hermeneutic freedom God has given us in our relationship with Him. Being dependent upon our own goodness in this way is not to be in control of our own lives. But I am seriously out of role here, aren't I? I should leave the Judge to his own devices.



way I got started was by struggling with the practice when I first joined it. Ordinary issues . . . very ordinary issues . . . and . . . I'll tell you what. I have a few notes here from a speech I have been preparing for a bar meeting on a similar topic. Perhaps you can be a practice audience for me. (*Shuffles through one of the piles of papers until he finds what he is looking for*) Ah! Here it is.

COURIER: Good!

JUDGE: Maybe I should preface this. I believe that the story of which we lawyers are a part is the story of rhetoric. But it isn't the story of just any rhetoric. It is the tradition of a very particular form of rhetoric, a particular form of representative rhetoric, within a particular rhetorical culture, with particular forms of arguments<sup>5</sup> addressed to particular audiences who are restrained by particular roles.<sup>6</sup> This is a story then about maintaining a very particular conversation.<sup>7</sup> The ethic I am looking for in the practice

5. LAW CLERK: I have learned from the Judge, on other occasions, that it is very important to his concept of the legal practice that it maintain the ability, over time, to understand the quality of arguments such that there can be very successful arguments that are nevertheless very bad arguments. He is particularly concerned with arguments that are bad because they corrupt the audiences the legal conversation requires to be a good conversation on its own terms. I wish the Judge had said these things here, but he did not. I think he was getting tired.

6. LAW CLERK: The Judge, as you may have noticed, is not terribly concerned with problems of role morality. Perhaps part of the reason is that the practice of law leads lawyers, like the Judge, to appreciate the restrictions of roles more than most professions do. A lawyer's most important audiences, judges and jurors, are role restricted. (And clients, too, when it is understood that we impose a particular role upon them by changing their dispute to a social conversation). And, praise God for this! If they were to act true to themselves in these positions, it would be far more difficult to distinguish law from advertising. (Which is not to say that there is no ethic of the rhetoric of advertising, but it is a very different one). "One can sometimes observe marvelous changes in individuals as when some passionately biased person becomes a member of a jury or arbitrator or judge, and when his actions then show the fine transition from bias to an honest effort to deal with the problems at issue in a just and objective fashion." I read that in MAX WERTHEIMER, *PRODUCTIVE THINKING* 135-136, as quoted in CH. PERELMAN & L. OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* 21 (1969). And for a beautiful understatement of the potential problem: "If then one allows the existence of audiences of corrupt persons, whom one nonetheless does not want to give up convincing, and, at the same time, if one looks at the matter from the standpoint of the moral quality of the speaker, one finds oneself led, in order to solve the difficulty, to make distinctions and dissociation that do not come as a matter of course." *Id.* at 25. The shaping of the legal audiences is toward audiences that accept rhetorical proof and, because they do, they accept the lawyer's conversion of force to conversation. But here I am getting ahead of the Judge. Sorry.

7. LAW CLERK: The Judge has left something out here, but it is not surprising. It must seem so obvious to him that it does not occur to him that it needs to be said. Yet, I have learned that for some, and perhaps for the Courier, this is the most important thing he could say, and for others, it reveals a serious flaw in his thinking. What

this tradition maintains is the only sort of ethic a tradition can carry. It is a virtue ethic with the virtues being those things that move those in the practice towards its excellences, and the vices those things that head them off in the other direction. And this practice must have — for its own purposes — an ongoing internal inquiry about the teleology, the ends, of the practice. Okay, if you've got all that . . . (*pauses, no interruption*) . . . then the virtues of this practice, it seems, define for us a particular kind of person, even a particular way of life, because they reach beyond the practice itself. I don't think this adds much to your own insights about your education.

COURIER: I do see the connection, but each of us lives in a number of practices maintained by a number of traditions, don't we?

JUDGE: Good! Yes. Yes, of course we do! Of course we do! And there are always tensions among the varied traditions in which we live. This does not mean, however, that there is an ethic, or a self for that matter, that is somehow outside of any of these traditions. Nor does it mean that trying to locate our ethics, as defined by the traditions that constitute our lives, is a mistake.

COURIER: Well, I'm not sure . . . I . . . uh . . . you have us made up of competing ways of life. Where's the integrity in that?

JUDGE: I don't have you "made up," you are made up of what can be competing ways of life. And that is just as confusing as our lives

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he has left out is his conviction that the legal conversation he is referring to is always a moral conversation. As with the characteristics of the conversation the Judge does mention, it is a very particular form of moral conversation. In the legal conversation, there are moral appeals made on both sides of any issue because moral appeals are persuasive. This is not to say that the legal rhetor appeals to the particular morality of the judge or of the jury, but that behind each legal argument lies an often unstated moral claim. This moral claim is always toward those without an interest in the matter and is, therefore, more in the nature of a communal appeal about what "we" should do. Thus, the rhetoric required here moves the argument, and therefore also the counseling of clients, away from purely personal appeals or individual demands. It is important, however, to see that these social moral appeals are never, or almost never, directed to a universal audience, but to the role restricted audiences of the legal conversation. Lawyers often enough take a selfish or retributive motivation and convert it not to what it should be in a moral sense, but to what it must be in a rhetorical sense to be persuasive as a social moral appeal to these role restricted audiences. And, in doing so, they give us a decent way to talk about such "all too human" things. One of these days I am going to tell the Judge about another book because it is helpful here. Thomas B. Farrell, as I read him, says that in this way the rhetorican implements a practical wisdom through the complementary participation of someone else, namely, the rhetorical audience. THOMAS B. FARRELL, *NORMS OF RHETORICAL CULTURE* 73 (1993). I'm pretty sure the Judge would like that way of putting it, but you never can tell. It's not a good idea to make predictions about the Judge. What is best about him is the way he can surprise you.

are, and integrity is just as difficult as it really is. Look, I said that the practice this tradition of rhetoric maintains must have within it an ongoing inquiry about the teleology of the practice.

COURIER: Yes? I can see that. It would have to — to stay on course, to adjust to changes, to stay alive, I guess.

JUDGE: Yes! Exactly right! Well then, the practice requires practitioners capable of providing a good internal critique of the practice — one that is good because it considers those things beyond the practice that could threaten the quality of it or the maintenance of it or both. Let me put this in terms that will be all too real to you too soon. In this firm, I am proud to say, after much argument, we decided to drop minimum billable hours for associates, to encourage our associates to spend time with their families, to move them through departments so that they did not specialize too early, to design our offices and plan our schedules so that relationships among associates and partners could develop more informally, and to ask associates to join partners in doing pro bono work so that they would see other kinds of clients, other parts of the community, develop a sense of the profession, and so forth. And we did these things for two good reasons, although we did not talk about it this way. The first reason is what we are talking about. The story of which we are a part as lawyers needs real, well balanced, thoughtful people who are just like what our associates can now become. Or so we hope.

COURIER: And the second?

JUDGE: The second is that we still believe that what we offer to clients is a particular form of *phronesis* and, even though it is a particular form, even though, that is, it is a *phronesis* perfectly fitted to this practice; it too reaches beyond the practice because it has to! Our work is done in relationships with many other people in many other roles and our *phronesis* as rhetoricians has to reflect this.

COURIER: Tell me if I have this wrong, but what you are describing here is not that far from what we were saying this morning about the relationships among religious traditions.

JUDGE: No, not wrong at all. There's a connection. I hadn't thought of it in that way, but you are right there is a connection. And there is a way of understanding integrity in this, although it is certainly not a simple matter, is it?

COURIER: No. It isn't and I am still troubled by it.

JUDGE: Let me try to address this. We are in deep waters here, aren't we?

COURIER: Yes, I guess, we are.

JUDGE: And I don't swim that well. (*Pauses in thought*) There is no doubt that there is a story, a narrative, of each single life. As Aristotle put it, man is one in number. What we talk about when we use the word "integrity" is, I think, the coherence of each individual narrative. Integrity is the "fittingness" or the "appropriateness" of a person's conduct within the overall narrative of his or her life. If this is true, then it is wrong to think that integrity is to be found in some private, some internal world for the very sense of this "fittingness" is not our own. I think this is psychologically true as well. The virtues, even the general virtues that we might use to describe the integrity of a whole life, for example, can never be adequately understood as things that we carry around inside ourselves.<sup>8</sup> You know, even our strongest emotions are not our own in this way, but are based on narratives that are beyond ourselves.<sup>9</sup> (*Pauses again in thought*) But these are, as you can see, very complex matters, and I don't know that I am up to the task this present to us, and . . . uh . . .

COURIER: (*Interrupting; seeing the Judge's difficulty*) No, Judge, that's enough. I am sorry I took you away from your lecture notes. Let's go back.

JUDGE: Thanks you for coming to the rescue. What I was planning on saying . . . these notes are still sketchy . . . is a summary of what I think I have learned from the practice about its ethics. I have tried to be descriptive. (*Pauses*) I'm not at all sure this is a good idea. (*Shuffles through notes, sits down, looks up again*) Are you?

COURIER: Please go ahead, Judge.

JUDGE: Okay, I was going to say that I have found, in my own practice, five requirements of our practice, interrelated requirements, that are the source of a lawyer's ethics. There is first the ethics of the required relationship with the one for whom the lawyer is speaking. There is nothing so personal as to speak for an-

8. LAW CLERK: This is the kind of statement the Judge should back up at least a little, don't you think? He could do so by citing to OWEN FLANAGAN, *VARIETIES OF MORAL PERSONALITIES: ETHICS AND PSYCHOLOGICAL REALISM* (1991). I have read Flanagan and, as I read him, he is very much in the Judge's camp.

9. LAW CLERK: I am not sure how the Judge comes up with this stuff. There is an excellent article — I remember this one from graduate school — that makes the same point. It's Martha Nussbaum, *Narrative Emotions: Beckett's Genealogy of Love*, *ETHICS* 225 (1988). But I don't think the Judge read it. If I remember correctly, it has some nasty language in it that would not be his cup of tea. Let me tell you what the Judge said to me once, which I did not understand at the time. Maybe it fits here. He said: "We cannot understand our lives until we can hear them being played by somebody on a Martin D-18."

other and, because this is true, the form this relationship must take for the speaking to be truly for another is very ethically demanding. It is for this relationship that we honor client confidences, avoid conflicts, give preference to our clients over our own needs, and so forth. But the purpose of the required relationship also limits what we do for our clients.

COURIER: Limits?

JUDGE: Well, for example, the confidentiality we offer our clients is not just some general obligation of loyalty or even fidelity. It is certainly not there *just* to encourage client disclosures to their lawyers. It is the particular confidentiality needed to preserve a relationship necessary to speak for another within this rhetorical culture, and, if in a particular issue the questioned confidentiality does not serve this purpose or is even destructive of it, then we know that it is not the confidentiality that good lawyering requires. Nor, for that matter, is it something a client can, with any justification, insist upon. For clients must respect the fact that they came to a lawyer; accept, that is, that a good lawyer will practice true to the requirements of her craft. Thinking about it this way . . . I hope . . . offers a far more nuanced way of addressing confidentiality issues. (*Pauses*) Perhaps, this is the kind of thinking your Tyndale should be doing. But, let me go on because this may become clearer.

COURIER: Of course.

JUDGE: A second requirement is our obligation as good lawyers to maintain the legal conversation and to try to improve its quality.

COURIER: Is that like "officer of the court?"

JUDGE: No! Not like that at all! If that expression is meant to describe what I just said, it is a terribly misleading way of doing it.

COURIER: Why?

JUDGE: Because, from a lawyer's perspective, the legal conversation stands in judgment of the courts, of the adversarial system, of judges — of all those potential sources of ethical authority over your "officer." We are responsible for the maintenance and the quality of the legal conversation. Sometimes this means we have to resist the court, resist the judge, resist the entire adversarial system if need be, when we see it corrupting that for which we are responsible and upon which we depend for the quality of our work. (*Pauses*) We do so, however, in anguish and not in anger. (*Pauses*) No, what I have in mind is similar instead to the obligation to protect the playing field that is there in all practices, the general obligation not to foul one's own nest, not to warp the carpenter's rule before using it, and so forth. There are lots of metaphors, because

it is so pervasive. For lawyers, it includes, to be sure, protection over time of the unique language we use, the language into which we translate our client's claims, but it is far more than this.<sup>10</sup> And notice, Courier — I said earlier that these were interrelated requirements — how the ethics of the playing field are both in tension with and depend upon the ethics of the required client relationship. If the client is hiring a lawyer, the client surely needs to accept that the lawyer will not foul her own nest. The lawyer, however, must present this limitation, a limitation upon a relationship the client may feel he is entitled to, in ways that do not destroy the relationship that is required for good lawyering. For what quality could the conversation possibly have if it does not remain the conversation of our clients? So there is tension between these first two requirements of good lawyering . . . ah, now there is fertile ground for hard work by your Professor Tyndale!

COURIER: You are going to give him a lot to do! Judge, he's a very thoughtful man, a very intelligent man, well read. I think I gave you the wrong impression. He would love to be a part of this conversation.

JUDGE: Perhaps.<sup>11</sup> (*Quickly returning to his topic*) Now the third requirement is closely related to the second. I have thought of keeping them together, but they are better apart. The third sources of our ethic is the ethics of persuasion. Again, though, this is not just any persuasion — remember all the limitations of my little preface: particular audience and so forth — but the ethics of persuasion within our particular rhetorical culture with its clearly defined roles. I have in mind here a certain respect for our audiences and their roles, but I also have in mind those constitutive rules of the conversation such that if you use some other methods to per-

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10. LAW CLERK: I know, because I have had the opportunity to consult the Judge's lecture notes, that the Judge is thinking here of the work of James Boyd White on our obligations as lawyers to the language of the law. No surprise; the Judge loves White. The Judge's notes on this express some disappointed, however, that White has never spelled out the practical applications of this ethical obligation. I wish the Judge would take a look at BERNARD SUITS, *THE GRASSHOPPER: GAMES, LIFE, AND UTOPIA* (1990). There is much in the Judge's descriptions, with its playing fields and so forth, that is spelled out very nicely in Suit's work.

11. LAW CLERK: The Judge sees Tyndale, I know this to be true, as incapable of offering any response to Nietzsche's challenge to morality, and he does not think Nietzsche would love to be a part of this conversation so he is not likely to take the Courier up on this. Nietzsche is always there, somewhere, in the Judge's thinking. In some ways I think his life has been an exercise in learning how to come to terms with Nietzsche. If you have no place to stand in reading Nietzsche, if you can find no way of turning him fairly to your own purposes, then the Judge is not really that interested in you although, of course, he would never let on that this is true.

suade you are no longer engaged in the legal conversation but are outside of it. I am afraid I have not said that very well. Is it clear enough?

COURIER: I think so. For example, bribery, in all its many and subtle forms, is out, because it corrupts the audience.

JUDGE: Yes. Good. You have it. Bribery, in fact, would not only be corrupting and outside the constitutive rules of the game, but also destructive of the practice in the same way that cheating is destructive of any game. But I don't want you to think . . . and I can see by your description of bribery that you don't think . . . that this requirement only involves egregious wrongs. You can see the same wrong that bribery is in very subtle tempting of our audiences to make decisions upon improper bases. The issue is there appears in every time we consider a closing argument. It is there in every evidentiary issue; in every conversation with a journalist, in every negotiation with another lawyer, and on and on. It reaches all that we do as lawyers. So this is not just about egregious wrongs. In fact, the ethics of this are very subtle, wholly pervasive, and require great discernment. It is very troubling, for example, when the temptation the lawyer faces is to take advantage of the other side, to deny to your opponent's client her own participation in the conversation, and so forth. And the question for the lawyer is whether the proposed advocacy is within the game, to use the metaphor again, or outside and destructive of it. This is part of what lawyers talk about when they talk among themselves about ethical dilemmas. It is part of that ongoing internal inquiry I was talking about before. Of course, good lawyers don't talk about it the way we are doing here. They do it better, far more naturally.

COURIER: I heard some of this at dinner, I think.

JUDGE: Different context. But, yes, I think you probably did. The fourth requirement . . . let me look back at the notes again for I have lost my train of thought . . . (*reading paper*) . . . okay, the fourth source . . . no, wait, I think I can put the fourth and fifth together. So the next one would be the ethics of critique: internal critique, similar to what we were just saying, and *external* critique done internally. (*Amused by the expression*)

COURIER: (*No reaction*)

JUDGE: (*Returning to his notes*) Uh . . . the fourth requirement of our practice, the fourth source of the lawyer's ethics is the need we have as rhetoricians to critique our own rhetorical culture. Here, let me add this note: (*writing*) "internally and externally." The internal critique puts us in judgment of current practice so that the

question, "Is this true to who we are," is always asked. For us, one crucial element of this is keeping the language of the law connected over time so that what I have been calling the legal conversation is, in fact, a conversation. The *external* critique . . . (*writing on the paper*) . . . "done internally" . . . asks about institutional concerns, about keeping the practice adequately connected to the culture in which it is located, and about its place at the table of all practices. (*Looking up at Courier*) You can see the interrelationship again, can't you? The legal conversation must remain understandably about those things that our clients bring to us. It has to in order to retain its cultural validity as a way of handling social disputes and it has to retain that validity if it is to continue as a conversation at all. So even though we translate our clients' concerns to the language of law, they must be able see their concerns at least reflected in the conversation, don't they? Not as they brought them to us, of course, but at least converted in an understandable way to the particular persuasive demands of this particular social conversation about social disputes. Isn't this right?

COURIER: I think so, but I can see that you depend a lot on external critique.

JUDGE: I do?

COURIER: Yes, well, if I have it right, the constant accommodations the practice makes to the culture are the product of your external critique. And these are not just institutional accommodations, but also individual accommodations. Aren't they?

JUDGE: Yes, they are. Do you see the problem? Why the external critique must be done internally?

COURIER: Yes. Otherwise, the culture would corrupt the practice. The judgement, the balancing, would be very different.

JUDGE: Yes, and, when that happens, the ethic, the theology — "the goods" — that are carried by the practice are lost. (*Pause*) Well, Courier, I see I am not needed here anymore. But I do want to be clear about something that I may have passed over too quickly. As you can see, all these requirements are needed to maintain the practice and to maintain the quality of the legal conversation and I'm offering these requirements as the source of legal ethics. These are the maintenance obligations of one who wishes to be a good lawyer, and it is in these obligations that we find the primary ethical restraints . . . . No! Wait! It's wrong to refer to



these as restraints.<sup>12</sup> They are in fulfillment of good lawyering. Let me try again. (*Writing on the paper*) These constitutive ethical obligations of good lawyering are something that we impose upon our clients. The clients, by becoming clients, enters into our world of practice and, in doing so, must accept those things that are essential to the quality of our work. They have to accept, for example, the truthfulness the conversation depends upon, the required consideration of the persuasiveness of arguments on the other side — even if for no reason other than to know how to respond to them — the openness of the conversation to all, the inherent equality of each voice, the particular requirements of persuading our particular audiences, and accept the social nature of their own disputes.

COURIER: Is that the end of your notes?

JUDGE: Yes, but I'm not sure how to end the talk.

COURIER: Do you hold out your four requirements as offering different solutions to ethical issues. I mean are you going to work though some examples with the audience?

JUDGE: They do offer different solutions, often enough. And I can work through some examples if you think it needs them.

COURIER: Yes, I do.

JUDGE: The audience may be disappointed though.<sup>13</sup> The same tensions that show up in the usual discussions of ethical issues show up in the ones I wish to have.

COURIER: I don't see that as a problem, Judge. Those tensions are there within the traditions of the practice. What you are doing is giving lawyers a way of identifying the tensions better than before.

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12. LAW CLERK: There you go. The Judge is thinking about Nietzsche again.

13. LAW CLERK: Sorry to keep interrupting but, having heard the Judge work through examples with law clerks, I know that the Courier may be disappointed with the examples as well but not for the same reason. If the Courier thinks that the Judge is going to talk about traditions and practices and the like, he is in for a disappointment. Mostly the Judge talks about laws, ethical regulations, ethical obligations and exercises of judgments and it is all very contextual. Every time he and I chat about ethical issues, he insists that we spend most of the time playing with the hypothetical to see if the issue will go away. The Judge says that the real moral work is done in framing the issue. So, what you would likely hear from the Judge would be efforts to describe the situation as accurately as he can. He surely does not offer a decision procedure for lawyers. He tries instead to explain what ethical questions in the practice are questions about. One of the things he has helped me with is in understanding why some questions are so very difficult. The Judge, by the way, sees legal restraints on lawyers as those things that cannot be justified in the legal conversation. So when he talks about the *law* of lawyering he often comes back around to the same things discussed here.

In some ways, those are the tensions that define the practice, aren't they? So no one should expect them to just go away.

JUDGE: Thank you, Courier. And we have hundreds of years of trying to work through these tensions, don't we? Surely we have learned something about them, don't you think? What I would want to do with examples is to plug lawyers in to what we may have learned as a practice; to give them a better way of thinking through these problems, one that is supportive of the practice rather than, as is too often the case in these discussions, destructive of it.

COURIER: Can I press you a little, I know it is getting late, but . . .

JUDGE: (*Interrupting*) You can, but I know I am no longer needed here.

COURIER: Maybe. You have a lot of faith in the legal conversation and I was wondering what justification you think it has.

JUDGE: (*Not responding*)

COURIER: What's the point, in other words? What does it do? What do *we* do as lawyers? I'm not sure how to say this.

JUDGE: No, you've said it well enough. It is just hard to answer. There is a risk here of imposing something upon the practice that is not the practice. You know, if you said that the conversation was about justice, for example, you would have so much explaining to do about what this "justice" means because the justice that is carried by the practice of law is not at all what most people mean by justice.<sup>14</sup> But I don't want to go through all that so let me just say that its justification is . . . or, rather . . . what we do as lawyers is convert force to conversation.

COURIER: For peace?

JUDGE: You mean between the parties?

COURIER: Yes.

JUDGE: Then no, not peace, although peace may come. But no, it isn't about peace. This is a legal conversation for sinners. It is one that lives within human frailty. Much of what we do is keep people who want to harm each other from doing so and those who might do so in the future from getting themselves into tempting situations. That's not peace. I try very hard, within the requirements of good lawyering, to keep a potential for peace open, but if peace between the parties comes it is more a matter of grace than a product of my work. (*Pauses*) I think I want to say this more *brutally*:

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14. LAW CLERK: The judge once told me that the primary example we have of lawyers seeking "justice" is overzealous prosecutors who think they know what justice is.

If I tried to accomplish peace through my practice, I would not be a good lawyer.

COURIER: So what you do, then, is convert issues and potential issues between people into conversations and into language games within the conversation so they aren't resolved by force?

JUDGE: Yes, I guess. And "games" seems right. *Good* games. Is that good enough?

COURIER: I don't know. The conversation itself rests on force, doesn't it?

JUDGE: Of course, it does! It rests on the social force that is a necessary precondition for the conversation itself.<sup>15</sup> There may be a lot more force in the adversarial system than this, but from a rhetorician's point of view the justified force is the force needed by the conversation. Rhetoricians don't try to get rid of force in the world. We just try to take the inevitable use of force, including the force we use, and turn it into an argument in our own language as best we can. (*Pauses*) And you know, when true tyranny arises, we can be challenged to give our lives to this effort, and some good lawyers have. (*Catches himself*) I must be getting tired, Courier. I'm making this sound romantic and it isn't. Let me put it more mundanely: It is a common mistake to think that the use of force for the client is the goal of lawyering or that the use of peace is the same. The goal is the legal conversation; the rest is always and of necessity left to the audiences to whom the speaking is addressed. And, you know we have not talked about this much, but one of the audiences is the internal audience of the client.

COURIER: But Judge, why not be peace makers? I am troubled by your not seeing peace as a goal.

JUDGE: If God cares about peace between neighbors, as we know He does, should He not also care about the peace of communities of sinful people over time? Lawyers do not serve peace directly, but by converting force to conversation, and doing so as best they can in a fallen world filled with people for whom force has enormous appeal, enormous *moral* appeal, perhaps lawyers can be called "peace makers" too without doing too much damage to the Beatitudes or to the practice. But I am not sure about this. I am

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15. LAW CLERK: Apparently, the Judge has forgotten that he got this idea from reading Perelman back in the early seventies. Here is a citation if you want to see the sources: For a discussion of the pre-conditions required for argumentative conversation, see C.H. PERELMAN & L. OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* 14-17 (1969); and, for more on the requirement of binding force for decisions made upon rhetorical presentations and the rhetorical requirement of the connection of argument to action, see *id.* at 58-59.

not at all comfortable with it. I usually try to avoid the question of justification because it is so easy to go astray from the reality of the practice in the process of justifying. I don't know. The question of justification just does not arise very naturally from within a practice.

COURIER: Fair . . .

JUDGE: (*Interrupting*) Justifications are sort of the mission statements of philosophy.

COURIER: Fair enough, but aren't we back to theological questions then?

JUDGE: You mean back to where we started? (*Laughs*)

COURIER: Yes.

JUDGE: (*Bemused*) Well, the theological questions have already been answered, Courier.

COURIER: I was afraid you were going to say that, Judge, but can we talk them out just a little?

JUDGE: And I was afraid you'd say that. (*He laughs and is joined by Courier*) Okay. I think I said something like success, as defined within the practice, depends upon a certain understanding of the world. Right?

COURIER: Something like that, I believe.

JUDGE: And I "named" this, to use your term, a Christian theology. So, I said, the practice carries with it a certain Christian theology.

COURIER: Yes, from a Christian perspective.

JUDGE: Which, I think we agreed, is, of necessity, the perspective that this is the way the world is.

COURIER: Right, I am with you again.

JUDGE: The rhetorical world — the world of good arguments, good *moral* arguments,<sup>16</sup> on both sides of every dispute, the world in which we are dependent upon that which "adheres" to the mind of our audiences and "the liaison of ideas" for the good, dependent upon that which persuades, in other words, and not that which "convinces,"<sup>17</sup> dependent upon the very language that we use — is

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16. LAW CLERK: Didn't I tell you the Judge depended upon this particular unarticulated understanding of the legal conversation.

17. LAW CLERK: The terminology he is using here, "adheres," "liaison of ideas," and "convinces" (as opposed to persuasion) is all Perelman talk again. See, CH. PERELMAN AND L. OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* 14 (1969). The Judge puts an awful lot of trust in a sense of what is appropriate; a lot of trust in what "fits." I see this in his theology and in his practice-based ethics, don't you? He would say that these are a rhetorician's standards and they make clear both the interdependency and the contingency of our rhetorical

a world of contingent and tragic choices by fallen beings who need force just to be able to talk to one another other about those things that seem to matter to them the most. Because it is contingent, we are left fully responsible for the goodness of our choices. What you saw as your corruption as a Christian in the classroom was no such thing. It was a display of this contingent world to you. It was, as you said, a challenge to your faith, but I would insist that it was a good challenge, a challenge that called your faith to a new maturity, called it to wrestle, more than it had before, with the truthfulness of our fallenness and how one might, nevertheless, serve God. (*Pauses*) But people don't like to hear about responsibility, do they? It is distressing.

COURIER: No, I guess they . . . uh . . . I guess *I* don't. But what of God?

JUDGE: He is involved with us in this same troubling story; not bracketed away from it.<sup>18</sup> Isn't the Incarnation about God's willingness to live our lives with us? Look, at least one of the central messages of our Hebraic tradition is that what we do matters, *really matters*. The world is changed, *truly changed*, by our decisions. There is more room in this story, for the new, for the created, than there is in almost any other. There is room in it for the unique meaning of individual lives.

COURIER: And . . . ?

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world. It looks like an aesthetic ethic, even an aesthetic theology, to me. What do you think? I think the Judge has some hard work of his own to do here and the kind he does not like to do: epistemology, justification — the "mission statement" stuff he treated lightly before. But please do not tell him I said that. Let me do it my way later on.

18. LAW CLERK: I wish the Judge would use his own words more so I did not have to keep doing this. These terms are, I think, taken from James McClendon.

Our question must rather be whether the life experience of a Hammar skjold or an Ives is or is not understood better when it is treated as experience with God; that is, whether (as I believe) the ongoing story of their lives makes more or fuller sense when the involvement of God in that story is recognized, or when it is bracketed.

JAMES MCCLENDON, *BIOGRAPHY AS THEOLOGY: HOW LIFE STORIES CAN REMAKE TODAY'S THEOLOGY* 160 (1990). So, I would like to ask the Judge, how does it make "fuller sense?" I guess the Judge, with some irritation, would tell me that this too is a rhetorical standard and remind me again of our dependency and so forth. Sometimes I think the Judge is pretty radical for an old lawyer. He has a Wittgenstein-like aversion to letting things settle down securely in one place, if you know what I mean. For him, security is a mortal sin, I think. He has said to me many times that "we" — and I am never sure what he means by that — are called to insecurity. But when he says this it sounds something like Sherlock Holmes telling Dr. Watson "Come, Watson, the game is afoot." You know, he is enthusiastic, even joyful. It's strange.

JUDGE: And . . . then . . . the very meaning of your work as a lawyer is in the recognition that it is . . . that it can be . . . God's work with you.

COURIER: In the recognition and not in the revelation?

JUDGE: They are forever together. Surely the world works in such a way that we cannot escape from our own humanity! God has never revealed himself to us in ways that do not call upon our discernment, our ongoing discernment, through history and over time. For, if this were true, it would not be to us that He was revealed. To say that God's work is at the heart of our traditions, as I have tried to say here, Courier, is not to deny God's revelation but to accept the one to whom God's reveals and with whom He works.

COURIER: But how then does God work with us?

JUDGE: It is all a relationship, isn't it? Isn't that what this is all about? A relationship? I know this sounds terribly mundane, but it is true, isn't it? Look, we are, despite our most fervent wishes to the contrary, always co-Creators with a loving God in a contingent world.

COURIER: It's frightening to think of it that way.

JUDGE: Yes, I know. I am glad you said it that way. To think that we are in that kind of relationship with the One who created us! The truer issue for us as Christians is having the courage to recognize the responsibility of this relationship. As I see it with these old lawyer's eyes, it is the responsibility of living in contingency, living in interdependency, living in dependency or, as I said before, of recognizing that we live in Biblical times. (*Pauses*)

COURIER: (*Starts to speak*) Uh . . .

JUDGE: (*Interrupts*) You know, Courier, it occurs to me now, thanks to our conversation, that it is only in this recognition that we can come to know what it means to be who we are. To say that the Kingdom is within means, I think, that we cannot know ourselves until we locate this self within the Kingdom. And, still trying to answer your good question now, I have to know that, don't I? I have to know who we are to know how God works with us. Perhaps, this is what it means to practice law in the Kingdom, this coming to terms with who we are.

COURIER: And we can do this when we do those things I feared? I mean as lawyers, we can do this?

JUDGE: You mean making arguments that are not "yours," representing people you do not agree with, trusting the outcome of persuasion, and on and on through the litany of the ethical condemnation of lawyering?

COURIER: Yes.

JUDGE: I think so. With a hope and a patience made possible by Christ.<sup>19</sup> With a trust that man's good work, when truly done well, is work with God. A trust that the Creation continue. Our lives as lawyers, rightfully understood, are based on a miracle. This is the claim Christians offer against the powers that would claim the practice as their own. Here, let me read something to you if I can find it. (*Thumbs rapidly through a stack of note cards until he finds what he is looking for*) Yes, here it is: Christian hope means "exposing the non-necessity of supposing, like Nietzscheans, difference, non-totalization, and indeterminacy of meaning necessarily imply arbitrariness and violence."<sup>20</sup> I ask you, Courier, who, in the everyday

19. LAW CLERK: There he goes again. The Judge is borrowing here, and distorting a little, something that he got from another theologian, Stanley Hauerwas: "Patience is not merely what we must do until we are saved. It is our salvation." STANLEY HAUERWAS, *WILDERNESS WANDERING: PROBING TWENTIETH CENTURY THEOLOGY AND PHILOSOPHY* 180 (1997).

20. LAW CLERK: I found the same note card later on. On it the Judge attributes the quote to JOHN MILBANK, *THEOLOGY AND SOCIAL THEORY: BEYOND SECULAR REASON* 5-6 (1990). He found it in HAUERWAS, *supra* note 19, at 190 (1997). What Milbank, a philosophy of religion professor, said may be true about "Nietzscheans," but it is hardly fair to Nietzsche who saw himself as offering an alternative, even a light hearted one, to the pessimism of Schopenhauer — an affirmation of life in the face of the conditions Milbank describes. People like Milbank, who try to define themselves against Nietzsche, do not seem to understand how much their view of the world is Nietzschean. Here is another quote from Milbank to show you what I mean. This one comes from John Milbank, *The Ethics of Self-Sacrifice*, 91 *FIRST THINGS* 33, 37 (1999):

Thus we live under the ethical sway of an abstract otherness, mirroring in the ethical realm the legal assumptions of the respect for the rights of the individual in general with indifference to that individual's gender, character or cultural specificity. Given the assumption of such a state, two things follow: our responsibilities tend to become unlimited because we owe our lives infinitely to every other person; and the ethical good never arrives — we can never fulfill this impossible responsibility, and no one could ever legitimately relax and enjoy the benefits of the sacrifices of others. Thus the only thing that is achieved is the continued carrying out of self obliteration. Liberals pretend that continuous self obliteration is the demand of the moral law, but in reality it is only the demand of the liberal state, which cannot put a brake upon sacrifice because it is unable to promote any positive goals or values that would define true humanity. It follows that the exaltation of pure self-sacrifice for the other is secretly the sacrifice of all individuals to the impersonality of the formal procedural law of the state and marketplace. Like the antique polis, this alone abides, this alone is eternal.

If you added to the end of this quote "thus spake Zarathustra" you would be off, but not by as much as Milbank would like us to believe. The Judge introduced me to Nietzsche. I was, of course, surprised that he did, but now I have a better understanding of what he wanted me to get from him and it was not Milbank's "arbitrariness and violence." In fact, I now keep having this feeling that there was a holy and terrible sadness when Nietzsche, at the beginning of his insanity, rushed in to save that horse

world of practical affairs, other than good lawyers, act as if that were true? Most either hide from indeterminacy or see in it a world of power.

COURIER: I can see that, Judge, but it is so hard to see work with God in so much of what lawyers do?

JUDGE: Because it is so mundane?

COURIER: Well, that, too, but I was thinking because there is so much complicity with wrong doing.

JUDGE: Well, then, I am about to lose you.

COURIER: You are?

JUDGE: Yes, I was called the other day by an attorney for a cigarette manufacturer who wanted me to consult on a case that might be brought in this jurisdiction. I could not take the case because I'm leaving practice, but I probably would have taken it on.

COURIER: That's the complicity part.

JUDGE: I hope it works both ways for you.

COURIER: What do you mean?

JUDGE: I hope you worry just as much about complicity with the good.

COURIER: I don't follow.

JUDGE: Complicity with what most would see as a good cause, prosecution of criminals, for example. It's the same issue. But I'll leave that to get back to my tobacco case. I don't think the problem of complicity can be solved by withdrawing or refusing to take the cases you find morally troubling. In fact, that attitude, blinds you to your complicity in the harm you do in those cases you do not find morally troubling. In a fallen world you cannot avoid complicity in evil. You cannot deny that the world is tragic. And . . . of course . . . this is not an excuse. It is, instead, part of the truth that allows us to judge evil correctly. The alternative to complicity is not some personal moral purity, but the hope and the patience — the hope and the patience of the conversation that is our alternative to force, if you prefer — the hope and the patience I was talking about.

COURIER: But Judge we don't need the legal conversation to know that what the cigarette manufacturers are doing is wrong.

JUDGE: Of course not! We need the legal conversation to know what to do about wrongs, all kind of wrongs, especially those done in the name of righting wrongs. Look, you are saying, in essence,

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from a beating. Did I say that? Sorry. Carried away. Anyhow, take a look at TYLER T. ROBERTS, *CONTESTING SPIRITS: NIETZSCHE, AFFIRMATION, RELIGION* (1998) or, even better, PETER BERKOWITZ, *NIETZSCHE: THE ETHICS OF AN IMMORALIST* (1995).



that we know what must be done in this situation. Lawyers just don't *know* what others know must be true. This is one of the many reasons people don't like us. We await the outcome of a good legal conversation. It takes a lot of patience to do that, doesn't it? There is nothing more destructive of this conversation, and of the good it provides, than those who try to make it serve the known good. You can see that in my prosecution example, can't you. So I don't really need to pursue that, do I? And when the "true believers" pursue outcomes other than the conversation's outcome, trust in the conversation is lost, isn't it? I see that going on now all the time, don't you?

COURIER: I suppose so.

JUDGE: Lawyers are responsible for the clients they choose; morally responsible for the work they do.<sup>21</sup> But not in the way many think. Not as an exercise in some personal moral harmony. The *personal* moral responsibility of lawyers is a personal responsibility for those morals carried by the practice such that, for example, the representation of those with whom we disagree is a moral act. The selection of clients based on a personal moral agreement with the justness of the cause, even "all things considered", is a form of denial of moral responsibility for the practice. And I ask you which is really more important?

COURIER: I suppose — at least in the way you have described the practice — the morals of the practice. I'm not sure. What did you mean? Lawyers not knowing what others know?

JUDGE: Do you remember Nathanael?

COURIER: Sure.

JUDGE: Well, Nathanael was willing to go see, with Philip, if "anything good could come out of Nazareth." Most people wouldn't have bothered to make the trip. Lawyers tend to be more like Nathanael when they are at their best. (*Long pause*) Courier, it is all pretty mundane. Lawyers go about seeing God's work in contractual disputes, in petty domestic squabbles, in slip and falls, and so forth.<sup>22</sup> I've always thought that Christ's messages were much

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21. LAW CLERK: Did you notice how the Courier did not ask a question here? The Judge is off on his own frolic, I think. Sometimes he does this. Sometimes he seems as if he is arguing with somebody else. It can be annoying.

22. LAW CLERK: Although, it does not look like it, what the Judge is saying here, I have learned, is connected in his mind with the complex reaction of Saint Thomas More, a man with whom the Judge is very familiar, to the sanctification of ordinary life during the Reformation. I have found a very good analysis of this that, while it does not mention More, helped me make sense of how the Judge makes sense of More's reaction. See, CHARLES TAYLOR, SOURCES OF SELF: THE MAKING OF THE

the same: do unto others, love your enemies, follow the law except when it does not make good sense to do so, and live your lives so that you will come to know what this “good sense” is. God, Christ announces with His life, is at work in these things with you, so use your Christian head. This is what is radical and transformative in the Incarnation, but we want more and this wanting more is itself the sign of our fallenness. Not evidence of some striving after the divine, not evidence of the divine spark within us waiting to burst

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MODERN IDENTITY 215-229 (1989). For More, it was a theological mistake to think of monasticism, a practice he conceded was extremely corrupt in his time, as creating a hierarchy of spiritual life that devalued the ordinary, as a “slur on the spiritual standing of productive labour and family life.” *Id.* at 218. More, for all his horrible polemics against Luther — Is there any writing in all of literature more disappointing? — was in the awkward position for a good Catholic of agreeing both with Luther’s assessment of the conditions of the Church and his efforts to sanctify ordinary life (although the latter is not how Luther would have described what he was doing for he shared with More a fear of a peasant’s revolt). For More, Luther, of course, was making a horrible theological mistake, a heresy that risked the salvation of others. Sanctification of ordinary life could only come, he knew, through the ongoing tradition of the Church, a tradition maintained best through the conversation of the Council. He saw, better than most, the future that Luther offered and it frightened him to death.

More, one of the patron saints of lawyering, tried to live a life of faith mediated by the Church through his work as a lawyer, a work that he saw as deeply connected to the sacraments because all things must be. He tried, then, to live out as a lawyer his theological argument against Luther (and he did a better job of it this way than through his polemics). More believed Luther could lead us one of two ways: a Church destroying liberalism or a fierce Puritanism that substituted obedience and command for the ongoing work with God that is the continuing creation of the world and he wanted to live his life in opposition to both.

I do not think that More would have been troubled at all, and might even have agreed, with Mill’s criticism of the toll on human lives of Calvinists’ efforts to make strict obedience a central virtue. Like modern fundamentalists, these Calvinists thought that the rigidity of command could take over the role of the living tradition in maintaining the strictures of Christianity and, in so thinking, they tried to substitute dead words for a living faith. Or so, I think More would have thought and so, I think, the Judge would as well. My apologies to you if this footnote goes too far afield from the dialogue or if it does not interest you. Prompted by the Judge’s interest in him, I have read a lot about More recently and I wanted to get some use out of it. There are a lot of books on More these days, but I want to warn you that most people see in More whatever they want to see and what they want to see is often their own reflection. Can you imagine that? You would be truly amazed at the odd uses people have made of More’s life. Among the works I have read, the best article I found for the Judge’s purposes, *the one I am going to copy for him because it is so close to what he is saying here*, is Stanley Hauerwas & Thomas Shaffer, *Hope Faces Power: Thomas More and the King of England*, in STANLEY HAUERWAS, CHRISTIAN EXISTENCE TODAY: ESSAYS ON CHURCH, WORLD AND LIVING IN BETWEEN 199-219 (1988). This is true despite the fact that the authors rely almost entirely upon the More of Bolt’s A MAN FOR ALL SEASONS, a More that, to my reading, bears only a resemblance to the “real” More. The Judge will probably want to be more careful with the facts of More’s life.

into self-consuming flame. The opposite, I think. It is yet another way of avoiding the God in whom we would see our own responsibility for the good. Surely there is for all Christians a banality of goodness that we deny at our peril. (*Pauses*) But I fight a losing battle in saying this, Courier, because everyone wants more. Doesn't help to say, I suppose, that there is a form of sainthood possible within these ordinary lawyer lives.<sup>23</sup>

COURIER: And an understanding of evil as well?

JUDGE: Yes, a distinctive way of seeing a separation from God in those who seek to take themselves out of history, out of co-Creation, and out of responsibility. We can see a demonic in our institutions, including our churches. We can see a politics based on the motivations of a quest for the security of simplicity, of intolerance of ambiguity and complexity, of avoiding the need to wrestle with the world so that it reflects our own work. A politics of impatience and fear. Notice how the practice of law run counter to these practices, proceeding, as it does, in hope and with faith in the potential redemption of the fallen. Lawyering resist those who do not keep talking things out, who do not see in the openings provided by the complexity of our minds, the openings through which God's grace

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23. LAW CLERK: Early on, after the Judge told the Courier about McClendon, I thought I should read him. In one section of the book the Judge refers to, McClendon relies upon Guardini to recall something similar to what the Judge is saying in the text here:

So Guardini turns to speak of a "new kind of saint," who can embody sanity in this generation. In effect, his book is an evangelistic summons to take up the way of practical holiness in daily life. This way, however, is not nowadays to be that of detachment or asceticism; it is to be fulfilled by a self-abandoning obedience to God's directives just as these are mediated by the secular situations in which one finds oneself. The saint's way is, therefore, not to be extraordinary; no one will easily identify a modern saint. 'Their surrounds are standardized: they work in laboratories, in factories, in administrative agencies . . . lives in homes which are often the same to the slightest detail . . . dress the same . . . are subject to uniform 'packages' of education, entertainment, legislation. In such an environment, how could they lead a Christian way of life which had to express itself in extraordinary religious practices and experiences? They would have to become strangers to their own ways of existence; they themselves would have to recognize their lives as absurdities.' Nevertheless, there is a particular saintly task for today, and that is the task of changing or reshaping the world God has entrusted to human beings. For even today, "man is still answerable for the world, and the world is entrusted to man . . . His mission is not a 'profane' task paralleling the religious one. It is of itself and as such religious or rather Christian. In the final analysis there is one obedience, one service which man owes God in his faith and in his work."

McClendon, *supra* note 18, at 157 (citations omitted.) I cannot get over how good that is. I can see why the Judge recommended it.

can come. Lawyers are, at their best, people trained to live in Biblical times. But it is hard to accept. Hard to see it because it's not romantic. It is anti-romantic, if that's a word, and romanticism is how we have come to define our personal selves. (Pauses. Lighter now.) But enough blathering . . .

COURIER: Blathering, Judge? I don't . . .

JUDGE: (*Interrupting*) Someone is going to want to cut my head off one of these days for trying to be a good lawyer, trying to turn disputes about power into conversations about words, trying to hold on to the traditions in which we come to know who we really are. There you have it. (*Smiles*) I have caught myself romanticizing. (*Gets up from his chair slowly*) Haven't you had enough from this Christian lawyer? My mundane advice to you is that if you want to be a Christian lawyer do the things Christians have done to remain Christians for two thousand years. You know the rest. Probably better than I do. Isn't much, is it?

COURIER: No, I think it is . . . uh . . .

JUDGE: (*Interrupting*) Tell you what. Let's stay in touch. Here's my card, let me write in the new phone number.

COURIER: Thank you, Judge. You are . . . .

JUDGE: (*Interrupting again as if uncomfortable*) No need; enjoyed it. And Courier?

COURIER: Yes.

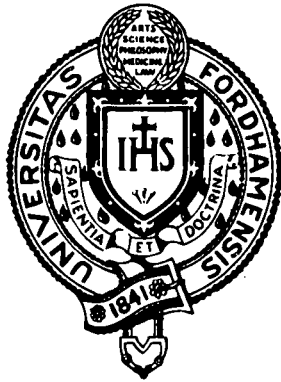
JUDGE: No more Tyndale. Go find a good clinician.

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The Courier left quickly after shaking the Judge's hands, took the elevator down to the parking garage, and drove out into the sparse late night city traffic towards the interstate that would take him back to his apartment near the Law School. The radio was on when he started the car, tuned to the college station as it usually was, but he didn't notice it. As he was approaching his exit, the words of the song being played slowly came to his attention: ". . . *I've seen your flag on the marbled arch, but love is not a victory march; it's a cold and it's a broken Hallelujah . . .*" and he recognized the young man's voice . . . "*It's not a cry that you hear at night; it's not somebody who's seen the light; it's a cold and it's a broken Hallelujah . . .*" and he wondered if the miracled world was not much more romantic than the good judge knew.<sup>24</sup>

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24. LAW CLERK: He was listening to Leonard Cohen's song, *Hallelujah*, as performed by the late Jeff Buckley. There are numerous versions of this song. I only found the quoted verses in the version sung by Buckley. Okay, that's it for me. Thanks for reading.



# FORGIVENESS AND THE LAW — A REDEMPTIVE OPPORTUNITY

*Douglas B. Ammar\**

## I. LYNN'S STORY

*Lynn's uncle, a former client, and her mother approached us, the Georgia Justice Project ("GJP") about representing Lynn. When I took the case, Lynn would barely talk to me. She was still in shock from the shooting. We tried to work with Lynn on her shock. Lynn grew to talk more about what had happened and the role that she played in this horrible incident.*

*Lynn and her cousin, both teenaged African-American girls, drove up near a pay phone outside a convenience store in suburban Atlanta. Their car was loud and the noise disturbed Matt, a twenty-two-year-old white man, who was making a phone call. After a brief interchange, Matt began cussing and threatening Lynn and her cousin. The two cousins quickly left and went directly to the motel room where Lynn's cousin's boyfriend (Joe) was staying.*

*Joe and two friends, all between eighteen and twenty years old, were in the room. They were drinking and smoking. After hearing what happened, they demanded to be taken back to the store. Minutes later, the group of five arrived at the store. Matt was still on the phone. Unbeknownst to everyone else, Joe had a gun.*

*After the car stopped near the store, Joe and one of his friends got out and walked toward the pay phones. Joe picked up a phone near Matt and acted like he was making a call. Suddenly and without warning, Joe pulled out a gun and opened fire. One shot pierced through Matt's mouth, another straight through the heart, another in the chest, another in the groin area, and a fifth shot in his leg. Without a word, Matt was killed in cold blood.*

*Joe and his friend quickly ran back to the car that was waiting beside the convenience store. The five sped away and went back to the motel. It took the police several weeks to find out who was*

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\* Douglas B. Ammar is currently the Executive Director of the Georgia Justice Project (the "GJP"), where he has practiced criminal defense for the past ten years. The GJP is a nonprofit organization whose mission is to provide justice for the indigent criminally accused, and to help them become productive citizens. The author wishes to thank J.C. Hillis for his generous time and energy in this effort.

*responsible for the killing. A confidential tip led the police to all five involved in the shooting — including Lynn.*

*In their statements to the police, everyone but Lynn gave varying and inconsistent stories. Eventually, they were all charged with the murder.*

*Fortunately, the prosecutor was fair and understanding. He did not believe that anyone but the trigger-man (Joe) was guilty of murder. Therefore, Lynn got a break. After many meetings with, and memos to, the prosecutor, Lynn was allowed to plead guilty to conspiracy to commit aggravated assault. Her sentence was 120 days in a detention center with five years of probation to follow.*

*During the months leading up to trial, we worked with Lynn, encouraging her to address her grief. She began by writing a letter to Matt's family. Lynn sympathized with their pain. The letter eventually resulted in a meeting with Matt's father. This occurred outside the courtroom after Lynn and three other co-defendants were sentenced. Four of us stood in a circle. Lynn and her mother cried as they expressed their sorrow over the senseless loss of life. Her head lowered as she sobbed and begged forgiveness. Matt's father wept as he listened. He said he was glad that she contacted him and that she was the only defendant to approach him. He could not forgive her yet, he said. He was hurt and angry. But some day, he said, he hoped he could.*

*I wept, too, as the four of us stood in a circle, sharing the grief and the pain. This is what healing is about. These are the moments when a law practice is redeemed — possibly even transformed. Moments of healing like this is where we might all begin to be redeemed — by willingly entering the circle of pain and suffering, by being exposed to and embracing the suffering of another.*

Forgiveness is not easy, and sometimes not possible, especially in criminal cases. Even when intentionally fostered, there is very little room for forgiveness in the court system. There is rawness in this kind of opportunity, a brushing up against difficult things. Some suggest it is a journey we should not be too quick to encourage others to take. Others think it is the only journey that offers us hope.

I believe I was asked to be involved with *The Role of Forgiveness in the Law* Symposium at Fordham University School of Law because of my work with the GJP. The GJP is a legal nonprofit organization in Atlanta, Georgia. The GJP's unique approach to criminal defense and rehabilitation is based on a relationship ethic,

a community-oriented ethic. I have been connected with GJP since 1986, a few months after John Pickens, a refugee from the corporate practice of law, founded the project. It is our work — working with the poor and the homeless, it is in our “street lawyering” approach, and it is our long-term and innovative involvement with those in the criminal justice system — that informs my view on forgiveness.

## II. ON NOT KNOWING HOW TO FORGIVE: A RESPONSE TO JEFFRIE MURPHY<sup>1</sup>

In cases of criminal wrongdoing, the propriety of forgiveness hinges upon at least three fundamental considerations: 1) the victim's selfhood; 2) the moral significance of forgiveness for the offender; and 3) the wellbeing of the community. It is only by respecting each of these concerns that the moral value of forgiveness becomes most apparent. Yet, it is not always apparent. On the one hand, an act of forgiveness may come only after much inner turmoil and anguish, as when a particularly heinous crime has been committed and the victim is left to put the broken pieces back together. Forgiveness in such cases usually arises from a steadfast religious faith or an enduring moral commitment. On the other hand, forgiveness is invariably wedded to particular circumstances: our street, that house, his anger, that knife, her body, your friend, his blood. Amid such circumstances and emotions, forgiveness may or may not see the light of day. Yet, the interruption of people's lives by a criminal offense and the possibility of living beyond it make forgiveness an issue. Forgiveness is foremost, though not exclusively, an issue for the victim, and it is for this reason that one must consider the victim's selfhood.

What is at stake when someone is the victim of a crime? In addition to her relations both to the offender and to the larger community, the victim's relation to herself has been called into question. In a sense, the criminal has challenged the notion that the victim is a person of equal worth and value. In the aftermath of the crime, the victim may feel compelled to reassert her own sense of identity and self-worth. Complicating things, it seems, is the possibility of forgiveness. For if the victim should choose to forgive the offender, the “language” through which she expresses forgiveness is bound-

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1. Parts II and III are co-authored by Patrick R. Leland, who recently finished his Masters of Theological Studies at Emory University in Atlanta. Patrick has been a volunteer and intern at the GJP for about a year and one-half. He has been instrumental in starting a juvenile program at GJP.



up with the language through which she reasserts her own value as a human being, and the danger arises that the former message might very well drown out the latter. In a culture historically influenced by exhortations to Christian charity, knowing when *not* to forgive has become something of a problem for some people.

### A. Murphy's Focus on the Victim's Selfhood

Recent attempts to resolve this dilemma find expression in Jeffrie Murphy's work on forgiveness as a qualified moral virtue.<sup>2</sup> For our purposes, Murphy's work is significant in that it articulates a criterion for adjudicating the appropriateness of forgiveness *and* that it does so with direct reference to the victim's selfhood. Specifically, Murphy has articulated an ethic of forgiveness, or, depending upon the circumstances, an ethic of resentment, based upon the primary value of self-respect.<sup>3</sup> For Murphy, an individual has a moral obligation to respect all individuals (including oneself) as ends in themselves. Failure to respect another human being properly runs contrary to one's moral duty. Failure to respect oneself is no less of a moral offense. Thus, the victim may bestow forgiveness upon an offender so long as doing so does not encroach upon the victim's sense of self-respect. Forgiveness and reasserting one's self-worth are not immediately compatible. In such cases, Murphy argues for the moral value of resentment as a means of restoring the equilibrium.<sup>4</sup>

The driving force behind Murphy's proposal is a formal ethic, the fundamental structure of which was articulated in the philosophy of Immanuel Kant. For Kant, all human beings in possession of a will and capable of reason are subject to the *moral law*.<sup>5</sup> This law is universally binding for all rational beings and presents itself to us as soon as we become conscious of our freedom to act. Moral obligation is thus determined by the instrument of universal reason, as exemplified in the oft-cited formula of Kant's categorical imperative: "conduct yourself in such a way that the maxim of your will could always simultaneously function as the giving of a universal law."<sup>6</sup> Phrased somewhat differently, when considering the moral

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2. See Jeffrie G. Murphy, *Forgiveness and Resentment*, in JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 14 (1988).

3. See *id.* at 14-34.

4. See *id.*

5. See IMMANUEL KANT, *KRITIK DER PRAKTISCHEN VERNUNFT* 32 (Karl Vorländer ed., 1990) [hereinafter KANT, *KRITIK*]; IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* 3 (Mary Gregor trans., 1997).

6. KANT, *KRITIK*, *supra* note 5, at 30.

propriety of your behavior, pursue only those actions that you could honestly desire to become universal human conduct. As suggested earlier, this ethical construal of how one should conduct oneself is fundamentally formal in the sense that it abstracts from all particularities and relies solely on the rational form of ethical behavior — its sole criterion being that it rationally conforms to the universal law.

Murphy's rationale for deciding when the victim should and should not forgive her offender emanates from the scheme moral decision-making espoused by Kant. For Murphy, as with Kant, all rational persons have a responsibility to respect the rules of morality. Among these rules exists the obligation to respect all persons as ends in themselves. When a crime is committed against a person, the victim is denigrated and rendered less than human. As a rational being, the victim is morally obligated in the first instance to respect, or in this case reassert, her own self-worth. For Murphy, this may take the form of moral indignation, or resentment, directed at the offender. Furthermore, it is only after she has fulfilled her obligation to the moral law that the victim may consider bestowing forgiveness upon the criminal.

### **B. Limitations of Murphy's Proposal**

Jeffrie Murphy's proposal is admirable on several counts. Foremost, perhaps, is that it provides a rational recourse — if not a source of accountability — for persons who might otherwise forgive too much; or, in other words, persons whose commitment to the virtue of charity inadvertently sustains the very denigration of selfhood which made the criminal act offensive in the first place. Yet, the manner in which Murphy suggests that we think of forgiveness and resentment has some serious weaknesses — limitations that are arguably inherent in any Kantian ethic. We will briefly discuss two of these difficulties.

One limitation is that the Kantian character of Murphy's proposal lends itself to a variant of narcissism. If one carefully examines the moral deliberations of the victim from within the context of rational moral decision-making, which Murphy advocates, one finds the victim morally obligated to enter a narcissistic vacuum. In this vacuum all particularities are excluded leaving only the individual and the rational moral law.

It is only from within this vacuum, that is, solely by means of the universal moral law, that the victim can arrive at an ethical decision as to whether she should forgive, hate or resent the person who

wronged her. When the victim asks herself, "Should I forgive him?," the voice she hears is not that of her friends or community, but rather the impersonal voice of the universal law, the voice of reason, the voice for everyone, every time.<sup>7</sup> It is not someone outside of the victim's head who proclaims the long-awaited answer. Rather, the voice emanates from within; with logical precision the voice arises from the very core of her identity.<sup>8</sup> When the victim asks, "Should I forgive him?," the only voice she can hear is her own. In a consumer society saturated with narcissism, espousing an ethic that arguably reifies some of our worst tendencies seems questionable, to say the least.

A second limitation, and one that is more pertinent to the interests of this essay, consists in the fact that Murphy's account of forgiveness and moral resentment strikes us as decidedly *non-relational*. In the moment of moral deliberation, when the victim might entertain the possibility of forgiveness, the fundamental axis upon which everything moves is not the victim's relationship to her community, much less her relationship to the offender, but rather the victim's exclusive obligation to fulfill the moral law. As suggested earlier, it is only when the moral equilibrium that regards all persons as ends in themselves is restored and, with that, the victim's own sense of self-worth, that the victim may *morally* forgive the criminal. Of course, this may yield the positive result of affirming the victim's selfhood. Yet, even this is questionable.<sup>9</sup> More problematic though is the fact that, for Murphy, one's moral obligation to a rationally-mediated universal law presumably takes precedence over all particular human relationships.

As is the case in the Kantian schema, where one abstracts from the particularities of a situation in order to apprehend rationally the formal principle of right conduct, the victim's primary response to the criminal is formulated from within a vacuum where only the universal moral law is present. All particularities are discounted, regardless of whether the offender is a fourteen-year-old child, the old man across the street, a lover from years past, or anyone else. In this scenario, morally speaking, you and I never relate to each other directly. Rather, my relationship to you is always mediated

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7. See Jacques-Alain Miller et al., *A Discussion of Lacan's "Kant with Sade,"* in *READING SEMINARS I AND II: LACAN'S RETURN TO FREUD 222* (Richard Feldstein et al. eds., 1996).

8. See *id.* at 230.

9. Indeed, is there not something existentially dissatisfying about deriving one's sense of self-worth — even if only temporarily — from a moral obligation?

by the imperative that my conduct be universally valid for all persons in *my* (and never *our*) situation. Thus, you and I, and all human beings are atomized, separated, as it were, into our cubicles of individual moral responsibility. Later, when we consider the status of the victim in the criminal justice system, the significance of this non-relational character will become more apparent.

### III. THE CRIMINAL LAW: HISTORY AND ISSUES

#### A. The Role of History

The leaders in the restorative justice movement<sup>10</sup> urge us to look to the past. There was a major shift in criminal law approximately one thousand years ago. When William the Conqueror successfully invaded England, though he was king, he found that his hold over the people and nobility was lacking. In looking for a way to get the nobility to pay him respect, he devised an innovative strategy. Starting at first with violent "crimes," he and his son following him (King Henry I) made the offender pay the State (either with money or other penalties).<sup>11</sup> William injected the State in the resolution of disputes among citizens.

Prior to this change in English law, even violent offenses had avenues of making the victim whole (for example, the State reinforced a community ethic by making the offender compensate the victim).<sup>12</sup> This tradition of the State requiring healing, compensation or restitution was present in the laws of many cultures.<sup>13</sup> The

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10. Howard Zehr, considered by many to be the contemporary father of restorative justice, summarized restorative justice as: "Crime is a violation of people and relationships. It creates obligations to make things right. Justice involves victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance." HOWARD ZEHR, *CHANGING LENSES* 181 (1973). He compares this with a retributive justice model, which he defines as: "Crime is a violation of the state, defined by lawbreaking and guilt. Justice determines blame and administers pain in a contest between the offender and the state directed by systematic rules." *Id.*

11. See DANIEL W. VAN NESS, *CRIME AND ITS VICTIMS* 66-68 (1986).

12. See *id.* at 64-66.

13. See *id.* For example, in Mesopotamia around 1700 B.C., the code of Eshnunna, allocated specific levels of compensation when victims lost noses, eyes, ears or teeth. In the *Iliad*, Homer refers to victim restitution — even paying a family after their brother was murdered. Roman law (under the Law of the Twelve Tables in approximately 449 B.C.) mandated that a thief pay back the victim as many as four times the amount stolen, depending on the circumstances and discovery of the theft. Restitution, even in violent offenses, was allowed in Sumeria under the code of Ur-Nammu in about 2050 B.C. *Lex Salica*, a German tribal law during the late 400s A.D., provided for restitution as the remedy in "crimes" from thefts to murder cases. See *id.* at 64-65.

emphasis was on healing and reconciliation between the victim and the offender (for example, if you stole your neighbor's horse or if you physically assaulted and injured him, you made your neighbor whole). After the change in English law, harming your neighbor is a crime against the State.

Thus, English criminal law took a major shift with William the Conqueror. Essentially, what the new king did was to replace the victim with the State. Crimes were now considered against the State, and the offender owed, first and foremost, the State. Today, it is accepted almost without question that when someone breaks the law (criminal law) his or her primary obligation is to the State, and not to restore the broken relationship with the victim.

### **B. The Status of the Victim in Murphy's Proposal**

Murphy's emphasis is on the victim's obligation to the moral law. He seems to want to restore a damaged relationship, but the "relationship" that he primarily emphasizes is that between the victim and the moral law. This is not a human relationship. Keeping (or restoring) the abstract equilibrium is his primary concern.

One could argue that Murphy and those who offer theoretical underpinnings to support a thousand-year-old displacement of power and relationships are supporting a thousand-year-old mistake. Perhaps they are political philosophers offering argument for why our society gives so much power to the State. It strains reason to understand why an offender owes the State anything for stealing his neighbor's goat (or Lexus). These are legitimate complexities.

Murphy's concern for relationships is well placed. Yet, Murphy is inadvertently serving the same role as William the Conqueror by offering a rationale that keeps the victim removed from the more true and vital relationship in a criminal case. One could argue that he is replacing William's state with the moral law. Both paths lead away from true restoration, however.

The primary relationship, contrary to Murphy's view, is one between the victim and the offender, not the victim and the moral law, nor the offender and the State. Murphy's approach is piecemeal. Also, Murphy perpetuates the victim's status as victim — that of not having power. To accept Murphy's arguments, opportunities for the victim to be anything other than a wounded, and possibly vocal, recipient of the offender's bad conduct are slight.<sup>14</sup> He

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14. See Jeffrie G. Murphy, *Getting Even: the Role of the Victim, in* RETRIBUTION RECONSIDERED: MORE ESSAYS IN THE PHILOSOPHY OF LAW 61 (1992) (almost argu-

is reinforcing the victim status and giving them neither the tools nor the opportunity to move beyond it.

### C. Restorative Hope

The current state of our criminal justice system leaves more victims than it finds. Victims lie in its wake by increasing what is considered a crime, by increasing mandatory sentences, by exploding prison populations, by eroding our civil liberties (which is often justified to the public as a price for the war on drugs), and by not offering the chance for healing and reconciliation. In our experience, victims are rarely involved in the resolution of cases.<sup>15</sup> In fact, some trends and practices, such as “no drop” policies<sup>16</sup>, remind us who has the power and who does not. It is no surprise that the State wins these metaphysical tug-of-war matches. Yet, restorative justice offers the possibility of hope.

Roughly speaking, restorative justice emphasizes that the resolution of a criminal case should lie in a dialog-based process between the community, the victim, and the offender. Restorative justice has profoundly affected the way we in our office practice criminal defense. It properly pulls back the power of the State and re-allocates it between the victim and the offender within the context of the larger community. It offers the chance for healing.

### D. Hope's Limitations

Though an obvious proponent of the restorative justice movement, I also am witness to its limitations. I practice criminal defense law in the Deep South. To the best of my knowledge, most of the successful Victim Offender Reconciliation Programs (“VORPs”) and other restorative justice practices do not take place in the South. Instead, they seem to do well (or at least have a chance of survival) in communities that are more homogenous than the South. Perhaps in those communities it is easier for the victim to recognize that they are members of a common community.

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ing for the “Victims’ Rights Movement” — advocating for a larger role in the criminal justice system).

15. For instance, in one case the victim contacted the GJP in referring the client to our office. He wanted to be involved in the outcome of the case. In discussing and subsequently resolving the case with the district attorney, the victim was intentionally left totally out of the process by the district attorney, even after I tried to have the victim included.

16. See Martha Minow, *Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice*, 32 NEW ENG. L. REV. 967, 977 (1998) (“[N]o-drop policies deprive or constrict the victim’s choices and refuse deference to her own assessment . . .”).

In the South, the criminal justice system operates also as a social control device. With the highest incarceration rates in the country (and in the United States, which is second in the world), the criminal justice system acts to oppress African-Americans, the poor, and other minorities. Howard Zehr, one of the present-day fathers of restorative justice, told me a few years ago that attempts to locate a VORP in Atlanta, the self-proclaimed "human rights capital of the world," failed. The racial divide is a massive gorge to cross and perhaps is particularly daunting when one side is harmed.

My experience in employing the above principles of healing reinforces my view. We are often successful at some form of reconciliation — most often when the perpetrator and the victim are of the same race. While attending *The Role of Forgiveness in the Law* Symposium at Fordham University School of Law, I was informed of a failed attempt to bring together our juvenile African-American client and his white victim of armed robbery. On the telephone, the wife of the victim ranted about race issues and obviously saw our client not as a fifteen-year-old child, but as a black man. It is important here to acknowledge limitations. I believe these are not limitations in or about the restorative justice process per se, but instead are issues of our culture, our prejudices, and our human limitations, which infect all that we do.

#### **IV. THE GEORGIA JUSTICE PROJECT: SOME REFLECTIONS FROM A RELATIONAL PRACTICE**

##### **A. The GJP: History & Mission**

Sixteen years ago, as John Pickens walked among the poor and homeless on his way home one night, his two worlds were in sharp contrast. As a person of faith, he had been spending years volunteering in soup kitchens and shelters. As a high-powered corporate litigator, he was accustomed to the plush offices and exalted salaries. How could one reality claim to be the most important (his faith), yet the other demand all of his time and energy? It was during that walk, as he saw the two worlds juxtaposed, when he decided to address personally the paradox of privilege versus poverty.

In April 1986, he entered the paradox of these disparate images by founding the GJP in Atlanta, Georgia. There are few places in the country where one can integrate lawyering and social service simultaneously. The GJP combines both in a unique way to offer

clients and staff an opportunity to merge these two worlds that often remain separate and isolated.

Since its beginning, the GJP has been providing crucial services to the homeless and indigent populations of metropolitan Atlanta through an innovation that breaks the destructive cycle of crime and incarceration. The GJP's mission is to do justice for the indigent criminally accused, and take a holistic approach to assist them in establishing crime-free lives as productive citizens. People are initially referred to the GJP because they have a criminal case pending and cannot afford to hire an attorney. They become a GJP client if they are committed to making a life change and becoming a productive member of society.

Our relationship with our clients does not end when the case is over. If our clients go to prison, we continue to visit them. We advocate for their needs and their release. Once released from prison or jail, we offer a variety of social services such as individual and group counseling, GED and literacy classes, monthly support dinners, and employment with our business New Horizon Landscaping.

Transformation, both theirs and ours, begins when we meet our clients. During the initial stage (legal representation), we establish the foundation of trust upon which all our programs are based. By providing quality and caring representation to the indigent, we are reversing the way legal services have been traditionally available to the poor. We make sure our representation is both thorough and personal and that the client is involved in all stages of the representation, not just at the courthouse on the day of trial.

The GJP is supported solely by private sources. We do not seek government funding. Because we are independent of the court system, we have total control over our caseload. Thus, we maintain an independent status with regard to the court system.<sup>17</sup>

### **B. Relationships are the Key to the GJP's Approach**

*"When a poor person is accused of a crime, most of society sees this as the end; Georgia Justice Project sees it as a beginning."*

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17. This also gives me a unique perspective in this discussion — especially given that everyone on my panel was (or is) employed by either the Justice Department or a State's prosecutor's office. As the only criminal defense lawyer (to the best of my knowledge) at the Symposium, it is incumbent upon me to address one point — of standing up for the outcast, of being united with those in our communities that are ostracized. This ethic is not only part of many religious traditions (including mine — Christian), it is also (I hope) part of the American legal culture.



Martha Barnett, President-elect, American Bar Association

The most unique and most powerful aspect of our work is that it is relationship driven. At GJP, we seek long lasting, redemptive relationships with our clients. It is not uncommon for our staff to spend time every week with clients whose cases have been over for years. Some of this time might be structured (e.g. counseling, working with our landscaping company). Some of the time is informal — our clients know that there are folks who care about them. One of our supporters describes the work of GJP as forming a second family for our clients. The attorney-client relationship is only the beginning of the relationship, not the end. It does not act as the sole temporal boundary of our relationship.

Without a relationship, without working toward it, without including it in the paradigm of the criminal justice system, there cannot be any forgiveness. There needs to be space, creating opportunity for relationships to begin and grow. Indeed, it is in this creating of space, that there is need for reform and change — from the big picture to the small — that creates the possibility of forgiveness and reconciliation.

In the end, it is the status of the relationship (whether one exists, whether such a relationship can be fostered) that is at the heart of forgiveness. Relationship is at the core of restorative justice. For forgiveness to be a possibility in the criminal justice system, the issue of relationship is central.

### C. Forgiveness

To address forgiveness, to suggest that it has any place at all in the criminal justice system, is to imply that there is, or could be, or even should be a relationship. What relationship? The relationship is between the offender and the victim. It suggests some level of relationship beyond the current criminal justice configuration.

To suggest, or even to advocate for, the possibility of forgiveness proposes giving the victim more of a role — not less — in the criminal justice system. Before parties can reach the issue of forgiveness, there first must be a window of opportunity and space for two parties to interact.

Should the victim and offender, through some form of mediation or reconciliation process, not be able to reach forgiveness, even that conclusion is one that can empower the victim. The result is a process that creates more options, and not less, for the victim (and possibly the offender). Most systems today resign the victim to the dis-empowered role of witness for the prosecution. Reconciliation,

restitution, even “venting” of one’s anger, are all important opportunities that allow healing. Unfortunately, all of these are the exception and not the rule.

Overall, I suggest that opening the process to include a wider set of options benefits everyone. The only winner in keeping the system is the State, which continues to retain the power.<sup>18</sup> Empowering the victim and communities is a healthier and more holistic model.

#### D. The Practice

The GJP’s practice is representing the poor in Atlanta’s inner city. It is this and our relationship ethic that informs our perspective on forgiveness.<sup>19</sup> Having been favorably influenced by restorative justice principles, our office seeks, where appropriate, to work toward healing not just with our clients but with the victim too.

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18. I found it interesting that in discussing these issues at the symposium, many folks voiced: But what about the State? What about the criminal justice system? Here is where I ask those questioners to expand their horizons. Are they so concerned about the State losing power or position? I suggest that we as lawyers, as concerned citizens, ought to be very careful and concerned when the State gains more power over the citizenry. I also suggest that the State will always take care of itself. Indeed, the more power we, as a society, give to the State, the more that power is most often used against the weakest citizens. In our current criminal justice system, nationally 80-90% of those in its grasp are poor. As middle class folks, giving more police and incarceration power to the State will probably have little impact on our lives. Most assuredly, it will and does adversely impact the poor, the minority, the powerless.

19. If we began to see everyone in our community as part of our community, then we might become invested in everyone’s condition. To the extent that our community is better, everyone benefits. If anyone in the community improves, then the whole community improves. Even those who are accused of (and those who commit) crimes are part of our community. Most non-violent offenders are getting out of prison and coming back . . . to *our* community. There are many issues related to our soaring prison population (such as the increased incarceration rates for non-violent offenders). Regardless, we are inextricably bound to each other.

Some lines in our society are easier to draw than others. Though I doubt it is a recent phenomenon, the “us-them” continuum has been recently reinforced. One of the most pervasive ways this occurs in our culture is the criminal justice system. Perhaps with the fall of the Iron Curtain and Eastern European communism, America needed a new common enemy. The criminally accused and convicted seem to be the largest recipients of our collective wrath. Indeed, in our growing rush to judgement, we often lose our humanity by denying the humanity of the offender. We lose our perspective by seeing only the criminal as someone other than a fellow member of our community. Saddest of all, our society has continually given more power to the State to keep “those people” away from “us.” Prison populations are at an all time high — highest in the Western world — and constitutional liberties are on the ropes. Might we be ready to turn a corner out of this dark period of our recent history?

In cases where we believe it appropriate, this first and foremost translates into not sacrificing our client's legal rights in the guilt-innocence phase — we pursue restitution and forgiveness. We often contact and include the victim in our case plan, even in violent cases. It is not uncommon for the victim to become an advocate for our client, sometimes contacting the prosecutor independently and coming to court at our request. My experience has been that we are far more likely to contact and work with the victim than the prosecution. Too often the victim is seen merely as “just another witness” by the prosecutor.

On a number of occasions, the victim has contacted us. Knowing of our social service program and long-term approach, most of these victims contacted us with the hope that we can work with the offender to address the underlying issues that led to the offense.

To most criminal defense lawyers, the idea of asking forgiveness is tantamount to a confession. Indeed, following conventional wisdom, what lawyer sabotages his or her own case? I have rarely seen forgiveness or apology employed by a criminal defense lawyer either tactically or for moral considerations. The current configuration of evidence law and ethical standards governing the profession do not allow much room for having a client “confess” by apologizing or asking forgiveness. It is understandable why so many criminal defense lawyers would not encourage their clients to seek forgiveness. On the other hand, too many practitioners are stuck on seeing only one fight — the guilt or innocence issue. So many lawyers forget that seeking forgiveness can have an impact on the second phase of a criminal case. Perhaps because GJP does so much alternative sentencing with our regular caseload, we are more prone to incorporate “radical” strategies.

There is plenty of room for the criminal defense bar to examine the practice and look for “forgiveness openings.” Just as alternative dispute resolution has revolutionized the practice in the civil arena, there is an opportunity for substantial change on the criminal side. Though there are structural limitations, some of that change needs to come from those most closely allied with the defendant.

**V. TED'S STORY: MORE THAN JUST CRIME AND PUNISHMENT**

*The Judge looked at Ted. "Do you have anything to say?"*

*"Yes," Ted responded, "I'd like to say something to the victim." The courtroom grew silent. Ted turned to face the victim. Un-rehearsed and unplanned, Ted said:*

*I had many months in jail to think about what I did, about who I was and about choices I made . . . . I am a better person now . . . . And I am sorry about what I did . . . . I was wrong. And I ask you to forgive me.*

*The courtroom was still holding its breath. Everyone was stunned, including us.*

*It started on a cool spring morning, as church was ending, someone tapped me on the shoulder. "Doug, my grandson is in trouble. He's in jail. They say he robbed some other boys of their jackets. Could you help him?" My church, a small Episcopal outreach in Atlanta's inner city, is composed of all kinds of folks: black and white, rich and poor. Although GJP turns down ninety percent of those who ask for help, I knew I would have a hard time saying no to this concerned and troubled grandmother. "We'll look into it," I said.*

*Ted was a likeable eighteen-year-old. Though he dropped out of high school, he was smart and well spoken. While in jail, he earned his GED. Ted impressed everyone who talked with him. He was a nice kid, but one who made some bad choices. He spent over six months in jail before we got him a bond. When he was released he came to work on NHL (New Horizon Landscaping — our company operated to employ clients). In addition, he attended individual and group counseling sessions with our staff.*

*The case didn't look good. He was charged with two counts of armed robbery. There were two eyewitnesses. Despite this, he vigorously proclaimed his innocence. GJP's custom is to believe our clients unless we can prove otherwise. It was not long into our investigation that we realized, despite his claims, Ted would be convicted if we went to trial. We confronted Ted and he told the truth - that he robbed two teenagers of their jackets. It was then that I asked him to write a letter - a letter asking forgiveness of the victims.*

*In the world of criminal defense, writing this kind of letter is lunacy - a sure way to get your client sent "down the road." However, it could not get any worse. He was looking at twenty years, at least. GJP has a different philosophy. We are about healing our clients and the community.*

*For the next few weeks, Ted continued to work on NHL. He was making progress. He talked about his past, his mistakes, and his pain. He began composing a letter to the kids he had robbed. The court date came faster than we expected. Due in large part to a district attorney ("D.A.") who had heard of GJP's program and our success with other clients, a miraculous plea bargain was negotiated - four-month boot camp and eight years of first offender probation.*

*The morning of Ted's public act of forgiveness, the courtroom was crowded. Lawyers, clients, and court staff were running around. We stopped by the victim's house and brought him to court. The D.A. presented his case. Then, GJP told the court about Ted's work with us.*

*The judge accepted the sentencing alternative. As of this writing, Ted is still in boot camp — though he should be out in a month or so. In a letter we recently received, he wrote:*

*I have learned to take responsibility for my actions . . . .  
I now see where I was making mistakes in my life . . . . I  
have learned to accept the past and try to prepare myself  
for the future . . . . I miss the concern, help, and love that  
GJP has shown me since I've been a client.*

*Ted's change would not have been possible without GJP's multifaceted approach. We fought for him. We employed him when he was released on bond. We counseled him and confronted him about his conduct. We encouraged him to reconcile with his victim — to heal the division that he created. Indeed, it is that healing, that joining of folks, joining of responsibility and conduct, which has been integral to Ted's rehabilitation.*

*GJP's approach is unique — not just in our services, but also in our approach with our clients. We believe in them and we encourage them to do things that other lawyers might consider imprudent. Ted is not out of the woods yet, but he has made progress. We will be there for him when he is released, and we will be along side him as his journey continues.*

## VI. CLOSING THOUGHTS

Forgiveness, at least creating some paths for its possibility, is worthwhile for the whole community because it allows reconciliation and healing — not just for the offender but for the victim and the community in general. Healing is the goal, the end result. Let us not too soon foreclose options that lead us toward this goal.

# WHEN VICTIMS SEEK CLOSURE: FORGIVENESS, VENGEANCE AND THE ROLE OF GOVERNMENT

*Susan Bandes\**

As one who has always opposed the death penalty, I find that my principles are most sorely tested when I hear of the anguish of the parents of children who have been murdered. As a mother, I wonder how a parent goes on to live her life each day after such an unimaginable loss.

In 1996, I read several articles about the upcoming execution of William Bonin, also known as the Freeway Killer, in Southern California. Bonin had confessed to killing twenty-one boys and young men, and was sentenced to death for fourteen of those murders.<sup>1</sup> The victims were mostly hitchhikers Bonin had picked up, raped, brutalized and strangled.<sup>2</sup> He had exhibited no remorse, and indeed had seemed to delight in torturing the parents when they requested information from him about their sons' deaths.<sup>3</sup>

Sandra Miller, the mother of a fifteen year old boy who Bonin had raped, tortured and strangled sixteen years earlier, was one of several parents of victims who said she expected a sense of closure from Bonin's death. "At the moment before the injection," she said, she would be seeing her dead son, Rusty, in her mind, and thinking, "Rusty, it's almost over. He's finally going to pay."<sup>4</sup> A victims' advocate who had worked with several members of the families said that "in the aftermath of the emotional devastation the murders wrought, some of the relatives had virtually put their lives on hold as the appeals process dragged out. 'Now,' she said, they hope the execution will 'open the door to being able to go on with the rest of their lives.'"<sup>5</sup>

Sandra Miller wrote a letter to Bonin which she hoped he would read just before his execution, which read, in part:

You taught me a few things: How to hate, that I feel I could kill you, little by little, one piece at a time. You'd best get down on

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\* Professor of Law, DePaul University College of Law.

1. See Carey Goldberg, *Families Hope Freeway Killer's Execution Ends Their Years of Pain*, N.Y. TIMES, Feb. 22, 1996, at A14.

2. See *id.*

3. See *id.*

4. *Id.*

5. *Id.*

your hands and knees and pray to God for forgiveness. I don't know if even He could forgive you. But I hope the Lord can forgive me for how I feel about you.<sup>6</sup>

The victims' rights advocate said that none of the family members she had spoken to had forgiven Mr. Bonin, and she did not advise them to try. She said "I tell them there are some things we aren't able to forgive and we should let God do that."<sup>7</sup>

A little more than a year ago, Aaron McKinney was spared the death penalty for the torture and brutal murder of Matthew Shepard, a gay college student McKinney and his friend Russell Henderson had abducted, beaten, burned, tied to a fence and left for dead.<sup>8</sup> Prosecutors said they had wanted to seek the death penalty,<sup>9</sup> but apparently the agreement to a sentence of life without parole came about largely at the insistence of Matthew Shepard's parents.<sup>10</sup>

Here is an excerpt from what Dennis Shepard, Matthew's father, said at McKinney's sentencing hearing:

I would like nothing better than to see you die, Mr. McKinney. However, this is the time to begin the healing process, to show mercy to someone who refused to show any mercy, to use this as the first step in my own closure about losing Matt . . . . Mr. McKinney, I'm going to grant you life, as hard as it is for me to do so, because of Matthew . . . . You robbed me of something very precious and I will never forgive you for that. Mr. McKinney, I give you life in the memory of one who no longer lives. May you have a long life and may you thank Matthew every day for it.<sup>11</sup>

He also said that he and his wife had supported the plea agreement because it meant no drawn-out appeals process, no chance of walking free on a technicality or receiving a lighter sentence and no opportunity for McKinney to become a symbol. He said "[n]o years of publicity, no chance of commutation . . . just a miserable future and a more miserable end. It works for me . . . ."<sup>12</sup>

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6. *Id.*

7. *Id.*

8. See Michael Janofsky, *Wyoming Man Get Life Term in Gay's Death*, N.Y. TIMES, Nov. 5, 1999, at A1.

9. See *id.* at A23.

10. See *id.* (citing David M. Smith, a spokesman for the Human Rights Campaign, which is described as the nation's largest gay rights group).

11. *Id.*

12. *Id.*

It is agonizing to read such statements. Despite the very different reactions of these parents, it is obvious that they are all living in a kind of hell, and are all seeking the elusive state they call “closure” to help them go on with their lives. Not that they seek to forget, or to stop grieving, but that they are frozen in a nightmarish, unbearable moment and must find a way to get beyond it, to achieve some respite from the images that haunt them. Their quotations are about forgiveness and vengeance — both Miller and Shepard talk about these, though they see the concepts very differently. Miller seeks closure in execution. She describes a sense that only capital punishment will come close to righting the moral equilibrium.<sup>13</sup> She evokes her experience of the long wait for execution as another kind of torture, another barrier to closure.<sup>14</sup> She sees forgiveness (both of Bonin and of the hatred in her own heart) as something that will have to come from God.

Shepard is not opposed to execution on principle, but in the case of his son’s torturer and killer, he finds that there may be a more satisfying punishment in allowing him to live, knowing his life is a gift from his victim’s family. He finds healing will come more quickly if he forgoes the long appeals process in favor of a quick and certain final outcome. He, too, has no intention of forgiving, but his feelings about mercy and vengeance are more complicated.

What are we to make of these very different reactions? We may feel that one is more sympathetic,<sup>15</sup> more in line with our spiritual or political beliefs, or more likely to lead to psychological healing; and we might know how we would hope to react if a child of ours is brutally murdered. More likely, though, it is something we try hard not to think about at all, and surely most of us cannot know how we would react. Therefore, it seems to me we ought to be very slow to judge what any particular individual in that position ought to feel or want.

But there is a separate question: the question of the law’s proper role in helping victims or survivors achieve the closure they need. This is where we do need to judge, and to decide. And where it becomes important to at least try to untangle what one’s religion

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13. The parents of some of John Wayne Gacy’s victims described a similar conviction. See Larry Oakes, *For Parents of Son Murdered By Gacy, The Years of Waiting Are Finally Over*, MINNEAPOLIS STAR TRIB., May 11, 1994, at A1.

14. See *id.*

15. Jacoby and Murphy both note that people tend to feel more sympathetic toward the forgiving victim than toward the angry, resentful victim. See SUSAN JACOBY, *WILD JUSTICE: THE EVOLUTION OF REVENGE* 358 (1983); See also JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 16 (1988).



might urge, from what psychiatry might try to achieve, from what politics might dictate, and all of those from what the law can, should or even attempt to accomplish.

When we talk about emotion's role in law, a number of difficulties inevitably arise — many of them a function of the attempt to employ complex and fluid psychological or philosophical concepts for narrow and pragmatic legal ends. There is, for example, the difficulty of finding a fixed definition for any particular emotion, or emotional state—forgiveness, the desire for vengeance, closure. . . . There is the difficulty of attempting categorical judgments about whether a particular emotion ought to be encouraged or discouraged in the law, or even in a particular legal context. There is, finally, the difficulty of assigning a role to the legal system in achieving particular emotional states — for example in helping victims attain closure or defendants feel remorse.<sup>16</sup> Yet the alternative to asking these daunting questions is not simply to ignore the emotional content of legal proceedings — the emotions, as the Shepard and Miller statements remind us, won't go away no matter what. So it is crucial, given the high stakes for victims, survivors, the accused, and society at large, that we examine and try to disentangle the questions.

We might begin by examining the question: what do victims require in order to achieve some measure of closure?<sup>17</sup> Assertions about what victims need are often presented as if they are empirically based. If this is indeed an empirical question about what conditions are most likely to help, we ought to be looking for empirical answers, and there are surprisingly few out there.<sup>18</sup> The quotations from Ms. Miller and Shepard indicate, anecdotally, that this is a question with variable and complex answers, as one might expect. The little empirical evidence of which I am aware supports the intuitively obvious view that different victims have different needs,

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16. See *THE PASSIONS OF LAW* 1-15 (Susan Bandes ed., 2000).

17. This question, of course, must be distinguished from other questions that often come up in discussions of forgiveness, vengeance and punishment in general: such as the question of what will help the wrongdoer, the question of what will deter future potential wrongdoers, and the question of what will help bring a larger form of closure, or equilibrium, to society at large.

18. Alternatively, it might be a prescriptive question — an inquiry into the conditions we, as a society, believe are appropriate responses to victimization. I think this is a more accurate description of the traditional inquiry into victims' needs. However, the more recent trend has been to couch the inquiry in terms of what victims in fact require. See Susan Bandes, *Reply to Paul Cassell: What We Know About Victim Impact Statements*, 1999 UTAH L. REV. 545, 551-52.

and that an individual victim's needs may change over time.<sup>19</sup> Moreover, these studies deal with the victims themselves, for example in crimes like rape or robbery, and their findings, inconclusive at best, are also not necessarily applicable to the needs of those who have lost a close relative to murder.<sup>20</sup>

Even if it were so that victims or survivors need certain emotional experiences in order to attain closure, what conclusions would this lead to? This is the point at which it becomes crucial not to fall into the trap of conflating two very separate questions: the question of what victims need and the question of what the legal system ought to provide.

For example, what if, as Jean Hampton and others have suggested, victims need to be able to forgive in order to attain closure?<sup>21</sup> There are a host of questions raised here: First, of what does forgiveness consist? Most of those who write in this field, including Jeffrie Murphy, Martha Minow, Susan Jacoby and Willard Gaylin, describe forgiveness as an internal change in the heart of the individual victim that doesn't necessarily bring any external or public consequences.<sup>22</sup> Thus the victim's forgiveness may have no bearing on society's demand for punishment. Indeed, the victim herself might plausibly forgive and still desire punishment — as Jean Hampton suggests. The victim might choose to forgive, both to cleanse her own heart of hatred and because she is willing to believe the sinner is more than just the sum of his sins — yet also might desire retribution for the sins themselves.<sup>23</sup> Hampton tells the remarkable story of the practice in colonial New England of urging the criminal to repent, holding a reconciliation feast once he'd done so, and then hanging him the following day.<sup>24</sup>

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19. See, e.g., Edna Erez, *Victim Participation in Sentencing: And the Debate Goes On . . .*, 3 INT'L REV. VICTIMOLOGY 17, 21 (1994); Bandes, *Reply to Paul Cassell*, *supra* note 18, at 545; Lynne N. Henderson, *The Wrongs of Victims' Rights*, 37 STAN. L. REV. 937, 964-66 (1985).

20. Bandes, *Reply to Paul Cassell*, *supra* note 18, at 550-51 (discussing problems with drawing conclusions about murder survivors from studies about victims of other crimes).

21. See MURPHY & HAMPTON, *supra* note 15, at 36-38.

22. See WILLARD GAYLIN, *THE KILLING OF BONNIE GARLAND: A QUESTION OF JUSTICE* 338 (1982); MURPHY & HAMPTON, *supra* note 15, at 21; JACOBY, *supra* note 15, at 334; MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 15 (1998). Jean Hampton, however, describes forgiveness as having an external component, in that it is "bestowed" upon the wrongdoer. See MURPHY & HAMPTON, *supra* note 15, at 36.

23. See MURPHY & HAMPTON, *supra* note 15, at 157.

24. See *id.* at 158.

Second, who has the right to bestow forgiveness? This question is a pervasive theme in Gaylin's book, *The Killing of Bonnie Garland*, in which he describes how many members of the clergy and community were willing to forgive Richard Herrin for his brutal murder of Bonnie Garland, and indeed, perhaps as a consequence he was ready to forgive himself — even before he had repented or accepted responsibility in any meaningful way.<sup>25</sup> Bonnie Garland's parents did not forgive him, and of course, Bonnie could not do so. Yet, as Gaylin describes it, the support and forgiveness of the religious community had a significant mitigating effect on Herrin's verdict and sentence.<sup>26</sup> Perhaps a parent can forgive her child's murderer for the pain the parent suffers, but can anyone other than the victim herself, or perhaps one's God, offer forgiveness for the entirety of the loss?<sup>27</sup> And what effect should the forgiveness of these others have in the courtroom?

Let's turn from forgiveness to vengeance. What if, as Jacoby and others suggest, and as the parents of the children killed by the California Freeway Killer so strongly believed, vengeance is necessary for a victim's or survivor's closure? This, too, raises a host of questions. What form ought that vengeance take? Is it based, in whole or in part, on what the individual survivor needs, or believes she needs at the time, or on some collectivized notion that takes these needs into account but doesn't acquiesce to them? And how ought we factor in the problem that certain punishments, such as the death penalty, bring with them an agonizingly long wait for survivors, one which they often describe as yet more torture? Should this wait be seen as another part of the wrong that needs to be avenged?

One difference between forgiveness and vengeance is immediately apparent. As I mentioned, forgiveness is often described as merely internal, a change of heart that doesn't dictate any course of conduct, and therefore doesn't implicate public justice at all. Frankly, I don't think this view can be wholly accurate — I believe

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25. The notion of repentance as a condition of forgiveness raises another issue — that while forgiveness might be an internal emotional change, it might depend on an emotional change, and its external manifestation, in the wrongdoer. See, e.g., GAYLIN, *supra* note 22, at 118; MURPHY & HAMPTON, *supra* note 15, at 41.

26. See GAYLIN, *supra* note 22, at ch. 4.

27. This is also a central question of Sue Miller's recent novel, *While I Was Gone*, in which the murderer of the protagonist's close friend both asks her forgiveness for the murder and makes clear that he has been generous in his willingness to forgive himself, evidently without fully repenting or even accepting responsibility for the act. See SUSAN MILLER, *WHILE I WAS GONE* (1999).

that notions of forgiveness, mercy and compassion are inextricably part of the process of setting norms for what is criminalized and how it is punished.<sup>28</sup> Nevertheless, vengeance presents a far less ambiguous case — it clearly is not an internal process. To the extent a survivor requires a measure of vengeance for closure, either the legal system is implicated, or we are talking about vigilante justice, which the legal system was set up to supplant.<sup>29</sup>

Assumptions about survivors' need for retribution or vengeance are often explicitly invoked in legal decision making. The failure to sentence a particular defendant to death or to a long prison term is often experienced as a devaluing of the worth of the victim's life, and thus another infliction of pain upon the victim's family,<sup>30</sup> and indeed prosecutors explicitly call upon juries to return death sentences in order to affirm the victims' worth.<sup>31</sup> One implicit assumption of introducing victim impact statements in capital cases seems to be that they will make the jury more likely to give a death sentence to help ease the survivors' evident pain.<sup>32</sup>

In addition, the lengthy appeals process is seen as an affront, an additional punishment, to survivors needing closure. Governor Jeb Bush of Florida, for example, in his current campaign to truncate the death penalty appeals process in that state, has "emphasized the suffering of victims' families and complained that inmates spend about fourteen years on death row before they are executed."<sup>33</sup> To what extent, then, should the needs of these families influence policymaking?

I raise this long list of daunting questions, not because I have answers to them, but in the hope that we can discuss them further.

First, let us be careful to distinguish the question of what victims need from the question of what the legal system ought to provide. Some of what individual victims or survivors need to attain closure must come from psychological, religious and social support systems. Such systems have greater ability to individuate among vic-

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28. See THE PASSIONS OF LAW, *supra* note 16, at 1-15; Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 366-71 (1996).

29. See CHARLES REMBAR, THE LAW OF THE LAND: THE EVOLUTION OF OUR LEGAL SYSTEM 92-99 (1980); Bandes, *Empathy, Narrative*, *supra* note 28, at 407 n.230.

30. See JACOBY, *supra* note 15, at 237; GAYLIN, *supra* note 22, at 347.

31. See, e.g., State v. Elliott, 475 S.E. 2d 202, 222 (N.C. 1996); Welsh S. White, *Prosecutors' Closing Arguments at the Penalty Trial*, 18 N.Y.U. REV. L. & SOC. CHANGE 297, 306-08 (1990-91).

32. See generally Susan Bandes, *Reply to Paul Cassell*, *supra* note 18 (discussing Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479).

33. Jim Yardley, *A Role Model for Executions*, N.Y. TIMES, Jan. 9, 2000, at 5.

tims and to accommodate the shifting and complex needs of particular victims. They are not obligated to reach a fixed and categorical judgment, or any legal judgment at all. Moreover, they are not obligated to weigh a host of other factors against the victim's needs, including the rights of the defendant and the good of society as a whole.

Second, let us be very careful when we talk about what victims need, and perhaps especially about their perceived need for closure. The legal system does demand certain kinds of closure, but they may not track the sorts of therapeutic or spiritual closure victims seek. Sometimes the legal system may be able to provide a punishment, or a result, that meets the individual's needs for vengeance, forgiveness, closure. Such people are fortunate (at least in that limited respect) because the burden of individual forgiveness or vengeance is heavy indeed, and a public, collectivized resolution at least may remove some of this weight from the victim's shoulders. But the legal system cannot and ought not meet such needs on a case by case basis.

Legal closure is, at some point, necessary — at some point the law needs to act definitively.<sup>34</sup> But given the terrible stakes involved, an essential part of *its* closure is that it incorporate notions of fairness and due process. Given the law's many limitations, it also ought to incorporate a large measure of humility. It needs humility about the possibility of error,<sup>35</sup> and also about the impossibility of knowing the secret heart of either the wrongdoer or the victim.

Closure is too easily transformed, particularly in capital cases, into an ending that forecloses, too early, the societal obligation not to put an accused to death until he has a fair chance to show himself unworthy of the conviction and sentence. My own view is that a capital sentence is a sort of closure we are ill equipped to command, since it reflects our unwarranted claim that we can judge who is irredeemable, without humanity or value. Just as we might show more humility before claiming to know what victims need, we might show more humility in declaring ourselves worthy to judge not just the sin but the sinner, and to decide who is deserving of that terrible and irrevocable form of closure.

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34. See Bandes, *Empathy, Narrative*, *supra* note 28, at 389-90.

35. See Steve Miller & Ken Armstrong, *Another Death Row Inmate Cleared*, CHI. TRIB., Jan. 19, 2000, at 1 (reporting that Illinois has cleared more death row inmates [13] than it has executed [12] since it reinstated capital punishment in 1977).

# FORGIVENESS AND THE CRIMINAL LAW: FORGIVENESS THROUGH MEDICINAL PUNISHMENT

Dennis M. Cariello\*

“There is a need for understanding, but not for vengeance, a need for reparation, but not for retaliation.”<sup>1</sup>

Punishment is the most dramatic manifestation of civil government power. Whom and how a society punishes are key political questions that are indicative of national character. Throughout history every civilization has struggled with two basic questions: whom shall we condemn and how shall we forgive?

The notion of forgiveness has ancient roots, finding bases in philosophy,<sup>2</sup> literature,<sup>3</sup> religion<sup>4</sup> and law itself.<sup>5</sup> Yet, despite this his-

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1. Alexandra Zavis, *Panel Faces Truth, Fear and Anger: Apartheid's Past is Confronted*, HOUS. CHRON., Mar. 2, 1996, at 23 (quoting Justice Minister Dullah Omar of South Africa who authored of the Reconciliation Bill).

2. See, e.g., Paul Whitlock Cobb, Jr., Note, *Reviving Mercy in the Structure of Capital Punishment*, 99 YALE L.J. 389, 391 (1989) (“Mercy is not a thing opposed to justice. It is an essential part of it: as necessary in criminal cases, as in civil affairs equity is to law.” (citing 5 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 285 (H. Frowd ed., 1920))); SENECA, *On Clemency, in THE STOIC PHILOSOPHY OF SENECA*, 137, 138 (M. Hadas trans., 1958) (“One man’s youth sways me, another’s age; one man I have reprieved for his eminence, another for his insignificance; and when I found no other ground for pity I have shown charity to myself.”).

3. See, e.g., T. HOCCLEVE, *THE REGIMENT OF PRINCES* 90 (Early English Text Soc’y Extra Series) (F. Furnivall ed., 1897, reprint 1978):

For your equal, reconciliation; for your enemy,  
Allowance of wrong-doing; and for yourself, virtue;  
For those in trouble, oppressed with wretched woe,  
Mercy indeed, and pity his hardship  
As far as you are able, and alleviate his misfortune;  
And have compassion for him, so that if your power fails  
Intention shall compensate you for your action.

*Id.* See also WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act IV, scene 1 (“The quality of mercy is not strain’d, / It droppeth as gentle rain from heaven / Upon the place beneath: / it is twice blest; / It blesseth him that gives and him that takes . . . .”); JOHN MILTON, *Paradise Lost*, Book X, in 2 THE WORKS OF JOHN MILTON 307 (F. Patterson ed., 1931) (“temper . . . Justice with Mercie”).

4. See, e.g., *Romans* 3:25 (“God presented him [Christ Jesus] as a sacrifice of atonement, through faith in his blood. He did this to demonstrate his justice, because in his forbearance he had left the sins committed beforehand unpunished.”); Samuel

tory many prominent scholars argue that society has no business forgiving criminals. They argue that forgiveness is the sole province of the individuals who have been wronged by the criminal act. At most, society can only offer mercy in the form of light sentences.

### A. What is Forgiveness?

Forgiveness is the voluntary cancellation of an obligation created by conduct, whether purposeful or negligent. It is the means by which a society<sup>6</sup> brings wrongdoers back into the community.<sup>7</sup> Forgiveness is the basis for a new relationship, one in which a wrongdoer accepts responsibility for his acts or omissions and desires to be welcomed back into the community. In turn, society must recognize the worth of the wrongdoer and that it is better to include the wrongdoer than banish him from the community.

Whereas forgiveness between persons is often an act of reconciliation fraught with emotions, society's forgiveness is a means to government's basic function: to make its citizens productive. History bears this point out. The English Kings, in extending pardons were seen as bestowing a gift bestowed on the wrongdoer.<sup>8</sup> A pardon was "a work of mercy, whereby the king either before attainder, sentence or conviction, or after, forgiveth any crime, offence, punishment, execution, right, title, debt or duty, temporal or ecclesiastical,"<sup>9</sup> "an instrument of equity in the criminal law designed to promote the general welfare by preventing injustice."<sup>10</sup> Pardons not only released the offender from punishment, it also renders the

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J. Levine, *Teshuva: A Look at Repentance, Forgiveness and Atonement in Jewish Law and Philosophy and American Legal Thought*, 27 FORDHAM URB. L.J. 1677 (2000) (tracing the notions of repentance, forgiveness and atonement through Jewish law).

5. See, e.g., EDWARD POWELL, *KINGSHIP, LAW AND SOCIETY: CRIMINAL JUSTICE IN THE REIGN OF HENRY V* (1989)

6. For the purpose of this essay, society encompasses the governmental unit responsible for punishing a wrongdoer. Thus, most often, society refers to local government units. It can, however, refer to higher levels of government if that is the level responsible for punishing a particular wrongdoer.

7. For the purposes of this essay, "community" refers to the body governed by the society that is punishing the wrongdoer.

8. See, e.g., JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 169-74 (1988).

9. E. COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 233 (4th ed. London 1669). See also Carla A. Johnson, *Entitled to Clemency: Mercy in the Criminal Law*, 10 LAW & PHIL. 109, 112-13 (1991).

10. Linda L. Ammons, *Discretionary Justice: A Legal Policy Analysis of a Governor's Use of the Clemency Power in the Cases of Incarcerated Battered Women*, 3 J.L. & POL'Y 1, 7-8 (1994).

offender innocent in the eyes of the law, and welcomed her back into the community at large.<sup>11</sup>

Like forgiveness between individuals, societal forgiveness does not require that society forget the wrong committed or the consequences of it. For example, only an extraordinary person could forgive an adulterous spouse and act as nothing had ever happened. For most people, the forgiving spouse would remember the sting of the adulterous offense, perhaps be more suspicious of late-night work sessions and trips with friends, and would otherwise need time to fully treat the adulterous spouse as if nothing had occurred. This defensive response is important in the forgiveness-process. The wrongdoer must work to regain her spouse's trust.

Likewise, by using forgiveness as a means to reintegrate wrongdoers into the community, it would be unwise to consider that the wrong act or omission never occurred. Society could make the community vulnerable to a wrongdoer who lapses into illegal behavior. If the society forgot the wrong committed, the community could not help the wrongdoer avoid the situation or take other measures to protect itself.

Moreover, in most cases, the penance a wrongdoer must perform is tailored to that wrong. The adulterous spouse need not prove her worth by washing cleaner dishes or getting a raise at work. She must perform acts that help restore the lost trust. Societal forgiveness should also take into account the conduct of the repentant

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11. *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866). Pardons are to be distinguished from other forms of executive forgiveness, such as clemency and amnesty. See generally Cozart, *Clemency Under the Federal System*, 23 FED. PROBATION 3 (1959) (discussing the nature and types of clemency and clemency procedures in the federal system). Conversely, amnesty, is not connected to forgiveness. Derived from the Greek word for "forgetfulness," 1 OXFORD ENGLISH DICTIONARY 406 (2d ed. 1989), amnesty is generally granted to groups of people when it is beneficial to overlook a group's bad acts because public welfare is improved. See *Burdick v. United States*, 236 U.S. 79, 95 (1915) (explaining the difference between pardon and amnesty). Unlike a pardon, however, the underlying crime is, as President Carter noted, forgotten, not forgiven. See EXEC. ORDER No. 11967, 3 C.F.R. 91 (1978) (directing the Attorney General to dismiss, *with prejudice*, indictments against draft evaders); KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* 81-82 (1989) (describing the effect and rationale of President Carter's grant of amnesty to those who evade the Vietnam draft). Although this distinction has little legal value, it is, however, significant in societal terms. *But see* *Knote v. United States*, 95 U.S. 149, 152-53 (1877).

It is sometimes said that [amnesty] operates as an extinction of the offence of which it is object, causing it to be forgotten, so far as public interests are concerned, whilst [pardon] only operates to remove the penalties of the offence. This distinction is not, however, recognized in our law.

*Id.*



wrongdoer and exercise wise caution to avoid placing that person in circumstances that will play to the wrongdoer's weakness or endanger others. This serves society's goal to make the wrongdoer a productive citizen again.

### B. How Society Should Forgive

Although forgiveness requires the release of an obligation, it does not require the wrongdoer to go unpunished. As the Bible explains, "[i]f your brother sins against you, rebuke him; and if he repents, forgive him."<sup>12</sup>

This rebuke is important in the forgiveness process; it is the means by which society can teach the wrongdoer what she did was wrong. This is, of course, the entire purpose of societal forgiveness, reintegrating a wrongdoer back into society and making her productive again. Thus, the tailoring of the rebuke to the wrongful act or omission is of critical importance.

Take the case of a child who purposefully breaks the window of a neighbor while playing with a ball. Most neighbors would ask that the window be replaced with the money of the child. If the child did not have the money to pay for the window, the child could then work it off performing chores for the neighbor. The neighbor forgives the child for what was done and, through this punishment, teaches the child an important lesson about the worth of personal property. This rebuke, which is part of the forgiveness process, is termed "medicinal punishment" by Thomas Aquinas.

If the only thing we want is to inflict punishment on the sinner, then we act altogether unlawfully; but if our primary aim is the good to be achieved through such punishment - the sinner's correction, or at least his restraint so that others may enjoy peace and justice be defended and God honoured - then in the right circumstances retribution can be lawful. . . . Fatal sins are sins deserving eternal death in the future retribution when God delivers his unerring judgement; but in this life punishments are meant to be medicinal.<sup>13</sup>

Similarly, after having felt the sting of an offense, society has a responsibility to act. Yet, society's action must be medicinal in nature to be forgiving: it should tailor punishment in such a way as to help the wrongdoer avoid committing the crime again. It attempts

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12. *Luke* 17:3-4. Elsewhere, Christ explained, "If we confess our sins, He is faithful and just to forgive us our sins and to cleanse us from all unrighteousness." 1 *John* 1:9.

13. II-II SUMMA THEOLOGICA 108 (T. McDermott ed.).

to teach the wrongdoer what was wrong about her act and how to avoid the situation again. By offering punishment with a desire to give offenders the opportunity to understand clearly what they have done wrong, take responsibility for it, and change their course of action, society can welcome the wrongdoer back into the community.

### **C. When Should Society Forgive**

Perhaps the toughest question is when society should forgive. Theoretically, society should forgive all wrongdoers. The practical realities of human nature and limited resources make it difficult to do so. Therefore, society should reserve its ability to extend forgiveness to a few situations.

First, society should forgive only when a wrongdoer is repentant. As mentioned, forgiveness is a means to bring a willing person back into the community. A relationship is created between a society that recognizes the value of the wrongdoer and the wrongdoer who wishes to rejoin society and become productive again. If a wrongdoer does not exhibit remorse for her actions, she would not benefit from medicinal punishment: she would fail to see the benefit of rejoining a law abiding community and the lesson society tries to teach, that her action was wrong, would fall on deaf ears.

Secondly, society should forgive only when an appropriate remedial measure can be fashioned. The measure must be sufficiently tailored to address the wrong committed by the wrongdoer so that it is remedial. Because of resource limitations, society cannot forgive every wrongdoer through medicinal punishment. For example, it might be extremely difficult to use medicinal punishment on a murderer: in some cases a punishment may not be able to be sufficiently tailored to meet the needs of the murderer, because of the nature of the crime; in others, a punishment could be crafted, say one that emphasizes the value of life, but there might likely be a shortage of people who wish to spend the necessary time with that particular wrongdoer. Thus, society should forgive transgressions when its resources make it most feasible to do so.

Perhaps no wrongdoer is better suited for society's forgiveness than a one guilty of possessing drugs for personal use. When a drug user exhibits a desire for help to rid herself of her addiction, society has an obligation to forgive her through medicinal punishment. Society is in a good position to impose medicinal punishment on the repentant drug user. There are numerous government programs available to help addicts. By seeking to alter the addict's

future conduct, society is forgiving the addict — by punishing her in a way designed to help her. And in turn, society reaps the benefits of the forgiveness it extended — increased productivity from the former-addict.

**FORGIVENESS AS A PROBLEM-SOLVING  
TOOL IN THE COURTS:  
A BRIEF RESPONSE TO THE PANEL ON  
FORGIVENESS IN CRIMINAL LAW**

*Derek A. Denckla\**

I have been invited to draft this response in order to provide an additional perspective — centered on courts' role in providing forgiveness in criminal law. Let me begin by responding to the question posed to the panel: Can the criminal law make room for forgiveness? Like everyone on the panel that addressed this question, I, too, believe that the answer is a firm "yes." The simplicity of that question allows for an affirmative answer. What remains to be explained, however, is how to answer some more pointed questions on this issue: Is there room for forgiveness in the criminal courts? If so, how does forgiveness manifest itself there? This response seeks to answer these questions generally by exploring the opportunities for forgiveness provided by "problem solving" courts.<sup>1</sup>

Over the past decade, courts, administrators and judges, out of frustration with the pitfalls of "business as usual," have considered and tested practices aimed at providing greater effectiveness and efficiency in the criminal justice system. One such solution has been to develop court programs and courts address the significant non-legal problems that arise along with the legal issues in a given case.<sup>2</sup> These "problem-solving" courts include drug courts, com-

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1. This response is not intended to provide an extensive or exhaustive essay into the topic of forgiveness. Rather, this response is a commentary on the panel on forgiveness in the criminal law from a court-building perspective that I have gained through my work and research at the Center. Additional work should be undertaken to investigate the gaps opened and questions raised herein. *See* Symposium, *The Role of Forgiveness in the Law*, 27 *FORDHAM URB. L.J.* 1347 (2000).

2. *See* Chief Judge Judith S. Kaye, *Making the Case for Hands-On Courts*, *NEWSWEEK*, Oct. 11, 1999, at 13.

munity courts, family treatment courts, mental health courts and gun courts. All of these courts can use the power and authority of the judiciary to change the behavior of litigants and even, in some cases, the behavior of governmental systems. In their various attempts to change the behavior of litigants, many problem-solving courts have hit upon the strategic use of forgiveness.

### I. THE COURTS AS A SOURCE OF FORGIVENESS

At first blush, it may seem that, of the various institutions that comprise the criminal justice system, the courts would be an unlikely source of forgiveness. The court's traditional role — through the person and the office of the judge — is to apply the law in a fair and impartial manner to the accused at trial and during sentencing and, in the absence of a jury, make factual findings that will determine culpability. Based on this description, the court's ability to impart forgiveness seems limited to showing mercy to a defendant by exercising discretion and, perhaps, reducing a sentence.

For various political and social reasons, however, courts are being forced to deal with a whole range of social, psychological and medical issues that they have never had to face before and with which they have little or no expertise. For instance, a traditional court is poorly equipped to help a substance-addicted person obtain treatment.<sup>3</sup> Yet the research into drug courts suggests that courts have something unique to bring to the table when it comes to successful treatment and accessing other services: coercion. Without the coercive power of a court and its threat of potential punishment, social services agencies are usually unable to effectively treat substance-addicted or certain chronically mentally ill persons. Thus, when someone is accused of committing a crime, the courts often become the place where the accused's substance addiction is first identified as a serious problem, ripe for treatment.

### II. THE CREATION OF "PROBLEM-SOLVING" COURTS

Sweeping changes in the social structure of society have had a deep impact on the functioning of the criminal courts, causing judges to re-think their roles and consider the place of problem-solving in the criminal justice system. At the same time, the public (such as the victim's movement) has been calling for the courts to

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3. Traditionally, criminal courts are meant to address the legal issues of a case. Courts are not designed nor are judges trained in treating the medial, social or psychological problems of defendants.

solve persistent social problems.<sup>4</sup> Like the prosecutors and defense attorneys on the panel, judges and court administrators have grown frustrated with “milling cases,” “repeat players” — defendants who return to court again-and-again on the same charges — rising caseloads and new and different types of cases that elude traditional judicial responses.

Problem-solving courts have not been associated with any particular philosophy of the law or jurisprudence. They tend to use whatever works, borrowing from many new approaches to the law that have surfaced over the years. This search for new and more effective approaches to court procedures and practices is motivated by the desire to make the court system more results-driven and outcome-oriented. In general, however, problem-solving courts share the following five characteristics: (1) an expanded scope of non-legal issues are presented to the court; (2) the use of judicial authority to solve both legal and non-legal problems that arise from an individual’s case; (3) the consideration of outcomes that go beyond merely applying the law, such as increased sobriety for addicts; (4) increased collaboration between government and non-government partners to help achieve shared goals; and (5) the modification of traditional rules by casting judges and attorneys in new roles.

Planners of problem-solving courts — particularly community courts — appear to have an approach that meshes with planners of restorative justice programs on many significant levels. In his remarks to the panel, David Lerman suggested permitting approaches in the criminal law that leave room for forgiveness, such as restorative justice. He went on to define restorative justice as “viewing crime in its aftermath,” which is essentially forward-looking, as opposed to seeking punishment for past wrongs. Lerman stated that restorative justice “asks a different set of questions [than traditional criminal justice]: first and foremost, what is the harm that has been caused; secondly, how do we fix that harm; and third, who is responsible for that repair?” Similarly, problem-solving courts are focused on the causes and consequences of criminal behavior, not just the moment of criminal behavior itself.

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4. See, e.g., U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (1998) (setting forth statistics on public frustration with courts); see also John Greacen, *What Standards Should We Use To Judge Our Courts?*, 72 JUDICATURE 23 (1988).

### III. FORGIVENESS IN THE "PROBLEM-SOLVING" MODEL

Forgiveness fits into the problem-solving approach in two important ways. First, problem-solving courts emphasize treatment and services in solving the non-legal problems that underlie the legal difficulties that bring people into court, such as addiction, mental illness or homelessness. The second way that problem-solving courts draw on the concept of forgiveness is by creating new vehicles for community residents to participate in the criminal justice system and its processes.

#### A. Solving Non-Legal Problems

The example that best demonstrates the way in which problem-solving courts address a defendant's non-legal problems is found in the drug courts, created to sentence addicted defendants to long-term, judicially-supervised drug treatment instead of incarceration. The first "drug court" began in Dade County, Florida in 1989. The results of the Dade County experiment have been provocative. A study by the National Institute of Justice revealed that Dade County drug court defendants had fewer re-arrests than comparable non-drug court defendants.<sup>5</sup> Subsequent studies have shown that retention rates for court-ordered treatment are much greater than the retention rates for treatment clients in general.<sup>6</sup> Following Dade County's example, a number of drug courts and other specialized courts have arisen that aim to combine counseling, treatment and social services as alternatives to incarceration with defendant accountability and compliance monitoring.<sup>7</sup>

In drug courts, compliance with a treatment regime is closely monitored by the drug court judge, who responds to progress or

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5. See U.S. DEP'T OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, *ASSESSING THE IMPACT OF DADE COUNTY'S FELONY DRUG COURT*, Executive Summary (1993).

6. For an overview of the research on drug courts, see Steven Belenko, *Research on Drug Courts: A Critical Review*, NATIONAL DRUG COURT INSTITUTE REVIEW (Summer 1998).

7. Currently, 444 drug court programs are operating in 46 states. In addition, 277 new drug courts are in the planning stages. See Office of Justice Programs Drug Court Clearinghouse and Technical Assistance Project at American University, *Summary of Drug Court Activity by State & County*, <<http://gurukul.ucc.american.edu/justice/DRCTCHAR1.htm>> (last modified January 10, 2000); Telephone Interview with Caroline Cooper, Office of Justice Programs Drug Court Clearinghouse and Technical Assistance Project at American University (February 2, 2000). For a general description of drug courts, see OFFICE OF JUSTICE PROGRAMS DRUG COURT CLEARINGHOUSE AND TECHNICAL ASSISTANCE PROJECT AT AMERICAN UNIVERSITY, *LOOKING AT A DECADE OF DRUG COURTS 3* (1999). The Department of Justice has funded many of these drug court programs.

failure with a system of graduated rewards and sanctions. The type of forgiveness that drug courts offer is not unconditional. Forgiveness is offered in return for the accused accepting responsibility for his or her criminal behavior and taking concrete and successful steps to address underlying problems that may have caused that behavior. Thus, problem-solving courts couple the “stick” of punishment with the “carrot” of assistance and forgiveness.

### B. Community Involvement

The creation of ways for community residents to participate in the criminal justice system and its processes implicitly honors and acknowledges the harm done to neighborhoods and their residents by substance abuse and chronic low-level offending. The best example of this approach to forgiveness may be found in community courts. In 1993, the first community court in the United States was launched in New York City — the Midtown Community Court.<sup>8</sup> The Midtown Court targets misdemeanor quality-of-life crimes committed in and around Times Square.<sup>9</sup> Offenders are sentenced to perform community restitution by performing such acts as sweeping the streets, painting over graffiti, or cleaning local parks in an effort to pay back the community they had harmed through their criminal behavior.<sup>10</sup> The Court also links offenders to on-site social services, including health care, drug treatment and job training. Further, the Court has tested a variety of new mechanisms for engaging the local community in the criminal justice process, including advisory boards, community mediation, victim-offender impact panels and townhall meetings.

The design of the Midtown Community Court reflects the belief that there is no such thing as “victimless” crime. The Court acknowledges that communities can be victimized just as individuals can. The planners of the court consulted community residents and businesses. These consultations revealed that members of the community were upset by the criminal behavior in their neighborhood. They wanted restoration. The community also saw, however, that those engaged in criminal behavior needed help to change their ways. In effect, the community advocated for a court

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8. Many of the current officers of the Center helped New York State Unified Court and the Midtown Community Court.

9. Shoplifting, prostitution and subway fare evasions and graffiti were the main categories of quality of life crimes.

10. See John Feinblatt et al., *Neighborhood Justice at the Midtown Community Court*, in CRIME AND PLACE: PLENARY PAPERS OF THE 1997 CONFERENCE ON CRIMINAL JUSTICE RESEARCH AND EVALUATION, National Institute of Justice (1998).



structured, in part, around forgiveness — a court that combined punishment and help together.

An evaluation by the National Center for State Courts found that Midtown had helped speed case processing, improve compliance with alternative sanctions and reduce local crime.<sup>11</sup> In its wake have come nine replications; an additional two dozen community courts are in the works.<sup>12</sup>

#### IV. IMPACT OF FORGIVENESS IN PROBLEM-SOLVING COURTS

Essentially, notions of forgiveness in courts arise from a desire to reach more durable and constructive results in criminal justice. Generally, forgiveness in the courts is found in the increasing emphasis on using the crisis of arrest as an opportunity to re-connect the accused to society and vice versa. Many judges have been searching to insert forgiveness into the criminal justice system in an effort to engage the accused and the community in a healing process that may be more effective in stemming future crime than merely putting someone behind bars. Thus, re-connecting the accused with the community may reduce the risk of recidivism. Furthermore, forgiveness is a central element present when a judge announces a sentence that restores the victims to their pre-crime state, mandates community service or engages the accused in a discussion of the impact of his or her crimes on society and the victims.

Court-based programs and procedures that emphasize forgiveness have two primary positive impacts. First, victims are granted some type of power to forgive the accused, giving them a pivotal role to play in shaping criminal justice. This new role can be seen in the growth of victim-offender reconciliation panels. By extension, when society is seen as a victim of every crime through the proxy of the government, then society also has the collective power to forgive. The second impact is that the accused is viewed as having the potential to be forgiven by the victim and society. Thus, forgiveness elevates the accused in the eyes of society, deeming him or her worthy of forgiveness. This powerful shift in perspective allows for government to investigate the accused as a whole person with a past history and a potential future, rather than nar-

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11. See MICHELE SVIRIDOFF ET AL., *DISPENSING JUSTICE LOCALLY: THE IMPLEMENTATION AND EFFECTS OF THE MIDTOWN COMMUNITY COURT* (1997).

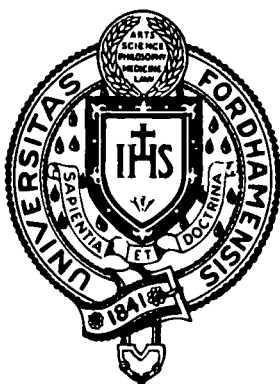
12. See *Community Courts* (visited Apr. 6, 2000) <<http://www.communitycourts.org>>.

rowly conceiving of the accused as a criminal who only exists in the moment of criminal behavior.

Viewing the accused as someone who can be "treated" is more than just semantic. While the provision of treatment may be seen as a form of punishment because a person is detained in a treatment facility and faces sanctions for leaving, treatment is also an act of sympathy, a gesture of forgiveness. Treatment sends a powerful message to the accused that says: "We forgive you for committing your crimes because we understand that you committed those crimes under the influence of circumstances beyond your control. If you agree to complete treatment, we will forgive you for your crimes in whole or in part. If you refuse treatment or fail to complete it, we will punish you for your crimes." Providing treatment acknowledges that the accused is capable of change. Society's positive investment in forgiving the crimes of addicted defendants arises from the defendant's success in completing treatment.

#### CONCLUSION

For courts and, by extension, for the whole criminal justice system, forgiveness may not be an end unto itself. Forgiveness is instrumental for courts attempting to have more effective and lasting results by addressing the non-legal causes and consequences of crime, rather than merely sentencing based on the crime itself. Bringing elements of forgiveness into the practices and procedures of criminal courts has produced some interesting and provocative results. For instance, the rise of the problem-solving courts, which use forgiveness as one of a number of new tools to address criminal behavior more effectively, suggests that the place of forgiveness in criminal law has been established and is ripe for further academic study and practical experimentation.



# FORGIVENESS IN PSYCHOLOGY AND LAW: THE MEETING OF MORAL DEVELOPMENT AND RESTORATIVE JUSTICE

*Robert D. Enright\**

*Bruce A. Kittle\*\**

In an age of increasing specialization, it is rare for psychologists and lawyers to mutually influence each other's work. Nevertheless, over the past decade, the Department of Educational Psychology at the University of Wisconsin-Madison and the Restorative Justice Project at the Law School united to discuss the implications of forgiveness in effecting change in the legal system.<sup>1</sup> That dialogue continues today, with this Essay representing some of the fruit of that labor.

This Essay begins by presenting a brief overview of the early work in the Department of Educational Psychology so that the reader may become firmly grounded in the meaning of forgiveness. Next, this Essay presents the mediation of a Victim Offender Conference ("VOC") as an illustration of a case involving forgiveness. Finally, in light of the model developed in Educational Psychology, this Essay draws some general implications for forgiveness within restorative justice.

## **The Early Work in Educational Psychology**

In 1985, the Department of Educational Psychology at the University of Wisconsin-Madison began holding weekly meetings to discuss issues about forgiveness. For instance, they examined the meaning of person-to-person forgiveness; the ways in which people forgive; and the consequences that result when people forgive. To date, the Department continues to hold these informal seminars.

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1. See, e.g., WALTER DICKEY, FORGIVENESS AND CRIME: THE POSSIBILITIES OF RESTORATIVE JUSTICE, in ROBERT D. ENRIGHT & JOANNA NORTH, EXPLORING FORGIVENESS (1998); see also Bruce A. Kittle, *Forgiveness in the Criminal Justice System: Necessary Element or Impossible Dream?*, WORLD OF FORGIVENESS NEWSLETTER 2, 3-11 (International Forgiveness Institute, Madison, WI 1999).

At that time, a body of literature was just emerging on the construct of forgiveness in psychology and related disciplines. For example, Lewis Smedes had recently published his seminal work for the general public, a book that has since become a modern classic and has helped many people hurt by injustice.<sup>2</sup> D. and M. Linn also released an influential book in which they based their model of forgiveness on Kubler-Ross' stages of death and dying.<sup>3</sup> Beyond that, the published literature contained case studies of forgiveness within therapy and reflections from psychiatrists and counselors.<sup>4</sup> Fitzgibbons' treatise was a year away, whereas Hope's essay was two years from publication.<sup>5</sup> And, from a religious perspective, there existed Augsburg's, Calian's and Donnelley's reflections.<sup>6</sup> However, there were still no published scientific works devoted to forgiveness.

The goal then, as now, was to be as accurate as possible in formulating a definition of forgiveness and a model of how people could go about forgiving. We also sought to avoid the traps of defining the word in our own idiosyncratic way and of reductionism in model building in which theorists commit to a few processes or one major mechanism in describing forgiveness. Finally, after years of study, there exists a concise definition and model.

### What is Person-to-Person Forgiveness?

Following North's ideas, we define forgiving as follows:

People, upon rationally determining that they have been unfairly treated, forgive when they willfully abandon resentment and related responses (to which they have a right), and endeavor to respond to the wrongdoer based on the moral princi-

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2. See LEWIS SMEDES, *FORGIVE AND FORGET: HEALING THE HURTS WE DON'T DESERVE* (1984).

3. See D. LINN & M. LINN, *HEALING LIFE'S HURTS: HEALING MEMORIES THROUGH THE FIVE STAGES OF FORGIVENESS* (1978).

4. See R. Hunter, *Forgiveness, Retaliation, and Paranoid Reactions*, *CANADIAN PSYCHIATRIC ASS'N J.*, 23, 167-73 (1978); M. Kaufman, *The Courage to Forgive*, *ISRAELI J. PSYCHIATRY & RELATED SCIENCES*, 21, 177-87 (1984); H. Close, *Forgiveness and Responsibility: A Case Study*, *PASTORAL PSYCHOL.* 21, 18-25 (1970).

5. See Richard Fitzgibbons, *The Cognitive and Emotional Uses of Forgiveness, in The Treatment of Anger*, *PSYCHOTHERAPY* 23, 629-33 (1986); D. Hope, *The Healing Paradox of Forgiveness*, *PSYCHOTHERAPY* 24, 240-44 (1987).

6. See D. AUGSBURGER, *THE FREEDOM TO FORGIVE* (1970); C. Calian, *Christian Faith as Forgiveness*, *THEOLOGY TODAY* 37, 439-33 (1981); D. DONNELLEY, *PUTTING FORGIVENESS INTO PRACTICE* (1982); see also D. Droll, *Forgiveness: Theory and Research* (Dissertation Abstracts International-B, 45, 2732 (1985)); Mary Trainer, *Forgiveness: Intrinsic, Role-Expected, Expedient, in the Context of Divorce* (Dissertation Abstracts International-B, 45, 1325 1984).

ple of beneficence, which may include compassion, unconditional worth, generosity, and moral love (to which the wrongdoer, by nature of the hurtful act(s), has no right).<sup>7</sup>

This definition is consistent with ancient views in Hebrew, Christian, Islamic and Buddhist traditions. It also conforms with modern philosophical writings on the subject.<sup>8</sup>

We believe that forgiveness is a choice. Although certain groups see it as an obligation, one has to exercise free will in order to choose to forgive. We think that, in order to truly forgive, a person must understand the meaning of forgiveness and its moral import, and then willingly choose to make forgiveness a part of his life.

According to this definition, forgiveness is a moral response, and so it involves more than simply ceasing to be angry or accepting what happened. Forgiveness is also not the same as condoning, forgetting or reconciling. When a person condones certain behavior, he realizes that the offender may have had an excuse for his actions. Conversely, when a person forgives, he clearly labels the offender's behavior as morally wrong, but accepts the person as having inherent worth despite the offense. Furthermore, when a person forgives, he offers what he can to the offender, such as compassion. With reconciliation, however, both parties must do their part to cure the situation, especially the offender who must take steps to re-establish trust. Therefore, it is possible to forgive without reconciling.

In a 1991 chapter, we address the writings that have been critical of forgiveness as weak or even immoral. We refer the reader to that chapter for our response.<sup>9</sup>

### **How Do People Forgive?**

The phase model of forgiveness is our primary model for helping people forgive. It is a prescriptive rather than descriptive approach in that it should help unjustly treated people to forgive, if they choose. After reviewing our ideas with hundreds of people through informal discussions, we revised and refined the model until we determined that we had captured the true essence of the for-

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7. Joanna North, *Wrongdoing and Forgiveness*, PHIL. 62, 499-508 (1987).

8. For discussion of both ancient religious and modern philosophical views, see, e.g., ROBERT ENRIGHT & RICHARD FITZGIBBONS, *HELPING CLIENTS FORGIVE: AN EMPIRICAL GUIDE FOR RESOLVING ANGER AND RESTORING HOPE* (forthcoming in 2000).

9. ROBERT ENRIGHT & THE HUMAN DEVELOPMENT STUDY GROUP, *THE MORAL DEVELOPMENT OF FORGIVENESS* (W. Kurtines & J. Gewirtz eds., 1991); *HANDBOOK OF MORAL BEHAVIOR AND DEVELOPMENT* 1, 123-52 (1991).

giveness process. We then put the model to a scientific test: assessing validity of the model for effecting forgiveness and psychological improvement in those going through our programs. The model has been found to be quite helpful to clients.<sup>10</sup> Additionally, in a study outside our own lab, Denton and Martin asked over 100 clinical social workers their opinion about the way forgiveness therapy usually proceeds, and the responses supported the process model as we describe it.<sup>11</sup> We continue to discuss the model with hundreds of people each year, and make subtle refinements.

The model has four phases that form a development progression. These phases — uncovering, decision, work and deepening — each have individual differences within them. Within each phase there are a series of units most people seem to pass through, the details of which are in Table 1. However, not everyone goes through the processes in the same way or at the same speed. The following is a brief overview of the four phases.

**TABLE 1**

*Processes Involved in Forgiving*

UNCOVERING PHASE

1. Examination of psychological defenses and the issues involved.
2. Confrontation of anger; the point is to release, not harbor, the anger.
3. Admittance of shame, when this is appropriate.
4. Awareness of depleted emotional energy.
5. Awareness of cognitive rehearsal of the offense.
6. Insight that the injured party may be comparing self with the injurer.
7. Realization that oneself may be permanently and adversely changed by the injury.
8. Insight into a possibly altered "just world" view.

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10. See, e.g., Radhi Al-Mabuk et al., *Forgiveness Education with Parentally Love-Deprived College Students*, J. MORAL EDUC. 24, 427-44 (1995); Catherine Coyle & Robert Enright, *Forgiveness Intervention with Post-Abortion Men*, J. CONSULTING & CLINICAL PSYCHOL. 65, 1042-46 (1997); Suzanne Freedman & Robert Enright, *Forgiveness as an Intervention Goal with Incest Survivors*, J. CONSULTING & CLINICAL PSYCHOL., 64, 983-92 (1996); John Hebl & Robert Enright, *Forgiveness as a Psychotherapeutic Goal with Elderly Females*, PSYCHOTHERAPY 30, 658-67 (1993); Carole Osterndorf et al., *Educational Programs on Forgiveness: Children and Adults*, Presented at the meeting of the Association for Moral Education (Nov. 1999).

11. R. Denton, & M. Martin, *Defining Forgiveness: An Empirical Exploration of Process and Role*, AM. J. FAM. THERAPY 26, 281-92 (1998).

### DECISION PHASE

9. A change of heart/conversion/new insights that old resolution strategies are not working.
10. Willingness to consider forgiveness as an option.
11. Commitment to forgive the offender.

### WORK PHASE

12. Reframing, through role-taking, who the wrongdoer is by viewing him or her in context.
13. Empathy and compassion toward the offender.
14. Bearing/accepting the pain.
15. Giving a moral gift to the offender.

### DEEPENING PHASE

16. Finding meaning for self and others in the suffering and in the forgiveness process.
17. Realization that self has needed others' forgiveness in the past.
18. Insight that one is not alone (universality, support).
19. Realization that self may have a new purpose in life because of the injury.
20. Awareness of decreased negative affect and, perhaps, increased positive affect, if this begins to emerge, toward the injurer; awareness of internal, emotional release.<sup>12</sup>

### *Uncovering Phase*

The uncovering phase describes a person's insight about whether the injustice, and subsequent injury, has compromised his life. This can be an emotionally painful time. Yet, if the person concludes that he is suffering emotionally because of another's injustice, this can serve as a motivator to change and to think about and try forgiveness.

This phase is separated into eight units. Unit 1 is a preforgiveness state of denial, where the person does not acknowledge the depth of his hurt or anger. Unit 2 involves a major step forward because the person acknowledges the injustice and responds with anger or related emotions. Sometimes, a forgiving person experiences guilt, shame or humiliation (unit 3), which deepens emo-

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12. Please note that this table is an extension of Enright and the Human Development Study Group. See ENRIGHT & THE HUMAN DEVELOPMENT STUDY GROUP, *supra* note 9.



tional pain. A person at this point can also feel emotionally drained (unit 4) and preoccupied with the problem (unit 5).

If a person, when comparing self and offender, concludes that the other is now considerably better off, anger may deepen (unit 6). At times, a person realizes he or she is permanently changed, as we will see in the case to follow, which further intensifies negative emotions (unit 7). All of this emotional pain can slowly lead a person to adopt a pessimistic philosophy of life, thinking that justice happens to others, not to oneself (unit 8).

### *Decision Phase*

The decision phase is a time for the person to think about what forgiveness is and is not. A decision to forgive is a cognitive process, not one in which forgiveness is completed. The person must distinguish a commitment to forgive and all that is involved in the process. Otherwise, upon committing to forgive, the person may conclude that most of the work is over where contrarily it is only beginning.

As the person begins to understand all of the anger, hurt, and frustration he has been harboring, the person may conclude that past attempts to deal with the injustice are ineffective, leading to an openness to new approaches (unit 9). As the person considers the possibility of forgiveness (unit 10), he may decide to abandon revenge and try to work on forgiving (unit 11).

### *Work Phase*

During the work phase, the person begins to understand that the offender is more than the offense (or offenses) committed. The focus shifts from self, where most of the attention was centered in the Uncovering Phase, to the offender, with an emphasis on understanding, empathy and mercy toward him.

The person starts with insight and cognitive exercises because, as Fitzgibbons realized, it is often easier to understand an offender than it is to feel empathy or compassion for him (unit 12). The point is to help the forgiver to gain a broader perspective on the offender: he is more than this one act of unfairness. Following insight, emotional transformations toward the offender may emerge, including both empathy and compassion (unit 13). In our view, this tandem of thinking anew about an offender and then feeling anew are part of a developmental sequence. First cognition, then affect seems to be the typical sequence. The key is that the participant is

seeing the offender in new ways and may become ready to respond in new ways.

Acceptance or absorption of the pain (unit 14) is a central point in learning to forgive and involves committing oneself not to pass on one's emotional pain to others, including the offender. Unit 14 implies the gift-like quality of forgiveness as the forgiver stops a possible cycle of revenge that otherwise may harm others, including one's children, co-workers, and the offender. Unit 15 emphasizes this gift-like sense even more as the forgiver considers a way to actually give a gift to the offender. This might include a demonstration of kindness or respect and need not be a tangible present, wrapped and delivered. For example, one person, in giving a gift to her deceased father who abused her years before, brought her children to his grave, preserving her father's good name in the family.

### *Deepening Phase*

Insights about an offender often stimulate other thoughts: Is there any sense in all of the pain I endured (unit 16)? Have I needed others' forgiveness in the past (unit 17)? What was it like for me when I was forgiven? What is my best source of support as I do the work of forgiveness (unit 18)? Am I motivated to interact in new ways with the offender and with people in general (unit 19)? The answers may lead to a recycling through the other phases, this time in a deeper, more insightful way. Forgiving is a moving target. As people learn to forgive, they may choose to appropriate that learning toward even deeper forgiveness, experiencing emotional relief (unit 20) and even paving the way for reconciliation. Later, they may begin to generalize the learning to new situations and people.<sup>13</sup>

We consider the phases to be developmental in that the uncovering phase usually occurs first and is followed by the decision, work and deepening phases, in that order. This is not a rigid, step-wise model in that people must start with uncovering and proceed in order to the end. It is possible, for example, for someone to feel empathy for an offender (in the work phase) that sparks an interest in exploring the details of the injustice and subsequent emotional hurt in the uncovering phase.

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13. We also have described the process of seeking forgiveness from others. See ROBERT ENRIGHT, *FORGIVENESS IS A CHOICE* (forthcoming in 2000).

### What Are the Consequences When People Forgive?

The initial five educational interventions were done with a wide variety of samples: late adolescents hurt by an emotionally distant parent; adult women who were the victims of incest; men hurt by an abortion decision of a partner; elderly hurt in a variety of ways by others; and adult children of alcoholics.<sup>14</sup> In most cases, we found that those who forgave reduced in anger, anxiety and sometimes in depression, and increased in self-esteem and hope. We would like to expand our choice of the variables we study to include the effect of a person's forgiving on the offender and even on entire families. We have yet to see even one case in which a person became measurably worse in an emotional sense when freely choosing to forgive in our programs within Educational Psychology.

#### Examination of a Case From a Victim Offender Conference

Walter Dickey describes the case of a man who robbed a church in Milwaukee.<sup>15</sup> In arranging for a conference between the man convicted of the crime, Mr. Singleton, and the pastor of the church, Reverend Davis, Dickey adhered to the ideas behind restorative justice as explicated by Umbreit:<sup>16</sup> 1) Criminal behavior is seen first as a conflict between people, and second between the state and the law-breaker; 2) The criminal's accountability for the crime is of greater importance than his punishment; 3) The victim's needs as a result of the crime must be taken into account; and 4) The victim and offender engage in constructive dialogue and problem-solving to restore the losses to individuals and community.

After much preparation for both parties, Mr. Singleton and Rev. Davis expressed an interest in meeting together, with Dickey as the mediator. A key to the success of this particular project centered on reframing, in which the pastor could see the offender in a larger context than the burglary itself. Mr. Singleton, careful not to make excuses for his behavior, explained his involvement with drugs prior to committing the burglary. Also, he had not realized that the building was a church, a reasonable statement given that the building is a former firehouse that was being renovated at the time of the crime.

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14. *See supra* note 10.

15. *See* DICKEY, *supra* note 1.

16. MARK UMBREIT, VICTIM MEETS OFFENDER (1994).

Mr. Singleton further explained that his father was an assistant pastor of a church, which deepened his remorse and need for forgiveness. In fact, in consulting with his father the day after the burglary, he decided to turn himself into the authorities. He concluded by apologizing to Rev. Davis for his actions.

Rev. Davis seemed to have compassion for Mr. Singleton after understanding his situation in greater depth. He acknowledged a burglar's failure to see the building as a church. He accepted the apology but explained to Mr. Singleton how the incident affected his congregation. Recently, in another church in Milwaukee, there had been a shooting. That incident, coupled with their own church being burglarized, led to many parishioners feeling unsafe while in church.

Mr. Singleton offered to address the congregation in attempt to reduce fear, but Rev. Davis thought this was unnecessary. The offender then offered to do voluntary service around the church grounds in reparation for his actions. Again, the pastor thought this was unnecessary because the stolen goods were returned. The pastor's statements were intended to show mercy on him. Because helping around the church seemed so important to Mr. Singleton as a way of making amends, however, Rev. Davis ultimately accepted his offer. Together they agreed on 100 hours of service.

At the end of the meeting, Mr. Singleton once again expressed remorse over what he did. The pastor told him that he saw genuine sorrow and that as far as he was concerned, the matter was settled. Rev. Davis wished him well in the future and stated that good results often come when we are placed in difficult situations. Mr. Singleton agreed with this.

The meeting was deemed a success by both parties. Mr. Singleton unburdened himself of much guilt and made plans for paying back the Church through service. Rev. Davis was able to show understanding, mercy, and forgiveness as well as accept the offender's offer to restore justice. Both men seemed to develop a mutual respect as reconciliation occurred.

### CONCLUSION

Not all attempts at restorative justice work out as well. Achieving both forgiveness and justice can be involved and complicated.

Therefore, this Essay proposes seven points to consider in the future:<sup>17</sup>

Forgiveness, like justice, is a moral concept. It is not a technique or strategy devoid of the intent to do good. Instead, forgiveness is a merciful act of giving a gift to someone who does not necessarily deserve it. In other words, the focus when someone forgives is predominantly on the other person, not on oneself. It is important that the victim have a clear understanding of what is being offered in forgiveness.

A mediator should be careful to assess the intent of the forgiver. Is forgiveness being offered out of a sense of pressure to do so? Does the victim forgive because the mediator has created subtle expectations that it occur? Does the victim feel any fear in withholding forgiveness? Genuine forgiveness is never forced. It can take time and is the choice of the one offended. Of course, there is nothing wrong with discussing the potentially positive aspects of forgiveness with a client, but ultimately this is up to him or her. The person has a free will to give the gift, refrain altogether, or wait. A victim who is not ready to forgive now may be ready in the future. Common sense and a concern for the victim can be guides regarding how to approach him or her about this delicate matter of forgiveness.

Asking for or receiving forgiveness also is a moral act, not a self-serving act to reduce one's own sentence or receive some advantage. Advantage may come, but this should not be the primary motivation. A mediator walks a fine line here. Perhaps a key to genuine acts of seeking forgiveness concern remorse. How genuinely remorseful does the offender seem to be? Does the person apologize? Does the apology seem sincere? Does the victim think it is sincere?

A mediator needs to carefully assess the readiness of both victim and offender to meet, especially for the purpose of discussing the delicate matter of forgiveness. An offender may be quite remorseful and ready to unburden the sense of guilt, whereas the victim is still afraid and apprehensive to meet. On the other hand, a victim may be eager to hear why the offender committed the act, whereas the offender may be too angry or embarrassed to meet. The con-

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17. These points are not intended to be a detailed discussion of the process of Victim Offender Conferencing. Rather, they are concerned only with the idea of forgiveness as a part of the conference. Details on already-established issues and ethical guidelines for such conferences can be obtained from the Victim Offender Mediation Association Web site at <<http://www.voma.org>>.

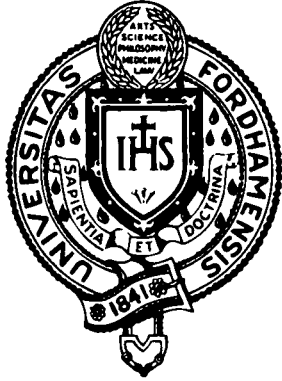
ference must await each party's willingness and readiness to discuss the issue together. Sometimes it takes years of preparation before both sides are ready to meet, whether or not forgiveness is even discussed.

Forgiving, receiving forgiveness and reconciliation may not occur. The process of forgiveness takes time. If a conference is not as productive as hoped, another meeting may be possible. The mediator, of course, must avoid the expectation that such conferences are part of therapy or other services that the mediator is not trained to provide.

Forgiveness is not a substitute for justice. If an offender apologizes and if a victim accepts that apology through forgiving, the offender still has a debt to pay, whether to the victim, to the state, or both. Rev. Davis' acceptance of Mr. Singleton's offer of 100 hours of service is one example of how forgiveness and justice can exist along side each other.

Certain "ingredients" seem particularly important in conferences where forgiveness is one of the goals. One is reframing, in which the victim sees the offender in a broader context than the offense. Hearing the offender's story of upbringing and the circumstances surrounding the crime can go far in helping the victim see a human being across the table. Another is compassion, or a willingness to suffer along with the offender, given his difficult circumstances. On the seeking forgiveness side of this issue, a sincere apology and a willingness to make amends seem particularly important.

Forgiveness deserves its place alongside the quest for fairness in this new model of victim and offender discussion. The addition of forgiveness into the legal process might change how we think about and serve justice. Perhaps forgiveness may be one avenue of humanizing the quest for justice.



## MERCIFUL DAMAGES: SOME REMARKS ON FORGIVENESS, MERCY AND TORT LAW

Neal R. Feigenson\*

I want to explore the place, if any, of forgiveness and mercy in tort law, using empirical psychological research where relevant to shed some light on the topic. I first describe a number of misgivings about encouraging forgiveness or mercy as part of the substantive or procedural law of torts. I then suggest a concept, *merciful damages*, that may allow some of the benefits of forgiveness and mercy while avoiding or at least mitigating some of the concerns.

I have benefited greatly from what Jeffrie Murphy and Jean Hampton have to say about forgiveness and mercy in their book,<sup>1</sup> especially Professor Murphy's first and last chapters, and I take some of his ideas as my points of departure. Murphy carefully distinguishes forgiveness, which involves a change in feelings toward the transgressor (specifically, to overcome resentment for the right reasons), from mercy, which involves an act toward the transgressor (specifically, to relieve the transgressor of some or all of what would otherwise be his or her just deserts).<sup>2</sup> Moreover, only a victim of wrongdoing is in a position to forgive the wrongdoer, while only a decision maker with authority to impose on the wrongdoer certain legal but harsh consequences is in a position to be merciful.<sup>3</sup>

Two consequences follow. First, forgiveness is neither necessary nor sufficient for mercy. Second, "[t]he area of resentment and forgiveness is individual and personal in a way that legal guilt and

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\* Professor of Law, Quinnipiac College School of Law. I am grateful to Elizabeth Malang and the other members of the *Fordham Urban Law Journal* for organizing the Symposium and inviting me to participate; to my colleagues Greg Loken and Linda Meyer for their helpful comments on an earlier draft of this Essay; and to Daniel Shuman for sharing with me a prepublication draft of his essay, *The Role of Apology in Tort Law*, in 83 JUDICATURE 180 (2000). See *infra* notes 51-53 and accompanying text (describing Shuman's proposal that fact finders be allowed to take a tortfeasor's apology into account in reducing noneconomic damages and comparison of that proposal with merciful damages).

1. See JEFFRIE C. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY (1988).

2. See *id.* at 20-21, 33-34.

3. See *id.*



responsibility are not.”<sup>4</sup> This is not very promising for an application of forgiveness to tort law as a system of substantive and procedural rules. Whether a tort victim, moved by compassion, decides to forgive the tortfeasor after fully litigating his or her case would seem not to concern the law (or society at large) directly. Should a victim be moved to settle with a tortfeasor and thus waive the right to seek the full compensation to which he or she might be legally entitled to — that is, to be merciful — would also seem to be without much significance for tort law. In the aggregate, however, such decisions may affect both the number and sorts of cases that remain in the formal adjudicatory system.<sup>5</sup>

Murphy suggests that mercy, as the “legal analogue” of forgiveness,<sup>6</sup> may be morally justified within a just legal system. If mercy on the part of a state decision maker is not simply an unjustified departure from what the law requires, there must be good reasons for the decision maker to be merciful. If such reasons exist, however, it seems that the decision maker has a *duty* to decide mercifully. Mercy becomes a matter of what the person being judged deserves, and hence mercy is subsumed within justice and is not an autonomous virtue.<sup>7</sup> Murphy’s way out of this conundrum is to refer to a private law model in which the victim of the offense has the right, but not the duty, to forgo imposing on the offender the penalty that justice makes available.<sup>8</sup> And if we think of those private victims as delegating to the appropriate state decision maker their right to forgo justice, there is no conflict between the state’s obligation to mete out just deserts to criminal offenders and its occasional exercise of mercy.<sup>9</sup>

This line of reasoning may help (at least in theory) to explain the role of mercy in criminal law, but it does not appear to be as useful when applied to civil litigation. By choosing to sue instead of settle, the victim of a tort implicitly (or explicitly) refuses to waive his

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4. *Id.* at 33.

5. The role of forgiveness in negotiation, mediation and the like is an interesting topic but it is beyond the scope of this essay. See, e.g., Jonathan Cohen, *Apology and Organizations: Exploring an Example from Medical Practice*, 27 FORDHAM URB. L.J. 1447 (2000) (discussing research on the potential benefits of apology in avoiding litigation); see also Deborah L. Levi, Note, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165 (1997).

6. See MURPHY & HAMPTON, *supra* note 1, at 34.

7. The argument is more complicated than this; for instance, mercy can be supported on consequentialist grounds, but in that case, justice is overridden by utility as a ground for decision. See *id.* at 172-73.

8. See *id.* at 175-76.

9. See *id.* at 177-80.

or her right to obtain full compensation from the tortfeasor. It seems odd, then, to posit that the state has been delegated any waiver such that the state's exercise of mercy in civil adjudication may be consistent with justice.

### Compassion, Mercy and Legal Judgment<sup>10</sup>

Let us assume, nevertheless, that state decision makers (judges and/or juries) in tort cases may, consistently with justice, decide mercifully. Let us also assume that, although forgiveness is neither necessary nor sufficient for mercy, the (private) feeling that drives forgiveness — compassion or sympathy<sup>11</sup> (and love) — may motivate the (public) act, and therefore, that the feeling may have some significance for law.<sup>12</sup>

Is compassionate or sympathetic decision making a good thing? Theoretical arguments that it is are (mostly) familiar. It has been said that “the ultimate function of sympathy is to provide[ ] a vital sense of commonality or connection among individuals, disrupt[ing] . . . the trend toward what will eventually be isolation and death.”<sup>13</sup> Philosophers, similarly, have long characterized sympathy as one of the “moral sentiments,” crucial to the maintenance of peaceful co-existence in society.<sup>14</sup> Compassion contributes to moral judgment because it promotes a concern for the welfare of others that is fundamental to many moral systems. It can be argued that sympathetic decision making may lead to more democratic and just results insofar as it helps correct for the law's relative lack of attention to those traditionally disadvantaged in society, thus tending to “level the playing field” of justice.<sup>15</sup> Finally, the process of compassionate decision making is democratically inclusive because it incorporates into formal legal decision making,

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10. The arguments and discussions of supporting research in this section are adapted from a previously published article. See Neal Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1 (1997).

11. A basic definition of *compassion* or *sympathy* (I treat the two terms as synonymous) is a heightened awareness of the suffering of another and the urge to alleviate that suffering. Compassion, like most if not all emotions, thus combines cognitive, affective and action-oriented features: the awareness of the other's suffering is both thought and felt and is accompanied by the desire to do something about it. Sympathy or compassion involves the ability to imagine oneself in the sufferer's predicament and, in some sense, to feel the other's suffering.

12. See MURPHY & HAMPTON, *supra* note 1, at 34, 176.

13. Feigenson, *supra* note 10, at 27 (quoting LAUREN WUPE, *THE PSYCHOLOGY OF SYMPATHY* 68, 177 (1991)).

14. See *id.*

15. *Id.*

with its traditionally male model of objective rationality, empathic modes of moral reasoning associated with women.

What does empirical psychology, and in particular the psychology of the emotions, have to say about the relationship between compassion or sympathy and legal decision making? Three benefits have been identified. Compassion in legal judgment may be desirable because it enables decision makers to better understand the situations they judge; "by taking the perspectives of all parties involved, judges better appreciate the human meanings of those situations."<sup>16</sup> Moreover, compassion is a natural part of human life whose absence or repression would impair decision making. Research on the effects of mood on judgment suggests that compassion may enhance legal decision making by leading to more careful and deliberate information processing.

The research also tells us, however, that compassion is likely to lead to decisions that are unduly subjective and biased, contrary to many norms of good decision making.<sup>17</sup> Because compassion involves taking the perspective of the other person, the target of the compassion, compassionate decisions are likely to be highly subjective (in a sense that cannot be ascribed to other emotional judgments). In one study, for instance, participants who were instructed to take the perspective of a target person attributed to the target a greater number of characteristics they believed to be true of *themselves* than did participants not instructed to take the perspective of the target.<sup>18</sup> Moreover, the researchers found no significant difference between the responses of participants instructed to imagine what they would think and feel if they were in the target person's situation and those instructed to imagine what the target person was thinking and feeling. This further indicated that decision makers instructed to empathize have a hard time distinguishing self from other.<sup>19</sup> The consequence is that decision makers may confusedly decide the case before them on the basis of information about themselves instead of the parties.<sup>20</sup> In a legal system in which similar cases may be presented to any of several decision makers (different juries, different judges in same district), this subjectivity promises to decrease consistency (or interdecision-

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16. *Id.*

17. *See id.*

18. *See id.* at 33-34.

19. *See id.* at 33.

20. This sense of subjectivity in judgment is, in part, what the rule against "Golden Rule" arguments is designed to avoid. *See id.* at 14-15.

maker reliability, to use the technical term), undermining the basic justice goal of treating like cases alike.

Compassion is also likely to bias legal decision making. For one thing, sympathetic or compassionate decision making is prone to diverge from the widely accepted ideal of impartial justice.<sup>21</sup> Research confirms this conflict between sympathy and impartial justice.<sup>22</sup> Participants in two experiments were faced with either the task of allocating relatively desirable or undesirable work assignments to employees or with the task of allocating scarce resources among deserving candidates.<sup>23</sup> In the first experiment, (procedural) justice dictated allocating the jobs by a random procedure; in the second, (distributive) justice dictated allocation according to need.<sup>24</sup>

In each experiment, participants who were instructed to imagine how the employee or potential recipient felt about the situation were more likely to allocate the better job or the scarce resource to the target person than justice principles required — and the participants themselves acknowledged that their choices were less fair.<sup>25</sup>

Additional unfair bias results both from the ways compassion is aroused (*i.e.*, the psychological “inputs” that influence the intensity of sympathy) and from how compassion affects social judgments (the psychological “outputs” resulting from the influence of sympathy).<sup>26</sup> Consider compassion’s inputs. A basic function of all emotions is to redirect the attention of the person experiencing the emotion. This function seems perfectly consistent with one major benefit of sympathy in legal judgment: it calls our attention to features of the case that are worth noticing and valuing. The redirection of attention and emphasis by emotion works well when the intensity of the feeling matches the urgency of the situation. Research shows, for instance, that levels of sympathy for an accident victim (and, hence, the urge to relieve the victim’s suffering) do correspond, to some extent, to the severity of the victim’s suffering.<sup>27</sup> But the intensity of a judge’s or juror’s emotional response to a case may not match its legal urgency. The ways in which sympathy is generated suggest that compassionate decision making is likely to be unfairly biased because the factors that cause sympathy

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21. See Feigenson, *supra* note 10, at 49.

22. *See id.*

23. *See id.*

24. *See id.* at 49.

25. *See id.* at 49-50.

26. *See id.* at 50.

27. *See id.*

do not correspond or are even irrelevant to the factors on which just decisions should be based. Any of three factors affecting the intensity of sympathy may be involved.

First, sympathy is subject to a salience bias. “Empathy and sympathy depend most on the sights and sounds of the person in pain.”<sup>28</sup> An empathy-based morality, as psychologist Martin Hoffman has argued, is therefore too prone to be biased by the salience and source of the stimulus.<sup>29</sup> “A cry of pain may arouse more empathic distress than a facial grimace; a friend’s or relative’s cry more than a stranger’s . . . .”<sup>30</sup> In general, the more salient the stimulus, the stronger the affective reaction. Yet the salience of a party’s suffering at trial may be affected as much by the lawyers’ talents in eliciting and evoking that suffering as by its true extent, in which case the intensity of emotional response would not reliably signal the appropriateness of that response.

Research also shows that compassion is more readily aroused the greater the *similarity* between observer and sufferer. The more similar to the sufferer the observer believes herself to be, the more readily and fully she can imagine what the sufferer’s world looks and feels like. Relatedly, the intensity of sympathy may be influenced by how much the perceiver *likes* the sufferer. But no acceptable legal or moral theory makes the similarity of the decision maker to the litigant or the likeability of the litigant relevant to the substantive justice of the outcome.

Compassion, like other emotional reactions, also tends to be more intense the more *unexpected* the event giving rise to the emotion. Research shows that observers tend to feel greater sympathy for the victim of an accident (or a crime) that occurs under exceptional circumstances. But the unexpectedness or perceived abnormality of an instance of suffering is not at all an accurate heuristic for whether a legal decision maker should mercifully seek to alleviate that suffering. Legal scholar Richard Delgado has eloquently explained how sympathy is liable, for exactly this reason, to ignore the most pervasive suffering: the more entrenched the poor become in their poverty, the more others become accustomed to the presence of the extremely poor, and the less sympathetic they are likely to be.<sup>31</sup>

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28. Feigenson, *supra* note 10, at 50.

29. *See id.*

30. *Id.*

31. *See id.* at 55.

Finally, consider compassion's outputs. Research on affect and social judgment also indicates that compassion may lead decision makers to perceive and weigh the evidence in a biased fashion.<sup>32</sup> This research shows generally that emotional feelings influence which facts decision makers will attend to, how much time they will spend poring over them, and how they will interpret and categorize them.<sup>33</sup> Decision makers' feelings in response to what they first learn about the case will affect their further perception and evaluation of the case, because they learn the evidence over a period of time and cannot withhold their judgments until all the evidence is in. And in the case of compassion or sympathy, the perspective-taking slants the observer's judgment in favor of the target of the emotion.<sup>34</sup>

These biases in compassionate legal judgment would not alone make compassion in tort law suspect, if the biases were those we would accept on moral grounds. Unfortunately, they are not. Favoritism based on the relative salience of the target person's suffering, the similarity of target to observer, the likeability of the target and the unexpectedness of the suffering bear no necessary connection to any coherent conception of fair decision making. The biases that compassion introduces to factual perception and interpretation only compound the problem. So to the extent that compassion motivates forgiveness and hence mercy, merciful tort decisions run a considerable risk of being biased and unfair.

Professor Murphy observes that mercy poses what he calls equal protection problems.<sup>35</sup> If there is a good reason to be merciful to A, then it must be (partly) because of some characteristic that A possesses. All things being equal, if B shares that characteristic, doesn't B, then, deserve equivalent mercy? But "deserve mercy" is an oxymoron. And if the giving of mercy remains optional, so that there is no paradox in not requiring mercy for B while continuing to recognize the characteristic as a good reason for mercy, the unequal treatment of A and B persists. If this is a bothersome feature

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32. *See id.* at 57-59.

33. *See id.*

34. I noted earlier that this perspective-taking makes judgment more subjective because it leads the observer to ascribe more of his or her own features to the target of observation. Relevant here is that this subjectivizing takes a particular direction: participants tend to attribute to the target person *positive* traits they attribute to themselves rather than neutral or negative ones. Thus, compassionate decision makers (unsurprisingly) tend to view the evidence favorably to the object of their compassion.

35. *See* HAMPTON & MURPHY, *supra* note 1, at 180-81.

with regard to the good reasons for being merciful, then it should trouble us all the more when unequal treatment results from less defensible features of compassion and mercy.

### Merciful Damages

Despite these misgivings, perhaps compassionate mercy could have a place in tort law, one that recognizes at least some of the virtues of forgiveness without being vitiated by (all of) the foregoing concerns. Consider that tort law (albeit to the chagrin of some) accommodates retributive emotions when it allows punitive damages to be assessed against defendants whose conduct is determined to be especially egregious or outrageous. Perhaps the law should also make room for forgiveness and mercy by allowing what I will call *merciful damages*. Merciful damages would *reduce* the extent of a culpable tort defendant's liability when the decision maker (properly) decides to be merciful toward the defendant. They would be determined in a separate damages phase of a bifurcated civil proceeding, after the liability decision. In the remainder of this essay I will briefly outline the when, how and why of merciful damages.

*When.* To determine when merciful damages would be warranted, let us turn to Professor Murphy's analysis of (private) forgiveness. Murphy argues that a victim ought to forgive wrongdoing in any number of situations in which it is possible to distinguish the immoral act from the immoral agent and thus to square forgiveness with self-respect and respect for the law.<sup>36</sup> Where the wrongdoer has separated himself from his act, we can "join the wrongdoer in condemning the very act from which he now stands emotionally separated"<sup>37</sup> without continuing to resent the person who committed the act. Forgiveness is morally appropriate where the wrongdoer (1) has repented or had a change of heart; (2) meant well or had good motives; (3) has suffered enough (for morally cognizable reasons); or (4) has undergone humiliation (for instance, through an apology ritual); and it is also appropriate (5) for old times' sake, out of recognition of the wrongdoer's personhood before the offense.<sup>38</sup>

Will any of these situations justify merciful decision making in the legal sphere? Some may. Repentance, sufficient suffering or

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36. *See id.* at 24-25.

37. *Id.* at 25.

38. *See id.* at 24. I do not address Murphy's argument that forgiveness may also sometimes be morally required. *See id.* at 29-32.

sincere apology by the tort defendant would seem to warrant a merciful response by a public decision maker just as they would support forgiveness by the private victim. Meaning well or having good motives could properly evoke mercy toward the would-be Good Samaritan whose carelessness leaves the victim worse off.<sup>39</sup> But there are difficulties. As a practical matter, many defendants who repent or apologize between tort and trial would presumably manifest that change of heart by settling the lawsuit, so there would not be much occasion for judge or jury to exercise mercy on those grounds.<sup>40</sup> Nor would forgiving for old times' sake find much purchase in many tort suits because of the lack of any prior (and potentially continuing) relationship between plaintiff and defendant.

Another ground for being merciful, however, may be peculiarly applicable to certain tort cases, and allows the tort decision maker to implement the same principle that Murphy's criteria share: warranting forgiveness by separating the sinner from the sin.<sup>41</sup> It should also tend to avoid the undesirable bias introduced by the personal emotional feelings that often drive forgiveness.<sup>42</sup> When jurors determine responsibility for harm, they tend to think (among other things) that bad outcomes must be due to bad people, and that the worse the outcome, the worse the cause.<sup>43</sup> The first is an extension of what psychologists call the correspondence bias or the fundamental attribution error: people act the way they do primarily because of the kinds of people they are rather than the kinds of situations in which they find themselves.<sup>44</sup> The second is an instance of what is known as thinking by representativeness: the sample resembles the universe from which it is drawn, the cause resembles the consequence it engenders.<sup>45</sup> The net effect of

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39. Experimental research shows that mock jurors take the actor's good motives into account in making punishment decisions in euthanasia cases when they interpret jury instructions as allowing them to do so. See Irwin A. Horowitz, *The Effect of Jury Nullification Instruction on Verdicts and Jury Functioning in Criminal Trials*, 9 *LAW & HUM. BEHAV.* 25 (1985).

40. That some apologizing defendants will not settle is presumed by Shuman's proposal that factfinders be permitted to reduce a tort plaintiff's noneconomic damages in recognition of the defendant's apology. See Daniel Shuman, *The Role of Apology in Tort Law*, 83 *JUDICATURE* 180 (2000).

41. See MURPHY & HAMPTON, *supra* note 1.

42. This ground is not necessary for an award of merciful damages; I am not sure whether it should alone be sufficient for them.

43. See NEAL FEIGENSON, *LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS* (2000).

44. See *id.*

45. See *id.*



these habits of thought is to conflate actor with outcome, sinner with sin.<sup>46</sup>

Sometimes this kind of thinking is especially inapt.<sup>47</sup> Sometimes the harm a defendant has caused the plaintiff is far out of proportion to the riskiness of his or her conduct, to the blameworthiness of the conduct *ex ante*. Indeed, many accidents are caused by mere inadvertence or impulse rather than intentional or even reckless disregard of the safety of others. The consequences of inattention, however, can be enormous: death or severe injury. In such cases it seems especially incorrect (albeit particularly tempting<sup>48</sup>) to identify bad outcomes with bad character. It is not so much that the tortfeasor has distanced himself or herself from his or her violation of the norm of reasonable care (for instance, by confession and apology) as that the circumstances show no great disrespect for the norm in the first place. Now as long as the defendant's conduct was sufficiently risky to reach the threshold of being considered negligent, the law entitles — commands — the decision maker to hold the defendant liable for the full extent of the injuries thus caused. When full liability is dictated by rule yet grossly disproportionate to just deserts, mercy would allow the decision maker to temper justice and decline to assess the (marginally blameworthy) actor with all of the (overwhelmingly negative) consequences of the act.

Thus, in awarding merciful damages, the decision maker in effect says to this sort of defendant: We recognize that you did wrong (acted negligently) and caused harm to the plaintiff. The magnitude of the harm, however, is so much greater than that the conduct probably risked that to say “the harm belongs to you” would impose unjustified suffering on you — no less unjustified (insofar as actual harm exceeds probable harm) than it would be to permit the plaintiff to bear that harm. Compassion is the appropriate re-

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46. For a detailed discussion of these and other habits of common sense legal decision-making, see FEIGENSON, *supra* note 43.

47. See Shuman, *supra* note 40.

48. When jurors are confronted with the task of assigning liability that seems disproportionate to blameworthiness, they may be prone to restore proportionality, a hallmark of common sense justice, by resorting to blaming habits that convert mere inadvertence into (greater) culpability. Thus the cause will seem to resemble the effect, and the punishment will seem to match the offense. Melodramatic thinking, in which bad outcomes like accidents are traced to the bad conduct of bad guys, is the jury's way of doing this. (And mercy tempers the consequences of juries' tendency to use melodramatic thinking to magnify the egregiousness of a tort defendant's conduct.)

sponse to the perception of unjustified suffering, and compassion motivates mercy.<sup>49</sup>

Think of merciful damages on this ground as a way to fine-tune Holmes's insight that liability attaches to the moral quality of (risky) action and not to action *per se*.<sup>50</sup> One who inadvertently causes serious harm or injures through conduct that falls slightly short of the community's expectations has indeed behaved in a blameworthy fashion — but not in a *very* blameworthy fashion. Harm in excess of culpability is just bad luck, not truly indicative of the blameworthiness of the actor as a person. Damages, however, must be paid by people, not their acts; in a third-party liability regime there is no practical way to disentangle the two even if morality suggests they should be distinguished. Merciful damages would allow decision makers to recognize the difference between the nature of the act and the nature of the actor when the difference is plain.

The idea of merciful damages is not entirely unanticipated in the law. In his recent article, Daniel Shuman points out that many states permit the fact finder to consider the defendant's public apology in mitigation of damages for defamation.<sup>51</sup> Shuman himself recommends extending this concept to allow the fact finder to reduce the plaintiff's intangible or noneconomic losses by recognizing the defendant's apology in any kind of case.<sup>52</sup> Merciful damages goes still further by permitting a reduction in the defendant's liability whenever mercy is warranted.<sup>53</sup>

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49. This kind of case should be distinguished from those in which tort law *entirely relieves* the defendant of responsibility on the ground that the (extensive) damages were *unforeseeable*. Forgiveness and mercy do not negate responsibility but rather (some of) what would otherwise be its consequences. Cf. Joanna North, *The "Ideal" of Forgiveness: A Philosopher's Exploration*, in *EXPLORING FORGIVENESS* 15, 17-18 (Robert D. Enright & Joanna North, eds., 1998). Consider, for instance, *Petition of Kinsman Transit Company*, 338 F.2d 708 (2d Cir. 1964). To simplify the facts, a shipowner negligently secured one of its boats to a dock, so that it was knocked loose by floating ice and crashed into a drawbridge that the city had negligently failed to raise. Ship and bridge dammed the flow of ice, causing widespread flooding. The court held both shipowner and city liable, rejecting their argument that their carelessness could not be considered the proximate cause of such vast damages and reasoning that the harm they caused was exactly the sort that should have been anticipated given their negligence, only greater. Had the defendant's carelessness been less pronounced (and perhaps also had the defendants met one or more of Murphy's five criteria), this could have been a proper case for liability followed by mercy.

50. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 76-77 (1881/1963).

51. See Shuman, *supra* note 40.

52. See *id.*

53. Shuman's recommendation resembles the merciful damages proposed in this paper in that it would apply to any kind of tort case, and would be decided by the fact

*How.* A few comments on the administration of merciful damages are in order. Relegating the merciful decision to a later, "damages phase" of trial, as I suggested earlier, promises some advantages. First, exercising mercy with regard to damages instead of liability would be more consistent with Murphy's conception of forgiveness as distinct from excuse, justification, or any other mitigation of responsibility. Forgiveness (and resentment) pertain to wrongdoing that is neither excused nor justified; one who forgives recognizes the wrongdoer's responsibility but then treats the wrongdoer less harshly than he or she has a right to do.<sup>54</sup> In the proposed scheme, the defendant's responsibility would first be decided in a liability phase of trial. Only the legally responsible defendant is subject to damages, and only such a defendant, whose responsibility has been recognized, could benefit, in a second phase of trial, from a merciful reduction in damages.<sup>55</sup>

Second, while the objections to the use of compassion in legal decision making discussed earlier would still apply to the decision whether to award mercifuls, at least some would apply with less force. Because forgiveness and mercy address the tortfeasor and not the tort, the sinner and not the sin,<sup>56</sup> more legally irrelevant information about the defendant would come before the decision maker, and the subjectivity and bias inherent in compassionate judging would continue to be a risk. If damages are determined after liability, however, compassion would not skew the basic liability judgment. Compassion would be no more likely to exonerate the defendant than it is now. The risk of unequal treatment of similarly situated defendants would remain, but would at least be confined to the damage award. In short, just as information not relevant to a capital defendant's guilt or innocence may be admitted into evidence in the penalty phase so that the decision makers may reach a morally superior sentence, so a damages phase in

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finder on a case-by-case basis. Merciful damages differ from Shuman's proposal, however, in a couple of important respects. First, as noted in the text, merciful damages may be warranted for reasons other than the defendant's apology. Second, an award of mercifuls would not reduce the plaintiff's recovery. See *supra* notes 49-52 and accompanying text.

54. See MURPHY & HAMPTON, *supra* note 1, at 20.

55. Merciful damages are thus distinguished from the sense in which the general tort rule of negligence can itself be described as "forgiving" (by comparison with strict liability), because the application of the more lenient negligence rule (where it makes a difference) results in a decision of no liability in the first place — which is not what Murphy and others mean by forgiveness. See *supra* note 49 (contrasting merciful damages with proximate cause limitations on legal responsibility).

56. See MURPHY & HAMPTON, *supra* note 1, at 24-25.

which mercifuls are possible would admit otherwise extraneous party information in order that the court decide on a morally superior award.<sup>57</sup>

An obvious objection to this proposal, even conceding that the defendant who (carelessly) causes harm far out of proportion to his blameworthiness may be a proper target of compassion, is the tort law precept that “where one of two innocent persons must suffer a loss, it should be borne by the one who occasioned it.”<sup>58</sup> Merciful damages would hardly be morally appropriate if they resulted in undercompensating a blameless and deserving victim — especially given experimental<sup>59</sup> and jury verdict<sup>60</sup> research showing that tort jurors may already be prone to anti-plaintiff bias in awarding compensatory damages. To address this concern, the state could establish a fund from punitive damages paid to the state instead of directly to the plaintiff (as some states already mandate<sup>61</sup>) and use that fund to make up shortfalls from full compensation created by mercifuls. These shortfalls are almost certain to be smaller on average than the funds generated by the average punitive award, because punitives can range up to many times compensatory damages, whereas mercifuls cannot exceed compensatory damages. Moreover, assuming that mercifuls are confined to unusual cases, such as those in which harm appears greatly to exceed culpability, they should be awarded only exceptionally — perhaps something

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57. This would not entirely avoid evidentiary problems. Federal Rule of Evidence 408, for instance, makes evidence of a defendant's apology inadmissible if made during compromise negotiations, and some states make a defendant's “benevolent gestures” inadmissible. See, e.g., MASS. GEN. LAWS ch. 233, § 23D (1999). As Shuman points out, there is at least a tension between the therapeutic value of apology for the victim, which is generally highest when the apology is prompt, and the evidentiary rules that protect only those apologies made during settlement talks. See Shuman, *supra* note 40.

58. *Seals v. Snow*, 254 P. 348, 349 (Kan. 1927).

59. Neal Feigenson et al., *Effect of Blameworthiness and Outcome Severity on Attributions of Responsibility and Damage Awards in Comparative Negligence Cases*, 21 LAW & HUM. BEHAV. 597 (1997); Doug Zickafoose & Brian Bornstein, *Double Discounting: The Effects of Comparative Negligence on Mock Juror Decision Making*, 23 LAW & HUM. BEHAV. 577 (1999).

60. See James Hammitt et al., *Tort Standards and Jury Decisions*, 14 J. LEG. STUD. 751, 752 (1985).

61. See, e.g., IOWA CODE ANN. § 668A.1(2)(b) (West 1999). See generally Sonia Larsen, Annotation, *Validity, Construction, and Application of Statutes Requiring that Percentage of Punitive Damage Awards be Paid Directly to State or Court-Administered Fund*, 16 A.L.R. FED. 129 (1993).

in the range of the 5% or so of cases in which punitives are now awarded,<sup>62</sup> so that the fund should not readily be exhausted.<sup>63</sup>

*Why.* Let me conclude by suggesting why merciful damages, if the idea can survive the criticisms raised earlier, might be a good thing. There is, first of all, a pleasing moral symmetry in permitting tort decision makers to judge mercifully. Just as punitive damages empower decision makers to give vent to anger and outrage at malicious conduct that results in relatively minor damage, so merciful damages would empower them to relieve defendants who have merely been careless of some of the overwhelming consequences of their behavior — behavior in which any of us could easily imagine ourselves engaging.

Forgiveness and mercy may also be therapeutic for the tortfeasor. Without mercy inspired by forgiveness, the likelihood is greater that an individual defendant will return again and again, even obsessively, to the memory of the transgression, which will continue to define his current existence as the linchpin of his self-narrative.<sup>64</sup> Forgiveness and mercy exercise a kind of social influence on the tortfeasor, through which society tells him or her, “You

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62. See generally Michael Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WIS. L. REV. 15.

63. Jury research suggests another reason why being merciful to tortfeasors in the way my proposal permits may be unjust to their victims. Experiments varying trial format show that plaintiffs win less often in bifurcated trials than they do in unitary trials (although when they win, they receive larger awards). See Irwin Horowitz & Kenneth Bordens, *An Experimental Investigation of Procedural Issues in Complex Tort Trials*, 14 LAW & HUM. BEHAV. 269 (1990). This may very well be because the sympathy for victims evoked by proof of damages sometimes inclines jurors in unitary trials to decide for the victims on the question of liability. Yet it would hardly seem fair to make room for leniency toward injurers at the expense of depriving some (otherwise deserving) victims of any recovery at all.

It could be argued, on the other hand, that juries, recognizing the availability of mercifuls, could inflate their compensatory damages awards, confident that the increment would be assessed to the fund, not to the defendant. Appropriate jury instructions permitting mercifuls only in exceptional cases could address this concern.

Another, procedural objection to the proposal is that every case would have to be bifurcated, because it most likely could not be determined in advance which cases would be strong enough candidates for a possible award of mercifuls. Currently only unusually complex cases tend not to be tried in unitary proceedings. This would somewhat simplify trials in which defendants are ultimately found not liable (by eliminating proof of damages), but would lengthen proceedings in the slight majority of cases in which defendants are found liable. Note that Shuman also recommends bifurcated proceedings. See Shuman, *supra* note 40.

64. See JEFFERSON A. SINGER & PETER SALOVEY, *THE REMEMBERED SELF* 42 (1993); cf. E.D. Scobie & G.E.W. Scobie, *Damaging Events: The Perceived Need for Forgiveness*, 28 J. THEORY SOC. BEHAV. 373, 395 (1998).

are not that act of negligence. It's okay to tell a new story about yourself."<sup>65</sup>

The value of merciful damages for the tort *victim* is another matter. Forgiveness, which as we have seen may inspire mercy, has often been proclaimed as therapeutic for the victim because it reduces the anxiety and stress associated with continuing anger and resentment.<sup>66</sup> (It may be observed that these positive health effects of forgiveness are based largely on anecdotal experience and clinical observation, and some researchers have pointed to a lack of quantitative empirical support for such claims.<sup>67</sup>) Perhaps more importantly from the victim's perspective, mercy may be valuable because, as Professor Murphy writes of forgiveness, it reflects moral humility, the victim's recognition that he or she, too, could offend and desire forgiveness, and would want to live in a world in which that forgiveness would be forthcoming.<sup>68</sup> Murphy also lauds the victim who, acting out of (appropriate) compassion, mercifully waives his or her right to enforce a legal obligation, because the "disposition to mercy" helps to reign in the "narrow and self-involved tendenc[y]" always to stand on our rights.<sup>69</sup>

But how can these benefits accrue to the tort victim when it is the *legal decision maker* who may award merciful? Indeed, what can be good about an act of mercy by the community toward a tortfeasor to whom the victim himself or herself, by proceeding to trial, has chosen not to be merciful? It is this: the public exercise of forgiveness and mercy is more impressive and more meaningful than the merely private. Only through lawful, public acts can the

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65. Cf. HANNAH ARENDT, *THE HUMAN CONDITION* 237 (1958).

Without being forgiven, released from the consequences of what we have done, our capacity to act would, as it were, be confined to one single deed from which we would never recover; we would remain the victims of its consequences forever, not unlike the sorcerer's apprentice who lacked the magic formula to break the spell.

*Id.* Later Arendt expands the point:

[F]orgiveness may be the necessary corrective for the inevitable damages resulting from action . . . . [T]respassing [as opposed to 'crime and willed evil'] is an everyday occurrence which is in the very nature of action's constant establishment of new relationships within a web of relations, and it needs forgiving, dismissing, in order to make it possible for life to go on by constantly releasing men from what they have done unknowingly.

*Id.* at 239-40.

66. See, e.g., Richard Fitzgibbons, *Anger and the Healing Power of Forgiveness: A Psychiatrist's View*, in *EXPLORING FORGIVENESS* 63 (Robert D. Enright & Joanna North, eds., 1998).

67. Scobie & Scobie, *supra* note 64, at 376.

68. See MURPHY & HAMPTON, *supra* note 1, at 32.

69. *Id.* at 176.

community affirm that *as a community* it displays the virtues of moral humility and not always standing on its rights. And because it acts through a public, lawful process, the community can be more confident that its mercy is morally appropriate, because it is not due to the victim's insufficient self-respect or insufficient respect for the rule or norm the defendant has violated. If we may presume that the tort victim who forgoes mercy by not settling (even after receiving the defendant's apology and, let us say, reasonable settlement offer) cedes to the community (represented by judge and jury) the right to determine satisfactory compensation, then the community may properly grant mercy even where the victim has not, thereby expressing its contrary view that mercy is warranted. It may even be that the victim will be led by the community's merciful example to become more forgiving (and thus to obtain the benefits that supposedly accrue therefrom).<sup>70</sup>

Finally, merciful decision making may be valuable because it addresses not just the tortfeasor, the victim, and the relationship between them, but also the relationship of both tortfeasor and victim to the community.<sup>71</sup> Forgiveness and mercy help to reintegrate the defendant into the community, reducing the debilitating social consequences of disconnectedness.<sup>72</sup> A priest and former police chief writes that the best way for a police department to respond to a big public mistake (e.g., the beating of Rodney King) may be to apologize and seek forgiveness,<sup>73</sup> and that forgiveness promises to benefit both the police and the public by alleviating their mutual sense of alienation and antagonism. It is not inconceivable that an analogous reduction in the alienation pervasive in consumerist society would ensue if corporate defendants were given an incentive to elicit forgiveness and mercy instead of treating victims of their

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70. Another divergence between the community's exercise of mercy and the tort victim's is that a jury might more readily be merciful with someone else's money. Making up merciful reductions in the victim's damages out of state funds, as proposed earlier, only partly responds to this objection, because even though the plaintiff will not be undercompensated as long as the compensation fund is solvent, jurors may still be too merciful too often for the solvency of the fund.

71. See Walter J. Dickey, *Forgiveness and Crime: The Possibilities of Restorative Justice*, in *EXPLORING FORGIVENESS* 106, 107 (Robert D. Enright & Joanna North, eds., 1998).

72. For a thorough discussion of restorative justice based on apology and reparations by the criminal offender, emphasizing the value of reintegration into the community, see Gordon Bazemore, *Restorative Justice and Earned Redemption: Communities, Victims, and Offender Reintegration*, 41 *AM. BEHAV. SCI.* 768 (1998).

73. See David Couper, *Forgiveness in the Community: Views from an Episcopal Priest and Former Chief of Police*, in *EXPLORING FORGIVENESS* 121, 126-27 (Robert D. Enright & Joanna North, eds., 1998).

products as quantifiable variables in calculations of expected accident costs.<sup>74</sup> Note also that giving defendants an incentive to apologize could also increase the number of settlements and reduce the number and cost of antagonistic, divisive lawsuits.<sup>75</sup> And the incentive seems real: what little empirical research there is indicates that confessing one's blameworthy actions does indeed reduce observers' anger toward the actor and increases their inclination to forgive.<sup>76</sup> So tort defendants would have reason to believe that contrition may pay off in the form of the enhanced prospect of mercifuls, as well as a better relationship with the community.

### CONCLUSION

Six centuries ago, the lawyer for a man whose servant properly set a fire but then carelessly tended it, so that it spread to the plaintiff's house and burned it, argued that his client "will be undone and impoverished all his days if this action is maintained against him; for then twenty other such suits will be brought against him for the same matter."<sup>77</sup> The judge responded: "What is that to us?"

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74. It may be relevant to note that, judging by the size of punitive damage awards, jurors seem to get angriest at corporate defendants who they believe to have subordinated consumer safety to cost-benefit calculations. See, e.g., *Anderson v. General Motors*, No. BC 116-926 (Cal. Super. Ct., July 9, 1999), in which a jury awarded burn victims of exploding gas tanks \$107 million in compensatory damages and over \$4.8 billion in punitive damages. (The trial judge later remitted the award to approximately \$1 billion, and the defendants are appealing the decision. See 43 JURY VERDICT WEEKLY 39 (Ca.).

75. See Cohen, *supra* note 5.

76. Bernard Weiner et al., *Public Confession and Forgiveness*, 59 J. PERSONALITY & SOC. PSYCHOL. 281 (1991). In another experiment, a little boy who transgressed (by helping a confederate trip a little girl) was perceived to be less aggressive and less deserving of punishment when he expressed remorse after the incident than when he expressed pleasure in what he had done. See Gary S. Schwartz et al., *The Effects of Post-Transgression Remorse on Perceived Aggression, Attributions of Intent, and Level of Punishment*, 17 BRIT. J. SOC. & CLINICAL PSYCHOL. 293 (1978). In addition, two studies show that children blame and punish transgressors less when the actor apologizes. See Bruce W. Darby & Barry R. Schlenker, *Children's Reactions to Apologies*, 43 J. PERSONALITY & SOC. PSYCHOL. 742 (1982); Bruce W. Darby & Barry R. Schlenker, *Children's Reactions to Transgressions: Effects of the Actor's Apology, Reputation and Remorse*, 28 BRIT. J. SOC. PSYCHOL. 353 (1989). Research on victims' responses also indicates that the offenders' apologies improve victims' impressions of the offenders and reduce victims' tendency to be aggressive toward the offenders. See Ken-ichi Ohbuchi et al., *Apology as Aggression Control: Its Role in Mediating Appraisal of and Response to Harm*, 56 J. PERSONALITY & SOC. PSYCHOL. 219 (1989). However, as Shuman emphasizes, these effects have not been shown for serious harms, so the incentives in at least some instances warranting merciful damages (those in which harm greatly exceeds culpability) are in question. See Shuman, *supra* note 40.

77. *Beaulieu v. Finglam*, Y.B. 2 Hen. IV, f. 18, pl. 6 (1401).



It is better that he should be utterly undone than that the law be changed for him"<sup>78</sup> Who today is not taken aback (at the very least) by this response? If it would be an improvement in the morality of our tort law to allow for exceptional acts of mercy, then perhaps merciful damages would be a good way to do it.

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78. *Id.*

# RESTORATIVE JUSTICE AND THE PROSECUTOR

*Frederick W. Gay\**

## INTRODUCTION

The dream of courtroom battle leads many young lawyers to the door of the prosecutor's office. Seeking to test newly acquired litigation skills against more seasoned opponents, the recent law school graduate relishes the opportunity to wear the white hat in a classic confrontation of good versus evil. It is this "us versus them" mentality that permeates the traditional prosecutor's office.

What the young prosecutor soon finds, however, is an active caseload of 200-300 cases in which the facts of today's new cases blur with those of yesterday's and last week's. For every trial on the misdemeanor docket there are ninety-nine other cases that the prosecutor must handle by way of initial appearance, arraignment, pre-trial conference and guilty plea.

Overcrowded prisons, jails and community corrections facilities force the young prosecutor to realize that not every "bad guy" is going to do the time deserved. This "injustice" begins to gnaw at his core beliefs. He begins to see himself trapped in the endless paper chase that he swore he would never be party to. He fields endless calls from defense attorneys who seem to have only one "wrongfully accused, innocent" client. He covers for every other prosecutor in the office on a moment's notice because prosecutors are said to be "fungible." He sits quietly by as countless victims air their complaints about insensitive cops, defendants getting away with murder, prosecutors too busy to return phone calls, unfeeling judges and the failed "system." Our young prosecutor whose only goal was to save the world soon finds himself daydreaming about packing his bags and going over to the "dark side" of private practice and the billable hour.

It is within this context that the emerging concept of restorative justice may have a chance of taking root in the prosecutor's office.

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There are many prosecutors now beginning to realize that the prosecutor's office is a key player in the management of the criminal justice system. Governmental funding sources are requiring prosecutors to accept responsibility for their actions. The prosecutor must now be an active participant in pre-trial detention decisions that impact jail overcrowding and in post guilty plea/trial sentencing recommendations that impact general system overcrowding.

Some prosecutors now recognize that they are the gatekeepers of the system. Their charging decisions, pre-trial detention positions and sentence recommendations go a long way in deciding which defendants flow to what level of supervision and/or incarceration. Once the prosecutor accepts his role as gatekeeper, it is a short jump to the paradigm shift from the "trail 'em, nail 'em, jail 'em" mentality that pervades the traditional criminal justice system, to the restorative justice mind set that considers every case in light of what outcome best addresses the needs of the victim, community and offender. The restorative justice concept provides another path to pursue, one that addresses public safety demands while meeting the needs of the victim and the community far better than the traditional system. This approach is more personal and involves both victim and community. It is more focused on reparation, restitution and accountability with less emphasis on punishment alone. Restorative justice is much more concerned about remedying harms than exacting punishment.

## **I. RESTORATIVE JUSTICE IN POLK COUNTY**

The Polk County Attorney's Office in Des Moines, Iowa, presently operates several programs that are restorative in nature. However, the office did not embrace the concept of restorative justice at any specific point in time. Rather, the recognition that restorative justice principles have a place in the way prosecutors participate in the delivery of justice has evolved slowly over the past decade, with the building blocks of a restorative justice practice being laid in a somewhat haphazard fashion.

### **A. Victim Offender Reconciliation**

In 1978, the Polk County Attorney's Office established the Polk County Neighborhood Mediation Center (the "Center") as a site where the resolution of relatively minor disputes could occur outside the formal legal process. From 1978 through 1990, the Center, contracting with trained mediators, handled hundreds of cases annually. Most of these cases would otherwise have worked

their way to Small Claims' Court or the Simple Misdemeanor Court.

In 1991, the Polk County Attorney's Office made the decision to institute a Victim Offender Reconciliation Program ("VORP"), loosely modeled after a community-based program in Elkhart, Indiana. The initial cases for this program involved unemployment fraud in which offenders had illegally received benefits. Defendants were given the opportunity to have a felony fraud charge reduced to a non-felony *after* successful completion of a victim offender mediation in which the offender met a state fraud investigator and reached a facilitated agreement concerning the restitution amount and a reasonable payment plan.

It soon became apparent that program referrals could be made in other types of criminal cases in which there was a *real* victim. Prosecutors began referring a variety of non-felony offenses to the program (assaults, thefts, harassments, criminal mischiefs, etc.). In almost all cases, the referrals were prior to guilty plea. Agreements stated that if defendants participated in good faith in a VORP, the state would either reduce the pending charge or recommend a more favorable disposition to the court at the time of sentencing. It became apparent that most offenders and victims were willing to participate in a VORP. Victims routinely reported in post-meeting victim impact statements that their victim-offender meetings allowed them to get answers from offenders about the crime. They also reported that the mediations allowed them to obtain closure in a way not otherwise possible.

Since the inception of the VORP in Polk County over eight years ago, more than 5000 victim offender mediations have been held. Agreements have been reached in more than ninety percent of the cases handled. There are nearly as many felony as non-felony offenses referred to the program with burglaries, robberies, thefts and forgeries the most common. A number of murder, vehicular homicide, kidnapping and sexual assault cases have been handled as well.

While referrals during the first two years of the VORP were exclusively from the Criminal Division of the Polk County Attorney's Office, the criminal court in Polk County now routinely orders defendants to participate in the program. In nearly all felony cases in which there is a crime involving a victim, the presiding judge orders the offender to meet with the victim (if the victim is willing) following the guilty plea and prior to sentencing. The purpose of the meeting is three-fold: (1) to allow the victim and the offender to

talk about the impact of the crime on the victim; (2) to allow the offender the opportunity to apologize; and, if needed, (3) to reach an agreement on a plan of restitution. If an agreement is reached, it is presented to the court at the time of sentencing. In misdemeanor cases where the guilty plea and sentencing almost always occur at the same time, the victim offender meeting is ordered as a condition of the defendant's probation.

The criminal court judges in Polk County recognize that the opportunity to participate in a victim offender meeting is an important need of crime victims. In a 1997 telephone survey by Polk County Attorney staff of victims who had participated in the program, ninety-six percent stated they would choose the program again, ninety-six percent stated they would recommend the program to other victims and eighty-six percent found meeting their offender to be helpful. Of offenders surveyed, eighty-eight percent reported they had apologized to the victim and sixty-two percent stated they felt the victim had a higher opinion of them as a result of the mediation.

More important than the numbers and the statistics is the fact that the VORP process allows victims and offenders to meet in the aftermath of a crime in a way that, until now, has not been possible. Our adversarial system of justice, while necessary to protect the rights of defendants, insulates both the victim and the defendant from the very real human contact that is often necessary. It is becoming increasingly apparent that victims have questions that only defendants can answer. Victims need to express to defendants the grief, fear, anger, and rage experienced as a result of the crime; they need to hear expressions of remorse and apology from offenders. In addition, many offenders do have remorse and want to apologize for their hurtful actions. Many offenders want to somehow make right their wrongs.

While every VORP is an not unqualified success, the overwhelming majority are.

Without the VORP process, a rabbi and members of his synagogue would not have met with two young neo-Nazis who had desecrated their place of worship with Nazi style graffiti. An agreement would not have been reached requiring direct service to the temple and completion of a high school level Jewish history course. A transformation would not have taken place that allowed both victims and offenders to shed their labels and, ultimately, consider each to be their friends.

Without the VORP process, a young woman, sexually abused as a child, would not have obtained the closure that counseling and therapy could not provide.

Without the VORP process, a young man who nearly died as the result of knife wounds suffered in an unprovoked attack would not have met with his assailants, found out why he had been targeted, and been allowed to tell them how the attack had cut short a promising baseball career.

Without the VORP process, the daughter of a woman killed by a drunk driver would not have met with the driver. She would not have learned that, in the minutes after her mother's death, the driver had a vision of the deceased entering his vehicle to comfort him and tell him that it would be alright. The driver would not have learned that the daughter had a similar vision of her mother's actions as she drove to the scene of the accident.

### **B. Youthful Offender Program**

While Victim Offender Reconciliation may well be the most recognizable manifestation of the core principles of restorative justice, other initiatives can also embody these principles. A second restorative justice program initiated by the Polk County Attorney's Office is the Youthful Offender Pre-Trial Intervention Program ("YOP"). The YOP was started in July, 1992 in response to the increasing number of sixteen- and seventeen-year-old offenders waived from juvenile to adult court on felony charges. The program's goal has been to provide first-time felons ages sixteen to twenty-one with services not available in the adult correctional system.

Offenders offered admission into the program are given the opportunity to plead guilty to a non-felony charge and, in most cases, receive a deferred judgment. To obtain this disposition, offenders are released on a pre-trial status to the YOP and must complete all program requirements before being allowed to plead guilty to the non-felony target charge.

The YOP draws upon a variety of community-wide resources to provide a holistic approach to rehabilitation of youthful offenders. Partners in the program are the Polk County Attorney's Office, the Fifth Judicial District Department of Corrections, Employee and Family Resources and others. The program is designed as a sentencing alternative, diverting targeted offenders from prison sentences or ineffective probation sentences by providing programming in the areas of education, substance abuse, attitudinal/behav-

ior change and job training. Incarceration is recommended only for those offenders who do not complete the YOP. Approximately seventy-five percent of offenders complete the YOP and are placed on formal probation following a guilty plea to the agreed upon non-felony charge. Offenders who fail to complete the YOP are prosecuted for the initial offense(s).

## **II. RESTORATIVE JUSTICE REFERS TO JUSTICE PROCESSES**

Restorative justice involves not only just results for all concerned but also just processes. The traditional criminal justice system is cumbersome, to say the least. Repeated court appearances for offenders and victims alike, leave many caught in its web frustrated and disillusioned. In the past few years, the Polk County Attorney's Office has begun to recognize that the prosecutor plays a key role in assuring that the criminal justice system is an efficient one that makes the best use of scarce resources. Toward this end, the office has implemented several programs based on restorative justice principles that seek to streamline the process and ease system pressure at various levels.

### **A. Structured Fine Program**

With the assistance of federal dollars, a pilot Structured Fine Program (Day Fine Program) was started in January, 1992. Operating on the premise that fines should be based on the level of the crime *and* the offender's ability to pay, staff was devoted to computation and collection of these fines. In less than four years, Polk County witnessed a 250 percent increase in both the collection rate and the dollars collected from fines. This occurred at the same time that the average fine for non-felony offenses decreased considerably as the result of lower fines assessed to those least able to pay. State legislation enabling this pilot program lapsed in 1996. However, efforts are underway to push for new legislation that would allow for the continuation of the program.

### **B. Welfare Fraud Program**

A Welfare Fraud Prosecution Program was initiated in the summer of 1998 to streamline the prosecution process, decrease the burden on the court system and on the Department of Corrections, involve the local community, and educate offenders so that recidivism is reduced.

Offenders are offered admission into the program by letters sent by the Polk County Attorney's Office advising them that a referral for felony prosecution had been received from the State of Iowa but that they can earn the opportunity to plead guilty to a misdemeanor if they attend a meeting at the Polk County Attorney's Office, enter into a plan of restitution, and attend a day-long class designed to teach skills in the areas of budgeting, credit issues, stress management and job seeking. They are also advised that they can meet with representatives from Polk County Legal Aid prior to the county attorney meeting. This process of notifying offenders by letter significantly impacts the prosecution process. Most offenders charged with a felony are arrested, booked, jailed, required to post a bond and make an average of five court appearances. The process utilized in this program requires appearance at one group meeting and the day-long class. There is no initial appearance, bond review, preliminary hearing, formal arraignment, pre-trial conference or discovery. In fact, there is no appearance at the courthouse at all, as the guilty plea is taken by a judge at the site of the required class. There is no law enforcement expense that would normally result from an investigation, arrest, booking and incarceration. There is no expense incurred by the Department of Corrections as none of these offenders are placed on supervised probation.

Finally, the community is involved in this program in two ways. First, volunteers provide the programming for the class that each offender must attend. Second, the class is hosted by a local church and participating area churches provide, at no charge to the offender, the noon meal that is served to the offenders. The volunteers and the offenders eat lunch together.

From September 1, 1998 through October 30, 1999, 114 offenders successfully completed the program, returned to court, entered guilty pleas to a misdemeanor and received either a deferred judgment or suspended sentence. All offenders were placed on an unsupervised probation with the requirement that they abide by their restitution plans and pay court costs. The total amount of restitution agreed to and ordered in the 114 cases was \$385,536.

### **C. Truancy Court Program**

Initiated in the fall of 1997, the Truancy Court Program, is a joint effort of the Polk County Attorney's Office, the Des Moines Public Schools, and the Polk County District Court. This program attempts to reach the parents of truant elementary school children



before the filing of formal charges. Letters are sent to parents of truant students inviting the parents to attend a voluntary session of Truancy Court. After meeting with a District Court Judge, the parents meet with staff from the Polk County Attorney's Office and sign up for mediation sessions with school social workers. The sessions are facilitated by mediators from the Polk County Attorney's Office Restorative Justice Center.

During the 1997-98 school year, thirteen elementary schools participated in the Program with referrals limited to students from the first, second and third grades. Schools reported that the students in the program averaged a sixty-five percent reduction in truancy days over the course of the school year. As a result of the first year success, the Program was expanded to all forty four elementary schools for the 1998-1999 school year. Preliminary figures indicate a greater than fifty percent reduction in truancy days for the 1998-1999 school year. Because of its success, the program was expanded to students in first through fifth grade for the 1999-2000. Plans are underway to further expand the program to include sixth through eighth grades for the 2000-2001 school year.

#### **D. Bad Check Restitution Program**

Initiated in January, 1999, the Polk County Attorney Bad Check Restitution Program aids individuals and businesses victimized by bad check losses and provides bad check writers with an educational opportunity designed to curtail their bad check writing habits. The goals of the program are to increase the accountability of bad check writers and recover losses for businesses, without increasing the administrative burden on the court system. It is offered at no cost to businesses or taxpayers and is funded through fees paid by the bad check writers.

To satisfy the requirements of the Program, and to avoid criminal prosecution, the bad check writer must pay full restitution to the victim and attend an eight-hour intervention class. The class is an integral part of the Program's success in reducing the number of non-sufficient funds checks in Polk County. It is designed to have offenders take responsibility for their actions and to help them recognize problems that might contribute to their bad check writing practices.

#### **E. Drug Court Program**

The Polk County Drug Court is aimed at those in the community who are addicted to a controlled substance and engage in criminal

behavior. Drug Court is a collaboration between the Polk County Attorney's Office, the Fifth Judicial District Dept. of Corrections, the Public Defender's Office, Employee and Family Resources and the judiciary. Drug Court is designed to meet the needs of both pre-plea and post-plea offenders. At any given time, approximately forty to fifty clients are under the supervision of Drug Court.

The Court is driven by intensive treatment and supervision of the client. All clients are expected to honestly and accurately report their progress since the last contact with any staff member. Weekly staff meetings are held to discuss problems with the clients. Drug Court requires the offender to attend Court as frequently as weekly, but no less than once a month. Random drug screens are required. The Drug Court Program has four phases with each phase lasting approximately three months. An offender entering the Program is placed in phase one which involves the most intense monitoring and contact. As the offender moves through the Program, the level of monitoring diminishes unless the offender's behavior suggests that a return to more intense monitoring is needed. In that event, the offender may be returned to an earlier phase of the Program. As the judge is a member of the team, all proceedings and processes are overseen by the judiciary. The Court encourages clients who are successful by providing donated passes to sporting events, certificates, and phase changes. Sanctions may involve increased level of treatment, increased supervision, and brief periods of detention in the county jail.

If the offender enters the Court prior to guilty plea, the offender must sign a plea agreement setting forth all terms and conditions of the program, including any fees and expectations. A target charge and sentence is outlined in the agreement as well. Upon completion of the program, the defendant enters a plea of guilty to the target charge and is required to fulfill any additional probation requirements. Offenders who fail to complete the program will be prosecuted for the offense with which they were initially charged. If the offender enters the Court as part of a diverted sentence or probation, the offender must complete the remaining sentence under general probation. Since its inception, more than forty offenders have graduated with only two former clients receiving new criminal charges since their Drug Court graduation.

### F. Jail Court

A Jail Court has been created in the Polk County Jail to help alleviate jail overcrowding. The county attorney's office has assigned a full-time prosecutor and a full-time legal assistant to staff the jail courtroom. In addition, a second prosecutor is assigned to handle only felony cases of incarcerated pre-trial defendants. Non-felony cases are placed on a fast track with formal arraignment occurring ten to twelve days following arrest rather than the traditional thirty-five to forty days. The staff assigned to this docket works closely with the judge, public defender, probation officer, substance abuse specialist, and jail review specialist assigned to the jail courtroom. A third full-time prosecutor staffs the county's three extended pre-trial release programs, *i.e.*, Drug Court, Intensive Supervision Pre-Trial Release, and the Youthful Offender Program. The ultimate goal of this team is to expedite case processing without sacrificing community safety.

### III. BLUEPRINT NEEDED

The Polk County Attorney's Office believes it has made progress in addressing victim, community and offender needs in the face of fiscal limitations. However, the office acknowledges that changes in office policy and procedure that have attempted to implement restorative justice concepts have been somewhat piecemeal. While a vague restorative justice vision has guided certain aspects of the office over the past few years, there is no blueprint for what a comprehensive restorative justice system would look like or how it would operate within the county. Assuming that the prosecutor is at the most critical juncture of the system, it may well be that most of the necessary pieces are present in the county to move to the next level.

Perhaps most critical is the existence of an experienced and well-staffed mediation center. Clearly, the foundation of restorative justice is victim-offender mediation in its various forms. If justice can best be realized when victims and offenders are able to meet in a controlled setting, with the assistance of trained facilitators, then access to justice for large numbers of victims can occur only where a system-based Victim Offender Reconciliation Program exists. Polk County has this along with a judiciary that is growing more comfortable with restorative justice concepts. Finally, the county has a prosecutor's office willing to accept responsibility as the gate-keeper of the system. The county attorney's office has demon-

strated the ability to take control of large numbers of criminal cases and work toward fashioning dispositions consistent with restorative justice principles.

The next step is to design a case flow approach that identifies those cases which are appropriate for a restorative justice disposition. A central intake unit, operating under established guidelines and having access to police reports, criminal history information and a victim interview, would direct cases in one of two directions: a restorative justice route or a traditional route.

The cases taking the traditional route would generally be the most serious, *i.e.*, murder, kidnap, sexual assault, and cases in which defendants have lengthy criminal histories. Those taking the restorative justice route would be all others.

Defendants who have cases appropriate for a restorative justice disposition would be contacted within the first two weeks of their arrest and offered an opportunity to meet with the victim of their crime. These defendants would also be provided information about a variety of community resources that might suit the defendants' needs. If the defendant is willing to meet with the victim, the victim is contacted to determine if a victim offender mediation is agreeable. Cases where the defendant does not respond or cases in which the victim does not want to meet with the defendant, are prosecuted in the traditional manner.

In those cases in which a victim offender mediation is held, the parties would be encouraged to reach agreements consistent with both the victims' and the offenders' needs. Victims and offenders participating in these mediations would be given considerable discretion to fashion agreements within a range established by the prosecuting attorney. In most cases, agreements would be structured so that the offender would have to complete all requirements of the agreement prior to receiving a charge reduction or a favorable sentencing recommendation from the prosecuting attorney. This approach would ensure a higher compliance rate and would reduce probation violations, as most conditions of probation would be completed prior to sentencing.

This two-track system does not initially appear to apply to so-called "victimless crimes" such as prostitution, drug offenses, and drunk driving. However, in Polk County, representatives of neighborhood associations have participated in several victim offender mediations involving solicitors and prostitutes arrested in designated areas. Victim offender mediations with drug defendants have taken place in the presence of middle school students with

favorable results for both defendants and students. First offense drunk drivers in Polk County are required to attend a weekend drunk driver education program where, among other things, they meet with panels comprised of victims who have been injured by a drunk driver or who have lost loved ones to a drunk driver.

If restorative justice is to move from being a mere concept to an integrated systemic approach, prosecutors must step forward. The prosecutor's office must honestly assess, in the light of restorative justice concepts, those beliefs that drive case dispositions. As gatekeeper of the system, the prosecutor's office must then scrutinize its own systems and determine where restorative justice concepts can be implemented. Finally, the prosecutor must involve system players, victims, and community representatives in a dialogue that invites them to help fashion an approach to justice that restores equity and makes things right for all concerned.

# **FORGIVENESS IN THE CRIMINAL JUSTICE SYSTEM: IF IT BELONGS, THEN WHY IS IT SO HARD TO FIND?**

*David M. Lerman\**

In this essay, I advocate the role of forgiveness within the criminal justice system, particularly from a prosecutor's perspective. I explore briefly what it can look like and finally, discuss some impediments to its increased presence and the leadership needed to allow it to develop within the system.

## **I. IS FORGIVENESS POSSIBLE IN THE CRIMINAL JUSTICE SYSTEM?**

Forgiveness can and should exist within the criminal justice system. Clearly, forgiveness in the context of this system cannot mean simply letting offenders off the hook without being held accountable for their actions. Rather, forgiveness can be seen as part of the healing process for crime victims. Robert Enright provides a helpful definition of forgiveness as the "willingness to abandon one's right to resentment, negative judgement, and indifferent behavior toward one who unjustly injures us . . ." <sup>1</sup> The focus of forgiveness as a benefit to the victim, the potential giver of forgiveness, has been well framed by Joanna North: "What is annulled in the act of forgiveness is not the crime itself but the distorting effect that this

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1. Robert D. Enright, *The Psychology of Interpersonal Forgiveness*. Paper presented at National Conference on Forgiveness, Madison, WI (1995), *quoted in* Walter Dickey, *Forgiveness and Crime: The Possibilities of Restorative Justice*, *EXPLORING FORGIVENESS* (Robert D. Enright & Joanna North eds., 1998).

wrong has upon one's relations with the wrongdoer and perhaps with others."<sup>2</sup>

There are many victims of crime, not just the immediate victims, as in an armed robbery or assault. In the absence of an actual victim, the community immediately affected by a crime, such as a neighborhood infested with drug sales or streetwalkers, may take on the communal role of being able to "give" forgiveness.

The criminal justice system has the wrong focus. Its major interest lies in incarcerating someone convicted of a particular crime. The system does not adequately deal with a major consequence of crime: the destruction of trust between people that results from crime. Crime can lead to a generalized fear by community members that they are going to be hurt, assaulted or "ripped off." As people become fearful, they become more isolated and disconnected from one another. This feeling contributes to the weakening of bonds that weave a community together. Without strong communities, there is less informal social control, which is the strongest and healthiest way to prevent crime. The ripple effects of crime are numerous. People lose the capacity to resolve disputes on their own. They choose to rely upon the "professionals", and place a call for emergency assistance. They become more fearful of the other and, without the opportunity to engage in a proactive healing process, they might remain bitter and fearful.<sup>3</sup>

## II. RESTORATIVE JUSTICE AS A HARBINGER OF FORGIVENESS

Restorative justice as a framework for dealing with crime and its aftermath offers great possibilities for changing the focus of criminal justice from simply incarcerating wrongdoers to focusing on the needs of victims, on repairing communities and on holding offenders accountable in meaningful ways.<sup>4</sup> Such a focus would naturally allow for the possibility of real healing for those immediately affected by the crime — victim, offender and immediate community. One abbreviated definition of restorative justice focuses on the basic inquiries pursued by the traditional justice system as opposed to a restorative approach. If the traditional system seeks answers to:

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2. Joanna North, *Wrongdoing and Forgiveness*, 62 *PHILOSOPHY* 409, 500 (1987).

3. See David Lerman, *Legal Ethics: Restoring Justice*, 14 *TIKKUN* 5, 13-15 (1999).

4. For an in-depth review of Restorative Justice principles, see HOWARD ZEHR, *CHANGING LENSES* (1990); see also Restorative Justice Institute (visited Mar. 23, 2000) <<http://www.rji.org>>; Center for Restorative Justice and Peacemaking, University of Minnesota (visited Mar. 23, 2000) <<http://ssw.che.umn.edu/rjp>>; Victim-Offender Mediation Association (visited Mar. 23, 2000) <<http://www.voma.org>>.

1) Who did the act?; 2) What rule/law was violated?; and 3) How should that person be punished?; then the restorative approach seeks answers to: 1) What is the harm done by an act?; 2) What needs to be done to correct the harm?; and 3) Who is responsible for that? Restorative justice is predicated upon a set of core principles. These include:

1. Crime is an offense against human relationships.
2. Victims and the community are central to justice processes.
3. The first priority of justice processes is to assist victims.
4. The second priority is to restore the community to the degree possible.
5. The offender has personal responsibility to victims and to the community for crimes committed.
6. Stakeholders share responsibilities for restorative justice through partnerships for action.
7. The offender should develop improved competency and understanding as a result of the restorative justice experience.<sup>5</sup>

One of the mainstays of restorative justice is processes wherein victims and affected community members meet in a safe setting with the offender. These meetings, commonly called victim-offender conferencing or dialogue, include three stages: 1) a discussion of the facts of the case; 2) a discussion of the impact of the act upon the parties; and 3) a discussion of what needs to be done to repair the harm.<sup>6</sup> These conferences allow a victim or community member to ask questions that they need answered in order to begin to clear up the "distorting effect" the crime has had on their lives. Thus, this process sets up the possibility for the victim to gather information and personally assess the offender in order to forgive him/her. Nevertheless, forgiveness does not mean letting an offender off the hook. Punishment in the form of incarceration may still occur; being held accountable in other ways that more actively repair the harm committed are also established. Sitting across from someone you have victimized is often more difficult than facing a judge for fifteen minutes during sentencing. I have observed one young offender who said outright that he could not and would not even look at his victims sitting across the table.

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5. U.S. DEP'T OF JUSTICE, NATIONAL INSTITUTE OF CORRECTIONS, RESTORATIVE JUSTICE: PRINCIPLES, PRACTICES, AND IMPLEMENTATION (July 1998).

6. See generally Bruce A. Kittle, *Forgiveness in the Criminal Justice System: Necessary Element or Impossible Dream?*, 2 THE WORLD OF FORGIVENESS 3-11; see also Web sites cited *supra* note 4.



The types of cases and healing achieved through conferencing are vast, ranging from homicides to employee thefts to vandalism. Conferencing may occur at any point during the life of a case, whether pre-charging, pre-plea or post-disposition. The notion of reaching forgiveness should absolutely never be foisted upon a victim as a reason to participate in a dialog. Clearly, some victims will have great anger, and will not be able to think in terms of forgiveness. However, simply allowing for the opportunity to engage in the very personal informal process is a humanization of the justice process.

For example, in rural Wisconsin two young men sought to steal a car from a home they thought was empty. When the middle-aged woman of the house came outside to investigate, they brutally attacked her and left her for dead. The woman survived, but she faces severe physical limitations because of the attack. The young men were caught, convicted and sentenced to long prison terms. Two and one-half years later the victim began a series of conferences with one of the offenders. The first face-to-face meeting with her offender was important for her. Meeting her attacker, speaking with him and hearing his fears allowed her to forgive him so that she could move on with her life. She also clearly stated that she hoped he never left prison, because he needed to be there for the safety of the community.

At the other end of the spectrum is the case of K.T., an eighteen-year-old cashier awaiting entry to college. Her older brother is in prison, her mother has a cocaine habit and her younger siblings at home sometimes suffer because their mother disappears for days. During one of these disappearances, K.T., who was fed up, and tempted by the cash at her fingertips, manipulated the "no sale" key on the cash register in a way she thought would hide her thievery. She was caught and confessed to prior incidents totaling just over \$1000. Prior to conviction, a conference was held with two representatives of the store. K.T. was tearful while listening to the human resources manager who had hired her describe the loss of trust. This manager, however, spoke of forgiveness after hearing the details of K.T.'s life and her expressions of remorse during the conference. Eventually, the store representatives suggested that K. T. return to the store to speak at new employee orientation sessions. She spoke at six sessions for her former employer, thus doing more to "earn" the forgiveness than simply saying "I'm sorry." She also developed greater competencies through this forward-

looking approach to justice, which took into account the needs of the victim. Her case was ultimately dismissed.

These two cases represent ways in which forgiveness can be established from within the criminal justice system. In one case, there was still traditional punishment for a particularly brutal offense. Yet, a humanizing process also occurred that benefited the parties. In the other case, the offender clearly left the justice process with a greater understanding of the wrong she had committed because of the ability to speak with the store representatives in a less formal setting. She also had the opportunity to develop greater competencies through the justice process that will benefit her in the future. Finally, she was not convicted, which may anger some traditionalists; however, justice was done and the parties were satisfied with the resolution.

If forgiveness, as evidenced by these restorative justice processes, is so beneficial, why are not more communities engaging in restorative processes?

### III. IMPEDIMENTS

#### A. Culture of Prosecutors

Prosecutors are the hub of the criminal justice system. Our charging decisions determine what, if any, exposure an offender faces and our recommendations in plea negotiations usually determine whether a defendant will plead or litigate. As more legislatures pass determinant sentencing structures or stricter sentencing guidelines, our discretion ultimately determines the posture of a case.

Meanwhile, the general crime control philosophy across the country is to "get tough." One commentator has termed the current orientation, which includes three strikes laws and generally harsher punishment, as "penal harm."<sup>7</sup> And clearly, prosecutors are a major force in the operation of the penal harm orientation. Thus, if any transformation of the criminal justice system towards allowing space for forgiveness is to occur, prosecutors are in a position to either assist or stymie that transformation.

What does a prosecutor rely on for guidance in developing policies on issuance or resolution of cases? Why should a prosecutor be concerned about forgiveness? This all boils down to providing a service to victims and doing justice.

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7. See T. CLEAR, *HARM IN AMERICAN PENOLOGY* (1994), *quoted in* S. Levrant et al., *Reconsidering Restorative Justice*, 45 *CRIME & DELINQUENCY* 1, 3-27 (1999).

Every prosecutor's office operates under its own set of policy guidelines. However, the National District Attorneys Association has promulgated a set of National Prosecution Standards that are instructive.<sup>8</sup> Standard 1.1 holds that "the primary responsibility of prosecution is to see that justice is accomplished."<sup>9</sup> The focus is justice, not vengeance, or even punishment. Justice is a far broader concept, and must take the overall needs of society into account. Indeed, standard 1.3 states: "the prosecutor should at all times be zealous in the need to protect the rights of individuals, but must place the rights of society in a paramount position in exercising prosecutorial discretion in individual cases and in the approach to the larger issues of improving the law and making the law conform to the needs of society."<sup>10</sup> The commentary states that a "prosecutor must seek justice. In doing so there is a need to balance the interests of *all* members of society, but when the balance cannot be struck in an individual case, the interest of society is paramount for the prosecutor."<sup>11</sup>

This should be seen as a resounding endorsement of the basic restorative justice principles enunciated above and a license to move away from the penal harm orientation currently in vogue. The restorative justice paradigm focuses on the broad interest of society, both long and short term, not simply the narrow perspective of locking up wrongdoers. For example, attending to the needs of victims in a meaningful way clearly is in the interest of society. Allowing victims of crime to continue to suffer from trauma induced by crime is counter-productive. The trauma suffered by victims can have devastating impact on personal lives, with a corresponding effect on work, family and relationships. Victims' needs might include ensuring that the offender is locked up for a period of time, ensuring that the offender receives drug/alcohol treatment and stays away from the victim, ensuring that the offender can make a decent wage to support children, creating the space necessary for the victim to receive some answers about the reasons behind the offense, and the space for the offender to learn about the real human consequences of his/her act.

The penal harm orientation fails to confront an outcome of crime — namely the distrust generated between people. Society

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8. See NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS (1991).

9. *Id.* at Standard 1.1.

10. *Id.* at Standard 1.3.

11. *Id.* (emphasis in original).

has an interest in being as whole, wholesome and healthy as possible.

While restorative justice as a framework is slowly finding its way into the criminal justice lexicon of prosecutors' offices, victim-offender conferencing/dialog has already received the endorsement of the American Bar Association House of Delegates. In August 1994, the ABA passed a recommendation that reads: "BE IT RESOLVED, that the American Bar Association urges federal, state, territorial, and local governments to incorporate publicly or privately operated victim-offender mediation/dialogue programs into their criminal justice processes." The ABA went on to attach a list of guidelines for programs.

The significance of this is that one of the pre-eminent U.S. attorney organizations has recognized the validity and importance of a process that allows for the opportunity for healing to occur. Forgiveness may or may not follow after a victim-offender dialogue, but providing the opportunity is truly serving the needs of society.

So, if the National Prosecution Standards inherently support restorative justice practices, and the ABA has explicitly supported the process of victim-offender dialog, what are the impediments? Why are prosecutors moving slowly in adopting this particular process, whether in house, or housed in a non-profit agency, or the broader framework of restorative justice?

Many young lawyers relish the notion of working in a prosecutor's office to gain valuable litigation experience. What is even better is that during the learning process, the young lawyer is "the knight in shining armor", the "good guy" in court. After all, nobody would need to be in court if the "bad" guy had not committed some offense. Prosecutors care deeply about engaging in the work of justice, but the overwhelming caseloads in most offices lead to a mantra of sorts, with one set of facts blending into the next. The cases become less about the real human stories behind them than about processing cases, getting through the day, placating a judge, or impressing a superior in order to achieve a coveted advancement.

Prosecutor culture also can advance the notion that all offenders are bad people, and need to be prosecuted zealously, regardless of the human side or equities in a case. One former prosecutor has written of a culture of "zealous advocacy" in which she dispensed shark candy to fellow prosecutors, and proudly displayed a poster

of Eliot Ness campaigning against Al Capone on her wall.<sup>12</sup> One prosecutor interviewed for the book, *D.A.: Prosecutors in Their Own Words*, stated, "Prosecutors turn into sharks. Sharks are eating machines."<sup>13</sup> Another stated:

You get a mind-set that everybody's bad, everybody's guilty, and everything is wrong. Everyone is a liar. Everybody is corrupt. Law does that you anyway, but it's worse as a prosecutor. You essentially become the wrong side of the public conscience. At one point I didn't care who went to jail, because everybody was guilty of something. It was just a matter of wining. I just had to win. A lot of prosecutors are into that.<sup>14</sup>

I heard of a prosecutor who refused to allow a victim-offender conference prior to sentencing because s/he was interested in having a "rabid" victim appear at the sentencing hearing. This prosecutor was obviously convinced that the victim would in some way 'forgive' the offender, and therefore not speak as forcefully for lengthy incarceration. In light of the NDAA Standards cited above, is this truly seeking *justice*?

Prosecutors sometimes fall into a work cadence or culture that does not comfortably allow for personal contact with crime victims. Yet, the public increasingly desires that contact. Ninety-two percent of respondents in one survey wanted this service; however, only forty percent believed the service was actually provided. Meanwhile, thirty-seven percent of victims whose case actually went to trial and spoke with the prosecutor actually felt that the prosecutor took their opinions into account.<sup>15</sup>

I don't intend to disparage the hard work that prosecutors engage in. I only seek to advance an approach to justice that is more encompassing of the vast array of human experience. Many colleagues question the viability of restorative justice programming; some even mock it. But restorative justice practices and principles would gain a stronger foothold if, at minimum, prosecutors were able to consider and accept the possibility for a victim or community to forgive a wrong committed, and in so doing, focus on the future of the victim, offender and community.

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12. See Mary Ellen Reimund, *Off to See the Wizard: A Prosecutor's Metamorphosis* (1999) (on file with author).

13. M. BAKER, *D.A.: PROSECUTORS IN THEIR OWN WORDS* (1999), cited in Reimund, *supra* note 12.

14. *Id.*

15. COUNCIL OF STATE GOV'TS/EASTERN REGIONAL CONF., *WHAT DO WE WANT (AND WHAT ARE WE GETTING) FROM THE CRIMINAL JUSTICE SYSTEM?* figs. 20, 23 (1999) [hereinafter COUNCIL OF STATE GOV'TS].

### B. Media Influence

Our culture is driven by images from the media. The depiction of law enforcement on television has affected how it is perceived in society. For example, the early television show the Lone Ranger portrayed law enforcement as omnipotent and capable of solving all disputes with swift justice. In that show, a "professional" would ride into town on a white horse to enforce the (good) code of the west. The show portrayed the townspeople as inevitably confused and helpless without his assistance. The Lone Ranger provides a poor example of how law enforcement should protect society. The townspeople rely upon him to enforce his belief of right or wrong without input from the community. This approach neglects conflict resolution skills.

Another example is the former television show *Dragnet*. In *Dragnet*, the detective is not concerned with the emotional reaction to crime but rather focuses on "Just the facts, ma'am, just the facts." The detective knows what his job is, what his notion of justice demands: just the facts.

This parable has contributed to victims feeling embarrassed by their victimization. A truly loving and caring society would instead reach out to victims in pain to assist them. In recent decades there has been great advances in this area. For example, the establishment of victim/witness units within District Attorney's offices has helped provide services for victims.

Recent television fare, such as *Law and Order*, explore more plausible and realistic scenarios. That is a step forward for disseminating realistic information about the system. Nevertheless, the traditional paradigm of the District Attorney as an expert is still present. A recent episode of "The Practice" showed two overzealous prosecutors re-enforcing each other's opinions that they alone are society's last resort in fighting a "tidal wave" of crime. They are the "good guys" who don't get enough credit for the job they do, even though without them society would degenerate into total chaos.<sup>16</sup>

The media generally has a sensationalistic approach to reporting crime. While every type of violent and non-violent crime has decreased during the 1990s,<sup>17</sup> the media has not altered its approach to reporting fear-generating crime. As a result, the public per-

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16. See *The Practice* (T.V. broadcast on ABC, Feb. 13, 2000).

17. See BUREAU OF JUSTICE STATISTICS NATIONAL CRIME VICTIMIZATION SURVEY, *Criminal Victimization 1998*, July 1999, fig. 1, at 2.

ceives danger on the streets. A 1999 survey conducted for the Council of State Governments/Easter Regional Conference reveals that forty-nine percent of the population feels “not as safe now” as compared with fifteen years ago.<sup>18</sup> Only fifteen percent feel “safer now.”<sup>19</sup>

### C. Elections

When politicians seeking elected office get around to discussing crime, there is often a race to declare which candidate is “tougher” on crime. Recent local ads have conveyed a “tough on crime” message in thirty second sound or image bites by discussing the number of people sent to prison, by showing the jail house doors clanging shut, or by campaigning to end the “coddling” of prisoners.

Surprisingly, it appears that the general public is not necessarily punitive minded in many typical criminal scenarios. Fifty-nine percent of people polled believe that the most important outcome for a burglar who stole to support a drug habit is not to be incarcerated, compared with thirty-eight percent who believe that incarceration is most important. Instead of incarceration, the three most desired outcomes were drug treatment, restitution, and strict supervision on probation. Only fifty-four percent believe that the most important outcome for a *non-addicted* drug user selling illegal drugs for profit is incarceration.<sup>20</sup> Yet, politicians keep ratcheting up accountability in the form of tougher laws, and longer prison sentences in the belief that this is both effective and what the public wants. With this as the pre-dominant criminal legal culture, it is difficult to discuss changes that at first sight, without a deeper understanding of what the processes and desired outcomes are really about, appear to be “soft.”

### D. Lack of Input from the Faith Community

Clearly, religion and governmental affairs are not to be mixed. But, that does not mean that the values which people of faith – whether that faith is organized religion, or some other value-based belief system – hold dear and by which they live their daily lives should not become a part of their decision making process in their work lives. Without such moral or spiritual guidance, our daily lives would be guided solely by the materialistic drive so evident in

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18. See COUNCIL OF STATE GOV'TS, *supra* note 15, at fig. 5.

19. *Id.*

20. See *id.* at figs. 30, 34.

today's popular culture. Nonetheless, there seems to be a fear of any outward mixing of faith values with the daily fare of the legal and business world.

Some of this fear is clearly warranted. There are many people of faith who cannot fathom the possibility of divergent views on issues of faith. Zealous exclusivism of any particular religion — the type which exclaims that it and only it are the true path to virtue, good life, peace, etc. — is dangerous and fails to account for the great diversity of cultures and religious belief in the United States.

I am not a student of faith other than my own; but I do understand that each religion with which I have a passing familiarity has something to say about repentance, forgiveness, and redemption. Combined with this is a belief in the fundamental value of each human life. Judaism holds dear the value of each human life, such that the Talmud states: If you save one life, it is as if you have saved a universe. Kay Pranis, the Restorative Justice Planner for the Minnesota Department of Corrections states succinctly that, "there is an enormous gap between what we teach in our churches, mosques, temples and synagogues and what we practice in daily personal and political life about the possibilities of forgiveness and redemption and about the fundamental dignity of all human life."<sup>21</sup>

Many lawyers, law enforcement personnel, and system officials participate actively in their faith communities. How do they each transfer the teachings of their individual faiths into their daily work lives? How do the teachings about the possibilities of redemption, forgiveness and the value of human life play out within the criminal justice system?

Jewish law and tradition offer an appropriate example. Repentance and prayer on Yom Kippur (the Day of Atonement) only atone for sins between people and the Almighty. Wrongs between people (i.e. when someone injures, curses, or steals from someone else) will never be forgiven until the wrongdoer makes the injured party whole. The injured party must be appeased. Appeasement means asking for forgiveness and assuaging the emotional discomfort caused by the original act.<sup>22</sup> Jewish tradition urges a victim to be receptive to a wrongdoer's overtures.<sup>23</sup> While forcing a victim

21. K. Pranis, *From Vision to Action: Some Principles of Restorative Justice*, CHURCH & SOCIETY, Mar./Apr. 1997, at 32.

22. See Maimonides, *Laws of Teshuva* 2:9. See generally David Lerman, *Restorative Justice and Jewish Law*, 2 FULL CIRCLE 2 (Apr. 1998).

23. Midrash Tanhuma, VAYERA 52a. See also Samuel J. Levine, *Teshuva: A Look at Repentance, Forgiveness and Atonement in Jewish Law and Philosophy and American Legal Thought*, 27 FORDHAM URB. L.J. 1677 (2000).



to forgive is absolutely the last thing that should ever be foisted upon any victim, Jewish Law does not recognize any particular process or time frame within which the forgiveness should occur.

Milwaukee's Task Force on Restorative Justice is a nineteen-member body created by the county board of supervisors in conjunction with the District Attorney's office. The task force is charged with the duty to educate the community and develop restorative justice programming. This body enjoys the active participation of representatives from the Interfaith Conference of Greater Milwaukee. Members of the Task Force have made presentations at various places of worship throughout Milwaukee County to discuss restorative justice concepts. Faith community members have been urged to seek restorative processes when they are victims of crime. A recent case in which a victim-offender community conference occurred involved a young man who stole a credit card number from someone's coat pocket while both were in church. The conference was held in the church basement. The young man could have easily been prosecuted in the traditional system. Instead, he will spend time serving meals at a meal site, and he will make complete restitution.

The concept of forgiveness within the criminal justice system will be better accepted with increased dialog between professionals who work in the system and the faith community. Whether the overtures come from within the system, as it did originally in Milwaukee, or from the faith community is not crucial. All that needs to occur is that a dialog begin. Nationally, several faith communities have made restorative justice and the criminal justice system a priority. There is a growing body of material with which to assist this dialog.

### **E. Leadership**

Ultimately, transformation of the criminal justice system will require strong, courageous leadership from within. I don't believe that any movement from the outside will be strong enough to force a change from our current policies and culture. It is too easy for elected officials, politicians, legislators, and judges to rely upon the notion of "do the crime, do the time" and such policies have led to the sharp rise in prison building "get tough" legislation which focuses solely on punishment in the form of incarceration.

To assist prosecutors willing to explore restorative justice principles and practices, there is a growing body of scholarship that reveals the efficacy of restorative justice principles, both for "soft"

outcomes, such as perceptions of fairness and client satisfaction as well as “hard” outcomes, such as recidivism. One study showed a thirty-two percent reduction in recidivism over one year for a group of juvenile participants in a victim-offender conferencing program.<sup>24</sup>

Several prosecutors across the country have assumed leadership roles in this area. Prosecutors in places such as Austin, Texas, Portland, Oregon, Des Moines, Iowa, Denver, Colorado, Milwaukee, Wisconsin, and Philadelphia, Pennsylvania have begun to explore the concepts of restorative justice — and thus, the role of forgiveness within the criminal justice system. Some of these jurisdictions have strong programs adopting restorative justice principles in place; others are beginning to explore options. These courageous prosecutors deserve continued support from members of their communities who recognize the value of a restorative approach to criminal justice.

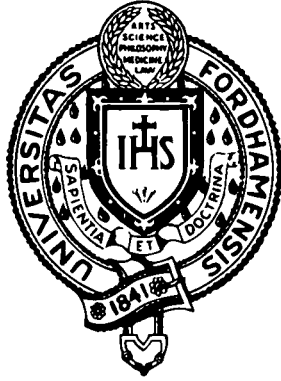
The concept of community prosecution is one that has received greater attention within prosecution circles, and has enjoyed greater levels of support from the Department of Justice. This is a promising development. While a community prosecution program is not automatically restorative in nature, it should, if engaged in with the real goal of interacting meaningfully with the target community, become restorative.

### CONCLUSION

Forgiveness has a place in the criminal law. The principles of restorative justice provide a theoretical and programmatic background for forgiveness to become a part of the lexicon of the United States criminal justice system. The impediments that exist are surmountable, but only if people of vision explore alliances that cut across traditional professional boundaries. Prosecutors have a heightened role in any move towards a system more open to forgiveness and a willingness to look forward from a criminal act. Several urban communities have begun to take the steps towards such transformation. For the sake of healthy communities, this journey should be joined by other communities.

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24. W. Nugent et al., *Participation in Victim-Offender Mediation Reduces Recidivism*, 5 VOMA CONNECTIONS (Summer 1999) (containing references to numerous other studies which measure some aspect of victim-offender dialog programs).



# **TESHUVU: A LOOK AT REPENTANCE, FORGIVENESS AND ATONEMENT IN JEWISH LAW AND PHILOSOPHY AND AMERICAN LEGAL THOUGHT**

*Samuel J. Levine\**

## **INTRODUCTION**

In his contribution to a recent *UCLA Law Review* symposium,<sup>1</sup> Professor Stephen Garvey introduces and develops the possibility of viewing “punishment as atonement.”<sup>2</sup> Garvey describes an “ideal community” in which punishment serves as “a form of secular penance aimed at the expiation of the wrongdoer’s guilt and his reconciliation with the victim and the community.”<sup>3</sup> Recognizing that the concept of atonement “sounds religious,” Garvey insists and sets out to demonstrate that “atonement makes perfectly good sense independent of religion.”<sup>4</sup> Nevertheless, Garvey acknowledges that “religion is one place where you’ll find atonement’s roots” and identifies St. Anselm’s eleventh century work as an early example of a theological discussion of atonement.<sup>5</sup> In further discussions of “theological atonement,” Garvey cites not only

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Unless otherwise noted, all translations of Hebrew were made by the author. As a result, the *Fordham Urban Law Journal* takes no responsibility for the author’s interpretation of Hebrew materials and the propositions those works support.

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1. See Symposium, *The Future of Punishment*, 46 *UCLA L. REV.* 1719 (1999).

2. See Stephen P. Garvey, *Punishment as Atonement*, 46 *UCLA L. REV.* 1801 (1999).

3. See *id.* at 1802. A similar approach has been proposed by a federal judge who “hypothesize[s] that in certain cases it would be beneficial to society if . . . we were to permit certain of them who are sincerely sorry to repent, atone for their crimes, and to seek, with the potential for earning, an official forgiveness – a ‘fresh start.’” Richard Lowell Nygaard, *On the Role of Forgiveness in Criminal Sentencing*, 27 *SETON HALL L. REV.* 980, 983 (1997).

4. Garvey, *supra* note 2, at 1803.

5. *Id.* at 1802-03 (citing ST. ANSELM, *CUR DEUS HOMO*, in *SAINT ANSELM: BASIC WRITINGS* 171 (S.N. Deane trans., 2d ed. 1962)).

Christian sources but also, briefly, Jewish sources, which he traces to the biblical book of *Leviticus*.<sup>6</sup>

Garvey posits that his analysis of theological atonement “shed[s] some light on the problem of punishment in our secular world.”<sup>7</sup> According to Garvey, parallel to theological accounts of atonement, which “depend critically on treating God as the object of the sinner’s identification,” a secular account of atonement “take[s] the object of identification not to be God, but one’s community and its members.”<sup>8</sup> Thus, having largely dispensed with the need to distinguish, for analytical purposes, between theological and secular approaches, Garvey relies on sources based in various forms of moral philosophy to develop an extensive description of the “process of atonement.”<sup>9</sup>

The aim of this Essay is to carry forward Professor Garvey’s project through a more detailed exploration of the concept of *teshuva*<sup>10</sup> in Jewish law and philosophy. The principle of *teshuva* is

6. See *id.* at 1807-08 (citing *Leviticus* 16:1-34).

7. *Id.* at 1810.

8. *Id.*

9. See *id.* at 1813-29.

10. Though often translated as “repentance,” see, e.g., PINCHAS H. PELI, SOLOVEITCHIK ON REPENTANCE (1984) (translating the Hebrew title “Al Hateshuva”), the Hebrew term “*teshuva*” is a derivation of the Hebrew root for returning, highlighting the purpose and dynamics of *teshuva*. *Teshuva* affords humans a process through which they are able to renounce and repair the improper actions that have led them astray, returning to God and to their own true selves by following the path that God has set down. Cf. Garvey, *supra* note 2, at 1816 (writing that an apology “distances and disassociates the true self from the guilt-tainted self”); MAIMONIDES, MISHNE TORAH [CODE OF LAW], *Laws of Teshuva* 2:4 (documenting the practice of changing one’s name after undergoing the process of *teshuva*, to demonstrate that “I am someone else, not the person who committed the wrongful act”).

Indeed, a number of foundational biblical verses describing the imperative for atonement speak of “returning” to God. See, e.g., *Deuteronomy* 4:30, 30:2, 30:10; *Hosea* 14:2. This verse from *Hosea*, which begins with the Hebrew word “*shuva*,” or “return,” opens a section from the writings of the Hebrew prophets that is read publicly on the Sabbath during the period of *teshuva*, observed between the holidays of Rosh Hashana and Yom Kippur. This Sabbath is commonly known, alternately, as either the Sabbath of “*shuva*” or the Sabbath of “*teshuva*.” That these terms are used interchangeably to label this Sabbath further demonstrates that these words not only share a common root, but, in the context of atonement, also connote a very similar concept.

As Rabbi Joseph Soloveitchik explained, although a human cannot actually harm God, the commission of a wrongdoing creates a distance between a person and God. See PELI, *supra*, at 85 (citing MAIMONIDES, *supra*, *Laws of Teshuva* 7:7 (quoting *Isaiah* 59:2)). Maimonides movingly describes the transformative power of *teshuva*, through which the person who “yesterday was distant from God . . . today clings to God.” See MAIMONIDES, *supra*, *Laws of Teshuva* 7:7. It is through *teshuva*, then, that the individual can both “return” to God and “return” to the self who does not carry the burden of sin.

fundamental to Jewish law and philosophy.<sup>11</sup> Jewish law views it as apparent that human beings are, by their very nature, fallible and incapable of avoiding all sin,<sup>12</sup> and thus through the possibility — indeed the obligation<sup>13</sup> — of *teshuva*, God provides humans a means of achieving atonement for wrongdoings.<sup>14</sup>

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The complete process of *teshuva* thus involves not only repentance and remorse, but a more complete achievement of forgiveness and atonement. For the purposes of this comparative study, the more limited concept of *charata* — or remorse — is equated with Garvey's use of the term "repentance," compare MAIMONIDES, *supra*, *Laws of Teshuva* 2:2, with Garvey, *supra* note 2, at 1814, while *teshuva* is used to refer to the broader process of atonement. Cf. ADIN STEINSALTZ, *TESHUVAH* 3 (Michael Swirsky ed. & trans., 1996).

Broadly defined, *teshuva* is more than just repentance from sin; it is a spiritual reawakening, a desire to strengthen the connection between oneself and the sacred . . . . [A]t the root of the notion of *teshuva* lies the concept of return (*shivah*)—return, not only to the past . . . but to the Divine source of all being.

*Id.* See also Nygaard, *supra* note 3, at 985 n.17 (stating that "metanoia," though "[u]sually translated as 'repentance,' . . . actually means something richer [,] closer to 'whole change' or 'new state' of mind, indicating a wholly new direction").

The word "*teshuva*," transliterated from the Hebrew, appears in English works in a variety of other forms as well, including *teshuvah*, *t'shuvah* and *t'shuva*. In the interest of consistency, I have altered the spelling in some quotations to conform with a uniform transliteration of "*teshuva*." In the interest of faithfulness to the original works, however, I have not altered the spellings of the titles of the works cited.

11. See STEINSALTZ, *supra* note 10, at 3 ("*Teshuva* occupies a central place in Judaism . . ."). See also generally 2 ARYEH KAPLAN, *THE HANDBOOK OF JEWISH THOUGHT* ch. 15 (Abraham Sutton ed., 1992).

12. See 1 *Kings* 8:46; *Ecclesiastes* 7:20; *Psalms* 103:3. For a discussion of moral vulnerability and susceptibility to temptations of evil in the human condition, see ABRAHAM R. BESHIN, *REFLECTIONS OF THE RAV: LESSONS IN JEWISH THOUGHT* 44-50 (1979) (adapted from lectures of Rabbi Joseph B. Soloveitchik). Cf. Garvey *supra* note 2, at 1811 (quoting P.S. GREENSPAN, *PRACTICAL GUILT: MORAL DILEMMAS, EMOTIONS, AND SOCIAL NORMS* 133 (1995)) (describing a "morality built on a view of human nature as imperfect but improvable").

13. For discussions of whether *teshuva* is considered a Biblical commandment and of its precise mode of performance, see KAPLAN, *supra* note 11, at 205 n.5; PELI, *supra* note 10, at 67-76.

Even if *teshuva* is not technically counted as one of the 613 commandments enumerated in the Torah, it is clearly an obligation incumbent upon an individual who sins. See PELI, *supra*. For a discussion of the concept, identification and derivation of unenumerated Biblical obligations, see Samuel J. Levine, *Unenumerated Constitutional Rights and Unenumerated Biblical Obligations: A Preliminary Study in Comparative Hermeneutics*, 15 *CONST. COMM.* 511 (1998).

14. See, e.g., *Deuteronomy* 30:2-3; *Isaiah* 1:18;43:25, 44:22. See also STEINSALTZ, *supra* note 10, at 3-4 ("All forms of *teshuva*, however diverse and complex, have a common core: the belief that human beings have it in their power to effect inward change.").

The opportunity for *teshuva* is often portrayed in Jewish thought as a manifestation of Divine beneficence that allows those who have violated God's laws to return to the proper path and atone for wrongdoing. See, e.g., BACHYA IBN PAQUDA, *DUTIES OF THE HEART, Introduction to Section 7*; RABBENU YONAH GERONDI, *SHA'AREI*

Though the verses in *Leviticus* cited by Garvey represent an early depiction of the mechanics and purposes of atonement in Jewish law, *teshuva* has occupied a central place in Jewish thought, from the Bible and the Talmud to the legal and philosophical writings of medieval and modern scholars.<sup>15</sup> These sources portray a complex process consisting of several steps required of the penitent individual, a process strikingly similar to that which Garvey describes. This Essay looks to further develop some of Garvey's ideas by closely analyzing *teshuva*, which stands as an illuminating conceptual analog to Garvey's depiction of secular atonement.<sup>16</sup>

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TESHUVA 1:1; RABBENU NISSIM GERONDI (RAN), DERASHOT HARAN 98-99, 107 (Leon A. Feldman ed., 1973); STEINSALTZ, *supra*, at 4.

According to the Talmudic sages, this possibility of altering reality after the fact, which is one of the mysteries of all being, was created before the world itself. Before the laws of nature came into existence . . . a principle even more fundamental and more exalted was proclaimed: that change—*teshuva*—is possible.

STEINSALTZ, *supra*, at 4.

15. For discussions in English of the history, sources, development and methodology of the Jewish legal system, see IRVING A. BREITOWITZ, BETWEEN CIVIL LAW AND RELIGIOUS LAW: THE PLIGHT OF THE AGUNAH IN AMERICAN SOCIETY 307-313 (1993); MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES 228-39, 281-399 (Bernard Auerbach & Melvin J. Sykes trans., 1994); Menachem Elon, *The Legal System of Jewish Law*, 17 N.Y.U. J. INT'L L. & POL. 221 (1985); DAVID M. FELDMAN, BIRTH CONTROL IN JEWISH LAW: MARITAL RELATIONS, CONTRACEPTION AND ABORTION 3-18 (1968); AARON KIRSCHENBAUM, EQUITY IN JEWISH LAW: HALAKHIC PERSPECTIVES IN LAW: FORMALISM AND FLEXIBILITY IN JEWISH CIVIL LAW 289-304 (1991); Samuel J. Levine, *Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts*, 24 HASTINGS CONST. L.Q. 441, 447-77 (1997).

16. A substantial body of literature has developed debating the efficacy of relying on religious sources to analyze and apply secular concepts in the American legal system. See, e.g., STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993); KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS (1995); KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988); MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES (1997); MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS (1991); MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW: A BICENTENNIAL ESSAY (1988); Suzanna Sherry, *Religion and the Public Square: Making Democracy Safe for Religious Minorities*, 47 DEPAUL L. REV. 499 (1998); Symposium, *Law and Morality*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1 (1984); Symposium, *Religion and the Judicial Process: Legal, Ethical, and Empirical Dimensions*, 81 MARQ. L. REV. 177 (1998); Symposium, *The Role of Religion in Public Debate in a Liberal Society*, 30 SAN DIEGO L. REV. 849 (1993); Ruti Teitel, *A Critique of Religion as Politics in the Public Sphere*, 78 CORNELL L. REV. 747 (1993).

A less extensive but similar debate has focused on the application of Jewish legal theory to American law. Compare Samuel J. Levine, *Capital Punishment in Jewish Law and its Application to the American Legal System*, 29 ST. MARY'S L.J. 1037, 1037-38 n.2 (1998) (citing, as examples of scholarship endorsing such application, David R. Dow, *Constitutional Midrash: The Rabbis' Solution to Professor Bickel's Problem*, 29 HOUS. L. REV. 543, 544 (1992); Irene Merker Rosenberg & Yale M. Rosenberg, *Guilt:*

### THE PROCESS OF ATONEMENT: A COMPARATIVE ANALYSIS

The process of atonement that Garvey proposes places separate obligations on the wrongdoer and the victim. The initial burden, understandably, falls on the wrongdoer, who must engage in “expiation,”<sup>17</sup> a moral journey consisting of the four steps of “repentance, apology, reparation and penance.”<sup>18</sup> After the wrongdoer

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*Henry Friendly Meets the MaHaRal of Prague*, 90 MICH. L. REV. 604, 614-19 (1991)), with *id.* at 1038 n.3 (citing, as examples of scholarship expressing a more cautious approach, Steven F. Friedell, *Book Review: Aaron Kirschenbaum on Equity in Jewish Law*, 1993 BYU L. REV. 909, 919 (1993); Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813, 893-94 (1993)).

Regardless of the different stances taken in these debates, the application of Jewish law appears appropriate here, given Garvey’s own acknowledgment of religion and Jewish law as early sources for the concept of atonement, *see supra* text accompanying notes 5-6, as well as Garvey’s willingness largely to dispense with distinctions between the secular and the religious in discussing the process of atonement. *See supra* text accompanying notes 7-9.

17. *See* Garvey, *supra* note 2, at 1813.

18. *Id.* Before describing the steps that comprise the process of secular atonement, Garvey establishes that, as a prerequisite to undertaking the process, a wrongdoer must first experience “guilt.” *See id.* at 1810. A person who commits a wrong, according to Garvey, “acquires guilt” or “becomes tainted.” *Id.* Indeed, he writes, “feeling guilt is the appropriate—the virtuous or morally decent—response to one’s wrongdoing.” *Id.* at 1810-11. It is the sense of “being ‘tainted,’ or more ominously ‘disfigured’ or ‘polluted,’” *id.* at 1810, that, ideally, leads to engagement in the path of atonement as a means of removing the taint. *See id.* at 1810-13.

For discussions of the importance of feeling guilt or shame in order to facilitate *teshuva*, see, e.g., *Ezekiel* 18:61-63; *Ezra* 9:6; RABBENU YONAH GERONDI, *supra* note 14, ch. 1, at 21-22.

It should be noted that one of the caveats inherent to a comparative study of legal systems composed in different languages involves inevitable ambiguities in syntax. *See supra* note 10, discussing the translation of “*teshuva*.” Thus, for example, while Garvey emphasizes a distinction between “guilt,” which he sees as a positive reaction to wrongdoing, and “shame,” which he sees as unproductive and unlikely to result in atonement, *see* Garvey, *supra*, at 1811-13, the Hebrew terms for these concepts carry no such contrasting connotations. Indeed, one contemporary scholar of Jewish law, relying on Hebrew primary sources but writing in English, expresses concerns similar to those of Garvey despite using terminology that would appear to contradict Garvey’s assertions. According to Rabbi Aryeh Kaplan, one who repents “should experience deep shame” but “should not sink into depression . . . knowing how ready God is to forgive . . .” *See* KAPLAN, *supra* note 11, ch. 15, at 18-19. *Cf.* STEINSALTZ, *supra* note 10, at 6.

[G]enuine regret for one’s misdeeds and recognition of one’s failings do not necessarily lead to the desired outcome . . . instead, they can cause a deepening sense of despair and a fatalistic resignation. Rather than promoting positive changes, such despondency, regarded in our tradition as one of the most serious afflictions of the soul, can cause one to sink even further.

Thus remorse . . . must be accompanied by something else: belief in the possibility of change. In this sense, the principle of *teshuva* — that no matter what the starting point . . . penitence is possible — is itself and important



has completed this journey, the victim is then obligated to forgive the wrongdoer, thus completing the process of atonement through a "reconciliation of the wrongdoer and the wronged."<sup>19</sup> This Essay likens Garvey's system of atonement to the process of *teshuva*, comparing the obligations placed on both parties and the requisite methodology for achieving true atonement.

## I. THE OBLIGATIONS OF THE WRONGDOER

In Jewish thought, the process of *teshuva*<sup>20</sup> is often described broadly in four stages, similar to Garvey's process.<sup>21</sup> Although the precise enumeration and identification of these stages varies among scholars,<sup>22</sup> the general formulation of the process of *teshuva* contains essentially the same elements listed by Garvey:<sup>23</sup> remorse, resolution not to repeat the wrongdoing, confession and changing one's ways.<sup>24</sup> The similarity in the general conceptual frameworks

source of reawakening and hope . . . . [K]nowing that there is no irredeemable situation [ ] can itself serve as a goad to *teshuva*.

*Id.* at 6-7. "[W]e focus on our blemishes and faults, not in order to wallow in guilt, but to use our flaws for leverage in the effort to progress . . . . Evil deeds, once recognized, become a constant goad and encouragement to reform." *Id.* at 56.

19. Garvey, *supra* note 2, at 1813.

20. Scholars have emphasized that *teshuva* is a complex and often difficult process, akin to a spiritual journey. See PELI, *supra* note 10, at 89 (comparing process of *teshuva* to a journey along the circumference of a circle, in the course of which it may be difficult to realize that the path ultimately leads to the desired objective); STEINSALTZ, *supra* note 10, at 7 (comparing one who engages in *teshuva* to "a person on a journey who at some point decides to change direction" and stating that "the new path, like the one abandoned, is long and arduous").

21. See *supra* text accompanying notes 17-19.

22. See STEINSALTZ, *supra* note 10, at 4.

Many books and articles have been written about *teshuva*, providing detailed analyses of the various stages of the process from start to finish. Yet, for all this elaboration, a few fundamental principles underlie all forms and levels of *teshuva* . . . . In fact, two essentials are found in every kind of *teshuva*: the renunciation of a regretted past and the adoption of a better path to be followed henceforth.

*Id.*

23. Scholars also list these elements in various orders, many of which differ somewhat from the order described by Garvey. For the purposes of this comparative study, Garvey's order has been adopted as a general framework. Indeed, Garvey's own list is a compilation based on the enumerations of different theorists. Compare Garvey, *supra* note 2, at 1804 n.4 (stating that "[a]tonement involves four components — repentance, apology, reparation, and . . . penance (though not all of these are always required)" (quoting RICHARD SWINBURNE, RESPONSIBILITY AND ATONEMENT 81 (1989))), with *id.* (listing "perception of wrongdoing, guilt, and repentance" (quoting JAMES GRIFFIN, WELL-BEING: ITS MEANING, MEASUREMENT, AND MORAL IMPORTANCE 272 (1986))).

24. See KAPLAN, *supra* note 11, at 209; *id.* at n.37-40. These elements are, indeed, quite similar to those articulated by Garvey. Thus, attention should be paid to the

of Garvey's process of secular atonement and the process of *teshuva* may allow for meaningful comparisons and contrasts of the two systems.

### A. Repentance

Garvey relies on a definition of "repentance" as

the remorseful acceptance of responsibility for one's wrongful and harmful actions, the repudiation of the aspects of one's character that generated the actions, the resolve to do one's best to extirpate those aspects of one's character, and the resolve to atone or make amends for the [wrong and] harm that one has done.<sup>25</sup>

Garvey thus sees repentance as a crucial first step in removing the taint of wrongdoing because it is "active," leading "[t]he repentant self [to] focus[ ] on the wrongdoing that produced the stain in the first place and on what the self can now do about it."<sup>26</sup>

In Jewish law and philosophy, remorse for a wrong, coupled with the resolution not to repeat the wrongdoing, is likewise essential to any possibility of atonement. In particular, as Maimonides writes in his *Code of Law*, these elements of repentance are prerequisites to effective confession.<sup>27</sup> Words of apology that are not accompa-

similarity in substance rather than to the slight difference in terminology, as the terms used for the elements in Jewish thought are translations of the original works. See discussions *supra* notes 10, 18.

Because the Bible serves as the fundamental source of Jewish law and philosophy, many of the medieval scholars who discuss the process of *teshuva* cite various Biblical sources for the different stages of *teshuva*.

For example, verses cited as sources for the step of remorse include *Hosea* 14:2, cited in SA'ADIA GAON, EMUNOTH V'DEOTH 5:5; *Jeremiah* 8:6, cited in RABBENU YONAH GERONDI, *supra* note 14, ch. 1, at 10; *Jeremiah* 31:18, cited in MAIMONIDES, *supra* note 10, *Laws of Teshuva* 2:2; *Joel* 2:14, cited in BACHYA IBN PAQUA, *supra* note 14, ch. 7, at 4.

Sources cited for the requirement to resolve not to repeat the wrongdoing include *Hosea* 14:4, cited in SA'ADIA GAON, *supra*; *Isaiah* 55:7, cited in RABBENU YONAH GERONDI, *supra*, ch. 1, at 11, MAIMONIDES, *supra*; *Job* 34:32, cited in BACHYA IBN PAQUA, *supra*.

Confession is included as part of the process of *teshuva* in such Biblical sources as *Hosea* 14:3, cited in SA'ADIA GAON, *supra*; *Leviticus* 5:5, cited in RABBENU YONAH GERONDI, *supra*, ch. 1, at 40; *Numbers* 5:6-7, cited in MAIMONIDES, *supra*, 1:1; *Proverbs* 28:13, cited in BACHYA IBN PAQUA, *supra*.

Finally, the need to change one's ways is derived from such sources as *Hosea* 14:2, cited in SA'ADIA GAON, *supra*; *Isaiah* 55:7, cited in RABBENU YONAH GERONDI, *supra*, ch. 1, at 11, MAIMONIDES, *supra*, 2:2, BACHYA IBN PAQUA, *supra*.

25. Garvey, *supra* note 2, at 1814 (quoting Jeffrie G. Murphy, *Repentance, Punishment, and Mercy*, in REPENTANCE: A COMPARATIVE PERSPECTIVE 143, 147 (1997)).

26. *Id.* at 1815.

27. See MAIMONIDES, *supra* note 10, *Laws of Teshuva* 2:3.

nied by sincere feelings of regret and resolve to change remain empty, bereft of the crucial element that lends them meaning.<sup>28</sup>

Citing a powerful analogy from the Talmud, Maimonides emphasizes the futility of an attempted confession that lacks the proper intent.<sup>29</sup> The analogy compares such a confession to an immersion for ritual purity undertaken while the impure individual continues to grasp onto the very object that rendered the individual ritually impure.<sup>30</sup> Just as it is impossible for ritual purification to take effect until the individual casts away the impure object, it is inconceivable that the purifying effects of confession will set in before the improper acts have been cast aside through regret and resolve for the future.<sup>31</sup>

In addition to its value as an illustration of some of the underlying principles of *teshuva*, the analogy to the laws of ritual purity underlines the legal nature of *teshuva* in Jewish thought. Indeed, since the times of Maimonides, scholars of Jewish law have used Maimonides' *Laws of Teshuva*, incorporated as a section in his *Code of Law*, as a springboard for extensive legal discussions of the concept of *teshuva*.<sup>32</sup> Among the works of contemporary scholars, Rabbi Joseph B. Soloveitchik's discourses are perhaps the most notable example of careful and technical legal analysis of *teshuva* through an exposition on Maimonides' *Code of Law*.<sup>33</sup>

Rabbi Soloveitchik posits that according to Maimonides, the role of resolve for the future in the process of *teshuva* depends on the specific nature of the individual's *teshuva*. Rabbi Soloveitchik observes that, in Chapter 1 of *Laws of Teshuva*, Maimonides lists re-

28. Cf. Matthew Atkinson, *Red Tape: How American Laws Ensnare Native American Lands, Resources, and People*, 23 OKLA. CITY U. L. REV. 379, 381 (1998) ("It's difficult to take seriously an apology that is not coupled with atonement." (citation omitted)); Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1017 (1999) ("For an apology to comfort the injured party, it must be sincere, or at least perceived to be sincere . . . . [W]hen an apology is given too cavalierly, the listener may question its meaning."); Deborah L. Levi, Note, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165, 1177-78 (1997) ("Like other important rituals, an apology is worthless unless the required gestures are filled with meaning. Apologies are speech-acts . . . .").

29. See MAIMONIDES, *supra* note 10, *Laws of Teshuva* 2:3 (citing TALMUD BAVLI, *Ta'anith* 16a).

30. *See id.*

31. Cf. SWINBURNE, *supra* note 23, at 82, *cited in* Garvey, *supra* note 2, at 1814 n.47 ("Repentance also involves a resolve to amend — you cannot repent of a past act if you intend to do a similar act at the next available opportunity.").

32. *See, e.g.*, PELI, *supra* note 10.

33. A portion of these discourses have been collected in PELI, *supra* note 10.

morse prior to resolution for the future, while in Chapter 2, the order of these two elements is reversed.<sup>34</sup>

Asserting that there is no contradiction between the two descriptions, Rabbi Soloveitchik instead suggests that in Chapter 1, Maimonides refers to *teshuva* that is motivated by emotion, resulting from the wrongdoer's spontaneous inner feelings of shame, which instinctively lead to remorse.<sup>35</sup> In such a scenario, he explains, it is the individual's sense of utter remorse that automatically brings about the resolve never to commit the same wrongs.<sup>36</sup> Chapter 2, according to Rabbi Soloveitchik, describes an individual who has arrived at *teshuva* on an intellectual level, who understands the impropriety and negative effects of sinful behavior and therefore resolves not to engage in such behavior in the future.<sup>37</sup> In such a case, the individual does not immediately experience passionate feelings of remorse; rather, remorse will grow out of the individual's continued determination not to repeat the wrongful actions in the future.<sup>38</sup>

Thus, the first step in both Garvey's process of atonement — repentance — and in the path of *teshuva* — remorse and resolution not to repeat the wrongdoing — incorporate elements of emotional commitment and future resolve, which must be met before continuing on the road to atonement.

### B. Apology

The next stage Garvey sees in the process of atonement, "confession," serves as "the wrongdoer's public expression of his repentance, whereby he openly acknowledges his wrongdoing and simultaneously disowns it."<sup>39</sup> Alluding again to the theological roots of the concept of atonement, Garvey refers to an apology as a "secular ritual of expiation."<sup>40</sup> Such expiation is achieved through

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34. See *id.* at 188 (citing MAIMONIDES, *supra* note 10, *Laws of Teshuva* 1:1, 2:2).

35. See *id.* at 200.

36. See *id.* at 200-01.

37. See *id.* at 202-03.

38. See *id.* at 204; cf. STEINSALTZ, *supra* note 10, at 5.

The recognition of the need [for *teshuva*] comes about in different ways. Sometimes one is overcome by a sense of sinfulness, of blemish, of defilement, which resulted in a powerful desire for escape and purification. But the desire [for *teshuva*] can also take more subtle forms, feelings of imperfection or unrealized potential, which spur a search for something better.

*Id.*

39. Garvey, *supra* note 2, at 1815.

40. *Id.* (quoting NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* at viii (1991)).

the profound willingness of the self to “accept[ ] responsibility for its wrongdoing but at the same time disavow[ ] the wrong.”<sup>41</sup> In short, an apology “embraces” guilt and then “expels” it.<sup>42</sup>

*Vidui* — confession, or apology — likewise serves an indispensable function in the process of *teshuva*. Through *vidui*, the individual unequivocally accepts responsibility for wrongdoing, at the same time displaying an outward expression of remorse and a willingness to make amends for the wrong.<sup>43</sup> Maimonides delineates the essential elements of *vidui*, which include: language demonstrating a clear admission of having committed a wrong against another; precise articulation of the wrong; a statement of strong remorse; and a declaration of a desire not to repeat the wrong.<sup>44</sup>

In his more detailed description of *vidui*, Maimonides, who is known for precision and economy of language,<sup>45</sup> repeatedly emphasizes the importance of verbalizing the feelings of remorse and resolve.<sup>46</sup> In addition, Maimonides cites Talmudic sources that praise an individual who recites an extended form of *vidui* by expanding on the more basic elements of confession and apology.<sup>47</sup>

Building on Maimonides’ discussions, Rabbi Soloveitchik offers an important psychological insight to explain the power and signifi-

41. *Id.* at 1816.

42. *Id.*

43. Through an analogy to medical ailments, the medieval legal authority Rabenu Nissim Gerondi (Ran) illustrates the significance of open admission of wrongdoing in the process of *teshuva*. Ran observes that a doctor cannot heal an individual suffering from a physical malady unless the patient reveals the illness fully to the doctor. Similarly, to be healed of the spiritual ailments that accompany wrongful acts, an individual must acknowledge and identify the wrongdoing, to the self and to God, so that the process of *teshuva* can begin. See RAN, *supra* note 14, at 149-50 (citing *Hosea* 7:1). See also RABBENU YONAH GERONDI, *supra* note 14, ch. 2, at 8 (employing a similar analogy).

Fundamental sources of Jewish law and philosophy have often used an analogy to physical health to help illuminate the notion of the spiritual ailments connected to wrongdoing and, conversely, the healing that accompanies *teshuva*. See, e.g., BACHYA IBN PAQUDA, *supra* note 14, ch. 7, at 1 (citing *Jeremiah* 31:29); MAIMONIDES, *supra* note 10, *Laws of De’oth*, chs. 2, 4; MAIMONIDES, INTRODUCTION TO COMMENTARY ON THE MISHNA, *Introduction to Pirke Avoth*; PELI, *supra* note 10, at 146-50 (citing *Psalms* 103:2-4; *Isaiah* 6:10; 57:19); RABBENU YONAH GERONDI, *supra* note 14, ch. 2, at 3 (citing *Isaiah* 33:24; *Psalms* 41:5); *id.* ch. 4, at 1 (citing *Isaiah* 6:10; *Psalms* 41:5); RAN, *supra* note 14, at 99-100; *id.* at 107 (citing *Hosea* 14:5; *Ezekiel* 18:27-28; TALMUD BAVLI, *Yoma* 86a-86b).

44. See RABBENU YONAH GERONDI, *supra* note 14, ch. 1, at 1; see also generally KAPLAN, *supra* note 11, ch. 16.

45. See ISADORE TWERSKY, INTRODUCTION TO THE CODE OF MAIMONIDES (MISHNEH TORAH) 97 (1980).

46. See MAIMONIDES, *supra* note 10, *Laws of Teshuva* 1:1, 2:2, 2:9.

47. See *id.* at 1:1.

cance of verbal *vidui*. Rabbi Soloveitchik notes that human nature sometimes leads a person, consciously or otherwise, to refuse to accept the reality of certain unfavorable facts.<sup>48</sup> Among the mechanisms a person may employ in the attempt to deny an unfortunate reality, he observes, is to avoid verbally expressing the unpleasant truth.<sup>49</sup> Perhaps one of the most difficult truths that a person must face involves the acknowledgment of having committed a wrongful act.<sup>50</sup> Through the verbal expression of *vidui*, then, rather than continuing to evade responsibility by deluding others and possibly one's self as well, the individual admits to the truth of the wrongdoing, thereby facilitating the process of *teshuva*.<sup>51</sup>

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48. See PELI, *supra* note 10, at 93.

49. See *id.*

50. See CHAIM SHMULEVITZ, SICHOTH MUSSAR 74-76 (1980) (citing numerous sources in Jewish thought describing the tendency of an individual to justify wrongful acts and the importance of overcoming such an inclination). Cf. TALMUD BAVLI, *Avoth* ch. 5, at 9 (listing qualities that indicate wisdom, including willingness "to admit error," can be interpreted literally as "to admit truth").

51. See PELI, *supra* note 10, at 93-96. Cf. Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 NOTRE DAME L. REV. 445, 480 (1983).

Genuine repentance as well as such states as contrition, remorse, the feeling of guilt, and the desire for atonement, all require some sense of continuity with the past and self-identity with an earlier wrongdoer. The essence of these states is the deliberate taking of responsibility for an earlier doing. To deny one's identity with the wrongdoer is to evade or deny responsibility for his crimes, quite another thing from repentance.

*Id.*; Theresa Klosterman, Note, *The Feasibility and Propriety of a Truth Commission in Cambodia: Too Little? Too Late?*, 15 ARIZ. J. INT'L & COMP. L. 833, 838-39 (1998) (stating that, on a societal level, "[d]etermining the truth about human rights violations is crucial" and that "officially sanctioned . . . acknowledgment is important because, in many religious and ethical traditions, it is a prerequisite to societal forgiveness and atonement."); Seymour Moskowitz & Michael J. DeBoer, *When Silence Resounds: Clergy and the Requirement to Report Elder Abuse and Neglect*, 49 DEPAUL L. REV. 1, 67 (1999) ("The 'confession' can be the catalyst for new behavior. In fact, repentance and accountability for the evil in which the penitent participated may ameliorate or end past wrongs."); STEINSALTZ, *supra* note 10, at 5-6.

The great obstacle in the way of *teshuva* . . . is self-satisfaction . . . This great stumbling block has been referred to by one sage as "obtuseness of the heart." Obtuseness of the mind is easily recognized as an impairment of cognitive functioning; that of the heart is more insidious, a condition of blocked moral and emotional awareness. Without this prodding awareness, however slight, without some feeling of inadequacy, no amount of intellectual sagacity can change a person's behavior . . . The initial perception and awakening is, in effect, the first and most inclusive "confession." When a vague feeling of discomfort turns to clear recognition that something is wrong, and when that recognition is expressed in words spoken either to oneself, to God, or to another person, the first step in the process of [*teshuva*] has been taken, the part that relates to one's previous life and character.

Thus the second stages of both Garvey's process and of *teshuva* require a public expression and acceptance of the wrongdoer's responsibility for the bad act, and an overt articulation of regret and repudiation of the wrong.

### C. Reparation and penance

In Garvey's depiction of the process of atonement, it is incumbent upon the wrongdoer, after feeling remorse and, through apology, verbally expressing such feelings, to "make amends."<sup>52</sup> Garvey suggests that most crimes result in both harm and a moral wrong; therefore, according to Garvey, the remedy for a wrongdoing consists of two corresponding actions, reparation and penance.<sup>53</sup> Because reparation, in the form of restitution or compensation, "makes amends for the *harm* the wrongdoer does, but not for the *wrong* he has done," Garvey explains, in addition to making reparations, "the wrongdoer must submit to penance."<sup>54</sup> Thus, Garvey refers to penance as "the final, critical piece of the expiation half of the atonement process."<sup>55</sup>

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*Id.*; Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1584 (1998) (documenting that a capital defendant's "acceptance of responsibility truly does influence the jury's decision making" and that "a defendant's verbal acknowledgment of his killing would increase the likelihood of receiving a life sentence").

This explanation of the importance of verbal *vidui* would further appear to be the rationale behind the principle, which Maimonides again cites from the Talmud, that a person should engage in public *vidui* as an effective step in the process of *teshuva*. See MAIMONIDES, *supra* note 10, *Laws of Teshuva* 2:5.

Criticizing those who view public apologies as merely "shaming penalties," Garvey cautions us not to "forget that the offender is not only being exposed and shamed, he's also *making an apology*. Indeed, as far as atonement goes, treating an apology as nothing more than a chance to cause shame misses the point." See Garvey, *supra* note 2, at 1816 (emphasis in original).

For descriptive and normative discussions of the use of apology in the American law, see, e.g., *id.*; Cohen, *supra* note 28; Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996); Steven Keeva, *Does Law Mean Never Having to Say You're Sorry?*, A.B.A. J., December 1999, at 64; Levi, *supra* note 28; Hiroshi Wagatsuma & Arthur Rossett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 L. & SOC'Y REV. 461 (1986).

52. See Garvey, *supra* note 2, at 1816, 1818. Cf. Moskowitz & DeBoer, *supra* note 51, at 67 (emphasizing that "[t]rue repentance does not deal with feeling, but with action—changing one's behavior, reversing direction"); Reverend Katherine Hancock Ragsdale, *The Role of Religious Institutions in Responding to the Domestic Violence Crisis*, 58 ALB. L. REV. 1149, 1168 (1995).

53. See Garvey, *supra* note 2, at 1816-27.

54. *Id.* at 1818.

55. *Id.* at 1819.

Garvey defines penance as “a self-imposed punishment, i.e., self-imposed hardship or suffering, which completes the process of expiation and finally rids the wrongdoer of his guilt.”<sup>56</sup> Penance plays a unique role in Garvey’s view of atonement, which “insists that punishment should do more: It should restore the offender to full standing in the community.”<sup>57</sup> To explore the potent question of “[h]ow suffering manage[s] to effect this restoration,” Garvey mandates the need “to shift perspectives.”<sup>58</sup> Specifically, Garvey’s approach requires us “to look at punishment not from the victim’s perspective, but from the wrongdoer’s.”<sup>59</sup> This simple yet profound suggestion recognizes that often a wrongdoer “will feel smaller than before” and “will experience anger and resentment toward himself.”<sup>60</sup> Significantly, Garvey explains, “the wrongdoer cannot restore his own moral standing unless he submits to punishment.”<sup>61</sup>

Regarding penance, Rabbi Soloveitchik’s discourses on *teshuva* again provide a helpful complement to Garvey’s thoughts. Like Garvey, Rabbi Soloveitchik establishes a framework for analyzing the concept of penance based on the premise that the commission of a wrong results in two interrelated but distinct consequences. He explains that, on one level, in relation to the victim, a wrongful act produces liability on the part of the offender.<sup>62</sup> Similar to Garvey, Rabbi Soloveitchik posits that to counteract this culpability, the individual must engage in reparation, through the payment of restitution or compensation.<sup>63</sup> Thus, one kind of *teshuva* effects *kappara*, a form of forgiveness or acquittal from wrongdoing.<sup>64</sup> An individual who undertakes this kind of *teshuva* both literally and metaphorically pays a debt owed to another and is thereby released from further liability.<sup>65</sup> Indeed, Rabbi Soloveitchik notes an etymological link that underscores the corresponding conceptual similarity between reparation and this form of forgiveness: *kappara* derives from the same root as *kofer*, the Hebrew term for payment of an obligation.<sup>66</sup>

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56. *Id.*

57. *Id.* at 1822.

58. *Id.*

59. *Id.*

60. *Id.* at 1823.

61. *Id.*

62. See PELI, *supra* note 10, at 49-50.

63. See *id.* at 50-51.

64. See *id.* at 51.

65. See *id.*

66. See *id.*



Yet, this form of *teshuva* does not adequately amend for the second result that Rabbi Soloveitchik attributes to the commission of a wrongful act. Employing an approach that anticipates Garvey's, and relying on various sources of Jewish thought,<sup>67</sup> Rabbi Soloveitchik examines the effect of wrongdoing on the individual who has committed the improper act. Specifically, he acknowledges the spiritual defilement caused by the impurity of sin.<sup>68</sup> To return from such spiritual defilement, Rabbi Soloveitchik explains, the individual must do more than merely pay the victim any obligation arising out of the wrongdoing.<sup>69</sup> As in Garvey's system, in the final stages of *teshuva*, Jewish law demands not only reparation, but, more importantly, penance, in the form of fundamental change in the individual's mode of behavior.<sup>70</sup>

To erase fully the taint of the wrongdoing and thus to obtain a restored place in the community, an individual must engage in what Rabbi Soloveitchik terms *teshuva* of *tahara* (repentance of purification), a more extensive form of spiritual purification or expiation.<sup>71</sup> Like penance, *teshuva* of *tahara* requires that a person undertake self-imposed forms of hardship, ones that relate to and address directly the particular nature of the act committed.<sup>72</sup>

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67. Rabbi Soloveitchik bases his approach on an idea he finds expressed in Biblical sources as well as in both legal and narrative strands of the Talmud, the *halacha* and the *aggada*. See *id.* at 51-55. For a discussion of *halacha* and *aggada* in Jewish thought, see Samuel J. Levine, *Halacha and Aggada: Translating Robert Cover's "Nomos and Narrative,"* 1998 UTAH L. REV. 465.

68. See PELI, *supra* note 10, at 51. In addition to its powerful philosophical implications, the notion of a change that takes place in the wrongdoer's personality is expressed in a technical legal sense as well. The Talmud documents Jewish law's acknowledgment of this change in spiritual status through the disqualification as credible witnesses of those individuals who have not reformed from their improper ways. See *id.* at 55-56 (citing TALMUD BAVLI, *Sanhedrin*).

69. Cf. MAIMONIDES, *supra* note 10, *Laws of Teshuva* 1:1 (emphasizing that a person who damages another does not achieve atonement merely through the payment of restitution or compensation).

70. See *id.* at 2:2 to 2:4.

71. See PELI, *supra* note 10, at 51-52.

72. For example, the Talmud discusses the acts of penance required of a usurer, who, as a result of violating the laws of the Torah, has been disqualified as a credible witness. The Talmud instructs that the usurer must destroy all credit slips and refuse to lend money on interest under any circumstances, even when it may be legally permissible to do so. See PELI, *supra* note 10, at 56 (quoting TALMUD BAVLI, *Sanhedrin* 25b). Thus, *teshuva* of *tahara* requires, for the purposes of restoring spiritual purity and the resulting testimonial credibility, acts that demonstrate a renouncement even of the conditions that led to the improper past behavior. See *id.* Cf. MAIMONIDES, *supra* note 10, *Laws of Teshuva* 2:4 (describing such practices as "distancing one's self far from the means of wrongdoing, changing one's name to demonstrate that 'I am not the same who committed those acts,' changing all of one's ways toward the good

Through *teshuva* of *tahara*, then, an individual truly regains and returns to the state of undefiled spirituality lost as a consequence of the wrongdoing.<sup>73</sup>

## II. THE OBLIGATIONS OF THE WRONGED: RECONCILIATION

Once the wrongdoer has successfully completed expiation and the guilt has thereby been removed, Garvey writes, it is then time for the victim to complete the process of atonement through forgiveness.<sup>74</sup> According to Garvey, forgiveness “achieves the reconciliation of wrongdoer and wronged.”<sup>75</sup> Specifically, Garvey suggests, just as expiation “enables an offender to purge the taint of guilt,” expiation coupled with forgiveness “enables the victim to overcome his resentment.”<sup>76</sup>

Discussing the mechanics of forgiveness, Garvey argues that although

[a] victim *may* permissibly extend forgiveness to a wrongdoer who has done nothing but repent . . . a victim may also legitimately withhold forgiveness until the wrongdoer has paid his debt in full, i.e., until the wrongdoer has not only repented but also apologized, made reparations, and endured his penance. Indeed, forgiveness may take some time in coming.<sup>77</sup>

Ultimately, however, Garvey considers forgiveness “one of th[e] victim’s] responsibilities.”<sup>78</sup> Indeed, Garvey finds that “[i]t reflects a moral failure . . . for victims to withhold forgiveness unreasonably

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and proper path, and exiling one’s self”); RABBENU YONAH GERONDI, *supra* note 14, ch. 1, at 35.

73. See PELI, *supra* note 10, at 55-56. The medieval scholar Rabbenu Yonah Gerondi elaborates on the biblical analogy of cleaning a stained garment to describe different modes and levels of *teshuva* and their effectiveness in removing the spiritual taint of wrongful acts. See RABBENU YONAH GERONDI, *supra* note 14, ch. 1, at 9 (citing *Jeremiah* 4:14; *Psalms* 51:4). Specifically, he points to the difference between a superficial washing of a garment, which may remove dirt, and a more thorough cleaning, which will restore the garment’s original color and brightness. See *id.* Cf. RAN, *supra* note 14, at 108 (citing TALMUD BAVLI, *Yoma* 86b) (describing different types of *teshuva* and corresponding levels of expiation); STEINSALTZ, *supra* note 10, at 53 (“*Teshuva* has two essential phases: a leap of disengagement from the past, and a lengthier, more arduous process of rectification. The first phase is one of destruction, the second of reconstruction.”). See generally KAPLAN, *supra* note 11, ch. 17.

74. See Garvey, *supra* note 2, at 1813.

75. See *id.*

76. See *id.* at 1828. Cf. Nygaard, *supra* note 3, at 984 (“Forgiveness looks evil in the eye, condemns it, but still permits one who meets the forgiver’s criteria, to start anew.”).

77. Garvey, *supra* note 2, at 1828 (emphasis in original).

78. *Id.* at 1827. Cf. Levi, *supra* note 28, at 1178 (stating that the “effectiveness [of an apology] in reconciliation depends not only on the speaker but also on the partici-

from offenders who have done all they can do to expiate their guilt."<sup>79</sup>

A similar approach to the dynamics of forgiveness is found in Jewish thought. Discussing the obligations owed to the victim, Maimonides explains that *teshuva* in the form of reparations is not sufficient, but that the wrongdoer must repeatedly appease the victim and ask for forgiveness.<sup>80</sup> The responsibility on the wrongdoer is such that, if the victim initially refuses the request, the wrongdoer must continue to make a number of attempts to obtain forgiveness.<sup>81</sup>

Nevertheless, once the wrongdoer has repeatedly demonstrated a sincere hope for reconciliation, parallel to Garvey's approach, Jewish law places the burden on the victim to grant forgiveness. In the powerful formulation of Maimonides, if the victim continuously denies forgiveness, the wrongdoer is released from further action, as the victim is then deemed to be the sinner.<sup>82</sup> Indeed, Maimonides emphasizes the responsibility incumbent on the victim, writing that it is improper for a person to withhold forgiveness; instead, a victim should be receptive to the wrongdoer's genuine attempts at reconciliation and atonement.<sup>83</sup>

### CONCLUSION

Despite the prominent position it has held for millennia in religious and moral thinking, the atonement model is relatively new to

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pation of an injured party. Absent the eventual complicity of the injured party, the apologizer's words are just talk.").

79. Garvey, *supra* note 2, at 1828. Cf. Cohen *supra* note 28, at 1021 (citing psychological evidence finding that "an injured party . . . who fails to forgive after receiving an apology [ ] may suffer the corrosive effects of storing anger"); Levi, *supra* note 26, at 1178 ("By apologizing, the offender acknowledges her diminutive moral stature and asks for restorative forgiveness. She also acknowledges the existence and importance (to both parties) of the moral register itself. When the apologizer gestures to acknowledge that meaning, he closes the circle of performance, thus establishing a new moral equilibrium."); Nygaard, *supra* note 3, at 1012.

For the offender who is sincerely repentant; feels shame for his act; who has recaptured compassion for the feelings of others; realizes the pain he has caused; and, who truly desires to turn a new leaf and be reconciled with society; the system must determine how it can facilitate that desire, not frustrate it out of ignorance or misguided notions.

*Id.*

80. See MAIMONIDES, *supra* note 10, *Laws of Teshuva* 2:9; RABBENU YONAH GERONDI, *supra* note 14, ch. 1, at 44.

81. See MAIMONIDES, *supra* note 10, *Laws of Teshuva* 2:9; RABBENU YONAH GERONDI, *supra* note 14, ch. 4, at 19.

82. See MAIMONIDES, *supra* note 10, *Laws of Teshuva* 2:9.

83. See *id.* at 2:10.

American legal theory. Professor Garvey's attempt to offer a systematic depiction and analysis of the process of atonement and its possible relevance to American law appears to represent the most extensive such effort to date.

As Garvey himself concedes, any application of a theory of atonement to the American legal system will encounter a number of problems and objections. For example, he acknowledges that "[i]f in the end you remain convinced that the ideal of community on which I base my account of atonement is indeed dangerous or irretrievable, then you will . . . be forced to turn elsewhere for your understanding of punishment."<sup>84</sup> These difficulties only increase when the analysis relates the concept of *teshuva* from Jewish law and philosophy to American law.<sup>85</sup> Nevertheless, Garvey's attempt is successful, for reasons that would appear to apply to theories of *teshuva* as well.

First, Garvey emphasizes that his "immediate aim is normative, not practical," and, therefore, "the discussion proceeds at a high level of abstraction" rather than "develop[ing] any concrete proposals for institutional or doctrinal reform."<sup>86</sup> Second, Garvey explains that a new model is necessary based on his conclusion that "the prevailing models of punishment . . . deterrence[,] retributivism[,] restorativism and libertarianism . . . fall short."<sup>87</sup> Finally, as Professor David Dolinko noted in introducing the symposium in which Garvey participated, Garvey's proposal offers a fresh perspective at a time when "[c]riminal punishment is an institution that is large, growing, and quite possibly mutating into new and surprising forms."<sup>88</sup> Ultimately, it is perhaps ironic that, in providing a new theory of punishment for American legal thought to consider in a future millennium, Garvey has in fact looked back to theories of atonement and *teshuva* that have spanned millennia of the past. The path to *teshuva* may indeed provide insight in formulating a new perspective on the notions of punishment underlying American law.

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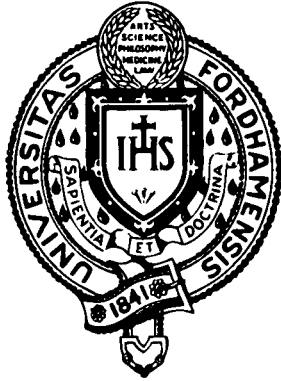
84. Garvey, *supra* note 2, at 1803.

85. Indeed, in the past I have expressed my own doubts about attempts to derive practical lessons for the application of the death penalty in the United States based on the approach to capital punishment in Jewish law, because, "[a]lthough the processes of repentance and atonement are inherent parts of the Jewish legal system, that is clearly not the case in American penal law." See Levine, *Capital Punishment*, *supra* note 16, at 1043 & nn.22-24. See also discussion *supra* note 16.

86. Garvey, *supra* note 2, at 1804.

87. *Id.* at 1829-30.

88. David Dolinko, *The Future of Punishment*, 46 UCLA L. REV. 1719, 1726 (1999).



# RELIGIOUS DIMENSIONS OF MEDIATION

*F. Matthews-Giba, ofm*

## INTRODUCTION

In thirteenth century Italy, St. Francis of Assisi mediated<sup>1</sup> a dispute between the Mayor and Bishop of Assisi with a spiritual song.<sup>2</sup> This use of spirituality<sup>3</sup> as a mediation technique is worth studying, particularly as it provides motivation for parties to settle.<sup>4</sup> The song that Francis and his followers sang was not primarily about God, or about being a good Christian, which might have had the effect of making the disputing parties feel guilty. Rather, the song was about the order of creation. The song opened with, "Praise to you God almighty for having given us the Sun. It is beautiful and radiant with great splendor." Then St. Francis continued to sing the praises of all of creation. This song reframed<sup>5</sup> the context of the parties' dispute from a contentious battle, which caused disorder in the community and to the ordered creation that

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1. See KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 12 (1994) (defining mediation as a "process where the third party neutral, whether one person or more, acts as a facilitator to assist in resolving a dispute between two or more parties").

2. See FRANCIS & CLARE, *THE COMPLETE WORKS* 37-39 (Regis J. Armstrong, ofm & Ignatius C. Brady, ofm, trans., 1982). It states, in part:

Praise be You, my Lord with all your creatures, especially Brother Sun, [w]ho is the day and through whom You give us light. And he is beautiful and radiant with great splendor; and bears a likeness of You; Most High One. Praise be You, my Lord, through sister Moon and the stars, in heaven You formed them clear and precious and beautiful.

3. The author defines spirituality as any transcendent system of beliefs to which a people refer to on a regular basis to order their lives.

4. See Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV 7 (1996) (citations omitted).

5. See KOVACH, *supra* note 1, at 108 (defining reframing as technique in mediation to "cause the author of the statement to look at the problem or concern in a different light").

surrounded the disputants.<sup>6</sup> This reframing provided an alternative model to contextualize the mediation.

By pointing to characteristics found in nature, such as gentleness, simplicity and endurance, St. Francis presented to the Bishop and Mayor of Assisi a model of generosity, virtue and peace that the disputants relied upon to settle their dispute. With the value of peace properly identified, reconciliation<sup>7</sup> is accomplished. St. Francis' song reframed the Bishop's and Mayor's dispute from individual gain to the ordered creation of the surrounding Umbrian<sup>8</sup> hillside. Reframing the dispute created an atmosphere where the parties could settle thereby allowing the town of Assisi to return to its ordered daily life.

Part I of this Essay will outline the religious roots of mediation, with a particular emphasis on the influence of the Franciscan movement.<sup>9</sup> Part II will explore the religious roots of mediation in the United States and its application in present day mediation. Part III will discuss the various styles, strategies and goals of mediation and their corresponding results. Part IV will analyze the religious motivation underlying settlement agreements. Finally, this Essay concludes that the proto-religious, creation-centered technique employed by St. Francis is a useful method for a multi-cultured mediation, when one or both of the parties raises religious objections to settlement.

## I. RELIGIOUS ROOTS OF MEDIATION

The Popes of the Middle Ages mediated among Catholic sovereigns.<sup>10</sup> In 1226, Pope Gregory IX was one of the most effective

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6. See FRANCIS & CLARE, *supra* note 2, at 29 (admonishing the followers of St. Francis to be conscious that only humans create disorder whereas the rest of creation follows the will of God naturally).

7. The author defines reconciliation as the state of a person's soul (interior life) characterized by peace, insight into self and friendship with God. This definition is derived from Catholic Sacramental Theology, specifically the Sacrament of Reconciliation.

8. St. Francis lived and ministered in the Italian province Umbria.

9. See LAZARO IRIARTE, FRANCISCAN HISTORY 9 (1983) (tracing Franciscan movement as established by Saints Francis and Clare of Assisi to integrate themselves into society so that they would contrast with "the new arbiters of society through total detachment").

10. See Henry T. King, Jr. & Marc A. Le Forestier, *Papal Arbitration: How the Early Roman Catholic Church Influenced Modern Dispute Resolution*, DISP. RESOL. J., Summer 1997, at 74-75 (discussing Pope Gregory IX in 1226, to Pope John Paul II in 1984, mediating disputes, to such extent that Rome was established as the conference ground for Europe).

Papal mediators.<sup>11</sup> Gregory IX mediated between the Holy Roman Emperor and the Lombard League. The Lombard League feared the encroaching power of the Roman Emperor who needed the support of the league to pursue the Crusades and to advance higher studies in the league's academies.<sup>12</sup> When the Roman Emperor, Frederick, sent a delegate to negotiate, the league killed the delegate. In retaliation, Frederick placed Lombardy under a ban and ordered their schools to be destroyed. With the dispute worsening, both parties appealed to the Pope for mediation. Gregory IX's predecessor, Honorarius III, resolved the dispute, though the Lombard League refused to acknowledge the decision. As such, Gregory IX was left with the task of obtaining the Lombard League's approval solely through the prestige of his office and the persuasiveness of his moral authority.

Nevertheless, the Pope's title proved to be insufficient. Honorarius III had the same Papal title, but could not bind the parties to an agreement. What Gregory IX offered to the Lombard League was trust, built by his moral authority.<sup>13</sup> Gregory IX thus opted to reframe the dispute between the Lombard League and the Roman Emperor by referring to principles of Christian charity.<sup>14</sup> Gregory IX maximized the trust given to the papal office by decreeing a peace pact for all of Europe that banned a Catholic sovereign from breaching the peace with another Catholic sovereign. When the political and religious unity of Europe disintegrated, the Papal office replaced the principle of Christian charity with the principle of rationality to provide a basis for mediation.<sup>15</sup>

Papal mediation had its problems, the most obvious being that popes mediated among Christian sovereigns exclusively.<sup>16</sup> For example, a dispute did not rise to the heightened importance of Papal mediation if it existed between a Christian sovereign and a non-Christian sovereign,<sup>17</sup> nor if a dispute existed between two Christian commoners.

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11. *See id.* at 76.

12. *See id.*

13. *See id.*

14. *Id.* at 77.

15. *See* Paul A. Freund, *The Philosophy of Equality*, 1979 WASH. U. L.Q. 11, 14 (recognizing overarching principles of rationality in United States jurisprudence).

16. *See* King & Le Forestier, *supra* note 10, at 75.

17. The Crusades are an example of this before the Pope became a party in the dispute.



Another difficulty was that papal mediation was costly; for in order for parties to avail themselves of papal mediation, they had to expend a significant amount of capital to simply secure a hearing.<sup>18</sup> In addition, papal mediation offered no opportunity to appeal, and the Pope held both the legislative and the executive powers. Accordingly, papal mediation lacked neutrality.<sup>19</sup>

The Friars Minor, a Catholic religious order of men that began in the Thirteenth century, remedied some of the foregoing difficulties.<sup>20</sup> One of the distinguishing characteristics of the Friars Minor was that they mixed freely with the people of their day and were well aware of the people's needs.<sup>21</sup> The Friars Minor popularized piety, as they worked primarily with common folk.

Thus, when the Church identified mediation as a proper focus through papal action and the creation of mediating ambassadors, the friars followed the lead. The Friars mediated between Catholic sovereigns,<sup>22</sup> among the sovereigns and commoners, as well as any other city rivalries.<sup>23</sup> In addition to mediating between common Christian folk, the Friars also mediated between non-Christian sovereigns and Christian Europe.<sup>24</sup>

### *The Use Of Religion As A Bridge Towards Understanding*

As an alternative to the Crusades, St. Francis went directly to the Sultan Yusseff el Mostansir in Morocco to discuss the religious values of their dispute.<sup>25</sup> St. Francis and his companion Bernard suggested that the Crusades could end if the Sultan converted. Though the Sultan was not willing to compromise his religious be-

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18. See King & Le Forestier, *supra* note 10, at 76 (stating "[t]he Court of Rome is very desirous: it has many needs and one must give many gifts").

19. See *id.* at 75. Though this lack of neutrality could be seen as a difficulty, some scholars argue that neutrality is not an essential aspect of mediation. See John D. Feerick, *Toward Uniform Standards of Conduct for Mediators*, 38 S. TEX. L. REV. 455, 463 (1997) (discussing the value of neutrality and disclosing the importance of non-neutral interests); Riskin, *supra* note 4, at 17 (describing two ranges of mediation styles, those who facilitate and those who evaluate); John Bickerman, *Evaluative Mediator Responds*, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 70 (1996) (arguing that evaluative mediation presses the participants to reevaluate their positions).

20. The term Friars Minor is Latin for "lesser brother," signifying the founder's (St. Francis of Assisi's) desire that his followers identify with the lesser members of society.

21. See IRIARTE, *supra* note 9, at 129.

22. See *id.* at 130 (providing many examples of Friar Minor mediation between the years of 1231 and 1410).

23. See *id.* at 130; see also *supra* note 6 and accompanying text.

24. See IRIARTE, *supra* note 9, at 133-34.

25. See *id.* at 139-41 (recounting Francis' attempted mediation of Crusades with Sultan).

liefs, he was impressed with Francis' openness and courage. Nonetheless, the mediation did not result in a settlement, and the Crusades continued. However, the Friars Minor and the Moslems ultimately reached a mutual understanding and acceptance. Based on early lessons such as this, scholars have identified understanding and acceptance as appropriate goals for mediation.<sup>26</sup>

Notably, the agreement forged between the Sultan and St. Francis extends to this day as the Friars Minor still retain the right to reside in Moslem countries. Another groundbreaking result of this mediation was that St. Francis inserted an injunction into the Rule of Life for all Friars Minor that when they are with non-Christians, Friars Minor "must not create disputes or arguments, but rather they must submit themselves to all for God's sake, and confess that you are Christians."<sup>27</sup>

St. Francis' mediation with the Sultan offers many insights for present day mediators. For instance, where no common ground exists among the parties, creating a win-lose situation, exploring religious values may reveal unforeseen commonality. As previously stated, because the Sultan was impressed with Francis' simplicity and sacrifice for the love of God, St. Francis and the Sultan were able to achieve common ground by virtue of their mutual Abrahamic tradition.<sup>28</sup>

Also, in a typical win-lose position, a mutually respected channel of dialogue may be established with third parties representing both sides of the dispute through exploring the parties' religious beliefs. For St. Francis and the Sultan, this was accomplished by discussing the love of God and the authority of a transcendent power. As a result of this conversation, some Friars Minor remained in Morocco, leaving a channel of communications between the warring parties: Christian Europe and the Islamic countries.

### A. The Growth of Papal Mediation

Papal mediation continued to have a positive influence throughout history. In 1917, for example, Pope Benedict XV wrote an armistice proposal to the warring powers suggesting a basis for an

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26. See ROBERT A.B. BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994); Zena D. Zumeta, *Spirituality and Mediation*, 11 *MEDIATION Q.* 25 (1993) (discussing understanding and connectedness as goals of mediation).

27. *Rule of Friars Minor* ch. 7, cited in FRANCIS & CLARE, *supra* note 2, at 141.

28. Islam, Christianity and Judaism trace their origins to the biblical patriarch Abraham.

end to World War I, and a lasting peace.<sup>29</sup> The proposal consisted of reduction and limitation of arms, establishment of international arbitration, and restriction of the use of military force for the defense of the international order. When Pope Paul VI received U Thant, Secretary General of the United Nations, he stated that "[t]he Holy See has the highest esteem for this international organization. It considered it as the fruit of a civilization to which the Catholic religion . . . has given its essential principles."<sup>30</sup>

Pope John Paul II also mediated a dispute between Argentina and Chile in 1984.<sup>31</sup> The dispute concerned which country had sovereignty over oil-rich islands in a channel between the two countries. A panel of judges, composed of members of the International Court of Justice, held hearings in Geneva over the course of six years and rendered the decision in favor of Argentina.<sup>32</sup> However, Chile refused to accept the decision, a situation that was reminiscent of the Lombard League's rejection of the decision of Honourable III. With troop movement reported in border towns,<sup>33</sup> John Paul II ultimately mediated the dispute by dividing the islands between the two countries.<sup>34</sup> In a visit to the area, he noted that the generosity of spirit of the two leaders was what prevented war.<sup>35</sup> Again, an appeal to religious and transcendent values provided the motivation to settle a dispute.

Papal mediation works on the international level much like adjudication works on the national level. As a matter of faith in the institution,<sup>36</sup> the disputing parties must submit their authority to settle to a larger institution. Both parties in the Argentine-Chile dispute had recourse to this level of decision-making because negotiations failed or were blocked.

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29. See STANLEY CHODOROW, *CHRISTIAN POLITICAL THEORY AND CHURCH POLITICS IN THE MID-TWELFTH CENTURY* 152-58 (1972).

30. EMILE M. GUERRY, *THE POPES AND WORLD GOVERNMENT* at vi (1963).

31. See King & Le Forestier, *supra* note 10, at 79.

32. See *Argentina and Chile*, *LATIN AMERICA, LAX*, 38, Oct. 1, 1976, at 304 (listing the five judges as Fitzmaurice from Great Britain, Gros from France, Dillard from United States, Onyama from Nigeria, and Petren from Sweden) (on file with author).

33. See *Argentina in LATIN AMERICAN POLITICAL REPORT, LAPR XI*, 48, Dec. 9, 1977 (on file with author).

34. See Associated Press, *Argentina Approves Treaty to Settle Dispute with Chile*, Dec. 29, 1984 (on file with author).

35. See John Reichertz, *Pope Commemorates Major Diplomatic Victory in South America*, Apr. 1, 1987 (on file with author).

36. See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 (1951) (J. Frankfurter, concurring) (observing that "so important to a popular government" is sentiment "that justice has been done").

Both the Papal office and the United States judiciary claim to have the moral and legal authority to settle disputes. They both call for people to build links of mediation that will consciously reassert values to reinforce peace.<sup>37</sup> The values that religion asserts to reinforce peace are a reframing of the dispute from individual loss or gain to reparation of a disorder and teachings on compassion and forgiveness of one's opponent. Tapping into the religious motivation to create these links provides a possibility for lay person<sup>38</sup> led expansion of mediation.<sup>39</sup> However, both institutions share three similar problems: (1) the requirement of a significant expenditure of money to gain access to the highest court; (2) an assumption that parties share faith in the larger institution (United States courts and the Pope) in order to accomplish a mutually acceptable determination of justice;<sup>40</sup> and (3) the incapability of settling the worrisome number of increasing disputes.<sup>41</sup>

## B. Historical Analysis of the Religious Roots of Mediation in the United States

A closer look at the history of mediation in the United States illustrates that using religious motivations to achieve mediation settlements is not a novelty. Native Americans, for example, were well-versed in mediation. Traditional Navajo common law fostered

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37. See, e.g., NEGOTIATION, *infra* note 41, at 13; JEROLD S. AUERBACH, JUSTICE WITHOUT LAW 115-37 (1983) (tracing the mediation/arbitration movement in the United States); THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE (R. Abel ed. 1982); Warren Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973); but see Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 7 (1983) (discussing the fact that "we are the most litigious people in the world").

38. I refer to "lay" in both senses of the term, i.e. non-ordained and not legally trained.

39. See JAY FOLBERG & ALISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 29 (1984) (presenting a mediation guide for lay and lawyer mediators).

40. See Robert N. Wilentz, *Chief Justice Swearing-In Ceremony For Justice James H. Coleman, Jr.*, 49 RUTGERS L. REV. 1173 (1997) (lamenting that African-Americans among other minorities do not have confidence in the U.S. judicial system. Justice Coleman says he looks forward to day when this will change); see also King & Le Forestier, *supra* note 10 and accompanying text.

41. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 379 (1982) (noting overcrowded case docket of U.S. judges); JOHN PAUL II, NEGOTIATION: THE ONLY REALISTIC SOLUTION 13 (1982) (observing that, internationally, an increase of armaments production has been accompanied by a decrease in ethical principles of goodness, friendship and love, rendering dispute resolution an insurmountable task).

a system of justice based on a variety of spiritual values, including clan relations, equality, freedom, responsibility, harmony, maintaining a good reputation, respect, and an emphasis on making victims whole.<sup>42</sup>

The early Puritan, Quaker and Dutch settlers employed mediation, arbitration and conciliation as a means of ensuring conformity to community norms, and resorted to the legal system only as a last resort.<sup>43</sup> In the nineteenth century, Mormons, as well as Chinese and Jewish immigrants, developed their own community dispute-resolution mechanisms as a reaction to perceived hostility from the broader society.<sup>44</sup> Indeed, the Chinese who immigrated to the United States brought an ancient tradition of mediation with them.<sup>45</sup> Up until World War II, the Chinese mediated disputes through the Chinese Consolidated Benevolent Association,<sup>46</sup> an organization that appealed to the traditional Chinese values of harmony in family, clan and village during mediation.<sup>47</sup>

Immediately after World War I, when secular courts in Europe were inhospitable, the Jewish community brought a dispute resolution mechanism from Europe to the United States.<sup>48</sup> Today members of the Jewish community continue the practice of submitting commercial disputes to a rabbinical mediator selected by the dis-

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42. See Tom Tso, *Moral Principles, Traditions and Fairness in the Navajo National Code of Judicial Conduct*, 76 JUDICATURE 15 (June-July 1992) (embodying Navajo Nation's Code of Judicial Conduct adopted on November 1, 1992 based on a system which has been in use for 100 years and which in turn is based on traditions observed by the tribe for centuries before).

43. See Corinne Cooper, *Justice Without Law? A Search Through History for Contemporary Solutions*, 48 ALBANY L. REV. 741 (1984) (tracing the use of religious fora for dispute resolution).

44. See *id.*

45. See Jerome Alan Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L. REV. 1201, 1205 (1966) (describing how Chinese immigrants to the United States brought ancient Confucian principles of mediation).

46. See AUERBACH, *supra* note 37, at 73-76 (describing Chinese use of mediation from their arrival to United States until World War II when the traditional controls began to crumble and state courts were more popular to break from Chinese strongmen).

47. See *id.* at 73.

48. See *id.*; see also AUERBACH, *supra* note 37, at 76-94 (tracing the use of Jewish Administrative Courts as a means of dispute resolution).

puting parties,<sup>49</sup> provided that all parties to the dispute are willing to accept rabbinic authority as binding.<sup>50</sup>

## II. THE APPLICATION OF RELIGION IN MEDIATION TODAY

The religious and spiritual pedigree of mediation is quite extensive, and the practice of using spiritual aspects of mediation still continues. Recently, the Christian Conciliation Service ("C.C.S.") established offices to train and provide church mediators for personal disputes.<sup>51</sup> According to the C.C.S., the purpose of mediation is to glorify God through love of one's neighbor and to help disputing parties learn how to change attitudes and behavior so as to avoid similar conflicts in the future.<sup>52</sup> In addition, the Roman Catholic Archdiocese of New York is in the process of establishing a mediation center for Catholics to settle their disputes outside of court.<sup>53</sup>

The Mennonite Conciliation Service avoids denominational approaches to mediations. Rather, the goal for Mennonites is to establish proper relationships "that honor mutual human worth, that redress past wrong as far as injuries are able to be redressed, and in which steps have been taken so that neither fear nor resentment play dominant roles."<sup>54</sup>

There is a troublesome history of using religious and spiritual traditions to oppress.<sup>55</sup> However, if the oppressive nature which created problems can be avoided, employing religious values to encourage settlement can be beneficial. Mediators may increase positive results in conflict resolution if they re-frame the differences of the disputing parties in terms of shared values. These shared values have two sources: (1) the commonly shared values found in

49. See *Kozlowski v. Seville Syndicate*, 314 N.Y.S.2d 439 (1970) (resolving a dispute among stockholders of a closed corporation, the parties signed an agreement to submit themselves to a decision of a named rabbi who was entitled to constitute a tribunal with two other rabbis and to consult with an attorney).

50. See AUERBACH, *supra* note 37, at 89 (noting that Jewish mediation committees are gaining new popularity).

51. O.J. COOGLER, *STRUCTURED MEDIATION IN DIVORCE SETTLEMENTS: A HANDBOOK FOR MARITAL MEDIATIONS* (1978).

52. See INSTITUTE FOR CHRISTIAN CONCILIATION, *CHRISTIAN COALITION HANDBOOK* 15 (rev. 3.2 1994).

53. See ARCHDIOCESE OF NEW YORK, *MEDIATION RULES AND GUIDELINES* § 103 (1993).

54. See John P. Lederach & Ron Kraybill, *The Paradox of Popular Justice: A Practitioner's View*, in *THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES* 357, 361 (Sally E. Merry & Neal Milner eds., 1993).

55. See *supra* note 46.

society as a whole, including, fair play, restrictions on unjust enrichment and equity; and (2) religious values (our concern here), including love of neighbor, a belief in an ultimate reckoning, and personal sacrifice.<sup>56</sup> It is important to note that religious values and other commonly shared values are not mutually exclusive.<sup>57</sup> A mediator can strategically present values as either commonly shared or religious, depending on how the parties identify their value orientation.<sup>58</sup>

### III. RELIGION AS PART OF A BROAD STRATEGY TO PROMOTE SETTLEMENT

When using spiritual traditions as a motivation to settle disputes, the mediator must use broad goals and strategies.<sup>59</sup> A narrow goal of mediation is to arrive at a settlement based on the claim as brought by the claimant, usually a dollar sum.<sup>60</sup> This approach uses the likely court decision as a criteria.<sup>61</sup> A broader goal, however, addresses more personal issues, such as the animosity the parties may feel towards each other, or the possible loss of self esteem if one of the parties settles.<sup>62</sup> More explicitly spiritual, the personal issues to be addressed as goals of mediation include moral growth, the ability to forgive,<sup>63</sup> love of one's neighbor,<sup>64</sup> empathy<sup>65</sup> and increasing the inter-connectedness of all of humanity.<sup>66</sup>

For court-based mediation, the parties should receive notice of the mediator's option of employing a religious-based mediation. This can be accomplished in several ways. One is to present the option of using a religious context as a re-framing device to the parties at some point during the mediation. This may be done

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56. See Cynthia A. Savage, *Culture and Mediation: A Red Herring*, 5 AM. U. J. GENDER & L. 269 (1996).

57. See, e.g., Bernard Haring, *Ten Commandments*, in 4 NEW CATHOLIC ENCYCLOPEDIA 7 (1967) (illustrating that the Ten Commandments were largely based upon commonly held values in the Ancient Near East); see also Kenneth Pennington, *The Spirit of Legal History*, 64 U. CHI. L. REV. 1097, 1105 (1997) (discussing how development of codified law in Europe relied upon Code of Canon Law).

58. See Savage, *supra* note 56, at 292.

59. See Riskin, *supra* note 4, at 17 (providing a grid for a mediator to access her mediation).

60. See *id.*

61. See *id.* at 19.

62. See *id.* at 20.

63. See Kenneth Cloke, *Revenge, Forgiveness, and the Magic of Mediation*, 11 MEDIATION Q. 67, 67 (1993).

64. See INSTITUTE FOR CHRISTIAN CONCILIATION, *supra* note 52, at 7.

65. See BUSH & FOLGER, *supra* note 26, at 81-112.

66. See Zumeta, *supra* note 26, at 25-26.

within various re-framing options: an on-going relationship between the parties; a reputation that the parties maintain within the community; or the time required to receive a hearing by the judge. Another way is through self disclosure on the part of the mediator. Mediators may share personal religious beliefs with the parties and then reflect with them on the impact of religious beliefs on this mediation. This religious reflection, however, should go to the religious beliefs of the parties rather than those of the mediator. These options would need to be discussed beforehand with the officers of the court.

Both the narrow and broad mediation strategies influence the outcome of the settlement.<sup>67</sup> A narrow strategy ascertains and evaluates the facts of the case, and applies the mediator's knowledge of how courts resolve this type of case.<sup>68</sup> A broader strategy, on the other hand, invites the parties to explore their own beliefs and behaviors that facilitate settlement.<sup>69</sup> This strategy would assist the parties in determining the underlying issues in their dispute, as well as provide opportunities to change themselves, their institutions, and their communities.<sup>70</sup>

When St. Francis of Assisi mediated between the Mayor and Bishop of Assisi he used a broad goal and broad strategy of mediation.<sup>71</sup> His goal was to bring peace to Assisi and not simply to reach monetary agreement.<sup>72</sup> St. Francis' strategy was broad in that it led the parties to consider a larger context within which to frame their dispute: the ordered creation surrounding the disputants.<sup>73</sup> As such, the parties were inspired to locate a different motivation to settle other than a higher monetary sum.<sup>74</sup>

#### IV. RELIGIOUS MOTIVATIONS TO SETTLE

In early American history, harmony and the protection of group identity provided the motivation for parties to settle a dispute.<sup>75</sup> Today, if the dispute is inter-cultural, the mediator's challenge is to find common ground between the disputing parties in order to ar-

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67. See Riskin, *supra* note 4, at 24-34 (evaluating four categories of mediation techniques and strategies and their potential influence and goals on case settlement).

68. See *id.* at 27-28, 33.

69. See *id.* at 24.

70. See *id.* at 32.

71. See FRANCIS & CLARE, *supra* note 2, at 37-39 and accompanying text.

72. See *id.*

73. See *id.*

74. See *id.*

75. See Cooper, *supra* note 43, at 745-746 and accompanying text.



rive at a settlement. A court does not provide a common ground. It simply applies a supposedly neutral criteria for settling disputes, where one party loses and the other wins. Spiritual values, however, create the possibility of providing a common ground upon which disputing parties may be motivated to settle their dispute through mediation.

The following are three scenarios where spiritually-based motivation for settlement would be appropriate: (1) a dispute within a culture; (2) a dispute between institutional bodies whose spiritual values are either non-existent or unspoken; and (3) a dispute between two cultures.<sup>76</sup> Each case will employ a broad strategy paradigm.

1. *Jewish Booth Renter v. Jewish Convention Corp.*

The claimant brings this suit to recover rental fee from the defendant claiming that the defendant prohibited the claimant from distributing the claimant's propaganda in violation of previous agreements where claimant had rented the booth space and was allowed to disperse propaganda. The claimant alleges that this censorship was specific to the claimant's political beliefs in that other booth renters were allowed to disperse their propaganda. The Defendant alleges that the contract neither states nor implies that booth renters may distribute propaganda. Furthermore, the defendant alleges that if other organizations did distribute propaganda, they did so out of area where the defendant had control. Both parties agree that it is the content of the claimant's propaganda that makes this dispute so insoluble outside of court.

At first, reading this hypothetical could indicate that religious values only serve to complicate objective mediation processes, and show that entering the quagmire of religious dispute is entering a futile, no-win mediation. A narrow goal, fee resolution, and a narrow strategy, a close look at the contract and the possibility of implied obligations, seems to be in order. And yet it is possible that religious values could help resolution by offering a broader goal, a sharing of Jewish values of community and justice, and a broader strategy, asking the parties to empathize with each other's shared belief system.

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76. These hypotheticals are based on actual cases mediated by the author in Manhattan Small Claims Court, which are on file with the author.

The first possibility is to ask the parties if they know of functioning Jewish mediation committees.<sup>77</sup> Assuming that the religious differences of the parties would prevent them from having recourse to a Jewish mediation court, a mediator could explore the parties' understanding of how their own deeply held religious beliefs could help settle disputes.

Before exploring the intricacies of how a Jewish mediation court may solve the dispute, it would be helpful to explore the communal experience of being Jewish to elicit a measure of empathy between the parties.<sup>78</sup> This empathy could be further explored by the mediator directing questions to tap into the Jewish understanding of community.<sup>79</sup> If the mediator is not Jewish, this might be explored by having both parties describe commonly accepted Jewish beliefs on peace and justice. The common Jewish tradition holds the possibility of re-framing the parties' dispute from the religious/political dispute to religious teachings on making peace with one's sister or brother.<sup>80</sup>

## 2. *Hospital v. Insurance Company*

A hospital claims that an insurance company implicitly gave permission for the hospital to authorize medical examination by approving a primary physician who only uses this type of medical examination. The hospital alleges that the insurance company knew of the primary physician's exclusive use of this examination. The insurance company claims that the policy with the hospital clearly prohibits the use of non-explicitly approved medical tests.

This hypothetical appears to offer a case that is void of any spiritual or religious tradition. The only viable option is identifying a narrow goal—whether the defendant/Insurance Company should pay the plaintiff/Hospital for services provided, and pursue a narrow strategy—to explore the insurance policy and past behavior of the hospital with the insurance company. However, larger values may be operative. Perhaps both parties may be angry by the other's behavior in addressing the matter.

Assuming that the two parties must work together closely for years, broader goals of mending the relationship would be helpful.

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77. See *supra* note 49 and accompanying text.

78. See AUERBACH, *supra* note 37, at 86.

79. See *id.* at 79 (describing the Jewish value of community as *kehillah* derived from European institutions).

80. *Id.* at 89.

The ideals of community and creating order, effective in non-corporate disputes, may be translated into establishing a broader goal that both parties maintain a good public reputation. The broad strategy to achieve this goal would be to direct questions for the parties to explore their mission statements. More value-based statements are often found in a corporation's mission statement.

Such statements have the potential to re-frame the dispute from maximum profits to promote healing, for the Hospital, and to help people feel secure for the Insurance Company. In either case, broadening the goals and strategies of the mediation allows for more transcendent values to enter the process and increases the possibility of the parties finding common ground. This hypothetical provides an illustration of how commonly held values, derived from religion or secular society, may be employed to help resolve a dispute.

### 3. *Presbyterian Client v. Catholic Owned Moving Company*

The defendant owns a moving van company which offers services to clients on a one-to-one basis at set rates. The plaintiff claims that the defendant scratched the plaintiff's furniture and stained the plaintiff's couch after agreeing to an insurance policy which guarantees full replacement on any injured materials. The plaintiff is suing for full re-purchase value of the couch. The defendant concedes that an insurance policy was agreed upon with plaintiff but the full replacement value was only guaranteed for such incidents as the destruction of the truck during the move, not incidental damages. After extended negotiations, the defendant makes what both parties seem to agree is a reasonable offer. However, the plaintiff refuses to settle, because he claims it is "God's law" that damages should be repaid.

This case presents a clash of cultural and class values. The defendant is a Dominican Catholic who lives in the Bronx, and the plaintiff is a White Presbyterian who lives in Westchester. The Plaintiff, relying on God's law not to settle, presents a strong case for the argument that religious values impede settlement. Following a narrow goal in the form of a settlement sum, a narrow strategy and explaining the agreement once again appears to be the most prudent option in pursuing the meditation.

However, the plaintiff's beliefs will not dissipate merely because the mediation process claims religious neutrality. The mediator could help the parties identify broader goals, such as learning how to change attitudes and behavior in order to avoid similar conflicts

in the future.<sup>81</sup> Perhaps the mediator could suggest a broader strategy of mediation by directing both parties to explore 'God's law' as love of neighbor.<sup>82</sup> Through discussing shared religious beliefs, they might build consensus and lower the "God's law" barrier to settlement.

With either of these alternatives, raising a religious factor would not be the death blow to mediation. In fact, an honestly stated religious belief may provide an opportunity for the parties to achieve greater mutual understanding. The plaintiff could explain that "God's Law" for him meant that those who damage other people's goods should make full restitution of damaged goods.<sup>83</sup> After a similar discussion of who wronged who, the religious discussion might incorporate their shared Christian values, in which they may discover that their greatest commandment is to love one another.<sup>84</sup> Though this religious discussion does not guarantee a negotiated settlement, it would foster mutual understanding which is a goal of mediation.

### CONCLUSION

Religious authority has a long history of promoting mediation. Since the Middle Ages, Papal mediation, relying upon shared religious values, has advanced settlements among intransigent parties. However, Papal mediation was only accessible to the highest echelons of society. The Friars Minor popularized and broadened the use of mediation. Presently, United States courts are facing overcrowded dockets, time and expense of litigation, and the reality that the justice system is most easily accessible to the privileged in society.

Value-based mediation presents a vehicle to popularize and broaden the use of mediation. Mediation in the United States has roots in religious identity emphasizing values such as stepping into the shoes of your adversary,<sup>85</sup> and assuring peace in the commu-

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81. See *supra* note 52 and accompanying text.

82. See *id.*

83. See, e.g., *Numbers 5:7*, REVISED STANDARD VERSION OF THE BIBLE ("[t]he person shall make full restitution for the wrong, adding one fifth to it, and giving it to the one who was wronged.").

84. See *John 13:24* (Jesus decreeing that "I give you a new commandment, that you love one another. Just as I have loved you, you also should love one another.").

85. See Tso, *supra* note 42 and accompanying text (discussing Native American use of mediation in legal codes).

nity.<sup>86</sup> Since World War II, religious groups have proceeded to set up mediation centers in order to mediate disputes from an explicitly religious context.<sup>87</sup> Mediation provides an opportunity to employ religious values as a positive force toward reconciliation, thus continuing an unbroken tradition of using shared transcendent values to motivate settlement. This reconciliation is characterized by inner peace of the parties.<sup>88</sup> Thus, it is only natural that we return to these roots in the ongoing development of mediation in the United States legal culture.

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86. *See supra* notes 43-45 and accompanying text (discussing various communities in the new world preferring mediation rather than resorting to legal system in order to preserve unity).

87. *See supra* notes 46-54 and accompanying text (discussing various religious groups offering mediation).

88. *See supra* note 7 (defining reconciliation).

# INTERNATIONAL DEBT FORGIVENESS AND GLOBAL POVERTY REDUCTION

*Chantal Thomas\**

The crushing debt burden of the world's poorest countries threatens not just basic dignity but life itself. According to the United Nations Hunger Project, thousands of people die each day from hunger, on average one person every 3.6 seconds.<sup>1</sup> According to the Institute for Food and Development Policy, ten percent of those hunger-related deaths are from war; ninety percent are from simple malnutrition.<sup>2</sup>

World poverty is a crisis of global dimensions that must be laid alongside peacekeeping and human rights as a challenge that the international community has an obligation to address. The international debt crisis has played a critical role in entrenching and prolonging global poverty. This Essay argues for an expansion of coordinated international effort, bolstered by fundamental principles of public international law, to address global poverty by substantially reducing the foreign-denominated debt owed by developing-country governments to industrialized-country governments, private banks and international financial institutions. This Essay will first describe the international debt crisis, and then consider the moral, economic, political and legal bases for international debt forgiveness. Finally, this Essay will discuss what is being done, and propose what needs to be done in the future.

## I. THE DIMENSIONS OF DEBT

The debt burden borne by developing countries totals over \$2 trillion.<sup>3</sup> Among indebted developing countries, the debt burden is particularly severe, not surprisingly, for the least developed countries. The World Bank and IMF have identified forty "heavily indebted poor countries" ("HIPCs") — countries at the bottom end of the world's wealth spectrum, with per capita incomes of just a

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1. See Peter Uvin, *The State of World Hunger*, in *THE HUNGER REPORT: 1998 3* (Ellen Messer & Peter Uvin eds.).

2. See *id.* at 5.

3. See UNITED NATIONS DEVELOPMENT PROGRAMME, *HUMAN DEVELOPMENT REPORT 196 (1999)* [hereinafter *HUMAN DEVELOPMENT REPORT*].

few hundred dollars a year.<sup>4</sup> The debt burden of these forty countries is just ten percent of the total for the developing world — about \$200 billion — but for these countries in particular, the burden is unsustainable one.<sup>5</sup>

To explain the dimensions of the debt crisis in more concrete terms: Two trillion dollars is a little over one-fifth of annual U.S. economic output, which is about \$9 trillion.<sup>6</sup> HIPC debt is 2.2% of annual U.S. economic output. It is about one-eighth or 12.5% of the U.S. federal budget; about 80% of the annual Department of Defense budget,<sup>7</sup> and about half of annual expenditure on Social Security.<sup>8</sup>

The debt burden is directly related to world hunger and poverty because debtor governments must divert precious and scarce resources to paying down external debt instead of meeting the pressing needs of their population. For the poorest countries, the debt burden is about \$5 billion each. This amounts to about 0.3% of U.S. federal budget, and .05%, or one-half of one-thousandth of U.S. annual economic output. The same \$5 billion in debt, however, constitutes an average 125% of annual GDP of each of these countries.<sup>9</sup>

Thus, external debt for these countries is an overwhelming burden that takes resources away from populations already in very dire straits. According to recent reports by Oxfam, the United Nations Children's Fund ("UNICEF") and the United Nations Development Programme ("UNDP"), about half of all households in these countries lack access to safe water and sanitation.<sup>10</sup> Average life expectancy is fifty-one years, or twenty-six years less than in industrialized countries. Life expectancy in many countries is actually declining, due in part to epidemic levels of the HIV virus. There is one doctor for every 7700 people on average, about

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4. See World Bank, Global Development Finance 1999 (External Debt Summary Indicators) (visited Apr. 10, 2000) <<http://www.worldbank.org/hipc/about/debt-table/debt-table.html>>.

5. See *id.*

6. See BUREAU OF ECONOMIC ANALYSIS, SURVEY OF CURRENT BUSINESS 132 (1999).

7. The U.S. federal budget was \$1.65 trillion in 1998. See Executive Office of the President of the United States, Budget of the U.S. Government: Fiscal Year 2000, at 365. The Department of Defense spent \$260 billion in 1998. See *id.*

8. See *id.* at 253.

9. See World Bank, Global Development Finance 1999, *supra* note 4.

10. See UNICEF & OXFAM, DEBT RELIEF AND POVERTY REDUCTION: MEETING THE CHALLENGE ¶ 2.1 (1999).

twenty times worse than industrialized country average.<sup>11</sup> The average literacy rate for the poorest countries is thirty-five percent, with over one-third of the population not reaching grade five.<sup>12</sup>

Despite the dire health needs and educational plight of the population, debtor governments spend more on debt payments than on health and education. In most of the HIPC's, more than one-fifth of the limited public revenue is being diverted to debt repayments.<sup>13</sup> Yet expenditure on health and education is under ten percent on average.<sup>14</sup> A recent joint report by UNICEF and Oxfam conveyed the dire consequences of this dilemma:

Countries such as Burkina Faso, Mozambique, Niger and Tanzania are spending \$3-\$6 per capita a year on their health systems, which is insufficient to finance a package of basic health interventions. Yet each of these countries spends more than double on debt servicing what is spent on primary health care. In Zambia — where infant mortality rates are increasing, over half a million children are out of school, and illiteracy is rising — debt servicing claims more of the national budget than health and education combined.<sup>15</sup>

In Zambia, per capita income is \$250. The debt burden is \$750 per person — three times per capita income.<sup>16</sup>

Of the amount repaid, less than half goes to paying principal — most goes to paying interest, so that the debt burden decreases only very slowly over time. In sum, debtor governments are caught in a cycle that they cannot break without debt reduction. There are moral, economic, political and even legal reasons for an international effort to relieve this burden.

## II. THE ARGUMENTS FOR INTERNATIONAL DEBT FORGIVENESS

### A. Moral Arguments

This Symposium on forgiveness in the law has extensively addressed the moral grounds for forgiveness.<sup>17</sup> Forgiveness recognizes the kinship of the human spirit — that there is a bond between us that overrides material differences and inequalities.

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11. See HUMAN DEVELOPMENT REPORT, *supra* note 3, at 173-75.

12. See *id.*

13. See UNICEF & OXFAM, *supra* note 10, ¶ 3.1.

14. See *id.*

15. *Id.* ¶ 3.2.

16. See *id.*

17. See Panel on *Forgiveness and Justice*, in Symposium, *The Role of Forgiveness in the Law*, 27 *FORDHAM URB. L.J.* 1347, 1367 (2000).



This is one reason why religious groups have become strong advocates for international debt forgiveness. The Roman Catholic Church has declared the year 2000 a Jubilee Year, invoking an ancient Hebrew tradition discussed in the Old Testament. According to this tradition, "the Jubilee was a time to start over, to right old wrongs, to reestablish justice and equity."<sup>18</sup>

However, the moral strength of this issue does not depend on religious belief or denomination. A more secular basis is provided by fundamental tenets of international human rights law: the principle of universal human dignity, and the belief that human solidarity requires action by all to ensure that the dignity of all is recognized and protected.

One might protest that debt forgiveness is not morally preferable because debtors should be held accountable for the debts they have accrued. Yet the causes of the debt crisis are complex and cannot be attributed solely to the debtors. Certainly, the crisis arose in part from excessive borrowing, inefficient and ill-thought-out economic policies and even corruption by debtor governments. The most notorious example may be that of Mobutu Sese Seko of the former Zaire, now Democratic Republic of Congo — Mobutu's theft reportedly equaled all health and education expenditures of that country.<sup>19</sup>

The behavior of debtor governments, however, was only one of many causes of the debt crisis. Part of the problem was excessive lending. Private banks, flush with petrodollars, were eager to recycle them to debtor governments. Industrialized governments, locked in a Cold War, were willing to lend money to corrupt and totalitarian regimes to secure their political alliance. Mobutu initially helped to wrest power away from the democratically elected prime minister Patrice Lumumba, with the support of the U.S. government, and secured his kleptocratic dictatorship with the support of the West.

Part of the problem also lay with the vicissitudes of the international economy, particularly the early 1980s. The bottom fell out of the international market for the export crops many of these countries depended on, such as copper and coffee. This recession in

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18. Address of Bishop John Glynn, US Catholic Conference, to Congress, November 4, 1999.

19. See Chantal Thomas, *Does the "Good Governance Policy" of the International Financial Institutions Privilege Markets at the Expense of Democracy?*, 14 CONN. J. INT'L L. 551, 555 & n.21 (1999). Ferdinand Marcos became similarly infamous for his colossal theft from the government of the Philippines.

revenue-earning exports coincided with tight monetary policy of the U.S. government that drove up loan interest rates and made debt burdens particularly acute.

Thus, many dynamics interacted to produce the debt crisis. Even if one could say debtor governments were entirely to blame, this conclusion would not produce a morally valid reason to withhold forgiveness. Forgiveness is the act of putting away and canceling claims on one who has done wrong. It is invoked precisely when the wrong done cannot be justified or excused. Moreover, insisting that governments must be held accountable for all past debts is meeting the wrong of excessive borrowing with another wrong, that of making the people in these countries pay the price.

### **B. Economic Arguments**

Debt repayment by very poor countries is an inefficient use of global resources, for a very simple economic reason with a fancy name, called the diminishing marginal utility of money.

The general principle of diminishing marginal utility says the more you have of a particular thing, the less value you're going to attach to each additional increment of that thing.<sup>20</sup> The diminishing marginal utility of money is an extension of that principle: beyond a certain level of income, one experiences decreasing (though positive) increments of well-being from successive incremental increases in income. This is one of the principles on which progressive income tax systems are based — it's a simple economic argument for redistribution.

In the international debt forgiveness scenario, if the U.S. economy grows by one-half of one-thousandth of a percent, it won't change things in the U.S. much. By contrast, in the world's poorest countries, the same amount could wipe out the debt and build a basis on which to begin making essential steps toward meeting basic human needs.

This redistributive argument seems particularly apropos at a time when the industrialized world is in the throes of unprecedented expansion. The United States is experiencing the longest peacetime economic expansion on record. Private lenders are benefiting from the bull market. Citibank, for example, earned eighty-six percent more than it did last year, and the annual *profits* (i.e.

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20. WILLIAM J. BAUMOL & ALAN S. BLINDER, *MICROECONOMICS* 98-100 (1998). To take a somewhat frivolous example, even if you happen to be a maniac for chocolate chip cookies, you would not appreciate the hundredth cookie as much as the first.

net, not gross, revenues) of Citigroup alone would pay off over one-quarter of the debt of the heavily indebted poor countries.<sup>21</sup>

Debt reduction, then, is crucial to the development of poor countries. Without the basic conditions necessary for the people of these countries to survive, let alone thrive, the crucial human capital that they bring to development process will remain largely untapped.

Many have also argued that debt reduction is in the economic interests of the Western world. Debt repayment is critical to enabling economic development, and economic development opens up places for Western actors to do business with. The Clinton Administration recognized this in its initiative related to debt relief, particularly in its trade and aid with Africa initiative. From this perspective, the debt burden is a dead weight on the global economy.

### C. Political Arguments

Debt forgiveness is also in the political interests of the world. In fact, it is critical to ensuring political security and international peace. The United Nations Security Council made headlines recently when it declared that the HIV/AIDS epidemic in the developing world constituted a threat to international security. United States Vice President Al Gore stated in his opening address to the Security Council that "the number of people who will die of AIDS in the first decade of the 21st century will rival the number that died in all of the wars in all of the decades of the 20th century."<sup>22</sup> And yet, as noted above, many heavily indebted governments have had to cut back on health services in order to service external debt. A population decimated and destabilized by disease is vulnerable to strife and unrest. Severe poverty does create political risk.

The political legitimacy of the current order is undermined when the world's powers stand by and allow the world's poor to suffer and even to die. Conversely, the political legitimacy of the current order is reinforced when the world's powers join the world's poor in partnership. The United States government realized this with the Marshall Plan and its other generous initiatives to rebuild Europe and Japan after World War II.

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21. Heidi Miller, *Citigroup Fourth Quarter 1999 Review* 3, 11 (Jan. 18, 2000).

22. Address by United States Vice President Albert Gore to the United Nations Security Council, January 10, 2000.

### D. Legal Arguments

Debt forgiveness is a crucial component in securing international prosperity and international peace — it is a challenge for the international order. As such, it is a challenge for international law. The current principles of international law represent the beginnings for progressive development of an international legal system to address state insolvency.

For example, numerous international human rights documents affirm the principle of human dignity. The Universal Declaration of Human Rights, the founding declaration of principles for the modern international human rights law framework, recognizes in its first sentence that the “inherent dignity . . . of all members of the human family is the foundation of freedom, justice and peace in the world.”<sup>23</sup> Article 1 of the International Covenant on Civil and Political Rights grants all people the “right of self-determination” which includes the right to “freely pursue their economic, social and cultural development,”<sup>24</sup> and states that “[in] no case may a people be deprived of its own means of subsistence.”<sup>25</sup>

These general principles of human dignity and self-determination are complemented by principles that have emerged with domestic legal systems specific to bankruptcy. According to international law doctrine, general principles of domestic legal systems offer a basis on which to derive norms of international law.<sup>26</sup> The principle of forgiveness in bankruptcy law seems to be well-established in this regard.

Indeed, domestic legal systems cause one to wonder about the possibility of establishing an international insolvency regime. International adjudicative bodies are growing and becoming stronger all the time: the International Court of Justice; the WTO; the International Criminal Court; and European Union courts. A multi-lateral forum for the management of state insolvency deserves consideration.

### III. WHAT HAS BEEN DONE

Among the poorest countries, the main creditors are industrialized-country governments and international financial institutions (“IFIs”).

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23. Universal Declaration of Human Rights, United Nations General Assembly Res. 217A(111), Dec. 10, 1948.

24. International Covenant on Civil and Political Rights, Art. 1, cl.1 (1966).

25. *See id.* at cl. 2.

26. *See* Statute of the International Court of Justice, Article 38 (1924).

The HIPC Initiative was established in 1996 as a joint program by the World Bank and the International Monetary Fund. It is conditional on agreement by debtor countries to a series of deep-reaching economic reforms, often called "structural adjustment." The HIPC initiative is intended to provide some relief for heavily indebted poor countries that followed IMF and World Bank policy advice but have not reached "debt sustainability," defined by the IMF and the Bank as 200 to 250% of annual export earnings.<sup>27</sup> A heavily indebted country can qualify if it has been unable to relieve its debt burden through existing debt relief mechanisms, and if it has a track record of implementing the economic and social reforms suggested by the IMF and World Bank. The program is divided into two stages of three years. In the first three years, a country establishes a record of implementing reforms. In the next three years, the IFIs work together with the country's creditors to allow the country to exit from unsustainable debt at the end of that period, or the "completion point." Multilateral creditors reduce their debt burden by up to eighty percent. To date, four countries (Uganda, Bolivia, Guyana and Mozambique) have completed this debt reduction and are receiving funds totaling 2.8 net-present-value ("NPV") billion (\$5 billion as dispersed). Seven countries have agreed on debt reduction packages (Bolivia, Burkina Faso, Cote d'Ivoire, Guyana, Mali, Mozambique and Uganda), totaling 3.4 billion NPV (6.8).

In June 1999, the G-8 group (US, Canada, German, UK, France, Japan, Italy, plus Russia) of industrialized countries meeting in Cologne proposed a "Cologne Debt Initiative" accelerating the HIPC initiative. Under this initiative, total debt relief available would rise from \$55 billion to \$100 billion. Creditor governments would agree to reduce their debt by up to 100%, up from eighty percent. The Cologne Initiative shortens the time frame for relief from six years to three years.

There has also been some bilateral debt reduction by creditor governments. In November of 1999, for example, President Clinton signed into law a debt relief directive<sup>28</sup> that cancels almost one hundred percent owed to the U.S. by the poorest countries and appropriates \$110 million in debt relief in 2000.

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27. See Axel van Trotsenburg & Alan MacArthur, *The HIPC Initiative Delivery Debt Relief to Poor Countries 1-2* (joint paper of the IMF and World Bank, Feb. 1999).

28. See Consolidated Appropriations Act of 2000, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-311 – 1501A-318 (codified as amended at 22 U.S.C. §§ 262, 286 (2000)).

#### IV. WHAT CAN BE DONE?

The IMF and World Bank HIPC addresses only a fraction of all developed countries. Moreover, the Cologne Initiative to improve it has not been clearly operationalized. Oxfam and UNICEF believe the debt sustainability definition used under the HIPC initiative allows debt burden still too high to allow a country to meet the basic needs of its population. Traditional critique of IMF and World Bank measures, which is that they often require fiscal discipline by the government that hurts the population and proves counterproductive, remains relevant. As a result of instructions to cut back on budgetary expenditures, for example, health clinics are cut in countries where health problems are already dire. This arguably is a backwards way of going about the issue, simply ensuring that the problems the government has to meet will be much worse by the time money is freed up to address them.

The IMF and World Bank have not been as sensitive to pressing debt need in other circumstances: e.g., Hurricane Mitch, a devastating hurricane in Central America that left thousands dead and homeless. IMF and World Bank did not participate in a moratorium on debt payments agreed by lender governments, so that in the midst of their attempts to deal with Hurricane Mitch, these two governments had to pay the IMF and World Bank \$1 million a day.

IMF is considering re-evaluating its gold reserves, which would free up to \$1 billion dollars, and is considering using some portion of that for debt relief. Governments must also increase bilateral debt relief. The Hope for Africa Act of 1999<sup>29</sup> currently in the Senate Finance Committee, provides trade, aid and debt relief for Sub-Saharan African countries, nearly all of whom are HIPCs. Finally, debt reduction by private creditors is a critical part of the puzzle. Ultimately, both a coordinated international response to the debt emergency and a longer-term solution are necessary.

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29. S. 1636, 106th Cong. (introduced Sept. 24, 1999); *see also* H.R. 772, 106th Cong. (introduced Feb. 23, 1999). The Hope for Africa bill was originally introduced by Rep. Jesse Jackson, D-Ill., as an alternative to H.R. 434, the "African Growth and Opportunity Act." The "Hope for Africa" bill offers expanded trade provisions and incorporating labor and environmental concerns. *See* 145 Cong. Rec. S11,877 (daily ed. Oct. 4, 1999) (statement of Sen. Feingold).

## INTERNATIONAL DEBT FORGIVENESS

## ORGANIZATIONS AND CONTACTS

*Oxfam*

<http://www.oxfam.org>

<http://www.oxfam.org/advocacy/papers.htm>

*The Jubilee 2000 Coalition*

<http://www.jubilee2000uk.org>

*National Conference of Catholic Bishops/United States Catholic Conference*

<http://www.nccbuscc.org/sdwp/international/debtindex.htm>

*World Bank Heavily Indebted Poor Countries Initiative*

<http://www.worldbank.org/hipc/>

*The Hunger Site*

<http://www.thehungersite.com>

*Your Congressperson(s):*

Get contact info at:

<http://www.house.gov/writerep> and <http://www.senate.gov>

## For local residents:

Representative Jerrold Nadler,  
United States House of Representatives  
Washington, DC 20510-3201  
(202) 225-5635  
[jerrold.nadler@mail.house.gov](mailto:jerrold.nadler@mail.house.gov)

Senator Daniel Patrick Moynihan  
United States Senate  
Washington, DC 20510-3201  
(202) 224-4451  
[Senator@dpm.senate.gov](mailto:Senator@dpm.senate.gov)

*Pending U.S. Legislation: H.R. 772; S. 1636 ("Hope for Africa Act")*

## IS THERE A PLACE FOR FORGIVENESS IN THE JUSTICE SYSTEM?

*Everett L. Worthington, Jr.\**

Transgressions unbalance the scales of justice, socially, emotionally, and sometimes politically. Unforgiveness can be seen as a set of “cold” emotions involving resentment, bitterness, hostility, anger, etc. that occur after ruminating about the transgression. People reduce unforgiveness in many ways. Justice reduces unforgiveness by balancing the social — and to some extent emotional — books. Forgiveness involves super-imposing emotions of empathy, compassion and other-oriented altruistic love (or even romantic love) on top of “hot” anger at the transgression or “cold” unforgiveness emotions. Justice involves social processes, while forgiveness occurs within individuals, even though social processes may hinder or facilitate forgiveness. Yet, there is a place for forgiveness in the justice system, but it is in the background rather than foreground.

There is something deep within almost every person that desires justice. Our spirits rail against unfairness and inequity. Unfortunately for most people, this deep-seated desire for justice is virtually a one-way street. The outrage of injustice happens almost exclusively when we are on the light end of the scales of justice — when we see ourselves as the victim, the one transgressed against. In those cases, we cry out for a balancing of the scales. We demand justice.

There is something deep within almost every person that desires love, mercy, and grace. Love, mercy and grace are closer to being two-way streets than is justice. In a kind of “justice of love,” we are able to reciprocate love when we receive it, balancing the scales of love. The marvel of humanity, however, is that we sometimes are able to give love to those we do not think deserve love. To make that miracle of love, grace, and mercy happen requires *empa-*

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\* Virginia Commonwealth University, Psychology Department Chair; Executive Director, A Campaign for Forgiveness Research, 1998 to present; Private Practice of Psychology (Counseling/Clinical), 1982 to present. Much of the research on which this Essay is based was funded by a generous grant from the John Templeton Foundation (the “Foundation”). Portions of this Essay were presented in an earlier form at a conference sponsored by the Foundation and Harvard Kennedy School for Government in October 1999.



thy. We cannot meet the needs of others if we cannot empathetically experience what they experience.

### A PERSONAL EXPERIENCE

I must admit to you that this struggle between justice and love, mercy and grace is not just of academic interest to me. Four years ago, in a botched home burglary, some youths murdered my mother, bludgeoning her with a crowbar.

At the beginning, I felt the rage and hatred for the youths, which you might expect. As I walked the floor late at night, fantasizing about beating the offenders' brains out with a baseball bat, the irony of having investigated forgiveness as a scientist, professed forgiveness as a Christian, counseled forgiveness as a therapist, and written of forgiveness as an author struck me. In fact, I had just finished a book co-authored with two of my graduate students, *To Forgive Is Human*,<sup>1</sup> based on seven years of psychological research. We described a five-step method of forgiving that centered on empathy for the transgressor.<sup>2</sup>

As I began to apply the method we had found successful in clinical research,<sup>3</sup> I imagined the way a youth might feel who planned a perfect robbery on New Year's eve. Suddenly, his careful plans would have been destroyed when an old woman walked in and caught him. He saw the certainty of jail flash before his eyes and reached out in anger to beat back the threat to his future and his happiness with a crowbar.

I could understand his motives and his feelings. Then I realized that I had said aloud that I could beat this youth's brains out with a baseball bat — to do to him what he had done to my mother. We were the same at heart. Yet as a Christian, I knew I was forgiven by God for my evil heart. Who, then, was I, to deny forgiveness to the youth? I forgave.

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1. MICHAEL E. McCULLOUGH ET AL., *TO FORGIVE IS HUMAN: HOW TO PUT YOUR PAST IN THE PAST* (1997).

2. See Michael E. McCullough, et al., *Interpersonal Forgiving in Close Relationships: II. Theoretical Elaboration and Measurement*, 75 J. PERSONALITY & SOC. PSYCHOL. 1586 (1998); see generally McCULLOUGH ET AL., *TO FORGIVE IS HUMAN*, *supra* note 1.

3. See Michael E. McCullough & Everett L. Worthington, Jr., *Promoting Forgiveness: The Comparison of Two Brief Psychoeducational Interventions with a Waiting-List Control*, 40 COUNSELING & VALUES 55 (1995); see also Everett L. Worthington, Jr. et al., *Forgiving Usually Takes Time: A Lesson Learned by Studying Group Interventions to Promote Forgiveness*, 28 J. PSYCHOL. & THEOLOGY 3-20 (2000).

**DEALING WITH CIVIL, CRIMINAL AND PERSONAL  
TRANSGRESSIONS**

Civil, criminal and personal transgressions occur within the justice system. Besides the societal issues involved in transgressions, many parties experience unforgiveness. Below I define unforgiveness, forgiveness and reconciliation, and analyze the role of forgiveness, if any, in the justice system.

**Unforgiveness**

Unforgiveness is defined as a complex of "cold" emotions involving hatred, anger, resentment, bitterness, hostility and perhaps fear. Those emotions arise from ruminating about the transgression and motivate a rapid reduction of unforgiveness.

A model of unforgiveness is embedded within this definition.<sup>4</sup> Unforgiveness begins with a transgression.<sup>5</sup> A person reacts with "hot" emotions of anger and fear.<sup>6</sup> Anger is experienced to the extent that a person's sense of justice is perceived to be violated.<sup>7</sup> Fear is experienced to the extent that the person is perceived to have been hurt and is concerned about future harm.<sup>8</sup> That anger and fear are not unforgiveness. Unforgiveness occurs as a person ruminates about the transgression and its consequences.<sup>9</sup> Over time a sense of resentment, bitterness, hostility, hatred, anger and fear, coalesce into a cold complex of emotions that we call unforgiveness.<sup>10</sup> Unforgiveness is an unpleasant state of affairs and motivates people to reduce their unforgiveness. There are many ways to reduce unforgiveness. Forgiveness is only one of those ways.

I have summarized many of those ways elsewhere.<sup>11</sup> Many ways to reduce unforgiveness center around promoting different ways to feel that justice has been served. These involve achieving successful retaliation or revenge, which can reduce a person's desire for retribution because the person believes that justice has occurred.

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4. See fig. 1 *infra* p. 1734.

5. See *id.* box 1.

6. See *id.* box 3.

7. See *id.* box 2.

8. See *id.* box 2.

9. See *id.* box 4.

10. See *id.* box 5.

11. See Everett L. Worthington, Jr., *Unforgiveness, Forgiveness, and Reconciliation and Their Implications for Societal Interventions*, in *FORGIVENESS AND RECONCILIATION: RELIGIOUS CONTRIBUTIONS TO CONFLICT RESOLUTION* (Rodney Peterson & Ray Helnick eds., in press).

Other ways of recognizing that justice has been done, and reducing unforgiveness, involve traditional punitive justice as well as restorative justice.<sup>12</sup> If an offender makes fair restitution, the victim can feel that justice has prevailed. Yet another way to believe that justice has or will be done is to hand the judgment over to God. This can be done with a desire for seeing God's justice and punishment poured out on the offender or it can be done as an act of faith, trusting that God knows more about people's hearts than does the person who is relinquishing judgment to God.

### Forgiveness

As described in the lower part of Figure 1, forgiveness is an emotional super-position or juxtaposition of different emotions onto the emotional complex of unforgiveness.<sup>13</sup> Emotional attachments to memories of transgressions prevent a person from ever experiencing unforgiveness to the same intensity or in the same way again<sup>14</sup> because unforgiveness is reduced<sup>15</sup> and forgiveness is experienced.<sup>16</sup>

Forgiveness is an individual phenomenon in which emotions are changed. Emotions involve not just feelings but also the person's body, brain chemistry, hormones, behavior, and mental processes.<sup>17</sup> It obviously matters what emotion is juxtaposed over the cold emotions of unforgiveness. Forgiveness involves emotions associated with love, empathy and compassion for the person who has offended or transgressed against a victim. (Recall the empathy I experienced for the murderer of my mother.) Forgiveness is furthered by a sense of humility, which sees oneself as capable of perpetrating great evils and harm to others, regardless of whether one has ever actually perpetrated such harm. Forgiveness also involves a sense of gratitude at having experienced forgiveness oneself for having hurt others in the past. That sense of having been forgiven can involve: (1) forgiveness by another person or, as in the case of the murder of my mother; or (2) forgiveness by the Divine. So forgiveness involves a complex of positive other-oriented emotions, which contaminate the hot emotions springing from the transgres-

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12. See HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* (1995).

13. See fig. 1, *infra* p. 1734, box 6.

14. See *id.* box 7.

15. See *id.* box 8.

16. See *id.* box 9.

17. See ANTONIO R. DAMASIO, *THE FEELING OF WHAT HAPPENS: BODY AND EMOTION IN THE MAKING OF CONSCIOUSNESS* 35-81 (1999).

sion or the cold emotions of unforgiveness that arise out of ruminating about hurts or offenses.

### **Reconciliation**

Reconciliation restores trust in a relationship where such trust has been violated by a transgression. Transgressions might be one-sided or might have occurred on both sides. Reconciliation depends on the trustworthy behaviors of both parties, not just the granting of forgiveness. Reconciliation often, though not always, involves a sincere and honest conversation about forgiveness.<sup>18</sup> This is because forgiveness is something within a person while reconciliation is something between people. Forgiveness is something granted to another person, reconciliation is something that people work together to earn,<sup>19</sup> seeking forgiveness from a victim, expressing forgiveness to an offender and accepting forgiveness that has been offered are all part of reconciliation.<sup>20</sup>

#### **TRADITIONAL JUSTICE AND THE PROBLEM OF PERCEPTION**

Humans see things through their own eyes. It takes a lot of effort and a certain amount of grace to be able to see things through someone else's eyes.

So when we perceive that an injustice has been done to us, we seek what is natural — repayment for that cost that we incurred, whether we had lost a loved one, property, peace of mind, physical well-being or emotional well-being.

In a two-party justice system consisting of offender and victim, the problem of differing perspectives makes it virtually impossible for both people to believe that justice has been done, that the scales have been balanced. Vigilante justice is a desire to balance the scales of justice on our own as an individual or group. But vigilante justice is seldom perceived as just by both victim and offender. We perceive wounds to ourselves as being more painful than wounds we inflict to repay the transgression. In revenge, we

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18. See Everett L. Worthington, Jr. & Dewitt T. Drinkard, *Promoting Reconciliation through Psychoeducational and Therapeutic Interventions*, 1 *J. MARITAL & FAM. THERAPY* 93-101 (2000).

19. See Everett L. Worthington, Jr., *The Pyramid Model of Forgiveness: Some Interdisciplinary Speculations About Unforgiveness and the Promotion of Forgiveness*, in *DIMENSIONS OF FORGIVENESS: PSYCHOLOGICAL RESEARCH AND THEOLOGICAL PERSPECTIVES* 107-37 (Everett L. Worthington, Jr. ed., 1998).

20. See Robert D. Enright & the Human Development Study Group, *Counseling within the Forgiveness Triad: On Forgiving, Receiving Forgiveness, and Self-forgiveness*, 40 *COUNSELING & VALUES* 107-26 (1996).

typically repay more than we incurred. Vigilante justice leads to escalation of hostilities.

Even civil or legal justice is often perceived inequitable. For example, if an intruder breaks into my home and steals \$1000 and that intruder is apprehended, goes to court and is told to repay the money, I still do not feel that justice has been served. True, I have my \$1000 back, but I have lost my sense of security, my trust in human nature and even my belief in justice. To feel that the books of justice have been balanced, I will want to be paid punitive damages — say one million dollars — which will ease the emotional suffering that I have undergone).

On the other hand, when the perpetrator is apprehended and forced to pay \$1000, he might believe that justice has not been served. After all, a lot of effort and energy went into planning the burglary. The suffering and humiliation that the perpetrator has experienced at the hands of the police and in the justice system is certainly something that has put him or her at a social disadvantage for the rest of his life. Being asked to repay the money adds insult to injury and perpetuates a desire to commit additional crimes to get the scales back into balance. If punitive damages are added on top of the restoration of property, or if a jail sentence is added, then the sense of injustice and unfairness felt by the burglar is fueled even more deeply. The person becomes even more volatile once restored to society.

The justice system understands that individual senses of justice reveal individual perceptions. Therefore, the justice system establishes a third party who can arbitrate using a process that can be accepted as fair.

### THREE PARTIES IN THE JUSTICE SYSTEM

When a crime or civil dispute occurs, three parties are involved: (a) a victim and supporters of the victim; (b) an offender and supporters of the offender; and (c) society, or two plaintiffs and society. Each of those has different interests and all are involved in resolving crimes and civil disputes justly. The justice system seeks to balance the social scales. The concern has traditionally weighed toward helping victims feel that the social scales are more balanced by punishing offenders. However, mostly, in the traditional litigative justice system, the victim's *emotional* scales are ignored. At best, it is assumed that rendering a fair verdict or judgment will balance the emotional scales. As I have argued above, though, unforgiveness might persist.

Unforgiveness might continue to torture the victim and create costs to the victim that go beyond the crime itself. For example, unforgiveness can result in decreases in health, troubled mental health, and interpersonal costs due to chronic anger and bitterness.<sup>21</sup>

There appear to be two ways that a victim can reduce her sense of injustice and give up unforgiveness. The first is in some way to see that the scales of justice become more balanced. The other is to forgive. Pursuing justice seeks a reestablishment of a *power*. The crime reduces the power and status of the victim. A victim's sense of power can be reestablished through balancing the social books (e.g., by restitution or incarceration of the offender) and balancing the emotional books (e.g., by seeing esteem lowering acts by the offender or through publicly humiliating the offender). In each, raising the esteem of the victim increases the victim's relative power — either by seeking revenge or seeing the criminal punished.

With forgiveness, the victim seems to be more motivated by love for a needy offender than by asserting power relative to a formerly powerful offender. Forgiveness is an altruistic gift to someone who needs forgiveness to restore him or her to a position of moral parity, whereas reducing unforgiveness through justice or vengeance is aimed at either pulling down the offender from a pedestal or elevating oneself above (or at least equal to) the offender. In forgiveness there is a recognition, as Aleksandr Solzhenitsyn remarked, that every person is a mixture of good and evil and people cannot destroy the evil with our hearts without also destroying the good.<sup>22</sup>

### Offender

The offender has an important stake in the justice system. The offender suffers a loss of esteem as well as potential penalties including financial costs and incarceration. The offender will also bear the stigma of having been convicted of a crime for the balance of his or her life. The offender might or might not want to restore what was taken from the victim in the course and aftermath of the crime (e.g., property, psychological well-being and physical well-being). The offender might or might not feel deserving of a verdict

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21. See Carl E. Thoresen, et al, *Forgiveness and Health: An Unanswered Question*, in *FORGIVENESS: THEORY, RESEARCH, AND PRACTICE* 254-280 (Michael E. McCullough et al. eds., 2000).

22. See ALEKSANDR SOLZHENITSYN, *THE GULAG ARCHIPELAGO: 1918-1956* (1985).

that attempts to equalize suffering through incarceration of the offender and punitive fines. As I illustrated earlier, victim and offender will *necessarily* have different perceptions of what is needed to *fairly* balance the scales, but both will be highly emotionally involved.

### Society

The third player in this triumvirate is society as represented by the trier of fact, the jury, and the observing public. Society's main interest traditionally has been in protecting the public, deterring future crimes, and providing for a fair and equitable balancing of the interests of victim and perpetrator to the extent possible. This balances the social books. Generally, the role of society has been more involved with conflict-resolution between offender and victim than in restitution, healing, and reconciliation after the conflict has been resolved. This balances the emotional books.

Yet, once society is involved, there is a third set of books to balance — the political books. Issues about forgiveness can work their way into society's consciousness, particularly if some members of society believe a verdict to be unjust. Notable examples of this are the O. J. Simpson and Rodney King verdicts, which displeased some (perhaps most) members of society. In the Simpson case, the legal system's differing verdicts in criminal and civil systems provided a way of resolving a conflict and rebalancing the political books. The riots following the King verdict were vigilante attempts to balance the political books.

### BALANCING THREE SETS OF BOOKS

We have arrived at the need to balance three sets of books: social, emotional, and political. Our traditional justice system has done a decent job (with some notable exceptions) of balancing the social and political books. It has given little attention to the emotional books. If anything, it is typically assumed that emotions are private and should be dealt with privately. Traditional justice has been conceived as impartial, and has been equated with being emotion-free, or at least emotion-neutral.

Recall my mother's murder. I forgave the murder in my heart. No one knew that. Yet I have now communicated my forgiveness publicly (which is different from forgiving). Forgiveness is an intrapersonal act, but its communication is an interpersonal and perhaps communal act. Those two ideas must be separated conceptually even though they are obviously related to each other.

Focusing on forgiveness simply as an intrapersonal event that has no interpersonal or societal consequences is an inadequate total picture.

Most people would probably concur that we want people to reduce their feelings of unforgiveness to the extent possible. In some cases, this will be aided if we can talk openly about forgiving under controllable circumstances. We have to consider also the conversation that occurs around forgiveness and provide a structured conversation around forgiveness.

Previously, the justice system has not had a conversation about forgiveness. The rise of a victim's rights movement has brought the victim into the societal picture. The restorative justice movement is bringing society into the picture. Restorative justice is aimed not just in punishing the offender but also in restoring the offender to his or her community, and the victim to his or her community, by providing a *conversation* within the community about crime and its resolution.

#### **A (RELATIVELY) NEW SYSTEM IN MODERN JURISPRUDENCE**

A restorative justice movement is now being practiced in several states.<sup>23</sup> In that process, a person who has committed a crime is brought in for face-to-face contact with the victim or the victim's family. Third parties (i.e., representatives of society) are typically present to ensure fairness. The perpetrator is allowed to confess his or her guilt, express his or her regret, apologize and offer to make restitution to restore the sense of fairness and justice within the victim's social and personal world. While these expressions of remorse and offers of restitution might trigger an experience of forgiveness in the victim, the essence of this restorative justice movement is to provide a kinder and gentler system of justice that will meet people's desire for justice deep within, and will help promote a restoration of the perpetrator to the community. Restorative justice, then, is not primarily about forgiveness. Rather, it is about a form of justice that values reconciliation over retribution.

In restorative justice, victims and community representatives want to see the offender feel and show remorse. They want to hear a humble apology. Further, offenders (and community representatives) want to know that a victim is willing to grant mercy. This is justice, not forgiveness. It is aimed more at balancing emotional and social books than at replacing unforgiveness with the empathy,

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23. See ZEHR, *supra* note 12.



love, and compassion of forgiveness. At best it is a severe mercy. It is grudging forgiveness, which satisfies the grudge by helping the victim feel free of hate and righteously magnanimous for granting mercy.

Unrestrained forgiveness is something else. It is giving a gift of grace not purchased by apology, repentance, and restitution — though such actions might occur.

The justice system is not able to truly employ forgiveness to deal with crimes. At best, it can attempt the severe mercy of *restorative* justice. Forgiveness happens in the hearts of the victims, apart from the ceremonies of restorative justice. Perhaps some people forgive before the meetings. Perhaps restorative justice takes a person one-mile down the hundred miles toward the eradication of unforgiveness, perhaps ninety-nine miles. Then forgiveness completes the journey.

### **THE ROLES OF FORGIVENESS IN THE JUSTICE SYSTEM**

Based on this analysis, you can probably see that I believe that the justice system can be configured to help reduce unforgiveness through the application of fair procedures and processes in which members can feel some trust. In the justice system, the reduction of unforgiveness and the balancing of social, political and emotional books are more important than the promotion of forgiveness.

#### **Hearing Testimony Can Produce Empathy**

Nonetheless, there are some aspects of the justice system that might help people forgive. For example, a victim can listen to the testimony of a perpetrator and might develop a sense of compassion, empathy, or even love for that perpetrator while justice is being acted out in court. Thus, at the personal level, forgiveness must be built within the heart of the victim.

#### **Building in Restorative Justice Procedures**

In the traditional justice system, though, there are few opportunities for reconciliation between victim and perpetrator. It is only as we move more toward restorative justice that reconciliation begins to be more of a probability. Forgiveness is more likely with restorative justice than traditional justice.

### **Introducing Forgiveness around the Edges through Compassionate Practice**

Because the justice system is concerned primarily with justice, its major emphasis will be always to establish fair outcomes that can reduce unforgiveness. But there is little room for actually producing forgiveness within the justice system. Forgiveness occurs as people are stimulated to empathy, compassion, love, humility, and gratitude. Those qualities are not commonly experienced within the justice system, though they may indeed occur as a consequence of (1) rulings by a merciful judge; (2) agreements by compassionate attorneys who, in conjunction with each other, work out arrangements that plaintiffs can be satisfied with; (3) interventions that accomplish restorative justice; or (4) pardons granted by an executive.

### **Involving the Wider Community**

It seems to me that the involvement of the wider community into the justice system offers another promise for bringing forgiveness into that system. As healing communities, such as churches, neighborhood organizations or civic groups can be invited into the process of resolving harms, forgiveness within the heart of both victim and perpetrator can occur. Therefore, there is no formula that says that the mere participation of a community will promote forgiveness. However, communities have a stake in promoting reintegration of victim and offender. Furthermore, personal relationships can be powerful motivators of restoration.

Communities can be divisive as well as oriented toward healing. In many ways, hatred, prejudice and the economic and psychological roots of crime are like an airborne virus that can be passed easily within a community. But forgiveness is an individual dose of medicine to fight against the disease. The system of justice cannot fully bring forgiveness into people's lives, though it can provide opportunities that make forgiveness and reconciliation more or less likely. Forgiveness needs to occur person by person — in the hearts of attorneys and judges, in the hearts of victims and perpetrators, in the hearts of community members. Each person desires justice and is starved to give and receive love. Both forgiveness and justice are operating together in human hearts, and one should not try to remove either from the heart, for that cannot be done without destroying the heart.

### Promoting Reconciliation

Reconciliation between perpetrators and victims, between perpetrators and society, and between victims and society is like building a bridge over a deep chasm.<sup>24</sup> One does not build a bridge by demanding that a meeting occur in thin air over the middle of the chasm, for that would lead to both sides falling. Rather, building the bridge of reconciliation starts at each side and the seeking and granting of forgiveness is the motive that helps people move away from their own entrenched self-interest, out toward the middle where they can meet. Reconciliation does not presume that each party is *equally* culpable.<sup>25</sup> It does presume that each party has wounds and probably has self-justification for pursuing centrifugal acts rather than centripetal acts. The motive of forgiveness helps people begin to walk the bridge *toward* a meeting place. The experience of forgiveness can occur at any point along the bridge to reconciliation.

### FORGIVENESS OF SELF

I have been primarily concerned to this point with relationships among offender, victim, and society. One other important venue must be considered. I am friends with a successful defense attorney, and in talking to him over the course of years, I was struck at how much he wrestles with his own conscience in his private time. On one hand, he is completely committed to providing the best defense that can be provided for any defendant. He has been extremely successful at the outcomes of his cases. On the other hand, he wrestles with moral issues. In one case a defendant told him that the defendant had indeed committed the murder with which he was charged. Yet the attorney knew that the police had little evidence and a conviction was extremely unlikely. The case eventually did go to trial, and the self-confessed (to his attorney) murderer was acquitted. While this attorney had behaved within legal and ethical guidelines, the attorney's sense of morality had been offended, and he had a difficult time forgiving *himself* in retrospect. During the case, he had convinced himself that he was doing the right thing. Later, his doubts haunted him.

Therefore, forgiveness of *self* is yet another venue for forgiveness around the edges of the justice system. Judges make errors.

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24. See Worthington & Drinkard, *supra* note 18, at 95.

25. See Jeanne M. Woods, *Reconciling reconciliation*, 3 UCLA J. INT'L L. & FOREIGN AFF. 81-127 (1998).

Juries make errors or are stampeded into awarding inequitable damages. Attorneys face irreconcilable choices, or they look back and admit to themselves that they did not give their best to a defense or prosecution. Attending to self-forgiveness within law school and providing continuing education to deal with forgiveness of self seem important, not as the major focus of law, but as an enduring subtext.

### **IS THERE A PLACE FOR FORGIVENESS?**

I see the main role of forgiveness within the justice system as being less involved in the justice system *per se* than potentially within each individual participant in the justice system. Can each participant empathize with the other participants? Can each individual feel compassion for the others? Can each individual love the others? Can each individual experience a putting aside of pride and an active sense of humility? Can each individual experience and recall with gratitude his or her own receipt of forgiveness from others? If there is hope for forgiveness within the justice system, this is the hope of forgiveness.

Forgiveness is more a by-product of sensitivity of individuals and of establishing structures that permit and encourage sensitivity within the justice system than it is a goal of the justice system. The goals of justice are (1) provide fair (to society, to victim and perpetrator, to plaintiffs) post-injustice settlements; and (2) protect society from future injustices. Such goals can be pursued with a hard heart aimed mostly at retribution and motivated by unforgiveness. Or such goals can be pursued with a soft heart aimed at restitution, restoration, and reconciliation, which are motivated by and motivate forgiveness. Note that in both instances, justice is pursued. I believe that the justice system operates best when reconciliation is the motivation, not retribution. There is a place for forgiveness in the justice system, but it is background, not foreground.

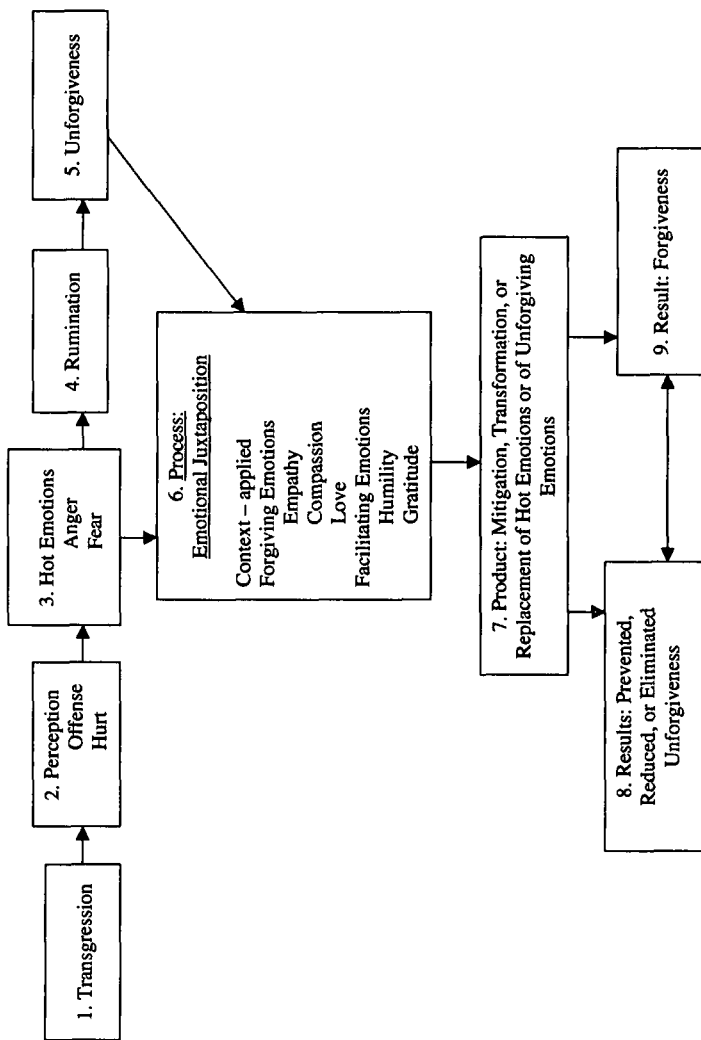


Figure 1. A conceptual model for reducing unforgiveness and promoting forgiveness through emotional juxtaposition.