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## Forgiveness in the Criminal Law

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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

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

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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.cjcr.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. ANTI 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 ANTIJE 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 N° 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.

