

Forgiveness, Law and Justice¹

Annual Reconciliation Lecture

University of the Free State, South Africa

Martha Minow²

Dr. Makheta, Vice-Chancellor and Rector Jansen, my dear friend Professor Pumla Gobodo-Madikizela, deans, faculty, staff, students and friends and guests, thank you all for being here and for the honor of inviting me to give this third lecture in the annual series addressing reconciliation. I would like to promise to be short but only my height promises to be short because the topic is a tall-order.

The project of reconciliation can seem abstract, remote, even a failure. I have heard about the disturbing event here last week. It is scary, troubling. It is hard to know what to do and what to do with our feelings when we see such a rupture of community and respect. How should decisions proceed? What is possible to do? I need to listen more than talk. One of my favorite cartoons shows a man sitting at a beach, talking INTO a sea shell. A bit unusual, I know, and the cartoon shows two women looking at the man and one says to the other, "He never was that good a listener." I look forward to listening as we turn to discussion after my remarks.

I was not here last week and I do not know all that the incident means to you. But it is with a heavy heart that I must tell you I have had experiences, recent ones, that came to mind as I learned about the two white students who aimed their car at a black student and then when he protested, they got out and beat him up.

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² Morgan and Helen Chu Dean and Professor, Harvard Law School.

Four years ago, shortly after I became dean, one of our students sent to another student an email indicating that black students inherently have lower intelligence than white students. And then it traveled. And it caused serious hurt and offense, resonating as it did with old and debunked claims made by leaders, including teachers and scientists, for a long time in our country. Now, there I am, new dean, what to do? I was urged by some to stand up for freedom of expression and by others to respect the privacy of an email. I believe in free speech and in privacy but also believe both must be used responsibly and as an educator I too have responsibilities. So I sent a community message, criticizing the student's statement, reinforcing our confidence in all students. And of course then I was criticized for failing to respect free speech and privacy. And that all went viral—showing risks of social media as people communicate without seeing the consequences for other real people. In my country, oppressive treatment on the basis of race is our original sin and we are still dealing with it.

The urgency of dealing with difference has occupied my professional life, as I have worked on school desegregation and its backlash, and genocide and its aftermath. We need ways to speak against the terrible degradation of people that puts the well-being and the very lives of some in jeopardy.

I have etched in my mind the recollection of Doctor Orbinski who was head of the mission of Doctors Without Borders in Rwanda as the genocide unfolded. He went to the head of a hospital and asked if children there could be moved so they would be safe. The head of the hospital said no. Dr. Orbinski asked him, "Do you have children?" "Why yes," replied the man and he proudly pulled out their pictures. "Well, these are children too," said Dr. Orbinski but he was met with the reply, "No, they are cockroaches."

How do we proceed in such a world, how do we go on day to day? We can ignore what happens and not discuss it. But it does not go away and indeed then violent rage or righteous hatred is a likely result. Revenge, after all, has at its core the kernel of a sense of justice. Wrong was done and should be righted.

We can pursue reconciliation though I find that really hard. I often think coexistence would be a major accomplishment.

Reconciliation already has contested meanings. A religious meaning calls for transformation, atonement, healing, joining those formerly divided into one community. But to some it means resignation or submission. To them it is an acknowledgement of interdependence and mutual implication of people in one another's lives. Or it could mean civic trust, or the conditions for building civic trust, or the conditions for the conditions for building civic trust. Its meanings cross religion and secular, disclosure and accountability, truth commissions and prosecutions, amnesties and reparations. One element may be forgiveness and I decided that would be my focus here for our consideration today.

What is Forgiveness? What is it? Why consider it? Should it be encouraged? By law, by leaders?

By forgiveness, I mean: a conscious, deliberate decision to forgo rightful grounds for resenting one who has committed a wrong or harm. To forgive is not an obligation; it is a choice, held at the discretion of one who was harmed. Forgiveness can offer benefits to an offender—relieving a sense of isolation, offering solace and acceptance; it can benefit the victim, who by forgiving can let go of resentment, regain a connection, or simply feel empowered by the choice to forgive—though the choice not to forgive can also be empowering. Archbishop Desmond Tutu, reflecting on his work as chairman of the Truth and Reconciliation Commission in South Africa, observed, “Forgiveness means abandoning your right to pay back that perpetrator in his own coin, but it is a loss that liberates the victim.”³

³ <http://www.neimanmediation.com/forgiveness/>

Forgiveness, tolerance, and mercy, figure prominently in philosophic and religious traditions, including Humanism, Christianity, Judaism, Islam, Buddhism,⁴ Baha'i, Hinduism, and Confucianism,⁵ as well as ancient practices of native peoples in Hawai'i, Canada, New Zealand, Sierra Leone, and elsewhere.

Widespread and honored, yes: but forgiveness is often hard to enact. It can be difficult to let go of resentments. How often I feel a desire for revenge even over minor matters! Forgiving family members and neighbors who harm us is a daily challenge. Some find it impossible to forgive if the wrongdoer has not apologized and made amends. Some acts are simply unforgiveable.

Law may grant amnesty in advance or amnesty on the condition that the alleged perpetrators tell what they did. Law may require victims and perpetrators to come and talk with one another. Ordering forgiveness at the level of individuals, however, is bound to be a charade. No one can force another to let go of resentment and desires for revenge. Nor can compelled apologies be terribly convincing. But government institutions can promote forgiveness by explaining its benefits or by bringing victims and wrongdoers face-to-face. Doing so can heighten debates about whether some acts are simply unforgiveable—and whether even unforgiveable acts should give rise to forgiveness as an alternative to punishment or dwelling in suffering.⁶

Not forgiving can be right. Certainly forgiveness should not be expected nor commanded. Law may grant amnesty in advance or amnesty on the condition that the alleged perpetrators tell what they did. Letting go of resentment cannot be done by someone else and pressuring or forcing forgiveness by one who already suffered would impose further harm. Declining to forgive can in fact express a fair expectation of accountability and responsibility. Indeed, even the desire for revenge can be understood as the source of a

⁴ See Shahid Athar, *Forgiveness in Islam*, <http://www.islamfortoday.com/athar12.htm>

⁵ Donald H. Bishop, *Forgiveness in Religious Thought*, *Studies in Comparative Religion*, Vol. 2, No. 1 (Winter, 1968), <http://www.studiesincomparativereligion.com/uploads/ArticlePDFs/38.pdf>.

sense of justice.⁷ A wrong should be made right; an intended harm should meet with a consequence.⁸

Forgiveness can operate not just between individuals but also between communities, societies, and nations. And it can be refused between nations or between other groups. Can, should forgiveness be encouraged, nudged?

A recent documentary film, “The Act of Killing” suggests what is unforgivable⁹. The documentary addresses the massacres in Indonesia that began in 1965 and killed in some estimates 2.5 million lives over the next year: mass murders, human cruelty that defies understanding while escaping any public reckoning. It focuses on the interior lives of perpetrators; unlike any other films or indeed any response to gross violations of human rights about which I am aware, this film by Joshua Oppenheimer invites two unrepentant perpetrators to re-enact their actions. Apparently delighted by the chance to create the film and to keep alive the memories of their actions, the two elderly perpetrators show no remorse or even flicker of self-doubt until, toward the end, when one plays the role of a victim. You cannot see this film without wondering: maybe some acts, maybe some people are unforgivable.

Some argue that some acts are simply beyond forgiveness—and expressions of forgiveness for crimes against humanity, for example, themselves represent a new wrong requiring forgiveness.¹⁰ Others press forgiveness precisely at such a moment in order to create a rupture with a terrible past.¹¹

⁶ See Hannah Arendt, *The Human Condition* 238-243 (1958). She wrote: “men are unable to forgive what they cannot punish and are unable to punish what turns out to be unforgivable.” *Id.*, at 241.

⁷ Susan Jacoby, *Wild Justice: The Evolution of Revenge* (1983).

⁸ For thoughtful debate, see Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (1988).

⁹ Joshua Oppenheimer, *The Act of Killing* (2013); see A.O. Scott, *Mass Murder: Gee, That Was Fun*, *N.Y. Times*, July 18, 2013, http://www.nytimes.com/2013/07/19/movies/act-of-killing-re-enacts-indonesian-massacres.html?pagewanted=all&_r=0.

¹⁰ Jacques Derrida, *On Cosmopolitan and Forgiveness*, 556 (2001).

¹¹ Diego Cagüñas Roza, *Forgiving the Unforgivable On Violence, Power, and the Possibility of Justice*. M.A. Paper, University of Amsterdam (2004), <http://www.banrepcultural.org/blaavirtual/tesis/colfuturo/Forgiving%20the%20Unforgivable.pdf>.

I am a lawyer so I turn to law, but I confess: I pursued law because I hoped it offers tools for reconstructing life, society, injustice, and discrimination. Someone once said, a civilization advances when what was once thought to be a misfortune becomes understood as an injustice. I want to be a part of that advance, mobilizing collective power to produce change. Collective power can be used to promote or directly express forgiveness. Law may discourage or encourage forgiveness. Law may penalize those who apologize and in so doing make forgiveness by the victim less likely. Law may construct adversarial processes that render forgiveness less likely than it would otherwise be. Or law can give people chances to meet together, in spaces where they may apologize and forgive.

Law may play many roles in making forgiveness possible. Here are some examples: First, consider a husband and wife—or in communities with same-sex marriage, a wife and a wife—on the brink of divorce. The legal process could require them to try to mediate their disagreements. A good mediator will call upon each spouse to express the grievances and desires of the other person. Even if the couple proceeds to divorce, the spouses may become more forgiving and more cooperative. They have the chance to see from the other’s perspective. A really good mediator finds ways to show common ground, for example, by scheduling a session at a time that both spouses find equally untenable. Some find it offensive to be told to forgive a former spouse. But in finding a capacity to forgive, to let go of the resentment, and to find a way to cooperate around child care, the forgiver gains freedom and more.¹²

Second, consider a victim of a physical assault. The law could put the question of prosecution in the hands of the victim and prevent any prosecution without the victim. Then, a victim who chooses not to proceed holds the authority to make the law forgive. But the law could instead treat the assault as a violation of public norms and go ahead with prosecution even if the victim chooses not to do so. A good argument for this approach is that a victim may decline to prosecute not out of forgiveness but due to fear

¹²Jennifer Ball, Growing Pains: A Tale of Forgiveness. http://www.huffingtonpost.com/jennifer-ball/growing-pains-a-tale-of-f_b_3091188.html.

of reprisal. Prosecution can proceed then regardless of the victim's view. But the law could turn to the victim later, once there is a conviction, and introduce forgiveness by the victim or by the community when it comes to designing the punishment.

Third, consider a very different context: a government or private creditors may forgive a debt of individuals, organizations, or sovereign nations. This forgiveness—and that is what we call it—may recognize futility, or prefer the fresh start for a better future, or may acknowledge the contributions of others or causes for the debtors failure to pay.

Instead of proceeding case-by-case, the legal system can use categories and decline to prosecute, for example, anyone who commits an assault in self-defense. The legal system may forgive women who murder abusive partners. This amounts to a collective judgment to forgo punishment under this circumstance. Clemency plays a role in criminal law; a court or an official may be empowered to lift a sentence for someone who did wrong. Or the government may enact an amnesty, a general pardon even before prosecution, say, of protestors against environmental hazards or of immigrants who entered the country illegally. This may express forgiveness, though it may instead express a political judgment about the behavior or the costs of persecution.

Following a civil war or mass violence, the law of one country or international law can call for criminal prosecutions for those who violated laws of war, or committed crimes against humanity, or the crime of aggression. Legal institutions might instead collect victims' statements for history and for memorials.

There is no better example than of South Africa's TRC. As we head into the 20th anniversary of your country's peaceful transition from racial Apartheid to democracy, it is striking to consider legacies of the institutional experiment with its Truth and Reconciliation Commission, the TRC. It has become the touchstone of the transitional justice movements. Did the TRC advance the charge of helping the country address and move beyond its conflicts? Studies and assessments by psychologists, political scientists, journalists, and poets from around the world show mixed results. It did offer a forum for

discovering and revealing past wrongdoing both by the government and by its opponents. Over the three years of its operation, The TRC invited victims to tell their stories and perpetrators to apply for amnesty conditioned on their telling their involvement actions and showing how the actions were limited to and proportional to political motivations. By inviting observers to register comments and holding sessions around the country, broadcasting them, and publicizing its report, the TRC offered vehicles for public acknowledgment of events long denied or unacknowledged publicly. The Minister of Justice, Dullah Omar, explained, "a commission is a necessary exercise to enable South Africans to come to terms with their past on a morally accepted basis and to advance the cause of reconciliation."¹³ Its designers hoped the TRC would prevent cycles of revenge by giving public acknowledgment to past wrongs and by investigating violations of human dignity both by the prior government and by those who fought against it. Its designers also hoped that the TRC could help the peaceful transition from Apartheid to democracy, while people began to build new political, legal, and social worlds. Yet political cartoonist Zappo brilliantly captured its limitations in a drawing showing TRC chair Archbishop Desmond Tutu standing on ground labeled, "Truth," on one side of a chasm between land on the other side labeled, "Reconciliation." And the operations of the TRC exposed ambiguity and multiplicity very idea of "reconciliation" which could refer to relationships between individuals, construction of an integrated political community, or building a narrative of unity regardless of the realities on the ground.¹⁴ You are all in a better position than I am to assess what worked and what did not work with your TRC. I will only suggest three points about it, with hopes of learning more—before returning to the broader questions.

First, I remain struck by initial responses when the TRC issued its final five-volume report. Challenged by ANC leaders and by the family of Steven Biko, the Commission's proceedings and report also drew fire from former Antiapartheid-government officials, police, and political leaders. Paul Van Zyl wrote, "The fact that both former and current rulers were distressed by aspects of the TRC's final report is perhaps the strongest

¹³ <http://www.sahistory.org.za/article/his-role-truth-reconciliation-commission>

¹⁴ See Tristan Anne Borer, *Reconciling South Africa or South Africans? Cautionary Notes from the TRC*, 8:1 *African Studies Quarterly* (Fall 2004), <http://asq.africa.ufl.edu/v8/v8i1a2.htm>.

evidence that the TRC fulfilled its mandate in a fair and impartial manner.”¹⁵ Any transitional justice effort is likely to trigger criticism and contest, and yet how much better for the disagreements to be well-distributed rather than lopsided from one side of the society rather than another. Second, studies report ambivalence, disappointment, with negative and mixed views about the TRC,¹⁶ but it also coincided with and seems to have contributed to the relatively peaceful political transition to democracy, with high levels of people’s reported willingness to engage with politics and to respect the legal system.¹⁷ And third, your TRC helped inspire transitional justice efforts in Rwanda, Sierra Leone, Cambodia, Liberia, and more—as well as truth commissions in Greensboro, North Carolina, in the United States, to investigate the killings of union activists by the Ku Klux Klan and Nazis. Some 40 national truth commissions followed—and more in cities, provinces, schools, and other institutions.¹⁸

Researchers trying to document the effects of such efforts frankly are most confident in their calls for more research. Yet the recognition of how little is actually known and how much more there is to learn about the impact of truth commissions shows healthy humility.¹⁹

¹⁵ Paul van Zyl, Dilemmas of Transitional Justice: The Case of South Africa’s Truth and Reconciliation Commission, 52:2 *Journal of International Affairs* 648 (1999), available at <http://center.theparentscircle.org/images/d96de38c44bc4080be6d8ffe2a172ccc.pdf>. © The Trustees of Columbia University in the City of New York

¹⁶ See Hugo van der Merwe and Tracy Chapman, eds., *Did the Truth and Reconciliation Commission Deliver?* (2008); Mahmood Mamdani, *The truth according to the TRC*, in Amadiume & An-Naim, eds., 176-183 (2000); Mahmood Mamdani, "A diminished truth", in James & Van Der Vijver, eds., 58-61 (2001); Claire Moon, *Narrating political reconciliation: Truth and reconciliation in South Africa*, 15:2 *Social and Legal Studies* 257-275 (2006).

¹⁷ James L. Gibson, *The Contributions of Truth to Reconciliation: Lessons from South Africa*, 50:3 *Journal of Conflict Resolution* 409 (2006), <http://www.arts.yorku.ca/politics/ncanefe/courses/pols4255/pdf/Week%209%20Gibson.pdf>; David Backer, *Evaluating Transitional Justice in South Africa From a Victim's Perspective*, 12:2 *Journal of the International Institute* (Winter 2005), <http://quod.lib.umich.edu/j/jii/4750978.0012.207/--evaluating-transitional-justice-in-south-africa?rgn=main;view=fulltext>, Permalink: <http://hdl.handle.net/2027/spo.4750978.0012.207> (reporting study of Cape Town residents).

¹⁸ Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2011).

¹⁹ See e.g., Michal Ben-Josef Hirsch, Megan Mackenzie, and Mohamed Sesay *Measuring the Impacts of Truth and Reconciliation Commissions: Placing the Global 'Success' of TRCs in Local Perspective*, 47:3 *Cooperation and Conflict*, 386–403 (September 2012).

Why is the Story of the TRC so Compelling? In the face of such ambiguity and even negative responses, why has South Africa's TRC generated so many initiatives, attention, and interest elsewhere? I offer these speculations:

- The language and examples of leadership offered by Nelson Mandela and by Archbishop Desmond Tutu offered inspiring narratives and images to communities thirsty for hope.
- The TRC's statements of aspiration substituted allowed people to conflate goals with assessment for many years.²⁰
- The TRC coincided with many national and international conflicts, creating ready audiences for the idea of a "third way" between no responses to atrocities on the one hand and costly and controversial criminal prosecutions on the other.
- The TRC did in fact create climate and proximity that allowed some individuals to engage in communications around apology and forgiveness. A combination of religious, political, and communal ideas about the value of reconciliation and forgiveness framed the TRC for the public and many people resonated with its hopes. The proceedings and their surrounding activities brought victims and applicants for amnesty into relationship at least through parallel proceedings and sometimes through actual meetings. Being physically near to one another is a precondition for forgiveness.²¹ The TRC created in the spaces and times surrounding its work opportunities for people to make apologies and for people to forgive.

Nonetheless, we should candidly compare myth and reality. The actual numbers of people involved in the TRC engaged in what they identified as forgiveness are small. One study indicates that of 429 participants in South Africa's process, only 72 discussed forgiveness; only 10% were willing to forgive if the wrongdoers took responsibility for

²⁰ See Borer, *supra*.

²¹ Moshe Halbertal, *At the Threshold of Forgiveness: A Study of Law and Narrative in the Talmud*, *The Jewish Review of Books* (Fall 2011), <http://jewishreviewofbooks.com/articles/74/at-the-threshold-of-forgiveness-a-study-of-law-and-narrative-in-the-talmud/>. For a video of his related lecture on the subject, see <http://www.juf.org/interactive/default.aspx?id=74744>.

their deeds, and only 7 were willing to forgive without conditions.²² These small numbers cast doubt on any claims that the TRC itself prompted individuals to engage in conscious, deliberate decisions to forgo their rightful grounds for seeking accountability and punishment for those who violated their dignity and rights, who murdered their loved ones or ruptured their lives with violence and oppression. Skeptics understandably fear that forgiveness seems an imperative but actually covers up wounds it is supposed to heal.²³

Perhaps the myth of the TRC is more significant than the reality. Domestically, it offered a national ritual, a break, a process that can be pointed to as the nation struggles to build its future. The story of South Africa's TRC inspired similar efforts elsewhere long before there could be any assessments of its reality. The idea is now a standard topic in the burgeoning field of transitional justice as nations contemplate paths out of mass violence and civil war. Uganda, for example, considers a truth commission in its proposed legislation for steps following the armed conflict between the Lord Resistance Army and the government.²⁴ The International Centre for Transitional Justice and other global consultants offer help to nations and groups considering the creation of truth commissions.²⁵ Some describe a "transitional justice mafia" that spread blueprints for truth commissions.²⁶ Such efforts seem to offer possibility of forgiveness or rituals allowing individuals and groups to move on after terrible violence. But transitional justice experts also push for criminal trials, memorials, and reparations.

Transitional justice efforts often now proceed with a variety of efforts, making forgiveness at best one of many themes. Take Sierra Leone. When it emerged from its

²² Hugo van der Merwe and Audrey R. Chapman, Truth and Reconciliation in South Africa, Did the TRC Deliver?, in Audrey R. Chapman and Hugo van der Merwe, eds. *Did the TRC Deliver?* 68 (2008) (only 51 of the 72 sampled).

²³ See Aleksandra Wagner, Introduction: "I Was Born in an Unforgiving Country," in Aleksandra Wagner, ed., with Carin Kuoni, *Considering Forgiveness* 13, 14 (2009).

²⁴ ICTJ Forum: A Critical Time for Justice in Uganda (interview of Michael Otim), <http://ictj.org/multimedia/audio/ictj-forum-critical-time-justice-uganda>

²⁵ International Centre for Transitional Justice, *Drafting a Truth Commission Mandate: A Practical Tool* (June 2013), http://ictj.org/sites/default/files/ICTJ-Report-DraftingMandate-Truth-Commission-2013_0.pdf.

²⁶ Jennifer J. Llewellyn and Daniel Philpott, Introduction, in Jennifer J. Llewellyn and Daniel Philpott, eds., *Restorative Justice, Reconstruction, and Peacebuilding* (forthcoming).

bloody and lengthy civil war, the nation created a truth and reconciliation commission but at the same time conducted criminal prosecutions through its special tribunal.²⁷ The combination may have confused people about whether to prefer forgiveness or punishment.²⁸ The legal institutions could, though, steer public understanding to forgive ordinary individuals who committed the atrocities while turning to criminal trials for masterminds.²⁹

Criminal prosecutions, pursuing accountability and deterrence, have their own problems including their cost and issues of selection. But trials and punishment may help some individual victims move on. Such is the premise of institutions like the Special Court for Sierra Leone. When that court pursued Charles Taylor, chief mastermind of the violence in Sierra Leone and former president of Liberia, he faced legal charges of war crimes and crimes against humanity and the Special Court ultimately convicted and sentenced him to 50 years in prison.³⁰ After the conviction, one survivor of the civil war commented:

One could argue that the conviction of Charles Taylor closes an important chapter in Sierra Leone's history; some may even call it justice. But court decisions won't rebuild Sierra Leone or other countries where former perpetrators and victims live alongside each other. Rebuilding can start only with a purposeful, daily decision to forgive and forge a common future.³¹

This survivor offering these reflections was Samuel Koroma. He recalled his life as a teacher before the civil war and the time he visited a student who had avoided school because other children made fun of his ragged pants and bare feet. Koroma bought the boy—he called him Vandie—some clothes and shoes and the boy returned to school.

²⁷ See Truth and Reconciliation Commission Report for the Children of Sierra Leone, <http://www.unicef.org/infobycountry/files/TRCCF9SeptFINAL.pdf>; Special court for Sierra Leone, <http://www.sc-sl.org/>.

²⁸ Robin Vincent, Punishment and forgiveness in Sierra Leone, *Observer.co.uk*, Sunday 3 November 2002 (The Registrar of the Special Court for Sierra Leone responds to Peter Penfold on the difficulties of reconciling peace and justice.). <http://www.guardian.co.uk/world/2002/nov/03/westafrika.sierraleone>

²⁹ See *id.*

³⁰ Charles Taylor Sentenced to 50 years for War Crimes, CNN, 31, May 2012.

³¹ Samuel Konkofa Koroma, Finding Forgiveness After Charles Taylor, *Washington Post*, May 18, 2012 http://articles.washingtonpost.com/2012-05-18/opinions/35454635_1_sierra-leone-rebel-soldiers-charles-taylor.

Then the civil war started. Koroma witnessed rebels from the Revolutionary United Front burn down his village and murder his sisters, brother-in-law and grandmother. Koroma was himself captured and told he would be executed. Then a youth, one of thousands of child soldiers drawn into the conflict, volunteered to serve as the executioner. Koroma recalled:

The boy led me out of sight of the group to the execution spot under several banana trees. My heart was pounding. My mind was fixed on death. “Teacher, do you remember me?” the boy asked. “I will not kill you. You are a good man. Do you remember that you bought me shoes and pants so I could go to school?” I watched in amazement as the young man removed the cover from his head, revealing familiar eyes and a tear-soaked face. Vandie drew a rough map with charcoal to the nearest village held by peacekeepers. That’s how I crawled to safety and, eventually, returned to my family.³²

After the war, Koroma helped Vandie as he returned to high school and university. They remain friends.³³ This is the story Koroma told in calling for daily forgiveness and rebuilding after violence. In a similar vein, Jeanne Sinunuyabo forgave her neighbor who killed her sons during the Rwanda genocide, although not right away, and not until the killer served time in jail, asked her repeatedly for forgiveness, and underwent his own religious conversion.³⁴

As these stories suggest, people may grant forgiveness especially when they already have a relationship. But strangers, too, grant forgiveness. Family members of murder victims have organized in the United States against the death penalty;³⁵ mothers of the young men known as the Gugleti Seven, killed by the Apartheid Police, forgave the government informant who tipped off the police.³⁶ Some forgive to be free of hatred; some forgive in

³² Id.

³³ Id.

³⁴ Lane Hartill, Love and Forgiveness After Rwanda Genocide, Catholic Relief Services, <http://crs.org/rwanda/love-and-forgiveness/>.

³⁵ David Mitchell, Families of Murder Victims Rally Against the Death Penalty, Colorado CW 2 (Jan. 8, 2014), <http://kwgn.com/2014/01/08/families-of-murder-victims-rally-against-death-penalty/>; Rachel King, Don’t Kill in Our Names: Families of Murder Victims Speak Out Against the Death Penalty (2003).

³⁶ See Long Nights Journey Into Day (film 2000)

the spirit of their lost loved ones or to feel close to those they lost. Some forgive while blaming the culprit but blaming other people or larger forces more.

Forgiveness, I suggest, is like kindness: both are a resource that need not be scarce; that is within our own reach and that can be one of the many tools we use to mitigate the hard parts of the past as we seek the future. But if forced, it is not forgiveness, it is not a deliberate decision by one who has been harmed to let go of resentment. Law can promote or deter forgiveness whether by individuals or for groups as large as a nation. To say so, though, simply opens new questions. For now, I contain myself to three.

1) Does looking to law to promote forgiveness invite too much public pressure on private emotions?; 2) does the analogy between interpersonal forgiveness and collective forgiveness work or does the analogy instead obscure how societies differ from individuals?; and 3) does forgiveness amount to a “second-best” solution, turned to when true justice is not possible legally, politically, or psychologically? Briefly, I will consider each one, and hope in doing so to spark more questions.

1. FIRST: Is there too much Public Pressure on Private Emotions?

The use of the law to press for forgiveness by individuals may be wrongly burdensome. If so, even in dealing with relationships between individuals, maybe law should not push people to forgive. Even though relief from burdens of anger and resentment may be appealing, forcing anyone to forgive is oppressive and counterproductive. Only the individual with resentful emotions coming from being wronged can let them go. Even to expect forgiveness by one who has been harmed is to impose a new burden on the one who is already a victim. In one study, 30% of participants in South Africa’s TRC reported feeling pressure to forgive.³⁷ That may not be, on balance, admirable.

³⁷ Truth and Reconciliation in South Africa: Did the TRC Deliver? (Pennsylvania Studies in Human Rights) by Audrey R. Chapman and Hugo van der Merwe, 80 (Jan 4, 2008)

Individual human beings are entitled to their own responses to injury and harm. Any process that makes an individual doubt or feel ashamed of his or her personal response of indignation imposes new damage. One acting in the name of victims can pursue an alternative to court action but the victims' own choice to forgive—or not to forgive—then is painfully cancelled. Then, what happens to accountability? What happens to truth? What happens to bringing an end to conflict because it has been thoroughly examined and subjected to judgment? Steered by the high moral ambitions of reconciliation, compassion, and peace, the law is likely to fall short of those high goals and also fail to do what it is good at doing.

On the other hand, it is only honest to acknowledge that legal institutions do affect human relationships one way or the other. Participating in a lawsuit affects the people involved. It can be emotionally draining; it can push the parties even farther apart. It magnifies negative emotions that exist because of the underlying conflict. In divorce and child custody matters, the adversarial process often increases bitterness and blame as each side tries to win the all-or-nothing contest.³⁸ Litigation can enlarge the distance between the disputing parties. For this very reason, commercial actors and corporations in long-term relationships of mutual benefit, often forgo litigation. Some even bypass the formalities of contract law, and seek to solve their disputes some other way.³⁹

Law, in short, cannot be neutral when it comes to the feelings and experiences of individuals who use it. Law can deter apologies, for example, by allowing their admission in medical malpractice cases.⁴⁰ If the legal framework inevitably affects emotions,

³⁸ See Lenore Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* 16-17 (1985).

³⁹ See Stewart Macauley *Non-Contractual Relationships in Business: A Preliminary Study*, 28 *A. Soc. Rev.* 55 91963; Ian MacNeil, *The Many Futures of Contract*, 47 *S. Cal. L. Rev.* 691 (1974).

⁴⁰ Thus, the admission into a medical malpractice trial that for a doctor by apology can be treated as evidence of legal liability. Thirty-six states have “apology laws” prohibiting admissibility at trial of certain expression related to sympathy or apology. See *Sorry Works! Making Disclosure a Reality for Healthcare Organizations*, <http://www.sorryworks.net/apology-laws-cms-143> (visited June 2, 2013). Or the law can instead exclude such an apology from consideration in any proceeding. That encourages apology. Apology encourages release of resentment and grant of forgiveness by the patient or patient’s family. [See Noni MacDonald and Amir Attarn, *Medical Errors, Apologies, and Apology Laws*, *Canadian Medical Association Journal* January 6, 2009 vol. 180 no. 1, <http://www.cmaj.ca/content/180/1/11.full>.

pushing toward forgiveness may be no worse than pushing toward revenge, adversariness, or bitterness. It is good to be cautious and humble about using law in order to shape—or manipulate—the feelings of individuals. But it is no less important to admit that law does affect its participants—and then to take responsibility for how we use law to do so.

2. SECOND: Is interpersonal forgiveness the same as societal forgiveness?

I, like others, jump from a discussion of personal forgiveness to political or societal issues. But we know that groups and nations operate very differently than individuals. Crowds behave differently than individuals. A nation may have a head but it is not a human being. How can a leader help individuals release resentments? When does a leader's statements and actions favoring forgiveness instead create new resentments? These are genuine empirical questions. Hence the studies of South Africans after the TRC, of public opinion toward impunity in Argentina after the fall of the military junta and the restoration of democracy in 1983, and of revivals of criminal trials after the ouster of Pinochet in Chile. The questions must be addressed with each new generation as each must make its own way through the legacies of a terrible past.

Studies should attend to particular risks not only to the adjustment of individuals but also to the functioning of law and even to the meaning of forgiveness itself. Hence, if courts come to direct people to consider forgiveness, or pressure people to do so, judges may be tempted to reduce the number of pending lawsuits or push people out of their chance for a hearing. Law may lose its predictability and equal treatment if it becomes entangled with the forgiveness granted or refused by individuals. Those who respond to legal incentives to forgive in fact become more compassionate or forgiving. And using law to prompt forgiveness by individuals in the view of some takes away the very quality that makes

The law can require an explanation and apology to the patient or the patient's family when a physician makes a medical error. My home state of Massachusetts enacted a law directing that if the testimony of a health care provider contradicts what was told to the patient by the provider, then the apology and acknowledgment of the mistake can be used to discredit the health care provider or for any purpose. In short, the health care provider must convey the truth, always. Jeffrey Catalano, *The New Medical Apology*

forgiveness distinctive: its distinctiveness, exceptional, unconditional quality, far from the routine or mechanism of formal rules or institutional practice. This is the view expressed, for example, by Jacques Derrida who writes: “forgiveness is not, it should not be, normal, normative, normalizing. It should remain exceptional and extraordinary, in the face of the impossible: as if it interrupted the ordinary course of historical temporality.”⁴¹ The unforced, surprising nature of forgiveness is crucial, in Derrida’s view. He focuses on the statement of a woman whose husband had been imprisoned and tortured, who, before the South African Commission for Truth and Reconciliation, said, “a commission or a government cannot forgive. Perhaps only I could do it. But I am not ready to forgive.”⁴² Derrida stressed, a State can judge, but only people can forgive.⁴³ When a government makes steps in the direction of forgiveness, it seems to change forgiveness by making it no longer about reconciling primary relationships—relationships between the actual individuals directly involved in the wrong—but instead turns to secondary relationships—relationships between groups concerned ultimately with the legal consequences of obligations within primary relationships.⁴⁴

Forgiveness expressed on behalf of a group or a nation is not the same as forgiveness by an individual. When an official stands in for victims by offering a pardon, the act does not itself directly repair the relationship between victims and wrongdoers. On this view, government officials can offer pardon or compensation to victims. Although the pardon may seem to take away authority from victims or their families, it may also enable constructive steps toward building a future for victims and their families, and for offenders. When officials offer compensation, they are not standing in for victims but instead substituting for offenders by seeking restitution or the symbolic acknowledgment

and Notice Laws: A Bold New Frontier for Patient Safety, May 8, 2013, <http://magazine.nationalpatientsafetyfoundation.org/magazine/ma-apology-and-notice-laws/>.

⁴¹ Jacques Derrida, *On Cosmopolitanism and Forgiveness* 32 (2001).

⁴² *Id.*

⁴³ Cláudia Perrone-Moises, *Forgiveness and Crimes against Humanity: a dialogue between Hannah Arendt and Jacques Derrida*, *Hannaharendt.net*, 2006, Disponível em <http://hannaharendt.net/research/perroneII.htm>.

⁴⁴ I am indebted to Alexander Rodney who developed these ideas by building upon work of philosopher Thomas Scanlon and work in public international law. See Alexander J. Rodney, *Law and the Forgiveness Narrative: The Path from Corrective Justice to Reconciliation and Moral Repair*, LL.M. Paper, Harvard Law School, April 2012 (supervised by Martha Minow and T.M. Scanlon).

of wrong. In both material and symbolic ways, official compensation can improve the circumstances and experiences of victims. Nonetheless, the actual victims may reject compensation as inadequate or as a mistaken effort to substitute material benefit for moral judgment or exoneration, as many in Israel following World War II rejected Germany's proposal as "blood money" until the German government agreed to make a public apology and commit to teaching German children about the Holocaust.⁴⁵ Yet governments may be the only entities with 'standing' to consider forgiving crimes against humanity precisely because such crimes transcend any individual, and represent violations of the dignity of every individual in the world. In this conception, only some representative could ever act on behalf of those who are victimized because all are victimized.

A government may not arrogate to itself individuals' decision over whether to forgive, but it can itself choose leniency, or amnesty, or peace-making. What then is the appropriate and effective use of leniency or amnesty asserted by government? The field of transitional justice now grows in academic worlds and engages political scientists, sociologists, psychologists, and lawyers, as well as citizens and journalists. Maybe some of you will help answer the big questions about what really helps individuals and societies after mass violence, what is justice, and what should be done.

3. THIRD: Does forgiveness amount to a "second-best," when justice is not possible?

Especially where very large numbers of wrongdoers are involved, we may think about forgoing legal responses for pragmatic reasons. My library grants amnesty to those with overdue books because it brings books back from people fearful of fines. In the far more serious circumstances of mass violations of human rights we may think of substituting forms of forgiveness because of the difficulty in doing anything else. Surviving victims may not know whom to forgive. Legal action may be difficult because evidence is

⁴⁵ See Jennifer J. Llewellyn and Daniel Philpott, *supra*; Netanel Lorch, ed. *Major Knesset Debates, 1948-1981* 724-5 (trans. Dorothea Vanson-Shefer 1991); Alexander J. Rodney, *supra*, at 50-54.

inadequate, because events happened long ago, or the wrongdoers so effectively hid their actions. Or there may be just too many violators, too many cases to handle. Further, the political circumstances may press against legal action. Dangers of reprisal could be at work. Elections and a peace negotiation process may be predicated on avoiding prosecutions.⁴⁶ The wrongdoers may be powerful. In societies undergoing transitions, the wrongdoers may still hold power. They may even manipulate a truth and reconciliation process to extend repression. After mass murders in some societies, the judiciary and prosecutors may be the same as those in power at the time of the mass atrocity. Or a new regime may be relatively powerless, or it may have made a deal to dispense with prosecution in order to gain power.

These challenges must be assessed, though, in the context of the real alternatives and competing goals. Goals can include: 1) individuals' recovery from suffering and developing capacities to build their future, 2) enabling peaceful and stable political transition and reducing risks of new violence, 3) building a new narrative that accounts for violations and acknowledges the past while offering hope for the future, 4) holding wrongdoers accountable for their violations, and 5) deterring future instances of mass violence. Another goal may be to prompt contrition by and rehabilitation of wrongdoers and self-forgiveness may be a crucial step. I hope paying attention to forgiveness opens rather than closes discussions about varied goals and permits richer and better considerations about what law and justice could mean after mass violence.

One new legal response to mass atrocities and human rights violations is the first permanent International Criminal Court founded in 2002, charged with prosecutions for those violations of human rights. A live question before this court is how to treat truth commissions. By design, the court loses its jurisdiction where a nation pursues the violators, but still unclear is whether some effort like South Africa's TRC counts for this purpose.

⁴⁶See Kvesi Aning and Thomas Jaye, *Liberia: A Briefing Paper on the TRC* (April 2011)(Kofi Anan International Peacekeeping Training Center Occasional Paper 33); <https://docs.google.com/gview?url=http://www.kaiptc.org/Publications/Occasional-Papers/Documents/Occasional-Paper-33-Jaye-and-Aning.aspx&chrome=true>.

In considering such questions, the gap between what works between individuals and what is effective for groups deserves steady attention. So does the contrast between what is right and what can ease difficulties, whether political, psychological, financial, or practical. In this spirit, I say: let us guard against turning to forgiveness solely when more robust justice is unavailable. Let us guard against using law to distort private emotions; and let us guard against eliding the differences between individuals and groups. Yet let's consider how and when law can usefully make space for forgiveness. Even when law adjudicates the past, we hope it will make for a better future. And in that spirit, the law should help us explore forgiveness. Because when we forgive, we in no way change the past, but we do change the future.⁴⁷ Let us think about the future for that, in the end, is what matters.

Oscar Wilde said, "The only difference between the saint and the sinner is that every saint has a past and every sinner has a future."⁴⁸ Nelson Mandela stressed, "Our human compassion binds us to one another, not in pity or patronizingly, but as human beings who have learnt how to turn our common suffering into the hopes for the future."⁴⁹ Yogi Berra reminded us, "The future ain't what it used to be."⁵⁰ Abraham Lincoln taught, "The best thing about the future is that it comes one day at a time."⁵¹ And Bill Keane remarked in his cartoon, Family Circus, "Yesterday's the past, tomorrow's the future, but today is a gift. That's why it's called the present."⁵²

⁴⁷ A similar comment has been attributed to law professor and Nuremberg prosecutor Bernard Meltzer.

⁴⁸ <https://www.goodreads.com/quotes/199213-the-only-difference-between-saints-and-sinners-is-that-every>.

⁴⁹ <http://sourcesofinsight.com/nelson-mandela-quotes/>.

⁵⁰ <http://www.brainyquote.com/quotes/quotes/y/yogiberra102747.html>.

⁵¹ <http://www.brainyquote.com/quotes/quotes/a/abrahamlin109277.html>.

⁵² <http://www.brainyquote.com/quotes/quotes/b/bilkeane121860.html>.