

Forgiveness, Law, and Justice¹

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INTRODUCTION

“Forgive me.” How often have you said it? These are the words we use when we arrive late to a date, when we need someone to repeat a phrase we missed, or when we do something much more egregious. These words are familiar in the prayers of religions; these words are steps toward repentance and redemption. Requests for forgiveness fill the lyrics of pop music detailing mistakes and apologies between lovers, parents and children, citizens and governments, and individuals and their gods. Forgiveness is pivotal in novels ranging from *Atlas Shrugged*,² to *The Lord of the Rings* trilogy,³ *Ender’s Game*,⁴ and *Wicked*.⁵ Victor Hugo’s classic novel, *Les Misérables*, and its musical adaptation illuminate the human costs of an unforgiving law on the criminal defendant as well as on the law enforcer.⁶ In the story’s climax, the escaped convict Jean Valjean mercifully spares the life of the police chief who has spent years pursuing him, shocking the man of the law with the power of forgiveness.⁷ Whether to forgive, and why, is a theme in entertainment, relationship advice, religious counseling, and political drama. When a high government official is caught in a personal or political scandal,⁸ journalists, philosophers, families, and friends discuss whether and when such a figure should be forgiven and by whom.⁹ Forgiveness expresses generosity of spirit, reconnection, and constructive focus on the future; forgiveness is potentially a

2. AYN RAND, *ATLAS SHRUGGED* 2588 (1957).

3. J.R.R. TOLKIEN, *THE FELLOWSHIP OF THE RING* 56, 627 (1954); J.R.R. TOLKIEN, *THE TWO TOWERS* 347, 467–69 (1954); J.R.R. TOLKIEN, *THE RETURN OF THE KING* 947 (1955).

4. ORSON SCOTT CARD, *ENDER’S GAME* 597, 600–01 (1985).

5. GREGORY MAGUIRE, *WICKED* 402 (1995).

6. VICTOR HUGO, *LES MISÉRABLES* 1263 (trans. Lee Fahnestock & Norman MacAfee, 2013) (1862); ALAIN BOUBIL & CLAUDE-MICHEL SCHÖNBERG, *LES MISÉRABLES* (1980) (musical, English-language libretto by Herbert Kretzmer); *LES MISÉRABLES* (Universal Pictures 2012) (film).

7. HUGO, *supra* note 6, at 1263. And perhaps Javert was unable to accept forgiveness from one he viewed as a criminal. See also Jonathan Simon, ‘*Les Mis*’: Why Do We Idealize Jean Valjean and Act Like Javert?, *BERKELEY BLOG* (Jan. 2, 2013), <http://blogs.berkeley.edu/2013/01/02/les-mis-why-do-we-idealize-jean-valjean-and-act-like-javert>.

8. See Molly W. Sonner & Clyde Wilcox, *Forgiving and Forgetting: Public Support for Bill Clinton During the Lewinsky Scandal*, 32 *PS: POL. SCI. & POL.* 554, 554–57 (1999); Marichu A. Villanueva, *Forgive, but Do Not Forget*, *PHILIPPINE STAR* (July 27, 2012), <http://www.philstar.com/opinion/2012-07-27/831905/forgive-do-not-forget> (recalling how politicians debated the inclusion of ex-Senator Miguel “Migz” Zubiri—who benefitted from voter fraud—in the senatorial ticket of the upcoming elections for the United Alliance).

9. S.E. Cupp, *Is America Too Forgiving? Bill Clinton, Eliot Spitzer, Tiger Woods—All Get Shots at Redemption*, *N.Y. DAILY NEWS* (July 7, 2010, 4:00 AM), <http://www.nydailynews.com/opinion/america-forgiving-bill-clinton-eliot-spitzer-tiger-woods-shots-redemption-article-1.467596>.

renewable and non-depleting resource, offering physical, psychological, and practical relief for both wrongdoers and victims of wrongdoing.¹⁰

But forgiveness has its limits: some acts seem unforgiveable. Wrongdoers who show no remorse after heinous acts especially try the limits of forgiveness. And terrible wrongs persist. A recent documentary film, “The Act of Killing,”¹¹ examines the massacres in Indonesia that began in 1965 and killed an estimated 2.5 million people.¹² Such human cruelty defies understanding; it has escaped public reckoning. This film by MacArthur “Genius” Fellow Joshua Oppenheimer invites two unrepentant perpetrators to re-enact their actions.¹³ Apparently delighted by the chance to participate in the film, the two elderly perpetrators show no remorse or even a flicker of self-doubt until, toward the end, one plays the role of a victim. The audience is left with horror unfathomable and seemingly unforgiveable.

Even the combined resources of law, politics, psychology, religion, and the arts may be too limited to reckon with some horrors. Limits appear in social practices. They also arise in the experiences of individuals who have the power but not always the actual ability to forgive. In these circumstances, private or public pressure on a victim to forgive can be a new victimization, denying the victim her own choice. Consequently, the very generosity of spirit enabling forgiveness can be misdirected and lead to more pain.¹⁴

Should law encourage people to forgive one another—and should law be used to forgive people for wrongdoing? Or is it a mistake to promote greater connections between law, with its need for predictability, and forgiveness, with its dependence on emotions and moral judgments?

Before exploring these questions, I will discuss what I mean by forgiveness in Part I. Then, in Part II, I will turn to the possible roles law can play in relation to forgiveness in the contexts of criminal law—international and domestic—and debt, both of sovereign nations and consumers. When I first turned to some of these issues, South Africa’s Truth and Reconciliation

10. See Angela Haupt, *How to Forgive, and Why You Should*, U.S. NEWS & WORLD REP. (Sept. 29, 2012, 12:55 PM), <http://health.usnews.com/health-news/articles/2012/08/29/how-to-forgive-and-why-you-should>.

11. THE ACT OF KILLING (Final Cut for Real 2012); see also 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>.

12. Scott, *supra* note 11.

13. See *MacArthur Fellows Program: Joshua Oppenheimer*, MACARTHUR FOUND. (Sept. 17, 2014), <http://www.macfound.org/fellows/923>.

14. For thoughtful explorations of the risks of forced forgiveness, see ADAM GRANT, *GIVE AND TAKE: A REVOLUTIONARY APPROACH TO SUCCESS* (2013); CAROL J. GREENHOUSE, *PRAYING FOR JUSTICE: FAITH, ORDER, AND COMMUNITY IN AN AMERICAN TOWN* (1986); Deborah Shurman-Kauflin, *Why You Don’t Always Have to Forgive*, PSYCHOL. TODAY (Aug. 21, 2012), <https://www.psychologytoday.com/blog/disturbed/201208/why-you-dont-always-have-forgive> (suggesting that forgiveness may not be possible in some cases and that forcing forgiveness may do more harm to the victim).

Commission (TRC) was just getting started. In the twenty years since, and in no small measure because of the TRC effort, forgiveness has attracted global attention and debate in law, psychology, and politics well beyond its traditional home in religious and philosophical discussions. So I will also consider in Part II what we have learned from the TRC about the promises and limitations of joining forgiveness and law—both for law and for forgiveness.¹⁵ In Part III, I will raise some questions about the inquiry myself. Finally, in Part IV, I will provide closing thoughts and suggestions for incorporating forgiveness into existing domestic and international legal frameworks. Finding room for forgiveness through law or alongside law can draw upon a non-depletable resource, thereby enhancing human relationships without forgoing the accountability so important to social order.

I.

WHAT IS FORGIVENESS?

By forgiveness, I mean a conscious, deliberate decision to forgo rightful grounds for grievance against those who have committed a wrong or harm. To forgive is not an obligation; it is a choice, held at the discretion of those harmed. Forgiveness can offer benefits to an offender—relieving a sense of isolation and 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. The choice not to forgive can also be empowering.

This definition raises questions about whether groups or institutions can engage in forgiveness as opposed to mercy, pardon, and amnesty, which do not so much forgo grounds for grievance as forgo warranted punishment. The difference in these acts signals the important element of letting go of resentment and blame. Forgiveness involves a shift in attitudes and relationships, not merely relinquishing the authority to punish.

Forgiveness, tolerance, and mercy figure prominently in philosophical and religious traditions, including Humanism, Christianity, Judaism, Islam,¹⁶ Buddhism, the Baha'i faith, Hinduism, and Confucianism,¹⁷ as well as in

15. Rigorous psychological assessments of victims and survivors following responses to mass atrocities are sparse. For acknowledgment of the sparse research on the impact of trials, combined with an effort to devise a typology of issues related to victims and human rights trials, see Jamie O'Connell, *Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?*, 46 HARV. INT'L L.J. 295 (2005). For acknowledgment of the limited measurement of the impact of truth and reconciliation commissions, see, for example, Michal Ben-Josef Hirsch, Megan Mackenzie & Mohamed Sesay, *Measuring the Impacts of Truth and Reconciliation Commissions: Placing the Global 'Success' of TRCs in Local Perspective*, 47 COOPERATION & CONFLICT 386–403 (2012).

16. See M. Amir Ali, *Forgiveness: The Importance of Forgiveness in Islam*, INST. ISLAMIC INFO. & EDUC., <http://www.iiie.net/index.php?q=node/52> (last visited Aug. 7, 2015).

17. Donald H. Bishop, *Forgiveness in Religious Thought*, STUD. COMP. RELIGION, Winter 1968, at 1, <http://www.studiesincomparativereligion.com/uploads/ArticlePDFs/38.pdf>.

ancient practices of native peoples in Hawai'i, Canada, New Zealand, Sierra Leone, and elsewhere. Evangelical Christians and followers of both the right-leaning Tea Party and left-leaning Occupy movement offer support for forgiveness—whether for criminal charges or consumer debt in the United States.¹⁸ Psychological, spiritual, and practical dimensions come together in calls to let go of justified resentment.

Though widespread and honored, the choice not to forgive can also be empowering, because forgiveness is hard to enact and declining to forgive can express a fair expectation of accountability and fairness. 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. And it is not bad to not forgive. Some acts are simply unforgiveable.¹⁹ Crucially, someone else cannot let go of resentment for us. Pressure to forgive imposed on one who has already suffered is a further harm. Declining to forgive can in fact express a fair expectation of accountability and responsibility. Indeed, the desire for revenge can be understood as the source of a sense of justice.²⁰ A wrong should be made right; an intended harm should be met with consequences.²¹ This idea is central to law: pursuing rights and correcting wrongs are the law's heartland.

Indeed, courts and legislatures can speak to our highest hopes for fairness, predictability, equality, and freedom from bias and corruption. Forgiveness may jeopardize the appearance, if not the reality, of law's evenhandedness. But this concern should not halt the inquiry; it should frame it. Legal tools are just that: tools. The purposes they serve should be ours. Law can be a tool for harmony, compassion, and human growth, converting suffering into opportunity.

18. See Christopher Matthews, *The People's Bailout: Occupy Wall Street Wants to Forgive Your Debt*, TIME (Nov. 12, 2012), <http://business.time.com/2012/11/12/the-peoples-bailout-occupy-wall-street-wants-to-forgive-your-debt>; *From the Tea Party: A Softer Line in Criminal Justice*, BIG COUNTRY (July 10, 2013, 12:47 PM), <http://www.bigcountryhomepage.com/story/d/story/from-the-tea-party-a-softer-line-in-criminal-justi/23404/sWrlcxZgJ0Swhx4s6Cpj3A>.

19. I assert this here as, at minimum, a psychological truth. As for normative analysis, the subject is debated. Thus, Hannah Arendt claimed that we cannot forgive absolute evils too large to punish. HANNAH ARENDT, *THE HUMAN CONDITION* 238–43 (1958); HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 439 (1973). Jacques Derrida, however, urged us to pursue legal accountability even when we forgive, and we can forgive even what we cannot judge. JACQUES DERRIDA, *FOI ET SAVOIR: SUIVI DE LE SIÈCLE ET LE PARDON* 104–05, 118–19 (2000).

20. SUSAN JACOBY, *WILD JUSTICE: THE EVOLUTION OF REVENGE* (1983).

21. For thoughtful debate, see JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* (1988).

II.

WHAT ROLES MAY LAW PLAY IN FORGIVENESS?

Collective power, through legal institutions and political actors, can be used to promote or directly express forgiveness but also to discourage it. Legal rules may penalize those who apologize, and in so doing, make forgiveness by the victim less likely. On the one hand, law may construct adversarial processes that render forgiveness less likely than it would otherwise be. On the other hand, law can give people chances to meet together in spaces where they may apologize and forgive. Law may itself enact forgiveness by forgoing otherwise applicable measures of legal accountability along with a suspension of blame. Law may force statements of apology and forgiveness, but it cannot compel the feelings they are meant to express.

Consider these examples of roles law can play in enabling forgiveness:

- The law may require a married couple on the brink of divorce 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 they proceed to divorce, the spouses may become more forgiving and more cooperative. They have the chance to see from the other's perspective. They might even perhaps find common ground in resenting the mandatory mediation exercise. Some may be offended to be asked to forgive a former spouse. But in finding a capacity to forgive, the forgiver can gain freedom from anger and resentment.²²
- Legal officials could ask a victim of a sexual assault whether he or she wants to prosecute; a victim's refusal to participate can undermine the goals of a "no-drop" rule requiring prosecution, thus making successful conviction more difficult. Then, a victim who chooses not to proceed holds the authority to make the law forgive—or give up. 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 cooperate. A good argument for this approach is that a victim may decline to prosecute not out of forgiveness but out of fear of reprisal. Prosecution can proceed regardless of the victim's desires. But the law could turn to the victim later, once there is a conviction, and introduce forgiveness to reduce the punishment.
- Instead of proceeding case-by-case, the legal system can make categorical determinations of forgiveness by declining to prosecute, for example, anyone who committed a crime of marijuana possession in a state later making such possession

22. Jennifer Ball, *Growing Pains: A Tale of Forgiveness*, HUFFINGTON POST (updated June 18, 2013, 5:12 AM), http://www.huffingtonpost.com/jennifer-ball/growing-pains-a-tale-of-f_b_3091188.html.

lawful. Or the government may enact an amnesty, a general pardon even before prosecution, say, of protestors or immigrants who entered the country illegally or who were children when they entered. An amnesty may express forgiveness, though it may instead express a political judgment about the criminalized behavior or the costs of prosecution.

- Law can prescribe negative consequences for a doctor who apologizes for making an error during surgery. The law can treat that apology as an admission. Thirty-six states have “apology laws” prohibiting admissibility at trial of certain expressions related to sympathy or apology.²³ Or the law can instead exclude such an apology from consideration in any proceeding. That encourages apology. An apology encourages a patient or patient’s family member to release grievance and grant forgiveness.²⁴
- Following 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, committed crimes against humanity, or perpetrated the crime of aggression. Legal institutions might instead collect victims’ statements for history and memorials. Law may grant amnesty in advance on the condition that the alleged perpetrators tell what they did. Last year, South Africa marked the twentieth anniversary of its peaceful transition from racial apartheid to democracy. No small part of that transition was the institutional experiment with the TRC. Over the three years of its operation, the TRC invited victims to tell their stories. The TRC also invited perpetrators to apply for amnesty, preventing criminal charges, conditioned on showing how their actions were limited to and proportional to political motivations.²⁵ Its designers hoped the TRC would prevent cycles of revenge by giving public acknowledgment to past wrongs and investigating violations of human dignity both by the prior government and by those who

23. See *States with Apology Laws*, SORRY WORKS!, <http://www.sorryworks.net/apology-laws-cms-143> (last visited Aug. 7, 2015).

24. See Noni MacDonald & Amir Attaran, *Medical Errors, Apologies, and Apology Laws*, 180 CAN. MED. ASS’N J. 11 (2009), <http://www.cmaj.ca/content/180/1/11.full>. 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. Nicole Saitta & Samuel D. Hodge, Jr., *Efficacy of a Physician’s Words of Empathy: An Overview of State Apology Laws*, 112 J. AM. OSTEOPATHIC ASS’N 302 (2012). In short, the health care provider must always convey the truth.

25. Dullah Omar, the Minister of Justice at the time, 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.” *His Role in the Truth and Reconciliation Commission*, SOUTH AFRICA HISTORY ONLINE, <https://web.archive.org/web/20141111135712/http://www.sahistory.org.za/article/his-role-truth-reconciliation-commission> (last visited Aug. 7, 2015) (accessed via the Internet Archive Wayback Machine).

fought against it. Yet political cartoonist Zapiro brilliantly captured its limitations in a drawing showing TRC chair Archbishop Desmond Tutu standing on ground labeled “Truth” on one side of a chasm and the ground on the other side labeled “Reconciliation.”²⁶ Even with its flaws, the TRC offered a forum for discovering and revealing past wrongdoing both by the government and by its opponents.

Analyses of what did and did not work with the TRC are beginning to move beyond the anecdotal to the more rigorous. Before returning to the broader question about law’s role in forgiveness, I suggest three further observations about the TRC.

First, the TRC drew criticism from opposing sides, which could indicate its impartiality. Challenged in court by the African National Congress and the family of Steve Biko,²⁷ the Commission’s proceedings and report also drew fire from former government officials, police, and political leaders. Paul Van Zyl noted, “The fact that both former and current rulers were distressed by aspects of the TRC’s final report is perhaps the strongest evidence that the TRC fulfilled its mandate in a fair and impartial manner.”²⁸ Any transitional justice effort is likely to trigger criticism and yet criticisms well-distributed across different sides of society would bode much better than criticisms coming from only one side.

Second, the TRC seemed to assist a nation that otherwise might have descended into civil war. Admittedly, some studies report ambivalence and disappointment with—and even opposition to—the TRC.²⁹ Some people wondered if efforts at forgiveness simply covered wounds the TRC intended to

26. Zapiro, *Archbishop Tutu and the Chasm*, ZAPIRO (May 27, 1997), <http://www.zapiro.com/cartoons/970527so> (original published in the SOWETAN). The TRC exposed ambiguity and multiplicity in the 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. See Tristan Anne Borer, *Reconciling South Africa or South Africans? Cautionary Notes from the TRC*, AFRICAN STUD. Q., Fall 2004, at 19, <http://asq.africa.ufl.edu/files/Borer-Vol8Issue1.pdf>.

27. Anti-apartheid activist Steve Biko led the Black Consciousness Movement, and his brutal death in prison inspired further challenges to the regime. See DONALD WOODS, BIKO (1991); CRY FREEDOM (Marble Arch Productions 1987).

28. Paul van Zyl, *Dilemmas of Transitional Justice: The Case of South Africa’s Truth and Reconciliation Commission*, 52 J. INT’L AFF. 648 (1999).

29. See TRUTH AND RECONCILIATION IN SOUTH AFRICA: DID THE TRC DELIVER? (Audrey R. Chapman & Hugo van der Merwe eds., 2008); Mahmood Mamdani, *A Diminished Truth*, in AFTER THE TRC: REFLECTIONS ON TRUTH AND RECONCILIATION IN SOUTH AFRICA 58 (Wilmot James & Linda van de Vijver eds., 2001); Mahmood Mamdani, *The Truth According to the TRC*, in THE POLITICS OF MEMORY: TRUTH, HEALING & SOCIAL JUSTICE 176 (Ifi Amadiume & Abdullahi An-Na’im eds., 2000); Claire Moon, *Narrating Political Reconciliation: Truth and Reconciliation in South Africa*, 15 SOC. & LEGAL STUD. 257 (2006).

heal.³⁰ Nonetheless, the TRC coincided with South Africa's relatively peaceful political transition to democracy and high levels of people reported willingness to engage with politics and respect the legal system.³¹

Third, the story of the TRC has been compelling enough to inspire similar efforts elsewhere. Documented instances of forgiveness enabled by the TRC are few. One study indicates that of 429 participants in South Africa's process, only seventy-two discussed forgiveness; only 10 percent were willing to forgive if the wrongdoers took responsibility for their deeds; and only seven people surveyed were willing to forgive without conditions.³² Nevertheless, South Africa's TRC inspired transitional justice efforts in Rwanda, Sierra Leone, Cambodia, and Liberia, as well as in Greensboro, North Carolina, in the United States where the community investigated the killings of union activists by the Ku Klux Klan and Nazis. Indeed, Priscilla Hayner's 2011 edition of her book surveys forty truth commissions.³³ 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, is considering a truth commission in its proposed legislation for steps following the armed conflict between the Lord's Resistance Army and the government.³⁴ The International Centre for Transitional Justice and other global consultants offer help to nations and groups considering the creation of truth commissions.³⁵ Such efforts seem to offer conditions of forgiveness or rituals that allow individuals and groups to move on after terrible violence.

Why this emulation of South Africa's TRC? The language and examples of leadership offered by Nelson Mandela and Archbishop Desmond Tutu provided inspiring narratives and images to communities thirsty for hope. The TRC's statements of aspiration have led many people to conflate these

30. See Aleksandra Wagner, *I Was Born in an Unforgiving Country*, in CONSIDERING FORGIVENESS 13, 14 (Aleksandra Wagner, Carin Kuoni & Matthew Buckingham eds., 2009).

31. David Backer, *Evaluating Transitional Justice in South Africa from a Victim's Perspective*, J. INT'L INST., Winter 2005, at 8 (reporting study of Cape Town residents indicating that "victims' critical responses to the TRC process" has not diminished their engagement with politics or their "support for the new democratic dispensation"); James L. Gibson, *The Contributions of Truth to Reconciliation: Lessons from South Africa*, 50 J. CONFLICT RESOLUTION 409 (2006).

32. Hugo van der Merwe & Audrey R. Chapman, *Did the TRC Deliver?*, in TRUTH AND RECONCILIATION IN SOUTH AFRICA, *supra* note 29, at 241, 256.

33. PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS (2011). For discussion of the inspiration offered by the South African TRC, see GREENSBORO TRUTH & RECONCILIATION, FINAL REPORT 9–18 (2006), <http://greensborotrc.org/introduction.pdf>.

34. *ICTJ Forum: A Critical Time for Justice in Uganda*, INTL. CTR. FOR TRANSITIONAL JUSTICE (Feb. 12, 2014), <http://ictj.org/multimedia/audio/ictj-forum-critical-time-justice-uganda>.

35. INTL. CTR. FOR TRANSITIONAL JUSTICE, DRAFTING A TRUTH COMMISSION MANDATE: A PRACTICAL TOOL (2013), http://ictj.org/sites/default/files/ICTJ-Report-DraftingMandate-Truth-Commission-2013_0.pdf.

aspirations with actual results.³⁶ Nonetheless, the TRC's work coincided with many national and international conflicts and offered to ready audiences the idea of a "third way" between no response to atrocities on the one hand, and costly and controversial criminal prosecutions on the other. According to observers, the TRC created an atmosphere of engagement and a process inviting proximity between individuals that permitted informal conversations, including some offers of apologies and forgiveness.³⁷

Transitional justice efforts now commonly proceed through a variety of processes, making forgiveness, at best, one of many themes. Sierra Leone offers a prime example. When it emerged from its bloody and lengthy civil war, the nation created a truth and reconciliation commission³⁸ while at the same time conducting criminal prosecutions through its special tribunal.³⁹

Despite criminal prosecutions following Sierra Leone's civil war, one survivor highlighted the need for forgiveness and rebuilding after the violence. After the Special Court for Sierra Leone pursued and convicted Charles Taylor, chief mastermind of the violence in Sierra Leone and former president of Liberia, on charges of war crimes and crimes against humanity,⁴⁰ 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

36. See Borer, *supra* note 26.

37. A combination of religious, political, and communal ideas about the value of reconciliation and forgiveness framed the TRC for the public and, for many, resonated with beliefs and hopes. The proceedings and surrounding activities brought victims and amnesty applicants into relationships, at least through parallel proceedings and sometimes through actual meetings. As legal and Talmudic scholar Moshe Halbertal has written, physical proximity is a precondition for forgiveness. Moshe Halbertal, *At the Threshold of Forgiveness: A Study of Law and Narrative in the Talmud*, JEWISH REV. 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 *On the Threshold of Forgiveness; Law and Narrative in the Talmud*, JEWISH UNITED FUND (March 25, 2011), <http://www.juf.org/interactive/default.aspx?id=74744>.

38. Reflecting the work of Fred Luskin, the Sierra Leone Forgiveness Project provided both the intervention and the study. See FREDERIC LUSKIN, SIERRA LEONE FORGIVENESS PROJECT (2009), http://learningtoforgive.com/wp/docs/Sierra_Leone_Forgiveness_Project.pdf; see also Frederic M. Luskin, Karni Ginzburg & Carl E. Thoresen, *The Efficacy of Forgiveness Training on Psychosocial Factors in College Age Adults*, 29 HUMBOLDT J. SOC. REL. 163 (2005).

39. See UNICEF SIERRA LEONE, TRUTH AND RECONCILIATION COMMISSION REPORT FOR THE CHILDREN OF SIERRA LEONE (2004), http://www.unicef.org/infobycountry/files/TRCCF9_SepFINAL.pdf; SPECIAL COURT FOR SIERRA LEONE, <http://www.rscsl.org> (last visited Aug. 7, 2015); see also Robin Vincent, *Punishment and Forgiveness in Sierra Leone*, GUARDIAN (Nov. 3, 2002), <http://www.theguardian.com/world/2002/nov/03/westafrica.sierraleone> ("The Registrar of the Special Court for Sierra Leone responds to Peter Penfold on the difficulties of reconciling peace and justice.").

40. Ben Brumfield, *Charles Taylor Sentenced to 50 Years for War Crimes*, CNN (May 31, 2012, 7:04 AM), <http://www.cnn.com/2012/05/30/world/africa/netherlands-taylor-sentencing>.

forgive and forge a common future.⁴¹

The 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 some clothes and shoes for the boy—he called him Vandie—and the boy returned to school. 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.⁴²

After the war, Koroma helped Vandie as he returned to high school and university.⁴³ They remain friends.⁴⁴ Koroma told this story in calling for daily forgiveness and rebuilding after violence.⁴⁵

But people without a prior relationship can still grant forgiveness. Family members of murder victims have organized in the United States against the death penalty;⁴⁶ mothers of the young men known as the Gugleti Seven, killed by the apartheid-era South African Police Force, forgave the government informant who tipped off the police.⁴⁷ Marita Michael joined with Michelle

41. Samuel Konkofa Koroma, *After Charles Taylor, Finding Forgiveness in Sierra Leone*, WASH. POST (May 18, 2012), http://articles.washingtonpost.com/2012-05-18/opinions/35454635_1_sierra-leone-rebel-soldiers-charles-taylor.

42. *Id.*

43. *Id.*

44. *Id.*

45. In a similar vein, Jeanne Sinunuayabo forgave her neighbor who killed her sons during the Rwanda genocide, although not right away, and not until he served time in jail, asked her repeatedly for forgiveness, and underwent his own religious conversion. Lane Hartill, *Love and Forgiveness After Rwanda Genocide*, CATHOLIC RELIEF SERVS., <http://crs.org/rwanda/love-and-forgiveness> (last visited Aug. 7, 2015).

46. RACHEL KING, DON’T KILL IN OUR NAMES: FAMILIES OF MURDER VICTIMS SPEAK OUT AGAINST THE DEATH PENALTY (2003); David Mitchell, *Families of Murder Victims Rally Against Death Penalty*, KGWN (Jan. 8, 2014), <http://kwgn.com/2014/01/08/families-of-murder-victims-rally-against-death-penalty>.

47. See LONG NIGHTS JOURNEY INTO DAY (Reid-Hoffmann Productions 2000).

Postell to found an organization called Forgiving Mothers to promote reconciliation for parents of murdered children after Postell's son shot and killed Michael's son in the District of Columbia.⁴⁸

Beyond individual acts, legal rules and procedures can create incentives for apologies and forgiveness between individuals, and for the related relinquishment of punishment afforded by pardons, amnesties, and reconciliation in such diverse contexts as divorce, criminal law, and intergroup violence. These efforts emphasize forward-looking thinking and invite people to draw upon or develop personal ties and social norms in the spirit of forgiveness, relinquishing the very grounds for grievance, even if they do not involve a shift in attitudes.

III.

QUESTIONS ABOUT THE INQUIRY INTO LAW AND FORGIVENESS

Thus far, I have identified potential benefits of forgiveness, defined as a conscious, deliberate decision to forgo rightful grounds for grievance against those who commit a wrong or harm. Forgiveness does not require an apology, reparations, or anything else in exchange, although apologies and reparations may make it easier to forgive. I have also acknowledged that forgiveness cannot be forced. If forced, it is not forgiveness, as the victim has not made a deliberate decision to let go of grievances. I have also suggested that forgiveness can operate not only between individuals but between groups, even groups as large as nations. And I have identified ways that law can promote or deter forgiveness whether by individuals or groups.

Four questions surface from the inquiry in this Part: First, does looking to law to promote forgiveness place too much public pressure on private emotions? Second, does the analogy between interpersonal forgiveness and collective forgiveness work or does it instead obscure how societies differ from individuals? Third, does forgiveness amount to a "second-best" solution, turned to when true justice is not possible legally, politically, or psychologically? Fourth, does forgiveness impair law and its commitments to predictability and equal treatment? I will briefly consider each one.

A. *Does Using Law to Promote Forgiveness Wrongly Impose Burdens?*

Although forgiving a wrongdoer can afford relief from burdens of anger and resentment, pressuring anyone to forgive is oppressive. In one study, 30 percent of participants in South Africa's TRC reported feeling pressure to forgive.⁴⁹ Pressuring someone to forgive can be counterproductive as well as

48. Michelle Boorstein, *At the Willard, Tea and Empathy*, WASH. POST (Sept. 2, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/01/AR2008090102542.html>.

49. Audrey R. Chapman, *Perspectives on the Role of Forgiveness in the Human Rights Violations Hearings*, in TRUTH AND RECONCILIATION IN SOUTH AFRICA, *supra* note 29, at 66, 80.

wrong. Any process that makes an individual doubt, or feel ashamed of, his or her personal response of indignation imposes new damage and resentment. 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—may be painfully cancelled by overriding the victims' self-determination. Then, what happens to accountability? What happens to truth? Steered by the high moral ambitions of reconciliation, compassion, and peace, the law may fall short of those ambitious goals and also fail to enact its central work, the articulation and application of predictable norms.

Whatever burdens may follow law's use of forgiveness, legal institutions inevitably affect human relationships. Participating in a lawsuit affects the people involved. It can be emotionally draining, push the parties even farther apart, and magnify 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.⁵⁰ Litigation can enlarge the distance between disputing parties. For this very reason, commercial actors in long-term relationships of mutual benefit often agree to forgo litigation and even formal legalities.⁵¹

It is wise 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. If the legal framework inevitably affects emotions, pushing toward forgiveness may be no worse than pushing toward revenge, adverseness, or bitterness.

B. How Does Societal Forgiveness Compare with Interpersonal Forgiveness?

Jumping from a discussion of personal to political forgiveness is problematic. Groups and nations operate very differently than individuals. However, the most eloquent spokespersons for societal forgiveness tend still to talk in interpersonal terms. Archbishop Desmond Tutu, reflecting on his work as the chairman of South Africa's TRC, observed, "Forgiveness means abandoning your right to pay back that perpetrator in his own coin, but it is a loss that liberates the victim."⁵² A leader might be able to help groups and even a nation translate interpersonal forgiveness into a collective project. Yet even then, it remains a challenge to understand what role a leader can and should

50. See LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 16–17 (1985).

51. See Stewart Macaulay, *Non-Contractual Relationships in Business: A Preliminary Study*, 28 AM. SOC. REV. 1 (1963); Ian R. MacNeil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974).

52. Phil Neiman, *Forgiveness*, NEIMAN MEDITATION, <http://www.neimanmediation.com/forgiveness> (last visited Aug. 7, 2015) (quoting Archbishop Desmond Tutu).

play as victims deal with their own personal recovery. A leader who forgives in the name of individuals may help others release resentments but may simultaneously create new resentments. Perhaps an institution such as a truth commission can more effectively promote societal forgiveness than an individual leader. Although these questions are far from resolved, scholars have been studying South Africans after the TRC, public opinion toward impunity in Argentina after the fall of the military junta and the 1983 restoration of democracy, and the effect of the ouster of Augusto Pinochet in Chile.⁵³ Research about public attitudes toward past violations of human rights and about those who committed grave crimes against humanity—whether they faced or evaded trials or truth commissions—should bear on future decisions as nations consider whether to pursue truth commissions, even though each circumstance ultimately is unique.

A different set of questions arises when the government, rather than an individual, engages in an act of forgiveness. In fact, shaping actual legal practices to promote interpersonal forgiveness or personal contrition could jeopardize both the project of law and the ideal of forgiveness. Using law to support or urge forgiveness by individuals could well undermine the predictability and equal treatment of, and restraint on government power that we seek with the rule of law. Courts are meant to hear and resolve disputes. 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. The result may well reduce compliance with rights and duties, and there is no guarantee that those who respond to legal incentives to forgive in fact become more compassionate or forgiving.

Some believe that using law to prompt forgiveness evaporates the very quality that makes forgiveness distinctive: its exceptional, unconditional quality, far from the routine application of formal rules or institutional practice. This is the view expressed, for example, by Jacques Derrida who writes: “[F]orgiveness 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.”⁵⁴

What happens when a government official declares forgiveness in the name of the people? Again, some argue that there are acts simply beyond forgiveness—and that forgiving a crime against humanity, for example, is a

53. See TRUTH AND RECONCILIATION IN SOUTH AFRICA, *supra* note 29; PAMELA CONSTABLE & ARTURO VALENZUELA, A NATION OF ENEMIES: CHILE UNDER PINOCHET (1993); SUSANA KAISER, POSTMEMORIES OF TERROR: A NEW GENERATION COPES WITH THE LEGACY OF THE “DIRTY WAR” (2005).

54. JACQUES DERRIDA, ON COSMOPOLITANISM AND FORGIVENESS 32 (2001).

new wrong.⁵⁵ Others press forgiveness precisely at such a moment to create a parting from a terrible past.⁵⁶ Beyond these questions, there is a definitional problem in placing government in the role of granting forgiveness. If forgiveness is the victim's decision to let go of grievance, a government does not have the "standing" or authority to forgive. Consider the woman whose husband had been imprisoned and tortured, who, before the South African TRC, said: "A commission or a government cannot forgive. Only I, eventually, could do it. (And I am not ready to forgive.)"⁵⁷ Perhaps only individual people, not officials, can forgive.⁵⁸ When a government pushes toward 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. The government instead turns to secondary relationships, relationships between groups concerned ultimately with the legal consequences of obligations within primary relationships.⁵⁹ When an official stands in for victims by offering a pardon, the act does not itself directly repair the relationship between victims and wrongdoers; government officials can pardon wrongdoers—they cannot forgive them. Governments may be the only entities with "standing" to consider forgiving crimes against humanity precisely because such crimes transcend any individual. Such crimes represent violations of the dignity of every individual in the world, and hence lie beyond the capacity of any single individual to forgive. In this conception, only a representative could ever act on behalf of those who are victimized because all are victimized.

Similarly, officials may pursue compensation for victims of atrocities as an effort of repair but not as an effort to stand in for victims. Indeed, government actors may themselves offer compensation to victims of a prior regime or mass atrocity and, in so doing, work to improve the circumstances and experiences of victims in both symbolic and material ways. Nonetheless, the actual victims may reject compensation as inadequate or as a mistaken effort to substitute material benefit for moral judgment or exoneration, as some

55. *Id.* at 556.

56. Diego Cagüñas Rozo, *Forgiving the Unforgivable: On Violence, Power, and the Possibility of Justice* (Jan. 2004) (unpublished M.A. dissertation, University of Amsterdam), <http://www.banrepcultural.org/blaavirtual/tesis/colfuturo/forgivingabs>.

57. See DERRIDA, *supra* note 54 (paraphrasing a victim speaking at the TRC); Cláudia Perrone-Moisés, *Forgiveness and Crimes Against Humanity: A Dialogue Between Hannah Arendt and Jacques Derrida*, HANNAHARENDT.NET (2006), <http://www.hannaharendt.net/index.php/han/article/view/90/146> (noting that Derrida suggests that a state can judge but only people can forgive).

58. See Perrone-Moisés, *supra* note 57.

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

in Israel responded to Germany's reparations following the Holocaust.⁶⁰ The issues posed by collective reparations, blanket or conditional amnesty for a class of violations, and leniency in punishment for human rights violations are instructive but require moving consideration of forgiveness beyond relations between individuals to questions for groups and whole societies.

C. Does Forgiveness Amount to a "Second Best" When Justice Is Not Possible?

We may try to promote 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 of inadequate evidence, dangers of reprisal, or the appeal of trading amnesty for peace.⁶¹ 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.⁶² The judiciary and prosecutors may have been in power at the time of the mass atrocity. A new regime may be relatively powerless, or it may have made a deal to dispense with prosecution to gain power.

All of these challenges must be assessed in each particular situation, with attention to the multiple and often competing goals of an individual or society wrestling with wrongs and harms. The journey toward forgiveness may be germane to many of these goals; some may even see that journey as the most valuable aim. Yet such goals, including peace and healing, may be in tension with at least some elements of justice.

D. Does Forgiveness Impair Law and Its Commitments to Predictability and Equal Treatment?

Forgiveness risks undermining the predictability of law and the appearance or even the reality of treating like cases alike. Specifying the factors and considerations relevant to departure from otherwise applicable sanctions can promote the goal of treating like cases alike while also advancing justice through greater notice and reason giving.⁶³ Doing so requires looking at particular examples. I will explore three.

60. See MAJOR KNESSET DEBATES, 1948–1981, at 724–25 (Netanel Lorch ed., Dorothea Vanson-Shefer trans., 1993); Rodney, *supra* note 59, at 50–54.

61. See KWESI ANING & THOMAS JAYE, LIBERIA: A BRIEFING PAPER ON THE TRC, KOFI ANNAN INTERNATIONAL PEACEKEEPING TRAINING CENTER OCCASIONAL PAPER NO. 33 (Apr. 2011), <http://www.kaiptc.org/Publications/Occasional-Papers/Documents/Occasional-Paper-33-Jaye-and-Aning.aspx>.

62. Some say this is an effect of the process in Rwanda. See Augustin Dukuze, *Rwanda: Stifling Dissent by Intimidation, Blackmail, and/or Repression Will Not Deter Our Quest for a Just and Equitable Society*, HUNGRY FOR TRUTH, PEACE AND JUSTICE (Feb. 12, 2010, 9:41 PM), <http://hungryoftruth.blogspot.com/2010/02/rwanda-stifling-dissent-by-intimidation.html>.

63. See Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597 (1990).

The first picks up a question left open by the framers of the first permanent International Criminal Court (ICC), charged with prosecuting gross violations of human rights; the second concerns responses to child soldiers; and the third turns to debt, notably sovereign debt.

1. *Should International Criminal Law Forgive Failures to Prosecute When Truth Commissions Rather Than Criminal Prosecutions Follow Mass Atrocities?*

By design, the treaty establishing the ICC⁶⁴ gives priority to affected nation states to prosecute international crimes.⁶⁵ So the ICC may exercise jurisdiction only when “national legal systems fail to do so, including where they purport to act but in reality are unwilling or unable to genuinely carry out proceedings.”⁶⁶ In this way, the ICC “complement[s]” domestic justice systems rather than replaces them.⁶⁷ When a nation state prosecutes international crimes on its own, the ICC lacks power to do so; when a nation state investigates and concludes it does not have grounds to prosecute, the ICC similarly lacks power to proceed.⁶⁸ Now, what should happen when a nation pursues accountability not through criminal prosecution but through a fact-finding and reconciliation process?

The Rome Statute, the authorizing law, leaves the question open. Its drafters could not reach an agreement after extensive debate over whether domestic use of truth commissions and other non-adversarial justice mechanisms would “count” and thereby deprive the ICC of authority to prosecute.

The question is technical but pointedly poses the question of law’s relationship to forgiveness. Should a truth commission, which collects evidence from perpetrators and victims, satisfy the international legal requirements and deprive the ICC of its authority to prosecute? If it advances accountability and ensures fairness, a truth commission organized by the affected nation could be meaningful and valuable. Besides giving victims the chance to be heard, a truth commission could hear from alleged perpetrators, conditioning amnesty (as

64. The ICC came into being in 2002 after ratification by an initial 60 states—the minimum specified by the Rome Statute. The United States has not become a member.

65. See INT’L CRIMINAL COURT DOC. ICC-01/04-01/07-1008-AnxA, INFORMAL EXPERT PAPER: PRINCIPLE OF COMPLEMENTARITY IN PRACTICE 3 (2003), <http://www.icc-cpi.int/iccdocs/doc/doc654724.pdf>.

66. *Id.*

67. Generally, Article 17 of the Rome Statute, supplemented by Articles 18–19, governs this principle of complementarity as an issue of admissibility. Rome Statute of the International Criminal Court, Jul. 17, 1998, 2187 U.N.T.S. 90, 100–03 (entered into force July 1, 2002), <https://treaties.un.org/doc/publication/UNTS/Volume%202187/v2187.pdf> [hereinafter Rome Statute or the Statute].

68. What if the nation state has granted amnesty to alleged violators? The Rome Statute does not explicitly address this question, but it could well be the kind of failure-to-prosecute that would preserve jurisdiction within the ICC. See Rome Statute, *supra* note 67, art. 17, 2187 U.N.T.S. 90.

South Africa did) on their participation in giving evidence. This could produce reliable accounts of what happened, including names of wrongdoers, and could generate reparations for survivors.

What if the truth commission is a sham? Local authorities may bend to the demands of despots who seek to negotiate the terms of their own amnesty. Some protection should come from ICC judges who oversee the Court's jurisdiction; the United Nations Security Council, which retains power to refer matters to the ICC; and member nations that govern the ICC.⁶⁹ Each of these groups can step in and check domestic departures from international criminal justice norms.⁷⁰ These same actors can also check professional prosecutors at the ICC who may understandably focus primarily on criminal convictions to the exclusion of broader goals of peace and societal stability.

A central goal of the ICC is to build a global network of nations committed to end genocide and crimes against humanity.⁷¹ A single court will never be enough to address the harms; complementarity encourages ownership by member nations and promotes human rights around the world. This means that the ICC should, where possible, show deference toward national responses to gross violations of human rights—with caution to guard against insincere or critically inadequate domestic responses to massive human rights violations.⁷² The international institution should not defer when a nation lacks the capacity or will to condemn terrible acts. But other than those circumstances, the ICC should take a broad view of the kind of domestic responses that suffice and hence deprive it of authority to proceed. By treating truth commissions, when robust and genuine, as sufficient alternatives to criminal prosecution, the ICC will respect nations preferring that particular response to genocide and mass violence over adversarial prosecutions.

The concept of “margin of appreciation,” developed to implement the European Convention on Human Rights, offers an instructive analogy.⁷³ As an interpretive guide, this concept offers flexibility and room for national practices to advance the common project of the human rights convention alongside respect for national differences; it allows the European Court of Human Rights to avoid harsh confrontations between an international norm on the one hand

69. *Id.* at arts. 18–19, 2187 U.N.T.S. 90.

70. *Id.* at art. 53(1)(c), 2187 U.N.T.S. 90. Although the Prosecutor's current interpretation of this phrase denies prosecutors discretion to refrain from prosecuting where considerations of domestic peace, reconciliation, and stability are involved, the ICC and the United Nations Security Council have powers to offer their interpretations and halt prosecution at the ICC.

71. *Id.* at Preamble, 2187 U.N.T.S. 90.

72. Louise Chappell, Rosemary Grey & Emily Waller, *The Gender Justice Shadow of Complementarity: Lessons from the International Criminal Court's Preliminary Examinations in Guinea and Colombia*, 7 INT'L J. TRANSITIONAL JUST. 455 (2013).

73. *Margin of Appreciation*, COUNCIL OF EUROPE, http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp (last visited Aug. 7, 2015). I am grateful to Professor Vicki Jackson for this point.

and a given nation's security and self-determination on the other.⁷⁴ The concept advances a process of ongoing efforts to realize human rights over time.⁷⁵ That the concept itself draws upon contrasting and at times inconsistent interpretive notions from the participating nations is itself a powerful reflection of the complex negotiations involved in building truly common notions of justice.⁷⁶

Determining which domestic alternatives to prosecution should suffice for the ICC requires careful factual consideration. Detailed consideration of particular factual contexts is what prosecutors and judges are equipped to do. Permitting at least some experimentation by nations in enforcing human rights will expand responsibility, rather than create distance, between the project of international criminal justice and the country most affected by a particular issue. From my own perspective, an alternative to prosecution should be specific; it should name particular wrongdoers. It should be fair and comprehensive, offering opportunities for both victims and alleged perpetrators to be heard. And if it excuses individuals from criminal liability, it should condition amnesty on actions by the wrongdoer, such as the provision of testimony or reparations. Details of this sort could assure the ICC that countries are pursuing accountability and fairness domestically, but using other elements could serve these goals and advance the international commitment to human rights. In the long term, respect for national self-determination in matters of peace and justice can build local commitment and engagement with the efforts to address—and prevent—genocide and crimes against humanity.

2. *Child Soldiers?*

The second problem involves forgiveness of child soldiers who take part in brutal killings, rapes, and other international crimes. Prosecuting those who turn children into soldiers is a recent advancement in international human rights enforcement.⁷⁷ The ICC made history in its initial case by sentencing

74. Steven Greer, *The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation?*, 3 UCL HUM. RTS. REV. 1, 4 (2010).

75. See Thomas A. O'Donnell, *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights*, 4 HUM. RTS. Q. 474 (1982). Critics, however, warn against exceptions, especially given the need of minorities within a nation to receive protections of universal principles. See, e.g., Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843 (1999).

76. See Benvenisti, *supra* note 75; O'Donnell, *supra* note 75. See generally STEVEN GREER, *THE MARGIN OF APPRECIATION: INTERPRETATION AND DISCRETION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS*, COUNCIL OF EUROPE (2000), <http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17%282000%29.pdf>.

77. ROMEO DALLAIRE, *THEY FIGHT LIKE SOLDIERS, THEY DIE LIKE CHILDREN* 123–24 (2010); HUMAN RIGHTS WATCH, *MAYBE WE LIVE AND MAYBE WE DIE: RECRUITMENT AND USE OF CHILDREN BY ARMED GROUPS IN SYRIA* (2014), https://www.hrw.org/sites/default/files/reports/syria0614_crd_ForUpload.pdf; Margaret Angucia, *Broken Citizenship: Formerly Abducted Children and Their Social Reintegration in Northern Uganda* 112 (July 8, 2010) (doctoral thesis, Rijksuniversiteit Gronigen), http://www.researchgate.net/publication/45180527_Broken_citizenship__

Thomas Lubanga, a warlord in the Congo, to fourteen years for enlisting, recruiting, and using children as soldiers.⁷⁸ That the first prosecution and conviction by the ICC focused on this crime is a significant statement of international human rights priorities. How, though, should the child soldiers themselves be treated? When children are abducted, coerced, or enticed into becoming soldiers,⁷⁹ they are victimized by adults who take away their childhoods and make them instruments of violence and lawlessness.⁸⁰ But some youths join rebel groups without being abducted or coerced; some are drawn by the ideology, opportunities for action and responsibility, or even the thrill of committing violence. Some coerced to join later kill and rape, actions that require some modicum of choice. Should their exercise of some degree of agency make them culpable? Or should they be forgiven?

Law may forgive individuals simply because they were children when they acted, or because they were victims who did not choose their fates. Many join armed conflicts when coerced by brute force or are made to ingest drugs after even slight acts of resistance.⁸¹ The particular issue of child soldiers currently involves only a few nations, although wars throughout history and

formerly_abducted_children_and_their_social_reintegration_in_northern_Uganda. The Rome Statute specifically punishes individuals who conscript or enlist children under fifteen or use them in hostilities, including for support functions. *Id.* at 23.

78. HUMAN RIGHTS WATCH, COURTING HISTORY: THE LANDMARK INTERNATIONAL CRIMINAL COURT'S FIRST YEARS (2008), <https://www.hrw.org/sites/default/files/reports/icc0708webwcover.pdf>; Wairagala Wakabi, *Lubanga Given 14-Year Jail Sentence*, INT'L JUST. MONITOR (July 10, 2012), <http://www.lubangatrial.org/2012/07/10/lubanga-given-14-year-jail-sentence>. The Special Court for Sierra Leone had a prior prosecution for recruitment of minors to be soldiers, but it resulted in an acquittal. The Special Court for Sierra Leone reached the very first judgment that enlisting minors to serve as soldiers is a crime against humanity. *See* Prosecutor v. Brima, Case No. SCSL-2004-16-A (Special Court for Sierra Leone Feb. 22, 2008) (Appeals Judgment), http://www1.umn.edu/humanrts/instree/SCSL/SCSL-04-16_Files/SCSL-04-16-A675.htm; Press Release, United Nations Office of the Special Representative for the Secretary-General for Children and Armed Conflict, Special Court for Sierra Leone: First Convictions on Recruitment And Use of Child Soldiers (June 21, 2007), <https://childrenandarmedconflict.un.org/press-release/21Jun07>.

79. Different and tragic issues arise for those minors turned into sex slaves or "wives." *See* SAVE THE CHILDREN, FORGOTTEN CASUALTIES OF WAR: GIRLS IN ARMED CONFLICT (2005), http://www.peacewomen.org/sites/default/files/HR_ForgottenGirls_SC_2005_0.pdf; Graça Machel, *Foreword*, in SHARANJEET PARMAR, MINDY JANE ROSEMAN, SAUDAMINI SIEGRIST & THEO SOWA, CHILDREN AND TRANSITIONAL JUSTICE: TRUTH-TELLING, ACCOUNTABILITY AND RECONCILIATION, at ix, xii (2010).

80. *See* Graça Machel (expert of the Secretary-General), *The Impact of Armed Conflict on Children*, UN Doc. A/51/306 (Aug. 26, 1996). Even when children's own perspectives are included and lend an understanding of their own sense of agency, their involvement in war roles terminates the lives they otherwise would have led. *See* OPIYO OLOYA, CHILD TO SOLDIER: STORIES FROM JOSEPH KONY'S LORD'S RESISTANCE ARMY 6, 13, 18–25 (2013).

81. Some are drugged and abducted, or made to witness violence and abuse of their families, or subjected to brain-washing or rituals involving superstition and tales of magical control, or beaten close to death. OLOYA, *supra* note 80, at 78–90, 100–01, 110–11. Hunger, loneliness, force, drugs, fear, and hope all appear as explanations in the memoir of child soldier Ishmael Beah from Sierra Leone. *See* ISHMAEL BEAH, A LONG WAY GONE: MEMOIRS OF A BOY SOLDIER (2007).

across the world have drawn the involvement of individuals not yet adults.⁸² Contemporary international law has targeted the coercion or recruitment of minors to engage in armed conflict but does not criminalize the act of recruiting individuals between the ages of fifteen and eighteen as soldiers.⁸³ Hence, under international law, one of this age who recruits teen soldiers is not responsible for their recruitment, but the conduct of individuals in this age range is itself beyond criminal liability. Thus, for purposes of international tribunals, individuals in this category of older children are “allowed to fight, but [] are protected from punishment for their actions.”⁸⁴ Under the Rome Statute, children between fifteen and seventeen years old are treated as victims, regardless of what they have done.⁸⁵

Hence, international norms, following the practices of many nations, discourage prosecution of individuals under the age of eighteen,⁸⁶ but other

82. See DALLAIRE, *supra* note 77; Angucia, *supra* note 77; Graça Machel, *supra* note 80.

83. Under the 1998 Rome Statute of the International Criminal Court, it is a war crime for any national army or other armed group to conscript or enlist children under the age of fifteen or to use these children to actively participate in hostilities. Rome Statute, *supra* note 67, at art. 8(2)(b)(xxvi), 2187 U.N.T.S. 90; art. 26, 2187 U.N.T.S. 90 (“The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.”) A similar provision appears in the Statute of the Special Court for Sierra Leone, art. 4(c), Jan. 16, 2002, 2178 U.N.T.S. 145, <https://treaties.un.org/doc/publication/UNTS/Volume%202178/v2178.pdf>.

84. David M. Rosen, *Who is a Child? The Legal Conundrum of Child Soldiers*, 25 CONN. J. INT’L L. 81, 84 (2009).

85. See Nienke Grossman, *Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations*, 38 GEO. J. INT’L L. 323, 358 (2007).

86. Rome Statute, *supra* note 67, at art. 26, 2187 U.N.T.S. 90. Moreover:

[The] 2007 Paris Principles expressly state that “children who are accused of crimes under international law allegedly committed while they were associated with armed forces or armed groups should be considered primarily as victims of offenses against international law.” The Paris Principles go on to state that “wherever possible, alternatives to judicial proceedings must be sought, in line with the Convention on the Rights of the Child and other international standards for juvenile justice.” The Principles iterate that, at the international level, “[c]hildren should not be prosecuted by an international court or tribunal,” while at the national level, alternatives to judicial prosecution of children should be sought. The Paris Principles were endorsed by fifty-nine states at the 2007 International Conference in Paris on Children Involved in Armed Forces and Armed Groups, and since 2007, new endorsements brought the total to sixty-eight states in support of rehabilitation over prosecution.

International Law and Laws of War and International Criminal Law—Prosecution of Child Soldiers—United States v. Omar Ahmed Khadr, 33 SUFFOLK TRANSAT’L L. REV. 175, 18182 (2010). Although the Statute of the Special Court for Sierra Leone granted the ICC jurisdiction over persons aged fifteen and above, the prosecutor declined to prosecute individuals between fifteen and eighteen because of an emphasis on prosecuting those “most responsible” for the hostilities. See U.N. Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, at 6–7, U.N. Doc. S/2000/915 (Oct. 4, 2000). The Statute for the Special Court of Sierra Leone provided that children between ages fifteen and eighteen could be put on trial for war crimes but barred imprisonment even following convictions of any in this age group. Statute of the Special Court for Sierra Leone, art. 7, 2178 U.N.T.S. 145. Chief Prosecutor David Crane chose not to prosecute anyone in this age group. Testimony of David Crane, Special Court Subcomm. on Int’l Hum. Rts. of the Standing Comm. on Foreign Affairs and Int’l Development, 2d Sess., 39th Can. Parl., 1 (May 13,

countries take a different view. These differences arise from contrasting conceptions of the proper age of responsibility as well as approaches to terrorism and political violence. The differences, though, may also reflect inconsistent assessments of blame and punishment.

Regardless of varied legal views about when adult responsibilities start, it is difficult to deny that even children make choices. One adolescent soldier explained to a researcher that he planned to return to Liberia so he could claim the benefits available to demobilized child soldiers but that he intended to return to fighting if he could not obtain sufficient support.⁸⁷

Some children in armed conflicts demonstrate choice in their involvement, becoming soldiers to defend against outside forces, escape from poverty, pursue what seems like a financially or ideologically appealing mission,⁸⁸ or operate outside of traditional gender roles.⁸⁹ Individuals, even in oppressive circumstances, demonstrate some degree of choice and agency.⁹⁰ The same young person may present himself as a tough combatant while with friends and former soldiers and then as a traumatized innocent while with workers from a nongovernmental organization.⁹¹ A young woman may find the

2008), <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=3494571&Mode=1&Language=E>.

87. Christine Knudsen, *Demobilization and Reintegration During an Ongoing Conflict*, 37 CORNELL INT'L L.J. 487, 499 (2004).

88. MAGALI CHELPI-DEN HAMER, YOUNGEST RECRUITS: PRE-WAR, WAR & POST-WAR EXPERIENCES IN WESTERN CÔTE D'IVOIRE 31–34 (2010). Hamer stresses that different individuals show different motivations and coercion operates for many. Emphasizing coercion and drugging, other scholars embrace the image of the child soldier as victim. *Id.*; see, e.g., Susan Tiefenbrun, *Child Soldiers, Slavery and the Trafficking of Children*, 31 FORDHAM INT'L L.J. 415 (2007); Sara A. Ward, *Criminalizing the Victim: Why the Legal Community Must Fight to Ensure that Child Soldier Victims Are Not Prosecuted as War Criminals*, 25 GEO. J. LEGAL ETHICS 821 (2012); Kathryn White, *A Chance for Redemption: Revising the "Persecutor Bar" and "Material Support Bar" in the Case of Child Soldiers*, 43 VAND. J. TRANSNAT'L L. 191 (2010).

89. CHILD SOLDIERS: FROM RECRUITMENT TO REINTEGRATION (Alpaslan Özerdem & Sukanya Podder eds., 2011); *Analysis: Girl Child Soldiers Face New Battles in Civilian Life*, IRIN: HUMANITARIAN NEWS & ANALYSIS (Feb. 12, 2013), <http://www.irinnews.org/report/97463/analysis-girl-child-soldiers-face-new-battles-in-civilian-life>. Angela Veale also found a sense of empowerment for Ethiopian female combatants, many who started as child soldiers. However, the Ethiopian conflict differed from other African conflicts. ANGELA VEALE, FROM CHILD SOLDIER TO EX-FIGHTER: FEMALE FIGHTERS, DEMOBILIZATION AND REINTEGRATION IN ETHIOPIA (2003). Describing teens who voluntarily joined rebels and reflected motives ranging from defense of their communities to desires for a military career, Christine Ryan stresses how nongovernmental organization workers incorrectly tried to conceive of the youth as lacking in agency and complete victims. CHRISTINE RYAN, THE CHILDREN OF WAR: CHILD SOLDIERS AS VICTIMS AND PARTICIPANTS IN THE SUDAN CIVIL WAR (2012). Other researchers also cite the problem of international human rights discourse obscuring the agency of children in wartime. See, e.g., DAVID M. ROSEN, ARMIES OF THE YOUNG: CHILD SOLDIERS IN WAR AND TERRORISM (2005).

90. Mats Utas, *Victimcy, Girlfriending, Soldiering: Tactic Agency in a Young Woman's Social Navigation of the Liberian War Zone*, 78 ANTHROPOLOGICAL Q. 403,426 (2005).

91. Susan Shepler, *The Rise of the Child: Global Discourses of Youth and Reintegrating Child Soldiers in Sierra Leone*, 4 J. HUM. RTS. 197, 199 (2005).

easiest way to deal with an interrogator is to form a sexual relationship with him.⁹² Children adjust tactics in response to constraints and opportunities, even as traumatic circumstances alter their own psychological development.⁹³ Even if initially coerced into the role of a soldier, a fifteen-year-old can commit murder, torture, and rape and recruit or kidnap younger children to serve as soldiers. Yet some former child soldiers have explained how they avoided killing by deliberating aiming incorrectly or otherwise permitting potential victims to elude harm.⁹⁴

Perhaps ironically, viewing child soldiers as innocent victims makes forgiveness beyond reach, because forgiveness is only for those who commit a wrong. Rather than seeing child soldiers solely as victims or wrongdoers, we could see them as individuals trying to make meaning of their experiences, including their past wrongdoing.⁹⁵ Many former child soldiers struggle with whether they can forgive themselves for what they did and transcend what they endured.⁹⁶ Emmanuel Jal, a former child soldier who became a music artist, expresses his struggle for healing in these lyrics: “I’m in another war / This time / It’s my soul that I’m fighting for.”⁹⁷

Nations and the international community could create a public process for those who participated in armed groups before they were eighteen to acknowledge, for themselves and the larger society, what happened and why. These young people can contribute to a social effort to recognize violence and

92. See, e.g., Utas, *supra* note 90, at 414–15 (describing how a young woman, placed in an arranged marriage at the age of sixteen, ran away; started dating military men; and after one was murdered, and formed a relationship with the commando sent to interrogate her when she was nineteen).

93. Cecilia Wainryb, “*And So They Ordered Me to Kill a Person*”: *Conceptualizing the Impacts of Child Soldiering on the Development of Moral Agency*, 54 HUM. DEV. 273, 283 (2011).

94. MYRIAM DENOV & RICHARD MACLURE, CHILD SOLDIERS IN SIERRA LEONE: EXPERIENCES, IMPLICATIONS, AND STRATEGIES FOR REHABILITATION AND COMMUNITY REINTEGRATION (2005) (report for the Canadian International Development Agency); Myriam Denov & Richard Maclure, *Engaging the Voices of Girls in the Aftermath of Sierra Leone’s Conflict: Experiences and Perspectives in a Culture of Violence*, 48 ANTHROPOLOGICA 73, 80–81 (2006).

95. Wainryb, *supra* note 93; see also Theresa S. Betancourt, *Developmental Perspectives on Moral Agency in Former Child Soldiers: Commentary on Wainryb*, 54 HUMAN DEV. 307 (2011) (endorsing Wainryb’s analysis). This analysis has potential implications for the legal treatment of young people outside of armed conflicts, and there are especially telling parallels regarding youth caught up in the drug trade and related criminal conduct as a result of adult influence or coercion. When Emmanuel Jal visited the District of Columbia Correctional Treatment Facility and described his experiences taking orders from thugs as a child soldier in Sudan, the young men in the jail found many similarities with their lives. See Petula Dvorak, *For One of Sudan’s ‘Lost Boys’ and Teens in D.C. Jail, A Shared Struggle*, WASH. POST (Oct. 8, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/07/AR2010100707012.html>.

96. Myriam Denov, *Coping with the Trauma of War: Former Child Soldiers in Post-Conflict Sierra Leone*, 53 INT’L SOC. WORK 791, 798 (2010).

97. DALLAIRE, *supra* note 77, at 152 (quoting Emmanuel Jal’s song, *Baakiwara*).

lawlessness and forge new and productive chapters in their own lives.⁹⁸ Lessons could be learned from efforts in many countries to establish special juvenile justice systems—offering alternatives to punishment based on perspectives from social work and psychological development. Another approach would draw on uses of truth commissions to enhance individual healing and social reintegration.⁹⁹ By finding ways to acknowledge both the wrongs done to and done by the young individuals, the law itself could forgive without leaving former child soldiers beyond accountability.

3. *Forgiving Debt*

The moral dimension of debt forgiveness may seem a quaint holdover from an earlier era. Yet Western and Christian morality infuse both the concept of debt and the concept of forgiveness.¹⁰⁰ In this light, the moral dimension involved in resolving financial debts is still relevant today. The legal mechanisms of bankruptcy implement the idea of forgiveness by allowing individuals and companies to declare insolvency, discharge debt, and obtain immunity from suit on those debts in exchange for meeting certain requirements. Those requirements may include financial counseling, selling off assets to repay creditors, and restructuring the payment schedule and amounts.

98. See Paul Angelo, Opinion-Editorial, *How to Reintegrate Colombia's Child Soldiers into Society*, MIAMI HERALD (Aug. 14, 2014), <http://www.miamiherald.com/opinion/op-ed/article-1979901.html>.

99. Former child soldiers returning to their homes in some settings face obstacles to reintegration because they have not been held accountable for their actions. These issues can be especially challenging for girls serving as sexual slaves or “wives” for the combatants. Theresa S. Betancourt et al., *Research Review: Psychosocial Adjustment and Mental Health in Former Child Soldiers—A Systematic Review of the Literature and Recommendations for Future Research*, 54 J. CHILD PSYCHOL. PSYCHIATRY 17, 28, 30 (2013). Some boys also experienced sexual exploitation and face trauma as a result. DALLAIRE, *supra* note 77, at 133. Not all girls who have been kidnapped or who join rebel or guerilla forces are raped or engage in sexual relationships, and experts call for more attention to the varied circumstances and experiences of these young people in efforts to assist their transitions back to mainstream society. See Chris Coulter, *Female Fighters in the Sierra Leone War: Challenging the Assumptions?*, 88 FEMINIST REV. 54 (2008); YVONNE E. KEAIRNS, QUAKER UNITED NATIONS OFFICE, *THE VOICES OF GIRL CHILD SOLDIERS* 6–7, 15–17 (2003), http://www.quno.org/sites/default/files/resources/The%20voices%20of%20girl%20child%20soldiers_SRI%20LANKA.pdf. Yet exclusive focus on the sexual dimension of their experiences neglects other violence these individuals endure and are forced to commit. See FIONA ROSS, *BEARING WITNESS: WOMEN AND THE TRUTH AND RECONCILIATION COMMISSION IN SOUTH AFRICA* 89 (2003); Fionnuala Ní Aoláin, *Exploring a Feminist Theory of Harm in the Context of Conflicted and Post-Conflict Societies*, 35 QUEEN'S L.J. 219, 240 (2009); Machel, *supra* note 79, at xiii.

100. See Shalini Satkunanandan, *Morality's Debt Perspective*, in EXTRAORDINARY RESPONSIBILITY: POLITICS BEYOND THE MORAL CALCULUS (forthcoming Sept. 2015); Gary Shapiro, *Debts Due and Overdue: Beginnings of Philosophy in Nietzsche, Heidegger, and Anaximander*, in NIETZSCHE, GENEALOGY, MORALITY: ESSAYS ON NIETZSCHE'S GENEALOGY OF MORALS 358 (Richard Schacht ed., 1994).

They also most likely involve receiving a poor risk rating, which reduces access to future credit after bankruptcy.¹⁰¹

There is something powerful about the chance that bankruptcy represents; the chance to start anew without punishing debt can allow an individual or a business to save enough to build for something better. Debt, and the property it represents, matters, but not more than liberty and dignity—or so societies decided in abolishing debtors' prison. Recent exposure to practices amounting to a return of debtors' prison has drawn public and judicial objections.¹⁰² The business world's approaches to bankruptcy suggest the power of debt forgiveness as an engine for building the future.¹⁰³ Although individuals still experience shame and personal difficulties when pursuing bankruptcy, businesses often declare bankruptcy as a business strategy (to break union contracts, prioritize relationships, or walk away from investments that no longer make sense, for example).¹⁰⁴

Yet by law, some debts lie outside bankruptcy. In current United States bankruptcy law, student loans used to finance higher education cannot be forgiven by undergoing bankruptcy,¹⁰⁵ except in instances of total disability or death and some instances of public service.¹⁰⁶ Debates over programs to

101. In the United States, individuals and business entities may choose between filing under Chapter 7, which cancels debts and liquidates property to repay creditors, or Chapters 11, 12, or 13, which establish a multi-year plan for repaying creditors and allow the individuals to keep some large assets as long as they make scheduled payments. See *Bankruptcy Basics*, U.S. COURTS, <http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics> (last visited Aug. 7, 2015).

102. See, e.g., Spencer S. Hsu, *Missouri Cities Sued over Municipal Court Practices*, WASH. POST. (Feb. 8, 2015), http://www.washingtonpost.com/local/crime/ferguson-and-jennings-mo-sued-over-municipal-court-practices/2015/02/08/256da2d2-ae4f-11e4-abe8-e1ef60ca26de_story.html.

103. Equal Justice Under Law, a nonprofit advocacy group, brought this suit after successfully settling prior litigation in Alabama. See Final Settlement, *Mitchell v. City of Montgomery*, No. 2:14-cv-186 (M.D. Ala. Nov. 17, 2014), <http://equaljusticeunderlaw.org/wp/wp-content/uploads/2014/07/Final-Settlement-Agreement.pdf>.

104. Chief executive officers at the helm when a company declares bankruptcy may not have the brightest prospects but are still often able to pursue further high-level leadership opportunities. Dawn Kawamoto, *Bankruptcy Not a Stigma for Some CEOs*, CNET NEWS (July 22, 2002, 4:15 PM), http://news.cnet.com/Bankruptcy-not-a-stigma-for-some-CEOs/2100-1017_3-274304.html.

105. James Surowiecki, *Living By Default*, NEW YORKER (Dec. 19, 2011), http://www.newyorker.com/talk/financial/2011/12/19/111219ta_talk_surowiecki.

106. See Press Release, U.S. Dep't of Educ., Default Rates Continue to Rise for Federal Student Loans (Sept. 30, 2013), <http://www.ed.gov/news/press-releases/default-rates-continue-rise-federal-student-loans>.

106. Justin Harelik, *Debts That Can't Be Wiped Out in Bankruptcy*, BANKRATE (Jan. 31, 2012), <http://www.bankrate.com/finance/debt/debts-wiped-bankruptcy.aspx>; *Forgiveness, Cancellation, and Discharge: Teacher Loan Forgiveness*, FEDERAL STUDENT AID, <http://studentaid.ed.gov/repay-loans/forgiveness-cancellation#teacher-loan> (last visited Aug. 7, 2015); see also Megan McCardle, *Debt Jubilee? Start with Student Loans*, ATLANTIC (Oct. 6, 2011), <http://www.theatlantic.com/business/archive/2011/10/debt-jubilee-start-with-student-loans/246307>. Calls for reform come from many quarters. See Rod Dreher, *Student Loans and Moral Hazard*, AM. CONSERVATIVE (Oct. 31, 2011, 1:43 PM), <http://www.theamericanconservative.com/dreher/student-loans-and-moral-hazard> ("Aside from the power of negative example, shouldn't there be banking reform laws in place that

forgive student loans reflect concerns about both irresponsibility and impossible burdens.¹⁰⁷

Individual creditors can choose to forgive debt even without bankruptcy. Following the subprime mortgage explosion—and massive defaults in the 2008 global financial disaster—many private creditors forgave portions of home mortgages. In response to public demands, Congress enacted the Mortgage Forgiveness Debt Relief Act of 2007, which created a three-year window for homeowners to refinance their mortgages without having to pay taxes on any debt modification or forgiveness that they received (up to two million dollars per year).¹⁰⁸

Sovereign nations cannot declare bankruptcy, but creditor nations and private lenders can forgive their debts. Drawing from the Biblical notion of a

restrict the ability of banks to loan money to students who are getting degrees in fields in which there is a reduced likelihood that they'll be able to pay the loans back? Or is that going too far, given that it can be difficult to predict which professional fields are likely to be solid in the future? Is it kind, or even wise, to have a system that allows teenagers to dig themselves into such a deep financial hole?"); Jack Jenkins, *5 Reasons People of Faith Should Care About Student-Loan Debt*, CTR. FOR AM. PROGRESS (June 27, 2013), <http://www.americanprogress.org/issues/religion/news/2013/06/27/68238/5-reasons-people-of-faith-should-care-about-student-loan-debt>; *Student Loan Debt: To Pay or Not To Pay?*, PBS NEWSHOUR (May 31, 2012), http://www.pbs.org/newshour/bb/business-jan-june12-makingsense_05-31 (“They made a contractual commitment in a very different economy. And you can say, well, it’s their tough luck, they should’ve known it all wasn’t going to last. But their elders and betters and wisers told them to do this.”).

107. See Jane C. Timm, *Students Seek Loan Forgiveness in Overwhelming Numbers*, MSNBC (Apr. 22, 2014), <http://www.msnbc.com/morning-joe/students-seek-debt-forgiveness-costs-surge> (“Enrollment in federal student loan debt forgiveness programs skyrocketed nearly 40% in the last six months, the U.S. Education Department told The Wall Street Journal, as education costs rise.”). In the “Pay As You Earn” program, revamped in 2011, the government program forgives federal student loans after borrowers have paid a certain percentage of their income for a specified number of years. *Education Department Launches ‘Pay As You Earn’ Student Loan Repayment Plan*, U.S. DEP’T OF EDUC. (Dec. 21, 2012), <http://www.ed.gov/news/press-releases/education-department-launches-pay-you-earn-student-loan-repayment-plan>. See Stacy Teicher Khadaroo, *Student Loan Forgiveness: 5 Ways Obama Wants to Ease Student Debt*, CHRISTIAN SCI. MONITOR (Oct. 26, 2011), <http://www.csmonitor.com/USA/2011/1026/Student-loan-forgiveness-5-ways-Obama-wants-to-ease-student-debt/Pay-as-you-earn>.

108. See News Release, IRS, *Mortgage Workouts, Now Tax-Free for Many Homeowners; Claim Relief on Newly-Revised IRS Form* (Feb. 12, 2008), <http://www.irs.gov/uac/Mortgage-Workouts,-Now-Tax-Free-for-Many-Homeowners%3B-Claim-Relief-on-Newly-Revised-IRS-Form>. Because forgiven loans are largely treated as taxable income in the United States, the government faced further pressure and excused the tax liability. *The Mortgage Forgiveness Debt Relief Act and Debt Cancellation*, IRS (Jan. 6, 2015), <http://www.irs.gov/Individuals/The-Mortgage-Forgiveness-Debt-Relief-Act-and-Debt-Cancellation>; *Fact Sheet: The Mortgage Forgiveness Debt Relief Act*, THE WHITE HOUSE (Dec. 20, 2007), <http://georgewbush-whitehouse.archives.gov/news/releases/2007/12/20071220-6.html>. When the Act was about to expire, Congress extended the Mortgage Forgiveness Debt Relief Act for one more year in an eleventh hour bill to avoid a possible fiscal cliff crisis and perceived unfairness, especially for underwater homeowners who owed more than their homes were worth and had no equity in their homes; these homeowners would have faced significant difficulties paying income tax on their forgiven debt. Anna Cuevas, *Mortgage Debt Relief Act Receives Much-Needed Extension*, HUFFINGTON POST (Mar. 12, 2013, 5:12 AM), http://www.huffingtonpost.com/anna-cuevas/mortgage-debt-relief-act_b_2427431.html.

Jubilee year clearing the slate of all debts, a nonprofit organization called Jubilee Network mobilizes faith communities and other groups and claims credit for “critical global financial reforms and more than \$130 billion in debt relief for the world’s poorest people.”¹⁰⁹ A coalition of activists collected twenty-four million signatures between 1996 and 2000 from 160 countries on a petition in support of canceling the debt of developing nations.¹¹⁰ International celebrities and global leaders including Bono and Pope John Paul II used moral arguments and their visibility to press “first-world” nations to undertake the Multilateral Debt Relief Initiative.¹¹¹

Scholars and advocates support recognition of a legal doctrine to halt debt repayment.¹¹² Called “odious debt,” the idea, as developed by scholars, justifies nonpayment of certain types of debts because they were undertaken for purposes at odds with the interests of the people expected to repay the loans.¹¹³ Despite the usual rule that agreements must be kept even when the government incurring a debt has been overturned and replaced, advocates urge cancellation of odious debt when the undertaking of sovereign debt failed to receive the general consent of the nation.¹¹⁴ Requiring repayment of such debts, argue advocates, punishes the people for the bad behavior of their leaders without doing anything to halt or deter lending to horrible regimes.¹¹⁵ Legal embrace of the odious debt doctrine could redirect international capital to better uses.¹¹⁶ In

109. *Our Work*, JUBILEE USA, <http://www.jubileeusa.org/en/ourwork.html> (last visited Aug. 7, 2015). The call for a Jubilee is in the Bible. *Exodus* 21:1–11; *Exodus* 23:10–11, *Deuteronomy* 15:1–18, and *Leviticus* 25 imagined a sabbatical for land and people every seven years and a seventh seven year—the Jubilee Year—when slaves would be freed, debts would be forgiven, and land would be returned. Further discussions of the Jubilee appear in the writings of Hebrew Prophets, *Nehemiah* 5:1–13; *Jeremiah* 3:4–22; *Isaiah* 61:1–2, and in the New Testament, *Luke* 4:16–30. The Jubilee 2000 movement combines biblical and human rights arguments to challenge third-world debt and loaning practices. *Id.* Pope Francis has even received the Jubilee group. *Global Jubilee Movement Meets with Pope Francis*, JUBILEE USA (May 22, 2014), <http://www.jubileeusa.org/en/press/press-item/article/global-jubilee-movement-meets-pope-francis-1.html>.

110. See Jane Davidson, *Canada, U.K. Act on Foreign Debt*, ANGLICAN J. (Feb. 1, 2001), <http://www.anglicanjournal.com/articles/canada-uk-act-on-foreign-debt-1161>; *21 Million Signatures Say Cancel the Debt of Poor Countries*, U2 (Sept. 11, 2000), <http://www.u2.com/news/article/780>; see also Joshua William Busby, *Bono Made Jesse Helms Cry: Jubilee 2000, Debt Relief, and Moral Action in International Politics*, 51 INT’L STUD. Q. 247, 249 (2007). Note that there is some disagreement on the exact number of signatures collected. Compare Davidson, *supra* (noting 24 million signatures), with *21 Million Signatures, supra* (noting 21 million signatures).

111. See COMM. FOR THE ABOLITION OF THIRD WORLD DEBT, <http://cadtm.org/English> (last visited Aug. 7, 2015).

112. See, e.g., Robert Howse, United Nations Conference on Trade and Development, *The Concept of Odious Debt in Public International Law*, U.N. Doc. UNCTAD/OSG/DP/2007/4 (July 2007), http://unctad.org/en/docs/osgdp20074_en.pdf.

113. See *id.*

114. See *id.*

115. See *id.*

116. See ODETTE LIENAU, *RETHINKING SOVEREIGN DEBT: POLITICS, REPUTATION, AND LEGITIMACY IN MODERN FINANCE* 98 (2014).

doctrinal terms familiar to Western lawyers, an odious debt doctrine would forgive debts in line with the idea of unjust enrichment. Creditors should not be able to secure returns on the basis of transactions that they know unjustly enrich them at the expense of others.¹¹⁷

The same point can be made in utilitarian terms: an odious debt doctrine of international law could create a disincentive for lenders to undertake bad loans. Because lenders are in a position to obtain information and act as gatekeepers, they could institute tighter preliminary review processes and ongoing oversight to identify and curb a corrupt or oppressive government whose officials use the funds for their own purposes and expect the citizens to repay the debt.¹¹⁸

But opponents argue that such an exemption would have terrible definitional problems; it would reward those in the worst-run countries with the worst-managed debt.¹¹⁹ Moreover, skeptics stress that a rule excusing repayment of odious debt would raise the price of funds offered on credit, shrink the supply of capital available from responsible lenders, and create openings for unscrupulous lenders to charge exorbitant rates, harming the poorest nations and risking disruption to geopolitical balance and global capital markets.¹²⁰ Legal recognition of the doctrine of odious debt would provide a defense excusing nonpayment.

As an alternative to excusing nonpayment, nongovernmental organizations could develop voluntary standards to rate and monitor international creditors with the aim of reducing loans for improper purposes and shifting focus from forgiveness to prevention.¹²¹ Public and private actors could offer technical assistance to debtor nations, allowing them to stretch out payments and take advantage of shifts in interest rates and the value of relevant currencies, just as lender nations do.¹²²

117. Tamara Lothian, *The Criticism of the Third-World Debt and the Revision of Legal Doctrine*, 13 WIS. INT'L L.J. 421, 465–67 (1995); Ashfaq Khalfan, Jeff King & Bryan Thomas, *Advancing the Odious Debt Doctrine* 46–48 (Center for International Sustainable Development Law, Working Paper, 2003).

118. Seema Jayachandran & Michael Kremer, *Odious Debt*, in SOVEREIGN DEBT AT THE CROSSROADS: CHALLENGES AND PROPOSALS FOR RESOLVING THE THIRD WORLD DEBT CRISIS 215 (Chris Jochnick & Fraser A. Preston eds., 2006).

119. Albert H. Choi & Eric A. Posner, *A Critique of the Odious Debt Doctrine*, LAW & CONTEMP. PROBS., Summer 2007, at 33; *see also* Lee C. Buchheit, G. Mitu Gulati & Robert B. Thompson, *The Dilemma of Odious Debts*, 56 DUKE L.J. 1201, 1205–07 (2007); Tai-Heng Cheng, *Renegotiating the Odious Debt Doctrine*, 70 LAW & CONTEMP. PROBS. 7 (2007).

120. William Easterly, *Debt Relief*, FOREIGN POL'Y, Nov.–Dec. 2001, at 20; Andrei Shleifer, *Will the Sovereign Debt Market Survive?* (National Bureau of Economic Research, Working Paper No. 9493, 2003), <http://www.nber.org/papers/w9493.pdf>.

121. YVONNE WONG, SOVEREIGN FINANCE AND THE POVERTY OF NATIONS: ODIUS DEBT IN INTERNATIONAL LAW 136–68 (2012).

122. *Id.*

Existing processes for renegotiating debt terms with banks could also be strengthened to function more like bankruptcy procedures.¹²³ Besides offering a less disruptive alternative to relying on markets for distressed sovereign debt,¹²⁴ coordination would express some degree of forgiveness toward the indebted nation that otherwise has to manage a chaotic and punitive legal and financial situation. Even when the debtor nation tries to act responsibly toward multiple creditors, it encounters new reminders of its relative powerlessness compared with wealthy nations and private creditors. Argentina, for example, recently tried to negotiate restructuring its national debt only to face holdout from creditors preventing the plan.¹²⁵

Taking a page from commercial debt collection companies that purchase bad debts and collect pennies on the dollar by garnishing wages and harassing debtors, supporters of Occupy Wall Street started Rolling Jubilee to purchase consumer debt and forgive it.¹²⁶ Having raised more than half a million dollars

123. See A. Mechele Dickerson, *Insolvency Principles and the Odious Debt Doctrine: The Missing Link in the Debate*, LAW & CONTEMP. PROBS., Summer 2007, at 53; Robert K. Rasmussen, *Integrating a Theory of the State into Sovereign Debt Restructuring*, 53 EMORY L.J. 1159 (2004). Great Britain apparently plans to take advantage of record-setting low interest rates and inflation in paying off debt incurred through government bonds after the 1720 South Sea Bubble. Stephen Castle, *That Debt From 1720? Britain's Payment is Coming*, N.Y. TIMES (Dec. 27, 2014), <http://www.nytimes.com/2014/12/28/world/that-debt-from-1720-britains-payment-is-coming.html>.

124. See Dickerson, *supra* note 123, at 53; Adam Feibelman, *Equitable Subordination, Fraudulent Transfer, and Sovereign Debt*, LAW & CONTEMP. PROBS., Autumn 2007, at 171, 172 (noting the option of sovereign bankruptcy); Anna Gelpern, *Odious, Not Debt*, LAW & CONTEMP. PROBS., Summer 2007, at 81, 86–88; Michelle J. White, *Sovereigns in Distress: Do They Need Bankruptcy*, BROOKINGS PAPERS ECON. ACTIVITY, no. 1, 2002, at 287. Revisions of tax rules and rules affecting bank balance sheets would also be needed to reduce the disincentives for lenders to forgive debt and then face a tax liability as well as to reduce the disincentives to hold on to unpaid sovereign debt and face a downgrading under the Basel Accords and comparable standards.

125. Adrian Salbuchi, *How to Solve Argentina's Recurrent Foreign Debt Crises: Proposal for a Long-Term Solution*, GLOB. RESEARCH (Nov. 7, 2006), <http://www.globalresearch.ca/how-to-solve-argentina-s-recurrent-foreign-debt-crises/3750> (calling for recognition as odious the debt created by “[a]n illegal and de facto military-civilian regime [that had] . . . close ties with, and the respect of, powerful international private banking interests . . . [and] implement[ed] a series of highly destructive, speculative, illegitimate—even illegal—economic and financial policies and legislation, which increased Public Debt almost eightfold to 46 billion dollars in a few short years”). The United States Supreme Court supported court-ordered discovery to assist bondholders claiming 100 percent repayment—permitting a 600 percent return on its purchase of bonds at a discount—and had the effect of blocking a negotiated debt restructuring in which most creditors accepted payment at a 70 percent loss. Ellen Brown, *Cry for Argentina: Fiscal Mismanagement, Odious Debt or Pillage?*, INTER PRESS SERV. NEWS AGENCY (Aug. 14, 2014), <http://www.ipsnews.net/2014/08/cry-for-argentina-fiscal-mismanagement-odious-debt-or-pillage> (describing how United States federal courts supported bondholders holding out for 100 percent repayment and blocked renegotiation of the majority of Argentina’s debt); Floyd Norris, *Ruling on Argentina Gives Investors an Upper Hand*, N.Y. TIMES (June 19, 2004), <http://www.nytimes.com/2014/06/20/business/economy/ruling-on-argentina-gives-investors-an-upper-hand.html> (discussing *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250 (2014)).

126. Victoria Pynchon, *Rolling Jubilee: A Bailout of the People, By the People*, FORBES (Feb. 19, 2013, 6:40 PM), <http://www.forbes.com/sites/shenegotiates/2013/02/19/rolling-jubilee-a-bailout>

by August 2013, this capital allowed the group to buy and forgive ten million dollars' worth of people's medical bills,¹²⁷ student loans, and consumer debt, while expressing compassion for "distressed debt" as a human problem. Nongovernmental actors can assist debt forgiveness by purchasing it or promoting changes in the behavior of creditors. Domestic and international government bodies can also facilitate such efforts through favorable tax treatment and other incentives.

IV.

CLOSING THOUGHTS AND RECOMMENDATIONS

Forgiveness by individuals, groups, and even governments affords a valuable resource in responding to wrongs. Promoting forgiveness, however, may jeopardize the predictability, reliability, and equal treatment sought by the rule of law. Efforts to amplify law's support for forgiveness could nonetheless preserve the rule of law and advance justice by attending to specific features of particular problems.

In this light, I suggest that the ICC recognize as complementary some domestic responses to genocide and crimes against humanity that do not use adversarial criminal prosecutions—where accountability and fairness, key elements of the rule of law, are present. I suggest treating as key elements the naming of specific wrongdoers, offering opportunities for both victims and alleged perpetrators to be heard, and conditioning amnesty on provision of testimony or reparations.

Individuals who became child soldiers¹²⁸ should not be subject to applicable international criminal sanctions nor should they be categorically exempt from accountability. To forgive them requires acknowledging wrongdoing. Domestic and international institutions could construct distinctive means both to acknowledge the wrongdoing and to assist the individuals and their societies in constructing positive next steps. The former child soldiers could themselves be involved in devising juvenile justice-style hearings, truth commissions, or other formats for acknowledgement; engaging in community service; and receiving educational and therapeutic supports.

Further, massive sovereign debt should be eligible for forgiveness and restructuring through legal frameworks functioning like domestic bankruptcy

of-the-people-by-the-people; ROLLING JUBILEE, <http://rollingjubilee.org> (last visited Aug. 7, 2015); see also Jerry Ashton, *Occupy Abolishes Almost \$4,000,000 in Student Debt, Enrolls Campus Activists, Announces Nationwide 'Debt Collective,'* HUFFINGTON POST (Sept. 17, 2014, 9:53 AM), http://www.huffingtonpost.com/jerry-ashton/occupy-student-loan-debt_b_5833178.html.

127. Pynchon, *supra* note 126.

128. Different considerations arise with those made to serve as sexual slaves or wives, but, even for them, some process allowing them to come to grips with what they have witnessed and done could be helpful not only in therapeutic terms but also in addressing their own sense of culpability and their community's response to them.

procedures; tax incentives provided by domestic governments could promote nongovernmental buy-backs to help relieve crushing student and consumer debt. The details of these suggestions are less important than the possibilities they indicate for devising legal rules and practices that support forgiveness without forgoing fairness.

We should guard against turning to forgiveness solely when more robust justice is unavailable. Let us be careful not to deploy the power of the law to distort private emotions, and let us not elide the differences between individuals and groups. Yet there is value in considering 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. Law, one way or another, affects emotions. It can support forgiveness as much as it can support revenge.

A man named Paul Boese loved to craft sayings that would be quoted. He once said, “Forgiveness does not change the past, but it does enlarge the future.”¹²⁹ Ultimately, forgiveness points toward the future, not just the past, and thus it offers an important dimension for designers and agents of the law.

129. Paul Boese, 53 QUOTE: WKLY. DIG. 146 (1967).

