

Redeeming the ‘F’ Word in Restorative Justice

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ABSTRACT

Genuine forgiveness usually does not happen in restorative justice. It should never be demanded. The objective is to create the kind of space for participants’ empathic and spiritual selves that welcomes forgiveness. The evidence is persuasive that forgiveness enhances human well-being. Eliza Ahmed’s evidence finds that forgiveness reduces bullying. In important ways, forgiveness is a more potent ideal in the Muslim than the Christian tradition. Muslims tend to see international human rights law as a creation of countries whose law was grounded in Christendom. One way to make the global rights regime more universal and legitimate would be a concession to a Muslim theology of forgiveness. This could mean a right of victims to forgive that can trump state policies of proportionate punishment. All these elements can be part of a social movement strategy of the *longue durée* to forge a forgiving world in which people live longer and better. The justice system is both part of the historical problem and part of this solution that can prevail in the *longue durée*.

1. ELUSIVE FORGIVENESS

Forgiveness eludes most Western restorative processes. In the randomized controlled trials conducted by Lawrence Sherman and Heather Strang in Canberra, in well under half the restorative justice conferences was a degree of forgiveness communicated. Forgiveness was, however, twice as likely in cases randomly assigned to restorative justice compared to cases assigned to court.¹ At the workshop that led to this special issue, a leading Northern Ireland practitioner and scholar of restorative justice, Tim Chapman, said Northern Ireland restorative conferences are usually successful in the sense that people reach a practical agreement on how to offer some repair for the harm and close the matter. This falls far short of forgiveness, he said, yet conferences succeeded where victims could say ‘that’s good enough for me.’² Quite

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1 Lawrence W Sherman and others, *Experiments in Restorative Policing* (Australian National University 1998); Eliza Ahmed and others, *Shame Management Through Reintegration* (Cambridge University Press 2001) 101.

2 Nicola Lacey and Hannah Pickard are thoughtful on the range of options for moving on, short of forgiveness: ‘On the one hand, overcoming hostile, negative emotions can occur in the absence of forgiveness. The passage of time notoriously dissipates strong emotions even when one will not forgive. Alternatively, one may decide the offender is simply not worth the energy these emotions require, thereby overcoming them through a form of withdrawal and rejection, rather than through forgiveness. On the other hand, one

often victims hope never to see the offender again, but if they did meet them on the street at least it could now be civil. Thin rather than thick civility. Even so, Lucy Allais conceives this capacity to ‘wipe the slate clean’, even in the absence of positive regard for the offender, as the essence of forgiveness.³

What Tim Chapman describes from Northern Ireland is something far short of all conceptions of forgiveness in the world’s great religions. Yet we should not sell short that shallow civility of being able to bump into persons who have victimized us without acrimony. Quantitatively, this civilizing impact of restorative justice can be large. In the Canberra Re-Integrative Shaming Experiment (RISE) violence experiment, 45 per cent of victims whose case had been randomly assigned to court said afterwards that they would harm their offenders if they had the chance. Only 9 per cent of those randomly assigned to conference agreed with this vengeful statement after restorative justice.⁴

Restorative justice here is consolidating in a major way what we might conceive as the greatest achievement of the rule of law as an institution. Historians of crime argue over whether homicide rates in medieval Europe were 10 times as high as today or 20 times or 50 times.⁵ They argue about whether these long-run effects are as high in Asia as in Europe.⁶ They do not argue about whether medieval times were more murderous than today. Sociology of the emotion interpretations of this result are framed in terms of the social structure of shame and the rise of civility and impulse control.⁷ Another plausible explanation that fits the historical record is that as more and more citizens won effective access to the justice of the courts, this supplanted personal revenge and blood feuds.⁸ In medieval England, as in some remote parts of the New Guinea highlands today, if your carriage ran over a child you were at grave risk of pursuit, even murder, by locals.

can forgive a person for one offense, while still holding a further offense against them, and so not replace one’s hostile, negative emotions with goodwill or positive regard. Relatedly, one’s affective stance post-forgiveness may simply be one of neutral detachment: one is willing to forgive and let bygones be bygones, but that does not itself mean one feels positively disposed towards the person who has offended.’ Nicola Lacey and Hanna Pickard, ‘To Blame or to Forgive? Reconciling Punishment and Forgiveness in Criminal Justice’ (2015) *Oxford Journal of Law and Religion* (forthcoming).

- 3 Lucy Allais, ‘Wiping the Slate Clean: The Heart of Forgiveness’ (2008) 36 *Philosophy and Public Affairs* 33.
- 4 Heather Strang and others, ‘Restorative Justice Conferencing (RJC) Using Face-to-face Meetings of Offenders and Victims: Effects on Offender Recidivism and Victim Satisfaction. A Systematic Review’ (2013) 9 (12) *Campbell Systematic Reviews* 42. Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Oxford University Press 2002).
- 5 Manuel Eisner ‘Long-term Historical Trends in Violent Crime’ (2003) 30 *Crime and Justice: A Review of Research* 83; Pieter Spierenburg, *A History of Murder: Personal Violence in Europe from the Middle Ages to the Present* (Polity Press 2008); Steven Pinker, *The Better Angels of Our Nature* (Viking 2011); Pieter Spierenburg, *Violence and Punishment: Civilizing the Body Through Time* (Polity Press 2013).
- 6 Pieter Spierenburg, *Violence and Punishment*, *ibid*; Rod Broadhurst, Thierry Bouhours and Brigitte Bouhours, *Violence and the Civilizing Process in Cambodia* (Cambridge University Press 2015).
- 7 Norbert Elias, *The Civilizing Process: Sociogenetic and Psychogenetic Investigations* (revd edn, Blackwell 2000); John Braithwaite, ‘Shame and Modernity’ (1993) 33 (1) *British Journal of Criminology* 1; Pinker (n 5).
- 8 Mark Cooney, ‘The Decline of Elite Homicide’ (1997) 35 *Criminology* 381; referring to the Spanish criminologist of that name, Nigel Walker describes ‘Montero’s aim’ as supplanting private retaliation with justice institutions. Nigel Walker, *Sentencing in a Rational Society* (Allen Lane 1969).

Likewise, we can conceive the sharp crime decline in Victorian times as a consequence of the rise of Victorian values about impulse control and the shamefulness of crime.⁹ An equally plausible interpretation is that in the 19th century the institution of Peelian¹⁰ police utterly globalized. By the end of that century one could not visit a significant city on the planet without seeing these para-military organizations on the street; at the beginning of the 19th century that was not the case. My hypothesis is that, beyond crime becoming more shameful, another reason violence declined during the century and a half up to the mid-20th century was because this was the era when access to police services was fanning out from cities to cover even remote rural spaces. During the past decade, I have conducted fieldwork in spaces where there are police but they do not do anything about your case unless you pay a bribe. Even then police may pay more attention to other cases that attracted bigger bribes. The effective closure of access of most of the population to police services in these spaces drives a great deal of revenge violence. In rural Bangladesh, for example, I observed a purse snatcher caught by a citizen and then set upon with sticks by many others, beating him, I fear, to death. I saw a shoplifter nabbed by a shopkeeper. The thief had utter terror on his face as the shopkeeper called fellow shopkeepers to the task of dragging him to the back of a shop to beat him with large sticks.

There is a wide gap between Tim Chapman's 'that's good enough for me' and the Christian forgiveness discussed in this journal. Yet, there is an even wider gap between the Chapman outcome and the actions of those Bangladesh vigilantes. We might conceive the historical trajectory from vigilante justice to courts to responsive policing to restorative justice as a journey of progress towards opening institutional spaces to possibilities for richer forms of forgiveness. We do not have justice institutions that are civilized at all in the West today; therefore, we cannot expect a culture of forgiveness. Yet, we might see justice as on a civilizing trajectory¹¹ where the empirical evidence is that late modern restorative justice is the latest civilizing step along that civilizing trajectory.

2. TRIBAL FORGIVENESS, CAPITALIST COMMODIFICATION

The civilizing narrative of the last section is certainly not a simple one of the superiority of Western (or Chinese or Japanese)¹² civilization. Tribal societies responded to the danger of blood feuds disintegrating communities by inventing various restorative forms of justice. Christianity, Islam, and Buddhism were among the religions that sprung with heavy emphasis on forgiveness from parts of the world with strong tribal traditions of this kind. In turn, tribal societies far away from the font of those religions embraced Christianity in Polynesia and Melanesia with an intensity and universality of devotion no longer apparent in the West. My conjecture is that this has

9 John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press 1989) 111–18.

10 There is much debate over whether it was the London Metropolitan Police model that globalized or the Dublin model of colonial policing. Since both were very much formed from the clay of Peel's policy imagination when he served in both Dublin and in Westminster, I construe Peelian policing here broadly to include both models.

11 Norbert Elias (n 7); Pinker (n 5).

12 Barend ter Haar, 'Rethinking Violence in Chinese Culture' in Göran Aijmer and Jon Abbink (eds), *Meanings of Violence: A Cross-Cultural Perspective* (Oxford 2000); Spierenburg (n 5) 69–70.

to do with the roots of Christian values like forgiveness in their ancestral tribal dispute resolution.

The paradox of Western capitalism is that along the civilizing road to courts and police, justice became commodified. Law and then policing became professions. Capitalist professions make their members wealthy by defending professional monopolies. Card-carrying members have a professional distaste for unqualified citizens doing their own justice. Instead, competent professionals must be paid appropriately to execute that justice. Universities followed a long commodification trajectory, currently at its highest peak ever, to service the professions. Law schools marketed qualifications in law as serviceable for command not only of the judicial branch of government but also of the executive and legislative branches, and even for the conduct of independent enquiries into highly technical matters (like a Royal Commission into causes of bushfires in Australia!). A university law degree was marketed as a ticket not only to wealth but also to power. My own humbler discipline of criminology has more recently been corrupted by commodification in like fashion. We train senior police with masters' degrees in criminology that we say will help them get promoted. Once we have them in our clutches, we indoctrinate them in the belief that a university degree in criminology is what they should require of their police trainees.

The commodification of law and criminology has various positive consequences. There is also a counter-civilizing trajectory of commodification and professionalization, however, which marginalizes non-professional justice. Ancient restorative justice traditions have been victims of that 'decivilizing' process. Colonial empires imposed a comparatively recent commodification where upper class or upper caste young men, now women and men, were trained as lawyers and sent out to push indigenous forms of justice to the margins. Their elite status and healthy pay packets were a formula for success at expanding the professional monopoly. The colonial legal professional class were compradors who slew restorative justice across the globe. They were paid to sell the strange idea that a crime was an offence against the king; therefore, a fine or a forfeiture of land should be paid to the king rather than the victim! This conquest was recently as close to the metropole as the highlands of Scotland (Box 1).

BOX 1. CELTIC PERSISTENCE WITH THE RESTORATIVE

Traditional Scottish disputing retained a reparative character until well into the 19th century. It is ironical that a place so near to the heart of the British Empire should have been one of the last places to have its restorative traditions crushed by formally retributive state law. Historians seem to think the reason restorative traditions were sustained later in Scotland than in England or on the continent was that Scotland was a place where kings were weak and local kin networks strong. Ian Whyte in *Scotland Before the Industrial Revolution* tells us that for serious crimes 'Settlements often involved formal public

reconciliations as part of a religious service and sometimes a marriage between opposing families to try and cement the peace.¹³ The reason for reconciliation being highly public, often in a church, was to lock kin in to end a blood feud.

Jenny Wormwald documents the widespread Scottish practice in the 16th century of contractual obligations to submit differences between and within kin groups to 'wyss [wise] freindis' or 'by siche [sight] of frendis or lawe as they think expedient'.¹⁴ Even murder was standardly dealt with by the payment of compensation, apology, masses for the soul of the dead, and pilgrimages.

According to Jenny Wormwald all the Stewart kings except James III believed it better to secure a 'lettre of slanis' than to take a serious crime to the courts in Edinburgh for a state-imposed solution, especially when securing the king's peace without the knowledge of the kin of a slain man meant that the kin still had a right of vengeance.¹⁵ The lettre of slanis was issued by the kin of the victim, stating that full and acceptable assythment had been made. Slanis is often thought to derive from the Anglo-Saxon slean, to slay. But Wormwald points out that Irish Celtic origins are more likely slán and its variants 'signifying health, safety, wholeness; spiritual salvation'.¹⁶ In short, the Celtic institution has a restorative meaning.

Restorative forgiveness in non-state justice was never completely crushed; nor was Christian, Buddhist, Hindu, or Muslim forgiveness. I have worked recently with Ali Wardak in Afghanistan¹⁷ and Ali Gohar in Pakistan¹⁸ on the potential of reviving and transforming Jirga traditions which have only quite recently been crushed by a combination of a Taliban project of replacing traditional justice with Taliban courts, and a commodification project of Westernized lawyers. Forgiveness remains a central value in the way rural Pashtuns think about justice even in cases of murder. When 15 different *Muslahathi* (Reconciliation in Arabic) Committee members and disputants from different locales were asked during our fieldwork in Khyber Pakhtunkhwa in 2013, 'How often do the victims forgive offenders who have committed serious crimes like murder', answers ranged from 'the majority of cases' to 'always', with most saying 80 or 90 per cent of cases. More than one person said 'You Westerners believe in forgive but don't forget; we believe in forgive and forget.'

13 Ian D Whyte, *Scotland Before the Industrial Revolution* (Longman 1995) 217.

14 Jenny Wormwald, 'Bloodfeud, Kindred and Government in Early Modern Scotland' (1980) 87 *Past and Present* 54, 72.

15 *ibid.*, 79.

16 *ibid.*, 62.

17 John Braithwaite and Ali Wardak, 'Crime and War in Afghanistan. Part 1: The Hobbesian Solution' (2013) 53 *The British Journal of Criminology* 179; Ali Wardak and John Braithwaite 'Crime and War in Afghanistan. Part 2: A Jeffersonian Alternative' (2013) 53 *The British Journal of Criminology* 197.

18 John Braithwaite and Ali Gohar, 'Restorative Justice, Policing and Insurgency: Learning from Pakistan' (2014) 48 (3) *Law and Society Review* 531.

Many would retort that in fact Westerners believe in don't forgive and don't forget. This is not quite right. Most Western parent-child relationships are punctuated by difficult moments where the child hits the parent, vice versa, or both. These violent encounters are mostly forgiven and forgotten when they occur in the context of a loving relationship overall. A Western family is like a rural Afghan village in the sense that it is not a justice option for a victim to say 'I never want to have to meet you again.' So we become more open to responding in an inclusionary rather than an exclusionary way.¹⁹ Forgiveness is one of the inclusionary options in all contexts where we simply cannot avoid repeat encounters—because we are in the same family, the same church congregation, the same tiny village. Let bygones be bygones is, after all, an expression that survives from a predominantly rural England.

A widespread problem revealed by our restorative justice experience with Australian families is sons assaulting their mothers. Here a forgive-and-forget family norm is a problem. Mothers too often blame themselves and forgive too quickly. If serious violence occurs, instant forgiveness, according to restorative justice theory, is inferior to a ritual that affirms the anti-violence norm before moving towards apology, repair, a safety plan for the mother, then the first step to genuine forgiveness. There are many ways in which forgiveness is an elusive accomplishment that can unravel unless it is surrounded by rituals of safety and norm affirmation. This point builds a bridge to the next section on the reflections of Paul Fiddes, who says: 'Only when the forgiver has made this costly journey of sympathy into the experience of the other can she go to him and say "I forgive you."²⁰ The editors have asked me to pay particular attention to the Fiddes contribution to this volume because it is a response to my work. This is attempted in the next section.

3. MAXIMIZING FORGIVENESS?

Paul Fiddes in an original way takes up the question of whether forgiveness should be a maximizing or an emergent value of restorative justice. So far this essay has discussed the possibility that forgiveness, while elusive and infrequently achieved in Western restorative justice, is a historically emergent possibility for a politics of hope and a theology of hope. Obviously, I think it is. With the right kind of vision, restorative justice activists can promote the historical emergence of forgiveness that is a light on the hill placed there for us by the world's great religions. Realizing that vision requires a practical amalgam of strengths of modernity embodied in rule of law institutions (reducing domination in the world when they work justly) and spiritual strengths of the ancient world that have been suppressed by commodification of that very rule-of-law modernity.

Whether one should seek actively to maximize forgiveness in restorative justice is a somewhat different question. What is my concern in cautioning that the restorative justice values of forgiveness, apology, remorse, and mercy should not be maximizing values? It is the worry that participants who wish to maximize remorse will say things like 'You

19 When siblings or children move to other cities, they can afford to move to don't-forgive-don't-forget. This transition can be sadly disappointing for family members who hoped to stay in the world of forgive and forget.

20 Paul Fiddes, 'Restorative Justice and the Theological Dynamic of Forgiveness' (2016) *Oxford Journal of Law and Religion* (forthcoming).

should be ashamed of yourself.' Yes we wish to see an affirmation of anti-violence norms, for example, in restorative justice. We are unlikely to get there, however, by demanding it, by badgering motivated by a maximizing spirit. The shamefulness of violence is best affirmed by creating a context where an offender comes to understand and empathize with the harm caused by her violence. A face-to-face meeting with their victim is one of the best ways to accomplish this, but not the only way.²¹ Surrounding the perpetrator in a community of support with the embrace of loved ones is the most important element for achieving this aim. The evidence is so powerful that we experience remorse when we come to realize that those we most love and respect express good reasons for the view that a terrible harm has been done.²² We are more likely to experience empathy for our victims when we see our loved ones moved to empathy for them. Herein lies much of the ancient wisdom of restorative justice. Let he who is without sin cast the first stone. Quoting Isaiah, Paul Fiddes enjoins, 'Come, let us reason together, says the Lord: though your sins be as scarlet they shall be like snow.'²³

Remorse achieved in this restorative way is the most likely path to a genuine apology that is volunteered rather than coerced. Heartfelt apology thereby achieved is one likely path to forgiveness that is volunteered by the victim rather than pushed by others. It is not the only path. In restorative justice I have often seen an unapologetic perpetrator moved to genuine apology by a victim who has enough forgiveness in her heart to give the perpetrator a hug and wish her well for a better future.²⁴

Underlying these observable dynamics of restorative justice are some inherent qualities of apology and forgiveness. One is that they are gifts. Gifts have less meaning for recipients who know their benefactor has been forced by others to give. Gift giving is another virtue that has been corrupted by commodification. Advertising is crafted to cultivate guilt about not giving gifts for ever more occasions. Asian boys who have no cultural connection to the idea of Valentine's Day are invited by advertisers to worry that their girlfriend will think less of their love if they do not give a Valentine's Day gift. Yes, commodified Santas do enliven Christmas with a spirit of fun for children, yet they corrupt the spirit of Christmas as a spiritual ceremony of the gift. To receive Christmas cards from people we barely know, from our mortgage broker and our member of parliament, also erodes the spirit of gifts subsumed as tools of markets (for mortgages, votes). The spirit of the gift has been a mortal casualty of commodification. This is good reason to note the way Paul Fiddes retrieves Dietrich Bonhoeffer's concern for automatically required forgiveness that is 'cheap grace'.²⁵

Hence, a late capitalist sensibility is to be cynical about gifts, to wonder why the giver wants to soften us up. The way this plays out in justice is that victims tend to be cynical that apologies are genuine (and victims only benefit emotionally and spiritually from apologies when they see them as genuine). Victims are prone to believe

21 Paul Fiddes cites Charles Grisworld to observe that there are other ways of constructing 'an imaginative and credible' narrative about an offender. *ibid.*

22 Ahmed and others (n 1).

23 Isaiah 1:18.

24 This reverse sequence is the one indeed found to be most productive in the Lacey and Pickford analysis. Lacey and Pickard (n 2).

25 Fiddes (n 20); Dietrich Bonhoeffer, *Discipleship* (Barbara Green and Reinhard Kraus trs, Dietrich Bonhoeffer Works 4, Fortress 2003) 3–5, 43–44, 50–55, 67–69.

that the apology is uttered only to help them get off lightly. In these conditions, there is little hope for victims to benefit from the healing restorative justice can deliver if they see someone say to the offender that they should apologize. When apology is not volunteered spontaneously, gifted restorative justice facilitators use the power of the long silence to give the offender every opportunity to find the strength within her to volunteer an apology, to fill the silence with genuine remorse, and the search to find ways to repair harm to the victim.

In reverse, when the family of a victim says the victim should forgive the offender because that is the Christian thing to do, the offender is unlikely to believe that the forgiveness arises from the victim being imbued with a spirit of forgiveness. Rather they think the forgiveness is uttered to placate their family, to get it over with by doing what others pressure her to do. Paul Fiddes is also right to identify family domination of the victim as an objection here; non-domination is for those of us who are philosophically republican the most foundational maximizing value of restorative justice.²⁶

Hence, in restorative justice training and advocacy I am always wary of urging my audience to a restorative justice that maximizes remorse, apology, or forgiveness. Instead, I say that these things only have power when they are gifts that come from the heart, that manifest no coercion.

This practice conclusion is where Paul Fiddes ends up theologically. We agree that to conceive of forgiveness as ‘remission from debt’, or as a kind of ‘pay-back’ as Martha Nussbaum expresses the concern,²⁷ is not the fertile way to conceive forgiveness.²⁸ In this limited sense, we also agree with Jacques Derrida that forgiveness is not about calculation, a balancing of accounts, not about an economy of exchange.²⁹ We agree that forgiveness is a ‘journey of empathy’ and that ‘forgiveness comes to its fullness in reconciliation, the restoring of a broken relation.’³⁰

Paul Fiddes is also right that there can be importance in non-victims forgiving. For example, there is the virtue in New Zealand Maori ways of thinking about shame (*whakama*) that the most healing kind of shame is the shame of letting ones loved ones down. This is because *whakama* can be transcended by the forgiveness of those loved ones.³¹ Thus, a *whakama* form of shame conduces to reintegrative shaming (which prevents crime) and averts stigmatization (which makes crimes worse).

Most fundamentally, Paul Fiddes and I can more or less agree on the practice principle that we can ‘encourage it [forgiveness] without of course demanding it or even urging it.’³² The following characterization of what encouraging might mean captures well the reflective wisdom accessible in the Fiddes essay:

26 John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford University Press 1990).

27 Martha Nussbaum, ‘Anger and Forgiveness: Resentment, Generosity, Justice’ (The John Locke Lectures in Philosophy, Oxford University Press 2014 in MS) 13, 109.

28 Fiddes (n 20).

29 Jacques Derrida, ‘To Forgive: the Unforgivable and the Imprescriptible’ in JD Caputo, M Dooley and MJ Scanlon (eds), *Questioning God* (Indiana University Press 2001) 25–30; Jacques Derrida, *On Cosmopolitanism and Forgiveness* (Cambridge University Press 2001).

30 Fiddes (n 20).

31 PS Sachdev, ‘Whakama: Culturally Determined Behaviour in the New Zealand Maori’ (1990) 20 (2) *Psychological Medicine* 433.

32 Fiddes (n 20).

Encouragement without coercion might take the form of reacting to questions and exclamations voiced by the victims themselves, such as 'Ought I to forgive him?' 'Am I expected to forgive him?' 'I'd like to forgive him, but . . . ' or 'I don't think I could ever forgive him.' It would be totally inappropriate for those facilitating the conference to respond 'You should forgive him', but they might respond: 'why do you say that?' or 'why do you think it might be important to think about forgiveness?' or 'can you imagine what it might be like to forgive?' And to use an ensuing conversation to create an ethos in which forgiveness might happen.³³

In one sense, this is what maximizing means for Fiddes, so at this level our disagreement is just about the meaning of the word maximizing. For Fiddes maximizing is a deeper matter of religious mission and conviction. Christian conviction motivates not only wise, patient, non-dominating encouragement of forgiveness but also leads us to 'expect' forgiveness. It is the latter that may be unwise. To promote an expectation of forgiveness in the here and now underestimates the decimation the virtue of forgiveness has suffered at the invisible hand of commodification.

Twenty-first-century Westerners have an impoverished capacity for forgiveness compared to their pre-capitalist forbears who gave birth to Christianity, and compared to contemporary rural Pashtuns in Afghanistan or Melanesian villagers. Those capacities have mostly been expunged from the public sphere, yet survive in the private sphere of Western family life. As a young man I also experienced rich and deep forgiveness in my communal experience of warm embrace with Aboriginal and non-Aboriginal men in the West End Rugby League Club in Queensland. Yet such survivals are obscure. In any case, commodification has now so consumed football clubs that one wonders how much they continue to preserve communal pre-capitalist virtues.

Nicola Lacey and Hannah Pickard³⁴ account in an interesting way for patterns of this kind by drawing upon the evolutionary psychology literature to find that both vengeance and forgiveness are universal human adaptations that have evolved as alternative responses to exploitation. This is why all cultures have both retributive traditions (that are more concentrated on out-groups such as invaders) and forgiving traditions (more concentrated on in-groups).³⁵ What is most interesting is that societies with the most potent warlike cultural resources are also those with the richest survivals of restorative resources.³⁶ Recurrent histories of warmaking conduce to

33 *ibid.*

34 Lacey and Pickard (n 2). Among the literatures they discuss as relevant to these claims are: Michael E McCullough, Robert Kurzban and Benjamin Tabak, 'Cognitive Systems for Revenge and Forgiveness' (2013) 36 *Behavioral and Brain Sciences* 1; Michael Bang Petersen and others, 'Evolutionary Psychology and Criminal Justice: A Recalibrational Theory of Punishment and Reconciliation' in Henrik Høgh-Olesen (ed), *Human Morality and Sociality: Evolutionary and Comparative Perspectives* (Palgrave MacMillan 2010) 72–131; Michael Bang Petersen and others, 'To Punish or Repair? Evolutionary Psychology and Lay Intuitions about Modern Criminal Justice' (2012) 33 *Evolution and Human Behaviour* 682.

35 John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press 2002) Ch 1.

36 Afghans, Polynesians, Melanesians, and various Indonesian peoples are among those whom I have discovered this to be the case in the Peacebuilding Compared project (<http://regnet.anu.edu.au/peacebuilding-compared/home>) and in earlier research.

cultural sophistication in peacemaking. More recurrently peaceful societies can, therefore, learn from them.

In conditions of modernity, when being emotionally fit to repel village invaders no longer improves survival prospects (better to flee as a refugee), our forgiving evolutionary psychology and our forgiving cultural survivals are more useful to us than our vengeful ones. The US evidence today is that forgiving people live longer.³⁷ Moreover, being a forgiving person has many other health, stress, and well-being benefits.³⁸ Forgiving hearts pump more gently,³⁹ get better quality sleep,⁴⁰ and suffer less chronic pain.⁴¹ Another reason forgiving people live longer is that they have happier marriages.⁴² Because there is also a strong association between death and living with post-traumatic stress symptoms in the long term, some restorative justice theorists suspect a connection between all of these results and the finding that victims whose case is randomly assigned to restorative justice suffer significantly fewer post-traumatic stress symptoms.⁴³

Particularly insightful in the Lacey and Pickard analysis is their conclusion that 'Where Associational Value is high, the orientation to forgiveness and reparation is accordingly enhanced; where it is low, the orientation to retaliation will be stronger.'⁴⁴ This gives us an account of why 'forgive and forget' can be as strong a survival in the families of contemporary Western cities and football clubs as in Pashtun villages.

We should not, therefore, 'expect' forgiveness in the public sphere. Rather, forgiveness should be a light on the hill in a politics of hope. This is nevertheless a practical politics of retrieval for the public sphere of something that still flourishes in the private sphere of families, churches and clubs. State courts and police have opened a space for that politics of hope at the same time as they have crushed restorative

37 Loren L Toussaint, Amy D Owen, and Alyssa Cheadle, 'Forgive to Live: Forgiveness, Health, and Longevity' (2012) 35 (4) *Journal of Behavioral Medicine* 375.

38 Alex HS Harris and others, 'Effects of a Group Forgiveness Intervention on Forgiveness, Perceived Stress and Trait Anger: A Randomized Trial' (2006) 62 (6) *Journal of Clinical Psychology* 715; Robert D Enright and Joanna North (eds), *Exploring Forgiveness* (University of Wisconsin Press 1998).

39 Kathleen A Lawler-Row and others, 'Forgiveness, Physiological Reactivity and Health: The Role of Anger' (2008) 68 *International Journal of Psychophysiology* 51.

40 Kathleen A Lawler and others, 'The Unique Effects of Forgiveness on Health: An Exploration of Pathways' (2005) 28 (2) *Journal of Behavioral Medicine* 157.

41 James W Carson and others, 'Forgiveness and Chronic Low Back Pain: A Preliminary Study Examining the Relationship of Forgiveness to Pain, Anger, and Psychological Distress' (2005) 6 (2) *Journal of Pain* 84.

42 Gary D Duncan, 'The Relationship Between Trait Forgiveness and Marital Adjustment in Heterosexual Individuals' (PhD Dissertation, Capella University 2008).

43 Caroline M Angel, 'Victims Meet their Offenders: Testing the Impact of Restorative Justice Conferences on Victims' Post-traumatic Stress Symptoms' (PhD Dissertation, University of Pennsylvania 2005); Caroline M Angel and others, 'Effects of Restorative Justice Conferences on Post-Traumatic Stress Symptoms Among Robbery and Burglary Victims: A Randomized Controlled Trial' (2014) 10 (3) *Journal of Experimental Criminology* 291.

44 Works Lacey and Pickard cite from evolutionary research in support of this are: Petersen and others, 'Evolutionary Psychology and Criminal Justice' (n 34) 110; Petersen and others, 'To Punish or Repair' (n 34); McCullough and others (n 34); Michael Wenzel and others, 'Retributive and Restorative Justice' (2008) 32 *Law and Human Behaviour* 375; Michael Wenzel and Ines Thielmann, 'Why We Punish in the Name of Justice: Just Desert versus Value Restoration and the Role of Social Identity' (2006) 19 *Social Justice Research* 450.

justice traditions. Their institutionalization of the rule of law opens the space for forgiveness; their commodification and domination of justice destroys forgiveness by muting citizens who are forced to speak through a legal mouthpiece rather than from the heart of their own emotion or spirituality. The professions of law and policing can be persuaded to reform in that regard to embrace restorative justice. When we have two generations of justice professionals who have shifted from suppression of restorative justice to encouragement of it; when we have two generations of citizens who have experienced the benefits of restorative justice over matters such as bullying in schools and then later in the justice system, only then may we be in a world where forgiveness is something we can expect in restorative justice.

Hence, a final point of agreement is that there is nothing immutable about the contemporary failure of restorative justice to routinely elicit forgiveness. Dismantling the suppression of forgiveness by deep structures of modernity is a project of the *longue durée*. Restorative justice advocacy for me is itself the path to that potential politics of hope.

A final point of difference is that I like to emphasize the more potent resources for forgiveness in Islam, more so than Fiddes so eloquently finds in Christianity. Islamic justice, for example, gives victims a presumptive right to punish the guilty, at least for a certain range of crimes and circumstances, and also encourages use of a right to forgive as a gift of community reconciliation and family reconciliation, underwritten by the belief that the sanction that matters will be God's at a much later time. The divine ordinance of *Qisas* in effect gives victims a right to choose between retribution, compensation, and outright forgiveness.⁴⁵ Westerners sometimes crudely stigmatize this as a choice between cutting off of hands, blood money, and impunity. My submission is that it would be a wonderful concession to Islam to introduce into international human rights law a new right for victims to choose forgiveness that has a capacity to trump state punishment. It would be a concession rather than is compatible with the Fiddes Christian theological analysis and with Western restorative justice. It is therefore a practical suggestion for the international space because it is an Islamic reform that can attract wide support from more Buddhist or Confucian societies such as Japan, from societies with tribal minorities or majorities, as well as from Christians and restorative justice advocates in the West.

Human rights defenders are always keen to defend international human rights law against the frequent charge from the Muslim world that it is Judeo-Christian law. The defence that human rights are universal is laudable but not entirely historically convincing. In an era where Christian thought has been so effectively repackaged with secular, universalist discourse, the defence only seems convincing because Westernness has come to be seen as natural and universal through a legal discourse that obscures its non-universal roots. Human rights law is a creation of the European legal systems of Christendom. The inclusion of rights in the United Nations (UN)

45 The Qu'ran at 5:45 affirms both proportionality and forgiveness thus: 'We ordained therein for them: "life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal." But if anyone remits the retaliation by way of charity, it is an act of atonement for himself. And if any fail to judge by (the light of) what Allah hath revealed, they are (no better than) wrongdoers.' See Susan C Hascall, 'Restorative Justice in Islam: Should Qisas be Considered a Form of Restorative Justice' (2011) 4 *Berkeley Journal of Middle Eastern and Islamic Law* 35.

Charter was inspired by white South African leader Field-Marshal Smuts and Panama's representative to the 1945 inaugural meeting of the UN, Alfredo Alfaro; it was steered into a Universal Declaration draft by American leader Eleanor Roosevelt and the inaugural head of the Division of Human Rights Secretariat at the UN, Canadian law professor John Humphrey, with considerable technical assistance from French legal scholar René Cassin. Of Christian heritage all, they engaged no Islamic scholars in drafting roles. Others on the drafting commission came from the UK, Austria, Russia, France, Chile, and two predominantly non-Christian countries, Lebanon and China. But the representatives of these countries were unusually Western: one, the Lebanese representative, was a Christian educated at Harvard; the Chinese-born representative also had a US undergraduate degree on a Boxer Scholarship, followed by a US Masters degree and then a US PhD, living much of his life and dying in United States.⁴⁶ While human rights law seems unequivocally good, the good of any institution forged by a politics of exclusion is jaundiced.

Muslim societies are of course not the only ones discussed in this essay that evince something like a right to forgiveness and that were excluded from the Western formulation of the rights regime. In Japan, many murderers receive only a suspended prison sentence because courts often give victims a *de facto* right to claim large quanta of contrition and cash; when they get it, victims often successfully suggest that the court waive incarceration. Japan has had rather consistently the lowest homicide rate in the world since World War II.⁴⁷ So it is hard to understand why Westerners who conceive a right to forgive as a dangerous prescription take no interest in how it plays out where it incipiently exists.

So my submission is that it could build legitimacy for the international human rights regime for it to be seen to incorporate a philosophically Islamic right of victims of crime to forgive. From the perspective of Western restorative justice philosophy such a right would have a positive impact on Western law as illustrated by the Clotworthy case (Box 2).

BOX 2. CLOTWORTHY⁴⁸

Patrick Clotworthy inflicted six stab wounds, which collapsed a lung and diaphragm, upon an attempted robbery victim. Justice Thorburn of the Auckland District Court imposed a two-year prison sentence, which was suspended, a compensation order of \$15,000 to fund cosmetic surgery for an 'embarrassing scar', and 200 hours of community work. These had been agreed at a restorative conference organized by Justice Alternatives. The Judge found a basis for restorative justice in New Zealand law and placed weight on the wish of the victim for

46 Will Pierre-Etienne, 'The Chinese Contribution to the Universal Declaration of Human Rights, 1947-48: A Re-examination' (2008) 1 *Guoshiguan guanxun* (The *Academica Historica* Newsletter) 2; Susan Waltz, 'Who Wrote the Universal Declaration of Human Rights' (2008) 13 (11) *eJournal USA* 19.

47 John Braithwaite, 'Crime in Asia: Toward a Better Future' (2014) 9 *Asian Journal of Criminology* 65.

48 *The Queen v Patrick Dale Clotworthy*, Auckland District Court, T 971545; Court of Appeal of New Zealand, CA 114/98.

financial support for the cosmetic surgery and emotional support to end through forgiveness 'a festering agenda of vengeance or retribution in his heart against the prisoner'. The Court of Appeal allowed the victim to address it, whereupon the victim 'reiterated his previous stance, emphasizing his wish to obtain funds for the necessary cosmetic surgery and his view that imprisonment would achieve nothing either for Mr. Clotworthy or for himself' (p 12). The victory for restorative justice was that 'substantial weight' was given by the court to the victim's belief that expiation had been agreed; their honours accepted that restorative justice had an important place in New Zealand sentencing law. The defeat was that greater weight was given to the empirical supposition that a custodial sentence would help 'deter others from such serious offending' (p 12). The suspending of the two-year custodial sentence was quashed in favour of a sentence of four years and a \$5000 compensation order (which had already been lodged with the court); the community service and payment of the remaining compensation were also quashed. The victim got neither his act of grace nor the money for the cosmetic surgery. He subsequently committed suicide for reasons unknown. A legal system with a right of victims to grant forgiveness would find that Justice Thorburn decided the case correctly and that the Supreme Court acted unjustly.

For most Western lawyers, *R v Clotworthy* is an idiosyncratic case: how often does it occur that a victim of such an awful assault wishes to forgive, wants their assailant out of prison? The perspective of this article is, in contrast, that the minority response of pursuit of forgiveness is precisely the kind of response we must honour, protect, and preserve by supplying the legal resources to overturn punitive orthodoxy. When state punishment desists from being the right that is the enemy of the good, that good will historically renew.

4. EMPIRICAL POWER IN A FORGIVING LIGHT ON THE HILL

Reintegrative shaming has been a major research interest of mine. Eliza Ahmed and I tested the theory on data from 1875 Bangladeshi school children.⁴⁹ We found that the children engaged in significantly less bullying when they had experienced reintegrative shaming in their families and when they had learnt habits of shame acknowledgement. However, the forgiveness effect was twice the reintegrative shaming effect and twice the shame acknowledgement effect in bullying reduction. Forgiveness reduced bullying more than any other variable in these analyses. Children who had learnt how to forgive and be forgiven in their families and schools, even when they lived in the most dense urban environment of any megacity on the

49 Eliza Ahmed and John Braithwaite, 'Forgiveness, Shaming, Shame, and Bullying' (2005) 38 (3) Australian and New Zealand Journal of Criminology 298.

planet, Dhaka,⁵⁰ were less likely to bully other children. Before this empirical result fell out of the data, I had tended to think of forgiveness as an ideal with the potential to have a large empirical impact but with little prospect of doing so because it was a thinly diffused ideal in conditions of urban modernity. This complements the findings that forgiveness still today has profound physical and mental health benefits for human beings.⁵¹

A restorative justice that expands the sphere of forgiveness not only in the criminal justice system, but also in the health system, in aged care, childcare, and child protection, in business and most importantly of all in the education system, is therefore a light on the hill. The evidence is that most people, normally more than 80 per cent of them,⁵² report the experience of restorative justice to be beneficial compared to alternatives available to them. Hence, the strategy for restorative justice advocates is simple enough. Notwithstanding the instant political appeal of retributive narratives, by persisting at restorative justice and forgiveness gradualism, and continuous improvement in the quality of evidence-based restorative justice, in the long run of history a tipping point may be passed.⁵³ On the other side of that tipping point, politically commodified retributivist vote-catching will no longer work. The simple patient politics is to keep communicating about restorative justice, to improve the quality of the evaluation research, the training, the monitoring, to keep inviting political and professional enemies of restorative justice to sit in on conferences, safe in the knowledge that however badly that conference goes, in the long run 80 per cent of them will come away with the view that restorative justice is not as bad as they thought: testing, truth, training and tenaciously telling the story decade after decade.

Under this view of political strategy, here-and-now realpolitik about most people not wanting forgiveness is naively shortsighted and cynical. Long-sighted vision rather than immediately practical policy impact is counselled by the empirical power of forgiveness to benefit people.

5. CONCLUSION

As Paul Fiddes argues in his contribution to this special issue, forgiveness can be usefully viewed as a continuous variable rather than something to be defined concisely. There is a bit of forgiveness in Tim Chapman's Northern Irish victim who bumps into their victimizer and exchanges civil pleasantries. There is more at the end of a restorative justice conference with a victim who can hug the young man who attacked her, yet who says afterwards that she cannot forgive him.⁵⁴ People can grow

50 The data were all from Dhaka where 12 million people live in its core inner city in conditions of far higher density than in any of the world's largest 10 megacities. See <<http://www.newgeography.com/content/003004-evolving-urban-form-dhaka>> accessed 20 November 2015.

51 See nn 35–41 above.

52 John Braithwaite (n 35) 45–71.

53 Malcolm Gladwell, *The Tipping Point: How Little Things Can Make a Big Difference* (Little Brown 2000).

54 This conclusion also resonates with Fiddes (n 20). 'However untidy it appears, we find that the initiating act of identification and empathy with a wrong-doer is forgiveness. We cannot hold back the generous utterance "I forgive you" until the end of the road. In this untidy, extravagant quality of forgiveness lies its transformative power. Nigel Biggar in his work on war and peace similarly identifies an unconditional "compassion-forgiveness" and a conditional "absolution-forgiveness", but perhaps he does not sufficiently

by moving on a trajectory from less to more forgiving ways of living. So can justice systems.

Forgiveness is also historically emergent. Contemporary courts and policing have created pacified spaces where forgiveness can enjoy expanded possibilities compared to times and spaces that were rule of law vacuums. Yet modernity gave birth to professions that conspired with the crown to commodify justice. It marginalized the non-professional justice in which much forgiveness occurred in medieval and ancient society. While the class and monopoly interests in the professionalization of justice, and more recently the professionalization and marketing of restorative justice as a realm of property rights, have set back the civilizing journey of forgiveness, there is no inexorability in the triumph of commodification. Western societies have growing legions of lawyers who see living longer and better as forgiving human beings as a more important matter than the dominant ethos of capitalism, of their profession, and the dominant proportional punishment ethos of mainstream criminal law jurisprudence. In law, restorative justice is but one of many branches of a healthy and expanding comprehensive law movement.⁵⁵

Restorative justice is a vibrant strategy that has taken root for reviving non-professional justice. The evidence is now powerful that schoolchildren who have yet to pay universities thousands of pounds for law or social work degrees can do restorative justice well to deal early with important dominations like school bullying.⁵⁶ That said, there is deep danger in impatience, especially the impatience of asking people to forgive or apologize because we have reason for thinking that would be good for them, or to humiliate rapists because it is important for rape to be shameful. On that most important matter, there is common ground between this article and that of Paul Fiddes. Those who, like Fiddes, subscribe to forgiveness on Christian theological grounds, those who do so as Islamic scholars or followers of other faiths, and those who do so on scientific or secular grounds will do best to support one another in the shared project of creating a more forgiving world. That is what social movements do when they triumph over entrenched professional ideologies. The formal justice system, reformed and in harness with restorative justice, can make a major contribution to that great social transformation, but only in the *longue durée*.

allow for the moving boundary between them in the process, and excludes relationality from the first moment which, for him, is entirely internal.'

55 Susan Daicoff, 'Law as a Healing Profession: "The Comprehensive Law Movement"' (2005) 6 (1) *Pepperdine Dispute Resolution Law Journal* 1.

56 Brenda Morrison, *From Bullying to Responsible Citizenship: A Restorative Approach to Building Safe School Communities* (Federation Press 2006); Paul McCold, 'Evaluation of a Restorative Milieu: Restorative Practices in Context' in Holly Ventura Miller (ed) *Restorative Justice: From Theory to Practice* (Sociology of Crime, Law and Deviance, vol 11, Emerald Group Publishing 2008) 99–137.