

Forgive but Never Forget:
Forgiveness in American Criminal Justice

by

Fisher J. Munro

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Certificate of Approval

This is to certify that the accompanying thesis by Fisher J. Munro has been accepted in partial fulfillment of the requirements for graduation with Honors in Politics.

Shampa Biswas

Whitman College
May 20, 2020

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Introduction

In 1997 Christopher Smith murdered 16 year old LoEshé Lacy. A member of Oakland's "Ghost Town" gang, he misidentified the car LoEshé was in as belonging to a member of a rival gang, and fired a handgun into it dozens of times. LoEshé was hit in the head and neck. Smith did not learn that he had killed LoEshé, who was actually a childhood friend, until the next morning. At the age of 16 Christopher Smith was sentenced to 20 years to life (Kann 2019). This is the story visible in a courtroom and in the news.

Chris Smith was a young Black man, living in a segregated part of town, with relatively few prospects. His family was abusive and neglectful and he eventually found himself in foster care. He had experienced deep poverty his entire life, with several stints of homelessness. He was convicted of his first crime, theft, at the age of 13, and was dogged by the criminal justice system ever since. He was often punished, spending lots of time in juvenile detention, but never helped. With no family or support of any kind, Smith turned to the gang. The night that Smith murdered LoEshé, his best friend had just been killed by the rival gang he had intended to attack. And even though killing LoEshé was an accident, true membership in the only family he could find required him to avenge his friend (Kann 2019). He was participating in a cycle of violence that he didn't start and couldn't escape. Smith was a victim of racism, poverty, and a system that provided no support when he needed it. This does not justify murder; LoEshé remains a victim in this story. But whether she was victimized by Smith or by the inhumanity of a society that did not care about either of their lives is less clear.

Christopher Smith suffered terrible trauma for the first 16 years of his life. Instead of that trauma being recognized, he lost the next 21 years to prison. Smith disappeared into America's vast prison system: one more of the millions currently incarcerated. In 2018, LoEshé's father, Donald, met with Smith in San Quentin and forgave him, going on to advocate for Smith's parole. Donald Lacy heard the story of oppression that Chris Smith had to tell. As a result he ceased to see Smith as a murderer getting what he deserved, and recognized him as a victim. In 2018 Smith was serving a life sentence. Now, in 2020, he is enrolled at Merritt College in pursuit of a degree in psychology (Kann 2019). Donald's forgiveness disrupted the social expectation of hatred, allowing both he and Chris to understand the true nature of the case: two young people falling victim to societal forces larger than themselves.

This story begins to illustrate the healing and transformative potential of forgiveness. Through its offerings of grace and humanity, forgiveness acts as a salve for pain—pain that is often blinding. In this way it allows us to cut through our ideas about one another. Donald could not forgive while he viewed Christopher as no more than a murderer. But understanding his daughter's killer as a victim in his own right, though true, was an incredibly difficult task. Yet forgiveness achieved it. As such forgiveness is a vehicle for the rethinking of even our most entrenched illogical positions. Forgiveness represents an opening for structural change, allowing for the alteration of the preconceived notions that under gird our lives and society. It is as an exploration of this potential of forgiveness, to ameliorate pain and thereby stimulate change, from which the rest of this thesis stems.

While I see forgiveness as a possible agent of change in every facet of society, and while I write in continual reference to such an ideal, I also take a pragmatic approach. I explore a limited location for forgiveness, a place where it has traditionally been lacking but the possibility of it is clear: the criminal justice system. I am guided by the following question: what work does forgiveness do in American criminal justice? My answer, at its most basic, is in two parts. First, I argue that forgiveness creates new communities and new relationships. Second, that forgiveness, specifically through the medium of restorative justice, sculpts these relationships into more equitable ones than those that constitute the current justice system. This allows me to conclude, with several significant caveats, that forgiveness should be enabled in the US justice system whenever feasible.

I begin to acquire the raw materials necessary to make this argument by describing the current relationships composing the American justice system. This system is defined by the mass incarceration it has produced. Section one of my thesis highlights the axes of race and class as the primary relationships of oppression that have led to mass incarceration. It also shows how these axes are coupled with neoliberal ideology. This is followed by a section that outlines the restorative justice paradigm. Restorative justice marks a significant ideological departure from the US justice system, and is the medium through which the forgiveness I advocate for can be facilitated. Thus, understanding restorative justice is mandatory for understanding how forgiveness could work in the raced and classed US context.

The model of forgiveness put forth by restorative justice is narrow and purportedly apolitical. Such a limited understanding of forgiveness is insufficient. In the third section I remedy this shortcoming by synthesizing a political theory of forgiveness.

This theory is premised on the idea that forgiveness is primarily a mechanism for establishing or rebuilding communities and relationships, and is therefore inherently political. Using this insight, I delineate the material and emotional criteria that make forgiveness possible. My final section brings the previous three sections together by analyzing the implications of this political theory of forgiveness, through the medium of restorative justice, within the context of US criminal justice. I ultimately conclude that, in US justice, forgiveness is a beneficial agent for change.

The Context of US Criminal Justice and Mass Incarceration

To begin this section I first define ‘crime’, as I use it, throughout my thesis. Technically, a crime is any act which constitutes an offense that can be persecuted and punished under the law. This is an exceedingly wide array of actions. But crimes which can be forgiven are limited to those acts which are an offense against another specific person or persons; forgiveness does not make sense in the context of a speeding ticket, but does in the aftermath of theft. Only these person-to-person crimes are relevant for my thesis. As I will show, society largely creates the conditions of possibility for such crimes. However, it is not possible for me to detail the entire social context of America, so I focus on the portion most relevant to crime: the justice system. For who exactly is the system harsh and who lenient? Who profits from it and who is ruined by it? The answers to such questions reveal the power relations of the current system; relationships that are the yardstick by which to measure the new relations created by forgiveness.

Two primary axes of oppression, race and class, are most relevant to a discussion of the context of American crime and forgiveness. However, lots of other abuse is prominent in US criminal justice. The system is highly gendered, disproportionately and harshly punishes queer people, and treats immigrants with contempt. Yet each of these horrors, and many others, require theses of their own and cannot be duly encompassed here. The specificities of even racial and class based harms will be largely absent. Race and class compose the substrate of the US justice system. They are the driving factors behind mass incarceration, but understanding the everyday minutiae of those living along these axes of oppression is beyond this thesis. Instead, my analysis of forgiveness

requires a vision of the overall blueprints of the justice system. That system is based in part on an architecture of class that made prison a more profitable alternative than fighting poverty. It is also premised on racism that primed Americans to see the 'criminal' as a Black 'other'. Finally, the system is soldered together by neoliberalism that obscures both axes, thereby creating a culture of individualization and responsabilization for any and all life conditions.

It is important to grasp the contours of the mass incarceration edifice that these three pillars support. The US justice system costs approximately \$250 billion per year. This vastly outstrips the spending of any other wealthy country, and is dedicated to the creation of a system considered to have the harshest penalties in the world (Clegg and Usmani 2019). Such a monumental investment in catching and locking up criminals results in the US representing about five percent of the total global population but about 25% of the world's incarcerated population (Yee Hee Lee 2015). Well over 2 million people currently reside in US prisons and jails (Alexander 2010, 8). A further several million people remain under the control of the justice system through mechanisms like parole, and at least 65 million Americans have a criminal record (147). This system is a retributive model of justice because it emphasizes punishment rather than preventing future crime or rehabilitating criminals.

The severe stratification of American society provides an initial explanation for this 'justice' juggernaut. Massive wealth inequality leaves millions of Americans below the poverty line, and poverty is the condition most conducive to crime. According to the Federal Reserve, in 2018 the top one percent of households controlled 32% of America's wealth while the bottom 50% of households only possessed one percent of the total

wealth (Nicolai da Costa 2019). This widespread poverty has resulted in high crime rates,¹ but mass incarceration need not automatically follow. However, the societal tolerance of this wealth inequality is indicative of a larger social attitude: Americans are ideologically opposed to the redistribution of resources. This redistributive reticence is reflected in the world's stingiest welfare state. But even this meager social assistance costs three trillion dollars per year as opposed to the \$250 billion for criminal justice (Clegg and Usmani 2019). Thus, the rise of mass incarceration results from a simple equation: the social assistance needed to deal with the root causes of crime is more expensive than imprisoning people. America drives people towards crime through astounding economic inequity and then incarcerates them, rather than alleviating the necessity of crime through redistributive social policy.

The lens of class does a lot to explain America's punitive justice system, but it does not capture the full picture. The most prevalent explanation of mass incarceration is that it was created to be a system of racialized control. This argument is forwarded famously and cogently by Michelle Alexander in her book *The New Jim Crow*. As she points out, white Americans use and deal drugs at higher rates than any other ethnic group, yet Black people made up as much as 90% of all drug offenders sent to prison in 2000 (Alexander 2010, 98-9). Blacks represent only 12% of the wider US population but 33% of its prisoners, while whites, at 64% of the total population, compose only 30% of its prisoners (Gramlich 2018). The remaining 37% of the prison population are people of color and or detained immigrants. Mass incarceration has made it so that a Black child today is less likely to be raised by two parents than one born during slavery (Alexander

¹ Crime rates have actually fallen since their peak in the 1990s, but remain far higher than at times in American history with much lower wealth inequality.

2010, 180). This vast disproportion of prisoners is enough to reveal the racialized nature of mass incarceration, but it is not the only significant element of the new racial caste system.

The racial control instituted by mass incarceration is at least as dramatic in its impact on people when they are released. Once tagged with a criminal record, a modern discrimination that resembles older forms of racial discrimination becomes perfectly legal. Discrimination in housing, voting, welfare, employment, jury service, and education are all permitted and widely exercised against those with a criminal record. In light of the significant proportion of America's people of color who have been saddled with a record, the racialized system of control materializes before our eyes.

Discrimination that used to be legal on the basis of race is now re-legalized on the basis of criminality, but functionally impacts mostly the same people (Alexander 2010, 141).

The perspectives of race and class together show us that the victims of mass incarceration are the poor and Black. But they fail to explain how the targeting of these groups has been politically justified. The development of American neoliberalism out of prior forms and prejudices is the lynchpin of mass incarceration and simultaneously obscures these axes of oppression from public view even as it enables them. Theorist Wendy Brown argues that neoliberalism is both a policy agenda and an organizing political rationality (Brown 2005, 38). As policy it is free market deregulation, globalization, and above all the maximization of corporate profit to the exclusion of all else. As rationality it somehow manages to be more perverse. Brown writes that neoliberalism "involves extending and disseminating market values to all institutions and social action, even as the market itself remains a distinctive player" (39-40).

Neoliberalism is the structuring of subjectivity such that ‘we,’ the public citizens, are replaced by self-interested and self-responsible individuals acting solely to further their own profit. The concept of a ‘social good’ becomes not merely antique, but nonsensical. Most importantly, this extreme individualization makes any given person completely morally culpable for any event in their life or action they take, regardless of outside forces or circumstances.

This rationality enables Americans to throw the poor in prison without pausing to wonder why they are poor or how poverty plays into their crime. As neoliberal subjects the poor are responsible for their own poverty, and the structural factors that forced them there are erased. These structural factors are often the creation of neoliberalism as policy. But even the staunchest neoliberal is forced to accept that nobody chooses their skin color, so the racial makeup of mass incarceration is not as easily accounted for. Yet race is just as entangled with neoliberalism. A steady process of making criminal justice ‘colorblind’ has allowed neoliberal logic to justify today’s racial apparatus of mass incarceration using race neutral terms.

Theorist Keeanga-Yamahtta Taylor argues that the passage of the 1964 Civil Rights Act plunged America into a new world in which racism was officially decried, but also inaugurated the era of colorblindness. She argues that “It was as if the signing of civil rights legislation had wiped the slate clean and African Americans had been given a new start” (Taylor 2016, 53). In this colorblind world the political establishment was able to separate “Black hardship from the material conditions that activists had worked so hard to expose” (53). Blackness was decoupled from the traumatic historical legacy of being Black in America. Colorblindness joined forces with neoliberalism to make

widespread poverty in Black communities the fault of each individual, rather than the result of centuries of the most vicious oppression the world has ever known. With the passage of the Civil Rights Act expression of racial animosity became less and less socially acceptable, but degradation of the poor and criminals became mundane.

Michelle Alexander argues that overt racism in criminal justice was exacerbated by neoliberal responsabilization for life circumstances. She shows that anti-crime rhetoric, which had been explicitly racial, also slipped into a colorblind mode (Alexander 2010, 40-1). Policy enacted through the ‘War on Drugs’ was facially race neutral, but due to previous decades of explicitly racial crime rhetoric, Americans already had a deeply embedded sense of Black as criminal (113). Thus, the writing of laws that surreptitiously target Black Americans, such as stricter sentencing for dealing crack than chemically identical cocaine, seem natural. This understanding of the criminal as a racial other, combined with neoliberalism, made many Americans willing to be punitive rather than adopt social policy they felt would only benefit somebody else.

Mass incarceration results from racial control and capitalist oppression together. Erroneously, advocates of the racial narrative often downplay the unfortunate reality that much of the racial disparity in incarceration is explained by significantly higher crime rates among Black Americans (Clegg and Usmani 2019). In doing so they unintentionally obscure the class based explanation, precluding its contributions to the fight against mass incarceration. Yet acknowledging the crime rate amongst Black Americans does not discount the racial narrative. The coding of ‘criminal’ as Black still marks an intentional effort to target people of color. The racial proportions of mass incarceration still indicate its position at the center of a racialized system of control. More than any other group,

Black Americans have historically been forced into generational poverty by our structurally unjust society. In a significant way, the racism and wealth inequality of America become very difficult to distinguish. America abuses its poorest residents, and it is not accidental that many people of color are among those ranks.

Forgiveness will be undertaken within these constraining realities of the criminal justice system. Simultaneously, these relationships of oppression are the very thing I hope forgiveness can begin to alter. First and foremost, the US has created the harshest penal state the world has ever seen, resulting in mass incarceration. That system is driven in large part by the class divisions of an American society that refuses to take serious redistributive steps to deal with crime. Mass incarceration also functions as a racial caste system, disproportionately affecting people of color. The American people have been primed to understand “the criminal” as “Black,” and their racism has led them to turn toward retribution rather than repair. Neoliberalism hides the structures involved in the racial and economic inequality of America, instead conceptualizing poverty as a personal failing of the impoverished for which they should be held punitively responsible. Widespread poverty, racism, and neoliberalism necessitate crime through the deplorable conditions they create even as they drive the punitive response to crime. The question becomes the following: will forgiveness in American criminal justice reinforce these relations that led to mass incarceration, or will it disrupt them?

Restorative Justice

Unsurprisingly, based on the cruel apparatus I just outlined, forgiveness is almost entirely lacking in US justice. As opposed to this retributive system, forgiveness is present in a justice paradigm known as restorative justice. Restorative justice seeks to rehabilitate rather than punish offenders, and to listen to the needs of victims rather than enforce the law without their input. Restorative justice was first articulated in the 1970s through the practice of victim-offender mediation. It has since broadened to incorporate a wide array of dialogue based crime resolution methods (McCold and Wachtel 2003, 1). Advocates around the US have begun to push this model as a replacement for the current system. If any significant alterations of US justice occur, it is likely restorative justice will be involved. As such, restorative justice is the vehicle for bringing forgiveness into the American justice system. Thus, forgiveness will not only be influenced by the context of mass incarceration, as described in the previous section, but mediated by the restorative justice paradigm. I will proceed by describing how restorative justice works and what it is meant to achieve. I will then detail how forgiveness functions within this paradigm.

Restorative justice, contra retributive justice, is about healing the harm caused by an offense. My survey of the literature finds most scholars in agreement with this sentiment. The current criminal justice system largely ignores the emotions of victims and offenders, instead catching them up into an inexorable law and order machine. Retributive justice punishes offenders according to a predetermined set of consequences, taking little account of the specificities of a given crime or the wishes of either the victim

or offender. But emotions are not merely peripheral effects of some empirical harm. The real hurt of a crime is located in the emotional and subjective experience of those involved (Kohen 2009, 401). An easy example: theft of \$100 is punished uniformly but experienced very differently depending on the wealth of the victim. Restorative justice places the emotions of the participants in the foreground, allowing them to be discussed and resolved through collaboration and reparation.² Though there are many different restorative justice practices, this emphasis on emotion is executed through an overarching procedural commonality: dialogue between victim and offender. Each different practice merely varies the exact logistics of that dialogue (Wenzel, Okimoto, Feather, and Platow 2008, 377). This model is explicitly intended as a method of keeping offenders out of prison and in society.

The dialogic basis of restorative justice warrants further investigation as it cannot be disentangled from restorative justice's reparative and emotional ideology. As I stated earlier, when an offense has been committed there is an injury beyond the material damage done to the victim or victims (Wenzel, Okimoto, Feather, and Platow 2008, 375). Dialogue provides victims and offenders the chance to tell their experience. Hearing the narrative truth from both parties transforms the thin truths of forensics into a thickened truth that incorporates the humanity and story of the other (Chapman and Chapman 2016, 142). This reaffirms the humanity of all parties involved and allows for the construction of a mutually agreed upon morality between victim and offender. Thus restorative justice

² Reparations are undertaken for the sake of mutual healing rather than punishment, which is done for its own sake, as a symbol of the moral authority of the victim. Reparations might take the form of a restitution plan or community service. I will discuss the concept of reparation in more detail later on.

constructively, rather than violently as in retributive justice, restores the sense of justice that was disrupted by the crime.

I now turn from this broad outline to the task of tracing the precise role of forgiveness within restorative justice. Much of the literature on restorative justice admits only a limited place for forgiveness. It is typically understood exclusively as an interpersonal and optional choice, and thus beyond politics. It is viewed as unethical to expect victims to forgive. Instead forgiveness is considered a ‘gift’ (Suzuki and Jenkins 2020, 2). From this perspective forgiveness is desirable, but is not required of restorative justice; it is considered an admirable byproduct. However, forgiveness has been shown to be quite prevalent. Though victims are often hesitant to say outright that they forgive the offender, research increasingly shows that, functionally, forgiveness has occurred (Umbreit, Blevins, and Lewis 2015, 30).

The designation of forgiveness as exclusively interpersonal, and therefore apolitical, is myopic in two important ways. First, a form of forgiveness that is self-contained is essential to restorative justice because it empowers the participants to reclaim their identity from the event. As multiple scholars have concluded, forgiveness is properly understood as the giving up of resentment against an other (Kohen 2009, 403). This definition ushers us to a rich understanding of forgiveness: letting go of resentment enables reclamation of the self from the trauma of an event; it is how a victim becomes a survivor (403-04). This self-empowering forgiveness requires nothing of the other, and can be undertaken entirely alone. It represents most of the healing potential available to conventionally understood ‘victims’ in the restorative justice process, and without it restorative justice is significantly devalued.

Second, the restorative justice literature falsely imagines the kind of interpersonal forgiveness that it does see as apolitical. This apolitical designation is largely the result of the neoliberal culture outlined in the prior section. Though the forgiveness that occurs in restorative justice is often between only two people, the need for it is the result of political circumstances, and the forgiveness itself is both determined by, and helps reinforce or change, those circumstances. This insight is what necessitates all of the prior section. Thus the ‘interpersonal’ forgiveness of restorative justice is political. As a result, the understandings of forgiveness provided by restorative justice literature are anemic and will not suffice to explain how forgiveness works in US criminal justice. A political theory of forgiveness is the apparent and necessary supplement. I will provide such a theory in the next section.³

³ It is important to note that restorative justice and forgiveness are distinct. The rest of my thesis will not be an analysis of how restorative justice would function if implemented in the US. As the orthodox theorization of forgiveness in restorative justice correctly claims, many of the goals of restorative justice can be achieved in the absence of forgiveness. Primarily, offenders can be kept out of prison. This is to say that while I will evaluate restorative justice using the criteria of forgiveness, it should not be discounted or accepted solely on this basis.

Political Theory of Forgiveness

In order to construct a political theory of forgiveness, I first ask why humans are capable of forgiveness at all. The answer to this question shows forgiveness to have a fundamentally political origin. Having established this political nature of forgiveness, I show that there is the potential for literally any act or person to be forgiven. The possibility of universal forgiveness calls for a framework that helps us navigate this unlimited potential. I oblige by outlining four criteria that must be met in order for forgiveness to occur. These criteria are that the victim be placed in a relative position of power, that the victim not seek revenge against the offender, that both parties recognize the humanity of the other, and that both parties agree on a past moral wrong. These four requirements constitute my political theory of forgiveness. But first, why do we forgive?

The capacity to forgive stems from the need to construct or repair relationships. Hannah Arendt was the first person to theorize forgiveness as political because she observed this function.⁴ She wrote that “Without being forgiven, released from the consequences of what we have done, our capacity to act would, as it were, be confined to one single deed from which we could never recover” (Arendt 1958, 237). Because humans live in community with each other it is inevitable that our actions will affect

⁴ Arendt was not the first person to recognize the power of forgiveness. The Christian tradition has long vaunted forgiveness, and even Arendt attributes the discovery of forgiveness to Jesus. But she writes that “The fact that he made this discovery in a religious context and articulated it in religious language is no reason to take it any less seriously in a strictly secular sense”(238). Many current practitioners and theoreticians of restorative justice cite a religious heritage in their work. But if forgiveness through restorative justice is to be widespread, as I hope, it will have to leave religion behind in order to maintain broad appeal. The models of restorative justice and forgiveness I describe in my thesis function entirely in the absence of religion. I choose, as Arendt, to take forgiveness seriously in a secular sense despite the Christianity that surrounds it.

others, sometimes negatively. Therefore, if we could not forgive we would be unable to live together, instead suffering from an endless cycle of retaliation. As such it is apparent that the original purpose of forgiveness is to repair relations and enable community.

This inherently social origin of forgiveness makes it by definition political. Theorists from Aristotle, to de Tocqueville, to Arendt, to Wendy Brown have explicitly argued and implicitly assumed throughout their work that politics is located in association. ‘The political’ is not present if you live your life alone in a cave. The neoliberalism outlined in the first section rejects this stance. However, the neoliberal construct of the autonomous individual presumes a background sociality which it then abstracts away, falsely depoliticizing the milieu that sculpts every subjectivity. As Arendt wrote, it is a “fact that men, not Man, live on the earth and inhabit the world” (Arendt 1958, 7). There is no conception of politics without man as a plurality. As such, forgiveness becomes an inherently political act.

The political basis of forgiveness delineated, I now identify who can be forgiven and what acts it is possible to forgive. Upon close analysis, these two questions collapse into one. Many theorists have observed, theoretically and empirically, that a victim forgives a person not an act (Govier 1999, 67). Arendt summarized this aspect of forgiveness, writing that “what was done is forgiven for the sake of who did it” (241). Forgiveness distinguishes the act from the person, condemning what happened even as it exculpates the transgressor. The what of the act still matters for forgiveness; it is weighed against how strongly the victim desires to be in a community with the transgressor. The more heinous the offense, the more desirable the offender as a community member must be to garner forgiveness. But utilizing a humanist premise, all people have the same

intrinsic value and inherent humanity. It follows that all people are worthy of being members of our community and therefore of forgiveness. This universally deserved nature of forgiveness implies that all acts can be forgiven; at least under the appropriate circumstances.

The writing of Jacques Derrida further bolsters this position. Derrida argues that the concept of an unforgivable offense is the very thing that gives meaning to forgiveness. If one is only prepared to forgive the forgivable, the logic of forgiveness does away with itself; forgiveness means little if it only applies to a limited set of acts. This points to an aporia at the heart of forgiveness which Derrida states as “forgiveness forgives only the unforgivable” (Derrida 2001, 32). As he argues, “true forgiveness” is only realized in the presence of the unforgivable, which means that it must be offered unconditionally to a person who has committed the most horrific acts. However, Derrida recognizes that this true forgiveness is counterbalanced by the actual forgiveness we experience day to day. Actual forgiveness is always conditioned and thus falls short of true forgiveness. Yet it is always done in reference to the ideal of true forgiveness, each instance approximating true forgiveness to a greater or lesser degree (44-5). These two heterogeneous but entangled poles of forgiveness further prove that any person and act can be forgiven. For forgiveness to have meaning, all things must be forgivable. But reality dictates that forgiveness will be conditioned upon the material and emotional circumstances of both parties post harm. My task in describing a political theory of forgiveness is therefore to specify those circumstances.

The first of four criteria required for forgiveness is that the victim be placed in a relative position of power.⁵ A relative position of power means that a shift from victim to potential punisher has occurred (Andrews 1999, 107). This is required because ‘forgiveness’ from weakness is not appropriately characterized as forgiveness. This is because it is neither conditioned nor unconditional, and thus fails to reference the ideal of true forgiveness in any way. Rather it is mandatory, because the superior strength of the other requires it. Forgiveness from weakness is more akin to a retreat and forced surrender to unfavorable social conditions. Forgiveness cannot be coerced and thus can only be done from a position of strength. This is the case for any forgiveness that is undertaken in order to establish new peaceful relationships or to create and maintain a community.⁶

The second criterion for forgiveness, forbearance from revenge, is enabled by the requirement of a relative position of power.⁷ Revenge is ruinous to a community and contradicts the community building goals of forgiveness (Digeser 1998, 702). Thus, if victims exact punishment, even if they claim to have forgiven emotionally, they have failed to forgive. Forgiveness cannot be only subjective. It must be represented tangibly in the actions of the victim towards the offender. However, it is not necessary to totally eliminate resentment on the part of the victim, for forgiveness to have occurred

⁵ It is important to note that I do not lay out the four requirements chronologically. These criteria need not be met in this exact order, and will often be met simultaneously if they are met at all.

⁶ The theory I am constructing does not account for instances in which forgiveness has become detached from the original social purpose of forgiveness; a quintessential example being what I have just worked to discount: offenders forgiving victims (forgiveness from a position of weakness). Forgiveness like this can do powerful political work. Someone in a position of weakness may confer agency upon herself through forgiveness. Yet this is work beyond the capacity of restorative justice to facilitate. This is a topic worthy of extensive research unto itself, but as such, I have left it out.

⁷ I use the terms revenge and punishment interchangeably. This is because, as I show in the next paragraph, punishment in the context of retributive justice is no more than revenge.

(MacLachlan 2012, 23). Instead material acts of forgiveness that help to create community, for instance not prosecuting a criminal, should be considered forgiveness. Harboring resentment may be prudent, and doesn't negate forgiveness if that forgiveness has succeeded in founding a relationship between the parties.

At this point it is important to more thoroughly distinguish between revenge and reparation. Reparations are constructive acts like a restitution plan or community service. Revenge is punishment for its own sake; causing pain to the offender as an exchange for the pain they caused. Incarceration is a prime example: the victim gains nothing from it but the offender suffers. Reparation is acceptable within forgiveness for two reasons. First, it actively strengthens the relationship that forgiveness seeks to create. Second, forgiveness must be undertaken in pursuit of a community worth living in. Reparations do material work to improve the community that both parties will thereafter share. Forgiveness is, to some extent, a bargain. Favorable material, political, and economic conditions must await both parties at the end of a forgiveness process. For the offender this is clearly the nullification of punishment. For the forgiver this means peace of mind, but often reparations as well.

The next condition for forgiveness is that both parties recognize the humanity of the other. Merely understanding the 'facts of the case', as the courtroom is limited to, is not enough. The mutual recognition of a shared humanity means that victims and offenders empathetically recognize parts of themselves in the other (Andrews 1999, 123). Forgiveness is neither a vision of, nor respect for, the face of the other. Instead it is the new found knowledge in both parties, based upon their similarity, that they could have done what the other did. Recognition of humanity thus enables forgiveness because it

erases a sense of the offender as evil, allowing victims to comprehend the actions of the offender as the result of circumstance.

Finally, but essentially, forgiveness requires agreement by both parties on a past moral wrong. Forgiveness cannot occur unless the offender acknowledges the harm. Without this agreement, forging community is impossible (Kohen 2009, 417). By failing to agree that a harm was committed, an offender turns their back on the victim, which often negates the recognition of humanity. It sends the message that the offender does not see it as an issue if the victim is harmed. Alternatively, such a refusal means that the offender stands by their actions as moral, even recognizing the humanity of the other, and does not see a need for forgiveness. Either message makes forgiveness impossible because the offender is signaling that they are willing to commit their offense again or that they do not care if the victim is harmed.

Thus I arrive at the bones of a political theory of forgiveness. Forgiveness requires a relative position of power for the forgiver, the forbearance from revenge, a dual recognition of humanity, and the agreement on a past moral wrong. The relative demands of each of these criteria are greater or lesser depending on the offense. For a horrific act they are far more stringent and reparations more demanding. But these requirements do function as a political theory of forgiveness because they could be applied to the aftermath of any offense. With this theory in hand I am now able to analyze the work of forgiveness within the raced and classed context of the US justice system, through the lens of restorative justice.

Should We Forgive

The political theory of forgiveness I outlined in the previous section is not normative; it provides criteria that help determine when forgiveness is possible. The desirability of forgiveness is a different question, hinging on the fundamental purpose of forgiveness: to forge community. If forgiveness helps to create a post-harm community better than the community in which the harm occurred, then it is desirable. To determine what community is created in the context of American justice I first show that forgiveness creates new relationships rather than repairing old ones. I then evaluate the impact of each of the four criteria for forgiveness on these new relationships. This analysis is done through the lenses, provided by the first two sections, of restorative justice and mass incarceration. I find significant drawbacks and important benefits that stem from forgiveness, and conclude that forgiveness should be integrated into US criminal justice.

Forgiveness can contribute to building and improving a community depending on whether it reconstructs old relationships or establishes new ones. A simplistic appraisal shows forgiveness to be about repairing the old. The same people are in the relationship post-forgiveness as pre-forgiveness and it is easy to assume that they have one contiguous relationship which was patched up by forgiveness. This explanation devalues forgiveness in criminal justice because crime highlights the contradictions and inequalities foundational to American society. A reparative vision of forgiveness means smoothing over the social disruption represented by crime, returning all involved to pre-harm relations. In a criminal justice system premised on the criminalization of poor

people and people of color such a return is incredibly damaging. However, this is a superficial vision of forgiveness.

As both Derrida and Arendt argue, forgiveness founds new relationships rather than restoring old ones. The genesis of a new relationship is made possible because a harm ruptures the current relationship or community that it occurs within. This rupture is evidenced by the impossibility of forgetting. Identities are informed by past trauma; harm cannot simply be erased as in the saying ‘forgive and forget’ (Cahan 2013, 182). In light of the inability to forget, the relationship is indelibly changed, and the harm demands a response. Responses such as revenge or cutting ties represent a relational continuity: there is a harm to which the victim acts accordingly. But responding with forgiveness is unexpected, releasing the parties from the normal cycle of revenge or avoidance. This release necessarily frees both victim and offender from the old relationship.⁸ Thus the relationship post-forgiveness is not contiguous with, though it remembers, the prior relationship.

Though this is far more than recaulking an old relationship, forgiveness also does not mandate the creation of a new relationship that is better or radically changed from the previous one. As I demonstrated in section one, the current justice system helps constitute and enforce the race and class relations of America. It does this materially by cementing the poverty of the disenfranchised. As Michelle Alexander showed, having a criminal record legalizes discrimination against criminals, making it incredibly difficult to climb the social ladder. The current system also maintains relations ideologically. The

⁸ This release necessarily frees both parties from their prior emotional and ideological relationship. This act of forgiveness alone does not immediately alter their structural relationship. I elaborate in the conclusion, but my premise is that change, like this, on the individual level eventually translates into structural change.

neoliberalism that undergirds mass incarceration enforces race and class relations by indoctrinating a survival of the fittest vision of society. This is particularly troubling because a wide spread culture of responsabilization lends itself to creating new relationships post forgiveness that continue to blame criminals for their life circumstances. In this light, the energy of inertia required to construct radically different relationships is high. However, mass incarceration entirely precludes the chance to alter communities or found new relationships. Thus, any prospect for change that forgiveness represents, even if slim, becomes precious. Further, the criteria required for forgiveness counteract both the mechanistic creation of an underclass by our socio-political institutions and the paralyzing ideological effects of neoliberalism.

I first address the criterion of forbearance from revenge because this aspect of forgiveness does the most material work to fight mass incarceration. For this criterion the medium of restorative justice plays an important role. A true restorative justice program is diversionary, meaning that offenders are directed into the program before they are sentenced or go to prison.⁹ The victim is then given the discretion, within limits, to choose the punishment of the offender.¹⁰ If a victim forgives then the offender receives no punishment at all. The victim may ask the offender to engage in restitution of some form, but they will not go to prison or be saddled with a criminal record. This does not necessarily fight the ideology of mass incarceration. But neoliberalism can be fought in

⁹ Many current programs, typically from lack of public awareness and severely limited resources, engage in restorative dialogue post incarceration but this is a damage control measure, and not the true aim of restorative justice.

¹⁰ The victim's ability to punish is limited to the punishments that the offender could have received under the law had they gone to court. In cases in which a victim decides to punish, the entire affair will be redirected to the court system.

other ways. Because of forbearance from revenge forgiveness through restorative justice represents an invaluable opportunity to concretely reduce mass incarceration.

Next I address the criterion that the victim be in a relative position of power. The majority of crime is committed against victims belonging to the same race and economic class as the perpetrator. This means that victims and offenders most often suffer from the same structural oppression. The purpose of changing the relationship between victim and offender thus appears to be defeated because the structural oppression that produced the crime remains untouched. But this analysis neglects the neoliberalism that is the lynchpin of mass incarceration. Neoliberalism does not only infect the wealthy and advantaged, but pervades the subjectivity of the disenfranchised as well. In his ethnography *In Search of Respect: Selling Crack in El Barrio*, Philippe Bourgois documents the lives of impoverished drug dealers. A dealer named Primo, who Bourgois interacts with closely, remarks to him “Man, I don't blame where I'm at right now on nobody else but myself” (Bourgois 2003, 1). This sentiment represents a blame-the-victim attitude that Bourgois shows us being propagated over and over by victims of oppression like Primo. As such, these oppressed people often don't see the structurally enforced racial and economic oppression that they share with an offender who commits a crime against them. But when a structural victim is given the vantage point of a relative position of authority they are momentarily freed from their own oppression; blinders removed, they easily find an affinity for the suffering of the offender. This witnessing of a similar oppression in the offender, be it economic, racial, or both, begins to de-individualize that oppression. Thus, the requirement of a relative position of power has the potential to convert the faux oppressive relationship between disadvantaged victims and offenders to one of solidarity.

This builds grassroots awareness of the racial and economic mechanisms of oppression; awareness that is the essential first step towards fighting back.

In this way forgiveness as a vehicle for radical change becomes seductive. However, the requirement of agreement on a past moral wrong presents an obstacle. This criterion for forgiveness is the one with the most potential downside. To understand that downside I look to Michel Foucault's theory of disciplinary power. Foucault argues that truth and power do not oppose, but rather constitute each other (Foucault 1975, 47-58). They are entangled in a power-knowledge regime that Foucault called disciplinary power. Disciplinary power is used to produce specific and internally tailored subjectivities within those under its sway (194-228). Agreement on a past moral wrong, and the restorative justice it operates through, are institutions of disciplinary power because they produce in the subjects involved a morality which considers the act of the offender wrong. This sculpting of the very being of both victim and offender is a perilous task, and I will carefully dissect its impacts.

In some instances this disciplinary production of morality is desirable. This is epitomized by a hate crime that was resolved through restorative justice in which teenagers spat on a trans woman (Racine 2019). In this case the morality and subjectivity produced by forgiveness defends gender expression. But in America a majority of the interpersonal crimes forgiveness can address are the result of the racial, economic, and neoliberal context that structurally forces Americans into positions conducive to crime. As such, most crime must be understood as a direct, if unconscious, challenge to that system. For example, theft is, to some important extent, a violent redistribution of wealth, necessitated by poverty. Many other crimes also impeach society. The crimes that

Bourgeois describe are not undertaken because of a love of 'the life'. Rather, it is the only option in a segregated and incredibly poor area of New York in which there is no other source of income. To produce a morality, through forgiveness, that unequivocally condemns such crimes is to buttress the larger social morality that makes the atrocious conditions of American society acceptable.

Restorative justice further exacerbates the downsides of agreement on a past moral wrong. Because offenders must agree that a wrong was committed via the dialogue process, they typically express contrition. To do otherwise is a nearly untenable position, as a failure to show remorse makes them appear monstrous. The danger is that this production of remorse in the offender potentially alters their subjectivity such that they become complicit with a system that oppresses them. As a result of genuine regret for what they've done, they may begin to believe that what is happening to them is justified, not resenting the system they are subjected to but rather believing fully in its rightness. They become newly christened law and order subjects in a society in which "law and order" is used to oppress specific groups of people.

To summarize, agreement on a past moral wrong presents two problems: the generalized production of a community morality that vindicates mass incarceration and the creation of a law and order subjectivity in offenders such that they become complicit in their own oppression. These two problems are potentially fatal for an argument that forgiveness should be introduced into American justice. But I continue to make this argument because it is not necessary that the norms produced by forgiveness unilaterally condemn crimes that call attention to inequity. A negotiation of norms and morality will occur as a result of agreement on a past moral wrong. I've just outlined the risks

involved. But the potential benefits from this negotiation are enormous. Fortunately, the criterion that both parties recognize the humanity of the other leads that negotiation away from the reaffirmation of current norms and towards the creation of new, more equitable ones.

Recognizing the humanity of the other directly contradicts the neoliberal lynchpin of mass incarceration. First it helps destigmatize ‘the criminal’. By humanizing one who is a criminal to one who is not, the hard edged category of ‘criminal’ begins to dissolve out of focus. This is important in a society in which carrying the label of criminal bears significant material repercussions. But recognition of humanity does even more direct work to fight neoliberalism. As I showed in the previous section, seeing the humanity of the other is not about an a priori deduction that all people must have humanity. Instead, it is about recognizing parts of yourself, and your own humanity, in the other. Thus, as neoliberalism is the hyper individualization of us all, recognition of humanity is our collectivisation into a group in which we see ourselves as more fundamentally similar to each other than different. It is a way to come up for air from the neoliberal culture we drown in. When a victim recognizes the humanity of an offender, they must conclude that the offender’s actions are largely the result of oppression and circumstance rather than moral failure. The story of self responsabilization that neoliberalism tells us begins to crack in the face of its own contradictions.

Further, based on the logistics of restorative justice, the recognition of humanity does not only fight neoliberalism, but highlights the economic inequity and racism of American society. Restorative justice achieves the recognition of humanity through dialogue. Because this dialogue is the telling of the full story of the event, from both

sides, it demolishes the idea of equity, as the victim is forced to come face to face with the conditions of the offender's life. I will provide an example that highlights the capacity of forgiveness, via the recognition of humanity, to fight neoliberalism while simultaneously exposing economic and racial injustice.¹¹

In 1997 a white police officer named Tom Morgan was shot and bludgeoned around the head by a young Black gang member named Jason Samuel. Restorative dialogue was facilitated between the two, and Tom Morgan heard Jason's story of poverty, being the foster kid of drug addicted parents, and homelessness. This was such a powerful event that Tom began to advocate for Jason to receive parole, and was instrumental in his release from prison. As a result, Tom reevaluated his role with the police, coming to believe that an encounter like the one between him and Jason was almost inevitable. He recognized that the system which had employed him set this situation up (Samuel and Morgan 2020).¹² Furthermore, though agreement on a past moral wrong functionally mandates remorse, mutual recognition of humanity makes it possible to show contrition while taking into account other factors. Jason felt genuine remorse for having shot someone, but this did not obscure the situation, largely outside his control, that led to the shooting. He explained his gang membership such that it was clear that the gang had been a legitimate and reasonable path given his circumstances. This reckoning exposed some of the racial and economic faults of American society and shaped the subjectivity of both victim and offender to counteract the dominant social

¹¹ Unfortunately this is an imperfect example of restorative justice because it occurs after the offender was sent to prison. This does not detract from its illustrative capacity, it merely partially negates the benefits that come from forbearance from revenge.

¹² As I commented in an early note, this revelation does not immediately translate into institutional change. The conditions that produced the encounter between Jason and Tom remain. However, recognition of the inherent flaws in a system when there was no recognition before should not be undervalued. This is the first step from which structural change can be made.

morality. Thus the requirement of recognizing the humanity of the other challenges the status quo not only by de-individualizing those involved, but through its exposure of oppression during the dialogue process.

Since the recognition of humanity goes both ways, forgiveness fights the trifecta of economic inequality, racism, and neoliberalism on behalf of both parties. As Bourgois showed, offenders are just as caught in the snare of neoliberalism as are victims. Recognition of their humanity in the victim also fights the individualization of neoliberalism that they are subject to. Thus offenders are enabled to cut themselves free from a survival of the fittest mentality, moving beyond internalized social norms that stigmatize them, and recognizing the economic and racial structures that hold them down. The offender can gain a much clearer vision of herself as one who is fully human but caught in a dehumanizing system of discrimination and structural inequity. Because mutual recognition of humanity directly counters the obstacles posed by agreement on a past moral wrong, the benefits of forgiveness are far more likely to bear fruit than the downsides.

Conclusion

Facilitating forgiveness in US criminal justice, through restorative justice, is a task worth pursuing. It is not a task without risk. As I discussed, the disciplinary effect of agreement on a past moral wrong possibly reinforces the morality of the current oppressive system while creating docile and complacent offenders. Yet this risk is mitigated by the other criteria for forgiveness even as those criteria enable both material and ideological improvements to the current community that composes America and its criminal justice system.

First, placing victims into a relative position of power creates solidarity amongst oppressed people. In light of the division sown amongst the oppressed by our victim blaming culture, this is an invaluable step towards mounting resistance to the structures that create poverty and segregation. Second, forbearance from revenge does important work to begin reducing mass incarceration. Third, mutual recognition of humanity counteracts the risks posed by agreement on a past wrong and fights neoliberalism. It mitigates the downsides of forgiveness by exposing both parties to the story of the other through the process of dialogue, thereby revealing the structural inequity that leads to crime. It also fights the individualization and responsabilization of neoliberalism by foregrounding our fundamental similarities: our collective and shared humanity. As such, recognition of humanity works in conjunction with forbearance from revenge, changing the culture that led to our system, even as the flow of bodies, which are the currency of mass incarceration, begins to dry up. Thus, in the context of US criminal justice,

forgiveness becomes immediately desirable. This is the concrete revelation that crowns my thesis.

Enabling forgiveness in criminal justice, through restorative justice, would be a tectonic shift for the US. As illustrated by section one, America is deeply entrenched in a racist system that plays on class divides and is sutured together by neoliberalism. But forgiveness comes into its own when a community needs to be remade. Forgiveness begins something new, laying the foundations from which a relationship can be built. Over the course of many interactions, the changed relationships between victims and offenders have the potential to crystalize into institutional change on a large scale. As difficult as the path towards restorative justice is, this transformative nature of forgiveness means it is a path worth walking.

Yet the picture I have just painted appears to be fundamentally reformist, and such a stance seems at odds with the context I outlined in section one. The current US justice system is inherently raced and classed. This grotesque image begs the question, is reform of an intrinsically flawed system possible or should we strive for prison abolition? To answer this, I begin by outlining the basic premise of the prison abolition movement.

At the core of prison abolition is an analysis of the concept of criminality. The criminal is a socially constructed category, just like race or gender. This is evidenced by the fact that the category 'criminal' differs vastly from the category lawbreaker. Nearly all people have broken laws, but only a specific minority have been made criminals. As I showed in section one, this minority is not random, but targeted, and thus the system is inherently prejudiced. Those who are sent to prison are not sent because they are law breakers, but because their communities have been criminalized. The prison abolition

movement uses this insight to argue that all prisons are inherently oppressive and should therefore be abolished (Davis 2003, 9-22).

Yet, as prominent abolitionist Angela Davis advocates, prison abolition does not mean the closing of prisons tomorrow (Davis 2003, 106). Instead it requires a conceptualization of the criminal justice system as not merely the sum of all the prisons in the country, but as the totality of relationships between the people, the government, corporations, history, racism, and everything else that actually makes up the current system (104-05). Prison abolition is a comprehensive effort to change those relationships. It is not the stultifying idea of taking ‘the prison’ out of the system and replacing it (106). The entire system must be redone. Thus, providing good quality education to all, demilitarization, universal healthcare, and many other changes can all be considered part of prison abolition because they alleviate the conditions that have led to the prison.

As such forgiveness through restorative justice, though it superficially appears to be a reform of the prison system, contributes to the abolition movement. Most importantly, it begins to change the entire paradigm of justice, shifting away from punishment and towards healing. Davis herself has identified this shift as fundamental to the abolition movement. She writes that we must create a “justice system based on reparation and reconciliation rather than retribution and revenge” (Davis 2003, 107). Such a shift is a sea change, altering the ideological premises that drive all of mass incarceration; it is not merely a reform.

Furthermore, forgiveness contributes to another paramount goal of prison abolition. The requirement of forbearance from revenge aids in the task of decarceration. As Davis defines it, decarceration is “the consistent reduction in the numbers of people

who are sent to prison - with the ultimate aim of dismantling the prison system as the dominant mode of punishment” (Davis 2003, 110). Forgiveness is thus part of abolition. The ability of forgiveness to structurally alter American criminal justice inaugurates its theoretical potential on a larger scale. If forgiveness can work in criminal justice, perhaps it can work in the broad array of relationships that prison abolition identifies as contributing to mass incarceration. Turning to forgiveness for assistance, we gain another tool with which to help cast aside the oppression that defines America.

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