

3 Takeaways Podcast Transcript

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Ep 90: Justice, Punishment and Forgiveness: When Should the Law Forgive? with Harvard Law School Professor Martha Minow

INTRO male voice: Welcome to the 3 Takeaways Podcast, which features short memorable conversations with the world's best thinkers, business leaders, writers, politicians, scientists, and other newsmakers. Each episode ends with a three key takeaways that person has learned over their lives and their careers. And now your host and board member of schools at Harvard, Princeton and Columbia, Lynn Thoman.

Lynn Thoman: Hi everyone, it's Lynn Thoman, welcome to another episode. Today, I'm excited to be with Harvard Law School professor and former Harvard Law School dean, Martha Minow. We're going to talk about what the right balance should be between forgiveness and punishment. It's not an easy question, a justice system needs to hold people accountable for their crimes and be fair, treating people the same, but when should the law forgive and allow for fresh beginnings? Martha has thought about this a lot, and in fact, has written a book titled When Should Law Forgive. So, she is the perfect person to ask. Welcome, Martha, and thanks so much for our conversation today.

Martha Minow: Thank you, so much.

LT: It is my pleasure. How did you become interested in forgiveness?

MM: Probably over determined. I wrote a book a long time ago, 1998, looking at responses to mass atrocity, genocide and violence, and I, at the time wrote the title Between Vengeance and Forgiveness, because I thought about the legal responses emerging at that time, Truth Commissions and International Criminal Justice trials and even reparations is trying to find some alternative to cycles of revenge on the one hand, and to what seemed like a Godly form of letting go of resentment exemplified by Archbishop Tutu, for example, in South Africa. But after I wrote that book and I talked with people in many places about it, people said, why are you looking for an alternative to forgiveness? Why shouldn't that be the focus? And that really got my attention and I ended up writing a book about that.

LT: And when you say forgiveness, what do you mean by forgiveness?

MM: I do mean letting go of justified grievances. It's not forgiveness, if there was no basis to actually hold a grievance against someone for committing a harm or a wrong, it takes work to actually let go. And it's not forgiveness, if there's a good defense. Self-defense, for example, we often think of as a basis for justifying, even using violence, even killing someone, that's not forgiveness. And someone who's granted self-defense as a grounds for not being convicted of a murder, that's not forgiveness, that's a justification. So forgiveness is letting go of a grievance that is justified.

LT: Does forgiveness have limits?

MM: Oh my goodness, absolutely, both psychologically, but also morally normatively. I think that

there are some offenses that are beyond the pale. I also do believe that forgiveness as a personal matter has to be a prerogative, a choice, by one who's been victimized or one who is a survivor of harm. When we're talking about the legal system and the acts of officials, really, one reason I ended up writing this book was that I thought the subject was under-studied. There's enormous range of discretion from a police officer who lets a particular speeder go without a ticket to a president who grants a pardon, but some of the uses of those kinds of discretion seem to me really misguided, and of course, officials who have those kinds of discretion, at many times draw a line and say, "Here I will not go, here, I will not forgive."

LT: Can you forgive a person without forgiving the wrongful act?

MM: Anyone who's been a parent has dealt with the difference between the act and the person, and absolutely, forgiving the person is often essential, certainly in the family context. But the act often requires accountability of one form or another, and I think it's not at all inconsistent for someone who's been a victim of a crime to say, "I personally forgive you. I want no ill to you, but your harm was not just against me, it was against the law and the community, and the processes of accountability should go forward."

LT: When can and should a person be forgiven?

MM: Well, again, I think these are for the individual victim or survivor, very personal questions. It's interesting to me that every religion, every civilization has developed techniques and thoughts about promoting forgiveness. It seems to be a capacity that allows human beings to get along, indeed large mammals. There are studies of large baboons that have rituals of forgiveness that seem to defuse conflict. But for the individual human being, it's interesting to see that there are very different views among different religious and philosophic traditions. For example, is forgiveness justified without any acknowledgement of the wrong doing by the offender? Religious groups disagree about that. Some say that an apology is necessary, some say that action by the wrong doer is necessary before forgiveness is warranted. Others say, actually it's more God-like for the survivor of a wrong to forgive without any action on the part of another.

MM: So, I do believe that for the individual, these are very personal and often religious theological differences. When I think about the American legal system, I do think that we are at this moment living at a time of great punitiveness, particularly in the criminal law system. And I think we have swung through time, the pendulums go back and forth. Right now we're on really is very severe, extreme, that's produced mass incarceration, that's produced more incarcerated people per person than just about any society in history. And therefore, I think that forgiveness is a missing ingredient and the development of grounds, reasons, and criteria. In my view, yes, forgiveness is more warranted, more justified when there's contrition, when there's acknowledgement by the wrongdoer that they've done wrong, and when they have actually taken steps towards amends.

LT: And how does forgiveness by law differ from forgiveness by individuals? Can you give some examples of forgiveness by law?

MM: Sure, so forgiveness by law, there are some actual technical methods, forgiving a crime, for example, a pardon... I mentioned the President, governors have the pardon power that derives from the pardon of a king, absolute power, more constrained in a democracy, one hopes. But other forms include in the criminal system, expungement of a record, so it erases from someone's record just

officially that they ever had a criminal sense. Another may be probation rather than serving a sentence, someone may be put under a surveillance or even earlier in the criminal process, there could be the decision not to prosecute, to divert a matter from the formal legal system to community service or to some other kinds of action or to nothing at all in terms of official response. And I also think it's interesting to compare all of this with bankruptcy, which is a major technology of forgiveness that the legal system has developed, the framers of the United States Constitution felt so strongly about it, they put it in the constitution that the Congress has the power to create a system to forgive debts, personal commercial debts. And that is a process in the United States that's governed by the federal government and allows individuals and businesses to start over, even if they are seriously in debt.

LT: When is forgiveness in the law justified?

MM: I think we can start with the example of forgiving debt, right now, in the United States, there's a federal statute that specifies the circumstances, I don't agree with it entirely, for example, it does not allow the student debt to be subject to bankruptcy, so that's a political debate. But I think that where individuals or companies have taken responsibility and show that they're good for future risks, I think it should be forgiven, I think that for the criminal law, I have a special interest in those who can demonstrate they have a future that could be very different, so very often for young people.

MM: For minors, the juvenile court was invented in the United States by Jane Adams in 1899. The idea that young people actually are still developing, and shouldn't be held to the same standards as adults. The United States right now has swung to the other extreme, and almost every state treats a young person as an adult if they've committed a very serious offense. And I think that that's missing the possibilities of forgiveness and second chances, starting over, clean slate, all the words that we use in the context of bankruptcy. I think the same can be said for even many adults who have taken steps to show that they are capable of change and are able to make amends or at least try to live in a different way going forward.

LT: And should that decision, the legal decision to forgive take into account the victim's decision on whether to forgive or not?

MM: You know, it's such an interesting question. I think it's of course, always somewhat relevant, but I do find it helpful myself to distinguish between the wrong done to an individual, which the individual should be the master about whether to forgive, whether to hold resentments and a grudge as opposed to the wrongs done to the society. On that the individual victim or survivor is one of many, many, and therefore, the view may be relevant but not determinative. And so, for example, it's a very difficult question where there are instances of domestic violence and the victim usually a woman very often says, "Oh, I forgive and I don't want an arrest and I don't want a prosecution," but sometimes that's an expression of the actual power relationships in that household, and it's a separate harm to the society, that there is that jeopardy, and that's a decision to be made by the police and by the prosecutor.

LT: Because the crime really harms a whole community, it's not just the victim who suffers.

MM: Precisely, precisely.

LT: And it would seem to be a heavy burden on victims to decide if the person who harmed them

should be prosecuted or not.

MM: Well, that's right, and the mirror image is the use by many states of what are called victim impact statements, that give the victim at the time of sentencing the chance to explain what kind of harm they have suffered. Which on the one hand, sounds very human and very lovely, on the other hand, it produces enormous inequities, so that the sentence then is affected by how articulate the victim is or how much the victim is a source of sympathy, or a target of sympathy for the judge, which may introduce racial bias, gender bias and other kinds of problems. So, even in that context, I don't think deference to the victim should have a very big part in the way the legal system responds.

LT: You talked about inconsistencies in the law and the lack of forgiveness of student debt, how do you see consistency in terms of forgiveness?

MM: Aristotle said that treating likes alike is the core idea of equality, and the corollary, of course, is that it's okay to treat those who are different differently, and indeed it might be very unfair not to do so. The difficulty is who's alike and who's not. Because law uses state power. Human beings and our foibles are then used in the law. There's a cartoon that I always think about. It shows a judge with a very big nose and a big mustache looking down from the bench at a defendant who has the exact same nose, exact same mustache and says, "Obviously, not guilty!" There is this risk, right, of the bias and the limits of sympathy that reflect the experience of those who are in positions of power. What law tries to do is restrain those personal differences, and tries to come up with standards for treating people who commit the same offense, the same way. However, forgiveness, which I do commend, introduces discretion. Whether it's done by the judge at the sentencing stage, or it's done by the prosecutor about whether or not to pursue a case, or by a governor, or a president about whether or not to pardon.

MM: And I'm not opposed to that, but I think that we're at a very early stage of developing the criteria so that we can even know whether those forms of discretion are exercised in any kind of consistent manner. Usually those are not even studied, they're not even recorded. What's striking to me, that the medical profession really evolved when it became far more empirical. The turn of the 20th century. You were as likely to die if you went to a hospital as if you didn't go to a hospital. Well, what changed was the decision to have empirical study, and to have evidence-based treatments. We're just at the early stage of that with the legal system. We don't even collect data in a systematic way. And until we do so, we probably won't be able to know whether there are massive inconsistencies or it's something approximating some emerging standards for the exercise of discretion. And I think we need to do that, and we need to work with lawyers, judges, but also the broader society, on what criteria are relevant to the exercise of discretion, and to the introduction of forgiveness in the system.

MM: Take, for example, what President Obama did when he had the pardon power as President. He thought that the discretion was a problem. So he introduced a challenge to a group of lawyers to come up with criteria and review cases, and then recommend a pardon. They recommended, in particular, pardons across the board for people who were punished under statutes that had subsequently been amended to have a lower sanction. So, for example, marijuana possession. And President Obama accepted that recommendation and had it across the board, forgiveness for whole classes of people. I think that that's a very stark difference from a president who, just on a whim or on the basis of who had access to the president, says, "I give a pardon."

LT: Are there any evidence-based studies, results of a punitive justice system, one with heavy sentences versus one that is more balanced toward forgiveness?

MM: Well, there are massive numbers of studies about the death penalty in the United States, which has shown not to have any particular effect in deterring crime. There's also an emerging plethora of studies about restorative justice, the use of a kind of alternative to a formal punitive system in the criminal law, but also, for example, in schools. Schools that are using peer-led or negotiator-led conversations, and then community service or other kinds of responses to the wrongdoing. And those are showing some promising results. Those alternatives actually reduce suspensions, reduce the violence in schools. And the studies in the criminal system also seem promising, but it's still too early to draw broad conclusions.

LT: You mentioned that the US has one of the highest mass incarceration rates in the world and one of the most punitive justice systems. Does the US also have a higher recidivism rate where people released from jails and prisons commit new crimes?

MM: From what I've seen, the answer is 'yes'. And your point about the length of sentences is particularly noteworthy. So the very same kind of crime in the United States and in Sweden, in Finland, will produce in the United States perhaps a 20 years' sentence, and in one of those Scandinavian countries, maybe five to 10 years. We are far more punitive, and we have no evidence that that produces lower rates of crime. In fact, we have higher rates of crime.

LT: Can you be more specific? What kind of crimes have 20-year sentences in the United States versus five years in other countries?

MM: Sure. Armed robbery. Even manslaughter, death committed by the individual.

LT: There are some examples where countries have negotiated, essentially, forgiveness agreements, amnesties. Can you talk about some of those and how you see them?

MM: In this era of post-conflict management, there's even now a word for it, 'transitional justice'. Societies that have had civil wars or even conflicts with another country, understand that rebuilding or building for the first time a reliable justice system, is part and parcel with how they emerge from those kinds of violent conflicts. South Africa has become a kind of touchstone for this movement of transitional justice, with the peaceful transition from Apartheid to democracy. And its interim constitution called for a transitional process to build a bridge, was the language, "Build a bridge from the past to the future." And it was under that framework that the South African Parliament created the Truth and Reconciliation Commission, which has now been copied by dozens, maybe at this point, if you include municipalities, hundreds of other communities. Another context that combines actually, debt and other kinds of forgiveness involves communities that are very indebted to creditor nations and negotiate forgiveness of their debt, often again, emerging out of some kind of conflict.

LT: When is forgiveness successful and when is it unsuccessful?

MM: For a society, forgiveness has success if there is no repetition of the injustice. Too often, societies understandably build a narrative about their past that creates justifications for new grounds of victimization, new grounds of civil war, or turning the prior oppressors into victims. And

unfortunately, we've seen that even in interpersonal relationships, these cycles of violence. So, I answer your question by looking to failure. So there are failures, if we don't have some process of breaking those cycles and forgiveness can represent a resource, interpersonally and in a society to break those cycles of violence.

LT: How does forgiveness help the victim?

MM: When I first started studying this subject, the only place at Harvard that had any references about it was the [Harvard] Divinity School, and at this point, there are as many resources in the [Harvard] Medical School, many, many studies about the therapeutic benefits to an individual who lets go of resentment, blood pressure, stress. Put aside though, those are pretty significant, those benefits, there do seem to be many benefits in terms of letting go of a burden. And this you find in works of literature and art, people talk about forgiveness as having this renewal for a victim. But it should be juxtaposed with the problem of people, even a society putting a pressure on victims to forgive, if they're not ready to forgive, because that's not real forgiveness and that can actually cause a new burden for the individual.

LT: You have a wonderful quote in your book, forgiveness does not change the past, but it does enlarge the future. Can you elaborate on that?

MM: I think there's a great danger of people thinking that the best way to deal with something that's terrible is to forget about it. We certainly know societies that have tried to do that and taken terrible atrocities and buried them. And we know individuals who've done that and it often actually leads to new kinds of trauma. So, the critical point for me is that forgiveness is not forgetting, and indeed finding ways to put the terror, the harm, the violence into the past rather than making it still part of the present, usually requires some kind of recognition, some kind of facing, facing what happened, not forgetting it. But if you don't come up with a way to put it aside, it does occupy not just the present but the future. Someone who has been a victim of violent crime is fearful to go out of the home. Someone who's lost a business is fearful of taking a risk again. Someone who has been victimized feels righteous, anger and becomes an offender himself. Those are the dangers about the future. And I think that it's not by accident that so many societies have developed processes and rituals around forgiveness to allow individuals and groups to create a different a future and yes, a bigger future, a future that's not mortgaged to the past.

LT: Before I ask for the three takeaways you'd like to leave the audience with today, is there anything else you'd like to mention that you haven't already touched upon?

MM: Thanks so much and thanks for all these wonderful questions. I think it's important to study where there may be systematic grants of forgiveness, and denials of forgiveness. And it probably isn't surprising to find that there are historically biases in a society that are reflected in the exercise of discretion around forgiveness, but also expectations, that some are expected to forgive, often women, often people of color, and others are not. These too may express the power imbalances, the historic roles assigned by society to some people as opposed to others. And those are reasons for real caution. The story I can't get out of my head was told to me by people involved in the truth and reconciliation process in South Africa, where there were opportunities for offenders to seek amnesty from the government if they told everything that happened.

MM: And there were individuals who would come and seek amnesty and then turn to the victim,

stick out their hand and expect to be forgiven personally. And I heard directly from some of those survivors of apartheid era violence that they had thought they were ready to forgive until there was that expectation, that assumption that they would forgive, and that kind of deprivation of their own choice about whether or not to forgive. And that further expression of the power imbalance that was underlying the entire conflict. So, that's one more thing that I would suggest, and just one more if I can. I have other parts of my work that deal with equality and discrimination on the basis of race and gender, disability.

MM: And people have asked me, what's the relationship between these two parts of your work? And I have to say, I see them all of a piece. I think that at an extreme form, discrimination can be the denial of people's humanity, and that is often just used in the course of violent acts and murders, in mass atrocities and if we don't work on actually strengthening affirmatively the recognition of the dignity of every person, we are always at risk of some new round of terror and violence, and the law is a mechanism, both to deal with the past, but also to strengthen this commitment to the dignity of every individual.

LT: The commonality in all of your work seems to be fighting injustice and creating a more positive way forward.

MM: Well that's very kind. I hope so.

LT: Martha, what are the three takeaways you'd like to leave the audience with today?

MM: Such a great challenge that you are giving me, but I would say that one is that forgiveness is a resource for individuals and for societies, if it is chosen to let go of a justified grievance, it can open up new possibilities for those who have suffered. I would also say a takeaway is that there is a past and there's a future, and there's a present, and we can use the law and institutions and culture to help us make sense of the past, but not make it spell our future and not make it determine our future, and law offers one resource for doing that, but so does art, so do rituals. So does the teaching of history, finding ways to let our past be in the past, to pay attention to it, but not control our future, that's a second takeaway. And the third takeaway that I would try to offer is that there are lessons to be learned from our personal lives.

MM: I made reference to being a parent, for example, for our collective lives, but we shouldn't assume that they're all the same, and when we talk about a society forgiving, it's not the same as an individual forgiving and so finding constantly, where are there points of connection, where are there differences? Let's be honest about that and not over-claim. That's another point that I would draw, and I'll just give you one more freebie, which is my very persistent method of analysis, is to do comparisons, as I did here, I'll compare criminal law and bankruptcy or the treatment of debt, I'll compare the treatment of child soldiers and the treatment of US youth offenders, and I think that comparison often is a way to help us be much clearer about our insights and our values.

LT: Thank you Martha, this has been terrific. And thank you for all your work fighting injustice.

MM: Thank you so much.

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