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When Should Law Forgive?

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Book Review:
When Should Law Forgive?

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When Should Law Forgive? Martha Minow (2019), New York, NY: W.W. Norton, 2019.
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“In heaven there will be no law, and the lion shall lie down with the lamb....
In Hell there will be nothing but law...”

Grant Gilmore, *The Ages of American Law* (1977, p. 111)

What should law forgive? The mere asking of the question suggests there is a tension between the noun and the verb. As Alexander Pope famously wrote in his “Essay on Criticism,” “To err is human, to forgive is divine.”

But not all errors, mistakes, or transgressions of social norms are considered criminal. It is the State that defines crime. And there are rules and processes used to distinguish between sin, human error, and crime.

Perhaps the structural difference between a private wrong and a public wrong can best be illustrated by looking at the caption or title of a typical private lawsuit and a public one. “Joe Jones v. Alex Smith” is a typical caption of a personal injury lawsuit to recover damages received in a car crash. “State of California (or in some states, People of the State of...) v. Alex Smith” is the caption of the criminal charges brought against the same defendant for criminal negligence in the car crash involving Jones. As can be seen, in the private lawsuit the aggrieved party is Jones; in the public lawsuit the aggrieved is the State or the People.

Should the alleged wrongdoer, Smith in our example, be judged by the same criteria in both lawsuits? Should the same process be used to determine if in fact Smith has violated the applicable rule of law? How should the penalty be determined? Should the “divine” decision of Jones to forgive Smith effect either legal action? These questions suggest the difficulties faced in trying to answer the question in the title of this book - when should law forgive?

To avoid the pitfalls of theoretical abstraction Professor Minow isolates three policy clusters where the law seems to be in some instances unforgiving and in others forgiving:

- 1 – The U.S. system of juvenile justice and the international legal system’s treatment of child soldiers.
- 2 – The different treatment of corporate debtors from that of student and consumer debtors, and nation-state debtors
- 3 – The differences between forgiveness (a pardon or amnesty) of the apartheid governors of South Africa, the bankers at the center of the 2008 mortgage crisis, former President Nixon, the Vietnam era draft resisters, and Sheriff Joe Arpaio.

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To be clear, Professor Minow recognizes the nuances in each of these human situations. Her policy-centered reflections, using an almost Socratic approach as she reasons toward answers to the questions with which we began, covers 163 pages of text and 663 endnotes. There are multiple examples of her scholarly recognition of the multiple, often conflicting values implicated in judging the persons in these situations. As a single but typical example, she discusses at some length the “guilt” of most older child soldiers, in that they are almost of what was once called the age of reason.

At the same time she highlights the mitigating factors that were likely operative in most children’s decisions to participate as a soldier: e.g., coercion. At one point she even mentions Victor Hugo’s 1862 novel *Les Miserables* to hint at the thought that in some circumstances redemption ought to supersede punishment.

I have one significant criticism. In her otherwise wide-ranging and complete discussion, Professor Minow tends not to focus on the fact that sound application of the law requires recognition of the “internal” imperfections in rules as applied. All rules are contextually ambiguous, thus requiring interpretation. For instance, does a law that prohibits all vehicles from a park prohibit a person dependent for mobility on using a motorized wheelchair from entering the park?

Also, all rules in application are both under-inclusive and over-inclusive at the same time, requiring interpretation in application. Again a simple example: The legal drinking age for alcohol is 18. At a family gathering celebrating a family member's marriage the 12 year old flower girl is given a small cup of wine so as to join a toast to the groom. Is this a violation of the prohibition on drinking alcoholic beverages by persons under 18 years of age?

Importantly, Professor Minow does discuss how “external” social-economic conditions, and developmental differences can and should be considered in law enforcement. She points to the once central concept of “equity” as the remedy for rigidities in the common law. She discusses the U.S. system of criminal justice today as a reflection of “the nation’s social and economic inequities.” Professor Minow identifies and discusses a series of decision-points where race and class factors distort the quest for equal justice, specifically, “arrests, police violence, judicial delays, inadequate legal representation, plea bargains in the face of prosecutorial overcharges, lengthy mandatory minimum sentences, jail and prison violence, and massive use of solitary confinement”.

Criticism aside, in each policy context Professor Minow recognizes the importance of human emotions: anger and revenge, remorse and repentance. She discusses for instance the pain inflicted on a victim who is pressured to forgive, and on the other hand how forgiveness by the victim can be liberating from the emotional prison of hate and vengeance.

Professor Minow identifies and illustrates in operation, three routes the law has taken to incorporate forgiveness in its decision-making:

- 1 – Judges and legislators can adopt rules that include mitigating conditions;

- 2 – As opposed to enforcement quotas they can enable by rule the exercise of discretion by law enforcement that tends toward leniency;
- 3 – They can make use of less formal procedures that permit inclusion of apologies and expressions of feelings by all persons affected by the decision to be made; procedures like mediation; truth and reconciliation commissions; or recently developed restorative justice initiatives that focus on repairing the harms to the persons and to their communities.

Throughout this challenging and important book Professor Minow provides guidelines for achieving a just balance of the many values and interests implicated in the application of inherently imperfect laws to the behaviors of inherently imperfect fellow human beings. One could begin implementation of these just guidelines simply by limiting the use of “zero tolerance” policies to those acts considered by law as unforgivable (p. 66).

On both page 209 in endnote 10, and page 217 in endnote 92, Minow refers to Biblical calls for a “Jubilee” every seventh seventh year: “slaves would be freed, debts would be forgiven, and land would be returned.”

While contemporary thinking dismisses these biblical calls for justice as impractical or worse, as recently as the 1970s Andre Trocme, one of Yad Vashem’s “Righteous Among the Nations” and the European secretary of the Fellowship of Reconciliation, wrote a classic book, *Jesus and the Nonviolent Revolution*, reissued by Orbis Books in 2004, in which he concludes “Jesus was indeed proclaiming a Jubilee” (quoted in Minow, 2019, p. 36).

Professor Minow’s mere mention of such material and of the work today of the Jubilee Network can be seen as a light drawing the law towards forgiveness, and beyond, to human solidarity and divine justice.