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FORGIVENESS AND THE CRIMINAL LAW: FORGIVENESS THROUGH MEDICINAL PUNISHMENT

Dennis M. Cariello*

“There is a need for understanding, but not for vengeance, a need for reparation, but not for retaliation.”¹

Punishment is the most dramatic manifestation of civil government power. Whom and how a society punishes are key political questions that are indicative of national character. Throughout history every civilization has struggled with two basic questions: whom shall we condemn and how shall we forgive?

The notion of forgiveness has ancient roots, finding bases in philosophy,² literature,³ religion⁴ and law itself.⁵ Yet, despite this his-

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1. Alexandra Zavis, *Panel Faces Truth, Fear and Anger: Apartheid's Past is Confronted*, HOUS. CHRON., Mar. 2, 1996, at 23 (quoting Justice Minister Dullah Omar of South Africa who authored of the Reconciliation Bill).

2. See, e.g., Paul Whitlock Cobb, Jr., Note, *Reviving Mercy in the Structure of Capital Punishment*, 99 YALE L.J. 389, 391 (1989) (“Mercy is not a thing opposed to justice. It is an essential part of it: as necessary in criminal cases, as in civil affairs equity is to law.” (citing 5 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 285 (H. Frowd ed., 1920))); SENECA, *On Clemency, in THE STOIC PHILOSOPHY OF SENECA*, 137, 138 (M. Hadas trans., 1958) (“One man’s youth sways me, another’s age; one man I have reprieved for his eminence, another for his insignificance; and when I found no other ground for pity I have shown charity to myself.”).

3. See, e.g., T. HOCCLEVE, *THE REGIMENT OF PRINCES* 90 (Early English Text Soc’y Extra Series) (F. Furnivall ed., 1897, reprint 1978):

For your equal, reconciliation; for your enemy,
Allowance of wrong-doing; and for yourself, virtue;
For those in trouble, oppressed with wretched woe,
Mercy indeed, and pity his hardship
As far as you are able, and alleviate his misfortune;
And have compassion for him, so that if your power fails
Intention shall compensate you for your action.

Id. See also WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act IV, scene 1 (“The quality of mercy is not strain’d, / It droppeth as gentle rain from heaven / Upon the place beneath: / it is twice blest; / It blesseth him that gives and him that takes”); JOHN MILTON, *Paradise Lost*, Book X, in 2 THE WORKS OF JOHN MILTON 307 (F. Patterson ed., 1931) (“temper . . . Justice with Mercie”).

4. See, e.g., *Romans* 3:25 (“God presented him [Christ Jesus] as a sacrifice of atonement, through faith in his blood. He did this to demonstrate his justice, because in his forbearance he had left the sins committed beforehand unpunished.”); Samuel

tory many prominent scholars argue that society has no business forgiving criminals. They argue that forgiveness is the sole province of the individuals who have been wronged by the criminal act. At most, society can only offer mercy in the form of light sentences.

A. What is Forgiveness?

Forgiveness is the voluntary cancellation of an obligation created by conduct, whether purposeful or negligent. It is the means by which a society⁶ brings wrongdoers back into the community.⁷ Forgiveness is the basis for a new relationship, one in which a wrongdoer accepts responsibility for his acts or omissions and desires to be welcomed back into the community. In turn, society must recognize the worth of the wrongdoer and that it is better to include the wrongdoer than banish him from the community.

Whereas forgiveness between persons is often an act of reconciliation fraught with emotions, society's forgiveness is a means to government's basic function: to make its citizens productive. History bears this point out. The English Kings, in extending pardons were seen as bestowing a gift bestowed on the wrongdoer.⁸ A pardon was "a work of mercy, whereby the king either before attainder, sentence or conviction, or after, forgiveth any crime, offence, punishment, execution, right, title, debt or duty, temporal or ecclesiastical,"⁹ "an instrument of equity in the criminal law designed to promote the general welfare by preventing injustice."¹⁰ Pardons not only released the offender from punishment, it also renders the

J. Levine, *Teshuva: A Look at Repentance, Forgiveness and Atonement in Jewish Law and Philosophy and American Legal Thought*, 27 FORDHAM URB. L.J. 1677 (2000) (tracing the notions of repentance, forgiveness and atonement through Jewish law).

5. See, e.g., EDWARD POWELL, *KINGSHIP, LAW AND SOCIETY: CRIMINAL JUSTICE IN THE REIGN OF HENRY V* (1989)

6. For the purpose of this essay, society encompasses the governmental unit responsible for punishing a wrongdoer. Thus, most often, society refers to local government units. It can, however, refer to higher levels of government if that is the level responsible for punishing a particular wrongdoer.

7. For the purposes of this essay, "community" refers to the body governed by the society that is punishing the wrongdoer.

8. See, e.g., JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 169-74 (1988).

9. E. COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 233 (4th ed. London 1669). See also Carla A. Johnson, *Entitled to Clemency: Mercy in the Criminal Law*, 10 LAW & PHIL. 109, 112-13 (1991).

10. Linda L. Ammons, *Discretionary Justice: A Legal Policy Analysis of a Governor's Use of the Clemency Power in the Cases of Incarcerated Battered Women*, 3 J.L. & POL'Y 1, 7-8 (1994).

offender innocent in the eyes of the law, and welcomed her back into the community at large.¹¹

Like forgiveness between individuals, societal forgiveness does not require that society forget the wrong committed or the consequences of it. For example, only an extraordinary person could forgive an adulterous spouse and act as nothing had ever happened. For most people, the forgiving spouse would remember the sting of the adulterous offense, perhaps be more suspicious of late-night work sessions and trips with friends, and would otherwise need time to fully treat the adulterous spouse as if nothing had occurred. This defensive response is important in the forgiveness-process. The wrongdoer must work to regain her spouse's trust.

Likewise, by using forgiveness as a means to reintegrate wrongdoers into the community, it would be unwise to consider that the wrong act or omission never occurred. Society could make the community vulnerable to a wrongdoer who lapses into illegal behavior. If the society forgot the wrong committed, the community could not help the wrongdoer avoid the situation or take other measures to protect itself.

Moreover, in most cases, the penance a wrongdoer must perform is tailored to that wrong. The adulterous spouse need not prove her worth by washing cleaner dishes or getting a raise at work. She must perform acts that help restore the lost trust. Societal forgiveness should also take into account the conduct of the repentant

11. *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866). Pardons are to be distinguished from other forms of executive forgiveness, such as clemency and amnesty. See generally Cozart, *Clemency Under the Federal System*, 23 FED. PROBATION 3 (1959) (discussing the nature and types of clemency and clemency procedures in the federal system). Conversely, amnesty, is not connected to forgiveness. Derived from the Greek word for "forgetfulness," 1 OXFORD ENGLISH DICTIONARY 406 (2d ed. 1989), amnesty is generally granted to groups of people when it is beneficial to overlook a group's bad acts because public welfare is improved. See *Burdick v. United States*, 236 U.S. 79, 95 (1915) (explaining the difference between pardon and amnesty). Unlike a pardon, however, the underlying crime is, as President Carter noted, forgotten, not forgiven. See EXEC. ORDER No. 11967, 3 C.F.R. 91 (1978) (directing the Attorney General to dismiss, *with prejudice*, indictments against draft evaders); KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* 81-82 (1989) (describing the effect and rationale of President Carter's grant of amnesty to those who evade the Vietnam draft). Although this distinction has little legal value, it is, however, significant in societal terms. *But see* *Knote v. United States*, 95 U.S. 149, 152-53 (1877).

It is sometimes said that [amnesty] operates as an extinction of the offence of which it is object, causing it to be forgotten, so far as public interests are concerned, whilst [pardon] only operates to remove the penalties of the offence. This distinction is not, however, recognized in our law.

Id.

wrongdoer and exercise wise caution to avoid placing that person in circumstances that will play to the wrongdoer's weakness or endanger others. This serves society's goal to make the wrongdoer a productive citizen again.

B. How Society Should Forgive

Although forgiveness requires the release of an obligation, it does not require the wrongdoer to go unpunished. As the Bible explains, "[i]f your brother sins against you, rebuke him; and if he repents, forgive him."¹²

This rebuke is important in the forgiveness process; it is the means by which society can teach the wrongdoer what she did was wrong. This is, of course, the entire purpose of societal forgiveness, reintegrating a wrongdoer back into society and making her productive again. Thus, the tailoring of the rebuke to the wrongful act or omission is of critical importance.

Take the case of a child who purposefully breaks the window of a neighbor while playing with a ball. Most neighbors would ask that the window be replaced with the money of the child. If the child did not have the money to pay for the window, the child could then work it off performing chores for the neighbor. The neighbor forgives the child for what was done and, through this punishment, teaches the child an important lesson about the worth of personal property. This rebuke, which is part of the forgiveness process, is termed "medicinal punishment" by Thomas Aquinas.

If the only thing we want is to inflict punishment on the sinner, then we act altogether unlawfully; but if our primary aim is the good to be achieved through such punishment - the sinner's correction, or at least his restraint so that others may enjoy peace and justice be defended and God honoured - then in the right circumstances retribution can be lawful. . . . Fatal sins are sins deserving eternal death in the future retribution when God delivers his unerring judgement; but in this life punishments are meant to be medicinal.¹³

Similarly, after having felt the sting of an offense, society has a responsibility to act. Yet, society's action must be medicinal in nature to be forgiving: it should tailor punishment in such a way as to help the wrongdoer avoid committing the crime again. It attempts

12. *Luke* 17:3-4. Elsewhere, Christ explained, "If we confess our sins, He is faithful and just to forgive us our sins and to cleanse us from all unrighteousness." 1 *John* 1:9.

13. II-II SUMMA THEOLOGICA 108 (T. McDermott ed.).

to teach the wrongdoer what was wrong about her act and how to avoid the situation again. By offering punishment with a desire to give offenders the opportunity to understand clearly what they have done wrong, take responsibility for it, and change their course of action, society can welcome the wrongdoer back into the community.

C. When Should Society Forgive

Perhaps the toughest question is when society should forgive. Theoretically, society should forgive all wrongdoers. The practical realities of human nature and limited resources make it difficult to do so. Therefore, society should reserve its ability to extend forgiveness to a few situations.

First, society should forgive only when a wrongdoer is repentant. As mentioned, forgiveness is a means to bring a willing person back into the community. A relationship is created between a society that recognizes the value of the wrongdoer and the wrongdoer who wishes to rejoin society and become productive again. If a wrongdoer does not exhibit remorse for her actions, she would not benefit from medicinal punishment: she would fail to see the benefit of rejoining a law abiding community and the lesson society tries to teach, that her action was wrong, would fall on deaf ears.

Secondly, society should forgive only when an appropriate remedial measure can be fashioned. The measure must be sufficiently tailored to address the wrong committed by the wrongdoer so that it is remedial. Because of resource limitations, society cannot forgive every wrongdoer through medicinal punishment. For example, it might be extremely difficult to use medicinal punishment on a murderer: in some cases a punishment may not be able to be sufficiently tailored to meet the needs of the murderer, because of the nature of the crime; in others, a punishment could be crafted, say one that emphasizes the value of life, but there might likely be a shortage of people who wish to spend the necessary time with that particular wrongdoer. Thus, society should forgive transgressions when its resources make it most feasible to do so.

Perhaps no wrongdoer is better suited for society's forgiveness than a one guilty of possessing drugs for personal use. When a drug user exhibits a desire for help to rid herself of her addiction, society has an obligation to forgive her through medicinal punishment. Society is in a good position to impose medicinal punishment on the repentant drug user. There are numerous government programs available to help addicts. By seeking to alter the addict's

future conduct, society is forgiving the addict — by punishing her in a way designed to help her. And in turn, society reaps the benefits of the forgiveness it extended — increased productivity from the former-addict.