

Does the American Legal System Thwart or Encourage Forgiveness?

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Does the American legal system thwart or encourage forgiveness? In lawsuits, persons allege that others have wronged them. The Gospel tells us that when persons wrong us, we must forgive them not seven times, but seventy times seven times.¹

Forgiveness seventy times seven times is not the first thing that comes to mind at the mention of litigation. The increasing number of lawsuits in this country has pushed the dockets of our courts to the breaking point. Does our method for resolving disputes that persons cannot resolve among themselves thwart or encourage forgiveness? We need not search long for an example of a lawsuit that resulted in a plea for forgiveness.

In 1998, President Clinton declared in a speech at the annual White House prayer breakfast that he had asked for “forgiveness” from his family, friends, staff, Cabinet, Monica Lewinsky, and her family for his self-described “sins.”² This request for forgiveness followed a protracted legal proceeding in which he was not quick to acknowledge, in his words, “the fact that I have done wrong.”³ Was the President’s plea for forgiveness something that our legal system encouraged or obstructed, or simply had nothing to do with?

I will address the broad question of whether our legal system encourages or thwarts forgiveness as follows. First, I will address what is meant by “forgiveness.” This is, of course, a large question not merely for the lawyer, but for the theologian and the philosopher. Notwithstanding the complexities of the question, we must establish a baseline meaning of forgiveness before we can consider the effect of our legal system on it. Second, I will address what place forgiveness, as understood, occupies in a legal system that is primarily concerned with other ends, such as equal treatment, due process, and corrective justice. Finally, having attempted to situate forgiveness among these other ends, I will set forth what incentives or disincentives I believe our rules of litigation create for forgiveness.

What, first, is meant by forgiveness? The word “forgive” has different meanings. It can mean, on the one hand, to grant a pardon for, or a remission of, something, as in to “forgive a debt.” In this sense, the word “forgive” is used as a transitive verb with a thing, rather than a person, as its object. Bankruptcy law is said to forgive the debt of the debtor. An executive pardon is said to forgive the crime of the offender. In this sense, forgiveness goes hand in hand with “mercy.” “Have mercy on the criminal by forgiving the offense.” “Have mercy on the debtor by forgiving the debt.”

Whether the American legal system thwarts or encourages the forgiving of legal liabilities, and thus thwarts or encourages mercy, is a large question that implicates the very concept of justice itself. I am more concerned here with the forgiveness of persons,

rather than the forgiveness of legal debts. As used in this sense, the word “forgive” is a transitive verb with a person as its object, as in “I forgive you.” The parent of the molested child can forgive the molester; the employer whose trade secrets are divulged can forgive the employee who spilled them; the family of the victim killed in a bombing can forgive the terrorist. Forgiveness in this context has been described as “forswearing resentment on moral grounds,”⁴ or “overcoming *apoint of view*, namely, the point of view of the other as ‘the one who wronged me.’”⁵

It is not necessary for purposes here to adopt one or another of the various definitions of interpersonal forgiveness. As the Catechism of the Catholic Church explains, in a way that draws out what is common to different definitions, it is “‘in the depths of the *heart*’ that everything is bound and loosed” by forgiveness. “It is not in our power not to feel or to forget an offense,” the Church goes on, “but the heart that offers itself to the Holy Spirit turns injury into compassion and purifies the memory in transforming hurt into intercession.”⁶

Suffice it to say that “forgiveness,” as I will use the term, is a moral response that the victim of a wrong has to the wrongdoer, be it giving up resentment, turning one’s heart from injury to compassion, or some other formulation. Forgiveness is not something that the law has power to compel. Just imagine a judge ordering the family of a bombing victim to forgive the bomber. A family member might comply with the order by uttering the words, “I forgive you,” but unless the act of will that those words represent occurs, there has not been forgiveness. Indeed, the law has no more power to compel forgiveness than it has to compel resentment.

The weakness of the law in this regard should not be cause for concern, for the notion of compelled forgiveness is incompatible with the change of heart that an *individual* must make in order to truly forgive someone. Though the law has no power to compel or forbid forgiveness, it may operate to facilitate or obstruct it. Before, however, we jump either to condemn a law for thwarting forgiveness, or to praise a law for encouraging it, we must acknowledge that the law primarily directs itself toward ends other than forgiveness.

In the criminal law, we speak of rehabilitating offenders, incarcerating them, deterring others from committing crimes, and exacting just deserts. In tort law, we speak of corrective justice and allocating the risk of accidents in society. In contract law, we speak of protecting expectations and reliance based on other people’s promises.

Across the bounds of different areas of law, we speak of promoting the common good by defining certain spheres within which individuals may freely pursue their own ends and others within which they may not. We proffer ideals of individual autonomy, equal treatment, and impartiality, all in service of the common good.⁷ In its pursuit of *justice*, there is no question that the law leaves room at different turns for *mercy*. We must be careful, however, to distinguish mercy from forgiveness. Mercy has been described as inflicting on a person a consequence that is less harsh than legal rules allow.⁸ The governor may grant a reprieve of execution to a guilty, convicted cold-blooded killer. The

family of the victim, however, may refuse to forgive the killer. Conversely, the family of the victim may forgive the killer, though it lacks the power to grant mercy. In criminal cases, the state has the power to grant mercy, but only individuals have the power to forgive the offender for the injuries they have suffered.⁹

We must be especially careful to distinguish mercy from forgiveness in civil cases, where each lies within the power of the victim to grant. Suppose an impoverished mother of four children is struck by a car driven by a wealthy and intoxicated driver. The victim's injuries result in uninsured medical bills of \$1,000, for which the driver is legally responsible. For the victim, the \$1,000 is the difference between feeding and not feeding her children for three months. For the driver, the \$1,000 is one meal out. The victim has the power both to forgive the driver (to foreswear her resentment of him), and to grant him mercy (to not sue him for the \$1,000). In order to forgive him, must she grant him mercy? In other words, may the victim truly give up any resentment she harbors toward him but still insist upon the demands of justice? It seems to me that she may do so, as the demands of justice serve interests that are separate from forgiveness. I do not mean to suggest that a victim always may demand compensation consistent with forgiveness of the wrongdoer. In a given case, if a victim has suffered \$1,000 in medical expenses and \$1,000,000 in emotional suffering (as the law would calculate it), perhaps a real change of heart would require that the victim absorb all or some of the emotional suffering—at least that part that relates to the victim's resentment of the wrongdoer. And if it is revenge that motivates any demand for compensation, there probably has not been forgiveness, as resentment persists.

That the law serves interests separate from forgiveness does not mean that the effect of laws on forgiveness should be entirely disregarded. Forgiveness is a moral virtue and, all else being equal, we should not have a primary intent to thwart it. Imagine a law providing that parties to a civil lawsuit are forbidden, once a lawsuit is commenced, from ever communicating with one another again. What explains our intuitive objection to this law? The prospect of individuals never having the opportunity to forgive each other and reconcile their differences is grim indeed. It is true that parties to a lawsuit under this regime might separately forgive each other in their hearts, but does not face-to-face contact facilitate forgiveness and reconciliation where otherwise it might not occur? I, for one, would oppose this regime for the primary reason that it fosters resentment and thus thwarts forgiveness. The law serves other ends, to be sure, but I doubt that there is an aspiration that would justify the wall that this law would place in the way of forgiveness.

The purpose of this example is to show that while the law serves ends other than forgiveness, it is fair to consider the effect of a given law on forgiveness. The fact that a given law encourages or thwarts forgiveness is not a conclusive argument for or against it; the incentives, however, that a law creates for forgiveness must be considered alongside other ends it purports to serve. The laws that I will now consider are those that govern how a civil dispute between two individuals is resolved.

My observations regarding the effect of these laws on forgiveness are based on anecdotal evidence. Alongside its effect on forgiveness, I will consider the law's separate purpose. I

do not mean to suggest that from balancing the law's effect on forgiveness with the other ends it is meant to serve will follow a conclusion that one interest outweighs the other. Such an analysis would be akin to asking whether a particular line is longer than a particular rock is heavy.¹⁰ Where, however, a law thwarts forgiveness, we may ask whether the other ends it serves can be equally well served by a different law more amenable to the virtue of forgiveness. Let us proceed to walk through a lawsuit.

Our impoverished victim is struck and injured after dark by a car driven by our wealthy and *allegedly* intoxicated driver. What is the first thing the victim does? She hires an attorney, who most likely will be paid on a contingency fee basis. What does this mean? It means the lawyer will be paid only if the victim recovers from the driver—typically, one third of the recovery. The lawyer thus has a monetary incentive to maximize the recovery. If a lawyer succumbs to this incentive, forgiveness may be thwarted. I am assuming that there is a just level of compensation that the victim may pursue consistent with forgiveness. Monetary incentives may tempt a lawyer to persuade a client to pursue a higher level of compensation. To the extent that the lawyer fans the flames of resentment to provide motivation for doing so, forgiveness is thwarted.

My observations of this phenomenon are of course purely anecdotal, and certainly not meant to be universally descriptive. What justifies allowing fee arrangements that, anecdotally, may create incentives against forgiveness? On one level, it is respect for the autonomy of the victim and the lawyer as contracting parties who are free to strike whatever bargain they wish. On another level, it is to create incentives to ensure representation for the poor. If the impoverished victim had to pay the lawyer up front or by the hour, she likely would not have legal representation. If lawyers could not recover fees that may exceed the value of the work they put into a given case, they might not take the cases, for in each contingency case there is a risk that the lawyer will be paid nothing.

In the end, a policy that creates incentives for lawyers to represent the poor may also create incentives that thwart forgiveness and reconciliation. Once a lawyer is retained, the first step in a lawsuit is to file a complaint with the court. All that a complaint typically must contain, to quote the rule governing complaints filed in federal court, is “a short and plain statement of the claim showing that the pleader is entitled to relief.”¹¹

A plaintiff need not set forth every fact that provides a basis for the claim. The bare facts that a plaintiff must allege need only be based “upon information and belief.” For example, our accident victim might allege “upon information and belief” that the driver had been drinking that evening. Our victim, too, might assert the maximum amount of damages; an allegation of \$1,000,000 would be conservative. What might be our driver's response to this document? “One million dollars! What she says is not true . . . that twists the story . . . I never said that . . . how can she say that . . . ? Let me explain!”

If our driver has a competent lawyer, he will be doing no explaining for the moment. The driver will file an answer that loosely denies the general allegations in the complaint and sets up legal defenses to liability. Our victim will read the answer and exclaim, “How can he deny that?” and begin to suffer angst over the litany of legal defenses raised.

Have the pleadings encouraged or thwarted forgiveness? In my experience, the pleadings breed additional resentment and invigorate that which already exists. Why, then, does the law allow a plaintiff to commence a lawsuit based simply on a “short and plain statement” of a claim? Why not require the plaintiff to provide all facts supporting the claims, supported by evidence, and thus provide defendants with a basis for understanding the plaintiff’s complete position?

The reason is that certain facts may be known, and certain evidence accessible, only to the defendant. Our victim may believe that the driver was drunk because she saw him stagger after the accident, but only he knows whether he was; indeed, only he may possess the “smoking gun”—for example, the bar tab—that would prove it. The law does not deny a plaintiff without evidence the opportunity to pursue a lawsuit; rather, it affords her the opportunity to discover all relevant evidence that may be in the defendant’s possession. The process of discovering evidence that follows does not generally improve the situation. It often leads to new wrongs that breed new resentments.

Two dynamics are in play here. First, the process of discovery is conducted by lawyers. One lawyer sends another lawyer a request for documents; a request for certain admissions; a demand that certain questions be answered. Opposing counsel responds with *some* documents; a refusal to admit facts as framed; careful answers to questions that give up very little. The parties to the lawsuit impute the less-than-full disclosure that results from careful lawyering to each other, and resent it. Each careful response leads to a follow-up request and subsequent response that cost the parties additional money in attorneys’ fees. “Why won’t she just answer the questions and stop putting us to all of these expenses?”

The second dynamic in play here is that most anything that one party says in the process of discovery is admissible evidence against that party.¹² An admission of wrongdoing or an apology is often a precursor to forgiveness. In litigation, however, for the driver of the vehicle to tell our injured victim, “I was drinking, and I am sorry that I hit you,” would be devastating to his case. The lawyer prevents this event by admonishing the client up front not to have any contact whatsoever with the victim. To do otherwise could be malpractice.

The one time a party must speak during the discovery process is when that party is deposed. Before trial, one party typically may require that another party submit to an examination by opposing counsel. The examination is similar to one that would occur in court, except that it usually occurs at a conference table in a lawyer’s office. The answers that President Clinton provided in his grand jury testimony are representative of the kind of answers often heard in depositions. When a prosecutor asked whether the statement—“There is no sex of any kind, in any manner, shape or form with President Clinton”—was false, President Clinton responded, “It depends upon what the meaning of the word ‘is’ is.” When asked about the impression that he gave in the Paula Jones deposition that he was never alone with Monica Lewinsky, he replied, “It depends on how you define

‘alone.’” The only thing that made these responses out-of-the-ordinary is that they were made by the President.

In a recent interview Gary Condit was asked whether he had an affair with Chandra Levy. He refused to answer the question. Why? There is some speculation that he may face a lawsuit. The answer “yes” would have been admissible evidence against him. What effect does this have on forgiveness? Senator Feinstein made headlines when she said, “He said he did not have a romantic relationship with her. He lied to me, and that’s something I just can’t forgive.”

The discovery process in a civil lawsuit creates incentives for new wrongs that breed new resentments, and indeed new lawsuits. President Clinton was impeached not because he had an affair. He was impeached because of what transpired during legal proceedings. In light of this effect on forgiveness, why does the law allow the use of admissions or apologies by one party against the other—for example, “I was drinking that night,” or “I am sorry that I was drinking that night”? If one party admits a fact, it is pretty good evidence that the fact is true. If the fact is true, and it proves that one party is entitled to legal recourse against the other, what reason is there to exclude that fact?

One reason might be that it thwarts efforts at reconciliation, but that is a response unlikely to withstand the need for truth in effecting corrective justice and other ends of the law that recovery would serve. That said, the law does not turn an entirely blind eye to reconciliation in the name of truth. Statements made during the course of settlement negotiations between the parties are generally inadmissible.¹³ So if victim and driver sit down in formal negotiations to settle their claims, any apologies or admissions either party may make cannot be used in subsequent court proceedings. The problem is that there is a list of exceptions that would admit such evidence for certain purposes. The potential application of an exception at a later stage in the lawsuit is a disincentive to speak freely. Moreover, settlement negotiations often do not arise unless there first is some apology or admission of wrongdoing. Without an admission, settlement negotiations may not transpire until lengthy discovery reveals that one or the other party holds the stronger position in the case.

The problem for forgiveness, in my mind, is that all of these rules taken together de facto require that parties not communicate once a lawsuit commences. Asking the State to wield its authority against another person is no small thing. It breeds new resentment. Litigation becomes a distant and inhuman process. How is that resentment to be overcome if the parties cannot communicate? Through the lawyers? Often, the lawyers have incentives against reconciliation: it may reduce their fee, or it may make them to appear to their client to be less than a zealous advocate. Many times in practice while fighting out something with opposing counsel I would think, “if only my client and her client would look each other in the eye, this all would go away.”

It is no secret that the probability of settlement is exponentially higher if the parties, rather than just the lawyers, attend the negotiations. That is why judges often order clients

to be present during settlement conferences. The hope is that requiring them even to be in the same building will effect a softening of hearts.

So, the question: does our system for resolving disputes thwart or encourage forgiveness? As against a system that would require the parties to put all their facts on the table at the outset, that would allow free communication between them without penalty, and that would demand them to give each other all relevant evidence without being asked twice; I suppose, based on my anecdotal experiences, that our system thwarts it. Does our system serve other worthy ends? Of course it does. For good reasons, a plaintiff with a baseless claim should not have free run at all of a defendant's papers and possessions. There must be rules of discovery. For good reasons, a plaintiff with a valid claim should be able to offer admissions by the defendant into evidence. Admissions are probative of the truth. There is no way to sift the bad claims from the good claims *ex ante*, and thus one set of rules must apply to all of them.

I am sure that some rules of litigation could be tweaked to better facilitate forgiveness without sacrificing their primary aspirations. Allow one party to apologize to the other without legal consequence.¹⁴ Require that parties attend settlement conferences. Stiffen the sanctions for discovery abuses. At the margins, there will be people who will apologize and move others by their apologies to forgiveness. There will be people who upon seeing their adversary face-to-face will be moved to reconciliation. Many others, however, will not apologize, will be unmoved by an apology unaccompanied by an offer of money, and will barely stomach having to be in the same room with their adversary.

At the end of the day, beyond tweaking at the margins, I am not sure that the law is well equipped to assist in the process of forgiveness without sacrificing some of the worthy ends it is meant to serve. The civil law, after all, largely exists to dispense justice where the parties cannot find it themselves. The law cannot compel parties to overcome their distaste for each other and settle their disputes. It can provide ready means for doing so: mediation and settlement conferences are both available and meant to facilitate private settlement. But steps toward reconciliation in litigation come at a cost. A party who proposes a settlement conference shows weakness. A party who extends an olive branch before or during negotiations risks an admission of liability. The law in its necessary operation creates disincentives to forgiveness. The person willing to risk adverse consequences for the sake of reconciliation is, in my view, all the more virtuous for it.

As the Lord's Prayer implores, "Forgive us our trespasses, as we forgive those who trespass against us." If we are to forgive as the Christian faith holds God in Christ forgave us, forgiveness will come at a price. It should not be surprising that for the forgiver, the price of forgiveness could include forgoing certain legal rights. It also should not be surprising that for the party seeking forgiveness, that price could be greater exposure to the demands of justice.

¹*Matthew* 18: 21-35.

²Speech of President William Clinton at White House Prayer Breakfast (Sept. 11, 1998).

³*Id.*

4JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 24 (1988).

5*Id.*

6CATECHISM OF THE CATHOLIC CHURCH 2843.

7See Martha Minow, *Keynote Address: Forgiveness and the Law*, 27 FORDHAM URB. L. J.1394, 1396 (2000) (noting how forgiveness departs from these conventional aspirations of Western legal systems).

8Jeffrie G. Murphy, *Forgiveness, Reconciliation and Responding to Evil: A Philosophical*

Overview, 27 FORDHAM URB. L. J.1353, 1356 (2000).

9See *id.* (discussing the relationship between justice and mercy).

10See *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988) (Scalia, J., concurring).

11FED. R. CIV. P. 8(a).

12See FED. R. EVID. 801(d)(2).

13See FED. R. EVID. 408.

14See Cohen, 26 FORDHAM URB. L. J. at 1418.