



The Paul and Dorothy Grob Lecture on American Jewish Life

The Nuremberg Trials at 75: Lessons and Legacies

April 6, 2021

Professor Martha Minow (Harvard Law School)

This transcript has been edited for clarity.

James Loeffler [JL] [00:00:08]: Good evening. My name is James Loeffler and I am a professor of history here at the University of Virginia, as you can see virtually behind me. I also serve as the Ida and Nathan Kolodiz Director of the Jewish Studies Program here at UVA. We are, if you're not familiar with us, a multidisciplinary program that explores Judaism and Jewish historical experience through a combination of research, pedagogy, that is, teaching, and programing, which is one of the reasons we are gathered here tonight. If you want to know more about what we do, you are welcome to visit us online at www.jewishstudies.as.virginia.edu. You can also find a link there to get onto our mailing list for other programs like this that we do all the time.

Now, as I mentioned to you, one of our core aims at the University of Virginia and in the Jewish Studies Program is to engage with critical issues of our day and our society, particularly as they intersect with Jewish themes and themes of Jewish history. In that regard, we're very proud tonight to introduce to you the latest in our installment of Lectures in Paul and Dorothy Grob Memorial Lecture series on American Jewish Life. This is supported through the generosity of Dr. Mayer Grob, an alumnus of the University, and his wife, Dr. Taryn Torre. It is endowed in memory of Dr. Grob's parents, who were longtime leaders in the Virginia Jewish community, and his father was also a noted cantor in the community in Norfolk, Portsmouth. This series was envisioned as an opportunity to bring distinguished visitors to campus, to Grounds, as we say at UVA, to meet with students, to speak to the public and faculty about key themes in American Jewish life as they intersect with the larger story of American democracy and American society as a whole in that regard.

We are therefore very, very excited and delighted to welcome a truly extraordinary speaker, scholar and thinker to join us tonight for this lecture series...Professor Martha Minow. She is, of course, the 300th Anniversary Professor and University Professor at Harvard University. She began her academic career as an undergraduate at the University of Michigan. She went on to take a master's degree in education from Harvard, and a law degree from Yale. She clerked for Judge David Bazelon ...and then the late Justice Thurgood Marshall on the Supreme Court. In 1981, she joined

the faculty of the Harvard Law School as an assistant professor, and she rose up to become Dean of the school for which she served from 2009 to 2017.

Professor Minow is a renowned scholar and commentator on a whole array of intersecting themes in the realms of law, justice, identity, ethics and international life. Her work has covered topics as diverse as education in the United States, the civil rights movement and constitutional law, global atrocity crimes, truth and reconciliation... She is the author recently of a very important book called *When Should Law Forgive?* from 2019. And that will be the beginning point for our conversation tonight as it actually passes through a number of issues, including the Nuremberg Trials, and the questions of memory, atrocity and loss in our world, past and present. So please join me in virtually welcoming Professor Martha Minow.

Martha Minow [MM] [00:07:08]: Thank you so much. Thank you for that lovely introduction and I'm very honored to be here, very honored to be invited to give this distinguished Paul and Dorothy Grob lecture and especially delighted to be in conversation with you, Jim.

JL [00:07:23]: Thank you ... I want to start our conversation by asking you more about the theme of your book, which is law and forgiveness. And you've given us a book that builds on what you've taught us over the year, about the power and the purpose of law, how law can define our values and our justice, but also the hard decisions about how we use it and how we interpret it. And there's nothing harder than forgiveness when it comes to law. So, in this book you asked us to consider a bunch of different scenarios. And let me first ask you: When you talk about forgiveness, what do you mean by that?

MM [00:08:11]: In interpersonal settings, forgiveness, I believe, means letting go of justified resentment, and it is all of those elements [which] are important, the letting go, the justified, and the resentment. When we shift from interpersonal to something that is more institutional, like, "Can law forgive or can a society forgive?" it gets complicated. Can an institution resent? Who has standing to let go on behalf of whom and what are justified resentments? So, there are many complexities, but that's the basic definition that I use.

JL [00:08:58]: You've written [in] the past about law and emotions and it's hard, but really kind of fascinating to think about institutions having feelings or cultures [having feelings] ... In the book, you really draw some remarkably diverse examples together to think about forgiveness. And you draw an interesting contrast between child soldiers and juvenile offenders in the U.S. This one of these many points where you ask us to think about *over there*, globally, and then think about *right here*. Why do you make that link between them? They're very different groups. So how do you draw them together?

MM [00:09:42]: Well, it really just struck me as curious that in international human rights discussions, there's a widespread claim that even those who have engaged in murder or rape or other violent crimes as child soldiers should not be held responsible because they were children, they were kidnapped or they were coerced or most of all, they were engaging in conflicts that were created by adults and they were being manipulated. And then you shift gears to the United States. I'm from Chicago, which sadly has currently and for some time serious issues with juvenile crime gangs in

particular. People don't talk that way. People don't talk about young people the exact same age as the child soldiers, as not people to be held responsible because they're caught in conflicts not of their own creation, because they were coerced or they were induced. And it's that juxtaposition that led me to draw the comparison.

JL [00:10:56]: And do you think, does that tell us something about ourselves or does that tell us something about how we imagine conflict globally, conflicts far away or conflict that we define as war versus the conflict at home? How do you explain that? I mean, do you start with human psychology or do you start with the kind of different textures of conflicts?

MM [00:11:23]: Well, now you're making me want to rewrite the book because you're asking very good questions. I do think that legally, certainly, and as a matter of social thought, we treat war differently than we treat crime. Although that's, of course, come into public debate about the war on terror. Should it be viewed as a war or should it be viewed again as something subject to crime or the Nuremberg Trials itself? It is very remarkable to bring the legal framework of prosecution to respond to events in war. So, there's confusion and debate and maybe evolution about that. But I think that the way we think about those things differently, is in part because the causes of war are so well understood as complex and beyond the actions of any individuals, whereas that's not always true when we talk about street crime or drug crime. But I think that understanding the systemic and institutionalized dimensions of the latter are as important as the former.

And yes, I do think there is a quality of looking beyond the United States, looking outside versus looking inside. You're a scholar who deals with human rights often and the way that human rights discourse proceeds from Americans when we talk about other countries is very much very different than the way it perceives when we talk about this country. And it may be related to notions of American exceptionalism...[the idea that we as Americans] don't need to participate in the international human rights or we're better than that. But here we are, the last country not to have signed the UN Convention on the Rights of the Child. And there are other international human rights agreements where we are not participants. The International Criminal Court is a good example.

JL [00:13:27]: And we'll turn to that in a little bit as we talk about Nuremberg specifically, but I want to stay on the other parts of your book first for a few minutes, because I think they're important and they're important for our audience, too, to understand the richness of it, but also the complexity of law and forgiveness. So, you know, comparing children and comparing youth across these contexts makes sense. You do another move in the book where you talk to us about this idea of debt forgiveness. And that's also one where you draw some interesting comparisons and note some striking contrasts in how we think about debt and forgiving debt. Tell us about how you chose to put that in this book and what you do with that?

MM [00:14:11]: Well, first, I'll say something about comparisons. You know, it is a basic technique of lawyers and particularly of law schools. We compare which one of these cases is not like the other. And if that is evocative for anyone here of Sesame Street, I mean it deliberately. "Which one of these things is not like the other?" is the distinction-drawing process that is at the core of legal reasoning and the drawing of

analogies and the drawing of distinctions. And I often think that juxtapositions help us really tease out our intuitions.

One further thought on comparing youth. You know, it's not that either forgiving young offenders or blaming them is right. Indeed, I think that there's something to be gained by looking at both directions and treating children as completely incapable of responsibility. Holding a young person who committed a murder in the course of a war responsible is not necessarily the right answer, nor is it the right answer to treat as totally responsible the young person who committed a crime in the United States. So, I think the comparisons work in both directions.

And the same is true with regard to debt and crime. So, it may seem somewhat surprising to put them together. But think about it. We use the word "forgiveness" in both contexts: to forgive a debt, to forgive an offense. And not only do we think that. I mean it goes back through great periods of history. The Athenian codes, Hammurabi's code, the Jubilee year in the Bible addressed both crime and debt, and the idea that at some point, sometimes a society needs a reset button and also to see that people are often incarcerated or enslaved because of debt and these interconnections are rich and complex.

But what struck me and the reason I really wanted to pursue this comparison is that we have the very familiar phrases with regard to debt: "Wipe the slate clean," "Have a fresh start." And those are ingrained, at least in American lingo, but in other countries as well. And somehow we're missing that in the United States when it comes to crime. Many states have what we now call the collateral consequences of debt. Even for someone who has been convicted and serve their entire sentence, it's not over because a felon has to report and then may not be eligible for a loan or for a particular kind of occupational license or for housing in particular locations. And those collateral consequences of debt are the opposite of wiping the slate clean in the debt context. You know we have a bankruptcy regime in the United States that's as old as the country it's actually provided for in the United States Constitution. And I often say so because one of its framers, of course, is Thomas Jefferson.

Thomas Jefferson insisted that there be authorization in the Constitution for Congress to enact a national bankruptcy law, to have uniform treatment of debt. And I think it's in part because he was in debt much of his life. He went in and out of debt. You all in Virginia probably know something about his history. But because he was Thomas Jefferson, of course, he developed a political theory about it that one generation should not burden the next with its debts. Again, this notion of a restart, that there should be a chance to start over. And I think that there's a way that the bankruptcy process incorporates the feedback mechanisms that come when you see the interconnections among not just one harm, one wrong, but systems and groups. So, the creditors need to understand what's a risky loan and that one of the ways to get that message across is that sometimes, the debts will be forgiven, and that has to be built into the process of anticipating when to make the loan and when not. We don't talk as much about these systemic dimensions of crime. And I think that's one reason we get caught in these cycles without being able to break them.

JL [00:18:44]: Very interesting, because we have a lot of new-found awareness in society about systemic bias. But you're pointing out that we haven't caught up with

thinking about the way which law works, too, and the interconnections between law and economics and the structures of bankruptcy law and punishment and stuff like that beyond simply ruling out ways in which the law may have disparate impact. You're also suggesting it may actually structure or limit or opportunities for things?

MM [00:19:20]: Exactly right. I mean, I do think about this somewhat visually, and it's remarkable with your paintings [in your zoom virtual background] to think visually at this moment. But if you think about the two of us having a conversation, we are actually having a conversation amid other conversations literally here in Zoom, but also more generally drawing on what we know, what we talk about, who we know and where each in circles that are concentric circles of larger circles and larger circles of conversation. And I think the same can be said even more profoundly about a harm or a crime. We can see the concentric circles that led to the causation. Certainly, that's true with regard to debt. And too often, I think in ordinary conversation, but certainly true in the legal system, we tend to narrow the lens and just take a slice out and not look at the interconnections.

JL [00:20:18]: So, I want to take this in a different direction and turn to talk a little bit more about atrocity trials. We can begin with the Nuremberg trials. There, of course, we have a problem where for victims, the question is, is there reparation? You know, should there be forgiveness? And for societies too there's a struggle with that.

We are in the 75th anniversary moment of the trials. And the trials themselves were not a foregone conclusion, how they would play out, what justice, how it could be structured, who would have the capacity. And I'd just like to ask you to tell us what your framing of it? What was the debate at that moment about what was justice and what was appropriate?

MM [00:21:22]: Well, the idea of having a trial as a response to a war was very controversial. Stalin and an adviser to Churchill both said, "Just take the bad guys out and shoot them. We were just at a battlefield, why would you have a trial?" So, there was a slight legal precedent after the Armenian genocide. But really, this is an unusual response. And I guess I think it was a brilliant response well summarized by the opening statement by Justice Robert Jackson, the United States justice, who as the prosecutor from the United States, began by saying, "Four great nations flushed with victory and stung with injuries, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law." This is one of the most significant tributes that power has ever paid to reason. It's incredibly optimistic and hopeful. It's an Enlightenment statement that somehow power, the victors in the war, can stay the hand of just vengeance and halt the war, halt the use of violence and use reason instead. That was the bold claim. And it was attacked then immediately for being just another form of victor's justice. After all, the trials only proceeded against those who lost. There were no trials of the allies for using the bombing techniques that actually helped win the war. And that was one criticism and then another criticism immediately was that there was retroactive justice. This was not following the rules of justice because it was applying standards that had not been the law in Germany, had not been the law internationally before. So, it was very controversial.

JL [00:23:26]: I wonder if I could ask you about that, because one of the other things you've pointed out is it was selective too, in the way in which it identified certain leaders

as the criminal defendants, but a mass of other perpetrators were just untouched and not subject to its sanction or even its judging. So, what do you think about that?

MM [00:23:54]: This is an issue to this day with the International Criminal Court, with the ad hoc tribunals for the former Yugoslavia and Rwanda. When you have mass atrocity, you have many, many people involved and trials are not so easy to conduct and they're very labor intensive and expensive. And we have to understand that these are in many ways symbolic. They are selective. The strategy with the International Criminal Court is quite explicitly go with those most responsible. And that implicitly was the strategy with the Nuremberg Trials. But it also depended in part on who could be captured, who could be present to be tried. The idea that people could only be tried if they are there, in person, limits who can be tried.

But from a different perspective, the Nuremberg Trials did create a precedent that then encouraged Germany itself to pursue state national trials, trials that then went across other countries. Certainly, Israel is another country and that then in turn inspired civil action, civil litigation, as well as criminal actions here in the United States and in England and elsewhere. So, while it may have started off as a small gesture with only a limited twenty political and military leaders tried in the first Nuremberg Trials, it expanded, it opened the door to using the legal system, the legal response to mass violence and atrocity.

JL [00:25:30]: And as you suggest, it's another point where you're suggesting to us also not to focus narrowly, to understand it is almost part of a network of legal processes. We tend to forget all these other trials that happened in other places in Europe, some of them even before Nuremberg and Poland. These were controversial trials, no doubt, but also processes of justice.

So, you know, when we were planning this lecture conversation, we talked about this as legacies, the legacies and lessons of Nuremberg. And you've already suggested, one, that it created a precedent which is so crucial for lawyers. But then really for all of us to be able to say this is the beginning that we can build on. What else would you say? You know, do you see it as a natural arc that runs through Eichmann trial and the other later tribunals? What are one of the main lessons you take out from it? What do you think are the legacies?

MM [00:26:30]: Justice Stephen Breyer gave a lecture about the Nuremberg trials, and I think he summarized it really, really well because he said that at some critical level, the Nuremberg Trials prevented denial of the crimes. That's no small accomplishment, particularly, as we still deal with the issues of Holocaust denial, the fact of the trials, their records, the documentary evidence. This can never be put aside and in subsequent efforts, for example, the Truth and Reconciliation Commission in South Africa to address the harms and crimes of apartheid. One of its motives was similarly to end denial, to pull the curtain back, make it impossible to say, "Oh, well, we didn't know." Well, nobody can say that it.

Now, a second element that Justice Breyer said was to motivate nations from then on, not to ignore terror and barbarous acts. And I do think that the Nuremberg Trials were part of the post-World War Two movement towards international human rights, towards the creation of the UN, towards the Genocide Convention. It did have that as

a legacy and an important one. You know, it's incomplete. There are still horrific acts that occur, including genocide. But the vocabulary and the institutional apparatus to respond at least got going.

And the third lesson, again, is from Justice Breyer. He said that the trials helped others to learn from the past and to warn those in the future. This is related to the first two. I do think that that there are memorial events going on all over the world right now because of the trials, which gives a chance for a new generation to learn the story and to try to learn from it.

JL [00:28:35]: So, it's interesting what you just said, because you referenced South Africa. You have extensive experience surveying global truth and reconciliation as well as criminal processes. One could say that Nuremberg was one road of justice. Right, and the truth and reconciliation mode of South Africa brings that truth and reconciliation, but doesn't bring us that justice process. But you're suggesting maybe ultimately there are kind of two sides of the same coin. Am I understanding that right?

MM [00:29:10]: Well, that's very perceptive. I do myself believe that they are now part of the toolkit of responses to mass atrocity and human rights violations. And in that sense, they are connected with each other and in some countries are used simultaneously. Sierra Leone proceeded with criminal trials as well as with a truth and reconciliation commission, sometimes in one order, sometimes in a different order, sometimes simultaneously. They differ, of course, in that the emphasis of the criminal process is fact-finding to lead to punishment. And the emphasis in the reconciliation process, as the name would suggest, is fact-finding to lead to reconciliation and maybe to forgiveness.

A famous cartoon published just as the TRC was starting in South Africa shows Archbishop Tutu, the chair of the Truth Commission on one side of a chasm. And on the other side of the chasm is the truth and reconciliation process. And in the middle is the chasm that's created by the truth. Who can get to reconciliation? How can you get there once you heard the scope of the harms? And in some sense, that's a fair concern. On the other hand, at least that's the goal and it's not the goal with the prosecutorial approach at all.

And indeed, prosecutions can lead to a kind of new demonizing of those who are put on trial and even of the nation, Germany in particular. I grew up in a time when I was in a Jewish home. We couldn't buy anything that was from Germany, couldn't be friends with people from Germany. That's the opposite of reconciliation. I have changed my views about Germany, but in part, that's because Germany changed. Germany actually paid reparations. Germany actually undertook the process of facing its history and teaching it to next generations.

JL [00:31:23]: At this moment, I just want to remind everyone who is with us that you can put questions into the Q&A and in just a few moments we'll shift to draw on some of them so that we can weave in some other perspectives and questions for Professor Minow.

So here I want to ask you about a distinction you often make in your work between private and public processes. It seems to me that what you're describing also is a

model of public accountability, but sometimes alongside that is private reconciliation or private truth seeking. So that's a big question for communities that are in the aftermath of harm and violence.

The Jewish community is one example, where there may be a parallel process of trying to make peace with it. Some have said the law doesn't actually do a good job of that. It doesn't give the same options for a community's right to seek reparations. Maybe states can do it, maybe individuals can file lawsuits and reclaim a piece of property, but we don't really have a great mechanism for communities below the state level. We're spread across many places so unable to connect and secure a kind of victim's justice. I wonder if you have thoughts about that distinction and how these things play out, say with Nuremberg or with South Africa.

MM [00:33:00]: Well, I do think reparations is a third element in the toolkit that includes trials, criminal or civil trials. Truth commissions are fact-finding commissions, while reparations typically require, at least in a democracy, something like a legislative process. If the reparations are to come from the government, from the community, you can have reparations, of course, provided by a private company for its conduct as well. There is a fourth element in this toolkit, which might be more cultural forms are a commemoration building monuments and museums, education. You ask an interesting question about what is the standing, as it were, for a community to seek reparations. Certainly, a city could seek reparations. What's interesting to me right now is to see the reparations debate going on in many communities in the United States.

Evanston, Illinois, just adopted a reparations program that's tied to housing and housing subsidy and repairs for people who are descended from enslaved human beings who lived in Evanston, Illinois. Another community in Virginia, I believe, has announced a project for reparations. So, there can be processes that are somewhat more like legislative or communal or city council. And I think that one of the encouraging signs about these developments is the creativity of inventing new institutions, new forms, new forms of accountability, new forms of reckoning. And I think "reckoning" is probably more the right word for the United States at this time than forgiveness. It's coming to grips with the past and then reckoning, I think, has to include. So, what are you going to do now? It doesn't mean how do you forgive or who forgives or who lets go or who forgets. It's to come to grips with it and integrate it with who we are.

JL [00:35:24]: It's very powerful what you're saying, because in one sense you're telling us that we need to do this. But also, we shouldn't fear this because the reckoning needs to proceed on its own before we actually are going to assume what's next. As Americans, we so often rush to ask, "What's next? What's our outcome?" I can't help but note we're having this conversation virtually as the University of Virginia has just opened its memorial to enslaved laborers. And, you know, it nicely represents what you're talking about, creativity, trying to find a new way to deal with space and memory that will create a reckoning and opening right for that kind of process while still allowing an institution, hopefully, to be able to kind of continue to grow with it rather than to see itself as poised in conflict with its past.

MM [00:36:18]: I have read about it and looked at some of the photographs, very moving. And I do think that art, sculpture, drama, monuments can create physical

spaces and mental spaces for individuals and groups to reckon, to reckon with their past, other people's past. You know, the Vietnam Memorial is such a pivotal example. Maya Lin's brilliant gash in the land. And as you walk down the path, you find yourself deeper and deeper and deeper, just the same way the United States got more deeply involved in the war with names, just the names of the people who died. And you see as an observer yourself, reflected in the stone and the names. And that reflection is such a way of capturing what is the process of reckoning. And I do think that what you all have been doing is similar, create a space where people can reflect and think and then reconstitute.

JL [00:37:36]: A number of questions are coming through about that. I want to try and tie a bunch of them together to ask you this. One who doesn't know you or me might say, "Gee, you don't sound like a law scholar because you're talking about more abstract or inchoate processes of memory. What about as a lawyer? What about retroactivity? What about these challenges we face where we want the system to be able to clarify our role and responsibility?"

So, I want to ask you, how do you think about that? The harder question, if you will, of law and collective responsibility.

MM [00:38:29]: So, I think that law is created by human beings to try to serve our own purposes. And while there is an internal logic of the law, and while it's very tempting to treat law as separate from society and separate from history, it's not and it has never been so. It is meant to serve human ends and therefore legal systems and the content of the rules, they change over time. I am a law professor. I believe in the fundamental principles of fairness and yes, not having retroactive justice and giving people notice. And at the same time, I see the importance of innovations such as altering when the statute of limitations runs.

For instance, if you have only recently discovered that there was abuse by people in high office and the statute of limitations has run long, long before people came forward, the law can evolve and the law should evolve. That said, I think that you're also pointing to the issue that's particularly acute in the United States. And we are here reflecting particularly about the American experience as well as the Jewish experience.

The United States emphasizes individuality and justice focused on individuals and individual culpability. And the American legal system really becomes uncomfortable in talking about groups. There are class actions. There is the possibility of having more collective responses. But even just take the fact that within the first 20 years of its enactment, the 14th Amendment's guarantee of due process of the law, no person shall be deprived by a state of due process of the law was interpreted so that a corporation is treated as a person because there was no way to think about collectivity other than it's either in one spot as an individual or it's somehow the collective. And then we can't sort out what its status is in the law.

I think that there are important ways that we actually need to evolve the law to understand that there are entities that aren't individuals. A labor union is not an individual and a nation-state is not an individual. And to find ways to comprehend

legally the forms of life that we have and we care about where we are, not just individuals, we come together.

It's interesting to compare Jewish law. The primary unit of analysis is not the individual and indeed the focus on individual rights in American law is to be contrasted in Jewish law. The primary frame is obligation and whether it's an individual's obligation or an individual's obligation that can only be performed in a group, even prayer itself in a group. That's a different way to think.

JL [00:41:42]: And we see it interestingly now with the American Jewish community trying to make sense of that. I mean, like many minority groups, the promise of legal individualism, of being treated just as an individual, especially if there's been stigma in the past, is very powerful. But there are also ways in which it becomes difficult to make claims about a community, what a community needs, and how its sense of its own religious practices which are not the same as another community. So, I can see that as an ongoing challenge.

MM [00:42:15]: No, I think you're absolutely right. And it's not just a negative. It can be a source of creativity to think through those dimensions and the way in which we are all individuals. Of course, we're in separate bodies, but we're also in community and in connection. And that can be a fruitful tension to explore.

JL [00:42:40]: I'd like, if you will, to turn to one of the themes we touched on briefly at the beginning, which is also coming up at some of the questions. You mention these words, "American exceptionalism." We could define that in different ways. But one simple way might be to say that while we have a strong commitment to certain liberal values abroad and the rule of law, we don't necessarily see our country as being obligated to join the same international legal system, to be to be under its supervision. It doesn't apply to us in the same way. And that seems to be a striking feature of the way Americans across a broad swath of the political spectrum think about international law. I wonder what you think about that? We seem to carry an awful lot of mistrust. We value human rights abroad, but there's still also a resistance to thinking about us on exactly the same international legal landscape.

MM [00:43:43]: I do understand the arguments that the United States is different, the United States at least still now, we'll see for how long, is a hegemon. It is the most powerful country. It is the wealthiest country. It has the largest military capacity. And it has, therefore, the risk of being the target of resentments and objections that are not the same that would apply to others. That, of course, is the major reason why the United States has resisted joining the International Criminal Court on the grounds that we wouldn't be treated fairly. At least that's the stated reason. But there are concerns, I think, that we really are undermining some of our own commitments by claims of exceptionalism. When we say of the United States that we're committed to a set of human rights values, but we don't hold those same standards to ourselves, we don't we don't actually have the moral authority globally in this regard.

This actually was the reason that the State Department recommended to the United States government in the 1950s to intervene with a State Department brief in *Brown vs. Board of Education* on the grounds that actually it was hurting the U.S. in the Cold War. The struggle for hearts and minds of propaganda war between the Soviet Union

and the United States, was hurt by the fact that we had segregation, racial segregation. And after all, it was many of the soldiers who returned from fighting in Europe who said, "We were fighting Nazism. We come back here and there is segregation." These were African American soldiers who we were fighting for American freedom, "We come back here, there's Jim Crow." And so, the State Department convinced the Eisenhower administration to actually explain one of the reasons that Separate but Equal was not tenable was that it was bad for America. That was a moment of recognition about how this exceptionalism thing isn't working so well.

JL [00:46:06]: A number of [chat] questions are asking, in effect, are we in another similar moment of reckoning? You've said that it's a moment of serious reckoning and debate about exactly what America should do with its racial past. We know around the world other countries and people in other societies are looking at us and asking, "What's going on with your country?" They're asking us, "What are you going to do right with these long-standing issues that you knew about?" We know about the legacies of slavery and institutional racism, but now they're very, very manifest for us.

Are there models that you can see? We've discussed a little bit models of memory, models of creativity. But I'm curious what you think is as a legal thinker. Are there ways in which we need to go further in borrowing human rights models, you know, borrowing human rights, legal principles to deal with our own society? Is that something that you think is helpful for us?

MM [00:47:21]: You know, it is, I think, one of the big issues of our time and again, the word "reckoning" for me is a touchstone. I think that there are in the shared elements of the prosecutorial model, the truth and reconciliation efforts, even the artistic efforts, the reparations, all of them share, at least as a first step, to face the past and face the present, to face the facts. So, I think that one of the lessons to be learned and well explored in a wonderful book by Susan Neiman comparing Germany's response to World War Two and to the Nazis, to the United States response or failures thereof to slavery, is that we haven't really had the serious reckoning. We have not had the meeting of all the historians to hammer out what really happened. And so, we have rival views of what happened, what happened on January 6th. We have rival views, what happened during the election. We have rival views.

And now, because of the splintering of media and the separate worlds in which people operate, we have separate textbooks that tell different stories about the Civil War, for example. So, if we can't actually agree upon what happened, I don't think there's any chance of building a solid shared future. So that for me is absolutely, undeniably a first critical step that has not fully been embraced. I'm part of a committee that Harvard has created to address the legacies of slavery at Harvard. And I have to say, I thought of myself as a fairly educated, alert person. I knew some basic facts. I didn't know the depth of the involvement of Harvard University, probably every institution around at the time of slavery in the United States, the financing, the donations, not just the physical building of buildings. Of course, that too, but the very creation of the institution and its sustenance was dependent on the institution of slavery. If I didn't know that a lot of other people don't know it.

JL [00:49:39]: As we round out our hour with you, I want to turn back to the Holocaust and I want to now ask sort of the second part of my earlier question, which is about

lessons, lessons that we take out of it. It strikes me that you're describing an American society that is really divided about even the basic storyline, you know, let alone the meaning of some of its past. And same might be said about the Holocaust. It's an event which as many communities commemorated this week is as divisive as it is unifying. It seems like in certain moments in our recent past it was a source of solidarity. People could say, "Nuremberg inspired us, and Holocaust warned us." But today, I think especially in the American Jewish sphere, it's divisive even to think about Holocaust memory, it seems to immediately lead us into debates about the Israeli-Palestinian conflict, about antisemitism.

So how do we retrieve from it something? How can it be a standard and a common storyline and inspiration without having that same divisiveness where as soon as someone references the Holocaust, someone says you've appropriated it to work for your political cause and you've lost its meaning within me. Do you have thoughts about that?

MM [00:51:06]: Well, we are living in a polarized time, we're living in a time of resentments, we're living in a time that is unforgiving, we're living in a time that is unlistening, if that's a word. People are not listening to one another. I think I myself am struggling very hard to overcome my own resentments, my own confidence that I'm absolutely right. I think that there is one place to start is with facts. I think that the Nuremberg Trials actually helped to establish some basic facts about what happened. I think that the stepping away from that to then draw analogies or metaphors, that's where the controversies arise. And so, my advice would be whatever the new topic is, let's again start with facts.

What seems to me most frightening about this moment is that the hopeful, idealistic Enlightenment ideas behind the Nuremberg Trials are themselves in jeopardy. The idea that we could have such a thing as a fact, that we could, in fact, have reason that isn't itself tinged with, drenched with bias. That is a scary, scary time to be living in that science is politicized, that courts are politicized. And I think that's one of the sad but intriguing moments of the last couple of weeks, is to watch this large ship stuck in the Suez Canal. And as tragic as it was, you could flip between Fox News, MSNBC, they all reported on the same thing. And it was so refreshing to share some reality, at least briefly. And I think that's the project right now. Can we find some ways to share some realities? And it may well be more to go back to your comment about subnational, sub-state context. It may be more in local communities where people actually, God forbid, talk face to face, actually try to listen with one another.

I don't know if you saw the News Hour tonight on PBS that ended with a story about an effort bringing together students at Georgetown University and then at a university or a college in Virginia, which is Bible-based. And they actually pair up in conversations and then learn to say what they heard from their partner, from the other school, in their words, in a way that's recognizable to the other. It's very moving. And in the very course of doing that, these students actually come to respect one another. They don't change their minds necessarily, but they come to respect them as human beings. I feel that we need that level of encounter and of listening and of humility the same way that, frankly, I think that elementary schools should practice, should actually involve students in practice and giving apologies and learning to forgive. It seems to be not something that Americans are particularly good at right now. And we have too many

high-profile individuals who give “non apology” apologies if somebody was injured or something like that. And that’s failing to take responsibility. We need we need practices that those very basic interpersonal levels, as well as this search for some facts that we can agree upon.

JL [00:54:51]: That’s both depressing and inspiring somehow, in diagnosing the problem but pointing to us as the source of hope for this process. So, let me ask you, as we as we round out our conversation, what do you think the future of law is in that large process? I mean, if anything, you’ve emphasized that this is a global experience interconnected and ever more so as you’ve outlined in the book. We began by talking about and the ways in which the Holocaust continues to inform and touch lives far away from where it happened and the way in which we live in an interconnected world, even if we in America think of our experience is so unique.

So where does the law fit into this? I know this is sort of an open-ended question, but I’m asking you as a philosopher of law, if the future of law, as you’ve described it, something that is humans make, is it something that we should be making into a new kind of international law that will touch us more? Is it to think about building more mechanisms for forgiveness into law, as you suggest in the book, and embracing that? Where can law take us in this larger moment?

MM [00:56:09]: Wow, that’s a big one. I think that all of the above, I think that there are resources within American law, international law, to tackle really hard questions, but with humility, because lawyers can only offer some procedures and can struggle for some degree of acceptance and legitimacy in South Africa. The courts were so associated with the apartheid regime that the invention of something that was not in a courtroom was necessary to build a future. I think that the law in this moment in the United States is not so associated with negativity and polarization. The courts are one of the few institutions that actually retains some degree of respect across political groups.

I think that when it comes to criminal justice, there’s a much more serious problem, but it’s not necessarily dividing people. I think that we all come to realize there’s some problems with our criminal system. It’s interesting to me that artists turn to law and to the trial format for our films and plays and I think it’s not by accident. There’s something about the crystallization of issues that law can provide. And I think that actually having some more shared artistic experiences, maybe even using a legal framework, might be a way to thrash out and to deal with some of the reckoning that we need to face.

But I think that your question is such a profound one, because it, in my mind, does again surface the challenge of this time, because law itself as a project, the idea that we can be abstracted from our immediate circumstances, that we can use words to resolve our conflicts. This is a hopeful project and the grounds for that hope are in jeopardy. And we have to work hard on rebuilding those grounds for law to play an important role going forward.

JL [00:58:24]: Thank you. This is an inspiring note to conclude on, so I want to thank you very much on behalf of the University of Virginia for and our Jewish Studies Program for joining us and giving us a really wonderful, fast-paced survey of a whole bunch of interconnected themes that you’ve worked on and written about and that are

at the center of our attention today in different ways. And it's hopeful, I think, the connections you draw.

This is Zoom life, so we can't all stand up and applaud. But again, I want to thank you for joining us. For those of you who have come with us tonight on this conversational journey, a reminder you can find out more about our work that we do at the University of Virginia Jewish Studies Program at our website www.jewishstudies.as.virginia.edu. And for us, this is a piece of a larger attempt to realize some of Professor Minow's ideas about engaging our ideas in our studies and engaging with the public at large as a university, as a community. So, we invite you to come back and join us in that engagement process.

Finally, I just want to thank you again, Professor Minow. You've given us so much to think about. I hope people, if they haven't already read *When Should Law Forgive?*, will take the opportunity to do so and learn more about the history behind this, as well as your thinking on the subject.

MM [00:59:55]: Thank you for just such wonderful questions and discussions and for the honor of this occasion.

JL [01:00:02]: Thank you. All right, with that, as we pledged to do, we'll stop on time here and thank you once again. We wish everyone a good night and a safe one.