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A DEDICATION TO JACQUES DERRIDA - JUSTICE

## Amnesty: Between an Ethics of Forgiveness and the Politics of Forgetting

By Peter Krapp\*

*Let them swear to a solemn covenant, while we cause the others  
to forgive and forget the massacre of their sons and brothers. Let them  
then all become friends as heretofore, and let peace and plenty reign.*  
(Homer, Odyssey)

### A. Introduction

Given the remarkable consistency in Jacques Derrida's work over several decades, it is not hard to draw a line from "Force of Law: The 'Mystical Foundation of Authority'" to his last seminars, on pardon and forgiveness.<sup>1</sup> The aporias of forgiveness are analogous to those of the gift and of justice he had analyzed in detail in previous decades, as Derrida states in "To Forgive: The Unforgivable and the Imprescriptible" – to that extent his last seminars and lectures were part of the same deconstructive project on the possibility of justice. At the same time, Derrida postulates that forgiveness is an experience outside or heterogeneous to the rule of

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<sup>1</sup> Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority"*, 11 *CARDOZO L. REV* 920 (1990); JACQUES DERRIDA, *GIVEN TIME, I: COUNTERFEIT MONEY* (1991) (see especially the last chapter of this book entitled: *The Excuse and Pardon*); JACQUES DERRIDA, *ON COSMOPOLITANISM AND FORGIVENESS* 27(2001) (available in French as: *Le siècle et le pardon*, *LE MONDE DES DÉBATS* 10-17 (December 1999)). See also Jacques Derrida, *Declarations of Independence*, 15 *NEW POLITICAL SCIENCE* 7 (1986); Jacques Derrida, *Before the Law*, in *ACTS OF LITERATURE* (Derek Attridge ed., 1992).

law.<sup>2</sup> In considering this juncture in Derrida's work, this paper will juxtapose the logic and history of amnesty with Derrida's analysis of pardon: the latter pivots on a monotheistic heritage, a Biblical-Koranic sense that is demarcated from the former concept, that of amnesty between an ethics of forgiveness and the politics of forgetting.

In its ceaseless questioning of origins, foundations and borders, deconstruction finds one of its "preferred asymmetries" in the rubbing of law against justice, and in the aporia confronting those who would assert a positive grounding of power. Authority, Derrida sought to demonstrate, might be legitimated in various ways, but returning to a founding principle will destroy it; hence he called Benjamin's procedure a practice of "performative tautology," or a "synthesis a priori." The mystical foundation of force is a "legitimizing fiction" - but this is not to say that justice could be deconstructed. Indeed it was Derrida's claim that while the law can be deconstructed, justice is ultimately undeconstructible. Responses to Derrida's reading of Benjamin in "Force of Law" focused mostly on deconstruction as a theory of justice in relation to contemporary legal philosophy.<sup>3</sup> This theory, if it is one, would seem to present itself in the aporetic shape of encoding infinite justice into a finite decision: justice requires an impossible mediation of the urgency of judgment and the infinite demands on exhaustive knowledge, a suspension, yet enforcement, of the rules, and an awareness, yet also an overriding, of undecidability. Justice is therefore, in Derrida's formula, an experience of the impossible - and much the same goes for the gift, and for forgiveness. Derrida wonders whether "the non-juridical dimension of forgiveness, and of the unforgivable - there where it suspends and interrupts the usual order of law - has not in fact come to inscribe itself, inscribe its interruption in the law itself."<sup>4</sup> Inversely and by extension I would argue that the question is not only whether this metaphysics is inscribed in the code of law, to the extent that justice remains inscribed in religious ethics, but also whether law or justice might make an experience of reconciliation possible that goes beyond institutional (academic or religious) sanctimony.

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<sup>2</sup> Jacques Derrida, *To Forgive: The Unforgivable and the Imprescriptible*, in QUESTIONING GOD 21 (John D. Caputo et al. eds., 2001). Compare also the transcription of the interview *For a Justice to Come: An Interview with Jacques Derrida*, THE BRUSSELS TRIBUNAL (February 19, 2004), at [www.brusselstribunal.org](http://www.brusselstribunal.org).

<sup>3</sup> See, e.g., R. Briggs, *Just Traditions? Deconstruction, Critical Legal Studies, and Analytic Jurisprudence*, 11 SOCIAL SEMIOTICS 257 (December 2001); J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE LAW JOURNAL 96 743 (1987).

<sup>4</sup> Derrida, *supra* note 2 at 25-26.

## B. A History of Amnesty

A provisional history of the concept of amnesty might usefully be told in its particular relation to ending civil war. The archaic wish for forgetting accompanies the inscription of cultural continuity from the *Odyssey* to the present day. One finds poetic (and not merely tragic) cultural production taking hold in this intersection, and the literary canon reflects this also in Schiller and Kleist, for instance, on the topic of amnesty. Between an ethics of virtual forgetting and the politics of memory, the shared horizon of culture and history constitutes the possibility of analyzing amnesty, as distinct from grace, pardon, or forgiveness.<sup>5</sup> The recent global proliferation of requests for forgiveness and reconciliation has created a sophisticated forum of political, philosophical, and psychoanalytical debates. However, perhaps owing to its own conceptual logic of a break with the past, there is no cultural history of amnesty. It is easy to compile dates – Cromwell’s English revolution ended 1660 with the “Act of free and general pardon, indemnity and oblivion,” on May 29, 1865, President Andrew Johnson issued a “Proclamation of Pardon and Amnesty” – but what is the trajectory such examples trace? From the first historically recorded amnesty, in Athens 403 BC, and to our post-World War II and post-Cold War present, amnesty joins a political decree – a ban on recalling a certain misfortune – to an individual oath: I shall not recall.<sup>6</sup> The complex logic of this rejected memory deserves our most critical attention. To outline the conceptual logic of amnesty, one could focus on two occasions when there was a call for amnesty in Germany, after 1945 and again after 1989; neither resulted in an actual declaration of amnesty, of course. In the interest of establishing a pacified national identity after World War II, certain legal circles called for an end to de-Nazification in the early 50s, by means of an amnesty for all but the worst offenders. It is worth noting that the US rejected a general amnesty

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<sup>5</sup> For the history of pardoning, see JÖRG FISCH, *KRIEG UND FRIEDEN IM FRIEDENSVERTRAG. EINE UNIVERSALGESCHICHTLICHE STUDIE ÜBER GRUNDLAGEN UND FORMELEMENTE DES FRIEDENSSCHLUSSES* (1979); NICOLE LORAUX, *LA CITÉ DIVISÉE. L’OUBLI DANS LA MÉMOIRE D’ATHÈNES* (1997); and NATALIE ZEMON DAVIS, *FICTION IN THE ARCHIVES. PARDON TALES AND THEIR TELLERS IN SIXTEENTH-CENTURY FRANCE* (1987). More recently, see Edgar Morin, *Pardonnner, c’est résister à la cruauté du monde*, *LE MONDE DES DÉBATS*, 24-26 (February 2000); *LE PARDON: BRISER LA DETTE ET L’OUBLI* (Olivier Abel ed., 1991); and PAUL RICOEUR, *LA MÉMOIRE, L’HISTOIRE, L’OUBLI* (2000) (which culminates in an “epilogue” on pardon). An English dossier on these texts is found in *PMLA* 117:2 (2002).

<sup>6</sup> Nicole Loraux, *De l’amnistie et son contraire*, in *USAGES DE L’OUBLI* (1988), translated in two versions as *Of Amnesty and its Opposite*, in NICOLE LORAUX, *MOTHERS IN MOURNING* 83 (1998) and in NICOLE LORAUX, *THE DIVIDED CITY: ON MEMORY AND FORGETTING IN ANCIENT ATHENS* 145 (2002). See, also, Louis Joinet, *L’amnistie. Le droit à la mémoire entre pardon et oubli*, 49 *COMMUNICATIONS* 213 (1989). Some point out that the amnesty of 403BC was perhaps not the first known amnesty in Athenian history; there are sources that claim it was modeled on an amnesty after the Persian Wars. See DANIELLE S. ALLEN, *THE WORLD OF PROMETHEUS: THE POLITICS OF PUNISHING IN DEMOCRATIC ATHENS* 237-242 (2002); AND ALFRED P. DORJAHN, *POLITICAL FORGIVENESS IN OLD ATHENS: THE AMNESTY OF 403BC* (1946).

for war criminals, but selectively paroled German war criminals in its custody in exchange for their help in the Cold War. As historians have demonstrated, the State Department gave this political scheme a legal framework, but the Army Judge Advocate branch opposed and attempted to delay it.<sup>7</sup> After the fall of the Berlin Wall, there was again a call for amnesty for those on both sides who worked as spies, soldiers, guards, politicians, activists etc. to keep the two German states apart. And given the monotheistic structure of the scene of forgiveness, it is surely no accident that access to the archive of Stasi-files was first administered by an ordained minister, who could not prevent the office from becoming his eponymous institution (Gauck Behörde).<sup>8</sup> The general assumption appears to be that all ethical positions require a metaphysical commitment; but perhaps this is not true to the same extent of amnesty.

One lawyer calling for amnesty after World War II was Carl Schmitt. First anonymously and then in his own name, he argued that a war of everyone against everyone was a civil war, and “even the cold war turns into a cold civil war.”<sup>9</sup> In what he described as a vicious circle of self-righteousness, revenge was being taken in the name of the law, and the origins of peace in mutual forgetting were no longer being remembered. Of course, strict mnemonics would have us suffer the curse of total recall – and we would forget how forgetting can play a significant role in creating a nation, as Ernest Renan put it at the end of the 19th century.<sup>10</sup> Other institutions also play a crucial role in the *mise-en-scène* of forgiveness: a community,

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<sup>7</sup> See MICHAEL CALDWELL MCHUGH, WITH MALICE TOWARDS NONE: THE PUNISHMENT AND PARDON OF GERMAN WAR CRIMINALS, 1945-1958 (Doctoral Dissertation, Miami University, 1991; DAI-A 52/07, p. 2676, Jan 1992).

<sup>8</sup> See Christian Meier, *Erinnern – Verdrängen – Vergessen*, 50 MERKUR 937 (1996).

<sup>9</sup> Carl Schmitt, *Amnestie oder die Kraft des Vergessens*, in STAAT, GROßRAUM, NOMOS 218-221 (1995), 218-221. This article first appeared anonymously on November 10, 1949 as *Amnestie - Urform des Rechts*, in CHRIST UND WELT. A modified version was printed on January 15, 1950 in SONNTAGSBLATT, Hamburg. Attributed to one Walter Masuch, it was plagiarized in DIE ZEIT on September 12, 1950, and finally appeared in Carl Schmitt's name in DER FORTSCHRITT, Essen, with the title *Das Ende des kalten Bürgerkrieges. Im Zirkel der tödlichen Rechthaberei - Amnestie oder die Kraft des Vergessens*. Schmitt marshals as his crown witnesses Aristotle's *The Athenian Constitution*, Xenophon's *Hellenica*, JP Kenyon on *The Stuart Constitution*, and the *Dialogue between a Philosopher and a Student of the Common Law* by Thomas Hobbes. Contemporary with Schmitt's intervention were similar arguments by Ernst Achenbach, *Generalamnestie!*, 6 ZEITSCHRIFT FÜR GEOPOLITIK 321 (1952) and FRIEDRICH GRIMM, AMNESTIE ALS VÖLKERRECHTLICHES POSTULAT (1951).

<sup>10</sup> However, in contrast to Schmitt, Renan warned that advances in historiography might pose dangers to politics. See Ernest Renan, *Das Plebiszit des Vergeßlichen*, FRANKFURTER ALLGEMEINE ZEITUNG (March 27, 1993). One of the rare serious inquiries into the conditions of amnesty in Germany (after 1945 versus after 1989) is the collection AMNESTIE ODER DIE POLITIK DER ERINNERUNG (Gary Smith and Avishai Margalit eds., 1997).

a Church or Temple or Mosque, a profession, a group of representatives, of survivors or victims. One obvious problem with the institutionalization of memory and forgetting, and with the institutionalization of forgiveness in particular, is that it seems to undermine and undo what Derrida calls the "solitude of two, in the sense of forgiveness," which "would seem to deprive any forgiveness of sense or authenticity that was asked for collectively."<sup>11</sup> Put differently, the scene of forgiveness hinges on confiding in the other, then asking, and being granted, forgiveness in a singular gesture. Making a public spectacle of it would seem to pre-empt the possibility of this scene being sincere – it becomes a display, it appears as a mere immodesty, it is taken for a distraction. Certainly this becomes the more untenable the larger the transgression – and since, as Derrida emphasizes, the need for forgiveness is the greater the greater the injury was, it becomes most necessary and most pure in the case of the unforgivable. However, what remains of the logic of forgiveness when one is faced with the immense guilt of war crimes, of crimes against humanity, of institutionalized persecution and genocide? "As I will not cease to repeat," Derrida stresses, "it is only against the unforgivable, and thus on the scale without scale of a certain inhumanity of the inexpiable, against the monstrosity of radical evil that forgiveness, if there is such a thing, measures itself."<sup>12</sup> It is thus also measured against collective guilt, total guilt, despite the logic of singularity inherent in forgiveness. The world wars illustrate how violence can become a systemic, a total situation. Schmitt appeals to the ancient category of amnesty because it seems to offer a solution to a situation where nobody can occupy the sovereign position of deciding about impossible forgiveness, and nobody is able to ask, privately or publicly, for collective forgiveness of inexpiable crimes.

One of the motivations for the Cardozo conference on "Deconstruction and the Possibility of Justice" was to address the question whether deconstruction amounted to a coherent ethical program, particularly since some critics had gone so far as to suggest that it basically lapsed into accommodating conservatism.<sup>13</sup> Drucilla Cornell argued that deconstruction, despite being portrayed as the rejection of any metaphysics, was merely the exposure of "the quasi-transcendental conditions that establish any system, including a legal system."<sup>14</sup> This meant that

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<sup>11</sup> Derrida, *supra* note 2 at 25.

<sup>12</sup> *Id.* at 34.

<sup>13</sup> JÜRGEN HABERMAS, *THE PHILOSOPHICAL DISCOURSE OF MODERNITY* 161 (1987); Thomas McCarthy, *The Politics of the Ineffable: Derrida's Deconstructivism*, in *IDEALS AND ILLUSIONS: ON RECONSTRUCTION AND DECONSTRUCTION IN CONTEMPORARY CRITICAL THEORY* (1991).

<sup>14</sup> DRUCILLA CORNELL, *THE PHILOSOPHY OF THE LIMIT* (1992).

even Carl Schmitt's radical distinctions were subject to deconstruction – in a way that Schmitt himself may have been implicitly admitting when he observed that only amnesty can end the cold civil war. But as Derrida writes, Schmitt failed to take into account, in his attempted analysis of cold civil war, how “the police and spy network – precisely, the police qua spy network (the ‘specter’ of the modern State of which Benjamin speaks in ‘For a Critique of Violence’) – points to what, precisely in the service of the State, ruins in advance and from within the possibility of the political, the distinction between private and public.”<sup>15</sup> This catachresis of the traditional distinction between private and public has been theorized by other observers of the 20<sup>th</sup> century; here, we are interested above all in the stumbling block it seems to represent for what Derrida describes as the “singular, even quasi-secret solitude of forgiveness” which “would turn forgiveness into an experience outside or heterogeneous to the rule of law, of punishment or penalty, of the public institution, of judiciary calculations, and so forth.”<sup>16</sup> Without following this trajectory of asking what Schmitt would have made of the control society, of data mining and cyber-crime, of the clipper chip and information warfare, suffice it to indicate here that despite all technological innovation that surely exerts structural effects, Derrida's thought remains consistent even as it moves from Montaigne and Pascal, to Benjamin and Schmitt, into the 21<sup>st</sup> century.

### C. Amnesty versus Forgiveness

It is crucial to distinguish between certain modified forms of recollection or of forgetting that come into play in politics and in jurisprudence, before raising other questions regarding forgiveness and amnesty. The latter, which can be understood as mutual forgetting, stands almost diametrically opposed to the former, insofar as forgiveness in its long monotheistic tradition conjures up the past to the extent of making it present again, repeating the injury, opening the wound, so that its full extent may indeed be forgiven. While amnesty has as its goal an instrumentalized amnesia, forgiveness strives for difference in repetition. However, Derrida brackets off the question of forgetting, indicating only that “forgiving is not forgetting (another enormous problem).”<sup>17</sup> The price of forgiving or forgetting is debated not only in the context of recent national and international politics; the representation of a certain split consciousness about the collective and individual past is intricately connected with issues of accountability and responsibility, above all in matters of a politics of memory. Certainly repudiation of the past hinders us from learning to

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<sup>15</sup> JACQUES DERRIDA, *THE POLITICS OF FRIENDSHIP* 144 (1997).

<sup>16</sup> *Id.*

<sup>17</sup> Derrida, *supra* note 2 at 23.

distinguish between false values and ideals, and those worth remembering, and from being able to recognize clearly their relevance for the present.<sup>18</sup> On the other hand, forgiveness neither presupposes nor ends in forgetting: on the contrary, it presupposes a lively recollection of injustice. Just as forgetting is a blockage of reception – one no longer gets it – forgiveness could be described as a stoppage in circulation. Beyond the apparent immediacy and reciprocity of give and take, we encounter the limits of such an economy; we encounter aberrations of mourning which have to do with inhibitions, anxieties, and melancholy. With the consideration of altruism and forgiveness we go to the limits of memory and forgetting. Repetition can push itself to the front as a resistance against remembering, as Derrida warned with Freud; and undoubtedly, such compromising repetition without repetition structures the scene of forgiveness, where an injury is called up again, to its full extent, without being literally repeated.

A general amnesty would allow one to go on “as if nothing had happened,” imposing silence about the memory of the unforgettable.<sup>19</sup> Pardon, by contrast, is a modification of forgetting that does not affect the irrevocable, nor repress its memory.<sup>20</sup> In fact, forgiveness requires the exact recall of the injury to be forgiven, and reinscribed as modified memory. By the same token, it is important to distinguish clearly between kitsch as a pathetic aestheticization of a mortified and artificially revived past, and recall of certain events in history that are incommensurable, unforgivable, inexpiable. In either case, history is irreversible – that means the past cannot return as past, nor we to it, and any regret felt about this realization is still a mortification of the past, in the mode of kitsch. The remorse code that communicates a revisiting of the unpardonable or irreparable, however obliquely, is the inverse impossibility. Here, Derrida insists that a pardon either forgives the unpardonable or it is not truly a pardon; it must be unconditional, without exception or restriction. By extension, I would argue, amnesty, understood as a politics of forgetting, is a product of negotiation; unlike forgiveness, amnesty does not invoke the religious, monotheistic perspective Derrida recognizes in forgiveness throughout its history. Although both forgiveness and amnesty may denote an ethics of forgetting, forgiveness is neither ‘prescription’ nor amnesty proper. Amnesty seeks to efface psycho-social traces “as if nothing had happened,” while prescription, in the French legal sense, is only the suspension of any legal or

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<sup>18</sup> MARGARETE MITSCHELICH, ERINNERUNGSARBEIT. ZUR PSYCHOANALYSE DER UNFÄHIGKEIT ZU TRAUERN 114-116 (1987).

<sup>19</sup> Nicole Loraux formulates this structure as „faire taire le non-oubli de la mémoire.“ See LORAUX, LA CITÉ DIVISÉE, *supra* note 6 at 171.

<sup>20</sup> RICOEUR, *supra* note 5 at 586.

penal consequences of the act committed.<sup>21</sup> Arguably, the difference between amnesty and pardon is not simply one of private versus social spheres. It is Lyotard's "universal proposition" that "all politics is a politics of forgetting, and that nonforgetting (which is not memory) eludes politics."<sup>22</sup> Both forgiveness and amnesty are modifications of collective memory and forgetting.<sup>23</sup> Forgiveness conjures up the past to the extent of making it present again, repeating the injury, opening the wound, so that its full extent may indeed be forgiven. If amnesty may be understood as mutual forgetting, it remains diametrically opposed to the asymmetry of forgiveness, which throughout its long monotheistic tradition is inseparable from investing someone with the power to forgive.<sup>24</sup> Selective or collective amnesty, by contrast, whether in the context of the South African "Truth and Reconciliation Commission," or in Chile, or after the Vietnam War, invokes no higher power than the law. If forgiveness goes to the limits of memory, amnesty tests the limits of forgetting. In either case, repetition can push itself to the front as a resistance against remembering. Undoubtedly, such repetition-without-repetition also structures the scene of forgiveness, where an injury is called up again, to its full extent, without being literally repeated.<sup>25</sup> While forgiveness is most necessary in situations that are so exceptional, traumatic, or catastrophic as to fall out of history, amnesty remains firmly within the political necessities of normalization and continuity.

#### D. Politics and Ethics

Amnesty is neither suspension of a duty to punish, nor abolition – the limits amnesty draws imply that past and present cases end with its declaration. An act of grace can only be granted by a sovereign or head of state, usually to individuals,

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<sup>21</sup> RICOEUR, *supra* note 5 at 593 and 610. See LE PARDON: BRISER LA DETTE ET L'OUBLI (Olivier Abel ed., 1991).

<sup>22</sup> Jean-François Lyotard, *A l'insu (Unbeknownst)*, in COMMUNITY AT LOOSE ENDS, 42 (Miami Theory Collective ed., 1991).

<sup>23</sup> Helmut Lethen, *Damnatio Memoriae und die Rhetorik des Vergessens*, in SCHWEIGEN. UNTERBRECHUNG UND GRENZE DER MENSCHLICHEN WIRKLICHKEIT 159-168 (Dietmar Kamper and Christoph Wulf eds., 1992); MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998); DESMOND TUTU, *NO FUTURE WITHOUT FORGIVENESS* (1999).

<sup>24</sup> Like Jankelevitch, Arendt folds biblical and classical Greek references into her discussion of the power to forgive. Hannah Arendt, *Irreversibility and the Power to Forgive*, in THE HUMAN CONDITION 236 (1958); VLADIMIR JANKÉLÉVITCH, *LE PARDON* (1967); and VLADIMIR JANKÉLÉVITCH, *L'IMPRESCRIPTIBLE: PARDONNER? DANS L'HONNEUR ET LA DIGNITÉ* (1986).

<sup>25</sup> See ACTS OF MEMORY: CULTURAL RECALL IN THE PRESENT (Mieke Bal et al. eds., 1999).

rarely to a collectivity.<sup>26</sup> The law, however, figures sovereignty differently: a deed may be punishable, not punishable, or require mitigating considerations. Legal systems serve to decide, case by case or in principle, what distinguishes each situation. Jurisprudence provides formal limits on punishment, such as a prohibition against retroactive pursuit consequences after legislation (*nullum crimen sine lege*) and the prohibition against advance parole or pre-emption. Two principal limits to amnesty are equality and security. Until the French Revolution, amnesty in France was the right of the monarch, an act of clemency only limited by a list of “*crimes irremissibles*” such as murder, rape, or attack on the king.<sup>27</sup> What distinguishes such clemency from amnesty is that the latter constitutes forgiveness without forgetting, while amnesty is a total effacement of the deed and its consequences. The affordance of protection from prosecution for a crown witness makes the inequality of selective effacement evident; to avoid any suspicions of impropriety of such a covert “amnesty,” the prosecution usually has to demonstrate substantial benefits to the system. Where a legal system provides the possibility of ceasing prosecution, reducing sentences, or suspending the remainder of a sentence, one should not speak of amnesty; on the other hand, and by the same token, amnesty is not to say that the deed was not wrong, it is not a denial of punishable acts, nor is it an excuse or a way of removing legal grounds. Amnesty proper only says that despite the specific act, no prosecution and no expected consequences are to follow.

Just as it must remain impossible for criminals to count on amnesty, it must not be stalled in parliamentary negotiations. Of course it cannot be sprung on the judiciary and the public without discussion – but if amnesty is not swift and sudden, it is in danger of becoming a mere political tool. To ensure that amnesty as an intrusion of politics into law remains an exception, an amnesty’s goals must be made as clear as its distinction from pardon and forgiveness. History provides plenty of examples resembling amnesties based on obvious calculations – a tax measure that may fill state coffers, a political measure that may protect partisans, an early release program to ease the burden on the prison system, a declaration voiding certain laws to foster reform, a post-revolutionary declaration of new law and order, or an election promise bordering on an advance parole. In many or all of these

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<sup>26</sup> “Une institution pénale reposant sur une fiction et qui a pour but d’enlever pour l’avenir tout caractère délictueux à certains faits pénalement répréhensibles, et interdisant toute poursuite à leur égard ou en effaçant les condamnations qui les ont frappés.” ROGER MERLE AND ANDRÉ VITU, II TRAITÉ DE DROIT CRIMINEL ET DE PROCEDURE PÉNALE n. 1602 (1980). See J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613 (1990).

<sup>27</sup> Compare book 2, chapter 5 of Rousseau’s *Contrat social* and book six, chapter 16 of *De l’esprit des lois* by Montesquieu. Kant likewise excluded amnesties in circumstances where they might give rise to danger; see METAPHYSIK DER SITTEN 460 (Werke vol IV).

examples, one may detect a hint of self-dealing. Argentina, for instance, passed an amnesty for the military and the secret service in the course of transition from military junta to democracy in 1983, which the newly elected President Alfonsín then had to declare null and void; the parliament confirmed this by annulling the law on December 19, 1983. Examples like this raise the question how amnesty, in its suspiciously generalized and generalizing complicity with forgetting, could become one definition of politics, as that which begins when vengeance stops.

### E. Virtual Forgetting

Of course amnesty does not in all cases come at the end of war, nor inevitably in the service of peace: participation in the First World War, the French promised, could extinguish (a certain amount of) guilt; and to this day, a similar pact is part of the recruitment efforts of the French Foreign Legion. But for the most part, amnesty is a historical companion to political unrest. There were few amnesties in Germany between 1871 and 1914, some during WWI, and quite a few right after. There were amnesties every year in the Weimar Republic, commonly as a means to solidify political power. And although the concept was being discussed in the late 1940s, there were no amnesties in Germany after WWII until the violence of 1968-69 was addressed politically in 1970. Except for the use of the term "amnesty" in tax law and immigration law, one would have to search long and hard for recent considerations of amnesty. The last sustained discussion of amnesty in the US was in 1974, as a means of pacifying the country in the aftermath of the Vietnam War, specifically of the draft and of anti-war demonstrations.<sup>28</sup> The sharp distinctions between these 20<sup>th</sup> century contexts are crucial to an appreciation of the benefits of political transparency, especially since the discussion of amnesty for draft evaders may have done more good than an actual amnesty decree could have done.

Clearly if jurisprudence, if philosophy ignored the concept of amnesty, the world might be less prepared for a resolution of current and future conflicts. At the same time, just as the use of selective presidential pardon has come under considerable suspicion, amnesty as a political instrument must be carefully limited by legislation and jurisprudence to avoid abuse. To the extent that punishment secures the conditions for a free society that protects individual and collective rights, amnesty must remain an exception; inversely, there must be cases that remain ineligible for amnesty, such as torture and genocide, war crimes and crimes against humanity. On the other hand, the assumption that amnesty is a check on state power in the name of grace or forgiveness has to be qualified carefully. Judicial activism or other

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<sup>28</sup> See William O'Rourke, *Remembering to Forget*, in *SIGNS OF THE LITERARY TIMES: ESSAYS, REVIEWS, PROFILES 1970-1992* 169-182 (1993).

forms of political interference in the justice system will lead to abuse; but the state monopoly on violence can also result in over-use or under-use of its power, and thus leave citizens either unprotected or make them the victims of unjust judicial persecution. Therefore if there were no limits to amnesty, the state would have abandoned law, but if there was no amnesty as a limit to the force of law, the system would abandon the principles it vows to uphold. And to the extent the legal system depends on testimony, on recall, it continues to prize individual and cultural memory, and the story of amnesty as virtual forgetting is not being told.