

The Unforgotten: Memories of Justice

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Justice is, in part, a form of remembrance: Memory occupies a vital place at the heart of justice and its struggle to keep the victims, crimes, and perpetrators among the unforgotten. I argue that this memory-justice at once informs core judicial practices and ranges beyond them in a manner that leaves judicial closure incomplete. It reminds us of a duty to keep crimes and their victims from the oblivion of forgetting, of a duty to restore, preserve, and acknowledge the just order of the world. Yet, in the shadow of remembrance, other human goods can wither, goods located in the temporal registers of present and future. This latter lesson is important, but it is one with which we are familiar. I emphasize another, with which we are perhaps less at home: the intimacy of memory's bond with justice, not as obsessional or as a syndrome, but as a face of justice itself.

Aharon Appelfeld's novel, *The Iron Tracks*, portrays a son's unceasing hunt for his parents' Nazi murderers. The "iron tracks" are the memory of the crime, and they suggest both the rectitude of his memory work and the compulsion, the life-sapping absorption in the past, that drives him: "My memory is my downfall. It is a sealed well that doesn't lose a drop. . . . Were it not for my memory, my life would be different—better, I assume" (Appelfeld 1998, 9, 195). We recognize in him, as in other more ancient bearers of memory, such as Electra, what Nietzsche called the "sleeplessness" (*Schlaftlosigkeit*) of too much bitter memory. Might it not be better, we ask, to let go of the past, to invest our energy and time in building a future rather than dwelling in the evils of an irreversible past? Perhaps the price of our future is that we allow the poisonous memory of the past, of its victims and perpetrators, to pass into oblivion. Our orientation in the world seems to take its bearings from the future or present.

From that vantage point, justice as the duty to remember is archaic, irrational, even dangerous. We look with suspicion on those mired in the past: on those in the Balkans, for example, riven by ancient animosities and squandering the potential of an open future for the sake of settling old accounts. We wonder at the waste of 3,000 lives in the Northern Irish conflict governed, it seems, by the memory of the Battle of the Boyne and the Easter 1916 Uprising.¹ To sacrifice the present and future on the altar of grievances, whether of the recent or distant past, appears deeply irrational and wrong. Our reaction to Achilles, who is driven by the memory of Patroklos' death, or to Electra, who lives and acts in the shadow of her murdered father, are likely of a piece with our views of the wars in the former Yugoslavia or of the strife in Ulster. It is not the quantity of the time passed between the motivating event and the present response that puzzles or repels

us, although the greater the temporal distance, the more likely we are to be perplexed at the long duration of the wound's presence in their lives. Rather, we see it as negative, divisive, and irrational precisely because these individuals and peoples have lost the use of their future-oriented compass. Justice as memory work seems in need of an apology.

This essay considers justice in its work of remembering, grounded in a debt to the past, and resistance to that work, opposition made in the name of the present and future. In focusing on the moral claims of remembrance, I move against the weight of a modern view with a very long ancestry: "It is the living, and not the dead, that are to be accommodated" (Paine [1791/2] 1979, 64). We who pride ourselves on our posttraditional condition, on our "radical openness" to the future (Habermas 1998, 197), may be especially drawn to this view, more so perhaps than the ancients, who saw both the ethical and obsessional sides of memory-justice. These latter warn us against an all-consuming absorption in the past. Yet, they tell us of something else, too: that the remembrance of past wrongs is not wholly a trifling and fruitless or destructive "[laboring] in past matters" (Bacon 1965) but, rather, one of the faces of justice itself.

Dikē, justice, is in one of its key dimensions the memory of evil past. The Furies, Daughters of the Night, who "hold the memory of evil," labor mightily to ensure that the evil they remember, the memory of *miasma* or guilt-pollution, does not pass into oblivion. In their undying search for those tainted by guilt (the polluted), the Furies are the handmaidens of justice (Loraux 1997, 275; Ramnoux 1959, 148). They are its memory, ensuring that the passage of time does not overwhelm the work of justice (Aeschylus 1971, line 381; Simondon 1982, 224; Sophocles 1994, line 870). The divine Furies and the mortal Electra are driven, which costs them (and others) dearly, but still their imperatives to remember and requite evil, not to let go, belong centrally to justice: "The triad of Zeus, the Erinyes, and Justice maintain the moral order of the world" (Simondon 1982, 223–4, 227). Whether divinities or mortals, their actions are driven by justice, by its remembering eye cast back into the past, and they do not abandon its work until retribution is made. This is a valuable reminder, as is also the counsel that forget-

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¹ "The Irish been living [sic] the last twelve hundred years on dreams of revenge." Tom Wolfe, *Bonfire of the Vanities*, quoted in Murphy 1988b, 185n.

ting is an antidote to the dangers of too much memory, and I shall return to both.

Although this essay is about justice and memory, I use transitions to democracy as the principal illustrative setting because there the weight of the claims of the past, and their clash with those of the present and future, are most visible. I argue for the centrality of memory to justice (illustrated in such transitions) through a discussion of its varied memory practices. Here, in a contemporary political transition, is an example of memory-justice at work in three registers: both institutionalized and socially diffuse remembrance and the opposed claims of a restorative forgetting. After decades of conflict in Northern Ireland, a sometimes faltering transition is under way that is designed to introduce a fuller democratic life and bring an end to civil strife. As part of that transition, Prime Minister Blair created the Saville Inquiry to probe the circumstances surrounding the killing of 13 unarmed Catholic civilians by British soldiers in Derry on January 30, 1972 (Bloody Sunday). Blair reaffirmed the victims' innocence and spoke of the importance of remembering the dead. He also set the inquiry in the context of his government's peace initiative: "I believe that it is in everyone's interests that the truth [about Bloody Sunday] be established and told. That is also the way forward to the necessary reconciliation that will be such an important part of building a secure future for the people of Northern Ireland" (Blair 1998a). Justice as the institutionalized remembrance of the past is seen here, as in other truth commissions, as a duty to the dead and as a condition of reconciliation.

At the sites of the Bloody Sunday killings in Derry, the nationalist community mounted wall-sized photographic murals of some of the 13 civilians in the moment of their death (Melaugh 1997a, 1997b). This also was an act of memory-justice, but not of the institutionalized kind. Rather, the community paid a debt of remembrance to its own dead and called to mind the injustice inflicted on both the individuals and their community. Such memory is unlikely to be fully assuaged by the results of the legal proceedings. Justice's memory in this case keeps the bitter well open, and for a very long time indeed. In a Catholic neighborhood in Belfast, there is another wall mural. Titled *an Gorta Mór* (The Great Famine), it depicts bodies being carted from a field and cites a line of poetry by Seamus Heaney: "They buried us without shroud nor coffin" (Rolston 1997).² That also is a memory in the service of justice, a giving of remembrance and dignity to those who were not granted it in their time, and is part of the community's long memory and identity, linked no doubt to the fresher wounds depicted on the Bloody Sunday murals.

But justice's memories (institutionalized or informal; of long or brief duration) also can be seen as a

destructive wallowing in the past and so be challenged by the call to forget for the sake of peace. Winston Churchill wrote of Ulster: "But as the deluge subsides and the waters fall short we see the dreary steeples of Fermanagh and Tyrone emerging once again. The integrity of their quarrel is one of the few institutions that has been unaltered in the cataclysm [World War I] which has swept the world" (quoted in Mandelson 2000). Against an absorption in the injustices of the past, Tony Blair (1998b) urged the parties "to put our histories behind us, try to forgive and forget," and he appealed for "a Northern Ireland free from . . . the battles of the past. Offering the children here the future they deserve" (Blair 1999).

These three registers are not simply separate paths of memory and resistance to it. Rather, they often coexist and conflict, especially in times of regime change. Judicially institutionalized memory-justice seeks to address and sometimes limit the effects of the informal, bitter memories of injustice; the latter press upon the institutions of justice demands that often are unanswerable; and justice as forgetting attempts to still the voice of memory in the name of the future.

In the last section I will return to the informal and diffuse presence of memory-justice. For now I want to mention three judicial or quasijudicial faces of memory—justice as it deals with the past: trial and punishment (criminal charges); illumination and acknowledgment (truth commissions); and forgetting for the sake of a future in common (amnesty). First, criminal charges may be brought against the perpetrators or some subset of them. Examples are Nuremberg, the Eichmann trial, and the proceedings against the Greek junta leaders, those responsible for the Argentinean "dirty war," and the erstwhile head of the East German Stasi, Erich Mielke. Second, in truth commissions the strategy is not prosecution or punishment but disclosure and, perhaps more important, acknowledgment of the evils committed and of their victims (Cohen 1995, 18). Illustrations are the Truth and Reconciliation Commission (TRC) in South Africa, the various official and unofficial *Nunca Más* (Never Again) efforts in Latin America (Chile, Argentina, Brazil), the Saville Inquiry, and the Study Commission for the Assessment of the History and Consequences of the SED Dictatorship in Germany (Hayner 1995). Third, amnesty is a form of political-judicial forgetting that puts the past out of sight. The past is here moved beyond the reach of justice and into the shadows of civic forgetting.³ The objective of such amnesties is almost always civil peace, born of the need to protect a young and vulnerable democracy from being torn apart by an absorption in the past and an attendant spirit of revenge. Democracy and its future must, in this view, take precedence over the past and its demands that justice be done. Uruguay is perhaps the most recent example, although amnes-

² The line should read "without shroud or coffin" and is from Heaney's "Requiem for the Croppies" (Heaney 1980, 54). The dead in the poem are not victims of the Great Famine but rebels from the 1798 Irish Uprising. I am grateful to Roy K. Gottfried for his assistance in identifying this passage and placing it in its historical context.

³ Amnesties and similar arrangements are sometimes used by truth commissions to induce witnesses to offer testimony. The disputes and resentment that these amnesties generate suggest the power of the claims of memory and retribution.

ties were employed in much of postwar Europe (De Brito 1997, 125–51).

RETRIBUTION

In the panoply of human passions and interests that inform momentous and traumatic transitions, there is likely no single motivation to which we can ascribe retributive judicial proceedings. Undoubtedly, revenge is often a factor. Another is the need to delegitimize or root out the former nondemocratic elites so as to lessen the prospect of a counterrevolution and the related need to reintegrate the victims and enhance the credibility of the new regime by underscoring its break with the past.⁴ I will consider another claim: An ethics of remembrance informs the calls for retributive justice that mark the efforts of the past century to craft a response to massive state-led human rights abuses and genocides. Retroactive justice, Carlos Nino (1996, x, 19, 21, 33ff) argues, is essential to democratic transitions, whether in Argentina (where he was a leading figure in efforts to bring to justice those responsible for the “dirty war”), in Greece after the fall of the junta, or in the 1991 Czech lustration law. We could say that a trial is an assertion of the power of memory-justice. Memory seizes the crime, keeps it among the forgotten, and insists on retribution. No other good or end to be achieved is invoked to justify this process. By the same token, countervailing considerations, such as the unhappy effects of the relentless pursuit of justice, are not entertained. The language is not that of healing, or of sustaining the reemergence of democracy, or of identity but, rather, of the imperative to do what justice demands (Minow 1998, 63; Weschler 1990, 244).

Perhaps this is what Minow (1998, 25) means when she writes that to respond to mass atrocity with legal prosecution is to embrace the rule of law. To embrace the rule of law is to put oneself in opposition to the lawlessness and violence of dictatorship, but it does something more. The great fear for memory-justice is that the crime will be allowed to slip into oblivion, into the forgotten; that the passage of time will, like a natural solvent or a willed forgetting, free the perpetrators and weaken the already weak hold of justice in the world. A trial is one forum of resistance to this; it is a venue for seeking the victory of the memory of justice over the will to forget, for seeking, in a sense, the rule of law. Justice and memory resist the passage of time and deny to it any power of moral/legal absolution (Améry 1977, 115–6; Jankélévitch 1967, 53; 1986, 26).

Faced with the power of the process of becoming and with a concern for the future, memory-justice, as the voice that insists on keeping the past present, must seek to prevent the effacement of the memory of the crime (Jankélévitch 1986, 39). Justice thus becomes the memory of evil, and it fights a desperate battle against

the oblivion that always threatens to engulf it, that gives sanctuary to the perpetrators and a victory to injustice (Jankélévitch 1967, 23, 25, 29–30; 1986, 39). What at first sight appears as a straightforward conflict between the vengeful Furies and the demands of lawful justice becomes, in the light of memory, more nuanced. The Furies, for all the real tension between their pursuit of those polluted by guilt and the requirements of a law-governed civic order, at least in part are doing the work of justice. Their ferocity is directed equally against the criminals and the forgetting that shields them from retribution, and their refusal to let go of the past expresses a core demand of the rule of law understood as justice’s memory work. Their work may be (to borrow Francis Bacon’s term) “Wilde,” but in its determined insistence on the memory of crime, it is justice, too.

Retribution, then, is first and foremost restorative not of the status quo ante of the victims but of a just condition as such. The Furies, Michèle Simondon (1982, 223, 227) writes, belong to a universe ruled by justice, and in awakening us, in calling us back from our forgetfulness, they do the work of justice and restore or bring to light again its presence in the world. Yet, retribution answers not only to the call to see justice embraced but also to the appeal of the victims. “Those who have been hurt need a response” (Williams 1993, 70). Justice through trials in the aftermath of dictatorship and human rights abuses is one such response. But that type of response raises difficult issues. It is in the nature of certain crimes, and especially those involving state-led terror, that the victims are no longer alive to hear the response that justice offers them for their sufferings. Under these circumstances, and allowing for the passage of often considerable time, it is a thorny issue to determine who the recipient of the response ought to be and how one gauges the appropriate magnitude of compensation, given the radically different conditions that prevailed at the time of the crime. And what can be given the victims in compensation for their loss? Human practice can alter the present and future but is unable to reach into the past. At best, we can provide only ersatz substitutes for what has been lost (Ackerman 1992, 3, 89ff; Elster 1998, 23–7; Schlink 1998, 433–4; Waldron 1992, 12ff).

How to calibrate compensation is one issue, but there are still deeper problems. The imperative to answer the victims’ need for a response is often understood as a duty to the dead. Memory-justice’s tenacious clinging to the memory of the crime and its victims is something owed to them, rather than to the living. The face of justice is here at least turned entirely toward the past, and the rightness of its present actions is understood squarely in light of a debt to the dead.⁵ We find

⁵ This is the imperative to give the wronged (the victims of the Holocaust, the disappeared, the victims of the apartheid regime) their full measure of justice. A related but differently inflected view of judicial response to the past is that the core debt is not (in the first instance) to the dead but to justice itself. The dead and surviving victims are no longer the centerpiece, and what takes their place is an almost Kantian concern for a just law-governed condition as such. Respect for justice (and morality) demands that past crimes be

⁴ Archbishop Desmond Tutu (1998), in his Foreword to the TRC’s final report, makes clear the multiple concerns at work in such proceedings, including amnesty so as to encourage truth-telling and opposition to lustration of implicated persons.

striking the idea of indebtedness to those with whom we have neither contract nor bargain nor even any tangible community except perhaps the communion of remembrance itself. Is the idea of a debt grounded in the imperatives of fidelity so very odd? Perhaps Sophocles' understanding that Orestes and Electra owe it to their dead father, Agamemnon, to see that his murderers do not escape punishment captures a dimension of memory-justice that is still at work among us.

Remarking on the various efforts to deal with the past in the course of South Africa's transition to majority rule, Arieh Neier (Neier, Zalaquette, and Michnik 1997, 3) states that the motivation was to recognize the dignity of the victims. To do otherwise, he concluded, would be to acknowledge that only the future has value. Related sentiments of the morality of memory lie behind our practice of public and private commemoration, monument building, and so forth. What is striking in all these practices is the idea of a debt to those who are not present, that they are entitled to hear the response of justice to their fate or to receive compensation, and of the weight accorded to this past. That is surely among the lessons of the Furies, Electra, and Achilles: Their absorption in their debts to the dead costs them (and others) mightily, but those costs and the obliviousness to the future that helps bring them about are (at least partially) justified and seen as good in light of the commitment to fidelity, to keeping faith with the victims (Jankélévitch 1967, 73; 1986, 60). We may be tempted to see in the logic of the Furies an obsessional immersion in the past, or an illustration of the need for a law-governed political order to vanquish their "Wilde" and private vengeance (Shklar 1990, 94–5).⁶ I look at another of their faces: as memory-justice giving voice to the past and its victims and insisting on the restoration of justice in the world against the oblivion of forgetting.⁷

The work of trials as acts of memory-justice in the wake of massive state crimes and during the transition to democracy can be framed in language other than that of the restoration of justice. Preventative and didactic purposes are examples of other justificatory

answered. In the former view, it is memory of the victims and the crimes against them that is central to the project of justice; in the latter view, it is justice itself that is recalled and set against the crimes of the past.

⁶ The Furies are the "agents of pollution who embody the anger of one slain by a kinsman" (Parker 1983, 107). Their conflict with the city in Aeschylus' *Eumenides* can be seen as a public/private justice tension, much as the ban on dueling was an attempt by the modern state to establish its monopoly on legitimate violence. I emphasize another facet of their behavior: Not so much their private character needs to be tamed as their destructive single-mindedness in light of the multiple goods sought by human beings. So tamed, the transition to (legal) justice in the city is seamless.

⁷ This is not to deny the destructiveness of the Furies' work and (sometimes) of memory's role in politics. Memory (individual and collective) can indeed be obsessional and destructive, not of goods external to justice but of the very core of justice itself. Memory, in brief, is readily available for abuse. Todorov (1995) provides a very good account of this dimension of memory, and the ancient Greeks were, as I note at the end of this essay, well aware of it. My purpose here is rather to draw attention to the ways in which the Furies and memory are the sisters of justice.

idioms. Both are future oriented, and their claims rest squarely on the accuracy of their empirical assumptions about the long-term effects of such measures. The preventative rationale is perhaps most familiar in the recent period from the *Nunca Más* process in Argentina after the "dirty war." The purpose of these trials was, according to Raúl Alfonsín (1996, 16), a former president of Argentina, not so much to punish as to prevent. Trials and other actions against the perpetrators can serve as a warning. Even if they do not wholly uproot the personnel and institutions responsible for state crimes and dictatorship, they put them on notice that there is no sanctuary from justice. Something like this motivation was no doubt part of the rationale for the Nuremberg trials and the trials that followed the collapse of military juntas in Greece and Argentina.

A second and no less powerful reason for such trials is didactic and identity-shaping: What we remember will determine what we become. They can contribute to shaping the collective memory of a community (Osiel 1997, 6; Smith 1997, 19). The ingathering of the past in the form of institutionalized memory-justice allows societies to cement their political-legal identity in the aftermath of trauma and disruption (Huntington 1991, 211; Waldron 1992, 5–6; Wieviorka 1998, 81, 95). Courts can be seen as the locales of a narration or an account of responsibility and guilt, placed in the wider canvas of the community's political identity, of what was lost and what needs to be restored. The restoration is of a (partial) status quo ante, a former version of the community: Republican France before Vichy, Greece before the coup d'état, or Chile before Pinochet seized power. And the narrative of remembrance takes its bearing precisely from that earlier condition.

When there is no past democratic and law-governed regime to serve as the focal point of a restorative narrative, restoration means the recovery of a law-governed condition not from the community's own past but, one might say, from justice itself. This is the memory of justice not in an empirical or historical sense but as an almost Platonic recollection of justice: a reminder to the community that it has strayed, not from its own past but from justice (Plato, *Phaedrus* 249c, 249e, 254b). The courtroom then becomes the site of a rupture. The past, acknowledged and condemned, is not seen as a regrettable interregnum, as if it were the work of criminal interlopers, but as the past of the community simply. A trial serves under these conditions as a call to remember the claims of justice on us and to repudiate one's former self in the light of those claims (Jaspers 1965, 100; Schlink 1988, 66–7; 1998, 437).

Whether by restoring integrity to a community gone astray from justice or by condemning a deviation from its own core values, these applications of memory-justice are arguably of special importance to the restoration or creation of liberal and democratic regimes after the defeat of dictatorship.⁸ This is so because

⁸ The idioms of restoration and remembrance also are important in the language of revolutionary foundings. The recovered past serves, among other things, to establish filiation, to mark out an (alleged)

properly conducted (i.e., not as democratic show trials that grossly violate the basic norms of a law-governed society) they reinforce the constitutional/judicial foundation of society. In other words, they demonstrate in practice the difference between a lawless regime and a mode of governance restrained by law. In its legal guise, memory-justice holds onto the past for the sake of retribution and restoration, of the rule of law, and of a law-ordered moral-political universe. In so doing, it can also help restore a political identity or announce a rupture and induce a new birth. It can reject the old self/regime in order to free the new society of the pollution of its predecessor.

JUSTICE AS TRUTH

Societies undergoing regime transitions and attempting to find a way to deal with the past can attend to the demands of memory-justice in two other ways. Memory and retribution are closely entangled (Minow 1998, 14, quoting Geoffrey Hartman). Grief, remorse, revenge, and retribution all participate in memory as well as in the resistance to forgetting. They cling to the past and fight against the erosion of memory brought about by the passage of time, its unceasing movement toward the openness of the future.⁹ But the memory of evil that the Furies hold, that central part of memory-justice, is not bound up with retribution alone. Once more, the ancient Greeks offer some guidance. Their word for truth, *alētheia*, means literally the “unforgotten” (from the root *lēthē*, forgetting) (Loraux 1988a, 37). Forgetting rather than falsity is the antonym. To remember is to preserve the truth of the phenomenon.

It is not surprising that truth as the unforgotten, on the one side, and justice as memory-justice, on the other, are closely linked (Detienne 1994, 69–70, 76). Justice seeks the truth, we might say, although concealed beneath that commonplace is the deeper observation that justice wants truth the way memory desires phenomena to remain (or become) unforgotten. It is the work of justice to bring the truth to light, to secure the deeds, victims, and perpetrators in *alētheia*, in the realm of memory, of the unforgotten. To forget is to

continuity so as to help secure authority for the new regime. Innovation is cast as renaissance (Le Goff 1992, 9). The importance of doing justice to the past in the context of transitions to democracy can be seen as part of this broader and complex relationship between political past and present.

Because my principal concern is to understand the relationship among justice, remembrance, and duties to the past, I treat the core issues of the memory of justice as analytically separable from the wider canvas of regime founding. Nevertheless, these issues point to just that wider canvas of time, memory, and regime identity. I touch on this elsewhere (Booth 1999), and see Arendt 1963, 42–3, 196–7, 201, 207–8. I am grateful to a reviewer for emphasizing this point.⁹ Revenge is a form of remembrance but is quite apart from and, indeed, opposed to judicial, law-governed retribution. Shklar (1990, 93–4) argues it is subjective, a passion often irrational and typically dissatisfied with lawful retribution. The possibility of a lawful reckoning with past injustices sometimes depends on vanquishing the spirit of revenge, or weeding it out (Bacon 1965, 104). Nevertheless, it is a sister of justice and has a certain kinship to lawful retribution, above all in its passion to remember wrongs done, to preserve them and their victims among the unforgotten, and to requite them.

live at once in untruth and injustice, which explains the often (but not exclusively) negative valuation attached to forgetting in the classical literature. Forgetting is opposed to both memory and justice. More precisely, forgetting is opposed to the core of justice that lies in the preservation of truth/memory (Detienne 1994, 6; Yerushalmi 1988, 20).

In our time, this memory-truth-justice connection has become, if anything, even more compelling. One goal of the twentieth-century perpetrators of mass crime was to obliterate any memory of the victims (Minow 1998, 1). To erase the memory of crimes and their victims is, of course, desired by criminals great and small, but I refer here to something more: By effacing their names, histories, and fates, it was hoped that the fact, the truth of their existence would also disappear.¹⁰ We need to preserve the memory of the crimes, in the words of the Polish poet Zbigniew Herbert, because only “a fatal defect in our tools/or a sin of memory” could leave the disappeared in the shadows of forgetting. “Ignorance about the disappeared/undermines the reality of the world” (Herbert 1985, 65, 67).

If the victims of mass crime are left faceless and nameless, if the hour, manner, and place of their last moments are unknown, then they are outside the light of truth, lost to forgetting. The world is left incomplete; its integrity broken; its reality undermined. The very incompleteness or the empty spaces that such effacement creates command memory’s attempt to recover these persons. The need for precision (Herbert titles his poem “Mr. Cogito on the Need for Precision”) is precisely the need to restore the truth against forgetting or effacement, whether willed or simply the consequence of the passage of time. What is missing and in need of restoration is not just a fragment of an incomplete whole, a shard to be restored to a shattered vase. Rather, justice is missing. “We are despite everything/the guardians of our brothers,” Herbert writes. To be their guardians is to keep them in the sanctuary of truth-memory, which at the same time preserves the (just) reality of the world.

The victims, especially the voiceless dead, are there in “the immensity of historic memory, constantly menaced by an unacceptable forgetting” (Semprún 1995b, 91). Remembering, bringing them into the light of truth, restores a kind of life to them. Memory is a sort of sepulcher that gives survival to what is remembered: “In spite of them [the Nazis], the souls of your brothers and sisters will live on, the martyrs whom they sought to destroy. For no one can annihilate letters. They have wings, and they fly around in the heights... into eternity” (Kugelmass and Boyarin 1998, 192). Remembering is to make what is past present, to rescue it from the status of what-had-happened, or more radically from the oblivion of forgetting. It connects what is lost

¹⁰ The Nazis planned to transform a Prague synagogue into a “Museum of a vanished race” once the annihilation of European Jews was complete. They thus would have destroyed them twice over: first, their existence, and then the remembrance of them. See Kiderlen 1990.

to what is here (Carson 1999, 38). Not to bring the dead into the sanctuary of truth-memory-justice is to annihilate them a second time: “forgetting: a second death” (Lenz 1992, 10). It is a second death because it ratifies and deepens the oblivion to which the initial crime seeks to consign them. “I feel guilty that after they [the murdered Jews of Jedwabne, Poland] died they were murdered again, denied a decent burial, denied tears, denied truth about this hideous crime, and that for decades a lie was repeated” (Michnik 2001).

Bringing the victims into memory/truth saves them from being forever lost among the forgotten. Memory is the truth of things, whether of victims or crimes, because it preserves the deeds and persons. What is left in silence dies and languishes among the lost. What we do not remember is as if it never happened (Lenz 1992, 17; Simondon 1982, 124). Out of this sense of menace to those who have already suffered comes an imperative of justice to remember and restore the truth. Illustrations abound. Nicole Lapierre (1989, 240) referring to the extermination of the Jews in the Polish town of Plock, states that “the effacement was total . . . what was left was my rage to write and to describe.” Germaine Tillion (1946, 19, 50), a survivor of Ravensbrück, recounts that her will to live in the camp was fueled by the desire to bear witness and to bring the truth out from the catastrophe. Patrick Modiano, born after World War II, set out to discover as much as he could about Dora Bruder, a Parisian Jewish teen who was murdered at Auschwitz: “If I was not here to write it, there would be no trace” (Modiano 1999, 65).¹¹

The language of truth-memory-justice is not, at its core, that of the “truth will set us free” kind (Soyinka 1999, 37). What principally justifies this pursuit of truth through the various public and private institutions of memory is the language of fidelity, of what is owed to the dead. To quote Czeslaw Milosz (1991, 281) in his Nobel Lecture: “Those who are alive receive a mandate from those who are dead and silent forever: to preserve the truth about the past.” This mandate demands of those who survive or who come after that they act as witnesses to the truth of what happened, that they speak on behalf of those who cannot (Lapierre 1989, 10). Their responsibility to the truth is an act of fidelity, of faithfulness to the victims (Jankélévitch 1986, 60, 79). Silent deeds die, whether those of greatness and heroism or those of abominable crime. All are in need of words, letters, monuments, of witnesses and makers of words, to preserve them among the unlost (Carson 1999, 40). There is an electiveness about this aspect of memory-justice: It is up to us, in the present, to give or withhold voice. But this voluntariness, far from diminishing the moral weight of the responsibility, rather redoubles the requirement to remain faithful to the victims of mass crime by not completing the perpetrators’ work of effacement.

The impetus that draws us to the work of truth-memory-justice is at once both palpable and perplexing. Palpable is the moral claim that we owe the victims the light of truth/remembrance; although they are silent, they call on us to witness the fact of their existence and their fate. We know and are familiar with the hold of truth-memory-justice over us. We see it in the “memory books” composed by survivors of the Holocaust. We see it in the work of Serge Klarsfeld (1995), who compiled 1,731 pages of names, photographs, addresses, and convoys of Jewish children deported from France to Nazi concentration camps. At the legal-political level, we see it in the work of truth commissions and similar processes that have accompanied transitions to democracy in South Africa, Chile, and El Salvador as well as in the release of Stasi files in reunified Germany (Huysse 1995, 52–3). Yet, perplexing is the notion that we have a bond to which we must remain faithful, a bond never stated or articulated but that nevertheless “denies us the right to be silent” (Raczynow 1979, 106). That thought goes beyond our customary understanding of obligation and its sources, as does its consequence: the weight that it attaches to this duty over our present and future concerns.

Is this preservation in the light of remembrance sufficient? For Sophocles, Electra and her brother are not simply the living truth and memory of the crimes committed against their father. They are also the instruments of retribution, and the justice they embody is complete in the unity of truth, remembrance, and a corrective. It is not surprising that some consider truth commissions and similar strategies for dealing with the past to be inadequate. They are found wanting both (and relatedly) because their focus is on disclosure, not on punishing the perpetrators, and because amnesties are sometimes needed to heal divisions and encourage the perpetrators to come forward. Referring to the TRC, Wole Soyinka (1999, 13) writes: “Truth as a prelude to reconciliation, that seems logical enough; but Truth as the sole exaction or condition for Reconciliation? That is what constitutes a stumbling block in the South African proceedings” (see also Holiday 1998, 47). Truth alone, the mere opening of files, cannot substitute for the vindication that can be achieved only when the oppressor appears in a court before his victims. Some measure of restitution is necessary (Soyinka 1999, 30–1, 36, 80).

Soyinka discusses this vindication in terms of healing and catharsis, but a less psychological way to phrase it would be to say that justice-memory and justice-retribution are two faces of justice and its relation to the past. Remembrance, as preserving the truth of the past, of the victims and perpetrators, at once saves the phenomena from oblivion and fulfills a debt of fidelity to the dead. But as Electra’s life makes clear, the light of truth has no exhaustive claim on the entirety of justice. We do not simply want crime to stand exposed in the light of truthful remembrance; we want it to be punished as well. Truth *and* retribution are what is wanted.

¹¹ Klarsfeld (1995, 1,535) located and published a photograph of Dora Bruder and wrote: “From now on, Patrick Modiano knows the face of Dora Bruder.”

AMNESTY

Justice and retribution stand in an uneasy relationship with other comportments, even virtues, that seek to moderate or season justice. Mercy and forgiveness are two of these: The former lessens the justly deserved punishment; the latter changes our attitude, how we feel, about the perpetrator (Minow 1998, 15; Murphy 1988a, 21, 24). The first is a not uncommon part of judicial or quasi-judicial proceedings; the second is more subjective. Forgiveness is the overcoming, on moral grounds, of the feeling of resentment, and it is particularly important in allowing human relations to continue that otherwise would be disrupted by resentment (Murphy 1988a, 20, 24). Because of its restorative power, forgiveness is a virtue, even (in Archbishop Tutu's phrase) a "civic sacrament," often recommended in times of regime transition (quoted in Gutmann and Thompson 2000, 29; Sachs 2000, 223–4). Yet, there is an uneasiness in the relationship of mercy, forgiveness, and justice, a tension that comes from the fact that although all three are counted virtues, the work that forgiveness and mercy strive to do is to lessen or moderate the full measure of retributive justice's rightful claims (Murphy 1988b, 167).¹²

There is another uneasy way in which justice may be seasoned, one that shares much in common with mercy and forgiveness but that is more explicitly bound up with justice as the work of memory. I stated earlier that keeping deeds and persons in memory is an elective matter, almost a matter of resistance against the natural course of things, of fighting against the corrosive quality of the passage of time and our preoccupation

with the future. Sophocles and other ancients reflect upon what it would mean for children to forget the murder of their father, to live untroubled in the presence of his killers and their unanswered crime, as if no injustice had been done. That would undermine the "[just] reality of the world." Antagonistically related to this retrospective glance of memory-justice is precisely a rejection of that orientation, that is, an effort to overcome the hold of the unforgotten, of remembrance, on us. This is not one of the faces of memory-justice but is a rejection of memory and, being grounded in that refusal, is intimately connected to the object of its refusal. Broadly speaking, this is the view that, in one fashion or another, a surfeit of memory is destructive of life. Remembrance draws us to what is dead and to the irreversible. It is nostalgia, bitterness, or the thirst for revenge. All these dwell in what is beyond human agency to modify; all, it seems, irrationally resist the becoming of time. Worse, all (therefore) sacrifice the present and future for the sake of the past. Perhaps forgetting, the letting go of the past, as Nietzsche (1957, 7–8) argued, is essential to life.

Forgetting can also sometimes be necessary therapy, a way to minimize the aftershocks of trauma. Jorge Semprún (1994, 292, 332), who emerged alive from Buchenwald in 1945, tells us that memory was deadly for him, and consequently "I chose forgetting. I put in place, without too much concern for the good of my own identity . . . the strategy of voluntary amnesia, cruelly systematic" (see also Appelfeld 1994, ix). In the ancient view, *Mnēmosynē*, memory, is also the goddess who allows us to forget our ills (Hesiod 1983, lines 54–5; Simondon 1982, 141; Vernant 1996, 117). Forgetting permits us to live in the present and to be open to the future. In the absence of this salve, memory can chain us to the past and, when the memory is of crime or injustice, to bitterness and resentment. We can see this clearly in the case of Electra and Orestes. They are the embodiment of memory-justice, but at the same time, or precisely because of that, they are bound hand and foot to the past. They are not creatures of the present and future, and their absorption in the past bars them from those other human times and their associated joys.

Homer's *Odyssey* and Aeschylus' *Eumenides* present the case for forgetting in a more directly political context. After Odysseus kills Penelope's suitors, Zeus tells Athena: "Let us make them forget the death of their brothers and sons, and let them be friends with each other, as in the time past, and let them have prosperity and peace in abundance" (Homer 1977, Book 24, lines 480–90; Loraux 1988a, 33). Forgetting is here the precondition not of individual well-being (as in Semprún's account) but of a return to peace. In the *Eumenides*, when Orestes is acquitted, Clytaemnestra's Furies, anxious for revenge against her son and killer Orestes, rage against the great dishonor and ills (*megala toi korai dustuxeis Nuktos atimopentheis*) that they feel they have received at the hands of Athena and the jury. Athena, in what Pierre Vidal-Naquet (1995, 266–7) calls the West's first argument for prescription (statute of limitations), convinces the Furies (who are

¹² Murphy and Hampton (1988), Gutmann and Thompson (2000), and Minow (1998) provide valuable discussions of forgiveness and justice. The tension between forgiving and merciful dispositions, on the one side, and justice, on the other, is nicely highlighted in Kant's theory of justice and morality. Kant (1968d, 337; 1991, 145) was suspicious of philanthropy, mercy, and forgiveness in their efforts to limit justice. Fellow feeling is a duty but should not be allowed to dilute the demands of morality and justice (Kant 1964, 66; 1968a, 398–9; 1968d, 448ff; 1991, 243ff). Of course, and by the same token, resentment would have been abhorrent to him, not because it is insufficiently forgiving, but because it substitutes feeling for respect for the moral law. Kant sees punishment as governed by a categorical imperative, not to be modified by "eudaemonism" or indeed any consideration of external social benefit (Kant 1968d, 331–7; 1991, 140–5).

Kant's moral and legal philosophies are only ambiguously related to the arguments presented here, but they offer some fertile ground for reflection. In general, moral judgment and remembrance are not related for Kant. The categorical imperative alone provides guidance as to the demands of the moral law under any circumstances, and it frees moral agents from the extramoral (and unreliable) calculus of experience (Kant 1968c, 555; 1968b, 583; 1968e, 286ff; 1974, 53–4). Moral conduct and justice as institutionalized morality (in relations of external freedom) are not driven by the notion of debts to persons, dead or living, but by respect for the (moral or external) law itself. More speculatively, it is worth entertaining the thought that the categorical imperative and its illustration, the Kingdom of Ends, are devices to remind us of the claims of the moral law. They are reminders not in the sense of calling to mind our empirical past but just the reverse: by reminding us of justice in the midst of the false and misleading lessons of the world as given in experience, a world filled with the forgetting of the truth of justice (Plato, *Phaedrus*, 248c). These devices are, one might say, a variant of the Platonic memory of justice.

motivated both by anger over the acquittal and by shame at being bested) not to visit conflict and death on the city (Aeschylus 1971, lines 825ff, 860ff, 975).¹³

The putting aside or forgetting of past crimes for the sake of peace and civic unity is not just a device of ancient epic and tragedy. As part of the Athenian reconciliation agreement of 403–402 BC that restored democracy after the dictatorship of the Thirty, an amnesty was proclaimed: “not to remember evil” [*mē mnēsikakein*], that is, the evils of the Thirty (Aristotle 1952, section xxxix; Elster 1998, 9–13; Loening 1987; Loraux 1997, 174; Nippel 1997). It was clear that civic peace could not be restored, much less democracy, without a public forgetting, the “institutional oblivion” of the past. Memory-justice as retribution divides and poisons; it impedes renewal. It seems that, as the Athenian democrats recognized, forgetting is an essential part of politics because it is an ally of peace and unity, just as the Furies, vengeance, and memory-justice are antithetical to civic peace (Loraux 1988a, 23, 30; 1988b, 13; 1997, 38).

Because it effects a rupture with the past, political-judicial forgetting can be an instrument of peace (Simondon 1982, 45). It seeks to draw a thick line between past and present and to debar memory-justice “from keeping . . . [the] Wounds greene” (Bacon 1965, 104), from forcing the present to drink from the bitter, polluted cup of the past, from sacrificing renewal to revenge. For the authors of the Athenian reconciliation agreement, peace and unity were great goods and more important than the search for full retribution. The justice of the demands for retribution was not in dispute. Rather, at issue was a choice (to put it rather too starkly) between peace and justice when, as is often the case, the two lead us in quite different directions. Forgetting answers one vital need of a community, especially after deeply divisive political traumas; it allows an end, a final point, to strife. Ernest Renan (1992, 41) is surely right that nations are rooted in both the things they remember together and the things they have willed to be forgotten.

Amnesty is not mercy but a “mutual forgetting” (*ein gegenseitiger Akt des Vergessens*) (Schmitt 1995, 219) that effectively precludes the evocation of the perpetrators’ deeds.¹⁴ It is particularly useful in ending civil

strife, when the need to restore unity is paramount (Gacon 1994, 104; Ricoeur 1995, 205; Schmitt 1995, 218). Hence the political importance of amnesties following the defeat of the Paris Commune, in Germany and formerly occupied Europe after World War II, and in France in the wake of Algerian independence (Frei 1997; Gacon 1994, 98; Rousso 1990, 67–8, 145–6). Of course, the process of forgetting extends beyond such legal-political actions as amnesty. Amnesia, a sort of informal collective forgetting and the crafting of conciliatory counternarratives of the past, also may play an important role. According to Hans Enzensberger (1990, 80), after World War II, Europeans took shelter behind a great amnesia; this occurred generally but especially in Germany, where the National Socialist period was left in silence, and in France, where De Gaulle managed to weave a tale of Vichy as a parenthesis in French history and of a national resistance to German occupation (see also Arendt 1989; Judt 2000, 299; Lagrou 2000).

There can be little doubt that a combination of formal amnesty and informal amnesia can serve current interests: the pursuit of civil peace above all as well as the desire of perpetrators to escape justice, of collaborators not to be stained by their acts of betrayal, and of passive bystanders to find redemption in a story of courage and moral uprightness. Equally certain is that amnesty and amnesia can be instruments of political actors in the present who seek to install one memory or expunge another (Finkelkraut 2000, 37–52, 135–6). Yet, the motivating presence of current interests in the politics of amnesty and amnesia should not lead us to stop with a facile view of the “constructed” or “imagined” character of memory and forgetting. Rather, memory and forgetting speak to something more elemental in our lives in common than the mere opportunism of those who want to save themselves or profit from a regime change.

Amnesty overturns the moral imperative of memory-justice so that we may be oriented to the present and future rather than (or not solely) to the fulfillment of a debt to the victims or to the carrying out of the demands of justice for its own sake. It asks: “What is the practical importance now of a judgment that injustice occurred in the past (Waldron 1992, 4, 27)?” As Raúl Alfonsín (1993, 18) argues, the consequences of punishing the past must be weighed against the present and future, and too high a present cost must be rejected (p. 18). The thick line between past and present that amnesty permits should not be seen as the avoidance of moral judgment but as the view that justice needs to be seasoned not so much by compassion for its own sake as by a concern for the future, the goods of which may be lost in a too strict adherence to the demands of the iron tracks of memory-justice. For example, the amnesty in Uruguay following the military

¹³ An equal number of votes are cast for and against acquittal of Orestes (Aeschylus 1971, lines 795–6). Even in the city of institutionalized justice, the Furies are not weak.

¹⁴ The English word “amnesty” has its root in the Greek *amnēstia*, “the forgetfulness of wrong” or “oblivion.” (See Plato, *Menexenus*, 239c: “but those exploits . . . which lie still buried in oblivion [*amnēstia*].”) Loening (1987, 21) remarks that the use of *amnēstia* for political/legal cases was a much later employment. See also Loraux 1988a, 23–4. Bacon (1951, 212) uses the term in that sense and ties it to reconciliation: “Reconcilement is better managed by an amnesty, and passing over that which is past.” Amnesty is a legal/political forgetting that allows the wrong done to pass into (legal) oblivion.

“Amnesia” is also rooted in the Greek term for forgetting, but the relationship with amnesty is not merely etymological. There have been efforts to combine the goal of reconciliation via amnesty with the duty to remember, with a rejection of amnesia, such as the “amnesty—yes; amnesia—no” proposal made during the Central European transitions to democracy. Michnik (1997) states that this

formula turned out to be too difficult for the people of the democratic opposition. Why? Perhaps the imperative to remember cannot so easily be confined to extrajudicial remembrance; in consigning crimes to legal oblivion, a wrong is committed that symbolic gestures of remembrance, such as speeches, flowers on graves, and monuments, cannot overcome (Jankélévitch 1986, 61).

dictatorship was justified as a moral decision “to give priority to the possibility of a future of agreement over a past of division” (Senator Manuel Flores Silva quoted in Wechsler 1990, 184). The then president of Uruguay, Julio María Sanguinetti, offered similar arguments and invoked Renan’s observation on the need for forgetting (pp. 175, 191).

It may just be that amnesty and, in general, a displacement of the grievances of the past are of particular importance in transitions to (or restorations of) democracy (Huntington 1991, 214; Minow 1998, 14; Smith 1997, 11). The degree of civility, trust, and tolerance necessary for a democracy to flourish would be jeopardized, it is argued, by too overzealous a pursuit of either prosecutions or disclosures. Corrective justice, the memory-justice of retribution, Ackerman (1992, 3, 69–71, 88) writes, divides a people into the guilty and innocent, collaborators and resisters. He views it as a negative device, focused on individual culpability rather than institutional reform, oriented toward the past, and one that can easily have counterproductive consequences for the new democracy. In Ackerman’s account it is not only prosecutions that are wrongheaded but also policies of disclosure: The secret police files should be burned, he urges, not made available to the public as in postunification Germany (see also Nino 1996, 128ff). The well of bitterness and division must be drained.

In this view, amnesty, political-judicial forgetting, is an answer to the Furies, to the vengeful face of memory-justice (Ricoeur 1997, 452). As in the *Eumenides*, the claims of retributive justice are not disputed as such but seasoned or moderated. An amnesty does not say that (retributive) punishment is undeserved but that it ill serves other purposes (e.g., reconciliation). The Furies should be tamed or, better, brought into the city’s institutions and their claims moderated by other imperatives, one of which is to ask how retribution will affect the present and future. The demands for justice by victims of past wrongs must be weighed against the claims of today and tomorrow. Humans live in all three temporal registers, and all insistently call to us, depend on us, and insist that we attend to their just claims.

For retributive justice-memory, to put aside the past in the name of present and future needs is unacceptable. That would allow the erosion that accompanies time and would complete or ratify the efforts of the perpetrators to erase their victims (Jankélévitch 1974, 247; 1986, 48). Amnesty and amnesia, as forms of forgetting, are not positions that take their bearing from the strictures of morality and justice; they are ways of yielding to the extramoral course of becoming. As agents capable of acting under self-given norms, we ought to resist forgetting and not simply collaborate with it (Améry 1977, 115, 116).

Memory-justice-retribution, as the voice of the silenced victims, commands: “Do not forget truly it is not in your power/to forgive in the name of those betrayed at dawn” (Herbert 1977, 79; see also Michnik and Havel 1993, 25). “Not in your power”: Can anyone other than the victims extend the gesture of reconcili-

ation that is amnesty?¹⁵ Samuel Pisar (1986, 72) writes of the Holocaust: “Who will pardon? Who could pardon? The dead? The survivors? The rest of humanity? No one” (see also Soyinka 1999, 26, 28). And because amnesties typically forget the victims and the crimes committed against them (Ertel 1993, 121), they may outrage our moral sensibilities for two reasons. They raise the question about who can forgive and forget, and they seem to violate our debt of fidelity to the victims, which is redeemed through remembrance.

A core vulnerability of strategies of willed forgetting is that injunctions not to remember evil may put crimes into the civic shadows, beyond judicial evocation, but cannot undo the fact that they were done (Jankélévitch 1974, 289). The irreversibility of time means that past injustices both cannot be directly undone and cannot be made to disappear entirely. The past and our memory of it always threaten to resurface. The Furies sleep but can be awakened (Ricoeur 1995, 208, quoting Hegel). Semprún (1994, 297) cited earlier on the need to forget for the sake of life, also states: “Despite the detours, the deliberate or involuntary censoring, the strategy of forgetting . . . despite all the pages written to exorcize this experience . . . despite all this, the past preserved the shattering power of the smoke and snow [of Buchenwald], just as on the first day.” De Gaulle’s strategy of Vichy as a parenthesis overlaid with a tale of heroic national resistance unraveled when the true extent of collaboration and passivity during the “dark years” was brought from the shadows by films such as *The Sorrow and the Pity*.

No society, Benjamin Stora (1991, 319) writes in relation to a later French national trauma, the war in Algeria, can live forever in amnesia. Past victims and perpetrators, or our memory of them, have the ability to return almost unbidden. The Furies are always there, waiting to return and rouse us from our sleep, should we become oblivious to the demands of memory-justice.¹⁶ Since forgetting cannot erase what has been done, amnesty and amnesia are at best provisional means to deal with the past (Jankélévitch 1974, 289). Our embeddedness in the present and future, and their just claims on us, are not exhaustive of the universe of justice. Perhaps attempts to make them so, to draw a thick line between past and present through amnesty and amnesia, only serve to awaken the Furies and in so doing to show how futile is the attempt to

¹⁵ We consider forgiveness something that can rightfully be given only by the person (or community) wronged. As Jeffrie Murphy (1988a, 21) observes, it would be odd to say that those born after World War II, and with no connection to the victims of the Holocaust, forgive Hitler for those crimes.

¹⁶ Stephen Holmes (1995) remarks on the waning passion for decommunization in much of Eastern Europe and on the reasonableness of that lack of interest. The trajectory of the passions surrounding the Holocaust, from neglect or indifference in the immediate postwar years to a powerful resurgence at the start of the new millennium, suggests that the quiet of the Furies should not be mistaken for their disappearance. Michnik (2001) comments on the furor in Poland over Jan Gross’s (2001) book on the massacre of Jews at Jedwabne: “It is a serious debate, full of sadness and sometimes terror—as if the whole society was suddenly forced to carry the weight of this terrible 60-year-old crime.”

draw such a line. The claims of memory-justice, although vulnerable to our pressing current needs and concerns for the future, can always transgress the boundaries we erect in the vain attempt to be done with the past.

LAW'S LIMITS

I have analyzed the relationship between memory and justice along three paths: retribution, truth preservation, and amnesty. I also have looked at the legal or quasi-legal instruments through which memory-justice does its varied work. I now want to explore the limits of the legal expressions of memory-justice. Do they exhaust the work that memory-justice seems to demand of us? Or do they leave a sense of incompleteness, as if law's empire cannot reach as far as memory-justice requires? According to one interpretation, it is from the standpoint of revenge, or "Wilde Justice" (again to use Bacon's phrase), that the work of the law in dealing with the past is judged frustratingly incomplete in wiping the slate clean (Shklar 1990, 93–4).

I want to suggest that this incompleteness is the recognition of something important left undone. This may occur even when significant legal action is taken against the perpetrators.

In part, of course, the incompleteness may simply reflect unfinished legal business, such as the concern that many Nazis escaped justice altogether or were dealt with too leniently when Germany went from being a defeated enemy to an ally in the Cold War. Similarly, there is the concern that some French officials who collaborated with the Germans in the persecution of Jews and members of the Resistance were never held to account. Yet, the continuation of something like the "Vichy syndrome" not only in France but in postcommunist East Europe and Germany suggests that the legal expression of memory-justice does not exhaust the claims of the past on us (Judt 2000, 308; Rousso 1990, 18). Indeed, the continuing politics of memory can be accounted for, at least partially, by the fear that a completion of the trials (and the passing of the generation that witnessed or perpetrated those events) will become an occasion for closure, on the pretext that all that can be done has been done. For this among other reasons, Alain Finkielkraut (1989) entitled his book on the trial of Klaus Barbie, the former head of the Gestapo in Lyon, *La mémoire vaine* (translated as *Remembering in Vain*).

Trials can help draw a thick line between past and present, and the crimes of the past then can become historic rather than present (Finkielkraut 1989, 12–3). Consider the concerns raised about building monuments and museums to the victims of mass state crime. The worry is that the object, the monument or inscription, becomes in effect the final gesture of compliance with the demands of memory-justice. Those demands are transformed into history, the past perfect, and cease to be part of the lived world of justice (Young 1993, 28–37). Remembrance itself, in other words, can sometimes be used to quit the debt once and for all, to throw off the weight of the past. Henri Raczymow

(1985, 213–4) writes of Mathieu and his efforts to be done with the memory of his sister, Esther, who committed suicide years earlier: "My son [Mathieu says] will be saved from the past. He will carry no stigma from it. I will never speak to him of Esther. . . . My book will have effaced her. Strangely, it required words for that. Words, and not silence. . . . Esther is buried. Good and buried. Her tomb can be seen there, somewhere in Bagneux cemetery. Her name is on the tomb, and her body inside it. Localized. Esther is no longer in me. I expelled her." The memoir and the tomb are not ways of preserving the memory of Esther but of freeing her brother (and his son) from her. So, too, trials, monuments, and days of remembrance can free communities from a burdensome past.

Law's empire does not reach as far as that of memory-justice. I want to sketch in some detail the distance between them. I will begin once more with the trial or retributive face of memory-justice. From the standpoint of the law, criminal trials of former regime officials may involve difficulties, such as retroactivity and statutes of limitation. From the vantage point of memory-justice, trials are hobbled by two related difficulties: their focus on guilt and their definitiveness. They may be focal points for shaping collective memory, and it may well be that the public face they give to memory-justice is essential to the work of justice (Osiel 1997, 6; Smith 1997, 19). But there is at once an incompleteness and an excessive definitiveness about them, properties that help mark out their limits.

First, as legal events that involve criminal charges, trials of the perpetrators of state crimes must inevitably look to individual accountability (Cohen 1995, 47). In the case of a regime with a wide grey area of collaboration and passive acquiescence or even support, that creates a very narrow focus: The weight of responsibility rests only on those held to be direct authors of the crimes (Osiel 1997, 61). Part of the past is selected out by legal processes as the locale of accountability and may only partially overlap with the sphere of responsibility as understood in memory-justice (French 1984; Williams 1993, 63–5). Although the Nuremberg trials made clear German accountability for the war and its crimes, they did not condemn the German people as a whole, only those held to be directly responsible for crimes (Jaspers 1965, 98, 100). The concern with guilt, understood as a "clear line" and "threshold" concept (French 1992, 65–6), focuses attention on the discrete actions of an individual rather than on a responsibility more diffuse (but perhaps more important, politically speaking).

Memory-justice, in its ingathering of the past, seems to need something else, the recognition of a responsibility that includes individual accountability but reaches beyond it to something not reducible to guilt. What is wanted, we might say with Habermas (1997), is a self-understanding by members of a political community that they are co-responsible even if not legally accountable. This we could call, in the aftermath of mass crimes, a sense of shame that emerges not from direct authorship of actions but from membership in a community implicated in these deeds (Morris 1976,

135; Schlink 1988, 59; Williams 1993, 80). Consider Albie Sachs, a South African antiapartheid activist severely wounded by a security service booby trap. When approached by an Afrikaner who asked him for forgiveness, Sachs (2000, 222–3) was perplexed: Since we do not accept collective responsibility, why should this man feel guilt and apologize?¹⁷ Perhaps, as Stanley Cohen (1995, 40) suggests, he was expressing a quite appropriate shame, not guilt. Memory as shame seems to be part of the demand of memory-justice, and it ranges far beyond the issue of guilt at play in criminal trials. During her 1950 visit to Germany, Hannah Arendt (1989, 45) was struck by the absence of a sense of shame, of the recognition of community responsibility. The lack of shame also may explain President Mitterrand's reluctance in 1992 to acknowledge any French co-responsibility for the deportation of Jews from France during World War II.

Shame and guilt differ, as does responsibility by virtue of membership in a community versus individual authorship. Communities exist across time, whereas the actionable deed occurs at a discrete moment; shame endures, whereas legal action and punishment of the guilty provide closure. Trials and retribution, no matter how thoroughgoing in the prosecution of the accused, do not reach a recognition of broad and enduring responsibility. Furthermore (and therefore), a trial offers premature closure: The guilty leaders are punished, and we are freed of any burden of responsibility. This may partially explain why the legacy of World War II still disturbs Europe, despite trials and purges of those most directly accountable. The sense of incompleteness is not principally due to any perpetrators left unpunished but to the limited way that legal action weaves the past into the national biography, into the memory of a community.

Second, another way for the memory-justice of law to secure the past is through truth-telling, by saving the deeds, victims, and perpetrators from the darkness of oblivion and falsehood. But the truth and memory of the witness as well as the collective memory of the community may only partially overlap with the truth sought in legal or quasi-legal proceedings (Yerushalmi 1988, 16). Some of this difference is suggested in Tillion's (1973, 203–4) comments on the postwar trial of her former Ravensbrück persecutors, in which she writes about the tremendous distance between her experiences and the descriptions she heard in court. In Claude Lanzmann's *Shoah* there is a sharp contrast between the testimony/memory of witnesses and the remarks of the sole historian to appear in the film, Raul Hilberg. As Tillion (1988, 12, 306) observes, part of the explanation lies in the difference between first-person memory and the transmitted, objectified past of the courtroom or historian. At one level, of course, we can describe these differences in terms of the intimacy of

the remembered event for the (first-person) witness and the emotional content of trauma (Lanzmann virtually had to compel some of his witnesses to speak). Some might also suspect personal recollection of being partial and not always accurate. The courtroom, or the historian's study, aspires to detachment, to an objective view, and the drive for truth is directed by the desire to explain or to assign culpability.

But the differences lie not just in the opposition between emotion-laden intimacy and detached objectivity. Two related dimensions are of special importance. An essential part of witnessing is the desire to keep the victims of mass crime in the light of truth. Truth-memory is, in this sense, an act of fidelity, typically to members of one's own community who have been lost. Memory-truth is not a gesture of fidelity to just anyone; it is faithfulness in the context of a community, whether a marriage, a religion, or a nation. The truth of remembrance differs from the truth of law and history in that its core is fidelity to the victim (Bédarida 1993, 7). And that fidelity occurs within the context of a shared something, a life in common across generations. Remembrance serves to reintegrate the victims into their community and to restore that community after the rupture induced by the crime. Faithfulness and the (re)integration of the community are two sides of the same phenomenon.

Memory-truth serves not to establish that such-and-such took place, that *x* was its perpetrator and *y* its victim, but to reintegrate the lost into the narrative unity, the collective memory, of the community. In this role, memory-justice-truth is the ingathering of the past for the sake of the continuity of the community across time. What is sought is not an (historical) explanation or a (legal) determination of responsibility so much as the restoration of unity to a shattered community. The truth at issue is the truth of that unity or identity, secured through remembrance. Remembrance may be the recovery of the lost, or the securing of those who risk being lost to forgetting, or the recognition and repudiation of a criminal regime as a precondition of a new life in common. Memory's truth, as it appears in such contexts, is uneven, jagged, and tied to collective memory and the community's autobiography. Great trials, and especially those in the wake of regime changes, can help shape that memory-identity; indeed, they can help awaken it. Memory-justice and memory-identity are not two utterly distinct phenomena; they are an ingathering of the past of justice and injustice as part both of doing justice and of affirming the continuity or identity (or rupture and new identity) of a community.

Serge Klarsfeld's testimony at the trial of Klaus Barbie illustrates memory-justice at work in both registers, legal- and the memory-justice of a community identity, and their overlapping but differentiated characters. Klarsfeld's work to apprehend Barbie and his testimony belonged to the world of law, but on the stand he read the names, ages, and some of the correspondence of the Jewish children of Izieu, deported to Auschwitz and murdered there. This went beyond giving evidence, although it referred to one of

¹⁷ The "Epilogue" to Sach's (2000, 228–9) account of his part in the struggle for democracy in South Africa offers a rich discussion of retribution and forgiveness. Sachs notes that many of the victims of apartheid were not interested in exacting punishment, although families and people outside South Africa often seemed to be focused on just that.

the most tragic of Barbie's war-time crimes in France. Its substance was not, Klarsfeld (1986, 132) said, a counsel's speech (*plaidoirie*) but an "introduction": "It seemed important to me to have all these children enter into the court." In his address to the court, Klarsfeld describes the proceeding as an act of justice bound up with an act of memory, and the purpose is "as much to remember, in actions, as it is to deny a pleasant old age to the executioner of the children of Izieu" (p. 138).

It was important to introduce and name these children, lest "the winds of forgetting extinguish the names" (Aichenrand 1993, 149). Lanzmann (1986, 55) refers to Klarsfeld's speech as "the act of naming [*nomination*]. He restored their proper name to each child of Izieu." The naming of the victims, so that they will not be lost to oblivion, is a way for memory-justice to fulfill its obligation to the dead. "After April 23, 1945 [Tillion's liberation from Ravensbrück], . . . I was in mourning, and I used this vast assembly of memories [in the recovery camp] to gather that which they retained about all those whom we had lost. At least their names, their only sepulchers" (Tillion 1988, 11).

Having the children "enter into the court" makes the dead present, and Klarsfeld's language draws on another important dimension of memory-justice. It is apparent in both the classical world (e.g., the dead Clytaemnestra appears in the *Eumenides*) and in the modern, as when André Malraux addresses Jean Moulin in the present tense as his ashes are interred in the Panthéon.¹⁸ Memory-justice in this role collapses the distance between past and present; it is, as Lanzmann puts it, an "incarnation" (Lanzmann 1986, 51). The victims are restored, if only in memory and speech, to their place in the community, and the living are reminded of their continuity with the past: "Remembrance is the proof itself of filiation" (Ertel 1993, 22). The naming and incarnation aspects of Klarsfeld's testimony make plain the second nonjudicial register (Rouso 1990, 247). The memory work being done in his speech has less to do with demonstrating Barbie's guilt than with the observance of a commitment to the victims; it is an evocation of their presence that affirms the community's identity across time and even through such violent traumas.

At the same time, the court is not merely a platform for a speech entirely foreign to its purposes. It is not a trivial fact that this testimony was delivered in a court of law, for it speaks to the proximity of memory-justice in its capacity as law and as bound up with bearing witness and identity. Both do the work of bringing the past into the light of truth through remembrance. The Barbie trial was an attempt to wrest that past from the "shroud" of history, of the past perfect, by drawing (via the memory of justice and injustice) his crimes into the "judicial present" (Finkielkraut 1989, 12–3). Klarsfeld contributed not only to that attempt but also, in naming and restoring the dead to their community (and its own past to the living community), to the other

tasks of memory-justice. His testimony is at once evidence, part of a judicial proceeding to prove an individual's guilt, the fulfillment of a debt, the bringing into the light of truth, and the assertion of a community's identity through time.

CONCLUSION

We can begin to understand why the extensive use in the twentieth century of trials, truth commissions, and amnesties in the wake of dictatorial and totalitarian regimes failed to bring closure. The memory of justice works in a number of ways. Within the law's orbit, it can have the face of retribution and punishment, of exposure and truth-telling, or of public amnesia. Varied (and overlapping) imperatives drive these phenomena: to fulfill a debt to the dead by punishing the perpetrators; to preserve justice; to save victims from the second death of forgetting; to put our present and future goods over our ties to the past. All these, in their different ways, display the intimate bond between memory and justice. At the same time they point to the limits of law's empire.

Memory-justice demands more than what a court or truth commission can provide. Freed from the constraints of determining individual guilt, memory-justice finds the conviction of only the direct perpetrators and/or their political masters to be too narrow an understanding of responsibility. Freed from prohibitions on the retroactive application of law, memory-justice raises its voice of condemnation (Soyinka 1999, 14). Concerned lest trials draw so thick and final a concluding line between past and present that we are thereafter absolved of the work of remembrance, memory-justice refuses to let this past become simply the historical past, the past perfect. Finally, in looking for the truth about the past not for its evidentiary or explanatory value, memory-justice seeks to make the past present, to bring the lost back into our midst. In this way we do justice to the dead and affirm the reality and enduring quality of the community we share with them. The demand for a recognition of wide co-responsibility across generations, of shame (to give it its title); for the genuinely imprescriptible character of these sorts of crimes, with the result that condemnation does not end with the conviction of one or many perpetrators; of memory-justice as the core of identity across time and even through the most radical ruptures in a community's life: these three faces of memory-justice mark out the limits of a legal overcoming of the past.

I began by observing that we could understand the need to keep crimes and their victims among the unlost, to guard them against the oblivion of forgetting, as one of the defining voices of justice as remembrance. I also suggested that this memory-justice at once informs core judicial practices and ranges beyond them in a manner that leaves their mode of closure incomplete. I end by drawing again on Sophocles and Aeschylus, who instruct us not only in the vital place that memory occupies at the heart of justice and its struggle to keep the victims, crimes, and perpetrators among

¹⁸ "Entre ici, Jean Moulin, avec ton terrible cortège" (Malraux 1971, 135).

the unforgotten but also in the meaning of living entirely in the shadow of memory-justice. More visible to them than to us, perhaps, the reality of memory-justice was something tangible, a duty that restored, preserved, and acknowledged the just order of the world. At the same time, they underscored the way in which, in the shadow of remembrance, other human goods can wither, goods located in the temporal registers of present and future. This latter lesson is important, but it is one with which we are, in our way, familiar. We still argue over the virtues of forgetting and letting the past go. We still frame the debate over judicial answers to state-led mass crime in the language of peace versus justice. I have chosen to emphasize what is ours, too, but with which we are perhaps less at home: the intimacy of memory's bond with justice, not as obsessional or as a syndrome but as a face of justice itself, looking to preserve the perpetrators, their deeds, and victims among the unforgotten.

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