

THESES ON LAW, HISTORY AND TIME

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[This essay offers eight theses in the style of Walter Benjamin's 'Theses on the Philosophy of History'. Law constructs time as linear, turns history into legal procedure and uses it to create the authorised record of the past, to legitimise the present and prevent radical change in the future. Heidegger's ontological and Benjamin's messianic conceptions of time can be used to undermine dominant legal temporality. But only a return to Athens and politics promises resistance and reconciliation.]

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In his *Hellenica*, Xenophon relates an extraordinary story.¹ In 403 BCE, when the Peloponnesian War had ended, the Athenian Democrats defeated the 30 tyrants who were ruling Athens subsequent to a coup. Cleocritos, the representative of the Democratic Party, could have acted as a vengeful conqueror and demanded the punishment of his enemies for the brutalities they had committed. Instead, his call to the Athenians was, 'let us forget the evils of the past.'² The demos passed a decree banning the recollection of these traumatic events and the raising of lawsuits related to them, and the citizens took the oath: *me mnesikakein* — not to remember the evils but also not to use memory as a tool for evil.³ A clause in the decree exempted only the 30 tyrants and 31 of their henchmen. Instead, these 61 were executed. When one of the Democrats objected to the imposed forgetting, he was brought before the demos by the Democrat Archinos and sentenced to death.⁴ After that, the evils of the past were forgotten.

There are clear precedents to this story. Herodotus relates the first prohibition on memory.⁵ The Persians put down a rebellion of the Ionians in Asia Minor in 494 BCE. They conquered and pillaged the city of Miletos and set fire to its

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¹ Xenophon, *The Hellenica of Xenophon* (Henry Graham Dakyns trans, 1890 ed) vol 1.

² *Ibid.*

³ *Ibid* 75.

⁴ Herodotus, *The Histories of Herodotus of Halicarnassus* (Harry Carter trans, 1962 ed).

⁵ *Ibid* 356.

altars and temples. The Athenians were devastated by the catastrophe that had befallen their brothers in Miletos. When the earliest tragedian Phrynichus produced *The Taking of Miletus*, the Athenians were deeply moved; they cried and mourned and hated it. They fined Phrynichos 1000 drachmas because he had reminded them of their own misfortunes. It was decreed that the play should never be performed again, because it recalled the *pathe*, the passion of their kin, the Ionians and their polis; ie, the destruction of political identity.⁶ The tragedy was condemned to Lethe, the river of oblivion.

The importance of forgetting is also found in the mythology of Athens. According to Plutarch, when Poseidon lost his contest with Goddess Athena to become the protector of Athens, he did not express a desire for revenge. The grateful Athenians deleted from their calendar the day of the battle, the second day of the month of *voidromionos* (September), because it was a sad memory for Poseidon, and they built an altar to Lethe on Acropolis.⁷ The banned day initiated the institution of what the Romans called *Dies Fasti* and *Nefasti* — banned days, days of mourning on which only certain religious and legal acts could take place. The Greek word is *imera apofras* — the day that cannot be spoken. We can say that the lost day, the second of *voidromionos*, is the day of the polis, the time of politics, a time intimately linked with the origins of tragedy, the beginning of Western literature. Aristotle agrees, arguing that politics is what gives rise to revenge, or brings an end to it.⁸

Some 23 centuries later, the great historian of the French Revolution, Jules Michelet, wrote:

each death leaves something good behind, and demands that it be recalled. The magistrates must supply friends to those who have none. Because law and justice are more certain than our forgotten tenderness because our tears are shed so quickly, this magistracy is History ... I have exhumed the dead for a second life ... they live now with us who have become their parents, their friends. Thus a family is created, a common city between the living and the dead.⁹

The strong link between memory, law and justice indicates that modern law and historiography have a common birthday. But in a transformation of huge consequence, memory and its recollection have now been largely entrusted to law and judicial proceedings. Nuremberg and Tokyo; the Eichmann,¹⁰ Barbie¹¹ and Papon¹² trials; and the post-conflict trials of Yugoslavia, Rwanda and Iraq have put history in the dock. In the Holocaust denial trials in Canada,¹³ in the

⁶ Ibid.

⁷ Plutarch, 'Symposiastics IX' in Edward O'Neil (ed), *Moralia* (2004) 6.

⁸ Aristotle, 'The Constitution of Athens' (Stephen Everson trans, 1996 ed) in Stephen Everson (ed), *The Politics and the Constitution of Athens* (1996) 211, 241. See also Nicole Loraux, *La Cité divisée* (1997).

⁹ Jules Michelet, 'Histoire du XIXe siècle' in Paul Viallaneix (ed), *Oeuvres complètes* (1982) vol XXI, 268 (author's own translation).

¹⁰ *Attorney-General of the Government of Israel v Eichmann* (1961) 36 ILR 5 (District Court of Jerusalem); (1962) ILR 277 (Supreme Court of Israel).

¹¹ *Fédération nationale des déportés et internés résistants et patriotes c Barbie*, Cass crim, 20 December 1985 (1986) JCP II, 20 655.

¹² See generally Catherine Erhel, Mathieu Aucher and Renaud de la Baume (eds), *Le Procès de Maurice Papon* (1998) vols 1 and 2.

¹³ See, eg, *R v Keegstra* [1990] 3 SCR 697; *R v Zündel* [1992] 2 SCR 731.

libel case of David Irving in England¹⁴ and in the criminal proceedings against him in Austria,¹⁵ historiography itself is put on trial. Finally, official remembrance rituals have been entrusted to quasi-legal procedures, most importantly that conducted by the South African Truth and Reconciliation Commission ('TRC'). Judicial proceedings have become one of our culture's essential responses to violence. Finding or telling the truth will hopefully reconcile heavily traumatised societies and cultures and allow new beginnings. What are the stakes in this transformation from history as the judge to the judge as historian?

Michelet writes on behalf of the dead but judges on behalf of the living, turning the dialogue between the two onto a 'common city': republican France.¹⁶ The exhumation of the dead aimed to show how their sacrifices led to revolution and the creation of the French nation. This speaking for the dead in order to explain the importance of the living was the main trope of modern historiography and in particular of European nationalism. At the origin of the nation we find a story of the nation's origin.

But this conception of history has come under pressure in the last 30 years. First, the idea of collective memory, introduced by the French sociologist Maurice Halbwachs in the 1920s, and dismissed by some historians, argues that memories are not mechanical inscriptions of the past on the mind, but a continuous and creative reconstruction under the influence of current concerns, pressures and fears.¹⁷ People view the past from the perspective of the present by placing themselves within the context of their communities, whether they are ethnic, class, political, professional, familial, or communities of another kind.¹⁸ Collective memory is determined by the communities and networks in which people find themselves; it is not unitary, but pluralistic and polyvalent.

Then came the interest in the history of dominated, excluded, subaltern groups — local histories and counter-narratives that challenged the canonical national myths. This fragmentation was further strengthened by the postmodern turn in historiography, for which history-writing was a narrative construction not radically different from literature. Postmodern historians turned towards the tricks of texts, emplotment, deep narrative structure, rhetorical devices and aesthetic criteria. Both primary materials — the bread and butter of the professional historian — and historiographies themselves were now examined for their uncertainties, ambiguities and ruses. The impurities of the written text would not be overlooked.

Professional historians are clearly worried about both the status of their discipline and our cultural forgetfulness. Memory is constantly on our lips

¹⁴ *Irving v Penguin Books Ltd* [2000] EWHC QB 115.

¹⁵ 'Holocaust Denier Irving is Jailed', *BBC News* (London, United Kingdom), 20 February 2006, available at <<http://news.bbc.co.uk/1/hi/world/europe/4733820.stm>> at 22 May 2006.

¹⁶ Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (2nd ed, 1991) 198.

¹⁷ Maurice Halbwachs, *On Collective Memory* (Lewis Coser trans, 1992 ed) 50–1 [trans of: *Les Cadres sociaux de la mémoire* and *La Topographie légendaire des évangiles en terre sainte*]. For historians who have recently disagreed with Halbwach's ideas, see, eg, Alon Confino, 'Collective Memory and Cultural History: Problems of Method' (1997) 102 *American Historical Review* 1386; Wulf Kansteiner, 'Finding Meaning in Memory: A Methodological Critique of Collective Memory Studies' (2002) 41 *History and Theory* 179.

¹⁸ Halbwachs, above n 17, 22, 53.

because it no longer exists. Eric Hobsbawm, the doyen of English history, laments:

the destruction of the past, or rather of the social mechanisms that link one's contemporary experience to that of earlier generations, is one of the most characteristic and eerie phenomena of the late twentieth century. Most young men and women at the century's end grow up in a sort of permanent present lacking any organic relation to the public past of the times we live in.¹⁹

The French historian Pierre Nora has proposed a periodisation of memory with premodern, modern and postmodern stages.²⁰ Premodern societies exhibit a natural, unselfconscious relationship between people and their past. Memory sustains traditions and rituals, which provide a stable sense of being in time. But the acceleration of life brought about by modernisation meant that old traditions lost their meaning and the relationship to the past was reconstructed through first-order simulations of natural memory. Elites produced *lieux de mémoire*, or sites of memory, in language, monuments and archive, the main referent of which was the nation state, and tried to secure the future through the invention of tradition.²¹ But the recent strains on the nation state have led to second-order simulations of natural memory, with the media throwing up identities and representations of the past bearing little relation to shared traditions, life worlds and political institutions other than the pace of media consumption itself. Memory, albeit constructed, becomes a problem rather than a support of collective identity and is accompanied by heightened anxiety about the loss of the past, the loss of history's mirroring effect.

Crises of memory coincide with crises of identity. Founding myths and master frames — as much as local and oral histories of the subaltern — aim to reconnect the group, to confirm the honour of membership and the necessity of exclusion of others, as the past is called upon to legitimate uncertain and fragile identities. This aspect of identity construction and support has now been entrusted to law. The nostalgic turn to collective memory, with its sites and simulacra, is melancholic and regressive. It indicates a crisis in modern temporality, and a need for anchoring after territorial boundaries and temporal continuities have been unsettled. The task is set for Michelet's magistrate to become a real Magistrate, for the judge to become historian.

But if history is the path to the glorious past, the law is firmly directed to the future. Law is made so that it can regulate future activities; its effectiveness lies in its application to all the myriad cases that are always still to come. This pre-empting of the future is an integral part of all legislation; in certain instances this future orientation becomes its central and defining import. These are the constitutional moments in a nation's history. Constitution-making is typically such a moment, particularly after liberation from conquest or radical regime change. Myths of foundation or refoundation attach to these events. Revolutionary assemblies, founding fathers or truth commissions have an eye firmly trained on history when they pronounce legal arrangements and rights.

¹⁹ Eric Hobsbawm, *Age of Extremes: The Short Twentieth Century* (1994) 3.

²⁰ See generally Pierre Nora, *Realms of Memory: Rethinking the French Past* (Arthur Goldhammer trans, 1996 ed) vol 1 [trans of: *Les Lieux de mémoire*].

²¹ *Ibid* 7.

But criminal proceedings have also been used as constitutional events, playing a central role in constructing the new identity of a nation with its intimate connections to history and the future. Such constitutional moments, which establish the link between old and new, later become the focal point for the collective memory of nations, Nora's *lieux de mémoire*.²²

Let me look briefly at three such constitutional moments separated by some 200 years. First, the French *Declaration of the Rights of Man and Citizen* — the manifesto of legal and political modernity;²³ secondly, the Eichmann trial in Jerusalem in 1962,²⁴ and finally the TRC of South Africa, which founded the new Republic.

The relationship between the past and the future became the philosophical and political horizon of modernity in the great revolutions of the 18th century and was expressed in their constitutions. These were quite clear about their unprecedented and future-looking character. This break from history is particularly evident in their treatment of natural rights, a main component of the new legal arrangements. The American and French Revolutions expressed in legal form the natural rights of man and pronounced natural rights inalienable because they were independent of governments and of temporal and local factors. Rights were declared to belong to all humanity. However, the legislator of this universalism was the French or American assembly, and the beneficiaries of these universal rights were the citizens of the two nations.²⁵ From that point, sovereignty has followed a national principle and belonged to a dual time. The constitutions introduced a historical teleology, which promised the future unification of nation and humanity, while Michelet and the historians reconstructed the continuous past of the nation. The two variants of this project are imperialism, in which the nation becomes the expression of humanity and spreads its civilising influence to the world; and cosmopolitanism, in which humanity overcomes national differences and conflicts in a global civil society. Both projects were evident in revolutionary France. From that point onwards, historians and lawyers were assigned the dual task of recalling the past and constructing the future, writing the past from the perspective of the future in order to control the present. Humanity and nation were the two referents that the French Declaration brought into existence and the relationship between the two, as future and past determining the present, became the task of the modern political project as empire or civilisation.

²² *Ibid* 1.

²³ *Declaration of the Rights of Man and of the Citizen* (1789) [trans of: *Déclaration des droits de l'homme et du citoyen*].

²⁴ *Attorney-General of the Government of Israel v Eichmann* (1961) 36 ILR 5 (District Court of Jerusalem); (1962) ILR 277 (Supreme Court of Israel).

²⁵ See generally Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (2000) 100–7.

THESIS I

Time as a continuum, history as timeline, modernity as historical time: these are all legal creations. The present opens before the law.

The trend for history trials started in Nuremberg and Tokyo. Nuremberg displayed atrocities and judged them through masses of documentary evidence. The methodology of Eichmann's trial and of the TRC was testimonial. The anguished evidence of survivors linked the requirement of evidence to the personal tragedy of witnesses and offered a picture of traumatic history. Finally, the Holocaust denial trials use standard evidentiary norms. Their paradigm was that of the professional historian, the expert who rebuts challenges to the authenticity of documentary evidence and to the memory of survivors.²⁶

Let me start with Eichmann and Hannah Arendt's extraordinary *Eichmann in Jerusalem* — the first and most important examination of the role of law in the redemptive function of history.²⁷ Arendt concludes that the trial was a symbolic and legal failure.²⁸ In ascending generality, the symbolic failures were: firstly, that the prosecution strategy founded the Israeli State on mistaken and highly problematic history; secondly, it turned the law into an instrument of state power and distanced it from the call to justice; and finally, it missed the opportunity to continue the Enlightenment project of humanism.

The trial's choreography was composed to teach 'superfluous and misleading' history lessons.²⁹ The main strategy was to explain how Judaism always faced a 'hostile world';³⁰ how Jews had degenerated; and how only 'the establishment of a Jewish state had enabled the Jews to hit back as Israelis had done in the War of Independence, in the Suez adventure, and in the almost daily incidents on Israel's unhappy borders'.³¹ It was a show trial, which served political aims and promoted Israeli interests as evidently good in opposition to the absolute evil of its enemies. When the Attorney-General used Emile Zola's *J'accuse*, Arendt furiously retorted that the heartfelt cry against injustice belongs to the victim and is not convincing 'in the voice of a government-appointed agent who risks nothing'.³²

The legal problem was that in its attempt to provide a founding myth for Israel, the trial departed from the purpose of a criminal procedure, which should be to 'render justice, and nothing else ... to weigh the charges brought against the accused, to render judgment, and to mete out due punishment'.³³ Yet even when rendering justice, trials make the evil banal. Faced with insufferable horror, the law can only rationalise, personalise, normalise, ask for authors of acts, intention and causation: did Eichmann or Papon know of the order to carry out

²⁶ See generally Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (2001) 97–184.

²⁷ Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (2nd ed, 1976).

²⁸ *Ibid* 274.

²⁹ *Ibid* 10.

³⁰ See, eg, Israeli Prime Minister David Ben-Gurion, as quoted in *ibid*.

³¹ Arendt, *Eichmann in Jerusalem*, above n 27, 10.

³² *Ibid* 266.

³³ *Ibid* 253.

the Final Solution? Is there evidence that Hitler signed it? Did the Tokyo defendants constitute a conspiracy? The past is reduced in order for it to be turned into authorised memory.

THESIS II

The historian writes history by looking at the past. The legislator judges the past by looking from the future. When the future judges the past, history becomes a tool for the vindication of the future and the law offers the past a funeral service. If history exhumes the dead to make them tell their story, the law exhumes the dead to bury them for a second time. This is why Walter Benjamin says that even the dead are not safe from the victors.³⁴ The time between exhumation and second burial is the time of the present.

Arendt believed that Israel should have handed Eichmann over to the UN and asked for the creation of an international tribunal to try him for crimes against humanity.³⁵ Such an action would have given the law a new concept that could be used to prevent ‘the massacre of the Jews ... from becoming a model for future genocide’.³⁶ By holding the trial in Jerusalem and by insisting on the Jewish nature of the Holocaust, the court presented the Holocaust ‘as not much more than the most horrible pogrom in Jewish history’.³⁷ Israel failed to understand that the distance between humanity and nation had narrowed, but not in the way evangelised by the Enlightenment. The humanity of humanism had already become a receding horizon, and in the Holocaust and the genocides that followed it, as Arendt predicted, humanity turned on a historical target for elimination. ‘It is quite conceivable’, wrote Arendt in 1951, ‘that one fine day a highly organized and mechanized humanity will conclude quite democratically — namely by majority decision — that for humanity as a whole it would be better to liquidate certain parts thereof’.³⁸ It was essential that the concept of crimes against humanity become part of the legal heritage of humankind, to reflect the new and terrible fact that humanity had developed the technological ability, the administrative mentality, and the moral and political will to eliminate parts of itself. By giving flesh and blood to philosophical humanity, Arendt turned it from an abstract philosophical concept into a concrete mass of people, communities, nations, whose future is not the promise of fulfilment of the philosophies of history, but elimination. But the trial, given the role of official historian, opted for the past, claiming the present as the redemption of a history of victimhood to which the law can never do justice.

³⁴ Walter Benjamin, ‘Theses on the Philosophy of History’ in *Illuminations* (Harry Zohn trans, 1968 ed) 257.

³⁵ Arendt, *Eichmann in Jerusalem*, above n 27, 270.

³⁶ Karl Jaspers, as quoted in *ibid*.

³⁷ Arendt, *Eichmann in Jerusalem*, above n 27, 267.

³⁸ Hannah Arendt, *The Origins of Totalitarianism* (3rd ed, 1966) 299.

THESIS III

Trials of history are always conducted on an unhappy border. The construction of history has always involved borders: the border between past and future; the border between the state, its neighbours and enemies; the border between law and justice; and finally, and clearest of all, the border between the state — every state with its violence — and the call to judgment of a history that cannot be dealt with in state courts.

The periodisation of history trials from documentary to testimonial to historiographical indicates that they have become increasingly academic exercises, losing their active link with memory. In Nora's terms, these trials are sites of memory, which work today from the feeling that there is no longer an authoritative memory: '[w]e must create archives, mark anniversaries, organize celebrations, pronounce eulogies, and authenticate documents' because memory has disappeared.³⁹ We collect, we organise exhibits, we catalogue, but this is only the form, not the substance, of history. All of these are not natural activities; the destruction of memory is associated with the generalised desire to record everything.⁴⁰ This is precisely what happens in history trials. An extensive record is produced in the court, but these traces of a disconnected past, found in testimonies, archives and documents, confirm the melancholy recognition that the past has lost its sacred nature and memory its foundational power. But at the same time, these traces, sanctified and authorised by law's ever-present authority, retain part of history's aura and aim to act therapeutically in societies that have lost for good their anchoring in the past.

This legalisation of history and memory must be attributed to both the galloping amnesia of postmodern societies and the changing function of law. Historical and commemorative narratives were mobilised by the state to legitimise its power and to anchor the nation in an imagined past. But as the nation state comes under pressure, history — severed from memory and its identification with the nation — has lost its authority and pedagogical mission. Similarly, collective memory can no longer draw its force from a continuous past and attests to the discontinuity of history as it gives way to the individual psychology of recollection and trauma. The legislators of nations once placed emphasis on the future. But now the future has become problematic and the past unpredictable.

At this point, the law, the other great discourse and institution that supported the creation of collective identities and the foundation of communities, comes into play. Law abandoned the perspective of the future at the same time that history dissolved into memory. Postmodern law places emphasis on individual rights and an ever expanding regulation of all aspects of life. As Foucault, Agamben and Hardt and Negri have commented, the law as 'biopolitics' bases

³⁹ Nora, above n 20, 7.

⁴⁰ Ibid 8–9.

its power on a total organisation of the social bond and on the control of life.⁴¹ Law becomes co-extensive with the social; it continuously reaffirms the present, but loses its significance. This law without significance is not only the regulative but also the symbolic principle of postmodernity. Memory and identity become legal concerns when they are problematised in history. Law takes over when history fragments, chased on the right by resurgent nationalist myths, and on the left by the various subaltern counter-narratives that reject a unified concept of history. Law becomes the cure for failed memory, a kind of group analysis for amnesiacs.

THESIS IV

History trials have a ritual character, which aims to create the new on the basis of a controlled reminiscence and forgetting of the past. Legal procedures act as a ritual of memory and also as a lethotechnics, to complement the mnemonics, in which an authorised forgetfulness takes over and assigns to the past its official meaning.

Ernest Renan, in his famous *What Is a Nation?*, wrote that ‘the essence of a nation is that all individuals have many things in common and also all have forgotten many things’.⁴² Renan asks and expects his fellow citizens to have forgotten the atrocious massacres of the religious wars in 16th century central and northern Europe and in 13th century southern Europe.⁴³ The exhumation of the dead, the task of the history of the nation, must be accompanied by a controlled amnesia.

What is the function of this forgetting that must be remembered? History answers the anxiety of identity, the urge to embellish the past and to see the present as its natural destination and the future as its inevitable fulfilment. This is at its most evident (and grandiosely absurd) when a new community is born and asserts its independence and sovereignty. The emerging nation, state or regime repeats a phenomenon that psychoanalysis describes as the mirror stage. The infant, beset by disobedient limbs and unrelated urges, sees herself in the mirror and acquires a first imaginary, both imaged and imagined, impression of her unity and oneness — a pivotal process in the creation of her identity. Similarly, the new community, still riven with the conflicts that led to its birth and traumatised by its past, wills itself into a united, common group.

The constructed histories, the enchanted memories, the promised future unifications become the mirror in which fragmented, fractious, injured communities imagine themselves as beautiful, continuous, happy. But nothing is further from the truth. This imaginary wholeness is beset by a non-linked entity — call it the immemorial — which cannot be represented without being missed, without being forgotten anew. The immemorial is found in the gap

⁴¹ See generally Michel Foucault, *The History of Sexuality* (Robert Hurley trans, 1980 ed) [trans of: *Histoire de la sexualité*]; Gilles Deleuze, *Foucault* (Seán Hand trans, 1988 ed); Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Daniel Heller-Roazen trans, 1998 ed) [trans of: *Homo sacer: Il potere sovrano e la nuda vita*]; Michael Hardt and Antonio Negri, *Empire* (2000).

⁴² Ernest Renan, ‘Qu’est-ce qu’une nation?’ in Henriette Psichari (ed), *Œuvres complètes* (1947) vol I, 982 (author’s own translation).

⁴³ *Ibid.*

between man and citizen, the splitting of an outside that made inside possible.⁴⁴ The creation of the foreigner is the prerequisite of citizenship and his or her exclusion is the precondition of the nation's existence. To be ourselves we need the others; to be at home others must have no home. This unhomely other, this *unheimlich* foreigner, is the ineffable immemorial that can be remembered only as forgotten. But it keeps returning as symptom, in xenophobia and racism, in hatred and fear, in martyrdom and suicide bombing.

Great atrocities push representation to its limits. The two major schools of historiography in this area have opposing views about the function of memory and forgetting. For Freudian historians, the past exerts an existential power over the present.⁴⁵ Memories are screens raised to shelter the self from the traumas of the past, but despite the great policing of imagination and forgetting, the original trauma remains a foreigner in the house of being and will inexorably return, in symptoms and sickness and dread. We try to forget the past, we cover it through screen memories. Yet we have no choice but to remember albeit somatically in bodily disturbance. Telling the past does not cure the trauma, it numbs it. The selection of narrative mode, the emplotment of facts and the building of memories can neither convey nor defend us from the inexpressible traumatic core. Telling stories is a palliative and nothing assures us that it soothes rather than aggravates the trauma.

Collective memory historians, on the other hand, believe that the story of the past is always told from the perspective of the present, and see in the past the continuation of the present.⁴⁶ If memory is provisional, as collective memory historians believe, it can always change to good effect. But collective memory arises in frameworks that emphasise current and future priorities. Collecting some memories does not turn them into collective memory. This is the lesson of public commemorations and national festivals, of dead heroes and unknown soldiers. Caught between an unknown but effective past and a malleable manipulable past, history enters its post-historical phase, the phase of history as trial.

In history trials and truth commissions, the law rationalises the past in certain ways, reconfigures it as appropriate to current and future needs, emplots it as relevant to present classifications and future expectations. All memory, of course, is selective. Law's memory is policed through devices that minimise ambiguity both forwards and backwards. It constructs an unambiguous future to which it aspires and a consistent past which it claims to redress. The past is oriented to the present; its recovery follows present needs and is tailored to future aspirations. Legal memory and techniques pre-structure our access to the past while its consistency control selects from the past what is pre-selected in the present.

⁴⁴ See generally Jean-François Lyotard, *Heidegger and 'the Jews'* (Andreas Michel and Mark Roberts trans, 1990 ed) [trans of: *Heidegger et 'les juifs'*].

⁴⁵ See generally Frederic Jameson, *The Political Unconscious: Narrative as a Socially Symbolic Act* (1981); Judith Butler, *The Psychic Life of Power: Theories in Subjection* (1997); Dominick La Capra, *Writing History, Writing Trauma* (2001); Shoshana Felman, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (2002).

⁴⁶ See generally Patrick Hutton, *History as an Art of Memory* (1993); Nancy Wood, *Vectors of Memory: Legacies of Trauma in Postwar Europe* (1999); Jay Winter and Emmanuel Sivan (eds), *War and Remembrance in the Twentieth Century* (1999).

Let us examine this process by briefly looking at the proceedings of the TRC in South Africa. Established in 1995 to examine gross violations of human rights committed between 1960 and 1993, the TRC recorded the atrocities of the past, narrated directly by their perpetrators and victims.⁴⁷ Public confessions by perpetrators entitled them to immunity from prosecution and aimed to restore the dignity of the victims,⁴⁸ while the testimony of victims was intended to act as a healing process. The assumption was that the telling of stories would construct a collective memory of the past, as the necessary prerequisite for the creation of the new community cleansed of its sins. It was a negotiation between past and future or between justice and nation-building. But collective memory arises within frameworks that emphasise current and, in constitutional moments, future priorities, and it controls the relationship between memory and forgetting. The law imposes criteria of memory selection, forgetting both what it leaves out and that it left it out.

The most obvious forgetting was that of the structural violence against the blacks, which pervaded all aspects of apartheid South Africa. The TRC 'forgot' the racial nature of the obscene economic and social inequality. While racial segregation was attacked, the class segregation of the townships and the urban underclass, which splits society along the same racial lines today as under apartheid, was forgotten and survived intact. This forgetting of the crimes of racialised capitalism was extended to the more legalised process of amnesties. The legal requirement of neutrality towards the two parties meant that the leaders of the apartheid and of the liberation movement were treated in the same way, as if legal neutrality could redeem the horrors of the past. The law will say, 'it was a great tragedy, how horrible. We will never cry again, we now respect human rights and that's it. It has been taken care of'. But this is a betrayal of the past and the new nation is founded on this betrayal.

It is only law's decisionism that creates the expectation that a commission or a trial will lead to reconciliation, through its work of rules and procedures about what can be remembered, and how, and what should be forgotten. The trick, the method, is to read the past through the modality of a future anterior state, the Good Friday Agreement that will have been. No other conflict is represented nor violence recognised except from that which the future community has acknowledged and then projected back to its past in order to cleanse it. One kind of violence becomes validated — it is the violence proper with which we have to deal; the others are forgotten — we remember gross human rights violations in South Africa but not violence against women or the violence of racialised capitalism. In its urge to generalise and subsume the unique under the generality of the norm and the abstraction of the concept, the singularity of memory and the uniqueness of the responsibility to the other becomes invisible. Finally, law's memory forgets the immemorial, that which questions community and its legitimacy. All that resists this recollection is rejected, forgotten; and the act of forgetting is forgotten too.

⁴⁷ *Promotion of National Unity and Reconciliation Act 1995* (South Africa) art 3(1)(a), (b) ('*Reconciliation Act*').

⁴⁸ *Promotion of National Unity and Reconciliation Act 1995* (South Africa) art 3(1)(b).

Ernst Bloch said that ‘history displays its Scotland Yard badge’.⁴⁹ Now the badge has passed to where it belongs. Benjamin said that the history that showed things ‘as they really were [was] the strongest narcotic of the century’.⁵⁰ Now the law tells us not only ‘how things really were’ but also that there is only one reality. If history was the strongest narcotic, now the law becomes a drug dealer who has chased all competitors from its turf. Henceforth law alone will have to bear the responsibility of affirming the truth of the past. As in all legal judgment, this truth will be one.

THESIS V

The future has arrived but this is no longer the future that closes the gap between nation and humanity. It is the future of an empty time in which the law acts as its own self-justification because it underpins the endless desire of individuals pursuing their interests through the language of rights. As nation and its memory recede and become a dead site of commemoration, law is assigned the role of justifying the present — no longer as the promise of a future to come but as what is an ever-present same.

Can we challenge the ever-present?

1 *Time as Relationship: Heidegger and the Ontology of Time*

We think of time in terms of the ‘Now’. Time is the present in the Now. The past and future are defective Nows, not-Nows, in the sense that the past is no longer Now and the future not yet Now. Time appears as a succession of Nows, each of which disappears in the Ago and is pursued by the Soon. We say ‘now’ and mean time, but no Now is ever there. That which shows itself as Now cannot be being, in the sense of presence; the present cannot be the Now. Presence determines being in the sense of presencing, coming to presence, unconcealing. To presence means to last, but this duration cannot be the lapse between two Nows, nor the presence of the present. Why?

Absence also reaches us constantly. That which is no longer present, in the way of the presencing of the present, presences its absence — in that it has been and does not just vanish from the Now as what is merely past. Absence, what has been or what is to come, is a manner of presencing. This presencing in the present, past and future means that being not yet present (the future) gives and brings about what is no longer present (the past), and what has been offers and gives the future. What *has been*, by refusing the present, lets what is no longer present *become* present; and what *is to come*, by withholding the present, lets that which *is not* be present. Denying and withholding are the two modes in which the present comes into presence. They manifest the manner of extending or opening that gives all presencing into the open. The reciprocal relation of the two gives and brings about the present, and it gives time a character: the mutual giving to one another by future, past and present.

⁴⁹ As quoted in Walter Benjamin, *The Arcades Project* (Howard Eiland and Kevin McLaughlin trans, 1999 ed) 463 [trans of: *Das Passagen-Werk*].

⁵⁰ Benjamin, *The Arcades Project*, above n 49, 463.

Time understood as distance measured between two points is the result of time calculation, a succession of Nows borrowed and mimicking representations of space. But true time consists in the mutual reaching and opening up of future, past and present. The unity of the three dimensions consists in the interplay of each towards the other. This interplay, extending or opening is the fourth dimension of time. But this fourth dimension is the first: the interplay determines all. This giving brings to future, past and present its presencing; it holds them apart and towards one another. It brings them close by distancing them, keeps what has been open by denying its absence as present.

THESIS VI

Time is not. There is, it gives time and the giving that gives time is determined by denying and withholding nearness, by an extending that opens and conceals. Time as a modality of being yields a law without foundations and without claims to principle or value, a law that supports the infinite multiplicity of beings in their integrity.

Can we challenge the ever-present?

2 *Time as Right*

We have learned from deconstruction, possibly a little too well, that the origin is never pure or pristine; it is never given to the innocent recollection of the historian. The past is always caught in the forgetfulness of memory and the impurities of the archive, whether written or oral, with its subjective selection of facts, the ideological framing of narrative and the ability to choose and vary narrative emplotments. Similarly we have learned from deconstruction, a little too well, that acts of memory are never just innocent repetitions or representations: they do not just bring back to presence what was and is now no longer. Memory amends as it repeats and every repetition is always repetitive and original according to the law of iteration.

What, then, is the truth of the past in relation to time? Greek time is the repetition of forgetting, messianic time is the double time, ontological time is the nearness of presencing out of present, past and future that unifies the time's threefold-opening and extending. In Benjamin's philosophy of history, the historical grand narrative is an empty mnemonic structure that historians try to fill with events like the beads of a rosary. But history is not a timeline. It is a porous surface whose holes provide windows into discarded past truths, it is the modality of time that presses against the present. Memories live not in a historically rigid sequence but in a simultaneity in which we may choose from many possibilities to create the present. As in Heidegger, the past is a modality of the present; indeed the past is a potentia or the potential of the present in its nearness to the future.⁵¹ But this potentia exists not as the ever-present denying and withholding, nor as the inescapable nearness of past, future and present but as a stain of past and future in the Now.

⁵¹ See generally Martin Heidegger, *Being and Time* (John Macquarrie and Edward Robinson trans, 1962 ed) [trans of: *Sein und Zeit*, 7th ed].

It is not the past that casts its light on the present, nor the present on the past: historical truth is like an image, a photograph in which the Then and the Now come together into a constellation, like a flash of lightning.⁵² If the relationship of the present to the past is temporal, says Benjamin, the relationship of the Then to the Now is dialectical, imagistic, not temporal. Here, Benjamin departs from time as presencing of being towards the messianic time of redemption in the Now of Judgment Day.⁵³ This is the messianic time, though not a time of arrival but of disappearance. History begins when memory is endangered; history is not past but is passing away, on the verge of disappearing without disappearing, the withholding of presence.

It is in this sense that Benjamin claims that the structure of the historical event follows that of the image: 'the image is dialectics at a standstill'.⁵⁴ A photograph emerges in the Now through its recognition. The image belongs radically to the present because it is only in the present that it can be understood. But the image is also radically historical, and the past can only be realised now. Benjamin explains:

The past can be seized only as an image that flashes up at the instant when it can be recognized and is never seen again ... For every image of the past that is not recognized by the present as one of its own concerns threatens to disappear irretrievably.⁵⁵

To understand the past historically 'means to seize hold of a memory as it flashes at a moment of danger'.⁵⁶ Memory as image does not belong to a certain time, but becomes legible at a certain time. If not recognised, it disappears alongside the trace it carried. The address of the past will not have been received if it is not read by the present that it enables. 'Every present day is determined by those images that are synchronic with it: every now is the now of specific recognisability ... truth is charged to the bursting point with time.'⁵⁷ That is how the past is saved, but this is a past that never was.

THESIS VII

Historical knowledge is to read that which was never written. Law's task is to right the wrong, to abandon rights for right.

Let us remember the Athenian Democrats. It was an extraordinary combination of a legal order: it is prohibited to remember the evils; and an oath, *me mnesikakein*: I will not recall the evils. But can we forget by decree? Freud's major contribution to mnemonics was his belief that memory loss does not result from the passage of time but from the barriers the unconscious builds in order to

⁵² See generally Benjamin, *The Arcades Project*, above n 49, 462.

⁵³ Benjamin, 'Theses on the Philosophy of History', above n 34, 256.

⁵⁴ Benjamin, *The Arcades Project*, above n 49, 462–3.

⁵⁵ *Ibid* 257.

⁵⁶ *Ibid*.

⁵⁷ *Ibid* 462–3.

forget and repress painful memories.⁵⁸ The unconscious is the guardian of memory; it selects what is to be remembered and hides the rest under a screen of fantasies and soothing memories. But the repressed return as symptoms of psychic disturbance and are the object of analysis.⁵⁹ If Lethe is presence without self-consciousness, a dark surface that hides that which has been repressed, amnesty would be paradoxical since traces of the deletion of memory would survive. And this is the importance of the oath. The promise the citizens give is performed in every moment when the traumas of the past return to haunt: 'I will not use the memory that returns precisely because it returns.' The oath neutralises memory without losing it, it disciplines memory by placing it in the midst of the polis, as a politics of forgetting acted out in the self-fashioning of citizens. The two prohibitions on memory, one imposed by law and the other self-imposed by the oath, re-founded democratic politics against the ruins of the civil war.

THESIS VIII

Could we find in the combination of the Greek political time of repetition — of me mnesikakein, remembering to forget every time that the trauma returns — with Benjamin's messianic time of redemption of the past in flashes of recognition, the trace of a different humanity? Neither originating in the past nor promised in the future, this is a humanity that through its action in every Now redeems the traumas of the past, and founds and re-founds a democracy to come. This is the greatest challenge of our traumatic times.

⁵⁸ See generally Sigmund Freud, 'Screen Memories' in James Strachey (ed), *The Standard Edition of the Complete Psychological Works of Sigmund Freud* (1953–75) vol I, 303–22; James Strachey (ed), *The Psychopathology of Everyday Life* (Alan Tyson trans, 1966 ed) [trans of: *Zur Psychopathologie des Alltagslebens*].

⁵⁹ Freud, above n 58.