



BOOK REVIEW

Acts of Oblivion

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Bernadette Meyler's *Theaters of Pardoning*¹ offers a profound and provocative meditation on the relationship between forgiveness and the state. In this comment, I follow her methodological and substantive lead by taking literary and legal approaches to a curious form of pardoning she discusses in her work—the “Act of Oblivion.” The Act of Oblivion operated as a super-pardon: It was “a form of general amnesty erasing the record of the underlying events rather than simply remitting punishment.”² Pardon is to oblivion as forgiving is to forgetting.

Part I briefly describes the Act of Oblivion and its superficial merits. Part II turns to the more telling critiques of such acts. Part III suggests that the Anglo-American repudiation of Acts of Oblivion continues to shape present-day jurisprudence. Part IV observes that despite this formal rejection, the spirit of such acts lives on in governmental gaslighting of the public, which asks the public to disown what it knows. Part V concludes.

I. The Brief Wondrous Life of Oblivion

As Meyler notes, formal Acts of Oblivion were putatively short-lived: “In mid-seventeenth-century England, the language of oblivion seemingly sprang from nowhere to become a prominent element of political discourse; it enjoyed a brief efflorescence through the late eighteenth century then rapidly disappeared as suddenly as it had emerged, giving way to the related and sometimes linked concept of amnesty.”³ Under Charles II, the Restoration Parliament enacted the famous 1660 Act of Oblivion, which required not only forgiveness, but also the forgetting of the revolutionary events that had deposed Charles I.⁴

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1 BERNADETTE MEYLER, *THEATERS OF PARDONING* (2019).

2 *Id.* at 29.

3 *Id.* at 177.

4 *See id.* at 200-01.

The 1660 Act worked off a prior template. The Act of Oblivion of 1563, enacted by the Scottish Parliament, mandated that “all deede . . . contrair the Lawes of this Realme . . . and the memorie thereof . . . be expired, buried and extinct for ever: even as the same had never bene maid . . .”⁵ The 1660 Act followed suit in fashioning a state-mandated exercise in collective amnesia. It barred the populace from making malicious allegations “against any other person or persons, any Name or Names, or other Words of Reproach, any way tending to revive the Memory of the late Differences.”⁶ And it had teeth—Meyler reports that anyone who violated it was “forced to pay the aggrieved individual a fairly significant fine.”⁷

This form of pardoning is deeply rooted in Western culture. Meyler points out that Thomas Hobbes’s characterization in 1681 of the 1660 Act as “never in our Law-Books before”⁸ was “unwarranted.”⁹ In addition to the 1563 Scottish Act, the Interregnum Parliament passed an Act of Oblivion in 1652.¹⁰ Moreover, the idea of oblivion had ancient roots (and here Hobbes would agree).¹¹ Meyler notes that the Greek concept of *lêthê* (Greek for oblivion) is a necessary strategy of conflict resolution in works dating back to the *Odyssey*.¹² The river Lethe, which bordered on the blessed realm of Elysium, was the only one of the chthonic rivers that had even a colorably rehabilitative aspect—individuals needed to drink of its waters before being reincarnated.¹³

The promise of oblivion is that it accomplishes the impossible—it unrings bells and unpoisons wells—to place us on a more promising alternate timeline. As such, it can be seen as a form of transitional justice: We might ask, then, why such Acts of Oblivion have themselves been forgotten.

II. The Trouble with Oblivion

One answer might be that Acts of Oblivion commandeer citizens in illegitimate ways. To understand the problem here, consider legal historian

5 *Id.* at 181 (quoting “The Act of Oblivioun,” in 2 THE ACTS OF THE PARLIAMENTS OF SCOTLAND 535-36 (Thomas Thomson & Cosmo Innes eds., 1563)).

6 *Id.* at 243 (quoting An Act of Free and General Pardon, Indemnity and Oblivion, 12 Car. II c. 11 (1660)).

7 *Id.*

8 THOMAS HOBBS, A DIALOGUE BETWEEN A PHILOSOPHER & A STUDENT OF THE COMMON LAWS OF ENGLAND 157 (Joseph Cropsey ed., 1971) (1681).

9 MEYLER, *supra* note 1, at 200.

10 *Id.*

11 *Id.*

12 *Id.* at 180 (citing JESSICA WOLFE, HOMER AND THE QUESTION OF STRIFE FROM ERASMUS TO HOBBS 101 (2015)).

13 See VIRGIL, AENEID, bk. VI, II. 703-51 (Frederick Ahl trans., 2007).

James Whitman's essay, *What Is Wrong with Inflicting Shame Sanctions?*¹⁴ In this work, Whitman explores the mirror image of the Act of Oblivion—the state-enforced remembrance embodied in the shame sanction. Whitman argues that the harm of such sanctions is difficult to parse if we look only at the state and the offender.¹⁵ Yet in a critical move, Whitman introduces another party to the shame sanction—the crowd around the offender—to bring the harm of such sanctions into sharper focus.¹⁶

Shame sanctions cannot be carried out without the assistance of the public. If someone is placed in the stocks or forced to stand wearing a placard reading “I stole,” then the public is complicit—however unwittingly—in the punishment. The distinctive harm of shame sanctions, Whitman maintains, is that “[t]hey involve a dangerous willingness, on the part of the government, to delegate part of its enforcement power to a fickle and uncontrolled general populace.”¹⁷ Such punishment “invites the public to rummage in some of the ugliest corners of the human heart.”¹⁸

A similar structural critique could be made of the Act of Oblivion. Writing of sixteenth-century France, Andrea Frisch observes: “Unlike royal pardon . . . which locate[s] political agency in the sovereign, the policy of *oubliance* places the burden of reconciliation on French subjects.”¹⁹ When the state pardons an individual, the relationship is dyadic. The public may disapprove the pardon, but it has not been rendered complicit in it. In sharp contrast, the Act of Oblivion forces the public to participate in the governmental act of forgetting. A citizen might vehemently disagree that the offense should be forgotten. Nevertheless, she must still participate in the oblivion. If she does not, she herself will incur a penalty.

Such concerns may have motivated the political limitations on the Act of Oblivion—indeed, they may have led to its demise. Meyler invokes the Philosopher in one of Hobbes's seminal political works to express this concern.²⁰ “The Act of *Oblivion*, without a Parliament could not have passed,” the Philosopher contends, “because, not only the King, but also most of the

14 James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055 (1998).

15 *Id.* at 1059.

16 *Id.* at 1087.

17 *Id.* at 1088.

18 *Id.* at 1091.

19 MEYLER, *supra* note 1, at 181 (quoting ANDREA FRISCH, FORGETTING DIFFERENCES: TRAGEDY, HISTORIOGRAPHY, AND THE FRENCH WARS OF RELIGION 41 (2015)).

20 *Id.* at 239. Hobbes's *A Dialogue Between a Philosopher & a Student of the Common Laws of England* is a posthumously published work that frames itself as a conversation between a philosopher and a lawyer (the “Student” of the title). As its title intimates, the work examines the boundaries of the sovereign's power (including the power to grant oblivion) in a common law system. See generally HOBBS, *supra* note 8.

Lords, and the abundance of Common People had received Injuries.”²¹ Because such injuries could only be pardoned through “their own Assent, it was absolutely necessary that it should be done in Parliament, and by the assent of the Lords and Commons.”²² Although Acts of Oblivion existed in seventeenth- and eighteenth-century America, they were similarly products of the legislatures rather than of the executive acting alone.²³ Yet of course, this democratic safeguard itself may have been insufficient. As Meyler points out, the logic that created the democratic check could be extended, such “that every subject should have participated in the pardon, not just the king and Parliament.”²⁴ Under that logic, the Act of Oblivion could not ever truly secure its legitimacy, as only an impossible universal consent could justify the blanket conscription it represented.²⁵

III. Formal Oblivion Today: An Enduring Rejection

The Act of Oblivion may seem no more than a curiosity today. Congress has never passed such an Act, nor is it likely to do so. Yet as Meyler has shown in a piece titled *Pardon, but Don't Forget*²⁶ in the *Take Care* blog, the Anglo-American rejection of the Acts of Oblivion may itself illuminate contemporary legal life.

In 2017, President Trump pardoned Joe Arpaio, who had served for decades as the sheriff of Maricopa County, Arizona. Arpaio had styled himself as “America’s toughest sheriff,” based in part in his campaign against undocumented immigrants.²⁷ Following several lawsuits, federal District Judge G. Murray Snow ordered the sheriff in 2011 to stop detaining individuals based on suspicion of immigration status absent evidence that a state law had been broken.²⁸ In July 2017, another district judge, Susan Bolton, found that Arpaio had deliberately and repeatedly violated the 2011 order and found him guilty of

21 MEYLER, *supra* note 1, at 239 (quoting HOBBS, *supra* note 8, at 77).

22 *Id.* (quoting HOBBS, *supra* note 8, at 77).

23 Bernadette Meyler, *Pardon but Don't Forget*, TAKE CARE BLOG (Oct. 4, 2017), <https://perma.cc/Q8GZ-65SJ>.

24 MEYLER, *supra* note 1, at 239.

25 While this illegitimacy should have been fatal to the Act of Oblivion, it was not necessarily the reason for its demise. The same logic would apply against shame sanctions, which are still with us today. Dustyn Coontz, Note, *Beyond First Blush: The Utility of Shame as a Master Emotion in Criminal Sentencing*, 2015 MICH. ST. L. REV. 415, 422-24 (2015) (collecting contemporary instances of shame sanctions).

26 Meyler, *supra* note 23.

27 Richard Pérez-Peña, *Former Arizona Sheriff Joe Arpaio Is Convicted of Criminal Contempt*, N.Y. TIMES, (July 31, 2017), <https://perma.cc/YHF6-ZVUS>.

28 *Id.*

criminal contempt.²⁹ Before he could be sentenced in October,³⁰ however, President Trump intervened in August 2017 with a pardon.³¹ The pardon extended to Arpaio's "conviction" and "any other offenses . . . that might arise, or be charged, in connection with" the original case.³² The Department of Justice asked Judge Bolton to vacate Arpaio's criminal contempt conviction on the strength of this pardon.³³

Writing in *Take Care*, Meyler argues that the pardon was valid but that the request to vacate the criminal contempt conviction was not.³⁴ She first observes that, as established in the 1925 case of *Ex parte Grossman*,³⁵ the pardon power extends to criminal contempt convictions.³⁶ At the same time, she maintains that the pardon power does not allow the Executive Branch to expunge the record, as that would be tantamount to an Act of Oblivion.³⁷ "Even in England," Meyler says, "the King did not issue these Acts of Oblivion through his prerogative powers. Instead, they were passed by the King in Parliament. In America, colonial legislatures, not governors, issued them."³⁸ She explains this difference by stressing that "the decision to forget is of great consequence."³⁹ For this reason, that decision "should be made by the whole community through its representatives, not by one person."⁴⁰ She elaborates that even in *Grossman*, the Court did not vacate the contempt conviction, but merely freed the offender from its consequences.⁴¹

Issued just weeks after Meyler's post, Judge Bolton's decision adheres to this line of reasoning.⁴² It states: "The power to pardon is an executive prerogative of mercy, not of judicial record-keeping."⁴³ To grant the defendant's request to vacate all rulings in the case, it continues, "would run afoul of this important

²⁹ *Id.*

³⁰ *Id.*

³¹ EXEC. OFFICE OF THE PRESIDENT, EXECUTIVE GRANT OF CLEMENCY OF JOSEPH M. ARPAIO (Aug. 25, 2017), <https://perma.cc/5NRX-RMDA>.

³² *Id.*

³³ Matt Zapotosky, *Justice Dept. Supports Arpaio's Post-Pardon Bid to Have Guilty Finding Thrown Out*, WASH. POST (Sept. 11, 2017, 2:55 PM EDT), <https://perma.cc/LHZ5-783W>.

³⁴ Meyler, *supra* note 23.

³⁵ 267 U.S. 87 (1925).

³⁶ Meyler, *supra* note 23.

³⁷ *See id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *See* United States v. Arpaio, No. CR-16-01012-001-PHX-SRB, 2017 WL 4839072 (D. Ariz. Oct. 19, 2017).

⁴³ *Id.* at *2 (quoting *United States v. Noonan*, 906 F.2d 952, 955 (3d Cir. 1990)).

distinction.”⁴⁴ The court concludes: “The pardon undoubtedly spared Defendant from any punishment that might otherwise have been imposed. It did not, however, ‘revise the historical facts’ of this case.”⁴⁵

IV. Informal Oblivion Today: Gaslighting

We may, then, appear to honor Acts of Oblivion more in breach than in observance. Yet at least one aspect of the Act of Oblivion—exercised by the Executive Branch alone—presents a live concern. This takes the form of executive gaslighting, which injures the collective memory in a way that is no less effective because it is more insidious than a direct Act of Oblivion.

To make this distinction between formal and informal Acts of Oblivion, I rely on Sanford Levinson’s work on governmental censorship.⁴⁶ Levinson observes that we generally understand censorship as the government barring speech. Yet he notes that “[f]ormally interdictive norms of the ‘thou shalt not’ variety are only one method and not necessarily the most important one by which a state regulates and helps to manufacture what will count, in the language of our day, as politically correct.”⁴⁷ To the contrary, many citizens fear that their views will be silenced not so much “in the specific sense of becoming legally unsayable as relegated to the margins of the social order because of the lack of resources possessed by those who wish to speak contrary to the state’s preferred vision.”⁴⁸ Censorship can occur not just by barring speech, but by generating so much governmental speech that competing private speech is drowned out.

Viewed through Levinson’s lens, the extant Acts of Oblivion may be the ones in which citizens are asked to disavow their own knowledge not through direct interdiction, but through the torrent of false governmental speech that causes them to doubt themselves. This phenomenon is widely known as “gaslighting,” after a Patrick Hamilton play in which the antagonist manipulates the protagonist to question her own perception, memory, and sanity. The play came out in 1938, and Ingrid Berman starred in the movie version of it in 1944. Tellingly, however, the word has only become a fixture in our public vocabulary in recent years.⁴⁹

⁴⁴ *Id.*

⁴⁵ *Id.* (quoting 67A C.J.S. *Pardon & Parole* § 33 (2019)).

⁴⁶ SANFORD LEVINSON, *WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES* (rev. ed. 2018).

⁴⁷ *Id.* at 70.

⁴⁸ *Id.*

⁴⁹ See, e.g., Emma Brockes, *From Gaslighting to Gammon, 2018’s Buzzwords Reflect Our Toxic Times*, *THE GUARDIAN* (Nov. 18, 2018, 8:04 AM), <https://perma.cc/R962-VM2N> (noting that gaslighting was on the short list of Oxford Dictionaries’ most popular words of the year).

To be sure, many state and non-state actors besides the executive engage in gaslighting. Yet if we think about the dangers of sovereign power canvassed by Meyler, we should be particularly troubled when the President uses his bully pulpit to do so.⁵⁰ And books like *Gaslighting America: Why We Love It When Trump Lies to Us*⁵¹ underscore how much our current President is availing himself of this particular technology of oblivion. In this work, Republican political commentator Amanda Carpenter argues that President Trump systematically uses a five-step method to gaslight the public.⁵² She begins with the example of then-candidate Trump's claim that President Barack Obama was not born in the United States.⁵³ She underscores, however, that this is one of a myriad occasions: "I cannot tell you the number of times I heard reporters and political observers ask one another questions like 'Can you believe what Trump said?' or 'Is this really happening?' over the course of the 2016 campaign."⁵⁴ She elaborates: "Oftentimes, Trump says something so long and so confidently—and with so much outside support—that you can't help but wonder if he isn't right. That's gaslighting."⁵⁵

Carpenter is not alone in stressing the dangers here—dangers which grew exponentially after Trump was elected President. Consider a recent *Washington Post* column by Eugene Robinson titled "Trump apparently thinks he's a master at gaslighting."⁵⁶ Robinson opens by saying: "President Trump's call with the Ukrainian president was an impeachable abuse of power. I repeat: President Trump's call with the Ukrainian president was an impeachable abuse of power. Once again, President Trump's call with the Ukrainian president was an impeachable abuse of power."⁵⁷ Robinson makes no apology for the repetition, as he finds it necessary to counteract the equally insistent repetition of falsehoods spoken and tweeted by the President.⁵⁸

The drowning out model of oblivion evades the safeguards we intuitively apply to oblivions. Pardoning was a sovereign spectacle; oblivion, a legislative effacement. Routine executive falsehoods from a President are neither. They do

50 Of course, gaslighting predates our current President and occurs on both sides of the aisle. See Maureen Dowd, *The Gaslight Strategy*, N.Y. TIMES (Nov. 26, 1995), <https://perma.cc/VRQ5-E25D> (describing, with an early use of the term, how the Clinton Administration was using a "gaslight" strategy against then-Speaker of the House Newt Gingrich).

51 AMANDA CARPENTER, *GASLIGHTING AMERICA: WHY WE LOVE IT WHEN TRUMP LIES TO US* (2018).

52 *Id.* at 15. The five steps are: "Stake a Claim," "Advance and Deny," "Create Suspense," "Discredit the Opponent," and "Win." *Id.*

53 *Id.* at 9-14.

54 *Id.* at 14.

55 *Id.*

56 Eugene Robinson, *Trump Apparently Thinks He's a Master at Gaslighting*, WASH. POST (Oct. 3, 2019, 2:00 PM PDT), <https://perma.cc/VLA5-R6SY>.

57 *Id.*

58 See *id.*

significant harm to the predicates of what counts as truth, while not being subject to the legislative checks fashioned for formal Acts of Oblivion.

V. Conclusion: Burning Books and Drowning Books

To return to the early modern context, recall two mages who famously renounced their grimoires in diametrically opposed ways. At the end of Marlowe's *Dr. Faustus*, Faustus promises to "burn [his] books"⁵⁹ in lieu of being carried off to hell. At the end of Shakespeare's *Tempest*, Prospero promises to "drown [his] book."⁶⁰ These two images—the burning book and the drowning book—conjure different models of censorship. The burning book can be seen as the direct interdiction—the destruction of the speech itself. The drowning book is a figure for the indirect quelling of speech—not by denying the speech existence but drowning it out with other speech.

Applied to Acts of Oblivion, the "burning" Act of Oblivion has disappeared in the Anglo-American tradition—we do not expect a federal or state legislature to interfere with our collective memory in this way. Yet the "drowning" Act of Oblivion should give us present pause. As I have briefly offered here, executive gaslighting occurs frequently, and can present a deeper threat because it is more subtle. It will take the stolid mantra-like repetition of the truth—as in Robinson's article—to overcome the government's unleashing of the waters of Lethe.

I wish to conclude not on an optimistic note, but on a hopeful one. In *The Tempest*, Prospero's drowning of the book can be fairly read as less than a full renunciation. Throughout the play, almost everything cast into the sea ultimately returns from it, transformed into something "rich and strange."⁶¹ The bulwarks against forgetting are the memorious, the erudite, and the wise among us, who continuously lead us both into knowledge and acknowledgement of that knowledge. In bringing a hidden history of forgetting into our collective memory, and in so many other ways, the scholar we honor today reveals herself to be such a person, and such a hope.

⁵⁹ CHRISTOPHER MARLOWE, *DOCTOR FAUSTUS* (B-TEXT), act 5, sc. 3, ll. 184-85 (David Scott Kastan ed., W. W. Norton & Co. 2005) (1616) ("Ugly hell, gape not! Come not, Lucifer!; / I'll burn my books!").

⁶⁰ WILLIAM SHAKESPEARE, *THE TEMPEST*, act V, sc. 1, ll. 54-57 (Virginia Mason Vaughan & Alden T. Vaughan eds., Arden Shakespeare 1999) ("I'll break my staff, / Bury it certain fathoms in the earth, / And deeper than did ever plummet sound / I'll drown my book.").

⁶¹ *Id.* at act 1, sc. 2, ll. 400-02 ("Nothing of him that doth fade / But doth suffer a sea-change / Into something rich and strange.").