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Power, Pragmatism, and Prisoner Abuse: Amnesty and Accountability in the United States¹

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INTRODUCTION

Our founding fathers faced with perils that we can scarcely imagine, drafted a charter to assure the rule of law and the rights of man, a charter expanded by the blood of generations. Those ideals still light the world, and we will not give them up for expedience’s sake.²

This is a time for reflection, not retribution. . . . We have been through a dark and painful chapter in our history. But at a time of great challenges and disturbing disunity, nothing will be gained by spending our time and energy laying blame for the past.³

President Obama’s 2009 inauguration speech emphasized the fundamental nature of America’s commitment to human rights and the rule of law in the country’s self-perception as an idealistic and inspirational society, where the rights of all are protected. Within the United States, such political rhetoric has long highlighted the nation’s

² President Barack Obama, Inaugural Address (Jan. 20, 2009), *available at* <http://www.nytimes.com/2009/01/20/us/politics/20text-obama.html?pagewanted=all>).

³ Press Release, The White House, Statement of President Barack Obama on Release of OLC Memos (Apr. 16, 2009), *available at* http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos) [hereinafter OLC Press Release].

potential to inspire other countries towards greater protection of individual rights. Despite America's much discussed tendency towards "exceptionalism" with regard to the jurisdiction of international law towards U.S. citizenry,⁴ this rhetorical commitment has been substantiated by the leadership role that the United States has played in the promotion of human rights, the rule of law, and transitional justice⁵ around the world. For example, it has provided enormous financial, logistical, and technical support to the work of international and hybrid courts in Nuremberg, Tokyo, the former Yugoslavia, Rwanda, Sierra Leone, Timor Leste, and Cambodia.⁶ Indeed, according to Schabas, "[s]ince international criminal justice first became truly operational, in 1945, it has had no greater friend or promoter than the United States."⁷ Through these actions, the United States has demonstrated support for legal accountability for human rights violations perpetrated by foreign warlords, dictators, and their foot soldiers. In addition, through the rule of law programs of agencies such as the U.S. State Department, the United States has provided considerable financial, personnel, and logistical resources to building rule of law capacity within numerous countries around the world.⁸ It has also contributed to the rule of law at the international

⁴ American exceptionalism has been written about extensively by legal scholars, as well as researchers from other disciplines. *See, e.g.*, AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS (Michael Ignatieff ed., 2005); DEBORAH L. MADSEN, AMERICAN EXCEPTIONALISM (1998); Harold Hongju Koh, *On American Exceptionalism*, 55 STAN L. REV. 1479 (2003). Part IV.B. explores in more detail the cultural and political aspects of American exceptionalism.

⁵ There is no universally accepted definition of transitional justice, but the phrase refers to a field of research and praxis that explores how states that are transitioning from conflict and repression can address legacies of mass violence. *See* Anne-Marie La Rosa & Xavier Philippe, *Transitional Justice*, in POST-CONFLICT PEACEBUILDING: A LEXICON 368 (Vincent Chetail ed., 2009); Wendy Lambourne, *Transitional Justice and Peacebuilding After Mass Violence*, 3 INT'L J. TRANSITIONAL JUST. 28 (2009), for an analysis of transitional justice institutions and objectives.

⁶ For example, the U.S. State Department 2011 budget for supporting transitional justice was \$55,000,000. U.S. DEP'T OF STATE, EXECUTIVE BUDGET SUMMARY: FISCAL YEAR 2012, available at <http://transition.usaid.gov/performance/cbj/156214.pdf>; *see also* JOHN F. MURPHY, THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS (2004); Annie Bird, Comparing Cases of US Involvement in Transitional Justice (Aug. 2011) (presented at the 6th ECPR General Conference), available at <http://www.ecprnet.eu/MyECPR/proposals/reykjavik/uploads/papers/180.pdf>.

⁷ William A. Schabas, *United States Hostility to the International Criminal Court: It's All About the Security Council*, 15 EUR. J. INT'L L. 701, 702 (2004).

⁸ A review of recent press releases on the State Department website indicates the breadth of the department's work in this area. *See, e.g.*, Press Release, U.S. State Dep't, Governance and Rule of Law: Two Year Fast Fact on the U.S. Government's Work in

level through its leadership role in organizations such as the United Nations.⁹

However, as has been extensively scrutinized in recent years, the lackluster pursuit of accountability for the widespread abuses committed by American personnel during the so-called “War on Terror”¹⁰ illustrates a disjuncture within domestic and international discourse between the dual perceptions of the United States as a law-abiding nation and America as a law-breaking state. This article seeks to explore this disjuncture through investigating the rationales of the Department of Justice (DOJ) for limiting accountability for the widespread torture of detainees by CIA interrogators. The author acknowledges that this focus excludes other abuses, such as those committed against Iraqi and Afghani civilians by the U.S. military, which are liable for prosecution under the Uniform Code of Military Justice.¹¹ It also excludes the liability of other actors implicated in

Haiti (Dec. 28, 2011), *available at* <http://www.state.gov/s/hsc/rls/179739.htm>; Press Release, U.S. State Dep’t, Rule of Law Programs in Afghanistan (May 4, 2012), *available at* <http://www.state.gov/j/inl/rls/fs/189320.htm>; Press Release, U.S. State Dep’t, Further Collaboration on Rule of Law Development in Moldova (May 21, 2012), *available at* <http://www.state.gov/r/pa/prs/ps/2012/05/190513.htm>; Press Release, U.S. State Dep’t, Pakistan Rule of Law (Nov. 23, 2012), *available at* <http://www.state.gov/j/inl/rls/fs/177705.htm>).

⁹ See United States Legal Counselor On Justice and the Rule of Law, Remarks at a Security Council Debate on Justice and the Rule of Law (June 29, 2010), *available at* <http://geneva.usmission.gov/2010/06/30/justice-and-the-rule-of-law/>.

¹⁰ AMNESTY INT’L, USA: SEE NO EVIL 26 (2011). Amnesty International has contended that “impunity and leniency [have] been the hallmark of the USA’s response to abuses.” *Id.* at 31. To date, criminal accountability for detainee abuse within the U.S. has been characterized as “abysmal” by Human Rights Watch. HUMAN RIGHTS WATCH, GETTING AWAY WITH TORTURE: THE BUSH ADMINISTRATION AND THE MISTREATMENT OF DETAINEES 6 (2011).

¹¹ As with the crimes of CIA interrogators, there has been impunity for crimes committed by military personnel. For example, a 2006 report authored jointly by three organizations documented “over 330 cases in which U.S. military and civilian personnel are credibly alleged to have abused or killed detainees . . . involv[ing] more than 600 U.S. personnel and over 460 detainees.” HUMAN RIGHTS WATCH, HUMAN RIGHTS FIRST AND THE NYU SCHOOL OF LAW, BY THE NUMBERS: FINDINGS OF THE DETAINEE ABUSE AND ACCOUNTABILITY PROJECT 2 (2006). Of the U.S. personnel identified, only fifty-four military personnel had been convicted, forty of whom had been imprisoned, and only ten of these sentences had been for more than one year. *Id.* at 24. The report further found that only half of the cases identified had been adequately investigated. Furthermore, the highest-ranking officer prosecuted for the abuse of prisoners was a lieutenant colonel, Steven Jordan, court-martialed in 2006 for his role in the Abu Ghraib scandal, but acquitted in 2007. HUMAN RIGHTS WATCH, *supra* note 10, at 6. In addition, in the 2010 Universal Periodic Review of the United States’ human rights record by the U.N. Human Rights Council, several American and international human rights organizations made submissions denouncing the lack of accountability for prisoner abuse. See U.N. Human

prisoner abuse including contractors, government lawyers, and political officials as these groups are subject to distinct accountability requirements. It focuses on the CIA's participation in coercive interrogations because, despite the domestic and international legal prohibitions on torture, these crimes have been subject to the greatest official effort to ensure impunity for the perpetrators.

To explain why the United States has pursued only limited accountability for prisoner abuse, this article begins in Section II by providing an overview of the nature and extent of the prisoner abuse, its relationship to domestic and international prohibitions on torture, and the efforts by the Bush administration to avoid respecting these prohibitions. In Section III, the article explores the domestic law governing the federal government's use of leniency for political offenses through pardon, amnesty, legislative immunity, and prosecutorial discretion. Given the international dimensions of the prisoner abuse scandal, this section will also explore the unilateral and multilateral involvement of the United States in the decisions of foreign governments to enact amnesty laws. Section IV examines the decisions of the DOJ not to pursue prosecutions for prisoner abuse in some detail by analyzing extensive data relating to the United States' enactment of domestic amnesty laws and pardons, and its involvement in foreign amnesty negotiations. These examples of America's attitudes towards amnesty laws are used to contextualize the current debates, and explain the decisions not to prosecute in light of America's previous use of leniency for political offenses. That analysis is grouped under the following themes: amnesty, empire, and hegemony; amnesty, denial, and justificatory claimsmaking; law, politics, and pragmatism in the use of amnesties; and amnesty, mercy, and the public welfare.

In analyzing American attitudes to amnesty laws, this article will draw on two overlapping datasets. Firstly, for domestic amnesties and pardons, the author has compiled a dataset of the texts of the relevant presidential proclamations. The universe of cases includes all the domestic amnesty laws since independence. In addition to amnesties, each president typically pardons a broad cross-section of offenders,¹² and a small number of these federal pardons are included in this dataset where the motivations, recipients, and/or offenses involved

Rights Council, *Summary Prepared by the Office of the High Commissioner for Human Rights*, UN Doc A/HRC/WG.6/9/USA/3/Rev.1 (Oct. 14, 2010).

¹² See, e.g., JEFFREY CROUCH, *THE PRESIDENTIAL PARDON POWER* (2009).

could be considered “political.” This dataset focused only on political pardons because, as this article will explore, many of the decisions to grant pardons in these cases faced similar political risks and rewards as the decisions not to pursue prosecutions for prisoner abuse. The selection of the political pardons included in the analysis is drawn from a review of the literature. The author acknowledges, however, that other “political” pardons may have been issued but have not been identified for inclusion, either because they have not been subject to extensive academic scrutiny or due to the subjectivity that can exist when distinguishing “criminal” from “political” offenses.¹³ The amnesties and pardons contained in this dataset are listed in Appendix 1.

Secondly, for the analysis of American engagement with foreign amnesty laws, this article will draw upon the Amnesty Law Database constructed by the author. This database compiles data on amnesties in all parts of the world that have been enacted since the end of the Second World War in response to conflict, repression and political transition. At the time of writing, the Amnesty Law Database contains information on 537 amnesty laws in 129 countries that were introduced between 1945 and June 2011.¹⁴ This article will use the database to identify and analyze instances where the United States has engaged with amnesties in other countries, either by acting unilaterally or through multilateral organizations. In compiling the information on U.S. state practice, the Amnesty Law Database collates a variety of materials, including U.N. Security Council resolutions, State Department press statements, newspaper articles, and academic writings. The cases identified will only paint a partial picture, however, due to the difficulties of accessing detailed information on American involvement in negotiations, particularly for earlier amnesty laws, when many of the political agreements would have been negotiated behind closed doors.

The article will argue that although amnesties and pardons are products of and regulated by law, their use creates exceptions to the law that are motivated by a range of inter-related political concerns,

¹³ See, for example, LOUISE MALLINDER, AMNESTY, HUMAN RIGHTS AND POLITICAL Transitions: Bridging the Peace and Justice Divide 135–44 (2008), for a discussion of the inclusion of political offenses in leniency measures.

¹⁴ See Louise Mallinder, *Amnesties’ Challenge to the Global Accountability Norm? Interpreting Regional and International Trends in Amnesty Enactment*, in AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY: COMPARATIVE AND INTERNATIONAL PERSPECTIVES 69, 79 (Leigh A. Payne & Francesca Lessa eds., 2012); MALLINDER, *supra* note 13, for further information on the Amnesty Law Database.

such as power, sovereignty, legitimacy, and national security. These concerns have been evident in America's historical engagement with amnesty laws and continue to be central to contemporary debates on accountability for prisoner abuse.

I

LAW AND TORTURE IN THE "WAR ON TERROR"

The "coercive interrogation" strategies¹⁵ developed by the Bush administration to question terror suspects in the wake of September 11, 2001, have become the source of much controversy, both within the United States and internationally.¹⁶ According to the abundant documentation that has become available, it is now established that thousands of foreign prisoners in U.S. detention were routinely subjected to a range of repressive interrogation techniques, which in some cases resulted in the deaths of prisoners.¹⁷ The techniques included waterboarding, stress positions, beatings, wall-slammings, and choking.¹⁸ In addition, prisoners were subjected to forced nudity, extended sleep deprivation and isolation, mock executions, religious and sexually degrading treatment, and threats to torture, rape, or kill detainees or their families.¹⁹ Interrogations were carried out by U.S. military personnel, Central Intelligence Agency (CIA) interrogators,

¹⁵ See ABU GHRAIB: THE POLITICS OF TORTURE (Meron Benvenisti et al. eds., 2004); MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR (2004); LAUREL E. FLETCHER & ERIC STOVER, GUANTANAMO AND ITS AFTERMATH: U.S. DETENTION AND INTERROGATION PRACTICES AND THEIR IMPACT ON FORMER DETAINEES (2008); K.J. GREENBERG & J.L. DRATEL, THE TORTURE PAPERS (2005); SEYMOUR M. HERSH, CHAIN OF COMMAND (2004); Richard B. Bilder & Detlev F. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT'L L. 689 (2004), for a detailed discussion of the rationales, development, and nature of the "coercive interrogation" strategies.

¹⁶ This ongoing contestation was apparent in debates resulting from the information released by Wikileaks showing that U.S. officials were aware of prisoner abuse in Iraq and Afghanistan. See, e.g., Phil Stewart, *WikiLeaks Show U.S. Failed to Probe Iraqi Abuse Cases: Reports*, REUTERS, Oct. 22, 2010. In addition, it was visible in the debates on whether information obtained through coercive interrogation permitted the U.S. authorities to locate and assassinate Osama Bin Laden. See, e.g., Jane Mayer, *Bin Laden Dead, Torture Debate Lives On*, NEW YORKER, May 2, 2011.

¹⁷ The exact number of detainees who died because of coercive interrogation is unknown, but by 2005 a U.S. Army report noted that 108 persons had died in U.S. custody. See *Report: 108 Died in U.S. Custody*, CBSNEWS.COM (Feb. 11, 2009), http://www.cbsnews.com/2100-244_162-680658.html.

¹⁸ CAROLYN PATTY BLUM, LISA MAGARREL & MARIEKE WIERDA, PROSECUTING ABUSES OF DETAINEES IN U.S. COUNTER-TERRORISM OPERATIONS 3 (2009).

¹⁹ *Id.*

and private military contractors, and were sanctioned by the highest levels of government.²⁰

The severity and systematic nature of the coercive interrogation practices arguably violated America's obligations under international and domestic law. Torture is prohibited in international criminal law, international humanitarian law, and international human rights law, which compositely regulate the treatment of prisoners by the United States during its military occupation of Iraq, its conflict-related activities within other states, and even its actions outside conflict.²¹ Within international criminal law, torture has been recognized as a crime by the Convention Against Torture. Under this Convention, where a State official is accused of torture, the State party is required to investigate the facts, and if appropriate, "submit the case to its competent authorities for the purpose of prosecution" or extradite the suspect.²² Under international humanitarian law, all four Geneva Conventions relating to international armed conflicts and occupation state that "torture or inhuman treatment" and "willfully causing great suffering or serious injury to body or health" are "grave breaches," which require states to prosecute or extradite suspects accused of these crimes.²³ In addition, under Common Article 3 to the Geneva Conventions, relating to non-international armed conflicts, "mutilation, cruel treatment and torture" and "outrages upon personal dignity, in particular, humiliating and degrading treatment" breach the minimum standards that state parties must respect.²⁴ Finally, the main international and regional human rights conventions recognize freedom from "torture or [from] cruel, inhuman or degrading treatment or punishment" as a non-derogable human right.²⁵ For all three branches of international law, freedom from torture is an absolute right that cannot be limited or restricted in conflict or other times of "public emergency which threaten[] the life of the nation."²⁶

²⁰ In his memoir, former President George W. Bush recalled that when asked by CIA Director George Tenet to approve the waterboarding of Khalid Sheikh Mohammed, he responded "[d]amn right." GEORGE W. BUSH, *DECISION POINTS* 170 (2010).

²¹ See Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580 (2006).

²² Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

²³ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

²⁴ *Id.* at art. 3.

²⁵ International Covenant on Civil and Political Rights, art. 7, Dec. 19, 1966, 999 U.N.T.S. 171.

²⁶ *Id.* at art. 4.

These bodies of law can trigger different oversight mechanisms, ranging from human rights treaty monitoring institutions that hold states accountable for violating human rights conventions, to international courts or courts in third states that can pursue individual criminal responsibility for torture.

Within the American legal tradition international law is often viewed as having a subsidiary status to domestic law. However, the international prohibition on torture is reflected in domestic law. For example, the Torture Statute criminalizes torture committed by U.S. citizens overseas and creates obligations to investigate and punish those responsible, with possible sentences of life imprisonment or death.²⁷ In addition, the War Crimes Act of 1996 defines war crimes as grave breaches and violations of Common Article 3 of the Geneva Conventions, including torture where either the victim or the perpetrator is a U.S. national or member of the U.S. military forces.²⁸ It imposes similar penalties to the Torture Statute.

Historically, state sovereignty meant that executive governments in all countries had considerable discretion on whether to prosecute serious human rights violations committed within their borders. However, the growth of international law and its incorporation into American domestic law meant that, by 2002, the Bush administration became concerned that by ordering coercive interrogation techniques, it could expose its officials to serious legal penalties before domestic and international courts.²⁹ As a result, the government pursued various strategies to prevent this, beginning by trying to conceal these practices through extraordinary renditions³⁰ and the “juridical othering” of terrorist suspects.³¹ In addition, it tried to obfuscate the legal status of coercive interrogation techniques, through the now

²⁷ See 18 U.S.C.A. § 2340 (West 2012) (“torture statute”).

²⁸ *Id.* at § 2441.

²⁹ KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* 191–92 (2011).

³⁰ See, for example, Joan Fitzpatrick, *Rendition and Transfer in the War Against Terrorism: Guantanamo and Beyond*, 25 LOY. L.A. INT’L & COMP. L. REV. 457 (2002); Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200 (2006); David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Torture Convention*, 46 VA. J. INT’L L. 585 (2005), for detailed discussion of extraordinary renditions.

³¹ See Ruth Jamieson & Kieran McEvoy, *State Crime by Proxy and Juridical Othering*, 45 BRIT. J. CRIMINOLOGY 504 (2005). This article explores the concept of *juridical othering* as processes by which there are efforts to define “individuals or groups as juridical others to whom normal rules do not apply,” by for example using terminology such as unlawful combatant. *Id.* at 517.

infamous “torture memos.”³² These memos, which continue to provide the justification for not pursuing prosecutions in the majority of cases of prisoner abuse, were a series of initially classified documents drafted by government lawyers working within the Justice Department’s Office of Legal Counsel (OLC). The first memos, drafted in January 2002, argued that under the American constitution, the U.S. President had the authority to “suspend” the application of the Geneva Conventions to prisoners who were labeled as “enemy combatants,” rather than prisoners of war. This argument was designed to reduce the scope for prosecution not just under the Geneva Conventions, but also under the War Crimes Act of 1996.³³

A further memo dated August 1, 2002, and authored by Assistant Attorney General Jay S. Bybee, sought to undermine the applicability of the international prohibition of torture within U.S. law. It argued that U.S. obligations under the Convention Against Torture do not apply to acts committed outside U.S. territory; that torture constitutes only acts specifically intended to inflict severe pain or suffering; and that the doctrine of necessity could supersede national or international laws prohibiting torture.³⁴ Further memos and letters produced by the OLC detailed what were deemed to be acceptable forms of coercive interrogation.³⁵

The reasoning contained in the torture memos was unpersuasive for military lawyers and legal advisers in the State Department, and “[b]y 2005, a clear consensus was starting to emerge among jurists that the memos were faulty as a matter of law, and would not hold up under international legal scrutiny.”³⁶ The Bush administration responded to these concerns by seeking to ensure legislative immunity for state officials engaged in coercive interrogations through the Detainee

³² See MICHAEL P. SCHARF & PAUL R. WILLIAMS, SHAPING FOREIGN POLICY IN TIMES OF CRISIS 181-200 (2010); see also DAVID P. FORSYTHE, THE POLITICS OF PRISONER ABUSE: THE UNITED STATES AND ENEMY PRISONERS AFTER 9/11, 60-94 (2011), for an analysis of the role of the government lawyers in providing legal cover for the practices of coercive interrogation. See also Ross L. Weiner, Note, *The Office of Legal Counsel and Torture: The Law as Both a Sword and Shield*, 77 GEO. WASH. L. REV. 524 (2008), for a description and analysis of the memos.

³³ Michael P. Scharf, *International Law and the Torture Memos*, 42 CASE W. RES. J. INT’L L. 321, 343 (2009); see also M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 CASE W. RES. J. INT’L L. 389 (2005).

³⁴ Scharf, *supra* note 33, at 344-45.

³⁵ See DAVID COLE, THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE (2009) (interpreting the torture memos); see also David Cole, *The Torture Memos: The Case Against the Lawyers*, N.Y. REV. BOOKS (2009).

³⁶ SIKKINK, *supra* note 29, at 206.

Treatment Act of 2005 and the Military Treatment Act of 2006, which will be explored below. In short, following September 11, 2001, the Bush administration sought to establish a legal regime under which serious crimes were perpetrated systematically by state officials across numerous locations and against large numbers of individuals.

During his initial months in office, President Obama was sensitive to the opposition that had developed to coercive interrogation. For example, soon after his inauguration he took a number of measures to end the policy, including stopping extraordinary renditions, closing “Black Sites” where the CIA conducted clandestine interrogations, declaring null and void legal memos issued by the Bush administration, and forbidding the use of enhanced interrogation techniques.³⁷ These policies did not extend, however, to closing the Guantánamo detention center or trying terrorist suspects in civilian courts rather than military commissions.³⁸ Furthermore, the administration has consistently been reluctant to pursue investigations and prosecutions for prisoner abuse. Instead, as the next section will explore, two prosecutorial decisions were taken to prevent prosecutions for the majority of CIA interrogators. To the extent that these decisions have granted impunity for torture, they can be compared to the use of amnesties and pardons.

II

LEGAL FRAMEWORK OF AMERICA’S ENGAGEMENT WITH AMNESTIES

This section will explore America’s power to grant leniency domestically. In addition, as Section IV will supplement the consideration of domestic amnesties with data relating to American attitudes to amnesty laws enacted abroad, this section will also consider America’s ability to engage in debates on amnesty laws around the world.

A. Leniency for Political Offenses Within U.S. Domestic Law

This discussion will explore the following forms of domestic leniency for political offenses: pardon, amnesty, legislative immunity, and prosecutorial discretion. While these are clearly not the sole

³⁷ Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

³⁸ See Kenneth Roth, *Empty Promises? Obama’s Hesitant Embrace of Human Rights*, 89 FOREIGN AFF. 10, 11 (2010), for a discussion of the failures of the Obama administration to substantially change the executive policies on human rights.

forms of leniency that are available to domestic politicians and legal professionals,³⁹ they have been selected here as they have all been used to grant leniency for offenders responsible for political offenses, either in America's past or as a result of prisoner abuse. This section will contrast how these forms of leniency are understood within scholarly literature and U.S. practice, and it will analyze the legal basis for their use.

1. *Presidential Pardons*

Legal scholars generally define pardons as “acts of legal leniency that remove only the consequences but not the prospect of adverse court proceedings.”⁴⁰ This means that pardons are granted to individuals *who have been convicted to release them from all or part of their sentence*. However, within the United States, pardoning powers are broader than this definition.

Following American independence from British colonial rule,⁴¹ the power to grant pardons initially resided with the states.⁴² However, at the 1787 Constitution Convention, the power to pardon federal crimes was included in the Constitution and vested in the President.⁴³ States retained the power to pardon offenses under state laws.⁴⁴ Among the main lobbyists for the creation of the federal pardon power was

³⁹ Other forms of leniency commonly used within the American criminal justice system include statutes of limitations, plea agreements, sentence reductions, and the use of immunity. See generally 18 U.S.C.A. §§ 213, 217, 221, 227, 229 (West Supp. 2000 & Supp. 2012).

⁴⁰ MARK FREEMAN, NECESSARY EVILS: AMNESTIES AND THE SEARCH FOR JUSTICE 14 (2009).

⁴¹ See Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 585–90 (1991), for a discussion of the power to pardon under British colonial rule.

⁴² Robert Nida & Rebecca L. Spiro, *The President as His Own Judge and Jury: A Legal Analysis of the Presidential Self-Pardon Power*, 52 OKLA. L. REV. 197, 204 (1999).

⁴³ *Id.* at 205.

⁴⁴ As Krug notes “[f]ifty-two jurisdictions—the federal government, each of the fifty states, and the District of Colombia—are competent to enact their own criminal laws and laws of criminal procedure, and to establish their own criminal justice systems. . . . [M]ost criminal laws are those of the states, and the vast majority of criminal cases are prosecuted by the state and local authorities.” Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMP. L. 643, 644 (2002) (footnote omitted). State pardoning powers remain significant and play a major role in the U.S. criminal justice process, but they are beyond the scope of this article. The delimitation of the pardon power between the federal and state-level governments is reviewed at length in Kobil, Kobil, *supra* note 41. See also LARRY N. GERSTON, AMERICAN FEDERALISM: A CONCISE INTRODUCTION (2007); ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM (2010); W. W. Thornton, *Pardon and Amnesty*, 6 CRIM. L. MAG 457 (1885), for a more general discussion of the powers of the state within the U.S. federalist system.

Alexander Hamilton,⁴⁵ who argued that “in seasons of insurrection or rebellion there are often critical moments when a well timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth.”⁴⁶ As will be explored below, pardons and amnesties were soon used in the way that Hamilton suggested within the United States. For other supporters of the pardon power, its inclusion was necessary to introduce an element of flexibility into an otherwise rigid criminal justice system.⁴⁷ For domestic pardons, both these rationales have become less pressing, as the federal government now faces substantially fewer challenges to its authority than in the early decades of the Union, and greater discretion has been introduced at all stages of the criminal justice process. As a result, presidential pardons for all types of federal offenses (and indeed, state pardons for violations of state law) are used far less often today.⁴⁸

Article II, Section 2 of the United States Constitution provides “[The President] shall have the Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”⁴⁹ This power has been interpreted broadly to enable the President to pardon any crime, with the exception of impeachment⁵⁰ or offenses under state laws. To obtain a pardon, individual recipients must consent to being pardoned, with admissions of guilt being viewed as consent. Although during and after the Civil War Congress sought to restrict the President’s power to pardon,⁵¹ in

⁴⁵ William F. Duker, *The President’s Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 501 (1977).

⁴⁶ THE FEDERALIST NO. 74, at 339 (Alexander Hamilton) (Pa. State Univ. ed., 2001).

⁴⁷ Duker, *supra* note 45, at 502–03.

⁴⁸ See Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President’s Duty to be Merciful*, 27 FORDHAM URB. L.J. 1483, 1484 (2000).

⁴⁹ U.S. CONST. art. II, § 2, cl. 1. See also *United States v. Wilson*, 32 U.S. 150 (1833), for a definition of pardons.

⁵⁰ The extent to which this exception prevents presidents pardoning themselves for criminal acts committed before or during their term of office is unclear. According to Nida and Spiro, the administrations of President Richard Nixon (for Watergate) and President George Bush Sr. (for the Iran-Contra Affair) both considered issuing self-pardons. See Nida & Spiro, *supra* note 42.

⁵¹ See JONATHAN TRUMAN DORRIS, PARDON AND AMNESTY UNDER LINCOLN AND JOHNSON: THE RESTORATION OF THE CONFEDERATES TO THEIR RIGHTS AND PRIVILEGES, 1861–98 (1953); Duker, *supra* note 45, at 475, for an overview of these struggles between Congress and the President. It should also be noted that during the Civil War, Congress itself issued amnesties, and during later debates on an amnesty for Vietnam-era draft dodgers and deserters, there was some discussion of whether Congress was empowered to issue amnesty laws. See Harrop A. Freeman, *An Historical Justification and Legal Basis for Amnesty Today*, L. & SOC. ORD. 515, 529 (1971).

the 1866 *Ex Parte Garland* case, the Supreme Court found the power to be “unlimited.”⁵² It continued by interpreting its effects broadly:

A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.⁵³

This Supreme Court judgment underscores the fact that pardons with U.S. law differ from understandings of the notion of pardon within the international academic literature on pardons in a number of respects. In particular, in the U.S. context, *pardons can be granted before as well as after conviction*. Though the Constitution does not explicitly mention amnesty laws, the U.S. Supreme Court interpreted the pardon power to include the ability to grant amnesties, as will be discussed below.

2. Amnesties

Developing a general definition of an amnesty law is problematic as within national legal systems, the term “amnesty” may be defined differently, and different bodies may be empowered to grant amnesties.⁵⁴ Furthermore, no accepted definition has yet been developed within international law. As a result, the scope and legal effects of amnesty laws around the world can look very different. However, Mark Freeman has developed a broad and useful definition of an amnesty law as:

[A]n extraordinary legal measure whose primary function is to remove the prospect and consequences of criminal liability for designated individuals or classes of persons in respect of designated types of offenses irrespective of whether the persons concerned have been tried for such offences in a court of law.⁵⁵

This definition illustrates that amnesties are typically distinguished from pardons in that they can apply pre-conviction. However, this

⁵² *Ex Parte Garland*, 71 U.S. 333, 380 (1866).

⁵³ *Id.* at 380–81.

⁵⁴ See René Lévy, *Pardons and Amnesties as Policy Instruments in Contemporary France*, 36 CRIME & JUST. 551 (2007).

⁵⁵ FREEMAN, *supra* note 40, at 13.

distinction is not so pronounced within the United States, where pardons can be granted pre-conviction.

The U.S. Supreme Court, when interpreting amnesties as falling within the presidential pardon power, has explored the distinction between the two forms of leniency within U.S. law. For example, in 1877, Justice Field, delivering the opinion of the Supreme Court in *Knote v. United States*, wrote:

Some distinction has been made, or attempted to be made, between pardon and amnesty. It is sometimes said that the latter operates as an extinction of the offense of which it is the object, causing it to be forgotten, so far as the public interests are concerned, whilst the former only operates to remove the penalties of the offense. This distinction is not, however, recognized in our law. The Constitution does not use the word ‘amnesty;’ and, except that the term is generally employed where pardon is extended to whole classes or communities, instead of individuals, the distinction between them is one rather of philological interest than of legal importance.⁵⁶

Since independence, successive presidents have issued amnesty laws and pardons for American citizens who have refused to adhere to federal laws. As illustrated in Appendix 1, the dataset compiled for this research on U.S. domestic practice has identified forty-three amnesties and pardons for political offenses enacted between 1795 and 1999. However, as will be explored below, since the 1990s, national sovereignty to grant amnesty for serious human rights violations has been eroded by the growth of international human rights law and international criminal law. As a result, when seeking to protect its armed forces and intelligence personnel from prosecution, the Bush administration turned to other mechanisms to deliver immunity.

3. Legislative Immunity and “Pseudo” Amnesties

As amnesty laws are generally intended to achieve political objectives such as encouraging rebels to surrender and abide by national laws, the stated goal of granting amnesty is often clearly expressed in the legislation. However, where states seek to grant immunity for human rights violations or for crimes committed by the state itself, often such states try to avoid criticism by concealing that they are in fact granting an amnesty. Such measures can be characterized as “pseudo amnesties,” which Freeman defines as “legal measures that have the same juridical effect as amnesties but are

⁵⁶ *Knote v. United States*, 95 U.S. 149, 152–53 (1877).

drafted in a disguised form and given titles that explicitly omit the word *amnesty*.”⁵⁷ Arguably, such “pseudo” amnesties have been used within the United States to grant legislative immunity to U.S. personnel implicated in prisoner abuse through the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006.

The Detainee Treatment Act of 2005 was initiated by John McCain and other members of Congress responding to allegations of prisoner abuse. The Act was originally designed to prohibit and prevent such abuse. However, it was bitterly resisted by the Bush administration, which eventually had language inserted into the legislation that granted immunity to U.S. personnel engaged in interrogations.⁵⁸ Section 1004(a) of the Act states “[i]n any civil action or criminal prosecution against an officer, employee, member of the Armed Forces, or other agent of the United States Government” who engaged in the interrogation of terror detainees and who

*were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful.*⁵⁹

The inclusion of this section was intended to “circumvent” the prohibitions on the mistreatment of detainees in sections 1002 and 1003 of the Act.⁶⁰ It implicitly provides that where U.S. personnel acted within the parameters outlined in the torture memos, they would be deemed to be unaware that their actions were unlawful, even though the memos had deliberately sought to reinterpret the law to limit prosecutions.⁶¹

In 2006, the U.S. Supreme Court found in *Hamdan v. Rumsfeld* that the military commissions that had been established to try “enemy combatants” violated the U.S. Uniform Code of Military Justice and

⁵⁷ FREEMAN, *supra* note 40, at 13 (emphasis in original).

⁵⁸ Arsalan M. Suleman, *Detainee Treatment Act of 2005*, 19 HARV. HUM. RTS. J. 257, 257–58 (2006).

⁵⁹ Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 101–104, 119 Stat. 2680 (2005) (emphasis added).

⁶⁰ Suleman, *supra* note 58, at 264.

⁶¹ SIKKINK, *supra* note 29, at 207.

the Geneva Conventions of 1949.⁶² Although this case did not relate to the policy of coercive interrogations, the decision nonetheless prompted the Bush administration to enact the Military Commissions Act of 2006.⁶³ Section 5 provided that:

No person may invoke the Geneva Conventions or any protocols thereto in any *habeas corpus* or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.⁶⁴

This provision has been criticized as creating further impunity for prisoner abuse by blocking detainees' access to U.S. courts.⁶⁵ In addition, Section 6 of this act revised the War Crimes Act of 1996 to amend the definition of war crimes with retroactive effect. These changes narrowed the definition of "cruel and inhuman treatment" and eliminated the crime of "outrages upon personal dignity, particularly humiliating and degrading treatment."⁶⁶ Matheson contends that as U.S. military personnel remained liable under the Uniform Code of Military Justice, these changes primarily benefited civilian officials and CIA personnel.⁶⁷ The changes have been described as providing "amnesty to any violation of Common Article

⁶² Hamdan v. Rumsfeld, 548 U.S. 557, 624–25 (2006); see generally JONATHAN MAHLER, THE CHALLENGE: HAMDAN V. RUMSFELD AND THE FIGHT OVER PRESIDENTIAL POWER (2008); Regina Fitzpatrick, *Hamdan v. Rumsfeld: Implications for the Geneva Conventions*, 20 HARV. HUM. RTS. J. 339 (2007); Mathew Happold, *Hamdan v. Rumsfeld and the Law of War*, 7 HUM. RTS. L. REV. 418 (2007); Eran Shamir-Borer, *Revisiting Hamdan v. Rumsfeld's Analysis of the Laws of Armed Conflict*, 21 EMORY INT'L L. REV. 601 (2007).

⁶³ See Julia Y. Capozzi, Note, *Hamdan v Rumsfeld: A Short Lived Decision?* 28 WHITTIER L. REV. 1303 (2006); Jill K. Lamson, Comment, *Hamdan v Rumsfeld and the Government's Response: The Military Commissions Act of 2006 and its Implications on the Separation of Powers*, 39 U. TOL. L. REV. 497 (2008).

⁶⁴ Military Commissions Act of 2006, Pub. L. No. 109-366, § 5, 120 Stat. 2600 (2006) (emphasis added). This provision was not amended by the Military Commissions Act of 2009.

⁶⁵ See, e.g., Michael C. Dorf, *The Orwellian Military Commissions Act of 2006*, 5 J. INT'L CRIM. JUST. 10, 18 (2007).

⁶⁶ See Military Commissions Act of 2006 § 6. This did not, however, change liability for murder and torture. See HUMAN RIGHTS WATCH, *supra* note 10, at 49.

⁶⁷ Michael J. Matheson, *The Amendment of the War Crimes Act*, 101 AMER. J. INT'L L. 48, 52 (2007).

3 . . . that does not rise to the level of MCA-specified ‘grave breaches.’”⁶⁸

The provisions of the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 cannot be considered—strictly speaking—amnesty laws, but their effects are similar to those of an amnesty, as they are designed to shield individuals from prosecution for crimes they have committed. Their provisions decriminalized several forms of abusive treatment and created an assumption that officials implicated in acts of torture were doing so on the understanding that their actions were lawful. This assumption has been adopted by the Department of Justice in justifying its first decision not to prosecute.

4. *Decisions Not to Prosecute and “De Facto” Amnesties*

Decisions not to prosecute can be taken at many points within a criminal justice system. As discussed above, the United States, like other countries, empowers both the executive and the legislature to enact measures to restrict prosecutions. Beyond these formal acts of clemency, immunity can arise from actors within the criminal justice system, such as prosecutors, deciding to refrain from exercising jurisdiction. Even in cases where prosecution would be clearly justified, most legal systems allow for selectivity in the identification of persons against whom the law will be enforced and in the charges to be brought. As Cryer notes, “[s]elective enforcement of the law is not inherently wrong,” particularly since no criminal justice system has the capacity to prosecute all offenses.⁶⁹ Therefore, “the question is not whether selective prosecution should occur . . . but when selective enforcement is unacceptable.”⁷⁰

Today it is widely recognized that American prosecutors have substantial discretion,⁷¹ which may be exercised for a wide range of reasons. Sarat and Clarke distinguish between decisions made by prosecutors on “predictions about success” based on the availability of sufficient evidence and witnesses, and decisions concerning the

⁶⁸ Arsalan M. Suleman, *Military Commissions Act of 2006*, 20 HARV. HUM. RTS. J. 325, 335 (2007); cf. Carlos Manuel Vázquez, *The Military Commissions Act, the Geneva Conventions and the Courts: A Critical Guide*, 101 AM. J. INT’L L. 73, 92 (2007).

⁶⁹ Robert Cryer, *Selectivity in International Criminal Law*, in BUILDING PEACE IN POST-CONFLICT SITUATIONS 153, 153 (Faria Medjoubia ed., 2012).

⁷⁰ *Id.* at 154.

⁷¹ Austin Sarat and Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 L. & SOC. INQUIRY 387, 389 (2008).

“desirability and appropriateness” of prosecution.⁷² They argue that the second type of decision can be influenced by a wide range of exceptional factors, which do not necessarily “derive from legal norms,” nor correspond to the viability of the prosecution.⁷³ Indeed, as Sarat and Clarke note, “[l]ike executive power in times of emergency or clemency, these decisions bring us to law’s limit.”⁷⁴

Prosecutorial discretion within the United States is thus “broad” and “generally unregulated” by the courts.⁷⁵ However, the Department of Justice has developed the *Principles of Federal Prosecution* to guide federal prosecutors towards objective decision-making when exercising discretion. The principles recognize that prosecutors can exercise discretion at all stages of criminal prosecution; however, this section will focus on decisions to decline prosecutions that would otherwise be viable.⁷⁶ The principles permit federal prosecutors to decline “because no *substantial Federal interest* would be served by prosecution,” and they identify several grounds to justify such decisions.⁷⁷ For example, prosecutors are encouraged to consider “the actual or potential impact of the offense on the community,” which can include economic harms; physical danger to citizens or public property; or the “erosion of the inhabitants’ peace of mind and sense of security.”⁷⁸ In addition, prosecutors may consider “what the public attitude is toward prosecution under the circumstances of the case,” but that “public interest . . . should not be used to justify a decision to prosecute, or to take other action, that cannot be supported on other grounds.”⁷⁹ As will be explored below, both public opinion and the impact of coercive interrogation on public security have featured prominently within debates on the desirability of pursuing accountability for prisoner abuse.

⁷² *Id.* at 391.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Krug, *supra* note 44, at 643; *see also* ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 5 (2007).

⁷⁶ The *Principles of Federal Prosecution* note the following moments in which prosecutors can exercise discretion: initiating and declining prosecution, selecting charges, entering into plea agreements, opposing offers to plead *nolo contendere*, entering into non-prosecution agreements in return for cooperation, and participating in sentencing. U.S. Dep’t of Justice, United States Attorneys’ Manual § 9-27.000, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrn.htm.

⁷⁷ *Id.* at § 9-27.230 (emphasis added).

⁷⁸ *Id.*

⁷⁹ *Id.*

The principles also encourage federal prosecutors to consider the economic, physical, and psychological impact of the offense on the victim. The crime of torture is widely recognized as creating profound and long-lasting harms for victims,⁸⁰ which under these principles would seem to indicate that federal prosecutors should, where the evidence permits, err in favor of prosecution. The principles also note that where the accused “occupied a position of trust or responsibility which he/she violated in committing the offense, [this] might weigh in favor of prosecution.”⁸¹ Therefore, for official personnel committing acts of torture, this provision also seems to guide federal prosecutors towards pursuing prosecutions.

When federal prosecutors decline prosecution, the principles state that the prosecutor should “ensure that his/her decision and the reasons therefore are communicated to the investigating agency involved and to any other interested agency, and are reflected in the office files.”⁸² However, there is no obligation that the reasons for the decision be communicated to victims or the public.⁸³ The principles are non-binding and do not “require a particular prosecutorial decision in any given case.”⁸⁴ Adherence to the standards can only be enforced internally within the DOJ, and Podgor has found perhaps unsurprisingly that prosecutors “do not always adhere to these guidelines.”⁸⁵ The absence of public reasons for the decisions arguably results in a lack of transparency and accountability. The obvious danger is that prosecutors may appear to decline prosecution for arbitrary or self-serving reasons, such as shielding perpetrators of serious crimes from public scrutiny, or succumbing to political

⁸⁰ See, e.g., MANU ACTIS ET AL., *THAT INFERNO: CONVERSATIONS OF FIVE WOMEN SURVIVORS OF AN ARGENTINE TORTURE CAMP* (2006); *TORTURE: A COLLECTION* (Sanford Levinson ed., 2004); Gabriela Fried, *Piecing Memories Together After State Terror and Policies of Oblivion in Uruguay: The Female Political Prisoner’s Testimonial Project (1997–2004)*, 12 *SOC. IDENTITIES* 543 (2006); Derrick Silove, *The Psychosocial Effects of Torture, Mass Human Rights Violations, and Refugee Trauma: Toward an Integrated Conceptual Framework*, 187 *J. NERVOUS & MENTAL DISEASE* 200 (1999).

⁸¹ United States Attorneys’ Manual, *supra* note 76, at § 9-27.230.

⁸² *Id.* at § 9-27.270.

⁸³ See Sarat & Clarke, *supra* note 71, at 392. See also MICHELLE MADDEN DEMPSEY, *PROSECUTING DOMESTIC VIOLENCE: A PHILOSOPHICAL ANALYSIS* 82 (2009), for a discussion of the need for prosecutions to justify their decisions not to pursue prosecutions in cases where there is a prima facie case.

⁸⁴ U.S. Attorneys’ Manual, *supra* note 76, at § 9-27.120. Podgor describes the principles as “policy statements and not legislative rules.” Ellen S. Podgor, *Department of Justice Guidelines: Balancing “Discretionary Justice,”* 13 *CORNELL J.L. & PUB. POL’Y* 167, 169 (2004).

⁸⁵ Podgor, *supra* note 84, at 169.

pressure. It can also be problematic where there is a “conflict of interest” resulting in DOJ lawyers investigating crimes that were sanctioned by the Department, as was the case with the torture memos.⁸⁶

The absence of prosecution where it results from an active decision not to prosecute made for arbitrary reasons can be interpreted as a “de facto” amnesty, where it creates “a situation in which there is impunity in practice, notwithstanding the absence of a legally-enacted amnesty law.”⁸⁷ Impunity has been defined in the U.N.’s Principles to Combat Impunity as “the impossibility, de jure or de facto, of bringing the perpetrators of violations to account—whether in criminal, civil, administrative or disciplinary proceedings.”⁸⁸ As the decisions taken by the DOJ in 2009 and 2011 not to prosecute CIA personnel for prisoner abuse where taken in the absence of any alternative forms of accountability,⁸⁹ they appear to fall within this definition of impunity, and hence could be considered “de facto” amnesties.

Although President Obama signed an Executive Order repudiating the legal advice in the torture memos,⁹⁰ in its first decision not to prosecute, the DOJ relied on them to justify its decision. On April 16, 2009, the DOJ announced that “intelligence community officials who acted reasonably and relied in good faith on authoritative legal advice from the Justice Department that their conduct was lawful, and conformed their conduct to that advice, would not face federal prosecutions for that conduct.”⁹¹ The DOJ further stated that it had informed the CIA that the government would provide free legal

⁸⁶ David Cole, *The Torture Memos: The Case Against the Lawyers*, N.Y. REV. BOOKS (Oct. 8, 2009), available at <http://www.nybooks.com/articles/archives/2009/oct/08/the-torture-memos-the-case-against-the-lawyers/?pagination=false>.

⁸⁷ FREEMAN, *supra* note 40, at 17.

⁸⁸ Comm. on Human Rights, Econ. and Soc. Council, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* 6 (2005).

⁸⁹ There have been some attempts by victims of prisoner abuse to sue U.S. state officials for torture. However, U.S. federal courts held that torture fell within the “scope of employment” of federal officials and is hence subject to the absolute immunity doctrine. *See, e.g.*, *Rasul v Bush*, 542 U.S. 466 (2004); *see also* Elizabeth A. Wilson, *Is Torture All in a Day’s Work? Scope of Employment, the Absolute Immunity Doctrine, and Human Rights Litigation Against U.S. Federal Officials*, 6 RUTGERS J.L. & PUB. POL’Y 175, 198–99 (2008).

⁹⁰ Exec. Order No. 13,491, *supra* note 37.

⁹¹ Press Release, Dep’t of Justice, Department of Justice Releases Four Office of Legal Counsel Opinions (Apr. 16, 2009), available at <http://www.justice.gov/opa/pr/2009/April/09-ag-356.html>.

representation to all employees accused of prisoner abuse in domestic, international or foreign courts, or congressional investigations, and would indemnify employees for any financial penalties they incurred.⁹² In justifying such strong support for intelligence personnel who had acted within the parameters of the torture memos, the Attorney General proclaimed that “[i]t would be unfair to prosecute dedicated men and women working to protect America for conduct that was sanctioned in advance by the Justice Department.”⁹³ This decision left open the possibility for prosecution for those interrogators who exceeded the guidance in the memos.

The exception from liability based on the torture memos was challenged on July 29, 2009, when the DOJ’s Office of Professional Responsibility (OPR) released a report describing the memos as containing “seriously flawed arguments” and not constituting “thorough, objective or candid legal advice.”⁹⁴ On this basis, the OPR report recommended that the DOJ “review certain declinations of prosecution regarding incidents of detainee abuse.”⁹⁵ This suggests that even where CIA personnel acted according to the torture memos, there may be grounds to reopen investigations against them. The Attorney General responded by announcing in August 2009 that he was appointing a special prosecutor to conduct “a preliminary review into whether federal laws were violated in connection with the interrogation of specific detainees at overseas locations.”⁹⁶ In his statement, despite the OPR’s recommendations, he reiterated that the review would not focus on those who had acted under the advice in the OLC memos, but would instead only focus on those who had exceeded it.

Based on the two-year “preliminary review,” which investigated the treatment by CIA interrogators of 101 prisoners, on June 30, 2011, the Attorney General announced full criminal investigations were warranted in only two cases relating to deaths in custody.⁹⁷ The

⁹² *Id.*

⁹³ *Id.*

⁹⁴ DEP’T OF JUSTICE, OFFICE OF PROF. RESP., INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL’S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY’S USE OF “ENHANCED INTERROGATION TECHNIQUES” ON SUSPECTED TERRORISTS 226 (2009).

⁹⁵ *Id.* at 261.

⁹⁶ Press Release, Dep’t of Justice, Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees (Aug. 24, 2009), available at <http://www.justice.gov/ag/speeches/2009/ag-speech-0908241.html>.

⁹⁷ Press Release, Dep’t of Justice, Statement of the Attorney General Regarding Investigation into the Interrogation of Certain Detainees (June 30, 2011), available at

announcement did not provide any details on the nearly 100 cases where the investigations had been dropped and it was not clear whether they related to any deaths in detention.⁹⁸

Given the severity of these abuses and the official status of those alleged to be responsible, the DOJ's decisions not to prosecute seem to deviate from its *Principles of Federal Prosecution* and have been characterized as granting impunity to those responsible for ordering, perpetrating and providing legal validation for prisoner abuse.⁹⁹ As such, they can be viewed as "de facto" amnesty for crimes committed by U.S. personnel against non-nationals. As the following section will explore, the United States has also at times been willing to support foreign amnesties for crimes committed by non-U.S. nationals.

B. America, International Law, and Foreign Amnesties

As noted above, unlike many exercises of leniency within the United States, the abuse of prisoners by CIA personnel is not purely a matter of domestic law. Torture is criminalized by international law that is binding on the United States, the victims were foreign nationals, and most of the crimes were committed outside American territory. This means that international legal requirements on amnesty and the duty to prosecute serious crimes are applicable to debates on the extent to which prosecutions have been pursued for prisoner abuse. Therefore, to evaluate America's attitude towards amnesty laws, it is necessary to examine not only domestic practice, but also the United States' international engagement with amnesties.

Until recent decades, amnesty laws were primarily viewed as exercises of state sovereignty that were largely unrestrained by international law, but international actors regularly became involved

<http://www.justice.gov/opa/pr/2011/June/11-ag-861.html>. In his statement, the Attorney General did not identify the two cases that will be investigated, but it has been reported that one case concerns Gul Rahman, who froze to death in 2002 after being stripped and shackled to a cold cement floor in a secret American prison in Afghanistan known as the Salt Pit. See Marjorie Cohn, *Avoiding Impunity: The Need to Broaden Torture Prosecutions*, JURIST (July 8, 2011), available at <http://jurist.org/forum/2011/07/marjorie-cohn-torture-investigation.php>. The other case is reported to concern Manadel al-Jamadi, who died in 2003 at Abu Ghraib prison in Iraq. He was suspended from the ceiling by his wrists, which were bound behind his back. See *id.* On June 16, 2011, the U.S. Department of Justice opened a grand jury investigation in the death of Manadel al-Jamadi. *U.S. Opens Grand Jury on CIA Detainee's Death*, RADIO NETH. WORLDWIDE (June 16, 2011).

⁹⁸ Eric Lichtblau & Eric Schmitt, *U.S. Widens Inquiries Into 2 Jail Deaths*, N.Y. TIMES, July 1, 2011, at A1.

⁹⁹ Cohn, *supra* note 97.

in mediating and implementing foreign amnesties. Since the late 1990s, three distinct legal regimes—international humanitarian law, international human rights law, and international criminal law—have arguably evolved to impose some restrictions on the ability of states to grant amnesties for crimes under international law.¹⁰⁰ At present, none of these regimes explicitly prohibits amnesties. The restrictions must therefore “be ‘read into’ a unified narrative of what the differentiated regimes collectively require.”¹⁰¹ For crimes against humanity and war crimes committed in non-international armed conflicts, such interpretations are reliant on customary international law.¹⁰²

Under the *Charming Betsy* doctrine, U.S. courts are required, wherever possible, to construe national statutes to “be consistent with international law so as to avoid interpretations that will give rise to international discord.”¹⁰³ The absence of international restrictions on national amnesty laws until the late 1990s meant that previously, U.S. enactment of amnesties or legislated support for foreign amnesties rarely risked conflicting with its international obligations. However, under the *Charming Betsy* doctrine, the evolutions in the duty to prosecute require U.S. courts to impose greater scrutiny on national legalization that conflicts with this duty.

As has been extensively explored in academic literature, America’s relationship to international law, and particularly to international

¹⁰⁰ CHRISTINE BELL, ON THE LAW OF PEACE: PEACE AGREEMENTS AND THE *LEX PACIFICATORIA* 243 (2008); see also FREEMAN, *supra* note 40; OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, RULE-OF-LAW-TOOLS FOR POST-CONFLICT STATES: AMNESTIES, HR/PUB/09/1 (2009); Charles P. Trumbull IV, *Giving Amnesties a Second Chance*, 25 BERKELEY J. INT’L L. 283 (2007); Louise Mallinder, *Peacebuilding, the Rule of Law and the Duty to Prosecute: What Role Remains for Amnesties?*, in BUILDING PEACE IN POST-CONFLICT STATES 9 (Faria Medjoubia ed., 2012).

¹⁰¹ BELL, *supra* note 100, at 249.

¹⁰² Article 38 of the International Court of Justice (ICJ) Statute requires that determinations of whether such a duty to prosecute exists under customary international law must be based on state practice and *opinio juris*. The ICJ Statute also provides that judicial decisions and academic research can be ‘subsidiary’ sources of international custom. At present, some subsidiary sources strongly support the existence of the duty to prosecute crimes against humanity and serious violations committed in non-international armed conflicts. However, State practice appears much less supportive of such a duty. See Mallinder, *supra* note 100, for a more detailed discussion of the status of amnesty laws under customary international law.

¹⁰³ Roger P. Alford, *Foreign Relations as a Matter of Interpretation: The Use and Abuse of Charming Betsy*, 67 OHIO ST. L.J. 1339, 1352 (2006). In its judgment, the Supreme Court held “an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains.” *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

treaties, is often described as “exceptionalist.”¹⁰⁴ For example, Ignatieff has identified the American habit of “support[ing] multilateral agreements and regimes, but only if they permit exemptions for American citizens or U.S. practices.”¹⁰⁵ This has been evident in U.S. engagement with international legal regimes, such as the International Criminal Court, that could result in foreign prosecutions of U.S. nationals.¹⁰⁶ This exceptionalism suggests that American attitudes to crimes committed by foreign nationals against foreign victims will not translate neatly onto the attitudes that may motivate domestic legal and policy decisions on leniency for crimes committed by U.S. personnel. Nonetheless, where the United States has called for, endorsed, or assisted in the implementation of foreign amnesties, it does reveal that although America may support accountability and rule of law programs around the world, in certain contexts and for certain crimes, it feels that amnesty may be necessary and permissible. Consequently, this section will consider unilateral pressure applied by the United States on other states in relation to amnesties, and its engagement in amnesty negotiations through participation in multilateral institutions.

1. Unilateral Involvement in Foreign Amnesties

As the author has explored elsewhere,¹⁰⁷ within conflicted or transitional states, domestic debates on whether to enact amnesty laws are often subject to international scrutiny and involvement. This involvement can come through international actors proposing that an amnesty be introduced; mediating peace negotiations that result in an

¹⁰⁴ Tara J. Melish, *From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies*, 34 YALE J. INT’L L. 389, 433 (2009); see also Jamie Mayerfeld, *Playing by our Own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture*, 20 HARV. HUM. RTS. J. 89 (2007); Kenneth Roth, *The Charade of US Ratification of International Human Rights Treaties*, 1 CHI. J. INT’L L. 347 (2000), for a discussion of U.S. ratifications of human rights treaties.

¹⁰⁵ AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS, *supra* note 4, at 4.

¹⁰⁶ See, e.g., Giovanni Conso, *The Basic Reasons for US Hostility to the ICC in Light of the Negotiating History of the Rome Statute*, 3 J. INT’L CRIM. JUST. 314 (2005); M.E. Lantto, *The United States and the International Criminal Court: A Permanent Divide*, 31 SUFFOLK TRANSNAT’L L. REV. 619 (2007); Gerhard Hafner, *An Attempt to Explain the Position of the USA Towards the ICC*, 3 J. INT’L CRIM. JUST. 323 (2005); Schabas, *supra* note 7; Ruth Wedgwood, *The International Criminal Court: An American View*, 10 EUR. J. INT’L L. 93 (1999).

¹⁰⁷ MALLINDER, *supra* note 13, at 323–59.

amnesty;¹⁰⁸ providing technical assistance during the drafting of amnesty legislation; or granting financial, logistical, or technical support to the amnesty's implementation.¹⁰⁹ At each of these stages, international support or opposition to an amnesty can be expressed through diplomatic, economic, legal, and military means. For individual states, involvement in foreign amnesties is often inconsistent with the result that the same state may endorse an amnesty in one country, while criticizing or failing to respond to a similar amnesty in another state. Furthermore, even within a state, different parts of the government may take divergent approaches. For example, during the later years of the Cold War, the U.S. Congress tried to condition aid to South American countries on their protection of human rights, whilst the U.S. armed forces and the CIA trained and supported amnesties for groups involved in perpetrating human rights violations in the region.¹¹⁰

Within the Amnesty Law Database, data has been collated on American unilateral involvement in twenty-nine amnesty laws enacted between 1977 and 2011. These amnesty laws ranged from amnesties for serious human rights violations to amnesties for political dissidents. This involvement has been categorized into diplomatic, economic, legal and military actions, and one amnesty process may have triggered multiple forms of involvement. As noted in the introduction, the author does not suggest that this data is comprehensive; but nonetheless, as summarized in Table 1, it does indicate some trends in U.S. involvement.

¹⁰⁸ See Jacob Bercovitch & Gerald Schneider, *Who Mediates? The Political Economy of International Conflict Management*, 37 J. PEACE RES. 145 (2000); SAMUEL FLAGG BEMIS, *A DIPLOMATIC HISTORY OF THE UNITED STATES* (1965), for discussions of America's role as a mediator.

¹⁰⁹ For example, in January 2012, the U.S. State Department urged that an amnesty be granted to the former Yemeni President Ali Abdullah Saleh. Although the amnesty was condemned by the U.N., the U.S. State Department spokesperson stated: "This is part and parcel of giving these guys confidence that their era is over and it's time for Yemen to be able to move forward towards a democratic future." *United States Defends Immunity Law for Yemeni President Saleh*, GUARDIAN (London), Jan. 10, 2012, available at <http://www.guardian.co.uk/world/2012/jan/10/us-backs-yemen-immunity-for-saleh>. This amnesty was approved by the Yemeni Parliament on January 21, 2012, and President Saleh arrived in the United States on January 26, 2012, a few weeks before he was due to formally step down. See Tim Fitzsimons, *Amnesty Plan for Yemen President Ali Abdullah Saleh Supported by US*, GLOBAL POST (Washington), Jan. 10, 2012; Sebastian Smith, *Yemen's President Saleh Arrives in US for Treatment*, AGENCE FRANCE PRESSE, Jan. 29, 2012.

¹¹⁰ CHANDRA LEKHA SRIRAM, *CONFRONTING PAST HUMAN RIGHTS VIOLATIONS: JUSTICE VS PEACE IN TIMES OF TRANSITION* 26 (2004).

Table 1. American Unilateral Involvement in Foreign Amnesties

	For	Against
Diplomatic	18	5
Economic	4	2
Legal	3	1
Military	6	0
Total	31	8

As will be explored in Part IV, U.S. unilateral action has at times focused on encouraging the negotiating parties to enact broad, unconditional amnesties that encompass the most serious human rights violations, which Trumbull has interpreted as suggesting a belief among U.S. government officials that amnesties do not violate customary international law.¹¹¹ In contrast, in other contexts, the United States has pressured the negotiators to exclude the most serious crimes from amnesty laws¹¹² and to pursue prosecutions for human rights violations.¹¹³ Overall, however, Table 1 indicates that where the United States has become actively involved in foreign amnesty processes, through exercising diplomatic, legal, financial, or military pressure, it has been considerably more likely to encourage or coerce states to enact amnesty laws than to withhold them. The global military and economic dominance of the United States makes it difficult for weak, conflicted, or transitional states to resist such pressure.¹¹⁴ American involvement in the amnesty decisions of other states can have significant consequences, not just for the states in question, but also for the development of international law as state practice can shape the emergence of customary international law in relation to amnesties for violations of international offenses.

¹¹¹ Trumbull, *supra* note 100, at 297. Trumbull makes this argument in relation to all third-party negotiation, rather than just U.S. diplomatic interventions.

¹¹² For example, in 1996 international mediators in Guatemala, including the United States, lobbied against the enactment of a blanket amnesty law, see Douglass Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 LAW & CONTEMP. PROBS. 197, 202 (1996).

¹¹³ For example, Cassel highlights that acting “under Congressional pressure, the U.S. has at times used aid leverage to insist on prosecution of particular human rights cases in such countries as Chile, El Salvador, and Guatemala.” *Id.* at 207.

¹¹⁴ See, e.g., *infra* text accompanying n.151 (discussing the Haitian amnesty process).

2. *Multilateral Involvement in Foreign Amnesties*

The United States can also influence foreign amnesty decisions through its participation in multilateral institutions, notably as a permanent member of the U.N. Security Council (UNSC).¹¹⁵ The Security Council is the world's "central site of law-making and law-enforcement in matters related to peace and security," and through participation in it, its permanent members, including the United States, can "control it much more easily than the typical processes of international lawmaking and [-]enforcement."¹¹⁶ This can enable the United States and the other permanent members "to make law merely for others, without being bound themselves."¹¹⁷

From the creation of the United Nations to the end of the Cold War, the Security Council was deadlocked between the two superpowers.¹¹⁸ This caused inaction, which combined with a tendency among states and international actors to view amnesty laws as matters of state sovereignty.¹¹⁹ As a result, for the first few decades of its existence, the UNSC did not routinely engage in amnesty debates within conflicted or transitional states. Following the fall of the Berlin Wall in 1989, the Security Council became more active in responding to serious human rights violations. This was particularly evident in the creation of the ad hoc tribunals for the Former Yugoslavia and Rwanda,¹²⁰ and the increased willingness to authorize peacekeeping troops to intervene in situations of mass violence.¹²¹ These developments were mostly "actively furthered by U.S. governments interested in the added legitimacy that Council actions and authorizations confer."¹²² Concurrently to these developments,

¹¹⁵ Cassel, *supra* note 112, at 206–07.

¹¹⁶ Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369, 398 (2005).

¹¹⁷ *Id.*

¹¹⁸ See, e.g., JOHN PRADOS, *KEEPERS OF THE KEYS: A HISTORY OF THE NATIONAL SECURITY COUNCIL FROM TRUMAN TO BUSH* (1991); *THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY* (David M. Malone ed., 2004).

¹¹⁹ See Max Pensky, *Amnesty on Trial: Impunity, Accountability, and the Norms of International Law*, 1 ETHICS & GLOBAL POL. 1 (2008).

¹²⁰ See S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

¹²¹ See, e.g., ROBERT M. CASSIDY, *PEACEKEEPING IN THE ABYSS: BRITISH AND AMERICAN PEACEKEEPING DOCTRINE AND PRACTICE AFTER THE COLD WAR* (2004); RICHARD N. HAASS, *THE RELUCTANT SHERIFF: THE UNITED STATES AFTER THE COLD WAR* (1997); Dean N. Reinhardt, *The United States Military and United Nations Peacekeeping Operations*, 19 HOUS. J. INT'L L. 245 (1996).

¹²² Krisch, *supra* note 116, at 398.

the UNSC also began to involve itself more directly in the amnesty decisions of nation states.

The Amnesty Law Database has collated data on UNSC resolutions and statements on its involvement in eleven amnesty laws enacted between 1996 and 2009.¹²³ As with the United States' unilateral involvement, the UNSC's involvement has been categorized into diplomatic, economic, legal, and military actions, and one amnesty process may have triggered multiple forms of involvement. For each of these actions to have been taken, the United States had to refrain from exercising its veto, from which it can be inferred that the U.S. either supported the action or acquiesced to it. Again, the data collected is not a comprehensive sample of UNSC decisions on amnesty, but the results are shown in Table 2:

Table 2. United Nations Security Council involvement in amnesty laws

	For	Against
Diplomatic	6	2
Economic	0	0
Legal	0	4
Military	3	0
Total	9	6

This table illustrates that the UNSC has been more likely to endorse amnesty laws than to object to them. However, on four occasions the UNSC objected to amnesty on legal grounds. These objections relate to amnesties in Croatia in 1996, Sierra Leone and the Democratic Republic of Congo in 1999, and Darfur in Sudan in 2006. These instances indicate that the UNSC members were willing to state that amnesty laws for genocide, war crimes and crimes against humanity violated international law. However, as discussed below, the United States' unilateral approach contradicted the position of the UNSC regarding the 1999 amnesty in Sierra Leone. This conflicting embrace by America of both accountability and amnesty will be

¹²³ This does not include U.N. Security Council resolutions that referred to amnesty laws in general, but rather specific laws that were proposed or enacted in a particular country. *See, e.g.*, S.C. Res. 1325, ¶ 11, U.N. Doc. S/RES/1325 (Oct. 31, 2000) (“[E]mphasiz[ing] the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls, and in this regard stresses the need to exclude these crimes, where feasible from amnesty provisions.”).

explored in section IV in relation to domestic amnesties and support for foreign amnesties.

III

INSTRUMENTALIZING AMNESTY: AMERICA'S USE OF CLEMENCY PAST AND PRESENT

The above sections have demonstrated that within the domestic legal system of the United States there are several mechanisms by which different organs of the state grant leniency to offenders. Furthermore, the United States has at times been willing to endorse foreign amnesty laws, even for crimes under international law. This acceptance of leniency conflicts with the leadership role America has played in the development of international justice. However, it does demonstrate a continuity of approach with the limitations placed on accountability for prisoner abuse. This section will examine this continuity by exploring the motivations for American enactment of or support for amnesties, which will be used to contextualize and explain the legal and political rationales used to justify limiting the pursuit of justice for torture.

Part V will draw upon the pardons and amnesties included in two datasets relating to the United States' engagement with amnesty laws. These historic examples will be analyzed in relation to four broad, overlapping themes that are drawn deductively from scholarly literature on presidential pardons and international law, together with the texts of the pardons and amnesties. These are amnesty, empire, and hegemony; amnesty, denial, and justificatory claims-making; law, politics, and pragmatism in the use of amnesties; and amnesty, mercy, and the public welfare. The themes are not to be viewed as precise categories, but rather as Weberian "ideal" types or heuristic models, and aspects of individual amnesty or pardon processes may relate to multiple themes. The relevance of each theme to the contemporary efforts to limit accountability will also be explored.

A. Amnesty, Empire, and Hegemonic Power

The concept of empire has its roots in the ancient Roman idea of *imperium*, which can be translated as the power to command. Within different aspects of Roman law, *imperium* referred to statutes, the legal authority of public officials, and to the territory over which the Roman Empire exercised power.¹²⁴ Thus, Roman *imperium* entailed

¹²⁴ ADOLF BERGER, ENCYCLOPEDIA OF ROMAN LAW 493-4 (1953).

the *direct* exercise of power by a state over its subjects. With the onset of the Industrial Revolution, European nations hungry for both raw materials and markets developed a form of imperialism that was based on the overwhelming military, economic, and political power of the colonial state over the peoples it subjugated. This power was often justified by a belief in the racial, intellectual, and religious superiority of the colonizing nations.¹²⁵ Empire during the colonial period shared with the Roman Empire an understanding of imperialism as supreme political power exercised by the metropolis over defined territories within its control.

The granting of amnesties has long been closely associated with the exercise of power and sovereignty.¹²⁶ For example, in 1922 Carl Schmitt developed his now famous definition of the sovereign as “he who decides on the exception” to the law.¹²⁷ Similarly, Strange has argued that “officially sanctioned mercy, like severity, ultimately expresses the politics of rule.”¹²⁸ Within these approaches, there is an assumption that by granting amnesty, the sovereign is expressing power that he or she already holds. However, of course, amnesties may be granted at moments when the sovereign has been weakened and wishes to reassert his or her power. As will be explored below, the use of amnesties to assert power and ensure compliance with laws imposed by the state were featured in the building of the American “empire” from independence until the end of the World War I.

World War I marked the apex of direct territorial forms of empire, and in the following decades, historic empires were dismantled and most colonial peoples gradually gained their independence. Although territorial control has remained central to understandings of

¹²⁵ There are diverse theories of this era of imperialism. For example, Marxist traditions emphasize economic dominance. *See, e.g.*, VLADIMIR ILYICH LENIN, *IMPERIALISM THE HIGHEST STAGE OF CAPITALISM* (1939); J.A. HOBSON, *IMPERIALISM: A STUDY* (1967). Other scholars have placed more emphasis on cultural aspects of colonialism. *See, e.g.*, EDWARD W. SAID, *ORIENTALISM* (1978). For a compelling history of this period of Empire, see also E.J. HOBBSAWM, *THE AGE OF EMPIRE, 1875–1914* (1987).

¹²⁶ The relationship of mercy to power has been explored more fully in KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* (1989); Kieran McEvoy & Louise Mallinder, *Amnesties, Transitional Justice and Governing through Mercy*, in *THE SAGE HANDBOOK OF PUNISHMENT AND SOCIETY* (Jonathan Simon & Richard Sparks eds., 2012).

¹²⁷ CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5 (George Schwab trans., 1985).

¹²⁸ Carolyn Strange, *Introduction* to *QUALITIES OF MERCY: JUSTICE, PUNISHMENT AND DISCRETION* 3, 5 (Carolyn Strange ed., 1996).

imperialism,¹²⁹ in the latter half of the twentieth century the concept evolved to recognize the diverse ways powerful states can exert dominance *indirectly* over the politics and economies of other countries. These indirect methods can entail powerful states forcing less powerful nations to bend to their will through granting or withholding military, financial, or political support. Alternatively, where the powerful states are hegemonic, they may exert “consensual dominance,” whereby weaker states adopt the ideological positions of the powerful.¹³⁰ As will be explored below, following World War II, America attained the status of a hegemonic state, and has used this status to influence or directly impose amnesties in other parts of the world in order to enhance its own power.

1. Amnesty and the Building of the American “Empire”

The United States has long been reluctant to acknowledge its potential or actual role as an empire. As a nation that was forged in a struggle for independence against the tyrannies of the British Empire, the United States seeks to portray itself rather as “the friend of freedom everywhere.”¹³¹ Indeed, unlike the empires of Rome, the Ottomans, the Hapsburgs, Napoleon, or the British, America does not seek to establish expansive colonies across the world.¹³² Nonetheless, the issue of “empire” arose early in America’s history. For example, George Washington, whilst leader of the Continental Army following its victory in the American Revolutionary War, referred to the “foundation of our Empire” in his *Circular to the States*, on June 8, 1783.¹³³ At this stage, the term “empire” was used to denote Americans’ mission of settling the landmass of the continent, rather

¹²⁹ Mona Domosh, *Selling Civilization: Toward a Cultural Analysis of America’s Economic Empire in the Late Nineteenth and Early Twentieth Centuries*, 29 *TRANSACTIONS OF THE INST. OF BRIT. GEOGRAPHERS* 453, 455 (2004). Indeed, in the post-World War II era, new territorial empires emerged, for example, the Soviet Union.

¹³⁰ See Christine Bell et al., *The Battle for Transitional Justice: Hegemony, Iraq, and International Law*, in *JUDGES, TRANSITIONS, AND HUMAN RIGHTS* 147, 153 (John Morison et al. eds., 2007) (discussing Gramsci’s theory of hegemony).

¹³¹ Michael Ignatieff, *The American Empire (Get Used to It)*, *N.Y. TIMES*, Jan. 5, 2003.

¹³² It does, however, retain control over the following islands: Puerto Rico, U.S. Virgin Islands, American Samoa, Guam, Northern Mariana Islands, and several other outlying islands. See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/OGC-98-5, U.S. INSULAR AREAS: APPLICATION OF THE U.S. CONSTITUTION (1997). Furthermore, it exercises administrative control over dependent territories, including Guantánamo Bay in Cuba. See Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 16–23, 1903, T.S. No. 418.

¹³³ GEORGE WASHINGTON, *CIRCULAR TO THE STATES* (1783), reprinted in *THE FOUNDERS CONSTITUTION* 218, 219 (Philip B. Kurland & Ralph Lerner eds., 1987).

than overseas expansion. From this period until the Civil War, U.S. territory gradually expanded through a series of treaties with the British, Spanish, and French who had all exercised control over parts of the North American continent. By 1861, the United States already claimed control over most of the landmass of present-day America.¹³⁴

During this expansionist period, the federal government sought to employ amnesty laws to entrench its power against those who challenged it and to encourage insurgents to adhere to national laws. For example, in 1795 President George Washington proclaimed a “full, free and entire pardon . . . of all treasons, misprisions of treason, and other indictable offenses against the United States” for the participants in the Whiskey Rebellion.¹³⁵ During this rebellion, farmers in the western counties of Pennsylvania rioted against the imposition of an excise tax on whiskey. This violence was viewed as a direct threat to the government’s authority, causing President Washington to respond by “[r]aising an army larger than the troops he commanded during most of the war with England and leading them himself into Pennsylvania”¹³⁶ In the face of such concerted action, the rebellion soon collapsed and an agreement was reached on September 2, 1794, which proclaimed that if the rebels adhered to the laws of the United States and paid the taxes on whiskey, they would be granted a pardon the following July. Washington duly complied with this promise and pardoned two leaders of the rebellion who had been convicted,¹³⁷ along with the other participants. The pardon was, however, conditional on the recipients continuing to adhere to the laws, and it excluded every convicted person who failed to comply with the agreement.¹³⁸ When a similar rebellion erupted in 1799, President Adams followed Washington’s example by enacting an amnesty for the insurgents.¹³⁹ For both the 1795 and 1800 amnesty

¹³⁴ In addition, from 1822 to 1847 Liberia was a protectorate of the United States.

¹³⁵ Proclamation of Pardons in Western Pennsylvania (July 10, 1795) [hereinafter Washington Proclamation], reprinted in I A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897 [hereinafter PRESIDENTIAL PROCLAMATIONS VOL. I], at 181 (James C. Richardson ed., 1899) (proclamation by George Washington granting pardon to certain persons formally engaged in violence and obstruction of justice in protest of liquor laws in Pennsylvania).

¹³⁶ ALFONSO J. DAMICO, DEMOCRACY AND THE CASE FOR AMNESTY 27 (1975).

¹³⁷ P.S. Ruckman, Jr., *Executive Clemency in the United States: Origins, Development, and Analysis (1900–1993)*, 27 PRESIDENTIAL STUD. Q. 251, 253–54 (1997).

¹³⁸ Washington Proclamation, *supra* note 135.

¹³⁹ Proclamation (May 21, 1800), reprinted in PRESIDENTIAL PROCLAMATIONS VOL. I, *supra* note 135, at 303–04 [hereinafter Adams Proclamation] (proclamation by John

proclamations, government forces had suppressed the rebellions several months before the proclamations were issued, which meant that the amnesties were not used to encourage the insurgents to end their violent struggle, but rather to encourage them to continue to abide by the law once the government forces had returned to barracks.

The outbreak of the American Civil War between 1861 and 1865 triggered a series of amnesty laws for draft dodgers and rebels. The first amnesty for the insurgents was offered in 1863, while the war was raging, in order “to suppress the insurrection and to restore the authority of the United States.”¹⁴⁰ It was conditional on the beneficiaries taking an oath to “henceforth faithfully support, protect, and defend the Constitution of the United States . . . and . . . abide by and faithfully support all” congressional acts and presidential proclamations relating to slavery.¹⁴¹ Following the war’s conclusion, several subsequent amnesty laws were issued culminating in an unconditional amnesty for treason proclaimed by President Johnson in 1868, when many in the South were resentful of the Reconstruction government and federal occupying forces, and paramilitary groups sought to resist the integration of freed slaves into the nation’s political life. Johnson’s 1868 amnesty proclamation sought to overcome these lingering resentments and “to secure a complete and universal establishment and prevalence of municipal law and order in conformity with the Constitution of the United States.”¹⁴² This

Adams granting pardon to certain persons engaged in insurrection against the United States in the counties of Northampton, Montgomery, and Bucks, in the state of Pennsylvania). This insurrection, known as the “Fries” or “House Tax” rebellion, arose in the counties of Northampton, Montgomery, and Bucks in eastern Pennsylvania in 1799. It was aimed at preventing the execution of a law directed at the valuation of houses, land, and slaves for the purposes of taxation. German-American farmers who protested against the law had been arrested by a federal marshal, which prompted 100 men, led by Jacob Fries, to assail the marshal to demand the release of the farmers. The federal government again gathered a large number of troops, causing the insurgents to surrender without resistance. Fries and one other leader of the rebellion were convicted of treason and sentenced to be hanged. However, in May 1800, President Adams, acting against the advice of his cabinet pardoned the convicted men and the other insurgents. *See* Ruckman, *supra* note 137, at 254.

¹⁴⁰ Proclamation No. 111 (Mar. 26, 1864), *reprinted in* VI A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 218 (James D. Richardson ed., 1907) [hereinafter PRESIDENTIAL PROCLAMATIONS VOL. VI] (proclamation by Abraham Lincoln concerning amnesty); *see also* Proclamation No. 108 (Dec. 8, 1863), *reprinted in* PRESIDENTIAL PROCLAMATIONS VOL. VI, *supra*, at 213–15 (proclamation by Abraham Lincoln regarding amnesty and reconstruction).

¹⁴¹ Proclamation No. 108, *supra* note 140.

¹⁴² Proclamation No. 170 (July 4, 1868), *reprinted in* PRESIDENTIAL PROCLAMATIONS VOL. VI, *supra* note 140, at 655–56 (proclamation by Andrew Johnson granting pardon to

illustrates that during the first phase of American “empire” in which the United States sought to consolidate its control over the continent; amnesties were used as a means of reducing dissent against federal power and ensuring compliance with federal laws.

Following the end of the post-Civil War Reconstruction period, America’s “empire” began to spread beyond its landmass with the Spanish-American War. This war resulted in the Paris Peace Treaty of 1898, in which Spain ceded to the United States control over Cuba, Puerto Rico, Guam, and the Philippines.¹⁴³ As the United States ruled over its new territories, it intermittently used amnesties to undermine dissent similar to how amnesties had been used within the United States. For example, in 1902, President Theodore Roosevelt proclaimed under his constitutional pardoning powers “a full and complete pardon and amnesty” to all persons in the Philippines who participated in insurrections against Spanish and American rule. To benefit, individuals were required to pledge to “recognize and accept the supreme authority of the United States of America in the Philippine Islands” and to “maintain true faith and allegiance” to the United States.¹⁴⁴ As the American empire spread overseas, amnesty laws continued to be used to ensure adherence to federal laws and acceptance of the power of the government.

2. Amnesty and the Exercise of Hegemonic Power

From World War II, American power on the international stage shifted from direct exercises of power over peoples and territories, towards more hegemonic forms of dominance. This conception of empire resulted in the United States intervening financially, diplomatically, and militarily in the governance of states around the world. Following the end of the Cold War, America became the world’s sole superpower. This power means that even though America became “an empire without consciousness of itself as such,”¹⁴⁵ or “[a]n [e]mpire in [d]enial,”¹⁴⁶ it nonetheless was and is

all persons participating in the late rebellion, except those under indictment for treason or other felony).

¹⁴³ Treaty of Peace, U.S.-Spain, Dec. 10, 1898, 30 Stat. 1754. The treaty itself contained an amnesty in Article VI. Subsequently, the United States also had protectorate control over Nicaragua between 1912 and 1933.

¹⁴⁴ Proclamation No. 483 (July 4, 1902), *reprinted in* A SUPPLEMENT TO A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1902, at 392–94 (George Raywood Devitt ed., 1903) (proclamation by Theodore Roosevelt granting pardon and amnesty to participants in insurrection in the Philippines).

¹⁴⁵ Ignatieff, *supra* note 131.

capable of (and frequently does) influencing the domestic policies of other states.

Although America's dominance enables it to influence the formation of global norms, it too is affected by evolution of those norms.¹⁴⁷ In relation to amnesty laws, it is significant that the United States' emergence as a global hegemonic power coincided with the growth of transitional justice and international criminal law, in which America became a leader. As noted above, these emerging legal frameworks arguably created restrictions of the use of amnesty laws, which the United States invoked in arguing against amnesties in contexts such as Bosnia, which will be explored below. In contrast, during and after the Cold War, the United States frequently endorsed foreign amnesties for its "allies" in the fight against communism¹⁴⁸ or where it wished to broker peace settlements. In these instances, U.S. invocations of international law contradicted its statements elsewhere, as the amnesties were described by U.S. officials as protecting human rights, rather than violating them. Such pragmatism was also evident in domestic pardons for crimes relating to the Iran-Contra affair, which related to questions of presidential involvement in selling weapons to Iran while contravening congressional enactments by funneling the proceeds of weapons' sales to the Contra death squads in Nicaragua.¹⁴⁹ The domestic pardon for the American officials

¹⁴⁶ Niall Ferguson, *An Empire in Denial: The Limits of US Imperialism*, 25 HARV. INT'L L. REV. 64, 64 (2003).

¹⁴⁷ SIKKINK, *supra* note 29, at 204–05.

¹⁴⁸ For example, during the Cold War, the United States provided diplomatic and financial support for dictatorial regimes and in some cases, the United States was directly implicated in horrific episodes of human rights abuses, such as *Operación Cóndor* in Latin America, which received American financial and technical support (many of the personnel involved were trained to inflict terror at the American-run School of the Americas). See, e.g., J. PATRICE MCSHERRY, PREDATORY STATES: OPERATION CONDOR AND COVERT WAR IN LATIN AMERICA (2005); Katherine E. McCoy, *Trained to Torture? The Human Rights Effects of Military Training at the School of the Americas*, 32 LATIN AM. PERSP. 47 (2005); Russell W. Ramsey & Antonio Raimondo, *Human Rights Instruction at the U.S. Army School of the Americas*, 2 HUM. RTS. REV. 92 (2001).

¹⁴⁹ Criminal proceedings were brought against executive branch officials, and Oliver North was convicted for his role in the scandal. The political implications of this pardon were explored in several contemporary articles. See, e.g., Stephen L. Carter, *The Iran-Contra Pardon Mess*, 29 HOUS. L. REV. 883 (1992); Harold Hongju Koh, *Begging Bush's Pardon*, 29 HOUS. L. REV. 889 (1992); Carl Levin & Henry Hyde, *The Iran-Contra Pardons: Was it Wrong for Ex-President Bush to Pardon Six Defendants?*, 79 A.B.A. J. 44 (1993); Lawrence E. Walsh, *Political Oversight, the Rule of Law, and Iran-Contra*, 42 CLEV. ST. L. REV. 587 (1994).

implicated in the affair sought to legitimize American support for the Contras.¹⁵⁰

In some cases, motivated by domestic and international policy priorities, American involvement in foreign amnesties moved beyond endorsement of the amnesty legislation to actively pressuring local actors to grant amnesties. For example, in 1994, when America was faced with a stream of Haitian refugees fleeing the military junta, the U.S. government responded by pressuring deposed, democratically-elected president Jean Bertrand Aristide to agree to a peace deal granting a broad amnesty and permitting the junta leaders to go into exile. In this instance there was strong resistance to the amnesty policy from the Haitian officials, with the result that U.S. involvement extended to drafting the text of the amnesty legislation.¹⁵¹ The U.N. and the Organization of American States endorsed America's amnesty proposal, but their acquiescence was described as "the usual post cold war charade . . . in which the US uses a tame UN to give international legitimacy to the pursuit of its own very particular foreign policy objectives."¹⁵² This example highlights the difficulties faced by smaller states in resisting American pressure to introduce amnesty laws.

At first glance, American engagement with amnesties as an exercise of its hegemonic power contrasts with the domestic amnesties enacted during its empire-building phase. The latter were introduced to encourage law-abiding behavior, whereas the former amnesties were often used to reward the law-breaking behavior of ideological allies. However, there are commonalities in that for both phases of U.S. empire, involvement in amnesty debates was designed to influence the outcome of political conflict in order to suit the priorities of the United States, and to weaken the opponents of American power.

The language of "empire" underwent a resurgence during the Bush presidency. For example, Charles Krauthammer proclaimed a few months before September 11, 2001, that "America is no mere international citizen. It is the dominant power in the world, more dominant than any since Rome. Accordingly, America is in a position

¹⁵⁰ See Proclamation No. 6518, 57 Fed. Reg. 62,145 (Dec. 24, 1992) (proclamation by George H.W. Bush granting executive clemency).

¹⁵¹ Michael P. Scharf, *Swapping Amnesty for Peace: Was there a Duty to Prosecute International Crimes in Haiti?*, 31 TEX. INT'L L.J. 1, 7 (1996).

¹⁵² Dominic Lawson, *The Pressure of Gunboat Diplomacy: Britain Has Offered the U.S. Two Warships to Help Invade Haiti*, FIN. TIMES, Sept. 3, 1994.

to reshape norms, alter expectations and create new realities. How? By unapologetic and implacable demonstrations of will.”¹⁵³ More directly, as a Bush administration official told investigative reporter Ronald Suskind, “We are an empire. We make our own reality.”¹⁵⁴ Unlike the preceding decades, during the Bush presidency, America’s “empire” once again engaged in territorial domination in the military invasions of Afghanistan in 2001 and Iraq in 2003. Following the “regime changes” in these countries, the United States used amnesties to weaken insurgencies that challenged its interests. For example, on January 7, 2004, the Administrator of the Coalition Provisional Authority,¹⁵⁵ Paul Bremer, declared an amnesty for over 500 Iraqis¹⁵⁶ who were being held by coalition forces for suspected involvement in insurgency. The amnesty offer excluded anyone who was accused of having “blood on their hands” by, for example, causing death or serious physical injury to an Iraqi citizen or member of the coalition forces.¹⁵⁷ Mr. Bremer, when announcing the amnesty, said that it was expected to contribute to American efforts to win the “hearts and minds” of the Iraqi people, following complaints about heavy-handed tactics.¹⁵⁸ In short, the amnesty was designed to support broader U.S. strategies of governance and control over Iraq.

3. Torture, Hegemony, and Creating Exceptions to the Law

As this section has explored, since independence the United States has grown from establishing control over its current territorial boundaries, through gaining increasing power on the international

¹⁵³ Charles Krauthammer, *The Bush Doctrine*, TIME, Mar. 5, 2001.

¹⁵⁴ See Raymond Michalowski, *Power, Crime and Criminology in the New Imperial Age*, 51 CRIME L. & SOC. CHANGE 303, 310 (2009).

¹⁵⁵ Following the 2003 invasion and occupation of Iraq by the United States and its allies, the occupying powers established the Coalition Provisional Authority (CPA) as a transitional government, which was empowered to exercise executive, legislative, and judicial authority over Iraq. The allies cited U.N. Security Council “Resolution 1483 (2003) and the laws and usages of war” as the legal basis to establish the CPA. Coalition Provisional Authority, Reg. No. 1 (May 16, 2003), available at <http://www.iraqcoalition.org/regulations/>.

¹⁵⁶ This number represented only four percent of the Iraqis believed to be in U.S. custody at that time. See Luke Harding & Richard Norton Taylor, *U.S. Frees Iraqis After British Protest*, GUARDIAN (London) Jan. 8, 2004.

¹⁵⁷ James Rupert, *U.S. Hopes Key Policy Reversal Will Help to Quell Iraq Insurgency*, SEATTLE TIMES, Apr. 24, 2004.

¹⁵⁸ Stephen Farrell, *Prisoners Freed in Bid for Hearts and Minds*, TIMES (London), Jan. 8, 2004, at 20; *US to Release 506 Iraqi Prisoners*, BBC NEWS, Jan. 7, 2004; *U.S. Begins Releasing Iraqi Prisoners: At Least One Vows Revenge*, WHITE HOUSE BULLETIN, Jan. 8, 2004.

stage, to becoming the world's sole superpower. This dominance enables the United States to use international law as an instrument of power, to regulate the behavior of other states and entrench its policies and worldview.¹⁵⁹ However, the regulations of international law also apply to the United States, and can constrain its exercises of dominance. Where this occurs, powerful states, like the United States, have a range of "soft and hard options," including violating the law, creating an exceptional legal regime that applies to the hegemonic state, and changing the applicable rules to suit the hegemon's interests.¹⁶⁰

As was explored above, torture is explicitly prohibited in multiple international treaties and U.S. domestic law. This constrained the legality of the Bush administration's policy of coercive interrogation. As a result, the administration's political and strategic goals came into conflict with the state's obligations under international law. Through the framing of the struggle against terrorism as a "war," and reinterpreting America's legal obligations in the torture memos, the Bush administration attempted to assert its hegemonic power by reshaping applicable international law to create an exception for the United States.

At the domestic level, the decisions not to prosecute prisoner abuse by CIA interrogators differ from the amnesties enacted during the United States' empire-building phase, as, although both benefited persons who were acting outside the United States' federal laws, the rebels in the earlier amnesties were challenging the authority of the federal government, whereas the CIA interrogators committed torture as part of a federally sanctioned policy. Consequently, the rationale for granting the interrogators amnesty is not to dissuade them from future law breaking, but to protect official institutions and personnel and to limit challenges to their legitimacy. In this way, the decisions not to prosecute can be compared to the United States' support for Cold War amnesties, which were designed to protect U.S. allies from accountability. Such forms of amnesty are designed to create exceptions to the law, by exempting those who usually deserve punishment from criminal sanction. By creating such exceptions from its international and domestic legal obligations, the United States has

¹⁵⁹ Krisch, *supra* note 116, at 371.

¹⁶⁰ Bell et al., *supra* note 130, at 153–4 (citing Michael Byers, *Presumptive Self-Defense: Hegemony, Equality and Strategies of Legal Change*, 11 J. POL. PHIL. 171, 171–74 (2003)).

demonstrated not just its ability to assert its power to commit serious human rights violations, but also to evade international standards on accountability that it seeks to encourage nations in other parts of the world to uphold. As the following section will explore, this double standard challenges the United States' self-image as an exemplary state.

B. Amnesty, Denial, and Justificatory Claimsmaking

America has been described as an “exceptional” society since Alexis de Tocqueville wrote *Democracy in America* in 1831.¹⁶¹ This study, and much of the subsequent literature, has found that in comparison to other developed nations, “the United States was created differently, developed differently, and thus has to be *understood* differently—essentially on its own terms and within its own context.”¹⁶² This perception has given rise to a rich literature exploring the uniqueness of different aspects of America's political, cultural, religious, and economic life that is too vast to be explored in this article. Instead, this section will restrict itself to exploring, through the lens of amnesties, how America's perception of itself as an exceptional society has influenced its justifications for involvement in human rights violations and the legal responses to these crimes.

From the earliest Puritan settlements in the “New World,” a self-understanding of America's national values and global role has resonated through the nation's political discourse. This view was presciently encapsulated in 1630 in a sermon by Puritan leader (and later New England Governor), John Winthrop, who described the society that the Puritans sought to create as a “city upon a hill,”¹⁶³ which would provide a shining example for the world through its commitments to liberty, democracy, equality, and religious devotion. Furthermore, he suggested that the success of this society that they were trying to establish would be ensured by the promotion of these goals at home and abroad. This concept, which Goodhart has termed “[p]rovidential exceptionalism,” refers to “a commonplace American belief that theirs is a chosen nation, one upon which Providence has bestowed special blessings and which has been charged with a special

¹⁶¹ *E.g.*, ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1835).

¹⁶² Byron E. Shafer, *Preface* to *IS AMERICA DIFFERENT? A NEW LOOK AT AMERICAN EXCEPTIONALISM*, at v (Byron E. Shafer ed., 1991).

¹⁶³ John Winthrop, *Sermon, A Modell of Christian Charity* (1630).

world-historical mission to cultivate and promote its values.”¹⁶⁴ Such conceptions of exceptionalism have been invoked in the rhetoric of nearly every American president, and Presidents Kennedy and Reagan explicitly cited Winthrop in speeches.¹⁶⁵ It was particularly evident in the “Bush Doctrine,”¹⁶⁶ and has continued into the Obama presidency.¹⁶⁷ This self-perception of America as a nation of values has affected why and how clemency has been used by different administrations.

As noted above, amnesty laws seek to prevent specified crimes or offenders being investigated, but when they are issued, they generally entail an assumption that crimes have been committed, and indeed, in some cases, the beneficiaries have been convicted prior to the amnesty’s proclamation.¹⁶⁸ Where amnestied acts are labeled as crimes, this has the potential to convey social disapproval of the acts in a similar manner to the expressivist functions of prosecution.¹⁶⁹ However, in some contexts, states may seek to use the enactment of amnesty legislation to reinterpret or justify these crimes, in order to alter how they are perceived by society.¹⁷⁰ Such forms of denial are prevalent where the state has responsibility for violence.¹⁷¹ Amnesties

¹⁶⁴ Michael Goodhart, *Reverting to Form: American Exceptionalism and International Human Rights*, in HUMAN RIGHTS IN THE 21ST CENTURY CONTINUITY AND CHANGE SINCE 9/11, at 65 (Michael Goodhart & Anja Mihr eds., 2011).

¹⁶⁵ Koh, *supra* note 4, at 1481 n.4.

¹⁶⁶ For example, in his second inaugural speech, President George W. Bush proclaimed: “We are led, by events and common sense, to one conclusion: The survival of liberty in our land increasingly depends on the success of liberty in other lands. The best hope for peace in our world is the expansion of freedom in all the world.” President George W. Bush, Second Inaugural Address (Jan. 20, 2005), *available at* <http://www.washingtonpost.com/wp-dyn/articles/A23747-2005Jan20.html>.

¹⁶⁷ For example, in his inaugural speech, President Obama invoked America’s leadership role in the world:

[T]o all the other peoples and governments who are watching today, from the grandest capitals to the small village where my father was born, know that America is a friend of each nation, and every man, woman and child who seeks a future of peace and dignity. And we are ready to lead once more.

President Barack Obama, Inaugural Address, *supra* note 2.

¹⁶⁸ FREEMAN, *supra* note 40, at 12.

¹⁶⁹ Expressing social disapproval of criminal actions is often a central justification for criminal sanctions. However, some restorative forms of amnesty that are offered in exchange for offenders admitting their acts publicly may have a similar expressive role. See MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW* (1997).

¹⁷⁰ Ross Poole, *Enacting Oblivion*, 22 INT’L J. POL. CULTURE & SOC’Y 149, 151 (2009).

¹⁷¹ See generally STANLEY COHEN, *STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING* (2001).

can contribute to such by “wiping the slate clean” regarding the offenders’ criminality, limiting the scope of investigations into particular allegations, or using amnesty legislation to privilege the official account of disputed historical narratives. In this way, an amnesty law may not be simply a tool for *forgetting* the crimes, but rather a legal means to *reinterpret* and *re-present* them as unworthy of punishment. Where amnesties are used to promote such reinterpretations, they are part of official claimsmaking discourse,¹⁷² whereby states hope that by using a legal measure such as amnesty to assert a clear position on the deserving nature of the crimes, this portrayal will become accepted and established within the nation’s collective memory.¹⁷³ Drawing on Stan Cohen’s seminal account of denial, this section will explore how America’s engagement with amnesty laws has been used to reinforce its national self-image through reinterpretation and justification of amnestied crimes.

1. Amnesty and Interpretative Denial

Interpretative denial entails arguing “what happened is really something else.”¹⁷⁴ It can take many forms, ranging from developing euphemisms to conceal or minimize the true nature of particular crimes (for example, labeling torture with the more neutral sounding term “enhanced interrogation”) to developing legal strategies to undermine internationally accepted legal definitions and principles (the torture memos provide a clear example of this approach). Among the amnesties enacted or endorsed by the United States, reinterpretations have included describing crimes as the misguided actions of normally patriotic and law-abiding citizens.

Several of America’s domestic amnesty laws and pardons have reinterpreted offenders’ actions in order to portray them as deserving of mercy due to their heroic or misguided behavior. For example, President Adams’ 1800 amnesty proclamation characterized participants in a rebellion against taxation as “the ignorant, misguided, and misinformed,” who had “returned to a proper sense of their duty.”¹⁷⁵ Subsequently, in 1815, President Madison pardoned a

¹⁷² For a discussion of claimsmaking, see MALCOLM SPECTOR & JOHN I. KITSUSE, *CONSTRUCTING SOCIAL PROBLEMS* (2000); Joel Best, *Rhetoric in Claims-Making: Constructing the Missing Children Problem*, 34 *SOC. PROBS.* 101 (1987).

¹⁷³ For a discussion of how law can shape collective memory, see OSIEL, *supra* note 169; Susanne Karstedt, *Introduction* to *LEGAL INSTITUTIONS AND COLLECTIVE MEMORIES* 1, 1–23 (Susanne Karstedt ed., 2009)

¹⁷⁴ COHEN, *supra* note 171, at 103.

¹⁷⁵ Adams Proclamation, *supra* note 139.

group of 800 smugglers in Louisiana, known as “the Baratavia pirates,” who had traded illegally with foreign states in violation of American acts on revenue, trade, and navigation. As part of the War of 1812 between the United States and British Empire, Britain tried to capture New Orleans, and they offered the leader of the Baratavia pirates, Jean Laffite, “\$30,000, a pardon, and a captaincy in exchange for assistance in the attack.”¹⁷⁶ He refused and his pirates fought with the U.S. government to defend the city.¹⁷⁷ In recognition of their actions, President Madison proclaimed a pardon for them on February 6, 1815, stating:

[T]hey have abandoned the prosecution of the worse cause for the support of the best, and . . . they have exhibited in the defense of New Orleans unequivocal traits of courage and fidelity. Offenders who have refused to become the associates of the enemy in the war upon the most seducing terms of invitation and who have aided to repel his hostile invasion of the territory of the United States can no longer be considered as objects of punishment, but as objects of a generous forgiveness.¹⁷⁸

In this way, the amnesty proclamation transformed the pirates from criminals, who violated the laws of the United States, to patriotic heroes, who fought to protect America from external enemies.

A similar approach was taken in an 1863 amnesty for Civil War draft evasion and desertion, in which those who surrendered and partook of the amnesty were described as “patriotic and faithful citizens” in contrast to the “evil-disposed and disloyal persons” who engaged in desertion.¹⁷⁹ Similarly, President Johnson’s 1867 amnesty proclamation described the population of the former Confederation as having become “well and loyally disposed” and as conforming, “or, if permitted to do so, will conform” to state or federal law.¹⁸⁰ Patriotic language was also invoked in later pardons. For example, the preamble to President Bush Sr.’s pardon for the Iran-Contra Affair

¹⁷⁶ Ruckman, *supra* note 137.

¹⁷⁷ *Id.*

¹⁷⁸ Proclamation No. 19 (Feb. 6, 1815), *reprinted in* PRESIDENTIAL PROCLAMATIONS VOL. I, *supra* note 135, at 558–60 (proclamation of James Madison granting pardon to certain inhabitants of Barrataria who acted in the defense of New Orleans).

¹⁷⁹ Proclamation (Mar. 10, 1863) *reprinted in* PRESIDENTIAL PROCLAMATIONS VOL. VI, *supra* note 140, at 163 (proclamation of Abraham Lincoln recalling soldiers to their regiments).

¹⁸⁰ Proclamation No. 167 (Sept. 7, 1867) *reprinted in* PRESIDENTIAL PROCLAMATIONS VOL. VI, *supra* note 140, at 547–49 (proclamation of Andrew Johnson offering and extending full pardon to all persons participating in the Late Rebellion).

extolled at length the “true American” patriotism and service of U.S. Secretary of Defense Caspar Weinberger, who had been indicted for perjury and obstruction of justice.¹⁸¹ While it is true that Secretary Weinberger had worked in public service for almost three decades, by emphasizing this aspect of his background, rather than repudiating his role in selling missiles to Iran to fund death squads in Nicaragua, the pardon was used to frame his actions as having been motivated by patriotism, and therefore, justifiable.

2. *Amnesty and Justificatory Denial*

Cohen identified a second form of denial (which he terms “implicatory” denial) as denial that partially acknowledges criticism of the state’s actions, but argues “what happened is justified.”¹⁸² In this approach, crimes come to be seen as acts that, although excessive or disproportionate, were carried out for a greater public good, such as defeating communism or global terrorism. America’s belief in its own inherent righteousness has at times resulted in it developing justificatory forms of denial to explain its involvement in violence or support for repressive foreign allies. For example, politicians often frame America’s participation in international conflicts as a fight against evil, in which all those who act with America, despite their methods, are portrayed as heroes, whereas their opponents are described as “evil.”¹⁸³

¹⁸¹ “Some of the best and most dedicated of our countrymen were called upon to step forward. Secretary Weinberger was among the foremost.” Proclamation No. 6518, *supra* note 150.

Caspar Weinberger is a true American patriot. He has rendered long and extraordinary service to our country. He served for 4 years in the Army during World War II where his bravery earned him a Bronze Star. He gave up a lucrative career in private life to accept a series of public positions in the late 1960’s and 1970’s, including Chairman of the Federal Trade Commission, Director of the Office of Management and Budget, and Secretary of Health, Education, and Welfare. Caspar Weinberger served in all these positions with distinction and was admired as a public servant above reproach. He saved his best for last. As Secretary of Defense throughout most of the Reagan Presidency, Caspar Weinberger was one of the principal architects of the downfall of the Berlin Wall and the Soviet Union. He directed the military renaissance in this country that led to the breakup of the communist bloc and a new birth of freedom and democracy. Upon his resignation in 1987, Caspar Weinberger was awarded the highest civilian medal our Nation can bestow on one of its citizens, the Presidential Medal of Freedom.

Id.

¹⁸² COHEN, *supra* note 171, at 103.

¹⁸³ Ruth Wedgwood, *The Supreme Court and the Guantanamo Controversy*, in *TERRORISM, THE LAWS OF WAR, AND THE CONSTITUTION: DEBATING THE ENEMY COMBATANT CASES 159* (Peter Berkowitz ed., 2005).

Justificatory forms of denial are present in the language of numerous American amnesties and political pardons. For example, President Adams' 1800 amnesty described the 1799 uprising as the "wicked and treasonable insurrection against the just authority of the United States of America," which the state had suppressed "speedily . . . without any of the calamities usually attending rebellion."¹⁸⁴ Later in the wake of the Civil War, the preamble to President Johnson's 1867 amnesty proclamation for those who participated in the "rebellion" opened by affirming the official narrative of the conflict:

[T]he war then existing was not waged on the part of the Government in any spirit of oppression nor for any purpose of conquest or subjugation, nor purpose of overthrowing or interfering with the rights or established institutions of the States, but to defend and maintain the supremacy of the Constitution and to preserve the Union, with all the dignity, equality, and rights of the several States unimpaired.¹⁸⁵

In this context, the terms of the amnesty were used to articulate the righteousness of the state's cause.

As Cohen notes, justificatory claimsmaking can also include contextualizing events by asserting that "normal standards of judgment cannot apply because the country's circumstances—terrorism, isolation, nuclear threats—are unique."¹⁸⁶ Such contextualization was evident in America's struggle against the threat of communism during the Cold War, which, as noted above, caused the United States to endorse or even demand broad amnesties for its allies that covered their most atrocious crimes. For example, in 1988, commenting on the agreement of a ceasefire in the Nicaraguan civil war, in which all political prisoners would be released and the Contras would be permitted to participate in national reconciliation, U.S. Secretary of State, George P. Schultz, described the actions of the Contras in Nicaragua as the "determination and sacrifice of the freedom fighters."¹⁸⁷ In a similar way to domestic U.S. amnesties and pardons, the text of these foreign amnesties often sought to portray a particular narrative of a conflict. For example, following the "dirty

¹⁸⁴ Adams Proclamation, *supra* note 139.

¹⁸⁵ Proclamation 167, *supra* note 180.

¹⁸⁶ COHEN, *supra* note 171, at 111.

¹⁸⁷ *Nicaragua: U.S. Keeps Arm's Length from Ceasefire Accord*, INTER PRESS SERVICE, Mar. 24, 1988.

wars” in South America,¹⁸⁸ military crimes that were amnestied were often framed as having been committed in response to the threat from left-wing terrorism, an approach known within South America as the “theory of the two demons.”¹⁸⁹ These narratives chimed with America’s own rationales for its involvement in human rights violations in the hemisphere and elsewhere, and by supporting these amnesties, it may have sought to bolster its own justifications.

More recently, in his 1992 pardon for Caspar Weinberger and others for their conduct related to the Iran-Contra affair, President Bush Sr. used the amnesty legislation to highlight what the State perceived to be America’s achievements in the previous six years. In the preamble to the pardon, he stated that, during that period, “the last American hostage has come home to freedom, worldwide terrorism has declined, the people of Nicaragua have elected a democratic government, and the Cold War has ended in victory for the American people and the cause of freedom we championed.”¹⁹⁰ Each of these events had taken place, but they were not directly related to the amnestied acts, or the individuals benefiting from the pardon. It therefore seems that President Bush Sr. included this celebration of official triumphs in the pardon to justify and minimize the granting of clemency to perpetrators of serious offenses.

3. Denial, Claimsmaking, and Prisoner Abuse

The officially sanctioned policies of torture, rendition, and arbitrary detention during the Bush administration are clearly at odds with America’s self-image as a society uniquely founded on commitments to liberty, democracy, equality, and the rule of law. It can be argued that these values were debased by the policies of torture.¹⁹¹ However, rather than focusing on accountability to reassert these values, the politics of denial and claimsmaking have featured in the legal responses to the abuses. For example, when announcing that no prosecutions would be pursued for those who had acted within the

¹⁸⁸ Greg Grandin, *The Instruction of Great Catastrophe: Truth Commissions, National History, and State Formation in Argentina, Chile, and Guatemala*, 110 AM. HIST. REV. 46, 48 (2005).

¹⁸⁹ The theory of the two demons has been written about extensively with reference to Argentina. See, e.g., Carina Perelli, *Settling Accounts with Blood Memory: The Case of Argentina*, 59 SOC. RES. 415, 431 (1992); Grandin, *supra* note 188, at 52–53; see also Mark Osiel, *The Making of Human Rights Policy in Argentina: The Impact of Ideas and Interests on a Legal Conflict*, 18 J. LATIN AM STUD. 135 (1986).

¹⁹⁰ Proclamation No. 6518, *supra* note 150.

¹⁹¹ Paul Krugman, *Reclaiming America’s Soul*, N.Y. TIMES, Apr. 24, 2009, at A27.

parameters of the legal advice given in the torture memos, President Obama took care to note that:

[t]he men and women of our intelligence community serve courageously on the front lines of a dangerous world. Their accomplishments are unsung and their names unknown, but because of their sacrifices, every single American is safer. We must protect their identities as vigilantly as they protect our security, and we must provide them with the confidence that they can do their jobs.¹⁹²

In this statement, President Obama sought to contextualize prisoner abuse within the unique security threats faced by the United States in the post-9/11 world. By emphasizing the work of the intelligence community in “keeping America safe,” the decision not to prosecute reinforced the arguments made by some commentators that coercive interrogation methods extracted some useful information from detainees.¹⁹³ This demonstrates an official reluctance to consider empirical evidence on international experiences, which demonstrate that torture rarely produces useful information,¹⁹⁴ and may have been counterproductive for American national security.

In contrast to the official discourse of the federal government, legislators¹⁹⁵ and human rights organizations within the United States¹⁹⁶ have argued that investigations and prosecutions are necessary. These campaigns contend that greater accountability would “convey to citizens a *disapproval of violations and support for core democratic values*”;¹⁹⁷ communicate to the world America’s commitment to its international legal obligations;¹⁹⁸ and enhance legitimacy, accountability, and transparency within domestic

¹⁹² OLC Press Release, *supra* note 3.

¹⁹³ *Cheney Enters ‘Torture’ Memos Row*, BBC NEWS, Apr. 21, 2009.

¹⁹⁴ BLUM ET AL., *supra* note 18, at 15–16.

¹⁹⁵ Shortly after President Obama’s inauguration, Democratic Senator Patrick Leahy led a campaign calling for the establishment of a truth commission to investigate prisoner abuse. Senator Leahy portrayed a truth commission as “a middle ground” between divisive prosecutions and impunity. Patrick Leahy, *The Case for a Truth Commission*, TIME, Feb. 19, 2009.

¹⁹⁶ For example, the Commission for Accountability, a coalition of nineteen human rights, faith-based, and justice organizations, called on President Obama to establish a commission to investigate torture, rendition, and detention policies sanctioned by the Bush administration. The investigative commission was intended to complement rather than replace criminal accountability. *About*, COMM’N ON ACCOUNTABILITY, <http://www.commissiononaccountability.org/pages/about> (last visited Feb. 22, 2012).

¹⁹⁷ BLUM ET AL., *supra* note 18, at 15.

¹⁹⁸ FORSYTHE, *supra* note 32, at 212–13.

institutions. These arguments have both legal and political weight, but it seems that, to date, they have been trumped in official policymaking by more pragmatic concerns.

C. Law, Politics, and Pragmatism in the Use of Amnesty

Doctrinal approaches to the production of legal knowledge emphasize the value of consistency, continuity, universality, objectivity, and fairness offered by law.¹⁹⁹ Here, law is portrayed as “separate from—and ‘above,’”—decisions motivated by politics, economics, culture, or religion.²⁰⁰ Where issues are characterized as “legal questions” rather than matters of political or social policy, they are deemed to be “settled and not debatable.”²⁰¹ However, this conceals the extent to which law is constituted by politics and can be instrumentalized within political decision-making. Indeed, as studies of law and politics reveal, “[l]aw is one of the central products of politics and the prize over which many political struggles are waged.”²⁰² Under such pragmatic or instrumentalist views, laws are not honored or valued for their intrinsic nature or status, but rather because of the outcomes that law can help policymakers achieve.²⁰³ This complex interplay between law and politics is often starkly revealed in public or legislative debates on the need for, and the scope of, amnesty legislation. Indeed, as noted by French jurist, Joseph Barthélemy, enacting an amnesty “is an act of high politics.”²⁰⁴ As this section will explore, pragmatic approaches to resolving domestic political disputes, responding to domestic public opinion, and delivering foreign policy priorities have all influenced America’s engagement with amnesty laws.

¹⁹⁹ David Kairys, *Introduction* to *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 1, 2 (David Kairys ed., 3rd ed. 1998).

²⁰⁰ *Id.* at 1.

²⁰¹ David Kairys, *Law and Politics*, 52 *GEO. WASH. L. REV.* 243, 248 (1984). Kairys argues that invoking law “legitimizes the removal of many crucial social issues from public involvement and scrutiny and the imposition of the will and interests of those at the top of the social hierarchy.” *Id.* at 249.

²⁰² Keith E. Whittington et al., *The Study of Law and Politics*, in *THE OXFORD HANDBOOK OF LAW AND POLITICS* 3, 3 (Keith E. Whittington et al. eds., 2008).

²⁰³ Martti Koskeniemi, *What is International Law for?*, in *INTERNATIONAL LAW* 32, 40 (Malcolm Evans ed., 3rd ed. 2010).

²⁰⁴ JOSEPH BARTHÉLEMY, *L’AMNISTIE* 27 (1920).

I. Amnesty and the Role of Law in National Politics

Among the amnesties proclaimed by American presidents for political offenses committed within the United States, amnesty was often described as necessary to unite the country and focus on the future. For example, President Johnson, in his 1867 amnesty proclamation contrasted the positive outcomes of amnesties with the risks of prosecutions: “[A] retaliatory or vindictive policy, attended by unnecessary disqualifications, pains, penalties, confiscation, and disenfranchisements, now, as always, could only tend to hinder reconciliation among the people and national restoration, while it must seriously embarrass, obstruct, and repress popular energies and national industry and enterprise”²⁰⁵ Here, rebuilding the country after the Civil War was viewed as a political task, in which law could be subordinated to the achievement of political goals.

Although, since the Civil War, the United States has not faced such serious threats to its national unity, subsequent U.S. amnesties have continued to be justified as necessary to end divisive, domestic political contestation. However, such contestation though damaging, poses little threat of armed conflict erupting on American soil. For example, thirty days after President Nixon was forced to resign due to the Watergate scandal, his chosen successor, President Ford, pardoned his predecessor.²⁰⁶ Unsurprisingly, this pardon was criticized as being politically motivated, prompting President Ford to appear before the House of Representatives Judiciary Committee’s Subcommittee on Criminal Justice to justify his decision.²⁰⁷ He argued that the pardon was necessary to “change our national focus . . . [t]o shift attention from the pursuit of a fallen president to the pursuit of urgent needs of a rising nation.”²⁰⁸ He continued that, without pardon, “[d]uring this long period of delay and potential litigation, ugly passions would again be aroused. And our people would again be polarized in their opinions. And the credibility of our free institutions of government would again be challenged at home

²⁰⁵ Proclamation No. 167, *supra* note 180.

²⁰⁶ Proclamation No. 4311, 39 Fed. Reg. 32,601 (Sept. 8, 1974) (proclamation of Gerald Ford granting pardon to Richard Nixon).

²⁰⁷ Duker, *supra* note 45, at 531.

²⁰⁸ President Gerald R. Ford, Statement by the President to be Delivered Before Subcommittee on Criminal Justice Committee on the Judiciary, House of Representatives (Oct. 17, 1974); Proclamation No. 4311, *supra* note 206.

and abroad.”²⁰⁹ In this statement, President Ford identified multiple threats posed by prosecutions including polarizing public opinion, undermining the legitimacy of the state, and weakening national recovery. Here, as with the post-Civil War era, these priorities are primarily political challenges, and hence the pardon was used to create exceptions to the rule of law that would arguably serve political goals.

President George Bush Sr. raised similar arguments in his pardon for the Iran-Contra Affair, in which, after citing a number of historical American amnesties, he declared: “[M]y predecessors acted because it was time for the country to move on. Today I do the same.”²¹⁰ He further highlighted the complex relationship between crime and politics by arguing:

The prosecutions of the individuals I am pardoning represent what I believe is a profoundly troubling development in the political and legal climate of our country: the criminalization of policy differences. These differences should be addressed in the political arena, without the Damocles sword of criminality hanging over the heads of some of the combatants. The proper target is the President, not his subordinates; the proper forum is the voting booth, not the courtroom.²¹¹

This quote is surprising, given that the beneficiaries were being investigated for involvement in criminal acts at the time the pardon was proclaimed. By introducing the pardon, President Bush was clearly trying to transform a legal matter—namely, whether individual acts of criminality should be prosecuted—into a political matter focusing on the government policies under which the crimes were committed.

2. *Amnesty to Satisfy Public Opinion*

Political pragmatism can cause pardons to be enacted to satisfy public demands for leniency. Among domestic amnesties in the United States, pro-amnesty public opinion is most evident for amnesties for draft evasion and desertion. For example, soon after the end of World War II, a campaign emerged to demand amnesty for persons who had been imprisoned or were liable for punishment for

²⁰⁹ Gerald Ford, Remarks on Signing a Proclamation Granting Pardon to Richard Nixon (Sept. 8, 1974), reprinted in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, GERALD FORD 1974, at 101, 102 (1975) [hereinafter Ford].

²¹⁰ Proclamation No. 6518, *supra* note 150.

²¹¹ *Id.*

violating the Selective Training and Service Act of 1940.²¹² A 1946 Gallup poll showed that an amnesty for conscientious objectors was supported by 69 percent of the American public.²¹³ The high degree of public support forced a reluctant White House to respond, and on December 23, 1947, President Truman granted pardon for a limited number of imprisoned deserters.²¹⁴

Pro-amnesties public opinion became a controversial issue again as mass protests against the Vietnam War erupted in the late 1960s, prompting thousands of conscripts to evade the draft or desert, often by leaving the United States.²¹⁵ The protests prompted the judiciary and armed forces to take a more lenient approach to the penalties imposed, but this did not resolve the issue.²¹⁶ By September 16, 1974, one year after the last U.S. serviceman had left Vietnam, President Ford granted amnesty to encourage the deserters to return. However, the amnesty was conditioned on the applicants performing up to two years of “alternative service in the national interest.”²¹⁷ Many “viewed the demand for alternative service as a form of punishment” and only a fraction of deserters or draft evaders applied for amnesty.²¹⁸ Their ongoing resistance prompted a subsequent amnesty in 1977, in which these conditions were removed, allowing most affected persons to return home.²¹⁹ This example suggests that, where sufficient sections of the public resist government policies, it can correspond to public support for amnesties for those who violate the law by their resistance. Where the state responds to public pressure by enacting amnesties, it may be a pragmatic decision to enhance the state’s legitimacy where the opposition to its policies had weakened it.

²¹² DAMICO, *supra* note 136, at 34–35.

²¹³ *Id.* at 35. In contrast, a campaign after World War I to demand amnesty for imprisoned conscientious objectors and other political offenders failed to gather public support and hence was initially unsuccessful; many prisoners had to wait until President Coolidge offered pardon for them in 1924, six years after the war had ended. *Id.* at 34.

²¹⁴ Proclamation No. 2762, 12 Fed. Reg. 8,731 (Dec. 23, 1947) (proclamation by Harry Truman granting pardon to certain persons convicted of violating the selective training and service act of 1940, as amended).

²¹⁵ DAMICO, *supra* note 136, at 6.

²¹⁶ *Id.*

²¹⁷ *Id.* at 7.

²¹⁸ *Id.* at 7–8.

²¹⁹ Proclamation No. 4483, 42 Fed. Reg. 4,391 (Jan. 21, 1977) (proclamation by Jimmy Carter granting pardon for violations of the Selective Service Act, August 4, 1964–March 28, 1973).

3. *Amnesty and Foreign Policy Priorities*

In addition to pragmatic decisions resulting from national policies or domestic public opinion, the United States has chosen to enact or endorse amnesties as a response to international events. For example, following World War II, America led the establishment of the international tribunals at Nuremberg and Tokyo. With the onset of the Cold War, America's enthusiasm for these tribunals waned as Japan and Germany came to be perceived as potentially useful allies in the struggle against communism. These strategic concerns caused the American head of the occupying forces in Japan, General MacArthur, to shield Emperor Hirohito from prosecution and to press for the introduction of an amnesty. The law was enacted on March 28, 1948, and resulted in unconditional amnesty being granted to all Japanese soldiers, including those accused of serious crimes.²²⁰ Consequently, despite an early commitment to prosecute Japanese war crimes, political concerns took precedence over law.

This pattern continued during the Cold War. For example, nearly all the countries that participated in the United States-backed *Operación Cóndor* program of repression of political dissent in South America also enacted amnesty laws to shield the agents of state terror from prosecution. Many of these amnesties received America's tacit backing or even vocal support. For example, following General Pinochet's 1978 amnesty decree, which granted unconditional impunity to perpetrators of serious human rights violations, the U.S. State Department proclaimed that the decree was "a positive contribution by the government of Chile to the improvement of the human rights situation in that country."²²¹ Here, U.S. officials invoked the language of human rights law, but used it to endorse an amnesty that benefited only those who had violated human rights. In doing so, America sought to shield its supporters from criminal proceedings that would potentially reveal America's complicity in the violence.

More positively, Cold War ideology also caused the United States to pressure Soviet bloc countries to issue amnesties for dissidents whose political views were perceived as more in tune with American policy than with their own governments'. For example, on November 25, 1977, President Carter said it was a "wise and generous act" of

²²⁰ Amnesty Law, Law No. 20 of 1947 (Japan), *reprinted in* 6059 KANPO FUKKOKUBAN 185 (Official Gazette, Reprint ed., Mar. 28, 1947). Freeman notes that "[i]n 1946, General MacArthur released nearly one million political prisoners in Japan." Freeman, *supra* note 51, at 519.

²²¹ *Amnesty Decreed*, FACTS ON FILE WORLD NEWS DIG., May 12, 1978.

Yugoslavia to grant amnesty to political prisoners.²²² Similarly, in 1984, the United States made the release of dissidents a condition for any warming of relations with Poland, and on July 23, 1984, the American State Department welcomed a prisoner amnesty as a “positive step.”²²³ The position America took in relation to the harms inflicted on political prisoners in Eastern Europe during the 1970s and 1980s stands in stark contrast to its policies on amnesties for those who perpetrated disappearances, extrajudicial executions, and torture on dissidents in South America during the same period.

Such Janus-faced approaches to amnesty continued to be featured in American foreign policy during the 1990s. For example, at the same time as the United States was pressuring the Haitian government to grant amnesty for the crimes of the military junta, it provided considerable financial, human, and political aid to the creation and functioning of the International Criminal Tribunal for the Former Yugoslavia (ICTY). Hazan argues that this support sprung from a desire to play “the Tribunal as a moral card against the virulent criticism” from the media and the public of American reluctance to intervene militarily to stop ethnic cleansing.²²⁴ However, with regards to the Balkans, American support for the ICTY led the U.S. Ambassador to the U.N., Madeleine Albright, to proclaim that the United States would “oppose vigorously any . . . amnesty” for war crimes.²²⁵ Ultimately, the U.S. Secretary of State, Warren Christopher, personally negotiated the provisions relating to accountability for war crimes in the 1995 Dayton Peace Accord that ended the conflict in Bosnia. The accord required the parties to the agreement to cooperate with the ICTY and to enact amnesty laws that excluded crimes that fell within the tribunal’s jurisdiction.²²⁶ Whilst these measures represent laudable achievements for justice, America’s pronouncements on the legality of amnesties for war crimes and crimes against humanity were not applied to its involvement in other conflicts.

²²² *Yugoslavia Frees Mihajlov*, FACTS ON FILE WORLD NEWS DIG., Dec. 17, 1977.

²²³ *U.S. Holds Fire on Lifting Sanctions on Poland; Political Prisoner Amnesty Welcomed by the U.S.*, GUARDIAN (London), July 24, 1984.

²²⁴ Pierre Hazan, *The Revolution by the ICTY: The Concept of Justice in Wartime*, 2 J. INT’L CRIM. JUST. 533, 536 (2004).

²²⁵ Madeleine K. Albright, *We Won’t Let War Criminals Walk; With or Without a Balkan Peace Deal, the U.S. Won’t Relent*, WASH. POST, Nov. 19, 1995, at C01.

²²⁶ The General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 4: Constitution of Bosnia and Herzegovina (1995) art. IX, Dec. 12, 1995.

One year after the Dayton Peace Accords, America helped to negotiate the Abidjan Peace Accord for Sierra Leone that offered an unconditional amnesty for the serious human rights violations that had occurred there.²²⁷ It repeated its support for broad amnesties in Sierra Leone in 1999 when it helped to broker the Lomé Accords.²²⁸ The 1999 accords prompted Madeleine Albright, who was by now Secretary of State, to deviate from her position on the Balkans, by describing the amnesty as “the price of peace [that had been] so desperately needed.”²²⁹ By 1999, the United States had spent \$250 million on humanitarian aid to Sierra Leone, and it appears to have run out of patience. As a result, it deviated from the position of the U.N. Security Council to push for a peace agreement including amnesty to end the conflict.²³⁰ The contrast between American approaches to amnesty in the Balkans, and the amnesties in Sierra Leone and Haiti, reveal that during the Clinton administration, the United States declined to adopt legalistic and uniform positions on amnesty laws for serious human rights violations. Instead, the U.S. took a more malleable approach that was adopted to suit its political priorities. Arguably, the privileging of political concerns over legal obligations continues to be evident in the response to prisoner abuse.

4. Prisoner Abuse, National Unity, and the Risks of Politicalization

Part C has demonstrated how America deployed or encouraged the deployment of amnesty laws to achieve a range of political goals. In some instances, the United States used international law to legitimize its preferred policy approaches by, for example, invoking the language of human rights to endorse amnesties for human rights abuses as a means to end abuses. Where international law’s requirements came into conflict with U.S. policy goals, America’s international legal obligations were marginalized. This privileging of pragmatic political concerns has also been evident in the debates on prosecutions for prisoner abuse. For example, in his 2009 statement

²²⁷ Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, art. 14, Nov. 30, 1996, 9 AFR. J. INT’L & COMP. L. 414 (1997) [hereinafter Abidjan Accord].

²²⁸ Lomé Peace Agreement Between the Government of Sierra Leone and Revolutionary United Front of Sierra Leone, art. 9, June 3, 1999, 11 AFR. J. INT’L & COMP. L. 557 (1999).

²²⁹ Karl Vick, *Sierra Leone’s Unjust Peace: At Sobering Stop, Albright Defends Amnesty for Rebels*, WASH. POST, Oct. 19, 1999, at A12.

²³⁰ Corinna Schuler, *Sierra Leone—A Wrenching Peace: Sierra Leone’s “See No Evil” Pact*, CHRISTIAN SCI. MONITOR, Sept. 15, 1999.

on the release of the torture memos, President Obama emphasized the need for national unity, rather than accountability:

This is a time for reflection, not retribution. We have been through a dark and painful chapter in our history. But at a time of great challenges and disturbing disunity, nothing will be gained by spending our time and energy laying blame for the past. That is why we must resist the forces that divide us, and instead come together on behalf of our common future.²³¹

Speaking to the press a few days later, President Obama, endorsing the DOJ decision that prosecutions would not be pursued for those who had acted within the guidance outlined in the memos, stated: “As a general view, I do think we should be looking forward, not back. I do worry about this getting so politicised that we cannot function effectively and it hampers our ability to carry out national security operations.”²³² This position reveals two arguments related to pragmatism: firstly, that prosecutions “would criminalize policy differences,” and would create a negative precedent of a U.S. administration launching prosecutions based on the policies of its predecessor.²³³ And secondly, that prisoner abuse was committed to protect national security, and that, given the serious challenges faced by the nation, national unity should be privileged over retribution.

The former argument has primarily been articulated by the political right in the United States, which, according to Forsythe, would view prosecutions as being “motivated by partisan politics.”²³⁴ In contrast, the American political left would see limited prosecutions as insufficient, as they would “scapegoat[e] the little fish while letting policy makers and lawyers off the hook.”²³⁵ Therefore, at opposite ends of the spectrum there is an assumption that decisions on the extent to which prosecutions should be conducted would be influenced by political concerns. As torture is criminalized within domestic and international law—and, in ordinary circumstances, its punishment should be perceived as an exclusively legal matter—the emphasis placed on politics in these debates is striking. Outside

²³¹ OLC Press Release, *supra* note 3.

²³² *CIA Memo Prosecutions ‘Possible,’* BBC NEWS, Apr. 21, 2009. This view was supported by the Attorney General, who stated: “I share the President’s conviction that as a nation, we must, to the extent possible, look forward and not backward when it comes to issues such as these.” U.S. Dep’t of Justice, *supra* note 96.

²³³ Jorge Heine, *Politics as Usual? US Torture Practices 2001–2008 and Transitional Justice*, 13 INT’L STUD. REV. 570, 572–73 (2011).

²³⁴ FORSYTHE, *supra* note 32, at 202.

²³⁵ *Id.*

political circles in Washington, D.C., it seems that there was some public support for investigations. For example, a Gallup poll conducted in early February 2009 indicated that thirty-eight percent of respondents said that they supported criminal investigations of torture claims by the Justice Department, and a further twenty-four percent said they would prefer a non-criminal investigation by an independent panel. In addition, there was international pressure for prosecutions. For example, the U.N. Special Rapporteur on Torture repeatedly called upon America to investigate accusations of torture.²³⁶ Furthermore, investigations of torture and rendition were launched in the courts of foreign states under the principle of universal jurisdiction.²³⁷ Nonetheless, the Obama administration seems to have attempted to sidestep both domestic and international calls for accountability, preferring instead to avoid the anticipated “political storm” that risks undermining the government’s ability to fulfill its other policy priorities, such as economic recovery and health care reform (on which the President needed the cooperation of Congressional Republicans to deliver).²³⁸

The second argument for pragmatism relates to the need for national unity in the face of security threats. For example, following the Attorney General’s announcement in June 2011 that investigations into CIA interrogators would only proceed in two cases, the CIA Director, Leon Panetta, said “I have always believed that [the CIA’s]

²³⁶ Peter Baker & Scott Shane, *Pressure Grows to Investigate Interrogations*, N.Y. TIMES, Apr. 20, 2009; see also Stephanie Nebehay, *U.N. Rights Chief Urges Obama to Prosecute Torturers*, REUTERS, May 14, 2009; Stephanie Nebehay, *WikiLeaks Files Should Prompt Iraq Abuse Probe: U.N.*, REUTERS, Oct. 26, 2010; U.N. Hum. Rts. Council, *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism*, U.N. Doc. A/HRC/13/42 (Feb. 19, 2010); U.N. High Commissioner for Hum. Rts., *U.S. Membership in the Human Rights Council* (May 14, 2009), available at <http://www.unhcr.ch/hurricane/hurricane.nsf/0/BECC7BAC2F03BACBC12575C100394C58?opendocument>.

²³⁷ For example, on April 29, 2009, following a request by human rights lawyers, Spanish investigating magistrate Baltasar Garzón launched a criminal investigation into allegations of torture at Guantánamo made against six Bush administration officials who created the policies that permitted torture to occur. See *Spanish Judge Opens Guantanamo Investigation*, ASSOCIATED PRESS, Apr. 29, 2009; Jason Webb, *Spanish Judge Keeps Guantanamo Probe Alive*, REUTERS, Apr. 17, 2009; *Spanish Judge Asks U.S. if It Will Probe Torture*, ASSOCIATED PRESS, May 5, 2009. The possibility of universal jurisdiction proceedings against Bush administration officials had concerned Donald Rumsfeld as early as 2003. See Memorandum from the Secretary of Defense on the Judicialization of International Politics (Apr. 9, 2003), available at <http://library.rumsfeld.com/doclib/sp/221/2003-04-09%20to%20Vice%20President%20et%20al%20re%20Judicialization%20of%20International%20Politics.pdf>.

²³⁸ FORSYTHE, *supra* note 32, at 202.

primary responsibility is not to the past, but to the present and future threats to the nation.”²³⁹ This view chimes with the approach of the right wing in American politics that prosecutions would be “unwise in the light of national security needs.”²⁴⁰ A more centrist position was adopted by Senator Patrick Leahy (Democrat-Vermont), Chairman of the Senate Judiciary Committee, who justified his calls for a truth commission to investigate prisoner abuse by portraying a truth commission as “a middle ground” between divisive prosecutions and impunity. He argued that such a commission was necessary “to get to the bottom of what happened—and why—to make sure it never happens again,” and “to bind up the nation’s wounds” and develop “a shared understanding of the failures of the recent past.”²⁴¹ However, this proposal shared with the position of the right wing that prosecutions would undermine national unity, and hence should not be pursued.

These debates on the risks of prosecutions are similar to the problems often faced by newly elected governments in countries that are transitioning from conflict or repression. These fledgling transitional regimes must balance an inclination towards asserting the rule of law with the pragmatic realities of governance. However, for transitional states, disunity often poses a genuine and substantial threat of a return to armed conflict or dictatorial rule, and hence, amnesties are offered to reduce this risk. However, these concerns do not allow “states to sidestep or suspend their fundamental obligations” under international law.²⁴² For the United States, disunity poses the prospect of difficult legislative battles, rather than violent ones. Such political contestations are often a central feature of public discourse in democratic states, and there are a wide number of issues for which it is unrealistic to expect consensus to be reached. As such, the avoidance of contestation does not seem to be a sufficient rationale for failing to fulfill America’s international legal obligations.

Furthermore, failing to hold its torturers accountable may actually undermine American security. For example, it arguably risks

²³⁹ CIA, Message from the Director: DOJ Investigations Moving Toward Closure (June 30, 2011), available at <https://www.cia.gov/news-information/press-releases-statements/press-release-2011/message-from-the-director-doj-investigations-moving-toward-closure.html>.

²⁴⁰ FORSYTHE, *supra* note 32, at 202.

²⁴¹ Leahy, *supra* note 195.

²⁴² BLUM ET AL., *supra* note 18, at 15.

enhancing the credibility of anti-American propaganda, which seeks to incite further terrorist attacks on U.S. targets. This argument was made by Alberto Mora, a former general counsel for the Navy, who contended that “some flag-rank officers believe that Abu Ghraib and Guantánamo constitute ‘the first and second identifiable causes of U.S. combat deaths in Iraq’ because they galvanized *ihadis*.”²⁴³ Similarly, an Air Force major told *Harper’s Magazine* that “hundreds but more likely thousands of American lives [were lost because of] the policy decision to introduce the torture and abuse of prisoners.”²⁴⁴ In addition, by abusing the prisoners within its control, America arguably removed the incentive for its enemies to respect the lives of captured American military personnel. Furthermore, although U.S. counter-insurgency operations are dependent on relations with Muslim communities in the United States and abroad, the abuse of prisoners may have made these communities less willing to cooperate,²⁴⁵ and it reportedly made some foreign governments reluctant to share intelligence.²⁴⁶

D. Amnesty, Mercy, and the Public Welfare

The sovereign’s prerogative of mercy has been an intrinsic part of criminal justice systems around the world for thousands of years. In previous centuries, pardons were necessary “to soften the harshness and correct the injustice of” relatively rigid bodies of criminal law.²⁴⁷ Today, however, pardons have a less central role in many criminal justice systems, as criminal law has developed to incorporate what were previously grounds for pardon (such as insanity and self-defense) into more flexible systems, and to ensure greater due process rights for defendants.²⁴⁸ As a result, pardons have evolved to be proclaimed primarily to serve the “public welfare.”²⁴⁹ This is an amorphous concept that can encompass pardons granted due to the

²⁴³ Nicholas D. Kristof, Op-Ed., *Time to Come Clean*, N.Y. TIMES, Apr. 26, 2009, at WK14.

²⁴⁴ Scott Horton, “*The American Public Has a Right to Know That They Do Not Have to Choose Between Torture and Terror*”: *Six Questions for Matthew Alexander, Author of How to Break a Terrorist*, HARPER’S MAG., Dec. 18, 2008.

²⁴⁵ FORSYTHE, *supra* note 32, at 213–14.

²⁴⁶ Kristof, *supra* note 243.

²⁴⁷ MOORE, *supra* note 126, at 22; *see also* Duker, *supra* note 45, at 479.

²⁴⁸ MOORE, *supra* note 126, at 84.

²⁴⁹ *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

personal circumstances of the offender.²⁵⁰ Pardons can be used to recognize and remedy injustices, such as where individuals have been punished for their political or religious beliefs, or alternatively, to prevent abuses of the rule of law where offenders are unlikely to receive a fair trial. As this section will demonstrate, mercy and the public welfare have often been invoked in the proclamation of political amnesties and pardons within the United States.

1. Amnesty as a Recognition of Personal Circumstances

The personal circumstances of pardon beneficiaries have often been used to justify granting mercy for their offenses. For example, when President Harding commuted the sentence of socialist activist Eugene V. Debs on December 24, 1921, he stated it was because “I want him to eat his Christmas dinner with his wife.”²⁵¹ In 1918, Debs had been convicted of sedition under the Espionage Act of 1917 and was sentenced to ten years imprisonment for making speeches denouncing the United States’ participation in World War I. In addition, it appears that sympathy for Richard Nixon played a role in President Ford’s decision to pardon him, as the proclamation describes Nixon as “a man who has already paid the unprecedented penalty of relinquishing the highest elective office of the United States.”²⁵² In addition, when appearing before the House Justice Committee to explain his decision, President Ford stated “it is common knowledge that serious allegations and accusations hang like a sword over our former President’s head, threatening his health as he tries to reshape his life, a great part of which was spent in the service of this country and by the mandate of its people.”²⁵³ He further demonstrated his sympathy by characterizing the Watergate scandal as “an American tragedy in which we all have played a part.”²⁵⁴

Similarly, in pardoning Caspar Weinberger, President Bush Sr. noted that he was “pardoning him not just out of compassion or to spare a 75-year-old patriot the torment of lengthy and costly legal proceedings, but to make it possible for him to receive the honor he deserves for his extraordinary service to our country.” The proclamation further stated that President Bush could not “ignore the

²⁵⁰ See David Tait, *Pardons in Perspective: The Role of Forgiveness in Criminal Justice*, 13 FED. SENT’G REP. 134, 134 (2001).

²⁵¹ Kobil, *supra* note 41, at 601 n.210.

²⁵² Proclamation No. 4311, *supra* note 206.

²⁵³ Ford, *supra* note 208.

²⁵⁴ *Id.*

debilitating illnesses faced by Caspar Weinberger and his wife.”²⁵⁵ This pardon was also extended to five other public officials who had been implicated in the Iran-Contra Affair. As with Weinberger, the proclamation praised their patriotism and argued that they had each “already paid a price—in depleted savings, lost careers, anguished families—grossly disproportionate to any misdeeds or errors of judgment they may have committed.”²⁵⁶ The pardon proclamation also characterized the Iran-Contra affair as “the most thoroughly investigated matter of its kind in our history,” thereby rationalizing that further investigations were not warranted.²⁵⁷ In the expressed motivations for these pardons, the presidents seemed to suggest, in the words of President Coolidge, that further application of the penalties would produce “no good results,” because either the offenders had suffered in other ways for their offenses, or that their offenses should be weighed against their previous contribution to American society.²⁵⁸

2. *Amnesty to Address Criminal Justice Deficiencies*

Decisions to grant amnesty or pardon have also been justified on the grounds of addressing the deficiencies within the criminal justice system. For example, in explaining his rationales for pardoning Richard Nixon, President Ford stated that he had been advised that “many months and perhaps more years will have to pass before Richard Nixon could obtain a fair trial by jury in any jurisdiction of the United States under governing decisions of the Supreme Court.”²⁵⁹ He continued that, were a prosecution to proceed,

a former President of the United States, instead of enjoying equal treatment with any other citizen accused of violating the law, would be cruelly and excessively penalized either in preserving the presumption of innocence or in obtaining a speedy determination of his guilt in order to repay a legal debt to society.²⁶⁰

²⁵⁵ Proclamation No. 6518, *supra* note 150.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ Proclamation: Amnesty and Pardon, 43 Stat. 1940 (Mar. 5, 1924) (proclamation by Calvin Coolidge granting pardons to World War I deserters). President Coolidge in 1924 proclaimed a pardon for World War I deserters. Jones and Raish state that this was a partial amnesty that “applied only to persons who had deserted after hostilities had ended and before Congress had declared the war to be over.” Douglas W. Jones & David L. Raish, Comment, *American Deserters and Draft Evaders: Exile, Punishment or Amnesty*, 13 HARV. INT’L L.J. 88, n.250 (1972).

²⁵⁹ Ford, *supra* note 209.

²⁶⁰ *Id.*

The need to intervene in a harsh criminal justice system was also invoked by President Clinton to justify his 1999 pardon of sixteen members of the Armed Forces of Puerto Rican National Liberation (FALN), an armed movement that opposed U.S. control over Puerto Rico.²⁶¹ The pardoned individuals had been convicted and imprisoned for seditious conspiracy relating to the planting of 130 bombs in public places across the United States.²⁶² The pardons were deeply politically controversial, and both the Senate and the House of Representatives passed motions condemning the act of clemency.²⁶³ In justifying his decision, President Clinton stated that “[t]he prisoners were serving extremely lengthy sentences—in some cases 90 years—which were out of proportion to their crimes.”²⁶⁴

3. Mercy, Fairness, and the “Torture Memos”

Within contemporary debates on non-prosecution for torture, the concept of mercy has not been mentioned explicitly, but the justifications given by the Obama administration have resonances with the types of mercy outlined above. For example, both President Obama and Attorney General Eric Holder have talked of the service and patriotism of the U.S. intelligence community, and the need to protect their identities so that they can continue their work when announcing decisions not to prosecute.²⁶⁵

The idea of fairness and due process has repeatedly been raised in relation to the politicized legal advice given in the torture memos. As noted above, section 1004(a) of the Detainee Treatment Act of 2005 provided that any American officials who were involved in interrogations of terrorist suspects would be shielded from prosecution when they “did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the

²⁶¹ LOUIS FISHER, *THE POLITICS OF EXECUTIVE PRIVILEGE* 211–12 (2004).

²⁶² *Id.*

²⁶³ *Id.* at 213.

²⁶⁴ Letter from President Bill Clinton to the Honorable Henry Waxman, Ranking Minority Member, Committee on Government Reform (Sept. 21, 1999), *cited in* Love, *supra* note 48, at 1498 n.54. The President further stated that the pardon had international support from persons such as Archbishop Desmond Tutu, former President Jimmy Carter, and Coretta Scott King. *Id.*

²⁶⁵ Eric Holder stated “the men and women in our intelligence community perform an incredibly important service to our nation, and they often do so under difficult and dangerous circumstances. They deserve our respect and gratitude for the work they do.” U.S. Dep’t of Justice, *supra* note 97.

practices were unlawful.”²⁶⁶ It further stated, in determining whether they knew their actions were unlawful, the extent to which they relied on the advice from counsel should be taken into account.²⁶⁷ This act attempted to create an ignorance or mistake of the law defense that assumed that officials implicated in acts of torture were doing so on the understanding that their actions were lawful.

Despite this repudiation of the Office of Legal Counsel (OLC) legal advice under the Obama administration, the assumption of ignorance of the law for past interrogation practices arguably remains in place. For example, in June 2011, Eric Holder restated the position he had held from 2009 that the Justice Department “would not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the [OLC] regarding the interrogation of detainees.”²⁶⁸ Weiner has argued this decision not to prosecute may have been influenced by the view that such persons “would have a strong defense to any prosecution under the ‘reasonable reliance’ doctrine.”²⁶⁹ Under this doctrine, an accused can invoke the defense of ignorance of the law where he or she acted

in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.²⁷⁰

At face value, this defense would seem to apply to intelligence personnel who followed the official interpretation provided by the OLC.²⁷¹ However, this does not take into account that torture is prohibited under both domestic and international law. Furthermore, under international criminal law, defendants are not permitted to use the defense of “superior orders” to escape accountability for actions that were “manifestly illegal.”²⁷² Given the severity of acts such as waterboarding, which both President Obama and Eric Holder have

²⁶⁶ Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 101-104, 119 Stat. 2680 (2005).

²⁶⁷ *Id.*

²⁶⁸ U.S. Dep’t of Justice, *supra* note 97.

²⁶⁹ Allen S. Weiner, *The Torture Memos and Accountability*, 13 ASIL INSIGHTS (2009).

²⁷⁰ MODEL PENAL CODE § 2.04(3)(b) (rev. ed. 1985).

²⁷¹ *Id.*

²⁷² *See, e.g.*, Rome Statute of the International Criminal Court, art. 32, July 17, 1998, 2187 U.N.T.S. 90.

recognized as torture, such actions could be deemed manifestly illegal, and hence ignorance of the law may not be a sufficient defense. Furthermore, it is established law that “advice of counsel—the ‘my lawyer said it was OK defense’—cannot serve as an excuse for violating the law,” particularly where the legal advice is deliberately designed to provide that excuse.²⁷³

CONCLUSION

This Article has explored why the United States has sought to limit accountability for prisoner abuse, despite longstanding domestic and international prohibitions on torture. Through exploring American approaches to amnesty and pardon within the United States and abroad, it has argued that American governments have an established tradition of using legal clemency to exercise and enhance their power, to assert the legitimacy of the state, to justify their policies, to ensure compliance with laws, and to control public discourse and the shaping of public memory. These findings run counter to theoretical assumptions within international law on amnesties in which the concept of amnesty is more frequently associated with forgetting, rather than memory, and with impunity, rather than encouraging lawful behavior. However, what the exploration of American attitudes has revealed is that such binary divisions may be overly simplistic, and that, instead, the relationship between amnesty and power, the rule of law, and memory is much more complex.

Nations, such as the United States, profit from the stability, consistency, and uniformity offered by legal regulation in their relationships within each other and with their citizens. These benefits have prompted the United States to play a leading role in the development of international criminal law and provide considerable support to the prosecutions of human rights abusers in other countries. However, its adherence to international norms has occurred predominantly when they did not conflict with its policy objectives or strategic interests. Instead, as this Article has argued, where the United States selected to pursue policies that ran counter to obligations under domestic or international law, amnesties were among the tools used to create exceptions to the law.

For many offenses under domestic law, creating such exceptions is unproblematic. Within the United States, the Supreme Court has

²⁷³ Bilder & Vagts, *supra* note 15, at 694.

found that the president's power to grant amnesties and pardons is unlimited, except where it conflicts with the Constitution. At the international level, however, torture has been widely accepted to be "non-derogable," which means that states are required to abide by their obligations to prohibit torture and investigate allegations of state involvement in such crimes even "in time of war, public danger, or other emergency that threatens the [state's] independence or security."²⁷⁴ Furthermore, within certain contexts, systematic and widespread torture can constitute a crime against humanity or war crime.²⁷⁵

The United States has often sought to promote individual criminal responsibility for crimes under international law committed in conflicted or transitional states through its support for international tribunals and rule of law programs. In these contexts, transitional regimes often face severe legal, political, moral, and practical challenges that inhibit their ability or desire to conduct prosecutions. However, states' invocations of these challenges as justifications for non-prosecution can trigger international criticism, including from the United States. In contrast, although at the time coercive interrogations were being conducted the U.S. was engaged in conflicts in Iraq and Afghanistan, as well as the metaphorical "War on Terror," it nonetheless was a consolidated liberal democratic state. As a result, pursuing prosecutions for torture, although politically difficult, did not threaten the stability of the state, nor risk overburdening non-existent or corroded legal systems. The United States therefore did not face equivalent challenges to fragile and under-resourced transitional regimes in pursuing prosecutions. However, similar justifications for non-prosecution were used by emphasizing the risk posed by prosecutions to national unity, the threats to national security, and the need to look forward rather than back.

Experiences of transitional states such as Spain, Argentina, Cambodia, and Bangladesh suggest that the decisions not to prosecute are unlikely to close the door permanently on the policy of prisoner abuse. The reopening of investigations and limited prosecutions in these states, decades after the crimes took place and amnesties had been granted, indicates that even where the executive decides not to prosecute systematic human rights violations, this rarely ends demands for truth and accountability. Instead, over the longer term,

²⁷⁴ American Convention on Human Rights, art. 27, Nov. 22, 1969, OAS Treaty Series No. 36.

²⁷⁵ Rome Statute of the International Criminal Court, *supra* note 272, at arts. 7–8.

the legacy of systematic abuse of prisoners is likely to remain a divisive issue within the United States, and one which may require the adaptation of existing legal and policy responses.

APPENDIX 1
AMERICAN AMNESTY LAWS AND “POLITICAL” PARDONS,
1795–PRESENT²⁷⁶

Date	Issued by	Persons Affected	Nature of Action
July 10, 1795	Washington	Whisky insurrectionists (several hundred)	General pardon to all who agreed to thereafter obey the law
May 21, 1800	Adams	Pennsylvania insurrectionists	Prosecution of participants ended; pardon not extended to those indicted or convicted
Oct. 15, 1807	Jefferson	Deserters	Given full pardon if they surrendered within 4 months
Feb. 7, 1812 Oct. 8, 1812 June 14, 1814	Madison	Deserters	3 proclamations; given full pardon if they surrendered within 4 months
Feb. 6, 1815	Madison	Pirates who fought in War of 1812	Pardoned of all previous acts of piracy for which any suits, indictments or prosecutions were initiated
June 12, 1830	Jackson (War Department)	Deserters	Deserters, with provisions: (1) Those in confinement returned to duty; (2) those at large under sentence of death discharged, never again to be enlisted
Feb. 14, 1862	Lincoln (War Department)	Political prisoners	Paroled
July 17, 1862 (Confiscation Act)	Congress	Rebels	President authorized to extend pardon and amnesty to rebels

²⁷⁶ Amnesties laws enacted between 1795 and 1952 are taken from a list in Gregory Weeks, *Fighting the Enemy Within: Terrorism, the School of the Americas and the Military in Latin America*, 5 HUM. RTS. REV. 12 (2003); see also THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/proclamations.php> (last visited Sept. 9, 2012).

Date	Issued by	Persons Affected	Nature of Action
Mar. 10, 1863	Lincoln	Deserters	Deserters restored to regiments without punishment, except forfeiture of pay during absence
Dec. 8, 1863	Lincoln	Rebels	Full pardon to all implicated in or participating in the "existing rebellion" with exceptions and subject to oath
Feb. 26, 1864	Lincoln (War Department)	Deserters	Deserters' sentences mitigated, some restored to duty
Mar. 26, 1864	Lincoln	Certain rebels	Clarification of Dec. 8, 1863, proclamation
Mar. 3, 1865	Congress	Deserters	Desertion punished by forfeiture of citizenship; President to pardon all who return within 60 days
Mar. 11, 1865	Lincoln	Deserters	Deserters who returned to post in 60 days, as required by Congress
May 29, 1865	Johnson	Certain rebels of Confederate States	Qualified
July 3, 1866	Johnson (War Department)	Deserters	Deserters returned to duty without punishment except forfeiture of pay.
Jan. 21, 1867	Congress		Sec. 13 of Confiscation Act (authority of President to grant pardon and amnesty) repealed
Sept. 7, 1867	Johnson	Rebels	Additional amnesty including all but certain officers of the Confederacy on condition of an oath

Date	Issued by	Persons Affected	Nature of Action
July 4, 1868	Johnson	Rebels	Full pardon to all participants in “the late rebellion” except those indicted for treason or felony
Dec. 25, 1868	Johnson	All rebels of Confederate States	Universal and unconditional
May 23, 1872	Congress	Rebels	General amnesty law re-enfranchised many thousands of former rebels
May 24, 1884	Congress	Rebels	Lifted restrictions on former rebels to allow jury duty and civil office
Jan. 4, 1893	Harrison	Mormons	Liability for polygamy annestied
Sept. 25, 1894	Cleveland	Mormons	Liability for polygamy annestied
Mar. 1896	Congress	Rebels	Lifted restrictions on former rebels to allow appointment to military commissions
June 8, 1898	Congress	Rebels	Universal Amnesty Act removed all disabilities against all former rebels
July 4, 1902	T. Roosevelt	Philippine insurrectionists	Full pardon and amnesty to all who took an oath recognizing “the supreme authority of the United States of America in the Philippine Islands”
June 14, 1917	Wilson		5,000 persons under suspended sentence because of change in law (not war related)
Aug. 21, 1917	Wilson		Clarification of June 14, 1917, proclamation

Date	Issued by	Persons Affected	Nature of Action
Mar. 5, 1919	Wilson	Espionage	Commutation of "unduly harsh" sentences for individuals sentenced for espionage during World War I
Mar. 5, 1924	Coolidge	Deserters	More than 100 deserters - as to loss of citizenship for those deserting since World War I armistice
Dec. 23, 1933	F. Roosevelt	Espionage and deserters	1,500 convicted of having violated espionage or draft laws (World War I) who had completed their sentences
Dec. 24, 1945	Truman		Several thousand ex-convicts who had served in World War II for at least 1 year
Dec. 23, 1947	Truman	Draft evaders	1,523 individual pardons for draft evasion in World War II, based on recommendations of President's Amnesty Board
Dec. 24, 1952	Truman		Ex-convicts who served in Armed Forces not less than 1 year after June 25, 1950
Dec. 24, 1952	Truman	Deserters	All persons convicted for having deserted between Aug. 15, 1945, and June 25, 1950
Sept. 16, 1974	Ford	Deserters	A limited clemency program in 1974 of partial relief for war resisters
Sept. 8, 1974	Ford	President Richard Nixon	Pardon for former President Richard Nixon for "offences against the United States"
Jan. 21, 1977	Carter	Deserters	Unconditional pardon for draft evasion

Date	Issued by	Persons Affected	Nature of Action
Dec. 24, 1992	Bush Sr.	Six Reagan administration members	Pardon for involvement in Iran-Contra Affair
Aug. 11, 1999	Clinton	Insurgents	16 members of Armed Forces of Puerto Rican National Liberation (FLAN) for violent insurgency within the United States
