

Articles

The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*

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I. INTRODUCTION

Somehow we in the West thought the age of war was behind us. After nuking Hiroshima, after napalming Vietnam, we had only distaste for the idea and the practice of war. The thought of dying for a noble cause, the pursuit of honor in the name of *patria*, brotherhood in arms—none of this appealed to us anymore. “I hate war and so does Eleanor,” opined FDR in the oft-repeated lyrics of Pete Seeger.¹ War became a subject for ironic disdain. As Tom Lehrer caught the mood of the 1960s: “We only want the world to know that we support the status quo. . . . So when in doubt, Send the Marines!”²

Behind this disdain for war lies as well a distaste for the Romantic view of the world that tends to glorify the nation and war as an expression of patriotism. As Nancy Rosenblum argues, in the Romantic view of the world, war and militarism become sources of inspiration.³ Identifying with an ideology worth dying for, accepting a place in the hierarchy of command, becoming part of the fighting collective—these are actions and commitments that lift men out of the quotidian and enable them to feel that their lives express a deeper meaning.

Revolutions and wars of self-determination have always appealed to Romantics.⁴ In the beginning of the nineteenth century, the Greek war of independence captured Byron’s imagination.⁵ The War of 1848 brought Francis Lieber face to face with the glory of battle.⁶ The Spanish Civil War had a similar appeal in the twentieth century.⁷ As Barbara Ehrenreich describes the popular reaction to World War I, the outbreak of hostilities in

1. ALMANAC SINGERS, *The Ballad of October 16th*, on SONGS FOR JOHN DOE (Almanac Records 1941).

2. TOM LEHRER, *Send the Marines*, on THAT WAS THE YEAR THAT WAS (Warner Bros. 1965).

3. NANCY ROSENBLUM, ANOTHER LIBERALISM: ROMANTICISM AND THE RECONSTRUCTION OF LIBERAL THOUGHT 11-12 (1987).

4. “Romanticism” is understood here as a frame of mind that antedated the historical flowering of Romantic thinking in the late eighteenth and early nineteenth centuries. For efforts to clarify this distinctive attitude toward the world, see *infra* text accompanying notes 22-39.

5. Contrary to popular belief, George Gordon Noel Byron (1788-1824) did not die in combat during the Greek war. He died of a chill received in an April rainstorm on the Greek island of Missolonghi. BENITA EISLER, BYRON 742-44 (1999).

6. Francis Lieber (1800-1872) was a German immigrant to the United States responsible for drafting the first rules of engagement for modern warfare, his General Order 100 of 1863, which became the guidebook for Union armies in the field. FRANCIS LIEBER, GENERAL ORDER NO. 100: INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (New York, D. Van Nostrand 1863). When the Revolution of 1848 broke out in Germany, he was lecturing at South Carolina College. According to legend, he broke out in tears and left immediately to fight in his homeland.

7. ARTHUR H. LANDIS, DEATH IN THE OLIVE GROVES: AMERICAN VOLUNTEERS IN THE SPANISH CIVIL WAR 1936-1939, at 4 (1989).

1914 unleashed “a veritable frenzy of enthusiasm, . . . not an enthusiasm for killing or loot, . . . but for something far more uplifting and worthy.”⁸ The aversion to war that set in after Hiroshima and Vietnam represented a rejection of this Romantic sensibility. Finding meaning in warfare was relegated to the outdated attitudes of another time.

In popular culture, at least, things have begun changing, and the shift became evident even before September 11. If the postwar and Vietnam eras found expression in films like *Dr. Strangelove*⁹ and *Apocalypse Now*,¹⁰ the new spirit of patriotism became visible in Steven Spielberg’s film *Saving Private Ryan*¹¹ and in Tom Brokaw’s bestseller *The Greatest Generation*.¹² Slightly more than fifty years after the event, the invasion of Normandy became a focal point of nostalgia and renewed interest in the lives of heroes bound together in the brotherhood of battle. Consider that Joseph Ellis, best-selling historian and professor at Mount Holyoke College, made up heroic military adventures to please his students.¹³ It would have been unthinkable for a professor circa 1970 or 1980 to think that he could impress a university audience by pretending to have fought against the Viet Cong.¹⁴ The recent call to arms against terrorism came when many Americans were yearning to believe, once again, that our highest calling lay in going to war for freedom and the American way.

Whatever may happen in the culture at large, the law has never been a particularly hospitable place for poets and Romantics yearning for peak moments of experience. Perhaps some lawyers who litigate grand political issues experience something like Romantics going to war. But by and large, we in the academic world are committed to the orderly life and, at least on the surface of things, to a set of ideas that I describe as the opposite of the Romantic ethic. We advocate the principles of voluntary choice, methodological individualism, and individual responsibility. All challenges to the hegemonic way of thinking are simply accommodated as variations on individual needs and preferences. For want of a better term, I refer to this collection of ideas as liberalism. Not many would dissent from the claim that the dominant culture of the law school world is this ever-

8. BARBARA EHRENREICH, *BLOOD RITES: ORIGINS AND HISTORY OF THE PASSIONS OF WAR* 13 (1997).

9. *DR. STRANGELOVE* (Hawk Films 1964).

10. *APOCALYPSE NOW* (Zoetrope Studios 1979).

11. *SAVING PRIVATE RYAN* (DreamWorks SKG 1998).

12. TOM BROKAW, *THE GREATEST GENERATION* (1998).

13. Pam Belluck, *On a Sworn Mission Seeking Pretenders to Military Heroism*, N.Y. TIMES, Aug. 10, 2001, at A1.

14. This shift from an aversion to a glorification of war was brought home to me in the classroom. When I was writing my book on loyalty in the late 1980s, I made some comments to my seminar at the Columbia Law School about the Vietnam War and the natural reaction of my generation to dissent from war and to avoid fighting. The students in their early twenties objected unanimously to my casual attitude toward the war. One of them said, “We regard your generation as unpatriotic.”

yielding, all-encompassing form of liberalism—the “L” word used, of course, in the philosophical rather than the political sense.¹⁵

There are variations of liberal jurisprudence but there is no school of Romantic jurisprudence. Admittedly the “R” word crops up here and there—in works by James Whitman on early nineteenth-century German attitudes toward Roman law,¹⁶ Steve Shiffrin on the First Amendment,¹⁷ and Vivian Curran on the disputed distinction between common law and civil law.¹⁸ A Lexis search reveals about 500 documents in the year 2001 containing the word “liberalism.”¹⁹ In the entire database of law reviews, there are about the same number of references to “Romanticism,” and often the use of the word is incidental or dismissive, as in the expression “naïve Romanticism.”²⁰

A single methodology dominates the legal discourse of our time. Whether the talk is of law and economics, of constitutional law, of corrective justice, or of human rights, the methodology remains the same. What counts is individuals, their rights, their preferences, their welfare.²¹

Perhaps we are missing something by ignoring the impulses that led Romantics to worship an expansive self that could identify with the entire nation as an actor in history. The Romantics in Germany, in France, and in England—though there were ample differences among them—created an alternative to methodological individualism. They developed a way of thinking about the self and about the nation that challenges us to reconsider

15. These views are expressed by the liberal philosophers of law. The standard works are BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980), RONALD DWORKIN, *LAW'S EMPIRE* (1986), and JOHN RAWLS, *A THEORY OF JUSTICE* (1971). The advocates of economic thinking in the law are also liberal in the sense that the basic foundation of their analysis is individual preferences. The orthodox line is found in GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1972), and RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (5th ed. 1998).

16. JAMES Q. WHITMAN, *THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA* (1990).

17. STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* (1990).

18. Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63 (2001); see also Anne C. Dailey, *Holmes and the Romantic Mind*, 48 DUKE L.J. 429 (1998).

19. A search of the Allrev library on Lexis, January 10, 2002, revealed 499 citations to “liberalism” for the year 2001. A search of the same Lexis library on the same day disclosed 603 citations to “romanticism” for the entire time span of the Lexis collection.

20. E.g., Cynthia R. Farina, *Getting from Here to There*, 1991 DUKE L.J. 689, 709 (noting that civic republicanism had been accused of being “the worst sort of naïve romanticism”); Garrett O'Connor, *The Psychology of Adolescent Addiction*, 31 VAL. U. L. REV. 701, 712 (1997) (warning against regarding the descriptions of social conflict as based on “sentimentality or naïve romanticism”).

21. There is some dissent from this view in the feminist emphasis on relationships as the framework for analysis of rights and responsibilities. The locus classicus of this critique is CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982). See also MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991). The ethic of care, supposedly derived from Gilligan, provides the basis for a different methodology. See Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 30-36 (1988) (suggesting the imposition of a duty to rescue based on a feminist ethic of care and interconnection).

liberal assumptions about both the virtues and the vices of collective entities of which we are a part. Of all the attributes of collective entities, the phenomenon of collective wrongdoing offers the greatest challenge. I want to take seriously the possibility that entire bodies of people, in particular the nations of which we are a part, can be guilty for the crimes actually carried out by a few. It is obvious that this possibility of collective guilt flouts liberal premises, which hold that only individuals can have the mens rea and tender the malice necessary to be held guilty for wrongdoing.

Though I probably have more sympathy for collective guilt than can be found in the current academic culture, I conceive of this Article as devoted not to a thesis but to a problem. The problem is whether it is acceptable to ascribe guilt to collective actors and particularly to nations like the United States, France, and Germany. The problem, I argue, is an outgrowth of larger conflict between the mentality of liberals and the sentiments of Romantics. For liberals and Romantics at war, this is one of the primary intellectual fields of battle. As the fight over collective guilt is won or lost, so are larger stakes decided: Is the individual the ultimate unit of action and responsibility, or are we, as individuals, invariably implicated by the actions of the groups of which we are a part?

A. *Defining Romanticism*

At the outset, I should clarify some of the basic terms and distinctions that accompany us in this exploration of the problem of collective guilt. The most ambiguous concept of all lies at the foundation of the inquiry, namely, the idea of Romanticism.²²

A good way to situate the contested concept of Romanticism in intellectual history is to see it as one pole in a larger set of oppositional concepts. On the one hand, we have stability, order, universality, and the boredom of the predictable and domestic. On the other hand, we have revolt, disorder, partiality, and the intense flames of lust and creativity. This is, of course, the way the Romantics might describe the opposition. The devotee of the Brandenburg Concertos would presumably use more honorific terms to capture the beauties of classicism.²³ These differences, expressed in the opposition between Bach and Beethoven, Rembrandt and

22. In the literature on the subject one finds considerable despair about defining Romanticism. *E.g.*, ISAIAH BERLIN, *THE ROOTS OF ROMANTICISM* 17-22 (1999). For a skeptical analysis of Romanticism, see Seamus Perry, *Romanticism: The Brief History of a Concept*, in *A COMPANION TO ROMANTICISM* 3 (Duncan Wu ed., 1998).

23. According to one definition of classicism in music, Haydn and Mozart are leading exemplary classical composers, and the style is characterized by “a concern for musical form with a greater emphasis on clarity with more concise melodic expression and clarity of instrumental color.” Classical Net, *Classicism*, at <http://www.classical.net/music/rep/defs/class.html> (last visited Mar. 5, 2002).

Delacroix, are of course disputed, but for the purposes of this Article, I need not improve on Isaiah Berlin's breathtaking account of the German Romantic reaction to the French Enlightenment. For Berlin, the core of Romantic thinking lies in the expressive self insisting on its own distinctiveness and value.²⁴ The uniqueness of each person, and by analogy, of each national culture, leads to a rejection of the Enlightenment ideal of a universal culture based on reason.²⁵ The French philosophes held that all problems are soluble, all values comparable, all issues amenable to the solvent of universal reason.²⁶ In general terms, the German Romantics from Hamann²⁷ and Herder²⁸ to Schleiermacher²⁹ and Schiller³⁰ shared an aversion to this flattening of cultural particularities. Their common denominator stands for the irreducibility of different selves and the incomparability of distinctive cultures. The subjective and the particular take precedence over the objective and the universal.

Expanding on Berlin's preoccupation with the Germans, we should think of Romanticism, then, as both a historical and cultural phenomenon and as a methodology. The historical phenomenon made its appearance at various stages in the late eighteenth century, primarily in England and France as well as Germany. In England, the poets led the way under the banner of Wordsworth's dictum that poetry is "the spontaneous overflow of powerful feelings."³¹ Rousseau's views on the social contract came at our problem of collective thinking earlier and from a different angle.³² Eugène

24. BERLIN, *supra* note 22, at 95 ("[T]he only thing which is worthwhile . . . is the exfoliation of a particular self, its creative activity, . . . its creation of values, its dedication of itself to these values.").

25. The thesis about unique national cultures is expressed famously in Johann Gottfried Herder, *Abhandlung ueber den Ursprung der Sprache* [*On the Origin of Language*], in *ON THE ORIGIN OF LANGUAGE* 178 (John H. Moran & Alexander Gode trans., Frederick Ungar Publ'g Co. 1966) (1772).

26. Berlin summarizes the basic tenets of the Enlightenment as the faith (1) that all questions about the world have answers, (2) that these answers are knowable with the use of reason, and (3) that all these answers are compatible with one another. BERLIN, *supra* note 22, at 21-22. For an American used to our chaotic systems of weights and measures, the spirit of the Enlightenment is well suggested by the metric system, adopted in France in 1795, a system expressing a rational view of all units of distance, space, and weight as reducible to a single common denominator.

27. Berlin credits Hamann with being the first Romantic to attack the Enlightenment. *See* ISAIAH BERLIN, *THREE CRITICS OF THE ENLIGHTENMENT* 272 (2000).

28. Herder, *supra* note 25.

29. *See* Richard R. Niebuhr, *Schleiermacher, Friedrich Daniel Ernst*, in *7 ENCYCLOPEDIA OF PHILOSOPHY* 316, 317 (Paul Edwards ed., 1967) (noting Schleiermacher's critique of Kant for devaluing "the particular and idiosyncratic").

30. The famous dramatist Friedrich von Schiller also wrote an essay on one of the characteristic concepts of the Romantic movement, the notion of the sublime. *FRIEDRICH VON SCHILLER, NAÏVE AND SENTIMENTAL POETRY AND ON THE SUBLIME* (Julius A. Elias trans., Frederick Ungar Publ'g Co. 1966) (1795).

31. WILLIAM WORDSWORTH, *LYRICAL BALLADS*, at xiv (Woodstock Books 1997) (1800). A conventional dating of the movement relies upon the publication of the first edition of Wordsworth's *Lyrical Ballads* in 1798.

32. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 72-74 (Maurice Cranston ed., St. Martin's Press 1968) (1762).

Delacroix, born at the time that Wordsworth was writing, brought the spontaneous expression of feeling to the canvas.³³ In Germany, the movement took different contours and expressed itself in different ways. Johann Georg Hamann, born in 1730, was a critical early figure in the German reaction against the French Enlightenment.³⁴ Though he was good friends with Immanuel Kant, Hamann rejected the philosophy of reason and urged instead an antirational emphasis on holistic religious experience.³⁵ Kant himself became a transitional figure because his emphasis on the autonomy of the self lent itself to misinterpretation by later Romantic thinkers.³⁶

In the course of the nineteenth century, the Romantic movements had an impact not only on German music and philosophy but also on the course of German law. Savigny argued against codification in his famous monograph of 1814³⁷ on the ground that, although the French thought they had found the universal approach to law in the *Code civil*, the German nation would have to evolve on its own and find its distinctive path among the legal cultures of the world. These artistic, philosophical, and legal themes interwove in the late eighteenth and early nineteenth centuries to generate a movement, a family of related views, that emphasized feeling over rationality, particularity over universality, and the impulses of genius over the predictability of normal life.

With so many different fields in play—ranging from poetry, to art, to music, to philosophy, to theology, and finally to law—it is not surprising that the term “Romantic” is associated with different antonyms in different contexts. In some cases the contrast is between Romanticism and classicism (art, music); in other cases, the distinction is between Romanticism and orthodoxy (theology). For our purposes the critical opposition is between Romanticism and liberalism.

There is no claim here of a one-to-one correlation between liberals and Romantics, on the one hand, and a position on collective guilt, on the other. Some people who are not Romantics (or show no signs of being Romantics) might subscribe to collective guilt. Karl Jaspers³⁸ and Margaret Gilbert³⁹ are good examples. And some self-styled Romantics might avoid the inference from the nation-as-actor to the nation-as-criminal. These are all

33. Significantly, in one of his earliest notable paintings, *Massacre at Chios* (painted in 1824), Delacroix centered on the themes of glory in warfare.

34. BERLIN, *supra* note 22, at 40.

35. *Id.* at 40-45.

36. *Id.* at 78 (discussing Schiller's adaptation of Kant).

37. FREDERICK CHARLES VON SAVIGNY, *OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE* (Abraham Hayard trans., Legal Classics Library 1986) (1831).

38. KARL JASPERS, *THE QUESTION OF GERMAN GUILT* (E.B. Ashton trans., 1947).

39. MARGARET GILBERT, *The Idea of Collective Guilt, in* SOCIALITY AND RESPONSIBILITY 141 (2000).

understandable positions. My claim is only that a strong methodological and cultural affinity binds Romantic thought to imputations of collective guilt on the one hand, and liberal thought to the insistence that only individuals can be guilty on the other.

In the following two Sections, I outline some distinctions in the theories of collectivity and of guilt that are necessary to this exploration of collective guilt. I will also clarify the difference between associative and aggregative guilt and stress the distinction between being guilty and feeling guilty.

B. *Two Views of the Individual*

Romanticism and liberalism both focus on individuals but in different ways. Romantics cultivate the individual as a source of value. The unique feelings of the poet, the private vision of the painter, the existentialist quandary of the theologian—these are elevated in Romantic thought to ultimate points of reference. Genius is celebrated as the supreme virtue. For liberals, individuals are at their best when they are the man in the street, one like the other. Their self-replication can occur at the base level of their preferences, their libidos, their aggressive impulses; or at the higher level of their reason. Liberals from Adam Smith to Immanuel Kant all thought about individuals as created in much the same form. It should not surprise us, then, that the crowning moral achievement of the eighteenth-century Enlightenment was Thomas Jefferson's effort to bring all individuals under a single formula of moral equality.⁴⁰ The claim "all men are created equal" is surely right, so far as it goes. In some sense we are all the mirror images of each other, but the Romantics insist on a different perspective on individuality—on creative sentiment as a lamp radiating illumination to infinity.⁴¹

The Romantic conception of the individual as an expandable source of spirit explains the easy transition in Romantic thinking from the individual self to the nation. The nation bears the characteristics that constitute each individual—the language, the history, the culture, the bond between geography and self. As the extrapolation from the Romantic self, the nation forms intentions, acts, achieves greatness, suffers defeat, commits crimes, and bears guilt for its wrongdoing. We find variations on this theme in Romantic ideas ranging from Herder's views on the characteristic cultural

40. Recognizing my own contradictory responses on these issues, I confess to great admiration of these liberal achievements. George P. Fletcher, *In God's Image: The Religious Imperative of Equality Under Law*, 99 COLUM. L. REV. 1608 (1999).

41. The lamp as a metaphor for the Romantic spirit is captured in the title of the influential book, MEYER ABRAMS, *THE MIRROR AND THE LAMP: ROMANTIC THEORY AND THE CRITICAL TRADITION* (1953).

expression of every nation⁴² to the political principle expressed, as we shall see, in Rousseau's *volonté generale*.⁴³

Not surprisingly, Romantics are drawn to movements, to crusades, and finally to armed conflict. They are prone not to petty bar fights but to mass engagements under a flag proclaiming their collective identity. For the poet William Wordsworth, the 1809 Convention of Cintra, allying British and Spanish troops against Napoleon, was an ecstatic moment bestowing upon the English soldier a chance for heroic greatness.⁴⁴ In these battles on the field of honor, Romantics can see great ideas at work. They can see the meaning of national existence and the ennobling effects of human conflict. By identifying with a nation or a cause they can achieve transcendence of the self. Their lives are at once merged with the fate of the group and ennobled by linkage with a virtuous idea or a sense of historical destiny. This is Romantic war at its best.

Underlying this contrast between liberals and Romantics is a distinction in the way each approaches reality. The difference is between expansionist and reductionist ways of thinking. To understand this distinction, think about the world that is assumed in all of our daily unphilosophical exchanges. Relative to this fuzzy baseline of conventional understanding, one can have either an expansionist or a reductionist way of thinking. The expansionist sees "more things in heaven and earth"⁴⁵ than the ordinary person assumes; the reductionist sees less. The expansionist Theodore Parker saw in every political dispute bearing on slavery a struggle between the "Slave Power" and the "Freedom Power."⁴⁶ The reductionist would see two individuals at odds about their immediate interests. The expansionist dwells on a grain of sand and like William Blake reaches out from the particular to the mysteries of the universe.⁴⁷ The reductionist looks at a grain of sand and finds a chemical composition.

My claim is that Romantics are expansionist; liberals, reductionist. The terms "struggle" and "movement" and "nation under God" resonate in the veins of the engaged Romantic. The reductionist replaces the expansionist self with the causal language of incentives and drives. If Theodore Parker

42. See Herder, *supra* note 25.

43. See ROUSSEAU, *supra* note 32.

44. WILLIAM WORDSWORTH, *The Convention of Cintra*, in THE PROSE WORKS OF WILLIAM WORDSWORTH 191 (W.J.B. Owen & Jane Worthington Smyser eds., Oxford Univ. Press 1974) (1809).

45. WILLIAM SHAKESPEARE, HAMLET act 1, sc. 5, ll. 166-67, in 3 THE COMPLETE OXFORD SHAKESPEARE 1121, 1131-32 (Stanley Wells et al. eds., 1987) ("There are more things in heaven and earth, Horatio, than are dreamt of in our philosophy.").

46. THEODORE PARKER, *The Slave Power*, in THE SLAVE POWER 248, 250-54 (James K. Hosmer ed., 1907).

47. The point is substantiated, perhaps, in these lines from William Blake's *Proverbs of Hell*, in *The Marriage of Heaven and Hell*: "A fool sees not the same tree that a wise man sees. . . . The hours of folly are measur'd by the clock, but of wisdom: no clock can measure." WILLIAM BLAKE, THE MARRIAGE OF HEAVEN AND HELL 7 (Clark Emery ed., 1963).

saw the Civil War as the acting out of great ideas on the stage of history, Richard Posner would presumably prefer to think about the respective economic advantages of abolition and slavery.⁴⁸ The Romantic understands Picasso's *Guernica*—coming as it did after years of the artist's interest in the Crucifixion—as a meditation on the redemptive effects of war. The liberal sees the painting as a critique of Hitler's Germany.

Romantic sentiments did not originate in the late or even the early eighteenth century. Expansionist urges and collectivist thinking date back to ancient legal cultures. The conflict between focusing on groups and focusing on individuals is not just a historical phenomenon but a foundational feature of all efforts to grapple with reality.

C. *Two Views of the Collective*

Individuals can be given either a liberal or a Romantic interpretation; the same is true of collectives such as society and the nation. Rousseau guides us through this distinction by expounding two interpretations of the popular will—the aggregative and associative senses of the term. In the aggregative sense, the popular will (*la volonté de tous*) is the sum total of the individual wills in the society.⁴⁹ This liberal version of the popular will resembles the economic idea of the whole society's preferences, which are found by adding up all the preferences of individuals in society.

The associative sense of the popular will (*la volonté generale*) is expressed by the society as a single entity abstracted from the individuals who constitute it.⁵⁰ To believe in the nation as an actor is to accept the idea of the popular will in the associative sense. Admittedly, it is difficult to know when one sense or the other is intended. When we discuss the will of “We the People,” for example, we could mean the popular will in either the aggregative or the associative sense. Bruce Ackerman, as I read him, thinks of “We the People” acting in an aggregative sense.⁵¹ In my view, at least since the Civil War, the will of the American people has been understood associatively as the spirit of a unified, organic nation.⁵²

48. Cf. RICHARD POSNER, *OVERCOMING LAW* 212-14 (1995) (criticizing academic proposals to extend the Thirteenth Amendment's prohibition of slavery and involuntary servitude as failing to consider the “aggregate impact” of the proposed interpretation).

49. ROUSSEAU, *supra* note 32, at 72 (translating “will of all” as “what all individuals want”).

50. *Id.* (“[T]he general will studies only the common interest . . .”).

51. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991). When Ackerman discusses the constitutional transformation represented by the New Deal, he relies heavily on a shift in the preferences of the electorate in 1936. The numbers count in computing the aggregative will of the people. *See id.* at 311.

52. This is evident in Lincoln's use of the concept of nationhood in the Gettysburg Address. *See* GEORGE P. FLETCHER, *OUR SECRET CONSTITUTION: HOW LINCOLN REDEFINED AMERICAN DEMOCRACY* 40-42 (2001).

This distinction is critical for assaying the problem of collective guilt. As individuals can be guilty, the society as a collection of individuals can also be guilty. The serious challenge in this inquiry is to consider the possibility of collective guilt in the associative sense. Rousseau argued for the general associative will (*la volonté generale*); we have to address the problem of general associative guilt (*la culpabilité generale*).

D. *Implications for the Law*

There is no uniquely right way of viewing the world. The Romantic has a rich ontology; the liberal prefers a parsimonious set of entities. But there is no neutral principle for deciding between the two. I commit myself only to the premise of eclecticism: Any area of thought that admits only one—either liberal or Romantic impulses—would be suspect. Unfortunately, the legal culture—and particularly, the American legal culture—is in precisely this impoverished position. For the last several generations, the leading thinkers in American law have tried to reduce legal studies to a social science, and the social sciences, as we understand them, are governed by something like Newtonian laws of regularity and predictability. If there is a science of law, it would have to resemble economics or psychology.

In universities dominated by this classical, universal conception of law, the study of comparative law has suffered, for if all human beings are alike and all advanced legal cultures are ultimately akin, what is the point of taking seriously the particular traditions of France and Germany, Islam and Judaism? The law, as we know it in Blackstone and under the Due Process Clause, rests on reason, a standard suitable for all of humanity.

In comparative law, there would be much to learn from the Romantics—their antiuniversalist bias in taking language seriously as a factor dividing societies and rendering separate cultures distinctive and irreducible to a single mode of life. Both Rousseau and Herder wrote tracts on the origins of human language, for they saw in language the key to understanding what it means to be a human being embedded in a culture.⁵³ Language was also important as a sign of the exotic. No one could be truly interesting and different unless he or she spoke in a strange idiom.⁵⁴ Would that we had the same orientation in the study of law. The appalling monolingualism of American law professors and students is only part of the problem. Even in comparative legal studies, there seems to be virtually no attention paid to the way in which syntax and semantics guide legal

53. Herder, *supra* note 25; Jean-Jacques Rousseau, *On the Origin of Language*, in ON THE ORIGIN OF LANGUAGE, *supra* note 25, at 5.

54. In France, the eighteenth-century interest in the exotic is frequently associated with Montesquieu. See CHARLES DE SECONDAT MONTESQUIEU, THE PERSIAN LETTERS (J. Robert Loy ed. & trans., Meridian Books 1961) (1721).

thought. In fact, no one quite knows the answer to the riddle of language and law. Surely, the particularities of language are not determinative of legal thought,⁵⁵ but it is equally hard to accept the hypothesis that language is a neutral factor in assessing the ways Americans and Chinese think about legal problems.⁵⁶ The liberal mind understandably ignores language because the assumption is that all people reason and express their intuitions against the same blank slate.⁵⁷

The liberal or reductionist bias pervades everything lawyers say and do. We focus on individuals in their transactions with each other. Even when addressing complex systems of interaction, we treat them as though they were single agents. Corporations are reduced to persons under the Fourteenth Amendment.⁵⁸ Countries become individuals under international law. They are liable in much the same way individuals are liable.⁵⁹ We even affirm corporate criminal liability as though the complex organism of the corporation could be reduced to a single actor liable for committing a crime.⁶⁰ The polycentric collective as a subject is basically foreign to the legal way of thinking. The generalization holds in our legal system as well as in the civil law tradition: Collective entities, their actions, their responsibility, and their guilt—these are ideas that run afoul of the methodological commitments of the legal mind.

One common-law exception is the law of conspiracy, which seems to address the peculiar danger represented by collective criminal action. Criminal organizations pose a heightened danger in their collective interdependence and reciprocal support, a danger that exceeds the

55. I address the Whorfian hypothesis that language determines thought in an early work. See George P. Fletcher, *The Presumption of Innocence in the Soviet Union*, 15 UCLA L. REV. 1203, 1206-13 (1968) (arguing that the reasons for the Soviet rejection of the presumption of innocence had nothing to do with the absence of the word “presumption” in Russian).

56. For some thoughts on the particularities of English as a legal language, see George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 950-51 (1985).

57. For an example of this way of thinking, see STEVEN PINKER, *THE LANGUAGE INSTINCT* 44-74 (1994) (discussing the preverbal language of “mentalese”).

58. *Santa Clara County v. S. Pac. R.R.*, 118 U.S. 394 (1886). For an early critique of this reductionistic way of thinking about corporations, see generally MEIR DAN-COHEN, *RIGHTS, PERSONS, AND ORGANIZATIONS* (1986).

59. GEORG SCHWARZENBERGER & E.D. BROWN, *A MANUAL OF INTERNATIONAL LAW* 43 (6th ed. 1976) (noting that in the period of absolutist monarchies, “monarch and state were for all practical purposes treated as identical in most European countries”). *But cf.* OTTO KIMMINICH, *EINFÜHRUNG IN DAS VÖLKERRECHT [INTRODUCTION TO INTERNATIONAL LAW]* 128 (1990) (arguing that although it is assumed that states are the subjects under international law, international law does not itself define a state). The United Nations Charter Article 2(1) recognizes the “sovereign equality of all its Members.” U.N. CHARTER art. 2, para. 1. Thus states are treated like human beings. If it is true that “all men are created equal,” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776), then states are like persons, also created equal.

60. For a good introduction to the comparative dimensions of the problem of corporate criminal liability, see *CRIMINAL RESPONSIBILITY OF LEGAL AND COLLECTIVE ENTITIES* (Albin Eser et al. eds., 1999). For a reflective account of the corporation as a moral person, see PETER FRENCH, *COLLECTIVE AND CORPORATE RESPONSIBILITY* 31-47 (1984).

aggregative threat of the individuals constituting the conspiracy. The idea that agreements to commit a criminal act could be punishable violates the principles of individual culpability that govern Continental criminal jurisprudence.⁶¹ Whether the American or European approach is correct in theory, the practical impact of conspiracy doctrines is to aggravate individual criminal liability by making co-conspirators liable for any and all substantive offenses committed by members of the group.⁶²

This aggravating function of the law of conspiracy brings into focus the way doctrines of collective guilt generally function in our legal culture. The typical association with group liability seems to be that some members of the group will suffer harsh and undeserved punishment. This need not be the case, and in fact one purpose of this Article is to demonstrate that theories of collective guilt can serve an ameliorative or humanistic purpose of mitigating punishment.

Arriving at a conclusion about mitigating punishment in cases of collective guilt requires an argument structured in several stages. My first task is to demonstrate that although the law maintains a liberal façade, we still nourish thoughts of the nation as an organic actor and implicitly recognize the reality of collective guilt in the law. I want to illustrate this thesis by focusing in some detail on the movement toward individual criminal liability in international criminal law. Despite the apparent recognition of methodological individualism in the area of international criminal liability, we still believe that these crimes express the actions and the implicit guilt of entire groups of people, most typically of nations that are in conflict.

Once this thesis comes into focus, we can turn our attention to the problem of mitigating punishment in light of the distribution of guilt between the individual and the nation of which he or she is part. This thesis is not easily established, and I present it here not in the mode of take-it-or-leave-it but as part of the problem of collective guilt.

As part of the exploration of this problem, I present some significant drawbacks to accepting the idea of collective guilt on the basis of Romantic sensibilities. This acceptance leads to distortions in the form of believing in

61. It is not uncommon for European codes to have some provision that facilitates the prosecution of conspiracies to commit crimes. *E.g.*, § 129 STRAFGESETZBUCH [StGB] (F.R.G.) (punishing the formation of criminal organizations); CODICE PENALE [C.P.] art. 416 (Italy) (punishing mafia-type organizations). But none of these provisions leads, so far as I know, to the use of conspiracy as a criterion of complicity—that is, holding the members of the organization responsible for all the offenses committed by other members of the conspiracy. For a comparative analysis of conspiracy doctrines, see George P. Fletcher, *Is Conspiracy Unique to the Common Law?*, 43 AM. J. COMP. L. 171, 173-74 (1994) (reviewing ELIZABETTA GRANDE, ACCORDO CRIMINOSO E CONSPIRACY [CRIMINAL AGREEMENTS AND CONSPIRACY] (1993)).

62. The most striking use of this doctrine is *Pinkerton v. United States*, 328 U.S. 640, 646-47 (1946), which upheld the conviction of a defendant for a crime committed by a co-conspirator while the defendant was in jail.

transmission of guilt by birth and to the denial of guilt altogether in the case of Romantically authentic ideologues. These distortions, and the difficulty of establishing the thesis of mitigation on the basis of collective guilt, lead to the nadir of the argument: the possibility of abandoning collective guilt altogether. In the latter third of the Article, I revive the thesis and defend collective guilt against the persistent challenges from those who believe that it is preferable to use the language of collective responsibility and collective shame.

This, then, is the rich set of issues raised by the problem of collective guilt in the war between liberals and Romantics. I begin by showing that in the liberal ideology of the law, Romantic impulses are still at work beneath but close to the surface of our rules and doctrines, particularly in the field of international criminal law.

II. CRIMES OF THE NATION

Traditionally, international law addressed the behavior of states. The state is a collective reduced to a person, a sovereign, a single entity that can take its place alongside the other sovereigns in the law of nations.⁶³ As all human beings are created equal, all states are equal subjects in international law. In the traditional way we thought about international relations, the only players were states; individual human beings—the plural subjects constituting the state—did not count. Since the Nuremberg proceedings, however, treaty-makers and international criminal courts have taken the innovative step of holding individuals responsible for crimes against the law of nations.⁶⁴ Human rights lawyers hail this development as a salutary transition toward the proper criteria of responsibility for aggression, genocide, crimes against humanity, and war crimes.⁶⁵ In the ICC Statute of July 1998—defining both the procedures and the substantive law of the proposed International Criminal Court—the critical assumption appears in Article 25(1): “The Court shall have jurisdiction over natural persons”⁶⁶ By implication, the statute does not cover legal persons like

63. *See supra* note 59 and accompanying text.

64. For one prosecutor’s personal account of the Nuremberg trials and their aftermath, see TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* (1992).

65. The literature is surprisingly noncommittal about the present state of the law, but for some early doubts, see Georg Schwarzenberger, *The Problem of an International Criminal Law*, 3 *CURRENT LEGAL PROBS.* 263, 275-76 (1950). *Cf.* David J. Cohen, *Bureaucracy, Justice, and Collective Responsibility in the World War II War Crimes Trials*, 18 *RECHTSHISTORISCHES J.* 313, 323 (1999) (“[A]ny attempt to deal with . . . criminality of the Nazi kind without focussing on problems of collective action is likely to prove inadequate.”). *See generally* NINA JØRGENSEN, *THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES* 73-76 (2000) (discussing individual versus collective responsibility under the heading of “individualism versus holism”).

66. Rome Statute of the International Criminal Court, July 17, 1998, art. 25(1), U.N. Doc. A.CONF/183/9 [hereinafter ICC Statute].

states and corporations.⁶⁷ Thus it appears that international criminal law is brought into line with the guiding assumptions of domestic criminal law. Only individuals—and entities thought of as individuals—can bear criminal responsibility.⁶⁸

And yet the liberal bias toward individual criminal responsibility obscures basic truths about the crimes that now constitute the core of international criminal law. The four crimes over which the Court has jurisdiction—aggression, crimes of war, crimes against humanity, and genocide—are deeds that by their very nature are committed by groups and typically against individuals as members of groups. Whatever the pretense of liberal international lawyers, the crimes of concern to the international community are collective crimes. It is true that as a formal matter only individuals are prosecuted, but they are prosecuted for crimes committed by and in the name of the groups they represent. Once the collective nature of these crimes comes into proper focus, once we overcome the liberal bias that has prevailed since Nuremberg, we should be able to see the influence of collective action in domestic law as well. I argue below that the innovation of hate crime laws in the United States reflects a similar turn toward collectivist thinking in the law.⁶⁹

In the balance of this Part, I do rather conventional things like read the ICC Statute in the context of its history and its purposes. My point is to show that although the orthodox view stresses individual responsibility, the heart of international criminal law remains collectivist in nature.

A. *War, Aggression, and War Crimes*

Because war lies at the heart of our Romantic inquiry, let us begin with the paradoxical relationship of war to the idea of criminal behavior. War is by its nature a collective enterprise. Organized groups engage in armed conflict with each other. They are typically states, but not always. The American Civil War counts as a war even though the Confederacy was never recognized as a state.⁷⁰ The recent *Karadžić* judgment recognized that the Bosnian Serbs, under the leadership of Radovan Karadžić, constituted an organized force equivalent to a state for purposes of international law.⁷¹ War always requires coordinated action, a chain of command, a sense of organization and, above all, a consciousness on the part of the individuals

67. One intriguing question is whether corporations should be subject to liability under international criminal norms. See Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001).

68. Cf. COST. [Constitution] art. 27(1) (Italy) (“Responsabilità penale è personale.” (“Criminal liability is personal and individual.”)).

69. *Infra* notes 107-109 and accompanying text.

70. See *The Prize Cases*, 67 U.S. (2 Black) 635, 636 (1862).

71. *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995).

engaged in military action that they are acting as part of the collective effort.

The crimes of concern to the proposed International Criminal Court are connected one way or another with the concept of war. Let us think first about the crime of *aggression*.⁷² Though still not formally defined, this crime is important because the concept of aggressive war triggers the right of the attacked state to exercise collective self-defense.⁷³ There are problems in defining the threshold of intrusion that should constitute aggression, but surely there is no doubt about the collective nature of the offense. The paradigm is one state's army marching into the territory of another. If a single Arab-American tourist throws rocks at Israeli military installations, that is an act of vandalism, but it is not an act of aggression. The group dimension of aggression carries with it the suggestion of recurrent and committed battle with aims of conquest, or at least of settling some political dispute.

Absent self-defense, therefore, aggression constitutes a collective crime against the international order. The body of law that recognizes self-defense as an exception is called *jus ad bellum* and encompasses the principles bearing on the right to go to war, not the question how the war is to be fought once declared.⁷⁴

War crimes arise out of an independent body of law called *jus in bello*—the principles defining permissible actions in fighting a war.⁷⁵ The paradoxical feature of war (as opposed to vandalism and isolated acts of terrorism) is that *jus in bello* has a legitimating as well as a potentially incriminating function. Routine and obviously criminal behavior—killing, battery, deprivation of liberty, destroying property, arson, theft—becomes legal and even meritorious in the course of military battle. At the same time, certain actions, like the killing of civilians or prisoners of war, can become crimes of a new sort, namely war crimes.⁷⁶

72. ICC Statute, *supra* note 66, art. 5(d).

73. U.N. CHARTER art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations . . .”). Note that the reference to “collective self-defence” does not carry the same meaning as the use of the phrase in the text. The reference in the Charter is to defensive force by a regional defense organization.

74. MICHAEL WALZER, *JUST AND UNJUST WARS* 21 (3d ed. 2000).

75. The basic assumption of international law is that *jus ad bellum* and *jus in bello* are completely independent bodies of law. *See id.* (referring to the “logical independence” and the “dualism” of the two categories); *see also* YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENCE* 12 (1988) (noting that *jus in bello* applies as soon as the state of war arises).

76. “War crimes” must be distinguished from violations of the “law of war” as that term has been used in American law. For example, spying in wartime is a violation of the law of war, *Ex parte Quirin*, 317 U.S. 1 (1942), but it is not a war crime under the ICC Statute. War crimes typically originate not from the conventional law of war but from the Geneva Conventions. For the importance of this distinction in assessing the constitutionality of military tribunals, *see* George P. Fletcher, *War and the Constitution*, 13 AM. PROSPECT 26, 28-29 (2002).

War crimes are different from ordinary crimes because *jus in bello* represents an alternative legal order. This order has its own internal logic and tradition. The state of war establishes a distinctive structure of norms and norm-creation. Each of the engaged military organizations becomes a legislative source expressing its own vision of the law applicable to the conflict and imposing its own military courts for trying the criminal behavior of its own and sometimes foreign military operatives.⁷⁷ The military of the United States remains subject to the Constitution of the United States, but the Constitution itself expresses deference in the Fifth Amendment to the military's judicial autonomy over its own subjects.⁷⁸

Theorists have pondered the proper rules of war for centuries,⁷⁹ but the actual process of codification began with Francis Lieber's General Order No. 100, formulated in 1863, to govern the behavior of Union armies in the field.⁸⁰ Lieber's manual on the proper treatment of citizens and prisoners of war became the foundation for the Hague Conventions adopted at the end of the nineteenth century.⁸¹ The "law of war" as understood in American parlance is torn between a tradition of chivalrous and fair combat, on the one hand, and a commitment to decent treatment of the enemy, on the other. Some violations of the law of war are improper and unbecoming of soldiers but they are hardly immoral. For example, one of the recurrent examples in American history is crossing enemy lines in civilian clothes for the purpose of spying. This was considered anathema under the traditional "law of war," a fit basis for capital punishment,⁸² but under contemporary standards there is nothing immoral or indecent about spying. It would not be considered a war crime under the ICC Statute.

The confusion between these two senses of the "law of war" pervades the current discourse of lawyers and journalists.⁸³ Those who use the term do not seem to be aware that until World War II, the Supreme Court always

77. See *In re Yamashita*, 327 U.S. 1 (1946) (upholding a military tribunal, invoked by an American commander in the Philippines on his own initiative, for the trial of a Japanese general); *Quirin*, 317 U.S. 1 (upholding President Roosevelt's executive order establishing military tribunals for the trial of German spies).

78. U.S. CONST. amend. V (exempting "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger"). The scope of this exemption is hotly contested. Compare *Reid v. Covert*, 354 U.S. 1 (1957) (denying court-martial jurisdiction over a woman who killed her soldier-husband on an airbase in England), with *Madsen v. Kinsella*, 343 U.S. 341 (1952) (recognizing court-martial jurisdiction over a woman who killed her soldier-husband on a base in Germany).

79. On the history of war crimes, see, for example, ARYEH NEIER, *WAR CRIMES* (1998); and WALZER, *supra* note 74.

80. LIEBER, *supra* note 6.

81. TAYLOR, *supra* note 64, at 10.

82. Reference is often made to the story of Major John Andre, who was hung for having met and collaborated with Benedict Arnold while wearing civilian clothes. *E.g.*, *Quirin*, 317 U.S. at 31 n.9.

83. For a critique of the ways law professors have analyzed the problem of military tribunals, see Fletcher, *supra* note 76.

used the term “law of war” in the traditional sense. With the trials in Japan and Nuremberg, the meaning began to shift toward war crimes in the modern sense of immoral conduct in violation of the Geneva Conventions.⁸⁴

The law of war is rent as well by a second conflict between an emphasis on fair play, which seems to encompass both senses of the term in American law, and a realistic conception of war that stresses the pursuit of national interests. According to the first view, combat is jousting writ large. Prohibitions against killing prisoners and noncombatants make sense as instantiations of the idea of winning not at any cost, but solely by playing by the rules and respecting the enemy. The opposing realistic tradition, famously articulated by Clausewitz, emphasizes war as a rational instrument of national politics.⁸⁵ The goal of winning justifies all measures that are necessary to force the enemy to submit.

The principle of taking prisoners with the corresponding right of combatants to surrender without being killed lies at the foundation of the alternative legal order called war. Terrorists do not take prisoners. They take hostages whom they are prepared to mistreat for their purposes. Robber bands and vandals do not take prisoners. They kill, loot, and move on. It is not surprising, then, that one of the fundamental war crimes prohibited by the Geneva Conventions and the ICC Statute is “declaring that no quarter will be given.”⁸⁶ “No quarter” means that all prisoners will be killed; safe surrender is no longer possible. The mere declaration of “no quarter” is a crime, for it breaches the foundational understanding of modern war that limits military engagement to actual combatants.⁸⁷

The practice of taking and caring for prisoners testifies to the collective nature of armed confrontation. Maintaining prison camps requires a level of administrative organization and geographical permanence lacking in informal bands. John Brown conducted a raid, but he was not prepared to establish prison camps. Also, the proper treatment of prisoners, coupled with the expectation of reciprocal proper treatment, makes it clear that war entails repeated engagements, including confrontations among different

84. The shift is apparent in *In re Yamashita*, 327 U.S. 1 (1946), which upheld the conviction of a Japanese general for war crimes in the modern sense. The transformation was not registered in the statutes of the United States until 1997 when Congress changed the name of the crime defined in 18 U.S.C. § 2441 from “grave breaches of the Geneva Convention” to “war crimes.” Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. No. 105-118, § 583, 111 Stat. 2386, 2436 (1997) (codified at 18 U.S.C. § 2441 (Supp. V 1999)).

85. CARL VON CLAUSEWITZ, ON WAR (Michael Howard & Peter Paret eds. & trans., Princeton Univ. Press 1976) (1832).

86. Fourth Hague Convention Respecting the Laws and Customs of War on Land, *done* Oct. 18, 1907, art. 23(d), 36 Stat. 2277, 2302, 205 Consol. T.S. 277, 293 [hereinafter Hague Convention]; ICC Statute, *supra* note 66, art. 8(2)(b)(xii).

87. The rebellion of the Confederacy became a war when the Union and Confederate troops exchanged prisoners after the First Battle of Bull Run. *Cf.* J.G. RANDALL, THE CIVIL WAR AND RECONSTRUCTION 384 (1937) (describing the recognition of Confederate soldiers as prisoners of war).

individual soldiers on both sides. The important point is that war creates an alternative identity. The person who goes to war ceases being a citizen and becomes a soldier in a chain of command. As Rousseau emphasized, in his alternative identity the soldier is a mere servant of the state.⁸⁸ He is not an autonomous agent, motivated by enmity for the enemy. As Rousseau conceived of war, the only actors were the states pitted against each other.⁸⁹

War crimes exist at the frontier between two legal orders. On the one hand, the alternative legal order called war suppresses the identity of the individual soldier and insulates him or her from criminal liability; on the other hand, the international legal order now holds individuals accountable for certain forms of immoral and indecent treatment of the enemy. When an individual commits a war crime, he or she breaks out, at least in part, from the collective order of war and emerges as an individual guilty of violating a prohibition adopted in the international legal community.

The situation is rendered more complicated by the possible application of domestic law to many situations that occur in the course of a war. A three-way conflict arises, therefore, among (1) the insulating effect of war as an alternative legal order, (2) international law as the source of individual criminal liability, and (3) domestic law as the basis of individual criminal liability. I want to illustrate this three-way conflict by focusing on two hypothetical cases that bring the issues into relief.

1. *The Case of the Polish Farmer*

Imagine the situation of German troops marching toward Warsaw after the Polish government has surrendered and ordered the army to lay down its arms. Suppose a farmer, standing by himself in the fields, sees the troops marching down the road in formation. He rushes to his barn, takes his rifle up to a window in the attic, and shoots at the soldiers as they pass. He kills three soldiers.⁹⁰ Does the legitimating effect of warfare encompass these killings that would otherwise be murder under Polish law or under German martial law?

One naturally has some sympathy for the Polish farmer defending his homeland, but these sympathies find little warrant in international law.⁹¹

88. ROUSSEAU, *supra* note 32, at 56.

89. *Id.*

90. A similar incident is discussed in Marcel Ophuls's film, *THE SORROW AND THE PITY* (T.V. Rencontre 1971).

91. Walzer expresses some sympathy for French farmers who killed German soldiers in the incident described in *The Sorrow and the Pity*. WALZER, *supra* note 74, at 176-79. There is some support for this view. See HILAIRE MCCOUBREY, *INTERNATIONAL HUMANITARIAN LAW: THE REGULATION OF ARMED CONFLICTS* 135 (1990) ("[I]nternational law does not in itself prohibit the commission by inhabitants of an occupied territory of acts hostile to the belligerent occupant.").

First, note that if the German soldiers had, as a military action, killed the farmer as they passed by, they would be clearly guilty of a war crime in violation of the Geneva Conventions and the ICC Statute.⁹² Providing this protection for the farmer against the dangers of warfare entails duties on his part. He is not entitled to think of himself as a free agent acting on behalf of the Polish army.⁹³ I believe this would be true whether or not the government had already surrendered. The implication is that the farmer is guilty of murder, under either Polish law or German martial law. Because the farmer is acting alone, independently of the army, the case falls outside the collective activity that defines the law of war and reverts to a case to be tried under domestic law.

But let us suppose that the government has not yet surrendered and the Polish army is still engaged in resistance: Could not the farmer invoke the general right of self-defense against external aggression? The answer is no. The Polish army has a collective right of self-defense against the German army, and individual Poles—as well as individual Germans—enjoy a personal right of self-defense if they are actually attacked. Collective self-defense is broader than individual self-defense because if one army attacks another army, all combatants on one side are per se aggressors against the soldiers on the other side. Membership in the group aggressing makes them liable to be killed in response, and membership in the group under attack gives each member the right to act in collective self-defense. The farmer acting alone, however, cannot pretend that he is a stand-in for the Polish army. He cannot invoke the collective right of self-defense and would have to rely, instead, on his own individual right to defend himself against an imminent attack directed personally at him. The problem is that there is no imminent attack against him.⁹⁴ The German soldiers marching down the road present no threat to his personal security.

This case is so difficult because we assume that the German invasion of Poland is illegitimate. Our sympathies are on the side of the Polish farmer, yet these sympathies have no bearing on the legal analysis of the case. The architectonic assumption of international law is that the right to go to war

92. This is described as a “grave breach under all the Geneva Conventions.” William J. Fenrick, *War Crimes*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 173, 182 (Otto Triffterer ed., 1999). It also would be a violation of the ICC statute. ICC Statute, *supra* note 66, art. 8(2)(a)(i). There might be a problem under Article 8(1) in establishing that the “wilful killing” was “committed as part of a plan or policy or as part of a large-scale commission of such crimes.” *Id.* art. 8(1).

93. Admittedly, there are some boundary issues between individuals acting alone and recruits in the army. I do not think the matter is resolved by the intention either of the farmer or of the government. To qualify as a combatant, the soldier must satisfy the objective requirements of Article I of the Hague Convention of 1907. Hague Convention, *supra* note 86, 36 Stat. at 2295-96, 205 Consol. T.S. at 289.

94. Unlike Model Penal Code § 3.04, which does not presuppose an “imminent attack,” European codes typically require that the attack be imminent. *E.g.*, § 32 para. 2 StGB; KODEKS KARNY [KK] art. 25, § 1 (Pol.).

(*jus ad bellum*) has no bearing on the law applied in the course of war (*jus in bello*).⁹⁵ The correct result under international law—as hard as it might be to swallow—is that the farmer is guilty of murder under domestic law.

The critical point is that the farmer acting alone or even a group of partisans acting alone—however appealing their cause—cannot claim the rights of warfare, including the right of collective self-defense. This is the critical line between terrorism and warfare. Terrorists like Timothy McVeigh cannot claim the rights of war for the simple reason that they are not engaged in an armed conflict between organized military forces. The crucial point in this argument is demarcating the boundary between collective actions covered by the law of war and individual crimes punishable under domestic law. The Polish farmer falls on the side of individual action governed by domestic law.

2. *The Case of the German Officer*

A more difficult case arises if we imagine that it is nighttime, and a German officer seeking relaxation dons civilian clothes and goes to a local bar. There are also Poles in the bar. Having had too much to drink, a Pole exchanges harsh words with the German officer, who takes a knife lying on the bar and kills the Polish citizen. I want to assume that this is an intentional killing and would be classified as the most serious form of criminal homicide under the local law, be it Polish law or German martial law. The question is whether the killing also becomes a war crime subject to prosecution in an international tribunal.

The ICC Statute, based on the Geneva Conventions, defines war crimes to include any “[w]ilful killing” of local civilians.⁹⁶ True, the ICC Statute also qualifies the definition of war crimes so that the International Criminal Court should take jurisdiction over war crimes “in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”⁹⁷ This language implies that the solitary soldier killing a solitary Pole in a bar would not be committing a crime of high priority for prosecution. But the theoretical question remains whether the killer’s identity as an occupying soldier and the victim’s identity as a local resident are sufficient to take the crime beyond the realm of national jurisdiction and make it of concern to the international community.

There is, admittedly, some controversy on this point. There are some thoughtful advocates of human rights who argue that every crime

95. See *supra* note 75.

96. ICC Statute, *supra* note 66, art. 8(2)(a)(i); cf. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *adopted* Aug. 12, 1949, art. 3, 6 U.S.T. 3516, 3520, 75 U.N.T.S. 287, 290 [hereinafter Geneva Convention].

97. ICC Statute, *supra* note 66, art. 8(1).

committed by an occupying soldier against a civilian is a war crime.⁹⁸ This would include every homicide, every theft, every rape, and in the language of the statute, every “outrage upon personal dignity”⁹⁹—however unrelated these acts might be to military operations and the war effort. I find this view hard to accept. It seems far more consistent with the spirit of the Geneva Conventions and the ICC Statute to require that these acts be carried out in the name of the military—in the name, as it were, of the occupying army. It is clear from reading the long list of war crimes that these are actions committed not by isolated soldiers but exclusively by military personnel acting in their role as soldiers. For example, if it is a war crime to “[d]eclar[e] that no quarter will be given,”¹⁰⁰ this presumably refers to a declaration of the entire force engaged in combat. It would hardly constitute a crime for a single soldier, separated from his unit and acting on his own, to shout out “I will take no prisoners.” The declared intention to kill prisoners must come from a collective army unit and express the will of the collective. The same analysis applies to the crimes of “[p]illaging a town”¹⁰¹ or “[i]ntentionally using starvation of civilians as a method of warfare.”¹⁰² The crime is orchestrated by the military command, even though executed by discrete individuals.

If this is true, then it follows that the homicide in the bar does not constitute a war crime. The German officer is not acting in his role as a soldier. The dispute is purely personal. The appropriate analogy to this problem in American law is the problem of state action in defining the scope of the Fourteenth Amendment. If a police officer commits a rape in plain clothes while off duty, in a context that has nothing to do with his official duties, he is not acting under color of law. He is not acting as an agent of the state.¹⁰³ The Due Process Clause does not apply, and the case remains subject to state law. The same is true of the German officer in the bar. If he is not acting in his role as soldier and officer, he is not acting “under color” of the occupation, and the killing should not fall under international criminal jurisdiction.

98. I am indebted to Professor Antonio Cassese of Florence, Italy, formerly a judge on the International Criminal Tribunal for Yugoslavia, for debating this issue with me in a conversation in early July 2001 in Paris. Professor Cassese is passionately committed to the view that all homicides committed by members of the occupying force would constitute war crimes. A careful look at the Fourth Geneva Convention, Article 6, would suggest, however, that the Convention applies only so far as the occupying army is engaged in “the functions of government in such territory.” Geneva Convention, *supra* note 96, art. 6, 6 U.S.T. at 3522, 75 U.N.T.S. at 292.

99. All these offenses are covered by the ICC Statute, *supra* note 66, art. 8. The quoted language is found in Article 8(2)(b)(xxi).

100. *Id.* art. 8(2)(b)(xii).

101. *Id.* art. 8(2)(b)(xvi).

102. *Id.* art. 8(2)(b)(xxv).

103. D.T. *ex rel.* M.T. v. Indep. Sch. Dist. No. 16, 894 F.2d 1176, 1186 (10th Cir. 1990) (recognizing that the “[a]cts of a state officer in the ambit of his personal pursuits are not acts under color of state law”).

I understand that there might be a practical problem in expecting an impartial trial of a German officer by the tribunals of the occupying army. If an independent court under a regime of occupation is not possible, then an international court would be a better procedural solution. Yet the question of principle remains: Is every action of a soldier, no matter how personal and how private, an action of the military itself? I want to insist that at some point the collective gives way to the personal and private. That this question troubles us is itself a recognition of the fundamentally collective nature of war crimes.

* * *

To summarize the results of the two hypothetical cases, the first stands for the application of domestic law and the implication that the farmer may not invoke the collective right of self-defense recognized under the law of war. The second stands for the application of domestic law instead of the rule of international law and the implication that the officer might not be liable for the intentional killing as a war crime. In both cases, the individual acts on his own, not as an agent of the collective, and therefore the only applicable law is the domestic law regulating individual behavior. Both the law of war, as a factor suppressing the individuality of soldiers, and the law of war crimes presuppose collective action.

We repress the dimension of collective action when we claim, in line with the principles of Nuremberg, that solely individuals are responsible for war crimes. Every crime in the international sphere requires both individual action and the expression of collective agency. The great danger of ignoring the collective component of every international crime is that we think of these crimes of killing, rape, and cruelty just as we think of individual crimes against domestic law.

B. *Crimes Against Humanity and Genocide*

When we turn from war crimes to the third category, namely crimes against humanity, the collective nature of the required action is apparent on the face of the statute: The specified acts, which include murder and rape, must be “part of a widespread or systematic attack directed against any civilian population.”¹⁰⁴ Of course, it might be technically possible for a single individual, without the aid of an organization, to carry out a “widespread or systematic attack.” Perhaps the Unabomber, Ted Kaczynski, came close to meeting this standard. But the ICC Statute makes it clear that individuals acting alone cannot commit crimes against

104. ICC Statute, *supra* note 66, art. 7(1).

humanity. The “widespread or systematic” attack must be “pursuant to or in furtherance of a State or organizational policy to commit such attack.”¹⁰⁵ The words could not be clearer; in my view the phrase “organizational policy” should inform the interpretation of war crimes as well.

The fourth category, genocide, appears, at least on the surface of its defining language, to be subject to commission at the hands of a single person acting outside of organizational influences and structures. All the Genocide Convention—and now the ICC Statute—require is that the individual engage in one of five specified acts inflicting harm on “members of the group” with the “intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such.”¹⁰⁶ It looks like a single individual, acting alone, could have this intention. Suppose a Sinophobe is walking down the street in New Haven. He kills the first two Chinese he sees with the intention of destroying the Chinese people at least in part. Technically, he has committed genocide. Is there a sensible construction of the statute that would avoid this counterintuitive result? I think there is.

The first thing to note about the ICC Statute is that it addresses serious and persistent group conflict. The limitation of its scope to a “national, ethnical, racial, or religious group” reminds us of similar limitations in the definition of hate crimes in the United States.¹⁰⁷ Genocide and hate crimes both represent aggravated forms of their underlying offenses. The problem is figuring out why genocide is worse than simple murder and why an assault motivated by racial bias is worse than an ordinary assault. The key lies in thinking about the limitation in both contexts to specific groups of victims. Why do we choose to protect some groups of victims and not others? Suppose that someone hates bald-headed people and decides to kill the first bald man he meets on the street. He acts with the kind of bias toward bald people that if exercised toward blacks would render his offense a hate crime. If we look just at the behavior of the individual and his sentiment of hatred, there seems to be no difference between hating bald men and hating Chinese people. Yet hate crime statutes do not include idiosyncratic hatreds that might be just as virulent as racial hatred or homophobia.¹⁰⁸

105. *Id.* art. 7(2)(a).

106. *Id.* art. 6; Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, art. 2, S. EXEC. DOC. O, 81-1, at 7 (1949), 78 U.N.T.S. 277, 280.

107. JAMES JACOBS & KIMBERLY POTTER, HATE CRIMES 29-44 (1998) (discussing the variety of hate crimes legislation in the United States). The Model Statute drafted by the Anti-Defamation League defines an offense of “intimidation” based on committing a specified form of physical violence “by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual.” *Id.* at 33. For a thoughtful critique of hate crimes legislation, see Anthony M. Dillof, *Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes*, 91 NW. U. L. REV. 1015 (1997).

108. JACOBS & POTTER, *supra* note 107, at 33.

The liberal account of protecting certain groups and not others stresses the element of efficiency. If there are not enough beneficiaries to warrant the investment of legal resources,¹⁰⁹ we should not do it. This supposedly explains the legislative disposition to protect Chinese people but not bald men. But there are few indications that efficiency considerations account either for the contours of genocide or for hate crimes legislation. If the issues were numbers, one could expect the crime of genocide to protect groups suffering political persecution¹¹⁰ or indeed to protect women as a class. But neither of these groups corresponds to the historical paradigms of genocide.

The better account of both genocide and hate crimes is that the attack is understood in the society as an expression of collective conflict. Both the offender and the victim are merely representatives of groups that are engaged in ongoing hostilities. Genocide has the particular feature that the historical paradigms stand not merely for bias but for the ambition to eliminate the hated group. Only when the conflict is collective can we say that the victim and other members of the group are exposed to continuing danger, a danger that persists even if the particular offender is caught and imprisoned. This kind of conflict exists among “national, ethnical, racial, and religious group[s].” But it does not exist between the hirsute and the bald. Some crimes are individual events; others bear the dangers of collective action.

Proof of this thesis is found in the willingness of the international community to treat killing as genocide simply because the offender and the victim belong to hostile, embattled groups, whether or not these groups meet the technical definitions of the law. The leading example is the conflict between the Hutus and the Tutsis, a conflict that has generated numerous prosecutions for genocide, both in the special tribunal established for Rwanda and in the Belgian courts under a theory of universal jurisdiction for genocide committed abroad.¹¹¹ The differences between the

109. Dillof, *supra* note 107, at 1045-49; Alon Harel & Gideon Parchomovsky, *On Hate and Equality*, 109 YALE L.J. 507, 523-38 (1999).

110. The initial resolution passed by the United Nations did in fact protect victims of political persecution, but the General Assembly eliminated this category before adopting the Genocide Convention. For a critique of this decision, see LEO KUPER, PREVENTION OF GENOCIDE 126-47 (1985).

111. In early June 2001, a Belgian court convicted four Rwandans, including two Catholic Hutu nuns, of complicity in the murder of 7000 Tutsis seeking refuge in their monastery. The *Economist* noted that “this was the first time that a jury of citizens from one country had judged defendants for war crimes committed in another.” *Judging Genocide*, ECONOMIST, June 16, 2001, LEXIS, Nexis Library, Economist File. The jurisdiction of the Belgian court was based on Article 7 of the Law of June 16, 1993, granting Belgian courts jurisdiction over genocide as defined in the Genocide Convention regardless of where the offense occurred or by whom or against whom the offense is committed. The statute was amended on February 10, 1999. Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Civil Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 HARV. INT’L L.J. 141, 145 (2001).

Hutus and the Tutsis are not national, not racial, and not religious, and no one has proposed a definition of ethnic differences that would cover their historical socioeconomic differences.¹¹² Yet neither the United Nations nor the international community at large has had qualms about applying the crime of genocide to the Hutus' persecution of their rival group.

The reason that the international community can respond so clearly to collective persecution in Rwanda is that the motivating force behind the law is not the letter of the 1948 treaty defining genocide but a historical paradigm of killing in order to eliminate a *genos*¹¹³ from the human species. The crime obviously has its roots in Auschwitz and the Holocaust. The author who coined the term in 1944, Raphaël Lemkin, emphasized the "nation" and its culture as the interests protected by the prosecution of "genos-cide" as a distinctive crime.¹¹⁴ The great evil of killing off a nation, he argued, was not simply the murder of large numbers of people but the resulting "loss of its future contributions to the world."¹¹⁵ Lemkin's words recall the Romantic conception of nationhood and the role of meaning in national self-expression in language, literature, and law.

I have shown, I believe, that the international crimes within the jurisdiction of the proposed International Criminal Court are collective in nature. Crimes of aggression, war crimes, crimes against humanity, and genocide are the consequence of embattled and violent hostility expressed by one group of people against another. Individuals act, but at the same time the nation or collective acts and expresses itself in the action. True, we hold individuals accountable for these crimes, but the formal structure of liability should not camouflage the collective heart of the evil they perpetuate. They are liable because they are members of the hostile groups that engage in unlawful aggression, commit "widespread or systematic" cruelty, and perpetuate harms with a design to eliminate opposing cultures. They are not like criminals and victims as we know them in the domestic scene, criminals who assert themselves and victims who are harmed as individuals.

The relationship of Romantic thought to the belief in collective action is surely not a simple equation of cause and effect. The idea of collective action predates, by far, the literary and artistic period we label Romantic. The notion of the collective, as we shall see later in the argument, has roots in Greek and biblical thought. My point is to demonstrate that our conventional, liberal, individualistic ways of thinking about criminal

112. See *Developments in the Law—International Criminal Law*, 114 HARV. L. REV. 1943, 2020 (2001).

113. "Genos" is a Greek word meaning "race or tribe." RAPHAËL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* 79 (1944).

114. *Id.*

115. *Id.* at 91.

liability simply do not account for the sentiments that actually shape the operative contours of international criminal law. The mind of the law may speak in the language of liberal individualism, but its heart lies in the disfavored ideas of collective action and collective guilt. The mind of the Romantic is with us, even if her voice is muted and too often scorned.

III. THE GUILT OF NATIONS

A. *From Collective Action to Collective Guilt*

We have concluded, without too much difficulty, that in the field of international criminal law, individuals act as agents of their states or nations. The next stage of the argument is more difficult. How do we reason from the idea of collective action to the stigma of collective guilt? I offer the argument in two stages, first to show that collective guilt by some groups is a plausible conclusion and then to show that the nation as an entity may be said to bear collective guilt. The first stage addresses collective action in general, whether it occurs in families, clubs, corporations, or armies. This stage of the argument, as presented in this Section, devolves into three parts: (1) finding collective action, (2) inferring collective crimes from collective action, (3) imposing collective guilt for collective crimes. The second stage of the argument, presented in Section III.B, responds to a distinct challenge, namely explaining why among all the possible agents of guilt, the nation warrants a special place in the pantheon of collective actors. Concluding that nations can be guilty will require that we bring to bear all of our prior reflections on liberals and Romantics at war.

Before turning to the details of moving through these distinct stages, we should note that nothing in the argument requires a discussion of *feeling guilty*. The notion of guilt employed here is the state of being guilty, the objective fact of being guilty. Of course, people do feel guilty, but their feelings are neither necessary nor sufficient for the conclusion that they are guilty. They might feel neurotic guilt for receiving benefits they think they do not deserve, and, conversely, they might well be guilty for crimes and sins they have committed without having any feelings on the matter at all. The connection between feeling guilty and being guilty becomes more problematic as we move the analysis from individual to collective guilt. To illustrate the problem I want to invoke a literary example.

In his recent novel, *The Human Stain*, Philip Roth provides us with a rich study in collective action and collective guilt.¹¹⁶ Coleman Silk, a high-ranking professor and dean at Athena College, refers to two persistently

116. PHILIP ROTH, *THE HUMAN STAIN* (2000).

absent students as “spooks.” Unbeknownst to him, the missing students are African Americans. The remark takes on racial overtones, and it is widely publicized as a bigoted reference to blacks. The entire campus turns against Silk, drives him out of his job, and continues to haunt him with charges of sexual exploitation for dating a woman much younger than himself. His death in an automobile accident breaks the mood of hostility and causes people to reconsider their knee-jerk responses. At his funeral service, a black professor named Herb Keble, Silk’s first hire at the university, takes the podium and confesses his cowardice in failing to defend Silk. His language is important: “I stand before you to censure myself for having failed my friend and patron, and to do what I can . . . to begin to attempt to right the wrong, the grievous, the contemptible wrong, that was done to him by Athena College.”¹¹⁷

Keble confesses not only his personal guilt but also the collective guilt of the entire community. He discovers something about himself—that he was cowardly and disloyal toward a friend—and he feels guilty. But he also senses that everyone around him shares the same weakness of character. He adds that the mistreatment of Silk “remains a blight on the integrity of this institution to this day.”¹¹⁸ He points the finger at them at the same time that he indicts himself.

The liberal response to this argument is that Keble is only accusing other individuals of complicity in his wrongdoing, but in fact he is doing more than that. He claims that the whole college community is guilty. They provided reciprocal emotional support for their persecution of Silk; they acted as a group in the sense that their intentions, attitudes, and actions were all self-consciously interdependent. The group consciousness deprives them of their ordinary capacities for compassion. If each of them stood in a one-to-one personal relationship with Silk, it is less likely that they would have been hostile toward him for an understandable mischoice of word. But if these individuals separated from the influence of the group did take offense, they would likely seek clarification not by talking to other members but by entering in a direct conversation with Silk, a step that would have easily corrected the misimpression.

To say that the entire college is guilty is not to suppose that there is a separate being someplace called “The College” and that this being feels guilty. It is rather to trade implicitly on a well-established philosophical argument about collective intentions and collective actions. As John Searle argues about intentions, we can—in a reciprocal understanding of what we are doing—share a collective intention.¹¹⁹ We might have this form of “we-

117. *Id.* at 309.

118. *Id.* at 310.

119. JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 23-26 (1995).

intention” in taking a walk together, playing in a quartet, or sitting in the legislature and passing a law. If we can have the consciousness of acting and intending as a group, we can surely tender feelings as a group. These feelings might be hostility, contempt, or, as in Herb Keble’s example, feelings of guilt for a wrong that we committed together.

Collective guilt of the college might have been possible, but Keble did not establish it by generalizing from his own feelings. His argument trades on a confusion between feeling guilty and being guilty. The steps in the inference go like this:

- (1) I feel guilty;
- (2) Therefore I am guilty.
- (3) The rest of the college has the same reason to feel guilty as I do;
- (4) Therefore, the whole college is guilty.

The giant hole in the argument arises from his assumption that the others feel the way he does and that he can make the same weak inference from their feelings to their state of guilt.

The better argument for Athena’s guilt would follow the arguments for collective guilt that I have laid out. There is little doubt that the college acted collectively in shunning Silk. Each member of the college did it with knowledge that they were acting together. It was not the case that each said to himself, “I will do this, and others will do it too.” They thought in the manner of “we-intentions”: “We will do this together.” Now to say that the college acted does not require that every single person was aware of what was going on. There might have been someone holed up in the library who never heard of the affair, but the few holdouts do not diminish the collective nature of the college’s action. The fans can cheer collectively even if there is a dissenter sitting in the audience with his hands over his ears. The important point is that the college acted as a body with a sense of shared identity among the participants. They all thought implicitly: “If you are one of us, you will treat Silk in the way we do.” That is, the college acted not just with an aggregative will but with an associative will that expressed its identity at that moment in time.

Taking the step from collective action to collective wrongdoing is not so demanding. The action toward Silk was wrong. It was intolerant, an expression of self-righteous political correctness. They did not give him a fair chance to explain himself. This happens all the time in the groups in which we live. Intolerant collectives turn against their perceived deviants and haunt them to the point of misery.

To take the step from collective wrongdoing to collective guilt, we need a theory of culpability, some ground for saying that the members of Athena College bore more than just responsibility for having done the act. The ground of culpability would be negligence. Each member of the community could have corrected his biased judgment about Silk but did not. They were willing to run the risk of error when it would have been easy to sit down with Silk, talk to him, and revise their judgment.

The case of Silk at Athena College illuminates the general problem of collective guilt; other cases—say, of German hatred for Jews—entail the same kind of group and conformist behavior in situations in which self-correction would not normally be difficult. Athena typifies the “banality of evil” made famous by Hannah Arendt’s treatment of Eichmann in Jerusalem.¹²⁰ The group members follow each other like sheep until something happens to shock them into awareness of their wrongdoing. But at any moment they could have turned to each other and said, “Let’s think about what we are doing here.” They had the capacity all along to understand their brutality and intolerance, but they could not bring themselves to see it. This is the paradigmatic case of being guilty but not feeling guilty until the finality of death awakens the normal human capacity for empathy.

B. *From Collective Guilt to the Guilt of Nations*

To make the transition from the guilt of small groups like colleges to the guilt of nations, we need a different methodology. There must be some way to single out the nation as the primary bearer of the guilt for actions committed by subgroups within it—groups like the army, a dominant political party, or a social movement that, like the intolerant members of the Athena community, allow themselves to descend into collective sin or criminality.

The problem is essentially one of attribution. Imagine a large circle with several small circles within it. Within each of the small circles there are several *x*’s representing individuals. There are some *x*’s standing apart from the small circles, encompassed solely by the large circle.

The small circles stand for subgroups within the society: families, colleges, professional organizations, clubs, armies, units within the armies, and the like. The large circle stands for the nation defined historically by its language, sometimes by its religion, often by its historical struggle for survival and independence. Some *x*’s within one of the smaller circles, call it the army, commit some great wrong but with the knowledge and spiritual

120. HANNAH ARENDT, *EICHMANN IN JERUSALEM* 135-39 (1963) (discussing the “little man’s mentality” and perversion of Kantian morality in Eichmann’s thinking).

support, to varying degrees, of everyone in the nation, defined by the outer circle. The problem is attributing the guilt for this action. Should the target of the attribution be the smaller circle, namely the army, or the larger circle, the nation?

As Hannah Arendt points out in her essay on German guilt, the problem of attributing collective guilt takes on political overtones.¹²¹ After the collapse of Nazi Germany, the problem was whether the Nazi Party would bear the guilt for its atrocities, or whether it could diffuse its guilt by transferring it to the entire nation. Karl Jaspers entered the debate on this question with one of the most penetrating articles ever written on the subject of collective guilt. I discuss Jaspers's article in detail in an effort to clarify the problem of whether the nation is a fit subject for bearing the guilt of its members.

Jaspers wrote *The Question of German Guilt* immediately after the war, when there was a widespread tendency to regard the Germans as collectively guilty for starting the war and for the mass murder of Jews, Poles, and Gypsies.¹²² There was considerable talk about collective punishment in the form of permanent limitations on the future development of German society.¹²³ Surprisingly, Jaspers comes out in favor of collective guilt but opposed to the idea of German guilt as an instantiation of the idea. To reach this conclusion, he situates the problem in a larger framework of four kinds of guilt: criminal, moral, political, and metaphysical.¹²⁴

Criminal guilt is the most familiar embodiment of the concept. There seem to be close associations between crime and guilt, on the one hand, and between guilt and punishment, on the other. The term for guilt across Western languages (*culpabilité*, *Schuld*, *vina*, *bünösség*, *ashma*)¹²⁵ is used uniquely in criminal law. We are familiar with the common-law institutions of guilty pleas and guilty verdicts. The notion of innocence as expressed in the presumption of innocence is closely tied to the same concept. It is not exactly on point to say that someone who does not commit a tort or does not breach a contract is "innocent." The term is part of a complex of ideas, including guilt and punishment, framed by the criminal law.

Moral guilt may coincide with criminal guilt, but it need not do so. As Jaspers uses the term, the realm of morality focuses our attention on the inner quality of the deed, but not in the way we are accustomed to think

121. Hannah Arendt, *Organized Guilt and Universal Responsibility*, in COLLECTIVE RESPONSIBILITY 273 (Larry May & Stacey Hoffman eds., 1991).

122. JASPERS, *supra* note 38.

123. Walter Russell Mead, *In the Long Run: Keynes and the Legacy of British Liberalism*, FOREIGN AFF., Jan.-Feb. 2002, at 199, 203 (referring to "the notorious Morgenthau Plan, which would have reduced postwar Germany to a pastoral economy").

124. JASPERS, *supra* note 38, at 32-33.

125. These are terms, respectively, in French, German, Russian, Hungarian, and Hebrew. The latter term has a rich history, which I take up in Section VII.A.

today.¹²⁶ Jaspers would say that those who act under duress or personal necessity—namely those who may be morally and legally excused in the conventional understanding of those terms—are still morally guilty if they could have avoided the act. Thus Dudley and Stephens—the famous sailors shipwrecked at sea who consumed a cabin boy to survive¹²⁷—made themselves morally guilty, even though many commentators today would say that they should have been excused under the law.¹²⁸ No one blames them for submitting to overwhelming pressure, but they could have exercised heroic capacities to abstain from cannibalism and risk death by starvation. Their failure to do so was enough for them to be morally guilty. The court found them legally guilty and sentenced them to death, and then the Crown commuted the sentence to six months in prison.¹²⁹

Both political and metaphysical guilt are beyond the moral category of the avoidable. They attach even in cases of living under dictatorships where it is not humanly possible to avoid the inhuman actions of those in charge. Political guilt is borne by each person in a political community merely by virtue of being there and being governed. As Jaspers puts it in a disarming sentence: *Es ist jedes Menschen Mitverantwortung wie er regiert wird.* (“Everybody is co-responsible for the way he is governed.”)¹³⁰ According to this view, the citizens of Stalinist Russia and fascist Germany were politically responsible for the actions of their leaders. They were co-responsible, along with the dictatorial parties, for their political life. It is not clear whether this shared responsibility derives from the unrealized ability to overthrow the dictator or whether it follows simply from the fact that, as Jaspers put it, this is the political realm in which *ich mein Dasein habe* (“my existence is lived out”).¹³¹ On the latter theory, political guilt derives from identification with the society and being there at that time.

The argument for political guilt based on personal history resembles Freud’s account of why we bear responsibility for the evil impulses of our dreams: “Unless the content of the dream . . . is inspired by alien spirits, it is part of my own being.”¹³² For the sake of effective therapy, we must accept our dreams as our own. The argument appeals to our desire for coherence and authenticity of our personalities. The same demands of consistency require us to recognize that we are part of the culture that has

126. JASPERS, *supra* note 38, at 63.

127. *The Queen v. Dudley & Stephens*, 14 Q.B.D. 273 (1884).

128. *E.g.*, PAUL ROBINSON, 1 CRIMINAL LAW DEFENSES 125 (1984); Joshua Dressler, *Exegesis on the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1374-75 (1989).

129. *Dudley & Stephens*, 14 Q.B.D. at 288 n.17.

130. JASPERS, *supra* note 38, at 31.

131. *Id.* The translation in the text is my own; Ashton prefers “under whose order I live.”

132. SIGMUND FREUD, SOME ADDITIONAL NOTES ON DREAM INTERPRETATION AS A WHOLE (1925), *reprinted in* 19 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 127, 133 (James Strachey ed. & trans., 1961).

nourished us. The theme of alienage runs throughout both Freud and Jaspers. We should not treat our dreams as alien to us, and we should not be aliens in our own land. This is the best way to understand Jaspers's claim that we accept co-responsibility for the way we are governed.

Jaspers thinks of metaphysical guilt as arising from solidarity with other human beings. The failure to rescue even with no prospect of success generates this form of existential guilt. As Jaspers describes the German situation, "We did not go into the streets when our Jewish friends were led away; we did not scream until we too were destroyed. . . . We are guilty of being alive."¹³³ Metaphysical guilt goes beyond all other forms of guilt. As Jaspers argues, "Someplace between human beings there is room for the unconditional proposition that either we live together or we do not live at all."¹³⁴

These propositions bring to mind a Talmudic analysis of sacrificing one to save many.¹³⁵ As the case is put, a Jewish caravan is surrounded by an enemy force. The enemy says, "Give us one of you as a hostage, or we kill everyone in the caravan." The rabbis concluded that the duty of the members of the caravan under these circumstances is to die together rather than arbitrarily to identify one of their number as a hostage.¹³⁶ This example illustrates Jaspers's point that there are some situations in which the solidarity of human beings requires them to endure the same fate. Suppose the travelers remain passive as the enemy troops approach the caravan and arbitrarily pick a hostage. If they resist, they will all be killed. But failing to resist, failing to die, they become, as Jaspers claims, metaphysically guilty for the death of their compatriot.

The problem is where the duty of solidarity stops. Claims of metaphysical guilt are presumably limited to a particular cultural situation and therefore stop short of the universal guilt advocated by Father Zosima in *The Brothers Karamazov*.¹³⁷ If everyone is guilty for everything, then everyone is also innocent. This distinction loses its bite.

These arguments for political and metaphysical guilt offer a qualified defense of collective guilt. Jaspers defends the idea that some groups can be

133. JASPERS, *supra* note 38, at 72.

134. *Id.* at 32. The translation is again my own; Ashton writes, "[S]omewhere among men the unconditioned prevails—the capacity to live only together or not at all."

135. JERUSALEM TALMUD, TRACTATE TERUMOT 8:4. According to the analysis in this passage, if the aggressor names a particular suspect and threatens to kill the travelers if he is not turned over, it is permissible to surrender him to save the caravan. The assumption is that if the authorities name a suspect, they have reasonable grounds to believe that he is guilty of some wrongdoing. Also, if the suspect is named, the guilt of choosing the victim does not fall upon the caravan.

136. See generally DAVID DAUBE, COLLABORATION WITH TYRANNY IN RABBINIC LAW (1965).

137. FYODOR DOSTOEVSKY, THE BROTHERS KARAMAZOV (Richard Pevear & Larissa Volokhonsky trans., North Point Press 1990) (1880).

charged with political or metaphysical guilt, but he takes a strong stand against the idea that nations as such can bear guilt of this sort. He denies the guilt of the German people (as opposed to Hitler and his party) for the war and the Holocaust on the ground that the German nation has no clear contours. There is no way of knowing who is included and who is not, who is at the core of the nation and who is at the periphery. He does not deny that some people possess more or less of certain national characteristics, but nationality is a scalar—not a categorical—concept. It is not like being male or female, but more like being tall or short. You can have more or less Germanness in your sense of identity, but there is no fixed level in this variable identification that defines someone as a German in his heart. There are many different Germans; no single identity can be reduced to a composite German. As he writes, “An entire nation [*Volk*] cannot be reduced to a single individual. A nation cannot suffer heroic tragedy. It cannot be a criminal; it cannot act morally or immorally. Only individuals in the nation can do these things.”¹³⁸

The clincher in Jaspers’s rejection of German guilt is his reliance on anti-Semitism as the paradigmatic charge of collective guilt. It is irrational, he claims, to hold Jews liable in eternity because 2000 years ago a specific set of Jews in Jerusalem collaborated with the Romans in crucifying a man who later was called the Messiah. There is no doubt that anti-Semitism had its roots, in part, in centuries of calumny against Jews as “Christ-killers.” If we now understand this kind of undifferentiated indictment of a nation as irrational and bigoted, he argues, we should not repeat the mistake by charging all Germans with the crime of the Holocaust.

Rhetorically and logically, Jaspers’s point compels our attention. To ascribe irreducible, associative national guilt to the Germans is to repeat the intellectual indecency of anti-Semitism. Implicit in the charge, however, is an assumption that national guilt is necessarily passed by birth to the next generation. Might it not be possible, however, to think of all compatriots living in Germany at the time of the Nazis as collectively guilty, but of Germans born after the war as free from the taint?

Might it be possible to develop a strong sense of the nation in the here and now without drawing the conclusion that the nation’s guilt is passed to the next generation? There will be more about that question later,¹³⁹ but for now the primary challenge is to address Jaspers’s claim that the nation has no clear contours, cannot be an actor in history, and thus cannot be guilty.

We have to ask ourselves what in our social and political lives makes the nation take on reality as an entity with a life of its own. This is the

138. JASPERS, *supra* note 38, at 41. The translation in the text is my own. Ashton prefers: “One cannot make an individual out of a people. A people cannot perish heroically, cannot be criminal, cannot act morally or immorally; only its individuals can do so.”

139. *Infra* Section V.A.

conception of the nation that one finds in Romantic writers from Wordsworth¹⁴⁰ to Herder.¹⁴¹ What could make it appeal to us today?

The solidarity of the nation appears particularly strong in the face of an attack—at the time of suffering. Witness the language used to describe the September 11 attack. The victims were not the government, not the culture, not just the people, but the American *nation*. The *New York Times* started running a daily supplement entitled *A Nation Challenged*. By using this term, the media mean to say that something more is at risk than our tall buildings, the security of our borders, or even our population. The nation is attacked, and that means that everything is at risk: the collective American experiment, the future, and the unique vision of democracy and freedom.

The same idiom presented itself to Abraham Lincoln in November 1863: The *nation* was at war testing whether this *nation* or any *nation* conceived in liberty and dedicated to equality could long endure.¹⁴² The concept of the nation enabled Lincoln to transcend the particularities of North and South. As he recognized in his Second Inaugural Address a year and a half later, “Both [sides] read the same Bible and pray[ed] to the same God,”¹⁴³ and both were part of the nation that suffered for the offense of slavery. God gave “to both North and South this terrible war as the woe due to those by whom the offense came.”¹⁴⁴ The entire nation suffered for its offense in founding a republic on the basis of slavery.

The contours of the nation become high-profile—they stand out relative to subgroups like religions, political parties, and other organizations—when, because of their historical situation, people become particularly conscious of their language, their historical legacy, and their belonging to a particular experiment in culture and government. The sense of the nation as an actor in history differs from culture to culture. Since the Civil War, Americans have experienced a strong sense of the nation as the bearer of the American commitment to liberty and equality. The French have long had a heightened consciousness of their nation in history, as evidenced today by a remarkable quotation from Charles de Gaulle found on a monument near the Champs Elysées in Paris: “There has been a pact for the last twenty centuries between the grandeur of France and the liberty of the world.”¹⁴⁵

140. WORDSWORTH, *supra* note 44.

141. Herder, *supra* note 25.

142. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), in LOIS J. EINHORN, ABRAHAM LINCOLN THE ORATOR 177, 177 (1992).

143. Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in EINHORN, *supra* note 142, at 179, 180.

144. *Id.*

145. De Gaulle made the statement in London on March 1, 1941. CHARLES DE GAULLE, DISCOURS ET MESSAGES PENDANT LA GUERRE: JUIN 1940-JANVIER 1946, at 73 (M. François Goguel ed., Berger-Levrault 1946) (author’s translation).

Germany, by contrast, has undergone a relatively complicated transformation in its sense of itself as an actor in history. This is evident in the peculiar German position on the crime of treason. In virtually all countries of the world, only people connected to the nation can commit the crime of treason. Only those who are nourished by the nation, whose identity is cast together with the nation, owe a duty of loyalty to the nation.¹⁴⁶ Not in Germany. Today anyone can commit the crime of treason against the Federal Republic.¹⁴⁷ When the Criminal Code was enacted in 1871, the crime conformed to the pattern elsewhere, with the requirement that the perpetrator be German.¹⁴⁸ It is tempting to infer from this legal particularity that the postwar Germans, seared by fascism, amended their law of treason to abolish the relevance of nationality in committing the crime. But this is not true. Hitler changed the law in 1934.¹⁴⁹ In his megalomania, Hitler thought that the entire world was duty-bound to respect his regime.¹⁵⁰ Anyone in the world who betrayed the Führer was guilty of treason.¹⁵¹ Beginning in the Third Reich, Germans expressed a

146. Virtually all European codes condition the crime of treason on a requirement of citizenship. *E.g.*, CODE PÉNAL art. 113 (Belg.) (“*Tout Belge qui aura porté les armes contra la Belgique sera puni de mort*” (“Every Belgian who carries arms against Belgium will be punished by death.”)); C.P. art. 242 (Italy) (“*Il cittadino che porta le armi contro lo Stato . . . è punito con l’ergastolo*” (“A citizen who carries arms against the Italian state . . . is punished by life imprisonment.”)); UGOLOVNIYI KODEKS RF [UK RF] art. 275 (Russ.) (establishing a maximum punishment of twenty years in prison for citizens engaging in activities harmful to the external security of the Russian Federation).

147. § 81 StGB (applying the crime of treason to “whoever undertakes”).

148. The original German Penal Code of 1871 distinguished between *Hochverrat* (high treason), which consisted in the murder or attempted murder of the Kaiser, and *Landesverrat* (state treason), which was committed by sympathizing with a foreign power and inducing the foreign power to wage war against Germany. It is not clear whether anyone could commit high treason, but only Germans could commit state treason. *See* STRAFGESETZBUCH FÜR DAS DEUTSCHE REICH § 80 (Hans Rüdorff ed., Berlin, J. Guttentag 1890) (high treason); *id.* § 87 (state treason by sympathizing with the enemy); *id.* § 88 (state treason by taking up arms against Germany). The term *Landesverrat* is now used to refer to acts of espionage—giving state secrets to a foreign power. It can be committed by anyone. § 94 StGB. But note that German legislation has introduced an offense, not called treason, that applies only to Germans. § 100 StGB (punishing relationships endangering the peace).

149. The relevant changes occurred in the Gesetz zur Änderung von Vorschriften des Strafrechts und des Strafverfahrens [Statute for the Amendment of Provisions of Criminal Law and Procedure] v. 2.5.1934 (RGBl. I S.341), *reprinted in* DIE STRAFGESETZGEBUNG DER JAHRE 1931 BIS 1935 [LEGISLATION FOR THE YEARS 1931-1935] (Ernst Schäfer & Hans V. Dohanyi eds., 1936).

150. The 1934 legislation employs a revealing turn of phrase that would be surprising if found in contemporary definitions of treason. Section 81 of the 1934 statute, STRAFGESETZBUCH FÜR DAS DEUTSCHE REICH, *supra* note 148, § 81, describes the act of treason as “robbing the President or Chancellor, the Reich or another member of the government of the Reich of his constitutional power” (“*Wer es unternimmt, den Reichspräsidenten oder den Reichskanzler oder ein anderes Mitglied der Reichsregierung seiner verfassungsmässigen Gewalt zu berauben*”). The National Socialists were so convinced of their rectitude that anyone who sought to undermine their authority was “robbing” them of something that was rightfully theirs.

151. Nazi theorists had an obsession with the phenomenon of betrayal. For the most interesting article on point, see Georg Dahm, *Verrat und Verbrechen [Treason and Felony]*, 95 ZEITSCHRIFT FÜR DIE GESAMTE STAATSRICHTSWISSENSCHAFT 283 (1935).

peculiar kind of internationalism focused on themselves. This was an unusual form of racism. The Nazis thought of themselves as creating a new world order with their race at the center.

It is difficult to know whether Jaspers's skepticism about the contours of German nationality reveals the traces of Nazi political theory. The more important question is whether his view of the nation as a potential agent is conceptually and historically correct. The claim that boundaries of Germanness are too diffuse to circumscribe the relevant agent seems to me false. At least as far as present-day Germany is concerned, there seems to be no doubt over who belongs and who does not. Germany is in fact one of the few countries of the world that—like Israel—maintain a law of return for their nationals born abroad. Any German from the East is entitled to immigrate to Germany and acquire citizenship immediately.¹⁵² Also, the Basic Law (Constitution) refers in several places to Germans and their rights and duties;¹⁵³ the reference is not to German citizens but to German nationals.¹⁵⁴

My conclusion, then, is that Jaspers's rejection of collective guilt in the nation is too hasty. But there are many more issues to explore before we say, definitively, that we agree or disagree with his position.

The fact is that in well-recognized institutions of law and politics, the notions of collective responsibility and collective guilt remain vital instruments of lawmaking. In at least two familiar contexts, the notions of collective responsibility—and perhaps guilt—seem to be unproblematic. The first is the notion of collective debt or disability deriving from the behavior of past generations. There are many details and complexities in the debate about compensating aborigines for expropriated lands or about compensating the descendants of slaves.¹⁵⁵ There are problems identifying the heirs of both the perpetrators and the victims. And there is an ongoing debate about returning the lands now used by others as a means of providing monetary restitution. But the collective inheritance of the debt is no more problematic than the principle of state succession in international

152. According to the latest amendment to the German citizenship law, all German nationals defined as Germans under Article 116(1) of the German Constitution on August 1, 1999, automatically become German citizens. See Gesetz zur Reform des Staatsangehörigkeitsrechts [Statute for the Reform of the Law of Citizenship], v. 15.7.1999 (BGB1. I S.1618) (codified at § 40a STAATSANGEHÖRIGKEITSGESETZ [StAG]).

153. E.g., GRUNDGESETZ [GG] [Constitution] art. 8 (granting all “Germans” the right peaceably to assemble); *id.* art. 12 (granting all “Germans” the right freely to choose their profession and their place of work); *id.* art. 20(4) (granting all “Germans” the right to resist efforts to undermine the Basic Law).

154. *Id.* art. 116(1) (defining “German” to include not only citizens but also German ethnic nationals—or their wives or descendants—permitted to reside in the territory of the German Reich as defined at the end of 1937).

155. See the pathbreaking decision in *Mabo v. Queensland* (1992) 107 A.L.R. 1 (Austl.), in which the High Court of Australia recognized that the Meriam people retained rights to certain lands in the Murray Islands.

law. If the states are responsible for the debts incurred by prior regimes, then the same principles apply to alleged duties to make compensation for past acts of wrongdoing.¹⁵⁶

More difficult issues arise in thinking about inherited disabilities. A good example is Article Nine of the Japanese Constitution, which states that the “Japanese People forever renounce war as a sovereign right of the nation” and prohibits the Japanese from maintaining “land, sea, and air forces.”¹⁵⁷ In practice, this provision is interpreted to permit a small force for purposes of self-defense. But the self-inflicted mark of Cain is inescapable. From now until eternity, the Japanese bear a disability not recognized, as far as I know, in the constitution of any other country. The current generation may feel no guilt at all, but surely General MacArthur had guilt in mind when he imposed that provision in the Japanese Constitution. Entrenching disabilities of this sort in a constitution seems to say to the world: “There is a bad seed here in this nation, and it is planted from generation to generation.” The irony of the Japanese situation is that apart from this provision in their constitution, the Japanese have had difficulty recognizing guilt for their behavior in World War II. Until recently, they resisted apologizing appropriately to the Chinese or Koreans.¹⁵⁸ Their military self-restraint stands out as a recognition of wartime guilt.

In these contexts at least, it is plausible, *pace* Jaspers, to think of the nation as the entity that bears collective guilt for the crimes of its subjects and citizens. It does not follow that subgroups are not also guilty, but if some collective entities are guilty, then the nation is among them.

IV. THE DISTRIBUTION OF GUILT: AN ARGUMENT FOR MITIGATION

The overall tendency in the discussion of collective guilt is to assume that the idea should be likened to repressive measures against people whom liberals would regard as innocent because they in fact did nothing. The great challenge in the area is to develop a humanistic approach to collective guilt that would lead to mitigation of punishment for those whom liberals would regard as guilty rather than to the sanctioning of those treated as innocent bystanders. The way to do this is to think about the distribution of

156. Compensation for prior racial discrimination raises special problems of the continuity of the debtor and creditor classes. *See* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (arguing that under the Constitution races cannot incur collective rights or debts).

157. KENPŌ [Constitution] art. 9 (Japan).

158. In October 2001, Japanese Prime Minister Junichiro Koizumi offered a public apology to Korea for Japan’s past policies. Valerie Reitman, *Japanese Premier Lectured and Yelled At in South Korea*, L.A. TIMES, Oct. 16, 2001, at A14.

guilt between the individual perpetrator and the nation in whose name he or she acts.

The notion of distributing responsibility is familiar to us in the law of comparative negligence. When two or more people contribute causally to the occurrence of a harm, each should pay according to the degree of causal contribution.¹⁵⁹ A similar idea underlay the law of provocation in the common law of homicide. The crime was reduced from murder to manslaughter if it was thought that the victim contributed to his or her own demise. This principle was reflected in the cases that required the provocative influence to come from the victim and not from a third party.¹⁶⁰ That is, originally, provocation was thought to be a partial justification: The causal input of the victim reduced the wrongdoing attributable to the defendant. Admittedly, today the doctrine of provocation functions as a partial excuse based on the relative incapacity of the person suffering "extreme mental or emotional disturbance."¹⁶¹ The important lesson to be drawn from comparative negligence and from the history of provocation is that it is possible to distribute guilt among the parties to a criminal transaction.

A famous case in Germany, decided before the new code was enacted in 1975, illustrates the same point in a way that is directly relevant to our exploration of collective guilt as a theory of mitigation. The KGB ordered an agent named Stashchinsky to commit assassinations in Germany.¹⁶² At his trial for murder, Stashchinsky claimed that he was merely the servant of the KGB, that it was the dominant party in the relationship. Therefore, even though the KGB was not before the court, it should be regarded as the principal, and he, Stashchinsky, should be treated as an accessory receiving a lesser punishment. It was an ingenious argument drawing on precedents in German law. The Supreme Court of Germany agreed. The result would be different under the common law¹⁶³ and under the new German code,¹⁶⁴ but

159. *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1243 (Cal. 1975). Admittedly there is some controversy about whether comparative negligence implies comparative personal culpability or comparative causation. The German code is explicitly grounded in comparative causation. § 254 BÜRGERLICHES GESETZBUCH [BGB] (establishing that liability for negligence depends "on the extent to which one party or the other caused the damage").

160. *White v. State*, 72 S.W. 173 (Tex. Crim. App. 1902); *Rex v. Simpson*, 84 L.J.K.B. 1893 (Eng. Crim. App. 1915). For analysis of these old cases, see GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 245-46 (1978).

161. MODEL PENAL CODE § 210.3(1)(b) (1985).

162. *Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt]* [Supreme Court] 18, 87.

163. For a discussion of parity of punishment for principals and accessories in common-law jurisdictions, see GEORGE P. FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* 190-94 (1998).

164. § 25(1) StGB. This provision, enacted to reverse the principle of the Stashchinsky case, now reads: "The person who actually commits the deed himself or through another is punished as a principal." *Id.* (author's translation).

the Stashchinsky case still represents a sound way of thinking about sentencing based on the relative participation and guilt of the parties.

The premise underlying this approach is that guilt must be measured and distributed in relative degrees of participation. This is true, in particular, when all the parties act intentionally and maliciously, and there is therefore no basis for distributing responsibility on the basis of *mens rea*. The criterion is not subjective but objective: The dominant or hegemonic party warrants more blame and punishment than the subservient party.

Now let us consider the prosecution of Adolf Eichmann in Jerusalem and the question of whether he should have been considered so guilty that he deserved the death penalty. I am very much drawn to the idea that the guilt of the German nation as a whole should mitigate the guilt of particular criminals like Eichmann, who is guilty to be sure, but guilty like so many others of a collective crime. Applying the Stashchinsky principle provides a way of recognizing that in cases of genocide and other collective offenses, there are in fact two perpetrators—the individual and the nation. Considering the guilt of the nation in the sentencing process would provide a concrete and practical way to recognize collective guilt in criminal trials. Recognizing the mitigating effect of the nation's guilt would mitigate the responsibility of the offender, though perhaps in many cases this guilt would remain sufficiently grave to justify severe punishment.

If we assume for the moment that the German nation is guilty for the Holocaust, the question is whether this guilt stands in the same relationship to Eichmann's guilt as does the responsibility of the KGB commanders to Stashchinsky. There are some problems in drawing this analogy. The German nation acted through Eichmann as well as through other agents of the Final Solution. But the relationship was not causal. While the KGB commanders were complicitous, indeed the dominant party in Stashchinsky's killings, the German nation is not complicitous in Eichmann's crimes in quite the same way. This point requires some explanation.

A relationship of complicity requires interaction between two completely independent parties. We have to be able to think of the KGB, as expressed presumably in the actions of its commanders, as distinct and separate from the behavior of Stashchinsky. If this is the case, then the KGB can become the dominant party in the relationship, and Stashchinsky can become the dependent accessory. The relationship between the German nation and Eichmann does not fall into the categories of domination and subordination. The relationship is more like that between a five-person improvisational jazz group and its drummer. The group expresses itself through the drummer as well as through other individual musicians, but the collective entity of jazz musicians does not cause the drummer to play. Nor

would it be correct to say the group, improvising as it does, dominates its members or is complicitous in their playing.

In order to see the problem of distributing guilt between Eichmann and the German nation more clearly, I must invoke the distinction explained in the beginning between guilt in the associative sense and guilt in the aggregative sense. Associative guilt attaches to a nation and not to its members. Aggregative guilt implies that the guilt of the nation consists of the sum-total guilt of the individuals who constitute it. In order for the nation to bear a portion of the guilt and thus to relieve Eichmann of part of his guilt, we must think of this guilt not as an aggregation but as an irreducible, associative guilt of the nation. The guilt must adhere to the nation as such and not to the individual members. If national guilt were simply an aggregation of the guilt of individuals, then for the purposes of sentencing a particular offender like Eichmann, the guilt of the nation would be either tautological or irrelevant. It would be tautological to claim that Eichmann should be punished less because his own guilt, projected onto the nation, provided a basis for mitigating his crime. It would be irrelevant to invoke the guilt of other SS agents who engaged in the systematic killing of Jews, for though their guilt might be part of an aggregated German guilt, their role would have nothing to do with blaming and punishing Eichmann. In order to make the claim, then, that German guilt should mitigate Eichmann's guilt, we have to think of the nation and its guilt in a fully robust Romantic sense. We must regard the nation as an independent agent capable of its own wrongdoing and its own irreducible guilt for wrongdoing.

We confront two basic problems. The first is how we can imagine a noncausal basis for mitigating the guilt of an individual wrongdoer like Eichmann. The second, related problem is how a factor of associative guilt could relate to an individual in a way that could plausibly mitigate his guilt. Our causal arguments, based on the examples of comparative negligence, provocation, and Stashchinsky, are of no avail. If the aim of distributing guilt between the nation and the individual is to be achieved, we have to look elsewhere and find an argument that does not depend on a causal nexus between the nation and the individual who chooses to do evil.

I think there is an argument. But in order to develop the claim, I must engage in a slight detour to explain the reasons for regarding individuals as culpable or guilty for their crimes. The conventional view is that individuals are culpable because they engage in unlawful action with the mens rea required by the definition of the offense. That is, as the particular statute requires, they purposely, knowingly, recklessly, or negligently engage in conduct that satisfies the elements of the offense.¹⁶⁵ This is true as far as it

165. MODEL PENAL CODE § 2.02(2).

goes.¹⁶⁶ But that is because we assume that people formulate these intentions and other mental states in the kind of society in which the particular criminal action is routinely criticized and condemned. But let us suppose we live in a world in which it is conventionally acceptable to hate Jews as “Christ-killers” or to regard blacks as subhuman or to think of gays as perverse and unworthy members of the species. Not so long ago these were the dominant opinions in the United States. Suppose, further, that in this world of hate, it is perfectly acceptable to commit physical assaults against these people who are nominally protected under the law but nonetheless routinely despised and demeaned. This behavior might be formally against the law, but nonetheless commonplace. If the dominant systems of beliefs encourage actions like *Kristallnacht*, lynchings, gay bashings, or domestic violence, those who succumb to violence are certainly to blame, but one has to wonder whether they alone are to blame and whether they must bear the guilt alone.

To domesticate these doubts in our theory of criminal liability, we must refine our notion of guilt by adding a second-level decision—namely, reflecting upon the intended action and deciding to go ahead with the criminal deed despite the opposition of others.¹⁶⁷ The potential criminal in a normally diverse society has an opportunity for self-correction, to revise his criminal impulse in light of generally prevailing moral norms of the society. Now what happens in a society in which all the external signals point in favor of the criminal action? This is the moral condition that generates “the banality of evil,” as Hannah Arendt so powerfully describes the climate of the Third Reich.¹⁶⁸ The sad truth is that these climates of moral degeneracy are all around us: in every school in Palestine that teaches hatred of the Jews; in every madrasa in Pakistan that teaches contempt for infidels; in every Yeshiva that preaches the permissibility of assassinating political leaders; in every society that tolerates the Ku Klux Klan; in every society that stigmatizes difference, legitimates hatred, or inculcates a disposition toward acceptable violence.

I want to suggest that those who generate a climate of moral degeneracy bear some of the guilt for the criminal actions that are thereby

166. I leave out of the discussion my more conventional critique, which explains that the notion of culpability requires integration of excusing conditions. See FLETCHER, *supra* note 163, at 82-84. This is true, but not relevant at this juncture.

167. For a closely related theory of second-order volitions, see HARRY G. FRANKFURT, *THE IMPORTANCE OF WHAT WE CARE ABOUT 20* (1988), which accounts for freedom of the will as securing conformity of the will to second-order volitions.

168. ARENDT, *supra* note 120. David J. Cohen anticipates the argument made here that the banality of evil should have had a mitigating effect on Eichmann's punishment. He criticizes Arendt for failing to see this point. Cohen, *supra* note 65, at 316 (“[H]aving made the best case, the case the defense did not make, for Eichmann's innocence by locating his crimes within the larger bureaucratic, moral, political, legal, and social context of Nazi occupied Europe, she completely denies the relevance of that context for an assessment of his guilt.”).

endorsed. These circumstances of criminal action do not come about by accident. They require teachers, religious leaders, politicians, policies of the state, and a network of supportive laws. Identifying the agent responsible for the climate of hate is not so easy. Sometimes we should call it the "society." Sometimes it is a political party of the government. Sometimes it is the people or the nation as a whole. However this collective is identified, it seems plausible to say that it is represented by the state when the state brings a criminal prosecution. The people bring the indictment against the offender, and in these cases where evil has become banal, the people constituting the society bear some of the guilt.

The way that criminal prosecutions actually function accomplishes the opposite of the proposed mitigation of guilt. Instead of recognizing the role of the nation's guilt in generating the crime, the purpose of the prosecution is to lay the entire responsibility for the criminal incident on the shoulders of the offenders. This is obvious in the ICC's current prosecution of Slobodan Milosevic, where the implicit purpose of the proceedings is to blame the defendant for the crimes committed by his army. A proceeding more sensitive to the problem of collective guilt would recognize the role of the Serbian nation in the genesis and execution of these crimes against Croats and Muslims.

One can think of this guilt as a kind of treason by the nation against its loyal citizens. The state and the nation it represents have a duty to contribute to the flourishing, both physical and moral, of individual members of society. To do this they must create—or at least not suppress—a climate of opinion in which potential offenders can exercise their second-order power of self-correction. By enforcing orthodoxy, by restricting the range of morally appealing options, the state deprives its citizens of a critical asset in their moral lives, namely the possibility of critical moral self-assessment. When the state or the society denies people the possibility of self-correction, it commits a wrong. It betrays its duty to create circumstances of moral action, and it bears part of the guilt for the crimes that result.

We have before us a humanistic theory of collective guilt, a theory that provides a plausible basis for mitigating the penalties of those who commit horrendous crimes. The theory is not simply an argument of state forfeiture—namely that the state has misbehaved and therefore cannot punish the crime fully.¹⁶⁹ The argument is based rather on the distribution of guilt between offender and society, between the offender and the nation in

169. Judge Bazelon used the "forfeiture" thesis to explain why a state that tolerated poverty should not be able to prosecute crimes that derive from that condition of poverty. David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976). *But see* Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247 (1976).

which his life is expressed. It should apply in foreign courts as well as in domestic courts. It should have had a bearing on the sentencing of Eichmann; it should have influenced our perception of the crime committed by Timothy McVeigh; it should have come into play when East German border guards were put on trial for doing what the ideology of their society preached, namely using deadly force to prevent their fellow citizens from fleeing to the West. The crime expresses not only the guilt of the offender but also the collective guilt of those who deprive offenders of their second-order critical sensibilities.

The argument is not causal in any narrow sense. The claim is not that the climate of opinion causes the crime, but rather that creating an orthodoxy of hate deprives people of their second-order capacity to rein in their criminal impulses. The second-order capacity for self-restraint resembles Kant's notion of freedom to choose between the phenomenal world of the senses and the noumenal world of reason.¹⁷⁰ The criminal is under the influence of a sensual impulse. He or she is subject to the forces of the phenomenal world but has the capacity to choose a different realm of causation, to enter the noumenal world of reason and thus to allow his or her conduct to be governed by the moral law. Failing to exercise this choice is a form of culpability. Kant would not concede that the society ever deprives an individual of that choice to be governed by the moral law, but the fact of the matter is that our circumstances can increase the difficulty of choosing the moral order over the immediate demands of the senses.

This humanistic theory of collective guilt could transform the way we think about guilt in criminal prosecutions. All too often—in cases ranging from Eichmann to McVeigh—we choose to ignore the complicity of the state and society by heaping guilt on a single offender. But we know that life and crime are not so simple. No one acts as an island. And when we pretend that evil can be concentrated in offenders who are sentenced and executed, we deceive ourselves about the genesis and nature of their behavior.

Let us review the intellectual journey that has led us to this point. The aim of this Part has been to devise a theory of collective guilt that could mitigate the guilt of seeming evildoers like Eichmann. The first attempt was to reason by analogy to causal theories of complicity represented by the *Stashchinsky* case. This inquiry led us into a cul-de-sac because the relationship between collective action by the nation and individual action by the citizen is not causal. Because complicity presupposes a causal relationship, we cannot say that the nation is complicitous in the crime.

170. See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 13 (Mary Gregor ed. & trans., Cambridge Univ. Press 1998) (1785) (citing the metaphor of the will as standing “between two roads”).

Thus we turned to the possibility of a noncausal theory based on the collective guilt of society for at least partially depriving the offender of the possibility of self-correction. Those who participate in creating the banality of evil bear a portion of the guilt for the accidental offender whose actions bespeak the mentality of the crowd.

This theory of collective guilt provides a humanistic defense of a doctrine that is generally regarded as repressive and violative of individual interests. But if the notion of collective guilt has so much to say for it, why do liberals resist the idea? Unfortunately, the concept has two faces, and we must turn now to the dark side of the Romantic impulses that led us to take collective guilt seriously.

V. TWO PERILS OF ROMANTIC THINKING

We should rehearse some tentative conclusions that we have made in the course of this exploration and identify the role of Romantic thinking in their genesis. First, we concluded that whatever the liberal edifice of the law, we in fact take collective action more seriously than we ordinarily suppose. I demonstrated this in the context of liability for international aggression, war crimes, crimes against humanity, and genocide. Second, we concluded that, so far as there is collective guilt for these crimes, it is appropriate to treat the nation as the bearer of that guilt. Romantic thinking, leading to the identification of the expansive self with the nation, provides the foundation for this second move. To take this step, we had to reject Jaspers's position recognizing the possibility of collective guilt but denying the nation as an agent capable of wrongdoing.

Now it is time to turn to the two serious moral consequences of Romantic thinking in the law. The first consequence derives from the belief in the nation as the bearer of guilt. The nation includes the dead and the unborn as well as the living. If the nation is guilty, the conclusion seems to follow that guilt is transmitted to future generations. The passing of guilt from the living to the next generation leads to the extreme that I identify as "too much guilt." The second consequence follows from the Romantic commitment to the authenticity of self—the human being fully realized when at home in his or her language and culture. This leads to a deep problem in the theory of criminal responsibility. If terrorists are authentically committed to the premises of their own culture, how can we blame them for committing crimes of violence against those they perceive as their enemies? If we cannot in good conscience blame them for their harmful deeds, we have to think twice about whether we justifiably punish them. This is a problem of "too little guilt." These two issues represent the excesses of Romanticism. We shall find that as we probe more deeply into

these implications of Romantic thinking, the liberal alternative will begin to look more attractive.

A. *The Excess of Transmission by Birth*

Let us take seriously the possibility that an entire nation is, at a certain moment of time, responsible and guilty for crimes committed in its name. The recurrent example is German guilt for the Holocaust. This is not because we are short of other convincing examples of the phenomenon. Many Americans overflow with feelings of guilt—for slavery, for the wartime internment of the Japanese, for having subjugated women for so long, for having harbored homophobic sentiments. In some respects we are the showcase example of collective guilt, but the German case has drawn sustained literary attention and therefore remains at the forefront of the debate about whether collective guilt is morally and conceptually plausible.

The charge of German guilt recurs in various writings. Daniel Goldhagen charged Germans living in the decades prior to Hitler's rise to power and the Germans living under Hitler as guilty of eliminationist attitudes and actions toward Jews.¹⁷¹ They created the political culture that made the Final Solution thinkable and doable. In a recent study of anti-Semitism, James Carroll writes: "Hitler's genocidal assault on the Jews became the work of an entire people . . ." ¹⁷²

The interesting question is whether these generalizations can be limited in time. Can one speak of German guilt for the years up to 1945, but of no guilt afterward—as though the Russian occupation of Berlin suddenly changed everything? In other words, can one generalize synchronically but not diachronically? Can one sweep up a range of people who lived in a certain decade in a certain geographical area but reject any spatial or temporal extensions?

Suppose there is a certain amount of data about the behavior of ordinary Germans in the face of anti-Semitic attacks like those of *Kristallnacht*—the burning down of most of Germany's synagogues coupled with the SS's physical assaults against Jews. What follows from these data as to the millions of people about whom we have no information at all? Are they complicitous in the German eliminationist culture; if so, why stop with the Germans? Why are not Poles, Ukrainians, Slovaks, and Hungarians also implicated? The impulse that leads us to generalize at the level of the nation is the Romantic preoccupation with nations as the bearers of culture. For thoughtful writers like Goldhagen and Carroll, the

171. DANIEL J. GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* (1996).

172. JAMES CARROLL, *CONSTANTINE'S SWORD: THE CHURCH AND THE JEWS* 28 (2001). The sentence ends: "and an entire civilization was prepared to let it happen." *Id.*

natural point of reference is the German people organized in a particular political regime, sharing a single history, speaking a single language. On the unspoken assumption that those who perpetrated *Kristallnacht* should be described as Germans and not more broadly as Europeans or more narrowly as young men of a certain political affiliation who happened to live in Germany, the “German” becomes an abstract wrongdoer. Here we are reminded of Karl Jaspers’s warning that ascribing guilt to the nation replicates the frame of mind that led to anti-Semitism.¹⁷³ Behind this particular form of hatred in the Christian West lies the conception of the “Jew” as the eternal deviant, as the bearer throughout history of guilt incurred in Jerusalem 2000 years ago.¹⁷⁴

The idea that guilt passes from generation to generation expresses, I think, an ineluctable consequence of attributing guilt to the nation rather than to particular individuals. The nation includes the young and the unborn. Is a child born in the Nazi period exempt? And if the child is born immediately after the collapse of the Third Reich, does it make sense to exempt the child from the culture that has rendered itself guilty? The ingredients of mass belief, the elements that accounted for eliminationist anti-Semitism, do not change just because the regime changes. If the guilt attaches to the nation, and the nation has a life greater than its constituent members, then the guilt would seem to pass to the next generation—not necessarily to individuals but to the nation as a whole. Thus, by the inevitable process of taking the next logical step, we have arrived at the conclusion that if the nation is guilty, the guilt is transmitted from generation to generation.

It is harder than we might think to avoid this particular perversion of collective responsibility. The idea dwells deep in the instincts of Western civilization. The primary example is the Christian doctrine of original sin. According to the Book of Genesis, Adam and Eve violated God’s command by eating fruit from the tree of knowledge of good and evil. Their disobedience brings to bear God’s threat of mortality: If they eat of the fruit, they will surely die.¹⁷⁵ Augustine read into this text the origins of a taint transmitted to each new generation: “The voluntary transgression of the first man is the cause of original sin.”¹⁷⁶ And Paul before him similarly concludes: “[B]y one man sin entered into the world, and death by sin.”¹⁷⁷ The idea that human beings are born already affected by sin has become a

173. *Supra* note 138 and accompanying text.

174. *See infra* note 192 and accompanying text.

175. *Genesis* 2:17.

176. Augustin, *De Nuptiis et Concupiscentia* [On Marriage and Concupiscence] bk. II, pt. xxvi, ch. 43 (420), in *5 A SELECT LIBRARY OF THE NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH: SAINT AUGUSTIN: ANTI-PELAGIAN WRITINGS* 257, 300 (Philip Schaff ed. & Peter Holmes et al. trans., 1971).

177. *Romans* 5:12.

theological premise for Catholics and many branches of Protestant thinking. Baptism became necessary to cleanse the newborn of original sin and to restore the possibility of everlasting life. Thus the doctrine of original sin is tied to the promise of salvation and the resurrection of Jesus as its demonstration.

Whatever the right theological associations of original sin, there are few ideas more disturbing than the claim that children are born tainted by sin. Not surprisingly, the Enlightenment attitude toward the value of human beings led to the rejection of the doctrine.¹⁷⁸ For Nietzsche, it is said, “it lay like a cancer in the bowels of an entire civilization.”¹⁷⁹ The idea is incompatible with the Jeffersonian creed that all men are created equal—at least if the claim of equality is based on the infinite value of all human beings made in the image of God. The distinctively American version of Christianity—the Church of Jesus Christ of Latter-Day Saints—explicitly rejects the doctrine of original sin. According to the second article of Joseph Smith’s creed: “We believe that men will be punished for their own sins, and not for Adam’s transgression.”¹⁸⁰ Though Muslims and Jews also share the same story of creation, they reject the standard Catholic reading of the Fall in Eden.¹⁸¹

Though the idea of transmitting guilt by birth is not a common Jewish doctrine, it is recognized in the Hebrew Bible. Under Moses and Joshua, the Jews fought a battle with a tribe called Amalek, and according to the version related in Deuteronomy, Amalek attacked from the rear when the Jews were “famished and weary.”¹⁸² In engaging in this maneuver Amalek was “undeterred by fear of God.”¹⁸³ The description of the Jews’ battle with Amalek is very obscure, but it seems to suggest that Amalek was guilty of some war crime, perhaps the first great war crime of the West. The Jews are commanded never to forget this crime and to make war against Amalek “throughout the ages.”¹⁸⁴ It is not clear whether this means that the guilt of the tribe passes from generation to generation, but that would at

178. Douglas Farrow, *Fall*, in *THE OXFORD COMPANION TO CHRISTIAN THOUGHT* 233, 233 (Adrian Hastings et al. eds., 2000) (noting the Enlightenment characterization of the doctrine of the Fall as a “perversion”).

179. *Id.*

180. Mormon Articles of Faith art. 2, *quoted in* BRUCE R. MCCONKIE, *A NEW WITNESS FOR THE ARTICLES OF FAITH* 79 (1985).

181. On the Jewish view, see the comment made about Adam eating the forbidden fruit in *ETZ HAYIM [TREE OF LIFE]: TORAH AND COMMENTARY* 18 (David Lieber ed., 2001) (“Moreover, we note that neither here nor anywhere else in the Bible is their act characterized as sin, let alone the Original Sin.”). On the Islamic view, see MARCEL A. BOISARD, *HUMANISM IN ISLAM* 63 (1988) (“Islam thus rejects the idea of a ‘fall of man’—of original sin—whose consequences were to be transmitted to all of mankind.”).

182. *Deuteronomy* 25:18.

183. *Id.*

184. *Exodus* 17:16.

least provide an account of the peculiar Jewish obligation to continue the war against Amalek.¹⁸⁵

As strong as the religious roots for transmission by birth may be, there is also a countertradition expressed in the Prophets. Ezekiel preaches, "What mean ye, that ye use this proverb concerning the land of Israel, saying, The fathers have eaten sour grapes, and the children's teeth are set on edge. As I live, saith the Lord God, ye shall not have occasion any more to use this proverb in Israel."¹⁸⁶

Ezekiel continues in this vein to stress that the father and the son shall each be judged according to their own deeds.¹⁸⁷ The idea that guilt is transmitted at birth is explicitly rejected. Yet the very fact that it is denounced shows how recurrent and tempting the doctrine is. One finds it not only in the declaration of perpetual war against Amalek but in the other doctrines of Jewish law, such as transmission of the taint of bastardy (*mamzerut*) for ten generations.¹⁸⁸ But nothing in Jewish thought comes close to the condemnation of all of humanity in the doctrine of original sin.

The line from the Pauline doctrine of original sin to Christian anti-Semitism is easily traced. Both have their origin in the Christian reading of the Fall in Eden. As Elaine Pagels points out in *The Origin of Satan*, anti-Semitism in the Gospels is strongly connected to the Christian invention of the devil as the force of evil.¹⁸⁹ The culminating passage comes in John when Jesus denounces the Jews as sons of the devil.¹⁹⁰ The origins of the devil lie in the Christian reading of the story of Eden, the same reading that produces the myth of the Fall leading to redemption at Calvary. The devil makes his appearance in the form of the serpent who seduces Eve to eat of the fruit.¹⁹¹ As the sin of Adam and Eve is passed from generation to generation, so is the influence of the devil, which Catholic theology associated with the crime of the Jews in betraying the Messiah and in refusing thereafter to accept him as their savior.¹⁹²

Jaspers was right in suggesting that adopting the idea that German guilt passes from generation to generation replicates the intellectual indecency of anti-Semitism.¹⁹³ We see from the story of Amalek, to the doctrine of

185. There is a peculiar contradiction between God's wish to blot out the memory of Amalek and His decree to remember Amalek and renew the war from generation to generation. Compare *Deuteronomy* 25:19 ("[B]lot out the memory of Amalek from under Heaven . . ."), with *id.* 25:17 ("Remember what Amalek did to you . . .").

186. *Ezekiel* 18:2.

187. *Id.* 18:20 ("The soul that sins shall die. The son shall not bear the iniquity of the father; neither shall the father bear the iniquity of the son.").

188. *Deuteronomy* 23:3.

189. ELAINE PAGELS, *THE ORIGIN OF SATAN* 102-05 (1995).

190. *John* 8:44 ("Ye are of your father the devil . . .").

191. *Genesis* 3:1-6.

192. PAGELS, *supra* note 189, at 104. See generally CARROLL, *supra* note 172 (discussing the history of anti-Semitism).

193. *Supra* note 138 and accompanying text.

original sin, to the birth of anti-Semitism, to the problem of German guilt, one baleful and pernicious line of argument. This is surely one of the most regrettable chapters in the history of Western thought. Ezekiel could rail against it, but he could not defeat it.

Let us retrace the steps that have led us, with seeming inevitability, to the doctrine of transmission of guilt by birth. We started with the idea of collective guilt as a way of making sense of the thesis that collective entities must participate in the crimes punished under international law, and we asked ourselves whether this form of guilt inheres, associatively, in the nation as such. In the last Part we argued that in order to advance a humanistic theory of collective guilt, one that has a mitigating impact on the sentencing of individual offenders, we had to assume this associative theory of guilt. If the guilt of the nation is merely aggregative, it could not have any relevance for sentencing.¹⁹⁴ But if guilt is associative and inheres in the nation itself, and if the nation lives from generation to generation, so do its achievements, its responsibility, and its guilt. But precisely this idea has generated relentless critique from Ezekiel, to Nietzsche, to Joseph Smith, to Karl Jaspers.

There are two, perhaps three, ways out of this moral maze. First, we could deny the existence of collective guilt altogether—an option that becomes ever more appealing. Or we could hold that collective guilt consists merely in the aggregative total of instances of individual guilt, in which case, as I have argued, it would be irrelevant for sentencing. Or we could take seriously the possibility that the guilt remains in the nation but that it bears no relationship to individual guilt. As the *volonté generale* tells us nothing about private individual wills, the *culpabilité generale* of the nation would not inform us about the guilt of any particular individual.

This third option is one that we should take seriously. We might call it nontransitive associative guilt. The nation is guilty for its crimes in the past, but nothing follows with regard to the guilt or innocence of particular people alive today. Perhaps this is the conception of collective guilt expressed in the renunciation of military action in the Japanese Constitution. This abstract form of collective guilt has great appeal even though it fails to satisfy the desideratum of a theory of national guilt that would bear on sentencing criminals like Eichmann. I turn later to a more serious examination of this form of nontransitive associative guilt.

194. For exposition of the thesis that aggregative guilt is either tautological or irrelevant, see *supra* Part IV.

B. *The Problem of Guiltless Sincerity*

If the doctrine of transmitting guilt by birth generates too much guilt, the other implication of Romanticism in the law yields too little guilt. The starting point for thinking about this distortion of guilt is the glorification of the inner self at the core of the Romantic movement. The seat of the poet's authenticity was the lamp that radiated from his or her imagination. Existence, reality, and ultimately morality come from within. For existentialist theologians like Hamann and Schleiermacher, the search for God begins with fires that burn in the hearth of the self.¹⁹⁵ This preoccupation with internal feelings has moral implications. The important guideline for conduct should not be society's criteria of right and wrong but the inner drummer, the internal beat that leads us to express our deepest selves. Isaiah Berlin summarizes the impact of this way of thinking in the German Romantic movement: "By the 1820s you find an outlook in which the state of mind, the motive, is more important than the consequence . . ." ¹⁹⁶ The core of morality becomes, in Berlin's words, "[p]urity of heart, integrity, devotion, dedication."¹⁹⁷

In the same time span at the turn of nineteenth century when the early English Romantic poets were celebrating sincerity and the imagination, English criminal law also took a turn inward. One sees this shift in the emergence of criminal attempts, crimes in which liability rests on the intention rather than the result.¹⁹⁸ One also encounters a transformation of larceny from a crime based on appearance and objective criteria to a crime based on intentions.¹⁹⁹ Embezzlement becomes a crime even though there is no way to perceive the moment that the clerk decides to keep the money already in his possession.²⁰⁰ The same transformation is evident in homicide. Though the criminal law had long recognized defeasing conditions based on mistake or accident, we find a progressive reorientation of homicide from a crime based on causing death²⁰¹ to a crime the core of

195. *Supra* notes 27-29 and accompanying text.

196. BERLIN, *supra* note 22, at 10.

197. *Id.*

198. One of the earliest cases in the common law was *Rex v. Scofield*, Cald. 397 (1784), cited in FLETCHER, *supra* note 160, at 134 n.9, which upheld a conviction for attempted arson when the defendant had put a candle among combustible materials, but was arrested before the fire broke out.

199. See George P. Fletcher, *The Metamorphosis of Larceny*, 89 HARV. L. REV. 469 (1976).

200. The first embezzlement statute was limited to "servants and clerks" who acquired possession of goods belonging to their masters. An Act To Protect Masters Against Embezzlements by Their Clerks or Servants, 39 Geo. 3, c. 85 (1799).

201. 4 WILLIAM BLACKSTONE, COMMENTARIES *201 (stating that causing the death of another human being "amounts to murder, unless where *justified . . . ; excused . . . ; or alleviated into manslaughter*").

which is *intentionally* causing death.²⁰² The critical transformation is from a criminal law based on results and the causing of harm to a criminal law anchored in the mens rea or “guilty mind” of offenders.

One sees the afterglow of this movement in the contemporary debate about moral luck. One scholar after another has lined up behind the counterintuitive view that consequences are morally irrelevant: All that matters in assessing the blameworthiness of offenders is that over which they have control.²⁰³ Their intentions and bodily movements are within their control, but not the consequences of their actions. According to this view, the aggressors of September 11 are guilty for intending to crash their hijacked airplanes into the World Trade Center and aiming the planes in that direction, but they are not guilty for the collapse of the towers and the resulting deaths. As bin Laden claims in the videotape released in December 2001, he did not even expect the total destruction of the towers.²⁰⁴

It is worth noting how a persistent misreading of Kant’s moral philosophy tends to support this metamorphosis of the criminal law. In *Groundwork of the Metaphysics of Morals*, Kant argued that only the good will could be called moral.²⁰⁵ The good will is one free of all sensual influence. It expresses pure reason and the moral law. Kant’s claim about the good will is deep and central to his entire theory of moral autonomy under the law. Yet the theory of the good will has become distorted by subtly shifting the focus from will to intention. The argument becomes that intention is the core of morality, thus dovetailing with Berlin’s account of the Romantic emphasis on “purity of heart, integrity, devotion, dedication.”²⁰⁶ This misreading of Kant—the confusion of will with intention—might have been just an obscure footnote in the emergence of sincerity as a basis for denying criminal wrongdoing. Yet the way Kant was read influenced the entire Romantic movement in the decades after his writing. His emphasis on the self and on autonomy dovetailed with those of others who preferred to read him as glorifying self-expression and the role of the expansive self in history.²⁰⁷ We witness this continued misreading in the way philosophers glorify “autonomy” as the capacity, supposedly, to

202. The transformation was complete when accident ceased being an excuse to be proven by the defense, and its converse, intentional killing, became an element of the prima facie case to be proven by the prosecution. See *Woolmington v. Dir. of Pub. Prosecutions*, 1935 A.C. 462 (Eng. H.L. 1935).

203. E.g., Joel Feinberg, *Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments Against It*, 37 ARIZ. L. REV. 117 (1995); Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679 (1994).

204. Elizabeth Bumiller, *A Nation Challenged: The Video*, N.Y. TIMES, Dec. 14, 2001, at A1.

205. KANT, *supra* note 170, at 7.

206. BERLIN, *supra* note 22, at 10.

207. On the way Johann Gottlieb Fichte used Kant as a bridge to a doctrine of self as the supreme source of value, see BERLIN, *supra* note 22, at 93-96.

do your own thing,²⁰⁸ when in fact, for Kant, autonomy required submission to the moral law.²⁰⁹ Berlin regards Kant as a transitional figure in the Romantic movement not because of what he really said but because of the way his ideas about the will and the importance of freedom lent themselves to other purposes.²¹⁰

The fixation on intentions as the core of criminality leads to the view that only bad intentions are subject to moral censure. Those who sincerely think they are doing the right thing cannot be blamed. They are merely expressing who they are. If we sentence them to prison or even impose the death penalty, as in the cases of Eichmann and McVeigh, it cannot be because they are guilty and deserve punishment; rather, the state has an interest in imposing the sanction. Perhaps the interest of the state lies in making the victims feel vindicated by seeing the offender suffer. Or perhaps the offender is simply a threat to public safety and must be neutralized. We should have more doubts than we do about whether ideological offenders are really guilty and whether the sanctions they suffer are really punishment rather than measures imposed for the sake of social protection.

More than one mistake in criminal theory has been made in the name of the doctrine that good intentions cannot be the proper subject of blame and condemnation. Think about the doctrine of imperfect self-defense in California and other states, which holds that if the actor sincerely believes in the necessity of self-defense, that belief—however unreasonable it might be—precludes a finding of malice and thus requires a verdict of, at worst, manslaughter.²¹¹ The first trial of the Menendez brothers represented a dramatic application of this doctrine. In the first trial the jury was deadlocked because half believed that the brothers killed in good faith; the others rejected their claims of a feared imminent attack. In the second trial the judge correctly instructed the jury that the issue of good-faith belief in an imminent attack was insufficient to mitigate liability for intentional murder.²¹²

Or think of the well-known mistake in the *Morgan* case in which the House of Lords concluded that, in principle, any good-faith belief in the consent of the female victim was sufficient to preclude a finding of intentional rape.²¹³ The misleading idea is that mens rea requires knowledge

208. For an example of this tendency to equate autonomy with liberty, see David A.J. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957 (1979).

209. KANT, *supra* note 170, at 53.

210. BERLIN, *supra* note 22, at 93-96.

211. *People v. Humphrey*, 921 P.2d 1, 6 (Cal. 1996) (concluding that an honest, but unreasonable, mistake negates malice and reduces intentional homicide to manslaughter).

212. For a detailed account of this controversy in the Menendez trials, see GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: PROTECTING VICTIMS' RIGHTS IN CRIMINAL TRIALS 141-48 (1995).

213. *Regina v. Morgan*, 1976 A.C. 182 (H.L. 1976).

that one is doing the wrong thing; it is not enough just to be negligent in believing that a violently protesting woman was consenting to intercourse. The worst form of this misguided theory in criminal law is the often-resuscitated misconception that negligence cannot be a real basis of blameworthiness and guilt because the inadvertently negligent actor does not choose to do wrong.²¹⁴ None of these ideas would have much currency were it not for Romantic emphasis on sincerity and authenticity as criteria of virtue. To be guilty, supposedly, one must be aware that one is deviating from right conduct. If one simply is deceived, misguided, and oblivious to the moral cues of one's situation, one cannot be guilty.

This doctrine of "guiltless sincerity" reflects an extreme of the view considered earlier that the guilt of the collective can mitigate the guilt of the misguided individual who is unable—because of the insulating effects of orthodox opinion—to engage in moral self-criticism. In the Romantic view of authenticity, this humanistic theory of mitigation is turned on its head. Now it becomes an affirmative doctrine for applauding the individual who acts in harmony with his culture, even if the cues of this culture are to hate some minority and to tolerate aggression against its members. The banality of evil becomes the virtue of being true to one's roots and one's culture.

This is surely a perversion of Romantic thought, but refuting the doctrine of "guiltless sincerity" is not so easy. Legal systems do in fact sanction ideological offenders, but if we pause to reflect on the meaning of guilt and punishment in these cases, we run into difficulty. What is the sense of blaming and punishing if the defendants see themselves as martyrs? What are we doing to them when they have no sense whatsoever of personal guilt?

To avoid this distortion of Romantic sincerity, we have to make some rather strong moral claims. First, we have to assert that there is an objective moral crime called harming and killing innocent people. For anyone who takes moral reality seriously, this is not too daunting a thought. Moral reality implies that propositions about right and wrong have a truth value—that is, they actually say something about the world. But, second, we have to make an argument about the blameworthiness and guilt of those who commit this wrong in good faith, in the sincere belief that under certain circumstances it is right to kill innocent people. They are guilty for failing to grasp and to act in conformity with moral truth. This might be right, but I cannot escape the feeling that this attribution of guilt for ignorance of universal truths carries the ring of moral dogmatism.

One problem with formulating and applying a universal proposition about killing innocent people is that virtually all the ideological offenders I

214. Jerome Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 COLUM. L. REV. 632 (1963).

have mentioned believed in one way or another that their victims belonged to a class of people who were aggressing against them. Their ideology was never simply to kill innocents but rather to eliminate what they perceived, correctly or incorrectly, to be some kind of threat. Hitler and his followers thought that Jews were strangling the nation. Amir, the assassin of Yitzhak Rabin, believed that Rabin was a *rodef*, an aggressor, threatening the life of Israel. Kaczynski thought that technology was ruining civilization. The aggressors of September 11 felt invaded by the existence of Israel and the presence of American troops in Saudi Arabia. The litany of paranoid perceptions goes on and on. But, irrational fears or not, these offenders would not have described their actions as the killing of totally innocent people. Their factual error adds to the difficulty of blaming them for ignorance of universal moral truth. Perhaps they knew the moral truth but just disagreed about its application in practice.

The distortion of guiltless sincerity is an ever-recurrent threat to clear thinking about guilt in the criminal law. Like the distortion of transmission by birth, this implication of Romantic thinking calls into question not only the project of attributing collective guilt but the project of understanding the very concept of guilt. We are, as it were, at a crisis of faith in our original thesis. Our attempt to understand international criminal law led to the thesis that nations engage in collective actions and participate in aggression, war crimes, crimes against humanity, and genocide. To account for this firm belief in nations as collective agents, we turned to the Romantic tradition in search of an answer. But now we see that the entire enterprise suffers from serious risks of distorted thinking. We are prone to accept too much guilt in the theory of transmission by birth and too little guilt in the doctrine of guiltless sincerity.

VI. SHADOWS IN THE NEIGHBORHOOD: RELATED CONCEPTS

In the face of these intellectual currents pushing us toward collective guilt and then repelling us, we should try to stabilize our inquiry by considering both a conceptual and a historical perspective on collective guilt. In this Part, I consider individualistic and collective variations of two concepts closely related to guilt, responsibility and shame. The promise of this inquiry is that it will illuminate ideas that lie in the vicinity of guilt and offer the possibility of reasoning by analogy from these neighboring concepts to guilt itself. In the end, these analogical efforts prove to be less than fully convincing, but they enable us to understand the appeal of the reverse analogy, namely the displacement of collective guilt into the language of collective responsibility and collective shame. In Part VII, I turn from conceptual to historical arguments and consider whether we

should seek to understand the attraction of collective guilt as the afterglow of a set of views clearly accepted and nourished in ancient legal cultures.

The most commonly invoked alternatives to guilt are the attitudes or sentiments of responsibility and shame. All three—responsibility, shame, and guilt—are relational attitudes, because in different ways they all imply interactions with others. The idea of responsibility always implicates another person because responsibility requires an answer—a *responsum*, an account—about some action to another person. The sentiment of shame always points to another person, present or imagined, before whom one is ashamed. Guilt defines a relationship toward both the victim and the authority against which one has sinned or committed a crime. The guilty person should expect resentment from the victim and punishment from the authority that proscribed the conduct as wrong. The interesting feature of these attitudes is that they all come in both individual and collective varieties. These variations generate the following schema of possibilities:

FIGURE 1.

	Responsibility	Shame	Guilt
Individual	one	three	five
Collective	two	four	six

The first four squares represent a set of ideas that stand in contrast to individual and collective guilt. I explore their contours in the hope of generating a basis for an analogical extension of sentiments of responsibility and shame to collective guilt. This is one approach to the target—square six in the chart. In the following Part, I consider a totally different approach to square six, one based on the transformation of guilt in the history of Western thought.

A. *Individual Responsibility (Square One)*

Responsibility appeals to us because it makes so few demands. It means simply that one person must respond—give an account—to another. The duty to give an answer might arise without any personal fault; for example, it might be based solely on having caused harm or being the person in charge when the harm occurred. In an early essay, H.L.A. Hart denoted various senses of responsibility, including causal responsibility and

criminal responsibility.²¹⁵ The term has analogues in almost all languages and provides a bridge connecting criminal law with private law and administrative law. The ubiquitous concept of responsibility appears to be the lawyer's friend. It does the job of justifying both punishment and civil sanctions, and it carries few metaphysical pretensions.

The notion of responsibility has several attributes that are absent in the concept of guilt. First, the idea of responsibility extends to future behavior. Students are responsible for certain cases prescribed by the syllabus. They must literally answer in class when questioned about the material. A responsible person is one who can be counted on in the future, not only to give an accounting of past actions, but to do what he or she is supposed to do.

Second, the negations of the concept of responsibility are more subtle than are the negations of the concept of guilt. The opposite of being guilty is being not guilty or innocent. There are two variations in the negation of responsibility, and they represent drastically different ideas. A *nonresponsible* person is someone who cannot be expected to give any account at all. By contrast, an *irresponsible* person is someone who will give a self-incriminating account, that is, someone who can be counted on to do the wrong thing. Neither can be relied upon in the future. The nonresponsible person might do the right thing but without planning to do it. The irresponsible person is likely to make plans that will preclude his or her doing what is expected. This fine distinction appears to be unique in English. I know of no other language that employs two distinct negations of the concept of responsibility.

Curiously, being responsible for a crime in the positive sense carries a denunciatory tone close to being guilty for the crime. But think of the striking difference in the negations. Being nonresponsible means you are not guilty by reason of insanity or incompetence; being irresponsible implies you are guilty on a particular occasion, and further that it is in your character to do the act that has rendered you guilty.

Third, by describing someone as responsible, nonresponsible, or irresponsible, we say something about their character, how they will behave over time. By contrast, guilt is always connected to a particular deed in the past. To say that someone is guilty implies a relationship between the guilt and the act for which he is guilty. Because the statement "She is responsible" is ambiguous (implying either that she is responsible in general or for a particular deed), the same conceptual connection does not arise. And fourth, affirming responsibility carries no necessary consequences, while guilt is closely connected to punishment—either an

215. H.L.A. Hart, *Varieties of Responsibility*, 83 LAW Q. REV. 346 (1967).

expectation of punishment by the criminal law or a craving for punishment in the case of feeling guilty.

This account of the differences between responsibility and guilt does not answer the question of why the concept of responsibility appeals to many people in place of the concept of guilt, particularly collective responsibility instead of collective guilt. Perhaps the difference is that responsibility seems like a secular, down-to-earth concept, stripped of metaphysical overtones, while guilt carries overtones of ultimate significance, a sense of the concept that we have yet to pin down.

B. *Collective Responsibility (Square Two)*

The move from the individual to the collective variation of responsibility poses few problems. If a single person can be responsible for a child in his care, then a team of babysitters can *take* responsibility as well. If something happens to the child, they—all together and as individuals—must provide an accounting, and they may have to stand responsible in the sense of accepting civil liability. The collective duty to act seems relatively easy to establish, and that duty, in turn, provides the basis for “joint and several” liability in tort or contract. They are each responsible for the whole damage, thus implying complicity in each other’s personal liability.²¹⁶

The very fact that collective responsibility is based on complicity, however, reveals an important difference between this attitude and the associative nature of collective guilt that we explored previously. The collective responsibility of the babysitters is aggregative, not associative. But perhaps there might be an associative version of collective responsibility. For example, one might offer this interpretation of the article in the Japanese Constitution renouncing military action. Instead of saying that Article 9 testifies to the collective guilt of the nation, some people would feel more comfortable saying that it represents a confession of collective responsibility.

But is “collective responsibility” really the right term? I assume that the war effort was the direct responsibility of the ruling military elite. It is not quite right to say that the war is also the responsibility of the younger generation that knows little about events that occurred a half-century ago. There is a sense in which a young German who goes to Israel to work on a kibbutz feels responsibility to make amends for the crimes of the past, but these feelings of responsibility do not imply that a duty to have the same response passes, like guilt, from generation to generation. Nor would

216. For an exploration of the distinction between moral guilt and compensatory responsibility, see Yael Tamir & Noam Zohar, *Who Done It? Moral Responsibility for Collective Action*, 2 ONLINE J. ETHICS (1998), at <http://www.stthom.edu/cbes/zohar1.html>.

authenticity lead to a denial of responsibility (in some sense) in the same way that it leads to the problem of guiltless sincerity. Yet perhaps this is precisely the advantage of terms connected to responsibility rather than guilt. The concept of responsibility is not plagued by the Romantic doctrines of nationhood and authenticity.

C. *Individual Shame (Square Three)*

Let us consider next how the notion of shame plays out first on the individual and then on the collective level. Shame comes in so many varieties that it is hard to sort them out. People can feel shame for their bodily defects, for their deeds, for the actions of their children, and, if they are teenagers, for the very presence of their parents.

A rather simple distinction holds between shame and guilt. People feel shame for who and what they are, and guilt for what they have done. This connection between shame and the objective facts of our identity explains why shame can connect with bodily parts and stand totally outside the criteria of responsibility. Guilt about what you have done can make you feel shame for who you are (to have done such a thing). But the inverse relationship does not hold. That is, someone might feel shame about a physical deformity and attempt to conceal it. But there would be no reason to feel guilt about an accidental feature of one's body. In such situations, one might be able to reason by analogy from shame to guilt. We might be able to argue: If you feel shame for having abandoned your children, you should also feel guilt.

The great text for learning about shame is none other than the Bible's account of the Garden of Eden—the same text that is invoked to teach us about the Fall and original sin. The actual language of Genesis more readily supports a lesson about shame than about disobedience, sin, or guilt. We can pinpoint the moment when Adam and Eve first felt a relational sentiment. When first created, “[t]he two of them were naked, the man and his wife, yet they felt no shame.”²¹⁷ After they ate of the forbidden fruit, “the eyes of both of them were opened and they perceived that they were naked; and they sewed together fig leaves.”²¹⁸ This is the transformative moment, and it links the idea of shame most closely with the genitals. Genesis grasped the seemingly universal truth that people feel shame about having their genitals exposed. It is not entirely clear why. Some people think the genitals reveal how much like animals we really are and that this is the consciousness of shame. But we share four basic functions with animals: sex, excretion, eating, and sleeping. We feel shame about the first

217. *Genesis* 2:25.

218. *Id.* 3:7.

two (the second being so taboo that it is not even discussed in the Bible), but the latter two animal impulses are the mainstay of all long-distance flights. This distinction awaits an explanation.²¹⁹

Opening one's eyes is essential to feeling shame. The core experience of shame is feeling exposed, subject to the gaze of another. There is no suggestion in the text that either Adam or Eve judged each other harshly, blamed each other, or felt anything in particular, but they were aware of each other's eyes. And the first reaction to each other's eyes was to sense the nakedness of that part of the body associated with shame. The response to shame, as to nakedness, is to avoid the gaze. This requires one to cover oneself up, as suggested by the metaphor of clothing oneself in fig leaves.

The concept of "nakedness" appears again in the story after Adam and Eve clothe themselves. God comes into the Garden and purports not to know where Adam is. This is, of course, an amusing quest by a supposedly omniscient God. The divine search for Adam enables the man, now with eyes opened, to say that he was hiding. He had heard the voice of God in the Garden and he felt something that made him sense his nakedness and required him to hide. The "something" that Adam felt after he heard the voice of God is critical to the passage. The Hebrew word "*irah*" is often translated with a connotation of fear. "I heard the sound of You in the Garden, and I was afraid because I was naked . . ." ²²⁰ The better translation in a religious context is "awe" or "reverence." Adam felt naked because he was in awe of God. He could not feel awe unless he also felt separate and able to see God for a power other than himself.

Adam and Eve feel shame toward each other, but their sentiment relative to God is not shame but awe and respect. The common theme is separation. They can feel shame when their eyes tell them that they are separate beings, and they can feel awe toward God only after they become like gods themselves, knowing good and evil.

Offering this interpretation of Eden is important for several reasons. First, it gives us a mythological account of the origins of shame in the experience of seeing and being seen. Second, it provides a plausible reading of Adam and Eve's conduct that is totally different from the Christian story of disobedience, fall, and corruption of the human condition. The idea of original sin, the doctrine of transmission by birth that troubled us in Section V.A, is by no means a necessary or even a compelling implication of the biblical text. The more plausible reading of the story leads to a conclusion not of disobedience but rather of independence from the parent/creator and the acquisition of knowledge that would enable Adam and Eve to maintain

219. Cf. Max Scheler, *Shame and Feelings of Modesty*, in *PERSON AND SELF-VALUE* 1 (M.S. Frings ed. & trans., 1987) (grounding the analysis of shame in the human need to distinguish humans from animals).

220. *Genesis* 3:10.

their independence. God's ambivalence toward their seized independence is revealed in the act of providing skins and clothing to them before they are expelled from the Garden.²²¹ I would not say that this brief exposition solves all the problems of the text, but it is a plausible beginning.

Shame in individuals, we can conclude, has a sound grounding both in our experience and in our mythology. The feature that makes it different from responsibility and guilt, however, is its nonrational quality. There is nothing logical about feeling shame for one's genitals. And indeed in nudist colonies people can easily overcome their habit of genital shame. Nor is there anything well-reasoned about minorities feeling ashamed of the way they are, with the resulting desire to conceal their origins and stay "in the closet." On the whole, it seems that the practice of coming out liberates people from the strictures of shame. Yet at the same time, a strong sense of shame provides people with sound moral restraints. Feeling ashamed for, say, cheating or committing adultery is a healthy reaction that strengthens our ties with others.

D. *Collective Shame (Square Four)*

With this clarification of shame as an individual experience, can we then infer, by analogy, the phenomenon of collective shame? Consider the problem assayed by the German philosopher Anton Leist as he reflected on the experience of Germans who visit Auschwitz.²²² Some feel shame and others do not. What should the first group say to the second? That they ought to feel shame? (Note they would not say, as parents say to children, "You ought to be ashamed of yourself!") It is hard to imagine a duty to feel shame. We just noted with regard to shame about being gay, or Jewish, or the victim of a rape, that there is no rational basis for the sentiment. There could hardly be a duty to feel the irrational. All we can say is that some have the experience and that some do not.

If all or just about all Germans experienced shame when they visited Auschwitz, we could say that they collectively as well as individually experience shame. Another interpretation of collective shame might be that Leist feels shame in his capacity or aspect as a German. He feels ashamed about a personal characteristic that he shares with the entire nation. In this situation, it would not matter how many of his compatriots shared the feeling. Note that, in both of these senses, the notion of collective shame is clearly aggregative. It consists of the sum total of the feelings of shame experienced by particular individuals.

221. *Id.* 3:21.

222. Anton Leist, *Scham und deutsches Nationalbewußtsein* [*Shame and German National Consciousness*], in *AKTUELLE FRAGEN POLITISCHER PHILOSOPHIE* [CURRENT ISSUES IN POLITICAL PHILOSOPHY] 369 (Peter Koller & Klaus Puhl eds., 1997).

There might be many good uses of the concept of collective shame. But I do not think that it could exist in a collectivity in an associative sense. Shame is too closely connected with individual experience for collective shame to be any more than the sum-total experience of individuals who feel shame. This is not to say that the concept is always so used. The notion of shame could appeal to us as a surrogate for collective guilt.

A good example of collective shame as a euphemism for collective guilt comes to the fore in a thoughtful essay by András Sajó about living as a Jew in post-Holocaust Hungary.²²³ Sajó argues that Hungarian Christians should feel collective shame for their participation in the mass murder of Jews after the German invasion in March 1944. As a recognition of this shame, he claims, they should be willing to make reparations to the victims and their families. As a liberal who believes in the paradigm of guilt exclusively for individual action, he thinks the concept of shame will serve his purposes better. But in fact he would want the Hungarians to go through a process resembling what they would do if they felt collective guilt.

Feeling shame is not the kind of sentiment that generates a duty to make compensation. Even if I feel shame for what I personally have done, I am not sure why I would want to compensate someone who has suffered as a result of my action. That would not make me feel less ashamed. But if it is guilt that I am feeling, then compensation might restore my relationship with the victim and reduce the hostility directed toward me. If the Hungarian Christians felt shame about their own, their parents', or their grandparents' role in the murder of Hungarian Jews, the appropriate response would be to try to hide, to cover themselves in order to avoid the gaze of those they injured. This response would not satisfy Sajó. He wants them to come out, to stand up and be counted. Ideally, they should confess. It seems that these are our expectations of people whom we regard as guilty for what they have done.

In reviewing these issues we are left with the nagging feeling that many serious thinkers may experience anxiety in invoking the concept of collective guilt. It seems much more comfortable to talk about collective responsibility or collective shame. But why should this be so? Perhaps there is something to be learned from taking a look backward and assaying the historical evolution of the concept of guilt.

VII. SHADOW FROM THE PAST: THE HISTORY OF GUILT

When we discussed responsibility and shame, we started naturally with the cases of individuals and reasoned by analogy to collectives, that is, we

223. András Sajó, *Affordable Shame*, in *THE PARADOXES OF UNINTENDED CONSEQUENCES* 163 (Lord Dahrendorf et al. eds., 2000).

assumed that the individual case was more basic and that it should be the starting point for reasoning. In the case of guilt, the same principle does not so clearly apply.

A. *Guilt in the Bible*

If we go back to the Hebrew Bible, we find a conception of guilt with contours radically different from our current assumption that guilt is basically individual and subjectively felt. When we first encounter guilt in Genesis, the concept is both collective and objective. The term appears in a story told three times in the lives of the Patriarchs. The pattern is always the same: One of the fathers of the Jewish people is about to enter a foreign land where he suspects that the “barbarians” will kill him and take his wife. Therefore, Abraham twice and Isaac once relive the same deception: Each tells the foreign potentate that his wife is in fact his sister. In all three cases something happens to inform the potentate that either he or a man of his court is about to commit adultery.

In the first version, Abraham (then called Abram) passes Sarah (then called Sarai) off as his sister. Pharaoh takes her into court. Plagues then descend upon “Pharaoh and his household” as a sign that a sexual sin has occurred or is about to occur.²²⁴ Pharaoh quickly realizes that something is wrong in the natural order and confronts Abram with his lie. In the later retelling of the same basic story (with Abram renamed Abraham and the potentate named Abimelech), the truth of sexual sin is realized not by a plague but by God coming to the king in a dream and saying “You are to die because of the woman that you have taken, for she is a married woman.”²²⁵ In the third telling, when Isaac passes off Rebecca as his sister, a king also named Abimelech discovers the lie when he sees them engaging in affectionate behavior that would be incest if they were actually brother and sister. Assuming that they are not an incestuous couple, Abimelech confronts Isaac, establishes the lie, and then says: “What have you done to us? One of the people might have lain with your wife, and you would have brought *guilt* upon us.”²²⁶

This is how the notion of guilt makes its appearance on the biblical stage. In those places where you would expect to find it—after Adam and Eve eat of the forbidden fruit, after Cain kills Abel, after Ham abuses his father Noah—the concept is absent. Adam and Eve feel shame, and Cain

224. *Genesis* 12:17.

225. *Id.* 20:3.

226. *Id.* 26:10 (emphasis added).

complains that his sin (*avon*), sometimes translated as punishment, is too great for him to bear.²²⁷

It is clear that guilt (*asham*) is understood at the time as something like a stain, a form of pollution on the people. The stain afflicts the entire nation of Pharaoh or Abimelech. And, significantly, Abimelech accuses Isaac: You are bringing guilt on us, on our own people; implicitly not on yourself, Isaac, not on Rebecca. The one who is responsible for the situation, the one who lied, is paradoxically not affected by the guilt.

The sign of sin in the first telling of this tale is the plague that descends on the Pharaoh and his house, reminiscent of the plague that descends on Thebes as the first sign that Oedipus has engaged in an act contrary to the natural order.²²⁸ The plague is evidence of pollution, of contamination generated by human action. The idea that guilt is pollution bears several features that can only jar our modern sensibilities. The guilt is collective, it is objective, and it is the same for everyone. Also at odds with our contemporary thinking is the total irrelevance of fault or blameworthiness. The men prepared to sleep with Sarah or Rebecca have no idea that she is married and that the union would be adulterous. Nonetheless, they bring a plague on the land, and they bring “guilt” on the people. Again, the analogies with Oedipus are compelling. The sins of patricide and of incest inhere in the act itself, regardless of personal culpability. This is what Karl Jaspers had in mind when he wrote of moral guilt as a consequence simply of acting.²²⁹

The remedy for guilt, in the sense the term is used in the Hebrew Bible, is to bring a sacrifice. The sacrifice cleanses the stain. Remarkably, the word used in chapter 5 of Leviticus to describe a whole range of sacrifices described in Leviticus is also guilt—*asham*.²³⁰ The prescription is to bring a guilt sacrifice to atone for specific sins, burnt offerings for others. The confusion here between the deed and the remedy recalls the controversy about translating the word that Cain uses in his complaint that something about his fratricide is too difficult to bear. Some think that he is referring to the punishment, others to the crime itself.²³¹ This easy interchange of the

227. Some translations of the Bible translate *avon* as “punishment,” others as “sin” or “crime.” The problem is well summarized in ETZ HAYIM, *supra* note 181, at 27 n.13, in a comment on the editor’s choice of the word “punishment.”

228. SOPHOCLES, OEDIPUS REX (Stanley Appelbaum ed. & George Young trans., Dover Publ’ns 1991). The text is not clear whether the pollution derives primarily from the patricide or the incest. The following lines of the Chorus suggest that the incest is at least a major factor: “Time found thee out—Time who sees everything—Unwittingly guilty; and arraigns thee now consort ill-sorted, unto whom are bred sons of thy getting, in thine own birthbed. O scion of Laius’s race.” *Id.* at 43.

229. See *supra* notes 126-128 and accompanying text.

230. *Leviticus* 5:6, 15-16, 18-19, 25.

231. See *supra* note 227.

negative and the positive, the contamination and the decontamination, reveals the tight conceptual connection between the two.

Walter Burkert, historian of Greek religion and culture, has a different take on this easy association of guilt and punishment in the ancient world.²³² He suggests that those who committed the offense requiring a sacrificial response actually tendered personal feelings of guilt and projected these subjective feelings onto the sacrifice. This account does not square with the language of the Bible, but perhaps both are correct.

The hypothesis seems safe that the ancient world understood these concepts in a way different from our own. In contemplating whether Oedipus feels guilt or shame for his fated patricide and incest, it is often said that the Greeks at the time of Sophocles did not distinguish between the two concepts.²³³ There are signs of both in the play. When Oedipus discovers his crime, he craves punishment as though he were guilty in the modern sense, but the method of his self-inflicted punishment—putting out his eyes and going into exile—resonates with shame. He cannot bear to see others looking at him.

While the ideas of guilt and shame are interwoven in Athens, they are distinct in Jerusalem. The biblical test recognizes a culture of shame in the story of Eden and a distinct understanding of guilt and guilt sacrifices in Leviticus. Even in Athens there are clear differences between Sophocles and Aristotle, who was born a century later than the playwright. *The Nicomachean Ethics* continues to be a guide to the general theory of responsibility and enables us to understand the concept of guilt as it is used in the modern sense.²³⁴

B. *From Objective to Subjective Guilt*

In the last 2500 years in the West, we have undergone a major transformation in our thinking about guilt. The evolution toward our current approach to guilt has required the transition from the objective phenomenon of pollution to the subjective condition of blameworthiness. Though we retain the ancient idea of objective guilt, the focus has shifted to the modern idea of feeling guilty. Along with this change there has been a shift from guilt as a fixed quantity, the same for everyone, to the concept of guilt as a matter of degree. The striking assumption of modernity is that some people are more guilty than others. Their relative degrees of guilt depend on two factors: first, how much they contribute or how close they come to causing

232. Walter Burkert, *Greek Tragedy and Sacrificial Ritual*, 7 GREEK ROMAN & BYZANTINE STUD. 87, 112 (1966) (noting that “the community is knit together in the common experience of shock and guilt” at the time of sacrifices).

233. BERNARD WILLIAMS, SHAME AND NECESSITY 88-89 (1993).

234. ARISTOTLE, THE NICOMACHEAN ETHICS (London, Cox & Wyman 1850).

physical harm, and second, their internal knowledge of the action and its risks. The principal who controls the actions leading to harm is more guilty than the accessory who merely aids in execution of the plan. Those who take risks intentionally are worse than those who do so inadvertently. These assumptions about relative guilt are built into the modern way of thinking about crime and punishment.

These shifts from the external to the internal, and from the categorical to the scalar, account for another conceptual transformation. The notion of guilt in the biblical culture was connected with a particular kind of response—the sacrifice of animals in a religious ritual. In the modern, secular understanding of guilt, the linkage is not with sacrifice in the Temple but with punishment prescribed in court. As Herbert Morris writes, “To be guilty is, among other things, both to owe something to another and to be the justified object of their hostility.”²³⁵ Morris emphasizes the element of indebtedness in guilt, a factor that provides a bridge between the duty to sacrifice and the duty to suffer punishment.²³⁶

The process of secularization of guilt should not lead us to forget one very important aspect of guilt in the modern understanding. Paul Ricoeur points out in *The Symbolism of Evil* that the guilty person suffers from a particular sense of unworthiness, a loss of self-esteem that leads to a craving for punishment as the fitting externalization of his internal self-depreciation.²³⁷ One should add that in our current post-apartheid and post-Communist political situation, the need for punishment can be satisfied as well by public confessions of guilt.²³⁸

This transformation of guilt is much too deep and too radical to be attributed to any single historical process. It is difficult even to date the transformation. It would seem to be older than the rebellion of the German Romantics against the French Enlightenment in the end of the eighteenth century, but it is not clear when the shift occurred. Did it take place with the preaching of the Hebrew prophets, with the emergence of Christianity and its conception of individual salvation, or with the sixteenth-century Protestant doctrine of salvation by faith alone? These religious movements account neither for the secularization of guilt nor for the grading of guilt as a matter of degree. Nor can the history of religion account for the modern phenomenon of free-floating guilt and its detachment from all external anchors. The modern condition is best expressed in the plight of Kafka's

235. HERBERT MORRIS, ON GUILT AND INNOCENCE 120 (1976).

236. Morris's argument is based largely on the common root in the German terms *Schuld* (guilt) and *Verschulden* (debt). Unfortunately, this linguistic clue is not, as far as I know, available in other languages.

237. PAUL RICOEUR, THE SYMBOLISM OF EVIL 100-02 (Emerson Buchanan trans., 1969).

238. RICHARD J. GOLDSTONE, HEALING WOUNDED PEOPLE: WAR CRIMES AND TRUTH COMMISSIONS (1998).

Joseph K.²³⁹ He knows that he is charged with something. He is regarded as guilty for something, but he does not know what. He must wander the maze of the law in search of the trial that will resolve his anxiety about his internal state of unworthiness. It is as though he is Oedipus, but with the plagues internalized and without a truth that can be discovered.

Among all these transformations is another that is critical for purposes of this investigation, namely a shift in the presumed point of departure from collective to individual guilt. Our entire investigation has taken for granted that the burden of proof is on the advocate of collective guilt. For the ancients, particularly the ancient Hebrews, collective guilt was the normal instance of the concept. Though we must accept the conventional assumption that individual guilt is well-understood and collective guilt problematic, it is hard for me to believe that we can entirely escape the influence of the past. The biblical understanding, as reflected in the story of Isaac and Abimelech, must remain with us in some fashion. We use the concept of guilt today in the shadow of the biblical language. The ancient understanding seeps through our intuitions and opens us to the plausibility of attaching guilt to collective entities like the nation.

C. *Feeling Guilty*

If we are going to go modern, then we should go all the way and start our inquiry with the common experience of individuals who feel guilty. This feeling is usually coupled with a sense of unworthiness and a craving to be punished.²⁴⁰ Jaspers's well-crafted categories address the status of actually being guilty in one of four ways—legally, morally, politically, and metaphysically. Now we begin with the other side, the subjective phenomenological state of feeling guilty.

As Oedipus and Abimelech are paradigmatic figures for the ancients in their approach toward guilt, Raskolnikov is the exemplar of the modern man who knows precisely what he has done but fails initially to grasp the moral qualities of his actions.²⁴¹ He undergoes a process of discovery, as did Oedipus and Abimelech. Raskolnikov captures the existential situation of all the ideological killers who know precisely what they have done but who have yet to discover their guilt for having put their hand to evil.

The process of discovery carries with it the sudden explosion of truth. Repression caves in, and truth overwhelms. The reaction can often be

239. FRANZ KAFKA, *THE TRIAL* (Willa Muir & Edwin Muir trans., Alfred A. Knopf 1957) (1937).

240. *Cf.* RICOEUR, *supra* note 237, at 100-02.

241. *See* FYODOR DOSTOYEVSKY, *CRIME AND PUNISHMENT* (Constance Garnett trans., Random House 1944) (1866).

violent, as in the case of Oedipus. Or it can be therapeutic and lead to a reconciliation with victims or with one's self.

The important implication for our purposes is that this process of exploration and discovery applies to groups as well as to individuals. An entire culture can support slavery, but the mass of people will be able to ignore the humanity of their fellow human beings only for so long. Sooner or later the truth will break through, and the abolitionist spirit will be born. These political transformations cannot but invite a sense of guilt for the mistakes of the past. For Germans living after the war, the critical experience was apparently a television series—named *Holocaust*—that told the story of one Jewish family exposed to systematic persecution and mass murder.²⁴² Suddenly, thousands of people understood for the first time the depth of the crime that their fellow countrymen had committed.

One cannot get the same logical slippage in talking about shame because there is no similar gap between feeling shame and being ashamed. I cannot say that another person is ashamed if she feels nothing of the sort. If a fellow American feels no shame upon visiting the museum in Hiroshima, I might be able to say that he or she ought to feel shame, but I cannot say about shame as I can about guilt that he or she is in fact ashamed without harboring any feelings of the kind.

The reason for this difference, I believe, is that shame never enjoyed the mythical history associated with guilt. From the beginning in the Garden of Eden, the concept of shame was used much as it is today—a sentiment of shortcoming felt in the eyes of another. It was never a taint that could be expunged by sacrifice or punishment. But guilt, as we have seen, has its roots in the practice of sacrificing animals to expiate sins, in particular, to cleanse the community of guilt that its members have brought upon it.

VIII. CONCLUSION: THE SOCIAL MEANING OF COLLECTIVE GUILT

Collective guilt is one of those ideas we try to avoid. We may be proud about the achievements of our people and our nation, but we do not want to acknowledge that we are personally touched by the crimes committed in our nation's name. We grow up in a language, absorb a culture, learn its history, and then think that we can pick and choose between the things we like and the things we do not. Responsibility is comfortably abstract. Shame obtains or not, as our feelings happen to take form. But guilt—collective guilt—touches all of us.

242. About half the adult population, 20 million people, watched some portion of the television series when it was first broadcast in January 1979. The experience had the effect of adding the word "Holocaust" to the German language. William Drozdiak, *Hitler Legacy Haunts Germany Still; 50 Years After Rise, Nation Sifts Lessons*, WASH. POST, Jan. 30, 1983, at A1.

The use of collective responsibility seems to avoid all the baggage associated with the staining, the cleansing, the distortions of original sin and guiltless sincerity. And shame has the same appeal.

Can we start with one of these more appealing concepts and reason by analogy up the scale to collective guilt? I doubt it. If we start with responsibility, we will find it hard to capture that special sense of unworthiness that attaches to guilt—both to the state of being guilty and to the feeling of guilt. The concept of shame offers no distinction comparable to that between being guilty and feeling guilty.²⁴³ Nor does shame accommodate the distinguishing feature, which is the process of discovering the moral truth about actions in the past. You might say of people that they discover their responsibility for deeds in the past, but the experience of recognizing responsibility is usually no more overpowering than an impulse to open one's checkbook.

The strong biblical associations of collective guilt explain both our avoidance and our attraction to collective guilt. Our avoidance stems from the sense that the concept is simply too primitive for a modern thinker, at least sufficiently modern to have absorbed the teachings of Ezekiel.²⁴⁴ At the same time, the biblical understanding of objective guilt as a stain on the entire people still shapes our intuitions and leads, when our guard is down, to making whole judgments about entire nations and their guilt for horrendous crimes.

In our fluctuations to and fro about collective guilt we remain oblivious to one important facet of the concept that serves to maintain the conditions for a cohesive society. To grasp this point, let us return to the story of András Sajó, who in a seminar about his article, conceded that he had a personal motive for wanting to attribute collective shame (in fact, collective guilt) to the Hungarian nation in which he lived.²⁴⁵ He is both Hungarian and an assimilated secular Jew. He would like to see his offspring merge into the Hungarian majority. Yet if the dominant society rejects its responsibility and its guilt, his total assimilation into the Hungarian nation could easily seem to him like a betrayal of his Jewish roots.

To understand Sajó's situation, we need only ask what it would be like to live as African Americans in the United States if the dominant white political class felt no guilt—no unease whatever—about having used guns and chains to bring their ancestors to American soil. Suppose the whites expressed the attitude: "You are free now; the past is irrelevant." I should

243. This point is admittedly controversial. I am indebted to Herbert Morris for making the claim that "shameful" conduct for which one feels no shame is parallel to being guilty but not feeling guilt. But shamefulness is an attribute of the conduct, not a description of a state of being. Whether this is a critical point remains subject to debate.

244. Sajó, *supra* note 223.

245. The seminar took place at the Cardozo Law School in February 2001.

think that this mass amnesia of the dominant culture toward the crimes of the past would be unbearable, both to blacks and whites. The recognition of guilt provides a bridge for the victims and those who identify with the victims to enter into normal social relations.

The recognition of collective guilt, then, bears important social associations. Even if the guilty are not punished, they put themselves in a morally subordinate position that enables the former victims to regain lost dignity. We see this in the practice of punishing Holocaust denial, the crime the Germans call “the lie about Auschwitz.”²⁴⁶ At first blush it is hard to understand why anyone should object to writers denying that Jews were systematically murdered. Why is it insulting and demeaning for Jews to be told, in an extreme version of denial, “You are just like everybody else. No one wants to hurt you now, and nobody wanted to kill you then”? Presumably it would not be a crime for someone to deny that the Exodus from Egypt ever occurred or that the Patriarch Abraham ever lived. These facts are more central to Jewish identity than the death camps of the Third Reich. And yet Holocaust denial—but not the denial of the Exodus—is punished as a crime in many jurisdictions.²⁴⁷

The only way I can make sense of the criminal prohibition in force in most European countries is to think of Holocaust denial as a way of saying that no one could possibly be guilty, or personally be touched, by these crimes of the past. Why should anyone feel guilty about something that never happened? Would it be enough to have a truth commission that articulated a public truth about the crimes of the past? I am not sure. It is important that the dominant group in fact recognize its moral burden. They must not only speak the truth but make a symbolic bow, an act of self-deprecation, in order to acknowledge the relative dignity of those who once suffered.

And would a sense of collective responsibility accomplish the same end? Curiously, if young Americans said today “We feel responsible for

246. § 130 StGB (providing, in part, that it is a crime punishable by up to three years in prison to act in a way likely to disturb the public order by cursing, heaping contempt upon, or defaming a segment of the population, and thus attacking its dignity). This provision is interpreted to penalize Holocaust denial. STRAFGESETZBUCH: KOMMENTAR [CRIMINAL CODE: COMMENTARY] § 130, at 1103 n.1 (Theodor Lenckner et al. eds., 25th ed. 1997). Holocaust denial is also subject to prosecution as a criminal insult according to § 185 StGB. For a review of the German case law, see Eric Stein, *History Against Free Speech: The New German Against “Auschwitz”—and Other “Lies,”* 85 MICH. L. REV. 277 (1986).

247. Provisions parallel to sections 130 and 185 of the German Criminal Code, explained *supra* note 246, are found in many European codes. *E.g.*, KK arts. 256-257 (Pol.); UK RF arts. 129-130 (Russ.). Canadian jurisprudence is well known for its willingness to punish Holocaust denial. *See* The Queen v. Keegstra, [1990] 3 S.C.R. 697 (Can.) (upholding a criminal hate speech law). On the German and Canadian practices and specifically on the question whether the fact of the Holocaust must be proved in litigation enforcing these and similar provisions, see Lawrence Douglas, *Wartime Lies: Securing the Holocaust in Law and Literature*, 7 YALE J.L. & HUMAN. 367 (1995).

slavery,” the statement would not ring true. Why should they be responsible for actions taken over a century and a half ago? But their guilt, arising by virtue of identification with the history of their nation, would make sense. The remarkable fact about the United States is that the children of twentieth-century immigrants can and do feel guilt for a nineteenth-century collective crime. American history has a pull like no other. It confers a new identity on immigrant children and gives them a stake in a psychological past that is not even part of their real past. By saying that they feel guilt for slavery, they would be saying that they see the effects of the nineteenth-century crime in the problems of race relations all around them, and they feel personally touched and unworthy that these circumstances of discrimination should constitute part of their psychological history. Their authenticity as whole beings requires them to recognize the crimes of the American nation and to make them part of their everyday sensibilities.

Americans, in fact, seem to have an inclination for recognizing social guilt. We are constantly discovering the evils of our past ways. In our robust egalitarian culture, we witness a newly discovered and shared sense of guilt for the sins of Columbus, the elimination of Native American culture, the oppression of women, and the persecution of homosexuals. Most significantly, our politically correct speech serves as a constant reminder of our collective guilt. The words by which subordination was expressed in the past have become taboo. As we ritualistically avoid the “N” word and all its analogues, we remind ourselves and each other that our language once provided a transcript of our evil ways.

The proof of collective guilt in politically correct speech is evident not just in the avoidance of certain words, but in the anxiety about using words that border on forbidden territory. To use a word like “niggardly” or “spooks” generates self-consciousness, a sense of possibly having crossed the line. The speaker says to himself: “Perhaps like Coleman Silk in *The Human Stain* I will be taken to be one of those bigots who still exist among us.” The same anxiety is felt by any professor who forthrightly addresses issues of race and racism in class or takes on the dangers of falsely accusing men of rape in criminal law. Some of the fear may stem from being falsely branded by the others as belonging “to the wrong side.” But part of it also stems from participating in a collective experience of stigmatizing attitudes of the past as oppressive and seeking to signal that covenant with justice in our daily use of language.²⁴⁸

248. I admit that there may be less charitable interpretations of political correctness in language. For example, the point may be to demonstrate that we belong to the educated class that has learned the proper way of referring to various minorities. Steven Pinker, Editorial, *The Game of the Name*, N.Y. TIMES, Apr. 5, 1994, at A21.

It is not surprising that every society has its characteristic ways of expressing its guilt for the past. For Americans, the reform of language is an ongoing project. For Continental Europeans, it is important to maintain public truths about genocide. For South Africans, it is enough to hear the stories and confessions of past oppression. For the Japanese, the renunciation of war serves as a constant reminder. The common element is a recognition that cultural continuity and the flourishing of the nation require the use of memory to institutionalize our guilt as well as our cultural triumphs.

The kind of collective guilt that is signaled in these ways is associative and nontransitive. It inheres in the nation, but it tells us nothing about the guilt of any particular person alive today. We remember and recognize our continuity with those in the past who, for one reason or another, routinely said and did things that we would today regard as unthinkable. In a peculiar way we feel even more aware of these past crimes and more guilty for their occurrence than we would expect of people at the time. After all, they were insulated from the truth by their historical circumstances. I cannot blame Thomas Jefferson for keeping slaves, and yet today it would be an unspeakable crime. Those who act enmeshed in a particular culture are less able to exercise their second-order powers of self-correction, but with the benefit of hindsight we all have refined judgments about the sins of the past. Our only problem is that we do not yet have hindsight about our current excesses of judging others who adhere to the now-stigmatized attitudes of the past. Nor do we fully realize now whether our fighting wars abroad or neglecting poverty at home will be judged by future generations to be a basis for *their* collective guilt.

Collective guilt is in fact on the ascendancy. We tend to feel increasingly touched and connected to the misfortunes that befall others. We feel guilty about polluting the environment if we throw a bottle on the street. We feel contaminated by wearing tennis shoes made by child labor on the other side of the world. We feel metaphysical guilt, as Jaspers would say, that people are starving or dying of AIDS somewhere in the world. The danger, of course, is the illusion of omnipotence. We want to matter so much to the events of the world that we assume guilt where, in fact, the events are far beyond our control.

Our capacity for feeling guilt underscores our humanity rather than our allegiance to a particular nation, for only human beings feel guilt. Animals may fear punishment and may experience shame, but they do not conceptualize their fears and anxieties as a failing of the self. Our capacity for guilt, then, distinguishes us as a species and reminds us of the universality of the human condition. The very fact of guilt, as we now understand it, serves the liberal view of the word, a vision of individuals

standing apart from their nations, each responsible solely for his or her own crimes.

Of all the problems I have raised in this Article, the two excesses of Romantic thinking remain with us as a constant challenge to the liberal mind. How do we confront and refute the cultural attachment to the transmission of guilt by birth and the argument that authentic actors can never be guilty? In the end I find a claim of associative, nontransitive guilt acceptable because this mode of transmitting guilt over time leaves open the question whether particular individuals are to be stigmatized. Yet the cultural grid that supports transmission by birth remains with us and poses a recurrent challenge to liberal thought.

Of equal and perhaps greater difficulty is the problem of ideological criminals, a phenomenon that, with religious fanaticism on the rise, seems to be all too common. There is no doubt that those who kill because they believe it is their religious duty to do so are still murderers and deserve to be punished. But it remains too difficult to explain their punishment to ourselves when the offenders are impervious to our reasons. We do not communicate condemnation when they are firmly convinced that they did the right thing. The challenge is to find the proper middle way that mitigates punishment on the basis of society's denying offenders their second-order capacity for self-criticism and yet stops short of excusing offenders because they are sincere in their actions.

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Does this mean that the Romantics and others who advocate an expansionist methodology have won the argument? Only in part. The stronger the case for collective guilt, the more the liberal spirit of individualism will rebel to protect the sanctity of individual autonomy and the importance of individual responsibility. We must remain on guard against the distortions represented by the doctrine of transmitting guilt by birth and of relying on criteria of sincerity to deny the guilt of those who commit great evil for ideological reasons. And all the theories and arguments about the past come to a halt when we come face-to-face with a concrete human being. This is true both for the Romantic as well as for the liberal. When confronted with a member of a group that supposedly bears guilt for its collective evil, I can see only another person like myself—someone who, like Shylock, may be burdened with a mythology of collective guilt but who bleeds and laughs like me. If this person is to be charged with guilt, we should want to know above all: “What did he do?” We cannot judge him on the basis of identity or party affiliation or religious beliefs. His group may be guilty of horrendous crimes. But the liberal form

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of the law is vindicated. There is no substitute—at least in court—for honoring the uniqueness of every individual.