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Retributory Theatre

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ARTICLES

RETRIBUTORY THEATER

Edward M. Morgan*

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INTRODUCTION

And the more one tells of the departure from Egypt, the more is he to be praised.¹

* Assistant Professor, Faculty of Law, University of Toronto. Many thanks for insights and advice to Marty Friedland, David Kennedy, Avraham Tsuri, Galila Turkienicz, and Ernie Weinrib. I am grateful to Thom Druyan for valuable research assistance, and to Tsiporah Lipton for virtuosity on the keyboards. Errors, of course, are mine alone.

1. PASSOVER HAGGADAH 9 (N. Goldberg trans. 1983) [hereinafter HAGGADAH] The *Haggadah* provides the reason for the Passover celebration: "Now if God had not brought out our forefathers from Egypt, then even we, our children, and our children's

Theater, according to playwright/criminal Jean Genet, is "a profound web of active symbols capable of speaking to the audience a language in which nothing is said but everything portended."² One goal of this article is to demonstrate that case law, particularly war crimes cases, can be similarly expressive in a subliminal and suggestive way. Stripped to their essence by an appreciation and then a peeling away of the "social crust and discursive thought"³ with which they are superficially adorned, these cases are examples of what Eugene Ionesco has dubbed "theater from within"; they articulate through the medium of law man's "most essential needs, his myths, his indisputable anguish, his most secret reality and his dreams."⁴ The point is to perceive all of the participants in the war crimes productions — judges, lawyers, defendants, witnesses, historical villains and victims — as significant not only in their own right, but as they appear in the legal drama as "sign[s] charged with signs."⁵

This article examines three prominent war crimes cases: *Nuremberg*, *Eichmann*, and *Demjanjuk*. These cases are analyzed as significant instances in the development of both criminal and international legal doctrine, but more centrally, as particularly evocative moments in the totality of expression aimed at the dehumanizing events of the Nazi era.⁶

children might still have been enslaved to Pharaoh in Egypt And the more one tells of the departure from Egypt, the more is he to be praised."

2. Genet, *A Note on Theatre*, 7 TULANE DRAMA REV. 37, 37 (1963). Genet suggests himself as potentially insightful in drawing the parallels sought to be described here precisely because of his dual character as artist and convict. The fascination and exploration in his plays of patterns of domination and submission, generally depicted metaphorically in terms of complicated ceremonies and ritual, are relevant to the drama of criminal law generally and war crimes cases in particular. See M. CARLSON, THEORIES OF THE THEATRE 413 (1984) (comparing Genet's aesthetic and philosophical relationship to other "absurdist" playwrights).

Another examination reinforces the theory that the law generally, and criminal punishment in particular, exists as a model of domination and subordination, through the general juridical form. See M. FOUCAULT, DISCIPLINE AND PUNISH 222 (A. Sheridan trans. 1979) (stating that "the real, corporal disciplines constituted the foundation of the formal, juridical liberties").

3. See E. IONESCO, NOTES AND COUNTER NOTES 224 (D. Watson trans. 1964) (tracing this terminology from Ionesco's description of the disguises in which theatrical expression is ordinarily cloaked; peeling away is the central goal of his "*theatre de derision*"). See generally M. ESSLIN, THEATRE OF THE ABSURD (1968) (emphasizing the raw insight that theater evokes on human nature as introduced by various authors).

4. E. IONESCO, *supra* note 3, at 223-24.

5. Genet, *supra* note 2, at 37.

6. See Kennedy, *Theses About International Law Discourse*, 23 GER. Y.B. INT'L L. 353, 355 n.4 (1980) (proposing a neorealist departure from strictly logical methods of analysis or exposition in favor of a more aesthetic approach such as the one pursued herein); Ball, *The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater*, 28 STAN. L. REV. 81, 113-15 (1975) (concluding that judicial theater is a humanizing process, the very essence of which takes place in our courtrooms).

In this respect, the litigation and judgments are modes of dramatic endeavor in the sense described above; underneath the legal forms and doctrinal language in which the cases present themselves lies a symbolic message about human existence.

In each of the three cases, the message is retributory in nature. The narration of episodes and guilt takes shape by mirroring the contradictory impulses expressed in the crimes.⁷ Thus, the conflicting pronouncements evidenced in the criminal and international doctrines are linked to the antonymous ways in which not only the defendants, but the judges and others involved in the legal process, conceive of life.⁸ Ultimately, the entire retributory drama spins a symbolic web in which a dual understanding of human personality is ensnared, and to which prevalent conceptions of personhood and peoplehood can be traced.

One more point requires explanation before descending into the legal theatrics predicated upon perhaps the most tragic night of world history.⁹ The presentation of war crimes cases here takes the general form

7. See *infra* notes 146-206 and accompanying text (describing the circumstances and tensions evident at the trials of Nuremberg, Eichmann, and Demjanjuk).

Generally, a retributive message to criminal law is distinguishable from an instrumental one in that while the latter consciously seeks to produce some social change, the former seeks to affirm some aspect of existing social life by symbolically negating the criminal act which placed that aspect of life under attack. See *infra* notes 122-36 and accompanying text (discussing retributive and instrumental displays of criminal liability).

8. This examination of war crimes cases does not focus so much on exposing doctrinal contradiction as it does on probing the competing ways of portraying significant relationships in the law. The difficult and frequently incompatible doctrinal expressions that form the subject matter of this article are symbolically charged, reflecting a deeper duality of the ways in which society and, finally, personality can be conceived. This article, however, presents no theory with respect to the historical contingency or transcendence of this understanding, or the identification of a duality. What it does offer is a reading of transcendent themes into the contingent expressions of the case law, but this in no way reflects a belief in the noncontingence of this reading.

In the realm of legal theory, the question of whether the conceptual contradictions underlying the contradictions of doctrine are historically contingent has become the subject of recent debate. See Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 221 (1979) (stating that "[t]he contradiction . . . is no more immortal than is the society that created it or sustains it"); Katz, *Studies in Boundary Theory: Three Essays in Adjudication and Politics*, 28 BUFFALO L. REV. 383, 383-84 (1979) (explicating that two premises of the boundary theory, unity and duality, are inherent to human thought).

This debate is further reducible to that between structuralism and poststructuralism in understanding texts, myth, and social practice. See Jacobson, *Translator's Preface* to C. LEVI-STRAUSS, *STRUCTURAL ANTHROPOLOGY* xi-xv (C. Jacobson & B. Schoepf trans. 1963) (outlining Levi-Strauss's position that one can understand kinship systems, myths, and major political events in historical and ahistorical terms); M. FOUCAULT, *supra* note 2, at 222-23 (deducing that "deep meaning" identified as transcending cultural constructs is also itself a cultural construct).

9. The image of "night" has been employed with reference to the historic events

of an allegory, with each case introduced and ultimately explained by reference to some aspect of the *Haggadah*, or narrative read at the Passover meal. The story and rabbinic commentaries on the exodus from slavery in Egypt suggests itself as relevant for a number of reasons, particularly the celebration of freedom embodied in the ritualized retelling of the tribulations of history. War crimes cases, in their guise as repetitive and formalized dramatic histories, share much of this essence. In periodically retelling these horror stories, we not only educate ourselves with respect to history and the extremes of human nature,¹⁰ but vindicate the freedom that lies in our various conceptions of ourselves.

I. *Nuremberg*: "Why is this night different . . .?"¹¹

It does not seem an exaggeration to say that nowhere in any legal system has a judicial panel articulated an abhorrence of evil quite so dramatically as did the postwar judges sitting at Nuremberg — perhaps because no judicial body has ever before or since been confronted with quite the magnitude of evil as that cumulatively embodied by the particular *Nuremberg* defendants. Yet, for all its stirring invocations of the "law of nations" and its evocative condemnations of "crimes against humanity," the *Nuremberg* case remains somewhat difficult to understand. In the aftermath of the world's (and certainly Germany's) most devastating war, what exactly did the conviction and execution of several more Nazis accomplish that had not already been done? Furthermore, was the trial, for all of its formalist theatrics, an assertion of principle over coercive force, or was it merely one more exercise of coercive power capping a decade of unparalleled violence? After all, the assertion of judgmental authority by the Allied powers over the individual leaders of Germany's Third Reich seemed anticlimatic following the massive punishment accompanying the liberation of Europe, and superfluously vengeful given the total defeat of Germany's wartime regime and the acknowledged impossibility of its immediate or future

now known to the world as the Holocaust on numerous occasions, although perhaps never more poignantly than in Elie Weisel's own intensely personal account of the Nazi era, the destruction of his family, and the world they came from. E. WEISEL, *NIGHT* (S. Rodway trans. 1960).

10. The annual reading of the *Haggadah* also is said to go beyond a mere educative function. See HAGGADAH, *supra* note 1, at 9 ("[e]ven were we all wise, all men of understanding, and even if we were all old and well learned in the Torah, it would still be our duty to tell the story of the departure from Egypt").

11. See HAGGADAH, *supra* note 1, at 8 (presenting the first of the questions to which the rest of the *Haggadah* narrative provides the answer: "Why is this night different from all other nights?").

resurrection.

Comprehension of the *Nuremberg* decision becomes possible only with an initial change in the focus of the inquiry. The question is not what the case accomplished because in the usual instrumental terms it accomplished next to nothing. Accordingly, the first glimmer of understanding comes only with an acceptance of *Nuremberg's* instrumental irrelevance and a further probing into those features of the case that suggest the proceedings represented something other than just another instance of arbitrary or self-righteous violence by nations against persons over whom they should have no say. The question in uncovering and appreciating the dramatic core of *Nuremberg* is: what message about transnational and national illegality and legal structures, or about human self-conceptions and human behavior, did the judgment evoke?

In attempting to approach the fundamental message of the *Nuremberg* case, one must simultaneously pursue two distinct lines of inquiry. One must come to grips with the nature of the legal authority asserted in the case and somehow reconcile the questions of judicial process that accompany this adjudication with the substantive notions of culpability that the judgment propounds. To accomplish this task, however, an inquiry into the general nature and project of retributory justice must supplement an analysis of the international and criminal process case law from which the *Nuremberg* case emerges. Ultimately, the judgment pronounced and punishment inflicted at *Nuremberg* takes on the classic retributive posture of mirroring the condemned acts for the sole purpose of articulating and dramatically enacting a symbolic statement. Thus, only when one gets to the heart of this symbolism, and interweaves the message about human self-definitions with the ideas of legal authority and criminal culpability embedded in the case, can one finally appreciate the *Nuremberg* dramatics.

A. THE RETRIBUTORY MESSAGE

Contrary to common perceptions, the primary message of retribution entails an affirmative rather than a negative statement.¹² In both a

12. The negativity generally associated with retribution as a basis for justice was perhaps most dramatically asserted by Beccaria. See C. BECCARIA, *ON CRIMES AND PUNISHMENTS* 42 (1st ed. 1983) (querying, "[c]an the groans of a tortured wretch recall the time past, or reverse the crime he has committed?").

For an overview of the philosophical literature dealing with retributive justice, see Brudner, *Retributivism and the Death Penalty*, 30 U. TORONTO L.J. 337, 345-54 (1980) (vindicating retributivism as the only morally defensible ground for punishment and relating its implications to capital punishment).

philosophical and an aesthetic sense, it is not so much the condemnation of the impugned act that gives the retributive theme its dramatic impact; rather, it is the assertion and vindication of that which the condemned act denied. Thus, although retribution as a basis for punishment ignores forward-looking goals of criminal justice such as deterrence and rehabilitation,¹³ cases expressing such a message do not tend merely to seek an historically oriented vengeance for the past acts.¹⁴

The undeniably evocative quality of any decision in which retribution plays a major thematic part can be traced to the affirmation of existence for which the case invariably stands. Ultimately, this exercise in mirroring offensive acts for no purpose other than its own symbolic message, can be seen as an elaboration upon those qualities that make all people — the victims, the defendants, and the population that the judicial body represents — free from the oppression that the unvanquished criminality would otherwise reflect. This basic celebration of the freedom that potentially inheres to human personality constitutes the affirmative retributory message and links the symbolic content of the judgment in these cases to the notion that "the most radical freedom is the freedom to be."¹⁵ While judicial theatrics can be, and often are, utilized for any number of transitive goals or instrumental purposes,¹⁶ retributive justice concentrates on the most dramatic crimes not to bring about a specific empirical change, but in an effort to express those eternal aspects of personality that account for everyone's

13. See Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 406-11 (1958) (positing principles of rehabilitation and deterrence as positive instrumental functions and two driving forces of criminal law, yet finding them generally distinguishable from retributive goals); see also Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson*, 23 UCLA L. REV. 293, 302-04 (1975) (comparing the instrumentalist theory with the legalist theory, while discussing the goals of criminal punishment).

For a more classical assertion of the instrumentalist view, see J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 172-75 (1970) (explaining why punishment is unjustified in circumstances where it would be "inefficacious").

14. See Weinrib, *Enduring Passion*, 94 YALE L.J. 1825, 1839 n.43 (1985) (citing I. KANT, ANTHROPOLOGY FROM A PRAGMATIC POINT OF VIEW §§ 80, 83 (M. Gregor trans. 1st ed. 1798), and S. SHELL, THE RIGHTS OF REASON: A STUDY OF KANT'S PHILOSOPHY AND POLITICS 122 (1980)). Kant postulated that revenge is tangentially related to law because it contemplates a notion of right and wrong for the avenger. However, it is distinct from retribution as discussed here in that its personalization of punishment constrains its message to the particular context of the offense, making any symbolic affirmation beyond the avenger's own satisfaction impossible. Weinrib, *supra*, at 1839.

15. R. UNGER, PASSION: AN ESSAY ON PERSONALITY 107 (1984).

16. See *infra* notes 122-36 and accompanying text (discussing judicial instrumentalism of criminal liability).

capacity to be "a unique person in the world as it is."¹⁷

In order to come to grips with the retributive message, therefore, one must first comprehend in an abstract sense the various ways in which freedom from oppression is conceived. This, in turn, requires at least some understanding of the human self-conceptions exhibited in the case law, which necessitates an inquiry into those attributes that characterize human endeavor and provide a deep structure to the portraits of freedom that the case law provides. For present purposes, these aspects of personality can be grouped into broad categories: rational thought and emotional bonds.¹⁸

The first of these attributes to be examined, after introducing the *Nuremburg* tribunal's jurisdictional dilemmas, is human rationality, which lies at the core of the judicial portrayal of freedom in the personalized, noncontextual form that G.W.F. Hegel has labeled "abstract right."¹⁹ The second of these attributes examined is human emotion, that lies at the core of the judicial portrayal of personal liberation in the socially bonded, contextualized form that Roberto Unger has referred to as the "life of the passions." Although neither vision of personality is on its own entirely explicative, a combination of the two opposing concepts lies at the substantive core of the complex assertions of judicial process over individuals and nations that international law and domestic criminal law exhibit. Ultimately, the assertion of legal authority by a given judicial body, particularly when the essence of the adjudication is the enunciation of retributive symbolism rather than the instigation of immediate social change, constitutes an evocation of those particular configurations of human personality. The court perceives the evocation as a characterized version of interactive social life presented by the stories of the prosecution and the defendant in the case.

17. R. UNGER, *supra* note 15, at 107-08.

18. To echo the introductory remarks by Roberto Unger in his work on the implications of a life dominated by human passions, this article attempts to pursue an analysis of war crimes case law as an exercise in the "practice of attributing normative force to conceptions of personality." R. UNGER, *supra* note 15, at vii (noting that the book presents methodological and substantive concerns).

The dualistic conception presented herein flows from Rousseau's insight that although rationality and passion seem to represent contradictory impulses, they in fact coexist in symbiotic balance. See J. Rousseau, *Discourse on Inequality*, in *THE SOCIAL CONTRACT AND DISCOURSE ON THE ORIGIN OF INEQUALITY* 188-89 (L. Crocker ed. 1974) (stating that "the human understanding is greatly indebted to the passions, which, on their side, are likewise universally allowed to be greatly indebted to the human understanding").

19. HEGEL'S PHILOSOPHY OF RIGHT 37-74 (T. Knox trans. 1952) [hereinafter HEGEL].

B. THE TRIBUNAL'S PROBLEM OF AUTHORITY

As indicated, the symbolic message with respect to human self-identity is articulated in conjunction with the novel structuring of legal authority that the *Nuremberg* case implied. The novelty did not exist on the plane of substantive criminal law. That is, it had become apparent by the time of the liberation of Nazi-occupied Europe that the persons comprising the upper echelons of the Third Reich deserved criminal punishment. The sheer extent of Germany's official depravity served to render any definitional questions with respect to criminality beyond the scope of sane debate.²⁰ Although such substantive issues as the "defense of superior orders" and the retroactivity of "crimes against humanity" were, and remain, the subject of some legal and scholarly concern,²¹ the interesting problems posed by the Nuremberg Charter²² and tribunal were essentially those of legal process rather than substance. On what basis could an adjudicative body created by non-German state entities assert judgmental authority over the former leaders of the German nation? Given that Goring, von Ribbentrop, Borman, Hess, and others²³ were guilty of any number of substantively offensive acts, by

20. Several instances in postwar legal discourse have tangentially generated debate over the nature of the Nazi regime. In one case, holocaust apologists and neo-Nazi enthusiasts have asserted a right of free speech. See *Collins v. Smith*, 578 F.2d 1197, 1210 (7th Cir.), cert. denied, 439 U.S. 916 (1978) (holding that a demonstration by American Nazi Party members is protected by the first amendment). In another case, actions were brought against revisionist historians and holocaust deniers. See *Regina v. Zundel*, 35 D.L.R.4th 338, 338-43, 352-55 (Ont. C.A. 1987) (allowing prosecution for spreading false and vindictive news under the hate literature provisions of the Canadian *Criminal Code*). Nevertheless, the substantive question of Nazi criminality has not been deemed subject matter worthy of mainstream legal, ethical, or political debate.

21. See Y. DINSTEN, *THE DEFENCE OF 'OBEDIENCE TO SUPERIOR ORDERS' IN INTERNATIONAL LAW* 127-59 (1965) (referring to the discussion of obedience to superior orders presented in the Nuremberg trial); R. WOETZEL, *THE NUREMBERG TRIALS IN INTERNATIONAL LAW* 109-19 (1960) (rationalizing the Tribunal's distinction between retroactivity and superior orders); Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT'L L. 38, 59-62 (1947) (reiterating the court's refusal to address crimes against humanity occurring prior to the outbreak of the war); Goodhart, *The Legality of the Nuremberg Trials*, 58 JURID. REV. 1, 6-8 (1946) (commenting on the ex post facto character of the Nuremberg prosecution).

22. Charter of the International Military Tribunal, reprinted in 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 10 (1947) [hereinafter Nuremberg Charter]. The Nuremberg Charter is annexed to the Agreement for Establishment of an International Military Tribunal, signed by the governments of France, the United Kingdom, the Soviet Union, and the United States. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, E.A.S. No. 472, 582 U.N.T.S. 279, reprinted in Official Document Supplement, 39 AM. J. INT'L L. 257 (1945).

23. Twenty-two individuals were indicted in the *Nuremberg* case, including: Goring, von Ribbentrop, Keitel, Streicher, Bormann (in absentia), Hess, Kaltenbrunner, Rosenberg, Frank, Frick, Funk, Schacht, Donitz, Raeder, Von Schirach, Sauckel, Jodl,

what power could punishment be inflicted and ultimate retribution be had?

A close reading of the *Judgment of the Nuremberg International Military Tribunal*²⁴ reveals several alternative footings on which the tribunal purportedly asserted criminal jurisdiction. In the first place, the Nuremberg Charter was perceived as an "exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered."²⁵ The connotation suggests that although the Charter was drafted and judges appointed by agreement among the four occupying powers, the tribunal itself was constituted as essentially a domestic German court. In this view the Allies, as conquerors, simply stood in the shoes of German sovereignty, so that with the demise of indigenous authority at the end of the war, the four-power administration was left to bring offenders to justice under any past or present German regime. Far from the innovative embodiment of international legality that the *Nuremberg* tribunal is generally thought to represent, this first jurisdictional assertion stands merely as a peculiar expression of postwar Germany's inherent right or power to try wartime German criminals.

Regardless of a certain logical appeal to this approach, conforming as it does to traditional assertions of criminal jurisdiction, this domesticated concept of war crimes adjudication is more of a disguise than an expression of the total *Nuremberg* message. Although the reluctance of the Allies to appear to be engaging in a victor's exercise in punishing the vanquished may well account for a traditional rhetorical shield, the postwar trials clearly enunciate a vision of legal authority going beyond the idea of the German nation's own judgment of its past leaders' domestic offenses. Indeed, if such were not the case, the judgment would represent just one more instance, albeit an historically odd one, of unilateral state power over domestic crime.²⁶ In addition, although such a

von Papen, Seyss-Inquart, Speer, Von Neurath, and Fritzsche. See *Judicial Decisions*, 41 AM. J. INT'L L. 172, 333 (1947) (specifying the counts on which each defendant was convicted and the sentence that each received).

24. *Id.* at 172-333. Edited and excerpted versions of the judgment appear in numerous international law casebooks. See D. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 555 (1983) [providing the version of the case hereinafter referred to as *Nuremberg* in HARRIS]; L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 907 (giving a synopsis of the case) (1980).

25. *Nuremberg* in HARRIS, *supra* note 24, at 556.

26. The capacity of a sovereign state to exercise criminal law and other powers over subject matters within its territorial bounds, without reference to any extrinsic authority, is so deeply entrenched in the legal consciousness as to rarely surface in the form of discussion or debate. See *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (stating: "[t]he jurisdiction of the nation within its own territory is necessa-

judgment would technically take the form of a sovereign exercise of domestic adjudicative authority, its content would not have emanated from within, but rather would have been imposed from outside of the domestic German legal system.²⁷ Accordingly, any symbolic portence of a newly conceived freedom would give way to an understanding of the case in only the crudest of vengeful or instrumental terms — an unlikely conception of a judgment by the powers that had recently subjected the defendants and their nation to a devastating defeat at war.

Having stated the possibility of its existence as a domestic criminal court, the tribunal in its next sentence responded to the inevitable skepticism and revealed its second, and somewhat less defensive, ground of jurisdiction. "The Charter is not an arbitrary exercise of power on the part of the victorious Nations," the judgment asserts, "but . . . is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law."²⁸ The substantive picture, as expressed through the doctrinal medium of international jurisdiction, is emphatically different from that contained in the first (domestic) statement of the tribunal's adjudicative authority. Here the individual defendants are envisioned not so much as having committed crimes against some embodiment of the German state, but rather as having acted offensively against the normative environment of the entire world.

This internationalization of the judicial process embodies the dramatic and historically novel message generally associated with the *Nuremberg* case. It is also this universalist theme, however, that imports the most difficult doctrinal wrinkles and conceptual hurdles that the case posed. As will be seen, the notion of individual responsibility in a transovereign setting was not readily compatible with the rhetorical framework within which international law traditionally operated.²⁹ In

rily exclusive and absolute It is susceptible of no limitation not imposed by itself"); see also MODEL PENAL CODE § 103 (1962), 10 U.L.A. 452 (1962) (declaring territorial applicability).

27. Although application of nondomestic norms by domestic courts is considered perfectly acceptable in such fields as contracts, torts, family law, and others, where it constitutes the central doctrinal focus of the body of rules existing under the rubric of conflicts of laws, the application of nondomestic criminal law is generally considered unacceptably close to an undermining of one state's sovereignty by the exercise of another's sovereign powers. See *Moore v. Mitchell*, 30 F.2d 600, 604 (2d Cir. 1929) (Hand, J., concurring) (declaring it impermissible for a criminal court "[t]o pass upon the provisions for the public order of another state.").

28. *Nuremberg* in HARRIS, *supra* note 24, at 556.

29. There are numerous pronouncements to this effect in pre-World War II international case law. Even those cases that ultimately enforce some international legal rule in favor of an individual involved in an interstate conflict do so in a way that either denies the separateness of the individual's identity from that of the parent sovereign, or

fact, it was equally at odds with the traditional domestic law formulations of extranational or extraterritorial criminal jurisdiction.

The very notion that other (i.e., non-German) sovereignties, or the international system itself, could somehow judge the admittedly offensive acts that Germans committed within their country appeared on its face to be intrinsically jarring to any pre-*Nuremberg* legal structure.³⁰ No preconceived version of normative authority fit the Nazi facts, or could be said to inform what the formal structure of the *Nuremberg* case suggested: the judgment of individuals by representatives of other nations. Thus, to fully appreciate the tribunal's ultimate statement of its own authority, and, in particular, in order to comprehend the vindication and symbolic identity that this highly visible instance of retribution is meant to serve, the theoretical bases of the various international and domestic pronouncements on the jurisdictional bounds of legal process must be explored in turn. The question becomes: is the case as appropriately different in its staging and message, its form and content, as was the "night," in the Wiesel sense of the word, from all other "nights?"

C. RATIONALITY AND PERSONHOOD

As indicated, comprehension of the message lying at the core of war crimes adjudications requires some preliminary consideration of several philosophical positions on personality that the case law combines and evokes. The first conception of human identity embodied by retributory

that domesticates the legal question by dissociating the individual from the sovereign state embroiled in the international controversy. Compare *The Nereide*, 13 U.S. (9 Cranch) 388, 394-95 (1815) (inferring that ownership of the enemy national's property seized on a neutral ship turns on the friend or foe character of the goods) with *The Paquete Habana*, 175 U.S. 677, 689-91 (1900) (recanting that an individual's ownership of a ship flying a belligerent flag depends on the separation of coastal fishermen from the national war effort of their country). See generally Morgan, *Internalization of Customary International Law: An Historical Perspective*, 12 YALE J. INT'L L. 63, 63-65 (1987) (discussing various rhetorical devices used in *The Nereide* and *The Paquete Habana* cases).

30. Not only were sovereign states perceived as the primary juridical personalities of international law and the primary source of all legal authority whether domestic or national, but entities lacking in one or more of the essential attributes of statehood were considered to be nonentities in the international legal sense of being nonbearers of rights and obligations vis-à-vis other sovereign entities. Compare Convention on Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097, 3100, 165 L.N.T.S. 19 (providing qualifications of states as international legal persons) with *Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the Legal Aspects of the Aaland Islands Question*, LEAGUE OF NATIONS O.J. Spec. Supp. 3, at 3 (1920) (finding that statehood constituted only if domestic authorities no longer depended on foreign military presence).

expression is that of abstract individuality. This conception is traced by its most forceful philosophic champions to the distinctly human capacity for rational endeavor. Although the link between moral personality and reason is generally associated with the philosophy of Immanuel Kant,³¹ it is in Hegel's further elaborations that the human capacity for detachment from external contexts into a pure abstraction of thought finds its ultimate expression as a source of freedom. Hegel begins his analytic endeavor by indicating that the nature of mankind, distinguished from that of other beasts, is defined by the thinking will. Unlike an animal whose actions represent a manifestation of instinct or "inner impulse," an individual holds before her mind the object of her desire, so that the actions that she takes, or those that she wills, are desires determined by the process of thought. In this view, one does not act against the external world by giving expression to unfettered desire or arbitrary will, but rather one understands the externalities and makes them part of one's own thought process.³²

This characterization of persons as inherently capable of standing over the objects of their desires by thinking, rather than allowing such objects to dominate them through uncontrolled impulse,³³ gives rise to Hegel's next proposition that freedom is integral to the thinking will. By definition, the will is said to dissipate "every restriction and every content either immediately presented by nature, by needs, desires, and impulses, or given and determined by any means whatever."³⁴ Will, in this view, is intrinsically wed to thought; therefore, the possibility exists for unrestricted abstraction from various impulsive inclinations as well as from any particular state of mind that a person might find in herself.³⁵

If the will is defined as the aspect of human nature that cannot be restricted or the process that underlies the self-determination of inner

31. See I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 12-13 (J. Ladd trans. 1965) (discussing the Kantian inspiration in which the capacity for reasoned action is identified as the starting point for an analysis of right).

32. See HEGEL, *supra* note 19, at 226 (explaining the freedom of will by referring to the physical law). In Hegel's own inimitable words: "The variegated canvas of the world is before me; I stand over against it; by my theoretical attitude to it I overcome its opposition to me and make its content my own." *Id.*

33. Kant makes a similar point by describing the human will as divided into two distinct processes; one generates desire, the other determines this desire into action. I. KANT, *supra* note 31, at 12. This inevitable two-step functioning of the will is put forward as an explanation of the fact that unlike animals, whose impulses are translated directly into actions without being filtered through the process of reason, persons can be enslaved neither by their own desires nor by the objects on which such desires may center. *Id.* at 13.

34. HEGEL, *supra* note 19, at 21.

35. *Id.* at 22.

impulse into action, so that active externalizations cannot be dictated by forces which bypass rational thought, it follows for Hegel that "[f]reedom . . . is just as fundamental a character of the will as weight is of bodies."³⁶ This internal or subjective freedom of the will, therefore, is the first identifiable characteristic of personhood that affects on behavior. The possessor of a thinking will so defined can never claim that her actions represent a manifestation of forces beyond control.

The free will establishes the nature of personality; therefore, every person must be equal in his natural freedom to determine himself through thought.³⁷ Thus, human freedom necessarily goes beyond the subjective sense of the capacity to surmount internal animalistic desires and is objectified by the notion of equality so that it extends to freedom from the unbridled desires of others.³⁸ As a result, the subjective freedom which inheres to personality translates neatly into an objective freedom from the impingements of others. Moreover, the structure of freedom that this view of personality implies is crucial to all social organization and, further, is expressed in "positivized" form as the delineation in practical terms of the scope of each individual's freedom.³⁹

This rationality implicit in any human act, and the inherently equal capacity of all persons to engage in a similarly rational process, allows any given external manifestation of will to be imputed with an abstract statement spoken in the reflective voice. Thus, an element of universality and self-submission to the reflective processes of the will prohibits the domination of any one thinking will over another.⁴⁰ While respect for personhood demands that each and every act implicitly convey that the actor is rationally cognizant of her existence among others with whom she shares equal personal freedoms, the egoistic impulse of self-

36. *Id.* at 226.

37. In Kant's terms every human action is, because of this fundamental equality of wills, "susceptible to imputation," i.e., readable as a universally applicable statement. I. KANT, *supra* note 31, at 24.

38. This sense of equality, however, is of a special, abstract type. In Hegel's terms: "[w]hen I say 'I', I *eo ipso* abandon all my particular characteristics, my disposition, natural endowment, knowledge, and age. The ego is quite empty, a mere point, simple, yet active in this simplicity." HEGEL, *supra* note 19, at 226.

Whatever else may exist to differentiate the possessions, character, and socialization of individuals, they are all, at the very minimum, equal in the definition of their essential rational nature.

39. Hegel states that "[t]he will is free, so that freedom is both the substance of right and its goal, while the system of right is the realm of freedom made actual, the world of mind brought forth out of itself like a second nature." HEGEL, *supra* note 19, at 20.

40. See *supra* note 37, at 13 (providing the Kantian explanation of this imputation).

assertion or self-preference is the mark of human disrespect.⁴¹

From the philosophical perspective that holds rationality as central to personhood, an external manifestation of thought that denies "abstract right" is an offense against human nature,⁴² in that it expresses a coercive show of unbridled will, and is a nullity in terms of interpersonal relations. In denying the system of "positivized" freedom or right, it effectively denies its own scope of action. "The manifestation of its nullity," Hegel writes, "is the appearance, also in the external world of the annihilation of the infringement."⁴³ Thus, egoistic or oppressive coercion is self-destructive because it asserts a claim not only to subsume another free will under it, but if universalized and turned against the actor, it will equally annul her own individual freedom.⁴⁴ The offender, therefore, not only allows himself to be coerced, but demands a reciprocal coercion if the inhuman assertion implicit in his actions is treated with the human respect it nevertheless deserves. Just as rationality is the essence of personhood, it is this logical reciprocity of aggression against the offender that, for Hegel, lies at the heart of retribution.

D. INDIVIDUALS AND INTERNATIONAL LAW

The *Nuremberg* case is a striking invocation of individual responsibility and vindication of abstract personhood in one sense, and an odd deviation from standard international legal process in another sense. In singling out the particular Nazi leaders and mirroring their offensive acts through the expression of culpability and infliction of punishment, the tribunal reenacted the deprivation of individual personality in a way that dramatically accentuated its rational essence. Yet, the structure of the theater, or the setting of the stage, seemed unfamiliar at best and incongruous at worst. The judging of individuals by foreign nations seemed so alien to international process that the substantive message threatened to lose itself in the interminability of the jurisdic-

41. To again invoke a Kantian explanation, an act manifesting an assertion of structural inequality between the actor and another is perceived by Kant as a self-preference in conception, and as such is an irrational determination of the will. I. KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 41-42 (L. Beck trans. 1959). This, of course, is also the fundamental message of the renowned categorical imperative: "[A]ct according to a maxim that can at the same time be valid as a universal law." I. KANT, *supra* note 31, at 26.

42. Note Hegel's assertion that "[t]he infringement of right as right is something that happens and has positive existence in the external world." HEGEL, *supra* note 19, at 69. Just as the infringement has a positive existence, so must the right. In this way, the naturalist exercise of tracing freedom to personality takes on the form of positive law.

43. *Id.*

44. *Id.* at 66-67.

tional debate.

Accordingly, this article delves briefly into the background of international legal process, and in particular examines the traditional relationships between persons and nations embodied in this field of legal endeavor, before comprehending the similarities and changes in both process and substance that the *Nuremberg* decision in the end expressed. In effect, one must appreciate the struggle of self-definition encompassed by classical international law to appreciate the scope of the soul-searching articulated by the postwar tribunal.

It is trite, if not entirely accurate, to say that individuals found no place within the thought structure of classical international law.⁴⁵ Indeed, some of the earliest of the modern attempts to formulate a notion of transnational rather than national legal order have at their core a conception of the natural sovereignty of persons rather than the (in this view) artificial groupings represented by polities or states.⁴⁶ Foremost among such thinkers was Hugo Grotius, whose vision of the universal sociability of human beings⁴⁷ and whose rejection of coercive state authority in favor of a transcendent and just social life demanded by the

45. The triteness comes from the fact that, as discussed above, individuals rarely found a place in the rhetorical structure of classical international discourse. The inaccuracy, however, comes from the correlative fact that, as noted *supra* note 29, the factoring of individuals out of international legal rhetoric often indicated that individuals had a significant place in the thought structure of international legality, but that for one reason or another the rhetorical devices of the discipline were not equipped to explicitly recognize the fact. See generally Kennedy, *supra* note 6 (discussing the operation of international legal rhetoric).

46. Debate over the legal recognition of human beings in their dual capacities as sovereign individuals and as members of a polity may be said to trace at least from Aristotle's identification of two irreducibly distinct forms of justice: corrective and distributive. ARISTOTLE, *V Nicomachean Ethics* 1129b-1132b, in *THE WORKS OF ARISTOTLE* 377-80 (W. Ross trans. 1952) [hereinafter ARISTOTLE]; see Weinrib, *Toward a Moral Theory of Negligence Law*, 2 *LAW & PHIL.* 37 (1983) (identifying corrective justice as appropriate to the algebraic structure of adjudication, and distributive justice as appropriate to the geometric relationships of regulation and welfare law). In contemporary international legal and scholarly debate, this dichotomy has revolved around competing conceptions of the primacy of personal rights protection and international order among political bodies. See D'Amato, *Nicaragua and International Law: The 'Academic' and the 'Real'*, 79 *AM. J. INT'L L.* 657, 659-60 (1985) (noting that the law of human rights existed before the United Nations Charter and continues to exist regardless of current notions of state sovereignty); McDougal, Lasswell & Reisman, *The World Constitutive Process of Authoritative Decision*, in *INTERNATIONAL LAW ESSAYS* (M. McDougal & W. Reisman eds. 1981) (discussing world public order as a meta-norm of international law). For a theoretical account of this international debate, see Brudner, *The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework*, 35 *U. TORONTO L.J.* 219 (1985) (contrasting universalized human rights with political will).

47. H. GROTIUS, *THE LAW OF WAR AND PEACE* 11 (F. Kelsey trans. 1925); see also Kennedy, *Primitive Legal Scholarship*, 27 *HARV. INT'L L.J.* 1, 79 (discussing Grotius's natural law view derived from the drive toward sociability).

law of human nature⁴⁸ is identified as a conceptual starting point for the modern search for universal legal order.⁴⁹

Ironically, the natural law flavor of this early approach to international legality and its own evident sources in such nonsecular (and nonpositivist) bodies of thought as those of Aquinas⁵⁰ and Augustine⁵¹ have led to the ultimate rejection of human individuality as both the point of departure for transnational juridical existence and the explicit premise for nineteenth and twentieth century international jurists. One can articulate contemporary (and certainly pre-World War II) international doctrinal pronouncements in such a way that the backlash of nineteenth century positivism, and the skeptical attack on the very notion of extrasovereign norms spearheaded by John Austin,⁵² have the most profound and lasting impact. For the most part, the bite of Austinian positivism and the lawyer's general discomfort with a system void of any hierarchical structure or source of normative authority⁵³

48. H. GROTIUS, *supra* note 47, at 587 (stating that individuals "should altogether refrain from [warfare] if it is clear to them that the case of the war is unjust"); see Kahn, *From Nuremberg to the Hague: The United States Position in Nicaragua v. United States and the Development of International Law*, 12 YALE J. INT'L L. 1, 47-53 (1987) (discussing the "just war" theories propounded at the dawn of modern international discourse).

49. See Kahn, *supra* note 48, at 48 n.171 (stating that "Grotius is the key link between the premodern, religious perspective on international legal obligations and the modern international legal concern with human rights"); Kennedy, *supra* note 47, at 77 (noting that Grotius secularized "the primitive vision of a worldwide normative order").

50. See THE POLITICAL IDEAS OF ST. THOMAS AQUINAS 113 (D. Bigongiari ed. 1969) (providing Aquinas's restatement of Aristotle's categories of natural justice in his consideration of "what is justice?").

51. See AUGUSTINE, THE CITY OF GOD 112 (M. Dods trans. 1950) (reiterating Augustine's renowned statement of natural justice: "justice being taken away, then, what are kingdoms but great robberies?").

52. See J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 201 (1954) (noting the classical assertion of this attack on the notion of international legality). Austin states, "[H]ence it inevitably follows, that the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author [T]he law obtaining between nations is law (improperly so called)" *Id.*

53. As is evident, the impact of positivist thinking has in this respect gone well beyond the international law context discussed here. In a general way, legal formalism readily conforms to Austin's pronouncement that "[l]aws properly so called are a species of commands." *Id.* at 133. The conceptual comfort of the legal consciousness within a positively manifested normative hierarchy is illustrated by cases in which there is seen a judicial disregard for ethical imperatives over the requirements of the (ethically arbitrary) sovereign or legislative will. See, e.g., *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 452 (1857) (holding the prohibition on slavery in federal territory unconstitutional); *United States v. Moylan*, 417 F.2d 1002, 1009 (4th Cir. 1969) (affirming the conviction of conscientious war protesters). Perhaps the most stark illustrations of an Austinian approach to legal positivism are instances in which courts are faced with the legal effect of the acts of a regime that has rebelled against the continu-

has engendered not only a great deal of sophisticated and defensive posturing by international jurists, but has prompted an elaborate attempt to build the positivists' crucial concept of sovereignty back into the very structure of trans-sovereign law.

The recreated positivism of international legal theory has taken the particular form of imbuing interstate norms of conduct with an equivalent type of formal, objectively discernable validity as that which denotes the unquestionably positive existence of domestic enactments. In the words of the champion of this brand of post-Austinian positivism, Hans Kelsen: "[I]nternational law is regarded as [a] . . . set of objectively valid norms that regulate the mutual behavior of states . . . [and] are created by custom, constituted by the actual behavior of the 'states.'"⁵⁴ In the Kelsenian view, the binding force of international legality, much like the edicts and commands of a domestic sovereign, finds its source in the externalized evidence of formal validity.⁵⁵ This apparently valid form, in turn, allows for the assertion by the legal theorist that "a basic norm is presupposed that establishes custom among states as a law-creating fact."⁵⁶ Much like the domestic enactment or decree that issues from the embodiment of sovereignty in valid form — the authority of which is presupposed by virtue of this very formal validity⁵⁷ — actual participation of sovereign states in acts identified as

ation of the constitutional authority of the preexisting sovereign. *See, e.g.,* Horn v. Lockhart, 84 U.S. (17 Wall.) 570, 580-81 (1873) (validating Confederate acts necessary to the preservation of the "bonds of society," but rejecting the insurrectionary acts of southern states against the rightful authority of the United States); *Madzimbamuto v. Lardner-Burke* [1969] 1 App. Cas. 645, 723-31 (P.C.) (rejecting de facto or de jure recognition of acts of the post-U.D.I. Rhodesian regime).

54. H. KELSEN, *PURE THEORY OF LAW* 215 (1967).

55. The positivist focus on the "external" criteria of legal form rather than the "internal" criteria of content underlies the usual distinction drawn by common law judges between the realms of law and ethics. Thus, ethical codes of various sorts are conceived as properly serving the wholly internalized phenomena of thought and desires. *See* *Matthew* 5:28 (stating that "whosoever looketh on a woman to lust after her hath committed adultery with her already in his heart"). By contrast, "the aim of the law," according to Justice Holmes, "is not to punish sins," but to prevent "certain external results." *Commonwealth v. Kennedy*, 170 Mass. 18, 20, 48 N.E. 770, 777 (1897).

56. H. KELSEN, *supra* note 54, at 215-16.

57. Kelsen states that the presupposition of authority flowing from a formally valid act constitutes the *grundnorm* (basic norm) of all legality:

For the historically first constitution such an interpretation [premised solely on validity] is possible only if we *presuppose* that one ought to . . . perform coercive acts only under the conditions and in the manner the constitution stipulates; if, in other words, we presuppose a norm according to which (a) the act whose meaning is to be interpreted as 'constitutional' is to be regarded as establishing objectively valid norms, and (b) the individuals who establish this act as the constitution[al] authorities . . . This presupposition is the ultimate . . . reason for the validity of the legal order.

constituting customary law in effect establishes the validity, and the presupposition of binding authority, of such law. As Kelsen puts it: "Coercion of state against state ought to . . . conform with the custom constituted by the actual behavior of the states.' That is the 'constitution' of international law in a transcendental-logical sense."⁵⁸

Notwithstanding these conceptual twists and turns operating in the realm of theory about international law, international legal discourse itself has remained remarkably unreflective about its own theoretical premises. Thus, the result of the dominance of Kelsenian positivism has been a rather simple, though effective, move to structure the doctrinal pronouncements in such a way as to trace the source of any particular international legal norm to the consent of the relevant sovereigns. The two primary forms that such norms take — treaty provisions and customary rules — are each said to flow either directly (in the case of treaties) or indirectly (in the case of custom) from some voluntary sovereign action. The effect of this international legal structure has been twofold. First, individuals have of necessity been factored out of the discourse, there being no place in a system of consenting sovereigns for any such quintessentially nonstate entities. Second, the identification of law in the manifestations of actual state practice and consent has become something of a rhetorical sleight of hand; the international legal system is thereby attributed with its capacity to pronounce restraints on state action while all the time seeming to accentuate rather than to limit the ultimate authority of sovereign states.

It is essential to explore more concretely the paradoxical manner in which international judicial pronouncements trace any hint of a systemic power of restraint to the unrestrained power of sovereigns to confer or withhold their consent. In so doing, a deeper comprehension might be achieved of the uncomfortable way in which the *Nuremberg* suggestion of individual responsibility sits in the state-oriented world of transnational legality. The most promising place to start is with the 1927 decision of the Permanent Court of International Justice (PCIJ) in *The S.S. Lotus*.⁵⁹ This decision, which contains perhaps the most renowned discussion of the essentially consensual nature of sources doctrine in all of international law,⁶⁰ goes a long way toward exemplifying

Id. at 46-47.

58. *Id.* at 215.

59. *The S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

60. It has become quite commonplace for discussions of the sources of international law to point to either the direct or the indirect consent of sovereigns. *See, e.g.*, *Reservations to the Genocide Convention Case*, 1951 I.C.J. 15, 32 (May 28) (Guerrero, McNair, Read, and Hsu Mo, JJ., dissenting) (stating: "the legal basis of . . . conventions,

the doctrinal constructs in which the predominant visions of legal sources and, indeed, statehood itself get expressed in traditional international discourse.

The case centered on the question of criminal jurisdiction in international law and would, therefore, seem immediately pertinent to the *Nuremberg* decision. The precise question faced by the court in *Lotus*, however, was that of the existence of any restraints on the unilateral assertion by a sovereign state of jurisdiction over extraterritorial acts, and so the court did not directly touch on any debate over the international system's own criminal process or jurisdictional presence. Indeed, the court responded to France's claim that Turkish criminal jurisdiction over acts aboard a French ship amounted to a violation of sovereignty by emphasizing its own passivity in the creative processes of international law making.⁶¹ Thus, the decision distinctly illustrates the way in which international tribunals attempt to impose normative limits on sovereign states without deviating from their comfortably defensive posture of protecting and reaffirming the very concept of unrestrained sovereignty. In this respect, the *Lotus* decision reflects the discursive posture that international legality has traditionally assumed; it articulates extrasovereign or systemic norms in a system with neither an overarching sovereignty of its own nor an ability to penetrate its sovereign participants and gaze directly at the wrongs and rights of their individual constituents.

The question of criminal jurisdiction addressed by the PCIJ, therefore, is one step removed from the ordinary issues of process that come before the criminal courts. Despite the obvious concern with the defendant's culpability, the *Lotus* decision seems to naturally shift its focus from the relationship between Captain Demian and the Turkish court to that between Turkey and France. Turkey's "victims' jurisdiction" is never discussed within its own frame of reference as a delineation of responsibility to the national community for which the Turkish courts stand. Neither, however, is it seen as a norm that transcends

and the essential thing that brings them into force, is the common consent of the parties"); *Asylum Case* (Colom. v. Peru), 1950 I.C.J. 266, 277 (Nov. 20) (stating that international customary obligations are based upon a "constant and uniform usage, accepted as law").

61. Captain Demians, the skipper of a French ship, the S.S. *Lotus*, was brought before the Turkish courts and accused under Turkish law of an act of criminal negligence aboard his own ship that led to the deaths of several Turkish sailors. The court's assertion that the "rules of law binding upon states . . . emanate from their own free will as expressed in conventions or usages generally accepted as expressing principles of law" provides a frequently cited explanation for the source of treaty obligations and international customary norms. *The S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

sovereign action or consent. Rather, what follows is a difficult juxtaposition of sovereign autonomy with systemic deference or passivity. Thus, the general notion that a state "may not exercise its power in any form in the territory of another state"⁶² is accompanied by the caveat that "it does not . . . follow that international law prohibits the state from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad."⁶³

One needs only a touch of cynicism in order to conclude from the *Lotus* decision that while sovereignty cannot possibly be absolute, the court's overriding concern is that the court itself not be the factor that restricts or invades sovereignty.⁶⁴ Instead, Turkey's invasion of French sovereignty is legitimized as somehow being necessary to a world of interacting sovereigns and which is then rationalized by the fact that the self-determination of criminal jurisdiction is crucial to Turkey's sovereignty. One might conclude, therefore, that the general regime of liberty under which Turkey is said to operate in pursuing this jurisdictional invasion of France is, as was found in *Nationality Decrees in Tunis and Morocco*,⁶⁵ "an essentially relative question: it depends upon the development of international relations."⁶⁶ The *Lotus* decision seems to conceive of the regime of jurisdictional freedom as essentially consensual and, therefore, transient in nature, potentially changing as the world political order fluctuates from one of libertarianism among states to one of cooperation.⁶⁷

The end result of this thinking for international law and its own characterization of the international legal system is twofold. First, the positivization of norms along Kelsenian lines not only causes the body

62. *Id.* at 20.

63. *Id.*

64. The combined absolute and restricted nature of states' territorial jurisdiction can be traced to the pronouncements of Chief Justice Marshall in *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812). Chief Justice Marshall recognized territorial jurisdiction as "[t]his full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power." *Id.*

65. *Nationality Decrees in Tunis and Morocco* (Gr. Brit. v. Fr.), 1923 P.C.I.J. (ser. B) No. 4 (Feb. 7).

66. *Id.* at 30-32 (noting that the extension of French citizenship to British subjects resident in North Africa was not prohibited in principle, but did violate an Anglo-French treaty).

67. See Kennedy, *supra* note 6, at 363-72 (discussing international relations as structured around these two poles of sovereign autonomy and interconnection or cooperation); see also Binder, *The Dialectic of Duplicity: Treaty Conflict and Political Contradiction*, 34 BUFFALO L. REV. 329 (1985) (stating that the tensions between national sovereignty and international legal order exists within international legal doctrine).

of legal sources doctrine to trace its own conceptual origins to the consent of those sovereigns that are bound by such norms, but to couch all articulations of sovereign restraint in terms of empirical observation of sovereign action.⁶⁸ Second, the system as a normative entity, as opposed to its assorted participants, is projected as having little force. Thus, notwithstanding the occasionally optimistic assertion that "the normal condition of states according to international law . . . [is] that the state has over it no other authority than that of international law,"⁶⁹ the international system itself is rarely seen as constituting more than the sum of its parts. Accordingly, although one sovereign participant in the system may on its own accord judge and, indeed, punish another participant for any impingements of sovereignty, the system itself tends inexorably to articulate only those restraints that can be posed as instances in which unlimited sovereignty is itself defended.

The traditional implication of a legal system in which international norms are couched in terms of the consensual acts of its sovereign participants is that entities other than states neither consent to nor are bound by the rules of the game and, thus, with rare exception, fail to qualify as players.⁷⁰ Although nonstate entities have on occasion been assimilated to the position of sovereigns and for certain purposes have achieved juridical status equivalent to that of states,⁷¹ individuals have

68. Ironically, sovereigns are told what they can and cannot do in a way that never deviates from a statement of what they already, in fact, do. This making of normative statements in empiricist language seems to characterize numerous fields of scholarly endeavor in the law. Thus, for example, "law and economics" theorists exhibit a tendency to posit wealth maximization as the end goal of legal decision making in a way that suggests a fundamental ambivalence between a moral preference for economic efficiency and mere observation and explanation of existing normative phenomenon. See Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEG. STUD. 103, 110 (1979) (discussing economic efficiency as the "attractive basis for ethical judgments"); Posner, *A Theory of Negligence*, 1 J. LEG. STUD. 29, 29-30 (1972) (positing wealth maximization as a goal of fault-based tort liability).

69. Austro-Germans Customs Regime, 1931 P.C.I.J. (ser. A/B) No. 41 (Advisory Opinion of Mar. 19) (considering the voluntary alienability of Austrian independence to Germany).

70. On the notion that a corporation has no juridical status of its own in international forums, see *Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, 1970 I.C.J. 4, at 39 (Feb. 5) (noting that only a state in which the corporation is registered has standing to assert a claim on behalf of a corporation). On the traditional nonstatus of liberation movements in international law, see *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791 (D.C. Cir. 1984) (per curiam) (dismissing the case for lack of subject matter jurisdiction but noting that tortious acts by Palestinian Liberation Organization members do not constitute state action and, thus, do not violate international law) (Edwards, J., concurring). On the nonconsenting, and thus nonparticipatory status of colonies in the international legal system, see *Newfoundland Continental Shelf* [1984] 1 S.C.R. 86 (Can.) (tracing the international status of Newfoundland before and after the Statute of Westminster 1931, 22 & 23 Geo. 5, ch.4).

71. See *Nanni v. Pace and the Sovereign Order of Malta*, 8 A.D. 2 (Ital. Corte

been expressly excluded from such possibilities.⁷² Prior to the postwar development of contemporary human rights doctrine only a few sporadic arbitral decisions and treaty provisions concerning the rights of aliens⁷³ existed on which to take account of individual personality when dealing with international sovereigns. Indeed, even modern human rights law is typically propped on the Kelsenian structure of legal positivism insofar as it is technically seen as binding by virtue of its source in either treaty or custom, or direct or indirect consent of sovereign states.⁷⁴

Cass. 1935-1937) (attributing international juridical personality to a religious order); *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 179 (Advisory Opinion of April 11) (characterizing the United Nations as a holder of international legal rights).

72. See Statute of the International Court of Justice, art. 34(1) (declaring that "[o]nly states may be parties in cases before the Court"); H. Lauterpacht, *Survey of International Law Commission*, U.N. Doc. A/CN.4/1/Rev. (1949), in 1 E. LAUTERPACHT, *INTERNATIONAL LAW, BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT* 469-71 (1970) (stating that individuals hold international legal rights solely by virtue of the intention of state parties to conventions or incorporation of international law into a state's domestic law).

73. See, e.g., *Mavrommatis Palestine Concessions* (Greece v. Gr. Brit.), 1924 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30) (holding that an injury to an alien national is an injury to the foreign state); *United States (B.E. Chattin) v. Mexico*, 4 U.N.R.I.A.A. 282 (U.S.-Mex. Claims Comm'n 1927) (considering a United States claim of denial of due process by Mexican authorities to a United States citizen); Briggs, *The Settlement of Mexican Claims Act of 1942*, 3 AM. J. INT'L L. 222, 222 (1943) (characterizing the United States-Mexico General Claims Commission as "dilatatory, inefficient and unfortunate"); Opinion of Commission of Jurists on Janina-Corfu Affair, *Report to League of Nations on Corfu Dispute*, 18 AM. J. INT'L L. 543, 543 (1924) (finding that "[t]he recognized public character of a foreigner and the circumstances in which he is present in its territory, entail upon the State a corresponding duty of special vigilance on his behalf").

74. Typical sources cited on behalf of human rights protection include the following: U.N. CHARTER, art. 1, para. 3 (declaring one of the purposes of the United Nations to be the promotion and respect of human rights among states); Universal Declaration On Human Rights, G.A. Res. 217 (III), 3 (1) U.N. GAOR at 71, Doc. A/810 (1948); International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 220, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966); European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (1950); American Convention on Human Rights, OASOR OEA/SER. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 2, Jan. 7, 1970, reprinted in 9 I.L.M. 672 (1970); see also *Sei Fujii v. California*, 38 Cal.2d 718, 721-25, 242 P.2d 617, 620-22 (1952) (stating that human rights are only enforceable when they qualify as binding treaty provisions and are thus "supreme law of the land"). For discussions on the sources of international human rights, see generally Henkin, *The Internationalization of Human Rights*, 6 PROC. GEN. ED. SEM. 7 (1977); L. SOHN & T. BUERGENTHAL, *THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS* (1973); H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* (2d ed. 1973); Schwelb, *The International Court of Justice and the Human Rights Clause of the Charter*, 66 AM. J. INT'L L. 337 (1972) (discussing whether human rights are now binding on signatories of the United Nations Charter).

Of course, the ability of sovereigns to allocate individual rights as they see fit points not so much to an exclusion of individuals from the international system, but rather to a traditional perception of individuals as significant solely in their capacity as appendages of their own sovereign. For this reason, the legal rights of aliens were able to achieve prominence in an era when individual or personal rights per se were otherwise excluded from international discourse.⁷⁵ As underlings of a particular sovereign umbrella, individuals were accorded the attention of the international system only when impingements upon them could readily be translated into an interference by one sovereign with the national insulation or autonomy of another.⁷⁶

With the postwar maturation of international legal discourse, and the transition from the ambiguously passive League of Nations Covenant to the affirmatively active United Nations Charter,⁷⁷ came a distinct rise in the level of rhetorical self-confidence. This development from the halting pronouncements of the PCIJ to the relatively assertive holdings of the International Court of Justice (ICJ), is perhaps best illustrated by the delegitimization of Liechtenstein's citizenship laws in *The Nottebohm Case*.⁷⁸ Liechtenstein brought the action against Guatemala, alleging the latter's mistreatment of one of the former's nationals; however, the court was seduced into its own self-assertion by Guatemala's defensive tactic of transforming the substance of

75. An examination of international law cases in which individuals are attributed with legally enforceable rights reveals that the basis for the enforceability is typically expressed in terms of the nonapplicability of international law. Thus, by way of illustration, where a proprietary entitlement depends on the court's assessment of the acts of an unrecognized government, the property right of the person is protected by virtue of judicial willingness not to apply international law; to overlook the lack of de jure recognition in favor of an acknowledgment of de facto recognition. See *Sokoloff v. National City Bank of New York*, 239 N.Y. 158, 165-66, 145 N.E. 917, 918-19 (1924) (recognizing the de facto government of Soviet Russia and its full effect in Russian law, regardless of the effect of the refusal of the United States government to recognize the Union of Soviet Socialist Republics as the government of Russia); *M. Salimoff & Co. v. Standard Oil Co.*, 262 N.Y. 220, 226-27, 186 N.E. 679, 682 (1933) (refusing to ignore the existence of the Soviet government and thus nullifying an attempt to present a tort claim against United States purchasers of land confiscated from Soviet nationals by the Soviet Russian government).

76. See D. HARRIS, *supra* note 24, at 123 (discussing the traditional expression of this viewpoint). Harris states: "[f]or the most part, however, the individual remains an object, not a subject, of international law whose most important characteristic for international law purposes is his nationality . . . It is nationality . . . that decides whether an individual can benefit from treaty guarantees that a state secures for its 'nationals.'" *Id.*

77. See Kennedy, *The Move to Institutions*, 8 CARDOZO L. REV. 841, 952-56 (1987) (discussing the rhetorical structure of the founding documents of international institutions).

78. *The Nottebohm (Liecht. v. Guat.)* 1955 I.C.J. 4 (Apr. 6).

Liechtenstein's claim into a debate over its stature as a claimant. The court used the adjudication as an opportunity to elaborate upon its own doctrine of standing, and produced a surprisingly restrictive rule. Its ultimate declaration that "[i]t is international law which determines whether a state is entitled to exercise protection [over its self-declared citizens]"⁷⁹ effectively separated the question of domestic legality from that of international validity, and set the stage for what appears in the result to be a forceful assertion of systemic power over autonomous sovereign power.

The point is not that the ICJ has found the strength to restrict in a metaconstitutional way any and all state action. While the *Nottebohm* decision enforces a relatively far reaching notion of sovereign restraint in the context of international legal process, it exhibits the court's unwillingness to enforce similar restraint on substantive grounds. While Liechtenstein's unorthodox citizenship rules were found to undermine the relevant participatory norms of the international system, Guatemala's mistreatment of an individual was found to be within the substantive scope of sovereign power.⁸⁰ Accordingly, the case displays both an increase in systemic power and a continuation of normative ambivalence with respect to the relationship between the participants in the system, i.e. sovereign states, and their own constituent members. Individuals continue to be factored out of the discourse in deference to sovereign stature. Restraints on the assertion of state power, however, are imposed in such a way as to suggest that where the process or international participatory concerns about the definition of nationhood are at stake, the relationship between the state and its individuals will be important in a way that rarely manifests when the concerns are those of an individual's stature as against the state.⁸¹

79. *Id.* at 21.

80. *Id.*

81. The normative ambivalence and rhetorical jumps between process doctrines and substantive doctrines continues to characterize the structure of international legality into the 1980s. For example, the debate over the "legality" of United States actions in support of paramilitary activities against Nicaragua has tended to vacillate along the process-substance continuum, at times focused on the substantive concerns of human rights and armed intervention, and at other times deflected into considerations of regional participatory institutions and questions of justiciability. See Chayes, *Nicaragua, the United States, and the World Court*, 85 COLUM. L. REV. 1445, 1450-51 (1985) (presenting United States arguments in defense of its withdrawal from the ICJ's compulsory jurisdiction on grounds analogous to domestic notions of political questions and jurisdictional limits based on separation of powers); Moore, *The Secret War in Central America and the Future of World Order*, 80 AM. J. INT'L L. 43, 90-92 (1986) (asserting that United States actions in support of the Nicaraguan "contras" constitute exercises of collective or regional self-defense); D'Amato, *Nicaragua and International Law: The 'Academic' and the 'Real'*, 79 AM. J. INT'L L. 657, 659 (1985) (concluding

Doctrinally, the result of these maneuvers is the attribution of enforceable rights or their corresponding obligations to individuals only when traced to a source in their home state's consent. The nature of international systemic authority is such that it refers to and reflects upon sovereigns in their external or interactive dimensions, leaving the internal communities of which the various sovereign constituencies are comprised to a different level of legal authority composed solely of domestic norms.⁸² The willingness of the ICJ to scrutinize a state's membership rules with respect to an individual connotes the reinforcement, rather than the denial, of the traditional suffocation of individual stature within the personality of the parent state. Both before and after *Nuremberg*, the international legal system presents itself as the authoritative embodiment not of individualized universality, but of a worldwide community of communities. Individuals are not unimportant, but their importance lies in their belonging to, rather than in their opposition to, a nation.

E. EMOTION AND PEOPLEHOOD

The second philosophical position evoked by war crimes adjudications is that which explains not the stature of autonomous individuals, but the bonding of national peoples into collectivities. Although the parallel is not exact, the contemporary work of Roberto Unger approximates an equally irreducible and alternatively powerful construction of personality to that based on rational thought. Much as Hegel draws on ancient tradition in abstracting the notion of right from the particularities of social or individualized contexts⁸³ and on the Kantian tradition in tracing personality to the capacity to reason and willfully act, Unger presents a modernist reconstruction of the by no means novel "Chris-

that beneath the traditional international rules of conduct lies a basic concern for human rights); Kahn, *supra* note 48, at 4 (arguing that the United States position translates substantive offense into state practice).

82. Compare *The S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 24-27 (Sept. 7) (asserting that vessels on the high seas are not subject to the authority of nearest coastal state) with *Schroeder v. Bissel (The Over The Top case)* 5 F.2d 838, 842 (2d Cir. 1925) (permitting enforcement of Coast Guard antimuggling operations beyond internationally recognized territorial waters). These conflicting rules evidently refer to different levels of legal authority, reflecting different conceptions of community. While the United States in its international relations is restricted (or perhaps more accurately has consented to restricting itself) to the jurisdiction delineated by the international law of territorial seas and contiguous zones, it encounters no such restrictions vis-à-vis the constituents of its own national community.

83. Aristotle pointed out that the requirements of justice must be kept conceptually distinct from the assorted virtues of character, which distinguish between persons. ARISTOTLE, *supra* note 46, at 377-78.

tian-romantic image of man."⁸⁴ Indeed, the inspiration for this work reaches as far back as classical Confucianism because it attempts to scrutinize existing forms of direct relations between people and to draw from this "small coin[age] of personal encounter . . . whole schemes of social life."⁸⁵

For present purposes, Unger's extensive account of the life of the passions need not be examined beyond the introductory idea of the work; the point is to put forward an alternative concept of human relations to that of abstract right and to demonstrate how it, too, is symbolically vindicated through the drama of retribution. Thus, just as an understanding of personhood does not require one to delve into the further reaches of Hegelian thought with respect to the move from abstract right to the state,⁸⁶ a basic comprehension of peoplehood does not require one to flesh out, as it were, the psychosocial battle between love and hate (and their respective offspring) within the realm of the passions that occupy much of Unger's thought. Rather, what must be emphasized is that just as the capacity for rationality is a distinguishing mark of human existence, so the drive toward emotional bonding is a nonseverable element in the human character.

Unger's opening portrayal is not a particularly happy one. The world is posed as a place that is all too "real and dense and dark," at which each lonely person gazes in "unspeakable horror" and perceives "the other things, the other people" as being "there for [d]esire . . . to feed on."⁸⁷ Staggering out of this self-centered vacuum and groping toward the world of others, the individual "discovers that the people in it live in mutual longing and jeopardy. This discovery is the beginning of passion";⁸⁸ in the Ungerian portrayal it marks the commencement of an entire existence characterized by "engagement in shared forms of life."⁸⁹ The greater part of Unger's work is then occupied by what is termed the problems of solidarity — the tension played out in this life of passion between the potential of such community with others to lead to depersonalization within an entrenched hierarchy of power, and the promise of a transformative or liberating experience that radical ac-

84. R. UNGER, *supra* note 15, at vii.

85. *Id.* at 66. Unger states that "[c]lassical Confucianism offers insights into the problem of solidarity that have never been surpassed by any other tradition of comparable influence." *Id.*

86. The very structure of Hegel's *Philosophy of Right* implies this sequential development, moving from the notion of right to its perfection in the nation state and, finally, to its expression in the international realm.

87. R. UNGER, *supra* note 15, at 95.

88. *Id.*

89. *Id.* at 96.

ceptance by others offers to all individuals.

What is important here, however, is the starting point: the notion that identity begins with an inherently risky and irrational bond, an emotional craving for and optimistic sense of "opportunity in association."⁹⁰ This has a distinct similarity to an analytic approach to personality found in another facet of Hegel's work: internal interrelatedness.⁹¹ That is, personal identity is understood as constituted by its interaction with others in such a way that the idea of solidarity or social belonging is central to the concept of existence.⁹² It is not so much that persons choose in a calculated or instrumental fashion to interconnect for a desired end, but rather that without such essential connectedness no person escapes the inevitability of becoming a "reality . . . shrinking into itself."⁹³

If the emotive connectedness to others is crucial to self-conception, it is the corollary notion of disconnectedness that gives this version of identity its practical meaning. While the solidarity of interactive social life is the definitional medium of meaningful existence, the absence of association with noninteractive others provides boundaries for the understanding of the self. Thus, the fundamental human experience of connectedness and disconnectedness, or similarity and difference, serves to shape any conception of life in relation to others.⁹⁴ The emotional bonds of similarity constitute the associative self-conceptions of members of a community, and the dissociation underlying identifiable difference provides for the connotation of foreignness attributed to people lying outside of community bounds. Likewise, the internal cohesions of different or autonomous societies are mirrored by the external similarity of one such social unit to another in a more expansive version of community life.⁹⁵

90. *Id.* at 99.

91. Cornell, *In Union: A Critical View of Toward a Perfected State*, 135 U. PA. L. REV. 1088, 1091 n.10 (1987).

92. See Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291, 372 (1985) (identifying an "ethic of citizenship" premised on the idea of internal interrelatedness); see also Cornell, *supra* note 91, at 1091 (defining Hegel's conception of internal interrelatedness as a view in which "[t]he individual is conceived not as an atomistic being . . . but rather as a social reality").

93. R. UNGER, *supra* note 15, at 95.

94. See Katz, *supra* note 8, at 384 (providing an elucidation of what is termed "Boundary Theory" and its application to legal analysis). Katz states: "[h]uman birth is simultaneously a moment of separation and symbiotic unity that, in addition, inaugurates a history of social connection . . . Boundary Theory . . . assert[s] that under all cultural circumstances the primal human experience is constituted by consciousness of similarity and difference." *Id.*

95. For an interesting version of the associative and dissociative aspects of identity, see Katz, *Foucault for Lawyers*, 33 BUFFALO L. REV. 195, 207 (1984) (stating that

In the retributory context, the effect of all this is that offenses among persons linked in emotional solidarity are addressed, and the associative identities of peoples are vindicated through punishment as an affirmation of the violated social bonds. In contrast, actions performed by persons unrelated and unidentified by such personal connectedness are not conceived as matters to be addressed by their dissociated counterparts. Indeed, it is the silence of one cohesive group on the events taking place within another such group that, in effect, vindicates the meaningful connectedness that constitutes the existence of each. Where the symbolic, retributive affirmation of existence is conceived as reinforcing the emotional outreach of the self in its interrelation with others, the disconnectedness of some persons becomes as important as the connectedness that the punishment dramatically restates. In this way, the emotional bonds of interpersonal experience become translated into notions of community association that make the potential for human freedom a reality. From this perspective, therefore, the retributive message affirms the peoplehood of those who live as one and, conversely, confirms the peoplehood of those who, from the domestic perspective, do not live as one.

F. STATE JURISDICTION OVER CRIME

If the structure of international legal authority is problematic to the *Nuremberg* endeavor when considered in terms of individuality, the question remains as to whether the adjudication can be perceived as having embodied a retributive statement whose purpose was the delineation of separate peoplehoods or nations. What this question involves is a view of the tribunal's criminal process in distinctly nonuniversalist terms. Given the traditional process deficiencies of international law for the case, the logical question is whether the redress of Nazi crime can be conceived of as a type of simultaneous monologue, or a song sung in unison, by each of the occupying powers. Could a judgment by Britain, France, the United States, and the Soviet Union be understood as one rendered not in their capacities as representatives of the international system, but as sovereigns in their own right? Given that the most centrally targeted of the defendants' acts

"since we are God's children we are all different and we are all the same"). The explanation provided here takes the conception of individual identity one step up from social life to intersocietal life, in much the way that international relations as depicted in international legal discourse tends to mirror the personal relationships portrayed in domestic law. *See, e.g.,* Case Concerning the Factory at Chorzow (Ger. v. Pol.) 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13) (equating international reparations with restitution).

took place outside the territories and among persons foreign to the judging states,⁹⁶ such a staging of the proceedings would have to be based on prevailing notions of extraterritorial or extranational criminal law.

Initially, this basis would not seem particularly difficult to establish. The statutory and case law governing the delineation of domestic criminal law jurisdiction in general appears so confused and internally contradictory that the rule might properly be formulated as one in which anything is permitted. For every assertion that sovereign authority is by nature "incapable of conferring [on courts] extraterritorial power,"⁹⁷ there is a competing pronouncement that "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders."⁹⁸ Each articulation and reiteration of the restricted territorial scope of criminal process⁹⁹ is matched with a corresponding finding that disobedience to domestic laws through conduct abroad renders a person subject to criminal punishment in her home courts.¹⁰⁰ Finally, the general proposition that domestic laws are presumptively inapplicable to the foreign acts of either foreign nationals¹⁰¹ or domestic nationals¹⁰² can readily be juxtaposed with the equally accepted proposition

96. This is not intended, of course, to downplay the extent of German atrocities perpetrated on the territory and against the personnel and populations of the Allied powers, nor to understate the extent to which each of the occupying powers may have been or felt particularly victimized. Rather, the point is to emphasize that the difficult theoretical core of the *Nuremberg* case revolves around Allied punishment of German actions committed within Germany itself.

97. *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812).

98. *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945).

99. For a summary of this line of criminal process thinking, see MODEL PENAL CODE § 1.03 (2-4) (1985) (discussing domestic jurisdiction over criminal acts committed within a foreign territory).

100. See *Blackmer v. United States*, 284 U.S. 421, 442-43 (1932) (upholding punishment for contempt of court as applicable to a subpoenaed witness, a United States resident domiciled in France); *United States v. Bowman*, 260 U.S. 94, 99 (S.D.N.Y. 1922) (applying the offense of conspiracy to defraud applicable to activities pursued on the high seas).

101. See *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633, 640 (2d Cir. 1956) (finding that the Lanham Act does not apply to trademark infringement by a Canadian corporation in Canada); *McCullough v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 13 (1963) (holding that the National Labor Relations Act does not apply to maritime operations of foreign vessels employing alien sailors).

102. See *United States v. Mitchell*, 553 F.2d 996, 1005 (5th Cir. 1977) (holding that the Marine Mammal Protection Act does not apply to United States citizens committing violations outside of United States territory but within territory of a foreign sovereign). For specific statutory reference to liability of United States nationals abroad, see 18 U.S.C.A. § 2381 (West Supp. 1986) (providing that "whoever owing allegiance to the United States, levies war against [it] or adheres to [its] enemies, is guilty of treason and shall suffer death"); I.R.C. § 7701(a)(39) (1986) (providing that "if a citizen or resident of the United States is not found in any U.S. judicial district,

that a state may regulate the conduct of either foreigners¹⁰³ or its own citizens¹⁰⁴ outside of its territory with respect to any matter in which it has an interest.

The reluctance of the international legal system to acknowledge an independent stature for anyone or anything that can be conceptually subsumed under the personality of a particular sovereign entity is not mirrored by domestic legal process. United States courts have made it clear that, notwithstanding occasional references to such notions as "international comity" and the inherent limitations of interacting sovereign states,¹⁰⁵ federal and state regulatory and criminal provisions have potential worldwide application.¹⁰⁶ The judiciary, therefore, gives the appearance of believing that the value system that inheres to the domestic law is properly conceived as universal in scope.¹⁰⁷

In articulating the proposition in so categorical a fashion, however, it is evident that one greatly overstates the United States judicial position. It seems jarring to any sense of legal structure to assert that, insofar as either the federal or the state courts are concerned, there is no

such citizen will be treated as residing in the District of Columbia for the purposes of any provision of this title relating to jurisdiction of courts or enforcement of summons"). In many cases the applicability of United States laws to the conduct of United States nationals abroad is judicially inferred from the nature of the statutory provision. See *United States v. Bowman*, 260 U.S. 94, 98-99 (1922) (stating that the application of strict territorial jurisdiction would curtail the usefulness of the conspiracy statute).

103. See *United States v. Watchmakers of Switzerland Information Center, Inc.*, 133 F. Supp. 40, 46 (S.D.N.Y. 1955) (applying the Sherman Antitrust Act to acts of a Swiss corporation).

104. See *Skiriotes v. Florida*, 313 U.S. 69, 76 (1941) (convicting a United States defendant for violating a Florida state statute forbidding the taking of sponges off the Florida coast, despite conduct having taken place outside United States territorial waters). The opinion noted that the United States has authority over the waters and over the sponge fishery. *Id.*

105. See *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965) (restricting the sovereign immunity doctrine to instances in which international comity is served).

106. Although United States courts have been the most forceful in this regard, the phenomenon is typical of most domestic legal systems. Certainly in the common law world, a similar pattern of extraterritorial and extranational jurisdictional application has developed. See generally *Director of Public Prosecutions v. Doot*, [1973] App. Cas. 807 (H.L.) (upholding a conviction for smugglers transshipping drugs from Europe through Britain to the United States); *Libman v. The Queen*, [1985] 2 S.C.R. 178, 21 C.C.C. 206 (Sup. Ct. Can.) (upholding a conviction for a Canadian participant in a conspiracy to sell fraudulent stock certificates in the United States, Costa Rica, and Panama).

107. A similar strand of thought can be identified in various conflict of law cases where the choice of law is said to necessarily be that of the domestic forum whenever the otherwise applicable foreign law "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of common weal." *Loucks v. Standard Oil Co. of New York*, 224 N.Y. 99, 103, 120 N.E. 198, 202 (1918).

difference whatsoever between an act taking place on the north or the south side of the Rio Grande or of Niagara Falls.¹⁰⁸ In fact, where a conclusion takes on such an appearance, the courts have strained to find a point of distinction between the ordinary cross-border instances of judicial deference or hands-off, and the hands-on approach being pursued. Thus, by way of illustration, the United States Supreme Court's application of a state civil rights statute to an excursion vessel and amusement park on a Canadian island in Lake Michigan¹⁰⁹ was accompanied by a perversely deferential and imperialistic assurance that "no detraction whatever from [Canada's] sovereignty is implied by saying that the business itself is economically and socially an island of local Detroit business."¹¹⁰

As is evident, it is nearly impossible to reconcile the wide array of cases in which domestic courts have either asserted or declined jurisdiction over foreign events. Indeed, the case law seems kaleidoscopic in its effect, at times focusing on the substantive right or wrong of the individual litigant in terms of the domestic legal norm, and at other times focusing on the right of the foreign state to be the sole judge of acts taking place within its boundaries. Nevertheless, a relatively straightforward, though coded message can be gleaned from the otherwise obtuse doctrinal references to the competing notions of "sovereignty," "state interests,"¹¹¹ "territoriality," and "effects or consequences,"¹¹²

108. Indeed, there are usually said to be serious constitutional impediments to one state in the United States attempting to extend its legal process or its regulatory reach into the territory of another state, to say nothing of impinging upon the territory of a foreign nation. Thus, the "police power" attributed by Chief Justice Marshall to the states in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 443 (1827) was historically tempered by one application or another of commerce clause doctrine. See *The License Cases*, (Thurlow v. Mass.) 46 U.S. (5 How.) 504, 583 (1847) (stating that "the police powers of a state are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions"); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824) (holding no state maintains authority over matters touching on commerce in another state or between states). In modern doctrinal terms, the limitations on state powers take the form of an inquiry into whether the subject matter in question is local in character. See *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 317-18 (1851) (upholding the state power requiring ships to use local pilots when entering or leaving port); see also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 406-08 (1988) (providing an historical overview and general discussion of the *Cooley* decision and its subsequent development).

109. *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28, 34-35 (1948) (holding that commercial excursions between Detroit, Michigan and Bois Blanc Island, Ontario do not constitute commerce with a foreign nation within the meaning of the commerce clause under the particular facts of this case).

110. *Id.* at 36.

111. For a juxtaposition of the sovereignty of a foreign state, which must be respected, and the interests of the domestic state, which must be protected, see RE-STATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 17

and so on. The idea is that, in order for the court to assume jurisdiction, the regulatory, criminal, or other offensive act must have been committed within or against the community whose authority the court reflects. Accordingly, despite the presumably universal character of the prohibition on murder, United States courts do not typically find themselves seized of any given case of extraterritorial homicide unless some factual wrinkle causes the defendant's act to be conceptually assimilated to the community that the forum's law reflects.¹¹³

Perhaps the best illustrations of the two possible ways of viewing the interplay between substance and jurisdiction, or normative universality and territorial or national insulation, are provided by cases in which domestic legal process directly contravenes considerations identified as belonging to international law. In *Blackmer v. United States*,¹¹⁴ the petitioner, a United States citizen residing in France, challenged the power of Congress and the District of Columbia courts to require him to appear as a witness in a trial in Washington, D.C., and to adjudge him guilty of contempt of court for his failure to appear. In particular, the petitioner questioned the validity of the statute empowering the trial judge to order a subpoena addressed to the United States consul in Paris and served on the witness,¹¹⁵ alleging that "Congress has no power to authorize U.S. consuls to serve process except as permitted by treaty."¹¹⁶

The case highlights both the differences and similarities between the domestic law of extraterritorial jurisdiction and international law. The petitioner's challenge framed the issue as one of domestic legislative and judicial power versus international sovereign capacity with the implication that only one of the legal systems must govern. The two systems, the former exercising its territorially unlimited sovereign authority and the latter with its consensually induced territorial restraints absent some alternative treaty arrangement, were posed as embodying

(1965) (attaching legal consequences to conduct that occurs within its territory).

112. See *id.* § 18 (providing a similar juxtaposition as that identified in *Bob-Lo Excursion Co. v. Michigan* this time with respect to conduct occurring outside the territory of a state that has effects within it).

113. The notion that jurisdiction over an offense reflects a conception of the community within or against which the offense was committed has ancient common law origins. See *Regina v. Keyn*, [1876] 2 Ex. D. 63, 159 (Cr. Cas. Res.) [1876] (Cockburn, C.J., concurring). Cockburn states that "[b]y the old common law of England, every offence was triable in the county only in which it had been committed, as from that county alone the 'pais' as it was termed — in other words, the jurors by whom the fact was to be ascertained — could come." *Id.* at 162.

114. *Blackmer v. United States*, 284 U.S. 421 (1932).

115. The trial judge acted pursuant to 28 U.S.C. § 1783 (1982).

116. *Blackmer v. United States*, 284 U.S. 421, 436 (1932).

a doctrinal contradiction. In the petitioner's view, the sober and cooperative route of international legality could be sharply contrasted with the "arbitrary, capricious and unreasonable" assertion of extraterritorial domestic legal process.¹¹⁷

In turn, the controversy pits the relationship of individual Americans with the national community of which they are members against the relationship of the United States and France as members of the international community. The difference between the two doctrinal systems is ultimately reducible to the different visions of community that the systems embody or reflect. Thus, notwithstanding the apparently sharp distinction between the two versions of legality, there is a marked similarity in their theoretical undercurrents. In its technical language, the court concluded with the point that, "[w]ith respect to such an exercise of [extraterritorial] authority, there is no question of international law . . . [because][t]he jurisdiction of the United States over its absent citizen . . . is a jurisdiction in personam."¹¹⁸ Translated to the plane of systemic self-conception, the statement points to an identity of approach between international and domestic law; each presents itself as a normative embodiment of a particular version of community. The judge's doctrinal choice under the circumstances designates the community that the substantive law at issue, as well as the forum's judicial powers, serves.

In choosing to treat the petitioner in *Blackmer* as a citizen of the United States rather than as a resident of France, the court permits United States legal process to extend its reach into French territory in apparent contradiction to many of its former pronouncements that seemed to bar any such extraterritorial reach. Nevertheless, this choice provides a graphic illustration of the conceptual structure that makes this otherwise inscrutable body of case law somehow coherent. Although the holdings are essentially irreconcilable, the fundamental theme that runs through all of the foreign jurisdictional case law is that of "we/they."¹¹⁹ In taking or declining jurisdiction over events that occurred abroad, or over events that occurred among foreigners at home,¹²⁰ the courts make a statement as to whether such events are

117. *Id.*

118. *Id.* at 437-38.

119. See Morgan, *Criminal Process, International Law and Extraterritorial Crime*, 39 U. TORONTO L.J. (forthcoming) (elaborating on this theme with respect to criminal process and foreign persons and events).

120. The extraterritorial question is, in one sense, merely the reverse side of the coin raised by the various aspects of sovereign immunity for foreigners acting within the domestic territorial bounds. Thus, the distinction between a foreign state's official or governmental actions and its "commercial activity" embodied in the Foreign Sover-

conceived as having taken place among "us" or among "them."

Legal authority as structured by the doctrines of extraterritorial and extranational jurisdiction, therefore, provides a direct reflection of the concept of community embedded in a given normative statement. In this sense, it is difficult to read the judicial process of the *Nuremberg* tribunal as an exercise of the four powers' ordinary, if extended, criminal law. The Allies' dramatic assertion of judicial power over Germans acting as Germans, or the leaders of a foreign nation acting in their capacities as such, seems directly contrary to the understanding of community that the jurisdictional link between the forum and the defendant symbolically expresses. From the point of view of the separate British, French, United States, and Soviet sovereigns, all of which were tangentially touched but none of which were central to the depravity addressed at *Nuremberg*, the message of "we/they" evoked by such unilateral extensions of domestic criminal process simply does not ring true. After all, the tribunal's formal condemnation of Nazi crime was not directed essentially at what the Third Reich did to the foreign nations sitting in judgment.¹²¹ The retribution embodied by the *Nuremberg* judgment was aimed, in the first instance, at what Germans did to people within their own community bounds — what they did to "themselves" rather than what they did to "us."

G. CRIMINAL LIABILITY AND SYMBOLIC EXISTENCE

Before returning to the *Nuremberg* decision and examining the precise way that the tribunal worked out its difficult jurisdictional quan-

eign Immunities Act can be explained in terms of an attempt to distinguish between acts that concern the domestic community and those that are solely the business of the foreign nation. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 289 (codified at 28 U.S.C. § 1602 *et seq.* (1982)); see *Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*, 26 DEP'T. ST. BULL. 984, 984 (1952) [hereinafter the Tate Letter] (providing the well-known assertion of this position); see also *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 359 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965) (citing the Tate Letter, and the State Department's hesitancy to grant sovereign immunity to friendly nations engaged in commercial activity).

121. This, of course, is somewhat overstated. In fact, the *Nuremberg* case did address the violations by the Nazi regime of international treaties and of customary international law vis-à-vis obligations owed to other sovereign states. The Agreement for the Establishment of an International Military Tribunal, 5 U.N.T.S. 251 (1945); see also Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, E.A.S. No. 472, 582 U.N.T.S. 279, reprinted in Official Document Supplement, 39 AM. J. INT'L L. 257, 257 (1945) (calling expressly for the tribunal to consider "Crimes Against Peace" and "War Against Humanity"). It is no exaggeration to say, however, that it is the latter category that makes the case so historically unique and lies at its analytical heart.

dry, it is worthwhile to put the two concepts of personality that seem to underlie judicial thinking into the perspective of retributory case law, where they find their clearest expression. In particular, it is necessary to contemplate the ways that jurisdictional concerns and substantive notions of wrong and right, or process issues and philosophical message, might interrelate in providing a coherent symbolic statement with respect to personal and social identity. This entails an interweaving of themes from both levels of expression and thought. The ultimate symbolism of retribution entails a complex relationship between the rationality of personhood and the individuality of criminal responsibility, versus the emotional bonds of peoplehood and the assertion and limits of sovereign jurisdiction. The *Nuremberg* case endeavors to capture and express this deep and complex structure to human self-identity.

The drama of retribution operates on a number of planes. As judicially presented in the form of criminal liability, it is perhaps best appreciated when compared to those judgments of culpability from which it differs. In particular, retributory cases in their basic noninstrumental posture are more clearly comprehended when placed within the context of contemporary theoretical debate over whether "the theatre should be viewed primarily as an engaged social phenomenon or as a[n] . . . aesthetic artifact."¹²² The essential thrust of the judicial message being evocative of an idealized reality rather than oriented toward social change, these cases are most naturally housed within the latter category of expression.¹²³ The factor that differentiates these cases from more commonplace articulations of criminal guilt is their symbolic statement of human freedom that, although specifically situated with reference to the vindicated community, is for the most part unconcerned with an actual (or, at least, an immediate) social effect.

This version of criminal liability, therefore, focuses on personality rather than on the particular arrangements of social life.¹²⁴ By contrast, the instrumental utilization of criminal law tends to veer away from any such assertion of idealized human freedom and move toward more active social engagement: the narrative play detracting attention from either the personhood of the defendant or the peoplehood of her

122. M. CARLSON, *THEORIES OF THE THEATRE* 454 (1984) (indicating that "a significant amount of contemporary theoretical discourse can still be oriented in terms of this opposition").

123. See *THE BASIC WORKS OF ARISTOTLE* 1456 (R. McKeon ed. 1941) (discussing Aristotle's concept of art as reflecting a process or movement from the extant material world of partially realized forms toward their ideal realizations).

124. In Unger's terms, it is in just such a noninstrumental expression of personality that embodies the human "quest for freedom — for the basic freedom that includes an assurance of being at home in the world." R. UNGER, *supra* note 15, at 107.

community. Like any dramatic expression, no legal text can be identified as lying purely on one or the other side of the activist/aesthetic divide. The primary distinctions between an instrumentalist and a retributionist message, however, can readily be perceived when they are grouped in a general way around this familiar opposition.

Consider an illustration in the decision of the Michigan court in *People v. Noble*,¹²⁵ where the defense argued the justification of the defendant's prison escape in view of the intolerability of his confinement with aggressive homosexual inmates. The court convicted the defendant, premising its decision on the imperative of avoiding "a rash of escapes, all rationalized by unverifiable tales of sexual assaults."¹²⁶ The decision leaves one with the sensation that the subject matter of the litigation was not the accused person himself, but the system in which he exists; the efficient running of a prison requires a conviction in the present case, and an acquittal might be exploited by others whose cases would present evidentiary problems. Nowhere, as Hegel would have it, is the rationality of the impugned act assessed and its imputation of reciprocity carried out. Thus, the ultimate statement of liability seeks to do something other than to reflect an idealized, rationality-based view of personality, and is accordingly difficult to read as anything resembling an assertion of human right for its own symbolic sake.¹²⁷

In the emotional-based and community-oriented view of personality, the distinction between instrumental punishment and criminal liability as a symbolic vindication of freedom is equally sharp. One might consider, for example, the competing arguments raised in the California case of *People v. Woody*.¹²⁸ The defendants, a group of Navajo Indians who were arrested while engaged in a religious ceremony at a remote desert location, were charged under a state statute prohibiting the unauthorized possession of peyote.¹²⁹ As in the *Noble* case, the prosecution framed its argument in a way that conceived of the defendants' culpability as a link in a chain of cause and effect. That is, not only was use of the hallucinogenic substance said to be harmful to the Indians and their children, but the "threat of fraudulent assertions of reli-

125. *People v. Noble*, 18 Mich. App. 300, 170 N.W.2d 916 (1969).

126. *Id.* at 303, 170 N.W.2d at 918.

127. One might note that the concern expressed in *Noble* that future escapes will be argued as justified due to unverifiable circumstances seems to imply that an accused in possession of sufficient evidence (such as appears to be the case with Mr. Noble himself) might in a similar case present a defense that the court would be inclined to accept.

128. *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

129. CAL. ANN. HEALTH & SAFETY CODE § 11500 (codified as amended at CAL. ANN. HEALTH & SAFETY CODE § 11350 (1975)).

gious immunity" were said to "render impossible the effective enforcement of the narcotic laws."¹³⁰

The answer, as provided by the defense in *Woody* and accepted by the court, stressed the spiritual significance of the drug to the community of peyotists, indicating that traditional Native American religious practitioners "regard peyote . . . as a 'teacher' because it induces a feeling of brotherhood with other members."¹³¹ The idea was to emphasize the essential disconnectedness, or social dissociation that exists between the community represented by the state's legal system, and that existing among the emotionally bonded Navajo group. While liability on the prosecution's grounds might serve to change behavioral patterns and facilitate law enforcement generally, the defense made it clear that the purportedly universalist thrust of such a judgment could not be read as an idealization of the emotive bonds which constitute personality, nor could it stand as a symbolic message of freedom in the form of a vindicated notion of peoplehood.

The judgments in both *Noble* and *Woody* might fruitfully be compared to that of the Supreme Court in *Reynolds v. United States*.¹³² In *Reynolds*, the Supreme Court held that Congress could constitutionally apply a prohibition against multiple marriages to a defendant who adhered to the polygamist tenets of the Mormon faith.¹³³ Interestingly, in addition to the evident desire of the court to eradicate a particular social practice, the finding of criminal culpability is expressed in a way that dramatically embraces both the autonomous and the communitarian visions of freedom from what is deemed an otherwise dually oppressive act¹³⁴ — symbolically voicing the rational and the emotional characteristics constitutive of personality. Thus, in the judgment's crucial

130. *People v. Woody*, 61 Cal. 2d 716, 721, 394 P.2d 813, 818-19, 40 Cal. Rptr. 69, 74-75 (1964).

131. *Id.* at 720, 394 P.2d at 817, 40 Cal. Rptr. at 73.

132. *Reynolds v. United States*, 98 U.S. 145 (1878).

133. In *Woody*, the court discussed the decision in *Reynolds v. United States* and indicated that "[t]he Mormon doctrine of polygamy rested in alleged divine origin and imposed upon male members . . . the observance of the practice upon pain of eternal damnation." *People v. Woody*, 61 Cal. 2d 716, 723, 394 P.2d 813, 819-20, 40 Cal. Rptr. 69, 75-76 (1964).

134. This assessment conforms generally to the debate over the precise source of the offensive quality of polygamist acts. That is, multiple marriages are on occasion perceived as offensive to the spouse's sense of equality and relational mutuality. See MODEL PENAL CODE § 230.1 (1980) (noting that a second marriage constitutes provocation to the first spouse and may undermine her various legal interests). On other occasions, however, polygamy is perceived as more of a public than a private affront. See M. BASSIOUNI, SUBSTANTIVE CRIMINAL LAW 372 (1978) (asserting that prohibitions on bigamy represent "the value judgments of a given society since others have found bigamy to be perfectly acceptable social behavior").

passage, the court declares:

Upon . . . [marriage] society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. . . . [P]olygamy leads to the patriarchal principle . . . which . . . fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.¹³⁵

The portrait of the individual goes beyond that provided in *Noble*; the emphasis is at least as much on the abstract equality and corresponding dignity of the person as it is on the instrumental value of the defendant vis-à-vis others similarly situated. Likewise, while the judgment expresses a concern for a behavioral transition, as did the prosecution in *Woody*, its focus on overriding the individual's marital choice is primarily on the associative bonds, or intrinsic connectedness of the defendant with the rest of his society; this time, however, the result is integrationist rather than separatist. In *Reynolds* the Mormons were identified as belonging to the American social fabric in a way that mirror-images the separate cultural identity attributed to American Indians in *Woody*.

The essential message of *Reynolds* is one of both autonomy and abstract equality of the individual and of the individual's inescapable identity as part of a greater social whole. Although the two strands seem in one sense to be contradictory, the case makes it clear that neither is complete without being juxtaposed with the other. It makes no more sense to concern oneself with the symbolic vindication of abstract individuals with whom one is disconnected in self-conception, than it does to concern oneself with the free existence of socially affiliated but impersonal entities such as property and pets. The point is that if the freedom from oppression that characterizes an idealized version of human reality operates on both a personal and a communitarian level, and if these are further reducible to the rationality and emotions that are together constitutive of personality, then any such symbolic affirmation of these psychological and normative attributes will naturally encompass both. Otherwise, one is presented with a dramatic portrayal of only half a person — a counterintuitive and notoriously dysfunctional ideal.¹³⁶

135. *Reynolds v. United States*, 98 U.S. 145, 165-66 (1878).

136. See VOLTAIRE, *CANDIDE* 47 (N. Torrey ed. 1946) (creating a satirical portrayal of an old woman who, after surviving the ravishes of a band of cannibalistic soldiers, finds herself pondering the impossibility of completing a horseback journey in her reduced state: "I will ride behind Mademoiselle Cunegonde, (although I can hardly keep my seat with only one buttock) . . .").

H. NUREMBERG: PROCESS AND SUBSTANCE REVISITED

In terms of traditional structures of legal authority, the *Nuremberg* case presents a puzzle. In seeking to judge individuals rather than the German state, the tribunal dissociated its deliberations from the discursive framework prevailing in international law. Likewise, in adjudicating and punishing the offensive acts of Germans at home, the tribunal removed itself from the thought structure of domestic legal process. While the substantive notions of criminality that drove the tribunal to condemn the genocidal acts of the defendants are readily apparent, what conception of adjudicative authority — reducible to a vision of community — made the *Nuremberg* judges tick?

In this regard, the most revealing passage found in the *Nuremberg* opinion defines the term "crimes against humanity." In setting out its frame of reference as an adjudicative authority over certain types of substantive offenses, the tribunal offers in one breath a straightforward definition of criminality and a circular reference back to those acts within its jurisdictional scope.¹³⁷ Given that the phrase "crimes against humanity" is the major contribution of the Nuremberg Charter to the modern legal lexicon (reflecting the major contribution, as it were, of Nazism to our understanding of the possible extremes of human behavior), its original definition is surprisingly obtuse.

In so defining its authority, the tribunal quite clearly positions itself as coming from outside rather than from within the German legal system; and, accordingly, it is irrelevant to the question of guilt that the defendants' acts may have been committed in furtherance rather than in violation of existing German law. Indeed, in one sense it would appear that positive legality has little to do with these types of offensive acts. In its opening clause, the definition section lists a variety of inhumane acts as offensive without any reference to a source in a particular political community or legal system. The implication seems clear that it is the very inhumanity of the acts that qualifies them as offensive in any conceivable community, thus giving the phrase a natural law connotation reminiscent of an earlier era of international discourse.¹³⁸

137. Nuremberg Charter, *supra* note 22, art. 6(c). The article states:

Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds, *in execution of or in connection with any crime within the jurisdiction of the Tribunal*, whether or not in violation of domestic law of the country where perpetrated.

Id. (emphasis added).

138. See *supra* notes 47-49 and accompanying text (discussing Grotius's approach to international law).

The definition of the crime, therefore, may in its opening clause bring the case a full circle back to the historic attempt to structure international legality around notions of individualized, natural right. Substantive wrong is defined with reference to the victimization of persons, not in their capacities as constituents of a given national polity, but in their uncontextualized stature as persons.¹³⁹ This suggests a legal authority over a socially undifferentiated mankind, tracing the normative force of this doctrine to the inevitable humanity of its subject matter. The definitional prologue is an upscaled, universalized staging of criminal liability, in which the form of the case (a judgment of individuals) parallels its content (the redress of crimes against individuals). Process, therefore, is depicted as inextricably linked to substance, so that jurisdiction over the defendants' acts of extermination and enslavement flows naturally to the tribunal from the universal quality of its human wrongs and correlative rights.

Given the naturalist pose struck by this opening gambit, it is difficult to interpret the Nuremberg Charter's immediate reference back to those inhumane acts only "within the jurisdiction of the tribunal."¹⁴⁰ In the tribunal's view, this clause serves as a temporal limitation, restricting its adjudicative authority to German criminal acts committed during the war years alone. The problem is quite obviously not one of evidence, nor does it stem from any lingering doubt about the nature of the defendants' prewar acts; indeed, the tribunal asserted pointedly: "The policy of persecution, repression, and murder of civilians in Germany before the war of 1939 . . . was most ruthlessly carried out. The persecution of Jews during the same period is established beyond all doubt."¹⁴¹ Rather, the commencement of war is simply used as a jurisdictional cutoff for the entire production. Thus, the judgment concludes

139. For a prominent contemporary example of persons as holders of human rights unconnected to any social structure, see the various international legal pronouncements condemning apartheid: Resolution On The So-Called Independent Transkei and Other Bantustans, G.A. Res. 31/6A, 31 U.N. GAOR Supp. (No. 39) at 10, U.N. Doc. A/31/39 (1976) (condemning "sham 'independence' of the Transkei"); Resolution On Economic Sanctions Against South Africa, 418 U.N. SCOR (2046th mtg.) at 5, U.N. Doc. S/Res/1417 (1977) (urging an end to violence against African people and elimination of apartheid and racial discrimination); I.L.C. Draft Articles On State Responsibility, [1979] 2 Y.B. INT'L L. COMM'N 90 (defining apartheid as an international crime). The overall thrust of these resolutions is to condemn the South African policy of attributing persons legal stature only within racially and ethnically defined social and political structures, in favor of the attribution of legal stature to all individuals within the country regardless of social affiliation. See Richardson, *Self-Determination, International Law and the South African Bantustan Policy*, 17 COLUM. J. TRANSNAT'L L. 185, 186-90 (1978) (providing an overview of the South African Bantustan policy).

140. Nuremberg Charter, *supra* note 22, art. 6(c).

141. Nuremberg in HARRIS, *supra* note 24, at 559.

that, "[r]evolting and horrible as many of these crimes were . . . the tribunal cannot make a general declaration that the acts before 1939 were Crimes against Humanity within the meaning of the Charter."¹⁴²

What comes immediately to mind is the historic tendency of international lawyers and decision makers to "positivize" the discourse in which their discipline is conducted. Much like the well established translation of universal norms into rules of sovereign consent,¹⁴³ the tribunal's strict jurisdictional scrutiny lends the appearance of positive legality to the otherwise blatantly universalist thrust of the dramatic vindication of natural right. In invoking what appears to be a normatively arbitrary, temporal baseline to the international adjudication, the tribunal, in one sense, supplants substance with process. In doing so, it deflects attention from the novelty of its initial all-encompassing, human base of authority. The tribunal subtlety shifts the emphasis to the particular criminal inquiry that the sovereign signatories of the Charter have mandated through consent.

In another sense, however, the positivist language and jurisdictional device reflect a genuine concern that would be symbolically unrepresented, or perhaps even undermined, if the naturalist implications of "crimes against humanity" were to remain untempered. The tribunal's theatric frame of reference pertains to a specific body of criminal acts coming out of a specific set of historic circumstances. In contrast, the individualized definition of offenses against natural right would inevitably encompass any and all inhumane acts in any social situation. In particular, the tribunal was constituted not to adjudicate all wartime crime in Germany, but rather was limited in its scope to the dramatic condemnation of defendants whose "offenses have no particular geographical location."¹⁴⁴ The tribunal's self-conception was that of an international authority sitting in judgment over acts that somehow differed from "ordinary" domestic crime. Although from a natural law point of view there could be no qualitative difference between the inhumanity of the death camps and, for instance, a murder performed during a bank robbery in Munich,¹⁴⁵ the Nuremberg Charter had to make

142. *Id.*

143. See *supra* notes 59-67 and accompanying text (discussing this rhetorical phenomenon).

144. Nuremberg Charter, *supra* note 22, art. 2.

145. Perhaps the most famous judicial statement of the notion that one life constitutes the legal and moral equivalent of many lives appears in the classic "defense of necessity" cases. Therein the utilitarian balance that justifies saving several lives, as against the taking of a single life, was rejected as a legitimate grounds of defense. See generally *Regina v. Dudley & Stephens*, (1884) 14 Q.B.D. 273 (Q.B.) (convicting sailors for killing and cannibalizing a cabin boy); *United States v. Holmes*, 26 Cas. 360

the distinction.

The difference between the two types of crime — those that, in the Charter's words, have no geographic location, and those that have taken place in Germany — is presented by the tribunal as turning on the date rather than the location of the events. Underlying this rather strange reversal of time and place, however, is a message that, when read in conjunction with other jurisdictional case law, resounds with a certain thematic coherence. Reading between the judgment's lines, it is evident that the wartime acts of the German elite at Dachau, and even Berlin, could not have a location in contemporary geography, because the country in which the crimes actually took place was not conceived as housing a nation competent to judge.

The message that the tribunal's opinion evokes, therefore, restates, with a twist, the motif that dominates the domestic extraterritoriality cases. The defendants' acts were simply not performed within and against the German nation as such. Although analyzed from within a formal framework of personal responsibility, the accused individuals are perceived and portrayed as having acted on behalf and in furtherance of the German nation rather than as an affront to the national will. Accordingly, while postwar German courts effectively adjudicate such inhumane offenses as murder within domestic German bounds, only a legal structure representative of a community that is similar in scope, if not in composition, to the international law community could effectively dramatize the offenses of the Nazi regime.

Thus, the *Nuremberg* judgment portrays a novel basis for legal authority, reflecting both the character and scope of the crimes, and the composition and extent of the community by which the tribunal was constituted. The irony, however, is that the novelty contrasts the judgment's formal structure. The case is technically staged to penetrate sovereignty in favor of individual responsibility for offensive acts and, thus, calls its perpetrators to answer to the nations of the world for their personalized, human wrongs. Yet, like international law, on the other hand, the judgment dissociates the domestic validity of the impugned acts from its judgment of their offensive character and focuses instead on the acts of a nation against others rather than within and against its own national community. In doing so, the judgment neither defers to German sovereignty nor disregards German peoplehood, but rather condemns the defendants and their fellow nationals on everyone else's behalf.

(E.D. Pa. 1842) (convicting a ship captain for throwing passengers overboard to lighten lifeboats).

As a result, it is the world community, not in its guise as distinct sovereign states but as a socially undifferentiated humanity, that sits in judgment of the defendants, not in their guise as autonomous individuals but as representatives of an entire nation.¹⁴⁶ The notion of community that the *Nuremberg* tribunal presents, therefore, is all-encompassing, embracing the human race in its personalized demeanor as well as in its pose as distinct national groups. The decision speaks as the normative mouthpiece of this world community, displaying a brand of retributive power more broadly conceived than any prior (or, for that matter, any subsequent) legal authority. Although the original conceptual problem was with the judgment of particular individuals by the nations of the world, the drama culminates as a symbolic judgment by a world of individuals of the inhuman deeds of a particular nation.

Looking back, therefore, the dual expression of outrage over the very dehumanization of individuals anywhere, and of abhorrence at the acts of an entire national community, provides the *Nuremberg* opinion with its uniquely structured message. The negation implied by the condemnation is then transformed into a dramatic statement of affirmation by the very fact that a legal authority has been found by which ultimate retribution can be achieved. As a piece of legal theater with a worldwide audience, the symbolic point of the punishment is to reassure people everywhere of the rational basis of autonomous personal existence and the emotional connectedness of peoples in their collective existence as nations. In looking back at the contradictions of Nazi crime, the judgment in effect is a celebration of the dual meaningfulness of freedom in human life.

II. EICHMANN: "WE WERE SLAVES OF PHARAOH

. . . ."¹⁴⁷

As with the *Nuremberg* case, it has long been recognized that the contentious and interesting questions arising from the decision in *Attorney-General of Israel v. Eichmann*¹⁴⁸ are primarily those of process

146. Ultimately, the *Nuremberg* message restates the *Haggadah's* explanation for the visitation of the ten plagues on all Egyptians in response to the actions of Pharaoh alone. "For God said to Abraham: 'Know you that your children will be strangers in a land not their own. They will be enslaved there and will be oppressed . . . The nation who will oppress them shall however be judged.'" HAGGADAH, *supra* note 1, at 11.

147. *Id.* The first sentence of the response to the questions that introduce the Passover ceremonies states: "We were slaves of Pharaoh in Egypt and the Eternal our God brought us out from there with a strong hand and an outstretched arm." *Id.*

148. The trial judgment of the District Court of Jerusalem appears in unofficial translation at 56 AM. J. INT'L L. 805 (1962). The judgment on appeal to the Supreme Court of Israel is reported at 36 I.L.R. 277 (1968); see D. HARRIS, *supra* note 24, at

rather than substance. That is, the legal debate engendered by the trial of Adolf Eichmann has centered on the abduction of the defendant from another sovereign's territory,¹⁴⁹ and on the assumption of jurisdiction by the Israeli courts for acts done outside of the territorial bounds of the state, and prior to its establishment as a sovereign entity.¹⁵⁰ In this instance, however, the jurisdictional issues cannot so readily be distinguished in the discourse from those involved in the defining of criminality. The link between the "victims' jurisdiction" asserted by the court¹⁵¹ and the "crimes against the Jewish people" articulated by the governing legislation¹⁵² is too evident for any rhetorical dissociation to take place, and, as a consequence, one cannot even coherently discuss the unique questions of criminal or international legal process without addressing the particular substance of Eichmann's offense.

Adolf Eichmann was the official ultimately in charge of administering what the Nazi's euphemistically labelled the "final solution to the Jewish problem": the genocidal policy that directly caused from 4.5 million to 6 million Jewish deaths in Germany and German-occupied countries.¹⁵³ Before delving into the decision in search of its underlying retributive message, an examination of the nature of the "Jewish problem" in the German nationalist consciousness is crucial to understanding the crime. It is, of course, not in any way productive to take the

223-30 [providing the version of the case hereinafter referred to as *Eichmann* in HARRIS].

149. Eichmann, a German national by birth, was apparently abducted from Argentina by agents of the Government of Israel in 1960 when no extradition treaty existed between the two countries. See *SIX MILLION ACCUSERS* 301 (D. Rosenne ed. 1961). Eichmann had entered Argentina with a Red Cross refugee passport issued under the false name of Ricardo Klement. *Id.*

150. See H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 841-43 (1986) (providing a standard formulation of these contentious legal issues).

151. In this, the trial court drew on the PCIJ decision in *The S.S. Lotus* case for the proposition that "the principle of territoriality does not limit the power of a State to try crimes," and thus asserted that its own "foundation of criminal jurisdiction conforms, according to accepted terminology, to the protective principle" in that it addresses "crimes injuring its subjects or serious crimes against its own safety." *Eichmann* in HARRIS, *supra* note 148, at 226-27 (quoting 1 OPPENHEIM, *INTERNATIONAL LAW* § 147, at 333 (H. Lauterpacht ed. 1955)).

152. The prosecution was conducted under the authority of the Nazi and Nazi Collaborators (Punishment) Law, 1951, § 1 (a), which stated:

A person who has committed one of the following offenses — (1) did, during the period of the Nazi regime, in a hostile country, an act constituting a crime, against the Jewish people; (2) did, during the period of the Nazi regime, in a hostile country, an act constituting a crime against humanity; (3) did, during the period of the Second World War, in a hostile country, an act constituting a war crime; is liable to the death penalty.

Id., reprinted in H. STEINER & D. VAGTS, *supra* note 150, at 841-42.

153. See G. REITLINGER, *THE FINAL SOLUTION* app. I (1953) (providing a statistical summary of the Holocaust).

perception of the so-called "problem" (or the cloaking of hatred in intellectually pretentious garb that the "problem" represents) seriously for its own sake. However, the history of pre-Nazi nationalist thought vis-à-vis the Jews helps shed light on the court's conceptualization of the crime being punished and the symbolic affirmation that the judgment seeks to achieve.

A. EUROPEAN NATIONALISM AND THE "JEWISH PROBLEM"

If the liberal, individual-oriented facet of eighteenth century European political thought, finding its most dramatic expression in the French Revolution, has a distinctly universalist and integrationist thrust, the conservative, nation-oriented political theories culminating in European nationalism exhibit a markedly particularistic and segregationist tendency.¹⁵⁴ Indeed, the very point of this school of thought is to philosophically ground and to politically emphasize the inherent diversity among peoples in their distinguishable social identities. As Elie Kedourie has pointed out, European nationalists started with this principle of diversity in the mid-eighteenth century, postulating that "the differences which distinguish individuals from one another are things holy," and went on to theorize that universal harmony can be attained only "through each different species reaching the perfection of its kind."¹⁵⁵

The cornerstone of national identity, according to the early nationalist theorists, is language. The conception of an individual was one of being "no passive spectator in the world," but rather as "actively involved in what he observes or experiences," with language providing the medium through which he expresses himself and "refer[s] everything to himself."¹⁵⁶ The idea, of course, is that people do not simply observe and assimilate things and events going on around them, but that they take part in these happenings and relationships by expressing their understandings and feelings through words. Thus, people relate to each other essentially through language and they externalize their thoughts and feelings and become conscious of themselves and others in

154. Thus, British conservative thinker Edmund Burke, in his reaction to the political theory of the antimonarchical uprising in eighteenth century France, asserted categorically that it makes no sense to speak of the "rights of man" as did the French revolutionaries, but rather it is meaningful to speak only of rights as emanating from a distinct social hierarchy, as in "the rights of the Englishmen." E. BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 36 (1955).

155. E. KEDOURIE, *NATIONALISM* 62 (1960).

156. *Id.* at 62 (citing HERDER, *TREATISE UPON THE ORIGIN OF LANGUAGE* (1772)).

the linguistic exercise of self-expression.¹⁵⁷

One evident problem with identifying language as the basis for human self-consciousness is that not everyone speaks the same language. Indeed, the linguistic nationalists went on to postulate that no person can truly speak more than one language because language was more than simply a communicative mechanism. Language encompassed "the individuality of a people . . . manifest in all of its other common activities,"¹⁵⁸ and so provided for both the source and delineation of a distinct people. Thus, one German political philosopher of this school asserted definitively that "we give the name of people to men whose organs of speech are influenced by the same external conditions, who live together, and who develop their language in continuous communication with each other."¹⁵⁹ It was in this sense of linguistic and cultural affinity, the defining point of social relations, that it could be said that "the [political] separation of Prussians from the rest of the Germans is purely artificial . . . [whereas] the separation of the Germans from the other European nations is based on Nature."¹⁶⁰

As Kedourie points out, the Nazi doctrine of racial nationalism was grounded on, and essentially indistinguishable from, the earlier linguistic versions. As the racial nationalism theory developed, language was viewed as peculiar to a nation first for the communicative bonds that it engendered, then for the cultural commonality for which it stood, and, finally, for its significance as a symbol of each nation as "a racial stock distinct from that of other nations."¹⁶¹ It is interesting that this cultural and racial purity is most frequently defined with reference to its antithesis, the foreign elements in the midst of an otherwise natural nation. Typically, the focus shifted from language to race by illustrative reference to the Semite in Europe, a linguistically, culturally, and racially foreign element in a continent of national peoples.¹⁶²

157. The expressive self-conscious can be juxtaposed against the reflective self-conscious espoused by Descartes. See R. DESCARTES, DISCOURSE ON THE METHOD OF RIGHTLY CONDUCTING TO REASON (E. Haldane & G. Ross trans. 1952) (stating: "I think, therefore I am"). Thus, one language theorist parodied the Cartesian formula for self-knowledge, exclaiming "I speak, therefore I am." 1 A. SOREL, L'EUROPE ET LA REVOLUTION FRANÇAISE 429 (1902).

158. F. SCHLEIERMACHER, HERMENEUTICS: THE HANDWRITTEN MANUSCRIPTS 163 (J. Duke & J. Forstmen trans. 1977).

159. E. KEDOURIE, *supra* note 155, at 64 (quoting J. FICHTE, ADDRESSES TO THE GERMAN NATION (1979)).

160. E. KEDOURIE, *supra* note 155, at 68 (quoting J. FICHTE, PATRIOTISM AND ITS OPPOSITE (1807)).

161. E. KEDOURIE, *supra* note 155, at 71-72.

162. In the words of French nationalist Charles Maurras, the connection between race and language was exemplified by the "fact" that "no Jew . . . could appreciate the beauties of Racine's line in *Bernice*: 'Dans l'orient desert quel devint mon ennui' "

Denigration of Jews in this individualized identity as persons unrooted in their host countries and, thus, incapable of "sinking their own persons in the greater whole of the nation"¹⁶³ may, therefore, be seen not as just another point of view in European nationalist politics, but rather as a defining point in the nationalist consciousness.¹⁶⁴ Moreover, this nonentity status in nationalist thought seems to have pursued the Jews even in their own collective and segregated existence. As Kedourie explains, "In nationalist doctrine, language, race, culture, and sometimes even religion, constitute different aspects of the same primordial entity, the nation."¹⁶⁵ Of these factors, classical nationalists tended to perceive the first three as legitimately delineating both the cohesions and the distinctions that characterize the world of separate nations. They tended, however, to exclude factors that, although at times asserted as a national bond of particular peoples, in fact exhibited a universalist rather than a truly communitarian thrust. With Christianity as its model, this mode of thought rejected religion as a properly distinguishing, nation-building force.¹⁶⁶

With the transnational embrace of Christian theology in mind, European nationalists dismissed the unifying feature of Jewish life as a basis for national communitarian existence.¹⁶⁷ As foreigners, the Jewish pres-

Id. at 72.

163. *Id.* at 73.

164. Echoing sentiment expressed toward his country's Jewish population, German nationalist Friedrich Schleiermacher exclaimed, "How little worthy of respect is the man who roams about hither and thither without the anchor of national ideal and love of fatherland." *Id.* at 73. See generally J. GAER, *THE LEGEND OF THE WANDERING JEW* (1961) (relating the anti-Semitic legend of the Jew condemned for having rebuffed Jesus to live aimlessly until the second coming).

165. E. KEDOURIE, *supra* note 155, at 78.

166. Kedourie points to Gennadius, the mid-fifteenth century Patriarch of Constantinople, as illustrating the traditional distinction drawn between ties of language and race on one hand, and those of religious adherence on the other. *Id.* at 77. In the Patriarch's words: "Though I am a Hellene by speech, yet I would never say that I was a Hellene, for I do not believe as the Hellenes believed. I should like to take my name from my Faith, and if anyone asked me what I am answer 'Christian.'" *Id.*

167. This tendency to exclude Jewish experience from the mainstream of history in light of the sharp distinction drawn in Christian theological and European political thought between spiritual and social bonds has continued from the early nationalists to twentieth century historians. Thus, Toynbee asserts that "it is the supreme irony of Jewish history that . . . a Galilaean Jewish prophet whose message was the consummation of all previous Jewish religious experience . . . was then rejected by the Judaean leaders of Jewry of his own age. Thereby Judaism not only stultified its past but forfeited its future." A. TOYNBEE, *A STUDY OF HISTORY* 485 (1947).

Ignored in the account, of course, is the Jewish self-conception rooted in the Biblical notion of covenant: the organizing idea of Jewish communal life, defining "the basis of political and social relationships among men as well as between man and God." D. GLAZER, *KINSHIP AND CONSENT* 21-25 (1983) (examining the conventional basis of Judaism and its origins dating back to the Bible). Jewish existence as a people apart

ence in Europe was qualitatively different than the perceived problem of, for example, Italians residing in France or even of entire German communities residing outside German political bounds. Caught within an historical discourse of contradictory denigrations, the Jews were portrayed as a foreign racial and linguistic/cultural phenomenon insofar as the "original" European nations were concerned, and as a religious (and therefore essentially noncohesive) phenomenon insofar as the possibility of their own nationhood was concerned. From the nationalist perspective, nonentityship ultimately came to characterize Jews in both their individual and their collective capacities.

While the groundwork of the "Jewish problem" was laid by the eighteenth century linguistic/nationalist theorists, it did not manifest itself as a subject of intellectual debate until the nineteenth century liberalization of European society. Promising the triumph of the market over extant social hierarchies, the ideology of liberalism captivated the nineteenth century European mind and recast the old status-based society in the name of individual social mobility.¹⁶⁸ As an all-embracing political ethic, liberalism held particular promise for the Jews. It not only viewed commercial success (the traditional niche left open to Jewish endeavor) in a more positive way, but it offered to terminate both the socially significant role previously played by ethnic identity and the general social rigidity that led to Jewish ghettoization.¹⁶⁹

The attempted accommodation of the ideologies of liberalism and nationalism took the peculiar form of idealizing the emergence of the modern bureaucratic state, which was to replace the preindustrial or organic communities of Europe with which the linguistic nationalists

cannot be understood without some comprehension of the insular character of the fused social/legal and religious covenant-community that Christian scholarship after Paul seems to have dismissed from history. See S. ROSENBERG, *THE CHRISTIAN PROBLEM* 101-03 (1986) (noting the Jewish self-government in exile and its adherence to the Jewish covenant).

168. On this overgeneralized movement from status to individualized relations as the governing principle of European society, see H. MAINE, *ANCIENT LAW* 163-65 (1986) (conveying the succession of the European movement as a phase of social order where the individual is distinguished from the social unit of the family and community); H. LASKI, *THE RISE OF EUROPEAN LIBERALISM* 270-77 (1936) (describing the new and ideologized birth and evolution of liberalism in Europe dating back to the sixteenth century); Wallerstein, *Class Formation in the Capitalist World-Economy*, 5 *POL. & SOC'Y* 367, 368 (1975); C. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* 1-70 (1962). See generally W. LAQUEUR, *THE HISTORY OF ZIONISM* 3-39 (1976) (discussing the European movement and its impact on European Jewry); Binder, *The Dialectic of Duplicity: Treaty Conflict and Political Contradiction*, 34 *BUFFALO L. REV.* 329, 537-42 (1985) (considering the dialectical history of liberalism and its effect on European Jews).

169. See Binder, *supra* note 168, at 538-39.

had been concerned. The newfound need for professionals and a civil service in the industrialized state combined conveniently with the individualized social mobility that liberalism brought about. Nationalist sentiment was thereby able to continue to flourish even as its original notions of depersonalization within the social fabric came to be undermined.¹⁷⁰

Against this mid-nineteenth century background of the apparent reconciliation of liberal individualism with the European nation state, Karl Marx engaged in his renowned speculations with respect to the "Jewish question" and a market-oriented social life.¹⁷¹ As Marx pointed out, development of the modern liberal state required the factoring of religion out of public or "political" life and relegation of religious belief to the private realm of "civil society." Thus, "members of the political state" could be religious only in a way that reflected "the dualism between individual life and species-life."¹⁷² Conversely, the constitutional states of modern Europe still preserved "the appearance of a state religion . . . in the formula . . . of a religion of the majority," such that to the European eye, "the relationship of the Jew to the state also retains the appearance of a religious, theological opposition."¹⁷³ Thus, the demand of Jews to participate as both Jew and citizen in public or political life was immediately problematic.¹⁷⁴

Marx's point was to show that the nationalist self-consciousness that permeated European political thought stood in inevitable contradiction to the tide of liberal theory. Entrance of the publicly identifiable Jew into the realm of public service would underscore the deterioration of nationalism in the face of individualism and the market, while denial of the public participatory capacity of the Jew would emphasize the faulty base of liberalism built on national communitarian sentiment. Either way, Jews continued to stand for the dilemma of nonentityship within the European conceptual world.

Therefore, anti-Semitism, that brand of prejudice so often associated

170. See E. GELLNER, *NATIONS AND NATIONALISM* 19-52 (1983) (discussing the combination of nationalism and liberalism, particularly among the newly created middle class in public service professions).

171. See Marx, *On the Jewish Question*, in *THE MARX-ENGELS READER* 26-27, 49 (R. Tucker 2d ed. 1978) (analyzing society's need to emancipate itself from economics or commerce, which were equated with Judaism).

172. *Id.* at 39.

173. *Id.* at 30.

174. *Id.* at 34. Marx notes: "[T]he *bourgeois*, like the Jew, only takes part in the life of the state in a sophistical way, just as the *citoyen* only remains a Jew or a *bourgeois* in a sophistical way . . . The contradiction which exists between religious man and political man is the same as exists between the *bourgeois* and the *citoyen*, between the member of civil society and his political lion's skin." *Id.*

with a lack of erudition or mere callous obstinateness,¹⁷⁵ captivated the European mind in even its most sophisticated theoretical musings.¹⁷⁶ While unadulterated nationalism excluded Jews from status in either their individual or community guises, the modern nationalism tempered by liberal values found it impossible to attribute them with political stature in the absence of outright assimilation into the secularity of public life.¹⁷⁷ Jews are important in the history of European political thought not for any acknowledgment of their own legitimate existence, but for the valuable comparison that their very nonexistence seemed to present to those theorizing about the stature of other European individuals and nations. Historically, the result of all of this for European Jewry was either a ghetto existence or some form of disappearance. Adolf Eichmann's solution moved from the former position to the latter.

B. THE FINAL SOLUTION

As judicial events go, the *Eichmann* case is as dramatic a case as one can find. The defendant was not only the biggest Nazi fish to be caught since the end of the war, but he was brought before the court in a way that gave the litigation maximum advance billing.¹⁷⁸ Moreover, from

175. See J. SARTRE, *ANTI-SEMITES AND JEWS* 20 (1948) (stating that "the anti-Semite is impervious to reason and to experience . . . because he has chosen first of all to be impervious").

176. The victims of European anti-Semitism have, on occasion, expressed amazement at the apparently sophisticated sources from which their mistreatment has come. See, e.g., Rabinovich, *A Double Drama*, Jerusalem Post Int'l Ed., May 14, 1987, at 5, col. 4 (providing the testimony of Yosef Czarny, a former inmate of Treblinka, in *Attorney General of Israel v. Demjanjuk*). This report recounts the daily atrocities of life in the camp:

'Why did they do this, honorable bench?' asked a sobbing witness, Yosef Czarny, with an astonishment that seemed as fresh when he testified this week when he first entered Treblinka as a hasidic youth not yet 16. 'To this day I cannot understand. How could the Germans do this? They are a cultured people.'

Id.

177. See Bauer, *The Jewish Problem*, in L. STEPELEVICH, *THE YOUNG HEGELIANS* 187-210 (1983) (discussing the notion that Jews could be accommodated in the liberal nation-states of Europe only in the event that they stopped being identifiable as Jews). Marx's polemic was a response to Bauer's work. See Marx, *supra* note 171, at 26 (stating, "[w]e do not tell the Jews that they cannot be emancipated politically without radically emancipating themselves from Judaism, which is what Bauer tells them").

178. This essay does not delve into the merits of the defense's allegations that the abduction of Eichmann from Argentina was a violation of international law, which rendered the subsequent trial invalid. It seems sufficient in this regard to simply cite the district court's acknowledgement of the Security Council Resolution 138 that called on the two countries to agree to some means of repairing Argentina's injured sovereignty, and to take note of the joint communique Israel and Argentina issued on August 3, 1960 in which the countries announced a settlement of the dispute. S.C. Res.

the very outset of the process the decision's retributive message promised to be particularly evocative in both its content and its (albeit formally legal) tone. While the stage was set for regurgitating a nightmare, the actual scenery and courtroom props bespoke the realization of a dream.¹⁷⁹ Although the case concentrated on condemning the Third Reich's ultimate approach to Europe's historic "Jewish problem," the very fact and location of the trial suggested the materialization of an alternative and equally final solution.

The court's response to the defendant's jurisdictional challenge moved in two seemingly contradictory directions. The judgment articulates two distinct grounds for its adjudicative authority over the defendant and his crimes. One asserts that criminal jurisdiction could be exercised by absolutely everyone and the other implies that such judgmental capacity is not for just anyone. These two grounds of legal authority, in turn, stand for the deep-seated duality that the substantive Nazi offenses were felt to represent: the affront to personality in both the rationally autonomous and the emotionally bonded sense.

As a preliminary jurisdictional matter, the court referred to the internationalist logic of the *Nuremberg* case. The decision indicated that the genocidal acts "struck at the whole of mankind," and that, therefore, they constituted "grave offenses against the law of nations itself" and require "the judicial and legislative organs of every country to . . . bring the criminals to trial."¹⁸⁰ Thus, the court in *Eichmann* in the first instance simply takes the notion of an international systemic judgment one step further, implementing in a literal fashion the process demands of a horizontal legal system. Once again, Nazi crimes are perceived as

138, 11 U.N. SCOR (865th mtg.) at 2526, U.N. Doc. S/4349 (1960). *Eichmann* in HARRIS, *supra* note 148, at 252. In addition, the court cited its own domestic doctrine of legislative supremacy in overriding the international legal claim and found further support for the position in international doctrine itself. See 4 J. MOORE, DIGEST OF INTERNATIONAL LAW § 597, at 311 (1970) (stating that a kidnapped fugitive cannot "set up in answer to the indictment the unlawful manner in which he was brought within the jurisdiction of the court"). Moore further stated, "[i]t belongs exclusively to the government from whose territory he was wrongfully taken to complain of the violation of its rights." *Id.*; see also *Kerr v. Illinois*, 119 U.S. 436, 440 (1886) (holding that obtaining custody in violation of a United States-Peru extradition treaty does not violate a defendant's constitutional rights). These pronouncements evidence the rhetorical displacement of transcendent individual rights in favor of sovereign consent. See *supra* notes 70-82 and accompanying text (discussing the phenomenon of sovereign consent displacing individual rights).

179. Theodore Herzl has been described as having written his *Judenstat*, the inspirational work of the modern Zionist movement, "[f]everishly, as if in a trance." M. MARGOLIS & A. MARX, A HISTORY OF THE JEWISH PEOPLE 703 (1972).

180. *Eichmann* in HARRIS, *supra* note 148, at 224.

having "no geographic location";¹⁸¹ having been committed against any conceivable collection of people, they consequently fall within any conceivable jurisdiction.¹⁸² Accordingly, this version of the adjudicative drama vindicates the universal rationality of persons and celebrates the autonomous, personal freedom of abstract right.

The court's second authoritative assertion was more particular in nature. This ground of legal power, based on a domestic Israeli statute,¹⁸³ was characterized as flowing from "the right . . . [of] the victim nation . . . to try any who assault its existence."¹⁸⁴ Again, the court acknowledged that the "victims' jurisdiction" can be conceived in two alternative ways. The first of these brings *The S.S. Lotus* to mind,¹⁸⁵ and presents the legitimacy of such judicial authority in what might be described as a negative way. In this view, the transnational normative system is characterized essentially by liberty, each state being free to try crimes in the absence of "a specific rule in international law which negates that power."¹⁸⁶

In view of the positive quality of the retributive message, however, the court was anxious to place its most evocative jurisdictional ground in a more affirmative light. Indeed, one need not read too deeply into the case to realize that the essence of a "victims' jurisdiction" is not to confirm that adjudicative power is open to the entire world, but rather to assert the special place of one community over others.¹⁸⁷ Here the issue is not so much the personhood of the individual victims as it is the

181. See *supra* notes 144-46 and accompanying text (discussing the phrase "no geographic location" as it appears in the Nuremberg Charter).

182. The court indicated that in the absence of an international tribunal such as that which existed in Nuremberg or that envisioned under the Convention On the Prevention and Punishment of the Crime of Genocide, any state that apprehends a Nazi fugitive would be in a position similar to that of a coastal state apprehending a pirate. Convention on the Prevention and Punishment of the Crime of Genocide, 1948, art. 6, 78 U.N.T.S. 277, 280-82, reprinted in Official Document Supplement, 45 AM. J. INT'L L. 7, 8 (1951) (establishing an international penal tribunal). Similarly, the situation is said to be comparable to that of the Northern Italian city-states of the Middle Ages with respect to roving criminals such as "*banniti, vagabundi, assassini*," over whom universal jurisdiction was asserted. *Eichmann* in HARRIS, *supra* note 148, at 225.

183. Nazi and Nazi Collaborators (Punishment) Law, 1951 § 1(a), reprinted in H. STEINER & D. VAGTS, *supra* note 150, at 841-42 (referring to "crimes against the Jewish people").

184. *Eichmann* in HARRIS, *supra* note 148, at 226.

185. *The S.S. Lotus* (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7). See generally Harvard Research in International Law, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435 (Supp. 1935) (discussing the general acceptability of such jurisdiction in international law doctrine).

186. *Eichmann* in HARRIS, *supra* note 148, at 227.

187. *Id.* The court declared: "[T]he 'linking point' between Israel and the accused . . . is striking in the case of 'crime against the Jewish people,' a crime that postulates the intention to exterminate the Jewish people in whole or in part." *Id.*

peoplehood of the Jews in their collective, emotionally bonded, and distinct national essence. To this effect, the court affirmatively declared that "[a] people which can be murdered with impunity lives in danger, to say nothing of its 'honour and authority.'"¹⁸⁸ While Eichmann's crimes expressed the inconsequentiality of Jewish existence, the redress of these crimes vindicated the authority and symbolically expressed the communal connectedness and the insular distinctiveness of Jewish national life.¹⁸⁹

To return momentarily to Europe's historic "Jewish problem," the Jewish embrace of individualism as an emancipatory exit from the ghetto emphasized for Europeans the incompatibility between the new ethic and the ingrained ethos of nationalism.¹⁹⁰ With an acceleration of anti-Semitism in the late nineteenth century, dramatically culminating in what was for Herzl the inspirational Dreyfus affair,¹⁹¹ the idea of Jewish emancipation turned from liberalism to an ideology of nationalism strikingly similar to the European movements from which they had historically been excluded.¹⁹² In a sense, the Zionist idea combined the twin negative experiences of ghettoization and assimilation into an affirmative new mix, urging both communal segregation and the disappearance of Jews from the European scene through emigration into a sovereignty of their own.¹⁹³

188. *Id.*

189. The court reiterated a central theme in the retributive message in stating that although the codification of the offenses under which the defendant was charged were drafted with retroactive effect, their intended significance was aimed at the present rather than the past. *Id.* The court postulated:

This Law was enacted in 1950, to be applied to a specified period which had terminated five years before its enactment. The protected interests of the State recognized by the protective principle is in this case the interest existing at the time of the enactment of the Law, and we have already dwelt on the importance of the moral and defensive task which this Law is designed to fulfill . . .

Id.

190. See A. HERTZBERG, *THE ZIONIST IDEA* 21-32 (1972) (discussing the Jewish emancipation and liberal values).

191. On October 15, 1894, Alfred Dreyfus, a Jewish military officer attached to the French general staff, was charged with treason against France. M. MARGOLIS & A. MARX, *supra* note 179, at 703. The resulting case galvanized French public opinion for and against not only Dreyfus, but with respect to the place of Jews in French society. *Id.* Theodore Herzl, then a Paris resident and correspondent of a Vienna newspaper, was apparently so moved by the events as to overcome his formerly meager interest in the co-religionists of his birth, allowing "the Jewish question [to] preoccup[y] his thoughts, and it presented itself to him neither as an economic nor as a religious, but as a political and national one." *Id.*

192. See Binder, *supra* note 168, at 537 (stating, "one nationalism begets another").

193. See W. LAQUEUR, *supra* note 168, at 84-135, 193 (relating the origins of the Zionist political movement).

In asserting its "victims' jurisdiction," the *Eichmann* court deployed in argument the "protective principle" on which the English courts have rationalized the exercise of jurisdiction over various treasonous acts.¹⁹⁴ To assert the "protective principle" the court had to address the argument that the defendant's acts predated the creation of the state whose protection was being invoked. The court first detailed the elements of the defendant's genocidal solution to the problem of the Jews in Europe, and then conceptually assimilated the jurisdiction on behalf of the victims to a jurisdiction on behalf of the state, all of which made sense without further elaboration to an audience familiar with the history of the "Jewish problem" and its ultimate political solution.¹⁹⁵ The nonentityship of the Jews in the eyes of European nationalists had finally been turned on its head.

This, then, represents the final message of the *Eichmann* drama. While in a preliminary way the rational personhood and equality of every Jew with every one of her historical detractors is affirmed, the most evocative theme is that of the positive capacity of the Jews to bond into distinct nationhood. Not just Jews, but the Jewish nation, is symbolically placed on par with the nation(s) that has been its nemesis, as Europe's ultimate nationalist bureaucrat is made to answer to the authority of Jewish courts. In the end, therefore, the case is not (only) a vindication of 6 million lives lost, but a poignant celebration of Jewish sovereignty at last achieved.¹⁹⁶ It is the fitting response to a history in which Jews were denied stature in their personal capacities as human beings and, perhaps more to the point, in their collective capacity as a people.

III. *Demjanjuk* : "This is the bread of affliction"¹⁹⁷

In November 1983, after more than twenty years of judicial silence

194. *Eichmann* in HARRIS, *supra* note 148, at 226 (citing *Joyce v. Director of Public Prosecutions* [1946] A.C. 347, (which held a dual British-American citizen guilty of treason under British law for propaganda broadcasts on behalf of Germany during World War II)).

195. *Id.* at 227. In a single sentence the court declared, "[t]he connection between the State of Israel and the Jewish people needs no explanation." *Id.* In this sense, the case provides graphic illustration of Foucault's observation that, "[b]roadly speaking . . . punishment is a ceremonial of sovereignty." M. FOUCAULT, *supra* note 2, at 130.

196. Sovereignty, of course, is portrayed as the formal realization of historic nationhood. In the words of the *Haggadah*, "Israel became a distinct nation in Egypt," prior to the return to the promised land. HAGGADAH, *supra* note 1, at 12.

197. HAGGADAH, *supra* note 1, at 8. The opening paragraph of the Passover Story states:

This is the bread of affliction which our forefathers ate in the land of Egypt. All who are hungry — let them come and eat. All who are needy — let them come

on the question of war criminals, John Demjanjuk, a Ukrainian by birth and resident of the Cleveland suburb of Parma, Ohio since the end of World War II, was arrested at the request of the government of Israel.¹⁹⁸ After hearings at three levels of the United States federal courts, Demjanjuk was extradited in February 1986.¹⁹⁹ It was the first extradition request that Israel had made regarding a Nazi-era criminal, and the first major trial of a Holocaust perpetrator in the twenty-five years since the *Eichmann* case.²⁰⁰ Unlike the diminutive and cerebral architect of the "final solution," however, the six-foot tall, overweight Demjanjuk did not conjure memories of the grand, pseudo-scientific Nazi scheme. Rather, he was accused and convicted²⁰¹ of being the sadistic Ivan the Terrible of Treblinka, who "all too enthusiastically ran the . . . gas chambers, taking it upon himself to mutilate and whip the naked throngs of Jews to hurry them into death."²⁰²

Although the *Demjanjuk* case commenced amidst an upsurge of interest and litigious activity,²⁰³ war crimes trials have become and will

and celebrate the Passover with us. Now we are here; next year may we be in the Land of Israel. Now we are slaves, next year may we be free men.

Id.

198. Kessel, *Israel, in a Test Case, Seeks to Extradite Suspected Nazi War Criminal from U.S.*, Wall St. J., Nov. 25, 1983, at 16, col. 1.

199. *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985), *aff'd* 612 F. Supp. 571 (N.D. Ohio 1985), *cert. denied*, 475 U.S. 1016 (1986).

200. The only prosecutions under Israel's Nazi and Nazi collaborators (Punishment) Law, 1951, had been of Eichmann himself and several "kapos," or Jewish collaborators who had become citizens of Israel. Lubet & Redd, *Extradition of Nazis from the United States to Israel: A Survey of Issues in Transnational Criminal Law*, 22 STAN. J. INT'L L. 1, 2 (1986).

201. See Rabin, *Israeli Court Convicts Demjanjuk of Atrocities at Treblinka Camp*, N.Y. Times, Apr. 19, 1988, at A1, col. 2 (reporting the unanimous judgment of April 18, 1988 in which Demjanjuk was convicted of four counts of "crimes against the Jewish people, crimes against humanity, war crimes and crimes against a persecuted people").

202. Clines, *Once Again into that Ashen Night of History*, N.Y. Times, Feb. 22, 1987, at E3, col. 1 [hereinafter Clines, *Once Again*]. The defendant is described as "shambl[ing] onto the stage each morning with, as audience members invariably note, the physical look of a central casting Nazi thug." *Id.*

203. Whereas Nazis and the war years have long been a favorite topic of the film industry, the success of Claude Lantzmann's *Shoah* is unique insofar as it focuses on the tragedy of European Jewry rather than the war itself. *Berlin Film Festival Screens "Shoah"*, N.Y. Times, Feb. 20, 1986, at C15, col. 1. For further evidence of this phenomenon, see Weintraub, *Reagan to Visit German Graves*, N.Y. Times, Apr. 12, 1985, at A1, col. 1 (describing the controversy surrounding President Reagan's August 1986 visit to the German military cemetery at Bitburg); Markham, *Elie Wiesel Gets Nobel for Peace as 'Messenger'*, N.Y. Times, Oct. 15, 1986, at A1, col. 2 (discussing the awarding of the Nobel Peace Prize to Holocaust writer Elie Wiesel).

In the legal world, war criminal defendants have begun making appearances in the courts of a number of different countries. Romanian "Iron Guard" member Bishop Valerian Trifa was stripped of his United States citizenship. *United States v. Trifa*,

doubtless remain rarified events, as the counting of time since the European death camps has shifted from years to decades to generations.²⁰⁴ In view of the roles played by past war crimes defendants and the retributory drama presented by past decisions, the prosecution of Demjanjuk raised at least a threshold question of purpose. That is, the difficult theoretical questions of substance and process, the complex meanings of punishment, and the vindication of persons and peoples involved in the receding events were so thoroughly canvassed in *Nuremberg* and *Eichmann* that their repetition at first might seem needlessly painful.²⁰⁵ Furthermore, the case itself is a judicial event that from its inception promised to raise no controversial issue other than the factual one of the defendant's identity. Finally, it seems particularly ironic that this physically oversized defendant, who was by all accounts a brutal but peculiarly "small cog" in the Nazi wheel,²⁰⁶ should follow twenty-five years of silence in the Jewish courts since the 1961 conviction of the physically petit genocidal grandmaster. At this point, as one Israeli news magazine asked in bold headlines at the beginning of the *Demjanjuk* proceedings: "Who Cares?"²⁰⁷

662 F.2d 447, 448 (6th Cir. 1981), *cert. denied*, 456 U.S. 975 (1982). Klaus Barbie, former Gestapo chief of Lyon, France was extradited from Bolivia to France, and convicted by a French court for crimes against humanity. A. RYAN, *QUIET NEIGHBORS*, 273-79 (1984); *see also* Bernstein, *French Court Finds Barbie Guilty and Orders him to Prison for Life*, N.Y. Times, July 4, 1987, at A1, col. 4 (describing the conviction of Barbie and his sentence of life imprisonment). Former S.S. member Helmut Rauca was extradited from Canada to West Germany. *Federal Republic of Germany v. Rauca*, 41 O.R. (3d) 225 (Ont. C.A. 1983). Karl Linnaas was deported from the United States to the Soviet Union to face charges of war crimes in his native Latvia. *Linnaas v. I.N.S.*, 790 F.2d 1024 (2d Cir. 1986), *cert. denied*, 55 U.S.L.W. 3393, 107 S. Ct. 600 (1986).

204. Newspaper accounts of the *Demjanjuk* trial, which commenced in the Jerusalem District Court in February 1987, emphasized the fact that, while the prosecution witnesses tended to be septuagenarians, the majority of the audience for the televised proceedings was born after the cremation of Adolf Eichmann. *See e.g.*, Rabinovich, *supra* note 176, at 5, col. 4 (stating that "[t]he principal objective of the government in extraditing Demjanjuk from the United States, apart from justice, was to make the Holocaust real to the younger generation").

205. This opinion was expressed by substantial sectors of the Israeli public at the commencement of the trial. Clines, *Israel Opens Case in Death Camp Trial*, N.Y. Times, Feb. 17, 1987, at A3, col. 4 [hereinafter Clines, *Israel Opens Case*]. This attitude, however, seems to have ended rather quickly as "the public apathy and empty rows of seats that marked the first days of the Demjanjuk trial [gave] way to spectators camping overnight outside the entrance in order to ensure themselves a place." Rabinovich, *supra* note 176, at 5, col. 4.

206. Meyer, *Demjanjuk On Trial*, Jerusalem Post Int'l Ed., May 14, 1987, at 5, col. 1 (describing the defendant as a "small cog" prone to extreme sadism).

207. Clines, *Once Again*, *supra* note 202, at E3, col. 1.

A. THE LESSON: RELIVING OPPRESSION

The *Demjanjuk* trial commenced with an acknowledgement by the defendant of both his local audience and his international viewers. Thus, the man accused of being the former Ivan the Terrible of the Treblinka death camp entered the Jerusalem courtroom on the first day with a resounding Hebrew "*boker tov*" (good morning) and, in English, a showman-like "Hello, Cleveland!"²⁰⁸ In these facile expressions, with all of their connotations of a dark past hiding under a present buffoonery, resides the first part of an answer to the troubling question of the case's meaningfulness. It is in the cognizance of audience, the awareness by all parties concerned that war crimes trials are nothing if not a spectator sport,²⁰⁹ that the *Demjanjuk* litigation began to make sense.

First and foremost in this respect is the "history lesson" aspect of the case. Much has been made of the live television coverage that the Israel broadcasting network provided for the trial, and the manner in which Israeli high school classrooms became engaged in the replay of history that unfolded with the case.²¹⁰ Indeed, *Demjanjuk's* defense counsel commented in his opening statement that the actual criminal proceedings faced by his client, the trial of identification on which the defendant's life can quite literally be said to have turned "is far less important than the historical trial."²¹¹

Notwithstanding *Demjanjuk's* own apparent inconsequentiality, the particular role he was alleged to have played in the overall Holocaust scheme, for all of its narrowness, has become central to the lesson itself. While the excesses of Nazism are grasped by most of the world in the abstract, there have been few, if any, comparable occasions for graphically depicting the way in which the genocide unfolded on a daily basis. Thus, where *Eichmann* acknowledged that the numbers may have reached somewhere in the incomprehensible range of six million people, the *Demjanjuk* prosecutor promised to bring home the picture of how "[d]ay in, day out, hundreds of Jews naked as the day they were born were pushed into the chambers, forced down a path known

208. Clines, *Israel Opens Case*, *supra* note 205, at A3, col. 4.

209. Meyer, *Hall Prepared for Demjanjuk Trial*, *Jerusalem Post Int'l Ed.*, Feb. 21, 1987, at 4, col. 3. A theater building was converted into a courtroom for the *Demjanjuk* trial, with an elevated bench for the panel of three judges and a box for the accused set up on the stage. *Id.*

210. Watzman, *Not a Show Trial*, *Jerusalem Post Int'l Ed.*, Mar. 28, 1987, at 5, col. 3. Much like the *Demjanjuk* "history lesson," the concurrent trial of Klaus Barbie in Lyons, France has been dubbed a "morality play in which everyman meets the Devil and survives." Morgan, *Voices from the Barbie Trial*, *N.Y. Times*, Aug. 2, 1987, § 6 (Magazine), at 8, col. 1.

211. Rabinovich, *supra* note 176, at 5, col. 4.

as the 'road to heaven.'"²¹² From the audience's point of view, not only does the *Demjanjuk* story provide a living textbook of events,²¹³ it narrates the historical drama on a judicially unprecedented personal level.²¹⁴ In keeping with the character of the brutish Ivan, there is no speculation with respect to the intellectual sources of anti-Semitism, or the politics of the war years in his native Ukraine.²¹⁵ Rather, the transcripts of the prosecution's case bear remarkable resemblance to the Holocaust literary chronicles of Elie Wiesel.²¹⁶ The story unfolds as a tale of 900,000 individual tragedies at the Treblinka camp,²¹⁷ and accordingly presents a startlingly unique and intensely personalized perspective on an episode in history whose actual details had almost come to be taken for granted within the abstract evil represented by the

212. Clines, *Israel Opens Case*, *supra* note 205, at A3, col. 4.

213. Friedman, *Treblinka Becomes an Israeli Obsession*, N.Y. Times, Mar. 13, 1987, at A1, col. 1. In response to the trial, Israeli high school student Zvi Weiss stated that "[o]ur generation bears the responsibility to go and listen to this, because from here on it is only going to be textbooks." *Id.*

214. *Id.* Israel Foreign Ministry spokesman Ehud Gol stated:

I'm waiting to take my eleven year-old daughter on a day when one of the survivors testifies. I want her to hear something that she'll never forget for the rest of her life, so that 30 or 40 years from now when her children come to her and ask what happened, she'll have an answer.

Id.

215. Meyer, *Trial of John Demjanjuk*, Jerusalem Post Int'l Ed., Feb. 28, 1987, at 3, col. 1. The prosecution's case did include, however, testimony by historians as expert witnesses. *Id.* Dr. Yitzhak Arad, Director of the Yad Vashem Holocaust Remembrance Authority, spent the second day of the trial

unravell[ing] the grisly story of the almost total extermination of East European Jewry by the Germans Saying that Treblinka was the largest cemetery of Polish Jewry, . . . Arad outlined and described the major steps that led to the setting up of the extermination camps, as distinct from concentration camps, of which Treblinka was the largest.

Id. Similarly, Demjanjuk's lawyers opened his defense with an historical account of Soviet-Ukrainian animosity in support of the contention that the defendant's association with the Nazi regime was first as a prisoner of war, and then later, as a member of an anti-Soviet Ukrainian army, which fought alongside the Germans. Friedman, *Demjanjuk on the Stand: Denies Guilt*, N.Y. Times, July 28, 1987, at A3, col. 2.

216. WIESEL, *supra* note 9. Wiesel's works center around the plight of millions of individuals who remained tragically ignorant of the total Nazi scheme. *Id.*; see *id.* at 20 (describing the extraordinarily personal account of his own family's fate). Wiesel remembers his father's reaction to the requirement that all Jews must wear the yellow star: "[t]he yellow star? Oh well, what of it? You don't die of it" *Id.* Wiesel recounts: "Poor Father! Of what then did you die?" *Id.* at 21.

217. Meyer, *supra* note 215, at 3, col. 1. In testimony, Yitzhak Arad indicated that a total of 870,000 Jews had been killed at Treblinka. *Id.* Other estimates have ranged from 700,000 to 1,200,000. *Id.* Arad also pointed out that "on a record day" Ivan would have pushed approximately 11,000 to 12,000 victims through the entrance to the gas chambers. *Id.* See generally Y. ARAD, BELZEC, SOBIBOR, TREBLINKA (1987) (engaging in a full history of the approximately 1,650,000 deaths to have taken place at Treblinka, Sobibor, and Belzec between March 1942 and February 1943).

whole.²¹⁸

Perhaps the testimony of one witness, former Treblinka inmate Eliyahu Rosenberg, suffices to illustrate the particular flavor of the educational message contained within this adjudicative enterprise. Although Rosenberg does not purport to speculate on the great themes of world history, he is both instructive in the information he conveys and reflective in the questions he asks. Needless to say, it is not for the face value of the information that his recounting, in a monotone, of the fact that "the bodies of women and children . . . for some reason . . . burned better than those of men"²¹⁹ conveys a valuable message to the listener. Rather, the significance is in the capacity of eyewitness narrators to bring such grotesque tales to life for an audience still incredulous after forty years. Likewise, the very imponderability of the questions that witnesses like Rosenberg evoke remains with the listener long after the effects of meticulously documented, but detached histories of the Nazi era have worn off. Thus, Rosenberg ended a graphic description of Ivan's penchant for mutilating his soon-to-be-gassed victims with the haunting questions: "I can understand beatings . . . but why this cutting of living flesh . . . How could he do it?"²²⁰

The key to this microperspective on history, this outpouring of particular memories and personal experience, is the identity defense.²²¹

218. This point seems to have been acknowledged early in the proceedings by Chief Judge Dov Levin, who found that personal accounts of Treblinka were admissible. See Clines, *Israel Opens Case*, *supra* note 205, at A3, col. 4 (discussing Judge Levin's conclusion that the full story of Treblinka needed to be heard). "'You cannot take it for granted,' [Judge Levin] said as he ruled that the prosecution could offer a detailed presentation of the camp's history and the testimony of some of the camp's few survivors." *Id.*; see also Friedman, *supra* note 213, at A8, col. 1 (discussing the riveting quality of the gruesome acts attributed to Ivan). Friedman reports:

What makes this trial all the more compelling is that unlike Eichmann, who was a bureaucrat charged with responsibility for the murder of six million people — a crime so enormous that the human mind can barely encompass it — the guard known as Ivan the Terrible was responsible for killing specific individuals in the most grotesque fashion with his own hands.

Id.

219. Friedman, *supra* note 213, at A8, col. 1.

220. Rabinovich, *supra* note 176, at 5, col. 4.

221. Meyer, *supra* note 215, at 3, col. 1. Demjanjuk's lawyer informed the judge that he would continue his argument because no evidence existed as to the identity of the accused. *Id.* Demjanjuk's lawyer also indicated that although there was some argument as to the legitimacy of Israel's jurisdiction over the defendant in international law, the focus of his case would be on the assertion: "my client is not that human animal, Ivan Grozny (the Terrible). I defend my client against Ivan Grozny." *Id.*; see also Schofield, *Was Never in Death Camp Demjanjuk Testifies at Trial*, *Toronto Globe & Mail*, July 28, 1987, at A11, col. 1 (discussing Demjanjuk's plea to the jury). At one point, Demjanjuk cried, "[p]lease believe me and don't try to put a rope around my neck for something someone else has done." During the trial, Demjanjuk blurted out: "I am not the hangman or henchman you are thinking of. I was never at Treblinka

Unlike other forums in which World War II policies and atrocities have come under scrutiny, the *Demjanjuk* case offers neither apology nor debate. The defense is in no way premised on the "superior orders" of a supposed stooge, nor does it entail any element of Holocaust denial of neo-Nazi ideology. Rather, the entire litigation turns on the question of the defendant's identification: is he Treblinka's Ivan?²²² Accordingly, the case mounted by the prosecution (and countered by the defense) maintains a purely factual approach. In addition to some documentary evidence (a rare S.S. identity card dated 1942 in the name of Ivan Demjanjuk, with a description and picture of the defendant) and the accompanying forensic and historical expertise,²²³ the trial transcripts consist primarily of the memories of those who were there and who somehow survived to tell.

The historical narrative, therefore, is charged with the personal remembrances of people whose own individual struggles, like those of Thomas Hardy's²²⁴ tragic characters, are both all-consuming and insignificant in the greater scheme of a history that they were powerless to alter or totally comprehend. The lesson, however, is all the more valuable for this powerlessness of the witnesses/victims. The judicial forum provides for the ultimate empowerment of the prosecution witnesses, transforming in a striking way the silence that greeted the victims²²⁵ into a secular voice of understanding and conscience.²²⁶ The point is

or Sobibor. Since the beginning of this trial I have been sitting looking at the shadow of the accursed Treblinka." Friedman, *supra* note 215, at A3, col. 1.

222. Friedman, *supra* note 215, at A3, col. 1. Demjanjuk repeatedly testified that he was not the accused: "I am accused of being at Treblinka . . . but I was never at Treblinka, or Sobibor, or Trawniki, or any other such place." *Id.*

223. See *id.* (discussing the testimony of Holocaust historian Wolfgang Scheffler on the accuracy of the details found in the 1942 card identifying Ivan Demjanjuk as an S.S. concentration camp guard trainee at Trawniki, supplied to the prosecution by the Soviet Government from its war archives).

224. See generally T. HARDY, *THE MAYOR OF CASTERBRIDGE* (1886) (describing the effects of a series of tragic events on the lives of English townsfolk with lessons of futility and struggle against historical fate and human nature).

225. The incomprehensible silence of both God and humanity is at the thematic core of much Holocaust literature. For example, Wiesel states:

As a boy . . . I became the disciple of a kabbalist [mystic]. Every night at midnight, he would arise to put a handful of ashes on his brow; in a low voice, seated on the ground, he would lament the destruction of the Temple of Jerusalem . . . I was young then and could not imagine that the Temple would soon be destroyed six million times, that the suffering of God could never — never — be compared to that of the Jewish children who were already being sent to the pyre while the world remained silent, as silent as he who is judged to be its creator. Wiesel, *The Last Return*, in *LEGENDS OF OUR TIME* 113-14 (1968).

226. It is interesting to compare Wiesel's continued sensation of powerlessness in addressing the same thoughts not to mankind, but to God. *Id.* at 7. In reaction to his teacher's death, Wiesel concluded: "[a]ll things considered, I think that tomorrow I

not to change events or even to inform the audience of the decimation of European Jewish life and other large tides of history, but rather to narrate the insights into human nature that the wartime Jewish experience — the personal confrontation with the most inhuman behavior that one could imagine — so dramatically provides.²²⁷

B. THE NARRATION: RELIEVING OPPRESSION

While the prosecution witness' reliving of the personal agonies of the war years is uniquely informative for the court and its audience, the effect of the proceedings on its participants ultimately counts as its most valuable element. First, the trial itself constitutes an implicit attribution of human rationality and the concordant restoration of dignity to even the inhuman Ivan. In this respect, Demjanjuk's actual identity is accentuated in its meaninglessness, the dramatic point being that no accusation of inhumanity can effectively be expressed in a setting that is contradictory to the vindication of human freedom that the retelling of the events affirms. As one Israeli scholar has noted, it is the very formalism of the judicial setting that separates the desire to punish Ivan from Ivan's own degradation of his victims. Notwithstanding the excruciating lessons of the testimony, the message is: "No. We are not going to just go out and kill Demjanjuk."²²⁸

In one sense, therefore, the judicial spectacle restored Ivan's humanity, regardless of whether John Demjanjuk was correctly identified.²²⁹ The purpose of the exercise is not to dehumanize an historic villain, but to take seriously the capacity for rationality that even a death camp guard demands.²³⁰ While the history lesson aspect of the trial informed

shall go to the synagogue after all. I will light the candles, I will say *Kaddish*, and it will be for me a further proof of my impotence." *Id.*

227. This sentiment perhaps reflects that often attributed to Wiesel himself, and which is said to provide the point of distinction between his literary portraits of human nature and those of other authors. See F. Mauriac, jacket Description to E. WIESEL, *THE GATES OF THE FOREST* (F. Frenaye trans. 1966) (stating that "[w]hat gives Elie Wiesel a unique place among all the novelists of his generation is that while all others have experienced life, he alone has experienced death").

228. See Friedman, *supra* note 213, at A1, col. 1, (interviewing Professor David Hartman, Director of Shalom Hartman Institute for Advanced Judaic Studies).

229. In this sense, the defense counsel is correct in asserting that the recounting of history in the judicial setting has overshadowed the question of identity posed by the defendant himself. See Clines, *Defense Ridicules Israeli Trial*, N.Y. Times, Feb. 18, 1987, at A3, col. 2. (stating that the defense denounced the proceeding as a "show trial" aimed at establishing the guilt of Ivan rather than of Demjanjuk).

230. It has been previously noted that Lon Fuller's observation that sense perceptions alone cannot give meaning to even the simplest human actions is particularly applicable to judicial phenomena and goes a long way to distinguishing between retribution and revenge. Fuller, *Human Purposes and Natural Law*, 3 NAT. L.F. 68, 70

us of the existence of an animal named Ivan, the forum itself and the deliberations over the gruesome narration inform Ivan (whoever and wherever he is) that he is after all a man.

The most important message of the trial, however, is addressed neither to Ivan the Terrible, nor to the audience at large, but to the victims themselves. In describing dramatically, but with the full propriety and attention commanded by the witness box, the nightmarish events that occurred (what now seems to be) a lifetime ago, the victims are given another chance to purge the past and celebrate its having passed. Although no passage of time could erase for witness Pinhas Epstein the memory of his younger brother's murder while standing next to him in line at their arrival at Treblinka, or the whimpering of two babies lying alive at the bottom of a pit serving as a mass grave,²³¹ the mere narration of the forty year-old scenes to a sobbing courtroom audience was quite evidently cathartic in its effect and liberating in its message.²³²

Like the annual retelling of the enslavement and exodus of ancient Israel, there is a celebratory quality, a reminder of present freedom, in the recapitulation of the oppressions of the past. As the *Demjanjuk* case illustrates, it is primarily the prosecution witnesses who are availed by the judicial theater of the opportunity to once again narrate the sequence of past oppressions. Ultimately, therefore, it is the narrators themselves that represent both the subjects and the objects of the celebration. No account of a trial like that of *Demjanjuk* could be complete without acknowledgement of the desperate need of Ivan's victims to tell a story, not of the S.S. or of their Ukrainian guards, but of themselves. After all, it is their personhood that is at the thematic core of the war crimes case.

(1958); see also Brudner, *supra* note 12, at 350 (inferring that actions under the guise of legal propriety, e.g., a judicial hanging, can be physically identical to those that represent their antithesis, e.g., a lynching).

231. Meyer, *Nazi Hunter Friedman Will Appear for Defence*, Jerusalem Post Int'l Ed., Mar. 7, 1987, at 3, col. 1. This report states: "[Epstein] described how he was told to take an old woman to the sick-bay — but on arrival there she was taken to the edge of a pit and shot. 'I saw two babies at the bottom of that pit, in which a fire was burning. I can hear their whimpering to this day.'" *Id.*

232. *Id.* At one point during Epstein's testimony regarding a twelve year-old girl who came out of the gas chamber alive and crying for her mother, there was sobbing in the courtroom and Epstein himself is reported to have almost broken down before going on to tell of the girl's horrific final moments. *Id.*; see also A. BOAL, *THE THEATRE OF THE OPPRESSED* 46 (C. McBride & M. McBride trans. 1979) (describing the catharsis of the tragic hero in Aristotelian drama and the identification of the audience with this introspective purging); M. CARLSON, *supra* note 2, at 475 (stating that "[t]he spectators . . . feel empathy with the tragic hero" and that "[t]his is the basic function of catharsis.").

The point is perhaps best illustrated through the story of eighty-six year-old Treblinka survivor, Gustav Boraks, who testified in his native Yiddish.²³³ The elderly witness' recollection of events was clearly a difficult matter. Indeed, in response to cross-examination with respect to testimony he had provided at Demjanjuk's extradition hearing in the United States, Boraks responded that he remembered travelling from Israel to America and that he had gone there by train — eliciting a gasp from the courtroom audience.²³⁴ In what might be the saddest moment of the trial, Boraks at one point halted in his narration of war-time experiences prior to and during his months at Treblinka, apparently unable to remember the name of his youngest son, Yosef, who was killed by the Nazis. Suddenly, however, the name came back to him — revived memory imparting relief. "I didn't forget!" he defiantly told the bench.²³⁵

As Mr. Boraks was helped out of his chair at the end of his court appearance, Chief Judge Dov Levin wished him a long life. His testimony quite evidently had a double value. From the spectators' point of view, it is as important to have learned about the existence of Yosef as it is to have learned about the existence of Ivan. Just as the descriptions of Ivan's cruelty bring home the Nazi essence in a way that descriptions of Eichmann's efficiency do not, so the attributing of faces and names to the six million victims puts the entire Holocaust in an altogether new light. What is even more important, however, and what Judge Levin seems to have captured in his simple salutation, is that the *Demjanjuk* case has constituted a forum in which the dignity of the victims lives can in a formal and dramatic way be affirmed. In the final analysis, the case is truly significant because it provided Mr. Boraks himself with the opportunity to once more remember and tell us of Yosef.

CONCLUSION

Looking back over the more than forty years since the end of the Nazi era and examining not the history itself, but the dramatic accounts that war crimes cases have produced, one can see that the thematic movement has been from the general to the particular. The ghastly events are first dramatized at *Nuremberg*, where the narration of doctrine and, more to the point, of a vision of freedom in personhood and peoplehood is as different from other expressions of criminal and

233. See Friedman, *supra* note 213, at A1, col. 1 (reporting Borak's testimony).

234. *Id.*

235. *Id.*

international process as was the "night" being described from other offensive acts. Then, in *Eichmann*, the enslavement of a people by their neighbors, the juridical and literal disappearance of the Jews from Europe's terrain, is portrayed on a stage whose very existence celebrates the exodus into free nationhood. Finally, and almost as an epilogue to the more generalized themes of the prior cases, the *Demjanjuk* trial presents in a most dramatic way the highly particularized afflictions and personal remembrances of those for whom relief from past oppression comes through retelling rather than forgetting.

It is the audience, not just the actors in the dramas, that must ultimately be spun into the web of freedom for which the repetitive narration of war crimes symbolically stand. Although each case restates the message with its own peculiar twist, it is in the very restatement to an engaged audience that the celebrational quality of the narratives is evoked. The progressive shifting of focus — from the vindication of humanity and condemnation of a nation, to the acknowledgment of a nation and the denial of its detractors, to the liberation of individuals from their torturers — constitutes a sequential revelation of the multiple facets of affliction and relief. In the end, however, this overall movement from general to particular is significant as much for the ceremonial repetition that it allows as for the progressively new perspectives that it brings. The point, after forty years, is to dramatize and reverberate through time the oppression, and the freedom, felt by each and every one of us, in whatever capacity we choose to conceive of ourselves.

In every generation one must look upon himself as if he personally had come out from Egypt²³⁶

236. HAGGADAH, *supra* note 1, at 23.