

Punishing Collectives: States or Nations?

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The idea of collective liability comes into play because it seems right to attribute acts to collectives that cannot plausibly be seen as acts of their members, or even as a simple aggregation of their members' actions. To the extent that liability can be individually assigned, or to the extent that some or all members contributed personally to some portion of a blamable action, individual liability (selective or across the board) is all we need. However, as all of the chapters in this book have argued, individual liability often fails to match reality. As several chapters have noted, that point was perhaps most strikingly made by Arendt's "banality of evil" construct: not all or even most of those whose complicity is essential to evil acts are themselves essentially evil. If they were, the right retributive response would be to try them, one by one, for their deeds, if one could. (If the number of offenders is high, the problem, although severe, is practical, not conceptual.) The reason for not doing so is that collectives have features that their members do not have: first, individual behavior is profoundly conditioned by the collective context; second, collective action has consequences that are not the intended consequences of many of those who contribute to it. Both causes and effects are latent, as it were, in the agents' social and political context. Thus, we need to ask, it would seem, if collectives are punished and the effects of punishment distribute downward, becoming costly for members, hasn't an injustice been done?

Yet, if we want to punish collectives only on account of those things for which their members are *not* individually blamable, we confront a dilemma. Whatever else it is, a punishment is necessarily consequential. It is the deliberate imposition of a loss (of life, liberty, goods), and losses can be experienced only by sentient beings. Abstractions, fictive entities, or collective nouns cannot suffer losses; something counts as a loss

only if a sentient being suffers it, for nonsentient beings lack souls to damn or bodies to kick. How, though, can we reconcile this with the point just made – that the idea of punishing collectives makes sense just because, or to the extent that, what is blamable in their acts is not properly attributable to their members’ sentient purposes? If only persons have punishable features, can it make any sense at all to speak of punishing a collective?

I believe we can approach this dilemma only by exploring the respects in which costs imposed on a collective can justly distribute downward to its members – thus counting as punishments – and that we can explore that question only by way of the character of their membership. Whether individuals can be made to suffer on account of what their collective has done depends on how they are connected to it; that in turn depends on how the collective is (relevantly) characterized. Specifically, this chapter asks: is it as a state or as a nation that a political entity is held accountable? Alternatively put: is it as cocitizens or as conationals that its members can justly be made to bear a personal share of punishment, by virtue of their membership alone? To avoid prejudging this question, I refer to the constituent territorial units that make up the world as sociopolitical entities (SPEs). We could of course simply call them “nations” or “states.” (Sometimes they are called “nation-states,” although that matches reality only if we relax the term “nation” quite a bit, so that the term “nation-state” embraces multinational states.) I want to avoid the terms “state” or “nation” at this basic level, however, because I want to address an issue that brings into question the moral relevance of both of the ideas of community to which they may be taken to refer.

The practical point of that question could at once be challenged on the (true) grounds that sanctions, or many of them, have the same effect regardless of how, exactly, we conceptualize their target. Suppose, for example, we impose a financial penalty (“reparations”), take away territory, or impose constitutional limitations, such as forbidding the SPE to develop certain kinds of military resources: these amount to constraints on the SPE whether we think of it as *essentially* a politically organized entity (“state”) or *essentially* as a historically abiding entity that survives changes of regime (“nation”). When, for example, division was imposed on Germany after the end of World War II, we could describe that division – if we regard it as a kind of punishment, as the context surely allows – as a sanction directed at the (previous) German state, or else as one aimed at eliminating (previous) German national identity. However, there would surely be a point, all the same, if it were to turn out that the

way in which the SPE is characterized were to govern the way in which its punishment could justly distribute downward, and hence the kind of collective sanction that could justly be imposed. I argue that this intuition is supported.

The argument of this chapter proceeds in three stages. First, the idea of an SPE's collective liability in general is explored, and a case is made that it is as a state, rather than as a nation, that its liability is best secured. It is acknowledged, however, that this case is an on-balance one rather than decisive (the first two sections). To reinforce the case, the question is then approached from the other end, that is, in terms of liability *for punishment*, and what is additionally required for that (third and fourth sections). Finally, if we are to conclude that, as argued, it is as states that SPEs may be punished – and that punishment may justifiably distribute down to members by virtue of cocitizenship, rather than shared nationality – what could their punishment be like (concluding section)?

THE QUESTION OF CONTINUITY

An important feature of the state-centered approach is the claim that it identifies a continuous agent, to which responsibility can be attached. Chandran Kukathas, for example, in his discussion of the topic of restitution, rejects the idea of attributing responsibility to “society as a whole” and argues that we should look instead to entities that have “structures of *authority* that are thus able to make collective decisions and that “endure over time.”¹ Janna Thompson, also in connection with the topic of restitution, rejects the “moral collectivism” that attributes guilt to suprapersonal entities, and builds an argument on the necessity of transgenerational commitments by states.² Toni Erskine, in a seminal article, argues for attributing responsibility only to those groups that have deliberative and decision-making capacity, and that, like states, “have an identity over time.”³

Very interestingly, however, it is precisely the topic of continuity that grounds one of David Miller's three objections to the state-centered

¹ Chandran Kukathas, “Responsibility for Past Injustice: How to Shift the Burden,” *Politics, Philosophy and Economics* 2 (2003), 165–90, pp. 180–83.

² Janna Thompson, “Collective Responsibility for Historic Injustices,” in *Shared Intentions and Collective Responsibility*, eds. Peter A. French and Howard K. Wettstein (Boston: Blackwell, 2006).

³ Toni Erskine, “Assigning Responsibility to Collective Agents,” *Ethics and International Affairs* 15 (2001): 67–85, p. 71.

approach and, hence, his own argued preference for taking nations as the subject. “We may want to hold nations responsible for actions performed by states that no longer exist,” he writes, citing the case of Germany after the end of the Nazi regime.⁴ This objection is double-edged and gives rise to competing considerations. On one hand, of course, the point suggests that states, in the case of regime change, are *not* continuous entities and, thus, as Miller suggests, that one of the important reasons for the state-centered view fails. On the other hand, punishing state leaders may be intended as a way to defuse *national* responsibility – I take it that exactly this was part of the justification of the Nuremberg Trials, which we may regard as a practical expression of the view that nations are not properly seen as the responsible entities, at least in those cases in which their political character has been fundamentally altered.⁵

Yet, should we accept the view that the continuity of states does not survive regime change? That question has the distinction of being among the oldest questions in political science, having been raised by Aristotle himself. His answer, although magisterial, is unhelpful. We may think of a polis in terms of a territory or population, he says, or in terms of an association formed in a particular (constitutional) way; given his views about constitutions, it is no surprise that he opts for the latter, and thus for the view that when the constitution changes, the very identity of the polis changes – it is no longer the same thing.⁶

That view, however, is at once rendered indecisive, in two ways. First, it applies (he says) only to a polis, not to states that have the dimensions of a “people” (*ethnos*), a view that surely reflects his focus on forms of intense political association in which political arrangements mold the whole character of relations among people, and even (he says) the character of the people themselves, so that it is plausible to think of constitutions as defining collective identity. Second, he distinguishes the question of identity from the question of obligation: whether or not a polis is the same after regime change, it is, he says, a distinct question from whether its previous obligations survive. In an appendix to his edition of the *Politics*, the political theorist Ernest Barker drew attention to the Athenian democracy’s view that it should honor the war debts incurred by the thirty oligarchs whom it had overthrown, a view that

⁴ David Miller, “Holding Nations Responsible,” *Ethics* 114 (2004): 240–68, p. 244.

⁵ See Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, NJ: Princeton University Press, 2000), chap. 5.

⁶ Aristotle, *The Politics*, Book III, chap. 3.

may well have suggested the practical qualification that Aristotle makes to his main, deductive argument.⁷

Even if the modern SPE were like a polis, then, so that we could suppose regime change altered its very identity, it would not follow, on Aristotle's view, that its obligations were altered. Of course the modern SPE is not much like a polis (nor even a "people," the alternative term in Aristotle's vocabulary). According to modern international law, "A state comes into existence when the community involved acquires the basic characteristics associated with the concept of a state: a defined territory, an operating and effective government, and independence from outside control," the international lawyer Gerhard von Glahn writes (adding "etc.").⁸ No doubt there are complex questions about when it is appropriate to recognize a government as "operating and effective," especially when its claim is contested, but those questions are about which of the competing claimants to recognize, not about whether the state whose government awaits recognition exists. When a regime changes, even if the new rulers dissociate themselves root and branch from their predecessors – perhaps even to the extent of renaming the SPE or renumbering the calendar years so that their predecessors are expunged from history – they do not feel obliged to justify, starting from nothing, the physical extent of the state's jurisdiction. The *in rem* right survives, implying strongly that the *res* does, too.

So for these reasons it seems that, adopting Anthony Lang's suggestion,⁹ we should distinguish states from regimes. We should see states as politically organized populations occupying definite territories, and hence as subsisting even when their mode of political organization changes. This allows us, conceptually, to introduce a collective entity that meets the continuity requirement, without at once resorting to nationhood. It also meets the difficulty that punishing "regimes" appears, on the face of it, to be collective punishment only in a marginal sense, for the penalties (such as lustration) fall directly on individuals, by virtue of their own agency. True, the penalties may be imposed on categories of persons, such as officeholders above a certain level of responsibility, and this may involve some significant legal creativity, but from a moral

⁷ *The Politics of Aristotle*, ed. Ernest Barker (London: Oxford University Press, 1972), 381n.

⁸ Gerhard von Glahn, *Law among Nations*, 7th ed. (New York: Longman, 1995), 68.

⁹ Anthony F. Lang, Jr., "Crime and Punishment: Holding States Accountable," *Ethics and International Affairs* 21 (2007): 239–57, p. 253.

point of view it is no great stretch of the idea of “agency” to include in it the holding of an office. (One could have exercised agency by leaving it.) Without an idea of statehood that is distinct from regime, then, we may lack a concept that allows some dimensions of collective responsibility to be grasped.

CAN WE DISTINGUISH STATES FROM NATIONS?

The problem with this provisional conclusion, however, is that states thus conceived of become difficult to distinguish from “nations,” to the extent that these are regarded not as Aristotle’s *ethnoi* but as civic entities. They are defined, in part, by the desire for political recognition and self-organization (although this need not go so far as statehood). Consider, too, the civic-nationalist idea of a “shared public culture” as a constituent of nationality.¹⁰ It is “a set of ideas about the character of the community,” “to some extent the product of political debate,” and modifiable (although not easily so) by further political debate.¹¹ “Public culture” looks like a more restrictive requirement than mere population-plus-territory, as indeed it is; to have a public culture is more than to share space, it is to share space on broadly agreed terms, and it is that agreement that is, we may suppose, at the heart of nationality in the relevant sense. However, several considerations press the notion toward an almost-pure idea of citizenship in which the distinctively national element is somewhat attenuated. Consider, for one example, the case of multinational states, a topic that, understandably, is bracketed in Miller’s discussion here.¹² If SPEs are to be held accountable on the basis of nationality, we have to bring into play an idea of nationhood that encompasses multinational states, or else we exempt several once-powerful states (Britain, the Soviet Union) from responsibility for what they did; and the conception of “nationality” that is usable here picks out what is for the most part a political identity that is consistent with the stronger and more ethically or culturally comprehensive subnationalities within. It is at one possibly quite large remove from what would seem to be the most basic constituents of identity. With at least one significant difference that will be explored in a moment, this conception may not be at a great distance from shared statehood.

¹⁰ Miller, “Holding Nations Responsible,” 243.

¹¹ David Miller, *On Nationality* (Oxford: Clarendon, 1995), 68–69.

¹² Miller, “Holding Nations Responsible,” 244n.

For a second example, consider the topic of change in the shared public culture. It is certainly arguable that some changes in public culture are more fundamental than some regime changes. The public culture of the province of Quebec is generally thought to have evolved radically, during what is termed the “Quiet Revolution” in the 1960s, from a Catholic and conservative nature to a secular and progressive one. This was, as surely one might judge, a greater change than (say) France experienced in the transition from the Fourth to the Fifth Republic. Because its objective is to show that nations are more continuous than states, the nationalist argument must presumably absorb the point by claiming that a public culture subsists despite change, in a way in which states do not subsist through regime change. Why, when it changes, is it the same public culture?

Here we may seem to return to Aristotle, this time, however, to the famous metaphor of the ship¹³ that is entirely replaced piece-by-piece while remaining the same ship; or, alternatively, to Michael Oakeshott’s metaphor of “Sir John Cutler’s famous stockings, so continuously darned with wool that they became wholly transformed, not one particle of silk remaining.”¹⁴ Is continuous identity secured by a chain of continuous links, such that even though nothing intrinsically links A to N, if there are links from A to B and from B to C and so forth all the way to N, then A and N are continuous? That model, although perhaps solving some problems, does not seem to make the decisive difference that is sought, in this context at least (because there are equivalent links, of an institutional kind, from the Fourth French Republic to the Fifth). I do not think we should be content with the incremental model, however, for the examples invite us to examine a further question. There are two importantly distinct ways of thinking about continuity that they force us to consider.

First, unlike ships or stockings, human communities work on themselves. They are not the products of another’s workmanship but of self-creation, and so, we may say, what underwrites their endurance is not a causal sequence but continuous agency. The province of Quebec was transformed from A to N: what makes it the same entity is not that A led

¹³ But for doubts about whether the example is Aristotle’s, see “The Importance of Ships in Greek Philosophy” on Barry Stocker’s blog: <http://web.mac.com/barrystocker>.

¹⁴ Michael Oakeshott, *On History* (Oxford: Blackwell, 1983), 114. Actually – perhaps because of classist assumptions? – Oakeshott gets the example wrong. Sir John’s stockings were originally worsted and were darned with silk. The reference is to Alexander Pope, *Memoirs of the Extraordinary Life, Works and Discoveries of Martinus Scriblerus* (Dublin: Faulkner, 1741), 96–97.

to B which led to C and so forth, but that the process was undertaken by a self-identifying collective agent. The difference between self-induced change and externally imposed change is rightly stressed by theorists of multiculturalism: what multiculturalist policy seeks, they say, is not that cultures should be preserved in their present form, like museum exhibits, but that they should be in secure possession of a “structure” that enables them to determine their own path of development.¹⁵ Further, their claim to possession of that is normatively compelling in a way that a blindly conservative preservationist ethic, focused on cultural content, would not be. If we accept that view, then, we will want to find a normative place for the self-determining capacity of SPEs that have a sufficiently strong sense of their political identity (either as states or as subunits enjoying recognition within states). This recognizes the important truth in the view that continuity requires something other than a “state” in the sense of a regime – there is some enduring entity behind the regime, seeking agency through it. However, the way in which that truth has been acknowledged here emphasizes that what lies behind the regime is a society identified by its political character.

The distinction between continuity as preservation and continuity through self-determination is important. However, is it clear that we can do without preservation altogether? Let us (fancifully) suppose, for example, that the province of Quebec, exploiting its self-determining power within the Canadian federation, decided to abandon the French language, as a commercial and political impediment in the globalized world. Would we really be quite so sure that Quebec was “the same”? To be sure, it can remain “the same” while abandoning some identity-markers, such as Catholicism and political conservatism, but would it be the same if it gave up the last continuous marker, its language? That question invites a return to the metaphors. Aristotle’s ship remained a ship, after all, whereas another series of modifications could perhaps have turned it into a large toboggan or an elaborate garden shed. Sir John Cutler’s stockings continued to be stockings, as opposed to being made into dusters for his servants’ use; as Oakeshott notes, there are “unchanged items in the situation, namely the shape and so on which identifies the stockings as stockings, which survives and is not composed by the differences.”¹⁶ This invites a rather different response.

¹⁵ Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon, 1989), chap. 8.

¹⁶ *On History*, 115n.

On the former view, the continuity of an SPE is established by the continuity of its internal political process. It is enough, on this view, that there should be a civic process, regardless of where that process may lead. On that view, I have suggested, the line between state membership and nationality may be hard to draw with any confidence. On the latter view, however, there must be an abiding “shape” that underwrites continuity despite change. This, because we are setting ethnic nationalism aside, can only be provided by the values contained within a nation’s public culture. So, I believe, we are led to a choice. Are people to be held responsible on the basis of their membership in a political community or on the basis of their adherence to a set of shared national values?

There is a basic objection to the latter view. The objection is that practical conclusions do not follow immediately from values. It is not true that, if one is committed to value *A*, one is more closely bound to act *a* – one justified in *A*’s name – than anyone committed to value *B* is, for mediating considerations come into play. Christians with conservative views on, say, extramarital sex or abortion have more in common with many Muslims, in that respect, than they do with many Christians, despite the fact that their theological starting point is closer to that of any Christian than to that of any Muslim. If people can be held responsible for anything, it must be for something that is *done*, and what is to be *done* cannot be read off one’s fundamental beliefs in such a way as to imply complicity in what others take their practical requirements to be. Furthermore, here the confusing potential of the ends–means distinction comes to light. Whatever the merits of that distinction, it cannot mean that we first settle on ends and then and only then begin to think about means, for what we ought to think about ends should involve thinking about the means that are necessary to their realization. If means have consequences that outweigh the value of the end sought, the end should not be sought in the first place. We have to choose sequences of ends and means together, and it has to be that it is for the sequence that we choose that we are held accountable – not for our endorsement of the end alone. For despite our endorsement of the end, we may come to believe its value to be outweighed by the moral costs of the means adopted.

Those who plotted (at terrible cost) to assassinate Hitler were German patriots. So was Werner Heisenberg, who, speculation suggests, surreptitiously undermined the Nazi nuclear bomb project by dragging his feet and exaggerating the likely costs.¹⁷ Neither unpatriotically wanted

¹⁷ See John Cornwell, *Hitler’s Scientists* (New York: Viking, 2003), chap. 23.

their country to lose the war. Shostakovich was a Russian patriot who loathed and feared Stalin but also feared a German victory. Bishop Bell was a British patriot who bravely denounced the bombing of Dresden. They all emphatically endorsed some *A* while refusing some *a*. I do not think we should take them to be accountable for their endorsement of *A* absent some heroic costs for their rejection of *a*. The Hitler assassins *were* heroic. Heisenberg could excusably have avoided heroism, given the world-destroying risks of a Nazi bomb. Shostakovich was cryptically evasive and ironic. Bishop Bell lost preferment. The price that they had to pay was contextually determined. Given the distinction that I have tried to draw thus far, however, I do not believe their responsibility should be determined on that basis, for to will the end is not to will the means, and we need not be excused for something that we have never willed in the first place.¹⁸ The manner in which values are politically mediated is decisive, and when the means adopted – specific policies of aggression or atrocity – are criminal, their criminality cannot be seen as immediately implicating those who hold the national values in question.

COLLECTIVE RESPONSIBILITY?

The foregoing does not claim to be decisive. There is, clearly, too much overlap between the nationalist and statist views, the one positing a nation with a political culture behind the state, the other requiring only a political society – somewhat resembling (conceptually) the “civil society” that Locke interposed between the state of nature and the creation of a political regime, perhaps. There is obviously room for contestation, furthermore, over what should and should not be immediately attributable to a nation’s values. In real-world cases, continuity will normally involve elements of both the self-determination model and the value-stability model, so that even if an analytic distinction could be made it would have little or no application. All the same, however, the distinction is one that demands to be pursued in one context at least: that of collective liability to punishment, for that specific liability calls for a specific justification.

In *The Question of German Guilt*, effectively the beginning of the modern discussion of the topic, Karl Jaspers unfortunately conflates the issues of general liability and liability to punishment, in the following way. His book famously distinguishes between four kinds of guilt, introducing the category of “political guilt” for what is incurred by membership in

¹⁸ But see Amy Sepinwall’s chapter in this volume.

an SPE that has committed crimes. As others have pointed out, “guilt” is a poor term for what he has in mind, which might better be called “liability,” for its implications are entirely a matter of what can be done to members of a criminal SPE when it has been defeated.¹⁹ Unlike “guilt” properly so-called – something incurred only by what someone has done – liability is a forward-looking concept. It is about what may befall you. If your SPE commits aggression and atrocity and is defeated in war, you should expect to suffer whatever the consequences turn out to be. Terminology aside, after defining the concept, Jaspers immediately goes on to announce two propositions: “Everybody is co-responsible for the way he is governed,” and “Jurisdiction rests with the power and will of the victor.” These two propositions cover at least three possible scenarios, which may provoke quite different moral responses.

There are, first, what we may term the natural consequences of waging aggressive war. Obviously the term “natural” is only approximately right, for what happens to either side in a war results in large part from voluntary decisions by its adversary. We can hardly say that the destruction of Dresden was a natural consequence of the bombing raids on Coventry, mediated as it was by Air Marshal Arthur Harris’s vengeful response.²⁰ However, something, involving some degree of severe physical damage obviously not statable in advance, would almost certainly have been the consequence. Other consequences of war include economic dislocation, shortage of vital resources, loss of population, military occupation, and perhaps forced migration when disputed territory is lost. Such things are rightly describable as “the consequences of the deeds of the state whose power governs me and under whose order I live.”²¹ We may extend those consequences to embrace another case, too. Let us suppose that one side or other, after the conflict, must bear certain costs, and that it is within the discretion of the victor to decide to whom they should fall. Those on the losing side would have to accept, as “consequences of the deeds of [their] state,” that if resources are scarce the populations of victorious states, or of states victimized by the aggression, will be given higher priority, or that if capital for reconstruction is in short supply, then reconstruction in the territory of the aggressor state will be given low priority. I think that both of these cases demonstrate the force, but also the limits, of

¹⁹ On the distinction between guilt and responsibility, see especially Hannah Arendt, *Responsibility and Judgment* (New York: Schocken, 2003), 147–58.

²⁰ See Randall Hansen, *Fire and Fury: The Allied Bombing of Germany 1942–45* (Toronto: Doubleday Canada, 2008).

²¹ Jaspers, *Question*, 31.

Tony Honoré's notion of "outcome responsibility," that type of responsibility that we appeal to in deciding where the benefits and burdens resulting from an action should fall. As Miller explains the notion, it is distinct from both causal responsibility – we might be causally responsible for remote or improbable consequences that we should not suffer for – and moral responsibility – it may not arise from moral fault.²² This certainly seems a good idea of responsibility to employ when we are looking for something more than mere causation and something less than moral guilt, but it takes for granted that there is some *given* set of benefits and burdens to be distributed, somehow, and so cannot justify our creating *new* or additional burdens on the basis of an attribution of guilt.²³ It would be one thing to feed civilian refugees before feeding captured prisoners of war from an aggressor state, if one had to make that hard choice. It would be something else deliberately to withhold available food from the latter.²⁴

This brings us to the third case, that of punishment. Jaspers maintains that it is a matter of absolute discretion on the part of the victor. "The victor can, if he will, bring the consequences into a form of right, and thus of moderation."²⁵ This idea apparently comes out of nowhere in Jaspers's book. There is perhaps a Nietzschean echo in the implication that "right" is not a constraint on the strong but something that the strong may optionally "will" if, exercising discretion, they choose "moderation." However, it is hard to find mooring for the idea in either political theory or international law; in neither do we find good arguments, or any argument at all in fact, for the idea that anyone's power should be unrestrained by anything. It is simply not a good idea. Nor is it even barely consistent with any developed idea of "punishment," which standardly entails a degree of proportionality between offence and sanction, something that is of course entirely inconsistent with the so-called punisher's absolute discretion.²⁶

²² Miller, "Holding Nations Responsible," 245–46.

²³ I follow Anthony Lang ("Crime and Punishment," 247) in maintaining that "the *infliction* of harm in response to a violation of a norm" (emphasis added) is essential to the idea of punishment, and I assume that this means that the infliction is justified *as* such a response and not as an element of some other purpose (such as military victory). I also follow Lang (*ibid.*, 248) in excising the requirement that punishment be inflicted by states, thus rejecting Kant (*Metaphysics of Morals* 6.331), whose view implies that states and their rulers cannot be "punished."

²⁴ For a relevant controversy, see S. P. MacKenzie "On the *Other Losses* Debate," *International History Review* 14 (1992): 661–80.

²⁵ Jaspers, *Question*, 36.

²⁶ This is so even if we take a relaxed view of the proportionality requirement: see Jon Elster, "Retribution," in *Retribution and Reparation in the Transition to Democracy*, ed. Jon Elster (New York: Cambridge University Press, 2006), 39–40.

If we reject Jaspers's proposal, however, we are left with no clear basis, among his categories, for the justification of collective punishment. His category of "metaphysical guilt," it is true, is often taken to implicate all conationals, but on Jaspers's account, it is actually presented as universal²⁷ – although it is somehow intensified by conationals' proximity and association, it is everyone's, and as Jaspers describes it would presumably attach in some degree to appeasing nations who failed to obstruct the rise of Nazism. "Criminal guilt" and "moral guilt" rest on attributions of individual agency and cannot tell us what should happen to collectives. It is this that forces us to confront hard choices about what the collective is. For whereas the collective, whatever it is, will indeed suffer certain necessary consequences, we cannot deliberately impose further consequences without a more compelling account of the capacity in which it is to be made to suffer them.

COMPLICITY, RISK, AND LIABILITY

To be a member of an SPE is to share in a complex and unpredictable mix of advantages and risks. Although both advantages and risks are important from a normative point of view, it is the former that have most commonly been emphasized in political thought. The receipt of benefits has often been taken to be one of the most important grounds of political obligation, requiring (it has been argued) a contribution of service or obedience in return. The case for national liability may be made in the same way. Miller, for example, relies on it as an alternative (or supplement) to the argument from shared values. Setting "like-mindedness" aside, members of a group are engaged in cooperative relations that make them "beneficiaries of a common practice" and so liable for "their share of the costs," such as external costs imposed by their group on other groups.²⁸

In its more narrowly political form, where it is often called the "fair-play" thesis, the argument from the receipt of benefits has been repeatedly and effectively criticized. One kind of critique, given a famous formulation by Robert Nozick and developed in detail by A. John Simmons, contends that the receipt of benefits is morally inconclusive. You may not have wanted the benefits, or what you are called on to do in return for

²⁷ Jaspers, *Question*, 32; but see Erin Kelly's contribution to this volume (Chapter 7) for a different view.

²⁸ Miller, "Holding Nations Responsible," 253.

them exceeds their value to you. There may be cases in which people have voluntarily chosen to receive benefits, but there are probably not enough such cases to sustain a theory of obligation that entitles states to general obedience.²⁹ Another kind of critique, developed by Robert Goodin, points out that the respective scopes of receiving and giving do not map on to each other: we give protection to various categories of vulnerable people without expecting to receive anything from them in return.³⁰ A third kind of critique, aimed particularly at Rawls's view of civic reciprocity and the (limited) internationalism that he derived from it, refers to facts of interdependence in a globalized world, in which networks of beneficial exchange do not coincide with, but far exceed, the boundaries of SPEs.³¹ I believe that the same or similarly serious obstacles stand in the way of the nationalist version. The considerations that obstruct the benefits-received case for political obligation also make it hard to accept the parallel case for requiring conationals to bear responsibility for the external costs imposed by their nation's actions.

Elsewhere I have argued, however, that the risks entailed in association are more normatively powerful than the benefits produced by it.³² That one is part of an association that generates risks for others generates a special reason for concern about its actions. That is true regardless of where one's account stands in an audit of benefits and costs. What makes the individual liable is not an individual accounting but participation in a general scheme. What *justifies* that scheme, or makes it morally defensible, is indeed the hope of net benefit, as the social contract tradition maintained. What *legitimizes* it,³³ however, or entitles it to claim your support, is that it systematically presents everyone with the possibility of loss, so that all participants are bound to do what they can to diminish its riskiness. The moral intuition here is a basic one: individuals are especially liable for what they contribute to, and the most ordinary acts of members of an SPE amount, in effect, to contributions to its support. The risks that it imposes are many. Some arise from the fact that, by collectivizing

²⁹ See Robert Nozick, *Anarchy, State and Utopia* (Oxford: Blackwell, 1974), 90–95; A. John Simmons, *Moral Principles and Political Obligation*, chap. 5.

³⁰ Robert Goodin, "What Is So Special about Our Fellow-Countrymen?" *Ethics* 98 (1988): 663–86.

³¹ See, for example, Joshua Cohen and Charles Sabel, "Extra Rempublicam Nulla Justitia?" *Philosophy and Public Affairs* 34 (2006): 147–75.

³² Richard Vernon, "States of Risk: Should Cosmopolitans Favor Their Compatriots?" *Ethics and International Affairs* 21 (2007), 451–69. The view is developed in *Cosmopolitan Regard* (Cambridge: Cambridge University Press, 2010), chap. 2.

³³ The distinction is made by Simmons, *Moral Principles*, chap. 1.

security arrangements, SPEs diminish personal capacity (the capacity of Mill's "savage" to "shift for himself," because "civilization," as he says in his essay with that title, makes us codependent). Some arise from the fact that by promoting intense forms of interdependence, they increase each member's vulnerability to others. Some arise from the fact that minorities inevitably expose themselves to majority tastes and preferences from which they cannot and perhaps even should not be wholly protected. Some arise from the pervasiveness of political demands on us. Some arise from the fact that SPEs acquire, through the compliance of their members, enormous coercive force.

It is, of course, with the last of these that we are concerned here – the internal support that enables SPEs to deploy external violence. The topic of collective punishment is triggered when the coercive resources of an SPE are deployed against members of other SPEs in ways that rise to the level of international crime. Such crime is possible only because of the organized resources of an SPE, and members of the SPE are related to it by virtue of their participation as citizens in a structure of arrangements that make possible the deployment of physical force on a massive scale and in an effective way. That, I think, remains true even when we insist that an SPE is not only a political structure, that it also embodies a set of shared beliefs, for the fact remains that, whatever the relation between those beliefs and criminal state acts, it is the political structure that enables one practical intention, as distinct from other potential practical intentions (sustainable by those beliefs) even to be formed, and the intended acts then to be executed.

Why, though, is it proper for the members of an SPE to be made to suffer punishment for what their collective, in its political aspect, does? In the final section of this chapter, I argue that in fact many forms of punishment are improper, but we need a reason why *any* might be proper. It is of course a standard feature of theories of collective responsibility that responsibility is collective just to the extent that it does not reduce to responsibility on the part of the collective's members. Members may also have individual responsibility, of course, by virtue of what they have personally done, and that responsibility will be graded (as international law seeks to do) on the basis of what they did. That simple membership should incur responsibility, however, is another matter. Nor do I think we can settle that matter by invoking a domestic equivalent of the "double-effect" doctrine in military ethics. Invoking that, we might say: sometimes visiting costs on the innocent is a sad but unfortunate ("collateral") effect of punishing the guilty, but one that we must accept if the guilty are not to

go unpunished. That argument proceeds against the secure background of a theory of retribution that has already established that punishment is deserved, however, and is not available at a point at which we are trying to decide about punishability in the first place. Members of an SPE are not “collateral” to it, they comprise it, and are the very people on whom, under a certain description, punishment is to fall.

It is the special nature of political membership that may provide at least the outline of an answer here. Being a member of a social group does not necessarily entail responsibility for what it does. Consider David Miller’s example of a crowd on a rampage, different members of it contributing differentially to its destructiveness.³⁴ Although not all of the crowd’s members intended its most destructive acts, and some may indeed regret them, it is still the case that the whole group can be held responsible for the damage done and that all its members can be made liable for repairing it. That seems true, but only within certain limits. Suppose, to modify the example, a group of workers go on (legal) strike and take their turns maintaining a picket line. Some pickets lose their cool and overturn a vehicle that tries to cross the line. Is the whole group responsible? If we think not, then in the case of social groups, it seems, we draw some kind of a line – no doubt always in need of contextual interpretation – between a group’s essential aims and what is extrinsic to them. If militant philatelists were to get together and demonstrate in favor of some philatelically relevant cause, and one among them were to be convicted of an opportunistic crime (shoplifting, let us say), we would surely not hold all philatelists collectively responsible for the offence, or hold philately itself to be morally tainted by larceny.

Political society is different, however, in that what we let ourselves in for, by virtue of our membership in it, is *inherently* open-ended. In the case of social groups, exit is normally possible, sometimes even easy. In the case of social groups, moreover, the ends are normally transparent. In the case of SPEs, neither condition applies; exit is costly, and the ends to be adopted are opaque in the sense that what they will turn out to be escapes any one person’s control. An SPE in which neither of those conditions applied would not have the features that made the existence of SPEs possible or even desirable. If exit were easy – as easy as exit from a typical social group – it would have to be the case that an SPE offered only the minimal advantages that could automatically be replicated elsewhere, not the basis for any sort of continuous identity. On the other hand, an SPE that guaranteed to any of its members that its future decision

³⁴ Miller, “Holding Nations Responsible,” 249.

stream would conform reliably to their values would have to be a closed society, precommitted to a collective identity in ways that foreclosed future politics.

Political liberals are strongly wedded to the idea that responsibility attaches only to individual agents and are likely to resist the claim that anything but one's own agency can lead to commitment.³⁵ Yet, even if we hold, at the level of moral principle, the view that people should be held responsible only for their own decisions, we must recognize that in supporting a state we effectively lend our support to unknown future policies. This is true even in the case of liberal states that impose constitutional side constraints on the choice of possible future policies, for that only reduces the range of uncertainty, albeit significantly, without eliminating it. To be part of a state of any kind is to be exposed, by way of the most ordinary activities of citizenship, to acute moral risk. The risk is that of complicity in policies of which one may strongly disapprove. This may seem to depend on an overly generous notion of complicity, one that makes the individual complicit in decisions that others have made without his or her approval. For reasons stated by Locke himself, however, unless this is so, there can be no political society, for the very idea of a political society depends on the general adoption of binding decision-rules that exclude personal consent.³⁶ That adoption is simply inseparable from the functional capacity that grounds the justification of states. It is this forward-looking element, an implication of future, as-yet-unknown commitment, that enables us to say that state membership creates liability in a way in which shared national values do not. It is part of being a citizen that one should recognize that the political power that one supports will be put to as-yet-unknown use; it is not similarly part of being a member of a nation that one should be implicated in as-yet-unknown constructions of the values that one recognizes. When others (in my judgment) misconstrue the values that I share with them, I can unilaterally dissociate myself from their views; I cannot in the same way unilaterally dissociate myself from the practical support that I have given to a political system that, as it happens, adopts policies that I detest.

In Mark Drumbl's terms, the attribution proposed here is "crude," in passing over moral differentiations and excuses.³⁷ That view, as Drumbl rightly notes, is immediately objectionable, for its reach is indiscriminate.

³⁵ *Ibid.*, 242.

³⁶ Locke, *Second Treatise*, s. 98.

³⁷ Mark Drumbl, *Atrocity, Punishment and International Law* (New York: Cambridge University Press, 2007), 197. For a defense of crude attributions, see Amy Sepinwall, Chapter 9, this volume.

Those who object to the reach of the view, for liberal (or perhaps other) reasons, may be somewhat reconciled to it by the following section, which briefly sets out reasons for limiting the consequences of political liability. Accepting the crude characterization, I propose that the crudeness of attribution demands restraint in punishment, as the final section of the chapter suggests.

POLITICAL PUNISHMENT?

To recapitulate, this chapter rejects Jaspers's view of political "guilt" as absolute: such a view would effectively obliterate any distinction between collective and individual liability, because the victor and "punisher" could impose unlimited sanctions on collective and individual alike, or, if nominally on the collective alone, without regard for how collective sanctions distributed to individuals. The view advanced here is different, in specifying that sanctions must fall on the collective in its political aspect, so that their (foreseeable) distribution to individuals should respect the distinction between their political identity and their other identities. The view advanced here is also different, however, from Tracy Isaacs's category of "membership responsibility," a category that imputes responsibility that is defeasible by an individual's resistance to, or protest against, the acts of her collective. I agree with Isaacs that this is identical to personal moral responsibility and, being *basically* distributive, not properly a species of collective liability at all.³⁸ Political liability, as defended here, is collective and indefeasible. However, unlike Jaspers's "political guilt," it is not unlimited.

What might it mean, though, to punish a collective "in its political aspect"? It could of course mean extinguishing its political identity altogether (thus exemplifying Rousseau's dictum that "It is possible to destroy a state without destroying any of its members"³⁹). This could be done by incorporating it within a larger state or by dividing it into several pieces. Or it could mean imposing regime change upon it. (MacArthur's Japan is the notable example, perhaps only formally marred, as an example, by the retention of the emperor as the state's embodiment.) Moving down a level, punishment could mean imposing strict limits on a state's political capacity, particularly its military capacity: the limits imposed

³⁸ Tracy Isaacs, *Moral Responsibility in Collective Contexts* (New York: Oxford University Press, forthcoming).

³⁹ Rousseau, *Social Contract*, I.4.

at Versailles on German rearmament, and Article 9 of the post-1945 Japanese constitution (forbidding offensive military capability) are examples. Moving down another level, we can imagine more minor restrictions on sovereignty, such as enforced no-fly zones, monitored guarantees to minorities, or international inspection regimes, as, potentially, forms of punishment, although to my knowledge, such things have never been imposed as punishments but by UN peace-and-security decision or by treaty.

All these are measures that, by striking at political capacity, can be discriminated as political punishments, and thus as valid forms of collective punishment, according to the foregoing argument. A particularly difficult issue is posed, however, by reparations, which are among the oldest forms of penalty imposed by victors. For here the argument points in two directions. On the one hand, assuming that reparations will be paid from tax revenue, imposing reparations will amount to a political penalty as described earlier, because it is the raising of revenue that constitutes an essential feature of states and the spending of revenue that constitutes one of the principal modes of political independence. Requiring an SPE to pay reparations inhibits or replaces other potential uses of its revenue, thus striking fundamentally at its political capacity. On the other hand, given the fungible nature of money, reparations amount to replacements of other uses to which taxpayers might put their resources, individually or collectively, thus striking at them not (only) as citizens but in a generic capacity as consumers of private or public goods. Should we regard this, reverting to an idea from military ethics mentioned earlier, as an instance of “collateral damage,” the penalty to consumers being inseparable from the penalty to citizens, and thus legitimate?

The objection to that approach may be formed in terms of yet another borrowing from military ethics. Suppose there is some resource that is essential to both military and other purposes: the electricity grid, let us say, that powers not only radar stations and missile batteries but also hospitals and homes: can that be targeted, on the grounds that the damage to hospitals and homes is “collateral” to the destruction of military assets? Henry Shue argues persuasively that it cannot.⁴⁰ Although we may justifiably regard a munitions factory as primarily a military target even though civilians work in it and will die if we bomb it, we cannot regard

⁴⁰ Henry Shue, “Bombing to Rescue? NATO’s 1999 Bombing of Serbia,” in *Ethics and Foreign Intervention*, eds. Deen K. Chatterjee and Don E. Scheid (Cambridge: Cambridge University Press, 2003).

general purpose infrastructure as “primarily” anything (or it would not be *general* purpose). Taking that consideration back to the case in hand, money is, surely, the most general purpose of all goods, in fact, the one example of a good that is a good only because it *is* general purpose – as Marx vividly explained in the 1844 *Manuscripts*. Thus the argument that prohibits attacks on general purpose infrastructure would seem to rule out forced reparations as well.

What might tip the argument the other way, however, is another consideration mentioned earlier. A distinction was made between what could (with reservations) be called the natural consequences of a decision, punishment for making a decision, and, between the two, the issue of allocating burdens when allocations must be made between the guilty and innocent parties. If damage from conflict reaches the point at which what is left cannot save both parties from severe deprivation, it would seem legitimate for the innocents to put their needs first. The situation in which this dilemma arises is rare, however. The decision to prefer the innocent would arise not from any theory of punishment but from two principles: that the victims of injustice should not be made to suffer further and that the agents of justice should not be penalized. Even in the extreme case, then, the argument here supports only political punishment (properly so-called), for political membership, not for national identity. Political membership, I have argued, invites liability in a way that national identity does not but, correspondingly, what it invites – in terms of punishment – is quite restricted. The strongest reason for collective sanctions weakens their modality.