Introduction

Accountability for Collective Wrongdoing

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The contributions to this volume address a range of questions that arise when we start to consider legitimate ways to respond to collective wrongdoing and collective guilt. The chapters that follow cover an array of topics, from the effectiveness of international courts and tribunals, especially atrocity trials, in achieving postconflict justice to home state responsibility for the conduct of transnational corporations. Many of the contributors engage either directly or indirectly with questions of collective punishment and what justified means, if any, there are to punish collectives. Although the notion of collective responsibility is not the central focus of debate in this volume, the authors attend extensively to what collective responsibility consists in and how it distributes, particularly but not exclusively, in the context of justified forms of collective punishment. The issue of distribution raises questions about the nature of membership and the responsibilities, obligations, and even risks to which membership in a collective such as a state or nation gives rise, particularly if that collective is engaged in wrongdoing.

The chapters address the issues from the multiple disciplinary perspectives of law, political science, and philosophy. The volume is divided into two parts. Part I focuses on collective accountability in international law. Part II focuses on distributing accountability. In truth, many of the chapters fit well into both sections, but those in Part I engage more directly with the international legal structures – such as international criminal tribunals, the International Court of Justice (ICJ), and the International Criminal Court (ICC) – and some of the challenges and limitations that those entities have in addressing collective justice.

In this introduction, I take up two tasks. First, I provide a basic historical and scholarly context for the topics that arise in the chapters that follow. Second, using these contexts as a starting point, I draw attention

to three main themes that arise throughout the chapters: (1) the limits of individual criminal trials for addressing atrocity; (2) issues about responsibility, punishment, distribution, and group membership; and (3) collective punishment and alternatives.

HISTORICAL CONTEXT

In the aftermath of World War II, two major events occurred that had a profound influence on contemporary thinking about accountability for collective wrongdoing. The first of these events was the establishment of International Military Tribunals to address war crimes committed in World War II. The most famous of these, the Nuremberg Tribunal, was established in 1945 to try high-ranking Nazis accused of war crimes. The Tokyo Tribunal (1946) prosecuted Japanese war criminals. The second event is a more scholarly turn – namely, the publication of Karl Jasper's *The Question of German Guilt* (1947).[1] In the series of lectures that produced this text, Jaspers confronts the question of the guilt of German citizens for the Nazi atrocities of World War II, most notably the Holocaust. Jasper's book stands as a classic text in the large body of scholarship on collective responsibility generated in the latter half of the twentieth century up to the present.

Nuremberg introduced the idea of individual legal guilt and punishment for political crimes. This approach found its way into the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (1947).[2] Between 1949 and 1954, the International Law Commission (ILC) drafted several statutes for an international criminal court, but none was adopted.[3] No agreement could be reached concerning the definition of aggression, and then the Cold War put a stop to further efforts for the next three decades.[4] The possibility of an international criminal court was revisited beginning in 1989, when Trinidad and

[1] Karl Jaspers, *The Question of German Guilt,* trans. E. B. Ashton (Dial Press, 1947) from the German *Die Schuldfrage* (1946).

[2] Convention on the Prevention and Punishment of the Crime of Genocide. Resolution 260 (III) A of the U.N. General Assembly on 9 December 1948. Entry into force: January 12, 1951.

[3] "Chronology of the International Criminal Court," n.d. Available at http://www.icc-cpi.int/Menus/ICC/Home.

[4] Joanna Harrington, Michael Milde, and Richard Vernon, "Introduction," *Bringing Power to Justice? The Prospects of the International Criminal Court,* ed. Joanna Harrington, Michael Milde, and Richard Vernon (Montreal: McGill-Queen's University Press, 2006), p. 5.

Tobago asked the United Nations to expand the jurisdiction of international law to include drug trafficking. Although this expansion did not happen, it prompted the UN General Assembly to mandate the ILC to renew its efforts to develop a draft statute for an international criminal court.[5]

During the period leading up to the establishment of the ICC in 2002, the International Criminal Tribunal for the Former Yugoslavia (ICTY)[6] and the International Criminal Tribunal for Rwanda (ICTR)[7] were established by a UN Security Council resolution in 1993 and 1995, respectively, to address ethnic cleansing during the war in the former Yugoslavia and genocide in Rwanda. As at Nuremberg, these tribunals tried individuals, not states. The approach to addressing international crime by trying and prosecuting individuals continues in the ICC in The Hague. The ICC Statute was adopted in 1998 at the United Nations Conference of Plenipotentiaries in Rome. The Statute came into force on July 1, 2002, after receiving the requisite sixty ratifications.[8]

Mark Drumbl has described the approach of the legal prosecution and punishment of individuals for international crimes as following the model of the *liberal criminal trial*.[9] He has also subjected it to great scrutiny and criticism, as have other contributors to this volume. In the second part of this Introduction, I identify some of the key concerns that the authors raise regarding the effectiveness of this approach to international criminal justice. First, I turn briefly to the scholarly context out of which these discussions arise.

The scholarly conversation about collective responsibility that followed Jaspers's examination of German guilt has had as much influence on the subject matter and direction of discussion in this volume as the developments in international criminal law just outlined. Jaspers's lectures raise philosophical questions about the reach, extension, and mechanisms of collective guilt. He draws important distinctions between four types of guilt: criminal guilt, political guilt, moral guilt, and metaphysical guilt.[10]

[5] Ibid.

[6] "About the ICTY," the United Nations International Criminal Tribunal for the Former Yugoslavia, n.d. Available at http://www.icty.org/sections/AbouttheICTY.

[7] For an extensive and informative website about the International Criminal Tribunal for Rwanda, see the United Nations International Criminal Tribunal for Rwanda. Available at http://www.ictr.org/.

[8] "Chronology of the International Criminal Court."

[9] See Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press), as well as Drumbl's contribution to this volume.

[10] Jaspers, *The Question of German Guilt,* p. 31.

His philosophical analysis of the way in which the German people – not just those who participated but the people as a group and as a nation – might bear some guilt for the war crimes of their government and military, generated a scholarly discussion that still takes place today among philosophers, legal scholars, and political scientists. Jaspers points out that "the restriction of the Nuremberg trial to criminals serves to exonerate the German people. Not, however, so as to free them of all guilt – on the contrary. The nature of our real guilt only appears the more clearly."[11] In Jasper's taxonomy of guilt, the sense in which all Germans are guilty is the political sense, in so far as "[w]e were German nationals at the time when the crimes were committed by the regime which called itself German, which claimed to be Germany and seemed to have the right to do so, since the power of the state was in its hands and until 1943 it found no dangerous opposition."[12] In 1963, Hannah Arendt's *Eichmann in Jerusalem: A Report on the Banality of Evil*, a detailed account of Eichmann's trial for crimes against the Jewish people, crimes against humanity, and war crimes, introduced the idea that evil is not the exclusive property of sociopaths.[13] On the contrary, she argues, Eichmann's testimony demonstrates the workaday commitment of a man whose main objective was to discharge the duties of his job as efficiently as possible.

In the decades between the end of World War II and the present, the point of focus has understandably moved away from the specific historical example of the German people in World War II to more general questions about the nature of collective agency and responsibility, including collective intention and collective action. There has been lively debate about the possibility and nature of collective responsibility.[14] Further, although some of the "applied" discussion addresses responsibility for war and war crimes,[15] much of the work has focused on corporate responsibility. Among the most frequently cited works in both the applied and theoretical literature is Peter French's article, "The Corporation as a Moral Person."[16] In it, French argues that corporate structures and

[11] Ibid., p. 61.
[12] Ibid., p. 61.
[13] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Viking Press, 1963).
[14] See, for example, Stacey Hoffman and Larry May, eds., *Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics* (Savage, MD: Rowman and Littlefield, 1991).
[15] Richard Wasserstrom, "The Relevance of Nuremberg," *Philosophy and Public Affairs* 1, no. 1 (Autumn 1971): 22–46.
[16] Peter French, "The Corporation as a Moral Person," *American Philosophical Quarterly* 16, no. 4 (July 1979): 207–15.

decision-making mechanisms are the basis for intentional corporate action and support the idea that collectivities with sufficient organizational structure fulfill the conditions for moral personhood. When they satisfy the relevant criteria, they may justifiably be held collectively responsible for their actions in a way that is independent of the responsibility of any individual member.

As influential as French's argument has been, the concept of collective responsibility has many detractors. Some object on the grounds that collective entities do not have the requisite qualities for moral agency and that we do better to focus on the moral responsibilities of individual members, whose agency is less contested.[17] The most frequently cited reason against collective responsibility, voiced even before French argued for the corporation as a moral person, is that it holds some people responsible for the actions of others, a state of affairs that smacks of injustice.[18] In response, a number of authors have emphasized that if an attribution of moral responsibility is truly collective, then no individual member of the collective is necessarily implicated.[19] As Jaspers notes, there are a number of ways a person may be guilty, and without an exploration of what collective responsibility is and how it might hold some individuals responsible for the actions of others, the objection underdescribes its complex target. For example, Larry May picks up on Jaspers's notion of metaphysical guilt to explore the means through which membership in a guilty collective might subject a person to *moral taint,* a condition that does not always involve responsibility but, as the word "taint" suggests, also does not leave a person morally spotless.[20]

The concern about moral responsibility implicating or condemning innocent individuals is most urgent when we extend the discussion to the realm of punishment. When we begin to consider collective liability for international crimes, the impact of the actions of some on the lives of

[17] Seumas Miller, *Social Action: A Teleological Account* (Cambridge: Cambridge University Press, 2001); Christopher Kutz, *Complicity* (Cambridge: Cambridge University Press, 1999).

[18] See H. D. Lewis, "Collective Responsibility," in *Collective Responsibility,* ed. Stacey Hoffman and Larry May, op. cit., pp. 17–33, and more recently, Jan Narveson, "Collective Responsibility," *The Journal of Ethics* 6, no. 2 (2002): 179–98.

[19] Peter French, "The Corporation as a Moral Person," op. cit.; Tracy Isaacs, "Collective Intention and Collective Moral Responsibility," *Midwest Studies in Philosophy (Shared Intentions and Collective Responsibility)* XXX (2006): 59–73; Toni Erskine, this volume, Chapter 10.

[20] Larry May, "Metaphysical Guilt and Moral Taint," in *Collective Responsibility*, eds. Stacey Hoffman and Larry May, op. cit., pp. 239–54.

others is no longer an abstract concept but a concrete reality. If collective sanctions befall a nation's citizens because of the war crimes of some subset of them, innocent individuals suffer the consequences of others' transgressions. In the wake of the atrocities committed in the former Yugoslavia and Rwanda, recent scholarly work has engaged closely with the prosecution and punishment of criminals in international tribunals and courts, examining the merits, shortcomings, and justice of trying and punishing individuals for collective crimes.[21]

The contributors to this volume advance the discussion about collective punishment in significant ways, taking a careful look at the possibilities for and justice of collective forms of punishment that address wrongdoing at the level of collective entities such as states. In what follows, I articulate the contribution that this volume makes to three themes in particular. First, a number of authors question the emphasis on individual accountability that has emerged as the dominant approach to the prosecution of international crime since Nuremberg and argue that a broader base of responsibility, including the responsibility of states, would more effectively achieve the goals of justice. Second, a host of moral challenges ensue when we consider collective sanctions and the way in which their impact distributes among potentially innocent members of collectives. Here, the discussion addresses not only distribution but also the nature of membership and the extent to which it implicates. Third, the authors examine and propose possibilities for collective punishment as well as alternatives to it. These contributions help us gain practical and theoretical purchase on the problems and debates outlined throughout the volume.

THE "LIBERAL CRIMINAL TRIAL" APPROACH TO PROSECUTING ATROCITY: CHALLENGES AND LIMITS

Despite mass crimes such as genocide generating interest in collective responsibility, the brief historical overview in the previous section demonstrates that from Nuremberg to the contemporary ICC, the purpose of international criminal trials has been to prosecute individuals.[22] Apart from being extremely resource-intensive, this approach to atrocity

[21] Larry May, *Crimes against Humanity: A Normative Account* (Cambridge: Cambridge University Press, 2005); Mark Drumbl, *Atrocity, Punishment, and International Law,* op. cit.

[22] Drumbl, Ibid.

arguably falls short in a number of ways that are taken up in this collection by Drumbl, Lang, and Luban.

In "Collective Responsibility and Postconflict Justice," Drumbl argues that the international criminal courts are ineffective at achieving justice because the liberal criminal trial model is limiting and inconclusive, precisely because it fails to attend to collective responsibility in exactly the sorts of cases in which collective responsibility is most appropriate. Atrocity, maintains Drumbl, is the product of collective violence. Individual participation is "deeply conformist" and simply would not occur outside of the collective undertaking. Thus, maintains Drumbl, the prosecution of individuals through the mechanisms of the ICC simply does not do justice to the nature of the atrocities committed. If, instead of pursuing individual criminal prosecutions and traditional legal punishment such as incarceration, emphasis were placed on collective responsibility, justice might be sought through different mechanisms of accountability. These results could be more satisfying. The prosecution of individual criminals at high-profile atrocity trials not only fails to address the collective nature of the violence committed but is also enormously-resource intensive and leaves as an open question whether convicted perpetrators can ever receive their just deserts, given the nature of the crimes.

In "State Criminality and the Ambition of International Criminal Law," David Luban argues that one of the primary reasons international criminal law focuses on individuals is because of its "fetishization" of the state. This tendency to fetishize states means that officially recognizing a category of state criminality would be heretical. Luban cites the notion of head-of-state immunity as part of the evidence for this claim; until recently, heads of state have enjoyed immunity because they personified the state. International tribunals, however, do not recognize head-of-state immunity; but neither do they prosecute states. Instead, notes Luban, in attributing international crimes to individuals, these tribunals reduce atrocity to "mere crime." This focus sidesteps an important fact: states can be the worst criminals. Moreover, those individuals who do stand trial are not ordinary criminals, even if their brand of evil is of the banal variety. Drumbl points out that war criminals reintegrate well into society and are extremely unlikely to reoffend. Luban maintains that their particular criminality requires not individual evil, but the context of a criminal state. Again, the individual criminal trial does not adequately address this feature of the transgressions in question.

In "Punishing Genocide: A Critical Reading of the International Court of Justice," Anthony Lang suggests that international crimes such as

genocide have a "dual criminal nature" in so far as they are crimes of individuals and of states. At present, the recent international tribunals and the ICC are equipped to handle the individual criminal nature of these crimes. The International Court of Justice addresses complaints against states but does not prosecute them as criminals. Thus, the current international legal order cannot sufficiently address state criminality. An explicit statement of the possibility of states being held responsible for the crime of genocide comes from the ICJ in its consideration of the responsibility of Serbia for genocide in Bosnia and Herzegovina. Although the ICJ judgment does not find Serbia responsible for genocide in Bosnia and Herzegovina, it explicitly asserts that states can be held responsible for genocide.

What solutions do we find for the shortcomings of prosecuting individuals for extraordinary crimes such as genocide, war crimes, and crimes against humanity? The authors in this volume make a number of suggestions.

In response to the unsatisfying and limited nature of atrocity trials that follow the liberal criminal trial model, Drumbl suggests that an approach he calls "cosmopolitan pluralism" would more effectively integrate multiple sites of justice at the local, national, and international levels instead of favoring the high-profile international trial. In addition to reclaiming the significance of local and national judicial bodies, this approach would allow for extralegal accountability mechanisms with the primary goals of reconciliation and repair. Such mechanisms might include truth commissions, public inquiries, reparative funds, the politics of commemoration, redistributing wealth, and fostering constitutional guarantees that structurally curb the concentration of power. Such an approach would maintain the integrity and functioning of indigenous institutions of justice instead of forcing them to "judicialize" by conforming to the liberal model if they are to have respect and funding.

As we have seen, Drumbl sees this point as a reason for expanding beyond criminal trials into the broader category of collective responsibility. In so doing, the mass participation and broad complicity does not drift out of sight. Luban urges that state criminality be added to legal doctrine. This latter solution leads to additional questions, which he recognizes must be addressed if his proposal is to have teeth. First, some will question whether a state, being an artificial person, can commit a crime. Luban gestures toward the legal model of agency as one means of addressing this challenge. He notes further that there are promising directions for ascribing acts of humans to states articulated in the International

Law Commission's 2001 "Draft Articles on Responsibility of States for Internationally Wrongful Acts." Corporate criminality provides a legal model of how extending the application of the Draft Article from civil to criminal law might work.

Lang urges a restructuring of the international legal order to capture the duality of international crimes. He maintains that in order to recognize the state and individual dimensions of the crime of genocide, a new relationship between the ICJ and the ICC must be established. The ICJ statement in the Bosnia and Herzegovina genocide case helps to support the argument that, by viewing states as corporate agents, the ICJ might work in a more integrated fashion with the ICC to address the dual nature of international crime.

So far, the main criticism of current judicial means of addressing atrocity we have seen is that the emphasis on the prosecution of individuals inadequately captures the collective element of such crimes. Intermediate between the accountability of states and the accountability of individuals lies the potential accountability of regimes, or of groups of individuals in authoritative positions, who jointly engage in atrocious acts.[23] Michael Scharf's chapter, "Joint Criminal Enterprise, the Nuremberg Precedent, and the Concept of 'Grotian Moment,'" addresses a concept that offers to fill this intermediate space, thus introducing a collective element of criminality into what would ordinarily be individual criminal trials: the concept of "joint criminal enterprise." Scharf's chapter discusses and defends the proposed use of this category in proceedings of the tribunal before which, at the time of writing, some alleged perpetrators of Cambodian atrocities face prosecution. Scharf makes the case that the concept of joint criminal enterprise is supported by precedents dating back to the prosecution of war crimes in World War II. The originating precedents do not, indeed, concern regimes; they concern groups of combatants whose actions resulted in war crimes (the murder of prisoners) in circumstances in which it was impossible to isolate individual culpability – to stand guard while a comrade pulls the trigger is not to commit murder, but it is to be complicit in a murderous "enterprise." However, the relevance of the idea to the case of regimes is clear. Regimes do not pull triggers, but they collectively create circumstances in which triggers get to be murderously pulled, and so should attract accountability. If the idea of "joint criminal enterprise" can be sustained, then we would have

[23] See Luban's and Vernon's chapters in this volume (Chapters 2 and 11, respectively) for a discussion of the distinction between a state and a regime.

something important to contribute to solving the problem of individual criminal prosecution for atrocity: we could show that criminal prosecution can extend its reach significantly beyond strict individual culpability. Its potential, in so far as it extends the reach of accountability, is that it may capture just those degrees of culpability that attach to members of a regime whose actions are jointly necessary for atrocity, although none of them individually commits atrocious acts.

The chapters discussed thus far suggest that some revisions to the individual crime and punishment approach of the "liberal criminal trial" are in order. All of the suggestions point in the direction of a model that takes collective responsibility, and in some cases even collective criminality, more seriously. The idea of putting more emphasis on collective responsibility brings us squarely up against skeptical worries about the impact attributions of collective responsibility might have on innocents. The next section takes up this worry, which is primarily about the distribution of responsibility and punishment among members of guilty collectives.

RESPONSIBILITY, PUNISHMENT, DISTRIBUTION, AND MEMBERSHIP

Much of the skepticism directed against collective responsibility turns on the concern that it unjustly distributes punishments to innocents. A number of authors take a close look at the possibilities for collective punishment, and in so doing, they examine questions of distribution and justice. These issues relate closely to the way collective responsibility (not just collective punishment) might distribute, which in turn presses us to clarify our understanding of membership and its implications. Finally, as we have seen in Drumbl's cosmopolitan pluralism and shall see in other chapters as well, punishment is not the only response to collective responsibility. There could be other ways of holding collectives accountable, and these warrant our attention as well.

In "The Distributive Effect of Collective Punishment" (Chapter 8), Avia Pasternak examines the impact collective punishment might have on group members by drawing attention to three bases for distribution: proportional, equal, and random. Recognizing that it is almost inevitable that collective punishment will pose burdens on individuals simply by virtue of their group's wrongdoing, she argues that the way the burden is distributed ought to be taken into account when assessing the legitimacy of collective punishment. Her discussion begins with the example of the proposed academic boycott of Israeli universities, advocated by a number

of British academic associations, as a punitive measure against the state of Israel.

Some people (e.g., Peter French) maintain that the harm individuals suffer as a consequence of collective punishment is not to be considered *punishment*, because they are not the intended recipients of the burden. Instead, they experience a derivative harm, in much the same way that the financial hardship the family of a convicted criminal faces is a derivative harm if the criminal goes to prison. Nonetheless, argues Pasternak, derivative harm is not normatively neutral. Considerations of how harm distributes among those who are not the intended recipients of the punitive measure ought to play a role in decisions about a particular punishment's appropriateness.

She considers and evaluates three possibilities for the distribution of the burdens of collective punishment: proportional distributions, in proportion to personal involvement in bringing about the collective harm; equal distributions, distributed equally among all members of the collective; and random distributions, not guided by any systematic principle but randomly befalling people.

Pasternak draws attention to our normative intuitions about fairness. These intuitions tend to be based in our sense of what individuals do and do not deserve. The possibility that someone may bear the burden or cost of punishment although she or he is not individually responsible for the transgression is in conflict with retributive views about desert. The normative considerations in her discussion of the three ways that collective punishment might distribute pick up a thread of the retributive intuition that a person should only suffer punishment to the extent that she or he is responsible. The primacy of retributivism is tempered by Pasternak's claim that equal distribution might be understood as an expression of the value of the common bond of citizenship. Although equal distribution might at first seem to fly in the face of fairness, Pasternak suggests that Michael Walzer's notion of "common destiny" can support equal distribution on normative grounds in so far as "each citizen is tied to outcomes of the political community's shared political goals and institutions in a way that does not depend on his or her personal contributions to it" (p. 226).

Amy Sepinwall invokes a similar idea – co-citizenship – to broaden the reach of accountability in her chapter, "Citizen Responsibility and the Reactive Attitudes: Blaming Americans for War Crimes in Iraq," (Chapter 9). Using American war crimes in Iraq as her running example, she argues that even when not individually culpable, individuals may

still bear responsibility for group transgressions. Although she discusses responsibility more than punishment, her conclusion clearly legitimates the *blaming* – that is, the holding responsible – of U.S. citizens for the war crimes of their military. Citizens may be morally responsible without being causally responsible, and they may be blameworthy without considering themselves to be blameworthy. This is not to say that all citizens bear the same relationship to the wrongdoing. Sepinwall recognizes distinctions between dissidents, complacent bystanders, and perpetrators with respect to the magnitude of their responsibility. Dissidents, bystanders, and perpetrators might not share all the same grounds for responsibility, but with respect to war crimes, they share the ground of commitment to the nation itself. This commitment is very like Pasternak's idea of citizenship as common destiny, in which citizens recognize their political activity as a joint venture with other citizens. Sepinwall's emphasis is somewhat different, insofar as she sees the commitment in terms of the value of loyalty to one's fellows. Membership generates an obligation of loyality: "citizens have an obligation . . . to operate with a certain regard for the ways in which their acts reflect on or contribute to the nation-state" (p. 240). Similar points about membership arise in Richard Vernon's discussion of the risks of citizenship and in Erin Kelly's view, it would stand as a good reason for "cautious thinking ahead to how things might go wrong" (p. 209).

One might worry that if everyone is responsible as co-citizen, then the distinction between perpetrators and nonperpetrators dissipates. However, claims Sepinwall, a perpetrator will bear further responsibility, not just as citizen, but also as perpetrator. In this way, Sepinwall's view makes space for the claim that perpetrators bear more responsibility than bystanders or dissidents, while being able to claim that all citizens bear some responsibility.

In her contribution, "Kicking Bodies and Damning Souls: The Danger of Harming 'Innocent' Individuals while Punishing 'Delinquent' States," Toni Erskine draws attention to the distributive risks of collective punishment. Although the main aim of collective punishment is to punish collectives, she recognizes, as do many others, that this form of punishment has an impact on individuals in a number of ways. First, it might render them vicariously responsible, in the sense that all are held responsible for the misdeeds of some. Second, it might result in misdirected harm, such that individuals are punished instead of the state, for the simple reason that "lacking a soul to be damned and a body to be kicked," the collective cannot really be punished. Third, institutional

punishment might result in "overspill" or collateral damage, through which individuals indirectly suffer the burden of institutional punishment. In the case of overspill, because the punitive action is neither intended nor directed against these people as targets, it does not automatically undermine collective punishment, although the overspill ought to be minimized. With respect to vicarious responsibility and misdirected harm, however, innocent individuals are specifically implicated and targeted, thus rendering these consequences unjust. Erskine maintains that punishment may only distribute if responsibility for the action or omission to which it is a response also justly distributes. This conclusion places a fairly stringent restriction on legitimate uses of collective punishment in cases where it distributes. Once again, however, it is worth noting that overspill or collateral damage is not the same thing as punishment, and if that is the only consequence, then collective punishment might be justly imposed.

Thinking about the way collective responsibility and punishment distribute down to individual group members turns significantly on our understanding of group membership. Drumbl, introducing a helpful distinction, suggests that group membership be defined in a "crude–careful" manner for the purposes of liability. To define membership crudely is to base it wholly on one crude feature of a group, that is, nationality, ethnicity, religion, or inhabited territory. To define it carefully is to work on the basis of individual causal responsibility, according to which one is a member of a culpable group for liability purposes only if one's action or inaction causally implicates one in the wrongdoing. Drumbl's moderate position defines group membership crudely but provides individuals with an opportunity to demonstrate that they should be excluded from the liable group. This crude–careful approach to group membership moderates the concern about wrongfully implicating innocent group members. When Sepinwall and Pasternak invoke the values of co-citizenship and of a common destiny to justify more broadly implicating compatriots in the transgressions of their states, they are closer to the crude than the careful side of Drumbl's continuum. An "opt-out" option would compromise the values they use to ground their conclusions. In some ways, Erskine's approach is more careful. Where distribution of punishment is concerned, those who are punished must be individually responsible as well. With respect to the way the *harm* might distribute, however, she is closer to the crude side of the spectrum, recognizing harm to innocents as potentially unavoidable. We can see that cruder and less careful approaches to group membership legitimate broader implications and leave less space

for individuals to escape bearing the costs of membership legitimately. As Richard Vernon notes in his chapter, "Punishing Collectives: States or Nations?" (Chapter 11), group membership has its risks. This is especially true if membership is defined crudely.

Vernon maintains that whether individuals might bear a personal share of punishment in virtue of their membership depends on their relationship to the collective entity – are they co-citizens of a state or conationals of a nation? We are to understand states as essentially politically organized entities and nations as essentially historically abiding entities. The dividing of Germany at the end of World War II, for example, might be understood as a sanction directed against the German state or at the German national identity. The subject of the sanction (state or nation) has a moral bearing, argues Vernon, on the justice of a downward distribution of the punishment to the members. Vernon believes that it is as a state rather than as a nation that the collective liability of what he calls a "sociopolitical entity" (SPE) makes the most sense. More than nations, states have the sorts of deliberative structures that French and others, including Erskine, Lang, and Seck, argue are requisite for corporate or institutional agency. They also endure over time, even surviving regime change. Although some might be inclined to identify states with the regimes that rule them, and nations with a shared public culture that appears to have more inherent continuity, Vernon maintains that the political character of a state provides "an abiding 'shape' that underwrites continuity despite change" (p. 295).

We have seen other authors – Drumbl, Sepinwall, Erskine, Pasternak, Kelly – talk about, although not in all cases defend, the view that being a member of an SPE brings with it benefits but also, as a trade-off, burdens in the form of responsibilities, obligations, and sometimes suffering the consequences of the state's blameworthy acts and omissions. In Vernon's terms, members of SPEs "share in a complex and unpredictable mix of advantages and risks" (p. 299). Individual liability for the acts of the SPE is based in participation in the scheme, and the scheme presents each participant with the possibility of loss. All are subject to the risk of loss, so all are bound to contribute to the reduction of the risk as far as they can. They share in the liability insofar as their actions as members amount to support. Among the many risks imposed on the members of an SPE by virtue of their membership is the risk that their SPE will use coercive force against the members of another SPE in a manner that constitutes international crime. What, however, could justify the extension of this risk to suffering punishment meted out as a retributive response to the

crimes of their SPE? Here Vernon invokes the notion of political membership; exit options are costly, and participation in the political process does not give ordinary members much control over the actual ends their SPE will adopt and pursue. This uncertainty is the great risk of political society, with the potential to render citizens complicit in decisions and policies with which they disapprove. We see this very idea at play in Sepinwall's analysis of citizen responsibility. Even the dissident who strongly and vocally disapproves of the U.S. conduct in Iraq bears some responsibility for it qua citizen, simpliciter. No excuse can relieve that burden of responsibility. Although Vernon believes, as does Sepinwall, that political society requires membership to be characterized in the crude way, not admitting of excuses on the basis of personal disagreement with state policy, he believes also that this crudeness supports restraint in punishment. Punishment must aim as far as possible to strike collectives in their political dimensions.

Collective punishment and alternatives to it constitute the third central theme with which many of the chapters engage. The next section examines the ways in which this theme is taken up in the volume.

COLLECTIVE PUNISHMENT AND ALTERNATIVES

Historically, one of the more common types of collective punishment leveled against states has been war. Another form of collective punishment that we have seen and that has gained attention in recent years is the collective detention of people who might be security threats. The prisoners at Guantanamo Bay are an example; stateless individuals being detained in refugee camps, such as those displaced by civil war in Sudan, are another example. In "Collective Punishment and Mass Confinement," Larry May considers the justification for collective punishment in the form of war or collective detention. His discussion takes place in the context of international law and just war theory and concludes that war is not a legitimate form of collective punishment and that collective detention is only justified in the rarest of cases. His argument draws explicit attention to issues of distribution that arise when we move from a finding of blameworthy collective responsibility to collective punishment.

War as collective punishment is hard to justify because of the inexact nature of its target and because of the severity of the conditions to which it exposes innocent individuals. May's concern extends beyond prisoners in Guantanamo Bay to detainees in refugee camps and camps for displaced persons. These camps hold stateless individuals who have fled

their home countries and are not accepted by the host countries. They must remain in the camps not because of any qualities they have as individuals, but because of their relationship to a collective identity. For this reason, these kinds of detention centers constitute collective punishment. May maintains that they are condemnable because they render people "outlaws" in the sense that their rights are protected by neither domestic nor international law. May challenges them on equity grounds, in so far as they fail to distinguish innocents from criminals, thus treating them all equally. Moreover, May argues, it is by virtue of being a member of the human community, not a citizen of a particular state, that individuals should have their basic human rights protected. The mere fact of being stateless is not a legitimate reason to have rights ignored. May's argument takes place in the context of some fundamental principles inscribed in the Magna Carta, most notably those concerning "arbitrary imprisonment, outlawry, or exile" (p. 186).

Erskine shares the concern that war and other forms of collective punishment might miss their target – namely, the state. However, she leaves it an open question worthy of further exploration whether military engagement such as war might ever constitute a legitimate form of punishment. Although this conclusion might appear to depart significantly from May's claim that war is an unjust response to state wrongdoing on the grounds that it imposes unacceptable burdens on innocent populations, Erskine, too, thinks that this distributive feature of war means that it is not the most appropriate form of *collective* punishment. If, however, the responsibility for the acts or omissions that are being punished is legitimately distributed among individuals as individuals, then war might be a coherent response. She would agree with May that if war is directed against the state, the broadness and severity of its impact calls it into question.

The real challenge of collective punishment is to find a way of doing it that strikes at the right level. Only then do we recognize it as a just response to the wrongdoing. If a state warrants punishment for its delinquent behavior, then the state should suffer, not the individual citizens. Vernon addresses the challenge of collective punishment hitting its mark, particularly in the case of states or nations, arguing in favor of what he calls "political punishments," that is, punishments that strike at political capacity.

Vernon proposes a number of means of punishing a collective in its political aspect: eliminate its political identity by absorbing it into a larger state or dividing it into pieces; impose a regime change; limit its political

capacity, perhaps by restricting its military; restrict sovereignty (enforced no-fly zones, monitored guarantees to minorities, international inspection regimes). The political aims of these punishments make them collective in the right sort of way. Reparations are not as straightforward because they will inevitably be paid from tax revenue. In one way, this makes them political because collecting and spending tax revenue is an important function of SPEs. Yet if an SPE must pay reparations from tax revenue instead of using it in ways that would reduce consumer expenses, reparations might be understood as ultimately being punitive to the citizens. Vernon suggests moderating the latter conclusion by noting that if reparations are necessary, arguments can be made to support favoring the innocent over those whose political membership aligns them with the guilty collective.

In addition to offering candidates for collective punishment, as Vernon does, the authors in this volume also offer alternatives to it. Whereas Vernon considers reparations and compensation as a kind of punishment, others (Kelly, Drumbl, Pasternak, Erskine) propose them as alternatives. Other alternatives include truth commissions as well as reconciliation schemes (Drumbl, Erskine), boycotts (Pasternak), and public inquiries (Drumbl). The merit of many of these approaches is that, being less severe than war, they do not require the same strict standards of culpability to be justified. Moreover, in most cases, except perhaps boycotts, these measures do not have retributive goals. As a result, any distributive shortcomings they might have are less concerning. In fact, in some instances, the broader impact of such measures might be a merit. Both Drumbl and Sepinwall point out that in collective transgressions, a broad base of responsibility implicates many through their complicity. For this reason, Drumbl suggests that we expand our sights beyond criminal prosecutions and think instead in terms of collective responsibility, which does not necessarily require criminality.

In "Collective Responsibility and Transnational Corporate Conduct," Sara Seck takes the notion of state responsibility under international law into a different application than the extreme of international criminal conduct. The framework for her discussion is the issue of state responsibility for the actions of transnational corporations (TNCs) – in particular, with respect to human rights violations. Her investigation of the relationship as found in international law between a home state's duty to protect human rights and a TNC's human rights violations sheds light on how the state may be understood as a collective agent. As do Lang and Erskine, Seck applies the model of corporate agency, with its origins in the

work of Peter French, to states. On this basis, she concludes that home states have a duty to regulate. If they have this duty, then they also can violate this duty. They are not responsible for the violations of TNCs per se, however. As do the views of Lang, Drumbl, and Luban, Seck's conclusions challenge existing international legal doctrine, which limits the jurisdictional scope of home states. By drawing attention to the broader category of collective responsibility – a category that transcends the law and makes space in international law for noncriminal sanctions – her view allows for home states to play proactive preventive roles in regulating the conduct of transnational corporations abroad. Her analysis offers ways for states, as corporate agents, to exercise their agency in positive ways in the protection of human rights.

In "Reparative Justice," Erin Kelly turns to reparative justice, which, she argues, yields a lower threshold of fault and is more forward-looking than backward-looking in its aims. A case for reparative justice might be viable when a justification for a retributive response is not.

Kelly extends this urge in the direction of reparative justice to collective responsibility contexts through Karl Jaspers's idea of metaphysical guilt, the concept of moral luck, and the forward-looking notion of *taking responsibility*. Because reparative justice is less stringently tied to individual responsibility from the beginning, it is a good match for collective action scenarios; it does not seek to attach blame to particular individuals to provide a reason for their obligation to participate in reparative schemes. To take responsibility is to acknowledge and to respond appropriately to one's part in a morally objectionable outcome. Jasper's notion of metaphysical guilt articulates one instance in which a direct individual causal role is not a prerequisite for taking responsibility. Taking responsibility for wrongdoing provides an opportunity for agents to redirect future behavior in accordance with new values. This redirecting opens the door to reparative obligations. Collective agency, argues Kelly, expands "our understanding of what participants do to include what they do together" (p. 204). For this reason, when an individual has misgivings about the collective actions of her group, she may *take responsibility* as a group member even if her own contribution to the misdeed is marginal.

Note that Kelly does not understand reparative schemes as forms of punishment. Indeed, she does not believe that complicity is a sufficient basis for either individual or collective punishment. Reparative justice as she understands it calls for measures that follow from taking responsibility, such as acknowledging the wrong done, compensating those who are

wronged, or directly repairing the wrong. When participants acknowledge their roles as group members, they open up possibilities for "a collective commitment to taking responsibility for social injustice" (p. 209). One way to fulfill this commitment is to engage in schemes of reparative justice. Because the reasons for participating in such reparative schemes are, in Kelly's view, forward-looking in nature rather than punitive, she would not follow Vernon in reserving it for only the extreme case.

As this brief survey of collective punishment and the alternatives to it that are discussed in the pages that follow shows, when retributive punitive measures are deemed necessary, the manner in which the punishments distribute need careful attention. At the same time, retribution is not the only response to collective wrongdoing that makes sense. Approaches that provide opportunities for repair and rebuilding also make sense, and these opportunities might be available at both the collective and individual levels.

CONCLUSION

Although this collection does not solve the issues of state responsibility, state criminality, effective means of punishing collectives or otherwise making them accountable for their transgressions, and the challenging questions surrounding the almost inevitable downward distribution of collective punishment to the members, it nevertheless raises the level of discussion to a new level of complexity. No longer can we simply say that corporate entities, lacking souls to be damned and bodies to be kicked, cannot be held responsible or suitably punished. Nor can we end the discussion of distribution by noting only that any impact collective punishment might have on individuals as a result of distribution is justified because it is a mere side effect, not to be understood as punishment at all. The discussion in the chapters that follow highlights a rich territory of interdisciplinary discussion about accountability for collective wrongdoing, in which the perspectives of legal scholars, philosophers, and political scientists mutually inform one another and advance our thinking on this increasingly urgent issue.