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# The Führer Principle of International Law: Individual Responsibility and Collective Punishment

Larry Catá Backer\*

## *Abstract*

I offer here an extended Nietzschean joke: the *necessity* of error in the constitution of individual authority and communal power. Communities—the nation-state, religious communities, terrorist organizations—are arranged through a cultivation of error: mistaking causes for effects, assuming a false causality, creating an imagined causality, and assuming a free will. These errors of causation, these miscausations, have been offered as a means through which leaders or leader classes—the judge, the priest, the king, the president, the charismatic leader of violent sub-national communities—maintain authority. In contrast, the community itself, those who are led, dominated, controlled, manipulated, are considered only in the passive. They are the victims, the weak-willed, the powerless, the sheep, the herd. They obey because they must. But authority is not power, and reality is more subtle and layered than what appears on the surface of relationships. Just as the priest, the leader uses miscausation to create the illusion of power and so protect and expand individual authority, so the community uses miscausation to assert communal power—over the

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\* Professor of Law, Pennsylvania State University, Dickinson School of Law, <<http://www.personal.psu.edu/lcb11>>. My gratitude to Emily Atwood ('03) for her superb research assistance. An earlier version of this article was presented as part of a panel, "Inevitabilities Two: The Social and Post-Structural Thought" at the Law, Culture, and the Humanities Conference, University of Pennsylvania Law School, Philadelphia, Pennsylvania, March 9, 2002. Many thanks to participants for their comments and especially to the organizer of the panel, Peter Fitzpatrick (University of London, Birkbeck College), who inspired this work. Special thanks to James I. Nelson ('03) and Cherie Owen ('04), outgoing and incoming editors in chief of the *Penn State International Law Review* and their first-rate staff. This article would not have been possible without their help and encouragement.

priest, the president, the judge, the leader—through the illusion of weakness. The strong leader does not usurp power from the communal weak; the herd, for its own preservation as a herd, demands the appearance of overlordship of the leader. The cult of the leader, of the individual solely responsible for her acts, and of communities consisting of passive amalgams free from responsibility serve as the foundation for modern human rights and humanitarian law. But the cult of the leader itself constitutes a titanic act of mis-causation in four parts: (1) that communities are protected not because they are weak, but because they are strong, to protect the community against blame for action committed in its name by its leaders; (2) that the leader is dependent on the community; the leader acts in conformity to the wishes of the people; (3) that the leader then serves as proxy for the community; the doctrine of personal responsibility for communal acts protects a community by sacrificing its leaders for acts of communal wrongs; and (4) that the community, the sheep, are in actuality the Shepherd in a world arranged to minimize the costs of inter-community conflicts for power. For modern political and legal theory, this misunderstanding unveils the perversity of the logic of modern international humanitarian law. I will offer an example—the way international humanitarian law, used to condemn punitive house demolitions in Israel, serves to subsidize the maintenance of the cultural production of hatred which constitutes communal permission to engage in individual acts of violence against not Israelis, but Jews.

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*But what astonished me more was that they thrust their fingers into a region where we women as a rule allow ---- to enter. At first I thought this very strange—it is remarkable how travel broadens the mind—but I later learnt that the purpose was to discover if we had concealed any diamonds. The practice had been established from time immemorial among the highly efficient nations that scour the seas. I have been told that the religious Knights of Malta never neglect it when they capture Turks of either sex. It is a part of the law of nations, from which they never deviate.<sup>1</sup>*

This essay is offered as an extended Nietzschean joke: the *necessity* of error in the constitution of individual authority and communal power.

I start with an apocryphal story of the constitution of power and community, the story of the elevation of Saul to the throne of Israel and his subsequent removal. The story of Saul provides the recipe for the construction of authority and the constitution and perpetuation of the

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1. VOLTAIRE, *CANDIDE* 27 (Norman Cameron, trans., Penguin Books, Ltd. 1997) (1759) (The Old Woman's Story).

power of community through a process of veiling and misdirection. As between the leader and the community, the leader has authority, but may lead only by following the will of the community or by convincing the community that the leader is implementing the will of the community. Authority in this way produces an illusion of power; that illusion, when internalized by the community, preserves the authority of the leader.<sup>2</sup> As between communities, the leader serves as a proxy for the community, and as protection against communal extermination. When communities act, individuals are held personally responsible.<sup>3</sup> They stand in for the community. The leader is offered up to suffer punishment for communal action, the community is spared.

I then examine the particular ways in which miscausation is used in the modern world to veil the relationships between authority and power, between a leader and the community. The story of Saul and Israel is the story of the modern world, written not in a slim passage of an ancient text, but in a multi-layered nuanced system of law and custom that applies with increasingly coercive force to all political communities on the globe. That system is based on four inversions: (1) the portrayal of communities as weak collectives; (2) the illusion of the leader as independent of the community; (3) the deployment of the leader as a proxy for the people of a community; and (4) the dispersal of power within a community to be used by those who can deploy manifestations of the will of the community.

Lastly, I apply the lessons of the kingship of Saul and the inversions of modernity to explore the absurdity of our emerging system of international law which is obsessed with individual responsibility for communal acts and in which communal responsibility appears in the academic literature as something of a novelty.<sup>4</sup> For this purpose, I focus

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2. For example, the Soviet leadership between 1917 and 1991 profited from the illusion of power flowing from authority, and paid the ultimate price when the illusion was shattered and the people replaced one representative of its power with another. See Noam Chomsky, *The Soviet Union Versus Socialism*, 17 *OUR GENERATION*, 47-52 (1986). The Chinese Communist Party may suffer the same fate in this century as it pushes and is pushed by its community out of its isolation and into the world.

3. The truth of communal action, of communal perpetuation of even the most atrocious actions, is sometimes documented. With respect to the German community's actions against the Jewish community and others, see DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* (Vintage Books 1996); on the participation of the peoples of Spain in the Inquisition, see CECIL ROTH, *THE SPANISH INQUISITION* (W.W. Norton & Co. 1996); on the participation of the Khmer people in the purges of the 1970s, see WILLIAM SHAWCROSS, *THE QUALITY OF MERCY: CAMBODIA, HOLOCAUST AND MODERN CONSCIENCE* (1984); on the communal orchestration of the conflict between Tutsi and Hutu peoples in Rwanda, see, e.g., ALISON DES FORGES, *LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA* (Human Rights Watch 1999).

4. See, e.g., John Quigley, *State Responsibility for Ethnic Cleansing*, 32 *U.C.*

on the development of a purported prohibition under “international humanitarian law” of collective punishment applied to house demolitions in the territories—some of which have been determined by the international community soon to become the state of Palestine<sup>5</sup>—which are currently administered by Israel. In particular, application of the Fourth Geneva Convention of 1949, Relative to the Protection of Civilian Persons in Time of War,<sup>6</sup> serves to reinforce the power of the community to nurture a fundamental culturally constitutive element—demonification and hatred of some constructed “other”—in Western culturally acceptable ways. International humanitarian law subsidizes the cultural project of producing hatred as a communal activity, and taxes state action that interferes with the collective activities of these communities. Individuals, and the occasional leader, may be punished for physical manifestations of communally produced hatred and aspirations, but the community itself remains untouched. Miscausation, Western-style, at its best!

#### I. Text: Constituting Community, Unmasking Power: Saul Law, Narrative and Literary Analysis

The tale of the kingship of Saul forms the central element of my exploration of the communal constitution of power. The story is well known:

Then all the elders of Israel gathered themselves together and came to Samuel. . . . And they said unto him: “Behold, thou art old, and thy sons walk not in thy ways; now make us a king to judge us like all the nations.” . . . And Samuel prayed unto the Lord. And the Lord said to Samuel: “Hearken unto the voice of the people in all that they say unto thee; for they have not rejected thee, but they have rejected Me, that I should not be king over them. . . .; howbeit thou shalt earnestly forewarn them, and shall declare unto them the manner of the king that shall reign over them.” . . . And Samuel told all the words of the

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DAVIS L. REV. 341 (1999); José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons Form Rwanda*, 24 YALE J. INT’L L. 365, 377 (1999).

5. It merely remains for the parties to accede to the international will in this matter. This, certainly, has been the approach of the international press in its reports of the agreement, fashioned among the United States, the European Union, Russia, and the United Nations, for the formal partition of the old province of Palestine into the States of Israel and Palestine. “The roadmap—developed by the United States, the United Nations, the European Union and Russia, the so-called international diplomatic “quartet” on the Middle East—lays out a series of steps to be taken in order to create a Palestinian state by 2005.” Matthew Lee, *Mideast Roadmap to be Unveiled Once Palestinian PM Confirmed by Bush*, AGENCE-FRANCE PRESSE [Corrected 03/14/03] 2003 WL 2752798.

6. Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, adopted Aug. 12, 1948, entered into force Oct. 21, 1950, 75 U.N.T.S. 287 (hereafter the “4<sup>th</sup> Geneva Convention”).

Lord unto the people that asked of him a king. . . . But the people refused to hearken unto the voice of Samuel; and they said: "Nay; but there shall be a king over us; that we may also be like all the nations; and that our king may judge us, and go out before us, and fight our battles."<sup>7</sup>

The story of the appointment of Israel's first king provides the West with an illustration of a basic normative template constructing relationships between power, action and authority within any organized community. In the story of the eventual elevation of Saul to the throne of Israel, God is the holder of ultimate power. The source of God's power is control: the normative basis of community is the monopoly of God. God, in this sense, is manifested as a code of conduct, as an objectification of the means of defining communal taboos. God is the representation of the borders of permissible conduct by the community. But God does not command that a king be appointed. The people insist on a king, so they could be like other people. God is, in this tale, primarily the actualizer of the people's will. The power to act, to demand a king, is in the people. Indeed, the people insist over the objection of God. God's objection is based on a reluctance to permit even a symbolic or apparent competition for control of the normative structure of the community. God wants no king to become, or even to appear to become, an alternative source of rule-making—"but they have rejected Me, that I should not be king over them."<sup>8</sup> Yet God satisfies the people's desire even as God condemns them for the choice they make.<sup>9</sup> Authority over the community, at the insistence of the people, thus appears to pass from Samuel, the servant of God,<sup>10</sup> to Saul, the servant of

7. *1 Samuel* 8:4-7, 9-10, 19-20.

8. *1 Samuel* 8:7.

9. After Saul's coronation, God, through Samuel, sarcastically reminds the people of their desire to ape the communities around them by insisting on a king, when by doing so they were displacing their real king—God. *1 Samuel* 12:12-14. "And all the people said unto Samuel: 'Pray for thy servants unto the Lord thy God, that we die not; for we have added unto all our sins this evil, to ask us a king.'" *1 Samuel* 12:19. God provides some comfort. Though God first acknowledges the transgression—overthrowing the direct overlordship of God for that of a man ("ye have indeed done all this evil." *1 Samuel* 12:20)—God also promises not to abandon this community "because it hath pleased the Lord to make you a people unto Himself" (*1 Samuel* 12:22), but only if the community and its king "fear the Lord, and serve Him, and hearken unto His voice, and not rebel against the commandment of the Lord." *1 Samuel* 12:14.

10. Samuel was among that long line of men in Israel with a direct connection with the Divine Voice. Samuel was the connection between the community as eternal abstraction and the community as people at any one point in time. "And I will raise Me up a faithful priest, that shall do according to that which is in My hearty and in My mind. . . ." *1 Samuel* 3:35. On the nature of the relationship between the priest and the community, see Larry Catá Backer, *Retaining Judicial Authority: A Preliminary Inquiry on the Dominion of Judges*, -- WM. & MARY BILL RTS. J. - (forthcoming, 2003).

the people. As king, Saul becomes a different type of intermediary between the community and its normative obligations, that is, with its God. Saul, as king, is a leader one step removed from both popular and divine power, yet responsible to both as the representative of both. In Saul, we in the West have had appointed, at our insistence, our first *agnus dei*.<sup>11</sup>

*And thus the joke:* both God and the people use the king to veil and preserve their respective powers. The joke is on Saul and those who follow. Saul quickly discovers that he has no power to defy either the people or the normative ordering of society. He also discovers that in contests between the community and the normative order, the leader will bear responsibility for the acts or effects of either. Saul, holding authority without power in fundamental matters, quickly finds himself abandoned by both the people and God.<sup>12</sup>

God abandons Saul soon after the beginning of his reign when Saul, impatient for the arrival of Samuel to perform sacred rites for the community prior to a battle with the Philistines, took the priestly task of sacrifice on himself.<sup>13</sup> Saul may pretend to the Philistines and other

11. The term *agnus dei* is better known in the contemporary West as a representation of Jesus Christ, usually as a lamb with nimbus, holding a banner of the Cross on which Jesus, the lamb, is sacrificed. For a discussion of the iconography of the Lamb in the New and Old Testament, see, e.g., Maurice M. Hassett, *The Catholic Encyclopedia* (Robert Appleton Company Vol. III, 1910). Moreover, this version of the meaning of Saul's kingship assumes greater meaning for Christians when viewed as against the decision by the People of Israel to abandon Jesus to the Romans for the preservation of the nation, as recounted in the Gospel of John. See *John* 11:45 *et seq.* The imagery of sheep and shepherd is common in the Jewish and Christian versions of the Bible. In the days before the destruction of the Jewish Temple in Jerusalem, sheep were a common sacrificial offering. See, e.g., Lev. 1:10, 4:32, 22:23, 27:26. The imagery of sheep and shepherd in the constitution of communal government precedes the anointing of Saul -- Moses asks God to appoint a successor so "that the congregation of the Lord be not as sheep which have no shepherd." Num. 27:17.

12. The joke has not been lost on the children of imperial power. See George Orwell, *Shooting an Elephant*, in *THE COLLECTED ESSAYS, JOURNALISM, AND LETTERS OF GEORGE ORWELL* I 235 (1968) (relating experience as a British police officer in Burma who chasing a rampaging elephant and finding it now docile, decides not to kill the animal, until a mob forms with the expectation of action).

And suddenly I realized that I should have to shoot the elephant after all. The people expected it of me and I had got to do it; I could feel their two thousand wills pressing me forward, irresistibly. . . . Here was I, the white man with his gun, standing in front of the unarmed native crowd—seemingly the leading actor of the piece; but in reality I was only an absurd puppet pushed to and fro by the will of those yellow faces behind. . . . For it is the condition of his rule that he shall spend his life in trying to impress the "natives," and so in every crisis he has got to do what the "natives" expect of him. He wears a mask, and his face grows to fit it.

*Id.* at 239.

13. 1 *Samuel* 13:8-14.

communities against which Israel competes to have independent power as king, to do as he sees right under the circumstances. But he is absolutely subordinate to the normative power of the community. By asserting power over the sacrifices Saul sought to assert power over God. But he had no such power, and the kingdom would be taken from him as punishment.<sup>14</sup>

The people abandon Saul to his fate soon after that. God, through Samuel, commanded Saul to lead the people in the destruction of the Amalekites and all they possessed.<sup>15</sup> The people chose to spare Agog, the Amalekite king and the best of the Amalekite herds.<sup>16</sup> Saul led, but only as the follower of the people. Because he “feared the people, and hearkened to their voice,”<sup>17</sup> Saul was willing to interpret the command of God to suit the people. Again, the same result—Saul may appear to hold power as well as authority as king, but he remains as subordinate to the will of the people, as he was subordinate to the will of God.

The majesty of leadership—the crown of the king, the pomp and circumstance of a President’s address to Congress—thus veils the reality of the relationship between leader, community, and the web of normative rules within which the community acts. This illusion deploys the four great errors of causation.<sup>18</sup> This illusion draws a veil of contentment. This veil causes a blindness, a forgetfulness, that permits a self-satisfaction, a sense of complete justice, in the prosecution of the leader for the crimes of the “state.” This veil permits the personification of the state in the body of the leader (or leadership). Even within democratic states, the international community is content to apply, even to leaders of democratic regimes, as international human rights law, that old saying attributed to that absolutist monarch, Louis XIV of France: *L’etat c’est moi*. Thus, one can, without any trace of irony, suggest that “[t]he conviction of Rwanda’s Prime Minister and the arrest and prosecution of Yugoslavia’s President on charges of genocide represent a watershed moment in the development of international law.”<sup>19</sup> And it permits the

14. “And Samuel said to Saul: ‘Thou hast done foolishly; thou hast not kept the commandment of the Lord thy God. . . ; for now would the Lord have established thy kingdom upon Israel for ever. But now thy kingdom shall not continue.’” *1 Samuel* 13:13-14.

15. *1 Samuel* 15:3.

16. *1 Samuel* 15:9.

17. *1 Samuel* 15:24.

18. Friedrich Nietzsche, *Twilight of the Idols*, in *THE PORTABLE NIETZSCHE* 464 (Walter Kaufmann, trans., Viking Press, 1972) (*DIE GÖTTER-DÄMMERUNG*, 1889) at 492-501.

19. Michael J. Kelly, *Can Sovereigns be Brought to Justice? The Crime of Genocide’s Evolution and the Meaning of the Milosevich Trial*, 76 *ST. JOHN’S L. REV.* 257 (2002).



ultimate sovereign of democratic theory<sup>20</sup>—the people—to remain hidden. The collective, the ultimate sovereign, avoids responsibility for the actions of the state, and its leader, of which it is the ultimate authority. An irony? A hypocrisy? A miscausation? A *führer principle*<sup>21</sup> of international law miscauses authority without responsibility.

*The confusion of cause and effect.*<sup>22</sup> Because Saul is vested with the authority of kingship, he believes that he necessarily also has power to the extent of the competence of his office. The office gives Saul authority over community and norms. Saul believes, like we believe, that this authority is the same as power over community and norms. Saul comes to believe this, and acts on this belief. His reward is the loss of his kingship. Thus, the Biblical tale is written to teach that Saul lost his kingship because he disobeyed God.

A higher reasoning might instruct that authority without power is always lost—Saul could not succeed given the nature of his real

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20. The German Federal Constitution memorializes this understanding nicely: “(1) The Federal Republic of Germany is a democratic and social federal state. (2) All state authority emanates from the people. It shall be exercised by the people by means of elections and voting and by specific legislative, executive, and judicial organs.” GG Art. 20, *quoted from* DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 510 (2<sup>nd</sup> ed., 1997).

21. The term *führer principle* is chosen deliberately to jar the reader. Stop long enough to consider the utility of the term as description and subtextual comment with rich ironic secondary meaning. In its descriptive sense, I use the term as the name of a principle of leadership which, as I will show, serves as the lynchpin of international humanitarian law. The use of the German terminology is used as a subtextual, and naughty, reminder of the perversity and corruption of the condition to which the term refers. The modern manifestation of a *führer principle* of governance originated in Germany during the period of Nazi rule, 1933-45, to describe principles of democratic governance, centering on the notion of the leader as embodiment of the sovereignty of the people. See Arthur Kaufmann, *National Socialism and German Jurisprudence From 1933-1945*, 9 CARDOZO L. REV. 1629, 1637-41 (1988) (law was an expression of democratic will for the community as embodied in Hitler). “In a nutshell, the Führer principle idolized Hitler as the single minded and decisive decisionmaker who leads the German Volk to a bright future free of democratic quibbling.” Marcus Dirk Drubber, *The German Jury and the Metaphysical Volk: from Romantic Idealism to Nazi Ideology* 43 AM. J. COMP. L. 227, 264 (1995). Having vanquished, at great cost, the socio-political community which held to and acted on this principle, the West appears to have adopted an inverted variant of the premise of this principle as the foundation of modern humanitarian law. The West now distinguishes between a community that educates and prepares its members for the commission of violent or criminal acts, and the individual who actually effectuates the act. The individual actor is treated as an actor free of any connection with or service for communities that might have made his actions possible in tangible and intangible ways.

22. Friedrich Nietzsche, *Twilight of the Idols*, *supra* note 19 (*The Four Great Errors* ¶¶ 1-2, *id.* at 492-494). “The newspaper reader says: this party destroys itself by making such a mistake. My higher politics says: a party which makes such mistakes has reached its end; it has lost its sureness of instinct.” *Id.* at 493-494.

relationship to the people and to God. He feared disobeying a community intent on preserving the riches of the Amalekites.<sup>23</sup> His authority could not have prevented an act of the will of the people, his kingship (and his life) would have been lost. But, even though he merely acceded to the will of the community, Saul could not escape punishment by God. By obeying the people, Saul exceeded the breadth of the authority given to him by God, a limited and directed authority made manifest in a direct divine command. Acting as he did, permitting the people to assert power over his authority, Saul acknowledges the limits of his own power against the will of the people. But Saul's decision to do as the people demanded, because Saul did not have power to do otherwise, ironically causes Saul to assert authority where he did not have power—he disobeys the explicit command of God (effectively breaching a core taboo of socio-religious conduct). Saul is trapped. And thus another confusion of cause and effect: a leader can command only what the community wishes to obey.

*Illusion through the creation of a false causality.*<sup>24</sup> God has elevated Saul to the kingship. As a result, Saul, as leader, must be more than he was before he became king. Saul is now a symbol, a representative; he must be more than himself. But even as king, Saul is still only a man, and very much a part of the community over which he was elevated. Saul remains a man among many people. Saul stands at the crossroads of community and norms. What is Saul after he becomes king? Here false causality comes to the rescue.

The people, grown weary of obedience to an abstraction (God), choose to make God manifest on earth in the person of the king. But the king is not the abstraction. He is merely an objectification of abstraction, a second order abstraction functioning as a fetish—a symbol. Because he is king, he stands for the state. But a fetish can never be the thing it merely represents. Saul becomes the state not because he proceeds from the abstraction (again, God) and is therefore wrought in the image of the abstraction, but because he proceeds from the attempt to manifest an abstraction in the image of those who must imagine it (the nation). And the best that the people can do is create a collective image of themselves. This is the ultimate parody by the community of its own creation from

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23. "And Saul said to unto Samuel: 'I have sinned; for I have transgressed the commandment of the Lord, and thy words; because I feared the people, and hearkened to their voice.'" *1 Samuel* 15:24.

24. Friedrich Nietzsche, *Twilight of the Idols*, *supra* note 19 (*The Four Great Errors* ¶ 3, *id.* at 494-495). "He even took the concept of being from the concept of the ego; he posited 'things' as 'being,' in his image, in accordance with his concept of the ego as a cause. Small wonder that later he always found in things only that *which he had put into them*. The thing itself, to say it once more, the concept of thing is a mere reflex of the faith in the ego as cause." *Id.* at 495.

out of God (the normative foundation given concrete expression as the community).<sup>25</sup> Yet God rejects this conflation of the leader with the subject—of authority with power.<sup>26</sup> Rather than punish the people directly, God is satisfied to punish the authority of the people—the king.<sup>27</sup> Thus, caught in the tangle of power and authority not of his own making, Saul, rather than the nation, is rejected by God for disobedience. False causation is a self-preservation mechanism. God is the abstraction of the nation, the nation is the manifestation of that abstraction. These are the only powers that count. Punishing Saul preserves intact both kingship and community.<sup>28</sup> Saul loses the power of kingship—keeping only the authority until his death at the hands of his enemies.<sup>29</sup> Here the spirit of God, as the power that caused his appointment through a popular act, ends his kingship through another popular act—the loss of a battle at the hands of his enemies.

*The creation of imaginary causes.*<sup>30</sup> A direct relation between the people and its God, its communal *genius*,<sup>31</sup> is too unsettling. It is *necessary* for Israel to resemble all other nations. But, in turn, all other nations will also find it easier to resemble Israel, and thus come into the ultimate, but now removed kingdom of God. Of course, this is the fundamental principle of Christian success in the pagan world; a pagan

25. "And God created man in his own image, in the image of God created He him; male and female created He them." *Genesis* 1:27.

26. "Though thou be little in thine own sight, art thou not the head of the tribes of Israel?" *1 Samuel* 15:17.

27. "Because thou hast rejected the word of he Lord, He hath also rejected thee from being king." *1 Samuel* 15:22.

28. "The Lord has rent the kingdom of Israel from thee this day and given it to a neighbour of thine, that is better than thou. And also the Glory of Israel will not lie nor repent; for He is not a man that He should repent." *1 Samuel* 15:28-39. This idea is echoed in some of the writings of the Prophets. "Behold, I am against the shepherds; and I will require My sheep at their hand, and cause them to cease from feeding the sheep; neither shall the shepherds feed themselves any more; and I will deliver my sheep from their mouth, that they may not be food for them." *Ezekiel* 34:10.

29. "Then he [Saul] said: 'I have sinned; yet honour me now, I pray thee, before the elders of my people, and before Israel, and return with me, that I may worship the Lord thy God.' So Samuel returned after Saul; and Saul worshipped the Lord." *1 Samuel* 30-31.

30. Friedrich Nietzsche, *Twilight of the Idols*, *supra* note 19 (*The Four Great Errors* ¶¶ 4-6, *id.* at 496-499). "Thus, one searches not only for some kind of explanation to serve as a cause, but for a particularly selected and preferred kind of explanation—that which has most quickly and most frequently abolished the feeling of the strange, new, hitherto unexperienced: the *most habitual* explanations. Consequence: one kind of positing of causes predominates more and more, is concentrated into a system, and finally emerges as *dominant*, that is, as simply precluding other causes and explanations." *Id.* at 497-498.

31. Here *genius* is used in its ancient sense, as the guardian of a person or people, as well as in its modern sense, as the manifestation of the guardian spirit of a people (for example, the *genius* of France is manifested in its representative institutions).

success with a Hebrew purpose.<sup>32</sup> An abstraction, God, is a hard master—imitation of others is a gentler God. But such imitation does not make the imaginary real—it merely blinds the believer.

The error of imaginary causes bedevils the tale of Saul as well. The people disobeyed God in the matter of the destruction of the Amalekites because Saul so ordered. The people are easily characterized as helpless, either as against the king's desire or their own. In one sense, then, they were the weak instruments of the king. They followed the king's commands because they must—the king controlled the army. In another sense they were the weak instruments of their base desire. The people trusted the king to implement the divine commandments against their human cravings. The imaginary here centers on the illusion of kingship for the protection of the community—and its consequences. The people create in Saul an imagined image of God—as Saul. This imaginary God—the leader—is comforting. Disobedience of a king was infinitely less severe an infraction than disobedience of the will of God.<sup>33</sup> And should the consequence of their actions be adverse—the people could always unmask the king. No longer a stand-in for God, the king could be transformed into a stand-in for the community, a community, in this case, that was innocent because they were collectively only following orders. Saul, after all, and not the people, had transgressed. Thus, the people profit in both directions. From Saul they secure obedience—because the power of the community to action resides in the people. From God—the inescapable normative context of their constitution—the people have secured a proxy against destruction, for when the community errs, it is their proxy, the king, who pays in the place of the community.

*Illusion based on the error of free will.*<sup>34</sup> It was a sovereign act of the national will to appoint a king over Israel. It would require a

32. Even the Church acknowledges this tendency, though for very different effect. Gregory the Great's famous letter to the Abbot Mellitus, advising that pagan temples in England be used for the worship of the Christian God that people '*ad loca quae consuevit, familiaris concurrat,*' and that the sacrificial animals of heathenism be now devoted to Christian festivals, agrees with the *responsa* of the same pope to Augustine concerning the choosing of local customs best suited to the conditions of the converted.

William A. Chaney, *Paganism to Christianity in Anglo-Saxon England*, in EARLY MEDIEVAL SOCIETY 67 (Sylvia L. Thrupp, ed., 1967).

33. See note 10, above.

34. Friedrich Nietzsche, *Twilight of the Idols*, *supra* note 19 (*The Four Great Errors* ¶¶ 7-8, *id.* at 499-501). "Today we no longer have any pity for the concept of 'free will': we know only too well what it really is—the foulest of all theologians' artifices, aimed at making mankind 'responsible' in their sense, that is, *dependent upon them*. . . . The entire old psychology, the psychology of will, was conditioned by the fact that its originators, the priests at the head of ancient communities, wanted to create for themselves the right to punish—or wanted to create this right of God." *Id.* at 499.

sovereign act of equal magnitude to remove the king—and end the kingdom. Thus is created a box within which the people think they can regulate the king, and their relationship with God. Yet, the bargain made between the people and God is neither one of freedom nor of will. It is, instead, a bargain meant to optimize the effectiveness of guilt and punishment as tools of state governance.<sup>35</sup> “Men were considered ‘free’ so that they might be judged and punished—so that they might become *guilty*.”<sup>36</sup> Having demanded the boundaries of a kingship, having carved authority and responsibility without power into the very body of the king,<sup>37</sup> the nation abandoned their free will to judgment and punishment. Indeed, in this sense, the very demand of Israel for a king, an act of free will against God, is better understood inverted—as an act of dependence. Israel emerges from its fight for a king doubly dependent. Israel is now dependent on a king—a sovereign who judges and punishes. Israel is also dependent on a God—who has judged and punished Israel by granting the nation its wish. In this sense, the community suffers in both directions, from both the impositions of the king (their corporeal manifestation) and from that of God (their normative manifestation).

## II. Subtext: The Inversions of Miscausation, a Legal Sociology

Just as Israel stood before God, importuning the divine for a king, the modern world has stood before its divinely infused core principles of humanity and demanded from them a sovereign. And the post Second World War world has indeed constructed itself a king worthy of anything

35. “And ye shall cry out in that day because of your king whom ye shall have chosen you; and the Lord will not answer you in that day.” *1 Samuel* 8:18.

36. Friedrich Nietzsche, *Twilight of the Idols*, *supra* note 19 at 499. This notion is not extraordinary within Christian thought. A very different but not alien notion of the relationship of free will to sin and guilt can be found in Calvin. See JOHN CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION*, Book II, chapter II (1559) (“Man Has Now Been Deprived of Freedom of Choice and Bound Over to Miserable Servitude”), reprinted as CALVIN: *INSTITUTES OF THE CHRISTIAN RELIGION* I 255-289 (John T. McNeill, ed., Ford Lewis Battles, trans., Philadelphia, The Westminster Press, 1975). Here is an elaboration of an Augustinian idea that

man, using free will badly, has lost both himself and his will. Again, the free will has been so enslaved that it can have no power for righteousness. Again, what God’s grace has not freed will not be free. Again, the justice of God is not fulfilled when the law so commands, and man acts as if by his own strength; but when the Spirit helps, and man’s will, no free but freed by God, obeys.

*Id.* Bk. II, ch. II, para. 8 (McNeil edition at I, 265). For the Catholic position, see, e.g., *CATECHISM OF THE CATHOLIC CHURCH* ¶¶ 1730-1748 (English translation, 1994) (“There is no true freedom except in the service of what is good and just. The choice to disobey and do evil is an abuse of freedom and leads to ‘the slavery of sin.’” *Id.* at ¶ 1733; cf. *Rom.* 6:17).

37. The notion of the king’s body as both physical and symbolic has been deeply ingrained in Western culture. See E. KANTOROWITZ, *THE KING’S TWO BODIES* (1959).

from out of the Judeo-Christian Bible.<sup>38</sup> Through this king, this kingship of the mythic individual as wholly independent hero,<sup>39</sup> modern political communities have embraced the *necessity* of error in the constitution of individual authority and communal power. But kingship has assumed a modern form. It has been reconstituted as the *führer principle* of democratic political organization.<sup>40</sup> The exercise of sovereign free will by political communities have continued a conflicting double dependence—on the ‘leader’ as the corporeal manifestation of the political community and on the divine as the manifestation of the normative constitution of the community. As between communities around the globe this principle has permeated the very fabric of the foundational norms of political and legal organization.

As in the Biblical recounting of the elevation of Saul, the modern form of the errors of the constitution of political communities involves three actors—the leader, the people, and their norms (sometimes incarnated as God). Of the three, the leader is given pride of place—she is easy to identify, the body on which misdirection can be concentrated. Scholars certainly tend to gaze at leaders, at the king, like the readers of

38. As an aside, I note but reject the notion that “Judeo-Christianity” is some sort of malformed artificial construct made out of the irreconcilable and mutually antagonistic. It is true enough that there is no “Judeo-Christian” faith community as such, but the connection between the holy books of the various incarnations of Judaism and of Christianity is difficult to ignore even if the nature and character of that connection is disputed. It is to that connection, and connection in a cultural rather than a primarily faith sense, that I refer. It follows, of course, that I do not mean by this reference to value any such characterization of connection over others.

39. The type of the hero is not limited to Judeo-Christian holy texts. For an examination of the hero as a foundational cultural type, see, e.g., JOSEPH CAMPBELL, *THE HERO WITH A THOUSAND FACES* (Princeton University Press, 2<sup>nd</sup> ed., 1968).

40. For a discussion of the use of the term *führer principle* in this article, see, note 21, *supra*. While the term is used principally in connection with the development of a peculiar template for international human rights law, I use it here to reference, with some irony, the development of a related principle which forms part of the core of foundational rules of democratic political organization. The West no longer vests the sovereign authority in a king -- instead, the kingly power is vested in a leader who can be denominated president, or premier or prime minister, it doesn't really matter. Thus, rather than anointing a king as the embodiment of the divine, modern communities elect a president as an embodiment of the whole community. From a conservative perspective, there may be little difference between the ancient and modern forms.

Traced to this source, the voice of a people -- uttered under the necessity of avoiding the greatest of calamities, through the organs of a government so constructed as to suppress the expression of all partial and selfish interests, and to give a full and faithful utterance to the sense of the whole community, in reference to its common welfare -- may, with impiety, be called *the voice of God*.

John C. Calhoun, *A Disquisition on Government*, in JOHN C. CALHOUN, *UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN* 5, 31 (Ross M. Lence, ed., 1992) (1850).

romance novels focus on the hero.<sup>41</sup> The king, priest, legislator—leader—is a *type* that embodies the post-modernist insights into the nature of the striving for power, personal power from out of attributes of class, race, status, caste, religion, or membership in some other community. Modernity is, in a sense, a wrestling with, and perhaps an embrace of, the elaboration of a *führer principle* in theorizing. The success of the leader type through the millennia has given religion,<sup>42</sup> and political organization<sup>43</sup> its particular character.

The leader (as priest, king, president, legislator, or tyrant) is permitted to maintain her hegemony of authority within a community through deployment of the four great rules of mis-causation.<sup>44</sup> “Every single sentence which religion and morality formulate contains it: priests and legislators of moral codes are the originators of this corruption of

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41. Professor Alvarez expresses the general understanding when he notes, in a different context:

There is also widespread consensus among international lawyers that the flaws of prior proceedings at Nuremberg and Tokyo have been largely corrected and that the new ad hoc tribunals for the former Yugoslavia and Rwanda are more credible instruments of the international community in terms of their respective bases of jurisdiction, rules and procedures, bench, and bar. To date, most international lawyers regard proceedings within these ad hoc tribunals as more attractive than available alternatives and few criticize the jurisdictional primacy these entities enjoy. International lawyers' emphasis on international fora has also been accompanied by clear preferences as to whom to indict. From the outset, most international lawyers have argued that the scarce resources of the international community need to be devoted to trying those perpetrators who have the greatest responsibility, by which they mean the leaders and instigators, at a high policy level, of mass atrocities in the former Yugoslavia and in Rwanda.

José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons Form Rwanda*, 24 YALE J. INT'L L. 365, 377 (1999).

42. Nietzsche was particularly good at attempting a demonstration, through the example of the construction of modern Christianity. See, especially, Friedrich Nietzsche, *The Antichrist, in THE PORTABLE NIETZSCHE* 568 (Walter Kaufmann, trans., Viking Press, 1972) (DER ANTICHRIST, 1895) at ¶¶ 39 *et seq.*

43. See ARISTOTLE, POLITICS (William Ellis, trans., London Everyman's Library, J.M. Dutton, 1912). Aristotle, of course, suggests that government must be organized in accordance with the tastes, character, and habits of the people who are worthy of citizenship. But not all people are by nature, character, or birth worthy of citizenship. And not all citizens are always worthy of sharing in the honors of governance. “There must therefore necessarily be as many different forms of governments as there are different ranks in the society, arising from the superiority of some over others, and their different situations.” *Id.* at 110. In an interesting comment, Aristotle suggests that, even democratic communities must, from time to time, suffer the leadership of the few: “But whenever a whole family or any one of another shall happen to so far exceed in virtue as to exceed all others persons in the community, then it is right that the kingly power should be in them. . . for it is contrary to nature that what is highest should ever be lowest.” *Id.*, at 104. On the constitution of worthiness, see ARISTOTLE, NICOMACHEAN ETHICS (Martin Oswald, trans., Bobbs-Merrill Company, Inc., 1962).

44. Friedrich Nietzsche, *Twilight of the Idols*, *supra* note 19, at 499.

reason.”<sup>45</sup> In the hands of the leader, the great errors of miscausation describe and predict the manner in which the socio-political priestly caste, the king and his minions, relate to and operate within the community over which it seeks to preserve their authority. Communities—the nation-state, religious communities, terrorist organizations—are arranged through the cultivation of these errors of causation by the leader. Nietzsche thus provides us with an insight of how, from the perspective of the leader—of Saul—the cultivation of errors of causation can be dangerous for a community. Miscausation creates the illusion of power where there is only authority. It provides a basis for the seduction of a community by its leader.

The cultivation of the leader through the inversions of miscausation can be dangerous for a community, especially for one theorized as essentially passive. Yet, the cultivation of miscausation can also serve a community well. Nietzsche again provides insight. In this case that insight suggests that the inversions so useful to the leader’s authority serve the power of the community in equal measure.<sup>46</sup> Shifting one’s gaze from Saul to Israel—from the leader to the nation—provides a basis for removing a veil cloaking the place where power resides. The forms of miscausation that preserve the *authority* of the leader, that create the illusion of power centered on the leader, also undergird the *power* of the community from both its leader and the normative foundations of the community nations (our modern global deity). This normative foundation currently finds expression in the human rights norms that have come to dominate systems of behavior codes between nations.

The story of Saul and Israel is the story of the modern world, written not in a slim passage of an ancient text, but in a multi-layered system of law and custom that applies with increasingly coercive force to all political communities on the globe. The priest, the legislator, the leader does not usurp dominion over the herd. Rather, the herd, for its own preservation as a herd, demands the overlordship of the leader. Here is Negri’s post-modern horde, inverted to reveal the sheep managing the wolves.<sup>47</sup> The *führer principle*, the leader-dominance model that forms the core of global political organization, thus serves to hide, behind its miscausations, the realities of the relationship between people—communities—and their leaders. In this instance, the errors of causation—mistaking cause for effects, false causality, imagined causality and the assumption of free will—serve to protect the power of

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45. *Id.* at 492.

46. *Id.* at ¶¶ 26-26.

47. See MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* (Harvard U. Press, 2000) (“A new nomad horde, a new race of barbarians, will arise to invade or evacuate Empire.” *Id.* at 213).



the political community by perverting the principle of individual responsibility for unlawful acts.

Thus understood, the contribution of the *führer principle* to the construction of the great human rights law edifice of the second half of the 20<sup>th</sup> century becomes clearer. The *führer principle* exalts the individual as both dependent and independent actor within national and international law theory.<sup>48</sup> The idea of the individual, as dependent actor, has led to the application of the *führer principle* in the production of emerging global principles of human rights, spreading a cloak of protection around communities of individuals for communal acts.<sup>49</sup> The individual, as independent actor, has given rise to a cult of individual responsibility for political acts,<sup>50</sup> the responsibility for which once rested with the political community in whose names the acts were perpetrated.<sup>51</sup>

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48. Note the potential circularity of the *führer principle* in this context. "This principle linked individuals to the will of the leader, who was a crystallization of the will of the group he represented." Hugh T. Scogin, Jr., *Withdrawal and Expulsion in Germany: a Comparative Perspective on the "Close Corporation Problem"* 15 MICH. J. INT'L L. 127, 150 & N. 86 (1993) citing to ENTWURF DES REICHSJUSTIZMINISTERIUMS ZU EINEM GESETZ ÜBER GESELLSCHAFTEN MIT BESCHRÄNKTER HAFTUNG VON 1939, at 35-69 (Werner Schubert ed., 58th ed. 1985). The leader is the embodiment of individual will—he is a dependent actor—but only he can discern the collective will, and in this sense is the only active actor. The people can share in the benefits brought by the leader—she is only implementing their collective will (the purest form of democratic action), but can also distinguish themselves from the leader—an individual among individuals—when the community is called to task for its actions.

49. The great international treaties on the conduct of war between communities makes a great distinction between civilians and combatants. Civilians are defined as all individuals other than combatants. See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, at art. 4.a.1-3, 4.a.6; Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict, June 8, 1977, at Arts. 43, 50. During conflict, the civilian population may not be the object of attack. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted June 8, 1977, entered into force Dec. 7, 1978, 1125 U.N.T.S. 3-608 ("Additional Protocol I") at art. 48. The United States is not a signatory to the 1977 Protocol.

50. Modern international law defines combatants as members of all organized groups under a command that is responsible for the conduct of the combatants. Geneva Convention on definition of combatants—their exposure and their protection (due process in combat situations). See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, at art. 4.a.1-3; Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict, June 8, 1977, at Arts. 43, 50.

51. Warfare in ancient times assumed the investment of the community involved. Consider the nature of combat among the Greeks and Romans before Christianity. Nature of action was by people at the behest of the Gods. For the losing population, the consequence of loss was usually death or slavery. Thus, for example, Thucydides recounts the fate of the Melians after their defeat by Athens during the Peloponnesian War. The "Melians surrendered at discretion to the Athenians, who put to death all the grown men whom they took, and sold the women and children for slaves, and

Indeed, the thrust of the modern constituent organization of conflict requires the creation of systems of hierarchy around which group action is to be organized. The purpose is to force organization that focuses on individual action in the context of communal action.<sup>52</sup> The most spectacular recent example of this cult of personal responsibility for atrocious communal acts has been the movement towards limited personal responsibility for acts of genocide and other crimes against humanity<sup>53</sup> originating with the Nuremberg prosecutions at the Second World War and continuing into the 21<sup>st</sup> Century with the prosecution of

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subsequently sent out five hundred colonists and inhabited the place themselves.” THUCYDIDES, *THE PELOPONNESIAN WAR* 337 (Crowley, trans., Modern Library edition, 1951) (411 B.C.E.?). Mongol combat followed a similar pattern—for instance, the invasion of Baghdad in 1256. As recounted in Muslim histories of the time, the Mongols beheaded the elite of the city, trampled the last ‘Abbasid Caliph and then murdered a good part of the population of the City. See REYNOLD A. NICHOLSON, *A LITERARY HISTORY OF THE ARABS* 444-447 (1969).

52. The rules of conflict are imposed on combatants, as individuals. Commission of crimes are individual events which fall on the lowest status individual combatant committing the act, and then up the chain of command to the highest military and political level where responsibility for oversight or command may be lodged. See, e.g., Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict, June 8, 1977, at Arts. 43.1, 44.1 (stating that the “armed forces of a Party . . . shall be subject to an internal disciplinary system which . . . shall enforce compliance with the rules of international law,” and “any combatant . . . who falls into the power of an adverse Party shall be a prisoner of war”).

53. See, e.g., Geneva Convention Relative to the Protection of Civilians in Time of War, Aug. 12, 1949, at Art. 33; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, at Art. 87; Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict, June 8, 1977, at Arts. 75.2.d. The modern general understanding is well articulated by one of the foremost non-governmental humanitarian groups of the early 21<sup>st</sup> century, *Médecins Sans Frontières*:

International law posits that no person may be punished for acts that he or she did not commit. It ensures that the collective punishment of a group of persons for a crime committed by an individual is forbidden. . . . This is one of the fundamental guarantees established by the Geneva Conventions and their protocols. This guarantee is applicable not only to protected persons but to all individuals, no matter what their status, or to what category of persons they belong. . . .

FRANÇOISE BOUCHET-SAULINIER, *THE PRACTICAL GUIDE TO HUMANITARIAN LAW* (Laura Brav, ed. & trans., Rowan & Littlefield Pub., 2002). Individual responsibility becomes possible when acts taken in the course of communal conflict are reduced to crimes, in the context in which there is general agreement that crimes may only be committed by individuals. Individual liability becomes workable as a something other than a concept when communities agree to organize their conflict on the basis of distinctions between combatants and non-combatants and to organize their combatants through strict chains of command. In a world generally organized for conflict along these lines, a community, like a corporation, cannot commit a crime. Or, put a different way, only individuals involved in the acts ascribed to the community—or the corporation—may be punished. See Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violators of a Prior Regime*, 100 *YALE L.J.* 2537 (1991).

the former leader of the Yugoslav federation for genocide.<sup>54</sup> The accusation of a man and his minions, Osama bin Laden and his advisors, for the attack on New York and Washington D.C. on September 11, 2001 has sharply focused this understanding. Thomas Franck recently reported on a conference in Europe in which the Americans were roundly criticized for violating the miscaused rules of personal responsibility and the sanctity of the community from which those acts sprang.<sup>55</sup>

The construction of this legal edifice of rights thus veils and protects power in a world of communal conflict. The methodology of this veiling is inversion. Inversion in this sense points to reversals and transpositions, focused to produce specific socio-political results. Inversion is the product of the miscausation identified by Nietzsche and so amply demonstrated in the apocryphal Biblical tale of Saul. Inversion reminds us that when searching for power within the matrix of communal behavior, it is best to turn one's gaze away from the leader. As in the animal world, the brightest plumage does not necessarily indicate the most important object.

In the modern world, four great inversions of authority and power have been produced out of the miscausation suggested by Nietzsche. These inversions dominate much of the law that regulates and protects the constitution of political communities in the modern world. These inversions evidence the extent to which the modern world has transposed the story of the Biblical Saul into the language of law. Those teaching not only serve to construct the rules we use with respect to community, but also veil the edifice of rights and protections the rules construct. The

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54. There is a mountain of writing on personal responsibility for atrocious communal acts. See, e.g., CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW* (1992, The Hague: Martinus Nijhoff); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violators of a Prior Regime*, 100 *YALE L.J.* 2537 (1991); John Dugard, *Reconciliation and Justice: The South African Experience*, 8 *TRANSNAT'L & CONTEMP. PROBS.* 277 (1998).

55. The following propositions were assayed to demonstrate the alleged illegality of U.S. recourse to force: . . . (1) It violates the Article 2(4) of the Charter prohibition against the use of force except when authorized by the Security Council. . . . (2) Self-Defense is impermissible after an attack has ended; that is, after September 11, 2001. . . . (3) Self-defense may be exercised only against an attack by a state. Al Qaeda is not the government of a state. . . . (4) Self-defense may be exercised only against an actual attacker. The Taliban are not the attacker. . . . (5) Self-Defense may be exercised only "until the Security Council has taken measures necessary to maintain international peace and security." . . . (6) The right to self-defense arises only upon proof that it is being directed against the actual attacker. . . .

Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 *AM.J. INT'L L.* 839 (2001) (referring to the Symposium, *The United States and International Law—The Effects of U.S. Predominance on the Foundations of International Law*, Göttingen (Oct. 25-27, 2001)).

cult of the leader, the solicitude for the powerless sheep hide a very different reality. That reality defines the boundaries of the inversions of political organization.

*A. The first inversion: communities are protected not because they are weak, but because they are strong.*

Law protects community against the apparatus of the state and its leaders because the community is weak—unarmed, unable to defend itself. Thus the law of war and of humanitarian aid posits a world of strong leaders backed by effective coercive mechanisms of state power<sup>56</sup> and of weak civilian populations.<sup>57</sup> The community is important to a leader because of the value it represents—in terms of people and wealth. From the leader's perspective, the community is a flock of sheep—weak, docile, valuable.<sup>58</sup> Thus, from the conventional perspective, the individuals comprising the political community are protected, in law and custom, because, as against the leader they do not count. Populations, like herds of sheep, are protected because they are useful. Populations are a source of wealth, of production, for the elites. People are a resource with respect to which leaders, the elites, fight to control. In this sense, the rise of human rights law can be understood as a method by which sheep protect themselves because of their productive value. Because the community as discrete individuals doesn't count, it deserves protection. Malthus understood this.<sup>59</sup> This understanding accounts in

56. These include armies, money, bureaucracy, authority; see generally Sohail Inayatullah, Proutworld, *UN Futures and Structural Possibilities of World Governance: World Government, Globalization and UN Reform*, (1999), at <http://www.proutworld.org/ideology/leadership/futunandwg.htm> (last visited April 25, 2003).

57. Weakness here in the sense of the absence of any of the coercive powers of a state apparatus. Clearly, weakness is not uniform. See, e.g., Mariano Aguirre, *Silence over Chechnya*, 4 THE PROGRESSIVE RESPONSE 9 (Mar. 7, 2000), available at [http://www.foreignpolicy-infocus.org/progresp/volume4/v4\\_n09\\_body.html](http://www.foreignpolicy-infocus.org/progresp/volume4/v4_n09_body.html) (last visited April 25, 2003).

58. See Jack L. Goldsmith and Eric A. Posner, *Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective*, 31 J. LEGAL STUD. S115 (Jan. 2002); see also Jack Goldsmith, *Book Review: Sovereignty, International Relations Theory, and International Law: Sovereignty: Organized Hypocrisy*, 52 STAN. L. REV. 959, 963-964, 971 (April 2000) and Wiktor Osiatynski, *Human Rights for the 21<sup>st</sup> Century*, St. Louis-Warsaw Trans'l 29, 46-47 (2000).

59. Amartya Sen, *Fertility and Coercion*, 63 U. CHI. L. REV. 1035 (Summer 1996) (citing Thomas Robert Malthus, *An Essay on the Principle of Population*, E. Wrigley & D. Souden eds. 1986 (1<sup>st</sup> ed. 1798)). Malthus set forth the population theory and became England's first professor of political economy in 1806 at East India College. Herbert Hovencamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 405 (Jan. 1988). Malthus' conclusions drew two conclusions: 1) Population, when unchecked, will grow geometrically; and 2) Once all good land has been put into production, the food supply can grow, at best, arithmetically. Malthus' observations had

part for the nature of population planning of the “great powers” of the 19<sup>th</sup> century as well as of the Soviet state, that sought to increase population for power—production, armies, emigration.<sup>60</sup> Today the poorer countries most valuable resource is the people it can send abroad.<sup>61</sup>

Yet, the community of aggregate individuals does count. Inverting traditional understandings produces a clearer reality—law protects the political community because it is strong. Political communities have had written into the international law of inter-communal conflict a series of protections in its favor against their own leaders. The wealth of communities is the community itself, as a (to use the language of business) a going concern. Leaders, in a sense, are either parasites, or tools useful for the deployment of the coercive power of the community—God’s description of the nature of the practices of kings is revealing in this light.<sup>62</sup> In an older world, where leaders were understood to serve as instruments of a community, communities along with their leaders, paid in intra-communal conflicts.<sup>63</sup> In the extreme case, communities faced annihilation in fact. Indeed, there is a long tradition in the Middle East, known to the West since the campaigns of Alexander the Great, for communities resisting an attacking army to suffer the death of the adult males and the selling into slavery of the women and children.<sup>64</sup> Here sociology, law and politics provides the foundational subtext to the narrative of the Biblical tale of Saul. God

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profound implications for Britain, which was heavily developed at the time of his theory. *Id.*

60. See generally Lee S. Wolosky, Jonathan M. Malis, and David A. Schwimmer, *Recent Development: Start, Start II, and Ownership of Nuclear Weapons: The Case for a “Primary” Successor State*, 34 HARV. INT’L L.J. 581 (Spring 1993).

61. See, e.g., Frederick G. Whelan, *Strangers to the Constitution: Immigrants in American Law: Principles of U.S. Immigration Policy*, 44 U. PITT. L. REV. 447, 483-484 (Winter 1983). The author argues that “[T]he provision of opportunities for migration (temporary or permanent) may be seen as an alternative to economic growth in the poor country . . . . The admission of immigrants from poor countries into a rich country such as the United States, which gives them access to resources, is the economic equivalent of redistributing the resources from here to there.” *Id.*

62. *1 Samuel* 8:11-18.

63. Cf. Henry J. Richardson, III, “Failed States,” *Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations*, 10 TEMP. INT’L & COMP. L.J. 1, 58 (Spring 1996); see also Michel Rosenfeld, *Can Human Rights Bridge the Gap between Universalism and Cultural Relativism? A Pluralist Assessment Based on the Rights of Minorities*, 30 COLUM. HUMAN RIGHTS L. REV. 249 (Spring 1999).

64. See, e.g., ARRIAN, *THE CAMPAIGNS OF ALEXANDER* (Aubrey de Séincourt, trans., Penguin Books, rev. ed., 1971). Arrian describes how Alexander sold into slavery everyone taken after the capture of Tyre (though other accounts mention the crucifixion of 2,000 men as well. *Id.* at 143. In the course of the subsequent capture of Gaza, most of the adult male defenders were killed and the women and children sold into slavery. *Id.* at 147.

rejected Saul when he did nothing to prevent the transgressions of the people. But God never rejected the people.

*B. The second inversion: the community is not dependent on the leader, the leader is dependent on the community.*

The republican principle, participatory democracy, suggests an interaction among individuals. The leader represents the aggregate of a majority of individual atomistic decisions.<sup>65</sup> Because democratic action is atomistic and the electorate apathetic and manageable, leaders, as managers of the governance structure of the political community, tend to control the electoral process.<sup>66</sup> Even if a democratic state is a function of the interaction of sub-communal factions,<sup>67</sup> or interest groups,<sup>68</sup> the

65. For a standard version of the classic theory, see, e.g., Cass R. Sunstein, *The Republican Civic Tradition: Beyond the Republican Revival*, 97 YALE L.J. 1539-41 (July 1988).

66. This theory is well developed in American corporate law. See MARK J. ROE, *STRONG MANAGERS AND WEAK OWNERS: THE POLITICAL ROOTS OF THE SEPARATION OF OWNERSHIP FROM CONTROL* (1994); John C. Coffee, Jr., *Liquidity Versus Control: The Institutional Investor as Corporate Monitor*, 91 COLUM. L. REV. 1277, 1281-89 (1991). See, also, Alexander G. Simpson, *Shareholder Voting and the Chicago School: Now is the Winter of our Discontent*, 43 DUKE L.J. 189, 215-16 (1993) (in the area of shareholder democracy, the current system forces firms into a single, largely republican mold); see also, Patrick B. Griffin, *The Delaware Effect: Keeping the Tiger in its Cage. The European Experience of Mutual Recognition in Financial Services*, 7 COLUM. J. EUR. L. 337, 339 (citing William Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663 (1974) (suggesting that Delaware's corporate law works in favor of management and against shareholders. This bias, according to Cary, stems from the reality that management, not shareholders, make critical decisions). But the notion has application in modern political theory as well. This may provide a useful way of understanding the way the American presidential election of 2000 was decided as between the electorate and judiciary. In a sense, the electorate served as the equivalent of corporate weak owners, and the judiciary served the interests of the strong managers—the competing organizations of the national political parties. Moreover, just as corporate managers tend to control the electoral process in the sense that managers' choices for board membership tend to be elected, see Edward B. Block, *The Logic and (Uncertain) Significance of Institutional Shareholder Activism*, 79 GEORGETOWN L.J. 445 (1991), so do incumbents and the established political parties have a significant advantage in electoral campaigns. Cf. THE FEDERALIST NO. 10 (James Madison) (defining republican principles as those that promote the general welfare of the community as a whole by treating every person equally and guarding each individual person's rights. Republican principles are *not*, according to Madison, "the force of government used to conform all its citizens into one common mold with the same opinions, passions, and interests. . .").

67. THE FEDERALIST NO. 14 (James Madison) (describing the Union as the "antidote for the diseases of faction, which have proved fatal to . . . popular governments").

68. For an insightful description of the individual versus group conflict theories of democratic organization in a labor context, see, Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1 (1999) (examining the history of interest-group pluralism industrial pluralism and its impact on labor law).

leader emerges as essentially independent of the polity that elected him.<sup>69</sup> Inverted, a more realistic view emerges. The leader is a singularity, the community an aggregate. The authority of the leader springs from her position relative to the conflict of democratic sovereignty.<sup>70</sup> Democracy, then, is better understood as

a concept of participation that is linked to the vitality of a population and to its capacity to generate a dialectic of counterpowers—a concept, therefore, that has little to do with the classical or the modern concept of democracy. Even the reigns of Genghis Khan and Tamerlane were from this perspective somewhat ‘democratic,’ as were Caesar’s legions, Napoleon’s armies, and the armies of Stalin and Eisenhower, since each of them enabled the participation of a population that supported its expansive action.<sup>71</sup>

The leader is dependent on the community; the leader acts in conformity to the wishes of the people. The leader acts against the preferences of the people at his peril. Saul risked the wrath of God rather than countermand the people. The preferences of the people may be expressed by the actions of the mob,<sup>72</sup> the votes of the electorate,<sup>73</sup> the

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69. In one sense, in elections by simple majority, the leader needs the votes, or the support, of a bare majority. For the others, the leader can represent tyranny. This notion underlies the once controversial idea of the concurrent majority in 19<sup>th</sup> century Southern political theory. See John C. Calhoun, *A Disquisition on Government*, in *UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN* 35-39 (Ross M. Lence ed., 1992).

70. See MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* (Harvard U. Press, 2000) (“the social base of this democratic sovereignty is always conflictual. Power is organized through the emergence and interplay of the counterpowers. The city is thus a constituent power that is formed through plural social conflicts articulated in continuous constitutional processes.” *Id.* at 162).

71. MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* 373 (Harvard U. Press, 2000).

72. Consider the role of the crowd in symbolic acts, like the fall of the wall separating East from West Berlin. See e.g. Heiko Koo, *12 Years After the Berlin Wall Fell—November 9, 1989: An Eye-witness Account*, (2001) at [http://www.marxist.com/Europe/berlin\\_wall.html](http://www.marxist.com/Europe/berlin_wall.html); BUREAU OF DIPLOMATIC SECURITY, U.S. DEP’T OF STATE, *POLITICAL VIOLENCE AGAINST AMERICANS* (1998), <http://www.ds.state.gov/about/publications/terrorism/pvaa1998-low.pdf>; *Mob Trashes Iraqi Embassy in Iran*, (Apr. 11, 2003) at <http://www.cbsnews.com/stories/2003/04/11/iraq/main548829.html>.

73. See generally, David B. Magleby, *Legislatures and the Initiative: The Politics of Direct Democracy*, 59 J. ST. GOV’T 31 (1986); *Voting Makes a Difference*, at [http://cltr.co.douglas.nv.us/Elections/History\\_at\\_Work.htm](http://cltr.co.douglas.nv.us/Elections/History_at_Work.htm) (last visited Apr. 26, 2003) (noting that in 1800 Thomas Jefferson was elected President by one vote in the House of Representatives after a tie in the electoral college; in 1824 Andrew Jackson won the presidential popular vote but lost by one vote in the House of Representatives to John Quincy Adams after an electoral college dead-lock; in 1876—Samuel Tilden won the presidential popular vote but came up one electoral vote shy and lost to Rutherford B. Hayes).

articulations of opinion polls,<sup>74</sup> the reportage in the popular press,<sup>75</sup> or the economic decisions of consumers and investors.<sup>76</sup>

The expression of that power may be cyclical—a cycling between explosions of the masses and consolidations of those explosions in ever narrower circles of authority,<sup>77</sup> or between vigor and decadence.<sup>78</sup> In modern cultures the expression of the popular will may be constituted—through a process of formal plebiscite or referendum.<sup>79</sup> Yet the

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74. See generally Yonkel Goldstein, *The Failure of Constitutional Controls Over War Powers in the Nuclear Age: The Argument for a Constitutional Amendment*, 40 STAN. L. REV. 1543, 1566-68 (1988) (stating that the empirical data from the Vietnam and Korean Wars supports the proposition that public opinion poll data influences policy decisions); DIANA C. MUTZ, *IMPERSONAL INFLUENCE: HOW PERCEPTIONS OF MASS COLLECTIVES AFFECT POLITICAL ATTITUDES* (1998).

75. In any given election, one has only to turn to newspapers, magazines, or internet sites to read or view reports of the preferences of the general public. The influence of the popular press, whether in the form of print, or increasingly, visual media, cannot be underestimated. See generally KATHLEEN HALL JAMIESON & PAUL WALDEMAN, *THE PRESS EFFECT: POLITICIANS, JOURNALISTS, AND THE STORIES THAT SHAPE THE POLITICAL WORLD* (Oxford University Press, 2002).

76. See e.g., *Co-op America's Boycott Organizer's Guide* at [http://www.coopamerica.org/boycotts/boycott\\_organizer\\_guide.pdf](http://www.coopamerica.org/boycotts/boycott_organizer_guide.pdf) (last visited April 26, 2003) (defining boycotts as “marketplace democracy in action—consumers voting with their dollars for social and economic change”).

77. See ANTONIO NEGRI, *INSURGENCIES: CONSTITUENT POWER AND THE MODERN STATE* (Maurizia Boscgli, trans., Univ. Minnesota Press, 1999) (on the conflict between constituent power, the active operative element of popular political expression, and constituted power, the articulations of formalized organizations of a representative exercise of power through rules and law).

78. The classic statement of the historiography of decadence in political governance was articulated by ‘ABD-AR RACHMAN IBN KHALDÛN, *THE MUQADDIMAH: AN INTRODUCTION TO HISTORY* (Franz Rosenthal, trans., N.J. Dawood, ed., 1967) (1377) (*Muqaddimah* (Introduction) to *Kitâb al-'Ibar* (Book of the History of the World) at 97-119).

79. The referendum process in the United States has served as both a powerful element of popular expression in certain states, such as California, and as a means of subverting the will of the representative authorities. For a discussion in the American context, see, e.g., Jerry W. Calvert, *The Popular Referendum Device and Equality of Voting Rights—How Minority Suspension of the Laws Subverts “One Person-One Vote” In the States*, 6 CORNELL J.L. & PUB. POL’Y 383 (1997). See also, David B. Magleby, *Legislatures and the Initiative: The Politics of Direct Democracy*, 59 J. ST. GOV’T 31 (1986). In Europe, plebiscites play a crucial role in the constitution of the European Union. The negative vote of the Irish people in connection with the recently drafted Treaty of Nice provides a powerful example. See, e.g., Kevin Connolly (BBC News), *Nice Treaty Set for Irish Verdict*, Nov. 5, 2001, available at <http://c2d.unige.ch/news/rel.php?rel=1317&lang=> (Ireland is the only EU member state conducting a referendum on the Treaty of Nice); Michael Roddy, *Irish Reject Nice Treaty in Blow to EU Expansion* (Reuters), June 8, 2001, available at <http://c2d.unige.ch/news/rel.php?rel=1335&lang=> (Ireland’s Constitution, vesting sovereignty in the people, requires that the treaty be ratified by referendum; since the treaty required ratification by all 15 EU members, the Irish people effectively blocked the enlargement of the EU. Turnout was low with only 32% of the electorate voting, 54% of them voting against the Nice Treaty). The voice of the Irish people spoke again on



expression of the popular will in modern times can as well be violent. The transformation of socialist Eastern Europe in the late 1980s provides a dramatic example.<sup>80</sup>

In older cultures, the expressions of the popular will was more crude, and perhaps more direct. The democracy of the late Roman Republic provides stark illustration of this principle.<sup>81</sup> Electoral politics was a function of bribery, agreement between candidates, and violence. Legislation, especially legislation in the popular assemblies, was marked by violent communal action.<sup>82</sup> The careers of P. Clodius Pulcher<sup>83</sup> and

October 19, 2002: see Michael Roddy, *Irish say "yes" to EU enlargement* (Reuters), Oct. 20, 2002, <http://c2d.unige.ch/news/rel.php?rel=1665&lang=> (in a turnout of 49.47% of the electorate, voting 62.8% to 37.11%, the Irish people voted to ratify the EU pact that 14 other member states had already approved). Earlier iterations of fundamental changes to the structure of the European Union had also been subject to the power of the plebiscite, for example the Danish rejection of the Treaty of European Union in the early 1990s. For a discussion of plebiscites in Europe generally, see Nicolai Ronnebek Hinrichsen, Note, *The Constitutional Objection to European Union Membership: A Challenge for the Danish Supreme Court*, 15 B.U. INT'L L.J. 571; see also Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, available at <http://europa.eu.int/eur-lex/en/accessible/treaties/en/livre317.htm>. For a general discussion of plebiscites in Europe, see generally, Michael Gallagher, *Electoral Systems: Referendums and Plebiscites*, at <http://www.aceproject.org/main/english/es/esc01a.htm> (last modified Nov. 2, 2001).

80. See generally, EASTERN EUROPE IN REVOLUTION (Ivo Banac, ed., 1992). With respect to specific countries, see generally, Todorova, *Improbable Maverich or Typical Conformist? Seven Thoughts on the New Bulgaria*, in EASTERN EUROPE IN REVOLUTION, 149-50 (Ivo Banac ed., 1992); Katherine Verdery & Gail Kligman, *Romania after Ceausescu: Post-Communist Communism?*, in EASTERN EUROPE IN REVOLUTION 130, (Ivo Banac ed., 1992); Jan Gross, *Poland: from Civil Society to Political Nation*, in EASTERN EUROPE IN REVOLUTION 60; Judt, *Metamorphosis: the Democratic Revolution in Czechoslovakia*, in EASTERN EUROPE IN REVOLUTION, 96-99. See also "Protests Mark Launch of New Romanian Party," REUTERS, Nov. 19, 1990, available in LEXIS, NEXIS Library, Reuters File, and Anna Gelpern, *The Laws and Politics of Privatization in East-Central Europe: A Comparison*, 14 U. PA. J. INT'L BUS. L. 315.

81. It is no answer to the analogy drawn here that the Roman Republic is both long gone and represents a culture with no current expression. Modern scholarship has demonstrated the continuities of culture from the time of the founding of the civilizations of the Mediterranean and modern European culture. See, e.g., MICHAEL GRANT, *THE COLLAPSE AND RECOVERY OF THE ROMAN EMPIRE* (Routledge, 1999).

82. Drawing from the original sources Lily Ross Taylor concludes that:

Many of the irregularities familiar from the electoral assemblies were known in the legislative assemblies, but generally intimidation of voters and violence were far more common here than bribery. The public meetings in which rival orators addressed the people on new laws were frequently disorderly, and both sides began going to the meetings accompanied by armed thugs and gladiators. . . . [C]lashes between armed bands were common on the city street, in public meetings, and even while voting was in progress.

LILY ROSS TAYLOR, *PARTY POLITICS IN THE AGE OF CAESAR* 74 (Univ. Of Calif. Press, 1949).

83. Clodius, a member of the Roman nobility, later adopted into a plebeian family in

T. Annius Milo<sup>84</sup> provide an instructive example of a democracy of the mob.<sup>85</sup> Though the mob warfare of Clodius and Milo was extreme, the expression of the popular will through acts of violence or intimidation had been and remained part of the fabric of Roman political life.<sup>86</sup> Thereafter, it was for the triumvirs themselves, and thereafter the emperors, to seek the favor of the mob directly,<sup>87</sup> or to face the mob.<sup>88</sup>

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order for him to stand for the office of tribune, as a youth had been at the center of a great scandal that resulted in the divorce by Julius Caesar of his wife. Disguised as a woman, Clodius had secreted himself into the house of Caesar, where the rituals of the Bona Dea, forbidden to men, was being performed. Clodius was acquitted of the charge of sacrilege after a trial more remembered for the ostentatiousness of the bribery than for its merits, and Caesar divorced his wife Pompeia on the grounds that any wife of his must remain above suspicion. For the story, see Plutarch, *The Life of Cicero*, in PLUTARCH, FALL OF THE ROMAN REPUBLIC 311, 338-340 (Rex Warner, trans., Penguin Books, 1958) (before 120); see generally H. H. SCULLARD, FROM THE GRACCHI TO NERO: A HISTORY OF ROME 133 BC TO AD 68 116 (3<sup>rd</sup> ed., Methuen & Co., 1970).

84. An individual in the service of Pompey to organize a gang to counter the effects of Clodius in Roman political life of the 50s BC. See H. H. SCULLARD, FROM THE GRACCHI TO NERO: A HISTORY OF ROME 133 BC TO AD 68 121 (3<sup>rd</sup> ed., Methuen & Co., 1970).

85. Clodius revived the right of people to associate in groups, the *collegia*. These were associations of the poorer men of a city organized around a cult or a trade and serving primarily for mutual aid—principally burial. See, e.g., LILY ROSS TAYLOR, PARTY POLITICS IN THE AGE OF CAESAR 43 (Univ. Of Calif. Press, 1949) (The *collegia* were used in politics to terrorize opponents. *Id.* at 45). Clodius then “organized a number of the poorer classes into political clubs, and he provided himself with a bodyguard of armed slaves.” Plutarch, *The Life of Cicero*, in PLUTARCH, FALL OF THE ROMAN REPUBLIC 311, 340-41 (Rex Warner, trans., Penguin Books, 1958) (before 120). These Clodius put at the disposal of the First Triumvirate. Eventually Clodius turned on Pompey, who managed, in Milo, to find a counter to Clodius. Politics in the 50s BC was reduced to armed conflict within Rome in parallel with the running of the ordinary institutions of the state—the Senate and the law courts. Eventually Milo’s followers managed to kill Clodius, and Milo, condemned for the murder despite a defense by Cicero, was exiled. Much of this is recounted in Plutarch, *The Life of Cicero*, in PLUTARCH, FALL OF THE ROMAN REPUBLIC 311, 340-347 (Rex Warner, trans., Penguin Books, 1958) (before 120). About 80 years before these events, in 133 BC, two tribunes, the Gracchi, were murdered in the course of a campaign for a reform of the agrarian laws in violence that for some marks the start of the turbulence leading to the end of the Roman Republic. On Tiberius and Gaius Gracchus, see Plutarch, *Tiberius Gracchus and Gaius Gracchus*, in PLUTARCH, THE MAKERS OF ROME 154-193 (Ian Scott-Kilvert, trans., Penguin Books 1965) (before 120).

86. “In the fifties the gangs of Clodius, recruited from the guilds [*collegia*] of the urban plebs, and the rival thugs of the *optimates*’ man Milo, probably drawn from the country people, kept the city in constant uproar. Even more effective than such private armed forces were the experienced soldiers and veterans of the great commanders. Frequently, their presence was enough to turn the voting into a sham and a mockery.” LILY ROSS TAYLOR, PARTY POLITICS IN THE AGE OF CAESAR 74 (Univ. Of Calif. Press, 1949).

87. Though Caesar was quick to suppress the *collegia* that had served him well under Clodius. See H. H. SCULLARD, FROM THE GRACCHI TO NERO: A HISTORY OF ROME 133 BC TO AD 68 148 (3<sup>rd</sup> ed., Methuen & Co., 1970).

88. NERO SALLUST, TACITUS.

Eventually, the gangs of the Late Republic gave way to the circus factions of the Imperial period. A sense of the old knowledge of these mob parties survives in distorted form to this day.<sup>89</sup> Byzantine state politics seemed also dependent not on a blind obedience to the imperial power (except by those closest to the imperial household) but rather on the ability to maintain the goodwill of Constantinople's organized mobs.<sup>90</sup> Thus, although the histories are written to suggest imperial leadership and manipulation of mobs, it is as easy to posit mob control and manipulation of an imperial household anxious to maintain their position and always in need of the resources necessary to maintain the state.<sup>91</sup>

*C. The third inversion: the leader serves as proxy for the community; the doctrine of personal responsibility for communal acts protects a community by sacrificing its leaders for acts of communal wrongs.*

The first and second inversions produce irony. The theory of individual responsibility, even for communal acts, is grounded, in substantial part, on the idea that leaders are strong and the polity weak (first inversion) and that leaders have a freedom of decision independent

89. The movie *Gladiator* made much of the power of the circus parties in the ability of the Emperor to retain power. See *GLADIATOR* (Dreamworks 2000).

90. Modern Scholars have come around to the view that the political parties of the early Byzantine Empire, the demes, were significantly more important than mere sporting associations. Found throughout the big cities of the Empire, their organization provided militia for the defense of the city and the nucleus through which the population arranged themselves politically. Whatever the authority of the Imperial household, action was impossible without taking into account the reaction of the Blues and the Greens.

The antagonism between the two factions showed itself in severe and frequent clashes, and from the mid-fifth century the political life of the Empire was marked by a perpetual struggle between the Blues and the Greens. The central authority was forced to take the demes into account in its policy, favouring either one or the other, so that as a rule one faction would support the government while the other joined the opposition. At times both demes made common cause against imperial rule in order to defend their liberties against the absolutism of the central administration."

GEORGE OSTROGORSKY, *HISTORY OF THE BYZANTINE STATE* 67 (Joan Hussey, trans., rev. ed., Rutgers Univ. Press 1969) (1954).

91. In this light consider the relationship of Justinian and Theodora to the mobs controlling Constantinople at the height of the early Byzantine Empire.

Thus they split the Christians into two parties, each pretending to take the part of one side, thus confusing both . . . and then ruined both political factions. Theodora feigned to support the Blues with all her power, encouraging them to take the offensive against the opposing party and perform the most outrageous deeds of violence; while Justinian, affecting to be vexed and secretly jealous of her, also pretended he could not openly oppose her orders.

PROCOPIUS, *SECRET HISTORY* 54 (Richard Atwater, trans., Ann Arbor Paperbacks, 1963) (550).

of the demands of the polity (second inversion).<sup>92</sup> Inverted, we come closer to a reality revealed by the story of Saul's kingship—because leaders are dependent on political communities for their power (second inversion) leaders will tend to further the desires of the political community. Because political communities are strong and leaders dependent, political communities can shift responsibility for their acts onto their leaders. As a result, leaders bear the burdens of communal acts in the name of the political community. In a world of competing communities, these entities could minimize the extent of their risk of destruction by creating a system of substitution. The basis of this substitution was the premise that leaders serve as symbol of the community. While communities survive, their debts to other communities could be paid with the bodies of their leaders. Substitution can be made plausible through a system in which authority symbolized power. Thus, political communities protect themselves against their own actions by setting up a system of action that posits communal action at the insistence of their leaders. The punishment for infractions by a political community, especially against another community, is borne by the leader as proxy for the community. The doctrine of personal responsibility for communal acts is thus an inversion for the protection of the community. The leader is sacrificed so the community may continue. Leaders don't necessarily lead unwilling populations. In return for appearance of power, they serve as the community's representative vis a vis other communities on whom communal rewards or punishments are focused. Slobodan Milosevic is today learning the lesson of Saul. He will be punished so that Serbia may continue.<sup>93</sup>

In this inversion we have a fine example of Nietzsche's notion of *ressentiment*.<sup>94</sup> *Ressentiment* acts as both a sword and a shield. As a shield *ressentiment* is directed toward reaffirmation of a culture based on powerlessness and the imposition of an obligation to protect those embracing the characteristic—weak. As a sword *ressentiment* is directed toward the imposition of systems shifting power from the strong—the protectors, to the weak—the protected. *Ressentiment* permits control out of perceptions of weakness, the great ironic inversion. Protection of inversion itself requires miscausation, the necessity of error.

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92. See generally HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA (Carla Hesse and Robert Post eds., 1999).

93. See Part III, *infra*.

94. FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS ¶¶1-11 to 13 (Walter Kaufmann & R.J. Hollindale, trans., Vintage Books, 1989) (ZUR GENEALOGIE DER MORAL, 1887).

*D. The last inversion: the community, the sheep, are in actuality the Shepherd in a world arranged to minimize the costs of inter-community conflicts for power.*

This reversal is the most curious, this inversion of power. It turns cause and effect on its head. If the leader is a proxy; if the political community retains power, including the power to sacrifice the leader on the basis of the artifice of leadership, then the sheep, the political communities, are in actuality the Shepherd in a world arranged to minimize the communal costs of conflicts for power between communities of sheep. The authority of the leader is thus greatest in the smallest but most obvious things, and least powerful in the most fundamental. Power lies elsewhere within communities.<sup>95</sup> *It lies in culture, action and illusion.*

Culture provides the abstract space where power lies. Fundamental ordering norms, like God, exert an influence superior to the power of any particular system of governance to overcome. Democracy, oligarchy, tyranny or monarchy, the relationship between authority and control is the same. "The true interest of an absolute monarch generally coincides with that of his people. Their numbers, their wealth, their order, and their security, are the best and only foundation of his real greatness; and were he totally devoid of virtue, prudence might supply its place, and would dictate the same conduct."<sup>96</sup> By sacrificing to God directly without the intervention of Samuel, Saul defies the other fundamental principle on which his kingship rests—the leader cannot directly challenge the basis of social ordering. In this case Saul sought to become king and priest, combining two offices in one. The excuse, expediency,

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95. Indeed, kingship, priesthood, and the structures of governance and hierarchy may just be symbols of the outward and impermanent forms that power takes. Power lies in the community, taking form as an aggregate by exercised within a large ambit of multiple relationships between individuals. The sum of these relationships provide a snapshot of power. The institutions of authority merely provide the field in which this power may be manifested from time to time.

It seems to me that power must be understood in the first instance as the multiplicity of force relations immanent in the sphere in which they operate and which constitute their own organization; as the process which, through ceaseless struggles and confrontations, transforms, strengthens, or reverses them; as the support which these force relations find in one another, thus forming a chain or system, or on the contrary, the disjunctions and contradictions which isolate them from one another; and lastly, as the strategies in which they take effect, whose general design or institutional crystallization is embedded in the state apparatus, in the formation of the law, in the various social hegemonies.

MICHEL FOUCAULT, *I THE HISTORY OF SEXUALITY: AN INTRODUCTION* 92 (Robert Hurley, trans. Vintage Books 1990) (1978 trans.) (1976).

96. EDWARD GIBBON, *I DECLINE AND FALL OF THE ROMAN EMPIRE* 106 (Modern Library n.d.) (1788).

was insufficient to overcome the magnitude of the breach.

The social subsystems of every community provide the material space through which power is manifested. These sub-systems, fields of communal activity, create the social, economic and political hierarchies through which social order is maintained. Individuals provide the key to engaging the power of communal norms within these sub-systems. Individuals invoke cultural norms to induce concrete action within already developed social subsystems—the press, industry, the church, academia, and other groups that replicate the organization of these forms.<sup>97</sup>

The application of these principles of invocation are reproduced at every level of human endeavor—from collective action at the level of the largest organizations, to the actions of even the lowest status individuals within any collective. Modern students of organizational psychology now remind us that:

A significant aspect of personal success in organizations is the ability to identify and control seats of power and influence. To do so . . . you first have to understand both your values and the values of those around you. When all these values are clear in your mind, and only then, you can move to the more rewarding task of approaching the values of others in order to influence them to change their behaviors in ways that satisfy your values.<sup>98</sup>

Individuals implement social practice through action, through mobilization of individual within sub-groups who are motivated to act through the invocation of cultural instructions—“greed is good,” “just war,” “equality of opportunity,” and others have all been cultural instructions invoked to mobilize social sub groups to act—and in acting assert communal power. Thus, communal power does not lie with any particular person, or in any particular position, or with an organization, or in a particular thing, to the exclusion of others. Communal power lies in the possibility of invocation—by *any individual* who can pull the necessary cultural levers. In the West, these ideas are well understood, and have been increasingly studied and rationalized by those who study business.<sup>99</sup>

The practices of manipulation and persuasion, of pressing the right

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97. Larry Catá Backer, *What is a City?: Sovereign Organization in the 21<sup>st</sup> Century* (forthcoming; copy on file with author).

98. Roger Schenke, *Forward*, in CHARLES E. DWYER, *THE SHIFTING SOURCES OF POWER AND INFLUENCE I* (American College of Physician Executives Rinaldi Publishing Co.: 1991) (discussion of invocation for control within the sub field of medical administration; see *id.* at 57-76).

99. See, e.g., ALAN ANDREASEN, *MARKETING SOCIAL CHANGE* (Jossey Bass, 1995); VANCE PACKARD, *THE HIDDEN PERSUADERS* (Pocket Books, 1976) (1958).

cultural levers for an intended effect, have been practiced well at the state level itself. The several realities of Ireland provide fertile ground in this respect. Patrick Hanafin adroitly extracts the fiction from out of the creation of the modern Republic of Ireland through the myth making by elites for a public thirsty for those very myths.<sup>100</sup> Barry Collins has extended this myth making from the 26 county Republic to the Island itself.<sup>101</sup>

Collectives, including nation-states outside the West have internalized these patterns as well. Robert Mugabe's Zimbabwe provides a complex and rich example of the means of internal and external manipulation. Internally, the issue of land reform, that is, of a redistribution (or seizure) of land in the hands of white owners, many, but all of which,<sup>102</sup> in turn had been seized at the beginning of the last century, has proven fertile ground for pressing both internal and external cultural levers.<sup>103</sup> Race tied to an increasingly fantasized colonial past were used to mobilize an electorate for the perpetuation of an increasingly corrupt order presided over by Mugabe's Zanu-PF party.<sup>104</sup>

Illusion provides the means for perpetuation of communal power—for and against individuals as well as against the leader. In a world constructed to demand payment for infractions from leaders, communities pay for their infractions with their most debased and least valuable coin. In order to make the payment more acceptable, illusion is created. The leader is clothed in tremendous power. The leader is vested

100. See Patrick Hanafin, *Constitutive Fiction: Postcolonial Constitutionalism in Ireland*, 20 PENN STATE INT'L L. REV. 339 (2002).

Yet paradoxically this projection of mythical rhetoric led to the instantiation of a political reality that was to reflect the values of this imagined Gaelic Romantic notion of Ireland. This new state was indeed a fake. Yet, it was for its citizens only too real in its narrow minded, craven "bureaucratic dinginess."

This use of rhetoric by the elite reflects Threadgold's thesis that the telling of stories by elites can lead to the creation of particular institutional realities.

*Id.* at 351 (citing TERRY THREADGOLD, *FEMINIST POETICS: POIESIS, PERFORMANCE, HISTORIES* 148 (1997)).

101. See Barry Collins, *The Belfast Agreement and the Nation that "Always Arrives at its Destination"*, 20 PENN STATE INT'L L. REV. 385 (2002).

102. MARTIN MEREDITH, *MUGABE: POWER AND PLUNDER IN ZIMBABWE* (2002) ("Like many white farmers, the Buckles had bought their 1,000 acre farm after independence. In accordance with government regulations, they had obtained a certificate declaring that the government had no interest in the property." *Id.* at 167).

103. For a fuller account, see STEPHEN CHAN, *ROBERT MUGABE: A LIFE OF POWER AND VIOLENCE* 147-180 (2003).

104. With Zanu-PF's claim to being in the best position to solve the land issue in Zimbabwe, "albeit contradicted by two decades of land-reform failure, came some else: a memory of an anti-colonial struggle that only Zanu can invoke, and an image of a time when the party was in fact a Maoist-type 'fish within the sea' of the rural masses." PATRICK BOND AND MASIMBA MANYANYA, *ZIMBABWE'S PLUNGE: EXHAUSTED NATIONALISM, NEOLIBERALISM AND THE SEARCH OF SOCIAL JUSTICE* 77 (2002).

with the highest responsibility. Nations of tens and hundreds of millions are reconstituted as servants of the leader's will. When the terror attacks against the United States occurred on September 11, 2001, a name was craved. A person not a people, a leader not a political community, was responsible. With the emergence of a name—Osama bin Laden,<sup>105</sup> and a command hierarchy—Al Qaeda,<sup>106</sup> personification was possible. When a formally organized political community was required to provide a geography understandable in the common parlance of globalism, another name emerged—the Taliban—not Afghanistan. From that point, the culpability of Islam, of Saudi Arabia, of Pakistan, of Afghanistan, vanished. And the United States, the prime adversary, went out of its way to ensure that counterattack was aimed at the names, not at the communities.<sup>107</sup> The Afghans, a more traditional community, thought and acted differently. For them, power and authority, responsibility, was located within the community itself. Attacks against community members followed—against Arabs, Pakistanis, heretics, and other “foreign” elements.

The illusion thus created serves the power of community. Punishment of the *individual* is *communal*; the state will use its power as collective sovereign to punish an individual for inducing another political community to act. The process of punishment chosen is neutral—the purpose of which is to establish in a impartial forum the facts which will serve to individualize communal activity deemed worthy of punishment. A court, the judge, and trial cement the illusion with the authority of truth.<sup>108</sup> Trials establish individual responsibility for acts over a collective assignment of guilt. This reduces the call for revenge by the victorious community and leads the way to reconciliation.<sup>109</sup> The people

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105. See generally Elizabeth Becker, *Nation Challenged: Hearts and Minds—A special report.*; *In the War on Terrorism, A Battle to Shape Opinion*, N.Y.TIMES, November 11, 2001, at 1A.

106. See generally, *id.*

107. Consider the great lengths to which the United States and its European allies went to turn the characterization of the “enemy” from a people to a group of individuals making up a modern version of a “bandit gang;” President Bush, on various occasions, went out of his way to speak well of the larger communities—Islam, Pakistan, and the like.

108. In this light, see Larry Catá Backer, *Tweaking Facts, Speaking Judgment: Judicial Transmogrification of Case Narrative as Jurisprudence in the United States and Britain*, 6 S. CAL. INTERDISCIPLINARY L.J. 611 (1998) (demonstrating how “all sides attempt to use the courts as vehicles for the approval of lifestyle [and i]n this enterprise, particular facts make no difference—cultural facts are the real issue).

109. Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT’L LEGAL PERSP 73 (2002). Daly cites Cassese’s view that the principal accomplishments of criminal trials are 1) to distinguish the culpable perpetrators from others within the same broad class or ethnic category, 2) to dissipate calls for revenge because, essentially, the victim has entrusted to the state the right to punish the perpetrator, 3) to foster



thus experience vicariously the pain of unsuccessful communal action, and avoid the temptation to repeat the error. Such error, is thus transferred from the community to the leader, now punished, and the community continues. Power remains veiled, within and between communities.

I do not mean to suggest that the current system of human rights and humanitarian law is fundamentally flawed and must be abandoned in its entirety. The great success of the later half of the 20<sup>th</sup> century was the creation of a legal systemization of basic protections for individuals. This system represents a noble reaction to a history in which certain individuals—particularly Jews, Gypsies, and sexual minorities—had been brutalized earlier in that century.<sup>110</sup> But I do suggest that the great edifice of humanitarian law and human rights is limited by the context from out of which it was created. Global patterns of political organization, and of conflict, were not universally represented in the world conflict that ended in 1945, and the focus and character of conflict has changed dramatically since the end of the 20<sup>th</sup> century. The nation-state is no longer the ultimate expression of sovereign organization. Civil society—a product of a long and brutal struggle in Europe and North America—is not necessarily accepted as the highest and best expression of political organization. Discrimination has become fashionable again—covertly in the West, overtly everywhere else. Oblivious to the increased importance of a range of new actors and new techniques for conflict, the system of human rights and humanitarian law no longer provides a satisfactory basis for the regulation of human conflict. The story of Saul and Israel have produced a system of regulation grounded in the relationships between Saul, the people of Israel and God. The irony of its effects are only now being understood.

### III. Context: The Liability Free Cultivation of Hatred in the Modern World

Miscausation is at the heart of the power of community in the 21<sup>st</sup> century. Miscausation fuels the paradox which is the *führer principle*. Law provides the language for masking the obvious.<sup>111</sup> But

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reconciliation by ensuring that perpetrators pay for the crimes which, Cassese seems to posit is a precondition for reconciliation, and 4) create a fully reliable record of the past atrocities.

110. For a history of the development of regional and global understandings of human rights and humanitarian obligations, see e.g., R. Bierzanek, *War Crimes: History and Definition*, in 3 *INTERNATIONAL CRIMINAL LAW* at 29-31 (M. Cherif Bassiouni ed., 1987).

111. "The 'decision' that Carl Schmitt sees as marking the very possibility of law, the identification and conflict of friend and enemy, and that he sees as running through the whole system, shaping it and overdetermining it—this act of war represents the maximum of factuality, cast as absolute immanence in the juridical system." ANTONIO

miscausation, and the *führer principle*, provides opportunity to communities, as well as protection. Communities may act through individuals and escape responsibility. Communities may educate, prepare, sustain, encourage, and provide an ideology of action, but only individuals are deemed responsible, under principles of humanitarian<sup>112</sup> and human rights law,<sup>113</sup> for action. Though leaders of states may be subject to the restraints of action, or may be forced to pay for the actions of the community, the community remains untouched. But even leaders of communities not organized as states may escape responsibility for creating and maintaining the context through which action is planned, supported and encouraged. Miscausation, and the rules for the constitution of community have thus worked to subsidize action by non-state groups like the IRA, the Tamil Tigers, the PLO, and protected their political and propaganda wings from responsibility for the action of individuals 'inspired by' the ideology, but acting as individuals unconnected with the group. The imbalance of this legal result has bedeviled states confronted by opportunistic communities not constituted as states. Efforts to right this imbalance, to void the responsibility free cultural subsidy of hate, to avoid the fantasy of legal construct for the reality 'on the ground,' have proven problematic for the United States, the United Kingdom, Sri Lanka, and Israel.

The extraordinary power of law to mask the obvious is nicely evidenced by the 4<sup>th</sup> Geneva Convention's rules for the protection of civilian populations in time of war. In particular the use of the rules in furtherance of the construction of the state of Palestine, in a certain form, by the international community, provides a useful example of the distorting effect of law in the context of 'passive' communities and 'active' individuals, as well as an oh-so-typical European tendency to use the cover of law or 'principle' for targeted political effect, especially

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NEGRI, INSURGENCIES: CONSTITUENT POWER AND THE MODERN STATE 8 (Maurizia Boscgli, trans., Univ. Minnesota Press, 1999).

112. Humanitarian law is based on the principle of individual penal responsibility. See Protocol I Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Victims of International Armed Conflict, adopted June 8, 1977, entered into force, Dec. 7, 1978, 1125 U.N.T.S. 3-608, Art. 75(4)(b); Protocol II Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Conflicts, adopted June 8, 1977, entered into Force, Dec. 7, 1978, U.N. Doc. A/32/144 Annex II, 1125 U.N.T.S. 609, Art. 6(2)(b).

113. Thus, for example, the American Convention on Human Rights extends due process guarantees in ways that have been construed to limit responsibility to individuals who act. See American Convention on Human Rights, (1978), 1144 U.N.T.S. 123, Art. 5(3) ("Punishment shall not be extended to any person other than the criminal."). See also African Charter on Human and Peoples' Rights, (1986), O.A.U. Doc. CAB/LEG/67/3 Rev. 5 ("Punishment is personal and can be imposed only on the offender.").

when Europeans deal with the detritus of its imperial past, as well as of its bad behavior. The contortions become much more interesting when two irreconcilable objects of Western, and especially European, guilt clash. The Western world's *Judenfrage*<sup>114</sup> in what was European and Turkish imperialism's Palestinian playground,<sup>115</sup> and what is to become the states of Israel and Palestine<sup>116</sup> provides a nice example indeed.

What is emerging in the West as the standard, or orthodox, version of a legal analysis of house demolitions is easy enough to summarize.<sup>117</sup> The arguments usually start with an underlying postulate which blends fact and a moral stance: The Israeli government has engaged in a large number of house demolitions and sealing since 1967<sup>118</sup> and this is bad. The bulk of the argument then proceeds to find a neutral,<sup>119</sup> that is, legal,

114. I deliberately use a discredited (and historically offensive) term here to remind readers of the spectre of (Western) history that haunts any discussion of the State of Israel in Europe and the Western Hemisphere. The term was common in Central Europe in the 19<sup>th</sup> and 20<sup>th</sup> century and eventually became connected with Nazi notions of separation and ultimately extermination. *See, e.g.,* DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* 63 (1996).

115. *See* TOM SEGEV, *ONE PALESTINE, COMPLETE: JEWS AND ARABS UNDER THE BRITISH MANDATE* Haim Watzman, trans., 2000).

116. After the success of the American efforts to topple the dictatorial regime in Iraq in 2003, the time was thought ripe to unveil and compel the Jews and Arabs to abide by a "roadmap" leading to independence for a Palestinian State and recognition of the Jewish State of Israel by Arab states. *See* Agence-France Presse, *Israel's Sharon Sees Quicker-Than-Expected Deal with Palestinians After Iraq* [Corrected 04/13/03], 2003 WL 2778992.

117. For good expositions of the argument, *see, e.g.,* Shane Darcy, *Punitive House Demolitions: The Prohibition of Collective Punishment and the Supreme Court of Israel*, 21 PENN STATE L. REV.—(forthcoming Spring 2003); John Quigley, *Punitive Demolition of Houses: A Study in International Rights Protection*, 5 ST. THOMAS L. REV. 359 (1993); Martin B. Carroll, *The Israeli Demolition of Palestinian Houses in the Occupied Territories: An Analysis of its Legality in International Law*, 11 MICH. J. INT'L L. 1195 (1990); Usama R. Halabi, *Demolition and Sealing of Houses in the Israeli Occupied Territories: A Critical Legal Analysis*, 5 TEMP. INT'L & COMP. L.J. 251 (1992); Cheryl V. Reicin, *Preventive Detention, Curfews, Demolition of Houses, and Deportations: An Analysis of Measures Employed by Israel in the Administered Territories*, 8 CARDOZO L. REV. 515 (1987). For an early version from an organ of institutionalized internationalism, *see, e.g.,* Reconstruction of Palestinian Homes, Commission on Human Settlements, U.N. Res. 11/10 in U.N. Division for Palestinian Rights, XI Bulletin No. 6, at 12 (1988).

118. For some statistics from an organization within the State of Israel opposed to the practice, *see* [http://www.btselem.org/english/House\\_Demolitions/Statistics.asp](http://www.btselem.org/english/House_Demolitions/Statistics.asp) (Last visited April 2003).

119. Americans, in particular, are acutely susceptible to arguments made from law, especially though which appear to apply normatively value neutral provisions. Americans worship neutral principles—or at least the appearance of such principles. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 88-103 (1980); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). The allure of law as the old Enlightenment God-as-master-clockmaker—the divinity creating a system of universal and perfect rules which only need to be followed for order and optimality to result has long been understood in the West. For a perceptive

basis to support a moral conclusion<sup>120</sup> drawn from an assessment of fact.<sup>121</sup> The first set of arguments revolve around the validity of Regulation 119(1) of the Defense Emergency Regulations promulgated by the United Kingdom before the end of its mandate in Palestine,<sup>122</sup> the provision under which the Israeli Defense Force (IDF) has undertaken its demolitions. Regulation 119(1) is either invalid, having been revoked by the United Kingdom at the end of the Mandate or that its provisions are incompatible with international law. In particular, house demolitions constitute an unlawful violation of property rights,<sup>123</sup> due process protections to individuals charged under penal provisions of local law,<sup>124</sup>

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commentary, see VOLTAIRE, *CANDIDE* (Norman Cameron, trans., Penguin Books, Ltd. 1997)(1759). For a modern critique from the perspective of Critical Race Theory, see Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1378-84 (1988).

And it is to the American market that many of these hoped for value judgment changing arguments are made. In this respect the arguments have more value as culturally significant speech, designed to move value judgments of the American voting population in a particular direction, than as arguments of any value within the field of law *per se*. See Larry Catá Backer, *Culturally Significant Speech: Law, Courts, Society and Racial Equity*, 21 U. ARK. LITTLE ROCK L.J. 845(1999).

120. Of course, what I characterize as a moral conclusion is as easily characterized as a political conclusion as well. I am not convinced that American traditionalists (forgetting or forgiving for a moment their own particularized agenda masquerading as yet another universal) are wrong when they assert that the moral and the political—or the religious (since religion and morals have been inseparable from the time of the repudiation of the ancient cults in the West) and the political—are two sides of the same coin. See, e.g., RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* (2d ed. 1984) (arguing that religion has a legitimate place in public discussion); Stephen L. Carter, *Liberal Hegemony and Religious Resistance: An Essay on Legal Theory*, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* 25 (Michael W. McConnell et al. eds., 2001); but see BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 280-82 (1980). Thus, perhaps, the issue of house demolitions is interesting for law in part because it serves as a convenient vehicle for an indirect political assault on the hegemony of the State of Israel in certain territories meant to serve the state building needs of others.

121. Indeed, even the “finding” of facts—especially facts targeted for a particular result—has become of the essence to political negotiation. See, e.g., Arthur Lenk, *Fact-Finding as a Peace Negotiation Tool—The Mitchell Report and the Israeli-Palestinian Peace Process*, 24 LOY. L.A. INT’L & COMP. L. REV. 289 (2002).

122. The Defense (Emergency) Regulations, 1945 (as amended until 2nd March, 1947) (1947) (Great Britain); [1945] *Palestine Gazette* (No. 1442), Supp. No. 2, 1055.

123. Art. 53 of the 4<sup>th</sup> Geneva Convention prohibits the destruction of property except when “rendered absolutely necessary by military operations.” See 4<sup>th</sup> Geneva Convention, *supra* note 7. Article 23 of the 1907 Hague Regulations provides a special prohibition on the destruction of enemy property “unless such destruction or seizure be imperatively demanded by the necessities of war.” Regulations annexed to Convention IV Respecting the Laws and Customs of War n Land, signed at The Hague, Oct. 18, 1907 (the “1907 Hague Regulations”).

124. 4<sup>th</sup> Geneva Convention, *supra* note 7. In addition, the 4<sup>th</sup> Geneva Convention imposes a number of due process rights in connection with the enforcement of penal provisions, including the right to a trial (art. 71), to information about the charge (art. 71),

protections against cruel, inhuman or degrading treatment or punishment,<sup>125</sup> or protections against collective punishment<sup>126</sup> under international law.

The standard legal arguments, of course, are contestable on their own terms. Because my purpose here is to escape the bounds of the *führer* principle of international law that perverts any analysis, I suggest only some. For example, an important basis for the legal attack on house demolition focuses on the invalidity of the legal basis Israel has put forward to justify its policy—Regulation 119. That attack comes in two forms—first, that the Regulation was revoked by the time Israel recaptured the territories from its Jordanian occupiers in 1967 and, second, that the Regulation, even if effective, is inconsistent with international human rights obligations. The double form of the attack on Regulation 119 is necessitated by history. Let us consider the first objection. Since Regulation 119 was enacted and invoked with impunity by the government of the United Kingdom during the Mandate in Palestine, and since it would be troublesome now to suggest that the pre-1948 actions of a European and Christian power might have, at the time, violated core principles of international law, it is necessary to suggest that the Regulation was no longer in effect after the end of the Mandate. But that argument is hardly incontestable—whatever the desires of the international political community otherwise. Israel has put forward arguments in support of the continued validity of the Regulation.<sup>127</sup> To the extent the argument is plausible, that should be the end of the analysis. A different result—consistently applied—might suggest the loss of sovereignty so fundamental that the core understanding of the basic character of what it means to be a nation-state would disappear.

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to representation (art. 72), to present evidence (art. 72), and to appeal a judgment (art. 73). For similar requirements, see International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 17, entered into force March 23, 1976, 999 U.N.T.S. 171, reprinted in 6 INT'L LEG. MAT. 368 (1967), at art. 14 (penal sanctions may be imposed only after a full and fair trial).

125. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 151 at 97, U.N. Doc. A/39/51 (1984), article 16. A certain portion of the international community has given its political judgement that house demolitions might under certain circumstances amount to violation of this provision when practiced by Israeli military authorities. See Concluding Observations on Third Periodic Report Submitted by Israel, CAT/C/XVII/Concl.5 of 23, Nov. 2001, ¶ 6(j).

126. Article 50 of the 1907 Hague Regulations prohibits assessments of general penalties against the population for individual acts. Article 33 of the 4<sup>th</sup> Geneva Convention prohibits punishment of protected persons "for an offense he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited." 4<sup>th</sup> Geneva Convention Art. 33(1).

127. See, e.g., Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISRAEL Y.B. HUM. RTS. 262 (1971).

Applying the argument, as made by the critics of Israel's house demolition policy, it would be possible to challenge the validity of any regulation by any democratically constituted sovereign, even after that sovereign's supreme judicial organ passes on the issue. A plausible result, no doubt, but one that as yet is still somewhat beyond the current reality of state practice. European courts, especially, have rejected similar notions in the context of a much more coercive quasi-international system—the European Union.<sup>128</sup>

Second, if the fairly technical legal invalidity argument fails to convince, then the violation of international law argument might succeed. But the argument poses some awkward issues precisely because it is necessary to distinguish use of that authority by European Christians until 1948 (permissible) and semi-European Jews after 1948 (bad) under international law. Thus, the arguments based on the prohibitions against general penalties in the 1907 Hague Regulations,<sup>129</sup> rings hollow in light of the enactment of Regulation 119 in the face of the prohibition. To the extent that the 1907 Hague Regulations are reinterpreted especially to suit the character of the present Israeli-Palestinian conflict suggests something other than the application of neutral principles in a principled way. Indeed, the argument is especially ironic when made in the context in which it is declared that the 1907 Hague Regulation were “by 1939, declaratory of the laws and customs of war.”<sup>130</sup>

There is a more principled method of making the distinction between the acts of Christian Britain and that of the Jews under Regulation 119. The instruments of that distinction, of course, are the various human rights and humanitarian instruments which came into

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128. Thus, for example, “German courts continue to reserve the power to review and judge the activities of the Community institutions in light of basic German ideas of fundamental rights and German interpretations of the powers of Community institutions under the EU Treaty. This stands in stark contrast to the ECJ’s pronouncement of its supreme power to determine the scope and enforcement of fundamental social norms.” Larry Catá Backer, *Forging Federal Systems Within a Matrix of Contained Conflict: The Example of the European Union*, HARVARD JEAN MONNET WORKING PAPER, No. 4/98 (1998); 12 EMORY INT’L L. REV. 1331, 1371 (1998) (citing Cases 2 BvR 2134/92 & 2159/92, Brunner v. European Union Treaty, [1994] 1 C.M.L.R. 57 (BVerfG 1993); Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel, [1974] 2 C.M.L.R. 540 (BVerfG 1974)).

129. Art. 50 provides, in part, a prohibition against general penalties inflicted upon general population “on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.” See, 1907 Hague Regulations, *supra* note 124.

130. See Darcey, *supra* note 118 (citing in part International Military Tribunal, Judgment 83, 1947, NAZI CONSPIRACY AND AGGRESSION: OPINION AND JUDGMENT (1947)).

effect after the end of the British Mandate in Palestine.<sup>131</sup> First, of course, it is not at all clear that Regulation 119 conflicts with the provisions of the Convention.<sup>132</sup> Additionally, it ought to be difficult to make an argument which effectively requires a belief that the United Kingdom sought, in ratifying the various human rights and humanitarian instruments now used against Regulation 119, to suggest that its own prior conduct in Mandate Palestine, especially with respect to the use of that Regulation, was a model of serious human rights abuses against which international human rights conventions were written. Instead, it is plausible to suggest that Regulation 119 might be better understood as a model of appropriate military conduct, but one which, at least when applied by the IDF, has become unpopular.

The violation of protections against penal sanctions under internal law argument is particularly telling. The argument is based on a suggestion that nice civilized countries do not use property confiscation as a penalty except the property of the accused and only after conviction.<sup>133</sup> But the United States permits the confiscation of property that is not entirely owned by the person committing the underlying crime.<sup>134</sup> And confiscation of property for violation of administrative rules, where there is no underlying illegality is also permitted, though subject to a Constitutional rule of proportionality.<sup>135</sup> But these arguments serve as a veil to the real dispute—a political dispute in which

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131. Thus, for example, Article 64 of the 4<sup>th</sup> Geneva Convention, *supra* note \_\_, is sometimes deployed to suggest that Regulation 119 must be void as in violation of the terms of that International Covenant. Article 64 provides that only law that is not an obstacle to the application of the Geneva Conventions may remain in force. The official commentary makes the point in stronger terms: “when the penal legislation of the occupied territory conflicts with the provisions of the Convention, the Convention must prevail.” COMMENTARY ON GENEVA CONVENTION IV OF 1949 RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIMES OF WAR 336 (Jean Pictet, ed., 1958).

132. See discussion above at notes 120, 121.

133. See, e.g., John Quigley, *Punitive Demolition of Houses: A Study in International Rights Protection*, 5 ST. THOMAS L. REV. 359, 365-366 (1993).

134. See *Bennis v. Michigan*, 516 U.S. 442 (1996) (no innocent owner defense to confiscation of car used for the solicitation of prostitutes by husband who was co-owner of vehicle seized). Moreover, what Marcus Dubber has suggested in the American criminal context may have some bearing in the Israeli-Palestinian conflict: “The paradigmatic crime of the war on crime is not murder, but possession; its sanction not punishment, but forfeiture; its process not the jury trial, but plea bargaining; its mode of disposition not conviction, but commitment; and its typical sentencing factor not victim impact, but dangerousness as “evinced” by a criminal record. “Marcus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 833 (2001).

135. See *United States v. Bakajajian*, 524 U.S. 321 (1998) (seizure of about \$360,000 for failure to report transportation out of the country; though the entire amount was subject to forfeiture, the court permitted assessment of \$15,000 forfeiture holding that punitive forfeitures, forfeitures grossly disproportionate to offense violates Constitution).

legal arguments with respect to the deployment of Regulation 119 are used as a weapon in a political battle over the ultimate shape of the settlement between the State of Israel and what will be the State of Palestine.<sup>136</sup>

In addition, the argument that application of Regulation 119 violates the 4<sup>th</sup> Geneva Convention's prohibition against collective punishment suggests a misreading of that provision of the 4<sup>th</sup> Geneva Convention as well as the opinion of the Israeli Supreme Court that construed it. Article 33(1) prohibits punishments for offenses not personally committed. Regulation 119 permits punishment of those who have committed, abetted the commission, been accessories after the fact of any act of violence as defined in the Regulation. Punishment is not imposed for the act of violence; the actual perpetrator of that violence remains solely liable for its consequences. However, Regulation 119 also punishes abetting and aiding the perpetrators of violence. Punishment, therefore, is tied to personal conduct—the abetting of the act or the acting as an accessory after the fact to the commission of the offense. In this sense, then, it can be argued that the 4<sup>th</sup> Geneva Convention is not violated because Regulation 119 does not permit the imposition of collective punishment. That, I think, was the point that Justice Ben-Dror might have been trying to make in his opinion in *Daghlas v. Military Commander of the Judea and Samaria Region*.<sup>137</sup> That such a construction, itself, would violate the 4<sup>th</sup> Geneva Convention, would suggest that all penal laws imposing penalties on aiding and abetting, on conspiracy, on liability for post act aid, might no longer be valid.<sup>138</sup> Or, more nonsensically, that such provisions, while perfectly valid within a nation state as a core part of its criminal laws, would not be valid when applied by an occupying power.<sup>139</sup>

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136. "The demolitions have drawn such sharp criticism not only because they are unlawful in and of themselves, but because they are viewed by the international community as part of Israel's broader effort to settle its citizens in the Gaza Strip and the West Bank, and to pressure Palestinians to leave these territories. . . . The demolition issue is part of a larger violation by Israel of Palestinian rights in the Gaza Strip and West Bank, and is addressed by the international community in that light." Quigley, *supra* note 134, at 374.

137. HCJ No. 698/85, 40(2) P.D. 42. This construction makes sense of the judge's conclusion that "'punishment' has not been imposed on the homes of the uninvolved persons, and it is difficult to understand the origins of the claim that we are here dealing with a case of collective punishment." Contrast the discussion in Darcy, *supra*, note 118.

138. *But see* Quigley, *supra* note 134, at 368-369 (suggesting that Regulation 119 permits the assessment of liability in contexts significantly more broad than those in which liability is imposed for conspiracy or aiding and abetting).

139. An additional irony to these arguments, of course, is that those who make them almost invariably then conclude that some sort of undifferentiated Israel ought to be responsible for the resulting grave breaches of the 4<sup>th</sup> Geneva Convention. *See, e.g.*, Darcy, *supra* note 118.



For what it is worth, and it seems to be worth very little to those who would single mindedly seek to have Israel cease its demolition policy, Israel is not a signatory to all of the international conventions deployed against it.<sup>140</sup> Perhaps those who deploy international law against the State of Israel are also suggesting another principle of customary international law—a non-signatory principle of binding.<sup>141</sup> Under it, execution and ratification of a convention by the elected representatives of a democratic polity is no longer necessary in some contexts for the convention to have effect. Consequently, the principles and norms of certain instruments of human rights and humanitarian law establish principles of conduct binding on all.<sup>142</sup> And this process of binding through international osmosis appears to trump that other principle of international law—the principle of democratic political organization. Thus, for example, building a case against house demolitions on the basis of the American Convention on Human Rights,<sup>143</sup> the African Charter on Human and Peoples' Rights,<sup>144</sup> the 3<sup>rd</sup> Geneva Convention,<sup>145</sup> Additional Protocol I,<sup>146</sup> Additional Protocol II,<sup>147</sup> the 1907 Hague Regulations,<sup>148</sup> the 4<sup>th</sup> Geneva Convention,<sup>149</sup> as binding

140. Thus, for example, Israel has not signed the Additional Protocols to the Geneva Conventions, see Additional Protocol I, *supra* note 50, and Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, adopted June 8, 1977, entered into force Dec. 7, 1978, U.N. Doc.A/32/144 Annex II, 1125 U.N.T.S. 609 (“Additional Protocol II”). See FRANÇOISE BOUCHET-SAULNIER, *THE PRACTICAL GUIDE TO HUMANITARIAN LAW* 460 (Laura Brav, ed. & trans., 2002).

141. Along parallel lines, see Anthony D’Amato, *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, 25 GA. J. INT’L & COMP. L. 80 (1995/1996).

142. Critical, then, for international law arguments, is acceptance of the notions of the creation of “universal” norms as expressed in instruments that might or might not have been ratified universally, and their applicability without the benefit of direct expression by the local sovereigns. “U.N. practice also reflects the applicability of human rights law in belligerent occupation.” The U.N., in a General Assembly resolution, stated that “[f]undamental human rights, as accepted in international law and laid down in international instruments continue to apply fully in situations of armed conflict.” John Quigley, *Punitive Demolition of Houses: A Study in International Rights Protection*, 5 ST. THOMAS L. REV. 359, 363-64 (1993). Cf. Ivan Simonovic, *From Sovereign Equality to Equally Reduced Sovereignty*, 24 FLETCHER F. WORLD AFF. 163, 171-172 (2000) (development of international legal regimes limit the exercise of state sovereign authority).

143. American Convention on Human Rights (1978) 1144 U.N.T.S. 123.

144. African Charter on Human and Peoples’ Rights (1986), O.S.U. Doc. CAB/LEG/67/3 Rev. 5.

145. Third Geneva Convention, *supra* note 7.

146. Additional Protocol I, *supra* note 50.

147. Additional Protocol II, *supra* note 50.

148. 1907 Hague Regulations, *supra* note 124.

149. Fourth Geneva Convention, *supra* note 7.

as an international convention cocktail by operation of principles for the recognition and creation of principles of customary international law,<sup>150</sup> makes a mockery of the treaty system and irrelevant expressions of national free will in choosing not to participate in particular expressions of agreement among some, but not all, nations. On the basis of the theory sought to be used to bind Israel, the United States will eventually (sooner rather than later) find itself bound by the convention creating the International Criminal Court,<sup>151</sup> even though the United States specifically refused to ratify the treaty.<sup>152</sup>

The standard argument against house demolition from the perspective of international law thus provides no clear answer to the issue of house demolitions. Indeed, the arguments suggest the limits and flaws of an international law regime that is complicit in the protection of community from the acts it encourages in its individuals, especially in individuals who die for their trouble. A miscausation analysis, however, more realistically reveals both the potential for perversity in the application of the fuhrer principle of international humanitarian law, and the possibility of an alternative perspective. Consider the community and the articulation of its norms through official organs of state secular and religious organization. Listening to religious broadcasts over state sponsored Palestinian television on any Friday one can hear that:

The Jews are the Jews. There was never among them a supporter of peace. They are all liars . . . the true criminals, the Jewish terrorists that slaughtered our children, that turned our wives into widows and our children into orphans, and desecrated our holy places. They are terrorists. Therefore it is necessary to slaughter them and murder them, according to the words of Allah . . . it is forbidden to have mercy in your hearts for the Jews in any place and in any land. Make war on them anyplace that you find yourself. Any place that you meet them—kill them.<sup>153</sup>

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150. See, e.g., *Darcy*, *supra* note 118. See also, Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348 (1987).

151. Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF. 183/9, 37 I.L.M. 999 (entered into force July 1, 2002).

152. Indeed, fears of similar acts of binding led the United States to seek bilateral agreements with signatory states to protect American troops abroad. For accounts in the popular press, see *US to Focus on South Asia, Mideast Seeking ICC Immunity Deals*, Agence France-Presse, Nov. 14, 2002, 2002 WL 23649558 ("US diplomats will soon focus their efforts to negotiate deals giving US troops immunity from prosecution by the International Criminal Court (ICC) on nations in South Asia and the Middle East").

153. Dr. Ahmed Yousouf Abu Halabiah, Palestinian television, Oct. 13, 2000, *quoted in* Itamar Marcus, *Islam's Mandatory War Against Jews and Israel in Palestinian Authority Religious Teaching*, Studies on Palestinian Culture and Society [Study No. 4], March, 2002 (study prepared for Palestinian Media Watch, an Israeli organization based in Jerusalem). Dr. Halabiah was, at the time, a member of the Palestinian Sharianic

Perhaps, instead, one might listen on Fridays to Dr. Muhammad Ibrahim Madi on Palestinian TV say:

A youth said to me: "Oh, Sheikh, I am 14 years old. I have 4 more years and then I will blow myself up among Allah's enemies, I will blow myself up among the Jews." I told him: "Allah should let you merit martyrdom . . ." We will blow them up in Hadera, we will blow them up in Tel Aviv and in Netanya in Allah's righteousness against this riff-raff.<sup>154</sup>

Or perhaps one might read the newspaper instead so that one can understand that "The battle with the Jews will surely come . . . the decisive Muslim victory is coming without a doubt . . . and the Day of Resurrection will not come without the victory of the believers over the descendants of the monkeys and the pigs and with their annihilation."<sup>155</sup>

Or maybe one can solace in prayer: "Allah, show us your wonderous capabilities on the Jews. Allah, show us on the Jews a day like A'ad and Tha'mud. Allah, transform them into spoils of war for us and for all Muslims."<sup>156</sup>

Rulings Council and Rector of Advanced Studies, the Islamic University.

154. Sheikh Dr. Mohammed Ibrahim Madi, Friday Sermon on PATV, Aug. 3, 2001, *quoted in* Itamar Marcus, *Islam's Mandatory War Against Jews and Israel in Palestinian Authority Religious Teaching*, Studies on Palestinian Culture and Society [Study No. 4], March, 2002.

155. Sheikh Muhammed Abd Al Hadi La'afi, Al-Hayat Al-Jadida (newspaper), May 18, 2001, *quoted in* Itamar Marcus, *Islam's Mandatory War Against Jews and Israel in Palestinian Authority Religious Teaching*, Studies on Palestinian Culture and Society [Study No. 4], March, 2002. Sheikh Dr. La'afi was reported at the time to be responsible for religious teaching and instruction in the office of the Waqf in the official newspaper of the Palestinian Authority, Al-Hayat Al-Jadida.

156. Sheikh Dr. Mohammed Ibrahim Madi, Friday Sermon on PATV, May 4, 2001, *quoted in* Itamar Marcus, *Islam's Mandatory War Against Jews and Israel in Palestinian Authority Religious Teaching*, Studies on Palestinian Culture and Society [Study No. 4], March, 2002.

There are some within the Greek Orthodox priesthood in Israel itself who have publicly shared these views. One of them, Father 'Atallah Hanna, Archimandrite Theodosios Hanna, the former spokesperson of the Greek Orthodox Church, in a sermon marking the Epiphany and the baptism of Jesus at a Greek Orthodox cathedral in Jerusalem, January 19, 2003, stated:

We declare publicly our blessing, support, and legitimization of the brave Palestinian resistance [carried out] by any means, including the brave Fidayin martyrdom operations. . . . The names of the Fidayi Shahids [the martyrs] will be inscribed in the history of our Palestinian and Arab people in holy white letters. The voices of those who defame these acts of heroism and honor are nothing more than anomalous voices that do not represent Arab and Palestinian public opinion. . . .

*Palestinian Christian Leader in Praise of Martyrdom Operations and the Formation of a Muslim and Christian Human Shield to Defend Iraq*, Special Dispatch Series No. 459, The Middle East Media Research Institute, available at <http://www.memri.org/bin/articles.cgi?Page=countries&Area=palestinian&ID=SP45903#>

Within the quiet of family, it ought to be possible to escape the construction of a privileging of violence as the foundation of a reactive social order. But even the house serves multiple purposes. In an interview with the mother of a suicide bomber in a London Arabic language newspaper, the interviewee described how her house was used as a center for the coordination of violence, and the effects of this use of her house on the son who would become a suicide bomber:

Imad lived with us for 14 months, and he had a room in our house from which he would plan the operations. The mujahideen would come to him and plan and sketch everything out, and little Muhammad would be with them, thinking and planning. This was the source of Muhammad's love of martyrdom.<sup>157</sup>

Reconsider the suicide bomber, or other perpetrator of violence, in this context. Here is a context in which, from a cultural perspective, the call to violence is so pervasive as to become invisible.<sup>158</sup> It has international appeal as well, with leaders of other states providing financial support to the families of suicide bombers,<sup>159</sup> as well as international Islamic organizations sometimes characterized as charitable.<sup>160</sup> In the context in

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157. Interview with Umm Nidal in The London-based Arabic-language daily Al-Sharq Al-Awsat, reprinted as *Interview With the Mother of a Suicide Bomber*, Special Dispatch Series No. 391, The Middle East Media Research Institute, available at <http://www.memri.org/bin/articles.cgi?Page=countries&Area=palestinian&ID=SP39102> (June 19, 2002).

158. The support is pervasive enough to provoke little shame when ordinary people are polled to determine their attitudes. "A new poll of Palestinians found that roughly 60% support continuing suicide bombings and military operations inside Israel, while only 15% believe a violence-free strategy best serves Palestinians." Robin Wright and Henry Chu, *the World Mideast 'Road Map' Detailed an International Plan Calls for a Provisional Palestinian State this Year, Preceded by an End to Violence. Also, Israel must Halt Settlements*. LOS ANGELES TIMES, April 29, 2003, 2003 WL 2401630. While the sentiments expressed in the polls do not usually translate into action—they can translate into a public and communal expression of support and permission.

159. One of the reasons Saddam Hussein enjoyed a high status among Palestinians was his willingness to provide financial support, as a reward for good behavior of sorts, to the families of suicide bombers. See, e.g., Karbet Leggett, *The Assault on Iraq: Rising Arab Protests Unsettle Region's Stability*, THE WALL STREET JOURNAL, March 24, 2003, 2003 WL-WSJ 3962668 ("Mr. Hussein enjoys broad support in the West Bank and Gaza, in part the result of the financial assistance he gives to Palestinians who carry out suicide attacks against Israelis."). The support, to the extent it is real, can be substantial. "Last week, Defense Secretary Donald Rumsfeld repeatedly noted Saddam's financial support for the families of Palestinian suicide bombers. He said Iraq had recently increased its payments to such families from \$10,000 per family to \$25,000." Barbara Slavin, *Middle East Turmoil Shakes Up U.S. Plans for Iraq*, U.S.A. TODAY, April 8, 2002, 2002 WL 4723539.

160. For a recent example described in the popular press, see, Dena Bunis, Vik Jolly, and Ann Pepper, *Home from ordeal // People—Dr. Riad Abdelkarim, Freed from an Israeli Jail, Denies That His Humanitarian Mission Was Linked to Terrorist Groups*, THE

which she lives, her society has crafted a privilege to violence against the “other” in a way reminiscent of a different sort of privilege to violence and subordination against African-Americans in the United States after the Civil War.<sup>161</sup> Indeed, violence appears as little more than a necessary claim to self-defense the ‘apes and pigs’ who now constitute Israel.<sup>162</sup> The popular press of the region is full of articles about the vileness of the habits and practices of this “other”:

Shortly after the Palestinian intifada against Israeli rule began in late September 2000, Hammouda wrote an article that appeared in Egypt’s main daily newspaper, Al Ahram, that also repeated the “blood libel” against Jews. Although the article flatly stated that the practice was continuing, with Israeli Jews taking the blood of Palestinian children to bake Passover matzo, Hammouda now says he doesn’t believe that the practice is contemporary—but that it did occur in Damascus, Syria, in the 1800s.<sup>163</sup>

From a cultural perspective, then, it may appear to the suicide bomber that her conduct is not only appropriate, but necessary for the protection of children, a religiously positive act, a political act of the highest order,

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ORANGE COUNTY REGISTER, May 21, 2002, 2002 WL 5449466 (“Evidence strongly suggests that the HLFrd has provided crucial financial support for families of Hamas suicide bombers, as well as the Palestinians who adhere to the Hamas movement,” according to an FBI memo.”).

161. Christian Sundquist put it nicely:

Despite occupying privileged social positions, white people tend to claim innocence so long as they do not actively discriminate against Blacks or other groups. Indeed, many white people have great difficulty even recognizing the existence of privilege. Privilege is transparent to the privileged because it is enveloped within what they view to be the normal state of affairs. In addition, belief in the American value of individualism inhibits seeing privilege, as people tend to view themselves as individuals rather than beneficiaries of collective advantage accrued by skin color.

Christian Sundquist, *Critical Praxis, Spirit Healing, and Community Activism: Preserving a Subversive Dialogue on Reparations* 58 N.Y.U. ANN. SURV. AM. L. 659, 674-75 (2003).

162. “Calling Jews ‘apes and pigs’ is very common in the antisemitic discourse of the Arab world, particularly in Islamist circles. For the most part, the term is used as a synonym for Jews, or in strings of epithets originating in the Koran and Muslim tradition regarding Jews.” Yigal Carmon, *Harbingers of Change in the Antisemitic Discourse in the Arab World*, The Middle East Media Research Institute, Inquiry and Analysis Series, No. 135, available at <http://www.memri.org/bin/latestnews.cgi?ID=IA13503> (April 22, 2003) (“In the past two years, however, the Arab media has reflected significant criticism of, and reservations regarding, manifestations of antisemitism in the Arab world.” *Id.*).

163. Michael Slackman, *Saudi Editor Retracts Article That Defamed Jews*, LOS ANGELES TIMES, MARCH 20, 2002, 2002 WL 2462517 (quoting Adel Hammouda, editor in chief of the Egyptian newspaper, Sawt al Umma). The article also related the retraction, after the Western press picked up translations of the story to the embarrassment of the Saudi government, of a story by a Saudi Doctor purporting to document the use of non-Jewish blood to make Jewish holiday dishes.

and one for which the state or its supporters would compensate her family for the loss of her life. From this cultural perspective, it is also easier to sense the web of subsidy, extending from all of the community to all of the community for such acts of violence. With every act, every member of the community is benefitted in tangible and intangible ways—the enemy is weakened or made to suffer in an effective way, the community is spared responsibility for the individual's acts but can continue to nurture the sort of foundational norms which produces more acts of individual violence. From this cultural perspective, then, it is also possible to understand demolition as a culture to culture act—a culturally targeted response to cultural subsidies of violent individual activity.

Ironically, the standard international law analysis of house demolition policy in the context of unconventional warfare might benefit by an analysis from a Critical Race Theory perspective.<sup>164</sup> In particular, the sort of spirit injury,<sup>165</sup> that might justify, or at least ameliorate the criminality, of individual or group behavior is particularly apt.

At the group level, spirit injury can lead to the devaluation and destruction of a way of life or an entire culture. What has been ignored in the L.A. 8 case as beyond the scope of immigration law is the reality of life for all Palestinians worldwide. In their decades-old quest to establish an independent state, the Palestinian people have suffered many violations of their human rights, including exile, family dissolution, land dispossession, death, torture, and imprisonment. They have also faced a “web of racism, cultural stereotypes, political imperialism, dehumanizing ideology . . . and it is this web which every Palestinian has come to feel as his uniquely punishing destiny.”<sup>166</sup>

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164. See Adrien Katherine Wing, *Reno v. American-Arab Anti-Discrimination Committee: A Critical Race Perspective*, 31 COLUM. HUM. RTS. L. REV. 561 (2000) (application of insights from Critical Race Theory to enhance understanding of rights and injuries in group global context to support rights of residents to support PLO in the United States).

165. For an excellent application of the principles to an understanding of the context of action by individuals in Palestine and the Palestinian diaspora, see Adrien Katherine Wing, *A Critical Race Feminist Conceptualization of Violence: South African and Palestinian Women*, 60 ALB. L. REV. 943 (1997); Adrien Katherine Wing, *Reno v. American-Arab Anti-Discrimination Committee: A Critical Race Perspective*, 31 COLUM. HUM. RTS. L. REV. 561 (2000). Professor Wing has also applied the concept in the context of the Rwandan genocide of the 1990s. See Adrien Katherine Wing and Mark Richard Johnson, *The Promise of a Post-Genocide Constitution: Healing Rwandan Spirit Injuries*, 7 MICH. J. RACE & L. 247 (2002). See also Patricia Williams, *Spirit Murdering the Messenger: The Discourse of Finger Pointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127 (1987).

166. Adrien Katherine Wing, *Reno v. American-Arab Anti-Discrimination Committee: A Critical Race Perspective*, 31 COLUM. HUM. RTS. L. REV. 561, 589 (2000) (quoting in part EDWARD W. SAID, *ORIENTALISM* 27 (1978)).

The irony of the conflict which forms the context in which house demolitions become an 'issue' of international law ignores a spirit injury in which in their millennia old quest to establish an independent state, the People of Israel in the diaspora have suffered many violations of their human rights, including exile, family dissolution, land dispossession, death, torture, and imprisonment. The People of Israel, and especially those that constitute the political community of the State of Israel, have faced a web of cultural stereotypes, political imperialism, dehumanizing ideology which continues long held Western (and now Eastern) traditions of a uniquely punishing identity.<sup>167</sup> The great insight of spirit injury, drawn from Critical Race Theory, adds a richness to an understanding of both the Palestinian "rage of terrorism—revenge, retribution, and hatred,"<sup>168</sup> and the scope of Israeli response.<sup>169</sup> Where the levers of popular culture, of religion, of state policy (even when perpetuated by quasi-states or other intangible entities) are directed

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167. The internalization of these forms of racism can follow particularly circuitous routes. Consider, in the Middle East, how modern views may have been assimilated, in part, from the understanding commonly held when the populations were all substantially Christian—prior to the first Muslim invasions. While the populations may have eventually embraced Islam, the earlier popular attitudes, fully developed within the pre-Islamic Byzantine State, would have remained the same. See ELIZABETH REVEL-NEHLER, *THE IMAGE OF THE JEW IN BYZANTINE ART* (David Maizel, trans., 1992).

But the Middle East has also borrowed extensively from the calumnies created in Western Europe in the years after the Islamic conquests of 7<sup>th</sup> centuries. Only recently the Saudis indulged in the old blood libel against the Jews. See Michael Slackman, *Saudi Editor Retracts Article That Defamed Jews*, LOS ANGELES TIMES, MARCH 20, 2002, 2002 WL 2462517. The Egyptians, a nation not noted for freedom of expression, defended on freedom of expression grounds, a television serial, developed for popular consumption, in which the perfidy of the Jews formed the core of a story line. See Yigal Carmon, *Harbingers of Change in the Antisemitic Discourse in the Arab World*, The Middle East Media Research Institute, Inquiry and Analysis Series, No. 135, available at <http://www.memri.org/bin/latestnews.cgi?ID=IA13503> (April 22, 2003) (with reference to the Protocols of the Elders of Zion). Within states actively manipulating the levers of popular cultural development in these ways, it becomes more difficult to understand arguments based on sole individual liability for acts of violence.

168. Adrien Katherine Wing, *Reno v. American-Arab Anti-Discrimination Committee: A Critical Race Perspective*, 31 COLUM. HUM. RTS. L. REV. 561, 591 (2000) (Professor Wing notes that such action "can only lead to politically, socially, and morally unacceptable cycles of death and destruction." *Id.*). But see Paul Butler, *By Any Means Necessary: Using Violence and Subversion to Change Unjust Law*, 50 UCLA L. REV. 721 (2003) (limited violence is justified under just war theories to combat race based executions).

169. See, e.g., <http://www.btselem.org/PRESS/980514.htm>. These, as Professor Wing notes, might ultimately be politically, morally, and socially unacceptable to outside communities. However, these actions invariably need not be legally unacceptable, either as applied against the rules arising from out of the fuhrer principle of international law and responsibility, or as applied against another community where the action is targeted to the manifestation of a cultural subsidy of individual acts of violence meant to pervert, or use to advantage, the international legal system of individual culpability.

toward subsidizing, encouraging, and rewarding, on a tangible or intangible level, then the miscausation of modern international humanitarian law works at its most effective to shield the community for its actions. Suicide bombers provide the most efficient utility of the miscausations inherent in the *führer* principle: the community collectively provides the normative foundation within which suicide bombers can be recruited, trained, and deployed, but only the bomber is liable for her acts of violence. Yet where the bomber dies along with her targets, then responsibility is altogether avoided. What was true enough in the Rwandan genocide of the 1990s applies with equal force in the context of slow motion genocidal acts through the mechanisms of suicide attacks: “Both international and domestic procedures need to acknowledge that massive atrocities usually involve massive complicity by large numbers of perpetrators, at all levels of domestic and international society, and not merely by a select group of government elites.”<sup>170</sup>

It is in this context that the socio-politics of Zionism becomes relevant to the legal construct which is the *führer principle* of international law. Here again, the insights of Critical Race Theory can help us understand better the perversity of the increasingly accepted canard put forward that suggests that the mechanics of popular cultural hatred are targeted against ‘Zionists’ and ‘Zionism’ and not ‘Jews.’<sup>171</sup> Most of the advocates of the Zionism-is-evil and Zionists-are-bad-but-we-all-like-and-respect-‘Jews’ formulation tend to go out of their way to make the distinction between the two. But sometimes the advocates of the distinction forget. That, apparently, occurred during the recent U.N. sponsored racism conference in South Africa. “Books freely distributed by the Arab Lawyer’s Union contained cartoons again equating Israelis with Nazis, and picturing Jews with hooked noses, blood dripping from their hands, and fangs.”<sup>172</sup> But both Critical Race Theory and Queer Theory reveals a deeper and less benign meaning of this rhetorical trope.

It remains, however, to speak of *remedies*. Remedies are most usefully considered as a set of political choices. This becomes quite apparent with respect to the remedy of house demolitions for acts of violence. Merely because a case can be made for house demolitions and

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170. José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons Form Rwanda*, 24 YALE J. INT’L L. 365, 467 (1999) (suggesting larger scale domestic legal action).

171. The genesis of this approach to modern Judeophobia first found institutional expression in the condemnation by the United Nations of Zionism as racism. See G.A. Res. 3379, U.N. GAOR, 30th Sess., Supp. No. 34 at 83, U.N. Doc. A/10034 (1975). For a discussion of the politics of this resolution within the United Nations, see, THOMAS M. FRANCK, NATION AGAINST NATION 205 (1985).

172. Anne Bayefsky, *The U.N. World Conference Against Racism: A Racist Anti-Racism Conference* 96 AM. SOC’Y INT’L L. PROC. 65, 67 (2002).



sealings does not mean that such a policy is either politically efficient nor optimally directed at the entity with the greatest culpability. In its narrowest sense, house demolitions target a strong locus of cultural expression within Palestinian culture—the family and clan structure. As I suggested, it is possible to construct arguments within the confines of the *führer* principle itself to suggest sufficient culpability as aiders and abettors or co-conspirators of the suicide bombers. It is also possible to understand demolition as a culture to culture act—a culturally targeted response to cultural subsidies of violent individual activity. For good or ill, these justifications tend to ring hollow within emerging international popular culture, now accustomed to a heightened solicitude for the ‘innocent’ individual and fierce in the protection (and freedom from responsibility) accorded to state culture (but not necessarily the state and its representatives).<sup>173</sup> The irony here, but one familiar to Critical Race Theory, is that the success of the cultivation of group hatred within popular international culture itself tends to privilege a particular stance, a particular construction of the legal apparatus of the *führer principle* that protects from adverse consequences the machinery of cultural or group hatred and its privileging of violence against the other,<sup>174</sup> while limiting punishment solely to those who will die in furtherance of the violence encouraged, and who, as a consequence, will escape legal penalty completely.

The major difficulty of house demolitions as remedy is, when

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173. See, e.g., David L. Nersessian, *the Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals*, 37 *TX. INT’L L. J.* 231 (2002) (genocide convention); Matthew Lippman, *the 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-five Years Later*, 8 *TEMP. INT’L & COMP. L.J.* 1, 36-39 (1994) (cultural genocide).

174. Professor Sunder suggests, examining the way religion can impede the human rights of women under international human rights norms, that religious fundamentalists take advantage of modern human rights law’s view of religion as

natural, irrational, incontestable, and imposed—in contrast to the public sphere, the only viable space for freedom and reason. . . . Failing to recognize cultural and religious communities as contested and subject to change legal norms such as the “freedom of religion,” the “right to culture,” and the guarantee of “self-determination” defer to the claims of patriarchal, religious elites, buttressing their power over the claims of the modernizers. . . . In short, human rights law, not religion, is the problem.

Madhavi Sunder, *Piercing the Veil*, 112 *YALE L.J.* 133, 1402-1403 (2003). Indeed, as Professor Sunder suggests, the character and identity of Islam “is an especially important issue in places such as Mali, the Philippines, South Africa, and Palestine, where officials are considering reform of personal, customary and religious law.” *Id.* at 1439. In that context, officials must be given incentives, as well, to change customary teachings about the Jew as a religious “other” and the permission, inherent in that customary view, to do violence to this other when the other fails to act as ordered, or as a Muslim deems appropriate. Cf. Barbara Flagg, “*Was Blind But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 *MICH. L. REV.* 953 (1993).

considered outside the narrowing boundaries of the *führer principle*, that it is both overinclusive and underinclusive. The policy of house demolition as remedy is underinclusive because it tends to produce a windfall to all of the members of the political community that either benefit from (directly or indirectly) the cultivation of hatred or who (directly or indirectly) cultivate the hate that constitutes a cultural permission to engage in acts of terror. As such, only some, but not all of the beneficiaries, of cultural hate, are made to bear the burden of responsibility which should be shared by all who benefit. It is also underinclusive to the extent the policy targets only one community. It is overinclusive to the extent the policy tends to include within the community of hate those persons who may not be members of the community, but whose family members are. Thus, the policy tends to include within its sweep people who may have chosen to deny or reject, in public and affirmative ways, inclusion in the community which gives cultural permission to violence.

Commentators who have acknowledged the problem of collective complicity, whether in the form of state or popular responsibility, have suggested a variety of alternatives. “In the contemporary era, many societies are grappling with constructive responses to spirit injury, including ‘rhetorics of history (truth), theology (forgiveness), justice (punishment, compensation, and deterrence), therapy (healing), art (commemoration and disturbance), and education (learning lessons).’”<sup>175</sup> Others, more accepting of the postulates of the *führer principle*, continue to argue in favor of judicial or quasi judicial remedies against individual representatives or actors within a community that does wrong.<sup>176</sup>

I would suggest a different, and much more traditional approach—a tax or fee on cultural violence. There are any number of ways of implementing such a tax. I will suggest one. The tax would have the character of a capitation tax, assessed against all of the members of the community, men, women and children. The tax would be assessed at every instance of violence against any of the members or property of the target community—that is, whenever an act of hate violence is perpetrated against individuals targeted as objects of hate by the

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175. Adrien Katherine Wing, *Reno v. American-Arab Anti-Discrimination Committee: A Critical Race Perspective*, 31 COLUM. HUM. RTS. L. REV. 561, 591 (2000) (quoting, in part, MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 147 (1998)). Professor Wing makes the distinction between collective and individual remedy: “Concretely, the cures can include individual counseling, individual criminal prosecutions, individual suits for damages or restitution, individual or collective apologies, international criminal tribunals (Nuremberg, Former Yugoslavia, Rwanda), truth commissions (South Africa), repatriation, and reparations (Japanese Americans).” *Id.*

176. See, e.g., Alvarez, *supra* note 171.

community maintaining a “web of cultural stereotypes, political imperialism, dehumanizing ideology.”<sup>177</sup> Because the world is still organized on the basis of the nation-state, the source of payment would be the nation-state. Every nation-state in which national or subnational groups, officially or unofficially, directly or indirectly, participate in the privileging of violence would have an obligation to pay the tax forthwith from their treasuries for cultural violence occurring within their jurisdiction.<sup>178</sup>

A cultural hatred tax affirms the power of a community to constitute itself through opprobrium—to generate as a positive cultural value a hatred of and the condoning of violence against, others, on the basis of culturally distinct characteristics. But the tax would also compensate those who feel manifestations of that hatred directly. And because the condoning or perpetuation of hatred is a wrong shared by all of the members of the community, the tax would serve as a personal penalty for complicity in a culture that subsidizes violence through the cultivation of hatred. The effect is to remove the shield from liability that the *führer principle* provides communities without doing harm to the necessity of connecting individuals to individual wrongs. Thus, even for those who cling to the formalist legality of the emerging human rights and humanitarian law frameworks, a cultural hatred tax provides a ready connection between those who profit by, subsidize or perpetuate hatred which is manifested in violent acts against others, and the penalty imposed.<sup>179</sup>

The tendency at this point, especially among western trained lawyers might be to smirk and dismiss. To the extent the smirk is grounded on the refusal to look beyond the individual to the communal context in which individual action is institutionalized, I can only repeat that such narrow formalist blindness to the strength of culture and the

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177. EDWARD W. SAID, *ORIENTALISM* 27 (1978).

178. The states would then have whatever tax and borrowing authority to make up the call on their revenues through other means.

179. A distinction, of course, must be made between political acts and acts generated or subsidized by cultural hatred. In the case of the Israeli-Palestinian dispute, the argument would be made, and indeed the international community prefers to characterize the dispute as strictly political in nature. This, in its own way, was the brilliance of the idea of separating Zionism—a disease carried by all Jews and perhaps by some others—with Judaism (the religion) itself. It is a fine distinction that permits an ostensible secularization of the conflict, without robbing it of its important religious dimension—because all Jews are, by definition either Zionists, or capable of slipping into Zionism at any opportunity. The distinction was harder to make in the disputes that tore apart the old Yugoslavia between Catholic Croats, Muslim Bosnians, and Orthodox Serbs. Indeed, the Balkans provides fertile ground for imposing a system of cultural hatred taxation on the population as a means of extracting the violence subsidy provided by cultures promoting hatred of each other.

contextualization of individual action within the web of cultural permissions and taboos<sup>180</sup> will continue to provide a legal basis for communities to promote individual acts of violence in furtherance of perverse communal lusts—racism, anti-semitism, ethnocentrism and the like<sup>181</sup>—without fear of liability. I would suggest, however, that my proposal is steeped in the most foundational of liberal Western thought.

A culture tax serves not only a compensatory purpose, but a symbolic one as well. I am suggesting that these notions, so well established with respect to individuals, ought to have as great an effect on the conduct of intangibles—juridical, political, religious, social or other communal persons. A culture hate tax, assessed on communities, is also efficient. Its primary benefit is to turn something harmful to productive effect—using of the mechanics of the *führer principle* against itself by turning upside the mechanics of the cultural subsidy of suicide bombers and their families. The tax or assessment, administered through the very state apparatus that encourages the deployment of a normative system of hate and demonization, is meant to cancel in tangible and intangible ways the cultural subsidy, in a rough but symbolically pointed sense.

In this last respect, the tax or assessment shares something in common with one of the foundations of modern Western law—the old Germanic codes. It seems appropriate, in a clash of societies characterized by a modern rhetoric of hate and an ancient form of vendetta, to refer back to an ancient normative structure focused on the elimination of the utility of vendetta.

It was in an attempt to prevent the long-term ill effects of vendettas and blood-feuds that the Germanic customary law, as observed by Tacitus, provided for the payment of set levels of compensation as reparation for the commission of specific injurious acts. In Anglo-Saxon England, this customary practice was condoned by the Church and memorialized in the first and subsequent sets of kings' laws. . . . The kings' laws also expressly prohibited violent acts of self-help-vendettas and acts of vengeance—under most circumstances, and required, instead, that disputants resolve their disputes peacefully, through the legal process.<sup>182</sup>

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180. See Larry Catá Backer, *Chroniclers in the Field of Cultural Production: Interpretive Conversations Between Courts and Culture*, 20 B.C. THIRD WORLD L.J. 291 (2000).

181. See Larry Catá Backer, Altheimer Symposium on Racial Equity in the 21<sup>st</sup> Century: *Culturally Significant Speech: Law, Courts, Society and Racial Equity*, 21 U. ARK. LITTLE ROCK L.J. 845 (1999).

182. Valerie A. Sanchez, *Towards a History of ADR: the Dispute Processing Continuum in Anglo-Saxon England and Today* 11 OHIO ST. J. ON DISP. RESOL. 1, 14-15

But money, while an effective compensatory proxy for returning to a status quo ante, is hardly ever enough. I might suggest that the international legal community might also profit from one of the rare successes of cultural reformation—that of postwar Germany. Perhaps the German constitution provides a rough guide to additional provisions—aimed at both groups and individuals—that would also serve to help communities avoid the temptation of hate. In particular, the German constitutional provisions ensuring the implementation of a militant democracy, *wehrhafte Demokratie*, might be useful in the context in which house demolitions seem so inevitable a response to a culture that condones, even encourages and rewards, violence. In the German context, “[f]undamental rights may be limited or even forfeited (under the terms of Article 18) if they are used to combat or to abolish the constitutional order. . . . Article 9(2) of the Basic Law prohibits associations whose ‘purposes or activities . . . are directed against the constitutional order or the concept of international understanding.’”<sup>183</sup> Article 5 imposes a limitation on arts and science, research and teaching. None of these may be used as a means to “absolve from loyalty to the Constitution.”<sup>184</sup> Most important, perhaps, Article 21 limits the freedom of political parties which “seek to impair or abolish the free democratic basic order or endanger the existence of the Federal Republic. . . .”<sup>185</sup> The German Federal Constitutional Court supported the banning of the Sozialistische Reichspartei<sup>186</sup> and the German Communist Party,<sup>187</sup> on this basis. Combined with a focus on collective responsibility for communal encouragement of violence, an adoption of the system of provisions designed to foster a militant and open democracy, such as those in place in the German Republic, might be far more effective in mediating violence—of both groups and individuals—than the reliance on the amorphous, and usually unhelpful generalities of international

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(1996) (citing to C. TACITUS, *THE AGRICOLA AND THE GERMANIA* 73 (R. B. Townshend trans., 1894) (observing that feuds could be ended by “the payment of a fixed number of cattle and sheep, and [that] this [plan of] compensation [was] . . . greatly to the public advantage, for feuds where men have so much freedom are exceedingly dangerous.”).

183. DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 217-218 (2<sup>nd</sup> ed., 1997).

184. See, GG Art. 5(3), quoted and translated in DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 508 (2<sup>nd</sup> ed., 1997).

185. See GG Art. 21(2), quoted and translated in DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 511 (2<sup>nd</sup> ed., 1997). Americans, especially, find this provision foreign. See, e.g., DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 213 (1994).

186. Sozialistische Reichspartei Case, 2 BverfGE 1 (1952).

187. Communist Party Case, 5 BverfGE 85 (1956)

law.<sup>188</sup>

A culture tax also respects the fundamental principle of human dignity,<sup>189</sup> as well as the principle that there should be a direct relationship between action and responsibility that adversely affects the human dignity of others. A tax, imposes costs but does not order any particular sort of response. It is left to the community itself to respond to the incentives or disincentives created by its normative structures, to change, or refuse to change when the externalities of hate are required to be internalized in a humane way. Such importation of the externalities of hate permit the culture, by its own hand, to develop normative responses unrestrained by the normative values of others. Moreover, the cultural hate tax is not meant to be a substitute for current international law, but a necessary supplement. Effective responsibility of all members of cultural community for its cultural acts leave undisturbed the architecture of individual responsibility for violent actions.

Again, the insights of critical race theory suggest both the relevance and importance of a tax on culturally cultivated hatred, assessed against all of the members of the hating community. Foundational work in this field, like that of Charles Lawrence and Kimberlé Crenshaw,<sup>190</sup> remind us of the ways that individuals, as a community, both construct and profit by cultures of hatred and subordination of a chosen other. Indeed, in the United States, much of the criticism of American jurisprudence is an implicit condemnation of the *führer principle* as applied to the internal law of the United States (especially in the context of 14<sup>th</sup> Amendment jurisprudence). The movement seeking reparations for African-Americans is in part based on a discomfort with the *führer principle* of law as a dangerous form of subsidizing race hatred.<sup>191</sup> Indeed, the United

188. These ideas are developed in more detail in, Larry Catá Backer, *Leviticus as International Law: Milosevich and the Utility of the German Solution to Communal Strife* (forthcoming; on file with author). Indeed, in the context of the Israeli-Palestinian conflict, a mutually enforced provision like that of GG Art. 9 might be quite useful.

189. See, e.g., GG Art. 1 ("Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."), quoted and translated in DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 507 (2<sup>nd</sup> ed., 1997).

190. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

191. See, e.g., Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 374-80 (1987) (demonstrating how adherence to a narrow vision of fault and causation based on a direct physical connection are an impediment to acceptance of reparations as a remedy for past socially subsidized wrongs); Rhonda V. Magee, Note, *The Master's Tools, from the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863, 913-16 (1993). Professor Magee generalizes this

States, like other nations before it, has begun to take tentative steps in this direction.<sup>192</sup>

But do not confuse the indictment of the perversities of the *führer principle* of international law as a plea for communitarianism or communitarian ideals, except perhaps in its most ironic and perverse sense. With communitarians, I agree that the essence of the individual is her tie to the communities to which she belongs.<sup>193</sup> Rather than suggest community as a source of state building, I accept the idea that community, and communal norms, have a privileged position in the constitution of the nature and character of the state. I suggest that with this privilege ought to come not immunity but obligation, in the form of legal responsibility, for the construction and maintenance of communal norms privileging violent individual acts against others. Community, in the sense I use it here, is hardly enough.<sup>194</sup>

#### IV. Conclusion

I would like to end where I started—with core cultural archetypes. This time I return not to what the Christians call the Old Testament, but to the New. In John, the understandings and consequences of the deal made by the People of Israel with God come to fullness. Jesus is sacrificed to the Romans by the hand of the People of Israel, so that the nation might live. The story, unique to John, is well known, though usually misinterpreted in the standard commentaries:

Many of the Jews therefore, who had come with Mary and had seen what he did, believed in him; but some of them went to the Pharisees and told them what Jesus had done. So the chief priests and the Pharisees gathered the council, and said, "What are we to do? For this man performs many signs. If we let him go on thus, every one will believe in him and the Romans will come and destroy both our holy place and our nation." But one of them, Caiaphas, who was high priest that year, said to them, "You know nothing at all; you do not understand that it is expedient for you that one man should die for the people, and that the whole nation should not perish. He did not

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rejection as applied to 14 Amendment jurisprudence in later work. See Rhonda V. Magee, *the Third Reconstruction: an Alternative to Race Consciousness and Colorblindness in Post-slavery America*, 54 ALA. L. REV. 483 (2003).

192. See, e.g., Eric K. Yamamoto, *Racial Reparations: Japanese-American Redress and African-American Claims*, 19 B.C. THIRD WORLD L.J. 477 (1998).

193. For a discussion of the nature and character of communitarian community, see, e.g., Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685, 692-719 (1992).

194. For another argument about the limits of communitarianism in the context of state building, see, e.g., Wendy Brown-Scott, *The Communitarian State: Lawlessness or Law Reform for African-Americans?*, 107 HARV. L. REV. 1209 (1994).

say this of his own accord, but being high priest that year he prophesied that Jesus should die for the nation, and not for the nation only, but to gather into one the children of God who were scattered abroad.<sup>195</sup>

Here is a story of an altogether different form of kingship and sacrifice built into the framework of Western thought. Alan Watson captured the essence of this passage well:

They faced a dilemma. In the eyes of some or even many Jews, Jesus was a special person deserving protection, but if he were not sacrificed, the whole nation would perish. For the Romans to come and take Jesus would be no solution. Some people would see that as an affront and rebel, thus likewise endangering the nation. The Sanhedrin had to take the initiative in arranging Jesus' destruction.<sup>196</sup>

In John we are presented with a variation of the story of the kingship of Saul. In John's retelling, from God—the inescapable normative context of their constitution—the people have secured a proxy against destruction, for when the community errs or is threatened, it is their proxy, the king, who pays in the place of the community. The Lamb of God serves as the shield, a necessary shield it would appear from the inevitabilities set into motion by the birth of Jesus, for a community that bears responsibility but must be preserved.<sup>197</sup> But here the Lamb is not the King of Israel—Saul—a man appointed as surrogate on earth by God, but rather an aspect of the Divine power manifested as a man, who combines again both the royal power ceded by God to the House of David and the unlimited power of the Divine.<sup>198</sup> John, thus, attempts a closure in the rupture between God and His community created by the original demand for a king in what, for Christians, would be the only possible way—through the re-effectuation of *ultimate* divine sovereignty

195. *John* 11:45-52 (Rev. Standard Ver.).

196. ALAN WATSON, *JESUS AND THE JEWS: THE PHARISAIC TRADITION IN JOHN 55* (1995) (describing the rabbinic tradition of the sacrifice of one so that the nation might live as developed during the period in which the Gospels were written, *id.* at 54-57).

197. Jews, of course, might read the passage with a great deal of irony, given the peculiar way in which the Christian community took the fundamental message of the sacrifice to heart, at least with respect to the Jews.

198. This accorded with the connection between God and man in the ceremonial of the scapegoat—*Leviticus* 16:7-8 (“And he shall take the two goats, and set them before the Lord at the door of the tent of meeting. An Aaron shall cast lots upon the two goats; one lot for the Lord and the other for Azazel.”). The Lord's goat was to be offered for sacrifice, the other “shall be used for making atonement by sending it into the desert as a scapegoat.” *Leviticus* 16:10. This also accords, for Christians seeking a physical manifestation of the promise made by the Divine through the Prophets of a time when God will again become the shepherd of the Divine flock, *Ezekiel* 34:1-34:19, with the fulfillment of that promise.



in the form of a facet of God made man. But the Divine cannot be contained by the limits of the physical body. The Divine kingship must be brought back “home.” Thus, the manifestation of Divine power is again activated through sacrifice—the one for the many. Thus removed again from direct contact with the world, the community can once again mediate its relations to God (its *nomos*) through the miscausations of the individual—elevated to actor or leader.<sup>199</sup>

John's retelling of the story of Jesus and Pharisees confirms the enduring importance of the Saul story as a template for human behavior. This template survives the Crucifixion, even for Christians, who must await the return of the “King of Kings” and the (re)establishment of the divine order on earth. This template has even survived religion, to find expression in the formation of the core mores of international law: the leader has authority, the community has control; the leader may command, but the community follows its own passions. The community cultivates the ideology of the individual, free will and power, but constrains each; those who appear to lead, to act—those communal surrogates of communally understood divine will, the divine surrogates on earth—also serve as the surrogates for communal responsibility for its wants, desires and actions. By continuing to fix the communal gaze on the Divine, by cultivating error, in this case through the construction of a “divine” international law of individual responsibility, communities can continue to live through the sacrifice of individuals as incarnations of the nation. In an ironic sense, then, this is an international law of Biblical proportions.<sup>200</sup>

Communities—the nation-state, religious communities, terrorist organizations—are arranged through a cultivation of error. Nietzsche understood these as errors of causation: mistaking causes for effects,

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199. Thus, for Nietzsche, the concentration of the disjunction between Jesus as evangel, and what was thereafter made of Jesus, the redeemer, so that, in death, the emerging Christian community could convert Jesus into an image of themselves.

[T]he frenzied veneration of those totally unhinged souls no longer endured the evangelic conception of everybody's equal right to be a child of God, as Jesus had taught: it was their revenge to *elevate* Jesus extravagantly, to sever him from themselves—precisely as the Jews had formerly, out of revenge against their enemies, severed their God from themselves and elevated him. The one God and the Son of God—both products of *ressentiment*.

Friedrich Nietzsche, *The Antichrist*, *supra* note 42, at ¶ 40 (615-616).

200. The error of the emerging international legal order, its dangerous incompleteness, thus joins that of its predecessors—religion and morality: “Morality and religion belong altogether to the *psychology of error*: in every single case, cause and effect are confused; or truth is confused with the effects of *believing* something to be true; or a state of consciousness is confused with its causes.” Friedrich Nietzsche, *Twilight of the Idols*, *supra* note 19, at 499.

assuming a false causality, creating an imagined causality, and assuming a free will. These errors of causation are the tools of certain individuals, or classes of individuals, for the purpose imposing authority over a community. These structural hegemonists—the judge, the priest, the king, the president, the charismatic leader of violent sub-national communities—all of these are the stuff of theory. Nietzsche shows us how, from the individual perspective, priest and error can be dangerous. Yet Nietzsche also confirms how priest and error can be of great value in the deployment of institutions to control communities. In contrast, the community itself, those who are led, dominated, controlled, manipulated, are considered only in the passive. They are the victims, the weak-willed, the powerless, the sheep, the herd. They obey because they must.<sup>201</sup>

Yet authority is not control. Reality is more subtle and layered than a direct relationship between authority and control. Again, Nietzsche provides valuable insight on the relationship between ruler and ruled. Just as the priest, the leader can use miscausation to preserve individual authority, so the community uses miscausation to assert communal power—over the priest, the president, the judge, the leader. In an ironic twist of causation I will argue that the priest, the legislator, the leader does not usurp dominion over the herd. Instead, the herd, for its own preservation as a herd, demands the overlordship of the leader. Leaders, held up as an independent actor, are better understood as the sword and the shield of the communities of the powerless over whom they appear to assert an independent authority.

I have offered an extended Nietzschean joke: the *necessity* of error. The cult of the leader in modern legal, and political theory itself constitutes a titanic act of mis-causation in four parts: (1) that communities are protected not because they are weak, but because they are strong, to protect the community against blame for action committed in its name by its leaders; (2) that the leader is dependent on the community, that is the leader acts in conformity to the wishes of the people; (3) that the leader then serves as proxy for the community; the doctrine of personal responsibility for communal acts protects a community by sacrificing its leaders for acts of communal wrongs; and (4) that the community, the sheep, are in actuality the Shepherd in a world arranged to minimize the costs of inter-community conflicts for power.

For modern political and legal theory, this mis-understanding can problematize the most imperative legal logic of the last century. I offered an example from the public sphere—the relationship between

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201. NIETZSCHE, GENEALOGY OF MORALS, *supra* note 95, at I-10-14.

community and principles of personal responsibility in international humanitarian law. If indeed, the herd is master, if it is the herd, through its levers of cultural, ethnic, or political instruction that teaches, prepares, supports, incites, encourages, condones, and sends out an individual—whether directly or indirectly—to actualize the will or “fantasy will” of the people, then the bearer of legal, moral and political responsibility should not be limited to the individual instrumentality of group hatred—the suicide bomber, the rock thrower, the saboteur—but should embrace as well the community that spawned these instrumentalities of hatred, of group will.<sup>202</sup> If the community uses as a shield against liability the individual who acted, ought not the members of the community, as well as its leaders, also bear responsibility for the communal acts that educated, prepared, and sent the individual off on her mission? Modern humanitarian law avoids the question and focuses singlemindedly on the individual. My discussion suggests that the answer may not be as clear cut as the humanitarian jurisprudence and philosophy of the years after the Second World War have made it appear.<sup>203</sup> Or, perhaps, the answer is simple—where law offers the possibility of perversion, of its use against itself—then politics dictates that the possibility will be made fact. Hiding behind the dead in the Israeli-Palestinian Wars, and profiting immensely therefrom within the battleground of world opinion, seems to have served at least one side of that war well indeed, but at a terrible price. For whatever be the end of that conflict, the great communal

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202. There is a connection here, of course, between group will as a valid object of legal responsibility, and the ancient North African idea of ‘asabiyah—group feeling, as the intangible but powerful force that holds a group together, and that forms the basis and grounding of every individual action. The term in Arabic is “asabiyah.” ‘ABD-AR RACHMAN IBN KHALDŪN, *THE MUQADDIMAH: AN INTRODUCTION TO HISTORY* (Franz Rosenthal, trans., N.J. Dawood, ed., 1967) (1377) (*Muqaddimah* (Introduction) to *Kitāb al-‘Ibar* (Book of the History of the World) at 97-119. Ibn Khaldun intuited that communities have a natural life like individuals (*id.* at 136); and posited a cyclical existence for individuals and communities based on a variety of perceived factors and conditions, leading nowhere but to patterns of repeatable human condition. *See also* Robert W. Cox, *Towards a Post-Hegemonic Conceptualization of World Order: Reflections on the Relevancy of Ibn Khaldun*, in *GOVERNMENT WITHOUT GOVERNMENT: ORDER AND CHALLENGES IN WORLD POLITICS* 132, 153 (James N. Rosenau and Ernst-Otto Czempiel, eds., 1992) (*‘asabiyah* is the form of intersubjectivity that pertains to the founding of a state; *id.*).

203. I have considered, with a certain amount of irony and double meanings, Peter Fitzpatrick’s quite astute observation, in the context of a far more complicated analysis, that “[w]hat, then, impels law is not, contrary to standard attribution, the enduring achievement of a determined or posited certainty. An achieved certainty would simply and fully ‘be’ and there would be no call for law. Law is called upon to effect certainty always in the face of uncertainty.” PETER FITZPATRICK, *MODERNISM AND THE GROUNDS OF LAW* 69 (2001). Yet certainty can serve to conceal and misdirect as well as to reveal and direct. Modern humanitarian law tends to do both—reveal and make certain with respect to individual action, and conceal and misdirect with respect to communal activity.

mechanisms of hate—the most potent tool for converting individuals into weapons of war—will not have been dismantled, and the community that created it will not suffer in the least because of it.

Perhaps Palestine offers us, in this respect, an important lesson for the 21st century: cultural power free from restraint, the utility of disassociating individual action from communal incitement to act, and the cultivation of collective hatred as a protected value of international human rights law. The necessity of the creation of a Palestinian political entity within the dar al-Islam should not blind the West to the price it has been willing to pay to achieve this end. Hatred of another, cultivated as a core value of socio-religious and political organization, can long survive its utility to the international community. The dissolution of Yugoslavia into its ethnic and religious components should have provided a warning; but it did not. The grand lesson for the 21<sup>st</sup> century will surely be that National Socialism and its horrors did not constitute a comprehensive catalogue of human evil, and a legal structure built to prevent National Socialist atrocities will prove wholly inadequate to confront persistent and collective evil in this century.

