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Individual Responsibility for Assisting the Nazis in Persecuting Civilians

Stephen J. Massey*

Recent events—the controversy over President Reagan's visit to Bitburg, the attempt to identify Josef Mengele's remains, the extradition and pending trial of John Demjanjuk, and the strife over Kurt Waldheim's election in Austria—demonstrate that the need to remember and assign responsibility for the Holocaust has retained its urgency. The United States is implicated in that tragedy by its failure to do more to rescue threatened Jews during World War II,¹ and by its post-war immigration policies, which allowed entry to persons who had assisted the Nazis in persecuting civilians.

Since its establishment, the Justice Department's Office of Special Investigations (OSI) has attempted to identify those persons whose entry into the United States was illegal because they assisted the Nazis in persecuting civilians on the basis of race, religion, national origin, or political opinion, and it has initiated a series of suits to denaturalize and deport such persons.²

This Article focuses on the central issues these cases raise.³

* Attorney, Cravath, Swaine & Moore, New York, New York. I presented an earlier version of this Article to New York University's Law and Philosophy Colloquium and acknowledge the helpful comments and suggestions I received from the participants. I would like to thank Jim Weygant and, especially, Debra Livingston for our many discussions of the issues and for their assistance in improving the Article.

1. See, e.g., D. WYMAN, *THE ABANDONMENT OF THE JEWS* (1984). Although he argues that the War Rescue Board, the United States government's main effort, came into existence far too late, Wyman credits it with saving approximately 200,000 Jews. *Id.* at 285-87. He holds a broad range of individuals and groups responsible for failing to pursue other rescue proposals, which he believes could have saved the lives of many more Jews. *Id.* at 311-40.

2. See A. RYAN, *QUIET NEIGHBORS: PROSECUTING NAZI WAR CRIMINALS IN AMERICA* (1984) (describing genesis and scope of efforts to identify and prosecute persons living in the United States who assisted the Nazis).

3. This Article does not address all of the legal issues the cases raise. For example, the Article does not consider the problems of identification raised when witnesses seek to identify defendants as many as forty years after the events in question occurred. See generally D. Nesselson & S. Lubet, *Eye-witness Identification in War Crimes Trials*, 2 *CARDOZO L. REV.* 71, 75-94

Part I includes a brief synopsis of the statutory framework underlying the cases. Part II then provides an extensive discussion of the leading Supreme Court case, *United States v. Fedorenko*.⁴ Part III follows with an analysis of some difficult cases that arose after the Supreme Court's decision in *Fedorenko*. Because the Court decided *Fedorenko* before the lower courts had much opportunity to construe the applicable statutory provisions, these later cases present precisely those "more difficult line-drawing problems" the Court identified but did not resolve in *Fedorenko*.⁵ The belief that a defendant assisted in persecution only if he personally participated in persecution has constrained lower courts deciding these cases.⁶ The courts' language and the results they reach, however, are often more consistent with an approach to assistance in persecution that looks not just to whether the defendant personally participated in persecution, but also to whether the defendant knowingly made more than minimal contributions to a group whose objective was to persecute civilians.⁷ The result has been unpredictable and inconsistent treatment of precisely what constitutes assistance in persecution.

Having addressed the state of the law in Parts I-III, Part IV of this Article discusses some recent philosophical work on individual and collective responsibility that offers guidance to

(1980) (discussing problems of proof and identification raised by denaturalization proceedings). Nor does the Article discuss the due process questions that have so bothered some courts. See, e.g., *United States v. Kowalchuk*, 773 F.2d 488, 501-06 (3d Cir. 1985) (Aldisert, C.J., dissenting) (arguing that the majority had countenanced severe due process violations), *cert. denied*, 106 S. Ct. 1188 (1986).

4. 449 U.S. 490 (1981).

5. *Id.* at 513 n.34.

6. See, e.g., *Laipenieks v. INS*, 750 F.2d 1427, 1432 (9th Cir. 1985) (holding that assistance in persecution under 8 U.S.C. § 1251(a)(19) (1982) requires "proof of personal active assistance or participation in persecutorial acts"); see also *United States v. Sprogis*, 763 F.2d 115, 122-23 (2d Cir. 1985) (holding that the government failed in its burden of proof where it could show only that defendant had "passively accommodated the Nazis, while performing occasional ministerial tasks . . . which by themselves cannot be considered oppressive").

7. See, e.g., *United States v. Kowalchuk*, 571 F. Supp. 72, 81 (E.D. Pa. 1983) (stating that although evidence did not sufficiently prove that the defendant had personally participated in the atrocities, "the evidence as a whole leaves little doubt that . . . the defendant, must have known of the harsh repressive measures which [his organization was] carrying out pursuant to German direction"), *aff'd on other grounds*, 773 F.2d 488 (3d Cir. 1985) (en banc), *cert. denied*, 106 S. Ct. 1188 (1986); *United States v. Dercacz*, 530 F. Supp. 1348, 1351 (E.D.N.Y. 1982) (finding assistance in persecuting civilian Jews where defendant admitted to bringing Jews not wearing armbands to police station and to reporting civilians who sold food to Jews).

courts deciding what constitutes assistance in persecution. Moral philosophers have focused on contexts in which individuals may seek to deflect blame onto the organizations of which they are a part by arguing that "the organization" is to blame,⁸ that they were only doing their jobs,⁹ or that their contributions were too minimal to justify holding them morally responsible.¹⁰ In analyzing such situations, philosophers have examined the problems various groups present for assigning individual responsibility and have argued that to properly evaluate an individual's acts it is necessary to consider how those acts foreseeably combine with the acts of others to produce significant effects, for good or evil.¹¹

Drawing from the work in moral philosophy, this Article proposes that courts treat personal participation in persecution as a sufficient, though not necessary, condition of finding that a defendant assisted in persecution. Part of the reason for this conclusion is the difficulty of defining "assistance in persecution." Even when it is impossible to characterize a defendant's own acts as persecutorial, he may have assisted in persecution by virtue of knowingly having made more than minimal contributions to an organization which had as an objective the persecution of civilians. The philosophical work provides guidance in the difficult task of assessing an individual's contribution to a collective outcome.

Although the intention of this Article's philosophical discussion is to shed light on the central legal issues, a consideration of the cases included in Part IV may also advance understanding of the general problem of assigning individual responsibility for the outcomes of collective efforts. Although helpful, the contributions of moral philosophers are sometimes

8. See, e.g., French, *Morally Blaming Whole Populations*, in PHILOSOPHY, MORALITY, AND INTERNATIONAL AFFAIRS 226, 278-82 (V. Held, S. Morgenbesser, T. Nagel eds. 1974) (discussing instances where collectivity is blameworthy although individual members are not). See also Cooper, *Collective Responsibility*, 43 PHIL. 258, 260 (1968) (analyzing fault of tennis club for closing which could not be ascribed to individual members).

9. See, e.g., T. TAYLOR, *NUREMBURG AND VIETNAM: AN AMERICAN TRAGEDY* 42-53 (1970) (addressing the defense of obedience to a superior's orders). See also Wasserstrom, *The Responsibility of the Individual for War Crimes*, in PHILOSOPHY, MORALITY, AND INTERNATIONAL AFFAIRS 47, 56-62 (examining moral culpability of combat soldiers who obey orders from superiors).

10. See, e.g., Ladd, *Morality and the Ideal of Rationality in Formal Organizations*, 54 THE MONIST 488, 513-15 (1970) (discussing moral responsibility of individuals for organizational actions and decisions in which they played negligible or small roles).

11. See *infra* notes 225-261 and accompanying text.

limited by their emphasis on contrived¹² or trivial¹³ situations or on the responsibility of only relatively high-level officials.¹⁴ The cases, in contrast, involve serious situations rich and varied in detail; the defendants are often relatively low-level personnel. A better understanding of how to correctly decide the cases may thus enhance understanding of the responsibility of low-level personnel for their contributions to collective outcomes.¹⁵

The final section of this Article, Part V, addresses the question whether the Government should continue to maintain a special unit of the Justice Department, the OSI, devoted to identifying, denaturalizing, and deporting individuals who committed crimes long ago and who have, since then, lived law-abiding lives in the United States for many years. Some have argued for the abolition of the OSI or for the imposition of a statute of limitations on the charges it brings.¹⁶ One courtroom observer aptly expressed the sentiment behind such demands when, while passing by a hearing room in which the OSI was seeking to deport a person who had assisted the Nazis in persecution, he asserted that "the money for bringing the [deportation] case would be used better to prosecute drug dealers."¹⁷

12. See, e.g., J. FEINBERG, *Collective Responsibility in DOING AND DESERVING* 222, 248 (1970) (discussing individual responsibility for failure to act to save property when Jesse James robbed entire car full of passengers).

13. See, e.g., Cooper, *supra* note 8, at 260 (1968) (analyzing individual responsibility of members for closing of local tennis club).

14. See generally Levinson, *Responsibility for Crimes of War*, 2 PHIL. & PUB. AFF. 244 (1973) (focusing on responsibility for war crimes of relatively high-level officials in Germany during World War II and in America during the Vietnam War). See also Wasserstrom, *supra* note 9, at 63-70 (same). *But see id.* at 57-62 (addressing responsibility for war crimes of individual soldiers in battle). Cf. Wasserstrom, *The Relevance of Nuremberg*, 1 PHIL. & PUB. AFF. 22, 29-40 (1971) (analyzing responsibility for war crimes of inductee who must decide whether to accept conscription).

15. The technique Claude Lanzmann employs in his highly acclaimed documentary, *Shoah*, also emphasizes the responsibility of lower-level personnel, including the non-Jewish inhabitants of villages from which the Germans took and murdered all Jews. Because Lanzmann does not use films from the era, the highest officials actually involved in the killing that the viewer sees are relatively low-level SS personnel and camp guards. In the same way as do these cases, *Shoah* forces the viewer to reflect on the responsibility of people other than high-level officials for collective outcomes.

16. The Baltimore Jewish Times, March 15, 1985, at 66; see also *United States v. Fedorenko*, 455 F. Supp. 893, 899 (S.D. Fla. 1978) (questioning the basis of enormous government expenditures in denaturalization proceeding against "model American citizen" which exceeded expenditures in prosecution of mafia don), *rev'd*, 597 F.2d 946 (5th Cir. 1979), *aff'd*, 449 U.S. 490 (1981).

17. The Baltimore Jewish Times, *supra* note 16, at 66.

This Article addresses these questions and sentiments and concludes that the OSI should remain intact and that the imposition of a statute of limitations on the charges it brings is inappropriate.

I. THE STATUTORY FRAMEWORK

A. DENATURALIZATION

Historically, the Government has initiated both denaturalization and deportation proceedings against persons whom it believes assisted the Nazis in persecuting civilians.¹⁸ The Government's authority to denaturalize a citizen derives from the Immigration and Nationality Act of 1952 (1952 Act).¹⁹ Although a suit to denaturalize is a civil proceeding, the Government must show, by "evidence of a clear and convincing character,"²⁰ that citizenship was "[1] illegally procured or . . . [2] procured by concealment of a material fact or by willful misrepresentation."²¹

18. Although in both denaturalization and deportation proceedings the Government has offered, with some success, grounds unrelated to the claim that the defendant assisted the Nazis in persecuting civilians, this Article focuses on that claim alone.

19. Ch. 477, 66 Stat. 163 (1953) (codified as amended at 8 U.S.C. § 1451(a) (1982)). This section provides that:

It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title [8 USCS 1421(a)] in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: Provided, That refusal on the part of a naturalized citizen within a period of ten years following his naturalization to testify as a witness in any proceeding before a congressional committee concerning his subversive activities, in a case where such person has been convicted of contempt for such refusal, shall be held to constitute a ground for revocation of such person's naturalization under this subsection as having been procured by concealment of a material fact or by willful misrepresentation. If the naturalized citizen does not reside in any judicial district in the United States at the time of bringing such suit, the proceedings may be instituted in the United States District Court for the District of Columbia or in the United States district court in the judicial district in which such person last had his residence.

20. *Schneiderman v. United States*, 320 U.S. 118, 123 (1943).

21. 8 U.S.C. § 1451(a) (1982). Section 18 of the 1961 amendment to the Im-

In denaturalization suits for illegal procurement of citizenship,²² the Government argues that a defendant's failure to lawfully enter the United States²³ by means of a valid immigration visa, a condition precedent to naturalization, mandates denaturalization.²⁴ The Government reasons that because such defendants assisted in the persecution of civilians, the defendants were ineligible for visas under the terms of the acts permitting their entry into the United States.²⁵ A defendant's willful mis-

migration and Nationality Act, Pub. L. No. 87-301, 75 Stat. 650, 656 (codified as amended at 8 U.S.C. § 1451(a) (1982)) restored illegality in the procurement of naturalization as a ground for revocation of naturalization. Although this ground had been present in prior revocation statutes, it was omitted from the Immigration and Nationality Act (1952 Act) as originally enacted. See H.R. REP. NO. 1086, 87th Cong., 1st Sess. 39, *reprinted in* 1961 U.S. CODE CONG. & AD. NEWS 2950, 2982.

22. "Naturalization is illegally procured if some statutory requirement which is a condition precedent to naturalization is absent at the time the petition was granted." H.R. REP. NO. 1086, *supra* note 21, at 39; 1961 U.S. CODE CONG. & AD. NEWS, *supra* note 21, at 2983.

23. See 8 U.S.C. § 1427(a) (1982).

24. See 8 U.S.C. § 1181(a) (1982); see also Immigration Act of 1924, Ch. 190, § 13(a), 43 Stat. 153, 161 (1924) (repealed 1952).

25. Many defendants entered the United States pursuant to the terms of the Displaced Persons Act of 1948 (1948 Act), Ch. 647, 62 Stat. 1009 (1948). See, e.g., *United States v. Dercacz*, 530 F. Supp. 1348, 1349 (E.D.N.Y. 1982) (defendant entered the United States in 1949). In its definition of "displaced person" eligible for entry, the 1948 Act incorporated annex I of the Constitution of the International Refugee Organization (IRO), which stated that persons who had "assisted the enemy in persecuting civil populations of countries" were not "the concern" of the IRO. I.R.O. CONST. annex I, pt. II, *reprinted in* 62 Stat. 3037, 3051-52 (1948); Displaced Persons Act of 1948, Ch. 647, § 2(b), 62 Stat. 1009 (1948).

In 1950, the 1948 Act was amended, and additional defendants were admitted pursuant to that amendment. An Act to Amend the Displaced Persons Act, Ch. 262, 64 Stat. 219 (1950). The amended § 13 barred visas to "any person who advocated or assisted in the persecution of any person because of race, religion, or natural origin." *Id.* at 227. See, e.g., *United States v. Sprogis*, 763 F.2d 115, 117 n.2 (2d Cir. 1985) (defendant entered America in 1950 under terms of amended 1948 Act).

Other defendants have entered the United States under the provisions of the Refugee Relief Act, Ch. 336, 67 Stat. 400 (1953) (omitted 1957), which contained a provision, § 14(a), which barred visas to "any person who personally advocated or assisted in the persecution of any person or group of persons because of race, religion, or national origin." *Id.* at 406. *But see* A. RYAN, *supra* note 2, at 327 n.* (asterisk-indicated footnote) (Act "contained no effective enforcement mechanism against the Nazi war criminals it ostensibly barred").

Finally, some defendants have entered under the normal procedures of the 1952 Act, Ch. 477, 66 Stat. 163 (1953) (current version at 8 U.S.C. § 1182 (1982)). Ryan states that because this Act

did not bar Nazis until the Holtzman amendment of 1978, [OSI's] task was slightly more complex. In those cases, [OSI] produced the State Department officials who had issued the visas; they testified that they

representation or concealment of facts, such as his residence or occupation during the war, also provides a basis for the Government's claim that a visa was illegally obtained.²⁶

Similarly, the Government supports denaturalization suits on the ground that, subsequent to admission, the defendant procured citizenship "by concealment of a material fact or by willful misrepresentation."²⁷ The facts typically concealed or misrepresented were the defendant's wartime location,²⁸ employment,²⁹ or organizational affiliations.³⁰ Thus, the Govern-

had the discretion to deny a visa to anyone who, in their opinion, would not have been a desirable immigrant, and that this certainly included Nazi war criminals.

A. RYAN, *supra* note 2, at 248 n.* (asterisk-indicated footnote). Only a few defendants have entered under the terms of the earlier 1924 and 1918 Acts.

26. Section 10 of the 1948 Act states that "[a]ny person who shall willfully make a misrepresentation for the purposes of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States." Displaced Persons Act of 1948, Ch. 647, § 10, 62 Stat. 1009, 1013 (1948).

Section 212 of the 1952 Act, currently found at 8 U.S.C. § 1182(a)(19) (1982), similarly renders ineligible for a visa any person who has "procured a visa . . . by willfully misrepresenting a material fact." Immigration and Nationality Act, Ch. 477, § 212, 66 Stat. 163 (1953).

As a third basis for claiming that a defendant illegally obtained citizenship, the Government argues that the defendant lacks the good moral character required for citizenship. *See* 8 U.S.C. §§ 1427(a)(3), 1427(e) (1982). Evidence offered to show lack of good moral character is generally either evidence pointing to assistance in persecution or evidence that the defendant made material misrepresentations in the process of acquiring citizenship. *See* 8 U.S.C. § 1101(f)(6) (1982). Because either of these underlying bases themselves provide a legally sufficient reason for denaturalizing a defendant, courts have properly treated the claim that the defendant lacks good moral character as a subsidiary argument to which they have devoted minimal attention or analysis. *See, e.g.,* United States v. Demjanjuk, 518 F. Supp. 1362, 1382 nn.45, 47 (N.D. Ohio 1981) (treating briefly the claim that defendant lacks required good moral character and employing the claim merely as an additional reason to denaturalize), *aff'd*, 680 F.2d 32 (6th Cir.), *cert. denied*, 459 U.S. 1036 (1982); United States v. Osidach, 513 F. Supp. 51, 103 n.31 (E.D. Pa. 1981) (same).

27. 8 U.S.C. § 1427(a) (1982).

28. *See, e.g.,* United States v. Demjanjuk, 518 F. Supp. 1362, 1381-82 (N.D. Ohio 1981) (defendant suppressed facts concerning his whereabouts during the war which, if disclosed, would have warranted denial of his petition for naturalization), *aff'd*, 680 F.2d 32 (6th Cir.), *cert. denied*, 459 U.S. 1036 (1982).

29. *See, e.g.,* United States v. Dercacz, 530 F. Supp. 1348, 1352-53 (E.D.N.Y. 1982) (defendant misrepresented himself as having been a dairy farmer in Poland during the war).

30. *See, e.g.,* United States v. Schellong, 547 F. Supp. 569, 574-75 (N.D. Ill. 1982) (defendant's failure to list with specificity his affiliation with organizations such as the SS Death's Head Unit "Sachsen" constituted concealment of a material fact and justified revocation of citizenship), *aff'd*, 717 F.2d 329 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984).

ment maintains that not only those concealments or misrepresentations made in the process of obtaining a visa, but also those made at the time the defendant sought naturalization, are relevant.

B. DEPORTATION

The Government's authority to deport derives from section 241(a) of the 1952 Act.³¹ In seeking to deport a defendant, the Government relies on two principal grounds. As in suits for denaturalization, fraudulent statements or misrepresentations made to obtain a visa provide a basis for deportation.³² Here also, the fraudulent or willful material misrepresentations typically involve either the defendant's location or employment during the war, or his organizational affiliations.³³ The Government in deportation cases also maintains that persons who assisted in persecuting civilians and who entered the country under the terms of various Acts which explicitly rendered ineligible those who had assisted the enemy in persecuting civilians, lacked valid visas at the time of their entry and are, thus, deportable under 8 U.S.C. §§ 1181(a) and 1251(a)(1) (1982).³⁴

Because the terms of early Acts did not contain explicit exclusions, difficulty in deporting individuals who entered the

31. Currently codified at 8 U.S.C. § 1251(a) (1982).

32. Such statements provide a basis for deportation on several different legal grounds. First, if the defendant entered the country under the terms of the 1948 Act, his visa is invalid under § 10 of that Act. *See supra* note 26 and accompanying text. Second, if the defendant entered under the 1952 Act he is ineligible to receive a visa and excludable according to 8 U.S.C. § 1182(a)(19) (1982). *See supra* note 26. Provisions of the 1952 Act apply only to those defendants entering the country after that Act became effective. Although the 1924 Act did not contain a specific statutory ground rendering excludable those persons who obtained a visa through misrepresentation, it did provide, in § 13(a)(1), that an alien is excludable unless he has an unexpired immigrant visa. Immigration Act of 1924, Ch. 190, § 13(a)(1), 43 Stat. 153, 161 (1924) (repealed 1952). Cases interpreting § 13(a) of the 1924 Act have held that a visa obtained through a material misrepresentation "is not a valid visa and hence is no visa." *Ablett v. Brownell*, 240 F.2d 625, 629 (D.C. Cir. 1957). *See also* *United States v. Shaughnessy*, 186 F.2d 580, 582 (2d Cir. 1951) in this regard. Finally, because a visa obtained through fraud or willful misrepresentation is not valid, a third basis for exclusion is 8 U.S.C. § 1181(a) (1982). *See infra* note 34.

33. *See supra* notes 28-30.

34. 8 U.S.C. § 1181(a) (1982), in relevant part, provides that "no immigrant shall be admitted into the United States unless at the time of application for admission he (1) has a valid, unexpired immigrant visa . . ." 8 U.S.C. § 1251(a) (1982) provides that the Attorney General can order deportation of any alien who "at the time of entry was within one or more of the classes excludable by the law existing at the time of entry[.]"

country under their terms was expected.³⁵ This concern led, in 1978, to passage of the Immigration and Nationality Act—Nazi Germany (1978 Act).³⁶ The 1978 Act explicitly renders ineligible to receive visas, excludable from admission,³⁷ and deportable³⁸

[a]ny alien who during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with—

- (A) the Nazi government in Germany,
- (B) any government in any area occupied by the military forces of the Nazi government of Germany,
- (C) any government established with the assistance or cooperation of the Nazi government of Germany, or
- (D) any government which was an ally of the Nazi government of Germany,

ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.³⁹

Because denaturalization and deportation proceedings can rest on various grounds, the cases involve a variety of different statutory formulations, including: 1) “assisted the enemy in persecuting civil populations;”⁴⁰ 2) “advocated or assisted in the persecution of any person because of race, religion, or national origin;”⁴¹ 3) “personally advocated or assisted in the persecution of any person or group of persons because of race, religion, or national origin;”⁴² and, 4) in collaboration with the Nazis, “ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin,

35. See 1978 U.S. CODE CONG. & AD. NEWS 4700, 4702.

36. Immigration and Nationality Act—Nazi Germany, Pub. L. No. 95-549, 92 Stat. 2065 (1978) (codified at 8 U.S.C. 1182(a)(33), 1182(d)(3), 1251(a)(19), 1253(h), 1254(e) (1982)). See H.R. REP. NO. 1452, 95th Cong., 2d Sess. 3 (1978), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 4700, 4702.

37. § 212(a)(33) of the 1952 Act (codified at 8 U.S.C. § 1182(a)(33) (1982)).

38. § 241(a)(19) of the 1952 Act (codified at 8 U.S.C. § 1251(a)(19) (1982)).

39. *Id.* Even when a person is deportable under other statutory sections, the Government has pressed for finding deportability under 8 U.S.C. § 1251(a)(19) because discretionary relief by the Attorney General is unavailable to aliens found deportable under the latter provision. See The 1952 Act, *supra* note 25, §§ 241(f) (waiver); 243(h)(2)(A) (withholding); 244(a) (suspension); 244(e) (voluntary departure) (currently codified at 8 U.S.C. §§ 1251(f); 1253(h)(2)(A); 1254(a), and 1254(e) (1982) respectively). A defendant found deportable under 8 U.S.C. § 1251(a)(19) also is ineligible for asylum under § 208 of the 1952 Act (codified at 8 U.S.C. § 1158 (1982)), for failure to qualify as a refugee within the meaning of § 101(a)(42)(A) of the 1952 Act (codified at 8 U.S.C. § 1101(a)(42)(A) (1982)).

40. See *supra* note 25.

41. *Id.*

42. *Id.*

or political opinion."⁴³ Courts⁴⁴ and Congress,⁴⁵ however, have generally ignored these differences. Both have treated the various formulations as different expressions of the same underlying concern, which is whether the defendant assisted the Nazis in persecuting civilians because of race, religion, national origin, or political opinion.⁴⁶

43. 8 U.S.C. § 1251(a)(19) (1982).

44. For example, Judge Kearse treated a case construing the most general first formulation as dispositive of the issue of assistance in persecution arising under the most specific last formulation. *Maikovskis v. INS*, 773 F.2d 435, 445-46 (2d Cir. 1985) (citing *United States v. Fedorenko*, 449 U.S. 490 (1981), which construed § 2(b) of the 1948 Act, in deciding a case arising under 8 U.S.C. § 1251(a)(19) (1982)), *cert. denied*, 106 S. Ct. 2915 (1986). Another respected jurist, Judge Lumbard, cited a case construing the most specific last formulation as authority in a case arising under the less specific second formulation. *United States v. Sprogis*, 763 F.2d 115, 122 (2d Cir. 1985) (citing *Laipeniaks v. INS*, 750 F.2d 1427 (9th Cir. 1985), which construed 8 U.S.C. § 1251(a)(19) in deciding a case arising under the 1948 Act, §§ 2(b) and 13 as amended).

45. In amending the 1952 Act to add the very specific last formulation, Congress saw nothing deficient in the prior formulations containing language excluding persons who had assisted in persecution. Its concern was rather to add a provision that would exclude *the very same persons* who would have been excludable had they entered under the terms of the Acts containing the excluding language, but who entered under Acts that did not contain such language. See H.R. REP. NO. 1452, *supra* note 36, at 3, 8; U.S. CODE CONG. & AD. NEWS, *supra* note 36, at 4702, 4707.

46. The argument that the first formulation, in § 2(b) of the 1948 Act, differs from the remaining three because it contains no requirement that the persecution be "because of race, religion, . . ." is unconvincing. Cf. *Maikovskis v. INS*, 773 F.2d 435, 456 (2d Cir. 1985) (Newman, J., concurring) (stating that the 1948 Act definition differs from that in 8 U.S.C. § 1251(a)(19) (1982) because it "makes no mention of political motivation in describing persecution"), *cert. denied*, 106 S. Ct. 2915 (1986). As noted, § 2(b) of the 1948 Act incorporates by reference the IRO constitution's definition of "refugee," "displaced persons," and those who were "the concern" of the IRO. See *supra* note 25 and *infra* note 63. The problem of persecution confronted by the IRO after World War II involved persecution because of race, religion, national origin, or political opinion. See L. HOLBORN, *THE INTERNATIONAL REFUGEE ORGANIZATION I* (1956) (identifying as the largest twentieth century refugee movements those created by political and racial persecution). In defining what counted as a refugee's valid objection to returning to his home country, the IRO constitution explicitly referred to "persecution, or fear based on reasonable grounds of persecution because of race, religion, nationality or political opinions[.]" See I.R.O. CONST. *supra* note 25, at annex I, pt. I, § C1(a)(i). The requirement that the persecution be related to features such as race, religion, national origin, or political opinion is implicitly part of the definition of persons who are not of concern to the IRO. Its omission from the explicit definition is best explained by the drafting problems that plagued the IRO. See *infra* note 90.

Instead of the full phrase, "assisted the Nazis in persecuting civilians because of race, religion, national origin, or political opinion," this Article sometimes uses the shorter "assistance in persecution" or "assisted in persecuting civilians."

C. ASSISTANCE IN PERSECUTION AND MATERIAL MISREPRESENTATIONS

Although it is clear that the concepts of assistance in persecution and material misrepresentation (concealment or fraud) are central to the cases, the relation between the two has engendered uncertainty. In *Fedorenko*, the Court declined to decide several key materiality issues. Consequently, without going beyond the Supreme Court's holding in *Fedorenko*, it is doubtful that a court will find a misrepresentation or concealment material unless it first finds that the defendant assisted the Nazis in persecuting civilians.⁴⁷

Courts have taken stands on the materiality issues the Supreme Court left unresolved in *Fedorenko*.⁴⁸ The assistance in persecution issue, however, remains primary. If a defendant in a denaturalization suit has not misrepresented or concealed his location, employment, or organizational affiliations, the court cannot avoid deciding whether he assisted in persecuting civilians.⁴⁹ Even when the defendant has made misrepresentations, a firm understanding of what activities constitute assistance in persecuting civilians is necessary to determine whether the misrepresentations are material. Likewise, in the deportation context, if the Government claims that the defendant was excludable or is deportable under 8 U.S.C. §§ 1182(1)(33), 1251(a)(19) (1982), explicitly addressing persecution, the court cannot avoid deciding the assistance-in-persecuting-civilians question. Consequently, assistance in persecution is both the primary legal concept and the one that most requires examination if these cases are viewed, at least in part, as attempting to ascertain individual responsibility for Nazi crimes.

47. See *United States v. Fedorenko*, 449 U.S. 490, 508-16 (1981) (finding that misrepresentation is material if it would have rendered applicant ineligible for a visa, and concluding as matter of law that all who assisted in the persecution of civilians are ineligible under § 2(a) of the 1948 Act).

48. See, e.g., *United States v. Kungys*, 793 F.2d 516, 529 (3rd Cir. 1986) (addressing materiality); *Maikovskis v. INS*, 773 F.2d 435, 440-42 (2d Cir. 1985) (same).

49. For example, in *United States v. Sprogis*, 763 F.2d 115 (2d Cir. 1985), despite the fact that Sprogis had not misrepresented his location, employment, or organization affiliations, the government charged him with making misrepresentations. On the facts of this case, the district court properly observed that "in order to prevail under any of its theories, the government had to show that [the defendant] assisted in the persecution of Jews or other civilians . . ." *Id.* at 120.

II. UNITED STATES V. FEDORENKO⁵⁰

In 1941, Feodor Fedorenko was a Ukrainian member of the Russian Army.⁵¹ Within a month of mobilization, Fedorenko was captured by the Germans and transported first to one prisoner of war camp, and then another. He was subsequently chosen for transfer to a work camp and was ultimately moved to Poland where he served as an armed guard at Treblinka, the Nazi death camp.⁵² Fedorenko was issued a uniform, given a rifle, and allowed only limited time away from the camp.⁵³ Treblinka was closed after a prisoner uprising in 1943,⁵⁴ and Fedorenko served at various German labor and prisoner of war camps until 1945.⁵⁵ When the British liberated Hamburg in 1945, Fedorenko passed himself off as a civilian and worked as a farm laborer until 1949. At that time, he gained permanent admission to the United States under the 1948 Displaced Persons Act (1948 Act).⁵⁶ The 1948 Act specifically excluded from the category of "displaced persons" individuals who had "assisted the enemy in persecuting civilians."⁵⁷

In his application for a visa under the 1948 Act, Fedorenko deliberately lied about his wartime activities. He concocted a story of forced labor in a factory in Poelitz during 1942-45, thereby concealing his service as an armed camp guard at Treblinka for ten months during that period.⁵⁸ In 1969, again concealing his service at Treblinka, he applied for and was granted United States citizenship.⁵⁹

In 1976, the Government brought a denaturalization action against Fedorenko under section 340(a) of the 1952 Act.⁶⁰ The Government charged that Fedorenko's service as an armed

50. 449 U.S. 490 (1981).

51. *Id.* at 494.

52. 455 F. Supp. 893, 900-01 (S.D. Fla. 1978), *rev'd*, 597 F.2d 546 (5th Cir. 1979), *rev'd*, 449 U.S. 490 (1981). For a thorough discussion of the atrocities that took place at Treblinka, see *id.* at 901 n.12. It is estimated that at least 800,000 persons were murdered at Treblinka during World War II. 449 U.S. at 494 n.2.

53. 449 U.S. at 494.

54. See R. HILBERG, THE DESTRUCTION OF THE EUROPEAN JEWS 915-16 (Rev. ed. 1985) (providing a vivid description of this uprising).

55. 449 U.S. at 494.

56. See *supra* note 25 discussing the 1948 Act.

57. 449 U.S. at 495. For a brief discussion of the relevant provisions of the 1948 Act, see *infra* note 63.

58. 449 U.S. at 496.

59. *Id.*

60. See *supra* notes 18-30 and accompanying text for a discussion of denaturalization.

guard and his commission of atrocities at Treblinka constituted assistance in persecution of civilians and that he was, therefore, ineligible for a visa under section 2(b) of the 1948 Act. Thus, he had obtained his citizenship illegally and denaturalization was necessary. The government also argued that Fedorenko's visa was procured through willful misrepresentation of material facts concerning his wartime activities because when he applied for an immigration visa in 1949, Fedorenko concealed his service at Treblinka. The Government maintained that this was material information and, because it was concealed, revocation of Fedorenko's citizenship was mandated.⁶¹

A. THE LOWER COURTS

The United States District Court for the Southern District of Florida found for Fedorenko.⁶² During the trial, a vice-consul who had reviewed 1948 Act applications testified that, had Fedorenko revealed the facts about his employment during 1942-45, an investigation would have ensued to determine whether he was excludable under section 2(b) of the 1948 Act.⁶³ The district court, however, rejected the Government's argument that, under *United States v. Chaunt*,⁶⁴ the vice-consul's

61. 449 U.S. at 497-98.

62. 455 F. Supp. 893, 921 (S.D. Fla. 1978), *rev'd*, 597 F.2d 546 (5th Cir. 1979), *rev'd*, 449 U.S. 490 (1981).

63. Section 2(b) of the 1948 Act defines a "displaced person" as "any displaced person or refugee as defined in annex I of the Constitution of the International Refugee Organization and who is the concern of the International Refugee Organization." Part II of annex I, in turn, states that among those who are not of concern to the IRO are:

2. Any other persons who can be shown:

(a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or

(b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.¹

I.R.O. CONST. annex I, pt. II, *reprinted in* 62 Stat. 3037, 3051-52 (1948) (footnote in original).

Footnote 1 in § 2(b) states:

Mere continuance of normal and peaceful duties, not performed with the specific purpose of aiding the enemy against the Allies or against the civil population of territory in enemy occupation, shall not be considered to constitute "voluntary assistance." Nor shall acts of general humanity, such as care of wounded or dying, be so considered except in cases where help of this nature given to enemy nationals could equally well have been given to Allied nationals and was purposely withheld from them.

Id.

64. 364 U.S. 350 (1960). In *Chaunt*, the Court reversed the Ninth Circuit's

testimony was sufficient to establish Fedorenko's misrepresentations as material within the meaning of 8 U.S.C. § 1451(a).⁶⁵ The court read *Chaunt* to require that the Government show the existence of facts that would have warranted denying Fedorenko's citizenship.⁶⁶

Thus, the district court in *Fedorenko* next focused on whether Fedorenko's activities as an armed guard constituted assistance in the persecution of civilians.⁶⁷ Although the court described his activities in some detail, it did not decide whether those activities constituted assistance in persecution. The court instead found that Fedorenko was not ineligible for admission under section 2(b) of the 1948 Act.⁶⁸ Because ineligibility under that provision requires that the defendant have voluntarily assisted in persecuting civilians and because the court held that Fedorenko had no "feasible choice other than serving as a guard, particularly at Treblinka,"⁶⁹ it found that he was not ineligible for admission.

The district court in *Fedorenko* recognized that the language of annex I of the Constitution of the International Refugee Organization (IRO),⁷⁰ incorporated by reference into section 2(b) of the 1948 Act, presented an obstacle to finding that assistance in persecution had to include a finding of voluntariness. Although the IRO constitution stated that those who "voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations" were not "of concern" to the IRO, it omitted the word "voluntarily" when stating that those who had "assisted the enemy in persecuting civil populations of countries" were not "of

order revoking *Chaunt's* naturalization because he had procured citizenship by concealment of several arrests. The Court held that the suppressed facts were not material because the Government had failed to show that their disclosure "(1) . . . would have warranted denial of citizenship, or (2) . . . might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship." *Id.* at 355.

65. 455 F. Supp. at 915-16. According to the Government, *Chaunt* did not impose upon it the burden of showing that the investigation would have revealed ultimate facts justifying denial of citizenship. Instead, the Government argued that it was sufficient if "the conceded facts prevented the Government from making an investigation which *might* have resulted in a denial of citizenship." *Id.* at 915 (emphasis in original).

66. *Id.* at 916.

67. *Id.* at 913-14.

68. *Id.*

69. *Id.* at 913.

70. See *supra* note 63.

concern."⁷¹ Nevertheless, the court read a voluntariness requirement into the section 2(b) exclusion for fear that the most deserving persons, prisoners who had survived death camps such as Treblinka, would become ineligible for admission because of the involuntary assistance they had rendered to the Germans in running the camps.⁷² The court concluded that because Fedorenko's acts as a camp guard at Treblinka were not voluntary, his acts did not constitute assistance in the persecution of civilians for purposes of the 1948 Act, section 2(b). His misrepresentations about his whereabouts and employment during 1942-45 were, therefore, not material.⁷³

The United States Court of Appeals for the Fifth Circuit reversed,⁷⁴ finding that the district court's interpretation of *Chaunt* eviscerated that case's second materiality test⁷⁵ by requiring the Government to establish ultimate disqualifying facts even when an applicant for citizenship had made misrepresentations in a situation where truthful responses would have triggered an investigation.⁷⁶ The Fifth Circuit interpreted *Chaunt* "to require only that the government prove by clear and convincing evidence that disclosure of the true facts would have led the government to make an inquiry that might have uncovered other facts warranting denial of citizenship."⁷⁷ The court then relied on the testimony of the vice-consul, rejected by the district court, to conclude that the Government had met its burden. The Fifth Circuit, therefore, ordered Fedorenko's denaturalization.

B. THE SUPREME COURT

Although the primary issue presented in the petition for certiorari was whether the court of appeals had properly interpreted the *Chaunt* test,⁷⁸ the Supreme Court declined to decide whether *Chaunt* applied to misrepresentations made at the visa procurement stage or to endorse any particular interpretation

71. *Id.*

72. 455 F. Supp. at 913.

73. *Id.*

74. *United States v. Fedorenko*, 597 F.2d 946, 954 (5th Cir. 1979), *rev'd*, 449 U.S. 490 (1981).

75. *See supra* note 64.

76. 597 F.2d at 951.

77. *Id.*

78. *United States v. Fedorenko*, 449 U.S. 490, 526 (1981) (White, J., dissenting).

of *Chaunt*.⁷⁹ Instead, the Court maintained that, under any of *Chaunt's* possible interpretations, a misrepresentation is material when it hides the existence of ultimate facts which, if known, would warrant denial of citizenship.⁸⁰

Holding that Fedorenko's service as an armed camp guard rendered him ineligible for a visa as a matter of law,⁸¹ the Court chided the district court for ignoring the "plain language" of section 2(b) of the 1948 Act and "traditional principles of statutory construction" in concluding that an applicant was ineligible under section 2(b) only if his assistance was voluntary.⁸² The Court noted that the contrast between the language of sections 2(a) and 2(b) in annex I of the IRO constitution showed that "Congress was perfectly capable of adopting a 'voluntariness' limitation where it felt that one was necessary" and that "[u]nder traditional principles of statutory construction, the deliberate omission of the word 'voluntary' from § 2(a) [of Annex I] compels the conclusion that the statute made *all* those who assisted in the persecution of civilians ineligible for visas."⁸³ The Court concluded, therefore, that because Fedorenko's activities, voluntary or not, constituted assistance in persecution, and thus warranted a visa denial,⁸⁴ his misrepresentations concerning his whereabouts during 1942-45 were material and his denaturalization was justified.⁸⁵

1. Rejection of a Voluntariness Requirement

Although the Supreme Court in *Fedorenko* treated its decision as the only one compatible with the statutory provisions,⁸⁶ the plain language of the statute, the principles of statutory interpretation, the legislative history of the 1948 Act and its amendments, and the testimony of an administrator of the 1948 Act together establish that the available legal materials did not mandate rejection of a voluntariness requirement.

The Court noted the language that annex I, part II of the IRO constitution uses in referring to those persons who were not the concern of the IRO.⁸⁷ It omitted, however, a footnote

79. *See id.* at 508-09.

80. *Id.* at 509.

81. *Id.* at 514.

82. *Id.* at 512.

83. *Id.*

84. *Id.* at 509-10.

85. *Id.* at 514-15.

86. *Id.* at 512.

87. *Id.*

the IRO appended to the end of section 2, which states in part: "Mere continuance of normal and peaceful duties, not performed with the specific purpose of aiding the enemy against the Allies or against the civil population of territory in enemy occupation, shall not be considered to constitute 'voluntary assistance.'"⁸⁸ The clear import of this footnote is that only those who had *voluntarily* assisted the enemy in persecuting civil populations were not of concern to the IRO. If this were not the correct interpretation, the footnote would not address, as it undoubtedly does, the question of what type of behavior in relation to the civil population of enemy-occupied territory constitutes voluntary behavior. The drafters of the IRO constitution may have thought that the voluntariness requirement, which explicitly applied to assisting the enemy in operations against the United Nations,⁸⁹ was equally applicable to assisting the enemy in persecuting civilians for the purpose of determining whether a person was of concern to the IRO. At the very least, this footnote makes it uncertain whether only those who had *voluntarily* assisted the enemy in persecuting civilians were not of concern to the IRO.⁹⁰

88. See *supra* note 63.

89. *Id.*

90. Louise Holborn's detailed description of the process by which the IRO defined "refugee" and related terms shows that these definitions cannot bear the close parsing and scrutiny that the Supreme Court gave them. The greatest difficulty the IRO encountered was when attempting to define terms such as "refugee" and "displaced person." L. HOLBORN, *supra* note 46, at 36. Of the final definitions, Holborn states: "Annex I, Part I, consisted of a set of cumbersome worded definitions which reflected compromise between the views of the western countries—which on the whole sought to expand the definitions—and those of the countries of origin, which tried to restrict them." *Id.* at 48. Although Holborn specifically refers to the definitions in part I of annex I, the definitions in part II are at least as cumbersome worded. In any case, "the Constitution was only a framework for the work of the IRO, and the spirit in which this work was to be carried out would be far more important than the framework itself." *Id.* at 53. The definitions of "refugee" and "displaced person" proved difficult for the IRO to administer fairly and impartially, *id.* at 49, and there was an increasing tendency after 1948 for the IRO to liberalize the interpretation of its own definitions. *Id.* at 210. Although Holborn refers to the IRO's task of determining which applicants had "voluntarily assisted the enemy forces during the war," *id.* at 175, she does not refer to the provision in annex I, part II, excluding those who had assisted the enemy in persecuting civilians.

Congress itself was aware of the imprecision of the IRO's definition of "displaced person." See S. REP. NO. 1237, 81st Cong., 2d Sess. 1 reprinted in 1950 U.S. CODE CONG. & AD. NEWS 2513, 2514; see also 96 CONG. REC. 2467 (1950) (remarks of Sen. McCarran). When it came to amending the 1948 Act in 1950, a group of senators thought that Congress should, *for the first time*, frame its own definition of displaced persons and establish a government

Principles of statutory construction do not unambiguously support the Court's rejection of the view that in order to be ineligible for a visa a person had to have voluntarily assisted the enemy in persecuting civilians. The Court wrote as though Congress itself had *drafted* the distinction between those who had "assisted the enemy in persecuting civilians" and those who had "voluntarily assisted the enemy forces . . . in their operations."⁹¹ The legislative history of the 1948 Act and its 1950 amendment reveal, however, that Congress never considered the distinction between sections 2(a) and 2(b) of annex I, part II of the IRO constitution.⁹² Congress adopted the IRO definitions *in toto* because it saw such an adoption as the way to deal with between 850,000 and 1,150,000 displaced persons in camps in the American, French, and British sectors of Europe who were still there long after over 7,000,000 other persons, displaced at the end of the war, had found permanent residence.⁹³ Because the IRO was the organization agreed upon to address this problem, which included making initial determinations of eligibility, it was reasonable for Congress simply to incorporate the IRO definitions by reference into the 1948 Act.⁹⁴ Where Congress, for reasons independent of the specific language used in defining a term in another document, has incorporated by reference that document's definition of a term, a court should not be obliged to show the same deference to the precise statutory language as it is compelled to do when Congress itself explicitly formulates the definition or draws the distinction.

Moreover, the legislative history of the 1948 Act and its 1950 amendment reveal that Congress was unaware that the 1948 Act contained *any* provision rendering ineligible for visas persons who had assisted the enemy in persecuting civilians. Although Congress considered the IRO definition of displaced persons when debating the 1948 Act, on no occasion did its attention focus on whether those who had involuntarily assisted

agency for its administration. *See generally* 96 CONG. REC. 2636 (1950) (remarks of Sen. Eastland); 96 CONG. REC. 2467 (1950) (remarks of Sen. McCarran).

91. 449 U.S. at 512.

92. *See, e.g.*, 96 CONG. REC. 1634-42 (1950); 96 CONG. REC. 2458-77 (1950); 95 CONG. REC. 7169-202 (1949); 94 CONG. REC. 7727-34 (1948) (The preceding citations are representative of topics debated by Congress. For additional citations, refer to the Index to Volumes of the CONGRESSIONAL RECORD. The absence of any reference to a distinction between §§ 2(a) and 2(b) of the IRO constitution is noteworthy.).

93. *See* 94 CONG. REC. 7738-39, 7872 (1948) (remarks of Rep. Fellows).

94. *See supra* notes 90 and 92.

the enemy in persecuting civilians were ineligible for visas.⁹⁵

The 1950 amendment to the 1948 Act provided for an amended section 13 which states that “[n]o visas shall be issued under the provisions of this Act, as amended, . . . to any person who advocated or assisted in the persecution of any person because of race, religion, or national origin”⁹⁶ Congress interpreted this provision as excluding a class of individuals who had not previously been excluded under the 1948 Act, despite the fact that section 2(b) of the 1948 Act incorporated the IRO definition of “displaced persons.” In 1949, when enumerating the distinctive features of House Bill 4567, for example, Rep. Feighan stated: “Persons who advocated or assisted in the persecution of any person because of race, religion, or national origin *would be added to those* to whom no visas could be issued under the act.”⁹⁷ Statements such as this are quite remarkable in view of the fact that section 2(b) of the 1948 Act incorporated by reference section 2(a) of annex I, part II of the IRO constitution.⁹⁸ At the very least, such statements show that Congress paid virtually no attention to the distinction, with respect to a voluntariness requirement, between sections 2(a) and 2(b) of annex I, part II of the IRO constitution.

Perhaps realizing the weakness of its statutory argument, the Supreme Court placed great weight on the testimony of the vice-consul involved in administering the 1948 Act as corroborating the correctness of its statutory analysis.⁹⁹ The vice-consul testified that if Fedorenko had disclosed his activities as an armed guard at Treblinka, he would have been declared ineligible for a visa under the 1948 Act.¹⁰⁰ Although the testimony of State Department officials is crucial in determining whether a truthful statement would have triggered an investigation that might have revealed disqualifying facts, it is of only

95. The focus of the debates was almost exclusively on the fact that various favored groups—the Volkdeutsche, *see* 94 CONG. REC. 7770-78 (1948), General Anders’ Polish soldiers stranded in London, *see id.* at 6879-82, and certain Greeks—were not considered “displaced persons” under the IRO constitution and thus would be ineligible if the 1948 Act allowed visas only to those persons whom the IRO defined as displaced.

96. An Act to Amend the Displaced Persons Act, Ch. 262, § 13, 64 Stat. 219, 227 (1950).

97. 95 CONG. REC. 7184 (1949) (emphasis added).

98. The argument that the amended § 13 changed the law by introducing the new requirement that the persecution be “because of race, religion, national origin, or political opinion” is unconvincing. *See supra* note 46

99. 449 U.S. at 498-500.

100. *Id.* at 499.

slight probative value in determining whether given acts constitute assistance in persecuting civilians.¹⁰¹

Thus, neither the statutory materials nor the testimony of the vice-consul dictated the Court's rejection of a voluntariness requirement. This raises the question why the Court decided the case as it did. One possibility is that the Court simply did not believe that concentration camp guards served involuntarily, and was, therefore, unwilling to find for Fedorenko on the basis of the district court's mistaken decision to the contrary.¹⁰² More plausibly, it is likely that in interpreting "assistance in persecuting civilians," the Court implicitly relied on beliefs about those acts for which persons who worked in concentration camps are morally responsible. Because an individual who was an armed guard bore more than minimal moral responsibility for assisting in persecution, regardless of whether the person's acts were voluntary, the Court deemed it proper to find that such an individual has met the legal standard of assisting in persecution. Rather than openly acknowledge that it was making a moral decision regarding the level of moral responsibility necessary to find that an individual has met the legal standard, the Court pretended that its conclusion was dictated by neutral arguments of statutory construction.¹⁰³

101. As Judge Lumbard stated in *United States v. Sprogis*: "[T]he immigration officials' opinions regarding evidence which would have led them, in 1950, to withhold permission to immigrate cannot be dispositive on the legal issue which must be decided by the court, namely, what constitutes assistance in persecution." 763 F.2d 115, 123 (2d Cir. 1985). *But see* *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (noting that the agency's construction was not necessarily the only reasonable one or even the one preferred by the Court itself, but stating that "[w]hen faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration").

102. There is evidence both that the Supreme Court believed that guards served voluntarily, *see* 449 U.S. at 499 n.14, and that this belief is correct. *See* R. HILBERG, *supra* note 54, at 898 n.23. It is unlikely, however, that the Court would have barred all categories of potential defendants from invoking involuntariness of service as a defense merely because it believed that camp guards had served voluntarily.

103. *See* 449 U.S. at 512-14. Dworkin emphasizes how apparently neutral semantic analyses may give more effect to judges' personal convictions (about such questions as moral responsibility) than would a frankly political jurisprudence. R. DWORKIN, *A MATTER OF PRINCIPLE* 30 (1985). *See also id.* at 329 (contending that it is preferable to confront underlying moral choices than to pretend that decisions are forced "by neutral arguments of statutory construction").

2. Two Approaches to Assistance in Persecution

Although the Supreme Court rejected the district court's inclusion of a voluntariness requirement in section 2(b) of the 1948 Act, it felt obliged to address the district court's concern that prisoners who had survived camps such as Treblinka might become ineligible for visas because of assistance they had rendered to the Germans. In an important footnote, the Court concluded that, rather than read a voluntariness requirement into section 2(b) of the 1948 Act, a court must focus on "whether particular conduct can be considered assisting in the *persecution* of civilians."¹⁰⁴

Thus, an individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the *persecution* of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians. Other cases may present more difficult line-drawing problems but we need decide only this case.¹⁰⁵

The Court's statement suggests two different approaches to interpreting assistance in the persecution of civilians. With the first approach, an initial inquiry is made to determine whether the collective activity to which the individual contributed constitutes persecution of civilians because of race, religion, national origin, or political opinion. Certainly it is plausible to so characterize the collective activity to which both the hair-cutter and the armed camp guard contributed.

The next step under this first approach requires determining whether it is possible to characterize the individual's particular activity as assistance in that persecution. An important difference between the armed camp guard and the hair-cutter is the magnitude of their contributions to the collective effort. Even though the hair-cutter made some contribution, it may seem so minor that it renders the hair-cutter only minimally morally responsible for the persecution wrought by the collective. Such a judgment is then expressed by finding that the hair-cutter has not assisted in persecution. The magnitude of the guard's contribution, on the other hand, is sufficiently great to render him more than minimally responsible. This judgment is expressed by finding assistance in persecution.

104. 449 U.S. at 512 n.34 (emphasis in original).

105. *Id.* (emphasis in original).

Consequently, once it is determined under this first approach that the collective to which the individual contributed has persecuted because of race, religion, national origin, or political opinion, it is necessary to look only at the nature of the individual's contribution. Whether the individual's own acts constitute persecution or the individual's personal motivation for acting are no longer part of the inquiry.

By italicizing the word "persecution" and noting that the term persecution does not apply to some of the tasks performed by concentration camp inmates,¹⁰⁶ the Court suggested a second approach that dictates a close nexus between individual conduct and persecution. This approach is less a coherent theory of assistance in persecution, which examines whether the objective of the collective enterprise constitutes persecution and whether the individual's acts contributed to achieving that objective, and more an inquiry into whether what the individual actually did is characterizable as persecution and an examination of the individual's own motivation for acting.

Under this approach, for the person's conduct to constitute persecution, he need not have personally committed crimes or atrocities.¹⁰⁷ A sufficient connection must exist, however, between the conduct and the persecution to justify speaking of the individual's personal participation in persecution. Although this second approach is vague, it is still possible to explain the distinction the Court drew under its terms. For instance, even though a camp guard has not personally committed atrocities, it is still possible to characterize the guard's activities as persecutorial after examining them in context. An inmate, seeing a camp guard patrolling with a rifle and pistol and knowing that the guard will shoot if the inmate tries to escape, surely sees the guard as a persecuting force. Even more so would a guard's actual shooting at prisoners attempting to escape constitute a form of persecution, even if the shots were fired over the prisoners' heads. Conversely, in finding that the hair-cutter's activity did not constitute persecution, the Court invokes a benign picture of the concentration camp hair-cutter. Unlike the guard, for the hair-cutter to perform his duties, it was unnecessary to use weapons or threatening gestures against inmates.

106. *Id.*

107. The Court found that Fedorenko had assisted in persecution despite accepting the district court's finding that there was no clear and convincing evidence "that petitioner committed crimes and atrocities against inmates while he was an armed guard at Treblinka." *Id.* at 505 n.24.

Thus, prescindng from the context in which these activities occurred, it may seem proper to characterize one type of activity, but not another, as persecution.¹⁰⁸

Although the Court intimated a preference for the second approach, it is not necessary to adopt that approach to explain the result in *Fedorenko*. Some courts dealing with the difficult cases have also reached results consistent with both approaches. When this is so, it is possible to ask which approach offers the better explanation. Other courts have, however, reached results consistent with only one of the approaches. The discussion now turns from *Fedorenko* to these cases.

III. THE DIFFICULT CASES

Since *Fedorenko*, the lower federal courts have decided, on the merits, approximately a dozen cases involving the issue of assistance in persecuting civilians.¹⁰⁹ Although there have been "easy" cases at both the armed camp guard¹¹⁰ and hair-cutter¹¹¹

108. When viewing the entire situation, this conclusion is far less clear. The Nazis wanted the hair, which they used in manufacturing felt footwear for U-boat personnel and Reichsbahn employees. R. HILBERG, *supra* note 54, at 954. Cutting the victims' hair also connected with the Nazis' desire to dehumanize their victims at the death camps. *Id.* at 898; *see also id.* at 971 n.56 ("At Belzec the naked women who had their hair cut were beaten on the head and in the face.").

109. *See* Maikovskis v. INS, 773 F.2d 435 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 2915 (1986); United States v. Sprogis, 763 F.2d 115 (2d Cir. 1985); Laipenieks v. INS, 750 F.2d 1427 (9th Cir. 1985); United States v. Kairys, 600 F. Supp. 1254 (N.D. Ill. 1984), *aff'd*, 782 F.2d 1374 (7th Cir.), *cert. denied*, 106 S. Ct. 2258 (1986); United States v. Kungys, 571 F. Supp. 1104 (D.N.J. 1983), *rev'd*, 793 F.2d 516 (3d Cir. 1986); United States v. Kowalchuk, 571 F. Supp. 72 (E.D. Pa. 1983), *aff'd on other grounds*, 773 F.2d 488 (3d Cir. 1985) (en banc), *cert. denied*, 106 S. Ct. 1188 (1986); United States v. Schellong, 547 F. Supp. 569 (N.D. Ill. 1982), *aff'd*, 717 F.2d 329 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); United States v. Koziy, 540 F. Supp. 25 (S.D. Fla. 1982), *aff'd*, 728 F.2d 1314 (11th Cir.), *cert. denied*, 105 S. Ct. 130 (1984); United States v. Dercacz, 530 F. Supp. 1348 (E.D.N.Y. 1982); United States v. Linnas, 527 F. Supp. 426 (E.D.N.Y. 1981), *aff'd mem.*, 685 F.2d 427 (2d Cir.), *cert. denied*, 459 U.S. 1036 (1982); United States v. Demjanjuk, 518 F. Supp. 1362 (N.D. Ohio 1981), *aff'd per curiam*, 680 F.2d 32 (6th Cir.), *cert. denied*, 459 U.S. 1036 (1982).

110. *See, e.g.*, United States v. Kairys, 600 F. Supp. 1254 (N.D. Ill. 1984) (defendant denaturalized because of wartime service as armed camp guard at Treblinka labor camp), *aff'd*, 782 F.2d 1374 (7th Cir.), *cert. denied*, 106 S. Ct. 2258 (1986); United States v. Linnas, 527 F. Supp. 426 (E.D.N.Y. 1981) (defendant denaturalized because of wartime service as supervisor at concentration camp), *aff'd mem.*, 685 F.2d 427 (2d Cir.), *cert. denied*, 459 U.S. 883 (1982); United States v. Demjanjuk, 518 F. Supp. 1362 (N.D. Ohio 1981) (defendant denaturalized because of wartime service as camp guard at Treblinka and many individual atrocities committed there), *aff'd per curiam* 680 F.2d 32 (6th Cir.), *cert. denied*, 459 U.S. 1036 (1982).

ends of the continuum, the majority fall in the troubling middle range. Although numerous cases have followed the Court's holding in *Fedorenko*,¹¹² the ensuing discussion addresses those cases especially illustrative of the difficulties that continue to arise in the process of defining the concept of assistance in persecution. This Article now considers these cases in terms of the two approaches previously discussed.

A. THREE UKRAINIAN POLICEMEN

In each of three cases involving Ukrainian policemen in the Galicia region of pre-war Poland,¹¹³ the Government successfully claimed that the defendant deserved denaturalization because he had assisted in the persecution of civilians. Although these results are defensible on the ground that the individuals had personally participated in persecution, they are more plausibly defensible under the contribution approach.¹¹⁴

111. See, e.g., *United States v. Kungys*, 571 F. Supp. 1104, 1144 (D.N.J. 1983) (defendant not denaturalized because Government could prove with clear and convincing evidence only residence in district where two massacres of civilians occurred). On appeal, however, the Third Circuit reversed, 793 F.2d 516, 530-33 (3rd Cir. 1986), finding that Kungys's misrepresentations were material without deciding whether he had assisted in persecuting civilians.

112. See *Laipenieks v. INS*, 750 F.2d 1427 (9th Cir. 1985); *United States v. Kairys*, 600 F. Supp. 1254 (N.D. Ill. 1984), *aff'd*, 782 F.2d 1374 (7th Cir.), *cert. denied*, 106 S. Ct. 2258 (1986); *United States v. Schellong*, 547 F. Supp. 569 (N.D. Ill. 1982), *aff'd*, 717 F.2d 329 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); *United States v. Demjanjuk*, 518 F. Supp. 1362 (N.D. Ohio 1981), *aff'd per curiam*, 680 F.2d 32 (6th Cir.), *cert. denied*, 459 U.S. 1036 (1982).

113. *United States v. Koziy*, 540 F. Supp. 25 (S.D. Fla. 1982), *aff'd*, 728 F.2d 1314 (11th Cir.), *cert. denied*, 105 S. Ct. 130 (1984); *United States v. Dercacz*, 530 F. Supp. 1348 (E.D.N.Y. 1982); *United States v. Osidach*, 513 F. Supp. 51 (E.D. Pa. 1981).

114. Although the Ukrainians gave some help to escaping Jews, Hilberg notes that the Germans, in their efforts to concentrate the Jews of Poland into ghettos, asserted control over regular indigenous police left or reorganized in occupied territories. R. HILBERG, *supra* note 54, at 598. In the Generalgouvernement region, Polish and (after the 1941 attack on the USSR) Ukrainian police totaled more than 16,000. *Id.* at 201-03. In that phase of the final solution in which the Germans employed mobile killing units, they were assisted by Ukrainian militia, often paid by municipalities with funds confiscated from Jews. These militia performed tasks, such as shooting children, that were deemed too corrupting and destructive for the Germans to do themselves. *Id.* at 313-14. Ukrainian stationary police in Galicia assisted the Germany Order Police in rounding-up and deporting Jews to the death camps. In Rawa Ruska, for example, the "roundup was conducted by police teams consisting of one German, one Ukrainian, and one Jew." *Id.* at 486. See also *id.* at 519 (stating that the Ukrainians, never considered pro-Jewish, participated in massacres of millions of Ukrainian Jews).

Hilberg presents a picture of the Ukrainians very different from that evi-

1. Bohden Koziy

Bohden Koziy entered the United States in 1949 under the 1948 Act and was naturalized in 1956.¹¹⁵ In applying for a visa, he stated that he had been employed as a tailor's apprentice during the war. Thus he concealed his voluntary employment with the Ukrainian police.¹¹⁶ The district court, citing *Fedorenko*, held that "his employment with the Stanislaw Kommando of the Ukrainian Police" constituted one of four legally independent grounds for finding that he was ineligible for a visa under section 2(b) of the 1948 Act and that denaturalization was warranted.¹¹⁷

The Ukrainian police assisted the Nazis in transporting Jews from their homes to the ghettos, participated with German police in security sweeps, made arrests within the Stanislaw ghetto, and aided the Germans in rounding-up Jews to bring them to the ghettos.¹¹⁸ Although Koziy had served voluntarily as a Ukrainian policeman, the district court made only one specific finding connecting Koziy, in his capacity as a member of the Stanislaw Kommando, with the Nazi objective of persecuting civilians. The court found that "[i]n the summer of 1942 the Jews of Lisets were rounded up by the Ukrainian Police and forcibly relocated to the ghetto in Stanislaw. Defendant participated in this round-up."¹¹⁹

Rounding-up of Jews (evicting them from their homes, forcibly relocating them, and confining them into ghettos) plau-

dent in *United States v. Kowalchuk*, 773 F.2d 488, 513 (3d Cir. 1985) (Aldisert, C.J., dissenting), *cert. denied*, 106 S. Ct. 1188 (1986). In *Kowalchuk*, Chief Judge Aldisert indicated that Ukrainians were as much the victims of the Nazis as were the Jews. "[W]ith the alternatives of arrest, torture, imprisonment, and death staring them in the face, it is hardly surprising that many inhabitants of occupied countries were passively accommodating to the Nazis." *Id.*

115. *United States v. Koziy*, 540 F. Supp. 25, 34 (S.D. Fla.), *aff'd*, 728 F.2d 1314 (11th Cir.), *cert. denied*, 105 S. Ct. 130 (1984).

116. *Id.* at 33.

117. *Id.* at 35. Although it is plausible to characterize the personal atrocities that Koziy committed as acts of persecution, the court regarded them as one independent legal basis for his ineligibility for a visa under § 2(b) of the 1948 Act, *see* Conclusions of Law 70 & 73, while treating his employment with the Stanislaw Kommando of the Ukrainian Police as another independent legal basis for ineligibility under § 2(b), *see* Conclusions of Law 69 & 73. *Id.* at 35.

118. *Id.* at 27-30.

119. *Id.* at 30. In view of the court's findings regarding Koziy's own activities, including his personal involvement in several murders, Findings nos. 43 & 44, *id.* at 32, it was unnecessary to make specific findings that Koziy assisted the Nazis in persecuting civilians. *Id.* at 35.

sibly qualifies as participation in persecution as contemplated by the 1948 Act, section 2(b). Involvement in such a round-up is unquestionably morally wrong because it substantially assisted the Nazis in their goal of persecuting (annihilating) the Galician Jews. Forcibly evicting Jews from their homes and concentrating them in ghettos was merely one step in a long process. That process ultimately culminated in the Jews' forced shipment to a concentration camp (in this case, Belzec), and in their brutal murders.¹²⁰ Given the importance of this step, it follows that an individual who participated in it bears a significant measure of moral responsibility for the death of the Lisets Jews.

Although the district court in *Koziy* did not explain why it concluded that Koziy's employment with the Stanislaw Kommando constituted assistance in persecuting civilians, it is consistent with the court's result to say that an individual has assisted in persecution even though that individual's particular acts were not themselves persecutorial. Absent this conclusion, a low ranking individual like Koziy might escape responsibility for his knowing contribution to group persecutorial objectives.

2. Michael Dercacz

Michael Dercacz entered the United States in 1949 under the 1948 Act and was naturalized in 1954.¹²¹ In his visa application, Dercacz stated that he had been employed as a dairy farmer during the war and concealed his service as a Ukrainian policeman in the town of Novy Yarychev.¹²² The district court granted the Government's motion for summary judgment on the ground that, as a matter of law, the duties Dercacz admitted performing constituted assistance in persecuting civilians.¹²³ Dercacz acknowledged that he had brought Jews not wearing

120. R. HILBERG, *supra* note 54, at 158-87, treats the "concentration" stage as crucial in the destruction process.

121. *United States v. Dercacz*, 530 F. Supp. 1348, 1350 (E.D.N.Y. 1982). In 1982, the Government sought to deport Dercacz. He died in August 1983, just one week before the deportation hearing was scheduled to begin.

122. *Id.* at 1349.

123. The district court described the persecution of Jews as follows:

In 1942, some 2,000 Jews of Novy Yarychev and other Jews from surrounding villages were forcibly concentrated in a ghetto near the town marketplace. The Jews were required to wear identifying armbands, were restricted in movement, trade, food and water, and some were used as forced laborers. In January 1943, the Jews were rounded up and killed by German forces.

Id.

identifying armbands to the police station and that he had reported them to the commandant and the Gestapo.¹²⁴ Additionally, he admitted reporting civilians who had sold food to the ghettoized Jews.¹²⁵ The court determined that “[t]hese admissions provide clear and convincing evidence of defendant’s invidious duties as a member of the Ukrainian police in Novy Yarychev and leave no doubt that defendant’s service in such police force assisted the Nazis in persecuting civilian Jews.”¹²⁶

It is plausible to depict the acts of reporting Jews not wearing armbands and bringing them to the station as participation in persecution. As with Koziy’s actions,¹²⁷ what seems immoral about such acts is that they contributed to the Nazis’ goal of ridding the area of Jews. The Nazis concentrated Jews in ghettos readily accessible to railroad transportation so that they could easily transport them to the nearest killing center. A system of identification, such as armbands, was necessary to alert the Nazis to any potential victims who were not in the ghetto. By identifying Jews who were not wearing armbands, Dercacz substantially contributed to the Nazis’ efficient identification and elimination of the largest possible number of Jews.

Dercacz’s second activity, reporting civilians known to have sold food to the ghettoized Jews, did not require personal contact with the persecuted Jews. It is unclear, therefore, whether such activity can be characterized as personal participation in persecution. Nevertheless, it clearly constitutes assistance in persecution because of its tendency to further isolate Jews from other citizens of Novy Yarychev and to ensure their suffering from an inability to obtain food. Thus, the better justification for denaturalizing Dercacz is that his actions made a substantial contribution to the Nazis’ persecution, not that his actions were themselves persecutorial.

3. Wolodymir Osidach

Osidach, like Koziy and Dercacz, entered the United States in 1949 under the 1948 Act.¹²⁸ He was naturalized in 1963.¹²⁹

124. *Id.* at 1351.

125. *Id.*

126. *Id.* The court did not specifically state that Dercacz was aware of Nazi persecution of Jews. Because the duties he performed brought him into close contact with both Jews and Germans, however, it is reasonable to assume either that he was aware of the persecution or that he should have been.

127. *See supra* text accompanying notes 115-120.

128. *United States v. Osidach*, 513 F. Supp. 51, 58 (E.D. Pa. 1981). Osidach died in May 1981, before the appeal he had filed was heard.

When he applied for a visa, he stated that he had been a dairy mechanic during the war. In doing so, he concealed his service as a Ukrainian policeman in the town of Rawa Ruska.¹³⁰ The district court ordered Osidach's denaturalization.¹³¹

The district court in *Osidach* identified four categories of Ukrainian police activity in Rawa Ruska that it characterized as assistance in persecution: 1) enforcing ghettoization and laws enacted for the oppression of the Jewish population; 2) guarding and abusing Jewish slave laborers; 3) helping to deport Jews from the Rawa Ruska ghetto; and 4) assisting in the liquidation of the ghetto.¹³² Using these categories, the court determined that Osidach himself had participated in acts of persecution,¹³³ focusing on two separate activities in which he had engaged from 1942 to 1944.¹³⁴

Osidach admitted that he had patrolled the streets of Rawa Ruska as a full-time, paid, and armed Ukrainian policeman.¹³⁵ The court found that this activity itself constituted a form of mental persecution.¹³⁶ It reasoned that:

The mere presence of the watchful eye of the conqueror or his deputies, coupled with the often demonstrated presence of both the means and the inclination to persistently inflict various indignities, physical abuse, injuries or even death, without notice or reason, is the personification of mental persecution, to anyone, let alone innocent civilian men, women and children reduced to various degrees of substandard

129. *Id.*

130. *Id.* at 101.

131. *Id.* at 107.

132. *Id.* at 86-91.

133. The court's focus on whether Osidach had participated in persecution derived not only from its adoption of the participation-in-persecution approach, but also from errors it made in interpreting the statutory structure. The court's most serious error was its claim that in the 1950 amendment to § 13 of the 1948 Act "Congress further defined the act of assisting in the persecution of civilians as being a 'member of, or participant in, a movement' that persecuted civilians. Section 13, therefore, expanded upon the somewhat vague IRO provision." *Id.* at 70.

The new "member of, or participant in" language qualifies movements hostile to the United States, or to its form of government, and not, as the district court argued at great length, to movements which assisted in the persecution of persons because of race, religion, or national origin. The legislative history does not support the district court's claim that the language Congress added in the amended § 13 was intended to add to those who were ineligible the entirely new categories of those who were merely voluntary members of groups or participants in movements that assisted in the persecution of civilians. See *supra* notes 90, 92 and accompanying text.

134. 513 F. Supp. at 96-100.

135. *Id.* at 97.

136. *Id.* at 99.

mental and physical well-being.¹³⁷

Rather than characterizing the actual patrolling as persecution, however, it is more plausible to say that Osidach's daily, armed patrolling assisted the Nazis by substantially contributing to their goal of annihilating the Jewish population of Rawa Ruska. Patrolling policemen reminded Jews that any attempt to escape almost certainly meant death and this fear tended to make them more compliant. Thus, resistance was less likely.

Osidach also admitted that he had served as an interpreter for the Ukrainian police and the German gendarmes.¹³⁸ He interpreted, for example, when the police arrested persons suspected of being communists, and he acknowledged the possibility that some of the people for whom he interpreted were Jews.¹³⁹ He claimed to have been the "main interpreter" for the Ukrainian police and stated that while performing these duties he had always carried a loaded pistol at his side.¹⁴⁰

The court maintained that Osidach's activities as an interpreter "could be classified as both physical and mental persecution."¹⁴¹ Analyzing the case in this way requires acceptance of a very broad definition of "physical or mental persecution." To counter this definition of persecution, Osidach could have plausibly defended his actions by stating that they were not themselves persecutorial and that, if any persecution occurred during the interviews, the Germans were the persecutors. He had merely translated their words.

The district court was sensitive to these problems in bringing Osidach's activities as an interpreter within the participation-in-persecution framework. The court's language suggests that what was most wrong with Osidach's activities is that they contributed to the Nazis' objective of annihilating the Jews.¹⁴²

Osidach's role as a full-time, paid and armed interpreter for both the German gendarmes and the Ukrainian police made him *a necessary link between the Germans and the objects of their persecution*—the Jews in the town of Rawa Ruska—from 1942 to 1944. His ability to translate three separate languages . . . in a multilingual German-occupied area was obviously *a vital skill he delivered to the Germans*, who at that very time were carrying forward their occupation policies.¹⁴³

The emphasized phrases highlight the important contributions

137. *Id.*

138. *Id.* at 98.

139. *Id.* at 97.

140. *Id.* at 97-98.

141. *Id.* at 99.

142. *Id.*

143. *Id.* at 98 (emphasis added). Because Osidach was aware that the Nazis

of someone functioning as the Nazis' "main interpreter." To accomplish their objective of annihilating all Jews and communists in an area where not everyone spoke German, it was absolutely necessary that the Nazis rely on interpreters. Without such assistance, the Nazis could not have achieved their objective as efficiently or completely.¹⁴⁴

B. TWO HIGHER OFFICIALS

The following two cases advance the analysis from the ordinary policeman to higher officials, one, a Lithuanian mayor and the other, a Latvian police chief. This extension is logical. If those who personally participated by contributing to the objective of persecution are responsible for acts of persecution, those officials who ordered that personal participation are likewise liable for acts of persecution. In deciding these cases, difficulty arises only if the court insists that the defendant's acts themselves were persecutorial. Obviously, insistence on such a requirement results in the exculpation of many higher officials, because individuals in positions of greater authority are unlikely to have personally performed acts that constitute persecution.¹⁴⁵ To avoid this unacceptable consequence,¹⁴⁶ those adhering to the participation-in-persecution approach have to maintain that an individual participates in persecution either by

were persecuting Jews, *id.* at 93, the knowledge requirement of the contribution approach was satisfied.

144. R. HILBERG, *supra* note 54, at 312, notes the important contributions made by native speakers to the Nazis' killing operations in areas, such as the Ukraine, where German was not the predominant language.

145. In the judgment it issued after Adolf Eichmann's trial, the Israeli court stated:

'[I]n such an enormous and complicated crime as the one we are now considering, wherein many people participated, on various levels and in various modes of activity—the planners, the organizers, and those executing the deeds, according to their various ranks—there is not much point in using the ordinary concepts of counseling and soliciting to commit a crime. For these crimes were committed en masse, not only in regard to the number of victims, but also in regard to the numbers of those who perpetrated the crime, and the extent to which any one of the many criminals was close to or remote from the actual killer of the victim means nothing, as far as the measure of his responsibility is concerned. On the contrary, in general *the degree of responsibility increases as we draw further away from the man who uses the fatal instrument with his own hands.*'

H. ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 246-47 (rev. ed. 1964) (quoting the Israeli court) (Arendt's emphasis).

146. See Levinson, *supra* note 14, at 249 n.10 (it "reverse[s] the priorities of sensible discussion" to focus on the atrocities of individual soldiers as "criminal" while treating the acts of higher officials as "merely" immoral).

doing acts that are themselves persecutorial or by ordering others to do such acts.

1. Kazys Palciauskas

Palciauskas entered the United States in 1948 under the 1948 Act and was naturalized in 1954.¹⁴⁷ When he applied for a visa he stated that he had been a clerk during the period of Nazi occupation,¹⁴⁸ thereby concealing that he had been the mayor of Kaunas, Lithuania, from June 1941 to May 1942.¹⁴⁹ The district court ordered him denaturalized.¹⁵⁰

The district court made a number of factual findings relevant to Palciauskas' assistance to the Germans. The Nazis established a Jewish ghetto in Kaunas in July 1941, and, between August and October 1941, engaged in a mass execution of Jews.¹⁵¹ They paid Palciauskas a substantial salary, in valuable German marks, for his service as mayor. In his capacity as mayor, Palciauskas exercised considerable power over governmental functions, housing, sanitation, and police.¹⁵² In addition, Palciauskas knew of the Nazis' attitude toward the Jews¹⁵³ and had "some knowledge of horrible living conditions in the ghetto."¹⁵⁴ He also played a role in implementing the Nazis' decisions.¹⁵⁵

147. *United States v. Palciauskas*, 559 F. Supp. 1294, 1300 (M.D. Fla. 1983), *aff'd*, 734 F.2d 625 (11th Cir. 1984).

148. 559 F. Supp. at 1299.

149. *Id.* at 1296.

150. *Id.* at 1301.

151. *Id.* at 1296-97.

152. *Id.* at 1297.

153. *Id.*

154. *Id.* at 1298.

155. *Id.* at 1297; *see also id.* at 1296-97 n.3 (indicating ample and irrefutable evidence that Palciauskas helped implement the directives of an order to establish the Kaunas ghetto).

The district court concluded its findings of fact by stating: "As it appears unnecessary to resolution of this proceeding, the Court makes no specific findings relative to possible active participation by the defendant in acts of persecution of Jews." *Id.* at 1300. Given the findings already made by the court, this statement can only mean that the court found it unnecessary to make any finding that the defendant had personally engaged in acts of persecution toward identifiable Jews.

In affirming, the court of appeals misinterpreted the district court's statement to mean that it had made no findings regarding the defendant's cooperation "with the Nazi regime in the ghettoization and persecution of the Jewish community in Kaunas . . ." 734 F.2d at 626. The court of appeals did not recognize, however, that by holding that it is possible for a misrepresentation to be material, even without establishing the existence of ultimate disqualifying

As mayor of Kaunas, Palciauskas contributed substantially to the Nazis' persecution efforts by helping to create the Jewish ghetto and by expropriating and distributing Jewish property; both steps were vital to the process culminating in the murder of the ghettoized Jews.¹⁵⁶ His acts thus fit easily within the contribution approach.¹⁵⁷ Some of his acts, such as appropriating all Jewish owned property outside the ghetto, also fit fairly well within the participation in persecution approach.¹⁵⁸ To characterize his most crucial act, ordering the ghetto's physical enclosure with barbed wire, as persecutorial, however, it is necessary to expand the category of persecutorial actors to include persons who have ordered others to commit persecutorial acts.

2. Boleslavs Maikovskis

Maikovskis entered the United States in 1951 under the terms of the amended 1948 Act.¹⁵⁹ In his application for admission, he stated that from December 1941 to October 1944 he had worked as a bookkeeper in Riga, Latvia.¹⁶⁰ This misrepresentation concealed his service during that period as Chief of Police in the Nazi-dominated Second Police Precinct in Rezekne, Latvia.¹⁶¹ The Second Circuit affirmed a unanimous decision of the Board of Immigration Appeals (Board) ordering Maikovskis deported.¹⁶²

Maikovskis had volunteered for his position as Chief of Police in the Nazi-created police force.¹⁶³ As Chief of Police, his authority had extended to the village of Audrini, where, in December 1941, at least two Latvian police officers were killed by Soviet partisans apparently harbored in Audrini.¹⁶⁴

facts, it decided the issue the Supreme Court refused to decide in *Fedorenko*—the proper interpretation of *Chaunt*. See *supra* text accompanying notes 78-80.

156. It remains unclear whether the district court actually found that Palciauskas was ineligible for a visa under § 2(b) of the 1948 Act because he assisted in the persecution of civilians or whether the court relied exclusively on some of the other legal bases identified in its Conclusions of Law. 559 F. Supp. at 1300-01.

157. The contribution approach is discussed in text following note 105, *supra*.

158. See *supra* text accompanying notes 106-108.

159. *Maikovskis v. INS*, 773 F.2d 435, 438 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 2915 (1986). See also *supra* note 25 and accompanying text for a discussion of the 1948 Act.

160. 773 F.2d at 437.

161. *Id.* at 438.

162. *Id.* at 437.

163. *Id.*

164. *Id.*

Nazi authorities ordered that action be taken against Audrini, and, on or about December 22, 1941, Maikovskis ordered his Latvian police to join with German soldiers in arresting all of the Audrini villagers, totaling 200-300 men, women, and children; on or about January 2, 1942, pursuant to Maikovskis's orders, his policemen assisted the Germans in burning the village to the ground.¹⁶⁵

Maikovskis denied any involvement in the subsequent retaliatory public execution of approximately 30 villagers in the Rezekne market square and in the murder of the remaining villagers in the nearby Anchupani Hills.¹⁶⁶

Despite the absence of any finding that Maikovskis had personally persecuted any person because of his political opinions, the court of appeals had little difficulty in finding that his actions constituted assistance in persecution.¹⁶⁷ Under the contribution approach,¹⁶⁸ it is clear that a police chief, under the direction of Nazis, who wanted to persecute villagers because of their political opinions and who ordered his men to arrest the villagers and burn their village, has assisted in persecution. This result is evident under the participation-in-persecution approach,¹⁶⁹ however, only if that approach is expanded to include those who order others to perform persecutorial acts. The Second Circuit's summary rejection of the defendant's claim that he had not assisted in persecution suggests that it adopted the view that substantial contributions to persecution wrought by an organized group constitute assistance.¹⁷⁰

C. AN EXTREME VIEW: EDGAR LAIPENIEKS

Laipenieks entered the United States in 1960 under the 1952 Act and was never naturalized.¹⁷¹ When he applied for a visa, he concealed his past service with the Nazi-affiliated Latvian Political Police (LPP).¹⁷² In an opinion that takes an approach diametrically opposed to that of *Maikovskis*, the Ninth

165. *Id.*

166. *Id.*

167. *Id.* at 446.

168. For a discussion of the contribution approach, *see supra* text following note 105.

169. The participation-in-persecution approach is discussed *supra* notes 106-108 and accompanying text.

170. The issue most seriously contested on appeal was the adequacy of the Board's finding that the arrests and burning constituted persecution *because of political opinion*, as opposed to being a form of brutal wartime reprisal. Judge Newman dissented on this issue. 773 F.2d at 448.

171. *In re Laipenieks*, 18 I. & N. Dec. 433, 434 (BIA 1983), *rev'd sub nom. Laipenieks v. INS*, 750 F.2d 1427, 1429 (9th Cir. 1985).

172. 750 F.2d at 1429.

Circuit reversed the Board's unanimous decision ordering Laipenieks deported.¹⁷³

In July 1941, Laipenieks joined a section of the Latvian Auxiliary Police, the LPP, which the Nazis had formed and controlled.¹⁷⁴ Laipenieks rose to the position of an officer of the LPP and was assigned the tasks of fighting against Jews and communists.¹⁷⁵ Among other things, his duties included conducting investigations of communist suspects, questioning witnesses, and interrogating communist prisoners.¹⁷⁶

The Board found that Laipenieks's activities as an investigator and interrogator constituted assistance in persecution because they were "a necessary link" between the LPP and its objects of persecution.¹⁷⁷ In so deciding, the Board likened Laipenieks to Osidach, the paid and armed interpreter for the Ukrainian police.¹⁷⁸ Significantly, the Board concluded that, because Laipenieks was a higher level officer, his conduct "presented an even stronger case of assistance than [that presented] in *Osidach*."¹⁷⁹

The Ninth Circuit reversed.¹⁸⁰ Although the Government had established that the LPP had been "involved in acts of persecution because of political beliefs,"¹⁸¹ it had failed to establish that Laipenieks himself had been so involved or "at least that Laipenieks' acts led to the persecution of individuals because of political belief."¹⁸² Thus, even if striking prisoners constituted persecution, it was still necessary to establish "that this persecution occurred *because of the prisoner's political beliefs*."¹⁸³

Furthermore, it was not enough to show that the LPP ordered a prisoner's investigation solely because of his political beliefs. It was necessary also to show that Laipenieks himself struck a prisoner because of his own personal aversion to the prisoner's political beliefs.¹⁸⁴ In so finding, the court resound-

173. *Id.* at 1435.

174. 18 I. & N. Dec. at 449.

175. *Id.*

176. *Id.* at 450-51.

177. *Id.* at 465.

178. *Id.*

179. *Id.*

180. 750 F.2d 1427 (9th Cir. 1985).

181. *Id.* at 1435.

182. *Id.*

183. *Id.* at 1437 (emphasis in original).

184. The Ninth Circuit thus adopted the position rejected in *Maikovskis*, in which the Second Circuit insisted that the "alien's personal motivation is not paramount." 773 F.2d at 445.

ingly repudiated the Board's inquiry into "the *objective effect* of actions"¹⁸⁵ in favor of a requirement of actual individual participation in particular acts of persecution. Satisfaction of such a requirement is possible, in Laipenieks' case, only by showing either that he had struck prisoners because of his own negative attitude toward their political opinions, or that particular persons he had investigated were ultimately persecuted because of their political opinions.

Under the contribution approach, it is possible to maintain that Laipenieks assisted the Nazis in persecuting civilians because of their political opinions even if he never actually struck any prisoners and even if none of the individuals he investigated was ever ultimately persecuted. Suppose, for example, that the Nazis had wanted to discover and eliminate all communists in the area, and that Laipenieks had not been an especially competent investigator. After the Nazis, or the LPP, had made a preliminary determination as to which persons were likely communist sympathizers or activists, they might have had Laipenieks investigate the least likely cases, knowing that they would probably not need to murder any of the persons he investigated. Under these circumstances, Laipenieks' investigations, in his capacity as a member of the LPP, would have assisted the Nazis in persecuting communists because of their political opinions by freeing more competent LPP investigators to investigate persons seriously suspected of being communists. Thus, he would have contributed to persecution even though the persons he investigated were never actually persecuted.

D. TWO TRULY DIFFICULT CASES

Truly difficult cases arise when the correct result is unclear under either approach or when an individual, although he voluntarily joined an organization that assisted the Nazis in persecuting civilians, performed acts not themselves persecutorial and subsequently made only minimal contributions to the organization. One such case is *United States v. Kowalchuk*;¹⁸⁶ another is *United States v. Sprogis*.¹⁸⁷

185. 18 I. & N. Dec. at 465.

186. 571 F. Supp. 72 (E.D. Pa. 1983), *aff'd on other grounds*, 773 F.2d 488 (3d Cir. 1985) (en banc), *cert. denied*, 106 S. Ct. 1188 (1986).

187. CV-82-1804, slip op. (E.D.N.Y. May 18, 1984), *aff'd*, 763 F.2d 115 (2d Cir. 1985).

1. Sergei Kowalchuk

Kowalchuk entered the United States in 1949 under the 1948 Act and was naturalized in 1960.¹⁸⁸ When he applied for a visa, Kowalchuk stated that during the German occupation of the Ukraine he had lived in Kremianec and had worked as a tailor, thus concealing his service with the Lubomyl militia.¹⁸⁹ The district court held that, as a member of the Luboymyl Schutzmannschaft, Kowalchuk had assisted in persecuting civilians and consequently ordered his denaturalization.¹⁹⁰

Although the district court did not find that Kowalchuk had personally participated in acts of persecution against Jews,¹⁹¹ it concluded that he had assisted in persecution by virtue of his relation to the Luboymyl Schutzmannschaft, an organization which clearly assisted the Nazis in their objective of rendering the area judenfrei.¹⁹² Kowalchuk was not simply a member of the Schutzmannschaft. He had "occupied a responsible position, albeit largely clerical, within that organization."¹⁹³ The court found that even if Kowalchuk was unaware of the Germans' intention to murder all the Jews of Lubomyl, he was nonetheless aware of the responsibilities the Germans assigned to the Schutzmannschaft and of atrocities its members had committed against Jews.¹⁹⁴ Finally, the clerical duties Kowalchuk had performed contributed to the Schutzmannschaft's ability to efficiently assist the Nazis in persecuting Jews. For the militia to function smoothly, someone had to type and issue duty rosters and daily reports of police activity. In the Lubomyl Schutzmannschaft, Kowalchuk had been that person.

Although the Third Circuit affirmed, the court did not reach the question whether Kowalchuk's acts constituted assist-

188. 571 F. Supp. at 74.

189. *Id.* at 76.

190. *Id.* at 82-83.

191. *Id.* at 81.

192. *Id.* at 82. The Luboymyl Schutzmannschaft, organized by the Nazis shortly after their June 1941 invasion,

regularly and routinely enforced the martial law restrictions imposed by the Germans, including beating Jews found outside the ghetto after curfew, beating or severely reprimanding Jews who failed to wear the required insignia, assisting the Germans in confiscating valuables from the Jewish inhabitants, arresting and participating in the harsh punishment of persons involved in black-market activities or subversive activities hostile to the German occupation forces

Id. at 81.

193. *Id.*

194. *Id.*

ance in persecuting civilians.¹⁹⁵ Chief Judge Aldisert's vigorous dissent did address the question, however, and argued that Kowalchuk's acts did not constitute assistance in persecution. Judge Aldisert stressed that Kowalchuk "was not involved actively in any persecutions"¹⁹⁶ and that his responsibility was "simply that of a clerk and not that of a decisionmaker."¹⁹⁷ In arguing that the *Fedorenko-Dercacz-Osidadch* line of cases should not extend to encompass Kowalchuk, Judge Aldisert compared Kowalchuk's conduct to that of persons who do not seem morally responsible for having assisted in persecuting civilians:

Can we say that the baker who delivered bread to the Lubomyl militia was guilty of assisting in Nazi persecutions? Or the charwoman or janitor who cleaned the office where Kowalchuk toiled as a clerk? A line must be drawn. Although to do so is a very difficult, if not ultimately arbitrary, act, we are required to do so in this case whether we affirm or reverse the district court.¹⁹⁸

The *Kowalchuk* dissent demonstrates that even under the contribution approach it remains difficult to determine whether an individual has contributed enough to merit the attribution of more than minimal moral responsibility for persecution.

2. Elmars Sprogis

Similarly, in *United States v. Sprogis*,¹⁹⁹ an individual who performed largely clerical duties was found not to have assisted in persecution. Sprogis entered the United States in 1950 under the 1948 Act, as amended, and was naturalized in 1962.²⁰⁰ Unlike other defendants in these difficult cases, he truthfully acknowledged his wartime service as a Latvian police officer.²⁰¹

195. The Third Circuit affirmed on the grounds that because Kowalchuk had voluntarily assisted the enemy, he was ineligible for a visa under § 2(b) of the 1948 Act, and that he had procured his citizenship through a material misrepresentation. A panel of the Third Circuit originally reversed the district court's denaturalization order. *See United States v. Kowalchuk*, 744 F.2d 301 (3d Cir. 1984) (withdrawn). This opinion was subsequently withdrawn and the case was heard en banc. The majority had difficulty resolving the case and did not reach the question of assistance in persecution. 773 F.2d 488, 494 (3d Cir. 1985). Additionally, the court's argument that Kowalchuk voluntarily assisted the enemy, *see id.*, is perfunctory and unsatisfactory, as the dissent properly points out. *See id.* at 508-10 (Aldisert, C.J., dissenting).

196. 773 F.2d at 511.

197. *Id.*

198. *Id.* at 513.

199. No. CV-82-1804, slip op. (E.D.N.Y. May 18, 1984), *aff'd*, 763 F.2d 115 (2d Cir. 1985).

200. No. CV-82-1804, slip op. at 1-2.

201. *Id.* at 35.

Sprogis voluntarily served as Assistant Chief of Police in Gulbene, Latvia, from July 16, 1941, to August 10, 1941.²⁰² When he arrived for work on July 19, 1941, he found nine Jews in the duty policeman's room.²⁰³ Sprogis thought that the German Wehrmacht had arrested the nine solely because they were Jewish.²⁰⁴ After the police took the rest of the nine Jews' confiscated property to the mayor, Sprogis paid the remaining 100 rubles to the four farmers who had delivered the Jews.²⁰⁵ When a Latvian unit took the Jews from the duty officer in Gulbene, Sprogis was fairly sure that they were going to be shot, as indeed they were.²⁰⁶ Finally, Sprogis signed three forms detailing the money and personal property confiscated from the Jews and reflecting payments to the farmers who had reported them.²⁰⁷ There was no proof, however, that Sprogis had ordered his men to detain the Jews at the Gulbene police station.²⁰⁸

Another incident occurred in late July or early August of 1941 when Sprogis traveled in his official capacity to Litene to witness the Germans' execution of an alleged communist.²⁰⁹ As he was leaving the site after the execution, Sprogis saw a column of 100-150 people, guarded by several military units, walking toward the Litene summer camp.²¹⁰ Sprogis did not recognize any of the military personnel.²¹¹ The next day, he learned that the Arajs Commandos had shot all of the people he had seen the previous day, most of whom were Jewish.²¹² These events occurred during the first sweep of the Nazis' mobile killing units through Latvia.²¹³

The district court found that the Government had failed to establish, by clear and convincing evidence, that Sprogis had assisted in persecution.²¹⁴ In its opinion, the court emphasized the ministerial nature of Sprogis's actions²¹⁵ and that he had

202. *Id.* at 36-37.

203. *Id.* at 44.

204. *Id.* at 45.

205. *Id.* at 39-42, 47-48.

206. *Id.* at 46.

207. *Id.* at 39-42.

208. *Id.* at 48.

209. *Id.* at 49.

210. *Id.* at 50.

211. *Id.* at 46.

212. *Id.* at 83.

213. See R. HILBERG, *supra* note 54, at 312.

214. No. CV-82-1804, slip op. at 84-85.

215. *Id.* at 83.

not personally participated in specific atrocities against Jewish civilians.²¹⁶ Thus, the court concluded:

While it is evident that Elmars Sprogis was physically present at the events of July 19, 1941, and stood by when the Germans picked up the nine Jews and watched a hundred or a hundred fifty men, women and children being marched to an execution site, the Court does not believe that Congress intended to exclude from citizenship persons who were present when others were persecuted. We fear that after the holocaust and the Second World War, there would have been very few displaced persons eligible for citizenship if Congress so intended.²¹⁷

In affirming, the Second Circuit observed that Sprogis's acts of paying the farmers, signing the forms, and being present at the police station "were not acts of oppression. They do not amount to the kind of active assistance in persecution which the DPA [1948 Act] condemns."²¹⁸ The Second Circuit opinion emphasized the inaccuracy of characterizing Sprogis's acts as persecutorial, and it maintained that in each of the cases in which courts had found assistance in persecution, "the individual condemned as a persecutor had actively participated in some act of oppression directed against persecuted civilians."²¹⁹ The court concluded that to attribute liability for persecutorial acts to Sprogis for the performance of "occasional ministerial tasks" and for his "passive accommodation of the Nazis, . . . would require the condemnation as persecutors of all those who, with virtually no alternative, performed routine law enforcement functions during Nazi occupation."²²⁰

Even if Sprogis committed no specific persecutorial acts, however, under the contribution approach there is still a sense in which he participated in persecution. Sprogis had played a role in the confiscation and distribution of the nine Jews' property,²²¹ and he was present in his capacity as Assistant Chief of Police when they were detained.²²² If these facts are insufficient to conclude that he assisted in persecuting civilians, it is only because the participation-in-persecution approach requires some greater degree of participation that is difficult to define.

Although the Second Circuit emphasized that Sprogis had

216. *Id.* at 80.

217. *Id.* at 85.

218. 763 F.2d at 122 (citing *Laipeniaks v. INS*, 750 F.2d 1427, 1432 (9th Cir. 1985)).

219. *Id.* at 122.

220. *Id.* at 122-23.

221. *See supra* note 205 and accompanying text.

222. *See supra* notes 202-204 and accompanying text.

not personally committed persecutorial acts, it added that any contribution he might have made to the Nazis' objective of killing Jews was simply too minimal to justify his "condemnation as [a persecutor]."²²³ Its claim that Sprogis's acts "do not amount to the kind of active assistance in persecution which the DPA [1948 Act] condemns," its distinction between "active participation in persecution" and "Sprogis' passive accommodation of the Nazis," and its emphasis on the lack of evidence that Sprogis had made any "decision to single out any person for arrest and persecution"²²⁴ indicate both that the magnitude of an individual's contribution is relevant to whether he assisted in persecution and that Sprogis's contribution was insufficient. Each of these judgments has substantial plausibility. Although Sprogis's acts might have assisted the Germans in efficiently achieving their objective of rendering Latvia judenfrei, they might, nevertheless, have made too insubstantial a contribution, even in sum, to warrant holding Sprogis more than minimally morally responsible.

IV. MORAL RESPONSIBILITY

In addition to the inherently troubling nature of the assistance-in-persecution cases, courts have difficulty determining which acts to characterize as assistance in persecution. Courts are relatively inexperienced at assigning individual responsibility for harm wrought by a large group over a period of years. The paradigm of criminal responsibility is the individual actor who has individually harmed identifiable persons. Even when there is more than one actor and a differentiation of roles between principals and accomplices, the number of individuals involved is usually small. The harm the Nazis wrought, however, was of necessity accomplished by an organized effort integrating the actions of many individuals who themselves occupied different roles in a variety of organizations.²²⁵ A discussion of

223. 763 F.2d at 123.

224. *Id.* at 122.

225. R. HILBERG, *supra* note 54, at 47, notes that in their concern to achieve a Final Solution of the "Jewish problem," the Germans moved from street violence, exemplified in Kristallnacht (November 10, 1938), to more organized, bureaucratic methods: "It is the bureaucratic destruction process [involving four stages—identification, expropriation, concentration, and annihilation] that in its step-by-step manner finally led to the annihilation of five million victims." *Id.* The Germans created or reorganized indigenous organizations, to which many of the defendants in these cases belonged, so that the organizations could efficiently assist them in accomplishing their ultimate objective of annihilating Jews. *See also id.* at 993-94 (describing the gradual growth of the

what philosophers have said about individual responsibility in this regard provides a useful framework for determining what constitutes assistance in persecution.

A. INDIVIDUAL MORAL RESPONSIBILITY FOR COLLECTIVE ACTION

The groups the Nazis structured to accomplish their goal of annihilating Jews, including the indigenous units to which many of the previously discussed defendants belonged,²²⁶ were of a type that philosophers call formal organizations, collectivities, or organized groups.²²⁷ Such groups have an identity independent of the particular individuals who happen at any one time to occupy roles within the group.²²⁸ These groups are hierarchical, both horizontally and vertically, with a pyramid of authority,²²⁹ and have an institutional structure, which usually defines the methods by which the organizations choose courses of collective action.²³⁰ Most importantly, such groups have a purpose, and members' performance is evaluated in relation to their contributions to that purpose.²³¹

Attributions of responsibility for action or failure to act arise in at least two contexts. In the first, we have in mind an action or event and want to know to whom responsibility is attributable. For example, a teacher returns to his first grade class and finds a chair overturned. The teacher asks who is responsible. The answer may indicate a person, animal, or inanimate object, for example, the wind. Assigning responsibility in this sense carries with it no implication of moral blame or answerability.²³²

terror from seemingly isolated events into an unprecedented five million murders).

226. See *supra* note 225 and accompanying text.

227. A leading article is Ladd, *supra* note 10. See also French, *Types of Collectivities and Blame*, 56 THE PERSONALIST 160, 160-65 (1975) (distinguishing aggregate from conglomerate collectivities); Gruner, *On the Action of Social Groups*, 19 INQUIRY 443, 446-48 (1976) (distinguishing non-institutionalized assemblies from structured, goal-oriented institutions). See generally Held, *Can a Random Collection of Individuals Be Morally Responsible?*, 67 J. PHIL. 471 (1971) (distinguishing collectivity/organized group from random collection of individuals).

228. French, *supra* note 227, at 164.

229. Ladd, *supra* note 10, at 489.

230. French, *supra* note 227, at 164.

231. Gruner, *supra* note 227, at 448; Ladd, *supra* note 10, at 495-96.

232. J. FEINBERG, *Action and Responsibility*, in DOING AND DESERVING 119, 138 n.17 (1970), refers to such judgments of responsibility as ones of "proper identifiability." See also H. HART, *Postscript: Responsibility and Retribution*,

In the second context, we have both the action or event and the human actor in mind and want to know to what extent the actor is morally blameworthy or morally obliged to make amends. Thus, the relevant inquiry considers not only the actor's causal relation to the harm, but also such factors as the actor's knowledge and ability to control his conduct.²³³ Assignment of responsibility in this sense carries with it the implication that the actor must answer²³⁴ or account²³⁵ for his conduct, and that he is properly blameworthy when he should and could have acted differently.²³⁶

Philosophers also have examined whether moral responsibility assigned to formal organizations is "non-distributive."²³⁷ Although a group's responsibility for an occurrence may not "distribute" to each of its members for their actions in bringing about that occurrence, it does not follow that responsibility for that occurrence is not assignable to particular individuals, including members of the group.²³⁸ Thus, even if the moral re-

in PUNISHMENT AND RESPONSIBILITY 210, 214-15 (1968) (discussing "causal responsibility"); French, *supra* note 8, at 268-72 (discussing non-moral blame).

233. H. HART, *supra* note 232, at 225.

234. *Id.* at 264-65.

235. J. FEINBERG, *supra* note 12, at 226. See also Pennock, *The Problem of Responsibility*, in RESPONSIBILITY 3, 6 (C. Friedrich ed. 1960) (discussing the notion of accountability).

236. See H. HART, *supra* note 232, at 225; cf. French, *supra* note 232, at 273-76 (discussing moral blame).

237. Group responsibility is "distributive" when it "is simply the sum of all the individual responsibility." J. FEINBERG, *supra* note 12, at 243. It is "non-distributive" when it is "more than the sum of the responsibility of its members." *Id.* at 248.

238. Some, although not all, of the group's moral responsibility for an occurrence may distribute to members for their actions in bringing about the occurrence. P. FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY 112-13 (1984) (a finding of non-distributive collective responsibility for an occurrence does not exonerate all the individuals in the collective of responsibility for their actions in bringing about the occurrence).

The non-distributive responsibility is assignable to the individuals constituting the group, not for acts they perform in their group roles, but for their acts of choosing to become members or to remain members once they become fully aware of the group's objective. See Held, *supra* note 227, at 475; see also Downie, *Social Roles and Moral Responsibility*, 39 PHIL. 29, 35 (1964) (discussing responsibility for having accepted or remained in a role).

Finally, responsibility is attributable to individuals who are not group members, for example, to individuals or groups benefiting from the existence of the group and contributing to maintaining its existence. See, e.g., Benjamin, *Can Moral Responsibility Be Collective and Nondistributive?*, 4 SOC. THEORY & PRAC. 93 (1976) (responsibility of collective is understandable in terms of responsibility of non-members who maintain collective's existence); Downie, *Col-*

sponsibility of a group is non-distributive, it is still necessary to determine each individual member's moral responsibility.

As with criminal responsibility, a group member is morally responsible only if there are present both an *actus reus*, primarily in the form of the member's contribution to achieving the group's objective, and certain *mens rea*, primarily in the form of knowledge.²³⁹ When a group can achieve its objectives only by the coordinated activities of many members occurring over a period of time, the central *actus reus* issue is to determine any particular individual's contribution to the overall undertaking.²⁴⁰ In making this determination, Joel Feinberg asserts the need to consider such "incommensurable" factors as degrees of initiative, difficulty or causal crucialness of assigned tasks, degrees of authority, and percentage of benefit received.²⁴¹

Another important question concerning individual contributions to group actions is how to treat actual membership in a group.²⁴² It is plausible to characterize knowing, voluntary and active membership in a group in terms of the contribution, however minimal, the individual thereby makes to achieving the group's purpose.²⁴³ By becoming a member, an individual has voluntarily placed himself in a position to assist the group in obtaining its objective. Naturally, the group turns first to its members when in need of someone to contribute, and is justifiably harsher in its judgment of a member than of a nonmember

lective Responsibility, 44 PHIL. 66 (1969) (moral responsibility of collective is traceable to individuals who are not members of the collective).

239. Adolf Eichmann was well aware of these two conditions for responsibility. In his interrogation by the Israeli Police prior to his trial, he stated: "I never claimed not to know about this liquidation. I only said that Bureau IV B 4 had nothing to do with it." *Eichmann Interrogated* 82 (J. von Lang ed. 1984).

240. See J. FEINBERG, *supra* note 12, at 246; see also Lewis, *Collective Responsibility*, 23 PHIL. 3, 13 (1948) (guilt of each member is strictly proportionate to his part in the joint undertaking).

241. See J. FEINBERG, *supra* note 12, at 246.

242. Both Held, *supra* note 227, at 475, and Downie, *Collective Responsibility*, *supra* note 238, at 68, believe that it is possible to hold an individual morally responsible merely for joining, or retaining membership in, a collective. See also Walsh, *Pride, Shame & Responsibility*, 20 PHIL. Q. 1, 10 (1970) (discussing the doctrine of tacit consent to joining or retaining membership in the collective).

243. Another explanation of the moral relevance of a person's voluntarily joining a group and retaining membership while knowing its purpose is that it helps to evaluate that person's character. We learn about a person's identity by knowing what objectives are paramount in the groups that person has joined. By such information, we hope to find an explanation for why an individual with apparently good moral character joined only groups with goals that involve harming others.

for failure to contribute. Similarly, the number of active members in a group is usually a factor for consideration when a group is deciding which course of action it will pursue. Likewise, the group's members create the atmosphere or dynamic of the group, and that atmosphere is, in large part, responsible for determining whether the group will pursue its objective successfully. Because certain activities, such as waging war or killing large numbers of people, are successful only if attempted through organized group effort, some moral responsibility may attach to an individual member merely because the individual voluntarily joined and retained membership in the group while knowing of the group's objectives.²⁴⁴

A problem the assistance-in-persecution cases raise is that, even when all the various indicia of contribution are taken into account, the defendant's own contribution to achieving the group's objective may seem minimal. Kowalchuk's contribution, for example, was limited to clerical work for the police and to membership in the Schutzmannschaft.²⁴⁵ Philosophers troubled by this problem seek ways to determine individual moral responsibility for small contributions.²⁴⁶

John Ladd notes that where the contribution of any particular group member to a collective action is neither necessary nor sufficient, each member may seek to deny moral responsibility.²⁴⁷ To deal with this problem, Ladd suggests rejecting the assimilation of moral to causal responsibility.²⁴⁸ It would then follow that a person involved in a collective action is morally responsible even though his actions were neither causally necessary nor sufficient.²⁴⁹ Thus, it becomes possible "to assess the actions of any particular official on [individual] merits without regard to the other causal factors contributing to the final result."²⁵⁰

244. This argument establishes only that the mere fact of active group membership itself might constitute a form of contribution, not that membership with no other contribution suffices to justify assigning a high degree of moral responsibility for the group's acts. *Cf.* *Maikovskis v. INS*, 773 F.2d 435, 446 (2d Cir. 1985) (mere membership sufficient), *cert. denied*, 106 S. Ct. 2915 (1986).

245. *See supra* notes 195-198 and accompanying text.

246. Thus, philosophers have properly rejected the approach taken by the International Military Tribunal at Nuremburg, which regarded less than substantial participation in certain activities as equivalent to no contribution at all. *See* Levinson, *supra* note 14, at 264-65 n.59.

247. *See* Ladd, *supra* note 10, at 514.

248. *Id.* at 515.

249. *Id.* at 514-15.

250. *Id.* at 515.

The problem with Ladd's approach is two-fold. First, it is important to maintain the connection between moral and causal responsibility. Ladd suggests, however, that it is necessary to repudiate the assimilation of moral to causal responsibility because, although the actions of the individuals in an organization together "make up the rope, . . . any particular strand is dispensable."²⁵¹ The dispensability of any particular contribution does not, however, require accepting the premise that any particular individual has made no causal contribution. Because *every* contributor could say that his contribution was dispensable, the end result of Ladd's approach is an outcome for which no one is held even partially causally responsible. The ramifications of this result are contrary to even the narrowest view of individual accountability for contribution to collective effort. Ladd's problematic argument demonstrates the need for a better understanding of the attributions of causal responsibility for collective actions and not, as Ladd suggests, to a rejection of the connection between causal and moral responsibility.

The second problem with Ladd's approach is evident in his assertion that it is possible to assess a particular official's actions individually without regard to other contributing causal factors: should we *want* to assess a particular individual's contribution without regard to other contributing causal factors? The distinctive nature of collective efforts is that the result is achieved by combining individual contributions, which alone are neither causally necessary nor sufficient. In such a context, proper evaluation of an act is impossible without knowing how it combined with the acts of others and what the actor knew about those combinations and their effects.

Derek Parfit has developed a moral theory which explicitly takes account of the way that the contributions of many individuals can combine to produce substantial harm or benefit.²⁵² He contrasts two ways in which victims experience the same amount of suffering:

The Bad Old Days. A thousand torturers have a thousand victims. At the start of each day, each of the victims is already feeling mild pain. Each of the torturers turns a switch a thousand times on some instrument. Each turning of a switch affects some victim's pain in a way that is imperceptible. But, after each torturer has turned his switch a thousand times, he has inflicted severe pain on his victim. . . .

The Harmless Torturers. In the Bad Old Days, each torturer in-

251. *Id.* at 514.

252. See D. PARFIT, REASONS AND PERSONS 67-86 (1984).

flicted severe pain on one victim. Things have now changed. Each of the thousand torturers presses a button, thereby turning the switch once on each of the thousand instruments. The victims suffer the same severe pain. But none of the torturers makes any victim's pain perceptibly worse.²⁵³

Parfit argues that there is no morally significant difference between these two cases. Each Harmless Torturer acts just as wrongly as he did as a torturer in the Bad Old Days. The explanation for Parfit's conclusion appeals to what the torturers together do, and says that "[e]ven if each harms no one, they together impose great suffering on a thousand victims."²⁵⁴ From these two examples, Parfit derives the principle that when an individual knows that his actions, in combination with the actions of others, will produce harm, he should not act, even when his actions, in isolation, would have insignificant effects.²⁵⁵ Thus, a particular act is wrong because of its effects, even though the act on an individual level is seemingly insignificant, because the relevant effects include both the effects of the particular act as well as the effects of the set of acts to which the particular act belongs.²⁵⁶

Although Parfit does not state his conclusions in terms of moral responsibility, their relevance to that issue is clear.²⁵⁷ Rather than ignoring apparently small or de minimus contributions, it is preferable to examine the way a particular person's contributions connect with those of other members to achieve the group's overall purpose. It is also necessary to be alert to the various ways in which contributions are made. For example, one member's acts may combine with different types of acts performed by other members to more efficiently achieve the group's ultimate objective.²⁵⁸

253. *Id.* at 80.

254. *Id.* at 81.

255. *Id.*

256. Parfit labels as the Second Mistake in Moral Mathematics the claim: "If some act is right or wrong *because of its effects*, the only relevant effects are the effects of this particular act." *Id.* at 70 (emphasis in original).

257. Parfit states his conclusions in terms of what a person ought to do. If, by failing to do what he or she ought to do, a person contributes to harming others, it is plausible to say that the person is morally responsible for having made that contribution. Parfit's examples involve "heaps" and continuous amounts of, for example, pain and beans on a person's plate. *See id.* at 511 n.44. Although his claims are most convincing within such cases, they are still applicable when the contributions of each person are varied and connect in diverse ways with the contributions of others.

258. Efficiency is especially important in judging contributions to Nazi war crimes because of the Nazis' objectives. The Nazis aspired to destroy all Jews

The crucial mens rea factors involved in determining whether a particular individual contributed to the group's harmful objectives are the individual's knowledge and the voluntariness of his actions.²⁵⁹ The knowledge factor suggests that moral responsibility for acts performed by a group to which a person belongs and contributes is attributable to that person only if he knew or should have known both the group's objectives and the way his actions contributed to achieving those objectives.²⁶⁰ Although courts have emphasized the former element,²⁶¹ they have not explicitly dealt with the latter. Perhaps courts have overlooked the latter element on the assumption that the defendants should have known or been aware of how their acts contributed to achieving the group's ultimate objectives.

The second mens rea consideration is the voluntariness of the individual's acts in joining the group, retaining membership, and performing the tasks assigned to him.²⁶² Moral responsibility typically is attributable when the individual was free to do or not to do the act.²⁶³ Plausibly, a member is not responsible if he was coerced into joining the group or doing

in Europe while simultaneously fighting a world war. Such an ambitious plan demanded efficiency.

259. Mens rea considerations relevant in other contexts are not typically relevant in these cases. No defendant has attempted to avoid liability on the ground that he lacked what Hart calls "capacity responsibility." See H. HART, *supra* note 232 at 227-30. Although it is a necessary condition of attributing moral responsibility to defendants that they intended their acts, it is not necessary that they intended thereby to harm anyone. See Ardal, *Motives, Intentions and Responsibility*, 15 PHIL. Q. 146, 148-51 (1965). Similarly, it is not necessary for a group member to possess bad motives for moral responsibility to attach to that person's contributions to the group's objective. See *id.* at 153-54 (contending that "intentionality is not a necessary condition for responsibility").

260. The second condition is necessary because it is possible that a member was aware of the group's objectives and, yet, was justifiably unaware of the manner in which his actions contributed to their furtherance. The Nazis, eager to avoid the psychological problems that would arise if the individuals who assisted them became fully aware of the nature of their acts, sought for ways to obscure this awareness. R. HILBERG, *supra* note 54, describes an example in which the Judenrat of a Latvian village tried to make it easier for a nurse to kill Jewish premature babies by telling her "to proceed in such a way that she would not know the nature of her act." *Id.* at 1035.

261. See, e.g., *United States v. Kowalchuk*, 571 F. Supp. 72, 81 (E.D. Pa. 1983) (defendant must have known that Schutzmannschaft was carrying out harsh repressive measures), *aff'd on other grounds*, 773 F.2d 488 (3d Cir. 1985)(en banc), *cert. denied*, 106 S. Ct. 1188 (1986).

262. See J. FEINBERG, *supra* note 12, at 246.

263. See Freund, *Responsibility—Definitions, Distinctions, and Applications in Various Contexts*, in RESPONSIBILITY 28, 37 (C. Friedrich ed. 1960).

the particular act.²⁶⁴ A crucial problem in determining voluntariness in these contexts is deciding what type of behavior is reasonable to expect of individuals. It is necessary to ascertain which threats of harm it is reasonable to expect individuals not to succumb to so as to avoid contributing to harming others, and which features of a situation are relevant in determining what behavior is reasonable. These questions are beyond the scope of this Article, because in *Fedorenko* the Supreme Court ruled that a defendant need not have assisted the Nazis voluntarily in persecuting civilians.²⁶⁵

B. MORAL RESPONSIBILITY AND ASSISTANCE IN PERSECUTION

This discussion of the principles of individual and collective responsibility can provide courts with a framework within which to determine whether conduct constitutes assistance in persecution.²⁶⁶ Although the statutory language does not itself refer to moral responsibility,²⁶⁷ the concern that persons responsible for persecution not enjoy the benefits of United States citizenship underlies all the various statutory formulations.

If a court finds that a defendant's own acts were per-

But see J. FEINBERG, *supra* note 232, at 149-50 (arguing that "voluntariness in this sense has no direct and invariant connection with liability").

264. *See* J. FEINBERG, *supra* note 12, at 248 ("The man who 'cooperates' with crime under duress is surely in a different position from the man who cooperates . . . as the result of a bribe."); *cf.* Cooper, *Responsibility and the "System,"* in *INDIVIDUAL AND COLLECTIVE RESPONSIBILITY* 81, 88-91 (P. French ed. 1972) ("One cannot reasonably expect a man to sacrifice friendship, the welfare of his family, or even his home, by standing out against what has become the accepted and normal practice in his township."); Wasserstrom, *The Relevance of Nuremberg,* *supra* note 14, at 32-33 ("One interpretation of 'moral choice' would focus heavily on the degree of choice exercisable by the actor.").

265. *See supra* text accompanying notes 86-103.

266. Although an understanding of the principles of individual and collective responsibility can assist courts in determining what constitutes assistance in persecution, caution is necessary when drawing implications from the preceding discussion. Moral responsibility is a matter of degree. *Cf.* J. FEINBERG, *supra* note 12, at 245-46 ("The problem of determining degree of responsibility of individuals in joint undertakings . . . is assessing the extent of each individual's contribution."). Courts, on the other hand, must make an all-or-nothing decision whether the individual's conduct amounted to assistance in persecution and, on that basis, decide whether the defendant should be denaturalized or deported. Situations may arise in which the defendant is morally responsible for assisting in persecution. If that defendant assisted only minimally, however, such conduct will fall below the legal standard of having "assisted in persecution."

267. *See supra* text accompanying note 39.

secutorial, the inquiry should end there. Persecutorial acts and personal participation in persecution are not easy to define, however, and courts have expanded the definitions in various ways.²⁶⁸ A defendant need not have personally committed atrocities or crimes against identifiable victims. Nevertheless, there must be a sufficiently close connection—how close is unclear—between the defendant's conduct and the persecution. Beyond these two claims, little else is clear about this approach.²⁶⁹

Analyzing these cases is easier if personal participation in persecution is limited to two situations: either the individual's acts were clearly persecutorial, as evidenced by direct contacts with civilians which caused obvious physical or psychological harm, or the individual directly ordered others to have such harmful contacts with civilians. Under this analysis, the acts of a camp guard and of an individual who evicted Jews from their homes, confiscated their property, and concentrated them in a ghetto would constitute personal participation in persecution. On the other hand, the acts of someone like Osidach, in his function as an interpreter, or of Kowalchuk, in his function as a clerk, would not constitute personal participation.

Although personal participation in acts of persecution is sufficient to constitute assistance in persecution, courts should not treat it as necessary.²⁷⁰ Many individuals who bear substan-

268. See *supra* notes 109-112 for cases addressing this issue.

269. Some courts have suggested that an individual may participate in persecution by ordering others to commit persecutorial acts even though the individual's own acts are not themselves persecutorial. See, e.g., *United States v. Sprogis*, 763 F.2d 115, 122 (2d Cir. 1985) (assistance in persecution includes ordering others to arrest or shoot detained civilians).

The language of 8 U.S.C. § 1251(a)(19) (1982), referring to those who "ordered, incited, assisted, or otherwise participated in the persecution of any person or group of persons because of race, religion or national origin . . .," supports the view that ordering persecution is a form of participation in persecution. This statutory formulation, however, is not especially helpful in deciding the difficult cases. It indicates that ordering, inciting, and assisting are *ways of participating in persecution*. While this is technically accurate, it conflicts with the ordinary usage of these terms, in which orders to persecute or to assist in persecution are typically distinguished from personal participation.

270. Insisting that personal participation in persecution is necessary for a finding of assistance in persecution renders the "assist" component of the statutory language otiose. If the individual's acts were themselves persecutorial, that resolves the matter. If they were not, that likewise concludes the inquiry. Consequently, the question of assistance is never reached. Given that the collective to which the individual belonged and contributed had persecution as an objective, did the individual assist in that persecution, even though his own particular acts were not themselves persecutorial? By using the term "assist,"

tial moral responsibility for persecuting civilians, as a result of their contributions to a group effort with that objective, have never personally committed acts of persecution.²⁷¹ Therefore, even if a court determines that a defendant has not personally participated in acts of persecution, it could nevertheless find that the individual assisted in persecuting civilians.²⁷²

Because most of the defendants in the previously discussed cases allegedly assisted in persecution by virtue of their duties as members of organizations,²⁷³ a court must determine what role the Nazis assigned the organization, how much control the Nazis exercised over it, and how effective the organization was in helping the Nazis achieve their objective of persecuting civilians. If a court finds that the organization assisted the Nazis in persecuting civilians, the court should then determine the ex-

the statutory language anticipates that on some occasions it is important to ask this question.

Requiring personal participation implicitly sanctions the form of moral reasoning used by the commander of Einsatzgruppe D, Ohlendorf, who, in order to avoid personal responsibility, demanded that his team of murderers stop shooting large numbers of Jews in the neck and ordered them instead to employ "massed fire from a considerable distance." R. HILBERG, *supra* note 54, at 319.

271. Adolf Eichmann is a good example. Although Eichmann himself may never have directly persecuted Jews or ordered others to do so, he certainly bears a large share of moral responsibility for persecuting Jews, because of his substantial contributions to Nazi objectives. Eichmann advised the collecting centers on how to meet their "quotas." He ensured that adequate trains were available to transport Jews to death camps. He consulted with the local Judenrat. Moreover, he knew the fate of those Jews he sent to "the East." It is unnecessary to show that someone like Eichmann personally participated in acts of persecution to explain his moral responsibility for the death of countless Jews. Likewise, many others, equally free of personal participation in persecution, may share in that moral responsibility to an extent commensurate with their contributions.

272. *But see* A. RYAN, *supra* note 2, at 248. Ryan offers two reasons for limiting cases to those in which "the defendant himself personally took part in, or incited, the persecution of which he stood accused."

First, I wanted no witch-hunts, prosecuting people whose actual guilt was uncertain. And second, I believed that no judge in America would deport a middle-aged or elderly man (or woman) who had lived in the United States for thirty years for no reason other than that he had once been a fascist and had lied on some application forms.

Id. at 249.

The Eichmann example shows, however, that even if a person has not personally taken part in persecution his guilt is not necessarily uncertain, nor need the attempt to prosecute such individuals constitute a "witch-hunt." As for the second reason, judges are sensitive to the wide spectrum of responsibility between mere membership in an organization that persecuted civilians and personal participation in acts of persecution. *See supra* note 271.

273. *See supra* text accompanying notes 116-213.

tent of the defendant's individual contribution to the organization.

Measuring individual contribution requires a consideration of factors such as the degree of initiative required, the difficulty or causal crucialness of assigned tasks, degrees of authority, and the Nazis' estimate of the defendant's contribution as manifested by wages and privileges.²⁷⁴ Courts should treat the fact of membership in an organization that had as an objective the persecution of civilians as a contribution, but one which, in the absence of other contributions, is insufficient to justify finding that the defendant assisted in persecution.²⁷⁵ Even so, courts should not ignore apparently small contributions on the assumption that they are insignificant.²⁷⁶ They should sensitively evaluate the way seemingly minor contributions would predictably combine with the acts of others to produce great harm.²⁷⁷

If a court finds that a defendant's contribution was more than minimal, it should next consider whether that person knew that the organization persecuted Jews and that his actions contributed to achieving that objective. If all these conditions are satisfied, the court should conclude that the defendant assisted in persecuting civilians.²⁷⁸

274. See *supra* note 241 and accompanying text.

275. See *infra* notes 277, 278.

276. *Id.*

277. In context, for example, the egregiousness of Dercacz's actions in reporting Jews not wearing arm-bands to police authorities and the Gestapo becomes obvious. Hilberg says of the system of identification:

The whole identification system, with its personal documents, specially assigned names, and conspicuous tagging in public, was a powerful weapon in the hands of the police. First, the system was an auxiliary device which facilitated the enforcement of residence and movement restrictions. Second, it was an independent control measure in that it enabled the police to pick up any Jew, anywhere, anytime. Third, and perhaps most important, identification had a paralyzing effect on its victims. The system induced the Jews to be even more docile, more responsive to command than before. The wearer of the star was exposed; he thought that all eyes were fixed upon him. It was as though the whole population had become a police force, watching him and guarding his actions. No Jew, under those conditions, could resist, escape, or hide without first ridding himself of the conspicuous tag, the revealing middle name, the tell-tale ration card, passport, and identification papers. Yet the riddance of these burdens was dangerous, for the victim could be recognized and denounced. Few Jews took the chance. The vast majority wore the star and, wearing it, were lost.

R. HILBERG, *supra* note 54, at 179-80.

278. Applying these criteria, courts can find that a defendant assisted in persecution even though the defendant is not morally responsible for assisting in persecution. This is the case if the defendant was forced to render assist-

This approach has definite implications for some of the difficult cases. For example, under this approach, the outcome in *Laipenieks* is different. Even assuming that Laipenieks's acts did not themselves constitute personal participation in persecution, they nonetheless contributed substantially to achieving the LPP's objectives, which included persecuting civilians because of their political opinions.²⁷⁹ Moreover, Laipenieks was aware not only that the LPP persecuted civilians because of their political opinions but also that his actions contributed to achieving that objective.²⁸⁰ Additionally, using this approach, Laipenieks's personal motivation for acting, which was of utmost importance to the Ninth Circuit in deciding this case, is irrelevant in view of his contributions to an organization which had as *its* objective the persecution of civilians because of their political opinions.

In contrast, the court in *Osidach*²⁸¹ properly concluded that the defendant assisted in persecution. In terms of this framework, however, it would not have found that his duties as an interpreter constituted personal participation in persecution. Rather, the court could have held Osidach responsible for assistance in persecution because he substantially contributed to the Nazis' objective of rendering Galicia judenfrei. Additionally, Osidach knew that the Nazis had this objective, that they expected the Ukrainian police to assist them in reaching their objective, and that his own activities, as an interpreter and member of that police force, helped them to achieve their objective.

Although this framework has obvious implications for some difficult cases, it is not an algorithm. Any expectations

ance or, possibly, if it was necessary for the defendant to render assistance in order to save other potential victims from harm, for example, by being in a better position to shelter them. Given the Court's treatment of the voluntariness issue in *Fedorenko*, it follows that a defendant is not necessarily morally responsible for assisting in persecution in order for the Court to hold that assistance was rendered. Greater congruity between the legal and moral standards for finding assistance in persecution is attainable by treating satisfaction of the criteria suggested in the text as constituting a prima-facie case that the defendant assisted in persecution. The burden would then shift to the defendant to establish that the conduct amounting to assistance was coerced or justified.

279. See *supra* notes 174-185 and accompanying text.

280. See *Laipenieks v. INS*, 750 F.2d 1427, 1441 (9th Cir. 1985) ("[He] admitted that he personally investigated all kinds of communists, and acknowledged that some were imprisoned solely on grounds of political beliefs.").

281. See *supra* text accompanying notes 128-144 for a discussion of this case.

for a simple, all-inclusive solution to these difficult problems are groundless. *Kowalchuk*,²⁸² for example, remains a deeply troubling case. Because Kowalchuk's acts were not themselves persecutorial, the question remains whether his contributions to the Nazis' objective of persecution were anything more than minimal. It helps to address this question in terms of the indicia of contribution this Article previously identified.²⁸³

Kowalchuk's tasks required no more than a minimum of initiative. Adequately performing them required average competence. The Schutzmannschaft could have assisted the Nazis in persecuting civilians even without a member whose duty it was to type duty rosters and daily police reports. It would have done so, however, with less efficiency and effect than it did with Kowalchuk's contribution. As for Kowalchuk's authority, although his was a position "of some responsibility," the responsibility was that "of a clerk and not that of a decisionmaker."²⁸⁴ Furthermore, he was one of only three Schutzmannschaft members with his own office, and the Nazis sent him away for further training. This indicates that, in the Nazis' estimation, Kowalchuk was a valuable employee and his contribution was more than minimal. Additionally, although his primary duties were clerical, as an active member of the Schutzmannschaft he presumably had to be available to perform other tasks. Finally, his contributions combined with those of others. Kowalchuk interacted with the person from whom he received orders and with those who performed their daily duties on the basis of the rosters he typed. Taking these factors together, it is reasonable to conclude that Kowalchuk's contributions were more than minimal and, thus, to find that he did assist in persecuting civilians. The case is very close, however, and it is equally reasonable to conclude that Kowalchuk's contributions were only minimal.²⁸⁵

282. See *supra* text accompanying notes 188-198.

283. See *supra* notes 273-278 and accompanying text.

284. 773 F.2d at 511 (Aldisert, C.J., dissenting).

285. Analyzing Kowalchuk's contribution in terms of the factors suggested in this Article demonstrates why his case is different from those of the baker and the charwoman. See *supra* text accompanying note 198. The application of many of the factors to the latter two confirms that their contribution to the Nazis' objective was considerably less than Kowalchuk's. By comparison, the town baker's contribution was more discrete and focused. Admittedly, the Nazis and the schutzmannschaft needed bread. Yet the Nazis could call on the baker only for bread. In contrast to a member of the Schutzmannschaft, the baker would not have had to be available and ready to assist the organization in any way when called upon. Taking all the factors into account, neither the

V. THE OFFICE OF SPECIAL INVESTIGATIONS

The philosophical discussion of individual moral responsibility for group action, and its application to the cases, does not directly address the question whether the United States should continue to expend money and resources²⁸⁶ to identify, denaturalize, and deport individuals who occupied low-level positions within the Nazi hierarchies or their collaborating organizations.²⁸⁷ This question becomes more poignant given the fact that the defendants, in most cases, have led unobtrusive, law-abiding lives since coming to the United States as many as thirty-five years ago.²⁸⁸ Most are old; some are ill and near death. Although the Supreme Court has declared that equitable defenses, including laches and estoppel, are unavailable to defendants in individual cases,²⁸⁹ it is still appropriate to ask whether the Government is justified in supporting a unit, the OSI, whose purpose is to identify, denaturalize, and deport these individuals.²⁹⁰ For reasons including those just men-

baker nor the charwoman made more than minimal contributions to the Nazis' objective. Thus, neither of them assisted in persecution.

286. The district court in *Fedorenko*, 455 F. Supp. at 899, emphasized the large expenses the Government incurred in prosecuting the case. A. RYAN, *supra* note 2, at 61, notes that Congress initially appropriated \$2.3 million for the OSI when it was formed in 1979.

287. Subsequent events in the *Sprogis* case reveal that there is a potentially high and incalculable cost to the Government's efforts to identify and prosecute those who it believes assisted the Nazis in persecuting civilians, even when courts find in the defendant's favor. On Friday, September 6, 1985, a bomb exploded at the Long Island home of Elmars Sprogis, a former Latvian policeman accused and acquitted of Nazi war crimes. The Jewish Defense League claimed responsibility for the blast, which seriously injured a bystander who, upon seeing flames, rushed to the house to warn Sprogis. N.Y. Times, Sept. 7, 1985, at 25, col. 2. Ultimately, the bystander faced permanent disability and the state paid the high medical costs.

288. See, e.g., *United States v. Kairys*, 600 F. Supp. 1254, 1259 (N.D. Ill. 1984) ("Since coming to this country [defendant] has led an unremarkable life."), *aff'd*, 782 F.2d 1374 (7th Cir.), *cert. denied*, 106 S. Ct. 2258 (1986); *United States v. Fedorenko*, 455 F. Supp. 893, 896, 920-21 (S.D. Fla. 1978) (defendant is "a man who is not interested in 'making waves' or causing trouble"), *rev'd*, 597 F.2d 546 (5th Cir. 1979), *rev'd*, 449 U.S. 490 (1981).

289. *Fedorenko v. United States*, 449 U.S. at 516-18.

290. Denaturalization and deportation are civil penalties, thereby making it technically incorrect to speak of "punishment." Courts have held that because defendants are not technically threatened with punishment, they are not constitutionally protected against cruel and unusual punishment, or against bills of attainder and ex post facto laws. See Note, *Toward a Constitutional Definition of Punishment*, 80 COLUM. L. REV. 1667, 1667 (1980) (concluding that deportation of aliens is not punishment). Nevertheless, being denaturalized and deported under these circumstances constitutes a severe form of treatment sharing many of the characteristics of punishment. Packer claims, for exam-

tioned, numerous groups have called for the imposition of a statute of limitations on the charges the OSI brings.²⁹¹ The remainder of this Article addresses these two questions and the related arguments.

A. ABOLISH THE OSI

1. Forget

One argument made to support the abolition of the OSI is that everyone, Jews included, should simply forget the Holocaust and get on with life. The OSI should not exist, therefore, because its existence impedes forgetting. This argument ignores the possibility that forgetting an occurrence before fully realizing its moral implications and adequately dealing with them is morally irresponsible.

What counts as dealing with an occurrence depends on the nature of that occurrence. In the case of a promise, for example, performance or some other means of discharging the promised act must occur before it is correct to say that the promise has been dealt with. Similarly, in the case of an event such as the Holocaust, it is plausible to refuse to forget until those who

ple, that "[t]he deportation of an alien, under our present legal arrangements, is punishment but not criminal punishment." H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 35, 35 (1968). See also Hart, *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401, 404 (1958) (contending that the only distinction between civil and criminal sanctions is the judgment of community condemnation); Moeller, *United States Treatment of Alleged Nazi War Criminals: International Law, Immigration Law, and the Need for International Cooperation*, 25 *VA. J. INT'L LAW* 793, 819 (1985) (discussing this issue as it specifically relates to Nazi war criminals).

The Court does draw some distinction between denaturalization and deportation cases. Because denaturalization results in the deprivation of a legal right, it constitutes punishment. See, e.g., *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164-66 (1963) (holding unconstitutional draft evasion sanctions which employ loss of citizenship as a punishment); *Trop v. Dulles*, 356 U.S. 86, 103, 105 (1958) (five justices holding that involuntary divestment of citizenship upon court martial for desertion is unconstitutional).

Even when it asserts that deportation suits do not strictly result in punishment, the Court nevertheless acknowledges similarities between their sanctions and punishment. See, e.g., *Galvan v. Press*, 347 U.S. 522, 531 ("The intrinsic consequences of deportation are so close to punishment for crime"), *reh'g denied*, 348 U.S. 852 (1954); *Barber v. Gonzalez*, 347 U.S. 637, 642 (1954) ("Although not penal in character, deportation statutes as a practical matter may inflict 'the equivalent of banishment or exile' . . . and should be strictly construed.").

291. See, e.g., *Washington Post*, April 6, 1985, at A9, col. 1 (reporting meeting between attorneys for emigre groups and Justice Department to discuss statute of limitations on deportation actions for Nazi involvement).

are responsible are dealt with or brought to account to the extent that it is still possible. It is the burden of the advocates of forgetfulness to show, in the face of the lingering moral implications of the Holocaust, that society has adequately and fully dealt with those implications.²⁹²

2. Forgive

Another argument made to support the disbanding of the OSI is that society should forgive the perpetrators of the Holocaust. Against this argument, Martin Golding maintains that some wrongs "need not, may not, be forgiven. Such wrongs may be extremely rare, but if anything is a wrong of this order it is the German's destruction of the Jews."²⁹³ A characteristic of wrongs of this magnitude is that, from the perpetrator's perspective, it is impossible ever to make adequate amends. Similarly, from the victim's perspective, the inexcusability of the wrong makes it difficult, if not impossible, to forgive.²⁹⁴

When making this claim, Golding uses the singular "German" and "wrong."²⁹⁵ The OSI, however, is concerned with particular defendants who were involved in particular instances of wrongdoing and not with attempting to right the total wrong inflicted on the Jews by the Germans. In this context, depending upon the individual culpability of the defendant, it is possible, albeit difficult, to speak of forgiveness. Nonetheless, the logic of forgiveness dictates that only the victim may forgive the offender.²⁹⁶ Taking a restrictive view of who is considered the victim, only those persons who individually suffered at the

292. See 124 CONG. REC. 26,844 (1978) (remarks of Congresswoman Holtzman) ("[T]he presence of Nazi war criminals in America constitutes the unfinished business of World War II.").

In addition, simply forgetting may render more credible the claims of those who deny that the Holocaust ever occurred. See, e.g., N.Y. Times, Sept. 26, 1985, at A23, col. 1 (relating testimony of 22-year-old witness at trial of neo-Nazis that there was no systematic killing of Jews in World War II); The Washington Post, April 6, 1985, at A9, col. 1 (reporting letter to Attorney General Meese suggesting that no mass gassing of Jews took place at the Buchenwald and Dachau camps).

293. Golding, *Forgiveness and Regret*, 16 THE PHIL. FORUM 121, 135 (1984-85).

294. *Id.*

295. *Id.*

296. See, e.g., Downie, *Forgiveness*, 15 PHIL. Q. 128, 128 (1965) ("If A forgives B, then A must have been injured by B: this seems to be a logically necessary condition of forgiveness."); Mabbott, *Punishment*, 48 MIND 152, 158 (1939) ("No one has any right to forgive me except the person I have injured.").

hands of the Nazis and their collaborators may forgive their tormentors.²⁹⁷

An offer of forgiveness by the victim, however, does not alter the appropriateness of punishment. Forgiveness and pardon occupy two distinct moral realms. Individual victims and perhaps groups forgive actors for the injuries or wrongs they have inflicted. People acting in social roles *pardon*, not for any individual injuries they have personally suffered, but for offenses committed by the offender against the normative order which the pardoner is authorized to protect. Further, an individual's utterance of the words "I forgive you" is not sufficient to constitute forgiveness.²⁹⁸ The person offering forgiveness must also act to confirm that the previously existing moral relationship is restored.²⁹⁹ Conversely, when the appropriate official utters the words "I pardon you," he is in fact releasing the offender from his obligations.³⁰⁰ Finally, and most importantly for our purposes, a distinction exists with respect to the consequences of the offender's acts. "To pardon a person . . . is to let him off the merited consequences of his actions . . ." ³⁰¹ On the other hand, it is part of the logic of forgiveness that the victim may both forgive *and* simultaneously believe that it is appropriate for the offender to suffer the consequences of his acts.

3. Mercy

A call for mercy on behalf of the defendants is a third argument against the continuation of the OSI.³⁰² Mercy is usually

297. The restrictive view is unnecessary. Those who may forgive could include a variety of persons who were indirectly injured by the Nazi persecution. Cf. Card, *On Mercy*, 81 THE PHIL. REV. 182, 204 n.26 (April 1972) (the wronged include law-abiding members of a community who are "taken advantage of" by those who violate the law). This non-restrictive view creates the problem of identifying witnesses. Who is in a position to forgive someone like Sprogis? See *supra* text accompanying notes 199-224. According to the most restrictive view, only the nine Jews, but they are all dead. Their families? Nothing indicates that anyone knows who the nine Jews were, to say nothing of who their families were or where they are now. All Jews who suffered at the hands of the Nazis? All Jews, including those who were not alive at the time? All humanity, by virtue of a common humanity shared with the nine Jews?

298. Downie, *supra* note 296, at 131-32.

299. *Id.* at 133. Cf. Rashdall, *The Ethics of Forgiveness*, 10 INT'L J. OF ETHICS 193, 202 (Oct. 1899-July 1900) (later edition titled ETHICS) (contending that the person who must forgive may also naturally desire to penalize).

300. Downie, *supra* note 296, at 132.

301. *Id.* at 131.

302. The term "defendants" is used to refer to those the OSI has already formally charged and those against whom it might bring charges in the future.

extended by a person charged with setting penalties for offenses against a system of rules.³⁰³ When mercy is shown, the offender receives a penalty less severe than that which the system of rules authorizes, because imposition of the greater, authorized penalty would cause the offender to suffer unusually more than he deserves in view of his peculiar misfortunes, his basic character, and the nature of his offense.³⁰⁴ Although an offender has no right to mercy,³⁰⁵ a person in a position to dispense mercy ought to do so when there is a disproportionality between the authorized punishment and that which the offender deserves.³⁰⁶

Mercy is typically shown on a case-by-case basis. Thus, for the mercy argument to justify completely disbanding the OSI, it is necessary to show that the defendants, as a class, have suffered some peculiar misfortunes which would warrant an extension of mercy to all of them.³⁰⁷

One misfortune that the defendants share is the threat of denaturalization or deportation, late in life, from a country where they have lived for many years, to face an uncertain future. Although this penalty is severe, in determining whether it constitutes a peculiar misfortune it is wrong to focus only on what is currently happening toward the end of their lives. Generally, the defendants entered the country illegally and enjoyed the benefits of living in the United States for many years.³⁰⁸ In

303. See Card, *supra* note 297, at 189 (mercy "is a virtue of persons participating in and administering the rules of social institutions").

304. See *id.* at 184-87 (offering a more elaborate definition of mercy).

305. See *id.* at 92 (arguing that there is no *obligation* to show mercy).

306. *Id.* at 190-92.

307. It is possible that all the defendants have experienced severe pangs of conscience for the harm they did. Arguably, to impose the harsh penalties of denaturalization and deportation now would cause them to suffer more than they deserve. Allen Ryan states in response to this contention: "I see no evidence whatever that any of these men have been even slightly discomfited, let alone tormented, by their actions in the past." See A. RYAN, *supra* note 2, at 336. Although Ryan has had the opportunity to observe most of the defendants, he has seen them as the head of an office responsible for bringing charges against them. In private, however, these men's consciences may have burdened them. If this is the case, it is surprising that none of the defendants to date has taken the opportunity to publicly unburden his conscience. The Nazis did, however, take steps to ensure that those who perpetrated the Holocaust would not suffer severe psychological problems. R. Hilberg, *supra* note 102, at 1010-29. In the absence of solid evidence that the defendants have suffered the pangs of conscience, we cannot take this as the source of their peculiar misfortunes. Cf. *id.* at 186 ("Showing mercy to an offender . . . is grounded in a certain kind of appeal to his character and misfortunes.").

308. Card, *supra* note 297, at 205, notes that when an offender has avoided

some cases, they avoided criminal prosecutions or other forms of retribution that they would have suffered had they remained in the countries where they committed their acts. Considering the lives of the defendants as a whole, therefore, is proper. Whether a defendant has suffered peculiar misfortunes that render denaturalization or deportation undeserved depends on his individual character and the nature of that defendant's particular acts. For those defendants whose contribution and the resultant moral responsibility were extremely limited, perhaps showing mercy is appropriate. Because this is not true of the entire class of defendants, however, the argument for mercy does not support the termination of the OSI.

B. RETAIN THE OSI

The arguments for discontinuing the OSI, including advocating forgiveness, forgetfulness, and mercy, are outweighed by several arguments for the OSI's retention. It is not enough, however, to claim that "[w]e are putting [Nazi collaborators] on trial because they broke the law."³⁰⁹ Many people break the law; the question is why the Government should expend considerable resources to pursue these old people. It is appropriate to consider a proper response to the courtroom observer who stated that "the money for bringing the [Theodorovic deportation] case would be better used to prosecute drug dealers."³¹⁰

1. The United States Has a Special Responsibility

One set of arguments emphasizes the special responsibility of the United States for its own past acts. A recent *New York Times* editorial rationalized that the United States has a unique duty to seek out the "old men" who, in their youth, operated the "murder machine" established by Hitler "because it let a number of war criminals slip to safety through its refugee programs after World War II."³¹¹ The force of this argument is that the United States erred by permitting these individuals to escape accountability for their acts and "slip to safety" by allowing their entry to the United States. Thus, it presupposes a

prosecution for 20 years, for example, and is subsequently prosecuted, no unusual misfortune is necessarily present: "[T]he offender seems, if anything, to have been rather lucky, since a prison term imposed twenty years earlier, for example, might have robbed him of some of the best years of his life."

309. A. RYAN, *supra* note 2, at 335.

310. See *supra* note 17 and accompanying text.

311. N.Y. Times, June 13, 1985, at A34, col. 1.

principle of rectification. If a country now has the power to rectify some wrong it has done in the past, it has an obligation to do so.

The obvious means of rectifying the wrong done by harboring Nazi collaborators in the United States is to return the defendants to the countries where their acts were performed and allow those countries to prosecute them, should they choose to do so. United States immigration law, however, does not always permit extradition.³¹²

Because the United States enabled Nazi collaborators to escape formal judgment for their acts, and extradition is often impermissible, a second solution is for the United States itself to render judgment. That the United States bears responsibility for enabling the defendants to escape formal judgment, however, does not necessarily mean that the United States has the right to render that judgment itself. It has the authority to judge those who have broken its immigration laws, but that simply restates rather than answers the question why resources are expended on these particular offenders.

Even putting this objection aside, a difficulty with this "special responsibility" argument is that its premise—that by permitting entry to the defendants, the United States enabled them to escape formal judgment—is true of only some of the defendants. In the case of someone like Mengele, the subject of the *New York Times* editorial,³¹³ it is likely that he would have been put on trial had he remained in Germany. Yet, there is still a question whether the collaborators the OSI pursues would have ever faced trial had they not come to the United States. In some cases, the answer is yes,³¹⁴ but for low-level officials such as Sprogis,³¹⁵ the answer is less certain. This uncertainty prevails because Germany's record for pursuing persons who persecuted civilians is far from exemplary.³¹⁶ Conversely,

312. See 18 U.S.C. § 4100(b) (1982) ("An offender may be transferred from the United States . . . only to a country of which the offender is a citizen or national. . . . An offender may be transferred to or from the United States only with the offender's consent, and only if the offense for which the offender was sentenced satisfies the requirement of double criminality . . .").

313. See *supra* note 311 and accompanying text.

314. The case of Andrija Artukovic, for example, began many years ago when Yugoslavia sought his extradition to try him for war crimes. *Artukovic v. Boyle*, 107 F. Supp. 11 (S.D. Cal. 1952), *rev'd sub nom. Ivancevic v. Artukovic*, 211 F.2d 565 (9th Cir. 1954), *cert. denied*, 348 U.S. 818 (1954). Artukovic was recently extradited to Yugoslavia.

315. See *supra* text accompanying notes 199-206.

316. See R. HILBERG, *supra* note 54, at 1000-1109.

the Soviet Union, which now controls the countries where many of the defendants committed their acts, might have pursued them more aggressively than has the United States.³¹⁷ Perhaps it is enough that some of the defendants would certainly have faced trial had they not escaped to the United States. Even if *none* of the countries in which these acts were committed would have held the defendants accountable, however, an argument which supports the OSI and insists that the defendants face judgment now is desirable.

Another argument emphasizing the United States' special responsibility also presupposes the principle of rectification, but asserts that the wrong was the United States' failure to have done more to rescue Jews during World War II. Although there is a sense that society cannot undo the wrong done, emphasis on the failure to rescue nevertheless suggests a form of imperfect rectification. The Government could convene a formal commission of inquiry to establish the extent of and reasons for the United States' failure to rescue, to assign responsibility where possible, and to determine how the Government should respond in an analogous future situation.³¹⁸ This proposal has merit because it acknowledges the particular wrong of failing to do more to rescue the Jews. It also renders the Government less vulnerable to the charge that it is hypocritical for the United States to bring charges against the defendants more than forty years after World War II when it has failed to acknowledge its own moral culpability for failing to

317. A. RYAN, *supra* note 2, at 92-93, indicates that the Russians were eager to try any defendants who were deported to the Soviet Union. He does not say whether, immediately after World War II, the Soviet Union aggressively pursued persons who had collaborated with the Nazis. In 1965, however, the Soviet Union tried Maikovskis in absentia. He was convicted and sentenced to death. In *re* Maikovskis, slip op. at 16 n.12 (BIA Aug. 14, 1984), *aff'd sub nom.*, *Maikovskis v. INS*, 773 F.2d 435 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 2915 (1986).

318. In 1979, President Carter established a Commission on the Holocaust. Its principal function was to make "recommendations with respect to the establishment and maintenance of an appropriate memorial to those who perished in the Holocaust." See Exec. Order No. 12,093, 3 C.F.R. 250 (1979). In its Report to the President, the Commission's principal recommendations pertained to the establishment of a National Holocaust Memorial or Museum, including an Educational Foundation, the creation of a "Committee on Conscience," and the proclamation of annual Days of Remembrance of Victims of the Holocaust. See PRESIDENT'S COMMISSION ON THE HOLOCAUST, REPORT TO THE PRESIDENT, at 9-18 (1979). Congress established the Holocaust Memorial Council to implement the recommendations of the President's Commission. See 36 U.S.C. §§ 1401-08 (1980).

rescue Jews and for having permitted entry to the defendants in the first place.

Considering the nature of the wrong this "special responsibility" argument emphasizes, it provides only weak support for the United States now rendering a formal judgment on the defendants. Had there been no persecution of civilians, the United States would not have had to rescue them. Because there was persecution, however, and the United States should have rescued more Jews, its failure to do so is only weakly rectified by bringing to formal judgment those persons whose acts initially created the obligation to rescue.

2. Retribution

Retributivist considerations support the OSI's continuation. Theories of punishment labeled retributivist accept one or more of the following claims: (1) A person is punishable if and only if she has committed an offense; (2) a person who has committed an offense deserves punishment; (3) the justification of punishment consists in the justice of extending to those who have committed offenses the treatment they deserve; and (4) punishment is proper when "proportional to" the wickedness of the offense.³¹⁹

Retributivist theorists have encountered difficulties in explaining why persons who have committed offenses deserve punishment and why justice requires treating them as they deserve.³²⁰ Even if these claims can be explained and defended, a retributivist must still rank offenses according to their "wickedness" and construct a scale of punishments "proportional to" the wickedness of the offenses.³²¹

319. J. FEINBERG, *The Expressive Function of Punishment*, in DOING AND DESERVING 118 (1970). See also H. HART, *supra* note 232, at 231 (treating propositions similar to (1), (3), and (4) as providing a strict model of a retributive theory). Bedau notes that Hart's model ignores desert, which Bedau regards as central to retributivist theories. Bedau, *Retribution and the Theory of Punishment*, 75 J. PHIL. 601, 608-11 (1978).

320. Early retributivists, such as Hegel, spoke metaphorically of punishment as a way of "cancelling" or "annulling" the moral wrong involved in an offense, and as "deserved" for that reason. Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208, 236 (1984) (discussing Hegel's view). Modern retributivists rely on the different, but no more enlightening, metaphor of punishment as a way of "linking" or "connecting" the criminal with "correct values." See R. NOZICK, *PHILOSOPHICAL EXPLANATIONS* 374-97 (1981).

321. See, e.g., A. VON HIRSCH, *DOING JUSTICE* 66, 69 (1976); R. NOZICK, *supra* note 320, at 363-97. Bedau is skeptical about whether the retributivist requirement that the punishment fit the crime can be carried out in practice.

Assuming that this retributivist framework makes some sense, the question becomes whether the sanctions in the OSI's denaturalization and deportation suits are "proportional to" or "fit" the moral wrong of the defendants' offenses. Although the sanctions of denaturalization and deportation are not traditional criminal sanctions, they nevertheless seem particularly proportional to the moral wrong of the offenses.

Stripping Jews of their citizenship played a central role in the Nazis' plan to annihilate the Jews. The Nazis began by declaring that Jews who lived outside the Reich were not considered German nationals. At the same time, the Nazis were actively deporting Jews from the Reich.³²² As they proceeded to annihilate Jews in other countries, the Nazis typically moved first against stateless Jews, while pressing local authorities to revoke the citizenship of classes of Jews within their territory.³²³ Stateless Jews were thus more vulnerable to Nazi aggression than those who retained their citizenship.

Given the way the Nazis deprived people of their citizenship, denaturalizing those who assisted the Nazis is a particularly fitting response to the harm they wrought. The defendants themselves need not have contributed to the Nazis' denaturalization of Jews, nor need the Jews, whom the defendants assisted in persecuting, have themselves become stateless. It is sufficient that, given the role of denaturalization in the Nazis' objectives and the defendants' contributions to its implementation, denaturalizing the defendants is as "proportional" a response as we are likely to find.

Like the Flying Dutchman, an individual deported from the United States must find some country willing to take him in. This image of the homeless/stateless person seeking refuge is particularly apt in the context of the Nazis' persecution of the Jews. The Nazis uprooted Jewish families from their homes and concentrated them in alien ghettos. They forcibly removed them from those ghettos onto packed trains for transport to "the East," and death. Many of the defendants played important roles in these processes of "rounding up," concentrating, and deporting Jews. Again, assuming that the retributivist framework makes sense, the fact that the defend-

Bedau, *supra* note 319, at 608-11. In reply, von Hirsch maintains that such pessimism is premature. von Hirsch, *Proportionality and Desert, a Reply to Bedau*, 75 J. PHIL. 622, 623-24 (1978).

322. See H. ARENDT, *supra* note 145, at 157.

323. *Id.* at 163, 165, 167, 170, 182.

ants are now forced to find a place of refuge is a particularly fitting response to the roles they played in assisting the Nazis in depriving Jews of their homes, security, and, ultimately, their lives.

3. Deterrence

Moving from past acts to the future, the OSI's continued prosecution of defendants arguably is justifiable on the ground that doing so will deter others from acting in similar ways.

This deterrence argument is weak. First, the efficacy of the deterrent effect is a function of the severity of the penalty discounted by the likelihood of its imposition. Although the OSI is now vigilant in pursuing Nazi collaborators, the record of the United States Government prior to the OSI's foundation is very sorry indeed.³²⁴ Even Germany, not to mention some countries that seemed eager to have and protect high-level Nazi officials, has done little to ensure that Nazis who persecuted civilians were caught and severely punished.³²⁵ Some South American countries have afforded haven to Nazi criminals.³²⁶ Taking into account the record of the United States and the rest of the world since World War II, the OSI's efforts are likely to make only an incremental contribution to what is already of minimal deterrence effect.

Second, and more important, the deterrence argument fails to capture the special moral significance of holding the defendants accountable. On a deterrence view, the state uses "pain coercively so as to progressively eliminate certain types of behavior. . . ."³²⁷ The only reason punishment provides a reason for not doing an act, on the deterrence view, is that it increases the negative effects if the person is caught. It does not seek to provide a reason based on the person's realization that

324. A. RYAN, *supra* note 2, at 29-64.

325. On Germany, see R. HILBERG, *supra* note 54, at 1000-1109.

326. Several South American countries were particularly hospitable to former Nazis. See A. Riding, *Where Nazi Refugees Found the Climate to Their Liking*, N.Y. Times, June 16, 1985, § 4, at 1, col. 1; N.Y. Times, June 22, 1979, § 1, at A7, col. 3.

327. Hampton, *supra* note 320, at 214. When used in its narrow sense, "deterrence" occurs only when the person wants to do the proscribed act but does not because of her awareness of the bad effects that will ensue if she does. In a wider sense, punishment has achieved its deterrent effect when people are led to obey the law, whether the mechanism involved is fear of punishment, appreciation of the law's morality, or simple habit. See Hawkins, *Punishment and Deterrence: The Educative, Moralizing and Habitulative Effects*, 1969 Wis. L. REV. 550, 550.

the action is morally wrong. OSI's efforts have moral significance, however, not simply because they increase the downside for those who might, in the future, contemplate similar acts. Rather, it is important to make a statement now, for the defendants' sake as well as our own, that the acts they performed were wrong and that they are morally responsible for them.

4. Promulgating Moral Standards

Recent discussions of the justification of punishment emphasize its communicative aspect.³²⁸ Punishment communicates, forcefully and emphatically, to the criminal and society at large, the moral wrongness of the criminal's offense.³²⁹ By means of communicating moral right and wrong, punishment also plays a role in the moral education of the criminal and the larger society.³³⁰ Theories emphasizing this symbolic or expressive function of punishment are not easy to categorize as either retributivist or utilitarian.³³¹ Insofar as these theories attempt to match the condemnatory aspect of the punishment to the seriousness of the crime, or to communicate to the criminal what the world would be like if his acts were generally done, they share retributivist features.³³² The theories also "tremble[] on the margin of a Utilitarian theory,"³³³ inasmuch as they anticipate beneficial results from punishing offenders.

328. See, e.g., J. FEINBERG, *supra* note 319, at 95 (discussing "expressive function" of punishment); H. HART, *supra* note 232, at 235 (noting recent version of retributivism, emphasizing "the value of the authoritative expression, in the form of punishment, of moral condemnation for the moral wickedness involved in the offense."); R. NOZICK, *supra* note 320, at 370-74 (explaining the theory of retribution); Hampton, *supra* note 320, at 231 (emphasizing that "punishment is a way of teaching ethical *knowledge* . . ."); cf. *Doe v. Roe*, 400 N.Y.S. 2d 668, 679, 93 Misc. 2d 201 (1977) (punitive damages are sometimes available to "'express indignation at the defendants' wrong rather than a value set on plaintiff's loss'") (quoting *Gostowski v. Roman Catholic Church*, 262 N.Y. 320, 324, 186 N.E. 798, 800 (1933)).

329. See *supra* note 328.

330. Hampton, *supra* note 320, at 212-13, particularly emphasizes punishment as a means of moral education.

331. H. HART, *supra* note 232, at 235, notes that such "reprobation" theories have both retributive and utilitarian versions. R. NOZICK, *supra* note 320, at 371, calls his theory "teleological retributivism." Hampton, *supra* note 320, at 213, apparently regards her moral education theory of punishment as distinct from traditional retributive or utilitarian/deterrence theories because it presupposes "particular positions on the nature of morality and human freedom . . ."

332. C. CARD, *RETRIBUTIVE PENAL LIABILITY* (Am. Phil. Q. Monographs, No. 7, 1973).

333. H. HART, *supra* note 232, at 235.

The problem that proponents of the symbolic or expressive function of punishment confront is explaining why it is justifiable to punish offenders to communicate moral views or to educate the criminal and society.³³⁴ Their views prompt questions as to why simply taking out advertisements or devoting more resources to education would not accomplish the same result. Part of the answer is that punishment is the conventional way society communicates the moral views about which it feels most strongly. Perhaps painful experiences of a certain sort are necessary for the communication of certain types of moral messages.³³⁵ Moreover, whether punishment is justified may depend on the context, for example, the importance of the moral values being communicated and the likelihood that their importance is conveyable by means other than punishing those persons who disregard those values.

The important message communicated by the OSI's denaturalization and deportation suits—that the defendants breached a profound moral boundary by assisting the Nazis in persecuting civilians—is probably not effectively conveyable by any means other than continuing the suits. During World War II, the United States did little to aid threatened Jews.³³⁶ After the war, it knowingly admitted persons who had assisted the Nazis in persecuting civilians and for more than thirty years did little to disturb their enjoyment of the benefits of life in the United States.³³⁷ Given this history of action and inaction, mere words are unlikely to communicate the message that the people persecuted by the Nazis mattered and that those who assisted the Nazis acted very wrongly. Not only United States citizens but also citizens in other countries must receive this message. This is particularly true for those in Western Europe who are inclined to minimize the wrongness of acts or omissions that facilitated Nazi persecution.³³⁸ Because it is important to convey

334. H. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY 1, 2 n.3 (1968). Hart noted early on that "denunciation does not imply the deliberate imposition of suffering which is the feature needing justification. . . ." Both Hampton and Nozick indicate that the problem is the justification of *punishing* to convey a message or teach a certain moral lesson. See Hampton, *supra* note 320, at 223; R. NOZICK, *supra* note 320, at 371.

335. See Hampton, *supra* note 320, at 224 (noting "that only the infliction of pain of a certain sort following a wrongdoing is *necessarily* connected with the goal of moral education.") (emphasis in original).

336. See *supra* note 1.

337. See *supra* notes 1-2 and accompanying text.

338. The controversy over whether Kurt Waldheim assisted the Nazis,

these messages, denaturalization and deportation of those who assisted the Nazis are a justified and necessary means of conveyance.

Abolition of the OSI would certainly eliminate an important opportunity to promulgate the view that the defendants' acts were serious wrongs against undeserving victims. Even worse consequences are possible, however, depending on how people interpret, whether rationally or not, the cessation of the OSI's activity. For example, people may draw the inference, merely because so many years have elapsed since the acts were committed, that the defendants have atoned for their wrongs. Or, if the government stops pursuing defendants, it risks the appearance of condoning their acts, or of supporting those groups, including neo-Nazis, who deny that the Holocaust ever occurred.³³⁹

C. IMPOSITION OF A STATUTE OF LIMITATIONS

Even if disbanding the OSI is unwarranted, perhaps a statute of limitations on the charges it brings is appropriate.³⁴⁰ One consideration supporting such statutes is that, after a certain period of time, evidence becomes stale and loses its probative value.³⁴¹ This consideration, by itself, however, is insufficient to justify imposing a statute of limitations.³⁴²

which arose during his recent successful campaign for the presidency of Austria, raises this issue with particular force.

339. *See supra* note 292.

340. A number of groups that have wanted to eliminate the OSI have also sought to impose a statute of limitations on the charges the OSI brings. *See* Washington Post, April 6, 1985, at A9, col. 1. *But see* N.Y. Times, June 13, 1985, at A34, col. 1 (editorial against statute of limitations). As a practical matter, it is difficult to see how any plausible statute of limitations would not, in effect, result in the termination of the OSI.

341. *See, e.g.*, United States v. Gouveia, 467 U.S. 180, 192 (1984) (statutes of limitations protect against prosecutors bringing stale criminal charges); United States v. Marion, 404 U.S. 307, 322 (1971) (statutes of limitations are the "primary guarantee" against overly stale charges).

342. The federal district court and court of appeals judges hearing these cases encounter evidentiary questions as part of their daily work and they are skilled at making decisions on admissibility and weight. In view of this expertise, the mere fact that much of the crucial evidence in the cases is forty to forty-five years old does not warrant imposing an arbitrary deadline for bringing charges. The existence of the ancient documents exception to hearsay, Fed. R. Evid. 803(16), indicates that the age of documents itself provides virtually no basis for imposing a statute of limitations.

The structure of statutes of limitations also indicates that evidentiary considerations by themselves are insufficient to warrant imposing a statute. New York's statute, for example, is typical. It provides no limitations period for

A similar argument is that just as prosecutorial delay in bringing an indictment raises due process concerns,³⁴³ perhaps it is unfair to bring charges against the defendants after so much time has elapsed, because they have not evaded detection and the government has unreasonably delayed in bringing charges. Were its premise true, this argument would tend to support applying a statute of limitations to these cases.

With respect to the first contention, although most of the defendants misrepresented their wartime activities in order to gain admission to the United States,³⁴⁴ they have done little to avoid detection since arriving. As for the second contention, the Government had evidence that Nazi collaborators were gaining admission to the United States after the war, but in the years prior to the founding of the OSI in 1979,³⁴⁵ the offices charged with investigating such persons did virtually nothing to bring them to justice.³⁴⁶ Many of the cases were not triable, however, without access to supporting documents possessed only by the Soviet Union. An agreement securing access to this evidence was not reached until 1980.³⁴⁷ Moreover, whether it is fair to bring a person to account for a crime after a long period has lapsed depends on the seriousness of the crime.³⁴⁸ Given the seriousness of the allegations against the defendants, the Government did not unreasonably delay and was not negligent in bringing charges to such an extent as to warrant a statute of limitations.

A third argument for a statute of limitations relies on claims about personal identity and desert. When features of a person, such as character, have changed over the course of a

Class A felonies (murder and kidnapping), a five-year period for other felonies, two years for misdemeanors, and one year for petty offenses. N.Y. Crim. Proc. Law § 30.10 (McKinney 1981). *See also* 18 U.S.C. § 3281 (1982) (no limitation on prosecution for offense punishable by death); 18 U.S.C. § 3282 (1982) (5-year limitation on non-capital offenses). This differentiation of periods according to the seriousness of the crime, in combination with the concern about stale evidence, supports the Supreme Court's view that statutes of limitations "represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice; they 'are made for the repose of society and the protection of those who may [during the limitation] . . . have lost their means of defence.'" *United States v. Marion*, 404 U.S. 307, 322 (1971) (citing *Public Schools v. Walker*, 76 U.S. (9 Wall.) 282, 288 (1869)).

343. *See United States v. Gouveia*, 467 U.S. 180, 192 (1984).

344. *See supra* text accompanying notes 28-29.

345. A. RYAN, *supra* note 2, at 61.

346. *Id.* at 31, 41-42, 44, 329-31.

347. *Id.* at 65-93.

348. *See supra* note 342.

lifetime, perhaps punishment is undeserved late in life.³⁴⁹ Because Parfit has presented the most recent and elaborate defense of this position, this Article discusses this third argument in relation to his work.

Parfit distinguishes between Reductionist and non-Reductionist views of personal identity.³⁵⁰ According to the Reductionist view, personal identity is solely a matter of physical and psychological continuities. Although it is always the case, in logic, that a person either is or is not the same as some other person, personal identity, by nature, is a matter of degree and depends on the degree to which the physical and psychological continuities hold.³⁵¹ In contrast, the non-Reductionist view denies that personal identity is exclusively a matter of physical and psychological continuities; instead, it consists of a further fact beyond these continuities. The non-Reductionist insists that personal identity is, both in its logic and in its nature, "all-or-nothing."³⁵²

Although only the non-Reductionist view may seem to justify the claim that people deserve punishment, Parfit insists that in the Reductionist view people can properly deserve punishment for their past crimes. Nevertheless, there is still an important difference between the two views:

I shall make one general claim. When some convict is now less closely connected to himself at the time of his crime, he deserves less punishment. If the connections are very weak, he may deserve none. Suppose that a man aged ninety, one of the few rightful holders of the Nobel Peace Prize, confesses that it was he who, at the age of twenty, injured a policeman in a drunken brawl. Though this was a serious crime, this man may not now deserve to be punished. . . . I believe that my claim is plausible. It is one of the reasons why many coun-

349. Such changes are directly relevant to theories which justify punishment on the basis of the defendant's present state—for example, reformation and specific deterrence—rather than on the defendant's relation to the criminal act. See D. PARFIT, *supra* note 252, at 325.

350. Parfit's most recent statement of his views is in REASONS AND PERSONS, *supra* note 252. In an earlier article, he referred to the views as Complex (Reductionist) and Simple (Non-Reductionist). See Parfit, *Later Selves and Moral Principles*, in PHILOSOPHY AND PERSONAL RELATIONS 137 (A. Montefiore ed. 1973).

351. See Parfit, *Later Selves and Moral Principles*, *supra* note 350, at 139-40. Under the Reductionist view, the identity of a person over time is like that of a nation. Just as certain significant breaks within the history of a nation like Great Britain justify speaking of a series of successive nations, such as Anglo-Saxon, Medieval, or Post-Imperial England, so also do significant breaks in physical and psychological continuities justify speaking of successive selves of the same person. *Id.* at 142.

352. *Id.*

tries have Statutes of Limitations: periods of time after which a criminal cannot be punished for a past crime. These statutes may not cover very serious crimes. This is what my claim implies.³⁵³

The issue is whether Parfit's view supports imposing a statute of limitations on the cases the OSI brings.

A threshold question is whether the physical and psychological continuities of the defendants have become very weak. It is not surprising that Parfit uses a very specific example when discussing the relation between the weakening of the continuities and whether a person deserves punishment. This type of inquiry is most properly made on a case-by-case basis by the sentencing authority who considers relevant information on the defendant after his conviction. Statutes of limitations, on the other hand, are linked with categories of crimes or acts, each carrying a distinctive time period. To institute a statute of limitations on the basis of Parfit's theory, it is necessary to establish that, for people who commit that kind of crime, the continuities are generally very weak after a specific number of years. Even if this question were set aside and the assumption made that the physical and psychological continuities are very weak for all the defendants, as Parfit states his views, this would not justify imposing a statute of limitations for two reasons.

First, Parfit claims that when the continuities between a person as he now is and as he was when he committed the crime are weak "he deserves less punishment."³⁵⁴ The continuum Parfit identifies is one of degrees of punishment. As we approach one end, however, we do not eventually reach a point at which filing charges against an individual is no longer proper, rather, we reach points where punishment should be less severe. Thus, we do not obtain an argument for a statute of limitations, but rather for the claim that, when the continuities are very weak, less severe punishment is warranted.³⁵⁵

Parfit is misled in the way he describes the relation between the self who committed the act and the later self who

353. D. PARFIT, *supra* note 252, at 326.

354. *Id.*

355. Jim Weygandt has suggested that when a defendant's level of culpability is low he should receive a less severe punishment, perhaps involving something like community service. Although this suggestion deserves consideration, given the statutory law and the Supreme Court's refusal to allow district courts to take equitable considerations into account, see *Fedorenko*, 449 U.S. at 516-18, implementation is impossible short of changing the law. In any case, it is a different suggestion from the claim that a statute of limitations is required.

faces punishment. He treats the later self as a "sane accomplice" of the earlier.³⁵⁶ Treating the relation between the two selves as that of principal and accomplice, however, is wrong. In criminal law the accomplice deserves less punishment because although he contributed to making the crime possible, his contribution was less than that of the principal. Since, in Parfit's example, the criminal's later self makes no contribution to the act performed by his earlier self, the later self is not an accomplice, sane or insane, of the former.³⁵⁷

Second, Parfit claims that statutes of limitations may not cover very serious crimes. Because the acts for which the defendants are accused are very serious, Parfit would therefore presumably maintain that a statute of limitations should not apply.

Parfit's views, as he states them, do not support imposing a statute of limitations. When the implications of his Reductionist view of personal identity are properly drawn, however, the two objections just discussed are removed. Whereas Parfit, misled by his sane accomplice idea, mistakenly says that the later self deserves less punishment, it is proper to say that the later self "deserves punishment less."³⁵⁸ The proper continuum is thus not of degrees of punishment but of deserving punishment. Only on the latter continuum is there eventually a point at which the level of desert is so low that it becomes inappropriate to file charges. Assuming a case-by-case analysis, it is at this point that the statute of limitations becomes appropriate. Furthermore, nothing about the Reductionist view of personal

356. D. PARFIT, *supra* note 252, at 326. "Just as someone's deserts correspond to the degree of his complicity with some criminal, so his deserts now, for some past crime, correspond to the degree of psychological connectedness between himself now and himself when committing that crime." *Id.*

357. In a letter commenting on my discussion, Sydney Shoemaker has suggested that my criticism of Parfit's sane accomplice comparison depends on a too literal reading of it. Shoemaker interprets Parfit as making the primarily negative point that just as the diminished responsibility of the accomplice is not due to mental illness, neither is that of the later self. Shoemaker believes that, for Parfit, only in the limiting case does the later self have no responsibility. In other cases, he has reduced responsibility and it is here that the sane accomplice analogy is supposed to apply. Even with this reconstruction, the analogy remains lame.

358. Bernard Williams discusses various ways in which our moral views might require alteration in order to accommodate Parfit's "scalar" view of personal identity. B. WILLIAMS, *Persons, Character and Morality*, in *MORAL LUCK*, 1, 6 (1981). Williams believes that an attempt to apply this view to the moral notion of promising, which is analogous to the analysis of desert offered in the text, is either a "lunatic" idea, or "dotty" or presupposes the very non-Reductionist view Parfit wants to replace. *Id.* at 7-8.

identity requires the exclusion of serious crimes. Only with respect to serious crimes does it seem unfair to hold responsible a later self who has virtually no continuities with the earlier self who committed the crime.

Although the two objections to the way Parfit states the implications of his views are removable, two central questions remain. The first is whether, for virtually all the defendants, the psychological continuities between their present selves and their selves forty to forty-five years ago are sufficiently weak, and their characters sufficiently changed, that they no longer deserve punishment. It is a mistake to simply rely on the fact that although these people allegedly committed heinous acts in some cases, many years ago, they have since lived peaceful, law-abiding lives in the United States. Rather than constituting evidence of changed characters, it is possible that these varied behavioral patterns are simply different manifestations of the same character.³⁵⁹ Quite plausibly, the defendants' memories seem dim³⁶⁰ and their psychological continuities less strong because they chose to leave the places and the people of the past to come to a country where they could live in anonymity.³⁶¹ In the absence of further evidence that the psychological continuities are sufficiently weak for reasons unrelated to the defendants' own acts, it is correct to say that they now deserve punishment and that imposition of a statute of limitations is inappropriate.

The second question is whether Parfit's view of personal identity, thus far assumed, is true. This is a broad and difficult question. As a practical matter, however, Parfit's view of personal identity, which to some extent conflicts with our ordinary view of the matter, is unlikely to persuade Congress to impose a statute of limitations on the charges OSI brings.

Even if Parfit's views are true, they provide only weak support for a statute of limitations. His emphasis on the weakening of psychological and physical continuities over time and on changes of character provide some support for taking such fac-

359. Cf. Lifton, *Mengele*, N.Y. Times, July 21, 1985, (Magazine), at 16 (proposing psychological theory of "doubling" to explain personality of people like Mengele).

360. *But see* United States v. Sprogis, 763 F.2d at 124 (Mansfield, J., concurring) (if the incident with the nine Jews were the only one in Sprogis's life, "one would reasonably expect it to have made a life-long impression on him").

361. "[The defendants'] one abiding trait seems to have been a determination to stay anonymous and to cultivate the good will of their neighbors." A. RYAN, *supra* note 2, at 269.

tors into account on a case-by-case basis when determining the punishment someone convicted of a crime should receive. His argument is therefore better applied as a reason why a sentencing authority ought to show mercy to a defendant whose character now is very different from what it was at the time of the crime. In addition, both retributivist and utilitarian theories of punishment, including general and specific deterrence, offer plausible explanations of the typical structure of statutes of limitations, in which the period lengthens as the seriousness of the crime increases.³⁶² This structure suggests that beliefs about physical and psychological continuities play a role, albeit a limited one, in justifying such statutes. Were these beliefs more important, however, statutes of limitations would less characteristically discriminate between crimes of different degrees of severity. Therefore, even where the physical and psychological continuities of the defendants are now very weak, this fact is not a strong consideration in support of a statute of limitations.³⁶³ The considerations supporting statutes of limitation thus do not warrant imposing a limitation on the charges the OSI brings.

CONCLUSION

This Article addresses moral responsibility for collective actions and the cases that the Office of Special Investigations has brought. It has argued that the defendants assisted in persecution if they personally participated in persecution or knowingly and more than minimally contributed to a group that persecuted civilians. This conclusion requires the belief that there are standards of conduct to which we can rightly hold the defendants. If it is appropriate to apply these standards and to hold the defendants morally and legally responsible for their failure to meet them, we also have a responsibility to ensure

362. See *supra* note 342. See also *Handel v. Artukovic*, 601 F. Supp. 1421, 1430 (D.C. Cal. 1985) ("Because [statutes of limitations] are equivalent to acts of amnesty, the length of the . . . limitation [period] bears a necessary relation to the heinousness of the crime."); *United States v. Provenzano*, 423 F. Supp. 662, 666 (S.D.N.Y. 1976), *aff'd mem.*, 556 F.2d 562 (2d Cir. 1977).

363. This conclusion is consistent with the fact that very serious crimes, such as those of which the defendants are accused, are typically not covered by a statute of limitations. The United States seems to have supported the principle of no statute of limitations on war crimes, as embodied in the Convention on the Non-Applicability of Statutes of Limitation to War Crimes and Crimes Against Humanity, G.A. Res. 2391, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968) (*effective* Nov. 11, 1970). See discussion in *Handel v. Artukovic*, 601 F. Supp. 1421, 1430 (D.C. Cal. 1985).

that people are educated to those standards and that they are affirmed in our public acts through these cases. The Office of Special Investigations plays a role in educating the public to such standards and affirming their importance. If we permit the OSI to disband, we ourselves will bear some measure of moral responsibility.