

In Search of a Theory of Public Memory: The State, the Individual, and Marcel Proust

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This Article posits the existence and pervasiveness of an official public (or State) memory that is primarily constructed using public law devices and statements of official policy. While official public memory serves the purposes of social control and stability, it also seeks to mask contestation and is, accordingly, neither complete nor authentic. Using philosophical, scientific, and literary sources, this Article demonstrates how the affective (emotional) memory that is unique to individuals creates a permanent potential for contestation and authenticity and therefore sets a natural conceptual limit to the power of officially managed memory to contrive the past. To help establish this Article's initial claim, Part I provides as an illustration of the phenomenon of official public memory the legal and policy means by which the Austrian government sustains an official public memory of Austria as a victim State of Nazi aggression. Part II builds upon the Austrian illustration as well as examples from other States to expose the characteristic patterns—selectivity, constructivism, mythmaking (mythopoesis), incorporation, and presentism—by which government elites create and maintain a contrived ideological account of the past. It shows how States exploit law and the legal process in this task. In response to Parts I and II, the remainder of this Article (Parts III–V) is a search for a concept of public memory that provides a more contested (and authentic) account of the past, and thus a challenge to the law-sustained contrivance of official public memory. Others have sought to open up contestation by proposing actions that occur entirely within the construct of law and legal institutions. This Article broadens the inquiry by seeking to support contestation (and authenticity) using the work of other disciplines. Part III begins this quest for an alternative discourse by exploring the discipline of history, which is characterized by archival efforts to discover the “true” past. History's unending revisionism, however, makes it unlikely to serve the purposes of social control and stability that give official memory its power. And history's relativist biases makes it no more likely than official memory to create a broadly accurate portrait of the past. Part

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*IV considers whether social philosophy offers a more accessible paradigm of public memory, one that is grounded in the lived experience of individuals. In particular, Part IV draws on the concept of non-official "collective memory" expounded by French social philosopher Maurice Halbwachs as an alternative account of public memory. But this, too, is deficient as an authentic counterpoint to official public memory, because Halbwachs fails to exclude the effects of that very contrivance from his theory. Nor, importantly, does he account in his social theory of memory for a unique feature of individual lived experience, the scientifically verified condition of emotional or affective memory. Part V seeks to use literature, and in particular the theory of transcendent memory offered by Marcel Proust in *In Search of Lost Time*, to meet the ontological challenge of demonstrating how affective memory is the feature of individual lived experience that is most likely to sustain a reconceptualized public memory. By representing affective memory as an autonomous condition, this Article sets a cognitive, definitional, and even scientific limit to the power of official memory. Rather than finding a discourse to displace official public memory, therefore, this Article reaches the reassuring conclusion that affective memory allows an understanding of official public memory as intrinsically confronting a potential for contestation, and therefore for authenticity.*

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INTRODUCTION: POSITING AN OFFICIAL PUBLIC MEMORY

On the contrary, it's only fact. Truth is quite another thing and is the work of the imagination.¹

And if the facts say otherwise, then the facts must be altered. Thus history is continuously rewritten. . . . The mutability of the past is the central tenet. . . . Past events . . . have no objective existence, but survive only in written records and in human memories. The past is whatever the records and the memories agree upon. And since the Party is in full control of all records . . . it follows that the past is whatever the Party chooses to make it. . . . [W]hen [the past] has been recreated in whatever shape is needed at the moment, then this new version is the past, and no different past can ever have existed.²

A new future requires a new past.³

This Article posits the existence and pervasiveness of an official public memory.⁴ It explains that this kind of memory is primarily constructed using public law devices and statements of official policy. Government elites use this portfolio of techniques to shape for each *demos* a sanctioned and often sanctified collective national interpretive idiom (and remembrance of things past⁵). Thus, for example, this Article examines how an apparently sympathetic gesture of memory work, the modern device of establishing truth commissions, is exploited as part of the incorporative, assimilationist agenda that characterizes elite memory production.

This Article acknowledges that official public memory serves purposes of social control and stability. But official memory also seeks, through maintenance of a contrived ideological account of the past, to mask contestations of that account. Accordingly, official public memory is neither complete nor authentic, and that is the

1. TOM STOPPARD, *THE INVENTION OF LOVE* 93 (Grove Press 1997) (line attributed to Oscar Wilde).

2. GEORGE ORWELL, 1984, at 175–76 (Signet Classics, 1950).

3. ERIC FONER, *WHO OWNS HISTORY?: RETHINKING THE PAST IN A CHANGING WORLD* 77 (2002).

4. “Official public memory” should not be considered as synonymous or coterminous with the more plastic notion of a “collective memory.” As this Article explains, official memory is a conscious attempt by ruling elites to steer a public recollection of the past. That effort may succeed in also establishing a “collective memory” among the citizenry at whom these attempts are directed, but whether or not it does so, or to what extent the effort is compromised by competing sources of information, is not the dialectical concern of the present Article. *See infra* notes 6 & 7 (establishing the conceptual boundaries of this Article). It can certainly be recognized, however, that the sheer endurance of official public memory is likely to have an important influence on the shaping of the collective memory of the citizens of a State. *See infra* note 347 (on the imprecision of the notion of “collective memory” in contemporary social thought); *see also infra* text accompanying note 331 (examining a specific concept of a “collective” memory developed by Maurice Halbwachs).

5. *Cf.* MARCEL PROUST, *A LA RECHERCHE DU TEMPS PERDU* (formerly translated as “Remembrance of Things Past”) (Gallimard 1999). (For the Shakespearean provenance of the English title, *see infra* note 390.) Proust’s great novel of time and memory provides the conceptual structure for a theory of “transcendent memory” discussed in Part V of this Article.

issue with which I am most preoccupied in this analysis. Using philosophical, scientific, and literary sources, this Article seeks to demonstrate how officially produced memory is conceptually unable to mask the most authentic characteristic of individual memory, the emotional and affective resonance that individuals retain of past events.⁶ As such, while official public memory, particularly in the form practiced in modern liberal democracies, has techniques by which it seeks to block (and, in this sense, to incorporate or assimilate) contested interpretations of the past, the existence of individual affective or emotional memory creates a permanent potential of contestation of the officially managed narrative.⁷

6. The effect of the inability of official public memory to dictate or define individual emotional memory might be interpreted in a number of ways. In the first place, one might regard official public memory as dangerous insofar as it attempts to do something that might be considered inappropriate, namely, to constrain individuals in developing their own sense of identity and to deny populations access to resonances of memory that allow conflicts and nuances of the State's past to be absorbed more authentically. Alternatively, one might regard the autonomy of individual emotional memory as protected by the intrinsic impotence of official public memory and thus perceive the creation of an official memory by States as futile—and, therefore, not harmful. These alternative normative propositions raise a series of separate questions that this Article does not address, but which I take up in a separate work, Brian F. Havel, *The Power and Impotence of Official Public Memory* (on file with author). This Article instead takes on the fundamental tasks of identifying the concept and reach of official public memory and analyzing the important conceptual distance that separates official memory from individual emotional memory.

7. I acknowledge that the memory work of summoning a vanished past takes many forms—the private endeavor of historians, writers, and poets, for example. See, e.g., CHRISTOPHER HITCHENS, UNACKNOWLEDGED LEGISLATION: WRITERS IN THE PUBLIC SPHERE (2000) (essays illustrating how works of literature have acted as precursors to social and political reform); AVISHAI MARGALIT, THE ETHICS OF MEMORY 11 (2002) (noting the role of “[m]ythmakers, epic poets, and chroniclers of the royal court” who may provide legitimacy for regimes whose entitlement to govern is anchored in past events). Thus, although the streams of influence affecting the public memory of late-model bourgeois societies include also the media, the educational establishment, political parties and pressure groups, the military, organized religious organizations, and large business corporations, this Article is centered on *government* activity. While the contributory roles of what social critics Michael Bommes and Patrick Wright call this “accumulation of public forms,” Michael Bommes & Patrick Wright, ‘*Charms of Residence: The Public and the Past*,’ in MAKING HISTORIES: STUDIES IN HISTORY-WRITING AND POLITICS 253, 260 (Richard Johnson et al. eds., 1982), are impossible functionally to disaggregate, the central government, and the law, enjoy “a centrality of voice within societies which other institutions lack.” Jennifer Balint, *Law’s Constitutive Possibilities: Reconstruction and Reconciliation in the Wake of Genocide and State Crime*, in LETHE’S LAW: JUSTICE, LAW AND ETHICS IN RECONCILIATION 129, 133 (Emilios Christodoulidis & Scott Veitch eds., 2001). Some have argued that governments of democratic liberal democracies have less need to attach to the kind of memory reconstruction and what one history professor describes as “organized oblivion,” Claudia Koontz, *Between Memory and Oblivion: Concentration Camps in German Memory*, in COMMEMORATIONS: THE POLITICS OF NATIONAL IDENTITY 258 (John R. Gillis ed., 1994), practiced by authoritarian regimes. Each election, in this view, acts as a switching mechanism that constantly jolts the national attention toward the future. See MARGALIT, *supra*, at 11–12 (arguing that liberal democracies are “exempt from an orientation to the past and rest their power on their vision of the future”). This is unlikely to be true, even as a generalization.

In making this radical argument, this Article practices a form of disciplinary consilience,⁸ marrying the insights and intuitions of two distinguished French contemporaries; Maurice Halbwachs, a social philosopher whose conception of a “collective” memory shared by sub-State groups remains fundamental to understanding the social construction of memory,⁹ and Marcel Proust, literature’s iconic novelist of memory and author of the prototypical narrative of time and memory, *In Search of Lost Time*.¹⁰ Halbwachs provides the framework for an autonomous model of public memory that operates below the centralized structures of official memory, but his model (like official memory) fails to appreciate the powerful effects of individual affective memory. Proust, on the other hand, robustly illustrates how the emotional memory of individuals has *transcendent* power, since it overcomes the distance that normally separates recall of past events from the lived experience of those events. For Proust, affective memory reflects the most authentic existential experience of all memory. Accordingly, rather than finding a discourse that displaces official public memory, this Article reaches the reassuring and humanistic conclusion that the authenticity of affective memory places a natural limit on government control of the individual.¹¹

All governments are forced to operate in a diachronic continuum that relies on elements of shared memory (or of shared amnesia). Fidelity to a national constitutional tradition, to take a conspicuous example, is a manufactured process of memory that enlists a document of the “past” in the service of legitimizing elite actions in the present and for the future. Paul Ricoeur, France’s leading contemporary critical philosopher, contends that the institutional grip on memory, itself a product of an ideology of legitimacy, “is not a specialty of totalitarian regimes alone; it is the [natural accompaniment] of all those enamored of glory.” PAUL RICOEUR, *MEMORY, HISTORY, FORGETTING* 85–86 (Kathleen Blamey & David Pellauer trans., Univ. of Chicago Press 2004).

8. Yale historian John Lewis Gaddis expresses respect for how the disciplines of the natural sciences succeed by “remaining open—the word is *consilience*—to what insights from one field can tell you about another.” JOHN LEWIS GADDIS, *THE LANDSCAPE OF HISTORY: HOW HISTORIANS MAP THE PAST* 61 (2002) (emphasis in original).

9. See MAURICE HALBWACHS, *ON COLLECTIVE MEMORY* 22 (Lewis A. Coser trans. & ed., 1992) [hereinafter HALBWACHS, *ON COLLECTIVE MEMORY*]; MAURICE HALBWACHS, *THE COLLECTIVE MEMORY* (Francis J. Ditter & Vida Yazdi Ditter trans., 1980) [hereinafter HALBWACHS, *THE COLLECTIVE MEMORY*]. Maurice Halbwachs first identified a separate consciousness of collective memory that could be contrasted with the more formal discipline of history and the personal autobiographical memory. See *id.* at 52.

10. MARCEL PROUST, *IN SEARCH OF LOST TIME* (Christopher Prendergast ed., Ian Patterson et al. trans., Penguin Books 2002). This Article adopts the new English translation of *In Search of Lost Time* (which it sometimes refers to as “the *Search*”) published by Penguin Books in 2002. The “Penguin Proust,” the work of six different translators under the stewardship of a general editor, is the first completely new translation since the 1920s. See *infra* note 393 (noting that new translation is based on the most authoritative original version of Proust’s novel). Proust and James Joyce have been said to represent the “time cult” of literary exploration. Wyndham Lewis, *Time and Western Man* (extract), in MARCEL PROUST: *REVIEWS AND ESTIMATES IN ENGLISH* 107, 107 (Gladys Dudley Lindner ed., Stanford University Press 1942) [hereinafter PROUST: *REVIEWS IN ENGLISH*] (suggesting that the “time-cult” is in full operation in Proust and Joyce).

11. Margalit holds that memory (like will and belief) applies primarily to individuals, so that it is typical that an interpretive primacy is accorded to the individual sense of this concept as opposed to its use in collectives. See MARGALIT, *supra* note 7, at 48. For this Article,

This Article proceeds in five parts. Parts I and II establish the initial claim about the existence of an official public memory. Part I provides an empirical illustration of the phenomenon of official memory by tracking the experience of the modern Republic of Austria in coming to terms with the legacy of Nazi occupation and collaboration. In particular, this Part focuses on how the Austrian government continues to use public law—including a new legal category called a “State Treaty” negotiated with the Allied Powers after World War II—to establish an official public memory of Austria as a victim State of Nazi aggression.

The fluidity of memory work, so much in thrall to time and place and circumstance, makes generalization (though ultimately necessary) both difficult and inadequate. Empirical study, therefore, is essential to reveal some of the patterns of an official public memory. While many empirical contexts exist, the example of Austria allows an instructive exploration of how an official memory of Nazism, in a modern liberal democratic State, came under blistering challenge in the late 1990s when Austria and Austrian companies were “caught in the cross-hairs” of American class-action lawyers seeking restitution for the primarily Jewish victims of Nazi-era forced and slave labor and property confiscations.¹² This sudden return of the suppressed fact of its “brown” past forced the Austrian Republic to a historic moment of reckoning. Austria’s elites consciously used one of official memory’s most potent resources—the instruments of public law and policy—to maintain the cohesion and stability provided by the mytho-legal construct of a victim State that valiantly overthrew Nazi oppression and reclaimed its place in the community of civilized nations. Austria, as it joined Germany and Switzerland in propitiation of these old claims, sought still to preserve the core of this mythology, a specific *Vergangenheitspolitik*,¹³ even as the master narrative faced counter-mythological contestation after decades of uneasy silence.¹⁴

however, such a dogmatic separation would prejudge the entire premise of the argument. Official public memory and individual memory do share many characteristics, not the least of which is a dominating selectivity and the absence of a comprehensive reprographic recall even of deliberately selected events. See *infra* text accompanying note 363. This Article anticipates, however, an eventual point of *conceptual* separation where individual memory will *transcend* the bandwidth capacity of a posited official memory.

12. STUART E. EIZENSTAT, *IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II* 279 (2003) (beginning a description of how Austria inevitably became the next State, after Germany, to face U.S. class-action lawsuits brought against its corporations by lawyers for conscripted Nazi-era workers and dispossessed property owners).

13. See NORBERT FREI, *ADENAUER’S GERMANY AND THE NAZI PAST: THE POLITICS OF AMNESTY AND INTEGRATION* xii (Joel Golb trans., 2002) (translating *Vergangenheitspolitik* as “policy for the past”). The expression, from the immediate post-war Adenauer era, signified a deliberate effort to anesthetize the effects of the Nazi legacy through “social, professional, and civic” (though not political) rehabilitation of millions of Nazi Party members. See *id.* As Frei notes, the application to previously dismissed Nazi officials and fellow travelers makes the phrase much more precise in meaning than the commonly used reference, also a part of the old West German Republic’s political vocabulary, to “overcoming the past.” See *infra* note 14.

14. See Pierre Nora, *Between Memory and History: Les Lieux de Mémoire*, 26 REPRESENTATIONS 7, 16–17 (1989) (noting how modern nations emphasize historical discontinuity through mythologies of founding). Austria is a fascinating study of the dynamics of official public memory, not only because of its respectability as a denizen of modern international civil society, but also because, through a combination of domestic and foreign

Part II builds upon the Austrian illustration, as well as examples from other States, to expose certain characteristic patterns—selectivity, constructivism, mythopoesis (mythmaking), incorporation, and presentism—by which government elites create and maintain a contrived ideological account of the national past. The patterns reveal how States consciously exploit law and the legal process in this task. *Selectivity* partitions the huge corpus of past events and people into the memorable and the not-to-be-remembered, but does so in a framework of ideology rather than pragmatism. *Constructivism* involves the making of a claim, supported by law and policy, about a selected past event or series of events. It is revealed, for example, through a “claim,” backed by public law, that emphasizes Austria’s disappearance as an independent State during the Nazi occupation and that assigns responsibility for Nazi collaboration to individual citizens. *Mythopoesis*, the manufacture of myths, focuses on the fetishistic and cultistic dimensions of elite memory production, the creation of a canonical master narrative or master concept of the State. France and Great Britain have nurtured strong anti-historical self-concepts, but Germany has been forced to bend to the will of history. Again, law plays a central role in this kind of mythmaking, as this Article demonstrates through exploration of the Austrian and U.S. experiences.

The pattern of *incorporation* describes the complex ways in which official public memory seeks to absorb, and thereby to mitigate, contestations of the master narrative. This Article initially considers how Austria adjusted aspects of its master narrative to detoxify a series of challenges to the claim of victimhood, but enlarges this discussion into a broad analysis of how contestative events are managed by the pattern of incorporation. In this context, this Article contends that Mark Osiel’s normative proposal for a procedural republic characterized by perpetual dissensus, as well as John Gillis’s descriptive insistence on a post-national era where the State is no longer the principal site of memory for most people, account only for the margins of discourse. The ontology of incorporation, by which the State seeks to assure its dominance, is illustrated through the evolution of a German post-Nazi narrative of national regret and the normative separation of the post-war German Republic from the “unlawful State” of Nazism. This Article considers also how governments have successfully promoted, and habituated themselves to, certain devices of public law—including the recent

influences, it has so recently re-entered world consciousness for its past complicity with Nazi hegemony and the Holocaust. There is, in Austria as well as in Germany, a belated but still uneasy recognition that the Nazi legacy has remained unresolved. The notion of a second opportunity to come to terms with the past supposedly implicates replacement of *Vergangenheitsbewältigung* (“overcoming the past”) by *Aufarbeitung* (“working through the past”). Alexandra Barahona de Brito et al., *Introduction to THE POLITICS OF MEMORY* 1, 19 (Alexandra Barahona de Brito et al. eds., 2001) (discussing these terms in the context of Germany’s perception that the Nazi legacy remained unresolved). But the Nazi legacy clings limpet-like to the modern German State. German historian Daniel Frei uncovers Hitler’s enduring political appeal to Germans even after World War II. See FREI, *supra* note 13, at viii, xi (noting that Germany’s reconciliation to its past only became an independent subject for research in the 1990s when public debates began to consider the Holocaust and the issue of forced and slave labor). Similarly, this Article shows how Austria’s governing elites have used law, in effect, to compromise a process of “working through” the past, maintaining a stolid resistance to certain *re-workings* of history urged by the voices of contestation. As noted in the main text, this analysis is supported empirically by examples drawn *inter alia* from the course of Austria’s settlement negotiations on compensation for victims of Nazi-era forced and slave labor.

phenomenon of truth commissions—that manage, rather than create empathic spaces for, threats to the master narrative. Through incorporation, the compiled record of the administration becomes legally dispositive and part of the State liturgy.

Presentism, the final characteristic pattern, recognizes how official public memory is biased toward a State's living (and future) citizens and operates within this framework to achieve goals of stability and social order. For Austria, the law-based claim of victimhood acted as a national tranquilizer and social balm and continues to allow today's Austrians, temporally removed from Nazism, to reclaim a glorious pre-Nazi history and to esteem post-war neutrality and economic success. Governments, therefore, practice a kind of historical engineering that seeks to maintain the welfare and stability of their polities through sponsorship of a particular view of the past.

Closing Part II, this Article reflects once again on the importance of the lawmaking power to the creation of official memory. The five characteristic patterns of official public memory are observed through the lenses of law and the legal process, since it is also a characteristic of official memory construction (as opposed to the memory work of other elites such as the media or organized religion, for example) that the civil law-making apparatus is at the exclusive disposal of governments.¹⁵ Law's distinctive

15. In this sense, this Article instantiates what have been described as “expressive” theories of law. Theories of this kind “tell actors—whether individuals, associations, or the State—to act in ways that express appropriate attitudes to various substantive values.” Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1504 (2000). For example, with respect to the Patriot Act mentioned in the main text, see *infra* text accompanying note 16, the word “Patriot” (a contrived acronym formed from the full title of this anti-terrorist legislation, see *infra* note 16), signals the values (freedom-loving, favoring strong repressive government measures against terrorism) that are coded into the legislation but which are also part of an evolving master discourse that is de-internationalizing American political thinking. See *infra* notes 16 & 19 and accompanying text. The idea that law can express elite-sponsored values, or that it is sometimes symbolic of societal intent, is hardly an affront to sound thinking, yet for some scholars the debate resolves into a *reductio ad absurdum* that queries whether one can cogently ascribe a meaning to the collective action of a representative body such as Congress. See, e.g., Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1389 (2000) (suggesting that a multimember legal body voting on a text does not have a “mental state” independent of the mental states of each member, whereas a genuine communication presumes a genuine speaker). As Anderson and Pildes argue in reply, members of collective bodies “must be capable of understanding themselves as expressing mental states,” but, in any event, in democratic States “they are not the final arbiter of meaning”—public and shared meanings, as well as, presumably, court-ordered meanings, are also involved. Anderson & Pildes, *supra*, at 1526–27. Aside from this strange insistence (routinely contradicted by popular ascriptions of intent to Congress or to international organizations, for example), that plural subjects are a conceptual impossibility, Adler's fundamental point, it seems, is that it is wrong to overemphasize the symbolic power of laws. To do so, he argues, overemphasizes an inappropriate (and sometimes inconceivable) linguistic meaning; a particular law (in this sense, a “government action”) can cause what he calls “status harm” to a minority group without *linguistically* stigmatizing them. Adler, *supra*, at 1434. Thus, laws can have disparate impact on minorities and even impoverish them (welfare laws, for example) without betraying the kind of explicit stigmatic content of a law; for example, a law which provides that “only white males are eligible to serve as jurors.” *Id.* at 1430, 1438. Thus, his primary point is that expressivist theories retain too strong a conceptual link to language, even though he appears to concede, remarkably, that law's cultural impact may indeed

categories, including constitutions, legislation, treaties, truth commissions, and criminal trials, allow access to the past to be filtered through familiar and replicable structures, and thereby help to stabilize social expectations.

A prominent recent example of elite claim-making exercised through the legislative process is the adoption of the "Patriot Act"¹⁶ in response to the terrorist attacks of September 11, 2001. Through the Act, and repeated elite invocations of the Act, official public memory of that day (designated "Patriot Day" by official edict¹⁷) has

shape or reinforce social norms, social forms, and social practices. *Id.* at 1498. Anderson and Pildes respond to Adler by picking up on this apparent concession, pointing out that law's expressive power is socially constructed, since any proposed interpretation of a law "must make sense in light of the community's other practices, its history, and shared meanings." Anderson & Pildes, *supra*, at 1525. Thus, an interpretive *context* must exist, and not, *pace* Adler, merely a decontextualized string of possible semantic meanings. The interpretive context suggested in the present Article is the construction of an official public memory. As Anderson and Pildes conclude, a notion of expressivism "captures many intuitive understandings of the concerns of the law." *Id.* at 1575. As these authors also note, purely expressive harm *has* led to some laws being struck down because they strike "contemptuous, hostile, divisive attitudes . . . without [necessarily] requiring any demonstration of adverse causal consequences." *Id.* at 1534. The authors mention voting rights cases in this rubric, but a more pertinent recent example is the Supreme Court's galvanic opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating a Texas law that criminalized homosexual conduct, in part because the law was a declaration by the State that homosexual persons may be subjected to discrimination). The contemptuous value that is integrated into the Texas law is expressed by the Court as follows:

When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.

Id. at 575. Another case from the Court's evolving States' rights jurisprudence, *Alden v. Maine*, 527 U.S. 706 (1999), is replete with language that Anderson and Pildes describe as having "a strong expressivist cast"—epithets such as the "dignity" of States, the "esteem" with which Congress must regard the States as sovereigns, and the status of the States as "residuary sovereigns," Anderson & Pildes, *supra*, at 1563. The ultimate critique of Adler, according to Anderson and Pildes, is that he avoids ascribing moral import to these legal communications by focusing on the subjective reactions of addressees, a position these authors characterize as "bizarre." *Id.* at 1574.

16. The Act's popular name is an acronym for the final seven substantive words of its formal title, "Uniting and Strengthening of America to Provide Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001," Pub. L. No. 107-56, 115 Stat. 272 (2001). It will be noticed that all ten substantive words in the title spell out "USA-Patriot Act." This elongated title appears to be a conflation of the titles of separate bills from the House and Senate Judiciary Committees (the "USA Act" from the Senate and the "Patriot Act" from the House. See Jess Bravin & Ted Bridis, *Investigation and Mobilization: Political Role Reversals Shape Antiterrorism Legislation*, WALL ST. J., Oct. 8, 2001, at A8). *But see Provide Appropriate Tools Required to Intercept and Obstruct Terrorism*, H.R. REP. NO. 107-236, pt. 1 (2001) (statement of Rep. Frank) (attacking the decision to construct an "awkward" title for the proposed legislation to yield the acronym "Patriot," and finding an implication that those who disagree with the legislation are not patriots).

17. See H.R.J. Res. 79, 107th Cong. (2001) (joint resolution of the Senate and House of Representatives of the United States designating September 11 as "Patriot Day," and requiring

probably attained a point of *inscription*, where the event it recalls is now in compliance with a redemptive (and constructed) ideology of State survival.¹⁸ In the context of Bush Administration policies, the redemptive ideology (the *claim* that the Administration makes about September 11, 2001) and the legislation (which mythicizes that claim) have supplanted a competing and prior narrative of international community, the narrative of a U.S.-led international collaboration using the diplomatic and legal frameworks that were established after the Second World War.¹⁹ Official public memory has implanted a sense of a new foundational moment in legal culture that seeks to incorporate human rights—and international law—into the recast official narrative as evanescent indulgences, negotiable in the face of threats of terror, rather than as prerequisite conditions of the global order.²⁰

The U.S. decision to attack Iraq without a formal U.N. Security Council resolution was emblematic of this rebuilt official ethos²¹ and was aided by official cultivation (through very public acts of withdrawal and rejection with respect to existing and future treaty commitments) of a mood of public antipathy toward global cooperation.²²

the President to issue a proclamation *inter alia* calling on “the people of the United States” to observe a commemorative moment of silence on that day).

18. See JENNY EDKINS, *TRAUMA AND THE MEMORY OF POLITICS* 91, 102–03 (2003) (positing the aftermath of the World Trade Center attacks, including the declaration of a war on terrorism, as an example of how the State, through its powers of memorialization, “can capture the debate [and] reinforce the narrative of the nation”).

19. See Jed Rubenfeld, *Two World Orders*, *PROSPECT*, Jan. 7, 2004, at 32, 33 (detailing the U.S. role in setting up post-war international institutions, a “new internationalism” designed to “transmit American principles to the rest of the world”).

20. See generally John Strawson, *Introduction* to *LAW AFTER GROUND ZERO*, at xi–xiii (John Strawson ed., 2002) (examining disturbances to the legal culture caused by the Bush Administration’s reaction to the World Trade Center attacks, including toleration of mass detentions without trial as well as a much-contested reinterpretation of the U.N. Charter to treat a terrorist attack as an armed attack justifying measures of preemptive self-defense). In Strawson’s assessment, international law has now become a post-Westphalian “contested arena.” *Id.* at xix. *But see* Michael J. Glennon, *How War Left the Law Behind*, *N.Y. TIMES*, Nov. 21, 2002, at A33 (arguing that the U.N. Charter provisions on the use of force “are simply no longer regarded as binding international law,” so that the U.S. *realpolitik* attitude that attacks do not legally require U.N. approval is the more correct interpretation of current international law).

21. *But see* GLENNON, *supra* note 20 (disputing international law requirement for such a resolution). The Iraq invasion was legally premised on a doctrine of preemptive action to counter a sufficient threat to U.S. national security. See 2002 NATIONAL SECURITY COUNCIL, *THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA* 15 (Sept. 2002). In this report to Congress, President Bush proposed an adaptation of the traditional international law doctrine of preemption based on an imminent threat. *Id.* The broader Bush doctrine would allow anticipatory action “even if uncertainty remains as to the time and place of the enemy’s attack.” *Id.*; see also Amy E. Eckert & Manooher Mofidi, *Doctrine or Doctrinaire—The First Strike Doctrine and Preemptive Self-Defense under International Law*, 12 *TUL. J. INT’L & COMP. L.* 117 (2004) (arguing that the Iraq situation disclosed no legally valid imminent threat—a prerequisite for preemptive self-defense).

22. During this period, the United States refused to ratify the 1997 Kyoto Protocol on global warming, see Letter to Members of the Senate on the Kyoto Protocol on Climate Change, 37 *WEEKLY COMP. PRES. DOC.* 444 (Mar. 19, 2001); withdrew from the 1972 Anti-Ballistic Missile Treaty, see Remarks Announcing the United States Withdrawal from the Anti-Ballistic Missile Treaty, 37 *WEEKLY COMP. PRES. DOC.* 1783 (Dec. 17, 2001); disputed the application of

And public policy that is developed in reaction to sudden events has a tendency to change the complexion of the legal environment well beyond the passage of the triggering event.²³ This process of conversion of the past into a *scriptural* interpretation, using the centrality of the law, is quintessentially the province of government.

In response to the demonstration of the contrived nature of official public memory in Parts I and II, the remainder of this Article (Parts III–V) is a search for a concept of public memory that allows a more contested (and hence more authentic) account of the past, and thus represents a challenge to the law-based contrivance of official public memory. Writers like Osiel and Gillis seek to open up contestation by proposing actions (such as Osiel's notion of civic dissensus) that operate entirely within the existing State-centered apparatus of law and policy. The remainder of this Article, however, seeks to broaden the search for authenticity by consulting the work of other disciplines whose discourses may not be beholden to the collectivizing, mythologizing, and generalizing legal and policy analysis that produces the official public memory investigated in Parts I and II. Because authenticity implicates, among other things, a restoration of simple accuracy to the past, this Article looks initially to history, a discourse that (on first impression) appears to be separated from official public memory by a visceral ontological distinction, the difference between the ritualistic, selective recall of official memory and history's detailed archivist rendering (which this Article calls *chronique*). History work, in contrast with official memory work, is obsessional about discovering a "true," as opposed to "canonical," past.

On closer inspection, however, history proves to be both very unlike official public memory *and* very similar, and in each of these respects as a discourse it proves a weaker model for maintaining an enduring counter-discourse, a discourse of authentic recall, than might be expected. As a practical matter, its mission of *chronique*, the discovery of a literal "true" past, while undoubtedly separating history from the constructed product of official memory, also implicates an endless cycle of contestability that cannot serve the purposes of social control (through consensus) that

the Geneva Conventions to detainees held in the war on terrorism, e.g., Remarks Prior to Discussions with Chairman Hamid Karzai of the Afghan Interim Authority and an Exchange with Reporters, 38 WEEKLY COMP. PRES. DOC. 127, 128, 130–31 (Feb. 4, 2002); rejected NATO's offer of support in the fight against the Afghan Taliban, see Press Release, Statement by NATO Secretary General Lord Robertson (Oct. 8, 2001), available at <http://www.nato.int/docu/pr/2001/p01-138e.htm>; opposed proposals to strengthen and verify the 1972 Biological Weapons Convention, see Statement on Strengthening the International Regime Against Biological Weapons, 37 WEEKLY COMP. PRES. DOC. 1580 (Nov. 5, 2001); and, most remarkably in terms of conventional international law jurisprudence, purported to "unsign" its earlier signature of the 1998 Rome Statute to establish an International Criminal Court, see Robert S. Greenberger & Jess Bravin, *The Assault on Iraq: War May Conform with Law, but U.S. Prestige May Suffer*, WALL ST. J., Mar. 20, 2003, at A13 (listing treaties that the Bush Administration has rejected or unsigned); see also Exchange with Reporters in Milwaukee, Wisconsin, 38 WEEKLY COMP. PRES. DOC. 1123 (July 8, 2002); Press Briefing by Ari Fleischer (May 7, 2002), at <http://www.whitehouse.gov/news/releases/2002/05/20020507-6.html>).

23. See Strawson, *supra* note 20, at xvii (noting that anti-terrorist legislation enacted in haste tends to become a permanent feature of the legal environment); see also Michael Ignatieff, *Is the Human Rights Era Ending?*, N.Y. TIMES, Feb. 5, 2002, at A26 (suggesting that "the intellectual and political climate of a war on terror now resembles the atmosphere of the cold war").

give official memory its narrative power. Historical knowledge, which opposes a canonical, closed past, is *always* revisionist, because a perfect *chronique*, the knowing of *everything about everything* that occurred in the past, is ontologically unattainable. Revisionism is anti-hegemonic and schismatic, uninterested in (and probably incapable of commanding) a continuing consensus. Ironically, therefore, because of its most defining (and intellectually appealing) characteristic, history lacks the dogmatic stability—and, frankly, the institutional centrality—that would make it a discourse that would challenge the supremacy of official memory.

But history also *resembles* official public memory in a telling respect. History is not the work of Clio, the Muse of History, but of historians. While they would recoil from notions of alteration or management of the past, historians *do* interpret the past just as official memory seeks to do. The work of historians is never a pure facsimile of the past but an ideologically fraught conversation among the present, the past, and themselves. Historians operate subject to a relativistic mixture of contemporary ideological and professional influences, and often view the entire past through presentist ideological concerns (for example, discourses based on feminism, minority rights, sexuality, nationalism, or class). In this sense, historians are no less immune than governments from the viral effects of the interpretive fallacy—the idea that all attempts to configure the past are threatened by the biases of relativism and presentism.

Part III concludes with an illustration of how the elusiveness of *chronique* defeats history's essentialist claim to provide a comprehensive (and objective) picture of the past. Drawing again on legal processes, this Article analyzes the adversarial portrayal of historical incidents during recent Holocaust-related criminal and civil trials. This discussion reveals how history's ontological failure to provide a comprehensive reckoning of past events (for example, the absence of a documented order by Adolf Hitler to initiate the mass extermination of Jews) means that canonical (official) memory is rarely disturbed by the forensic scrutiny of a trial, whereas history's claim to *ex post* verification is belied not only by factual divergences and the incompleteness of the record, but also by the mediated and interpretive nature of what historians do.

Having set history aside as a model of memory that offers a permanent counter-discourse to the claims of official public memory, Part IV considers whether social philosophy offers a more accessible paradigm of public memory, one that is grounded in the lived experience of individuals, in place of the constructed images of official memory and history's burdens of *chronique* and relativism. In so doing, this Article moves from exploring a theory of public memory that might challenge official memory to a theory that conceptualizes a possible inherent—and therefore definitional—limitation of official memory. In this understanding, public memory will be reconceptualized as comprising both a non-dynamic component, official public memory, and an autonomous condition, the emotional or affective memory of individuals, that remains cognitively protected from official memory.

Part IV builds its quest for a public memory based on lived experience upon the concept of *collective memory* expounded by French social philosopher Maurice Halbwachs. It opens by acknowledging (as Halbwachs does) that much of the remembered past is merely mediated memory, a schematic measure of the actual experiences that others have lived. The techniques of official public memory, in fact, exploit this property of what this Article calls "contingent knowability." For Halbwachs, however, the personal lived memory predominates over the superficial stamping of the general conceptions of official public memory. He roots his notion of public ("collective") memory in socially constructed sub-State frameworks (a nuclear

family, a class of alumni or, more broadly, a religion or fellowship of musicians), whose multiple viewpoints on the past establish what he calls an “affective community.” Halbwachs proposes a ground-up conceptualization of public memory that contrasts with the top-down techniques of official memory. Each individual memory in the community is a viewpoint on that non-official public memory. Within this conceptualization, Halbwachs, in fact, criticizes history as a universal, monolithic, self-isolating process, remote from the memory of the groups who experienced past events.

Two important conceptual faults limit the applicability of Halbwachs’s theory as a source of an authentic public memory. First, Halbwachs does not examine how much of his sub-State memory space—given the borrowed nature of much of official memory—could still be occupied by the constructed ideological frameworks of official memory. His theory appears to call for public memory to be depoliticized and reindividualized, but he offers no conceptual boundaries for ensuring that this happens. Second, and more problematically, although Halbwachs visualizes an “affective community,” this Article shows that he does not appear to have grasped the full resonance of this idea. His decentralized public memory, which he proposes implicitly as a more authentic social confirmation of individual memories, is just as structurally incapable as official memory of accounting for the emotional or affective effects of memory on each individual who lives within his decentralized frameworks. Affectivity, the memory of how an individual *felt* in the past, necessarily transcends the shared stories and accumulated details about a past occurrence.

Halbwachs’s notion of an affective community, therefore, contains more than he seems to have imagined. He may have assumed—given the scientific knowledge of his time—that a collective memory comprising separate individual memories (or viewpoints) could not ipso facto be confused with the constructed formats of official memory. Yet, as modern science verifies, ordinary individual memory, like official memory, is itself a constructed phenomenon even though it does not recall in a precisely linear fashion and seems responsive to randomized impulses. While there is no searchable database of every memory trace we have ever laid, memory’s evocative properties help us to enjoy the benefits of this constructed memory, including the ability to concentrate on higher order judgmental operations and to allow a kind of mental precipitate to form, which comprises our rationality, our capacity to form general impressions, and to extrapolate from those to judgment.

Yet Halbwachs’s reference to an “affective community” does signal (even if, for him, unconsciously) that individual memory differs radically from official memory in having an emotional dimension, an affectivity, that is precisely the *unconstructed* capacity to recall the emotional resonance (if not necessarily the specific details) of a past event. This attribute of affectivity separates individual memory both from official public memory and also from Halbwachs’s notion of a public collective memory. New scientific research attests to the intuitively persuasive idea that emotional or affective memory—including memories of past trauma—represents the *most* adhesive type of recall. Our emotional quotient or affectivity, in other words the capacity to remember *how we felt* at the time of a past incident or series of incidents, is integral to a functional personal memory.

Part V uses literature, and in particular Marcel Proust's great novel of time and memory, *In Search of Lost Time*,²⁴ to overcome the hermeneutic challenge of demonstrating how "affectivity" is the feature of individual lived experience that is most likely to sustain a reconceptualized, more authentic concept of public memory. The complexity of Proustian memory pits unreliable simple memory, the incomplete (and highly constructed) forensic process of recovering past events, against authentic (and frequently uncomfortable) affective memory. The final volume of *In Search of Lost Time* is a manifesto of the potency of affective memory. The richest grain of this kind of memory—the Proustian moment—operates by a recessive analogical power that occurs instantaneously when a triggering mechanism (such as the taste of the madeleine pastry) causes a jolt of affective recognition of a past experience and a "transcendence" of the flux of time.²⁵ These authentic experiences of emotional recall (spontaneous and involuntary) are contrasted with mechanical (and voluntary) efforts to summon images and recollections from the past.

Proust thus creates a forceful literary context for understanding the power that modern science attributes to affective memory. While his understanding of a spontaneous transcendent memory occurs within the confines of the non-spontaneous and structured format of a novel, this irony of artifice simply elevates Proust's success at depicting the force of affective memory in our inner lives. Rather than focusing on the magical interventions of an involuntary memory, it is best to understand Proust's

24. While Proust's essential insights into time and memory suffuse popular and scholarly discourses, he is most noted in popular culture for his motif of the *madeleine*, symbolizing involuntary spasms of returning memory. In fact, the image of the madeleine plays no explicit role in the final volume of his work (considered, *infra*, in Part V of this Article), in which he presents his *summa summarum* of memory using an entirely different set of mnemonic triggers. See also EDMUND WHITE, MARCEL PROUST I (1999) ("the madeleine moistened by herbal tea has become the most famous symbol in French literature; everyone refers to sudden gusts of memory as 'Proustian experiences'"); JULIA KRISTEVA, TIME AND SENSE: PROUST AND THE EXPERIENCE OF LITERATURE I (Ross Guberman trans., Columbia University Press 1996) ("The 'petite madeleine,' which is flavorful, incestuous, delicate, elusive, and diluted in tea . . . offers a taste of Proust even to those who have never read him."); SERGE DOUBROVSKY, WRITING AND FANTASY IN PROUST: LA PLACE DE LA MADELEINE I (Carol Mastrangelo Bové & Paul A. Bové trans., University of Nebraska Press 1986) (questioning his own decision to write on a subject so "rehashed as that of the famous madeleine"); HITCHENS, *supra* note 7, at 73 (invoking "the madeleine" of the memoirs of Gore Vidal); MARGALIT, *supra* note 7, at vii (following the pattern noted here of the madeleine as an opening motif, commencing his exploration of memory by acknowledging that a local newspaper article was "[t]he Proustian [m]adeleine cake that triggered my search and research into the memory of the lost past"); David R. Ellison, *Proust and Posterity*, in THE CAMBRIDGE COMPANION TO PROUST 200, 201 (Richard Bales ed., 2001) [hereinafter CAMBRIDGE COMPANION] (suggesting also that it is not an exaggeration to say that Proust's fame "rests upon the twin pillars of a rather insipid pastry . . . and very long sentences").

25. Part V of this Article concentrates on an extended treatment of Proust's complex (and incompletely articulated) theory of transcendent memory. The unsettling prospect of the entire 3000 densely-textured pages of the *Search* (in French or in English) has always caused Proust to be "a name to quote" rather than a writer to read. F.L. Lucas, *The Mystic of Memory*, in PROUST: REVIEWS IN ENGLISH, *supra* note 10, at 186, 187. Yet the last volume of the *Search* offers, in 300 pages, a self-standing study—what may be the most sustained and profound in world literature—on the essence of individual affective memory.

notion of transcendence as a way of understanding that so much of ordinary memory is dull and unspecific. As a novelist rather than a scientist or a philosopher, Proust is engaged in a spectacular novelistic rendering of an important truth of human memory.

To demonstrate the force of these exposed realities, this Article uses Proustian *transcendence* to rehabilitate Halbwachs's concept of lived experience as the true basis of memory. Halbwachs correctly grasps the importance of lived experience to an authentic public memory, but understands the memory of lived experience only as Proust did before he experienced the ecstasy of transcendent memory: as sterile recall, images without the *essence* of experience. In Part V, therefore, this Article reconceptualizes Halbwachs to establish a sphere of memory that lies beyond the selected, constructed, mythicized, incorporative, and presentist patterns of official public memory, a sphere of memory that is (as Halbwachs may well have sensed but never formally articulated) *cognitively protected* from the State.

This Article's search for an authentic theory of public memory, therefore, concludes with the understanding that the State's managed recall reaches the conceptual limit of its power in the face of the unique affectivity of individual memory. When we express the sense that the past remains open or open-textured, but always threatened by the canonical actions of official memory (and perhaps also of history, as it turns out), we can now also recognize that a theory of public memory must embrace the lived experience of individuals as reflected in their personal affective memory, and therefore must always embrace the potential of contestation. Rather than a normative or descriptive commentary on public memory, the theory of public memory advocated in this Article recalibrates official public memory itself as *intrinsically* confronting the permanence of contestation. Whether or not contestation ever breaks the surface of State memory management, the threat of contestation endures as a cognitive reality in the minds of individuals, outside the incorporative mechanisms of official memory. Thus, this Article reaches the reassuring conclusion that there is a cognitive, definitional, and even scientific limit to the power of the State over the individual.

In an Epilogue, this Article closes with reflections on the enduring role of the State as a mythmaker for the past and on the limits of law as an agent of affectivity, and with a recapitulation of this Article's thesis that there exists a natural limit on government control of the individual.

I. CLAIMING SOVEREIGNTY OVER THE PAST: AN EMPIRICAL STUDY

A. Introduction

I turn now to a more precise reification of the characteristic patterns of official memory. The method of analysis, as explained earlier, is resolutely inductive. It is based on observation of a class of facts—official construction of memory in the Republic of Austria—as the premise for discovering the characteristics of how official public memory operates generally. Thus, while this empirical study narrates Austria's specific experience, the elements of the narration could be universalized as a prototypical group of issues (for example, the legal relationship of succession between a new government and a departed repressive regime) that could confront any State engaged in a morphology of post-conflict official memory. In Part II, I will offer a brief synthesis of these issues as a conceptual bridge to the derivation of the characteristic patterns of official public memory that follows. In this Part, however, it is necessary to analyze Austria's construction of an official memory of the era of Nazi occupation and

collaboration, and how very recent challenges to that official memory (most conspicuously from U.S. lawyers for victims of Nazi-era forced and slave labor and property confiscations) have been managed. The Austrian post-occupation experience also offers a powerful case study of how a State can construct its official memory using the centrality of law.

B. Austria after 1945: The Mantle of Victimhood

Newsreels of cheering Austrians welcoming Adolf Hitler to Vienna²⁶ would have undermined a founding narrative of a victimized people breaking out of the carapace of the Nazi *ancien régime*.²⁷ Moreover, the Austrian State had been locked in a forced union (the so-called Anschluss²⁸) with a defeated Germany,²⁹ so that an epic of autonomous national resurrection was plainly impossible to script. For the Austrian post-war leadership, official elaboration of a restored self-image would require both a narrative of victimhood that identified Austria with other nations subject to Nazi aggression, and a complementary and interwoven narrative to place Austria beyond the circle of defeated Axis powers as an Allied sympathizer whose fate compared to that of neutral Belgium.³⁰

26. See JUDITH MILLER, *ONE, BY ONE, BY ONE: FACING THE HOLOCAUST* 61–62 (1990) (noting estimates that some 250,000 people, a third of the city's population, filled Vienna's Heldenplatz to greet Hitler on March 15, 1938; see also GORDON BROOK-SHEPHERD, *THE AUSTRIANS: A THOUSAND-YEAR ODYSSEY* 325–28 (1996) (describing tumultuous and resistance-free welcomes for Hitler in Linz and Vienna: "Austria's darkest hour was not her finest"). See generally EVAN BUKEY, *HITLER'S AUSTRIA: POPULAR SENTIMENT IN THE NAZI ERA, 1938–1945* (2000); Evan B. Bukey, *Popular Opinion in Vienna After the Anschluss*, in *CONQUERING THE PAST: AUSTRIAN NAZISM YESTERDAY & TODAY* 151 (F. Parkinson ed., 1989).

27. The metaphor is Christopher Hitchens's. See HITCHENS, *supra* note 7, at xix (writing of a secular republic emerging within the carapace of Britain's fading imperial tradition).

28. *Anschluss*, "connexion" or "joining," is the historical euphemism describing Nazi Germany's bloodless annexation of the post-World War I Austrian Republic. Under the "Reunification Law" adopted without protest by the Austrian government on March 13, 1938, Austria became a province inside the greater German Reich. See BROOK-SHEPHERD, *supra* note 26, at 323–33 (describing events leading to *Anschluss*). A month later, a plebiscite on the *Anschluss* produced a 99.73% vote in Hitler's favor. See *id.* at 332.

29. See generally EIZENSTAT, *supra* note 12, at 279–80 (analyzing the pro-Nazi sentiment in Austria which eased the path to *Anschluss*, and the period of "wild Aryanization"—a phrase used by Austrians themselves—in the aftermath of the annexation).

30. Compare the experience of German post-war management of public memory of the Nazi era, as recounted by German historian Norbert Frei. It began with a "voluntary silence," "ascribing the horrors of the Third Reich to Hitler and a small clique of 'major war criminals'" who "seduced" the nation. FREI, *supra* note 13, at 311 (writing as though the West German population evolved these ideas reflexively, thus leaving open the question of the managed nature of memory). Frei also notes a post-war suppression of what he labels "the basic criminal character of the German aggression, its barbarism and madness from the start." See *id.* at 311–12. The visible result of this suppression, as a managed public memory would expect to produce, was the "hyperstability" of the new West German State. *Id.* Then, outside pressure—by Israel and the Eichmann trial, and by East German anti-fascist propaganda designed to demonize and destabilize its Western rival—forced West Germany to recalibrate the idea of Nazism as an alien regime and to become aware that the Final Solution (and the Nazis themselves) had a

1. A New Legal Category: The State Treaty

Crucially for Austria, its public law transformation of memory occurred at both international and domestic levels. The tripartite Allied Declaration on Austria, issued at Moscow on October 30, 1943³¹ “without fanfare or explanation,”³² committed the United States, Great Britain, and the Soviet Union to a schizophrenic formula of victimhood and responsibility that would, in the later Austrian self-interpretation, be conflated into a unitary notion of victim status. The powers “agreed that Austria, the first free country to fall victim to Hitlerite aggression, shall be liberated from German domination” and that they regarded the “annexation imposed upon Austria by Germany on March 15, 1938 as null and void.”³³ The immediate purpose of the Declaration—a purpose that was unmentioned in later construction of these events—was to galvanize Austrian opposition to Hitler.³⁴

Simultaneously, the Allies “reminded” Austria “that she has a responsibility which she cannot evade for participation in the war on the side of Hitlerite Germany.”³⁵ But the Allies drew some of the toxins from the accusation of responsibility with a pledge (again directed to motivating Austrian opposition) that “in the final settlement account will inevitably be taken of [Austria’s] own contribution to her liberation.”³⁶ The 1943

social anchoring among the wider German population. *Id.*; see *infra* text accompanying note 191 (considering these issues within the conceptual framework of “incorporation” of contestative narratives).

31. *Deklaration von Moskau betreffend Österreich*, 30 Oktober 1943 (Moscow Declaration on Austria, (Oct. 30, 1943)), reprinted in BUNDESMINISTERIUM FÜR AUSWÄRTIGE ANGELEGENHEITEN, 2001 AUSSENPOLITISCHE DOKUMENTATION: SONDERDRUCK, ÖSTERREICHISCHE MASSNAHMEN ZUR RESTITUTION UND ENTSCHÄDIGUNG VON OPFERN DES NATIONALSOZIALISMUS, Wien 2001 (MINISTRY OF FOREIGN AFFAIRS, 2001 FOREIGN POLICY DOCUMENTS: SPECIAL ISSUE, AUSTRIAN MEASURES FOR THE RESTITUTION AND COMPENSATION OF THE VICTIMS OF NATIONAL SOCIALISM, Vienna 2001), at 7 [hereinafter 2001 AUSTRIAN FOREIGN POLICY DOCUMENTS].

32. EIZENSTAT, *supra* note 12, at 281 (reviewing the circumstances of the Allied Declaration by the foreign ministers of the United States, Great Britain, and the Soviet Union).

33. 2001 AUSTRIAN FOREIGN POLICY DOCUMENTS, *supra* note 31, at 7. The annexation date of March 15 used in the Declaration is inaccurate by two additional days. See *supra* note 28.

34. See EIZENSTAT, *supra* note 12, at 281 (commenting that, in this purpose, the Declaration was a failure; its chief effect was on the post-war collective psyche).

35. 2001 AUSTRIAN FOREIGN POLICY DOCUMENTS, *supra* note 31, at 7.

36. *Id.* The word “liberation” as an element of the vocabulary of official memory has re-emerged in German public discourse on Nazism. The idea of the end of World War II as a “liberation” of the German people from Nazism is a response scripted to overcome the typical verdict of the collective defeat (and guilt) of Germany. The current German chancellor, Gerhard Schröder, expressing gratitude for Germany’s inclusion in the sixtieth anniversary commemoration of D-Day, said in an interview that the occasion was “important” to him because it made clear the meaning of D-Day, namely, “the liberation from National Socialism, which was not only the liberation of Europe, but also the liberation of Germany, or the beginning of the liberation.” John Vinocur, *Just Whose Liberation Was Begun On June 6?*, INT’L HERALD TRIB., June 1, 2004, at 2. The historical counterpoint to this German “official memory,” of course, is the ferocious resistance of the German armies (unhindered by any indigenous “Resistance”) against the Allied offensive after D-Day. See *id.* (suggesting that this use of the word “liberation” is a comfort word for a modern generation that identifies resistance

Declaration would become the legal lodestone of Austria's official memory of the *Anschluss*. Because of the Declaration's external provenance—and despite its strategic purpose of arousing opposition to Nazism—it had the powerful effect of muting criticism of Austria in the aftermath of Nazi rule,³⁷ and of providing a significant legal premise for an enduring official memory of a nation yoked against its will to Nazism.³⁸

Stalin's death in 1953 brought to power a collective Soviet leadership under Nikita Khrushchev that signaled its desire to improve contacts with the West through the policy it labeled "peaceful coexistence."³⁹ Although Moscow had formerly tied the status of Austria to the fate of a peace treaty with Germany, the Soviets in 1955 announced that they stood willing to conclude a "State Treaty" restoring Austrian sovereignty and to withdraw their troops from Austria without delay, provided that effective safeguards against a future *Anschluss* could be devised, and that Austria comply with the obligations of military neutrality.⁴⁰

In tracing the arc of Austria's official memory, the unexpected conceptualization of a "State Treaty" in 1955⁴¹ reprises and amplifies the dominating victimhood motif of

with "the few German Social Democrats, resistance fighters and gays" liberated from concentration camps by the Allies).

37. See IWONA IRWIN-ZARECKA, *FRAMES OF REMEMBRANCE: THE DYNAMICS OF COLLECTIVE MEMORY* 120 (1994) (commenting that forgetting the past "worked well" for Austria within the larger vision of the fallen Habsburg Empire, "but it could not have been possible without cooperation from both the United States and the Soviet Union"). As discussed in the main text, see *infra* text accompanying note 46, Austria's ability to maintain what Irwin-Zarecka calls a "morally purified narrative," *id.* at 129, was strongly attached to external support for the post-war geopolitical imperative of restoring a functioning independent Austrian State.

38. But see EIZENSTAT, *supra* note 12, at 281 (characterizing Austria's victimological identity as a "delusion").

39. See KONRAD GINTHER, *NEUTRALITÄT UND NEUTRALITÄTSPOLITIK (NEUTRALITY AND NEUTRALITY POLICY)* 95 (1975) (defining "peaceful coexistence" as "an ideological struggle with nonmilitary means, but moreover also through cooperation" (translation by author)).

40. Here is one author's perception of the Soviet gesture and Austria's perceived geopolitical importance:

There were strategic as well as diplomatic advantages for the Soviets in conceding Austria's neutralization at this time. For as well as conforming with the post-Stalin "new look"—a diplomacy which was seeking a *détente* with Tito and improved relations with the Asian neutralists—there were strategic advantages for the Soviet Union in thus separating two NATO powers (Italy and West Germany) and seeing the Swiss-Austrian wedge of neutral territory hindering the logistic consolidation of NATO. And Austria's neutralization entailed the transfer of 5,000 American troops from Salzburg to south of the Brenner.

PETER LYON, *NEUTRALISM* 168 (1963). So startling was the Soviet *renversement*, which by October 1955 had led to the departure of the last foreign soldier from Austrian soil, that in January 1984, in a review of the State of current East-West relations, the American news magazine *Time* could still cite it as the most auspicious signal displayed by the Soviet Union during the era of "peaceful coexistence." *TIME*, Jan. 2, 1984, at 42–43.

41. The *Staatsvertrag betreffend die Wiederherstellung eines unabhängigen und demokratischen Österreich* [*State Treaty for the Re-establishment of an Independent and Democratic Austria*], 217 U.N.T.S. 223 (1955), was prepared by a Conference of Ambassadors at Vienna in early May 1955, and signed by the foreign ministers of the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, the United

the Moscow Declaration of 1943. The unusual nomenclature of the Treaty, in fact, proves critical in demonstrating the role of law's conceptual categories in the shaping of official memory. Germany and the other defeated Axis Powers were subjected to "peace" treaties with all the victorious States. Austria's leaders, in contrast, achieved a remarkable trifecta of negotiating successes in 1955: (1) an entirely novel public law instrument, a "State" treaty rather than a "peace" treaty, confirming the Moscow Declaration's implication that Austria was not perceived by the Allies as a hostile belligerent;⁴² (2) signature of the State Treaty only by the circle of four occupying powers rather than by all victorious States;⁴³ and, most powerfully, (3) excision from the State Treaty of the equivocating reference to Austria's "responsibility" (moral and financial) that the Allied Powers had placed into the Declaration.⁴⁴ And Machiavellian *fortuna* played its mercurial part. Although the Allies were aware of the reality of Austrian complicity, the geopolitical advantages of restoring an independent and neutral Austria overwhelmed their sensitivity to counter-narratives.⁴⁵ "In 1955, 'one second of world history moved in our favor. And we made good use of it,' wrote one of Austria's most experienced journalists."⁴⁶

States of America, and France—described collectively in the Treaty as the "Allied and Associated Powers"—of the one part, and the Republic of Austria, of the other part, at the Belvedere Palace in Vienna on May 15, 1955. See generally Hanspeter Neuhold, *Background Factors of Austria's Neutrality*, in NEUTRALITY AND NON-ALIGNMENT IN EUROPE 44, 47 (Karl E. Birnbaum & Hanspeter Neuhold eds., 1982).

42. See *infra* text accompanying note 115 (discussing Austria's mytho-legal use of the State Treaty).

43. See *supra* note 41 (on the signatures of the State Treaty).

44. See HELLA PICK, *GUILTY VICTIM: AUSTRIA FROM THE HOLOCAUST TO HAIDER* 31 (2000) (noting Austrian foreign minister Leopold Figl's plea to the Allies that it would be unfair to burden Austria with guilt about past behavior at the very moment of its revival as an independent nation, a position that the Allies agreed to "[w]ith little pause for reflection"); see also MILLER, *supra* note 26, at 68 (noting that the image of Austrians as the "proto-martyrs of Europe" was well-established in 1955 when the treaty was signed).

45. See *supra* note 40 (analyzing Austria's geopolitical importance from the Soviet perspective); see also MILLER, *supra* note 26, at 68 (citing Austrian scholar's view that the Allies deliberately supported a new "founding myth" in order to sponsor a new national identity that broke from the perceived Austrian loyalty to the Third Reich).

46. Hugo Portisch, *quoted in* PICK, *supra* note 44, at 49. A similar view was expressed by Austrian historian Oliver Rathkolb: "You gave us a historical out, and we grabbed it." MILLER, *supra* note 26, at 69. For Germany, too, *fortuna* proved favorable. But for the Germans, the motion of the clock was in comparison almost a full hour. Eventually the so-called Morgenthau Plan, which *inter alia* anticipated a complete ruralization and demilitarization of Germany, as well as President Roosevelt's apparent willingness to drive the German people to soup kitchens and poverty, no longer represented U.S. policy (under pressure from Churchill, who wanted Germany as a bulwark against Russia), and Germany won its chance to create a new foundation. See generally MICHAEL BESCHLOSS, *THE CONQUERORS: ROOSEVELT, TRUMAN AND THE DESTRUCTION OF HITLER'S GERMANY 1941-1945*, at 108, 124, 148-49 (2002) (discussing evolution of Roosevelt's position and its eventual abandonment; as Beschloss describes, Roosevelt, in fact, denied that he could ever have endorsed a memorandum he initialed in Quebec with Churchill in which both leaders endorsed the Morgenthau Plan). For a summary of the Morgenthau Plan, see *id.* at 115; see generally JOHN DIETRICH, *THE MORGENTHAU PLAN: SOVIET INFLUENCE ON AMERICAN POST-WAR POLICY* (2002); WARREN F. KIMBALL, *SWORDS OR PLOUGHSHARES?: THE MORGENTHAU PLAN FOR DEFEATED NAZI GERMANY 1943-46* (1976). See

2. More Legal Invention: Adopting Permanent Neutrality

In establishing the post-war independent Austria, however, the country's rulers feared that their adoption of the Swiss model of a permanent neutrality⁴⁷ would still be perceived as a penalty imposed by the Allies on a former adversary.⁴⁸ The claim of victimhood, therefore, needed a domestic (and dominant) public law instrument to confirm that independent Austria was renouncing external alliances, including any with Germany, in the name of an autonomous and prudential foreign policy of a formerly victimized people. In convenient support of this official effort to distance Austria from the stigmatized Axis Powers, the instruments of Austrian neutrality were left messy and somewhat ambiguous. They comprised a trio of documents: (1) a bilateral agreement, the "Moscow Memorandum," signed in 1955 between an Austrian government delegation and the Soviet Union⁴⁹ (2) the State Treaty (the instrument ending the four-power occupation⁵⁰); and (3) a self-styled "constitutional" law on the neutrality of Austria, adopted internally by the Austrian parliament in October 1955, after the last foreign soldier had departed from Austrian territory.⁵¹

Austrian diplomacy removed any explicit reference to neutrality from the State Treaty, evidently in order to avoid the impression of a "neutralization" in its more pejorative meaning of an imposed condition,⁵² even though adoption of neutrality was patently the political price of securing Great Power unanimity on the long-deferred

infra note 110 and accompanying text (considering Austrian fear of imposition of a Morgenthau-style settlement).

47. Permanent neutrality, prototypically practiced by Switzerland as a matter of custom and treaty, as an institution of international law obligates a State adopting this status prospectively to maintain classical neutrality in the wars of other States, and not to take part in the wars of other States, irrespective of the identity of the belligerents or the geographical proximity of the conflict. *See* Brian F. Havel, *An International Law Institution in Crisis: Rethinking Permanent Neutrality*, 61 OHIO ST. L.J. 167, 183 (addressing the paradox of an institution that posits a "neutrality," a concept derived from the classical laws of war, as operative in peacetime).

48. I have elsewhere suggested that the term "neutralization" carries a political connotation of imposition that is inappropriate to a juridical term of art. I have proposed the term "neutralitization" to indicate a juridical process of adopting neutrality, irrespective of whether the political circumstances suggest imposition or discretionary adoption. *See id.* at 190-92 (noting that the new coinage, because of its semantic match with the doctrine of neutrality, eliminates the ambiguity in the root of the word "neutralization").

49. Under this Memorandum (a different document from the Allied Declaration discussed in text accompanying note 31), the Austrian delegation undertook to "see to it" that their government would "make a declaration in a form which will oblige Austria internationally to practice in perpetuity a neutrality of the type maintained by Switzerland," submit the declaration to the Austrian parliament, and seek international recognition for the declaration. As noted by Alfred Verdross, the leading international law scholar on Austrian neutrality, the Memorandum studiously avoided the impression of being a Soviet demand. *See* ALFRED VERDROSS, *THE PERMANENT NEUTRALITY OF AUSTRIA* 29-30 (1978). For the text of the Memorandum, *see id.* at 26-27.

50. *See supra* note 41 and accompanying text.

51. *See* Neuhold, *supra* note 41, at 44, 47.

52. *See supra* note 48 (discussing this political connotation of the term "neutralization").

State Treaty to restore the independence of the Republic.⁵³ The first article of the later domestic constitutional law of neutrality accomplished Austria's goal of suggesting a domestic law provenance for its new foreign policy: it asserted that Austria declared permanent neutrality "of its own free will" and "[f]or the purpose of the permanent maintenance of external independence and . . . the inviolability of its territory."⁵⁴ Confirming its official narrative that Austria should not be counted among the defeated powers, the Austrian government transmitted the text of the neutrality law to foreign governments with a request for recognition.⁵⁵

In sum, the Austrian government, with the implicit support of the Allies, used a conjunction of domestic and international legal processes to assert claims of national victimhood, non-complicity, and non-membership of the ring of defeated Axis Powers as Austria's official recollection of the period of Nazi supremacy. Taken together, the Moscow Declaration of 1943, the State Treaty of 1955, and the 1955 domestic constitutional law on neutrality comprise the principal public law mechanisms that Austria's rulers used after Nazism to construct this official public memory.

C. The 2000 Forced and Slave Labor Negotiations: Redefining Responsibility for the Past

In April 2000, as the compensation campaign for victims of Nazi forced and slave labor and property confiscation gathered momentum,⁵⁶ the recently elected Austrian

53. Austrian sensitivity to this question of imposition receded, however, after the fall of the Soviet Union. In 1995, then-foreign minister (now chancellor) Wolfgang Schüssel warned that "Austria must stop being a passive spectator hiding behind neutrality imposed after the Second World War." BROOK-SHEPHERD, *supra* note 26, at 448 (emphasis added).

54. *Bundesverfassungsgesetz über die Neutralität Österreichs* [Federal Constitutional Law on the Neutrality of Austria], reprinted in VERDROSS, *supra* note 49, at 28.

55. The Austrian government agreed to transmit the neutrality law to third States under the terms of the bilateral Moscow Memorandum with the Soviet Union. See *supra* note 49 and accompanying text. The second article of the constitutional law was an undertaking by Austria, consistent with the Swiss model of neutrality, "never in the future [to] accede to any military alliances nor permit the establishment of military bases of foreign [s]tates on its territory." See VERDROSS, *supra* note 49, at 28. By the end of 1975, over seventy-five States—including the four "Allied and Associated Powers" which had co-signed the State Treaty—had complied with the Austrian government's request for recognition, whether expressly (in the case of the four occupying Powers), or by taking note without objection, or by simply confirming receipt of the declaration of constitutional neutrality. See AUSTRIAN FEDERAL PRESS SERVICE, AUSTRIA TODAY AND TOMORROW 28 (1975). Since the collapse of the Soviet Union, Austrian government leaders have self-consciously cultivated doubt as to Austria's fidelity to the instruments of neutralization. The principal legal argument has been one of redundancy: German unity and the Soviet implosion stripped meaning from most of the State Treaty's provisions (and abrogated any lingering effect of the Moscow Memorandum). See Ian Traynor, *A Question of Neutrality in a Changed World*, GUARDIAN, Oct. 23, 1990, at 10. But the primary discourse has been one of political expediency rather than legal necessity. One writer, sympathetic to Austrian history, wrote of Austrian permanent neutrality in 1997 as having become "as impermanent as the Soviet Communism which had imposed it." BROOK-SHEPHERD, *supra* note 26, at 448.

56. For background to the campaign, which began in 1998 with the filing of several class-action suits against Austrian companies in U.S. federal court, see generally EIZENSTAT,

chancellor (prime minister), Dr. Wolfgang Schäussel, delivered an important address to the Austrian ministerial council in which he considered the “central idea” of *Verantwortung*, the “responsibility” of Austrians for the “inheritance of our past.”⁵⁷ Beneath the rubric of official public memory, the Chancellor confessed to a consciousness that “many Austrians bore responsibility for the tragedy of the Holocaust.”⁵⁸ In these careful words, Schäussel was crafting an important conceptual separation (expressible in legalistic terms) between the *State* of Austria (which had no legal existence during the *Anschluss*), and individuals who had been Austrian citizens, with respect to any direct responsibility for Nazi crimes.⁵⁹ Schäussel, in other words,

supra note 12, at 283–89 (describing how Austrian companies, facing the costs of litigation and reputational damage, pressed their government to seek a diplomatic solution). At the core of the campaign was the problematical question of what the generations of today owe victims of the past “when part of [today’s] prosperity is based on their country having enslaved and robbed them.” *Id.* at 279. Filings in the U.S. federal courts in New York accused Austrian companies of using slave laborers and of being “dishonest pimps for the Nazis.” *Id.*; see, e.g., Class-action Complaint, Elkan et al. v. Creditanstalt AG, No. 99 Civ. 0387, 1999 WL 33748771 (S.D.N.Y. filed Jan. 14, 1999) (inter alia accusing the defendant Austrian banks of knowingly obtaining economic benefits from and actively participating in the “illegal, inhumane and genocidal system of slave and forced labor inflicted by the Nazi regime . . . upon those people deemed ‘subhuman’ and used as disposable chattels and slaves or forced laborers” as well as the “Aryanization” of Jewish-owned property in Austria and pervasive looting of assets held by concentration camp inmates). In a media age, these kinds of unwelcome charges were calculated to (and did) set off a panic reaction in Vienna. American Jewish leaders threatened that Austria could expect “the Waldheim treatment” (i.e., complete ostracization) if it persisted in opposing new restitution efforts. See EIZENSTAT, *supra* note 12, at 294 (noting that this was the treatment meted out a decade earlier by the World Jewish Congress). *But see id.* at 346 (noting concern expressed by Abraham Foxman, president of the Jewish Anti-Defamation League in New York, about “monetizing” the Holocaust). For general background on the social and political reasons for the spread of a pro-reparations mindset among German elites and their counterparts in Austria and Switzerland in the late 1990s, see Ambassador J.D. Bindenagel, *Justice, Apology, and Reconciliation and the German Foundation “Remembrance, Responsibility, and the Future 9–10* (2002) (unpublished manuscript on file with the Indiana Law Journal) (noting that victim restitution lawsuits in the United States posed risks to U.S.-German economic relations, and in particular court judgments, regulatory sanctions, and boycotts against German companies, triggering European Union retaliation, were distinct possibilities). On West Germany’s early post-war reparations policy, amounting to more than \$60 billion to 500,000 Holocaust survivors, see EIZENSTAT, *supra* note 12, at 14–15.

57. *Erklärung von Bundeskanzler Dr. Wolfgang Schäussel vor dem Ministerrat zum 55. Jahrestag der Wiederrichtung der Republik, Wien, am 28. April 2000* [Statement of the Federal Chancellor Dr. Wolfgang Schäussel before the Ministerial Council on the 55th Anniversary of the Reestablishment of the Republic, Vienna, April 28, 2000], reprinted in 2001 AUSTRIAN FOREIGN POLICY DOCUMENTS, *supra* note 31, at 43 [hereinafter April 2000 Statement of Dr. Wolfgang Schäussel].

58. *Id.* at 45.

59. Elite management of the past frequently resorts to another variation of the State/citizen dichotomy, creating a distinction between the goodness of the citizens and their malevolent leaders. This was the approach (an inversion of Austria’s) adopted by Germany and France in the aftermath of World War II and by the Soviet Union in the age of *glasnost*. The West Germans maintained a conceptual distinction between the Nazis and the rest of the German *Volk*, and indeed accompanied the dichotomy by a similar notion of “victimhood” under Hitler. See FREI, *supra* note 13, at 1 (referring to the “standard distinction” between the

reconceptualized victimhood as a property of the *State*, and in this sense purified of the iniquities of identifiable members of its citizenry.

The rhetorical centerpiece of the Chancellor's address focused intently on this claim of a morally upright State. Thus, the Chancellor rejected earlier remarks by parliamentary deputies that linked the Federal Republic of Germany, the German Democratic Republic (the former East Germany), and Austria as "*drei Nachfolgestaaten*" (three successor States) of National Socialist Germany. "That is simply not true! . . . [t]his Austria is not a National Socialist successor State!" the Chancellor exclaimed.⁶⁰ The premise for the Chancellor's vehemence with respect to the dry issue of legal State succession was once again the official public memory of Austria's subjugation to Nazism. The Chancellor cited the Moscow Declaration of 1943 (noting that it was explicitly referenced in the pending restitution legislation) as a document "*which came not from Austria, but from the Allies.*"⁶¹ The Allies had installed an Austrian federal government in 1945, and Austria could not be viewed as a successor State of Nazi Germany because "in October 1955 Austria received a *State Treaty* and not a *Peace Treaty*!"⁶² While the Chancellor spoke of these distinctions as "only nuances" to the "unbiased observer," these "nuances" were nonetheless "a part of our history and must not be overlooked."⁶³ Chancellor Schüssel's April 2000 address also gave victimhood a more robust and less passive sensibility. Thus, the Chancellor wove some new strands into the official master narrative, echoing the American master

Nazi leadership and the German people); see also Claudia Koonz, *Between Memory and Oblivion: Concentration Camps in German Memory*, in *COMMEMORATIONS: THE POLITICS OF NATIONAL IDENTITY* 258, 275 (John R. Gillis ed., 1994) (commenting on the emergence since the 1980s of a German entitlement to describe their own "victimhood" under Hitler); *infra* notes 146, 382 (same). Similarly, Chancellor Konrad Adenauer in the early years after the war referred insistently to a corrupt and blind Fascist leadership and a new age of purification. See A. JAMES MCADAMS, *JUDGING THE PAST IN UNIFIED GERMANY* 138 (2001) (mentioning Adenauer's commitment to atone for "the base acts perpetrated in the name of the whole German people"). Chancellor Helmut Kohl, in a much later era, continued to cordon off the Nazi era as segregated and atypical. See BILL NIVEN, *FACING THE NAZI PAST: UNITED GERMANY AND THE LEGACY OF THE THIRD REICH* 242 (2002) (commenting on Kohl's policy to exclude any specific focus on German crime and responsibility, "preferring to label all Germans as victims"). In similar vein, French President Charles de Gaulle presented himself (and his post-war government) as the essence of a France that had not collaborated. *La France* was reborn and recast as a *collective* resister in contrast to the actions of the Vichy leadership. See ADAM NOSSITER, *THE ALGERIA HOTEL: FRANCE, MEMORY, AND THE SECOND WORLD WAR* 4 (2001) (observing that de Gaulle incarnated the essence of France, and that his version of the war's aftermath, that France had wiped out the vestiges of the Vichy dictatorship and been reborn as a democracy, was the accepted one); see also ERNA PARIS, *LONG SHADOWS: TRUTH, LIES AND HISTORY* 79 (2001) (addressing the implausibility of de Gaulle's official post-war French history in which the entire population was touted as having heroically resisted the Germans); *infra* text accompanying note 143 (on the existence of a particular French self-concept). Finally, with respect to the Soviet Union, see FONER, *supra* note 3, at 77 (recalling how former Soviet President Mikhail Gorbachev preached *glasnost* ("intellectual openness") to the Soviet people, while repeatedly portraying past Soviet leaders "in the blackest hues").

60. April 2000 Statement of Dr. Wolfgang Schüssel, *supra* note 57, at 43.

61. *Id.* (emphasis added).

62. *Id.* at 160 (emphasis in original).

63. *Id.* at 161.

concept of great men and covenantal documents.⁶⁴ In addition to fetishizing the State Treaty as something utterly distinct from a peace treaty,⁶⁵ Schüssel extolled his post-war predecessors who “took responsibility for this country in their own hands” (a noble kind of responsibility in contrast to the opprobrium of responsibility for Nazism) and declared Austria’s post-Nazi independence.⁶⁶

D. Conclusion

Forty-five years after the State Treaty, the Austrian master narrative of a nation unshackled from terrible bondage continued to determine official perceptions in negotiating the restitution agreement reached in 2000.⁶⁷ Intransigence about restitution had characterized Austrian decisions since the 1943 Moscow Declaration by the Allied Powers first professed Austria’s victim status and exempted the country from the compensation requirements imposed on other defeated Axis States.⁶⁸ The externally validated victimology became such an *idée fixe* in Austrian elite thinking that in 2000 the Austrian government felt comfortable drawing a distinction that recalled the honor of an Austrian *State* that disappeared with the *Anschluss*, while condemning those “citizens” of that non-existent State who allegedly collaborated with Nazi repression.⁶⁹

64. See *infra* text accompanying note 136 (discussing the U.S. Constitution and its “founding fathers” as elements of the U.S. official memory).

65. See *supra* text accompanying note 42 (noting that Germany and other defeated Axis powers were typically subjected to “peace” treaties with the victorious States).

66. 2001 AUSTRIAN FOREIGN POLICY DOCUMENTS, *supra* note 31, at 44. In a similar attempt to create a common political consciousness, the architects of the so-called “July Plot” to assassinate Hitler received post-war recognition in the new West German Republic. See FREI, *supra* note 13, at 269 (discussing an idealization of the plotters, “who in the end emerged as something approaching the fathers of West German democracy”). But see BESCHLOSS, *supra* note 46, at 258 (explaining that the Truman Administration declined similar recognition, preferring to emphasize the collective guilt of the German people rather than individual acts of defiance).

67. Stuart Eizenstat, who led the Clinton Administration’s efforts on Holocaust restitution issues, recounts the perceived inadequacy of Austria’s earlier efforts at compensation for victims of slave and forced labor and seized property. See EIZENSTAT, *supra* note 12, at 281, 302, 304 (mentioning loopholes and deficiencies in prior laws). Eizenstat concedes frankly that U.S. class-action lawyers forced the issue of past inadequacy into the open. See *id.* at 283 (discussing class-action suits on behalf of conscripted workers); see also *supra* note 56 (summarizing an example of a class-action filing).

68. See *supra* note 44 and accompanying text (discussing post-war Austrian diplomatic success at excising restitution obligations). A report of the American Jewish Congress, published in 1999, traces the history of Austria’s post-war policies on restitution and compensation for Jewish victims and survivors of the Holocaust. ROBERT S. WISTRICH, AUSTRIA AND THE LEGACY OF THE HOLOCAUST 17 (1999) (summary available at <http://www.ajc.org>) [hereinafter AJC Report]. The AJC Report emphasizes how the 1943 Allied declaration of “victimhood” remained a powerful disincentive to a reparations mindset. See *id.* at 8–12 (noting that, for Jewish organizations in the post-war period, “[i]t was not easy to claim reparations from a ‘victim’”).

69. In fact, as the Report of the American Jewish Congress notes, the dichotomizing of moral and legal responsibility that underlay Austria’s approach to the 2000–2001 restitution negotiations was already a mancrism of Austrian policy in 1953 when the Austrian

For Austrian official public memory at century's end, the public law doctrine of victimhood became fastened to a new legal distinction between a suspended State and the actions of a hypothetical citizenry. This combination of victimhood and lack of State responsibility defined official remembrance of the Nazi era even in the aftermath of other recent contestative events such as the controversial presidency of Kurt Waldheim⁷⁰ and the political rise of the reactionary governor of the province of Carinthia, Jörg Haider.⁷¹

government, prompted by the British and Americans, offered a small amount of relief in connection with "heirless property." See AJC Report, *supra* note 68, at 8 (indicating that the relief was characterized by the Austrian government as strictly "humanitarian," a moral rather than a legal responsibility); see also *infra* note 68 and accompanying text (discussing similar Swiss characterization in recent restitution negotiations). Chancellor Schüssel's April 2000 address, see *supra* note 57, focuses on immediate post-war efforts by Austria to cleanse the stain of Nazi collaboration. The Chancellor recounts a process of over 136,000 "investigations," over 28,000 "charges," over 13,000 judgments, and 30 executions, in addition to civil service and corporate purges; in addition, he summarizes a variety of reparations and compensation laws. April 2000 Statement of Dr. Wolfgang Schüssel, *supra* note 57, at 45–46. Yet the Chancellor omits any mention of Austria's policies of reintegrating and amnestying former Nazis. See *infra* note 155 and accompanying text (discussing these policies).

70. In 1986, Austria elected as State president former U.N. Secretary-General Kurt Waldheim, who had admitted altering his biography to conceal his past service on the senior staff of a Nazi army unit that had responsibility for concentration camp deportations. Waldheim's "brown past" has never been completely explained. The allegations that he had been involved in savage reprisals against Yugoslav partisans in the Balkans, and in the deportation of Greek Jews from Salonika, were never proved. For discussion of how U.S. Jewry reacted to Waldheim's potential elevation, see EIZENSTAT, *supra* note 12, at 56–57 (discussing World Jewish Congress investigation that contradicted Waldheim's denial of his Nazi past). The affair provoked some extreme and unsavory anti-Semitic rhetoric within Austria. It may be that Austrians ultimately picked Waldheim as their president not primarily because of an anti-Semitic backlash against his detractors but because he had a significant, if unremarkable, career as a global diplomat. See MILLER, *supra* note 26, at 78–79 (describing Waldheim as a "terrible" Secretary-General, but noting that how he "ran the world" was not important to the electorate, but merely the fact that "the world was run by an Austrian"). The new Austrian president found himself placed on the U.S. Department of State's watchlist and hence denied entry to the United States. See EIZENSTAT, *supra* note 12, at 282 (noting how "painful" the Waldheim period was for Austria). The United States and European Union also instigated a restricted contacts diplomatic policy that, in Eizenstat's view, forced Austria into deepening its sensitivity to Holocaust issues. *Id.* at 284–85. For a comprehensive overview of the Waldheim controversy, including Austria's efforts to "correct" its image even as the country became more introspective, see Melanie A. Sully, *The Waldheim Connection*, in CONQUERING THE PAST: AUSTRIAN NAZISM YESTERDAY & TODAY 294 (F. Parkinson ed., 1989) [hereinafter CONQUERING THE PAST].

71. The period since 1986 also witnessed a huge rise in popular support for the Freedom Party under its reactionary leader, Jörg Haider, the governor of the Austrian State of Carinthia. The Freedom Party became part of Austria's ruling coalition from 1999. Although Haider himself declined to join the cabinet, the new administration's international standing was damaged from the outset by his past record of open xenophobia and covert and overt Nazi apologias. Prominent among the elements of Haider's discourse that seeped into international public consciousness during this period were his views that National Socialism eliminated unemployment and created effective social policy, and that the Nazi concentration camps were "punishment" camps. See *Jörg Haider's Controversial Comments*, Agence France-Presse, Feb. 2, 2000, Global Newbank. Haider's party won the Carinthian State election in March 2004;

II. CLAIMING SOVEREIGNTY OVER THE PAST: EXPOSING THE CHARACTERISTIC PATTERNS OF OFFICIAL PUBLIC MEMORY

A. Introduction

The preceding account of how Austria managed its official memory of Nazism reveals certain universal or prototypical issues that motivate the creation of official public memory. Foremost among these issues must be the question of how any State should approach official memory of an “ignominious” past.⁷² In the process of reconciling itself with the State’s history, does an official memory accentuate certain aspects of the past and suppress others? What are the general or specific claims that a State will make about past persons or occurrences? How should those claims be formulated? Will certain claims be uniquely sanctified in a mythology of founding (or re-founding)? Will a State leverage its monopoly on law and of the civil and criminal legal processes to support those claims? Austria presents the problematic (and partly legal) question of how a new governing elite accommodates itself to being a successor to an ousted and internationally reviled predecessor. And the Austrian study also invites consideration of how to manage contestative narratives that may emerge decades after the initial claims of memory have been asserted and supported.

As will be seen in the next part, I have used the Austrian case study to reveal a number of *characteristic patterns* that demonstrate how State elites can approach these complex issues in the management of an official public memory. Because I have chosen to articulate these issues empirically, however, I do not present the exposed characteristic patterns as normative or directive. They reflect what appear to be repeated sets of actions by States attempting to construct ideological representations of their pasts, and in extrapolating these patterns from the Austrian experience I also report (both in the main text and in footnotes) other examples from the experiences of other States. The revelation of these characteristic patterns, moreover, suggests that States do accept the power of officially managed memory, and that their cultivation of an official public memory is therefore (from their own pragmatic perspective) a rational act.

B. From Case Study to Characteristic Patterns

I. A Summary of the Characteristic Patterns

It will be useful to begin with a short conspectus of the characteristic patterns identified in the following discussion. Official public memory primarily (but not

Haider Bounces Back, EIU VIEWSWIRE EUROPE, Mar. 15, 2004, available at <http://db.eiu.com>. For a detailed account of Haider’s early rise to prominence, see Max E. Riedlspurger, *F.P.Ö: Liberal or Nazi*, in CONQUERING THE PAST, *supra* note 70, at 257.

72. This is the precise word used by the German Consul-General in Chicago, Dr. Alexander Petri, at a ceremony in Chicago on April 22, 2004, to confer the Commander’s Cross of the Order of Merit of the Federal Republic of Germany on Professor M. Cherif Bassiouni for services to the Rule of Law and the establishment of the International Criminal Court. Members of the audience appeared stunned by the Consul-General’s candor. (notes of speech on file with the Indiana Law Journal).

exclusively⁷³) controls the removed past that lies beyond the immediate cognition of most or all of the present citizenry.⁷⁴ This kind of memory is highly *selective* in its treatment of the past, quickly partitioning past events and people into the memorable (and, hence, the “memorializable”) and the infinitely vaster provinces of the unmemorable (the “not-to-be-remembered”). It is *constructivist*, since it treats the past not as an archival finality (a fundamental conceit, as I discuss in more detail in Part III, of the discipline of history) but as a series of claims for which supporting data needs to be culled, organized, and often reformulated into centralized structures such as a national legislative instrument. It is *mythopoetic*, since official claims about the past are less concerned with historical fidelity than with creating adaptations and extrapolations that simplify a complex past. It is, or strives to be, *incorporative*, assimilating and attempting thereby to neutralize counter-narrative challenges to the claims made by hegemonic memory. Finally, official public memory is *presentist*, serving the pragmatic purpose of social control of existing and future populations and ideologies. While I present these characteristic patterns separately for purposes of exposition, collectively they supply a cohesive analytical texture to the study of why official public memory can be said to be contrived and inauthentic, and each of them will be regularly present in any empirical evaluation of official memory management.

2. Derivation of the Characteristic Patterns

a. Selectivity

Austrian official public memory emphasizes the Allied Powers’ wartime recognition of Austria’s status as “the first free country to fall victim to Hitlerite aggression.”⁷⁵ The projection of victimhood has been used to vitiate the newsreel memory of the Austrian *Volk* as willing votaries of Nazism. Even though, by the 1990s, new scholarship had explored and confirmed the painful realities of the Austrian embrace of Hitler’s own mythology of *Heim ins Reich*,⁷⁶ the State’s official public memory still insists that

73. See, e.g., *supra* text accompanying note 16 (observing the “real time” evolution of official memory in the context of the Bush Administration’s response to the September 11, 2001 terror attacks).

74. “Mass production” of memory, in the phrase borrowed by Mark Osiel, may have the power to displace the memory of events, and even the memory of those memories held by the descendants of the original witnesses. See MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW* 18, n.28 (1997) (suggesting that memory production by the State and its legal institutions, after survivors are no longer available, becomes “a realistic possibility and, for some, a terrible danger”). Indeed, the recession of the past need not indicate the passage of a great deal of time. The events of September 11, 2001, created a much larger psychic barrier between the presidency of Bill Clinton and that of his successor than the passage of nine months would seem to justify. See Jonathan Alter, ‘*Life is Fleeting, Man.*’ *NEWSWEEK*, Apr. 8, 2002, at 42, 44 (quoting President Clinton’s own observation that “the American people have moved on to other things”); see also *infra* note 410 (discussing Proust’s view that people in society lack clarity about the timing and significance of past historical events).

75. See *supra* note 31 and accompanying text (discussing the Allied Declaration on Austria, issued in 1943, which is the source of this formula).

76. The *Heim ins Reich* initiative (literally translated, “Home into the Realm”) was Adolf Hitler’s policy, starting in 1939, to spread a revanchist gospel to people of German descent

Austria, as the *directoire* of Allied Powers decreed in their Moscow Declaration, was the first victim of Nazi belligerence. Official public memory, therefore, shows a calculated *selectivity* in deciding what aspects of the State's past will be remembered, and (no less tendentiously) how they will be remembered.

The selectivity considered here, it should be noted, is ideological rather than pragmatic. Pragmatic selectivity requires no empirical deduction. It is a simple recognition that there is so much to recall, over such long time frames, implicating a profusion of national, local, and even tribal prejudices, that inevitably some narrative threads must be (and become) privileged over others. More powerfully than we can ever experience in individual memory, the nature of official public memory would necessarily have to be reductive, evacuative, and selective.⁷⁷ It feels no compulsion to try to remember everything that has ever happened in the national life.⁷⁸ As a *pragmatic matter*, therefore, official memory would silence not just contested interpretations of the past,⁷⁹ but *most* interpretations of the past. No past event or person automatically self-selects to become part of the rites of official memory.⁸⁰

On the other hand, the characteristic pattern of selectivity, as the Austrian experience demonstrates, is biased, intentional, and ideological. Official memory work is saturated with power dynamics that determine what is remembered (or forgotten), by what means, and for what objective.⁸¹ Selectivity's *biases*, in this sense, may just as readily compel amnesia as commemoration for reasons that have nothing to do with a pragmatic pruning of the historical record. In Nietzschean terms, official public memory leans toward celebratory and nostalgic ("monumental") memory rather than

living outside Germany that they should strive to unite their countries with Germany—to bring their regions "home" into a greater Germany. See generally Bukey, *supra* note 26, at 151 (describing how Austrians today have found it difficult to grasp the pervasiveness of Nazi collaboration and anti-Semitism during Hitler's occupation); see also CHRISTIAN ZENTNER, *HEIM INS REICH: DER ANSCHLUSS ÖSTERREICHS 1938 [HOME INTO THE REALM: THE ANNEXATION OF AUSTRIA, 1938]* (1988).

77. See *infra* note 371 and accompanying text (analyzing how individual memory survives—and thrives—by its evacuative properties).

78. See YOSEF HAYIM YERUSHALMI, *ZAKHOR: JEWISH HISTORY AND JEWISH MEMORY* 11 (1989) (noting that biblical injunctions place Israel under no obligation to remember the entire past, but only to recall "God's acts of intervention in history, and man's responses to them, be they positive or negative;" "Zakhor," incidentally, is the imperative mood of the Hebrew word for "remember." See *id.* at xiii (from foreword by Harold Bloom).

79. See David Middleton & Derek Edwards, *Introduction*, in *COLLECTIVE REMEMBERING* 1, 8 (David Middleton & Derek Edwards eds., 1990) (observing that commemoration silences contrary interpretations of the past, so that the remembrance of those who died in war also silences outrage at the courses of action that led to those losses) [hereinafter *COLLECTIVE REMEMBERING*]; see also EDKINS, *supra* note 18, at 21 (contemplating the difficulty of challenging public ceremonials of World War I despite "private experience of the war and its horrors").

80. See IRWIN-ZARECKA, *supra* note 37, at 133 (addressing the long-germinating and intentionalist creation of a feminist critique of patriarchy).

81. See John R. Gillis, *Memory and Identity: The History of a Relationship*, in *COMMEMORATIONS: THE POLITICS OF NATIONAL IDENTITY* 3 (John R. Gillis ed., 1994) (discussing how "memory work" is, like any other kind of physical or mental labor, embedded in complex class, gender, and power relations that determine the balance between remembering and forgetting).

the critical memory that judges and condemns.⁸² Celebratory public memory involves a “creative forgetfulness,” predicating memory of some aspects of the past on amnesia about others.⁸³ For Austria, celebratory memory recalls the glories of Empire and the peacemaking contributions of an activist neutrality, passing over the intercalary Nazi occupation as a period when the Austrian State was forcibly in hiatus. This is not to suggest that governmental selectivity consciously *falsifies* the past;⁸⁴ but the capacity to rework or suppress unpleasant history is omnipresent in official structuring of past events.⁸⁵ Nations pick and choose from their past, just as individuals do,⁸⁶ and the lucidity of the *public’s* memory (again, like that of individuals) is likely to decompose over time.⁸⁷ Thus, as the recent challenges to the Austrian master narrative have demonstrated, the power of official public memory can prevail despite accessible information that opposes it.⁸⁸

82. See Austin Sarat, *When Memory Speaks: Remembrance and Revenge in Unforgiven*, 77 IND. L.J. 307, 325 (2002) (applying Nietzschean categories of memory in the context of a motion picture critique, particularly (as Nietzsche writes) how “critical” memory “bring[s] the past to the bar of judgment, interrogate[s] it remorselessly, and finally condemn[s] it”). Critical or “realist” memory is anti-romantic, anti-heroic, and uncompromising in its “facticity.” *Id.* at 328 (suggesting that critical memory comes closest to a kind of history, while monumental memory is “steeped in the literary and political work of memorialization”).

83. “Creative forgetfulness” is another Nietzschean expression. See FONER, *supra* note 3, at xii–xiii (placing this idea within the framework of how the United States—at various sub-governmental levels—has effaced the legacy of slavery and the Civil War, to the point that what Foner calls “public history” has a large void with respect to what scholarship has identified as the “centrality” of slavery to the history of the United States).

84. *But see* MICHAEL KAMMEN, *MYSTIC CHORDS OF MEMORY: THE TRANSFORMATION OF TRADITION IN AMERICAN CULTURE* 3 (1991) (noting that “societies”—Kammen’s conception of the stakeholders of memory involves a much broader canvass than government elites—reconstruct their pasts rather than faithfully record them).

85. *But see* MARGALIT, *supra* note 7, at 98–100 (demonstrating how the ontology of State-managed memory can cause even seasoned critics to betray existential confusion, Margalit expresses skepticism about “the immense power accredited by some writers to the elites, who supposedly manipulate the masses by inventing communal stories to promote their own selfish interests,” while accepting that “nationalism” has tended to ensure that “collective” memory is indeed manipulated by these same elites).

86. See HITCHENS, *supra* note 7, at 85 (citing comment, *B propos* Britain, that it is easier to remember Shakespeare and Churchill than Northern Ireland).

87. See KAMMEN, *supra* note 84, at 9 (citing numerous sources supporting the perception that the public, notably the U.S. public, lacks a collective memory).

88. See *id.* at 26 (focusing on the endurance of cultural myths such as the supposedly boundless economic opportunities in the United States that drove nineteenth century immigration); see also Christopher Hitchens, *Kennedy Lies*, THE SPECTATOR, Nov. 19, 1983, reprinted in CHRISTOPHER HITCHENS, *PREPARED FOR THE WORST: SELECTED ESSAYS AND MINORITY REPORTS* 252–54 (1988) (attacking various alleged “lies” that underpin the “grandiose absurdity” of the Kennedy myth, which Hitchens evidently perceives as supported by official memory). Hitchens argues, for example, that Kennedy was not the author of his Pulitzer Prize-winning book, *Profiles in Courage*, and that he kept Congress in ignorance of a clandestine and ill-advised war against Fidel Castro’s Cuba. See *id.*

b. Constructivism

Artful legal interpretation was (and continues to be) the metric for understanding Austria's management of public memory of the Nazi occupation. A few months after Chancellor Schüssel's address (discussed above), Austria's Office of the Special Envoy for Restitution Issues issued a detailed technical analysis of Austria's international legal status between 1938 and 1945.⁸⁹ According to this analysis, the "legal responsibility" for which *Austria* as a State lacked capacity extended to the war crimes and human rights violations perpetrated by the Nazi regime.⁹⁰ This emphasis on Austria's disappearance as an independent State consolidated a public law construct of functional incapacity (and ultimate victimhood), so that the responsibility of "individual Austrians," and their associated "moral responsibility" for the crimes of Nazism, was once again configured on a different plane from the responsibility of their State of allegiance.⁹¹

In December 2000, the same Office published a report on past Austrian measures of restitution.⁹² Like the Chancellor's address, the report's introduction reveals a cautious

89. Ambassador Dr. Ernst Sucharipa, Office of the Special Envoy for Restitution Issues, *Austria's International Legal Status between 1938 and 1945 and Austrian Restitution Efforts*, August 2000, reprinted in 2001 AUSTRIAN FOREIGN POLICY DOCUMENTS, *supra* note 31, at 48.

90. *See id.* at 50 (citing the laws of State responsibility, under which it is firmly established that a State to which a violation of international law is to be attributed "must always—in addition to the legal capacity which it has by definition—also possess the capacity to act under international law" (citation omitted)).

91. *Id.* (emphasis in original). In keeping with the dominant construction, this technical analysis also called on external statements of support. The term "State Treaty," the document insists, was "deliberately chosen" by the negotiating powers. And a report of the U.S. Senate Committee on Foreign Relations on the Austrian State Treaty emphasized that Committee's view that "the treaty before the Senate is not a peace treaty. This nation was never in [*sic*] war with Austria. This treaty is, rather, the Austrian State Treaty which restores Austria to the status of independence it occupied before the *Anschluss*." *Id.* at 52. In support of the proposition that the Allied victors regarded Austria as a liberated rather than a defeated country, the Special Envoy's analysis quotes a number of additional U.S. post-war pronouncements, including a Department of State press release of November 10, 1946 ("[The U.S.] Government consistently avoided any step which might be considered to constitute de jure recognition of the annexation of Austria by Germany"); a radio address by President Roosevelt on May 27, 1941 (describing the Austrians as the first of a series of peoples enslaved by Hitler); the text of the Moscow Declaration of November 16, 1943, signed by the United States, *see supra* note 31 and accompanying text; and the judgment of the International Military Tribunal at Nuremberg which defined the invasion of Austria as a "a premeditated aggressive step in furthering the plan to wage aggressive wars against other countries." 2001 AUSTRIAN FOREIGN POLICY DOCUMENTS, *supra* note 31, at 51–52.

92. Ambassador Dr. Ernst Sucharipa, Office of the Special Envoy for Restitution Issues, *Survey of Past Austrian Measures of Restitution, Compensation and Social Welfare for Victims of National Socialism*, December 2000, reprinted in 2001 AUSTRIAN FOREIGN POLICY DOCUMENTS, *supra* note 31, at 64 (translation supplied). Article 21 of the State Treaty excluded all claims of reparation against Austria, providing that "[n]o reparation shall be exacted from Austria arising out of the existence of a state of war in Europe after 1st September 1939." *Id.* at 53. The Treaty did provide in Article 26, however, for the making of restitution and compensation with respect to forced transfer of property on account of the racial origin or

reformulation of the official memory of victimhood, acknowledging the “moral responsibility” of individual Austrians while still disclaiming national “legal responsibility” and maintaining victimhood:

[O]n the one hand, Austrians were among the perpetrators of the most heinous Nazi crimes . . . on the other hand, Austrians were among the victims of National Socialism . . . During the period of occupation by Nazi Germany in 1938 and liberation by the Allied Powers in 1945, Austria, as a State, lacked capacity to act and incur any legal responsibility on the international plane.⁹³

And this motif of Austria’s legal non-existence (and hence putative blamelessness and victimhood) was pursued into the final texts of the U.S.-Austrian agreements on the restitution process.⁹⁴ In the joint statement on the signing of the bilateral agreement on the reconciliation fund,⁹⁵ the preambular clauses acknowledge Austria’s “moral responsibility” but recognize “the suffering of all victims of slave or forced labor *who worked on the territory of the present-day Republic of Austria . . . which had been incorporated into the German Reich.*”⁹⁶

The deliberate ideological purpose reflected in the Austrian statements (and, consciously or not, in repeated U.S. endorsement) cannot be described as an incidental by-product of administration. The remembering and forgetting of Austrian memory management were (and are) highly constructed activities, not merely reproductions of

religion of the owner. *See id.* at 5. *But see* EIZENSTAT, *supra* note 12, at 312 (noting that, with respect to property restitution claims, the negotiations proceeded far beyond Austria’s original position “that it had already done all that was required on property restitution”).

93. 2001 AUSTRIAN FOREIGN POLICY DOCUMENTS, *supra* note 31, at 64.

94. These agreements, in Stuart Eizenstat’s words, comprised “one massive alternative dispute-resolution process.” EIZENSTAT, *supra* note 12, at 353 (summarizing the outcome as “rough justice” to pay mass numbers of victims rather than the kind of “individualized justice” that would be afforded by court review). The remedial procedures were primarily administrative, including Austria’s Fund for Reconciliation, Peace and Cooperation. *See id.*

95. Joint Statement on the Occasion of the Signing Ceremony of the Bilateral Agreements Relating to the Austrian Reconciliation Fund, Vienna, October 24, 2000, *reprinted in* 2001 AUSTRIAN FOREIGN POLICY DOCUMENTS, *supra* note 31, at 247 [hereinafter Joint U.S./Austria Statement].

96. *Id.* at 247 (emphasis added). A parliamentary committee report responding to a petition of members of parliament advocating a federal restitution law demonstrates the coherence with which the founding mythology of victimhood and legal non-existence continues to dominate elite analysis. Committee Report Concerning Petition 180/A of Representatives Cap, Khol, Westenhaler, Stoitsits, and Colleagues on the Subject of a Federal Law for the Fund for Voluntary Payments by the Republic of Austria to Former Slave Laborers and Forced Laborers of the National Socialist Regime (Reconciliation Fund Law), *reprinted in* 2001 AUSTRIAN FOREIGN POLICY DOCUMENTS, *supra* note 31, at 201 (translation supplied). The report veers slightly from the master narrative in acknowledging the “shared responsibility of Austria,” *id.* at 201 (emphasis added), and indeed proposes “a particularly alert and critical discussion and a necessary sensitivity to the structures and mechanisms of the National Socialist criminal system.” *Id.* at 202. But the report’s conclusion corrects any deviation from convention. For the victims, the report concludes, “the place where this [the “suffering of the victims of slave labor and forced labor”] happened was Austria, *even though [the State of Austria] did not exist at the time.*” *Id.* at 203 (emphasis added).

the past⁹⁷ or the mechanical retrieval of stored or archived information.⁹⁸ Official public memory involves the construction of a *claim* about a past occurrence or series of occurrences (the claim, for Austria, is premised on instruments of national and international law). Official public memory, in fact, is strongly *constructivist*.

An example from U.S. experience, the cult of Lincoln, is revealing. Lincoln's latter-day apotheosis was surely a work of construction as opposed to retrieval.⁹⁹ Although construction involved public commemoration rather than (as in the Austrian case) a specific set of legal instruments, the Progressive movement transformed Lincoln's ambivalent post-Civil War image precisely to assist passage of legislation sponsored by the movement. Sociologist Barry Schwartz, emphasizing this *social* construction "shaped by the concerns of the present," develops a compelling essay on how all of this happened.¹⁰⁰ Lincoln's death was not seen, in its time, as an irreplaceable loss.¹⁰¹ Lincoln became interesting to the Progressive movement, which sought to deploy federal governmental power in the pursuit of antitrust, food and drug law, child and sweatshop laws, workmen's compensation, a progressive income tax, and political reforms.¹⁰² So Lincoln became aggrandized. His colossal alabaster Memorial in the center of Washington, D.C. demonstrates this deferential evolution (and mythical separation) as the folk hero became the epic hero,¹⁰³ the declaimer of Gettysburg

97. See Sarat, *supra* note 82, at 311 (concluding that a memory, both private and individual as well as collective and cultural, is "constructed, not reproduced . . . in conversations with others that occur in the contexts of community, broader politics, and social dynamics") (citation omitted). The constructed nature of individual memory is discussed *infra* text accompanying note 363.

98. See Alan Radley, *Artefacts, Memory and a Sense of the Past*, in COLLECTIVE REMEMBERING, *supra* note 79, at 46 (again, emphasizing that memory is constructed activity rather than retrieval, and involves a "putting together of a claim about past States of affairs by means of a framework of shared cultural understanding"); see also Gillis, *supra* note 81, at 3 (asserting that memories—and identities—"are not fixed things, but representations or constructions of reality, subjective rather than objective phenomena").

99. Barry Schwartz, *The Reconstruction of Abraham Lincoln*, in COLLECTIVE REMEMBERING, *supra* note 79, at 81, 103 (discussing complexity of "presentist" influences on the process of construction).

100. *Id.* at 81. Schwartz also considers the "atemporal" views, *inter alia*, of Maurice Halbwachs, which "relates things remembered in a given context to beliefs, interests, aspirations and fears of the here and now." *Id.* at 82.

101. See *id.* at 83–84 (noting that Lincoln was opposed after his narrow reelection success by a large percentage of the Northern population, who perceived him as too forgiving to the South).

102. See *id.* at 93–94 (describing how the Progressives, harnessers of federal power, pushed a complex economic reform agenda in pursuit of humane capitalism, but also demanded democratic political reforms including direct elections of senators and women's suffrage).

103. See *id.* at 99–102 (analyzing how Lincoln, a man of relatively humble origin, was thought to be the kind of accessible and responsive figure that allowed his character and life to be merged with the promise of twentieth-century political and economic reforms, yet also to take on a second (and contradictory) set of characteristics as the more distant embodiment of the State, the power and moral dignity of America; Lincoln thus personified both the priority of the State and its elites and the entitlements of the masses, becoming a constructed figure who could at once serve as a common person of uncommon insight (the folk hero) and as the avatar of the greatness of the State and its authority (the epic hero)).

whose adamant words would almost a century and a half later be intoned on the first anniversary of the September 11 attacks.¹⁰⁴ Schwartz concludes that “the [S]tate, through its own archival and commemorative enterprises, seeks to make the appreciation of its great people independent of the different experiences of different generations.”¹⁰⁵

c. Mythopoesis

For Austria, victimology has been the cynosure of the State’s post-Nazi existence. Austria’s post-war leaders felt the need for a claim about Austria’s Nazi complicity that would shift the public memory (not just of Austrians, but of the wider world) to a story of Austria that would dilute, and ideally expunge, the Nazi stain. Substituting a pusillanimous neutrality for the *Anschluss* seemed to allow Austria to reach back in time to the age of the Habsburg Empire, positioning the newly independent country as a weakened but proud survivor with a glorious history, whose past radiance was dimmed by Nazism.¹⁰⁶ Neutrality itself could hardly be presented as a noble burden, given the moral ambiguity with which this concept has historically been associated.¹⁰⁷

104. *But see* Joyce Purnick, *A Dissent on Hallowing 9/11 Ground*, N.Y. TIMES, Sept. 5, 2002, at B1 (mentioning criticism by historian Garry Wills that use of the Gettysburg Address to commemorate 9/11 was inappropriate because it did not address the “specific tragedy” of the victims); Susan Sontag, Editorial, *Real Battles and Empty Metaphors*, N.Y. TIMES, Sept. 10, 1992, at A25 (attacking ritual citation and recycling of great Lincoln speeches, which empties them of meaning). For a recent study of Lincoln’s moral self-development, see WILLIAM LEE MILLER, *LINCOLN’S VIRTUES: AN ETHICAL BIOGRAPHY* (2003).

105. Schwartz, *supra* note 99, at 104 (noting comparison with “the Church”—presumably the Catholic Church—which “supervises the revelation of Christ” to ensure its immutability through the ages).

106. Discussing Argentina’s reckoning with a brutal past of military repression, Carina Perelli makes the candid and revealing argument that “the past is [a] central political commodity in the ‘has[-]been’ countries,” so that invocation of past glories becomes indispensable to the social stability of the depleted present. Carina Perelli, *Memoria de Sangre: Fear, Hope, and Disenchantment in Argentina*, in *REMAPPING MEMORY: THE POLITICS OF TIME SPACE* 39, 39 (Jonathan Boyarin ed., 1994) (describing Argentina as a “has-been country, where nostalgia flourishes”). The possibility of analogy to Austria can seem tragic: Vienna, with its imperial central boulevard, the *Ringstrasse*, is all too obviously the urban reliquary of a lost empire, and a nostalgic recall of past glory is an understandable elite fixation and a means to hold fast to a dignity based on a grand (but lost) heritage. *See* Richard Bernstein, *Vienna’s Grandeur Fails to Mask a Sense of Loss*, N.Y. TIMES, Aug. 3, 2003, at A8 (describing the “pathos” and “unrecapturable past” of a place that was once the center of the world and has been reduced to a lesser status). *See generally* PAUL HOFFMAN, *THE VIENNESE: SPLENDOR, TWILIGHT AND EXILE* (1988) (a history of the cultural elite of the city).

107. *See* Detlev F. Vagts, *The Traditional Legal Concept of Neutrality in a Changing Environment*, 14 AM. U. INT’L L. REV. 83, 84 (1998) (tendentiously describing neutrality toward a genocidal episode as “indifference, callousness, or a studied calculation of costs and benefits”). For a more measured view, see Seymour J. Rubin, *The Washington Accord Fifty Years Later: Neutrality, Morality, and International Law*, 14 AM. U. INT’L L. REV. 61, 80–81 (1998) (noting the quandary of choosing “evident and accepted” standards for choice in morally conflicted situations). The moral attack on neutrality, as is well-known, is the product of recent revelations concerning the European neutrals’ continuing economic relations with the Nazi

But it was a serviceable platform for clever political leaders (including long-time chancellor Bruno Kreisky) to promote a sympathetic outside view of the country and, in keeping with the official construction of memory, to escape the stigma of being a defeated Axis belligerent.¹⁰⁸

The Austrian ruling elite, in other words, became an “activist[] of memory”¹⁰⁹ in service to an official mythology of the modern Republic’s founding and history. They sensed an urgent geopolitical need to do so. A branding of Austria by imposed demilitarization or the systematic ruralization that the unrealized (but threatened) Morgenthau Plan advocated for Germany,¹¹⁰ could have been one outcome of the post-war settlements. A successful narrative, therefore, required Austria’s leaders to find a plausible means of restoring and preserving the country’s independence even as it was being “sucked into the ‘strudel’ of growing East-West conflict.”¹¹¹ Although derided by Austria’s critics as a *Lebenslüge* (a “life-lie”),¹¹² the externally validated mythology of victimhood, coupled with Austria’s conceded disappearance as an autonomous legal and administrative unit after the *Anschluss*, would persist to the end of the century as anchors of the official documents and speeches accompanying Austria’s agreements on compensation for victims of Nazi policies of slave and forced labor and property dispossession.¹¹³

At one level, the alignment of Austria’s documents of mythopoesis (the Moscow Declaration, the State Treaty, and the domestic constitutional law on neutrality)¹¹⁴ could be seen as technical and legalistic. On the empyrean planes of mythmaking and official public memory, however, the State Treaty—foreshadowed by the Declaration and foreshadowing the constitutional law—was a spectacular external ratification of

regime during World War II. On these topics, see generally JEAN ZIEGLER, *THE SWISS, THE GOLD, AND THE DEAD* 13, 18, 133 (John Brownjohn trans., 1998) (asserting de facto integration of Switzerland into the *Reichsdeutsch*—Greater German—economic area between 1940, upon the defeat of France, and 1945). Ziegler’s book is a blistering indictment of his country’s government, and of the Swiss banking community, for providing the gold laundering services that helped to finance the *Wehrmacht* by giving Germany access to internationally disposable foreign exchange to buy strategic raw materials. See *id.* at 48–49; see also Krister Wahlbäck, *Neutrality and Morality: The Swedish Experience*, 14 AM. U. INT’L L. REV. 103, 107 (1998) (discussing inter alia Swedish supply of iron ore to German munitions industry). Ironically, as Wahlbäck is at pains to point out, much of this economic activity was not in violation of the international law of neutrality. Rubin, *supra*, at 107.

108. For a commendatory account of Chancellor Kreisky’s numerous initiatives to enhance global respect for Austrian neutrality, see generally PICK, *supra* note 44, at 109–17 (noting in particular his efforts to promote human rights in the Soviet-dominated Eastern bloc, including his sponsorship of the Conference for Security and Cooperation in Europe).

109. OSIEL, *supra* note 74, at 3 (citation omitted).

110. See *supra* note 46 (discussing Carthaginian proposal hatched by Robert Morgenthau, Treasury Secretary under President Franklin D. Roosevelt, to ruralize, demilitarize, and dismember Germany).

111. GERALD STOURZH, *EINE KLEINE GESCHICHTE DES ÖSTERREICHISCHEN STAATSVERTRAGES [A SHORT HISTORY OF THE AUSTRIAN STATE TREATY]* 103 (1975).

112. AJC Report, *supra* note 68, at 19 (arguing that Austria’s post-war identity was constructed in part around a collective amnesia that denied any complicity in the Holocaust).

113. See *supra* note 30 and accompanying text (discussing the victimhood-Statehood dyad as the supporting arch of Austrian official public memory).

114. See *supra* note 55 and accompanying text.

Austria's victimhood and has been treated as such in repeated official commemorations of its signing. As one writer commented with respect to the controversy involving the alleged Nazi past of Austrian President Kurt Waldheim, "[i]t has . . . shown that politically self-serving myths resist being discarded, even when repeatedly confronted by contradictory information."¹¹⁵

Accordingly, if constructivism demonstrates the artifice of official public memory, mythopoesis, the manufacture of myths, reveals the fetishistic and cultish dimensions of official memory production, what one writer embraces as the establishment of *Torah*, a "teaching,"¹¹⁶ for a given people or nation. The *Torah* narrative, the master narrative of nationhood, is canonical, shared, and commands consensus.¹¹⁷ This is the kind of memory making that aspires to mythology, implicating a quasi-Platonic quest to extrapolate the ideal national prototype or essence.¹¹⁸ It posits a deterministic unfolding of the national story, with readable patterns and a Hegelian progression toward synthesis¹¹⁹ and toward "the progressive embodiment of spirit in the State."¹²⁰

115. MILLER, *supra* note 26, at 63 (concluding that Waldheim's election actually made anti-Semitism "respectable" again in Austria, even if only temporarily). *But see* EIZENSTAT, *supra* note 12, at 290 (noting deep Austrian resentment to external identification as a "Nazi country and a Nazi people"); *supra* note 88 and accompanying text (showing a similar conclusion to the discussion of the characteristic pattern of selectivity).

116. *See Torah*, in THE NEW ENCYCLOPEDIA OF JUDAISM 778-79 (Geoffrey Wigoder et al. eds., 2002) (indicating that "[t]he word 'Torah' is derived from the Hebrew root *yaroh* ('to teach') and is best translated as 'teaching' or 'instruction'"); *see also* GREAT JEWISH QUOTATIONS 12 (1996) (quoting from *Sefer Ha-Ikkarim* (1428), "The Torah will never change, for truth is unchangeable").

117. *See* YERUSHALMI, *supra* note 78, at 113 (observing that the teaching of "Torah" may be either oral or written, but must become "tradition" to survive). In Yerushalmi's self-consciously mystical perspective, *Torah* is "[T]he Path . . . the Way, the 'Tao' . . . the complex of rites and beliefs that gives a people its sense of identity and purpose." *Id.* "Only those moments out of the past are transmitted that are felt to be formative or exemplary for the *halakhah* [the 'path'] of a people as it is lived in the present; the rest of 'history' falls, one might almost say literally, by the 'wayside.'" *Id.* On its own terms, this argument appeals more to a religious sensibility, yet its presentist bias is also instructive for the (secular) presentation of a *Torah* archetype for nation-States.

118. *See generally* Bommes & Wright, *supra* note 7, at 265 (discussing how the unity of the "nation," its essence, tends to be projected as an ideological and poetic equivalent to the more prosaic and functional unity of the modern State). One could say that States in pursuit of this ineffable essence are practicing a form of civic Couéism, the now discredited form of psychotherapy based on positive autosuggestion ("Every day, in every way, I am getting better and better.").

119. *See generally* ALUN MUNSLOW, THE ROUTLEDGE COMPANION TO HISTORICAL STUDIES 114-16 (2000) (providing a critical assessment of Hegel's idea of the deterministic design of human activity, leading to a totalizing or grand narrative). *See also* BRYAN MAGEE, CONFESSIONS OF A PHILOSOPHER: A JOURNEY THROUGH WESTERN PHILOSOPHY 360 (1997) (discussing Hegel's theory of dialectical change through thesis, antithesis, and synthesis, which conceives history as a dynamic process of action, reaction, and resolution, but nonetheless stipulates that change is always rational and not arbitrary, even though it manifestly arises out of conflict).

120. Jonathan Boyarin, *Hegel's Zionism?*, in REMAPPING MEMORY: THE POLITICS OF TIMESPACE 137 (Jonathan Boyarin ed., 1994) (presenting Hegel's absolute model that defines

For pure Hegelianism, part of the State-building enterprise involves creating an official, rational, and national history, distinct from localized traditional memory (and, indeed, *oral* tradition).¹²¹ The segmentation of national and local memories is a self-conscious denial of the Halbwachsian experience of a decentralized collective memory.¹²² The State creates a common river of memory and of memorialization, sweeping all tributary streams and eddies into the mighty currents of its official narrative.¹²³

The most potent myths, as Austria's experience has shown, are the foundation or proto-myths of the State's creation. Most often these proto-myths have a legal anchoring in the form of a constitution (or, in the case of Austria, a multipart constitutional order that gives equal primacy to several mutually reinforcing documents of State origin). Constitutions are themselves fetishized as the "full height of nationhood," the "completest act of sovereignty."¹²⁴ A constitution centripetally reflects "the cult of new beginnings,"¹²⁵ or, in a related formulation, the "genesis myth."¹²⁶ Constitutional seminality is reminiscent of the new time consciousness that caused the year 1792 to be redesignated as Year 1,¹²⁷ or the German effort to

"history" in these terms, and also as the progression of the world spirit); *see also* MUNSLOW, *supra* note 119, at 113 (identifying in this context Hegel's "unreserved reverence for the [S]tate," for which Munslow tentatively expects to find "little appeal in a postmodern world that has little time for such intellectual grandstanding").

121. Boyarin, *supra* note 120, at 148 (echoing Jewish historian Yosef Hayim Yerushalmi's distinction between "Jewish history and Jewish memory," between "seeing reality" and a series of "lulling tales"). Given that the play of these distinctions is much more problematical in the making of an official public memory, it must be obvious that the Hegelian references in the main text carry a measure of hyperbolic freight.

122. *See infra* text accompanying note 332 (examining a collection of sub-State milieus that, in Halbwachs's thinking, are valid sources of socialized memory).

123. According to Boyarin, *supra* note 120, at 148, "[t]he history created for and in the name of nation-States is a past intended to define a bounded territory. It has no room for unofficial memory's 'overlapping jurisdictions.'" These "overlapping jurisdictions" must include, for example, the family and community traditions that Maurice Halbwachs locates at the center of his model of socialized memory. *See infra* text accompanying note 333.

124. DARRELL FIGGIS, *THE IRISH CONSTITUTION* 11 (1921) (analyzing the draft Irish Free State Constitution of 1921, untypical of its era in that it was not conferred by a suzerain act of the British Parliament). The persistence of sovereignty, and successful implantation of a Constitution, naturally presume State stability. Constitutions, after all, are as apt as ordinary legislation to vanish into history as regimes founder and are replaced. Figgis mentions the apocryphal tale of a bookseller declining a customer's request for a copy of the then-extant French Constitution (Figgis's book was published in 1921) with the remark that "[w]e do not . . . deal in periodical literature." *Id.* at 15.

125. Gillis, *supra* note 81, at 12 (mentioning Japan's adeptness at treating World War II as an "aberration" and reading Japanese history as if it had begun in 1945).

126. *See* ARTHUR G. NEAL, *NATIONAL TRAUMA AND COLLECTIVE MEMORY: MAJOR EVENTS IN THE AMERICAN CENTURY* 24 (1998) (observing, *en passant*, that Canada has eschewed a myth of spontaneous creation in favor of a historical tradition that recognizes the pluralism and cultural differences that spawned the Canadian federation—ironically, as Neal implies, this very tradition still threatens to split the nation).

127. *See* Gillis, *supra* note 81, at 7 (referring to the revolutionary French Republic's project of altering the time consciousness of the entire Christian world, and thereby symbolizing new beginnings).

recalibrate history to begin with the end of the Nazi era, speaking of *Stunde Null*.¹²⁸ The U.S. Constitution, anchor of the master narrative of an endowed American spirit,¹²⁹ could be described as the epic model of constitution-making.¹³⁰ The U.S. model acted (and was *designed* to act) as an historical caesura, cutting off what preceded it and celebrating the foresight and fortitude of those who brought forth the new nation.¹³¹

128. See Fritz Stern, *Foreword* to FREI, *supra* note 13, at ix (noting the unreality of this approach in West Germany's geopolitical and domestic social circumstances after World War II).

129. The narrative of American exceptionalism has gained increased currency in the new century, as the collapse of the Soviet Empire has given way to an era when the United States is the sole hegemon, the hyperpower. See, e.g., HUBERT VÉDRINE & DOMINIQUE MOVSI, *FRANCE IN AN AGE OF GLOBALIZATION* 2–3 (Philip H. Gordon trans., Brookings Institution Press 2001). Hubert Védrine, former French foreign minister, mentions his use of the word *hyperpuissance* since 1998, insisting that although the English prefix “hyper-” has a negative connotation, it is a neutral term in French—meaning very big or very much—and he did not intend a critical attitude toward the United States. See *id.* Indeed, Védrine insists that America's dominance has been “fueled by others' fiascoes, which seemed to justify the providential role—so-called manifest destiny—they had ascribed to themselves.” *Id.* at 2; see also *France's Voice in the World*, THE ECONOMIST, Nov. 11, 2000, at 68 (cautioning that Védrine's use of *hyperpuissance* is not pejorative and accurately describes America's position as “more than a superpower”). In David Brinkley's cognate expression (first used with reference to post-World War II power), we have entered “the new American imperium.” See BESCHLOSS, *supra* note 46, at 89.

130. See NEAL, *supra* note 126, at 22–23 (contextualizing the U.S. Constitution as the symbol of a post-Revolutionary national identity founded on popular democratic principles). Epical narratives have been written into the American national consciousness, too, through the Declaration of Independence, the cross-generational effects of which are captured in Daniel Libeskind's evocative symbolism of a 1776-foot “Freedom Tower” on the site of the destroyed World Trade Center towers. See Robin Pogrebin, *The Incredible Shrinking Daniel Libeskind*, N.Y. TIMES, June 20, 2004, Sect. 2, p. I (noting that Libeskind's concept, though it remains the signature emotional cue for the rebuilding plan for the World Trade Center site, has acquired a new architect). The idea of a “national consciousness” suggests the response of a population to the prompts of an official public memory. While this Article eschews empirical assessment of the success or failure of exercises of official memory-making, it is often possible to appreciate that a particular public consciousness exists, and that it has been strongly influenced by the structures of official memory. Despite these empirical testimonies, this Article resists collapsing these two concepts (official memory and “national” or “public” consciousness) into a single analytical category. Official public memory is deliberately made; a public consciousness, which lacks corresponding deterministic features, is at least partly the population's uncritical response to official memory's prompts.

131. Thus, the Constitutional Court of South Africa, commenting on the new South African Constitution which entered into effect in 1997, insists that the document reflects a “radical and decisive break,” and thus in no sense could be a codification of a legitimate past. See CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* (flysheet) (2001). The privilege of self-definition adheres most effectively when the newly-constituted State has rebelled against a foreign oppressor and claims its independence while bathed (however briefly) in the aura of revolutionary righteousness. Self-definition can be a legacy of post-colonial domination, as it was for Ireland when it adopted its constitutions of liberation in 1922 and again in 1937, proclaiming its “inalienable, indefeasible, and sovereign right to choose its own

The U.S. Constitution, on its launching in 1789, had much pretense. The numinous language of the Preamble, those iconic pledges of life, liberty, and the pursuit of happiness, might have been exposed as empty trumperies in a nation that professed itself the cradle of liberty while incubating the fierce practice of race-based slavery.¹³² (Indeed, that contestative trope—of slavery—resonated for later generations, long after manumission, who opposed wage *slavery* (the union movement) and sex *slavery* (the feminist movement)).¹³³ Moreover, the Constitution omits any reference to a preceding governmental order, a record of injustice, or even a legacy of pressing social or political concerns that must be attended to by the new dispensation.¹³⁴ In this sense, the

form of Government, to determine its relations with other nations, and to develop its life, political, economic, and cultural, in accordance with its own genius and traditions." Art. 1, Constitution of Ireland, 1937. The 1937 document was promulgated to signal Ireland's formal withdrawal from membership of the (then) British Commonwealth. Oddly, although the 1937 Constitution created a national presidency, Ireland did not formally declare itself a republic until 1949. Darrell Figgis, a contemporary of the 1922 Constitution, wrote poetically of Ireland as an "empire of memory and love" rather than a military power. FIGGIS, *supra* note 124, at 12. Thus,

Ireland is an ancient nation and a mother-country in her own right. She has herself peopled the earth with her children. Her empire is as far-flung as England's. *And if it is not based on military might, but linked by ties of memory, pride and love, it has not therefore proved itself any the less powerful internationally at times of crisis and danger for the mother at home.*

Id. at 7 (emphasis added).

132. And the U.S. Constitution studiously avoids the word. See FONER, *supra* note 3, at 172 (emphasizing that, "in deference to the sensibilities of some delegates," the words "slave" and "slavery" were omitted from the text of the Constitution; the document uses coded expressions such as persons "bound to service" or "held to service or labor") (emphasis omitted).

133. See *id.* at 56 (writing of how "freedom" has been defined and redefined by slavery, its putative opposite, in crusades by the labor and women's rights movements). The ironies of America's slave legacy are multiple, not the least of which (as Foner points out) being the presence of a Holocaust Museum on the Washington Mall yet not a single institutional acknowledgment of the centrality of slavery to U.S. history. See *id.* at xiii (emphasizing that historical scholarship has not neglected this topic, but that "public perception" has). The constructed mythology of "freedom" is so powerful that it has swept aside most efforts at reinterpretation or degradation. It has barely been disturbed, for example, by revelations of slave-owning by Thomas Jefferson and others. See, e.g., CONOR CRUISE O'BRIEN, *THE LONG AFFAIR: THOMAS JEFFERSON AND THE FRENCH REVOLUTION 1785–1800*, at 22–23, 258–67, 293–94, 315–25 (1998) (considering Jefferson as a racist and a slaveowner). The prestige of the myth (won through its nation-binding attributes) has become more important than the specific frailties of its inventors. This is precisely because the public memory of iconic figures has undergone a "constructive process" rather than historical "retrieval." Lewis A. Coser, *Introduction to HALBWACHS, ON COLLECTIVE MEMORY*, *supra* note 9, at 30 (commenting on Barry Schwartz's essay on the reconstruction of President Abraham Lincoln, see *supra* note 99 and accompanying text). At least since World War II, the more the United States has engaged itself with world events the more its own founding history and traditions, but particularly the official public memory of American "freedom," have become the object of reverence at home. See generally KAMMEN, *supra* note 84, at 532 (suggesting that World War II helped to enhance reverential regard for the history of the United States).

134. See Eduard Fagan, *The Constitutional Entrenchment of Memory*, in *NEGOTIATING THE PAST: THE MAKING OF MEMORY IN SOUTH AFRICA* 249, 250 (Sarah Nuttall & Carli Coetzee

gradual mythicization of the founding fathers¹³⁵ and of their documentary handiwork, the Constitution of 1789, implanted a coherent juridical and ideological reading of the founding that thoroughly displaced the messier, and bloodier, history of the failed constitutional order and Revolutionary War that preceded it.¹³⁶ The United States, accordingly, has prided itself on being a *written* country, founded on documentation, and therefore abstracted from the specific internecine polemics of its citizenry.¹³⁷ And scholars are complicit in this documentary mythicization, inventing jurisprudential theories (such as Sunstein's conception of constitutions as "[i]ncompletely theorized agreements"¹³⁸) that legitimize rather than contest the sense that the U.S. Constitution and its interpretive *acquis* have become "sacralize[d]" and "removed from the category of debatable."¹³⁹

eds., 1998) (discussing how the new South African Constitution "seeks expressly to capture the history and context of its creation"). The American Constitution, in contrast, is "forward-looking." *Id.* at 252. *But see* SUNSTEIN, *supra* note 131, at 67–68 (classifying the U.S. Constitution as primarily "preservative," in that it protects long-standing practices, and the South African Constitution as "transformative," representing a "decisive break" from the culture of apartheid and racism).

135. *See* NEAL, *supra* note 126, at 24 (commenting on the mixed secular and religious connotations of Fourth of July celebrations as an *hommage* to the "Founding Fathers"); *see also* Gillis, *supra* note 81, at 9 (examining how the past offers a screen on which desires for unity and continuity can be projected, so that the foundational moment at Philadelphia "took on mythic proportions in the eyes of succeeding generations").

136. Interestingly, the American Republic was founded in reaction to the mythology of monarchy. It seems ironic that a similar mythologizing process should affect the leaders of the democratic polity. *See* KAMMEN, *supra* note 84, at 18–19 (noting that the elevation of democratic "heroes" has been seen as "antithetical to popular sovereignty"). *But see id.* at 27 (suggesting that the Revolutionary leaders "worried about the mythicization or distortion of what they had done," but that paradoxically their reticence encouraged an upsurge of adulation during "the sectional crises of antebellum times"). The genuflection has taken some bizarre turns. *See, e.g.,* a new book which conflates the founding tradition with present-day America's "self-help" publishing industry. SCOTT THORPE, *REVOLUTIONARY STRATEGIES OF THE FOUNDING FATHERS: LEADERSHIP LESSONS FROM AMERICA'S MOST SUCCESSFUL PATRIOTS* (2003) (premised upon the conceit that "revolution" is essential to survival in the modern competitive business climate).

137. *See* HITCHENS, *supra* note 7, at xvi (considering it important that the founding documents are subject to continuous revision and interpretation). Later, Hitchens expresses amazement at how historical enemies like the Ulster Presbyterians and Celtic Catholics abandoned differences under the "larger sky" of the United States and under the "great roof" of the Constitution, which "stubbornly refuses to make any mention of any god of any kind whatsoever." *Id.* at 87.

138. SUNSTEIN, *supra* note 131, at 56 (noting that these kinds of agreements "play a pervasive role in constitutional law and in democracy generally"). The conceptual advantage of constitutions, with respect to their general acceptability, is that they largely lack explicit detail. Complete theorization of any subject is rare, Sunstein argues, and so what we encounter is a general theory and a series of steps toward concrete conclusions, deciding what it entails in particular cases—"casuistical judgments." *Id.* This deductivist bias certainly informs the process of constitution-making—in fact, it may be a *sine qua non* for the creation of constitutions—and in turn generates a huge amount of derivative law to elaborate the "incompletely specified standards" of constitutional texts. *Id.*

139. Sally Falk Moore, *Introduction to MORALIZING STATES AND THE ETHNOGRAPHY OF THE PRESENT 1* (Sally Falk Moore ed., 1993).

Mythopoesis, patterned with selectivity and constructivism, focuses relentlessly on a master narrative—and, at times, more precisely on a master *concept*—of the State. For the United States, that master concept is a fetishized document-based beginning guided by an enlightened assembly of wise philosopher-governors. France and Britain have long idealized a national identity,¹⁴⁰ cultivating a Durkheimian “theory” of the State¹⁴¹ that operates to color present(ist) consciousness.¹⁴² France imagines herself as the bearer of the Revolutionary Spirit and heroine of Gaullist resistance, and even the legacy of Vichy has not been allowed to revalorize a gallocentric *La France* as a supine collaborationist with Nazism.¹⁴³ In her own sometimes confabulatory scripting of World War II, Britain portrays herself with Whiggish hauteur as a brave island race led by a great leader (Churchill).¹⁴⁴

140. See generally Boyarin, *supra* note 120, at 141 (considering Hegelian theory of the State). A deracinated transnational system like the European Union, in contrast, finds it difficult to imitate the *amour propre* of nationalism. Indeed, the existential traumas of the European Union throw into bolder relief the success of nation-states in building law-based foundation mythologies, notably through the granitic narrative device of a constitution. All the more disappointing, then, that the current draft of a proposed “constitution” for the European Union is open to criticism as a bureaucratic *mélange* of interest group claims rather than the global icon it might have been, “a belated Old World response to the achievements of the new,” a counterbalancing answer to the hegemony of the United States. Edward Rothstein, *Europe’s Constitution: All Hail the Bureaucracy*, N.Y. TIMES, July 5, 2003, at A17.

141. See Mary Douglas, *Introduction* to HALBWACHS, *THE COLLECTIVE MEMORY*, *supra* note 9, at 16–17 (discussing Durkheim’s unitary notion of society as a “psychical unit” akin to the individual).

142. See generally Boyarin, *supra* note 120, at 144 (suggesting that the State presents itself within an ahistorical *grand récit*, counterfactually revealing an absolute, inevitable, inexorable, teleological unfolding of destiny) (quotation omitted).

143. See RICOEUR, *supra* note 7, at 450 (noting “the establishment of a dominant myth” of resistance “in the orbit[] of the . . . Gaullist party”); see also Mark Osiel, Comments at the Canadian Academy of Humanities and Sciences on Mass Atrocities, Collective Memory, and the Law (on file with the Indiana Law Journal) (noting that it is impossible that two-thirds of French males over the age of 65 participated in the Resistance, “even though surveys make claim to that”). The French State, through its public institutions, has always seen itself as the *chien de garde* of the national memory. See Sudhir Hazareesingh, *Guard Dogs of Good Deeds: Remembering Badly and Forgetting Well—History and Memory in Modern France*, TIMES LITERARY SUPPLEMENT, Mar. 21, 2003, at 12 (noting that memory is an ideological category in France, used instrumentally to celebrate the heritage of the Republic, so that, although there has been some “reassessment” of the Resistance myth and of Vichy, events such as the post-war prosecution of State torture and violence during the Algerian War are still not recalled in the “pantheonization” of French national memory).

144. See Bommies & Wright, *supra* note 7, at 213 (observing that this historical perception, a “popular conservative historiography,” has been useful to governments reminding Britons to “pull together” in times of national crisis). Churchill, the epitome of “great man” mythopoesis, has been subject to revisionist reinterpretation. See, e.g., Kevin Myers, *An Irishman’s Diary*, IRISH TIMES, Dec. 11, 2002, at 15 (writing of Churchill’s “Machiavellian” obsession with his place in history, and his “ceaseless misrepresentations of particular events”); see also JOHN CHARMLEY, *CHURCHILL: THE END OF GLORY* 648–49 (1993) (“Churchill had nothing to offer the British people in 1945, and no one has been prepared seriously to argue that he did. His thinking on foreign and domestic policy was stuck firmly in the past. Even when he

Austria and Germany, in unhappy contrast, are countries almost wrecked by history. Their self-concepts are defined unheroically under the shadow of a despised "other": Austria is not Nazi Germany, and Germany is not its former self.¹⁴⁵ The Austrian government asserts a claim of victimization and of a legal vacuum that insulated Austria from complicity as a State in Nazi crimes, supporting the master concept of a State that threw off its shackles of foreign occupation and rejoined the community of civilized (and victorious) nations after World War II. On the Apollonian side of its historical ledger, Austria consciously reaches backward to imperial splendor and forward to its post-war contributions as a neutral State. Germany has oscillated among amnesia, painful recollection, and has latterly experienced (though only tentatively as part of official memory) a revalorization of World War II and its aftermath to emphasize Germans as themselves victims of the Nazi incubus.¹⁴⁶ In broad terms,

grasped new ideas like 'Europe,' it was to do little more than deliver impressive speeches."); Bommes & Wright, *supra*, at 239 (describing Churchill's solipsistic account of his role in the Second World War, an account that is largely lacking in self-consciousness since it is inspired by a mythical "Conservative" version of national character and history). *But see* GADDIS, *supra* note 8, at 137 (recollecting Churchill's arch observation that "[h]istory will treat me kindly . . . because I propose to write it"). "Whiggish" history, incidentally, might be best defined as the history of great men and their great deeds, but focused on the nation-state, rather than the "world," as the object of providential interest. *See generally* FONER, *supra* note 3, at 102 (noting dominance of nationalist Whiggish history in European scholarship); MARGALIT, *supra* note 7, at 67-68 (writing of the commemorative "civic cult of the great men").

145. One risk for German official memory, implied by Novick, is that Nazism has secured a posthumous victory in making pain "a tradition" of the German State. PETER NOVICK, *THE HOLOCAUST AND COLLECTIVE MEMORY: THE AMERICAN EXPERIENCE* 281 (2001) (discussing the power of the Holocaust, as the emblematic Jewish experience, to endorse Hitler's definition of Jews as "despised pariahs").

146. Revalorization has two perspectives, one that identifies the German people generally as hostages of a deranged regime. *See supra* note 36 (discussing narrative of Germany's "liberation" from Nazism, and another, increasingly visible perspective that remembers Germans as victims of Allied air assaults and forced repatriation as World War II ended). The second perspective has strong cultural underpinnings but is also attracting official attention. *See, e.g.,* GÜNTER GRASS, *CRAWL* (Krishna Winston trans., Harcourt, Inc., 2003) (2002) (meditating on how the Internet has facilitated a revalorization of the Nazi era and legacy for young Germans). The historical process of atonement, for many young citizens of Germany, has yielded to a fascination with (and, Grass seems to imply) a rising bitterness toward the Allied destruction of the Nazi State. The protagonist's teenage son, for example, creates (and becomes obsessively identified with) a website which aims to launch "a much overdue discourse" on the Allied sinking of a German passenger ship during World War II. *Id.* at 159. The protagonist himself, occupying a complex intergenerational role—which he depicts metaphorically as a scuttling "crabwalk"—between his mother (a survivor of the ship sinking) and his Internet-savvy son, is himself mindful of the Allied air assaults on Dresden, Berlin, and other cities, just as his mother recalls mass rape and murder by advancing Russian soldiers. *See id.* at 105, 167. The post-war German generation remained silent about these and other depredations, the protagonist suggests through the voice of one member of that generation, "merely because its own sense of guilt was so overwhelming, merely because for years the need to accept responsibility and show remorse took precedence." *Id.* at 103. The main text, *supra*, mentions that national victimhood is only tentatively a component of German official memory. While it is true that the claim of victimhood is primarily a cultural phenomenon in Germany, its incipient presence in official statements should not be overlooked. Thus, it is worth noting a

however, Germany's recent leaders have continued the process of shaping an identity of self-catechization (discussed later in this Part),¹⁴⁷ symbolized in the early twenty-first century (architecturally) by the construction of a Holocaust memorial within sight of the gates of the rebuilt Reichstag in Berlin,¹⁴⁸ (economically) by adoption of the euro as a mercantile synecdoche for European unity, and (juristically) by fealty to the bureaucratic vapidness of a new European Union constitution.¹⁴⁹ But for all of these countries, whether they see their histories as enchanted or unenchanted,¹⁵⁰ the claims and interpretations asserted about the State's past have achieved their mythopoetic status through the operations of official memory management.

d. Incorporation

(1) Reflections on the Empirical Study

In addition to the contentious rise to power of both Kurt Waldheim and Jörg Haider, in recent years Austria (along with Germany and Switzerland) faced a long-deferred international campaign to compensate Jewish victims of Nazi slave and forced labor

recent speech by former German Federal President Johannes Rau—particularly in the shadow of my earlier assessment of the Federal Presidency as an institutional locus for national regret. See *infra* text accompanying note 199. In September 2003, Rau condemned Allied policies which forced twelve million ethnic Germans to flee their homes in Eastern Europe after World War II, commenting that “Hitler’s criminal policies do not exonerate anyone who answered terrible wrongs with terrible wrongs.” Peter Conradi, *Allies Blamed for German Suffering*, SUNDAY TIMES, Sept. 28, 2003, at 24. Rau’s speech, though largely unreported in Germany, suggests nascent efforts (powered by the increasingly influential *Bund der Vertriebenen*, “League of Expellees”) to reorient official memory toward establishment of an *Opferkultur*, “victim culture,” with respect to Allied policies toward Germany during and after World War II. See also *infra* note 382 (discussing recent German public attention to Allied firebombings of German cities).

147. See *infra* text accompanying note 198 (postulating a German self-concept of “national regret” for its Nazi past).

148. See Bartosz Jalowiecki, *Lies the Germans Tell Themselves*, COMMENTARY, Jan. 2004, at 43 (mentioning Peter Eisenman’s “Memorial to the Murdered Jews of Europe,” which will consist of “2700 concrete steles arranged in a terror-inspiring maze . . . situated adjacent to Berlin’s Brandenburg Gate . . . within eyeshot of the Bundestag”); see also EDKINS, *supra* note 18, at 133 (recalling journalist Leah Rosh’s searingly-phrased initial demand for a memorial: “I demand of this country of perpetrators a memorial . . . a site of remembrance, something that recalls THIS DEED”) (citation omitted) (emphasis in original).

149. See Rothstein, *supra* note 140 (contrasting unfavorably the laconic and enduringly influential U.S. Declaration of Independence with the rights-intensive “language of interest groups” that has bloated, and threatens to diminish the symbolic power of, the EU Constitution). For Germany, the European Union, the embedding institution sought by Adenauer, offers an alternative to its problem of being unable to have a “normal” perspective on positive State achievements. See also Jack Rakove, *Europe’s Floundering Fathers*, FOREIGN POLICY, Sept.–Oct. 2003, at 28, 31 (criticizing new EU Constitution for preferring “shopping lists” of social rights to expression of “restrictions on the authority of the State designed to foster . . . individual liberty and autonomy”).

150. For an articulation of this Weberian contrast, see *infra* text accompanying note 266.

and property expropriation policies.¹⁵¹ As these events unfolded, Austrians seemed to react defiantly, electing Waldheim and Haider's Freedom Party while enduring counter-narratives of latent anti-Semitism (including accusations that they still feared and hated the *Judeus ex machina* of international conspiracy theories) and continuing Nazi sympathies.¹⁵² These manifestations of counter-mythology crested in the late winter of 1999 when the American Jewish Committee published *Austria and the Legacy of the Holocaust*, a searing indictment of Austria's behavior toward Jews and the Holocaust during and after the Second World War.¹⁵³ The report, written by an academic historian, was published with the explicit purpose of breaking the "spell of . . . collective amnesia and the comforting image first accorded [to Austria] by the Allied nations in 1943 as the 'first victim State' of the Nazi war machine."¹⁵⁴ The report castigated Austria for an allegedly ingrained anti-Semitism that antedated the war and did not abate in the post-war era, and for its systematic integration and amnestying of former Nazis after 1948.¹⁵⁵

Austria's response to these challenges can be seen as an official attempt to expose the "wound of memory,"¹⁵⁶ the self-evident damage of Nazism, while reconfiguring the master narrative to allow certain qualifications to acceptance of national responsibility.

151. Austria's sluggish record of dealing with Jewish claims of restitution is considered in PICK, *supra* note 44, at 202–21 (in a chapter captioned "The Restitution Go-slow"). Pick's analysis mentions the anti-Jewish comments of some of Austria's early post-war cabinet leaders who favored delay and obfuscation of the restitution question. The comments came to light in 1983 when the cabinet minutes were accidentally discovered by a British historian researching in the Austrian National Archive. *See id.* at 206–7, 214 (quoting the comment of Minister of the Interior Oskar Helmer, who said that he "detect[ed] Jewish expansion all around" and accordingly found the Jews an unsympathetic case for restitution measures).

152. Sarcastic humor can be a wounding agent of counter-memory. The Austria Watch website, maintained by the Jewish Agency for Israel/World Zionist Organization, commented on the rise of the Freedom Party by paraphrasing Oscar Wilde, stating that "to elect one Nazi is unfortunate, to elect a second looks like carelessness." *See* Austria Watch, available at <http://web.archive.org/web/20000919224514/http://www.austriawatch.com/past.htm> (archived by the Internet Archive) (last visited Sept. 27, 2004). Austrians (and outsiders) were also startled by the notorious comment of their own Chancellor Fred Sinowatz, who remarked during the Waldheim campaign that "Waldheim wasn't a Nazi, only his horse was." JAMES E. YOUNG, *THE TEXTURE OF MEMORY: HOLOCAUST MEMORIALS AND MEANING* 91 (1993).

153. *See supra* note 68 (summarizing report).

154. Press Release, American Jewish Committee, *Austria and the Legacy of the Holocaust* (Feb. 12, 1999).

155. After 1987, as Kurt Waldheim's presidency focused global attention on Austria's wartime history, Austrian political and religious leaders developed a greater receptivity to the need to accommodate the forces of contestation. Speeches by Cardinal Franz König, former chancellor Franz Vranitzky, and former President Tomas Klestil set a tone of elite sensitivity to issues of culpability and the moral responsibility of restitution. *See* EIZENSTAT, *supra* note 12, at 282, 289 (noting these various expressions of awareness). Nonetheless, although President Klestil in 2000 indicated that, in the name of the Republic of Austria, he "bow[ed] with deep sorrow before the victims of that time," during the restitution negotiations there was never anything resembling a formal State apology for past official crimes. *Id.* at 301 (describing ceremony in which Klestil told victims of Nazism that "[w]e Austrians are finally looking in the eye of the historical truth—indeed the entire truth").

156. April 2000 Statement of Dr. Wolfgang Schüssel, *supra* note 57, at 45.

These qualifications have been made apparent earlier in this discussion. They include the legal distinctions made between post-*Anschluss* Nazi Germany and the suspended Austrian State, emphasis on the State Treaty and its expressions of victimhood, the attachment of victim status to the absent State of Austria rather than specifically to its citizens, and celebration of the avowedly heroic acts of the post-Nazi leadership in winning independence.¹⁵⁷ What Austria has done, in effect, is to incorporate counter-memory into its official rhetoric of the past, acknowledging the complicity of some Austrian citizens but ring-fencing the State itself against similar charges.¹⁵⁸ Interestingly, Austria continues to be aided in this effort by external endorsements. On January 17, 2001, the United States issued a joint statement with the Austrian government, Austrian companies, American and Austrian Jewish organizations, and the U.S. attorneys who had launched class-action compensation lawsuits against Austria in the United States.¹⁵⁹ The statement, which opens with an anodyne reference to the "light and dark sides" of Austria's past, accepts the official dyad of moral blame cohabiting with legal innocence.¹⁶⁰ Thus, the statement acknowledges "Austria's legal status during the period of occupation by Nazi Germany . . . and liberation by the Allied Powers in 1945."¹⁶¹ With these public declarations, the United States has bestowed external validation of Austria's incorporation of the counter-narratives of guilt and responsibility that track U.S. statements of support during the period of official memory construction from 1943 to 1955.¹⁶²

157. And, as discussed *infra*, text accompanying note 230, an assertion of the collective temporal distance of modern Austrians from the turpitudes of Nazism. This rhetorical conditioning of the past remains part of the elite agenda in Austria. See *infra* note 190 (reviewing report of Austrian government historical commission on Austria's record on restitution).

158. In recommending passage of legislation setting up the new special fund to compensate descendants of forced and slave labor, Chancellor Schüssel delivered an address to the Austrian parliament that again revealed his government's inclination to preserve the founding myth while seeking to assimilate recent counter-narratives. See *Rede des Bundeskanzlers Dr. Wolfgang Schüssel vor dem Nationalrat, Wien, am 31 Jänner 2001* [Federal Chancellor Dr. Wolfgang Schüssel, Speech Before the National Assembly, Vienna (Jan. 31, 2001)], reprinted in 2001 AUSTRIAN FOREIGN POLICY DOCUMENTS, *supra* note 31, at 157. The compelling aim of the legislation, according to the Chancellor, was *Rechtsicherheit*, "legal security," but not necessarily moral closure. "a moral final stroke." *Id.* at 160.

159. Joint Statement and Annexes, Washington (Jan. 17, 2001), reprinted in 2001 AUSTRIAN FOREIGN POLICY DOCUMENTS, *supra* note 31, at 86; see also Bindenagel, *supra* note 56, at 9 (drawing particular attention to the unprecedented role played by the class-action attorneys in international diplomacy); Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, FOREIGN AFFAIRS, Sept.-Oct. 2000, at 102, 109 (saluting the restitution negotiations for having "effectively headed off prolonged litigation that would have had a corrosive effect on important U.S. diplomatic relationships").

160. Joint Statement and Annexes, 2001 AUSTRIAN FOREIGN POLICY DOCUMENTS, *supra* note 31, at 86.

161. *Id.* at 87. The participating attorneys agreed to dismiss with prejudice all claims arising out of or related to the National Socialist era or World War II that had been or might be asserted against Austria and Austrian companies. See Joint Statement and Annexes, Annex A ¶ 10, 2001 AUSTRIAN FOREIGN POLICY DOCUMENTS, *supra* note 31, at 100.

162. See *supra* note 91 (discussing statements). Ultimately, the U.S. and Austrian governments reached an agreement concerning the establishment of a restitution fund with

Incorporation, therefore, is a characteristic pattern of official public memory that seeks to mitigate the socially disruptive challenges of counter-memory by absorbing

respect to slave and forced labor and other claims. Central to Austrian corporate participation (as was also true in the German context) was a resolution of the issue of “legal peace,” the dismissal of all pending lawsuits against Austrian corporations. See Bindenagel, *supra* note 56, at 12 (referring in this context to negotiations with German companies). The U.S. government agreed that, whenever a claim is filed against Austria in the future, it will file a so-called “Statement of Interest” indicating that it would be in the foreign policy interests of the United States for the fund to be the exclusive forum and remedy for the resolution of all claims asserted against Austria and Austrian companies involving the use of slave or forced labor during the National Socialist era. See Agreement Between the Austrian Federal Government and the Government of the United States of America Concerning the Austrian Fund “Reconciliation, Peace and Cooperation,” art. 2, reprinted in 2001 AUSTRIAN FOREIGN POLICY DOCUMENTS, *supra* note 31, at 232, 235 [hereinafter Agreement Concerning the Austrian Fund]; see also Bindenagel, *supra* note 56, at 13 (noting that the U.S. legal system does not permit the giving of any absolute guarantees by the U.S. government with respect to dismissal of privately-initiated lawsuits, nor would the United States as a matter of policy wish to bar Holocaust survivors who were U.S. citizens from having their cases litigated in U.S. courts). While the filing of a Statement of Interest, as the two governments acknowledge, is not a guarantee of a successful dismissal, plaintiffs do face other substantive and procedural hurdles caused by foreign sovereign immunity, justiciability, international comity, statutes of limitation, jurisdictional issues, *forum non conveniens*, difficulties of proof, certification of a class of heirs, and legal precedent, which all complicate their claims. In light of the uncertainty of the litigation prospects, attorneys in pending cases against Austrian interests undoubtedly took the more prudent course of action and agreed to file motions or stipulations to dismiss these claims with prejudice. See Joint U.S./Austria Statement, *supra* note 95, at 250. The approach of the U.S. administration was entirely consistent with the public law record to which the Austrian leadership has pointed since the Allied victory in 1945: recognition that an Austrian proposal, whether on neutrality in 1955 or a restitution fund in 2001, would be consonant with American foreign policy interests. Then and now, the Austrian government wanted to achieve “legal peace,” and the American government responded by granting precisely that. See Agreement Concerning the Austrian Fund, 2001 AUSTRIAN FOREIGN POLICY DOCUMENTS, *supra* note 31, at 233 (noting that “both parties desire all-embracing and enduring legal peace with respect to all claims asserted against Austria and/or Austrian companies involving or related to the use of slave or forced labor during the National Socialist era or World War II, to advance their foreign policy interests”). The use of the Alien Tort Claims Act, 28 U.S.C. § 1350 (2000), to found federal class-action jurisdiction over foreign corporations in U.S. courts has been roundly criticized by Anne-Marie Slaughter, who refers disparagingly to a beckoning era of “plaintiff’s diplomacy.” Slaughter & Bosco, *supra* note 159, at 103; see also EIZENSTAT, *supra* note 12, at 345 (putting the Holocaust cases in the context of the “broader excesses of the class-action system the United States uses to resolve mass injury cases, which is spinning out of control and exerting a drag on the U.S. economy”). As Eizenstat notes, other victim categories have used the Holocaust “model,” including Korean comfort women against the Japanese and anti-apartheid class-action suits against a number of American employers, financiers, and insurers of slaves during the American Civil War. See *id.* at 350–51. Eizenstat’s view, unsurprisingly in light of his stewardship of a very different, bureaucratized mass restitution system, is that U.S. courts are not ideal fora to resolve disputed historical and political questions. See *id.* at 341. But see *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (2004) (instructing U.S. courts to exercise caution in hearing claims under the Alien Tort Claims Act, requiring that any claim should rest on a norm of international character accepted by the civilized world, but in any event insisting that only a “modest” number of causes of action should be allowed).

them into the State's master narrative.¹⁶³ It is evident (although subtly) in a January 2001 speech by the Austrian Special Envoy for Restitution Issues, Dr. Ernst Sucharipa, who spoke of a "side effect" of the restitution negotiations as being "the intensive discussion that has been started in the Austrian media on Holocaust issues."¹⁶⁴ The official claim is that the intensive discussion is a side effect, an unintended but acceptably therapeutic consequence of adjustments to the master narrative.

The incorporative reflex is evident, too, in Switzerland's treatment of Holocaust issues and a contested past as revealed in the Swiss government's official final report on Holocaust restitution published in 2001.¹⁶⁵ The tone struck in this report is one of a calm, considered humanitarian response in the face of "impassioned polemics" by outsiders.¹⁶⁶ The word *humanitarian* appears to serve as the shibboleth for Swiss official public memory in the same way that *victim* is a shibboleth for Austrian official

163. Recent German commentary displays a similar sensibility to the distancing (and incorporative) capacity of time. Helmut Schmidt, West German chancellor from 1974 to 1981, borrowed Austria's strategy of collective temporal distance when he said (at Auschwitz in 1977) that "[w]e Germans of today are not guilty as individual persons, but we must bear the political legacy of those who were guilty. That is our responsibility." JEFFREY HERF, *DIVIDED MEMORY: THE NAZI PAST IN THE TWO GERMANY'S* 346 (1997) (citation omitted). Herf notes that Schmidt's address included the claim that Hitler's first victims were Germans. See *supra* note 36 (commenting on recent German appropriation of victim status with respect to Nazism). Herf's work, which conducts close readings of multiple political texts of post-war West and East Germany, is replete with expressions of an official German distancing from Nazism (while accepting the moral obligation of articulating a memory of the Holocaust). Chancellor Schmidt's successor, Helmut Kohl, spoke in 1984 in Israel of a generational change in Germany and Israel, propounding that "[a] young German generation did 'not understand German history as a burden but as a task for the future . . . [and] refuses to admit collective guilt for the deeds of its fathers.'" *Id.* at 351 (citation omitted). In 1985, in ceremonies marking the fortieth anniversary of the end of World War II, West German Federal President Richard von Weizsäcker rejected the idea of "the guilt or innocence of an entire nation," since guilt is personal, while accepting an obligation among younger Germans "to keep alive the memories," and to seek reconciliation with the Jewish nation, a reconciliation that "had to pass through the memory of the Holocaust." *Id.* at 357–58 (citation omitted). But see *id.* at 387 (recalling a tradition of public recollection, begun by certain Social Democratic leaders in the Adenauer era, "in which the Holocaust eventually found an enduring place in the dominant West German public narratives of the Nazi era").

164. Special Envoy for Restitution Issues Dr. Ernst Sucharipa, Statement on the Occasion of the Signing of the Joint Statement, Washington (Jan. 17, 2001), *reprinted in* 2001 AUSTRIAN FOREIGN POLICY DOCUMENTS, *supra* note 31, at 104, 105.

165. See FINAL REPORT OF THE SWISS FUND FOR NEEDY VICTIMS OF THE HOLOCAUST/SHOA (2002) [hereinafter SWISS FUND REPORT]. The Swiss have attracted their share of strong criticism for pro-Nazi actions during the Second World War. J.D. Bindenagel and Stuart Eizenstat, the two senior U.S. negotiators in the Holocaust settlements of the late 1990s, each candidly refers to a "myth" of Swiss neutrality during the war period. See Bindenagel, *supra* note 56, at 8; see also EIZENSTAT, *supra* note 12, at 108. Eizenstat is scathing about Switzerland's role as Hitler's "business partner," whose elites insisted on maintaining foreign trade relations with Germany "almost to the bitter end" of the war, *id.* at 103–105, and indicts the Swiss banking community as "Hitler's foreign exchange dealers." *Id.* at 105.

166. SWISS FUND REPORT, *supra* note 165, at 24 (commenting also on "the highly emotionally charged atmosphere reigning in the public").

memory. It does duty throughout the report as the adjective of choice to describe Swiss reparations policy.¹⁶⁷ And the report decouples Switzerland's humanitarian gesture from any historical moorings, casting it as an *ex nihilo* act of goodwill toward the "human race" rather than a specific action taken in atonement for Swiss complicity in Nazi abuse of Jewish Holocaust victims.¹⁶⁸ Indeed, Switzerland's self-regarding perspective mirrors that of German corporations, which have insisted that their participation in reparations is a moral gesture without legal liability, while insisting all the time on U.S. government fireproofing against future class-action lawsuits.¹⁶⁹

(2) The Incorporative Devices of Public Memory

Incorporation is surely the most complex, yet indispensable, task of official public memory. The State's unique capacity rhetorically to fix national identity,¹⁷⁰ using patterns of selectivity, constructivism, and mythopoesis, and sustained, in turn, by iteration (exercised not least through its lawmaking function), as well as the likely endurance of the State organism, are several bulwarks against contestations of official public memory. But how much fixity can be achieved? Competing sources of memory do not typically parade together under a synergistic banner. Halbwachs's syncretic notion of a system of ideas,¹⁷¹ if envisaged more capaciously as all the cultural white

167. See, e.g., *id.* at 25 (stating that creation of the restitution fund is in keeping with "Switzerland's longstanding humanitarian tradition"); *id.* at 27 (stating that the fund was "conceived as a humanitarian initiative"); *id.* at 30 (stating that "one of the most crucial challenges was to convey the idea of [the fund] as being humanitarian support").

168. It is fair to assert that Swiss official public memory continues to project a perception that Swiss sympathies in World War II lay overwhelmingly on the Allied side. This perception includes an implicit contrast with Austria and the *Anschluss*, premised on the (unprovable) assertion that if the Swiss had been as sympathetic to Hitler as is sometimes suggested, "the country would have been easily annexed to the Third Reich." Delegation of Switzerland, *Switzerland and World War II: A General Presentation*, in PROCEEDINGS OF THE WASHINGTON CONFERENCE ON HOLOCAUST-ERA ASSETS, 349, 351 (U.S. Dep't of State Pub. No. 10603, 1999).

169. See EIZENSTAT, *supra* note 12, at 217 (noting that the corporations, which are not "social welfare institutions," wanted to appease their shareholders by "dispos[ing] of the class-action suits as cheaply and expeditiously" as possible, maintaining access to the American marketplace unburdened by the Nazi stigma).

170. See Jonathan Boyarin, *Space, Time, and the Politics of Memory*, in REMAPPING MEMORY: THE POLITICS OF TIMESPACE 1, 16 (Jonathan Boyarin ed., 1994) (arguing, in connection with the State-created identity, that States look inward to their national collective space, and "map history onto territory," an imaginary perimeter of "intellectual fenceposts") (citation omitted). Figures of rhetorical reification include associating the nation to the "body." *Id.* at 24 (viewing the "collective" as a "superorganic representative of all the individual consciousness that it comprises"). The State, in this understanding, commands an allegiance analogous to that owed to parents and repels threats to its organic integrity. See *id.* at 25 (tying the success of the modern State to "two paradoxical yet complementary means of *legitimation* . . . a rhetoric of 'kinship' or 'community,' an assumption of common interests rooted in the putative 'memory' of common origin (but in fact at least as often rooted in the shared forgetting of a common violence) . . . [and] as guarantor of the individual's rationality and freedoms from the shackles and demons of the past") (citation omitted) (emphasis added).

171. See *infra* note 242 and accompanying text.

noise of a modern inorganic society,¹⁷² is itself in flux and susceptible to multiple influences. Memory, in such a context, may become not a fixed object of rhetorical veneration but a site of struggle, a flashpoint of competition over the distribution and dynamics of power in society.¹⁷³ Each time the well of memory is revisited (as it will be) by non-governmental entities as well as by citizens, fresh water is drawn.¹⁷⁴

172. A distinction between organic and inorganic societies is Novick's construct. See NOVICK, *supra* note 145, at 267–68 (presenting an “organic” common memory, the memory of traditional, homogeneous communities, as the peasant grandparent handing down rustic lore to a grandchild in sardonic contrast to the amnesiac, fragmented, and expendable texture of modern American urban life).

173. Memory, as Barahona de Brito writes, becomes a struggle “over power and who gets to decide the future.” De Brito, *supra* note 14, at 38 (concluding that “[w]hat and how societies choose to remember and forget largely determines their future options”). This intersectionality of power and memory has been expressed as “the politics of memory.” *Id.* at 37 (conceiving of the “politics of memory” narrowly as “policies of truth and justice in transition regimes,” and more widely as how a society interprets and appropriates its past to mold its future). Such a politics, Jonathan Boyarin contends, involves “rhetoric about the past mobilized for political purposes.” Boyarin, *supra* note 170, at 2 (linking this mobilization to “the modern identification of a nation with a sharply bounded, continuously occupied space controlled by a single sovereign State, comprising a set of autonomous yet essentially identical individuals”). Peter Novick suggests, as an example of this process (although there are many), the totemic appropriation of Holocaust memory by American Jewish leaders in order to return Israel to a central place in U.S. public policy. See NOVICK, *supra* note 145, at 280 (tracing critically the evolution of the Holocaust in U.S. political ideology, and concomitantly Israel's status in U.S. foreign policy, from marginal status to a central position).

174. Certainly, a government's use of its power to *inscribe* (as opposed to *describe*) a particular memory is pervasive. See Gillis, *supra* note 81, at 4 (noting how “identities and memories are highly selective, inscriptive rather than descriptive, serving particular interests and ideological positions”). Gillis explains further that remembered events are more political and social constructs than objective facts, and therefore must be treated not as natural objects with an independent existence outside language but essentially as vectors of thought that determine our politics, our social relations, and our histories. See *id.* at 5. They are inherently plastic, open to construction and reconstruction in the service of other ideological motivations. Ritualistic commemoration compels public attention, as in the designation of September 11, 2001, as “Patriot Day.” This commemoration is highly politicized, a question of construction rather than reproduction that takes place “in the contexts of community, broader politics, and social dynamics.” See Sarat, *supra* note 82, at 311 (citation omitted). Neal writes of a kind of gloss that commemoration puts on the past, for example, extrapolating a glorification of war, a higher meaning of sacrifice, from the tragedy and horror that otherwise is war's truth. See NEAL, *supra* note 126, at 207 (noting how death and destruction are “camouflaged” by emphasizing the sacred task of defending the State). It is self-consciously celebratory, since the officially prescribed association is with triumph over adversity. And the memory work of government, of course, may coexist with alternative selections from the past, or more intensive interpretations of the officially selected narrative, that are produced in other fora in society. In a free media society, for example, the decision of the New York Times newspaper to research and publish (in the daily newspaper, in book format, and on the paper's website) capsule profiles of more than 2300 victims of the World Trade Center attacks reinforces a government narrative of randomized terror meriting widespread limitations on civil liberties. See, e.g., *Portraits of Grief: Glimpses of Some of the Victims of the September 11 Attacks*, N.Y. TIMES at <http://www.nytimes.com/pages/national/portraits> (last visited Sept. 30, 2004) (indicating that

What, then, if there is a conflicted past? Inherent in the celebratory (or at least self-regarding) successions of Hegelian moments is the potential for narrative corruption and eventual entropy. The danger to a Platonic self-portrayal is that it, or strands of the narrative supporting it, becomes contestable. Unresolved past events have a habit of resurfacing, even if only in benign mnemonic recapture: Auschwitz, Vichy Syndrome, Vietnam complex.¹⁷⁵ Resuscitation of the past can be destabilizing, and may threaten the new relationships that are necessary to build successful postconflict communities.¹⁷⁶ Mark Osiel suggests a postmodernist, enlightened rationalist's understanding of how memory's conflicts should be reconciled. He describes the establishment of a "procedural republic," where adversaries advance toward mutual empathy, embraced in the rule of law, and where trust is assured by the State as the price of solidarity.¹⁷⁷ Osiel's multipolar rapprochement would generate solidarity through the "dissensus" that happens routinely in democratic politics,¹⁷⁸ since democracy "begins in conversation" and "presupposes a measure of respect for the rational and deliberative capacities of one's interlocutor."¹⁷⁹ Osiel's is a discursive,

"[a]ll profiles will remain on NYTimes.com indefinitely"); N.Y. TIMES, PORTRAITS 9/11/01: THE COLLECTED 'PORTRAITS OF GRIEF' FROM THE NEW YORK TIMES (2d ed. 2003). This well-intentioned effort to give "faces" to the victims also serves governmental functions. It appeals to visceral feelings, preserving a national animus, so to speak, because the capsulized biographies are so familiar, so paradigmatic, so typical of the calendrical cycles of ordinary American lives at this moment in history. This process of conversion of the past is quintessentially the province of government. The State seeks to universalize the remembered experience, as the United States, for example, has previously done for the Holocaust. See IRWIN-ZARECKA, *supra* note 37, at 37. The lessons for all humanity are expected to reside in this memory, so that the specific roles of specific players (e.g., Polish Christians and the Catholic Church) are not as deeply scrutinized. See *id.* at 37–38 (discussing a perceived Polish reluctance to accept collective responsibility, as a bystander community, for Jewish persecution; Poles, therefore, treated the Holocaust as "completely accountable within the history of Germany" and allowed themselves to "remember the Holocaust without reflecting on it"). But see NOVICK, *supra* note 145, at 278 (provocatively questioning the honoring of the Holocaust as deeply inconsistent since it did not occur in the United States, and speculating why Hispanics, Asians, and African-Americans should "sense either guilt or responsibility for what white Christians did to Jews in the Europe of the 1930s and 1940s") (citation omitted).

175. See De Brito, *supra* note 14, at 37 (describing how such "[t]erms emerge to describe the effects of past events on national culture"; these terms, argues De Brito, "indicate that the past is a disease of sorts, a burden on the present"). As Nossiter points out, mnemonic mechanisms have an "incantatory, minimizing effect," designed to soothe and contain the damage of the remembered event. NOSSITER, *supra* note 59, at 110 (suggesting that the "malign import" of Vichy France is somehow tempered (and thus distanced), for later generations, by deliberate association with the name of the town).

176. PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY 185 (2001) (warning that destabilization can occur because exposing "truth" comes at the expense of emotional pain to victims).

177. OSIEL, *supra* note 74, at 44 (contending that, while the notion of a "procedural republic" has been disparaged by some as "limited[,] . . . such a republic would be better viewed as a noble aspiration and hard-won achievement" for post-conflict societies).

178. *Id.* at 44. Paul Ricoeur describes Osiel's theme as "the civic education of the collective memory by *dissensus*." RICOEUR, *supra* note 7, at 323 (emphasis in original).

179. OSIEL, *supra* note 74 at 45 (quoting John Dewey and Jürgen Habermas); see also JOHN DEWEY, DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF

syncretic, optimistic organization of solidarity, contrasting pointedly with Emile Durkheim's oppressive, mechanical solidarity, which denies or actively suppresses differences between individuals and sub-groups "in the service of a single normative order."¹⁸⁰ In Osiel's polycentric version of the contestation process, we encounter a naïve view of a society engaged in conversation within itself, and disagreeing within itself, about the nature of *justice* and *good*, and yet nevertheless presuming (and relying upon) common schemes of "association and cooperation."¹⁸¹

Osiel's model (which is advocated by other writers)¹⁸² allows public space to many stories, so-called "little narratives," that impede or preclude the coalescence of a *grand récit* as the official public memory of an event (or a people).¹⁸³ His conception that official memory be regularly and complexly contested,¹⁸⁴ whatever its naïveté, suggests to Osiel that he is positioning himself halfway between a true postmodernist celebration of perpetual disruption as an end in itself, and a Durkheimian exaltation of consensus about moral fundamentals, which categorically denies "continuing disagreement among reasonable people."¹⁸⁵ Osiel's essentially normative model sits uneasily beside John Gillis's descriptive confidence. Though he shares Osiel's ethos, Gillis contends that public history in the "post-national era" has *already* become "democratized" and that the State (or the "nation") no longer functions as the principal site or frame of memory for most people.¹⁸⁶ Thus, the emergence of more nuanced histories of particular societal groups should (and, in Gillis's view, has) become a

EDUCATION 101 (Macmillan 1916) (writing that "[a] democracy is more than a form of government; it is primarily a mode of associated living, of conjoint communicative experience"); 1 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 99 (Thomas McCarthy trans., Beacon Press 1987) (arguing that "[t]he concept of communicative action presupposes language as the medium for a kind of reaching understanding, in the course of which participants, through relating to a world, reciprocally raise validity claims that can be accepted or contested").

180. OSIEL, *supra* note 74, at 49–51 (discussing three forms of societal solidarity, each of which has its privileged institutional locus: thus, *mechanical solidarity* evokes core values and authoritative interpretation through the symbolic resonance of an organization such as an established church; *organic solidarity* is reflected in the division of labor of a modern economy; and *discursive solidarity* rests on the freedoms of press and speech integral to democratic politics).

181. *Id.* at 51 (finding that "rules requiring civility in the management of disagreements"—a criminal prosecution, for example—provide a useful device for discursive exchange in society).

182. *See, e.g.,* IRWIN-ZARECKA, *supra* note 37, at 79 (arguing that the "emotional temperature . . . of a conflict is a product of both sides' involvement; the defining matters at stake" should not be the exclusive property of the victims). Celebrating the memory of Columbus, for example, need not involve a denial that Native Americans suffered greatly, so that "commemorat[ing] 1492 as the beginning of a genocide [denies] any worth to American society and its cherished values and myths," and ignores how the "challenge to America's sense of self-worth can be made to testify to it, provided serious memory work is done." *Id.*

183. OSIEL, *supra* note 74, at 51 (ascribing power to "the cacophony of alternative tales about the same large-scale event").

184. *See id.* at 53 (valuing civil dissension, and the "contested character" of collective memory, as a means for developing some solidarity in a deeply fractured society).

185. *Id.* at 53.

186. *See* Gillis, *supra* note 81, at 17 (suggesting that national history, therefore, is no longer a correct "measure of what people really know about their pasts").

metronome to measure the disruption of a dated Westphalian orthodoxy.¹⁸⁷ In this sense, Osiel and Gillis make common cause with the archival view of history (*chronique*, a concept considered further in Part III), advocating (as part of the vernacular of democracy) the continual recovery of a more accurate past, a perpetual process of correcting the lenses of official memory.¹⁸⁸

But Osiel's polycentrism, and Gillis's less ideologically laden view, surely account only for the margins of discourse even in the modern liberal secular State. Understood as a part of the institutional apparatus of any State-centered system, official public memory is ontologically incapable of allowing polyphonous voices from a contested past.¹⁸⁹ If it were to do so, it would be obviating its central power and its stabilizing purpose. What official memory does seek to do, as the Austrian and Swiss experiences have shown, is to *incorporate* other voices into a dominant master narrative.¹⁹⁰ The

187. See *id.* at 19 (arguing that the nation-State has been "desacralized" because the collective self-worship that spurred two world wars led to an iconoclasm opposing the impersonal, totalizing, and alienating representations of the State, and thus to a search for "usable pasts capable of serving the heterogeneity of new groups . . . [such as] racial and sexual minorities, women, youth, and dozens of new nations and ethnic groups aspiring to sovereignty").

188. See OSIEL, *supra* note 74, at 55, suggesting that accuracy in relation to the past is "an integral aspect of democratization." Indeed, it is precisely the argument of more accurate—one might say archival—recovery that appears to recommend history (on first acquaintance) as a powerful counter-discourse to official memory. See *infra* text accompanying note 363 (comparing history and official memory with respect to factual authenticity).

189. See, e.g., Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992, 1998 (2003) ("In modern liberal democracies, where sovereign power operates on the principles of consent, public accountability, and constitutional restraint, [stable and coherent] national narratives also confer *political* legitimacy [and] define the discursive space for the negotiation and justification of political power by regulating the collective memory of a nation's fundamental commitments. Collective memory, then, has deep legal and political salience. It is arranged, deployed and contested not simply on commemorative days and through public monuments and rituals, but in and through the institutions of State power.") (emphasis in original).

190. As part of the Holocaust restitution settlement, see *supra* note 56 and accompanying text, for example, the Austrian government established the Salzburg Seminar as a forum for expressing the values of tolerance, see Bindenagel, *supra* note 56, at 19, and an Historical Commission to examine the country's record on Nazi-era confiscation of the property of Jews and other victims, on slave and forced labor, and on post-1945 efforts at compensation and restitution. See Press Statement, Austrian Press & Information Service, Washington D.C., Final Report by Historical Commission: Expropriation in Austria During NS Era and Compensation After 1945, (Feb. 28, 2003), available at <http://www.austria.org/press/318.html> [hereinafter Press Statement on Historical Commission] (summarizing content and findings of report by Historical Commission). The broad mandate of the Commission, according to the proposal to the Cabinet by the Chancellor and Vice-Chancellor in 1998, was to conduct "an objective, transparent, independent and comprehensive clarification of one of the most painful chapters of [Austrian] history." Wolfgang Schüssel & Viktor Klima, *Joint Proposal to the Cabinet* (Oct. 1, 1998), in REPUBLIC OF AUSTRIA, HISTORICAL COMMISSION: WORK PROGRAMME 1, 3, available at <http://www.historikerkommission.gv.at/pdf/arbeitsprogramm-e.pdf> (last visited Aug. 14, 2004). The massive 800-page Report of the Commission, published in German in 2003 (and available at www.historikerkommission.gv.at), deflects criticism that Austria had done

German experience with the legacy of Nazism can help to explain this critical distinction between allowing contestation and incorporating it. Post-war West German Chancellor Konrad Adenauer sought to entrench his country as the re-Christianized anchor of a restored Western alliance, and rarely addressed the Nazi past.¹⁹¹ The *Wehrmacht* (German Army) was retrospectively mythicized as part of a deliberate “Nazism without Nazis” disjunction.¹⁹² The post-Adenauer persistence of what German historian Norbert Frei calls a “just leave it behind us mentality”¹⁹³ can be seen in the

nothing to aid victims, but cites ambiguous laws and regulatory obstacles as explanations for a “half-hearted” approach to the issue. See Press Statement on Historical Commission, *supra*. A supervening tone of self-exculpation, consistent with official public memory, is thematically strong in the Report. There is explicit reference to Austria’s acknowledged status as a “victim” State, see *supra* notes 28–30 and accompanying text, to the Moscow Declaration, see *supra* note 31 and accompanying text, and to the State Treaty, see *supra* note 41 and accompanying text. See also REPUBLIC OF AUSTRIA, HISTORICAL COMMISSION, INFORMATION 16 (2003), available at <http://www.bistorikerkommission.gv.at/pdf/INTENGLISCHEPRESSEINFO.pdf> (noting victim status of Austria as recognized by the Moscow Declaration); *id.* at 23 (recalling the State Treaty as “the prime objective of Austrian foreign policy”). At the same time, there is incorporative recognition of the “broad involvement of the Austrian population” in the destabilization of Jewish life in Austria, *id.* at 2, and of sections of the local population in the “wild Aryanization” of Jewish real estate and moveable property that followed the *Anschluss*, *id.* at 4. Ultimately, measurement of Austria’s restitution efforts is expressed to be a “value judgement [sic].” *Id.* at 31 (expressing concern that the “monetarisation [sic] of history, the conversion of guilt into debts . . . may itself ultimately involve deflecting guilt and attempting to draw a line under the issue”). The phenomenon of “historical” commissions has spawned commissions of this kind in more than twenty countries to investigate the national relationship with the Holocaust. See Bindenagel, *supra* note 56, at 6–7 (also mentioning the U.S. Presidential Advisory Commission on Holocaust Assets, which reported early in 2001); see also HAYNER, *supra* note 176, at 17 (referring to these kinds of official inquiry into long-past human rights abuses as “historical truth commissions”); Cf. EIZENSTAT, *supra* note 12, at 348 (describing how the appointment of historical commissions has influenced corporations—Daimler-Chrysler and Deutsche Bank, for instance—to appoint their own court historians to document their involvement with Nazism).

191. See HERF, *supra* note 163, at 220, 299 (noting Adenauer’s focus on embedding Germany in Western supranational institutions, a strategy that emphasized the need to create no new sources for mistrust of German foreign policy while never being specific about the Nazi past). Herf borrows a brutal metaphor to explain Adenauer’s predicament of silence: “in the house of the hangman, one ought not talk about the rope.” *Id.* at 300 (commenting on Adenauer’s fear of provoking the lingering support for Nazism that existed among sections of the post-war German public); see also John Keegan, *Gone with the War*, TIMES LITERARY SUPPLEMENT, Jan. 2, 2004, at 9 (noting, in response to German renunciation of militarism for a “consensual and legalistic internationalism,” a cynical response which holds that Germany has not abandoned its national aim of dominating Europe, only altered the means). Stuart Eizenstat, reflecting on post-war German public policy into the 1950s, writes of a “deafening silence” with respect to the Nazi past. EIZENSTAT, *supra* note 12, at 13. The silence was broken, according to Eizenstat, only when Israel decided to start reparations negotiations with the Federal Republic of Germany in 1951. *Id.* For German post-war denazification policy, see *supra* notes 14, 59, (discussing a specific “policy for the past” that emphasized silence over memory).

192. FREI, *supra* note 13, at 232 (suggesting a prevalent attitude among West Germans in the 1950s that regarded Nazism as a “crime without perpetrators”).

193. *Id.* at 25 (explaining support for an amnesty law adopted in 1949 that marked an important stage in the abatement of an initial policy of denazification).

fact that there has never been a general debate in the German parliament on the Nazi past.¹⁹⁴

Despite that dominant trend (or wish) for amnesia, however, the German State has more recently included in its official memory a constructed process of self-catechization, a controlled sequence of remembrance with respect to German responsibility for the Holocaust.¹⁹⁵ What could Germany do with a legacy that encompasses “shame, doubt, feelings of guilt”?¹⁹⁶ Should the national narrative be a patchwork of mistakes and failures?¹⁹⁷ Germany rejected a narrative of an ingrained lesion in the national character, but its desire to have a restored place in the world, its re-Christianized Europeanism, made it imperative (after Adenauer’s time of amnesia) that its elites *incorporate* a narrative of national regret for Nazism.¹⁹⁸ In this delicate process, the senior elective office of the State, the German Federal Presidency, has become the instrument for national rituals of conciliation and apologetics. Federal President Theodor Heuss self-consciously kept the Jewish Holocaust and the Nazi actions to the forefront even in the guarded Adenauer era, stating in 1952 that “*Diese Scham nimmt uns niemand ab*” (“no one will lift this shame from us!”).¹⁹⁹ In more recent times, Richard von Weizsäcker has embraced “a memorial of thinking and feeling within ourselves,”²⁰⁰ and Johannes Rau, in the presence of Holocaust survivors, knelt to “beg forgiveness.”²⁰¹ These public statements of official contrition have been

194. That is to say, a debate held “independently of specific legislative goals.” *Id.* at 1.

195. Unlocking these associations required grave caution in a country beset by what Christopher Hitchens describes as “repressed woes.” HITCHENS, *supra* note 7, at 85.

196. IRWIN-ZARECKA, *supra* note 37, at 94 (posing the dilemma of German history as “the integration of [the horrors of Nazism] into what should essentially be an inspiring narrative”).

197. *See id.* (questioning the degree of presence that should be granted to “a morally problematic, challenging past”); *see also* Spaulding, *supra* note 189, at 1998 (asking how, given the imperative of the consolation and inspiration of a shared memory, a State recites, much less commemorates, the litany of its misdeeds, making them part of its reason for being).

198. Mark Osiel offers the cynical view that the German elites describe themselves as the “worst offenders in history,” but do so in the framework of “something to teach the world—how to grapple with the past,” and that this self-conscious approach has become “an export market . . . a new nationalism based on how to deal with the past.” Osiel, *supra* note 143, at 14. For Osiel, “victims are the judges and . . . should be the ones who decide whether the project of grappling is successful, not the perpetrators.” *Id.*

199. HERF, *supra* note 163, at 321 (quoting Federal President Theodor Heuss, Speech at the Bergen-Belsen Concentration Camp (Nov. 30, 1952)). According to Herf, Heuss’s greatest accomplishment as Federal President was “to make the memory of the crimes of the Nazi era a constitutive element of national political memory.” *Id.* at 312 (arguing that Heuss made the office of Federal President into “a political center of national memory and liberal conscience”).

200. NIVEN, *supra* note 59, at 107 (quoting Richard von Weizsäcker, Speech delivered in Federal Parliament (1985)); *see also* ALEX BORAINÉ, A COUNTRY UNMASKED: INSIDE SOUTH AFRICA’S TRUTH AND RECONCILIATION COMMISSION 366 (2000) (noting that von Weizsäcker’s speech marked the 40th anniversary of Germany’s defeat in World War II).

201. Bindenagel, *supra* note 56, at 14; *see also* EIZENSTAT, *supra* note 12, at 251, 260 (noting that post-war Germany had a succession of “outspoken” presidents whose solicitude for attending to the Nazi past may have balanced, in Eizenstat’s estimation, “the historic scandal of Hitler being legally chosen as chancellor by the president of the Weimar Republic, Field

matched, on the legal plane, by a normative separation of the post-war Republic from the so-called *Unrechtsstaat* ("unlawful State") of Nazism.²⁰² This official memory work in the service of the reborn German State reached its apogee when former Chancellor Helmut Kohl marked the 50th anniversary of the end of World War II by visiting Allied capitals, causing one impressed critic to remark that Germany had "matured post hoc into one of the Allies."²⁰³

Marshal Paul von Hindenburg."). *But see supra* note 146 (noting President Rau's predeparture focus on Germans as victims of Allied repatriation policies after World War II).

202. This ideological gulf is most explicitly visible in Article I(1) of the German Constitution, which provides, with expressive rhetoric: "The dignity of man is inviolable. To respect and protect it is the duty of all State authority." GRUNDGESETZ [GG] [Constitution] art. I(1) (F.R.G.). In a more technical sense, one should also emphasize the central importance of Article I(3), which explicitly binds the legislature, the executive, and the judiciary to observe a lengthy sequence of enumerated basic rights which appears in subsequent Articles, in combination with Article XCIII, which creates a Federal Constitutional Court endowed with a pre-enactment power of judicial review of legislation that is accessible to every citizen. *See id.* arts. I(3), XCIII. For an account in English of the drafting of the *Grundgesetz*, see PETER MERKL, *THE ORIGIN OF THE WEST GERMAN REPUBLIC* (Oxford Univ. Press, 1963). For a theoretical exploration of how constitutional courts police the rhetoric of rights adopted in "post-horror regimes," see Kim Lane Scheppele, *Regimes of Horror and Not-That Constitutions* (April 10, 2000) (unpublished manuscript, on file with the Indiana Law Journal) (arguing that the new courts police the border between past and present governments by establishing that the new regime is "not that" past one, for example, in the approach of the German Constitutional Court which regards the human dignity clause of the *Grundgesetz* as paramount in the whole constitutional order). A later revised version of Professor Scheppele's manuscript elaborates her "not-that" construct into a "negative theory" of constitutional interpretation, which postulates that post-horror constitutional courts focus more on evils to be avoided (old, discredited practices) rather than on a "coherent theory of the ideals to which a community may aspire." *See* Kim Lee Scheppele, *Constitutional Interpretation After Regimes of Horror*, in *STUDIES IN LAW, POLITICS AND SOCIETY* (Austin Sarat & Patricia Ewick eds., forthcoming 2005) (manuscript at 23, available at <http://www.northwestern.edu/legalstudies/Scheppele.html>).

203. NIVEN, *supra* note 59, at 109 (noting that critics of Kohl attributed this process of identification to his lack of humility as he planned Germany's new place in the European and global "constellation"); *see also supra* note 36 (discussing the revisionist attitude of current German Chancellor Gerhard Schröder with respect to the 60th anniversary celebrations of D-Day, staged in 2004). Other countries have also adopted a schema of regret when confronted with unpleasant history. The United States, for example, has adopted apology as a national reflex. Congress in 1988 passed legislation framing an apology to citizens of Japanese ancestry who were incarcerated in detention camps after the Pearl Harbor attack. *See* Bindenagel, *supra* note 56; *see also* HAYNER, *supra* note 176, at 18 (noting that legislation provided \$1.2 billion in compensation to survivors). Indeed, President Gerald Ford had offered a similar apology in 1976. *See* BORAINÉ, *supra* note 200, at 368. Stuart Eizenstat, reflecting on his mission to win apology and compensation for Holocaust victims, offers the view that the United States should apologize for slavery. *See* EIZENSTAT, *supra* note 12, at 352 (arguing that such an apology "would help salve the wounds of generations of African-Americans"). The United States has not done so, although President George W. Bush condemned slavery as "one of the greatest crimes of history" when he visited Senegal in 2003. Richard W. Stevenson, *Bush, in Africa, Promises Aid But Offers no Troops for Liberia*, N.Y. TIMES, July 9, 2003, at A8. Bush also commented that "[a] republic founded on equality for all became a prison for millions." *Id.*

The success or failure of elite efforts to incorporate counter-narrative challenges is again a matter for empirical study, and cannot be resolved here.²⁰⁴ What can be posited, however, is the existence of structures of official memory work that accommodate counter-narratives and that are a rational attempt to limit potential fissures in the social consensus. Alex Boraine, a leading member of the South African Truth and Reconciliation Commission, has asked how governments can truly create what he calls “a space for the victims.”²⁰⁵ Boraine poses this question along an Osiel/Gillis axis of authentic contestation. Viewed within the terms of the characteristic patterns of official public memory, however, governments have developed incorporative devices, typically devices of public law, that *manage*, rather than create empathic spaces for, threats to the official narrative.

Thus, U.S. Ambassador J.D. Bindenagel (prime author of the restitution agreement with Austria), in a guileless exposé of incorporative strategy, proposes a tripartite sequence of apology, compensation, and formal remembrance as a methodology to propitiate victims of past official infamies.²⁰⁶ And Boraine, visiting the United States to publicize the work of South Africa’s Truth and Reconciliation Commission, noticed that the most frequent question he was asked by university and college audiences was—in relation to the perseverance of U.S. denial and misunderstanding with respect to slavery—“Do you think that the United States should have a truth commission?”²⁰⁷ The question reveals not only that there is a lingering need to resolve what Boraine calls “unresolved tensions and questions” with respect to slavery,²⁰⁸ but more acutely (for present purposes) that governments have successfully promoted the formula of a truth commission as a mechanism of incorporation that is already familiar to potentially affected populations.²⁰⁹ So much so, in fact, that Priscilla Hayner (in her important

204. See *supra* note 6 (explaining that, despite judgments that can be made of particular public responses to official memory management, empirical assessments of success or failure lie beyond the scope of this Article).

205. BORAINÉ, *supra* note 200, at 396 (citation omitted).

206. See Bindenagel, *supra* note 56, at 3, 18. Thus, Bindenagel presents a formula that will combine *reconciliation* with a specific program of *action* that includes, in addition to monetary payments, an undertaking to preserve memory. Accordingly, reconciliation is seen as a process, not a singular event (as might be construed from a single compensation settlement).

207. BORAINÉ, *supra* note 200, at 380 (noting that, “without exception, the question was asked by an African-American”). The reach of the question posed to Boraine need not stop at truth commissions. Christopher Hitchens, for instance, provocatively queries why the United States has not established a national museum of slavery. See HITCHENS, *supra* note 7, at 84–85 (speculating as to why the presumed purgative effects of a National Holocaust Museum in Washington, D.C., including creation of an “educated memory [to] begin the work of intelligent forgiveness,” were not thought equally applicable to the issue of slavery).

208. BORAINÉ, *supra* note 200, at 380.

209. But see Benjamin N. Schiff, *Do Truth Commissions Promote Accountability or Impunity? The Case of the South African Truth and Reconciliation Commission*, in *POSTCONFLICT JUSTICE* 325, 341 (M. Cherif Bassiouni ed., 2002) (identifying a “truth commission fatigue” that followed two years of testimony before the South African commission). In this respect, I disagree with the empirical premise of Mark Osiel’s view that the public is *aware* of the constructed nature of, for example, “collective memory of human rights abuse,” while accepting his normative proposal that an authentic shared memory can be

study of the phenomenon of truth commissions) seems to accept the *normativity* of a truth commission, in effect a customary international law *right* of transitional societies to have official truth-seeking after a period of authoritarian rule.²¹⁰ Thus, while Boraine insists that the South African model cannot be *imposed* in other contexts,²¹¹ a “South African-style truth commission” is already part of the ideational trappings of managing public memory.

Governments, in other words, have habituated themselves to formulas of incorporation and expiation, and Bindenagel and Boraine are describing two instantiations of this incorporative process. But to postulate a formula is to doubt the authenticity of any redemptive capacity that a formulaic revival of memory can reliably achieve.²¹² Indeed, we can go further in recognizing that there is a well-developed taxonomy of the available forms of post-conflict official justice, spanning a continuum from highly retributive (the criminal trial) to the most apparently restorative (the truth

developed only by ventilation and addressing disagreement rather than concealing it or suppressing it. See Osiel, *supra* note 143, at 8–9.

210. See HAYNER, *supra* note 176, at 183 (indicating that policy statements of both Amnesty International and Human Rights Watch have promoted the right to a truth commission in terms of an international law “right to the truth”). Principles to combat impunity (proposed in 1997 by United Nations Special Rapporteur Louis Joinet) declare, *inter alia*, that, “[a] people’s knowledge of the history of their oppression is part of their heritage,” and that the State (in pursuance of its “duty to remember”) should take measures to preserve “the collective memory from extinction,” including “guarding against the development of revisionist and negationist arguments.” Louis Joinet, *The Administration of Justice and the Human Rights of Detainees, Question of the Impunity of Perpetrators of Violations of Human Rights (Civil and Political)*, Final Report of the Subcommission on Prevention of Discrimination and Protection of Minorities, U.N. GAOR, Hmn. Rts. Comm., 48th Sess., Agenda Item 10, at 10, U.N. Doc. E/CN.4/Sub.2/1996/18 (1996). More recently, the *Guiding Principles for Combating Impunity for International Crimes* provide in Principle 11 that investigative commissions such as truth commissions “can play a crucial role” in scrutinizing violations of international humanitarian law. Schiff, *supra* note 209, at 255. The Principles, however, stop short of endorsing a normative view of such commissions (apparently out of concern that past investigative commissions have been used deliberately to circumvent the punitive force of criminal prosecution). *Id.*

211. BORAINÉ, *supra* note 200, at 381 (indicating that this is the response given to the question posed in the main text with respect to truth commissions in other countries and for other contexts). Boraine cautions that the decisive factor in choosing a mode of transitional justice is not in fact international law, and not necessarily legal or moral considerations. The choice among “trials, truth commissions, ad hoc international tribunals, [and] amnesty,” in Boraine’s view, is made by the political climate of the particular transition. See *id.* at 381–82. Hence, choices as different as those made in Germany (facing full defeat in an armed war), Chile (following a dictator’s electoral loss), South Africa (following compromise and negotiations), and Eastern Europe (transitioning from longstanding communist regimes) are explicable by the political conditions—and incorporative necessities—that created them, see *id.* at 382, but not (presumably) by any anterior theory of method.

212. See LAWRENCE L. LANGER, *HOLocaust TESTIMONIES: THE RUINS OF MEMORY* 165 (1991) (criticizing the vocabulary of redemption and salvation that frequently attaches to memory; Langer regards such notions as illusory in the context of the searing and unredeemable memories of Holocaust survivors); see also LAWRENCE L. LANGER, *ADMITTING THE HOLOCAUST* 35 (1995) (contending that the phrase “redeeming power of memory” is meaningless to recuperate the despair experienced by Holocaust survivors).

commission) but including also the bestowal of total impunity.²¹³ Because of pressures of incorporation, the seemingly cathartic and justice-driven work of criminal trials and truth commissions,²¹⁴ for example, can be reconceptualized as incorporative devices—contrivances of public law—to assure future social stability and the continued integrity of official narratives.²¹⁵ Certain watchwords will need to rank in the process of

213. See BORAINE, *supra* note 200, at 382 (offering typology of forms of post-conflict justice). Boraine's classification (a continuum from retribution to restoration) is the stuff of theories of transitional justice, but not of the actual polemics of political debate. See *supra* note 211 (explaining Boraine's view of the pragmatics of transitional justice); see also FONER, *supra* note 3, at 95 (analyzing the modern study of "transition theory" in the context of South Africa).

214. While it lies beyond the scope of this Article to consider the rationale of selection of forms—the important question for the present discussion is *who* is making the selection, not *why* a particular mode of official justice is selected in lieu of another—the complexity of selection is well-canvassed in the literature. It is often accompanied, as noted in the main text, by a rhetoric of justification. Depending on how empowered the revolutionary victors feel, a Jacobin mood of retribution may prevail, leading to perpetrator-focused criminal trials (and even show trials). See WOLE SOYINKA, *THE BURDEN OF MEMORY, THE MUSE OF FORGIVENESS* 17 (1999) (in relation to the Ghanaian experience); see also De Brito, *supra* note 14, at 19–20 (examining how "the nature of the [past] repression will shape the kinds of policies adopted"; thus, "[d]isappearances will require different responses to mass detention and torture"). A system of trials and prosecutions only, warns Boraine, fails to appreciate that the situation in many transitional societies is "ambiguous and traumatic," so that alternative models for different situations must always be in contemplation. BORAINE, *supra* note 200, at 400. A victim-centered approach, suggesting a desire to engage in truth-finding and reconciliation, may carry what Margalit considers a large empirical assumption that truth by itself will promote reconciliation rather than a societal implosion. MARGALIT, *supra* note 7, at 5–6 ("[M]emory breathes revenge as often as reconciliation, so that the hope of catharsis may be illusory").

215. The literature supporting truth commissions attributes to them the markedly superior characteristic, rarely apparent in criminal trials, of systematic consideration of the victims of the investigated oppression. See Martha Minow, *The Hope for Healing: What Can Truth Commissions Do?*, in *TRUTH V. JUSTICE* 235, 251 (Robert I. Rotberg & Dennis Thompson eds., 2000) ("When a democratic process selects a truth commission, a people summon the strength and vision to say to one another: Focus on victims and try to restore their dignity; focus on truth and try to tell it whole. Redefine the victims as the entire society, and redefine justice as accountability. . . . Honor and attend in public to the process of remembering.") *But see* Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1996) (discussing the fairly recent phenomenon in U.S. criminal trials of the "victim impact statement," which allows victims of convicted defendants to influence the judicial sentencing process). Moreover, the truth commission concept may be celebrated as "heroic," in Soyinka's words, "because forgiveness is a value far more humanly exacting than vengeance." SOYINKA, *supra* note 214, at 33–34. As Martha Minow observes, "[i]f the goals of repairing human dignity, healing individuals, and mending societies after the trauma of mass atrocity are central, truth commissions offer features that are often more promising than prosecutions." Minow, *supra*, at 236. And the creation of that forgiveness, in Christopher Hitchens's view, has to be *intelligent*: an "educated memory" produces such a response. HITCHENS, *supra* note 7, at 84. For Michael Ignatieff, the truth commission tackles the political reality that the past is an "argument," so that truth commissions, "like honest historians," serve to "narrow the range of permissible lies." Michael Ignatieff, *Articles of Faith*, in 25 *INDEX ON CENSORSHIP: WOUNDED NATIONS, BROKEN LIVES*, at 110, 113 (Sept. 1996). Ultimately, truth commissions are said to enable a "symbolic break" from a "dark past," while criminal trials can act as a form of

choosing an appropriate incorporative strategy, and many of these words (such as accountability, victimhood, and reconciliation) are the legacy of the international human rights culture.²¹⁶ The selection process will also be a product of the specific historical circumstances.²¹⁷ And, in the ferment of postconflict upheaval, for example, it may be less a reverence for honest memory work than a pragmatic desire to quell the feral motive of vengeance which determines what kinds of responses a State in transition can tolerate.²¹⁸ Memory, after all, can provoke revenge as easily as reconciliation.²¹⁹

But a stocktaking of available options cannot disguise the reality that ultimately the selection of an incorporative strategy is elitist: *someone* is making that deliberate choice and the choice-maker is the central government, the public sector.²²⁰

“political theater” to provide “collective lessons in justice.” De Brito, *supra* note 14, at 26. Both mechanisms are “opportunities for mythmaking.” *Id.* (noting, however, that this view of commissions and trials is not uncontested, and that official reports can obscure and marginalize other accounts of past violations). See Brandon Hamber & Richard Wilson, *Symbolic Closure Through Memory, Reparation and Revenge in Postconflict Societies* (1999) (paper presented at the Traumatic Stress in South Africa Conference hosted by the Center for the Study of Violence and Reconciliation) (copy on file with the Indiana Law Journal), for a more critical perspective of the truth commission process that explores divergences between individual psychological processes and national processes of remembering (as represented by truth commissions). See also HAYNER, *supra* note 176, at 139–42 (noting psychologists’ doubt as to whether a “one-time catharsis” constitutes authentic healing, and analyzing the danger that truth commissions pose of “retraumatization” without follow-up support: “The circus comes to town and the circus leaves”).

216. See BORAINÉ, *supra* note 200, at 6 (writing in the context of the establishment of the South African truth commission).

217. See HAYNER, *supra* note 176, at 7 (arguing that the specific needs and context of each country prevail over “universal guidelines”); see also MCADAMS, *supra* note 59, at 12 (emphasizing the “importance of historical context in weighing a government’s options in many transitional settings”; Argentina in the late 1980s, and Chile and South Africa in the 1990s, for example, “confronted acts of shocking cruelty and savagery” that far exceeded most of the crimes of Communism with which postcommunist Eastern European regimes had to grapple).

218. The selection of forms can be conceptualized as a reflection of the broader juridico-philosophical underpinnings of modern tort law. Thus, the suppression of rage and revenge is arguably also what tort law seeks to achieve. See generally J. M. Kelly, *The Inner Nature of the Tort Action*, 2 IRISH JURIST 279, 287 (1967) (describing compensation for tort victims as a matter of “ransom from vengeance,” so that the plaintiff is put in possession of a sum of money which in the court’s judgment “ought to be enough to satisfy his vindictive feelings against the wrongdoer”). Michael Ignatieff refers to a “dream time of vengeance”: “Crimes can never be safely fixed in the historical past, they remain locked in the eternal present, crying out for blood.” MICHAEL IGNATIEFF, *THE WARRIOR’S HONOR: ETHNIC WAR AND THE MODERN CONSCIENCE* 186 (1998); see also Sarat, *supra* note 82, at 308, 310 (discussing how revenge is, in a sense, objectified and transmuted through the operations of a State bureaucracy, so that personal animus is removed in favor of controlled retribution administered dispassionately).

219. MARGALIT, *supra* note 7, at 5 (noting that the South African Truth and Reconciliation Commission was established in the hope of a social catharsis that Margalit believes may be an illusion).

220. See Rodolfo Mattarollo, *Truth Commissions, in POSTCONFLICT JUSTICE*, *supra* note 209, at 295, 341 (distinguishing truth commissions as public sector bodies from nongovernmental organizations which carry out background work supporting the commissions).

Consequently, as creations of the State, truth commissions and criminal trials are “subject to the same encouraging or discouraging influences that successful or failed legal measures are likely to produce.”²²¹ This is the essence of incorporation as a characteristic pattern of official memory. The State organs select, and then organize, the commission or the trial. An official report or judgment becomes itself an historical account which, to a greater or lesser degree, will obscure or marginalize competing narratives of past misdeeds.²²² The compiled record of the national administration acquires an authority that is legally dispositive, and this *new* history is inscribed into the official State liturgy.²²³ And, however distasteful it may be to incorporate legacies of violence or dishonor in the *grand récit*, the elite calculation must be that initial tolerance, and the legal mechanisms of tolerance, can yield later to official revisionism once the social consensus is stabilized.²²⁴ That was precisely the experience of denazification described in Norbert Frei’s masterful new study of post-Nazi German reconstruction, the very title of which—Adenauer’s Germany and the Nazi Past: The

221. Schiff, *supra* note 209, at 337.

222. See De Brito, *supra* note 14, at 26 (noting that the salvific view of truth commissions and criminal trials as agents of consensus and collective justice is “not uncontested”); see also BORAINÉ, *supra* note 200, at 388 (warning against the danger, inherent in investigative processes, of creating “conflicting versions of the truth” that may inspire future conflict) (quoting Neil J. Kriz, *Is a Truth Commission Appropriate in the Former Yugoslavia*, Speech at the International Conference on War Crimes Trials (November 1998)).

223. See Schiff, *supra* note 209, at 338 (describing inscription of South African truth commission findings into a “new history” of the State, and as such a “step in nation-building”). The practice of truth commissions, in conformance with their bureaucratic origin, is to generate massive reports. The 2003 Peruvian truth commission, for example, issued a nine-volume report comprising many thousands of pages. See Juan Forero, *Truth Commission Leaves Many Indians in Peru Unsatisfied*, N.Y. TIMES, Aug. 31, 2003, at A12. Given the limited literacy of many of the populations directly affected by these reports, it is strange that even compact, simplified summaries of truth commission findings are typically not created.

224. Truth commissions have also encountered criticism in terms of their handling of the evidence they gather and, subsequently, evaluate. See Schiff, *supra* note 209, at 338 (discussing mixed experience of truth commissions in this respect); see also HAYNER, *supra* note 176, at 22 (commenting on the real but unrealistic pressure to be “perfect and comprehensive”). The massive task of compiling names of victims and perpetrators, dates and locations of acts, has been accurately described as an exercise in “acontextual logical positivism.” *Id.* at 81. Where a commission focuses mainly on gathering factual information regarding particular violations, it may fail adequately to address the causal or structural nature of a conflict and to present a meaningful qualitative analysis of the reasons for the conflict, the acts perpetrated, and the broader significance of severe political violence. In one view, this tendency focuses excessively on what happened, yet may fail to explain why the events took place. *Id.* Daniel Rothenberg, an anthropologist who was on the staff of the Guatemalan truth commission, has questioned the excessive reliance on a solely legal focus in the development of truth commission methodologies. His work considers the broad interpretive role of truth commissions for assisting post-conflict societies in reckoning with the meaning and structure of past political violence, a process that may require greater integration of social science, ideas, and methods. See *id.* at 81–82; see also BORAINÉ, *supra* note 200, at 290–91 (distinguishing the “microscopic” truth of criminal trials from “dialogical” or “social” truth, the “truth of experience that is established through [transparent] interaction, discussion, and debate,” and that may be, Borainé implies, the kind of truth that a “truth” commission is most apt to uncover).

Politics of Amnesty and Integration²²⁵—conveys the Potemkin-like nature of the post-war German efforts to lustrate the bureaucracy and political life.

e. Presentism

Austria's prolonged deferment of any response to the victims of Nazi policies caused its eventual decision to proceed with reparations to be viewed cynically as a public relations gambit rather than as an expiation of national shame "over its moral standing emanating from a confrontation with its past."²²⁶ But, if this is so (and there is no doubt that Austria acted under pressure from U.S. class-action lawsuits), it is an unsurprising outcome of the bias of official public memory toward a State's living and future citizens. What, after all, was the effect on Austria's post-war population of the claim of victimhood? Probably it encouraged the spread of a broad social amnesia. More pointedly it acted as a national tranquilizer.²²⁷ The population could exploit the public law mythology to ease the harshness of a *Halbwachsian* community memory.²²⁸ In the words of one commentator, "Austria quietly accepted the mantle of martyrdom as its own."²²⁹ Remembering the innocuously titled State Treaty became a secular ritual of commemoration that blunted the hard edges of a past so closely associated with the most terrible regime in modern history.

In a similar display of *presentist* bias, Chancellor Wolfgang Schüssel, in his April 2000 address to the Austrian ministerial council, applied a qualification of collective temporal distance to responsibility for Austria's Nazi past: "[t]he majority of us did not

225. See FREI, *supra* note 13, whose book examines how the Adenauer administration progressively reversed or recast West German denazification policies of the immediate post-war period. See *supra* notes 14, 59, for further consideration of this issue.

226. MILLER, *supra* note 26, at 91 (referring to an earlier, more parsimonious allocation of \$4 million in reparations for Nazi victims voted by the Austrian Parliament in 1988).

227. Although the focus of this Article is primarily on juristic mythmaking, it is also true that Austria benefited in the post-war era from myths extruded by the contrivances of popular culture. *The Sound of Music*, a spectacularly successful motion picture that appeared in 1965, introduced the world to "a previously unknown Austria of singing nuns, heroic children, and noble officer[s], defying and outwitting Nazi thugs while an emotional Austrian audience collaborated by roaring out the Austrian national anthem in patriotic defiance of the assembled Nazi top brass." Austria Watch, *supra* note 152, at <http://web.archive.org/web/20000919224514/http://www.austriawatch.com/past.htm>; see also MILLER, *supra* note 26, at 61 (observing, in connection with popular reception of *The Sound of Music*, that "history, as opposed to Hollywood, tells us that the overwhelming majority of Austrians preferred the German national anthem to their own").

228. The bias of presentism reflects also the majoritarian biases of official memory—the purpose of social control would not succeed, presumably, if the constructed memory overlaid the responsibility of the general population. Official memory will seek to avoid an imposition of collective guilt—or, where that becomes problematical (as in the case of Germany) to "incorporate" a process of regret into the institutional actions of the State. See *supra* text accompanying note 199 (considering the role of the German Federal Presidency as the institutional conduit for official apology).

229. YOUNG, *supra* note 152, at 91 (writing of a "nervous decorum" that characterized post-war Austrian treatment of the events of the Holocaust).

consciously live through these events.”²³⁰ Moreover, to maintain the social solidarity of the Austrian people, as discussed earlier, Austrian official memory splices together the ideas of *victimhood* and the legal and moral purity of the interrupted *Statehood* of Austria. In so doing, it licenses the present and future population to reclaim a glorious pre-Nazi history and to esteem the post-war successes of neutrality, economic revival, and membership of the European Union—and, concomitantly, allows each living Austrian, distanced by the Chancellor’s words from the horrors of Nazism, to escape a derivative historical responsibility for the actions of their predecessor fellow citizens.

The Austrian government, in fact, engaged hardly at all in the incorporative truth-seeking strategies of the post-war era such as criminal trials or the more recent phenomenon of a national truth and reconciliation commission.²³¹ The shaping of public memory through victimhood and suspended *Statehood*, therefore, was truly an exercise in preserving social solidarity even at the risk of ignoring past dishonor, and perhaps even the rights of true victims.²³² The creation of a public law mythology, a compressed history of Empire-to-neutrality, might have been a distortion of the true past but could act as a social balm that would preserve the Austrian nation and its identity in the post-war world.²³³ Chancellor Schüssel’s address in 2000 was explicit on this point. He noted the persistence of an “Austrian identity” (again, a noble identity) that survived the *Anschluss* with Germany.²³⁴ This is the better identity, in the Chancellor’s reasoning, to which Austrians should lay claim today.²³⁵

230. April 2000 Statement of Dr. Wolfgang Schüssel, *supra* note 57, at 43. The Chancellor’s insertion of the word “consciously” (*bewusst*) responds to the fact that, as he next indicates, “[m]ore than two-thirds of our people were small children at that time or were born in the following decades.” *Id.*

231. Some of the paraphernalia of postconflict justice, including criminal trials, lustration, and restitution, did appear in Austria for a time but were superseded by systematic reintegration and amnesty policies favoring former Nazis. See generally PICK, *supra* note 44, at 41 (discussing demise of Austrian denazification program as the Western powers concentrated on containment of communism and deterrence of a feared Soviet invasion of Austria). See also *supra* note 40 (noting Austria’s geopolitical significance).

232. See, e.g., OSIEL, *supra* note 74, at 6–7 (striking a warning, from a liberal’s perspective, that even the “salubrious” purpose of enhancing social solidarity to prevent a recurrence of genocide can easily permit a criminal trial to trample on the rights of defendants). For Germany’s similar post-war experience with denazification, see *supra* notes 14, 59.

233. As Eizenstat mentions, the juristic draperies of victimology accompanied other sociocultural eccentricities such as the wearing of peasant hats and the cultivation of a distinctive Viennese accent. See EIZENSTAT, *supra* note 12, at 281.

234. April 2000 Statement of Dr. Wolfgang Schüssel, *supra* note 57, at 43.

235. While a moral evaluation of the interplay of Austrian narrative and counter-narrative lies beyond the scope of this Article, the posture of State noncomplicity that Austria has adopted in the decades since it regained independence has come under increasingly critical scrutiny from outside observers. James E. Young, in a recent study of Holocaust memorial practice, casts a cold eye on Austrians’ longstanding willingness “to let the Germans do the memorial dirty work,” and on the bitter disputes surrounding memorialization projects in Graz and Vienna. See YOUNG, *supra* note 152, at 92. Controversies surrounding the Vienna memorial, Alfred Hrdlicka’s *Monument Against War and Fascism* (unveiled in 1988), were stoked by the Austrian artist himself, whose provocations of officialdom included the prank of building a giant wooden horse, bearing the colors of a Nazi stormtrooper, which he wheeled into Vienna’s central plaza for Kurt Waldheim’s inauguration in 1987. See *id.* at 104–06. In Young’s

Presentism, therefore, adds an important coda to this process of deriving characteristic patterns of official public memory. Selectivity, constructivism, mythopoesis, and incorporation would be hollow exercises if pursued only to freeze and canonize an official master narrative (an ingenuous explanation for cultivation of that kind of official public memory would simply be the inspiration of a genuine *amour d'état*). Governments are rationally interested in goals of stability and social order, what Middleton and Edwards describe straightforwardly as “socially organized remembering and forgetting.”²³⁶ The value of the nation-State, after all, is its ability to ensure the political and social welfare of the peoples it embraces. To maintain the continuity of the Hegelian enterprise (at least to the governmental mind) requires that the individuals who comprise a particular State/society respond to a particularized view of how that organism has emerged and is continuing to evolve.²³⁷ Governments are *at least* in the business of what has been called historical engineering,²³⁸ of a kind of valorization of aspects of the past that will suit their purposes in the present.²³⁹ This positivistic, instrumentalist thinking rejects the literalism of archivist history (a notion of *chronique*),²⁴⁰ which implicitly exalts the past over present and future policy. Official public memory, therefore, has propagandistic and incantatory properties, allowing a benign social control of populations who are placed in thrall of a distinctive and self-regarding important *version* of national history.

C. Official Public Memory and the Power of Law

As the discussion in this Part has repeatedly demonstrated, the State's lawmaking power is central to Halbwachs's notion of society as a “system of ideas.”²⁴¹ The

concluding words on the controversy, “Some wondered why it had taken forty-three years to build any kind of monument at all, and whether it was a gesture to memory or to a guilty conscience . . . Was it a nobly inspired mourning place, or only a gloss for foreign consumption?” *Id.* at 111.

236. Middleton & Edwards, *supra* note 79, at 10 (noting how, in addition to “social organization” in the sense of creating minutes, archives, and financial audits, socially organized remembering and forgetting relates to the large-scale “manipulation” of what should or could be remembered).

237. See KAMMEN, *supra* note 84, at 693 (concluding that the “common ground” in the manufacture of traditions, including those imposed by governments, is “ideological necessity and the political manipulation of myth as an integral part of the State-building process”).

238. Keith Wilson, *Introduction: Governments, Historians, and 'Historical Engineering'* to FORGING THE COLLECTIVE MEMORY: GOVERNMENT AND INTERNATIONAL HISTORIANS THROUGH TWO WORLD WARS 1, 2 (Keith Wilson ed., 1996) (explaining that “historical engineering” operates through the withholding and releasing of archival material).

239. See Bommes & Wright, *supra* note 7, at 266 (describing a process of “public valorization” of a British “National Heritage” that honors past incidences of elite leadership); see also Boyarin, *supra* note 120, at 147 (noting the focus of the liberal State on its *living* residents). In Irwin-Zarecka's phrasing, a “mythical structure” (including a “myth of the origin”) may be needed “to sustain a people.” IRWIN-ZARECKA, *supra* note 37, at 58.

240. See *infra* text accompanying note 263 (defining *chronique* in terms of an exhaustive, archivist exploration of the past).

241. HALBWACHS, ON COLLECTIVE MEMORY, *supra* note 9, at 188 (examining how teachings, notions, and symbols penetrate societal traditions); see also *infra* note 235 (commenting on Halbwachs's use of the term “society”).

Austrian Republic's restitution policy for forced and slave labor and property confiscation, for example, shows how government superintendence of lawmaking creates a dominating capacity for representational idiom in the arena of a population's memory. Legal and quasi-legal devices that are useful to the mythmaking of officialdom (including constitutions, legislation, treaties, truth commissions, criminal trials, and the making of official statements) channel the evocation of public memory using law's distinctive role as an a posteriori conceptual apparatus.²⁴² Law, in other words, rationalizes the experience of the past.²⁴³ Using categories such as parliamentary legislation, constitutional principles, or a spectacular device like the Austrian State Treaty, for example, law allows access to the past to be organized through familiar and replicable structures, and thereby stabilizes social expectations.²⁴⁴ These stabilizing and repetitive characteristics of public law are precisely what makes it valuable to governmental elites.

While some critics promote a vigorous contestation of collective memory, permanently unsettling the attempt to impose monolithic interpretations on the past,²⁴⁵ to the extent that law muffles the full echo of the past (aided, no doubt, by Proustian selectivity and forgetfulness), it checks the play of these contestations and promotes closure where counter-narrativists would prefer openness and disruption.²⁴⁶ At least analogically, Cass Sunstein's conception of law's "cascade effects" is appropriate, since it suggests that people believe what relevant others believe in the absence of private competing information.²⁴⁷ Mark Osiel writes of a consensus in memory and a

242. See Emiliios A. Christodoulidis, *Law's Immemorial*, in *LETHE'S LAW: JUSTICE, LAW AND ETHICS IN RECONCILIATION* 207, 218 (Emiliios Christodoulidis & Scott Veitch eds., 2001) (explaining that, as an a posteriori system, law (or more precisely, "legal memory") summons events as relevant to its current needs of classification and as relevant to expectations of how events will be classified in the future). The past, Christodoulidis maintains, must always be "reconciled with the present," and he seems to suggest that law's familiar categories allow, and demand, precisely that. See *id.*

243. See *id.* at 218 (arguing that law *reconfigures* the past as appropriate to current and future legal decisions).

244. See *id.* at 218–19 (describing law's recall as taking place along "specific pathways determined by structures of expectations").

245. See, e.g., OSIEL, *supra* note 74, at 53 n.65 (discussing postmodernist theories of actively supporting permanent disruption as an end in itself); see also YAEL ZERUBAVEL, *RECOVERED ROOTS: COLLECTIVE MEMORY AND THE MAKING OF ISRAELI NATIONAL TRADITION* 10 (1995) (suggesting that occasionally the fragile coexistence between divergent interpretations of the past breaks down, the capacity of the "myth" to mediate between these divergent readings is lost, the past becomes openly contested, and alternative commemorative narratives operate as a "countermemory" to the master narrative).

246. See Christodoulidis, *supra* note 242, at 220 (concluding that law's *preselection* of the past creates a compulsion in the way law works, and necessarily excludes openness and disruptability). In Christodoulidis's view, we cannot ask the system "to remember what it forgot and to remember that it forgot it . . . a (double) recall that is impossible for it to perform." *Id.*

247. SUNSTEIN, *supra* note 131, at 20–21 (postulating the existence of "information cascades" that exploit the absence of private, competing information on the part of many or most people to influence views on political, legal, and moral questions, and the direction of judgments about the appropriate course of government regulation or constitutional law).

consensus in oblivion.²⁴⁸ Either of these approaches, if one assumes a contrived consensus, in a milieu of civic trauma (and, later, as in Austria, in a milieu of civic complacency), can serve the purpose of forestalling disintegration.²⁴⁹

D. Conclusion

Official public memory, finally, is the construction of a claim that seeks to *supersede* actual memory, and to displace or at least assimilate competing sources of memory production such as the work of historians, the streaming output of news media and popular culture, and the unrequited expectations of groups whose own victimhood has not been recognized in the formation of a national hagiography.²⁵⁰ Official public memory seeks to force a shift in perception so that all future consideration of the past takes place within the official paradigm.²⁵¹ In a Freudian sense, official memory's bipolar actions of suppression and emphasis are fused into control over the State's

248. See OSIEL, *supra* note 74, at 26 (arguing, using the example of French memory of the collaborationist Vichy regime, that political conditions may make social solidarity more achievable through a *modus vivendi* of deliberate amnesia).

249. *See id.*

250. Yael Zerubavel writes of the "highly subversive" character of what he terms "countermemory," which typically occurs when minority groups oppose hegemonic interpretation and seek to perform competing commemorative rituals or to win recognition of past injustices. ZERUBAVEL, *supra* note 245, at 10–11 (discussing phenomenon of countermemory). Zerubavel views the tensions caused by countermemory as helpful in transforming and recharging collective memory into a dynamic cultural force rather than a static body of "survivals" that modern societies merely tolerate. *Id.* at 11–12 (noting that countermemory can eventually win hegemony, as in the French and Bolshevik Revolutions). Zerubavel's argument resonates with Mark Osiel's embrace of a collective memory that accepts cognitive and moral ambiguity within a common framework of association and cooperation. *See supra* note 177 and accompanying text; *see also* MUNSLOW, *supra* note 119, at 116 (considering post-Hegelian rejection of grand or totalizing narratives in favor of accepting otherness, alternatives, and constantly deferred meaning). But the empirical study of Austria considered in this Article demonstrates that countermemory efforts may simply encourage elites to reinterpret or recalibrate selected features of the master narrative rather than to transform it. (Indeed, Zerubavel himself betrays the persistence of elite memory work in another context when he argues that the Zionist master collective memory "assigned to oblivion" the centuries of life that were central to the Palestinians' collective memory of their homeland. *See ZERUBAVEL, supra* note 245, at 215.)

251. *See supra* note 6 (segregating the question of the success or failure of exercises of official memory from the conceptual analysis pursued in this Article). Halbwachs, in writing about "society," refers both to the subgroups (family, nobility, religion, etc.) that comprise a society (his usual planes of analysis), and globally to a broader encompassing "society" that comprises these groups. His references to a general society (the State), and hence to the possibility of an official collective memory, are infrequent. Nonetheless, it is probably this broader meaning that he has in mind when he remarks that "society can live only if there is a sufficient unity of outlooks among the individuals and groups comprising it." HALBWACHS, ON COLLECTIVE MEMORY, *supra* note 9, at 182–83 (arguing further that "society" tends to erase from its memory "all that might separate individuals or that might distance groups from each other," in pursuit of the social need—that is, the State's need—for unity).

past.²⁵² Official public memory, backed by the centrality of law and the voices of State policy, is therefore a pervasive apparatus of State control (and, for that reason, undoubtedly a powerful one). It is not a characteristic pattern of this kind of memory work that it is concerned with either a recovery of a literal, true past, or the individual lived experiences of the population at which it is directed (even though, in the cases of the countries I have examined in this discussion, the populations largely embrace the official message).²⁵³

Having demonstrated that official memory is contrived memory, this Article proceeds now to the search for a discourse of public memory that would allow a more contested (and therefore a more authentic) account of the past. While writers like Osiel and Gillis certainly seek to open official memory to contestation, their arguments are framed entirely within the existing State-centered apparatus of law and policy. In contrast, the remainder of this Article looks for a public memory that might also be informed by analytical sources *outside* the conceptual framework of public law and policy. To do this requires broadening the analysis to include more than legal and policy considerations and to consult other disciplines whose discourses may not be beholden to the collectivizing, mythologizing, and generalizing biases of law-based official public memory. In this search for authenticity, this Article pursues two dialectical approaches derived from the conceptual understanding of official memory presented in the preceding paragraph. The first approach proposes the restoration of simple accuracy to the past, and looks to history as the informing discipline. The second approach seeks to counter the generalizing bias of official public memory through a focus on individual lived experience, and in particular on the autonomous condition of individual affective memory. This approach will be informed by social philosophy, and also by literature and by science. I will begin with the approach of restoring simple accuracy to the past, and with the discourse of history.

III. EXPLORING AN ALTERNATIVE MODEL OF PUBLIC MEMORY: THE DISCIPLINE OF HISTORY

A. Introduction

The search for authenticity, in the context of this Article, could be considered here as a search for a restoration of simple accuracy to the past, something that eludes official memory because it is ontologically incapable of treating the past as anything other than a construct that serves ideological purposes. A search for accuracy, on the other hand, also presents a "democratic" possibility in the sense favored by Osiel and Gillis in their models of continuing contestation and disruption. Peeling away the glosses of official memory (the work of selectivity, constructivism, mythopoesis,

252. See GADDIS, *supra* note 8, at 137 (describing how historians, too, impose themselves on the past and are prone to construct memories that make the past "controllable" through Freudian emphasis and suppression). The role of history (and of historians) in shaping public memory is considered further in Part III, *infra*.

253. The successful reception of the official message probably also implants a durable "collective memory." See *supra* note 4 (distinguishing, for purposes of this Article, the concepts of "official public memory" and "collective memory").

incorporation, and presentism), might we uncover an authentic discourse that exists as a sustained (and sustaining) contrast to the claims of official elites?

If we pursue Michel-Rolph Trouillot's paradigmatic distinction and try to elevate "what happened" over "that which is said to have happened,"²⁵⁴ perhaps we can trust the discipline that (we may think) most obsessively adopts Trouillot's paradigm, the discipline of history, to *transcend* the fixed boundaries of an officially inscribed public memory. Trouillot discusses (although he does not in any degree endorse) the Western scholarly model of the role of the historian as being "to discover or, at least, approximate the truth."²⁵⁵ That definition more comfortably embraces history than other contributors to general public information, including the media (disqualified—at the least—by transience) and organized religion (which is dogmatic in the manner of official memory itself). In this Part, therefore, I will test whether the epistemic model of history could be appropriated as an unmediated (and therefore, presumably, more authentic) source of public memory.

B. History as Chronique

History and official public memory would appear to have a vexed relationship.²⁵⁶ If official memory appropriates and manages contestable claims about the past, history stripped to its essence purports to be the very antithesis of managed memory.²⁵⁷ But why should this be so? Is it possible to have a complexly rendered, archivist accounting of the past, or is it always necessary to expect the dominance of an established *image* of the past, even a past that never existed, which serves the purposes of the living present?²⁵⁸ The historian, it would appear, is perceived to be immune from the "imagined communities" forged by systematized, elite-driven remembering and

254. MICHEL-ROLPH TROUILLOT, *SILENCING THE PAST: POWER AND THE PRODUCTION OF HISTORY 2* (1995). Trouillot writes later of "the interplay" between what he calls "historicity 1" and "historicity 2," "between what happened and that which is said to have happened." *Id.* at 106.

255. *Id.* at 5.

256. See Harold Bloom, *Foreword to YERUSHALMI*, *supra* note 78, at xv (arguing that memory and history typically fail to "inform" each other). In a similar vein, Margalit contrasts history and memory as bipolar opposites analogous to common sense and science. See MARGALIT, *supra* note 7, at 63 (discussing the idea that science is regarded as a systematic and critical common sense, while history is seen as a systematic and critical collective memory).

257. See Sarat, *supra* note 82, at 310–11 (contrasting the "truth" of history to "the slippery terrain on which individuals and groups invent traditions and record partisan versions of the past on the basis of which they seek to construct a new present"); see also KEITH WINDSCHUTTLE, *THE KILLING OF HISTORY: HOW LITERARY CRITICS AND SOCIAL THEORISTS ARE MURDERING OUR PAST 1* (1994) (explaining that history is the gift of the Greeks, who invented the notion of history, recording "the truth about the past" in place of mythical tales); Sarat, *supra* note 82, at 311 (discussing intellectual and secular orientation of history).

258. See FONER, *supra* note 3, at xv (suggesting that narratives emphasizing the glories of American development (for example), sit uneasily with the broader canvas of "new" histories which disrupt "an unalloyed saga of national progress toward liberty and equality").

forgetting.²⁵⁹ Historians, according to this reasoning, understand this cognitive distance as their scientific objectivity, which allows them to stand apart from the living concerns of societal groups.²⁶⁰ History's principles of *selectivity*, in other words, are said to be internal.²⁶¹ On its face, this argument for conceptual segregation of the historian holds much appeal.

There appears to be, therefore, a visceral ontological distinction that separates official public memory from history, namely, the difference between ritualistic recall and detailed archivist rendering (what I call *chronique*²⁶²). History work, as opposed to official memory work, is expected to be obsessional about discovering a literal "true" past, an oration on display for example in recent investigative work on the attitude of the Papacy toward the Jews or the hidden medical pathology of President John F. Kennedy.²⁶³ The idea of a canonical, closed past,²⁶⁴ in this understanding,

259. De Brito et al., *supra* note 14, at 38, 330 (concluding, based on research, that the question of false or accurate memories is subordinate to how people "imagine" their communities).

260. See YERUSHALMI, *supra* note 78, at 114 (observing a progressive detachment of the historian, after the nineteenth century, from the societal group and its memory). History became a discipline with an independent, accelerating momentum, and its measurements of what is to be remembered have become endogenous to the discipline rather than determined by the "commonality of values" that comprises group memory. *Id.* Without group identification and value-generation, the historian (Yerushalmi surmises) cannot "transform history into memory" or "tell us what should be forgotten." *Id.* at 115.

261. *Id.*

262. This use of the word—which is imbued with notions of an annalistic rendering of past events—could easily be impregnated with more controversial doctrinal meanings. Historian John Lewis Gaddis, exploring the tension between "particularization" and "generalization," warns that there is danger in using the word *chronicle* to describe historical research. In his view, the word naturally suggests a mass of detail, but the mere unsorted accumulation of detail will not make for worthwhile history. "Abstraction" and "narrative" are two dynamic techniques of dealing with the assembly of facts, so that an instructive generalization emerges. See GADDIS, *supra* note 8, at 15. Generalizations then become incorporated into the narrative (not the other way around). See *id.* at 106 (citing, as an expressive example of the likely superfluity of chronicle, the historian who traces how each of the Japanese pilots who bombed Pearl Harbor learned to fly). Gaddis may be suggesting that history performs no more or less effectively than public or private memory—history, too, is abstract and constructed. With respect, however, I find this view of history to be constrictively dogmatic. Why should the historian—any historian—be discouraged from investigation of how a Pearl Harbor pilot learned to fly? This epistemological apriorism would tend to devalue historical treatment of how the World Trade Center terrorists "learned to fly," which, as we now know, was critical to an informed understanding of their attack and its planning. The salient difference between history and official public memory—which is reflected in my use of the specialized word *chronique*—remains that the former sees nothing in the past as inherently alien to its discourse, while the latter sees the past as an arena for reductive manipulation.

263. See SUSAN ZUCCOTTI, UNDER HIS VERY WINDOWS: THE VATICAN AND THE HOLOCAUST IN ITALY (2001); JOSE M. SANCHEZ, PIUS XII AND THE HOLOCAUST: UNDERSTANDING THE CONTROVERSY (2001); see generally DAVID KERTZER, THE UNHOLY WAR: THE VATICAN'S ROLE IN THE RISE OF MODERN ANTI-SEMITISM (2002) (discussing the issue of Jews and the Papacy). For a much more tendentious and polemical treatment of the same subject, see DANIEL JONAH GOLDHAGEN, A MORAL RECKONING: THE ROLE OF THE CATHOLIC CHURCH IN THE

should be anathema to the diligent historian. Margalit, indeed, suggests a Weberian contrast between the world as an enchanted place (as in the American hagiography of the “founding fathers”), and the world as an unenchanted place (the inclination of history, for example when it challenges Austria’s alleged delusion of Nazi victimhood).²⁶⁵ Government-sponsored memory work has been described as yielding a patriotic history²⁶⁶ that plots a convincing and even stirring portrait of the State’s emergence from some condition of prelapsarian innocence.²⁶⁷ And history, a discipline torn these days between academic insularity and media popularization, cannot in either of these guises challenge the dominating role of government.²⁶⁸ In any case, however,

HOLOCAUST AND ITS UNFULFILLED DUTY OF REPAIR (2002) (condemning the Church for its “anti-Jewish supersessionist creed”). For an account of President Kennedy’s concealed health problems, see ROBERT DALLEK, *AN UNFINISHED LIFE: JOHN F. KENNEDY 1917–1963* (2003) (drawing on previously unavailable records to frame arguments about the severity of Kennedy’s medical condition and its effect on his actions as President). See also Richard Reeves, *Kennedy’s Private Ills*, N.Y. TIMES, Nov. 21, 2002, at A37 (arguing that, by current “rules” of politics, Kennedy’s medical complications would prevent him from being elected President); N.R. Kleinfield, *The Real Story: Heroes, but Human; Firefighters’ Accounts Give Sept. 11 the Complex Nuances of History*, N.Y. TIMES, Feb., 3, 2002 (discussing how historians’ relentless search for accuracy and detail produces narratives that seek to disturb received understandings). According to Kleinfield, for example, detailed examination of transcripts of hundreds of investigative interviews with New York firefighters after September 11, 2001, reveals how deeply their actions on that day were determined by rampant fear and confusion rather than unalloyed heroism. See *id.* As Kleinfield points out, these more complex assessments of the record are not always welcome: “People want a simple narrative, and they give it up reluctantly.” *Id.* (citation omitted).

264. See MARGALIT, *supra* note 7, at 60–61 (observing, in an attempt to distinguish history from a “shared” community of memory, that even if, for example, the Jews’ shared memory of their exodus from Egypt is indeed memory of a true historical event, it is a *closed* memory of the event, since the only line of memory leading to this event is the one sanctioned by the community—presumably through its rabbinical leaders—as its canonical line of memory).

265. See *id.* at 64 (arguing that enchantment connotes myth and disenchantment is the viewpoint of critical history). Margalit has the impression that a kind of “Gestalt switch” has been thrown in “secular modern nation-states,” turning them from enchanted to disenchanted worldviews, but he argues that this *bouleversement* has not prevented even these States from cultivating modernized rituals and myths through commemorative ceremonials of great men or the cult of fallen soldiers. *Id.* at 67–68.

266. See Wilson, *supra* note 238, at 2 (adding that governments try to ensure that anyone granted special access to official documents must be a “patriotic historian”).

267. See FONER, *supra* note 3, at 102 (taking the view that governments expect historians to contribute to a “nationalization of the consciousness,” with the State as the focus of analysis and preordained end of historical development); see also RICOEUR, *supra* note 7, at 271 (recognizing that “the nation State remains the organizing center for the ordinary referents of historical discourse”). Again, governments have rational expectations. The “historian-patriot,” after all, is a common actor in many cultural traditions. See *id.* at 301 (mentioning the French and German historical schools).

268. See Wilson, *supra* note 238, at 2 (concluding that “in the forging, or shaping, of the collective memory, the role of governments has always been greater than that of historians, and is likely to remain so”). Wilson marshals Lord Salisbury’s conviction that democratic systems subject the government to the *aura popularis*, so that history which popularizes government can be immensely powerful. See *id.* at 18. Thus, “[a] collective memory of the

for the reputable (albeit Westernist) historian, a sycophantic air-brushing of the past would be a disciplinary abnegation.²⁶⁹ *Chronique* captures this sense of professional self-regard. History's own ontological and ideological conceit is that it should be linear, passive, and observational.²⁷⁰ In its purest form, it might perceive the historical fact as differing very little from the empirical fact in the experimental natural sciences.²⁷¹ Unlike official public memory, therefore, traditional history does not pretend that the past can be altered and managed, only discovered.²⁷²

recent past created by historians whose first and only allegiance [is] to the truth" is a collective memory not wanted by governments. *Id.* at 20. But clearly historians have *some* power, because their versions of the past can supersede firsthand memories over the course of time. See GADDIS, *supra* note 8, at 136 ("[H]istorians impose themselves on the past . . . as suffocatingly as States do on territories they seek to control."); see also Wilson, *supra* note 238, at 22 (stating that the archival disclosure reveals "wickedness," and "destroys idols and scatters theories"). Wilson has concerns about government manipulation of archival records which are well-understood by professional historians: if governments only selectively release documents, scholarship is deprived of what have been called the "secret and central documents" that reveal a government's true purposes. *Id.* at 23. The thirty-year nondisclosure rule that applies to State papers in the United Kingdom and Ireland, and the efforts made by succeeding U.S. presidents to guard the confidentiality of certain records of their administrations, attest to elite preoccupation with manipulation of the historical record. See *id.* at 2; see also Elisabeth Bumiller, *Bush Orders a 3-Year Delay in Opening Secret Documents*, N.Y. TIMES, Mar. 26, 2002, at A15 (discussing a U.S. executive order delaying release of millions of government documents, and for the first time extending the power of classification to the vice-president). But see Middleton & Edwards, *supra* note 79, at 9 (emphasizing that the "truth" of the past is not found unambiguously deposited in some objective social record or archive but is an epistemological enterprise created in dialectic and argument between the contrary positions of "fact" and "invention").

269. Even Yerushalmi, a determined critic of the discipline, concedes that the "dignity" of the historical vocation persists. His rationalization of this position, therefore, merits a brief quotation:

[I]t is no longer merely a question of the decay of collective memory and the declining consciousness of the past, but of the aggressive rape of whatever memory remains, the deliberate distortion of the historical record, the invention of mythological pasts in the service of the powers of darkness. Against the agents of oblivion, the shredders of documents, the assassins of memory, the revisers of encyclopedias, the conspirators of silence, against those who, in Kundera's wonderful image, can airbrush a man out of a photograph so that nothing is left of him but his hat—only the historian, with the austere passion for fact, proof, evidence, which are central to his vocation, can effectively stand guard.

YERUSHALMI, *supra* note 78, at 116.

270. The linearity of history is reflected in the Judaeo-Christian tradition of creation, redemption, and the promised end. See A. S. BYATT, *ON HISTORIES AND STORIES: SELECTED ESSAYS* 170 (2001).

271. See RICOEUR, *supra* note 7, at 178 (warning against the illusion that a designated historical "fact" coincides with what really occurred, or with the living memory of eyewitnesses, "as if the facts lay sleeping in the documents until the historians extracted them").

272. Deconstruction of this idea of "discovery" is essential to understanding the pretensions of history as a discipline. What, after all, is so-called "historical truth"? There are, to be sure, no "transcultural or transhistorical iron laws of human behavior," MUNSLOW, *supra* note 119, at 216, with which to assess the unfolding of past events, so that any evaluation of the past must occur within conceptual frameworks that exist in the present. When speaking of

C. Weaknesses of the Chronique Model of History

But history, despite the appealing premise that *chronique* might counterpoint the biases of official memory, is not necessarily a more authentic model of public memory. History, in fact, has characteristics which make it both very unlike official public memory and very similar, and in each of these respects it is a weaker model (both in terms of performing the societal function of official memory and in exposing the truth of the past) than might be expected. Thus, its mission of *chronique* makes it ontologically dissimilar to the constructed product of official memory, but an unending revisionism is unlikely to serve the purposes of social control through consensus that give officially managed memory its apparent power and prominence. More critically, however, history is very similar (and therefore not inherently superior) to official public memory in that historians are no less immune than governments from the viral effects of interpretive fallacy. I will discuss each of these apparent weaknesses in more detail.

I. History and Contestability

In postulating *chronique* as history's obsessive doctrine, we also recognize that this doctrinal impulse *must* produce contestability, a cycle of perpetual challenge (whether by simple accretion, by correction, or by reinterpretation) to received accounts of past events.²⁷³ And precisely because (unlike official memory) it necessarily promotes contestability about the past, history is inherently more likely to occupy the marginalized space of endless contestation that I earlier assigned to the normative and descriptive theories of Osiel and Gillis. Good history *discovers* hitherto unsuspected or unarticulated information about beatified events or personalities (to mention two recent examples, Roy Jenkins's patient reconstruction of Churchill's strategic distrust of the

"class," for example, are we imposing on the past a conceptual category that had no meaning to past societies? See *id.* Nor is there any point in suggesting an absolute one-to-one correspondence between what is written as history and what actually occurred in the past. See GADDIS, *supra* note 8, at 111. Like the mind itself, history cannot be a looping videotape recording of the past. See *infra* text accompanying note 364. The best approximation of historical truth, according to Munslow, is that it should have a coherence that fits with the descriptive consensus writing about a particular event or era. See MUNSLOW, *supra* note 119, at 217. Thus, the failings of history as a mechanism to establish truth are balanced by the "falsifiability principle," which holds that "historical interpretations are provisional propositions (or hypotheses) to be falsified in light of the evidence." *Id.* at 218. After the point of maximum falsifiability has been attained, the "residue" is historical truth. *Id.*; see also RICOEUR, *supra* note 7, at 328 (suggesting that a factual interpretation of the past is only verified "in the sense that it has not been refuted at the present stage of accessible documentation"). The "consensus," argues Gaddis, "can incorporate contradictions," GADDIS, *supra* note 8, at 10, but it must be replicable by other practitioners of the discipline. See *id.* at 107. In any case, the so-called "holist fallacy" operates to protect the historian from the mistaken idea that historians should select significant details from a sense of the whole universe of events and facts. Such a rigid protocol would prevent the historian from knowing *anything* until he knows *everything*. That would be "absurd and impossible," contends Gaddis, because the evidence is "*always* incomplete." *Id.* at 26 (emphasis added).

273. "[H]istory . . . [is] destined to revisionism." RICOEUR, *supra* note 7, at 342.

Normandy landings in 1944,²⁷⁴ or Michael Beschloss's documentary unveiling of Franklin Roosevelt's poor administrative skills²⁷⁵, or disturbs the grain of traditional historical analysis using new conceptual categories such as class, race, or gender.²⁷⁶ In doing so, it serves a useful function of contestation, but not the paramount purpose of social control that gives official memory its centrality and power.²⁷⁷

274. ROY JENKINS, *CHURCHILL: A BIOGRAPHY* 714–23 (Pan Books 2002) (discussing Churchill's sustained advocacy of a Mediterranean strategy that was inconsistent with Roosevelt's proposed landings in France).

275. See BESCHLOSS, *supra* note 46, at 88 (describing Roosevelt's "harum-scarum delight in pitting people against one another"). The historian, therefore, has acquired some of the characteristics of the investigative journalist (or vice versa). Demystification and debunking have become the *au courant* methodologies of contemporary historical work. Arthur Neal, in his profile of major American public events of the twentieth century, comments on the post-assassination "idealization" of the Kennedy presidency (anchored in the mythmaking apparatus of the eternal flame at Arlington Cemetery). See NEAL, *supra* note 126, at 117–18, 126. Neal also notes a counter-narrative, which he labels a "cultural milieu," that debunks its heroes (so that Kennedy has been redefined as a serial philanderer, a ruthless opportunist, and a beneficiary of clever "impression management"). See *id.* at 126–27.

276. The pressures on history as a discipline have been particularly challenging in the last twenty or thirty years as the rise of presentist ideological concerns—feminism, minorities discourse, sexuality, nationalism, class—have created a metric of contestability that compels attention to what Columbia historian Eric Foner calls "new social history." FONER, *supra* note 3, at xi; see also NEAL, *supra* note 126, at 214 (discussing rise of feminist history). For a contrarian view of these trends, see generally WINDSCHUTTLE, *supra* note 257 (rejecting fragmented cultural histories which no longer investigate the past *for its own sake*). The neglect of these issues in past historical research is being corrected, but at some cost to the "Whiggish history" that once dominated the discipline. See *supra* note 144.

277. See, for example, *supra* note 46 (discussing the fate of President Roosevelt's Morgenthau Plan to dismember and ruralize Germany, and the speculations of presidential historian Michael Beschloss as he analyzes what must now be recalled as the chatter of history, a memorandum supporting the plan exchanged between Roosevelt and Churchill, which Roosevelt later denied having seen). But Roosevelt endorsed the Morgenthau Plan as a way to mollify Stalin. See BESCHLOSS, *supra* note 46, at 131, 132 (considering Stalin's fears that the Western Allies would strike a separate deal with Hitler); *id.* at 149 (discussing Roosevelt's disavowal of any endorsement of the plan); *id.* at 287 (suggesting that Roosevelt used his support for the plan tactically to reassure his allies that he intended to transform Germany). As well as the fact that Beschloss's access to caches of official and private documentation is a chastening reminder that modern government operates rather differently, by e-mail, his work is also to some extent an example of the "lonely scholar" foraging in fields that are not of general interest to the public and drawing nuanced (and revisionist) conclusions that do not measurably alter public memory. See Michael Bommers et al., *Popular Memory: Theory, Politics, Method*, in *MAKING HISTORIES: STUDIES IN HISTORY-WRITING AND POLITICS* 205, 210 (Richard Johnson et al. eds., 1982) (commenting on the ill-matched powers of political ideology—including media reinforcement of ideology—and scholars producing small numbers of monographs). And, even though Beschloss's book sold moderately well, it could not (and did not), by itself, cause a perceptible shift in the popular perception—and official public memory—of the salvific Roosevelt presidency. Thus, the newly-dedicated Roosevelt Memorial in Washington, D.C., which mythicizes Roosevelt through quotations from his wartime speeches, is likely to have a far more enduring impact than Beschloss's painstaking assessment of Roosevelt's tactical *volte-face* on the Morgenthau Plan.

And history could not be expected to serve this purpose. Unlike official memory, it is not cognitively a mythologizing, archotyping, or liturgical enterprise. It is anti-hegemonic and schismatic, and while ironically these characteristics make it just as conceptually dogmatic as official memory or organized religion, they also exclude the canonical certainty and centrality of either of those sources of public memory. Official public memory, in contrast, is reductionist, confident that the past (or, more accurately, a specific rendering of the past) can be *stabilized* by interweaving of the characteristic patterns of reconstruction that I have earlier described. The actions of the past, in this understanding, are subject to the meaning they are given by official action in the present.²⁷⁸ History, not only because of its lack of centrality but also because of the implications of *chronique*, competes unequally against these powerful syncretic forces of elite memory. While history accurately judges the past to be conceptually open, the choices for investigating and explaining the past are not. Structures are placed on the past, most powerfully by the centralized actions of official memory, and those structures thicken into a received interpretation that may prove impossible to dislodge.²⁷⁹ Historians pursue a kind of forensic *pointillisme*, creating an ever more detailed depiction of the past. This process will certainly nurture contestability, but it also means that history will remain a marginal voice in the consensus that congeals around the patterning of official public memory.²⁸⁰

278. See Boyarin, *supra* note 170, at 12–13 (observing that considerations of changing consciousness cannot be separated from changes in the world that consciousness construes, so that (cynically) the German elite’s moral concern for the legacy of Nazi genocide helps Germany’s success in international commerce).

279. See HERF, *supra* note 163, at i (commenting that “writing history is a matter of reconstructing the openness of past moments before choices [congeal] into seemingly inevitable structures”).

280. The sundering of history and memory is nowhere more explicit than in Yerushalmi’s extended meditation on Jewish collective memory. See YERUSHALMI, *supra* note 78. This canon of memory, to Yerushalmi, comprises the liturgical traditions of Judaism. Thus, his skepticism that historians (who he describes, with some facetiousness, as a “guild,” *id.* at 6) can provide an alternative shared tradition is anchored in this mystique of a faith whose narrativizing and archotyping properties are comparable to the privileging impulses that generate official public memory. Yerushalmi, for example, sees in many cultures (including his own Israeli tradition) a preference for “mythic” over “historical” time. *Id.* This preference is reflected in, for example, “paradigmatic first acts,” “the dream-time when the world was new, suffering unknown, and men consorted with the gods.” *Id.* In these cultures, the “present historical moment possesses little independent value.” *Id.* The present only achieves meaning and reality when, in a Proustian act, it subverts itself through ritualistic repetition or reenactment, historical time is shattered, “and one can experience again, if only briefly, the true time of the origins and archetypes.” *Id.* at 6–7. History, in this light, is not a “restoration of memory,” but a “truly new kind of recollection.” *Id.* at 94. History, in its exhaustive searching, uncovers texts, events, and processes, that “never really became part of Jewish group memory even when it was at its most vigorous.” *Id.* Historians do not come in simply to replenish the gaps of memory, Yerushalmi infers, but to challenge “even those memories that have survived intact.” *Id.* In Yerushalmi’s conception of a fastidious *chronique*, the historian seeks recovery of a “total past,” and no subject, no document, no artifact lies outside his attention. *Id.* Thus, to Yerushalmi, “the notion that everything in the past is worth knowing ‘for its own sake’ is a mythology of modern historians, as is the lingering suspicion that a conscious responsibility toward the living concerns of the group must result in history that is somehow less scholarly or ‘scientific.’” *Id.* at

2. The Interpretive Fallacy

The second and more conceptually critical weakness of history and of *chronique* as a potential model of public memory is that historians, themselves part of a society anchored in images projected by official memory, are cognitively unable to liberate themselves from a disciplinary interpretive fallacy. Infused with a contemporary sensibility, they have to triangulate among the present, the past, and themselves.²⁸¹ This triangulation requires an intellectual dialectic between their present selves and the thought processes of past actors,²⁸² and cannot be described as simply a forensic collage of persons, events, and ideas. But in composing this dialectic, the historian remains a prisoner of her own context and times, and that context can precisely affect what subjects are researched, what ideology is used to do so, and indeed how past thought can really be reconstructed.²⁸³

Faced with presentist concerns, unyielding objectivity must be hard to attain,²⁸⁴ not least because historians, too, are affected by the Heisenberg uncertainty principle (of physics) which holds that we change what we observe.²⁸⁵ Historians, therefore, not only deal with the contestability of their disciplinary assertions, but as critical intellectuals they also do battle with the *idées fixes* of their own time and sometimes even with their inherited professional orthodoxies.²⁸⁶ As history evolves, its

100. Jews who focus on tradition, or return to it, find history irrelevant: they seek, “not the historicity of the past, but its eternal contemporaneity.” *Id.* at 96. Jewish rabbinical tradition was rooted in the Bible as both a repository of past history and a revealed pattern of the whole of a salvific history. *See id.* at 21. In effect, Yerushalmi argues, the rabbis had all the history they needed, and mundane *chronique* would be supererogatory. As Harold Bloom notes in his foreword to Yerushalmi’s text, Jewish memory moved not through contemporary historical writing but through ritual and liturgy, and in rabbinical custom and law, largely fixed after the year 500 of the Common Era when the Talmud achieved its definitive form. *See Bloom, supra* note 78, at xviii.

281. *See GADDIS, supra* note 8, at 128 (recognizing that, in the process of triangulating the past, the historian cannot stand aloof from moral judgments, and inevitably becomes engaged with the morality of his or her time; that engagement, however, must be distinguished from the morality of the individual or the age that the historian is writing about).

282. *See In Depth: Niall Ferguson* (C-SPAN2 television broadcast, May 2, 2004) (stating that “historians are engaged in the [very complex task of] reconstruction from documents of past thought”).

283. *See Bommes et al., supra* note 277, at 220, 224 (discussing the historian’s *amour propre* as creator of history, and privileged status as “bearer of the scientific canon”; Bommes contends that a socialist history of Britain is imperfectly constructed by middle-class academic historians).

284. *See GADDIS, supra* note 8, at 29 (noting that historians’ “modes of representation,” necessary because generalization is often the only available option in delineating the past, inevitably determine what is being represented and therefore exclude objectivity).

285. *See ALEXANDER STILLE, THE FUTURE OF THE PAST* 29 (2002) (noting that archeology suffers from the analogous idea that “[y]ou study it, you kill it”).

286. *See RICOEUR, supra* note 7, at 259 (noting, for example, that “the event called Auschwitz . . . lies in individual and collective memory before being in the discourse of the historian,” thereby “plac[ing] the historian-citizen in a situation of responsibility as regards the past”). This intermediation of the historian’s own historical situation is precisely why Ricoeur writes of a “crisis of testimony.” *Id.* at 176. Oral and written testimonies of past horrors do not themselves “speak,” according to Ricoeur, unless “someone asks them to verify,” in other words

practitioners operate subject to an ever more relativistic mix of ideological influences, and view the past through the lenses of *post hoc* intellectual constructs such as feminism, minority and gender discourse, sexuality, nationalism, and class.²⁸⁷ Far from being a detached, factualized, transparent activity—the conceit of *chronique*—history is described (notably by its structuralist critics) as a relativistic enterprise, presentist in bias, and neither immutable nor permanent.²⁸⁸ History, in this sense, has no intrinsic nature beyond the mind of the historian,²⁸⁹ no deterministic theory, no concealed patterns, and no necessary teleology.²⁹⁰

to sustain “some hypothesis.” *Id.* at 177. Quoting Marcel Proust, Ricoeur analyzes the “historian’s question” as not just a “bare question,” but as an “armed question that brings with it a certain idea of possible documentary sources and research procedures.” *Id.* Thus, memory is “archived” by the acts of the historian, and ceases to be a true memory in the sense of being “retained within a relation of continuity and appropriation in regard to some present conscious awareness.” *Id.* at 178. History, therefore, becomes a “critical reprise” of memory. *Id.* at 260.

287. See *supra* note 276 and accompanying text (discussing these “new” histories). For Paul Ricoeur, who identifies three levels of historical discourse (documentary, explanation/understanding, and narrative representation), there is “interpretation” at all three levels—at the documentary level with the selection of sources, at the explanation/understanding level with the choice among competing explanatory models, and at the narrative level with the historian’s personal preference, the basis of which remains “relatively opaque,” for a choice of scale (for example, macrohistory or microhistory). RICOEUR, *supra* note 7, at 185, 235, 339. If history is classically distinguished from fiction on the basis that history retraces what actually happened, Ricoeur asks why an “aporia” of truth in history becomes apparent “through the fact that historians frequently construct different and opposed narratives about the same events.” *Id.* at 241–42. Thus, Ricoeur views the process of history as essentially a perpetual process of writing and rewriting, so that the history book, the product of writing about documents (oral and written testimony), becomes itself another document, “open to the sequence of reinscriptions that submit historical knowledge to an unending process of revisions.” *Id.* at 234. A startling example of the historian’s hermeneutical challenge is the recent conflict concerning what might be called the “historicization” of the Holocaust (and Auschwitz), in other words, allowing the experience of National Socialism to be in some sense reinterpreted by being compared to other historical events such as the Stalinist purges in the Soviet Union. See Jalowiecki, *supra* note 148, at 44 (discussing the *Historikerstreit*, the “historians’ debate,” as to whether a “normalization” of Germany’s past should permit Nazism to be placed within the larger European context, for example as a copy of mass atrocities previously committed by the Bolsheviks under Stalin and Lenin). This “relativization” of historical interpretation was advocated by a new school of German historians. Was Nazism uniquely monstrous so that all modes of conventional (comparative) representation are, in Ricoeur’s words, “put to flight”? RICOEUR, *supra* note 7, at 256–57 (concluding that this debate undermines “[t]he principle of a distinction between interpretation and fact,” and will not be resolved by forbidding any mode other than the “literal chronicle,” which would mean “demanding the denarrativization of the events in question”).

288. See MUNSLOW, *supra* note 119, at 110 (presenting an epitome of the criticism of Michel Foucault, Roland Barthes, and others); see also RICOEUR, *supra* note 7 (discussing history’s susceptibility to “reinscription”).

289. See MUNSLOW, *supra* note 119, at 109. Thus, for example, Roy Jenkins concludes a very serviceable biography of Winston Churchill with the magisterial pronouncement that Churchill, “with all his idiosyncrasies, his indulgences, his occasional childishness, but also his genius, his tenacity and his persistent ability, right or wrong, successful or unsuccessful, to be larger than life,” was “the greatest human being ever to occupy 10 Downing Street.” JENKINS, *supra* note 274, at 912. Jenkins’s conclusion is certainly not based on a marshalling of all of the

In sum, therefore, history's revisionist impulses inevitably marginalize its power to shape public memory in the centralist, consensus model of official management of memory. But history also belies its own promise of *chronique* (which might, in other circumstances, have yielded a powerful alternative model of public memory) because its interpretivist biases make it conceptually no more likely than official memory to create a completely accurate portrait of the past.

D. History on Trial: An Empirical Study

It is ironic, indeed, that history's essentialist struggle to expose the entire past tends to make *chronique* ontologically improbable—a perfect *chronique*, knowing *everything about everything* that happened in the past, is unattainable both as a matter of logic and because of the interpretive fallacy.²⁹¹ History, then, is forced into a kind of intellectual defensive crouch, promising complete knowledge but always subject to marginalization when that knowledge is unavailable. Official public memory, in contrast, exists from the start as imposture, the certain product of drastic selectivity, a ritualistic and ecumenical cosmology of the State. The claims of official memory are not expected to be forensically testable (on the deep level of historical fact), and yet are capable of displacing or incorporating contestative narratives. And even if these observations may seem counterintuitive, they can be demonstrated empirically through a brief inspection of how historical incidents have been portrayed in the adversarial setting of some of the recent Holocaust-related civil and criminal trials. These trials, two of which are addressed here, are powerful instruments for the present discussion because they attempt to judge history by legal prescripts of proof and evidence rather than by standards of scholarly inquiry.²⁹²

Again, if history is premised on *chronique*, should it not also be adept (to the extent that it has investigated a past event) at providing accurate, detailed, and testable propositions even in the courtroom? The intuitive assumption, I should think, is to suggest that national myths (rather than history as *chronique*) will not survive the forensic scrutiny of a civil or criminal trial, since official memory tends toward substantial historical inaccuracy.²⁹³ The Holocaust proceedings, however, did *not* put

comparative evidence of the lives of the fifty-two occupants of the office of British prime minister since the position was created in the eighteenth century. Surely the conclusion is instinctual, and as such it is informed by Jenkins's own career experience as a member of the British Establishment. A very different view of Churchill, for example, can be gleaned from recent revisionist biographies and in a brief but thoroughly remarkable diatribe by a prominent Irish journalist that appeared at about the same time as the Jenkins biography. See *supra* note 144.

290. See WINDSCHUTTLE, *supra* note 257, at 177 (discussing the absence from history, a resolutely empirical enterprise, of any "deep-seated design"); see also RICOEUR, *supra* note 7, at 184 ("[T]here is no one privileged mode of explanation in history."); *supra* note 287 (further discussing Ricoeur's position).

291. See RICOEUR, *supra* note 7, at 448 (arguing that "[t]he idea of an exhaustive narrative is a performatively impossible idea[;] [t]he narrative necessarily contains a selective dimension").

292. See LAWRENCE DOUGLAS, *THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST* 224 (2001).

293. See Leora Bilsky, *Justice or Reconciliation? The Politicization of the Holocaust in the Kastner Trial*, in *LETHE'S LAW: JUSTICE, LAW AND ETHICS IN RECONCILIATION* 154, 166

national myths, in the sense of official memory production, on trial.²⁹⁴ If we accept that, like the assembled images of an official public memory, the mere utterance of the word “Holocaust” evokes a range of archetypal references (no doubt including “Nazism,” “Auschwitz,” “genocide,” “six million Jewish victims,” and other synecdochical phrases), then it is interesting that the “Holocaust” as an archetype of public memory did not come into direct question in any of these trials.

For example, in the civil libel action brought in 2000 by British historian David Irving against an American academic, Deborah Lipstadt, who had written a book *inter alia* accusing Irving of Holocaust denial, Irving’s strategy was to transform the litigation into a trial about the Holocaust *in history*, the facticity of very specific assertions, rather than a trial about the fundamental reality or non-reality of a structure that exists in public memory under the rubric of “the Holocaust.”²⁹⁵ Thus, Irving concentrated a great deal of his case on attempting to induce doubts about the existence of purpose-built gas chambers at Auschwitz and, more broadly, whether Hitler knew, or the Nazis even contemplated, a systematic top-down program of exterminating

(using the example of one of the heroic myths of Israeli memory of the Second World War to suggest that national myths may be based on actual events but studded with factual inaccuracies).

294. This is not to suggest that criminal trials do not serve an elitist agenda of memory, in the same way that I have earlier suggested that truth commissions do. See *supra* note 209 and accompanying text; see also DOUGLAS, *supra* note 292, at 109, 241–42 (noting that the trial of Gestapo officer Adolf Eichmann has become a “sacral commemorative space” in Israel, and arguing that the creation of a heroic memory of martyrdom and resistance, expunging the despised history of the Jew as hapless victim or spineless collaborator, offered a species of “national group therapy” in reconsidering an offensive past). Political theorist Hannah Arendt opposed this representational logic as a flawed (and ultimately banal) departure from the legalist, proceduralist, formalist business of the law in weighing charges, rendering judgment, and meting out punishment. See DOUGLAS, *supra* note 292, at 110. I doubt that Douglas truly engages Arendt’s critique. His response is rhetorical, almost polemical, namely, that a trial must possess one element of “irreducible risk . . . the specter of acquittal,” *id.* at 111, as well as a power to “submit the most horrific outrages to its sober ministrations . . . [to be] a spectacle of legality, [and to make visible] the sweeping neutral authority of the rule of law.” *Id.* at 41. Simultaneously, however, Douglas extols the trial for being precisely a vehicle for the narratives of the survivors, so that the Eichmann trial conveyed to a new generation of Israelis these “astonishing stories of personal survival” of their forebears. *Id.* at 142. Thus, Douglas clearly expects the trial to do “representational justice” to the Holocaust “*qua* event.” *Id.* at 113. Eichmann was, in Douglas’s view, a trial “by gesture,” where the exterminated Jews were “imagined as absent would-be citizens . . . in which the present State projects itself into the recent past to vindicate the rights of those who would have become its citizens.” *Id.* at 120. Douglas’s rhetorical concession that a “judgment” must be attached as a kind of exclamation point to the trial (a “disciplining drama” to avoid becoming “a race without a finish . . . a meandering lecture . . . an interminable story,” *id.* at 175–76) merely emphasizes that Douglas perceives the true purpose—or, better said, success—of the Holocaust criminal trial as integration into official public memory rather than, as Arendt would have it, a sober and depoliticized rendering of administrative justice.

295. D.D. GUTTENPLAN, *THE HOLOCAUST ON TRIAL: HISTORY, JUSTICE, AND THE DAVID IRVING LIBEL CASE 96* (2001) (emphasis added) (noting that this was a new kind of trial, since perpetrator trials “are probably already finished”). In her book, *DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY* (1993), Deborah E. Lipstadt had identified Irving as a principal figure in the movement to deny the historical reality of Nazi crimes.

Jews.²⁹⁶ What Irving challenged, in fact, was history's posing as a discipline that has the power of *ex post* verification or repudiation of the accuracy of the factual premises used in the management of official memory.²⁹⁷

In this setting, history, lacking an easily searchable cache of sources (a documentary order by Hitler authorizing mass extermination, for example) proved an unreliable witness. The strategic and tactical maneuvering of the courtroom, as it turns out, yields not so much a composite and instructive picture of the events of the Holocaust (or of any other general category of public memory, for that matter) as a particularistic impression of doubt with respect to specific incidents. Doubt is a reflection of the inevitable accommodations, including occasional triumphs of sophistic reasoning, produced in an adversarial contest,²⁹⁸ whether civil or criminal.²⁹⁹ In the criminal trial

296. See GUTTENPLAN, *supra* note 295, at 276 (quoting the statement in the decision of the judge in the Irving libel trial, Charles Gray, that "the documentary evidence for implicating Hitler in any policy for the systematic shooting of Jews is sparse. There is no 'smoking gun'").

297. Lipstadt and her lawyers faced the epistemologically daunting task of "[proving] the reality of the Holocaust," GUTTENPLAN, *supra* note 295, at 2, in the face of Irving's forensic punctilio. Here is how Guttenplan sets the stage:

Libel defense in Britain is always an uphill struggle, and part of Lipstadt's burden lay in having to prove things most of us take for granted: Adolf Hitler's murderous intentions, the horrifying efficiency of the death camps, the fatal consequences for the Jews. But the very act of taking so much for granted conceals precisely those questions which Irving's strategy was designed to provoke: How do we know these things really happened? What is the evidence? Who are the witnesses? How do we know they are telling the truth?

Id. at 2-3.

298. The trial of Klaus Barbie in France, for example, took place in a world far removed from the context of his crimes: "And this simple fact turned out to have enormous consequences which threatened the integrity of the trial," according to Alice Kaplan in her introduction to Alain Finkielkraut's 1989 essay on the Barbie trial. Alice Y. Kaplan, *Introduction*, in ALAIN FINKIELKRAUT, *REMEMBERING IN VAIN: THE KLAUS BARBIE TRIAL AND CRIMES AGAINST HUMANITY* ix, xx (Roxanne Lapidus & Sima Godfrey trans., Columbia Univ. Press 1992). As Kaplan notes, the temporal dislocation of the trial allowed Barbie's defense lawyer, Jacques Vergès, to direct attention to France's own record of moral ineptitude and hypocrisy in the colonies, notably Algeria, after World War II: "[H]e set up recent history [including France's own colonial policies] in a competition with what had come before it." *Id.* at xx. Barbie's lawyer, in other words, attempted to defend his client "on the basis of history that occurred after his own crimes." *Id.* at xxi. Thus, Vergès pursued a "defense of rupture," implicating ordinary Frenchmen in a web of *tu quoque* accusations. DOUGLAS, *supra* note 292, at 208. Vergès ruthlessly characterized crimes against humanity as "rhetorical window dressing Europeans used to describe crimes committed against fellow Europeans, as against those perpetrated against the colonized Other." *Id.* at 209. In this reasoning, according to Douglas, "everyone became a Nazi": the French in Algeria, the Americans in Vietnam, and even the Israelis in their association with a Palestinian genocide. *Id.* Kaplan, *supra*, concludes that although normally the present moves and the past remains still, the Barbie trial confuses "decades, political positions and moral stands," so that "[h]istorical agents from another era . . . haunt what came after them." *Id.* at xiii. This posture of *relativization* is not unfamiliar in conventional historical scholarship. Primo Levi, after all, writes that the Gulag came before Auschwitz. See PRIMO LEVI, *THE MIRROR MAKER: STORIES AND ESSAYS* 164 (1989).

of the Canadian Holocaust denier, Ernst Zundel, for example, his lawyer, Douglas Christie, consciously attacked history's claim to be a neutral, objective arbiter of the past. At the trial, Christie argued that the Nazi gas chambers were a myth, and portrayed his client as a latter-day Galileo persecuted for his rejection of a particular slice of dogmatic orthodoxy.³⁰⁰ In his cross-examination of the Israeli historian Raul Hilberg, Christie exposed numerous areas of factual disagreement among mainstream Holocaust historians on such elemental issues as the number of victims, the operational status of the concentration camps, or most dramatically, the premeditated nature of the crime of the Holocaust.³⁰¹

Instead of directly challenging the general archetype of the Holocaust, Christie sought to use the ontological weaknesses of *chronique*, and in particular the factual divergences he had uncovered in testimony, to *relativize* the Holocaust. He argued, for example, that the absence of a specific documented order by Adolf Hitler to instigate mass extermination³⁰² could be generalized to the Holocaust itself: it was a *theory*, and entitled therefore to "the same epistemological status" as the negationists' theory, "[a]nchored in hearsay, unquestioned axioms, opaque documents, and unreliable memory."³⁰³ And Christie also exploited history's other weakness, the interpretive

299. See DOUGLAS, *supra* note 292, at 260 (reflecting on how criminal prosecutions, *in situ* the Nuremberg, Eichmann, and Zundel trials, should be viewed as tools "to represent and judge traumatic history"). *Id.* at 243. To Douglas's mind, the weapons of the adversarial contest, including what he calls a "formal evidentiary agnosticism," may ironically wear down the line between truth and fiction that, ordinarily, the criminal law purports to demarcate. *Id.* at 243. For Douglas, therefore, it is scarcely surprising that truth-tellers are routinely called liars in the overheated cauldron of courtroom exchange. *Id.* at 241–42.

300. See *id.* at 224 (noting that Zundel was prosecuted under Canada's "false statements" statute for publishing a pamphlet questioning the veracity of the claim that six million Jews perished in the Holocaust).

301. See *id.* at 236 (describing how Christie baited Hilberg on the basis that "no historian has yet discovered a written order issuing from Hitler commanding the extermination of Europe's Jews," or "even a specific oral command"); GUTTENPLAN, *supra* note 296 (referring to a similar finding in the Irving libel trial). Christie also attacked Hilberg with the allegation that the historian, unlike the scientist, was simply "a dutiful compiler of hearsay," and "that Hilberg's method was based on certain axioms [such as the existence of the death camps] whose truth [he] had never bothered to call into question." DOUGLAS, *supra* note 292, at 233. Christie suggested that Nuremberg was based on hearsay and "victors' justice," and "that the Nazis' most serious crime was losing the war." *Id.* at 234.

302. DOUGLAS, *supra* note 292, at 236 (commenting on how this documentary lacuna parallels the lack of clarity as to whether Hitler even issued a specific oral command).

303. *Id.* at 238. "[H]earsay, unquestioned axioms, opaque documents, and unreliable memory" might well describe the stuff of official public memory. See *id.* But, again, Christie was not mounting an offensive against the "truth" of the Holocaust as archetype, only its *relative* truth in relation to the negationist theory. Christie's attack, therefore, was not against official public memory as such, but more pointedly against the pretension of history (and the historians who took the stand) to supply the factual information on which official memory purports to be based. In the precise framework of a criminal trial, Christie argued for a "reasonable doubt" about the reality of the Holocaust, but not for its absolute unreality. For Lawrence Douglas, Christie's advocacy highlighted the complex ways in which negationist arguments mimic the rhetorical conventions of attorneys practiced in the art of adversarial litigation. See *id.* at 239 (exposing how cross-examination proved a lethal weapon in skilled hands, as Holocaust witnesses were smothered in the microdetails of pit depths and roof angles).

fallacy, contending that historical inquiry is necessarily mediated and interpretive. “[T]he historian’s treatment of his sources,” Christie maintained, “is prefigured by his [contemporary] understanding of events” (the challenge of triangulation, as noted above), and the “past is consequently enveloped in an impenetrable hermeneutic haze.”³⁰⁴ All of history, in this argument, is irreducibly indeterminate.³⁰⁵

E. Conclusion

History’s idealized notion of *chronique*, and its sensitivity to a more accurate past, might have provided the framework for a more authentic model of public memory than that of official public memory. But the immanent weaknesses of contestability and interpretive relativism combine to make it necessarily a *weaker* model. As such, history (understood primarily as academic history³⁰⁶) would provide little counterweight to the prominence and apparent power of official public memory. Nor would history, with its strongly revisionist impulses, ontologically compete with official memory as a rational technique of societal stability and preservation. In the search for an authentic model of public memory, this Article now moves from the conceptual limitations of history—and indeed from the notion of a model that competes with official memory—to a theory that conceptualizes a possible inherent, and therefore definitional, limitation of official memory. In this understanding, public memory is reconceptualized to include both a non-dynamic component, official public memory, and an autonomous condition, the emotional or affective memory of individuals, that remains cognitively resistant to official memory. To do so, I need to develop a theory of public memory that recognizes the place of individual lived experience in its consideration of the past. I

304. *Id.* at 235 (analyzing Christie’s culminating attack on the meaning of history and memory). This was also the defensive strategy adopted by French collaborationist Maurice Papon at his trial in 1997, when he contended that actions and events that took place within the framework of the Nazi occupation could not be safely recollected outside that period. See NOSSITER, *supra* note 59, at 83–84 (setting out Papon’s theory that self-interest dictates what is remembered and forgotten).

305. See DOUGLAS, *supra* note 292, at 238 (reporting Christie’s argument that all disagreements turn into an “irresolvable interpretive dispute”). As discussed earlier, see *supra* text accompanying note 280, there is a respectable body of historiographical scholarship that does indeed perceive history as intensely mediated. See Richard J. Evans, *Introduction* to E.H. CARR, *WHAT IS HISTORY?* xii (2d ed. 2001) (noting Carr’s general hypothesis that “our search for the facts of history, and our identification of those facts when found, are necessarily determined by the—perhaps unconscious—beliefs and presuppositions which guide the search”); see also LEVI, *supra* note 298, at 166 (writing of an “ambiguous polemic” that scours the stains of the past).

306. But even faddish popular history suffers from transience and lack of centrality. Moreover, this kind of popular history—particularly television history—is essentially decontextualized, and events are seen without texture, as “dramas without consequences.” Adrian Hamilton, *A History of the World, Without Consequences*, *THE INDEPENDENT*, July 31, 2003, at 17. In other words, is popular history of any greater value than the similarly reductive work of official public memory? The answer, I suspect, is probably not. See Ian Kershaw, *Behind the Screen: How Television Trumpets and Trivializes History*, *TIMES LITERARY SUPPLEMENT*, Mar. 14, 2003, at 16 (noting that television leaves “little room for elaboration, differentiation or qualification”).

begin, therefore, with the theory of “collective memory” first conceived by Maurice Halbwachs.

IV. RESTORING THE INDIVIDUAL TO THE REALM OF PUBLIC MEMORY: MAURICE HALBWACHS AND A NOTION OF COLLECTIVE MEMORY

A. Introduction

Having exposed the weaknesses of history as an authoritative source of memory that challenges official memory, I seek in Part IV to develop a conception of public memory that moves more closely to the lived experience of individuals rather than to the mediated images of official memory (and, indeed, of history). Drawing on the concept of “collective memory” expounded by the French social philosopher Maurice Halbwachs, Part IV begins to restore the autonomy of a uniquely intense condition of personal memory, the memory of past emotional states, within the framework of public memory. That restorative process will continue in Part V with a treatment of Marcel Proust’s dynamic literary expression of the transcendent power of individual affective memory.

B. The Mediated Past of Official Memory

Official public memory shapes a mediated memory of events that have receded (even quite recently³⁰⁷) from the immediate experiences of most of the living population of the State. To do this, official memory uses combinations of the characteristic patterns analyzed in Part II (selectivity, constructivism, mythopoesis, incorporation, and presentism). The operative effect of these characteristic patterns is that the memory projected by State intervention is, as Maurice Halbwachs suggests, a “borrowed memory,”³⁰⁸ which the individual, responding to State prompts, can *imagine* but not actually *remember*. Some of these constructed memories have become so abstract—foundation mythologies, for example—that they are more truly symbols or conceptions of an inherited past.³⁰⁹ This kind of memory can become merely propagandistic,³¹⁰ or be delegated to the commemoration exercises of the political class, as well as to the memorials which are the ciphers of remembrance.³¹¹

307. See *supra* text accompanying note 16 (discussing construction of official public memory concerning the terrorist attacks of September 11, 2001).

308. HALBWACHS, *THE COLLECTIVE MEMORY*, *supra* note 9, at 51 (referring, *in situ*, to the mediated nature of the “memory” we possess of events in a State’s history).

309. See *id.* at 52. As one caustic critic of constructed memory has suggested, these memories have the tenor of an “ideological construct.” NORMAN G. FINKELSTEIN, *THE HOLOCAUST INDUSTRY: REFLECTIONS ON THE EXPLOITATION OF JEWISH SUFFERING* 5 (2000) (indicting Holocaust remembrance as such a construct).

310. Norman Finkelstein, in a polemic that has garnered public attention in Germany, represents the Holocaust as a propagandistic shield for Israel. See *id.* at 30.

311. See EDKINS, *supra* note 18, at 92 (examining the function of memorials and commemoration in the process of “nation building”).

Formalized, abstracted past memory is encoded in words or epithets like “founding fathers,” “victim State,” “Holocaust,”³¹² “Vichy France,”³¹³ “9/11,”³¹⁴ or “Ground Zero,”³¹⁵ but that insistent mnemonic repetition³¹⁶ merely produces (and reproduces) what Halbwachs calls a “condensed” or “schematic” measure of the actual experiences that others lived.³¹⁷ For the individual citizen, therefore, this transmitted, mediated memory is not really memory at all.³¹⁸

Viewed from a purely rational rather than ideological perspective, it is manifestly not a futile exercise for governments to use their superior resources (including the lawmaking prerogative) to shape a national consensus on the past. In other words, as I

312. See Koonz, *supra* note 59, at 259 (observing that the single word “Holocaust” now does polysemic duty for an abundance of crimes and victims).

313. See NOSSITER, *supra* note 59, at 104–05 (describing the birth of a “Vichy” government).

314. See EDKINS, *supra* note 18, at xiv (noting, in the context of “traumatic disruption of the linearity of time and expectations,” how this numerary combination “stood in as the most evocative designation for what had happened”).

315. See *id.* at 105 n.173 (describing the use of the term “Ground Zero,” the “technical term for the point on the surface of the ground immediately below or immediately above the detonation point of an atomic weapon,” as “a regrettable exaggeration of the destruction caused” at the World Trade Center site); see also IRWIN-ZARECKA, *supra* note 37, at 26 (assessing the “symbolic potency” of the term “Auschwitz,” which—outside Poland where the town located near the remains of the camp is located—has become an untransferable term that attaches only to the Holocaust); Michael Schudson, *Ronald Reagan Misremembered*, in COLLECTIVE REMEMBERING, *supra* note 79, at 108, 118 (observing, in the popular culture, a patterning of language that occurs, a rhetorical structure to recall “what everyone knows”—as in, presumably, the rhetorical structure that surrounds the phrase “9/11”).

316. See MARGALIT, *supra* note 7, at 54 (discussing the “division of mnemonic labor” in modern societies, which—unlike the direct line from people to priest in traditional societies—“travels from person to person through institutions, such as archives, and through communal mnemonic devices such as monuments and the names of streets”).

317. HALBWACHS, *THE COLLECTIVE MEMORY*, *supra* note 9, at 52 (attributing this property to historical memory). Thus, the telling of the experience is compacted into a single symbolic name. Beneath these shorthand labels, the quantitative base for recollection may be vast or circumscribed—a Proustian abundance of detail (for the Holocaust, for “9/11”), or an inaccessible record. Irwin-Zarecka mentions the “far from extensive memory base about mass murders in the Soviet Union.” IRWIN-ZARECKA, *supra* note 37, at 27. The short-circuiting synaptic process of mnemonic labels helps to resist the departure of events to what Peter Novick calls “the margin of consciousness.” NOVICK, *supra* note 145, at 1 (describing a pattern by which historical events “disappear down a memory hole where only historians scurry around in the dark”).

318. See MARGALIT, *supra* note 264 (discussing how communities canonize lines of memory, which are then distinct from historical lines to the original event). This suspicion of canonical memory, as it might be called, prompts Novick and (much more tentatively) Finkelstein to demand an explanation for the elevation of the Holocaust in American life: it is avowedly not an *American* memory, they suggest, so why should it be so memorialized in the United States? See NOVICK, *supra* note 145, at 1 (staking his claim to examine why the temporally and geographically distant event of the Holocaust “loom[s] so large” in modern American culture); see also FINKELSTEIN, *supra* note 309, at 144 (considering the “pretense” that the Holocaust is an American memory).

considered in Part II, governments can *rationalize* this practice because its effectiveness is ordained by the ontological properties of a mediated memory. Thus, the past, as many writers have expressed in many different formulations, is indeed a foreign country.³¹⁹ Its grip on the present becomes increasingly tenuous and open to being managed (or, in more benign terms, interpreted).³²⁰ The only *knowable* past, in this sense, is whatever component of the past is residually preserved in the present.³²¹ Moreover, when we as individuals survey the past, we are to an appreciable degree heeding the mileposts of officially created memory, since we plot our personal biographies, particularly during the years of early adulthood, within borrowed temporal and structural paradigms that we share with our contemporaries and generations.³²² We recollect years, decades, presidencies, political and economic cycles, and even eras of national sporting achievement, and we conjure and imagine the continuum of our existence within a shared flux of local, national, and international ideas and events.³²³

As individuals, we do not *remember* every event in the State's history. Nor were we actually a witness to the overwhelming majority of the events that inspire the structured official recollection of the State's past. These official public narratives, therefore, are much more than juiceless sequences of dates and facts, or mere mnemonic cues.³²⁴ They provide, to a greater or lesser extent, a formative context for each individual's

319. "The past is a foreign country: they do things differently there." L.P. HARTLEY, *THE GO-BETWEEN* 9 (1953). L.P. Hartley's memorable phrasing, the opening lines of his wistful novel of a sixty-year-old man recollecting an episode in lost youth, yielded the title of a well-researched study of how the past is treated in contemporary culture. See DAVID LOWENTHAL, *THE PAST IS A FOREIGN COUNTRY* (1985).

320. "Remembering the past and writing about it no longer seem the innocent activities they were once taken to be. Neither memories nor histories seem objective any longer . . . In both cases . . . selection, interpretation and distortion is socially conditioned." Peter Burke, *History as Social Memory*, in *MEMORY: HISTORY, CULTURE AND THE MIND* 98 (Thomas Butler ed., 1989).

321. See LOWENTHAL, *supra* note 318, at 187 (citation omitted) (arguing that naming or thinking of past things seems to imply their existence, but they do not exist—we have only present evidence for past circumstances).

322. See Neal, *supra* note 126, at 204 (concluding that, in terms of receptivity to external events, "[t]he members of a generation are influenced disproportionately by what was happening historically during their formative years"). In Neal's analysis, the "formative years" are "primarily the years of late adolescence and early adulthood" in which major life decisions are made in a context of "hyper-receptivity" to community and national events. *Id.*

323. "Grand narratives and individual narratives rise and fall together." Keith Hayward & Wayne Morrison, *Locating 'Ground Zero': Caught Between the Narratives of Crime and War*, in *LAW AFTER GROUND ZERO* 139–46 (John Strawson ed., 2002) (putting this observation in the context of the mutability of seemingly inexorable social components, including the nation-state, after September 11, 2001). British historian Simon Schama conjures a metaphorical image of individual lives plotted against a backdrop of public events, writing of how (in the context of wartime generations) "many of them . . . saw their own lives as a seamless whole, their calendar of birth, love, ambition and death imprinted on the almanac of great events." SIMON SCHAMA, *CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION*, at xi (1989).

324. See HALBWACHS, *THE COLLECTIVE MEMORY*, *supra* note 9, at 54 (attacking such a conception as incongruent with reality, since "[o]ur lives . . . sit on the surface of social bodies" and we can "link the various phases of our life to national events"—though usually only "after the fact" as we reconstruct the context of our earlier lives).

experiences as a member of a national community.³²⁵ We rely for these remembrances on the memory of others, including the memory framed by public law (which may include a founding treaty, a constitution, the report of a truth commission, or an epochal criminal trial), and also on the official chatter of the policy speeches, commemorative addresses, and even judicial pronouncements of quotidian administration. As a rational matter, therefore, official elites will always be tempted to exploit the contingent reality of the larger past to adjust the lenses of history and memory in service to the predominating ideological impulses of the moment.³²⁶

C. Halbwachs and the Personal Lived Memory

To restate the power and dominance of official memory is to realize that none of the contextual affiliation it provides to the broader political world is truly "lived" history, as Halbwachs seems to understand an individual's existence. It is a simulacrum of lived history, a history that has been learned (or imposed).³²⁷ For Halbwachs, the *personal lived memory* predominates over the superficial stamping of general and historical conceptions.³²⁸ Public memory in these circumstances comes not as corroborator or completer of an individual's recollection, but *as the very source of what the individual*

325. How all of memory penetration happens is probably a matter of "idiosyncratic personal experiences." LOWENTHAL, *supra* note 319, at 195 (recalling, for example, that his memory of the "parcel of facts" about Roosevelt's New Deal included his parents' partiality to the President and his grandparents' dislike of labor unions, so that political history is an annex to family history). The people who lived at a particular time, and whose memories were shaped by the actuality of events, can pass on certain artifacts of memory (in the form of written testimonies, caches of letters, family storytelling, and so on). But a child growing up will have only fleeting personal impressions of the times in which it lives. Later, the adult will reconstruct or reposition childhood within a socio-political milieu whose existence is to an appreciable degree the transmitted legacy of State action (as well as of history books, media, and other sources). See RICOEUR, *supra* note 7, at 394-95 (noting that "we can link the various phases of our life to national events only after the fact;" in this way, "personal as well as collective memory is enriched by the historical past that progressively becomes our own"). A young Austrian growing up in the formative years of the post-war republic will have memories of family discussions of public events such as the State Treaty that granted Austria its independence in 1955, see *supra* text accompanying note 41, of public discourses about Austria's social and economic recovery, of a timeline of particular leaders and of public policy issues. A young American in the same period of Austrian formation would be unlikely to register any memory at all of an Austrian independence treaty. That person's memory conception of Austria, if any existed, might well be some recall of seeing a motion picture, for example, *The Sound of Music*, in the 1960s. See *supra* note 227.

326. See Coser, *Introduction to HALBWACHS, THE COLLECTIVE MEMORY*, *supra* note 9, at 25 (observing that "[t]here are no empty spots in the lives of groups and societies").

327. See HALBWACHS, *THE COLLECTIVE MEMORY*, *supra* note 9, at 57 (indicating that this history, for all of its availability through formal study and reading, is nevertheless "learned" and not "lived," and memory can rest only on the latter).

328. See *id.* at 56-57 (recognizing, however, that our childhoods, for example, do bear the "stamp" of the recent history through which we have lived, albeit in a State of unawareness); see also *supra* notes 317, 324 (noticing that Halbwachs understands the pervasiveness of "national events" in the lives of the milieus he describes).

wishes to repeat.³²⁹ It cannot, in that sense, be in any way an authentic memory. The notions of official and personal memory, in fact, can be conflated to speak of a coalescence in memory of lived personal experience *as well as* a mediated past.

Halbwachs, therefore, has a segmented understanding of what public memory means, proposing a narrower scale of reference that exists alongside (but would appear to be distinct from) the shaping of officially produced memory. He roots his public memory—which he calls “collective” memory³³⁰—in smaller personal milieus or group dynamics, interpreting it as a very particularized and inherently temporary phenomenon, namely, the viewpoint of *living groups*.³³¹ Thus, Halbwachsian non-official public memory is the imprint of a societal constituency (Halbwachs specifies a nuclear family, a class of schoolmates, the population of a village) on its membership.³³² A large part of the potency of this rendering of public memory is that, unlike official memory, it occurs without the volition of an “activist of memory” (the State)³³³ yet is not either a genetic endowment or an innate psychic structure analogous to Jungian stereotypes.³³⁴

And Halbwachs also segmentalizes history, which he accuses (like official memory) of assuming the mantle of omniscient observer, creating a universal memory of the human species, “but there is no universal memory because every collective memory requires the support of a group delimited in space and time.”³³⁵ Halbwachs conceives of history, therefore, as a unitary, monolithic, self-isolating process, putting together past events “by separating them from the memory of the groups who preserved them

329. See HALBWACHS, *THE COLLECTIVE MEMORY*, *supra* note 9, at 51 (noting that these “historical remembrances” can be increased through conversation and reading).

330. *Id.* at 50.

331. *See id.* at 80 (describing collective memory as “a current of continuous thought whose continuity is not at all artificial, for it retains from the past only what still lives or is capable of living in the consciousness of the groups keeping the memory alive”).

332. These so-called “microhistories” are also the object of some historians’ epistemological scaling-down of the process of historical research. *See* RICOEUR, *supra* note 7, at 210–11 (discussing the principle of a variation in “scale” in historiography, and of a felt need to correct the inescapable loss of detail and complexity that accompanies the traditional historical larger scale); *see also id.* at 239 (discussing the traditional *Annales* school, where everything turns on the “primacy of the political . . . [and] the accent falls on decisions made by leading individuals”).

333. *See supra* note 109 and accompanying text (considering Mark Osiel’s conception of the State as an “activist of memory”).

334. *See* YERUSHALMI, *supra* note 78, at xxxiv (contending that a child left in a forest will not spontaneously utter a known language, nor will that child be imbued with recollection of the events of a collectivity: “[o]nly the group can bequeath both language and a transpersonal memory”). Boyarin, too, contests the idea of a “superorganic” memory, insisting that the place of memory “on the most material level” is the individual brain. Boyarin, *supra* note 170, at 23. Boyarin argues, therefore, that any notion of a collective memory of a people must be considered a psychological metaphor, operating through “intersubjective practices of signification, neither given nor fixed but constantly recreated within a framework of marginally contestable rules for discourse.” *Id.* In these words Boyarin seems to underplay the directive force of official public memory. As understood in this Article, official memory is not intersubjective (in the sense of plastic and autonomous), but is strongly constructed by power.

335. HALBWACHS, *THE COLLECTIVE MEMORY*, *supra* note 9, at 84.

and by severing the bonds that held them close to the psychological life of the social milieus where they occurred, while retaining only the group's chronological and spatial outline of them."³³⁶ True public memory, in contrast, is the fluid possession of specific groups, a shifting constellation of ideas and events that are mutually reinforcing and that ebb and flow with the shifting membership of the group. History searches *a posteriori* for the landmarks of change, retrospectively constructing the "Hundred Years War," for example.³³⁷ History perceives the outcome of a "sequence of transformations," but Halbwachsian public memory is the group "seen from within during a period not exceeding, and most often shorter than, the average duration of a human life."³³⁸ The progression of memories is irregular—eroding as members of the social group die or become isolated—and so in a constant process of transformation along with the group itself.³³⁹

Halbwachs's insight is that individual memory can be socially defined because of its accretional potential when the experiences of *known* others accumulate to build a composite of the past.³⁴⁰ While all of this departs from Durkheim's quasi-mystical notion of the social group as a psychic unit, with nearly all the characteristics of the human individual, nonetheless Halbwachs maintains that the "succession of our remembrances, of even our most personal ones, is always explained by changes occurring in our relationships to various collective milieus."³⁴¹ In this context,

336. *Id.* (considering history as a creator of "external" frameworks). In this context, Halbwachs's estimation of history adopts the forensic, "picture-book" process of literal memory (of pure *chronique*) that Marcel Proust characterized as inauthentic. *See infra* note 439 and accompanying text.

337. *See* HALBWACHS, *THE COLLECTIVE MEMORY*, *supra* note 9, at 81–82; *see also* Mary Douglas, *Introduction to HALBWACHS, THE COLLECTIVE MEMORY*, *supra* note 9, at 18 ("No one arrives at the dawn of a great historical period exclaiming, Today we begin the Hundred Years War!"). Thus, Halbwachs hews to a traditional, *universalist* view of history, whereas more recent history work seeks focused and specific (and traditionally overlooked) narratives, for example, the experiences of women and minorities. *See supra* text accompanying notes 276, 287; *see also* RICOEUR, *supra* note 7, at 246 (discussing the *post eventum* construction of phenomena that explain past events, such as structures of domination which are then "incorporated into the narrative of an event such as a battle").

338. HALBWACHS, *THE COLLECTIVE MEMORY*, *supra* note 9, at 86 (pinpointing how a group self-portrait unfolds through time, allowing the group to recognize itself through the total succession of images, "a record of resemblances").

339. *See id.* at 82 (emphasizing that the continuous development of the collective memory is unlike history in that it has "irregular and uncertain boundaries" rather than "clearly etched demarcations").

340. Thus, as Mary Douglas explores in her introduction to Halbwachs, the author clearly separated "the elements of social life that contribute to the collective memory" revealing "a flexible, articulated set of social segments consisting of live individuals who sustain their common interests by their own selective and highly partial view of history." Douglas, *supra* note 141, at 17; *see also* RICOEUR, *supra* note 7, at 38 (writing of a category of "reminiscing," which makes the past live again by "evoking it together with others, each helping the other to remember shared events or knowledge, the memories of one person serving as a reminder for the memories of the other"). Ricoeur invents a bold aphorism to summarize Halbwachs: "to remember, we need others." *Id.* at 120.

341. HALBWACHS, *THE COLLECTIVE MEMORY*, *supra* note 9, at 49 (suggesting, in opposition to Henri Bergson's exaltation of a subjectivist, personal consciousness, that the

Halbwachs writes importantly of an *affective* community.³⁴² Each individual memory in the community is a *viewpoint* on that non-official public memory.³⁴³ The contribution of the individual memory is elevated and accorded a status that it cannot occupy in the un-experienced, *unlived*, and consequently inauthentic conceptual space occupied by official public memory.

D. A Critique of Halbwachs

Despite the allure of Halbwachsian theory as a potentially powerful counterpoint to official memory, if one accepts that Halbwachs has advanced a possible theory of non-official public memory, there are two critical weaknesses of his putative conception that must now be addressed. First, while his theory seems to propose a more bounded sphere of public memory, Halbwachs does not examine how much (or how little) of that space could still be occupied by the constructed frameworks of official memory and how much by his own conceptual lodestone of individual lived experience.³⁴⁴ Second, and more problematically, a Halbwachsian idea of a public memory that more

content of a mind—of a memory—is the result of the “action in concert” of a multiplicity of elements that mark its “relationships to various milieus”).

342. *See id.* at 30. *But see also id.* at 33 (declaring that “our most personal feelings and thoughts originate in definite social milieus and circumstances,” indicating that he is resisting a conceptual distinction between personal emotional memory and the effects of the collective memory). According to Avishai Margalit, communities of memory take many forms, and “[w]e should not be stuck with one stock example of the nation as the only possible community of memory.” MARGALIT, *supra* note 7, at 102 (discussing the guild of New York firefighters, encircled by other religious and political communities of memory, who keep alive the heroism of the hundreds of firefighters who died in the terrorist attacks of September 11, 2001). Margalit writes of “[n]atural communities of memory,” including “families, clans, tribes, religious communities, and [ultimately] nations.” *Id.* at 69–70 (conceding, as he must, that each of these communities is a “social construct” and therefore not technically a “natural” event at all, but emphasizing that the resilience of social habits and institutions under the pressure of change is probably greater than “the essences of natural kinds”). For Margalit, the guild-like nature of the New York firefighters’ community evidences what he labels *thick relations* between its members, that is to say, the community has a natural sense of solicitude for its members, in opposition to the *thin relations* which connect us to individuals outside our communities of shared memory, and which therefore tend to dominate in society. *See* RICOEUR, *supra* note 7, at 131–32 (positing a category of “close relations” as intermediate between the self and the—more public, in Ricoeur’s view—“they” of Halbwachs’s collective memory: “my close relations are those who approve of my existence and whose existence I approve of in the reciprocity and equality of esteem”). Margalit, like Halbwachs, is clear that societal communities of memory exist, but is confusing as to whether those communities include *the State* itself. Thus, his concept of “thick relations” encompasses categories that are intuitively part of this concept, namely, parent and friend, but also the category of “fellow-countryman,” which is more likely to be considered a category of “thin” relations. *See* MARGALIT, *supra*, at 7. For an exposition of Margalit’s concepts of thick and thin relations, *see id.* at 7, 36–37, 101–02.

343. HALBWACHS, *THE COLLECTIVE MEMORY*, *supra* note 9, at 48 (recognizing that the act of remembering is specific to each individual, that individuals vary in the intensity of their experience of the remembrance, and “that everyone does not draw on the same part of this common instrument”).

344. *But see supra* note 324 (noting that Halbwachs certainly recognizes the potentially intrusive power of what he calls “national events”).

authentically confirms individual memories is just as conceptually incapable as official memory of registering the effects of individual memory's unique feature of emotional or affective recall on each individual within that schema of public memory. While granting once more that Halbwachs may not have imagined his theory of collective memory as a counterpoint to official public memory, the contrast is implicit, and to that extent it is necessary to consider each of the vulnerabilities described in this paragraph in more detail.

1. Weak Conceptualization of Frameworks

Halbwachs's insights have become muddled through repeated association with the amorphous concept of collective memory, a term that does not in itself dislodge a distinction between officially produced and unofficially produced memory.³⁴⁵ Halbwachs does emphasize localization and specificity, and his articulation of a certain idea of collective memory surely intends no phenomenological identification with official public memory.³⁴⁶ But Halbwachs himself is responsible for some of the conceptual slippage that has nonetheless taken place. While he draws the essentialist distinction noted above between lived and mediated memory, the salience of the distinction does not seem otherwise to have engaged his intellectual attention. Halbwachs writes generically of how "[w]e can remember only on condition of retrieving the position of past events that interest us from the frameworks of collective memory."³⁴⁷ But these "frameworks" could reasonably be expected (given the earlier discussion of borrowed contexts) to include also the constructed emanations of official public memory.

Halbwachs, in other words, does not elucidate his notion of frameworks necessarily to exclude the constructivist operations of the State from the contingencies of time, space, and the order of physical and social events which are to a large extent imposed on us through being established in and recognized by the members of any particular societal group.³⁴⁸ In other words, although his theory seems to call for public memory

345. See *supra* note 4 (distinguishing, for purposes of the present Article, a concept of "official public memory" from that of "collective memory").

346. This may be in part because the term "collective memory" has been wrenched from the localized context Halbwachs seeks to give it, so that, as Osiel points out, the term has remained a "woolly" concept that would benefit from conceptual clarification. OSIEL, *supra* note 74, at 18, n.28 (detecting ten different usages of the term in current social thought).

347. HALBWACHS, ON COLLECTIVE MEMORY, *supra* note 9, at 172 (discussing the particular clarity of recollections that appear "at the junction of a greater number of these frameworks," intersecting and overlapping with one another).

348. Halbwachs does view the "nation" as a "larger group," but only to insist that "the nation as such can't be said to be interested in the destiny of each of its members." *Id.* at 77; see also *supra* notes 317, 324 (considering Halbwachs's awareness of the role of "national events" in the lives of individuals). In this sense, "the nation is too remote from the individual for him to consider the history of his country as anything else than a very large framework with which his own history makes contact at only a few points." HALBWACHS, THE COLLECTIVE MEMORY, *supra* note 9, at 77. The nation, then, is seen as the polar opposite of the individual, and in between are the more restricted groups (or frameworks) that constitute authentic collective memory. But to posit the "nation" as a remote group or framework, and even to accept some peripheral intrusion of "national events" into sub-State milieus, does not preclude its sustained influence as a group

to be depoliticized (and re-individualized), he offers no conceptual boundaries for ensuring that this is so.

2. The Implications of an Affective Community

a. Individual Memory in a Collective Context

A Saussurean model of public memory,³⁴⁹ as espoused by Halbwachs, functions within a reticulation or network, each individual memory being propagated by, and in turn propagating, other individual memories, a mutually reinforcing ground-up socialization process that stands in obvious contrast to the top-down strategies of official public memory. Within this conceptualization, however, a potentially strong objection to authenticity still exists. Halbwachs, consumed by the apparent authenticity of individual memories acting in concert with one another, failed to recognize that collective memory of a social group, formed from the interplay of the memories of each member of the group, will be suffused with the emotional or *affective* memory of each individual in the group—and, for the individual, that *affectivity*, the memory of how he or she *felt* in the past, will be the element of epiphanic significance (what this Article will describe in Part V as Proustian “transcendence”).³⁵⁰

or framework, and assuredly does not dispose of the influence of official public memory as a directive component of individual experience.

349. Ferdinand de Saussure’s linguistic theory recognized the so-called “principle of opposition,” declaring that “the most precise characteristic [of linguistic signs] is in being what the others are not.” FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* 117 (Charles Bally & Albert Sechehaye eds., Wade Baskin trans., 1959); see also OSWALD DUCROT & TZVETAN TODOROV, *ENCYCLOPEDIA OF THE SCIENCES OF LANGUAGE* 18–19 (Catherine Porter trans., 1983) (citing Saussure as discussing how the linguistic “unit is defined only by its differences,” and as such, “is based upon nothing other than its ‘noncoincidence with the rest’”).

350. It is not as though Halbwachs was unaware of affective or emotional memory. But he was, as Mary Douglas points out, “collectivist and sociological” where his master, Henri Bergson (and Emile Durkheim also) were “individualistic, psychologistic, [and] subjectivist.” Douglas, *Introduction*, *supra* note 141, at 7. To the extent that Halbwachs considers the affective memory at all, it is to dispute the idea that “[a]ffective States” are wholly individualistic and internally generated, escaping the reach of a common collective memory and resident only in the individual mind. See HALBWACHS, *THE COLLECTIVE MEMORY*, *supra* note 9, at 96. In thus demonstrating his apostasy, however, Halbwachs seeks to reduce affectivity to a series of archetypes (“conscious states”) that derive ultimately from the common consciousness. See *id.* For example, the fact that “pain” can “be experienced by our fellow man” (in his view) demonstrates that “pain” is part of the common domain and is therefore of a “collective and familiar character.” *Id.* at 97. In effect, our personal experience of an emotion is “only an incomplete and truncated [version of the] collective representation[.]” *Id.* Thus, Halbwachs concludes,

In reality, many currents that proceed back and forth between one consciousness and another crisscross at each moment or stage of the unfolding of our thought. Consciousness is the point of intersection. The apparent continuity of what is called our inner life is due partly to going along such a current, a course of thought unfolding, in others as well as ourself, a particular inclination of collective thought

The individual has lived and experienced the recollected event. As such, the recollection cannot solely be an amalgam of shared stories about a past occurrence (Halbwachs's cumulative "collective" memory), but for each individual the recollection will project an emotional resonance that *transcends* any integration of the organizational details of the shared memory. Halbwachsian collective memory, in other words, is a shared composite of the past, but it must also be a recollection that each individual necessarily appreciates affectively.³⁵¹ Thus, the collective product of these shared individual memories will not, and cannot, be in any sense a *more* authentic rendering of the past. Consequently, when Halbwachs refers to an affective community, he fails to appreciate the full resonance of this thought, since the affectivity (the emotional quotient) of memory that drives the communal recollection is not solely a pooling of incomplete personal memories to create a composite (and purportedly more authentic) collective memory. This is what Marcel Proust means when he disparages a forensic memory process that corresponds to flicking the pages of a picture book.³⁵²

. . . . [A]ffective impressions tend to blossom into collective images and representations.

Id. at 97–98. Again, however, Halbwachs provides no conceptual basis by which it could reasonably be asserted that abstractions such as "pain," "love," "jealousy," or "grief" are simply the results of a generic accretional process (collective memory) which otherwise functions only to assemble consolidated memories of past *events* (his dominant articulation).

351. Ricoeur raises an additional objection, founded in Halbwachs's own words. Halbwachs uses the idea of viewpoint or perspective to indicate that "it is individuals as group members who remember." RICOEUR, *supra* note 7, at 124. Thus, he would "readily acknowledge that each memory is a viewpoint on the collective memory, that this viewpoint changes as [the individual's] position changes, that this position itself changes as [the individual's] relationships to other milieus change." *Id.* As Ricoeur surmises, this free "use of the notions of place and change of place . . . defeat a quasi-Kantian use of the idea of framework, unilaterally imposed on every consciousness." *Id.* It appears, rather, that the individual's unity of interior consciousness, its internal coherence and pre-existence, which is antithetical to a collective experience that precedes individual memories, is being conceded by Halbwachs.

352. See *infra* note 439 and accompanying text (discussing Proust's notion of literal memory). This is an intensely ironic critique of Halbwachs, who did not see himself within the Bergsonian tradition of regarding the entirety of the past as retained in some subterranean gallery of the mind and summonable like the printed pages of a book. See HALBWACHS, THE COLLECTIVE MEMORY, *supra* note 9, at 75 (noting that, for Bergson, only certain brain-related obstacles prevent us from evoking our entirely preserved memory of our past; see also Douglas, *supra* note 141, at 5 (calling Bergson's idea that past experience is stored in the unconscious "part of [Bergson's] theory of the intuition of personal identity"). Halbwachs was no literalist of memory. He understood that memory (organized through a social milieu) is a constructive process, while insisting on the shared nature of the data and conceptions. See HALBWACHS, THE COLLECTIVE MEMORY, *supra*, at 31 (asserting that the "data and conceptions" are continually passed back and forth between minds). But Halbwachs's idea of construction, nonetheless, is a forensic one, since his constant assumption is that reconstruction is the product of accumulation of data, with the addition of "reasoning" where the data is lacking. *Id.* at 69. Halbwachs, therefore, intimates that at least a simulacrum of the past is always feasible, whereas modern studies of memory have emphasized its creative and directive properties (which do not necessarily produce a reproduction of the past). See *infra* note 363 and accompanying text (discussing modern theories of memory).

b. The Constructivist and Affective Dimensions of Individual Memory

Missing from Halbwachs, therefore, is not only a conceptual instrument to caliper the respective spaces of non-official and official public memory, but also a comprehension that his notion of a decentralized public memory of shared stories could appear, without more, as merely a derivative, more thinly populated branch of the memory work that the State performs (through law and other channels) at the national level. Again, Halbwachs may not have understood that there *is* an essentialist distinction that needs to be made between official memory and his more attenuated perception, a distinction that resides precisely in his unreflective use of the phrase “affective community.” He may have assumed—given the scientific knowledge of his time—that a collective memory gleaned from the reticulation of separate individual memories in a societal group could not *ipso facto* be confused with the formalized patterning of State-sponsored memory. Yet present-day understanding of the operations of individual memory reveals that it actually operates with some analogy to the directivity of official memory.

This is not, of course, the popular perception of individual memory.³⁵³ While it is

353. The scientific study of memory, the search for the brain *locus* of memory functions, has produced no definitive account of how individual memory operates. A recent summation of current learning, for example, describes the continuing dispute as to “localizability” within the brain. See Steven Rose, *Memory: Biological Basis*, in *THE OXFORD COMPANION TO THE MIND* 458 (Richard L. Gregory ed., 1998) (1987) (noting that the controversy has persisted since at least the 1940s); see also DANIEL L. SCHACTER, *SEARCHING FOR MEMORY: THE BRAIN, THE MIND, AND THE PAST* 9 (1996) (indicating that “memories are not stored in any single location in the brain . . . nor are they distributed throughout the entire brain”). Present thinking prefers to avoid any conception that the memory function is a tangible molecular substance, and to see it instead (in the way that most of us would probably imagine it metaphorically) as a living “system” of synaptic interconnectivities: “Memory,” says the author of a leading study of Alzheimer’s disease, “is everywhere.” DAVID SHENK, *THE FORGETTING: ALZHEIMER’S: PORTRAIT OF AN EPIDEMIC* 51 (2001) (arguing that, like consciousness, memory cannot be isolated or extracted, but is a living process) (emphasis in original). Thus, there is no central processing mechanism for memory. It is a dispersed function, operating through “a vast and dynamic interaction of neuronal synapses.” *Id.* Each memory trace (or “engram”) requires a unique agglomeration of neurons “from different regions of the brain” firing in sequence. *Id.* at 51–52 (emphasis added). These traces must, presumably, have some physical manifestation inside the brain structure, but they do not comprise a discrete, physically identifiable cluster or lobe of cellular tissue. But each new sequence is effectively a simulacrum of a predecessor sequence, so that each iteration of a memory trace (in terms of reproductive fidelity) is a distortion of its predecessor (which in itself was a distortion). See Graham F. Reed, *Déjà Vu*, in *THE OXFORD COMPANION TO THE MIND*, *supra*, 182, 183 (suggesting that “in a series of recollections we are not recalling the original event at all, but our last recollection of it”). One has the impression from the scientific studies of a brain system “on fire” with kinetic memory traces, a free-association cognitive matrix with the odd and counter-evolutionary characteristic that repeated access to the traces diminishes their acuity and their accuracy but not necessarily their vibrancy. Professor Rose comments that all of this science travels a “long way from Marcel Proust’s evocation of youthful memory . . . with its sense imagery,” but in fact the scientific record remains hugely incomplete. Rose, *supra*, at 460. He presents the current state of biochemical and anatomical knowledge in quite revealing terms, comparing the search for the memory function to the fact that one can say a great deal how a tape recorder works by

true that, unlike the animals, a normally functioning human mind does not instantly forget what has happened,³⁵⁴ we imagine our memory systems to be shapeless and insecure, haphazard and fickle.³⁵⁵ We know that individuals recounting the past are notoriously prone to inaccuracy,³⁵⁶ with a tendency to conflate past events and even retrospectively to imagine that certain things happened and other things never did.³⁵⁷ Impeded by what Paul Ricoeur in his vast study of memory and history calls “the vicissitudes of the exercise of memory,”³⁵⁸ we do not recall in a precisely linear progression, nor do we enjoy a crystalline transmission of the texture and sequence of

analyzing “the chemistry and design of the recording head of a tape recorder and a cassette of magnetic tape.” *Id.* But one cannot, merely through such study, predict the message on the tape without playing it! *Id.*

354. See Sarat, *supra* note 82, at 307 (contrasting human and animal recall and the rebarbative capacity of the human past to disturb calm in later moments); see also John McCrone, *Reasons to Forget: Scientists Count the Ways We Get It Wrong*, THE TIMES LITERARY SUPPLEMENT, Jan. 30, 2004, at 3 (noting that animals make fully intelligent responses informed by their past experiences, but have “no power to roam their memory banks ‘offline’”).

355. See Inga Markovits, *Selective Memory: How the Law Affects What We Remember and Forget About the Past—The Case of East Germany*, 35 LAW & SOC’Y REV. 513 (2001) (contrasting public memory and personal memory). The condition known as antegrade amnesia denotes the inability to store new memories. SHENK, *supra* note 353, at 47. In this sense, Halbwachs may have thought of collective memory as a kind of social “confirmation” of the poor memories of individuals.

356. And this inattention may be quite volitional. See David Middleton & Derek Edwards, *Conversational Remembering: A Social Psychological Approach*, in COLLECTIVE REMEMBERING, *supra* note 79, at 23 (observing that, within the “pragmatics” of conversation, individuals have a “rare” concern for accurate and dispassionate accuracy, which in turn may simply comprise one of a variety of claims or positions to which talk about the past might be oriented). Middleton and Edwards discuss a classic study of the congressional testimony of convicted Watergate conspirator John Dean to illustrate the absence of verbatim recall, the sense of “gist” that predominates in personal recollection. The study of Dean’s testimony (which was compared with President Nixon’s subsequently published transcripts of conversations taped in the Oval Office) found a “repisodic effect,” an ability to recall the overall nature and implications of a repeated series of events despite “lots of gross errors of recall.” *Id.* at 36–37. A patchwork of “gross errors” covers a “deeper level” at which “he is right.” *Id.* More darkly, Lawrence Douglas describes how the Demjanjuk trial “volatilized memory.” DOUGLAS, *supra* note 292, at 212. It exposed memory’s susceptibility to suggestion and misidentification, “unintentionally inviting the [Holocaust] negationists to attack the larger truths in the survivor narratives.” *Id.* Indeed, as Douglas notes, there was an obvious linkage made at the trial court level between the accuracy of the identifications and the veracity of memories of the camp. *Id.*

357. See EDMUND BLAIR BOLLES, REMEMBERING AND FORGETTING: AN INQUIRY INTO THE NATURE OF MEMORY 83 (1988) (suggesting, *pace* Halbwachs, that we tend to believe our own construction of the past); see also RICHARD J. McNALLY, REMEMBERING TRAUMA 42 (2003) (noting that people sometimes have problems of “reality monitoring,” an uncertainty as to whether an event they remember actually happened—that is, came from “perception”—or was merely a dream or fantasy).

358. RICOEUR, *supra* note 7, at 57, arguing that if the exercise of memory is its use, “yet use includes the possibility of abuse,” what this philosopher labels “bad ‘mimetics.’” Throughout this recent work, Ricoeur is troubled by memory’s vulnerability, “which results from the relation between the absence of the thing remembered and its presence in the mode of representation.” *Id.* at 57–58.

past events.³⁵⁹ Our power over our recollections seems at best intermittent. We lose the strong impression of events we would like to remember and have insidious and often traumatic recall of unpleasant events. Much of our memory is latent, and seems to require a powerful catalyst (such as a visit to an old childhood neighborhood) to unleash a Proustian cascade of supposedly forgotten people and events.³⁶⁰ So we would likely conjecture that our individual memory systems respond to randomized impulses, and must be quite dissimilar to the managed and highly processed formats of public memory.³⁶¹

This sense of ourselves and of our memory systems is not wrong, but it is misaligned. For individuals (and, analogically, for official memory), the past is not a projection of events on an internal videographic screen, but is itself a creative, constructed process.³⁶² There is an executive program for memory, but it is not one that plays the traces of the past in our heads as though they were videotapes,³⁶³ and there is no searchable database of every memory trace we have ever laid.³⁶⁴ The most fundamental property of individual memory is that it successively cannibalizes itself in allowing us only to remember the memory of each prior memory of the original event. Thus, when a memory is constructed, it is the *construct* that we activate when we

359. See BOLLES, *supra* note 357, at 72 (observing that memory, hostage to subjective organization, processes the past “according to our understanding of what happened, not according to the way something really occurred”); see also Henry L. Roediger III et al., *Remembering, Knowing, and Reconstructing the Past*, 30 THE PSYCHOLOGY OF LEARNING AND MOTIVATION 97, 100 (1993) (noting how recall attempts by students reading a short story featured “many omissions, alterations of meaning, and occasional additions”); see also LOWENTHAL, *supra* note 319, at 194 (discussing how the hierarchy of what is remembered is in continual flux, in a process of distillation, distortion, and transformation of the past, “accommodating things . . . to the needs of the present”).

360. See McNALLY, *supra* note 357, at 40 (“All else being equal, we are more likely to recall something when the context of remembering resembles the context of encoding.”).

361. See Markovits, *supra* note 355, at 513 (postulating a haphazard behavior pattern for individual memory).

362. See BOLLES, *supra* note 357, at xi (indicating that there is no “storehouse of information about the past anywhere in our brain”); see also *supra* note 353 (discussing the impossibility of “localizing” memory in the brain). The nature of the construction that takes place is complex, but includes a re-scripting to fit with our present views and needs, the distorting influence of our present knowledge and egocentric biases that enhance the role of the self in recollected events; Schacter, *supra* note 353, at 7 (referring to memory’s curious blending of limitations and pervasiveness as its “fragile power”); Daniel L. Schacter, *The Seven Sins of Memory* 138–39 (2001) [hereinafter Schacter, *The Seven Sins*].

363. See Shenk, *supra* note 353, at 35 (noting that autobiographical recollection is a “reconstructive, not a reproductive, process”).

364. See BOLLES, *supra* note 357, at 83 (in a different metaphorical vein, suggesting that the remembering mind “does not consult some file cabinet to check a dossier containing a fixed truth”); see also Schacter, *The Seven Sins*, *supra* note 362, at 9 (emphasizing that we do not record experiences as if memory were a camera, but rather through a process of extraction of key elements, recreation, and reconstruction). The metaphorical chain includes lockboxes and warehouses, and has some claim to conceptual origin in Augustine’s *Confessions*. Ricoeur, *supra* note 7, at 98 (describing Augustine’s metaphors of the “spacious palace” of memory, the “great storehouse” of the memory, and the “vast cloisters” of memory, from which memories are “brought out and called back again when they are needed”).

attempt recall, not the event itself.³⁶⁵ Individual memory is not pure recall, and despite its long evolutionary gestation, as David Shenk explains in his acclaimed study of Alzheimer's disease, it retains a "built-in fuzziness."³⁶⁶ These characteristics are vividly demonstrated by the functioning of our *episodic* memory, the memory we hold of repeated similar past events. Someone who takes many airline flights, for example, will have a composite retrospective impression of such flights, but not typically a strong memory of any single flight. A person who rarely flies, or who has only taken a single airline flight, will retain a much more specific (episodic) memory of that more rare event.³⁶⁷ And just as official public memory serves the teleological purposes of the present and future, so our individual recollections of our personal pasts reflect the present preoccupations of our lives, including the generation of our concept of self.³⁶⁸ Indeed, research has shown that we remember ourselves in the past *as we are now*.³⁶⁹

None of this should be surprising. Like the work of official memory, the prime function of individual memory is, to borrow the unapologetically scatological imagery of one writer, to flush and void.³⁷⁰ This metabolic feature of the human brain is indispensable to sane life functioning.³⁷¹ The burden of carrying all of our memories in

365. See RICOEUR, *supra* note 7, at 76 (discussing the constructive process of memory in the context of the work of Jean Piaget). In John McCrone's description of current scientific understanding, the brain continually reshuffles its connection patterns for the construction of memory, a "sound design principle" if one thinks of the brain as "evolved for the efficient processing of current experience rather than for the preservation of a faithful record of the past." McCrone, *supra* note 354, at 3. In McCrone's paradigm, all human memory becomes a struggle against true brain function (and, in this, he comes rather close to the argument that human recollection is an annoying anti-evolutionary surplusage).

366. SHENK, *supra* note 353, at 56–57 (describing the brain's innate fuzziness as a "tendency to regularly forget, repress, and distort information and experience"); see also HALBWACHS, *THE COLLECTIVE MEMORY*, *supra* note 9, at 70 (noting the habit of recalling past events "in organized sets").

367. McNALLY, *supra* note 357, at 35–36 (using airplane flights as a model for the "reconstructive character of autobiographical memory"). In contrast to episodic memory of remembered events, "semantic" memory encodes factual information (for example, that John F. Kennedy was the thirty-fifth President of the United States), with no associated recollection of how or when that memory was acquired. See SHENK, *supra* note 353, at 48 (noting that semantic facts are "our facts about the world").

368. See McNALLY, *supra* note 357, at 38 (analyzing a study in which 48-year-old men were asked to reflect on their self-concepts as teenagers). The results indicate a disconcerting inability to dispense with the self-concepts in existence at a later stage in life. McNally notes that the study "can make us despair about remembering anything accurately about our past" but recognizes that we retain a certain fidelity to the "essence" or "gist" of past experiences, particularly those "having personal, emotional significance" (emphasis added). *Id.* at 38–39.

369. See BOLLES, *supra* note 357, at 83 (discussing the persistence of our current view of self when we look back to the past).

370. See HITCHENS, *supra* note 7, at 85 (suggesting that an inability to flush and void memory would produce idiot savantism; see *infra* note 371 for a literary illustration of this condition); see also SCHACTER, *THE SEVEN SINS*, *supra* note 362, at 4 (noting that "[t]ransience is a basic feature of memory").

371. A system that failed to flush memory "would likely result in mass confusion produced by an incessant coming to mind of numerous competing traces." SCHACTER, *THE SEVEN SINS*, *supra* note 362, at 190 (discussing example of a Russian mnemonist whose

instantly accessible fashion would be intolerable, so individual memory is constantly emptying its contents. In fact, modern human memory finds itself most adapted to higher order judgmental operations and is no longer merely (as it was in earlier times) a repository of rote learning.³⁷² The ability to flush away most information allows a kind of mental precipitate to form, which comprises our rationality, our capacity to form general impressions, and our capacity to extrapolate from those to judgment.³⁷³ Ordinary individual memory, in a word, is constructed.

But too much can be made of these processual similarities between individual and official public memory. When Halbwachs wrote of an affective community,³⁷⁴ he unconsciously signaled that individual memory has an emotional dimension, an affectivity, that is precisely the *unconstructed* capacity to remember the emotional resonance (although not a detailed forensic picture) of a past event. We remember, in effect, *how we felt* at the time of a particular incident or series of incidents. Details may evaporate (as memory's evacuative properties decree), but the power of the affective memory does not. In effect, we have an instinctive antipathy or attraction when

exceptional memory for details caused him to be unable to function at the abstract level). To take an extreme example of dysfunctional memory, Jorge Luis Borges's character, Funes the Memorious, was a Uruguayan who, as a result of a fall from a horse at the age of nineteen, finds that henceforth he can forget nothing.

We, in a glance, perceive three wine glasses on the table; Funes saw all the shoots, clusters, and grapes of the vine. He remembered the shapes of the clouds in the south at dawn on the 30th of April of 1882, and he could compare them in his recollection with the marbled grain in the design of a leather-bound book he had seen only once, and with the lines of the spray which an oar raised in the Rio Negro on the eve of the battle of Quebracho In effect, Funes not only remembered every leaf on every tree of every wood, but every one of the times he had perceived or imagined it. He determined to reduce all of his experiences to some seventy thousand recollections, which he would later define numerically. Two considerations dissuaded him: the thought that the task was interminable and the thought that it was useless. He knew that at the hour of his death he would scarcely have finished classifying even all the memories of his childhood

JORGE LOUIS BORGES, *Funes the Memorious* [*Funes el Memorioso*], in *FICCIONES* 112, 114 (Anthony Kerrigan trans., 1962).

372. As Shenk points out, modern society is "awash in external memory," where "Post-It notes, steno notebooks, Palm Pilots, libraries, and the Internet" have superseded the giant mnemonic devices of past centuries (such as memory palaces). SHENK, *supra* note 353, at 232. The modern brain, in this understanding, is an organ of "synthesis," melding together ideas, emotional impressions, rhetorical flair, and amusement. *See id.*; *see also* SCHACTER, *THE SEVEN SINS*, *supra* note 362, at 192 (regarding memory for "gist information" as essential to categorization and comprehension).

373. *See* SHENK, *supra* note 353, at 60 (intuiting that "[t]he brain climinates trees in order to make sense of, and remember, the forest[:] . . . [f]orgetting is what makes us so smart."); *see also* McCrone, *supra* note 354, at 3 (arguing that our brains are evolved "not for retrospection and contemplation but for intention and anticipation—for looking forwards rather than backwards, outwards rather than inwards, for being selective rather than merely retentive"; recollection, in other words, ought to be called an "anticipatory" image).

374. HALBWACHS, *THE COLLECTIVE MEMORY*, *supra* uote 9, at 30–33.

presented with the aggregations of the past.³⁷⁵ Here, rather than in Halbwachs's unresolved distinction between the public memories of the State and sub-State societal groups, lies the point where individual memory reaches an ineluctable conceptual separation from the kind of processed public memory represented by official memory and, in truth, by Halbwachs's collective memory.

How strong is affective memory? New scientific scholarship attests to the intuitively persuasive, but hitherto frequently disputed, idea that memories of past trauma are no less persistent than memory of ordinary events. In fact, consistent with the idea that emotional or affective memory is the *most* adhesive, a recent study by a Harvard Medical School professor demonstrates that stress and trauma do not impair memory of the central features of the stressful or traumatic experience—they *strengthen it*.³⁷⁶ Impairment, in fact, provides a framing of irony to this analysis, since the study concludes that trauma survivors, contrary to what one would expect from the normal evacuative properties of individual memory, have an impaired ability *to forget* the central features of disturbing events.³⁷⁷ The evidence from Holocaust survivors, for example, suggests a capacity to offer narratives of the salient details of their incarceration.³⁷⁸ The study concludes that a painful capacity for remembering is the price we pay for memory mechanisms that allow us to remember dangers, to survive, and to reproduce.³⁷⁹ Thus, the study apparently abandons the Freudian construct of deep repression, which has sustained the recovered memory branch of the psychotherapy industry for decades.³⁸⁰ Freud posited the notion of disturbing memories

375. See BOLLES, *supra* note 357, at 34 (describing the term *affective* memory as an erudite synonym for emotional memory). Notice, however, that invocation of emotional memory does not require a cognate condition in the present: “[T]he memory is, in fact, capable of recalling joy without being joyful, and sadness without being sad.” RICOEUR, *supra* note 7, at 99 (describing the memory of “passions of the soul”); see also McNALLY, *supra* note 357, at 62 (noting that, to the contrary, “what is difficult to imagine is how something as maladaptive as a mechanism for repressing, dissociating, or otherwise forgetting trauma could possibly have evolved throughout the course of natural history”).

376. See McNALLY, *supra* note 357, at 62. Although McNally emphasizes that a stronger memory of the “central features” of the stressful experience may persist at the expense of “peripheral details,” this selective elimination is consistent with the findings, noted earlier, that one of the most pervasive properties of human memory is an ongoing and irreversible evacuation of its contents. See *supra* note 371 and accompanying text; see also SCHACTER, THE SEVEN SINS, *supra* note 362, at 124 (demonstrating inaccuracies behind the epidemic of “false memories” that developed in the 1990s). Schacter also explores the intense relationship between emotion and memory, citing numerous experiments indicating that emotionally charged incidents are better remembered because of the “boost” they receive at the moment when the memory is born. *Id.* at 163–64 (confirming McNally’s notion of a dichotomy between central focus and peripheral details).

377. See McNALLY, *supra* note 357, at 62. Thus, “trauma does not block the formation of narrative memory.” *Id.* at 180.

378. See *id.* (citing studies by Lawrence Langer).

379. See *id.* at 62 (considering that this phenomenon may be a product of natural selection, and a more likely outcome than a “maladaptive” capacity to repress trauma).

380. McNally’s view on the phenomenon of repression is not so much that it is psychological folklore, but that it is a potential hypothesis that remains to be proven. *Id.* at 77 (noting that “[f]rom an evolutionary perspective . . . it is difficult to imagine how a repression

locked up by a censor-jailer, memories that stayed out of conscious thought but which were not destroyed.³⁸¹ The emotional quotient of memory, it turns out, is never suppressed.

E. Conclusion

Halbwachs insists that even individual memory is structured through social frameworks, so that unofficial public memory (or, in Halbwachsian usage, collective memory) is not a metaphor, but a social reality transmitted and sustained through the conscious efforts and institutions of the group.³⁸² But Halbwachs does not explicitly account for a conceptual distinction—the affective distinction—that crucially separates official public memory from the public memory of sub-State societal groups. Without the affective distinction, the constructive processes (as opposed to the teleological purpose) of official public memory, and the more decentralized public memory of groups, would differ primarily in degree. Halbwachs's intertwining of individual and public (collective) memory, localized in small community activity such as alumni groups, is a serious attempt to integrate individual lived experience into the realm of

mechanism that undermines memory for significant events could have evolved.”). For a countering argument, but unsupported by the kind of evidence McNally demands, see JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* 1 (1992) (concluding that “[t]he ordinary response to atrocities is to banish them” from memory). See also Victor Barall, *Thanks for the Memories: Criminal Law and the Psychology of Memory*, 59 *BROOK. L. REV.* 1473 (1994) (reviewing HARRY N. MACLEAN, *ONCE UPON A TIME: A TRUE STORY OF MEMORY, MURDER, AND THE LAW* (1993), (accepting a scientific dichotomization between “normal” and “repressed” memories and that the mind conceals traumatic incidents from itself within the “unconscious”).

381. See MARGALIT, *supra* note 7, at 2–3 (discussing the formative modern metaphor of “Freud’s prison”). Freudian psychotherapy traded on the ability—regarded as a healing process—to bring repressed memories to the conscious level. See *id.* at 3 (noting that repressed memories, in Freudian theory, are subversive and cause dysfunctionality). The parallels with the work of official public memory cannot be overlooked, although the degrading of confidence in Freudian theory warns us not to make similarly confident assertions that communal memories are any more susceptible to Freudian intervention. Margalit, a skeptic concerning the power of memory to provoke societal healing, mentions the example of French President Charles de Gaulle as an archetype of the “public” censor-jailer, artfully concealing the collaborationist history of Vichy France behind the scrim of a post-war refounded Republic, and therefore causing a neurotic backlash in French civil society after the war. See *id.* at 5. For Germany, the hegemonic rituals of regret and remorse produced (and lately have again produced) a contestative focus on Germans as victims of Allied reprisals against Nazism, including the horrific consequences of the Allied razing of Dresden and other German cities. See *To Make Amends, British Give Dresden a Cross, 59 Years Later*, *N.Y. TIMES*, June 23, 2004, at A8 (mentioning calls by German opposition lawmakers for a national memorial day for German civilians killed in Allied bombing raids); see also JÖRG FRIEDRICH, *DER BRAND: DEUTSCHLAND IM BOMBENKRIEG 1940–1945* [The Fire: Germany During the Bombardment 1940–1945] (2003) (condemning the Allied attacks as war crimes, and using a linguistic register that mimics the idiom of the Holocaust, e.g., describing densely populated urban areas as a *Vernichtungsraum*, “extermination space”). But see FREDERICK TAYLOR, *DRESDEN: TUESDAY 13 FEBRUARY 1945* (2004) (arguing that, as Germany’s seventh largest city, Dresden was a legitimate target with an industrial center contributing to the war effort).

382. See HALBWACHS, *ON COLLECTIVE MEMORY*, *supra* note 9, at 22 (insisting that Halbwachs’s collective memory does not imply “some mystical group mind”).

public memory, but does not, by itself, offer a powerful conceptual limitation of official public memory. The final Part of this Article, therefore, will seek to use the insights of literature, and in particular of Marcel Proust's great novel of time and memory, to reveal affective memory as an autonomous condition of lived experience which defines and limits the reach of official public memory. Understood in this way, official memory intrinsically confronts a permanent potential of contestation.

V. A PROTECTED COGNITIVE SPACE FOR INDIVIDUAL MEMORY: INTEGRATING MARCEL PROUST'S THEORY OF TRANSCENDENCE

A. Introduction

The search for an authentic epistemology of public memory, therefore, takes us beyond the managed imposture of official public memory, the imperfect *chronique* of history, and the incompleteness of Maurice Halbwachs's conception of a public memory founded in the lived experience of individuals. These modes of public memory offer insight into how the phenomenon of the past is managed, interpreted, recorded, altered, embellished, remembered, or forgotten by governments, by sub-State societal groups, and by professional historians. But, in the context of searching for a public memory that privileges a conceptual space for individual memory (and is therefore authentic where constructed memory cannot be), this Article has exposed important weaknesses in all three modes. Official public memory is a rational governmental act, backed by the centrality of law and policy that consecrates certain claims about the State's past as a dominant narrative for the State and its inhabitants. For individuals, it provides contextual grounding for their lives as members of the State community (as demonstrated in the empirical study of Austria), but this kind of memory serves the larger interests of social control and State endurance and resists the specific personalization or individualization of lived personal memory.

History, also, presents a depersonalized, often universalized version of the past, but its claims to unremitting objectivity and truth, which might have provided a compelling counter-discourse to officially constructed memory, are diminished by the interpretive fallacy and by the ontological improbability of a comprehensive *chronique*. Halbwachs, who intuited that a genuine memory can be socialized through collective sub-State milieus, was nevertheless unable to provide conceptual boundaries to ensure that localized public memory, formed from the social frameworks that exist in each individual's life, can exist free from encroachment by the master framework (as it were) of State memory.

The search for a personalized conception of memory, therefore, is a search for a theory of public memory that is cognitively (empirically) protected from the reach of State power: *this theory of public memory would set a conceptual limit to the apparent power of official public memory*. The uniqueness of a personalized conception of memory, noted particularly in relation to the vulnerabilities of Halbwachs's theory, lies in its *affectivity*, its capacity to experience the emotional (rather than the merely iterative or commemorative) resonance of the past. The hermeneutic challenge of isolating this unreplacable feature of individual lived memory could be tackled in a

number of ways: perhaps through biology³⁸³ or through philosophy, or even by application of logic. In this closing Part of this Article, however, I rely upon the most humanistic of resources, the practice of literature, and the most adroit practitioner of literary memory, Marcel Proust, to articulate a concept of public memory which will be, in effect, a theory of the integrity of affective memory (in Proustian terms, transcendent memory) as a permanent counterpoint to official memory.³⁸⁴

B. Proustian Inspiration

Marcel Proust is memory's literary icon,³⁸⁵ and memory is the afflatus of Proust's literary masterpiece *In Search of Lost Time*.³⁸⁶ Proust, according to his most

383. One could, for example, explore the physiological basis for intensified emotional memory as Daniel Schacter has done in his studies of the role of the amygdala, a small almond-shaped structure in the brain that appears to play a significant role in the neural systemization of recalling trauma. See SCHACTER, *THE SEVEN SINS*, *supra* note 362, at 178; see also SCHACTER, *supra* note 353, at 214 (concluding that "the effects of emotional conditioning depend on the amygdala, and are processed separately from explicit knowledge about what happened during the conditioning episode"); JOSEPH LEDOUX, *SYNAPTIC SELF: HOW OUR BRAINS BECOME WHO WE ARE* 213–21 (2002) (exploring role of amygdala circuits in fear conditioning). Interestingly, Schacter emphasizes the adaptive nature of the amygdala's function, noting that a persistent memory of emotionally arousing experiences—traumatic experiences—boosts our chances of avoiding recurrences. See SCHACTER, *THE SEVEN SINS*, *supra* note 362, at 187.

384. In this respect, to the extent that any kind of hermeneutic bracketing is possible or desirable, this Article falls within the first of the two tropes of the law and literature movement identified by Bruce Rockwood, namely, the study of specific texts and authors "for the light they shed on the nature of the law and its impact on our lives." Bruce L. Rockwood, *The Good, The Bad, and the Ironic: Two Views on Law and Literature*, 8 *YALE J.L. & HUMAN.* 533, 533 (1996) (reviewing DANIEL J. KORNSTEIN, *KILL ALL THE LAWYERS? SHAKESPEARE'S LEGAL APPEAL* (1994) and IAN WARD, *LAW AND LITERATURE: POSSIBILITIES AND PERSPECTIVES* (1995)). The other trope Rockwood identifies is engagement in the "systematic introspection" required to situate law and literature as a continuation of modern and postmodern intellectual history. *Id.*

385. Edmund Blair Bolles appreciates that Proust's style and setting may be uncomfortable for a modern readership (unless distilled through the popularizing skills of a de Botton, see *infra* note 387, but concludes that "people interested in the relation between *memory* and *life* should at least be aware of Proust's epic." BOLLES, *supra* note 357, at 277 (emphasis added).

386. See *supra* note 10 (explaining editions cited in this Article). *In Search of Lost Time* is an extended retrospective narrative (written in the first person) that recounts how a young, upwardly-mobile ingénue, a child of the commercial bourgeoisie, achieves his ambition to be admitted to the elite aristocratic circles of *Belle Époque* (turn-of-the-century) France. As he reaches his self-determined pinnacle (apparently in middle-age), the old aristocratic order is collapsing with the advent of world war. Throughout the *Search*, French aristocratic society is experienced as a rather ridiculous affair, and the tone of the work is unrelentingly ironic. To salvage something from the wreckage, the hero resolves to create a work of art (a novel), something that has eluded him during the years of his social ambitions. The finished novel, it would seem, is the *Search* itself. For Proust's narrative devices, see *infra* note 394 (discussing the use of a narrating intermediary). The monumentality of Proust's work has naturally provoked its quota of parody. Of particular note is Monty Python's "All-England Summarize Proust Competition," whose winning entry ("Marcel becomes a writer") could not be more

industrious modern critic, Jean-Yves Tadié, lived his life twice, once through existence and once more through the “resurrection” of memory.³⁸⁷ The task Proust set for himself, the recapturing of lost time,³⁸⁸ could scarcely be more ineffable or more enigmatic. Yosef Hayim Yerushalmi makes a brief, startling reference to Proust in the introduction to his study of Jewish public memory, suggesting that something within the Proustian spectacle of memory is deeply unsettling. Thus, Yerushalmi disparages the blandness of translator C. K. Scott Moncrieff’s rendering of Proust’s title as “*Remembrance of Things Past*” (which Moncrieff borrowed from a Shakespearean sonnet³⁸⁹) because the true meaning of Proust’s vast project is a “darker and more anxious search for a time that has been lost.”³⁹⁰

Yerushalmi correctly gauges the complexity of Proustian memory, a search which pits simple memory, the forensic recovery of events, against authentic (and frequently uncomfortable) affective memory. Although one of the divertissements of Moncrieff’s translation (and that of his cotranslators Andreas Mayor and Terence Kilmartin) is to watch Proust’s architectonic prose mutating into a mannered, post-Victorian gingerbread style of English,³⁹¹ Moncrieff and his collaborators sometimes step falsely, opening up a disjuncture between Proust’s more richly ironic intention and the translator’s surface meaning. For example, early in the final book of the *Search*, *Time*

laconic. See Ellison, *supra* note 24, at 202–03 (contending that the Monty Python group uses the signifier “Proust” to represent all that is high and great in an alienating literary tradition). See also ALAIN DE BOTTON, *HOW PROUST CAN CHANGE YOUR LIFE* 34–35 (1997) (explaining the inspiration behind the competition as being the suspicion that Proust, who could dedicate multiple pages of narrative to the simple act of falling asleep, could be ridiculed as a literary poseur).

387. See JEAN-YVES TADIÉ, *MARCEL PROUST* 89–90 (Euan Cameron trans., Viking 2000) (1996) (recounting how this existential cycle of lived experience and recollection was detectable in Proust’s earlier writings).

388. See MALCOLM BOWIE, *PROUST AMONG THE STARS* 30 (1998) (“From first word to last, Proust’s novel is about time.”).

389. “When to the sessions of sweet silent thought/I summon up remembrance of things past.” William Shakespeare, *Sonnet 30*, in *CAMBRIDGE SCHOOL, SHAKESPEARE, THE SONNETS* 39 (Rex Gibson ed., 1997). But see *Proust in Translation: Love by Osmosis*, *ECONOMIST*, Oct. 5, 2002, at 81 (noting that Proust himself disliked the original English title and that the phrase *la recherche* should signify something that is quasi-scientific and experimental, distant from the comfortable English “remembering”).

390. YERUSHALMI, *supra* note 78, at 5 (“We ourselves are periodically aware that memory is among the most fragile and capricious of our faculties”). The Moncrieff/Enright/Mayor translations, hitherto the benchmark for Proust in English, have recently been superseded (or supplemented, depending on one’s biases) by a new Penguin translation, published in September 2002, which features six different translators, each of whom tackles one of the books of the *Search*. This new “collegial” translation has received a mixed critical reception, but its recency (and proclaimed fidelity to the prestigious Pléiade edition, see *infra* note 393), commend it as the preferred translation for the present Article. As a matter of general observation, based on close comparison of the Moncrieff/Mayor/Kilmartin and Penguin texts, the new translators are determined to move Proust into a mode of unadorned contemporary directness, freed from the elaborate declamatory style of their predecessors.

391. See Robert Alter, *The Sweet Cheat Well and Truly Gone*, *TIMES LITERARY SUPPLEMENT*, Oct. 25, 2002, at 11 (mentioning the gingerbread characterization); see also BOLLES, *supra* note 357, at 277 (describing reading Proust as like trying to live for a season on a diet of the world’s most exquisite chocolate).

Regained,³⁹² the Narrator³⁹³ returns to scenes of his childhood (at the village of Combray³⁹⁴) but finds himself distressed by the lack of “that contiguity from which is born, even before we have perceived it, the immediate, delicious and total deflagration of memory.”³⁹⁵ To “deflagrate” memory, in its English denotation, would be to

392. The final book of the *Search* was originally “*Le Temps Retrouvé*.” The title as rendered in the new Penguin translation, see *supra* note 10, *Finding Time Again*, has been described as “perplexing,” given its locutional correspondence to the expression “finding time to read the paper.” Alter, *supra* note 391, at 12. But the Penguin edition has the signal advantage of being based on the highly prestigious and authoritative Pléiade edition of *A la recherche du temps perdu*, produced from 1987 to 1989 under the editorship of the world’s most accomplished Proustophile, Jean-Yves Tadié. See André Aciman, *Proust Regained*, N.Y. REV. OF BOOKS, July 18, 2002, at 58 (discussing Tadié’s apparent endorsement of the Penguin translation). Unless otherwise indicated (as in the present footnote, for example), the translations provided in this Part are from the new Penguin edition. (A copyright note: U.S. copyright law allowed Random House to renew its copyright on the last three parts of the Montcrieff-Mayor-Kilmartin translation, including *Time Regained*; accordingly, I am using the Penguin translation of the last two volumes of *In Search of Lost Time* as published in the United Kingdom and Canada, and these translations will not be published in the United States until 2019. See Peter Brooks, *The Shape of Time*, N.Y. TIMES BOOK REV., Jan. 25, 2004, at 11 (discussing this copyright issue)).

393. The voice of Proust’s novel is an intermediary who is described by critics (though not by Proust in the novel itself) as the “Narrator.” The device is deployed so expertly that the character of the Narrator appears to “morph” seamlessly from the small child of the early scenes in Combray (his childhood vacation home) to the social ingénue of the middle sections, to the (apparently) middle-aged adult in the climactic final banquet scene surveying the effects time has wrought on his contemporaries and elders. See *infra* note 423 and accompanying text. That the Narrator is a projection of the mind of Marcel Proust seems inescapable. Indeed, at two points in the novel the Narrator’s name is mentioned as “Marcel,” a rupture of fourth wall conventions that the author cannot have intended to be accidental. See ROGER SHATTUCK, *PROUST’S WAY: A FIELD GUIDE TO IN SEARCH OF LOST TIME* 32–33 (2000) (suggesting that the Narrator is “Marcel” who has grown old and become a writer and who tells his story in roughly chronological order). Shattuck uses an invented composite, “Proust-Marcel,” indicating the apparent intrusion of the “author” Proust into the artifice of his novel, to explain the excursus on transcendent memory that stands at the core of the final volume of the *Search* (and that is the concern of the present Article). See *id.* at 132; see also INGE CROSMAN WIMMERS, *PROUST AND EMOTION: THE IMPORTANCE OF AFFECT IN A LA RECHERCHE DU TEMPS PERDU* 176 (2003) (describing the device of the Narrator as a “flexible poetics” which allows Proust at the same time “to engage in fabulation and to speak in his own voice when it [comes] to sharing insights of universal import”); see also WHITE, *supra* note 24, at 153 (describing Proust as a literary “cyclops,” “a creature with a single great ‘I’ at the center of his consciousness,” a sovereign intellect, even if he used the literary device of the Narrator to pretend otherwise).

394. Combray is the fictional village where the Narrator spends childhood vacations with his parents. See SHATTUCK, *supra* note 393, at 30–31 (presenting a glossary of places in the *Search*).

395. MARCEL PROUST, *Time Regained*, in *IN SEARCH OF LOST TIME (VOL. VI)* 2 (Andreas Mayor & Terence Kilmartin trans., Modern Library Edition 1993). Montcrieff died before he could work on the final volume, but his stylistic presence remains in the work of his successor, Andreas Mayor. As part of the Penguin translation team’s quest for authenticity in reflecting Proust’s structure, this passage and several pages of related text now appear in Volume V, *Albertine disparue* (translated into English as *The Fugitive*) of the new Penguin

suddenly and violently burn it—in effect, to obliterate it.³⁹⁶ But Proust (or the Narrator) surely never intends to suggest the literal destruction of memory itself, but rather the destruction or effacement of the *distance* ordinary memory places between us and our experience of the past, its insidious presence as an artifice of the mind that forecloses an authentic “re-experiencing” of lived (past) experience.

Proust, in other words, engages in a “search” not for lost time, as the modern title seems to assure us, but for a way of revivifying or recapturing lost time in a way that is not defeated by the evacuative, distorting, and inauthentic characteristics of ordinary memory.³⁹⁷ Our lives spin past in a series of what English writer A.S. Byatt has called “disjunct sense-impressions,”³⁹⁸ and Proust tries to restore a redeeming sense of consciousness to this experience. This is an early hint of Proust’s later disquisition on an elevated form of memory, which is transcendence (in effect, the surmounting of the weaknesses of ordinary forensic memory). Transcendent memory is (in Proustian terms) fundamentally paratactic, ordering the past into smaller and smaller parts of deepening intensity.³⁹⁹ In contrast, official public memory—and law itself—are hypotactic, seeking the connections and relations to assemble a synthetic common experience.⁴⁰⁰

translation, *see supra* note 392, where the word “deflagration” is rendered rather less tendentiously (and considerably more accurately) as “irruption,” which suggests that memory bursts or breaks into present consciousness. In the new Penguin edition, the text of *The Fugitive* appears in the same bound volume as the fifth volume of the novel, *The Prisoner (La Prisonniere)*. MARCEL PROUST, *The Fugitive*, in *IN SEARCH OF LOST TIME (VOL. 5)* 653 (Peter Collier trans., Penguin Books 2002) [hereinafter PROUST, *The Fugitive*]. For information about the translation choices made in moving the text to the earlier volume, *see Translator’s Introduction to MARCEL PROUST, Finding Time Again*, in *IN SEARCH OF LOST TIME (VOL. 6)* x–xi (Ian Patterson trans., Penguin 2002) [hereinafter, PROUST, *Finding Time Again*].

396. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 523 (2d ed. 1987).

397. Ordinary memory, as discussed in Part IV, is also “constructed” memory. *See supra* text accompanying note 348.

398. BYATT, *supra* note 269, at 31 (expressing, however, a postmodernist resistance to the modernist theme of the constitution of the Self, accompanied by a sense that even great modernists like Proust, Joyce, and Mann exhausted themselves in a vain attempt to transcend the reality that “[w]e are perhaps no more than a series of disjunct sense-impressions, remembered incidents, shifting bits of knowledge, opinions, ideology, and stock responses”). On the other hand, Proust may never have intended such a project of overcoming of (as he saw it) life’s natural disjunctures. Indeed, philosophers are starting to look again at the theoretical/practical distinctions between those who view life as an unfolding narrative (so-called “diachronics”) and those who have no particular tendency (or desire) to scrutinize themselves in strongly narrative terms (the “episodics”). *See. e.g.*, Galen Strawson, *Commentary: A Fallacy of Our Age*, *TIMES LITERARY SUPPLEMENT*, Oct. 15, 2004, at 13–15 (identifying Marcel Proust as fundamentally an “episodic,” whose “remembrances [were] inspired by his [e]pisodicity”).

399. Parataxis is a term of stylistics which refers to a narrative of side-by-side sentences without transition or connections. *See SHATTUCK, supra* note 393, at xv–xvi. Since parataxis is obviously not Proust’s dominant style of writing, *see infra* note 400, the word is used here for potential philosophical implications.

400. Hypotaxis, as a term of stylistics, indicates the kind of complex array of connections and subordinating relations favored in Proust’s writing. *See id.* (noting, however, that Proust does—fleetingly—use parataxis). As the main text seeks to suggest, Proust’s hypotactic writing seems at odds philosophically with his “paratactic” search for deeper and deeper fragments of intensity. On the stylistic meaning of parataxis, *see supra* note 399.

C. Connectivities of Individual and State Memory

In a general sense, Proust's reflections on how individuals assimilate the past correspond closely to his occasional assessments of how States behave in matters of memory. Both the individual and the State, in his view, are engaged in a perennial process of evacuating memories, of simply forgetting their pasts.⁴⁰¹ Time, for the individual, removes both past love and past grief,⁴⁰² and nudges us toward a dulling of our "curiosity" about the past which ultimately discourages questions about things that obsessed us in some earlier incarnation of ourselves.⁴⁰³ Memory, in a phrase, is partner to forgetfulness.⁴⁰⁴

And this benign effacement of the past is also true, in Proustian analysis, of the most apparently dominant and disquieting events of a State's history. Proust does not explicitly suggest that the State is the responsible agent of effacement, but he intuits that there are directive forces, seemingly more powerful than individual memory, which steer social remembering and forgetting. In Proust's sensibility, nations actually "behave to some extent as if they were individuals,"⁴⁰⁵ and while his context is the

401. To borrow a phrase from Proust critic Malcolm Bowie, this may be the "ontological *telos*" of the *Search*. BOWIE, *supra* note 388, at 5 (emphasis in original).

402. See PROUST, *The Fugitive*, *supra* note 395, at 656 (expressing his astonishment that the passage of years can remove all apparent traces of past love and past grief, so that nothing remains of past torture; this result, in Proust's view, is consistent with a world in which everything wears out, and everything perishes). Proust is not suggesting that affective memory is removed, but only that time's arrow is so swift that the impact of past loves and griefs is no longer felt as a continuing imposition on the later present.

403. *Id.*

404. See Jack Jordan, *The Unconscious*, in CAMBRIDGE COMPANION, *supra* note 24, at 100, 110 (citing Proust's own declamation to the same effect).

405. PROUST, *Finding Time Again*, *supra* note 395, at 81. As revealed in the Narrator's often comical obsession with Mme Verdurin's *salon*, Proust rarely ascends to the macrocosmic plane of national or global events. Rather, he is content to reveal the psychological "laws" of humanness through the agency of his dramatis personae. See Harvey Wickham, *The Impuritans*, in PROUST: REVIEWS IN ENGLISH, *supra* note 10, at 128, 131 (postulating, in connection with his treatment of character, that "[Proust] must always have his 'law'"); see also WILLIAM C. CARTER, MARCEL PROUST: A LIFE 74 (2000) (noting how Proust, after making a particularly revealing comment about a character's personality or behavior that the reader might think unique, "defly switches to a pronoun, *one* or *we*, and embraces us all") (emphasis in original); PHYLLIS ROSE, THE YEAR OF READING PROUST: A MEMOIR IN REAL TIME 21 (1997) (observing that Proust is a kind of social researcher, discerning "connective laws" beneath particular examples of behavior). Proust's greatest "law," of course, is his recognition that change comes to all societal structures, or what we might call a law of group entropy. See Georges Lemaitre, *Marcel Proust*, in PROUST: REVIEWS IN ENGLISH, *supra* note 10, at 239–40 (discussing Proust's exacting description of the special characteristics, and eventual decay, of French high society of the *Belle Époque*); see also J.M. COCKING, PROUST: COLLECTED ESSAYS ON THE WRITER AND HIS ART 46 (1982) (reflecting on how Proust's "laws" apply also to the decline and renewal of groups, as the *grand monde* of the French aristocracy became infiltrated by the *bourgeoisie*—represented in Proust's novel by his Narrator). As Cocking notes, Proust drew criticism (from Jean-Paul Sartre, for one) precisely because of his propensity to generalize. See *id.* at 244–45. Sartre, according to Cocker, faulted Proust for espousing a bourgeois conception of a universalized human nature informed by analytical generalization. See *id.* at 245. Nonetheless,

belligerency of nations (in situ, France and Germany), his awareness of an internal logic of national behavior, and the "passion" that feeds that logic,⁴⁰⁶ have broader resonance.⁴⁰⁷ Thus, Dreyfusism, which caused an explosive cleavage in pre-war French society, had by 1916 been "integrated into a range of respectable and normal things."⁴⁰⁸ This integration, moreover, brought with it a moral indifference to the polarities of the cause. The intrinsic goodness or badness of Dreyfusism (or of Dreyfus himself) simply vanished from public debate as the Great War approached: "it was no longer *shocking* . . . [and that] was all that mattered."⁴⁰⁹ In Proust's view, the disappearance of the shock value, of any sense of (or the mattering of) accuracy, effaces memory and means that people simply do not remember whether something was once thought *outré*.⁴¹⁰

Proust is not unaware (at least novelistically) of the great cycles of public history through which individual lives move and by which they are influenced. He writes, ironically and meiotically, of "huge organized agglomerations of individuals which we call nations." PROUST, *Finding Time Again*, *supra*, note 395, at 79. Lest this *aperçu* be dismissed as fatuous, Proust strikes home a telling point: "[The life of a nation] merely repeats on a larger scale the lives of its component cells; and anybody who is incapable of understanding the mystery, the reactions, the laws of such entities will utter nothing but empty words when he talks about the struggle between nations." *Id.* To adapt a phrase, the collectivity recapitulates the individuality.

406. PROUST, *Finding Time Again*, *supra* note 395, at 81 (comparing national disputes to domestic or amorous quarrels).

407. Not that Proust is unaware of the grotesqueries of patriotism and the difficulty of securing a "detachment" from one's country's cause. *See id.* at 82. The Narrator associates his own bitter personal experiences of betrayal and falsehood with the deceptions of States, and reasons that it is adolescent innocence that induces us to take people (and countries) at their word. *See id.* Nonetheless, patriotism is resilient because "in all countries most of the people are silly," capable of defending, "passionately and foolishly, an unjust cause." *Id.* at 82–83. Proust, once again, establishes these opinions through the medium of a character, here Baron de Charlus, an idiosyncratic aristocrat who is (irrationally) angered by the unquestioning optimism of his French countrymen in underestimating Germany's strength in World War I. *See id.* at 83.

408. *Id.* at 33. The Dreyfus Affair, which straddled the end of the nineteenth century and the beginning of the twentieth, concerned a false allegation against a French military officer, Captain Alfred Dreyfus, who was Jewish, that he had disclosed national secrets to the Germans. It led to the famous newspaper manifesto of the writer Emile Zola, which began with the resonant declaration, *J'Accuse!* For background to the Dreyfus Affair, *see* Cynthia Gamble, *From Belle Époque to First World War: The Social Panorama*, in CAMBRIDGE COMPANION, *supra* note 24, at 7, 19–20 (describing the political significance of the affair in turn-of-the-century France); *see also* WHITE, *supra* note 24, at 10–13 (noting that Proust's defense of Dreyfus angered conservative, Catholic, pro-army aristocrats); TADIÉ, *supra* note 387, at 300–301 (assessing Proust's reaction to the affair in the context of his social circles). On Zola's intervention, *see* William Paulson, *Intellectuals*, in THE CAMBRIDGE COMPANION TO MODERN FRENCH CULTURE 145, 146–147 (Nicholas Hewitt ed., 2003) (discussing how the Dreyfus affair made the word "intellectual" a common usage associated with principled intervention in public life by writers, scholars, and other elite observers). Notice, incidentally, how comfortable Proust was with references to external (and real) political events. *See* HITCHENS, *supra* note 7, at xvi (bracketing Proust with Tolstoy, Dickens, and Nabokov in having a capacity to assimilate a real political milieu into storytelling).

409. PROUST, *Finding Time Again*, *supra* note 395, at 34 (emphasis in original).

410. Obviously, official public memory takes advantage of the evacuative properties of individual memory, most especially of memory stretched over several generations, to alter consciousness of the past. In this perception, people in a given society (according to Proust) lack

Proust does grant the State one critical attribute that distorts the symmetry he usually observes between public and individual responses to the departing past. He notices that the individual and the State have strikingly different capacities to absorb the broader significance of major events. In what might appear to be a delicate irony for the arguments made in this Article, Proust seems to imply that the State, precisely because (and not *despite the fact that*) it is an impersonal collectivity, can actually take on a sense of *feeling* that is denied to the individual.⁴¹¹ Proust speaks of a “reciprocal process” which “multiplies whatever concerns our own well-being, and divides by such a formidable number whatever does not concern us, that the death of millions of unknown people hardly troubles us, and we find it scarcely as disagreeable as a cold draught.”⁴¹² And, in this precise phrasing, Proust grasps the compelled intermediation that affects (or afflicts) the citizens of any State.⁴¹³ Proust’s statement of this psychological law is rendered, in the conventions of the *Search*, through an idiosyncratized vignette of the socialite and *maîtresse du salon*, Madame Verdurin, savoring her breakfast croissant (a wartime exception baked specially for her), while reading in her newspaper of the fate of the sunken passenger ship *Lusitania* “[a]s she dipped [the croissant] in her coffee, and flicked her newspaper with one hand so that it would stay open without her having to remove her other hand from the croissant she was soaking.”⁴¹⁴

clarity about the timing and significance of past historical events. Such people are, in Proustian parlance, “inattentive and forgetful,” PROUST, *Finding Time Again*, *supra* note 395, at 34, and are likely to imagine that events are placed much further in the past than they actually are. *See id.* Proust, indeed, suggests that the pre-war days were perceived in his time as separated from the era of the First World War by a temporal chasm resembling a geological age. *See id.* The dustbins of history, then, are capacious, and for Proust’s compeers even the notorious Dreyfus Affair, *see supra* note 408, had faded as the *sujet de salon* even for that enduring socialite and indfatigable *maîtresse de salon*, Madam Verdurin, as her importunities to her society guests change from “*Do come . . . to talk about the [Dreyfus] [a]ffair*” to “*Do come in at five o’clock to talk about the war.*” PROUST, *Finding Time Again*, *supra* note 395, at 37 (emphasis added). For background to the clite institution of the *salon*, *see* ROGER SHATTUCK, *THE BANQUET YEARS: THE ORIGINS OF THE AVANT-GARDE IN FRANCE, 1885 TO WORLD WAR I 9–10* (1968) (noting aristocratic favor for a formalized stage on which to pursue cultivated conversation). Proust’s pejorative reference to the Dreyfus contretemps as belonging to a “prehistoric” time can still be felt sometimes in the modern age when we dismiss such recently-departed eras as the presidency of Bill Clinton, *see supra* note 74, reflecting on this sense of psychic distance from past eras.

411. Margalit, for example, elaborating a theory of societal relations, suggests that “[m]ost people most of the time carry on by not caring for most other people.” MARGALIT, *supra* note 7, at 32–33 (discussing, apparently as a matter of rational observation, that human beings limit their circle of caring to family, friends, and some significant groups). “Caring” is a demanding attitude, and likely to become diffuse. We might care for humanity “in general,” therefore, but not individual human beings beyond a closely-drawn circle. *Id.* at 33. In that context, the pose of “caring” is better struck, and more effectively, by the State.

412. PROUST, *Finding Time Again*, *supra* note 395, at 80.

413. Thus, Proust (speaking through Baron de Charlus) suggests that “[t]he truth is that people see everything through the eyes of their newspapers, and how could they do otherwise given that they are not personally acquainted with the people or the events concerned?” *Id.* at 93.

414. *Id.* at 81. *See also supra* note 405 and accompanying text (discussing Proust’s use of the character traits of his dramatis personae to demonstrate general psychological laws).

Yet these remarks are at one with the characteristically dark ironic tone of the *Search*. The State's absorption of great and terrible events, its commemorative capacity *qua* State, is just as affectively empty as Madame Verdurin's casual flicking of her newspaper. Official public memory is designed exactly to perform its incorporative and commemorative duties in loco parentis for the citizenry, whose individual grasp of national events or catastrophes, even when they have played a part, is necessarily personalized and localized in a Halbwichsian sense. But Proust does not mean to suggest that the State itself has an independent memory of past events, much less a sense of their affective resonance. If States have a sense of "feeling," as Proust seems to imply, it is more properly described as a feeling of civic obligation rather than an emotional commitment. To adapt a French expression, the actions of the State are motivated by a spirit of *l'étatique oblige*.

D. Transcendent Memory in Proust

1. The Aesthetic Meaning of Transcendence

For most of the seven books of the *Search*, Proust's observations on memory take the form of intermittent *aperçus*. In the final book, *Finding Time Again*,⁴¹⁵ memory becomes a manifesto. Indeed, Proust's work, despite its inherent resistance to popularization, has entered vernacular appreciation through the phrase "Proustian moment," used to connote the involuntary rush of elegaic memory provoked by a sudden sensory experience (such as the smell of fresh-mown grass in summer).⁴¹⁶ Proust's conception of transcendent memory—his aesthetic theory⁴¹⁷—is mnemonic⁴¹⁸ and metonymic.⁴¹⁹ This richest grain of personal affective memory operates by a recessive analogical power that occurs instantaneously when a triggering mechanism is

415. See *supra* notes 10, 392 (discussing this newest English translation of the final book of the *Search* and the translation project which produced it).

416. See BOWIE, *supra* note 388, at 64–65 (comparing Proustian moments with Freudian slips, neither of which would have entered common speech "if their import had been in any way obscure").

417. See KRISTEVA, *supra* note 24, at 108 (introducing an analysis of Proust's theory of involuntary memory).

418. See Joseph Collins, *The Doctor Looks at Literature* (extract), in PROUST: REVIEWS IN ENGLISH, *supra* note 10, at 58, 60 (suggesting that, since the elementary components of present stimuli resemble previous stimuli, the recurrence of a new grouping of these stimuli produces an adaptive response, an "associative memory" that functions as a "mnemonic combination").

419. The word "metonymic" is used here in the sense of "associative." See J. Middleton Murry, *M. Marcel Proust—A New Sensibility* (extract), in PROUST: REVIEWS IN ENGLISH, *supra* note 10, at 3, 5 (articulating a deep connection in Proust's novel between memory and association, such that "the act of penetrating through some present circumstance to a fragment of past experience, which it seems to hold strangely concealed behind it, is represented as a consummation of personality"); see also KRISTEVA, *supra* note 24, at 19 (detecting a metonymy, reflected in the metaphor of the madeleine, "between present sensation and past sensation").

activated. Proust's work is replete with these mechanisms, these incitements of recollection,⁴²⁰ but they accumulate most insistently in *Finding Time Again*.

Evocation of this unique property of individual memory occurs in a scene plotted in the wartime Paris of 1916. While Proust's labyrinthine set-pieces (and associated sentence constructions⁴²¹) are the stuff of literary legend,⁴²² none is more so than the climactic vanity-fair event, the afternoon reception and concert at the house of the Prince de Guermantes,⁴²³ which the Narrator locates in three hundred pages at the core of *Finding Time Again*.⁴²⁴ As the Narrator approaches the Guermantes mansion for the

420. Roger Shattuck provides several evocative terms to describe Proust's experiences of affective recollection, including *moments bienheureux*, "mnemonic resurrections," and, most provocatively (though attributed to Samuel Beckett), "fetishes." SHATTUCK, *supra* note 393, at 257.

421. Critics have referred to "the clumsy centipedalian crawling of the interminable sentences," *id.* at 3 (quoting Arnold Bennett), or to the "molasses" of an "over-long book, with its over-long sentences," Joshua Landy, *The Texture of Proust's Novel*, in CAMBRIDGE COMPANION, *supra* note 24, at 117, 117. Bowie refers to the "fantastication" of Proust's writing style. BOWIE, *supra* note 388, at xvi (although Professor Bowie, it must be said, was probably not offering this epithet ungraciously).

422. No claim can be made, incidentally, that Proust's final volume displays a craftsmanlike cohesiveness. One commentator simply labels the whole volume incoherent. See COCKING, *supra* note 405, at 164; *see also id.* at 166 (arguing that the theory designed by Proust for the novel's climax "proliferated into a discussion which is desultory, repetitive, confused, and sometimes obscure"). Published after his death and posthumously recreated from his chaotic notes, the structure has been criticized as unwieldy, the arguments as dense, and the language as a single, forbidding (even by Proustian standards) block of densely-textured prose. See MARIA PAGANINI, READING PROUST: IN SEARCH OF THE WOLF-FISH 230–31 (Caren Litherland & Kathryn Milun trans., 1994) (summing up Proust's extraordinary efforts here as a kind of "lucid madness"). But Proust's stylistic and structural failings, while making his arguments harder to follow, certainly do not make them impenetrable.

423. See PROUST, *Finding Time Again*, *supra* note 395, at 164. The Guermantes family represents the aristocracy in Proust's novel, the ossified predecessor (as family and as *salon*) to the upwardly-mobile bourgeoisie ascendancy of Madame Verdurin. See *supra* note 414 and accompanying text. For the Narrator, however, the Guermantes represent an exalted and unattainable State, and he snobbishly disapproves of Madame Verdurin's less august origins (which parallel his own). Indeed, for him, the name of Guermantes cuts another channel of memories filled with "all the images of seigneurial forest and tall flowers which had then accompanied it . . . I had wanted to go to the Guermantes' house as if that might have been able to bring me closer to my childhood and to the depths of my memory in which I saw it." PROUST, *Finding Time Again*, *supra* note 395, at 164–65. Ironically, Madame Verdurin marries into the house of Guermantes, and it is she (as the Princesse de Guermantes) who presides at the final reception depicted in *Finding Time Again*. See Gamble, *supra* note 408, at 12–13 (describing the collapse of the Guermantes dominion).

424. The event is heralded with a brief epiphany, as the Narrator makes a carriage journey through the streets of Paris and suddenly experiences an ecstatic transformation into "an aviator, who has up to that point travelled laboriously along the ground, suddenly 'taking off,' [and rising up] slowly towards the silent heights of memory." PROUST, *Finding Time Again*, *supra* note 395, at 166. The Narrator, in this supernal incarnation, is no longer "passing through the same streets as those who were out walking along them that day, but instead [moves] through a shifting past, sad and gentle." *Id.* at 167.

afternoon party, he steps onto an uneven paving stone and experiences a jolt of recognition. The recollection is very specific, however. It is a recollection of a happiness

that, at different points in my life, had given me the sight of trees I had thought I recognized when I was taking a drive round Balbec, the sight of the steeples of Martinville, the taste of a madeleine dipped in herb tea, and all the other sensations I have spoken about, and which the last works of Vinteuil had seemed to me to synthesize.⁴²⁵

Ironically, these unguarded moments are the sentinels of memory. They are specific pathways or channels to the recollection of past events. The perception of the uneven paving stones, linked in memory to experiencing a similar set of uneven paving stones in the baptistery of St. Mark's Basilica in Venice, restores a complete memory image, "along with all the other sensations associated with that sensation on that day,"⁴²⁶ and that memory image, and its components, "had been waiting in their place, from which a sudden chance had imperiously made them emerge."⁴²⁷ Earlier in the novel, the taste of the madeleine had, in its turn, provoked an entire memory of Combray, the locus in quo of the Narrator's childhood.⁴²⁸

But for Proust, transcendent memory is not just a cascading series of synaptic impulses sparked by a causal agent.⁴²⁹ The experience is far from mechanical. Entering the pathway or channel produces a very precise result in the Narrator's experience:

425. *Id.* at 174–75. These signature triggers of memory, including the madeleine, provide a continuing pulse within the narrative. Balbec is the Narrator's summer vacation destination on the Normandy coast; Vinteuil is the composer of a violin sonata that serves as a recurrent mnemonic motif for the Narrator; see also WHITE, *supra* note 24, at 142 (noting that the theme of involuntary memory, presaged in the first book of the *Search* by the experience of the madeleine, is at last fully worked out here, as the Narrator begins his fateful entry to the afternoon reception).

426. PROUST, *Finding Time Again*, *supra* note 395, at 175; see also KRISTEVA, *supra* note 24, at 108 (describing Proust's conception of "connecting links" superimposed on past memories).

427. PROUST, *Finding Time Again*, *supra* note 395, at 175–76.

428. "In the same way, the taste of the little madeleine had reminded me of Combray." *Id.* at 176. The experience repeats a few moments later in the narrative, when the Narrator waits in an antechamber for admission to the party at the end of a musical set, and is transformed by a servant's accidental knocking of a spoon against a plate into recognition, through auditory resemblance to the action of a railwayman's hammer, of a past scene where he watched a row of trees from a railway carriage while opening a bottle of beer, the very row of trees whose depiction so threatened him that he despaired of ever achieving literary power. *Id.* The past echoes once more when he touches a napkin to his cheek which has the same "stiffness" and "degree of starch" as the towel with which he sought to dry his face on his first day at the seaside resort town of Balbec. *Id.* at 177.

429. See SHATTUCK, *supra* note 393, at 257–64 (patterning these episodes of "involuntary" memory in terms of a sequence that typically involves a state of mind, a physical sensation, an accompanying *frisson* of pleasure, all of which spark a vision of an analogous and forgotten past event, with (possibly) a presentiment of the future and, finally, some response to the experience (which, according to the governing conceit of the novel, is ultimately the creation of the novel itself)).

anxiety and intellectual doubts *about the reality of the experience* are dissipated.⁴³⁰ One critic speaks of this moment as Proust's "seminal moment of insight."⁴³¹ The essence is recapture, the moment when an instant of past life returns, but without the interception of intellectual construction that typically occurs in the present (which itself is consumed with the utilitarian purposes of the future).⁴³² Proust's Narrator is conscious of a transformative experience. The provoked recollections have no precedent in earlier efforts to "remember" childhood sojourns in Combray or even a journey to Venice made in adulthood.⁴³³ Those earlier, *mechanical* efforts were products of an undifferentiated memory,⁴³⁴ a memory that fails to integrate the full range of kinesthetic and affective experiences that accompanied the original experience (whether color, taste, temperature, atmosphere, condition of hunger, feelings of pleasure, or the experience of pain or sadness).⁴³⁵ Thus, the memory which returns on

430. PROUST, *Finding Time Again*, *supra* note 395, at 175. In this passage, the Narrator actually expresses the sense that uneasiness "about the future," as well as all intellectual doubt, have dissipated. This reaction, however, cannot be intellectually separated from the powerful impression formed by the resuscitation of the past, but is an inevitable emotional accompaniment of that resurgence (when the remembered event has positive associations). Shattuck, too, spots this oscillation of past and future in Proust's episodes of ecstatic memory. See SHATTUCK, *supra* note 393, at 258 (suggesting that the penetration of "the future" in Proust's experiences of memory has generally escaped notice).

431. RONALD HAYMAN, PROUST: A BIOGRAPHY 300 (1990) (referring, in situ, to the earliest manifestation, in the first book of the *Search*, of Proust's phenomenon of involuntary memory).

432. This idea of "intellectual construction" matches the understanding of ordinary forensic memory, which is considered *supra*, at text accompanying note 362. See PROUST, *Finding Time Again*, *supra* note 396, at 181 (explaining how "the intelligence desiccates [the spirit of the past]," and constructs a future "out of fragments of the present and the past from which it extracts even more of their reality without retaining any more than is useful for the narrowly human, utilitarian ends that it assigns to them").

433. See PROUST, *Finding Time Again*, *supra* note 395, at 178.

434. The word "undifferentiated" is used in the Mayor & Kilmartin translation. PROUST, *Time Regained*, *supra* note 395, at 260. The new Penguin translation prefers the less evocative usage, "uniform." PROUST, *Finding Time Again*, *supra* note 395, at 178.

435. PROUST, *Finding Time Again*, *supra* note 395, at 178. Proust's aesthetic theory generally implicates a joyful resonance of the past, since he is experiencing these moments of ecstatic memory as pivots for the production of art. See *id.* at 181 (writing of a "joy" that diminishes even the power of death). But since so much of the novel's memory work explores the Narrator's experiences of sadness or alienation or loss of intimacy, it is reasonable to postulate that Proust cannot have intended, *as a matter of theory*, to exclude the resurgence of unpleasant emotional memories along with those that inspire artistic creation. See, e.g., CROSMAN WIMMERS, *supra* note 393, at 60, 120 (emphasizing earlier sections of the *Search* where episodes of returned memory are clearly linked to sadness, anguish, and suffering). Thus, although Proust speaks of ecstatic recollection, his theory is capacious enough to include memories of a past that are not joyful or radiant, but which are just as susceptible to ecstatic recapture in the more expansive sense of a sudden, intense feeling or moment of overpowering emotion. We can speak, in fact, of an ecstasy of "rage" or "grief" as readily as one of joy or love. See RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 619 (2d ed., 1987) (distinguishing a state of "ecstasy"—which produces intensified feelings that may be of rage or grief or love—inter alia from a state of "rapture," which shares the power of ecstasy but most

deliberate effort, the conjured memory—the ordinary forensic memory, one might say, of past events⁴³⁶—can never be as vivid in its impressions as the kinesthetic/affective memory that returns and repairs the intellectual separation which our minds have created between the words uttered and the actions performed in the past and the “environment” in which they were uttered or performed.⁴³⁷ The present and past mix inextricably, and time (in its relentless intermittent flux) is vanquished.⁴³⁸

Memories of this strength, Proust believes, have an absolute certitude.⁴³⁹ They are experienced paradoxically in the present moment and at the same time in the context of a distant moment, so that the past encroaches extra-temporally upon the present and the mind tumbles into an existential imbalance as to whether it is in one or the other.⁴⁴⁰

often refers to an elevated sensation of bliss or delight). It is also possible to interpret these passages as moments of ecstasy generated purely by the appreciation that the past *can* return in this fashion (whether the evoked memory is one of joy or sadness). Proust’s pleasure, in other words, lies in the overcoming of the effacing power of memory, rather than in the specific emotional quality of the summoned memory. See, e.g., RICOEUR, *supra* note 7, at 417, observing that “we welcome as a small happiness the return of a sliver of the past, wrestled away, as we say, from oblivion.” In another place, Ricoeur writes of a notion of “happy memory” that seems also to capture the sense that it is the experience of overcoming oblivion, rather than the nature of the recollected memory, that is most significant:

I consider recognition to be the small miracle of memory. And as a miracle, it can also fail to occur. But when it does take place, in thumbing through a photo album, or in the unexpected encounter with a familiar person, or in the silent evocation of a being who is absent or gone forever, the cry escapes: “That is her! That is him!” And the same greeting accompanies step by step, with less lively colors, an event recollected, a know-how retrieved, a state of affairs once again raised to the level of “recognition.” Every act of memory (*faire-mémoire*) is thus summed up in recognition.

Id. at 494–95. Finally, one might well question Proust’s confidence (however contrived for purposes of his novel) that art is the product only of optimistic recollection, since so much of the empirical evidence points the other way. See KRISTEVA, *supra* note 24, at 170 (analyzing Proust’s exploration of memory in which the solipsistic “I” unfolds “ideas and images, flavors, smells and tactile impressions, reverberations and sensations, jealousies, frustrations, bouts of sadness and more joys”).

436. Again, this is the intellectual, constructed memory of the past. See *supra* note 362 and accompanying text (noting that the mind does not preserve a videographic record of past events); see also Philo Buck, *The Waters Under the Earth* (extract), in PROUST: REVIEWS IN ENGLISH, *supra* note 10, at 303, 305 (discussing the differences between Proustian memory and the memoranda of diaries or statistical record of doings that are filed for reference); Lemaitre, *supra* note 405, at 246 (discussing how everyday reality is often “adulterated” by intellectual elaboration).

437. See PROUST, *Finding Time Again*, *supra* note 395, at 178.

438. See Lemaitre, *supra* note 405, at 246 (writing of Proust’s commingling of past and present as a sort of “metaphysics”).

439. See PROUST, *Finding Time Again*, *supra* note 395, at 179.

440. See *id.* Proust, in effect, is attempting to arrest the flow of time—the very quality that defines time. Proust (through the Narrator) is provoked to imagine that the experience enjoys an extra-temporality, operational through an instantaneous fusion of the present with the past: the medium for perception of “the essence of things,” in effect the Narrator’s “being,” stands “outside of time.” *Id.*

Memory, in this sense, is not mere narrative or banal recollection. The past and present seem fused in a spiritual communion, yet the experience itself is more real than either of them.⁴⁴¹ What is projected is the “*sensory time of our subjective memories.*”⁴⁴² While the effect has been overstated as one of drug addiction,⁴⁴³ the sensory particulate that Proust claims to isolate is nothing less than a fragment of “time in its pure State.”⁴⁴⁴ Thus, the being that savors the triggers of memory (at the Guermites house, the spoon touching the plate, the touch of the linen napkin, the uneven paving stones,⁴⁴⁵ or much earlier, the taste of the madeleine), is a being suffused with what one could call Platonic essences, a being drawing “nourishment only from the essence of things.”⁴⁴⁶ When a noise or a scent or a taste or a sight from the past, Proust is suggesting, is heard or smelt or savored or seen (involuntarily) again in the present, a union of experiences can occur that is paradoxically “real without being present, ideal without being abstract,” and the “permanent and habitually hidden essence of things is liberated.”⁴⁴⁷

Proust’s Narrator appreciates that the essence of these reminiscences is that he is “*not free to choose them,*”⁴⁴⁸ which indeed is the very “mark of their authenticity.”⁴⁴⁹ Thus, the Narrator’s insight is truly paradoxical: the resurrection of past images and sensations is both spontaneous and authentic. The fortuitous springing to life of past sensations “controlled the authenticity of the past that it resuscitated.”⁴⁵⁰ Conscious recollection and conscious observation (presumably including the structured work of official memory, of history, and indeed of ordinary human memory) cannot accomplish this authentic recapture.⁴⁵¹ This transcendent memory is a heightened affective

441. See *id.* at 180.

442. KRISTEVA, *supra* note 24, at 171 (emphasis in original). See *id.*, at 170–71 (positing the internal subjective appreciation of time as an extreme alternative to the opacity of exterior time, the “hackneyed” calendrical spectacle of ordinary life).

443. See Buck, *supra* note 436, at 310 (finding something of the “attitude of the drug addict” in Proust’s ecstatic embrace of a succession of “sensuously rich memories of things past”).

444. PROUST, *Finding Time Again*, *supra* note 395, at 180.

445. See *supra* note 428 (reciting how these seemingly trivial actions or sensations are the catalysts of recall for the Narrator).

446. PROUST, *Finding Time Again*, *supra* note 395, at 181.

447. *Id.* See Frederick C. Green, *French Novelists from the Revolution to Proust* (extract), in PROUST: REVIEWS IN ENGLISH, *supra* note 10, at 148, 149 (suggesting that each of Proust’s extrapolated fragments of pure time “carries with it like an aura the self we were when it was first experienced by us”).

448. PROUST, *Finding Time Again*, *supra* note 395, at 187. See also SHATTUCK, *supra* note 393, at 121–22 (arguing that true memory, in the Proustian sense, “surges into being out of its opposite: *oubli*,” since otherwise it is merely a familiar habit—and therefore, presumably, the work of construction rather than transcendence).

449. PROUST, *Finding Time Again*, *supra* note 395, at 187.

450. *Id.*

451. See *id.* And so, as the Narrator (by happenstance) comes across the book *Francois le Champi*, a childhood favorite by George Sand, in the Guermites library, the experience brings a surge of childhood memories, not from the perspective of the adult browser, but “as the child I had been at that time;” thus the book retains that very sensibility of who he was when he

memory, standing outside the vicissitudes of time. It is time that was lost, and is now regained.⁴⁵² In Proustian terms, *this “affective” transcendence is memory’s most pure and most personalized artifact.*

2. Proust’s Irony

Proust is deeply engaged in a search for authenticity in memory, precisely the search that has been the theme for the present Article. To reprise the closing insight of the last subsection, he identifies a molten core of personal memory, of heightened affectivity, that has no analogue in the structured memory work of officialdom or history—or in the constructed nature of ordinary individual memory. Proust attributes real *force* to this transcendent memory. It is not merely a trick of *déjà vu*.⁴⁵³ The returning memories are not mere echoes or simulacra of past sensations. The past sensation itself surges forward.⁴⁵⁴ The sensation, common to past and present,⁴⁵⁵ pushes against the present reality, forcing itself into consciousness. And though beaten back by the present, as the state of ecstasy recedes,⁴⁵⁶ the past is nevertheless able to permeate the present scene.⁴⁵⁷ The result is a palpable wavering of the self between the “fugitive”

first experienced it. *See id.* at 194. The child “rises up” to take the Narrator’s place, the child who is

[T]he only one who has the right to read the title *Francois le Champi* and who reads it as he read it then, with the same impression of the weather outside in the garden, the same dreams as he formed then about other countries and about life, the same anxiety about the future.

Id. Note again, that Proust, perhaps unconsciously, summons the darker memory of the past (“anxiety” is rendered in the Mayor & Kilmartin translation as “anguish,” *see Time Regained*, *supra* note 395, at 285), even as he seeks to define a concept of involuntary memory that prompts joyful transcendence, the prerequisite (he feels) of artistic achievement. *See supra* note 435 (considering the implied presence of pain as well as joy in Proust’s notion of involuntary memory).

452. “One minute freed from the order of time has recreated in us, in order to feel it, the man freed from the order of time.” PROUST, *Finding Time Again*, *supra* note 395, at 1; *see also* SHATTUCK, *supra* note 393, at 118 (describing Proustian involuntary memory as “privileged,” allowing us “not just to see across time but to see time itself”).

453. *But see* SHATTUCK, *supra* note 393, at 111 (suggesting that Proustian transcendence is nonetheless “a close relative of *déjà vu*,” since it, too, represents “an unexpected short-circuit between past and present in our apparatus of perception”).

454. *See* PROUST, *Finding Time Again*, *supra* note 395, at 182.

455. *See id.* (referring to a “duplicate” of a past sensation).

456. On the layered connotations of the word “ecstasy,” which may encompass both joy and grief, *see supra* note 435 (discussing how an ecstatic summoning of the past may include painful memory).

457. *See* PROUST, *Finding Time Again*, *supra* note 395, at 182–83; *see also* SHATTUCK, *supra* note 393, at 119 (offering the robust metaphor, to appreciate the simultaneous depth perception of past and present, of the “stereopticon,” a nineteenth century binocular device that provided three-dimensional depth and verisimilitude).

resurrections of the past and the present reality.⁴⁵⁸ What are experienced, according to Proust, are “fragments of existence which [have] escaped from time.”⁴⁵⁹

The mystical intensity of Proust’s writing exposes an astonishing truth about human memory—the power and persistence of affective recall—that has been confirmed by recent scientific study.⁴⁶⁰ Viewed retrospectively, Proust is a shrewder analyst of the psyche than Freud. Some critics have felt that Proust’s manifesto of memory is overwrought, that he has indeed meditated excessively on the implications of an enigmatic *déjà vu*.⁴⁶¹ But it is important to appreciate that Proust’s framework of thought is one of supreme irony. Proust was, after all, a novelist and not a theoretician of time or memory.⁴⁶² His understanding of a spontaneous transcendent memory is presented within the confines of one of the most non-spontaneous and structured formats imaginable, the artifice of a novel. The Narrator’s experiences, rich with the thrill of affective recall, are densely plotted elements of this novel.

Proust, in fact, reveals toward the end of his manifesto that the only way to stabilize the experiences of transcendence,⁴⁶³ which contrast so formidably with the “picture book” experience of ordinary memory,⁴⁶⁴ is to engage in an even higher power of transcendence through the creation of a work of art.⁴⁶⁵ Indeed, he is acutely sensitive to

458. PROUST, *Finding Time Again*, *supra* note 395, at 183 (comparing the experience of these “resurrections” of the past to a “dizzying uncertainty akin to that which one sometimes experiences through some ineffable vision at the moment of falling asleep”).

459. *Id.*

460. See generally McNALLY, *supra* note 357 (analyzing the clinical and scientific evidence supporting the indelible imprint of emotional memory).

461. Thus, even a devoted Proustian, like Malcolm Bowie, offers the disconcerting view that Proust was in need of a “resonant exit-speech” to lend an air of “righteous striving” to an essentially selfish mental adventure. BOWIE, *supra* note 388, at 6; see also COCKING, *supra* note 405, at 213 (arguing that the “truths” of Proust’s experience are more important than the “rigidity” of his intellectual system, and that Proust’s schema of involuntary memory is “not very convincing”).

462. See KRISTEVA, *supra* note 24, at 306 (arguing that, in consequence, it would be “dangerous to try to ‘extract’ a philosophical doctrine from his work”).

463. Thus, Proust’s Narrator believes that an insight into essence is without value unless somehow he can “stabilize” or “immobilize it.” PROUST, *Finding Time Again*, *supra* note 395, at 184.

464. The Narrator, therefore, contrasts the spectacle of involuntary memory with the mundane aspects of “voluntary memory,” a conscious process of “leafing through a picture-book to choose illustrations of [days in Combray or Balbec, etc.],” so that the Narrator can then say, “with the selfish pleasure of a collector, as [he] catalogued the illustrations of [his] memory: ‘I’ve certainly seen some beautiful things in my life.’” *Id.* at 181. (Interestingly, Proust here makes no distinction between a constructed and a videographic memory, see *supra* note 436 and accompanying text, but one so aware of memory as Proust would hardly have thought that voluntary memory is anything other than a gauzy derivative of the actual texture or accuracy of past events and places. Moreover, even physical travel (back to the places conjured in the memory field) offers no hope of recapturing time that has been lost, since it merely provokes the illusion (according to the Narrator) that “these bygone impressions had an existence outside of [himself].” PROUST, *Finding Time Again*, *supra* note 395, at 185.

465. Art, then, becomes the channel through which the Narrator will resolve a quixotic paradox: “Impressions of the sort that I was trying to stabilize would simply evaporate if they came into contact with a direct pleasure which was powerless to bring them into being.”

the intellectual work needed to understand the force of memory.⁴⁶⁶ He is attempting to intellectualize affective memory as the source of artistic creation, and that valiant ambition is exactly why his writing sometimes verges on the ecstatic.⁴⁶⁷ But the irony

PROUST, *Finding Time Again*, *supra* note 395, at 185. The savoring of these impressions, therefore, is to understand them in their proper medium, within the self. *See id.* Life (and love) are tremendously difficult to appreciate in the flux of time. Roger Shattuck captures Proust's intent very sharply, positing that we cannot summon our entire selves into a simultaneous existence, and that "intermittence," therefore, is "the only steady state we know." SHATTUCK, *supra* note 393, at 5. We are a "succession of selves," *id.* at 6, and "our character [is] successive, dependent on time to reveal itself in any depth," *id.* at 89. *See supra* note 399 (discussing tension between narrative and episodic approaches to sensory existence). Proust, impatient and inquisitive, is constantly obsessed with the notion that "reality" (experience) must "reside somewhere else than in action." PROUST, *Finding Time Again*, *supra* note 395, at 185. It must reside in the realm of the "extra-temporal" that surges through the experiences of involuntary memory. *Id.* at 186. The task of interpreting these sensual, meta-intellectual insights strikes the Narrator as the "making of a work of art." *Id.* at 187.

466. For Proust, the emotions of memory are a force that requires the application of the intellect fully to understand (and to translate into worthwhile artistic creation). *See* PROUST, *Finding Time Again*, *supra* note 395, at 205. *But see* WHITE, *supra* note 24, at 143 (contending that art, which is recollected experience, can never be accessed through reasoning or method alone, but delivered through a process beyond the intellect's control). White is correct that involuntary memory is an extra-intellectual experience, and Proust himself says so, but Proust also realizes that the artifice of his novel—of any work of art—requires post-experiential intellectual effort. Thus, Proust repeatedly mentions the dreaming state, and the frailty of memory, and the sometimes mysterious intertwining of the real and dream worlds, as emblems of the "purely mental nature of reality," PROUST, *Finding Time Again*, *supra* note 395, at 223, the fact that our minds are the true arbiters of perception, *see id.* at 221. "I had lost my grandmother in reality many months after having lost her in fact, I had seen people vary in appearance according to the idea that I or others had of them, a single person being several according to the people who were observing him . . ." *Id.*

467. Again, however, Proust's experience of ecstasy must be understood as a carefully controlled mental experiment that occurs within the artifice of his novel. It is quite different, therefore, in temperament and construction from the "ecstatic" (and intentionally spontaneous) medieval dervish poetry of masters such as Jelaluddin Rumi. *See generally* the collection assembled in *THE ESSENTIAL RUMI* (Coleman Barks trans., 1995) (demonstrating how Rumi's poetry shifts abruptly among thoughts and ideas and defies conventional notions of structure and consistency). Rumi's lunatic versifying is atypical of literature, which is determined by the writer's control of remembered sentiments, so that Proust's Narrator attributes to literature the power to "reconstruct[] the demolished work of amorous illusion, giv[ing] a sort of afterlife to feelings which [are] no longer in existence." PROUST, *Finding Time Again*, *supra* note 395, at 214. Art—literature—demands a reconceptualization of "our private suffering . . . in [a] general form, which enables us to some extent to escape its grasp, makes everybody sharers in our pain, and may even offer a kind of joy." *Id.* Intellectually, therefore, escape from suffering is always possible:

Where life walls us in, the intellect cuts a way out, for although there may be no cure for love that is not reciprocated, the investigation of one's suffering does provide a way out, even if only by revealing its likely consequences. The intelligence does not recognize closed situations in life, with no way out.

Id. Passion "outlines" the content of art (and of books), and intervals of repose allow the writer to craft art (and write books), "intercalated between a number of episodes in the [writer's] life."

of artifice does not obscure—rather, it enhances—Proust’s success at depicting the force of personal affective memory in our inner lives. The gallery of “Proustian moments” in the *Search* is an artist’s rendering of the unique and complex property of affectivity in the human psyche.⁴⁶⁸

E. Proust’s Ideology

Proust examines the mind’s capacity to experience memory *otherwise than through application of strict reason*.⁴⁶⁹ While a cynical view would be that Proust is offering nothing more than warmed-over Freudian free association theory,⁴⁷⁰ his entire argument is a resounding endorsement of the power of affective—transcendent—memory, revealed through spontaneous recollections that elude the contingencies of time and unite past and present in a moment of epiphany.

The choice of Proust as the exegete of memory ought not to suggest, however, that I intend that Proust should be taken absolutely literally, as though he is a physician documenting the pathology of a condition of the mind. True, there is irony in describing an experience of memory that is, since it is located inside a novel, just as constructed as the modes of memory (official, historical, and individual) considered

Id. at 217. Relying on this evidently Wordsworthian sentiment, the writer’s control (the Narrator hesitates to use the word “exploitation”) of his or her past, or more particularly of the people encountered in one’s past, causes a “scrupulous” transformation into archetypes and composites, subservient now (along with the emotions they earlier inspired) to the later production of art. *Id.* at 218.

468. In a moment of ironic self-reflection, Proust (once again, in the voice of his Narrator) allows that his aesthetic theory of transcendent recall—the sensation of the madeleine—is implicit, indeed paradigmatic, in the works of other well-known writers. In Chateaubriand’s *Mémoires d’Outre-tombe*, which contains several passages of aroused recollection, the writer’s encounter with the scent of heliotrope causes him to reflect that, “in this perfume of a new dawn . . . there was all the melancholy of regret, of absence and of youth.” PROUST, *Finding Time Again*, *supra* note 395, at 228; *see also supra* note 435 (addressing the question of involuntary memory of past grief—or, as here, regret—as integral to Proust’s theory). Similarly, Baudelaire “seeks deliberately, in the scent of a woman . . . the analogies which will inspire him and evoke for him ‘the azure of the sky immense and round and a harbor full of masts and pennants.’” PROUST, *Finding Time Again*, *supra* note 395, at 228. Invocation of Baudelaire, a poet noted for his symbolist excesses, is the surest sign of artifice. The creation of such “analogies” (particularly those as strained as Baudelaire’s) is inherently a work of careful post hoc composition. The Narrator actually refers to Baudelaire’s “transposed sensation” and places himself in “such a noble tradition” with respect to his soon-to-be attempted work of creation. *Id.* at 229. The truly spontaneous production of art, as it happens, is a will-o’-the-wisp chased by many modernist writers. *See generally* MARTIN ESSLIN, *THE THEATRE OF THE ABSURD* (1980) (recounting a controversial movement in modernist French theater that sought to use stagecraft to mimic, and to communicate, the sense of perplexity that its authors felt when confronted with the human condition; the audience was forced to confront actions lacking apparent motivation, characters in constant flux, and seemingly perverse and unconnected stage happenings designed to unnerve the audience into wondering “what is going to happen next?”). Proust is no closer to spontaneity than any of these artists.

469. *See* André Maurois, *Invitation to Learning* (unrehearsed broadcast with Maurois as a guest), in MARCEL PROUST: *REVIEWS IN ENGLISH*, *supra* note 10, at 286, 289 (noting that, for Proust, intuitive memory is the only true memory).

470. *See* Jordan, *supra* note 404, at 113 (making the comparison, though not cynically).

earlier in this Article. But, as the last subsection intimates, Proust's transcendent memory is more properly a device to convey certain realities about the intensity of affective memory. There is a transcendence to personal memory that neither official nor historical memory can duplicate or imitate. Since memory, most of the time, offers very little to the imagination, it is certainly worth considering the suggestion that Proust is not advocating that we simply wait around for the magical interventions of involuntary memory, but rather that transcendence is a way of understanding that so much of memory is dull and unspecific.⁴⁷¹ Proust, then, is an artist and novelist, not a scientist or philosopher, and his intimations of an escape from reality through involuntary memory are a novelistic way of rendering an important truth of human memory.⁴⁷² In a sense, this is Proust's challenge to official public memory, which assumes a kind of "anosognosia"—medically, a vanished capacity for awareness of a disability—on the part of the populations to which it is addressed.⁴⁷³

F. Conclusion

Maurice Halbwachs proposes that a different (but wholly valid) kind of socialized memory flourishes among the collective milieus of sub-State groups, such as families, village (and, I would add today, suburban) communities, alumni associations, and religious sects. The lived experience of individuals in a community, Halbwachs suggests, creates an authentic "collective" memory within each community. Halbwachs is no doubt correct about this, but he fails to appreciate that an authentic personal memory must include what Proust reveals as the *essence* of lived experience, the affective and emotional resonance of the past. By not doing so, Halbwachs in effect presents lived memory as *denotation* rather than *connotation*. He understands the memory of lived experience as Proust did before he experienced the ecstasy of transcendent memory: as sterile recall, images without the *essence* of experience.

To reconceptualize Halbwachs in Proustian terms, the affective memory of lived experience, rather than the lived experience of sub-State groups, provides the most authentic counterpoint to the dominance of official memory. This sphere of memory, as articulated in Proust, is an autonomous condition that lies beyond the selected, constructed, mythicized, incorporative, and presentist patterns of official public memory. Accordingly, it is a sphere of memory that is (as Halbwachs may well have sensed but never articulated) *cognitively protected* from the State. The present search

471. See COCKING, *supra* note 405, at 256 (seeing Proust as a guide to deeper awareness rather than an ideologue of involuntary memory).

472. One critic has described the Proustian notion of escaping time as more properly an artist's "figure of speech." Lucas, *supra* note 25, at 190. Lucas attributes the "abnormal" intensity of Proust's own experiences—which, even for him, passed quickly—to the "mystic's communion with the Absolute." *Id.* at 190–91; see also SHATTUCK, *supra* note 393, at 123 (writing, more complexly, of Proust's "[e]nfolding a real psycho-physiological experience into a poetic-rational elucidation"). Proust, indeed, himself refers to his sensation of ecstatic recall as a "subterfuge." PROUST, *Finding Time Again*, *supra* note 395, at 180; see also PAGANINI, *supra* note 422, at 223 (suggesting that Proust's use of this term, and of other related terms, seems to insist on the "suspicious" nature of involuntary memory).

473. See SHENK, *supra* note 353, at 120 (showing this medical usage in the context of the cognitive disabilities of Alzheimer's disease).

for an authentic public memory ends, therefore, with a conceptual limitation that is intrinsically, indeed definitionally, present in the understanding of official public memory.

CONCLUSION: THE ENDURING POWER OF AFFECTIVE MEMORY

The premise of this Article has been that there is an authentic quality of personal memory—in effect, Proustian affective or transcendent memory—which official public memory cannot replicate or incorporate and which, therefore, is cognitively protected from the contrived emanations of State memory. Parts I and II presented, empirically and theoretically, the imposture of official memory as revealed through selectivity, constructivism, mythopoesis, and its incorporative and presentist biases. It functions as a tool for social control, monolithic and universalist in design, apparently unopposed by any permanent discourse that respects the autonomy of individual memory. Official public memory imposes narratives, suppresses or incorporates counter-narratives, and intrinsically asserts the State and its interests over the individual.

The search for an authentic theory of public memory, then, comes to this: irrespective of the management of official memory, the sphere of a State's public memory can never *conceptually exclude* the autonomous affective memory of its individual citizens. Managed public memory reaches the *conceptual limit of its power* in the face of this unique property of individual memory. Thus, when we say that the past remains open or open-textured,⁴⁷⁴ but always threatened by the canonical techniques of official memory, we can now also recognize that official public memory *definitionally and ontologically* must always embrace the lived experience of individuals as reflected in their personal affective memory. And, in doing so, elite memory must acknowledge potential contestation,⁴⁷⁵ because official public memory cannot conceptually mask this unique property of individual memory.

Thus, an authentic theory of public memory is neither normative (in the sense of the continuing play of contestations advocated by Mark Osiel⁴⁷⁶) nor descriptive (in the sense of the post-Westphalian challenge to official narratives that John Gillis perceives as already in existence⁴⁷⁷). Instead, the understanding of public memory reached in this Article recalibrates official public memory as *inherently* confronting the permanence of contestation for the very reason that it lacks power conceptually to efface the affective resonance that living individuals possess about the past.⁴⁷⁸ Halbwachs socialized

474. See *supra* text accompanying note 278.

475. Competing memories, in this sense, will continue to live "an unhealthy underground existence." RICOEUR, *supra* note 7, at 455.

476. See *supra* note 180 and accompanying text (discussing Osiel's notion of a discursive solidarity).

477. See *supra* text accompanying note 186 (discussing Gillis's view of the sacralization of the nation-State).

478. What about the passing generations? Is a State's official public memory capable of incorporating the affective memories of its nonliving citizens? The simple answer is that the sheer endurance of the State must inevitably impact the capacity of past generations to maintain a contestable relationship with official memory. Halbwachs, after all, defined his collective memory in terms of milieus that do not outlast the lifetimes of its component individual members. See *supra* note 338 and accompanying text. And yet, although this discussion lies

individual memory, but in doing so removed its signature imprint of affectivity. His model of collective memory, therefore, effaces the individual almost as convincingly as official memory.

In this conceptualization of public memory, the Austrian government, for example, could never efface or *incorporate* the affective memory of the living victims of Nazism. Whether or not it ever breaks the surface of State memory management, the threat of contestation endures as a cognitive reality in the minds of individuals, beyond the incorporative reach of official memory.⁴⁷⁹ Authentic public memory, therefore, is likely a question of faith over fact.⁴⁸⁰ Before Proust experienced the ecstasy of the madeleine, he thought of memory as sterile recall, images without the essence of experience. That forensic sterility also marks the work of official public memory. Emotional reminders, “recognition,” open connections to a whole life of people and experiences that are revived on a Proustian plane of transcendence. This is the fullness of memory, what Proust himself calls *emotional courage*.⁴⁸¹ None of this denies that official public memory can provide a stimulus or incitement for affective

beyond the present scope of this Article—and may require psychological as much as jurisprudential or sociopolitical study—there are anecdotal reasons, largely drawn from the generational shift from Holocaust survivors, to indicate that affective memory is transmissible through the generations. See EDKINS, *supra* note 18, at 193 (noting a developing literature on the “second-generation,” and that “increasingly the children of [Holocaust] survivors are taking up the torch from their parents”); see also EVA HOFFMAN, *AFTER SUCH KNOWLEDGE: MEMORY, HISTORY, AND THE LEGACY OF THE HOLOCAUST* (2004) (recounting the author’s own lived experience as a member of the “hinge-generation” between experience and memory of the Holocaust, and how the condition of her parents’ wounded psyches, rather than the experience of violence itself, has been passed down to her); Clyde Haberman, *Art, Tragedy And the Eye Of a Beholder*, N.Y. TIMES, Mar. 13, 2002, at B1 (noting the clamor raised by an organization called the International Network of Children of Jewish Holocaust Survivors in opposition to an exhibition at the Jewish Museum in New York).

479. Thus, as Paul Ricoeur has recently argued, “a distinct place must be set aside . . . for abuses, in the strong sense of the term, resulting from a concerted manipulation of memory and of forgetting by those who hold power.” RICOEUR, *supra* note 7, at 80 (referring to official memory in this context as “instrumentalized memory”).

480. See BORAINÉ, *supra* note 200, at 378 (recognizing that there is an alchemy that must take place, not necessarily grounded in fact, before countries can truly heal after division). For Germany, for example, there can be no rational State mechanism that *affectively* separates the Nazi State from its post-war successor. See *supra* note 202 and accompanying text (discussing legal mechanisms for doing this). While the Nazi State may indeed be perceived (by Germans and non-Germans alike) as the evil *Doppelgänger* of the modern democratic Federal Republic, the appreciation of the distance traveled from Nazism is pragmatic, not an emotional act by the German State. Germany exists in the modern world as a civilized democratic State because it must; it exists as a State that has renounced Nazism because individuals have achieved that metaphysical separation in their own minds. A recollection of a Holocaust of millions of victims is a historical fact absorbed into a State narrative. The emotional dimensionality of these massive crimes is a transcendent fact that only individuals can appreciate, and, in this case, almost certainly only the individuals who survived that event. *But see supra* note 478 (on the intergenerational transmission of some kind of affective remembrance of the Holocaust).

481. PROUST, *Finding Time Again*, *supra* note 395, at 205 (better rendered, perhaps, in the Mayor & Kilmartin translation as “the courage of one’s emotions,” see *TIME REGAINED*, *supra* note 395, at 300).

recall, but it is cognitively removed from the *reaction* it provokes—in the encapsulating phrase of one Proustian critic, look to where the finger points, not to the wrist.⁴⁸² Whether the remembered event is joyous or painful, the power of Proustian transcendent memory lies beyond the State's power of incorporation.⁴⁸³

EPILOGUE: FINAL REFLECTIONS ON THE LIMITS OF OFFICIAL PUBLIC MEMORY

If, indeed, there is no such thing as absolute historical truth,⁴⁸⁴ the mythmaking role of the State and its lawmaking apparatus can be rationally understood. It is easy to fathom that no State has yet come to a full reckoning with its past.⁴⁸⁵ The best that can be expected, in the view of one writer, is support of a continuing dialogue whose honesty is tailored to the circumstances, culture, and tradition of each State.⁴⁸⁶ But facing cascades of events and recollections, it is the task of State memory (and its handmaiden, public law) to make of memory a fixed object, an iconic framework of explanation,⁴⁸⁷ in opposition to the contestative narratives and counter-narratives that

482. See BOLLES, *supra* note 357, at 279 (explaining that the reminder must be distinguished from the memory, so that analysis of the stimulus or trigger of memory (the madeleine, for instance) will not in itself account for the reaction of memory).

483. A telling example of the survival of affective memory despite official neglect or amnesia is provided by the survivors of the Allied napalm firebombing of Tokyo in March 1945. After fifty-seven years, some of the survivors have begun to express themselves publicly about the bombing which, unlike the atomic bomb attacks on Hiroshima and Nagasaki, has never been officially memorialized in Japan. For Japanese government leaders after 1945, remembering the firebombing victims "could mean explaining things like the deliberate placement of war industries in dense residential areas, or the prolongation of the war for many months after its outcome was clear . . ." Howard W. French, *100,000 People Perished, But Who Remembers?*, N.Y. TIMES, Mar. 14, 2002, at A4. Post-war Japan prioritized the cultivation of diplomatic and commercial relations with the United States, which prevented official consideration of what one historian calls "almost a genocidal attitude on the part of the American military, [which] extended to the American public." *Id.* (quoting John Dower, Massachusetts Institute of Technology). For one of the survivors, his strongest memory is of the Sumida River "thick with bodies." Another survivor "began to cry as she recalled how she had fled the spreading blaze, but was separated from her younger brother, whom [sic] she never saw again." *Id.*

484. A sentiment echoed by Erna Paris in her recent global study of memory. See PARIS, *supra* note 59, at 450 (arguing that "[w]hat matters is the way that the past—however it is conceived—can be bent to serve the present," so that, "[a]lthough twentieth-century totalitarian cultures perfected the art of the controlled historical lie, in varying degrees, the *desire* to shape the way history is remembered is universal") (emphasis added); see also KAMMEN, *supra* note 84, at 3 (remarking that "critics adhering to diverse ideological persuasions have suggested that societies in fact reconstruct their pasts rather than faithfully record them").

485. See NOSSITER, *supra* note 59, at 16 (reflecting on the difficulties of fully exploring, and honestly judging, the past actions of a country's leaders and significant numbers of its citizens).

486. See *id.* This idealistic formulation, reminiscent of Osiel's theory of a discursive solidarity, see *supra* note 180 and accompanying text, allows the interlocutor to ask whether a country sponsored a candid accounting of its past.

487. See Hamber & Wilson, *supra* note 215, at 17. The authors ascribe this function narrowly to truth commissions, which act as "performances of memory," but it is a function that

may seek to exploit the past, with more or less honorable motives, for particular constituencies or groups.⁴⁸⁸

Currently prevailing scholarly views on impunity and postconflict justice would likely question this use of public law (and the attendant amnesty power) to fix a collective idea of the past in transitional or post-conflict societies.⁴⁸⁹ But against that must be set the official agenda of rapid closure, the desire to build a new post-conflict society that is not overwhelmed by the burdens of memory, even if that means sloughing off the past too easily, and asking survivors to engage in closure before all the psychological processes of truth and recompense could possibly be fully internalized.⁴⁹⁰ And for those successor elites who have inherited a preserved juristic talisman (in Austria, for example, the 1943 and 1955 expressions of Allied support of Austria's alleged victimhood during the Nazi occupation⁴⁹¹), the very existence of a constitutional or legislative artifact may insulate them for a long time from the charge of imposturous tampering with the past. They can limit themselves to commemoration and, if threatened by counter-narrative forces, to the kind of cautious, technical, and legalistic realignment of the dominant narrative that has lately been attempted in Austria.

What this Article has demonstrated, however, is that the construct of official public memory is ontologically unable to incorporate—and thereby to neutralize—the transcendent experience of individual affective memory. The difference between these two conceptualizations is absolute. The incorporative device of a truth commission, for example, calls to mind Michael Ignatieff's warning against the dangers of linking humanistic metaphors to the power of the State, as if a whole society could "come awake" after trauma in the same way that an individual sometimes does.⁴⁹² And

has also been discharged (as in the case of Austria) by the more typical operations of public law and governance.

488. Elites, it might be said, are not interested in doing what history does and individuals can hardly avoid doing, namely, *problematizing* the past. And this quest for a buoyant perspective on the past is especially perplexing, Eric Foner suggests, because history has so few "unambiguously festive conclusions." FONER, *supra* note 3, at 191 (mentioning William Dean Howells's remark that "what the American public always wants is a tragedy with a happy ending").

489. See generally Kent Greenawalt, *Amnesty's Justice*, in TRUTH V. JUSTICE 189 (Robert I. Rotberg & Dennis Thompson eds., 2000) (attempting to construct a narrow model for the grant of amnesty by truth commissions—excluding, for example, amnesty from civil liability to victims or surviving relatives). But, as noted above, see *supra* text accompanying note 215, even truth commissions, as emanations of the State, necessarily work to "fix" a collective remembrance. The output of truth commissions itself becomes part of a new master narrative, and the absorption of victims' stories into this master narrative pursues the overarching public goal of assuring social stability.

490. See Hamber & Wilson, *supra* note 215, at 13.

491. See *supra* text accompanying note 31 (discussing Austria's externally-supported aspiration to victimhood status after the Second World War).

492. See Ignatieff, *supra* note 215, at 121 (arguing that "[t]he only coming awake that makes sense . . . is one by one, individual by individual, in the recesses of their own identities"). But see RICOEUR, *supra* note 7, at 78 (insisting on the "analogical" sense of a "collective" trauma, but observing also "a direct analysis" of wounds to collective memory in losses that affect the power, territory, and populations of a State, notably in "[m]ourning behaviors" such as the "great funeral celebrations around which an entire people is assembled"). (On the question

Ignatieff appears to find it conceptually inappropriate to conflate political leadership with the mysterious process of coming to terms with the past.⁴⁹³

Nor, indeed, can the law itself mimic affectivity. James Boyd White appears to disagree, writing that law translates “mute and inexpressible experience to another plane, where it acquire[s] significance of a new kind. It [is] a way of giving meaning to life.”⁴⁹⁴ Words are, of course, highly potent, and in their existence as parasites of thought⁴⁹⁵ they resonate from their use in the law (as noticed in the nomenclature of the “Patriot Act”⁴⁹⁶). But Boyd White overlooks the critical understanding that the movement toward new significance is necessarily an abstracting one, a depersonalizing top-down effort at striking a communal tone.⁴⁹⁷ The mute and inexpressible experience, which is properly the individual’s affective recall of a past emotional environment (whether it be joy, pain, grief, or fury⁴⁹⁸), cannot accurately be recoded into the abstract verbalizing of legal process.⁴⁹⁹

of the analogical relationship (or transfer) that connects collective memory to individual consciousness, see *id.* at 119–20, finding that the transfer allows the prerogatives of individual memory (“mineness, continuity, the past-future polarity”) to apply also to collectivities.)

493. See Ignatieff, *supra* note 215, at 122 (recognizing, however, that individuals with political authority may have a potentially large influence on the process of healing).

494. JAMES BOYD WHITE, *THE EDGE OF MEANING* 220 (2001) (quoting a passage of his own juvenilia, but not repudiating it, in which White imagines the law to be a medium for giving voice to language out of silence, or what is said out of what could not be said).

495. See FIGGIS, *supra* note 124, at 12 (observing that words, acquiring connotation, “cling to the mind long after their original uses are forgotten”).

496. See *supra* note 16 and accompanying text (discussing the adoption and meaning of the Patriot Act in the United States).

497. Halbwachs, too, is doubtful that the law offers affective relief, calling it “a very mundane practice which considers individuals and their relations from the outside and tends to be frozen into formulas and reduced to a mechanical application of rules.” HALBWACHS, *ON COLLECTIVE MEMORY*, *supra* note 9, at 127 (arguing that “[a]ll laws are based on [general] classification[s] of people, actions, situations, and objects according to various external characteristics. Law’s suppleness as a mechanism for abstract categorization is precisely what commends it to the creators of official memory”). See *supra* note 242 and accompanying text (discussing law’s ontology as a system *a posteriori*).

498. See WHITE, *supra* note 494, at 220 (proposing that law articulates “the wrenching pain of the broken arm, the grief of the parent, the fury of the cheated man”).

499. As an alternative to the confined sphere of State memory work, Avishai Margalit posits a universal ethical community that would operate as a worldwide community of memory in recollection of conspicuous evil. See MARGALIT, *supra* note 7, at 71, 78 (projecting a utopian vision of shaping humanity to retain a common sense of memory of the “warning signposts in human moral history” including enslavement, deportations, and mass exterminations, as in the Gulags, Treblinka, or Hiroshima). But utopian universalism (which would require, as Margalit acknowledges, establishment of “thick” relations of caring among humanity at large, see *supra* note 342 (discussing Margalit’s concepts of “thick” and “thin” community relations)), is among the weakest of concepts in formulating a theory of memory. See MARGALIT, *supra* note 7, at 81–82 (arguing that the German people, for example, should not try to project their remembrance of the Holocaust into a remembrance for all humanity, but to “reestablish themselves as an ethical community, encumbered with painful shared memories”). For Margalit, the most promising projects of shared memory are those that travel through natural communities of memory. See *supra* note 342 (discussing these communities). The memory of evil is a simple postulate, but

The quest for a new theory of public memory, therefore, takes us to an understanding that official public memory is, at bottom, an exercise of limited power. Anxiety about the coagulating effects of government power—the endurance of the findings of a truth commission, the specific outcome of a criminal trial, the persistence of a doctrine of national victimology—must be counterpointed by the reassurance that personal affective memory is *always there*, and always capable of generating contestation and (eventually) of defeating incorporation.⁵⁰⁰ What we are presented with, either astonishingly or intuitively, is a natural limit on government control of the individual.

Margalit's theory relies on the very thin connections that individuals form with one another outside the natural communities of memory embraced by Halbwachs.

500. Jenny Edkins, in a recent study, seeks to reconstitute voiceless humanity—the categories of victims that she terms “bare life”—in opposition to the hegemonizing tendencies of the sovereign State. *See* EDKINS, *supra* note 18, at 18 (borrowing the phrase “bare life” from the work of Giorgio Agamben). In Edkins's construct, Holocaust victims and battlefield soldiers are among the representatives of “bare life”:

Bearing witness is an aggressive act. It is born out of refusal to bow to outside pressure to revise or repress experience, a decision to embrace conflict rather than conformity, to endure a lifetime of anger and pain rather than to submit to the seductive pull of revision and repression. Its goal is change. If survivors retain control over the interpretation of their trauma, they can sometimes force a shift in the social and political structure.

Id. at 191 (citation omitted). Inevitably, Edkins's position is problematic, since in order to bear witness, the victims are required to transcend the necessary inscription of their lives within the logic of the State system. *See id.* at 213 (conceding that “[g]enerally, bearing witness is normalised, categorised and appropriated”). Nevertheless, she advocates non-violent forms of resistance, including refusal by former soldiers to participate in State commemorations (as occurred in Britain after World War I), reclamation by the citizenry of public monumental spaces (as in Tiananmen Square in 1989), or private acts of monument-building (such as the veteran-financed construction of the Vietnam Veterans Memorial in Washington, D.C.). *See id.* at 214. I am unsure as to whether such a program for “de-scripting” victims from the grasp of sovereign power can be laid out as Edkins seeks to do, but her idea (indeed her optimism) is surely latent in the construct of affective memory. The present Article offers a theoretical explanation, presented humanistically, that seeks to set a predictable limit to (if not always to overcome) the conceptual reach of the State and its legal and policy processes as makers of memory.