

Law and Collective Memory

Joachim J. Savelsberg¹ and Ryan D. King²

¹Department of Sociology, University of Minnesota, Minneapolis, Minnesota 55455; email: savelsbg@atlas.socsci.umn.edu

²Department of Sociology, University at Albany, SUNY, Albany, New York 12222; email: rking@albany.edu

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Abstract

Law and collective memory are reciprocally associated. Law steers collective memory, directly but selectively, as trials produce images of the past through the production and presentation of evidence in ritual practices and public discourse. Law affects collective memory indirectly by regulating the production, accessibility, and dissemination of information about the past. Simultaneously, collective memory is preserved and activated by carrier groups to inform lawmaking and law enforcement; and memories of past atrocities serve as analogical devices that, under certain conditions, influence law. Such institutionalization of collective memory as law partly results from applied commemorations, lawmaking situations that invoke the past. The relevance of the reciprocal relationship between law and collective memory is highlighted by the international community's responses to recent atrocities and regime transitions and by its new openness to intervention in national affairs. This article reviews past research and discusses avenues for future work on law and collective memory.

Collective memory:

knowledge about that past that is shared, mutually acknowledged, and reinforced by collectivities such as small informal groups, formal organizations, or nation states and global communities

Transitional justice:

legal proceedings and decisions in the transition between regimes, typically from authoritarian to democratic, especially as they address repression by the previous regime

Institutionalization of collective memory as law:

the transformation of collective memories into legal norms and enforcement practices, for example through applied commemorations

INTRODUCTION

The reciprocal relationship between law and collective memory is the theme of this review. To what extent does law influence how collectivities remember the past and, in turn, how do collective memories of the past inform the creation and enforcement of law? Our focus on collective memory is distinct from the well-established psychological literature on individual memory and law (see Monahan & Loftus 1982 for review), as illustrated in research on topics such as eyewitness testimony (Wells 1993, Loftus & Doyle 1997) or recovery after victimization (Herman 1992). Relative to that scholarship, the social nature of memory and its relationship to law are less frequently the subject of socio-legal inquiry. A recent upsurge in this line of scholarship and pressures toward legal intervention following massive human rights violations warrant a review of the current state of this research.

The importance of understanding the impact of law on collective memory is recognized by practitioners and scholars alike. Landsman (2005, pp. 6f) quotes Robert Jackson, head of the U.S. prosecutorial team during the Nuremberg Criminal Tribunal against leading Nazi figures, who argued, "Unless we write the record of this movement with clarity and precision, we cannot blame the future if in days of peace it finds incredible the accusatory generalities uttered during the war. We must establish incredible events by credible evidence." Jackson's words find renewed relevance in light of recent atrocities in Rwanda, East Timor, and Sudan's Darfur region and in the former Yugoslavia and Iraq, and also following the end of dictatorial or autocratic regimes in East Central Europe, Asia, Africa, and Latin America. Law is central to new attempts at "breaking cycles of violence" (Minow 1998, 2002) and at providing transitional justice during shifts from authoritarian regimes to democracy (Kritz 1995, Teitel 2000), and collective memory can be a central mediating force (Meierhenrich 2006).

Law is an especially powerful institution for the creation of collective memory because it involves highly effective rituals (Durkheim 1984 [1893], Borneman 1997, Nino 1996) and its enforcement is backed by the coercive apparatus of states, churches, or other organized groups (Weber 1976). At the same time, law is subject to a particular set of institutional rules, such as those on the admission of evidence, that color the collective memory produced in legal institutions and through legal processes in ways that differ distinctly from memories produced by historians or in the worlds of politics, art, and religion (Alexander 2004, pp. 16f; Osiel 1997).

Whereas legal proceedings construct images of the past directly, law affects collective memory indirectly when it regulates what information can be collected or accessed and what can be said about the past. In some cases, information that could influence the memory of past events is restricted (Markovits 2001), and in other cases libel laws (Rose 1968, Smolla 1983) and criminal codes regulate the expression of opinions about the past, evidenced by the prohibition of Holocaust denial in many countries.

In reverse, we must consider collective memory if we seek to successfully understand and explain law on the books and law in action. Collective memories are activated in legislative and legal decision making, which Savelsberg & King (2005) refer to as the "institutionalization of collective memory as law." In addition, collective memories also affect law enforcement practices (King 2005).

We suggest in this review that the connection between collective memory and law represents a promising area of socio-legal inquiry. At the same time, research in this vein is dispersed across multiple disciplines and specialty fields, including anthropology, criminology, history, jurisprudence, political science, social psychology, and sociology, that employ various theories and methodologies. We seek to identify common organizing concepts in this body of research and propose new

directions for future research at the intersection of memory and law.

COLLECTIVE MEMORY AND CULTURAL TRAUMA—CENTRAL CONCEPTS

Collective memory, a term coined in the classic work of French sociologist Maurice Halbwachs (1992), refers to knowledge about that past that is shared, mutually acknowledged, and reinforced by a collectivity—from small informal groups to formal organizations to nation states and global communities (for a review, see Olick & Robbins 1998). Halbwachs's approach was novel in at least two respects. First, his work challenged the empiricist conception of the past associated with David Hume, according to which we, as enlightened subjects, have immediate access to the world and history. Second, it goes beyond Kantian apriorism, which posits that humans understand the world through a set of universally given categories. Instead, Halbwachs was inspired by Durkheim's (2001 [1912]) insight that the categories through which we see the world are themselves social constructions. More specifically though, Halbwachs maintained and sought to show that our understanding of the past is influenced by present-day interests, a perspective that Schwartz (1982) has labeled the "presentist approach."

Scholarly engagement of this theme has recently intensified. A search in *Sociological Abstracts* shows 183 publications with both the terms collective and memory in the titles; 72 of these appeared from 2000 through 2005. Some of this research supports Halbwachs's presentist claim. Fine (2001), for example, shows that the memory of past presidents and other famous and infamous people is affected by the position and interest of present-day "reputational entrepreneurs." This finding is in line with the insight that collective memory is always contested and subject to mnemonic struggles (Zerubavel 2004). Collective memory is reflected and activated in the minds

of individuals and always in flux (Olick 2005, Schwartz & Schuman 2005).

Collective memory is also dependent on previous ways of remembering history. Examining a series of commemorations of May 8, the day of German capitulation after World War II, Olick (1999) finds that today's commemorative speeches have to take yesterday's commemorations into account, at considerable cost to those speakers who fail to do so. They run the risk of breaking taboos and suffering reputational and political damage. Olick thus speaks of the "path dependency" of collective memory. More recently, Savelsberg & King (2005) expanded this idea with the concept of "applied commemorations," that is, commemorations not for the explicit sake of addressing historical events, but commemorations in the context of decision-making debates that involve historic events, for example legislative sessions on hate crime and restrictions on free speech.

Cultural trauma is a closely related term, defined by Smelser (2004, p. 44) as "a memory accepted and publicly given credence by a relevant membership group and evoking an event or situation that is a) laden with negative affect, b) represented as indelible, and c) regarded as threatening a society's existence or violating one or more of its cultural presuppositions" (for applications, see Alexander et al. 2004). Cultural trauma is a new concept anchored in Durkheim's (2001 [1912]) classical idea of "religious imagination"—an imagination that forms "inchoate experiences, through association, condensation, and aesthetic creation, into some specific shape" (Alexander 2004, p. 9).

Alexander (2004) spells out basic elements of a theory of cultural trauma, drawing from different sociological traditions. The construction of cultural trauma, he argues, is a process that involves (a) claims-making by agents; (b) carrier groups of the trauma process (with material and ideal interests); (c) speech acts by carrier groups, who address an audience in a specific situation, seeking to project the trauma claim to the audience;

Applied commemorations: implicit or explicit commemorations in the context of decision-making situations such as legislative sessions or legal proceedings

Cultural trauma: memory of an event or situation that is laden with negative affect, represented as indelible, and seen as threatening to a society's existence or violating its cultural presuppositions (Smelser 2004)

Carrier groups: groups that maintain or promote types of knowledge, here an image of history, often with the goal of controlling memory or advancing a cause

and (d) cultural classifications regarding the nature of the pain, the nature of the victim, the relation of the trauma victim to the wider audience, and the attribution of responsibility. Importantly in this context, Alexander observes that linguistic action, through which the master narrative of social suffering is created, is mediated by the nature of institutional arenas that contribute to it. It is in this sense that we examine the literature for insights on how institutional features of law, for example law's focus on individuals as responsible actors, affect the construction of collective memory compared with other institutional fields, while also being mindful that the varying shapes of law in cross-national and historical comparison warrant further specification of any generalization about the relationship between law and knowledge (Savelsberg 1994), including collective memory.

As we discuss the link between law and collective memory, we take a road that is not well traveled and on which many street signs are missing. When we enter collective, memory, and law as search terms, *Sociological Abstracts* shows only two entries for titles and thirteen for article abstracts.¹ Although the road that connects law and collective memory is not crowded, much literature is not captured through such a narrow search. Other work has not yet appeared in print at the time of our writing (e.g., Karstedt 2007²). We set out to review available publications that connect these themes while also pointing to avenues

not yet taken. Traveling the road in one direction reveals scholarship on law's influence on collective memory. In the other direction we find research on how collective memory affects the content and enforcement of law.

HOW LAW SHAPES COLLECTIVE MEMORIES

Direct Effects: Shaping History in Courts of Law

Civil, administrative, and criminal law proceedings (Landsman 2005, Osiel 1997) as well as administrative alternatives, such as truth and reconciliation commissions (TRCs) (Wilson 2003), contribute to the shaping of collective memory.³ Although law's explicit principles do not traditionally include this purpose, sociologists have long looked beyond philosophical goals to examine conditions and functions of criminal punishment. Their insights align with a law and collective memory perspective. Garfinkel (1956), for example, interprets courtroom events as "degradation ceremonies," leading to the ritual destruction of the persons on trial. Following the fall of a dictatorial regime that allowed or committed massive human rights violations, the ritual destruction of former political leaders, possibly charismatic figures, through trial is likely to result in a revision of collective memories of the role those leaders played in history. Mead (1918) points to the emotional aspects of trials that contribute simultaneously to "respect for the law" and "hatred for the criminal aggressor" and Durkheim (1984 [1893]) sees trials as ritual practices through which social sentiments maintain their force and

¹A search in *CAS Worldwide Political Science Abstracts*, using collective, memory, and law as combined search terms, results in zero hits for titles and eleven for abstracts. A *Criminal Justice Abstracts* search showed zero entries for titles and two for abstracts.

²Susanne Karstedt, editor of this forthcoming volume of conference proceedings, generously made her introduction available to the authors after the text of this article was drafted. Chapters cover the time span from World War II to the present. They include case studies on South Africa, Australia, South Korea, Norway, Poland, Czechoslovakia, and Germany and diverse mechanisms from criminal justice to lustration, truth and reconciliation commissions, constitutions, civil liberties, and property rights. A focus is on transitional justice.

³Another quasi-legal response is lustration, the exclusion from particular types of occupations of categories of people involved in previous regimes [see the special issue of *Law and Social Inquiry* (Siegelman 1995)]. For a brief comparative review of institutional responses such as trials, TRCs, lustration, compensation, naming and shaming, criminalizing denial of the past, commemoration and memorialization, reconciliation, and reconstruction as methods against denial, see Cohen (2001, pp. 222–48).

vitality. Reconfirming respect for law challenges the practices of a past lawless regime, and reconfirming social sentiments that might have conflicted with a past regime's practices similarly strengthens a critical view of recent history.

In addition to law's facilitation of such emotionally colored reinterpretations of history and its actors, legal trials also serve as bookkeepers of history. President Franklin Roosevelt's eventual support for the Nuremberg Tribunal was clearly motivated by this understanding, as Landsman (2005, p. 6) shows when he quotes a report by Judge Samuel Rosenman, Roosevelt's confidant: "He was determined that the question of Hitler's guilt—and the guilt of his gangsters—must not be left open to future debate. The whole nauseating matter should be spread out on a permanent record under oath by witnesses and with all the written documents" (see also quotation of Justice Robert Jackson, above). Roosevelt had come to believe that revisionist interpretations of World War I, challenging the doctrine of Germany's primary guilt, had contributed to isolationist tendencies in the United States, tendencies that Roosevelt strongly opposed (Landsman 2005, p. 6). His interest in documenting the Nazi regime's aggression and atrocities through court proceedings was political and strategic, exemplifying Halbwachs's (1992) claim of presentist orientations in the construction of collective memory.

Recent work addresses these affective and cognitive functions of trials and their contribution to law's unconscious or conscious role in the construction of collective memory. Arguing from a Durkheimian perspective, Carlos Santiago Nino (1996), an Argentinean jurist, former advisor to President Raúl Alfonsín, and strong proponent of criminal trials, argues that the prosecution of generals of the Argentinean military junta was necessary to impress on the collective conscience that the law is the ultimate force in society. Legal anthropologist Borneman (1997) takes a similar position regarding the treat-

ment of members of the former East European elites after the 1989 overthrow of communist regimes. Borneman considers trials as ritual performances of symbolic sacrifice. They engage in a process of internal cleansing and thus prepare the ground for a functioning democracy, the legitimacy of which depends on a system of accountability that is guaranteed only through the principles of the rule of law.

Osiel (1997), writing about the role of law in the construction of collective memories of mass atrocities, both supports and challenges the positions taken by such Durkheimian protagonists of criminal trials (see also Osiel 1995). He stresses the importance of trials as places in which the poetics of storytelling bear out, with defense attorneys telling the story as a tragedy and prosecutors as a morality play. The courtroom drama is then recast "in terms of the 'theater of ideas,' where large questions of collective memory and even national identity are engaged" (Osiel 1997, p. 3). Osiel suggests that "liberal show trials" are conducted by "moral entrepreneurs" and, quoting the Bulgarian philosopher Todorov (1996), by "activists of memory."

Yet, Osiel claims, Durkheimians expect too much from criminal law and overlook the limits of Durkheim's approach: Durkheim underestimated the role of reason and of the rational expression of dissenting opinions (i.e., conflict) in court trials, and he underestimated how the strengthening of the public's feeling may result in conflicting public sentiments and violence rather than social consensus. Osiel (1997, p. 35) suggests that Durkheim learned important lessons, but falsely generalized, from his experience of the Dreyfus trial (see also Coser 1971, pp. 158–59).

Osiel offers an alternative understanding of trials that, he argues, overcomes limits of the traditional Durkheimian approach. Instead of establishing mechanical or organic solidarity, legal proceedings manage to produce "discursive solidarity" (Osiel 1997, p. 51) by providing a civil arena in which dissenting actors can tell their stories and have to

Institutional logic of law: the distinct set of rules and scripts in legal proceedings concerning the presentation of evidence, the establishment of truth, and decision making

listen to each other, thus contributing to solidarity through civil dissensus. In line with ideas developed by Simmel (1950) and later elaborated by Coser (1956), Osiel stresses the sociating consequences of conflict, including trials as arenas in which conflicts can be engaged (see also Garland 1990). He understands trials, more specifically, as institutional arenas for the practice of communicative action (Habermas 1987), and he quotes John Dewey's dictum that "democracy begins in conversation" (Osiel 1997, p. 45; for an excellent review and critique, see Power 1998).

Although both Durkheimian and Habermasian perspectives thus speak to the strength of law as a contributor to collective memory, literature also explores selectivities and limits of law.

Selectivities in law's construction of history. Trials follow particular institutional rules of law (Weber 1976) or, if translated through the habitus of the judicial field into practice, the particular logic of the legal field (Bourdieu 1987). Legal proceedings are bound by evidentiary rules that differ, for example, from those used in other institutional spheres such as science or religion. Further, they target individuals (collectivities only if these can be conceived of as artificial actors), not groups, social processes, or structures. Actions they address are limited by legal classification systems. Trials also focus on defendants, with victims as tools in the pursuit of justice (for the Demjanjuk trial, see Landsman 2005, pp. 110–72). Finally, following the binary logic of criminal law, the defendant is guilty or not guilty, a gross simplification compared with social scientific standards (Schumann 1989). A budding literature has begun to explore the consequences for collective memory.

Considering the individualizing effects of criminal law, Giesen (2004) writes about how Germans in the postwar era coped with the trauma of perpetrators. He argues that German criminal trials against for-

mer Nazis served a decoupling function: "In the narrative of individual criminal guilt, the German people . . . take the position of the third party The law court was the institutional arena in which the demarcation of individual guilt was staged, ritually reconstructed, and reaffirmed" (Giesen 2004, p. 121). As individual perpetrators were ritually expelled, the majority of Germans were offered a chance to avoid acceptance of collective guilt. Osiel (1997, pp. 101f) extends this insight to France, where, in line with President Charles De Gaulle's urging, post-World War II trials were directed against a few top elite actors of the Vichy regime. Again, decoupling succeeded. By attaching guilt to some individuals through legal rituals, memory could be cleansed of the collaboration of many, and attention could be redirected from questions about their past to the reconstruction of France following war and occupation. Accordingly, criminal trials focusing on a few elite actors contribute to removing from collective memory those larger social mechanisms that involve broader segments of the population in the establishment and execution of dictatorial regimes and their atrocities.

Although literature discusses implications of the individualizing nature of criminal law on collective memory, effects of the other aspects of law's institutional logic warrant major research efforts, including limits set by particular evidentiary rules, legal classification systems, the focus on defendants, and criminal law's binary logic. In addition, comparative work is needed on the shape of collective memories constructed through trials against human rights offenders and war criminals by diverse types of courts: domestic courts under successor regimes (e.g., Argentina, Chile, Iraq) versus international courts (e.g., The Hague); courts in countries that represent victims (e.g., the Eichmann trial in Jerusalem) versus countries representing offenders (e.g., French courts against Nazi collaborators) versus neutral countries; or by victors' military tribunals (e.g., Nuremberg) versus courts

run by third parties or international organizations. Such research can draw inspiration from disagreements such as Hannah Arendt's (1963) critique of the "particularistic nature" of the Jerusalem trial against Adolf Eichmann and her related plea for international criminal courts. That viewpoint challenged Prime Minister David Ben-Gurion, who sought to tell of the suffering and struggle of the victims to a new generation and also to correct the Nuremberg Tribunal's focus on war-related crimes at the expense of the history of the anti-Jewish genocide (Douglas 2001, Landsman 2005). It evoked a heated debate and criticism by scholars such as Bell (1980), who recognized law's embeddedness in social life and challenged Arendt's universalistic demands.

Further, legal logic is historically variable. Evidentiary rules may change, and the individualizing and decoupling consequences of contemporary law are not eternal. Meierhenrich (2006) demonstrates how the individualizing consequences of law are the product of a rationalist response to a romanticist identification of the individual with collectivities. This rationalist response was manifested, for example, in the Nuremberg prosecutors' failure to reach convictions of various Nazi organizations. Only individuals were found guilty. In response, Meierhenrich pleads for a cautious rehabilitation of the concept of collective guilt because, he argues, the practice of collective guilt, its attribution, acceptance, and rejection are social facts, at times even reflected in legal practice (e.g., U.S. conspiracy law). Most importantly, collective guilt is argued to interact in a dynamic relationship with collective memory and collective violence; disregarding it would deprive us of the ability to effectively interrupt what Minow calls "cycles of violence."

Finally, although some literature demonstrates the selective contribution of trials to collective memory, other work shows that legal logic must not be overrated. First, legal trials initiate the collection of evidence, not all of which may be admitted in the court of

law, but evidence that will, nevertheless, be available for future historians or that may be directly communicated to the public through mass media. Hagan (2003) and Hagan & Levi (2005) document the diversity of extralegal expertise of forensic scientists, victim workers, journalists, and social scientists mobilized by the International Criminal Tribunal for the former Yugoslavia (ICTY) to uncover forensic and interview-based empirical evidence of the atrocities committed during the Yugoslav wars. Evidence such as recently opened mass graves reach a broad public through journalistic reports, independently of the success of translating these materials into legal evidence in the ICTY's legal proceedings. Investigatory evidence may also be used in future historical documentations, independently of its legal status at the trial (Bass 2000, p. 302).

Second, both legal proceedings and investigatory work may be guided by nonlegal rationales, especially political and ethical ones, in a substantivized type of law (Savelsberg 1992, Weber 1976). A substantive focus is particularly likely where legal institutions are not fully developed (see Hagan 2003 for the ICTY) and in cases of "victor's tribunals" (as distinct from neutral international courts), as discussed by Landsman (2005, pp. 7, 9) for the Nuremberg Tribunal. (For tensions between legal rules and practices and consequences for the construction of a genderized memory of atrocities in the Bosnian case, see Campbell 2002.) In addition, law enforcers' actions may stray from legal logic when they act under political pressure. Landsman (2005, pp. 111ff) describes the problematic work of the U.S. Office of Special Investigation (OSI) in the case against Ivan Demjanjuk, a man formerly of Ukraine who was suspected of being the infamous Ivan the Terrible from the Treblinka concentration and extermination camp. Landsman (2005, p. 123) quotes the OSI's deputy director: "The verdicts in our case went beyond the guilt or innocence of a particular defendant, each one helped to complete the historical record on what America had done [after the early years of

inaction] in response to the Holocaust.” Landsman interprets the politicization and resulting missteps of the OSI in the context of a dramatic shift in American public opinion. Americans increasingly challenged how the United States treated the question of Nazi genocide as a “matter of foreign countries” (Landsman 2005, p. 111), an opinion shift that had motivated the foundation of the OSI in 1979 in the first place.

Law’s interaction with other social institutions: dependency, competition, and conflict.

Law sometimes competes or conflicts with other fields, and law’s impact may depend on other institutions. Hagan (2003) documents the intense competition between the legal and diplomatic fields in the Yugoslav case. In addition, criminal courts are incapable of reaching large audiences directly (for the exception of strong states such as the People’s Republic of China, see Trevaskes 2004). Trials in democratic societies are open to the public, but the audience is small. No matter the ritual force of trials, courts depend on other institutions to communicate their proceedings and decisions to a broader public. Hagan (2003), in his simultaneous account of the atrocities committed in the Yugoslav wars and the building of the ICTY, describes how the charisma of the head prosecutors depends on mass media: “Even at Nuremberg, Justice Jackson needed . . . the cultivation of an initially unengaged press corps to play his charismatic role in the prosecution of Hermann Goering and his colleagues By the time of Ted Turner and CNN’s globalization of the news, the creation and consequences of charisma were even more important parts of international criminal practice” (Hagan 2003, p. 7).

News media not only disseminate the court’s accounts of history; they also report selectively, in general (Gans 1979), and in the coverage of trials specifically (Wright et al. 1995). Kahn’s (2000) account of a Canadian Holocaust denial case illustrates how courts and media interact. Using a rebuttal strategy,

prosecutors tried to disprove the defendant’s statements by calling experts and survivors to the stand. This strategy caused considerable public controversies and misleading newspaper headlines, some of which focused on any element of doubt about selective pieces of evidence. After a conviction was overturned on procedural grounds, a second set of prosecutors used an unmasking strategy, seeking to show that the defendant, as a Nazi, had an interest in denying the Holocaust, a strategy not to give deniers the appearance of seriousness by seeking to rebut their claims (Lipstadt 1993). This second trial, void of the presentation of historical evidence, provoked neither public controversy nor problematic publicity for deniers, illustrating how prosecutorial strategies, combined with media responses, matter even within a given legal institution. They may affect what narratives of history prevail and are communicated to a broader public.

Complementary or alternative mechanisms such as truth commissions.

Some 20 truth commissions (TCs) or TRCs have been at work since 1974, used primarily as alternatives or complements to criminal trials (Landsman 2005, p. 265). Such commissions are perceived as advantageous in light of the limits and selectivities of trials, spelled out above, especially when perpetrators and victims represent two distinct groups in society that must coexist in the post-atrocity era (Hayner 1994, Kritz 1995, Roche 2005; see also U.S. Inst. Peace 2006).

Yet, the work of TRCs, like all construction of historical memory, is selective. Critics stress that TRCs are more concerned with collective well-being than with the fate of individuals. Wilson (2003) cites Plato, for whom the interest of the state is the ultimate standard, placing reconciliation proponents such as legal scholar Martha Minow (1998, 2002) and activist Desmond Tutu in this tradition. Especially where old power holders maintain positions of authority (e.g., Pinochet in Chile, de Klerk in South Africa), amnesties

are seen as a potentially necessary but problematic political compromise, at times paired with TRCs. Wilson (2003, p. 369) argues for the South African TRC that “[a] culture of human rights was constructed upon the quicksand of a culture of impunity.” Wilson identifies several discursive features of TRCs: the construction of a new notion of the national self; an organic model of nation; metaphors of illness and health; and a common good that excludes retribution and stresses reconciliation. Accordingly, Bozzoli (1998) characterizes the South African TRC as “the sequestration of experience’ when individual narratives were subordinated to community histories and new national narratives on the experience of apartheid,” exemplified in Tutu’s dictum that “[s]ocial harmony is for us . . . the greatest good” (quoted in Wilson 2003, p. 370). Wilson finds the latter position anchored in intellectual communities of lawyers, political scientists, moral philosophers, and cultural anthropologists (e.g., Hayner 2001, Ignatieff 2001, Minow 1998).

In addition to the superordination of collective over individual concerns, specific mechanisms of narrating the truth about past atrocities color the collective memory to which they contribute, as discussed by ethnographic researchers for the South African TRC. The TRC’s Information Management System (Infocomm), for example, favors quantifiable forensic evidence: “In Infocomm’s view the only knowledge that matters is that which can be counted and measured” (Wilson 2003, p. 375). Relatedly, Buur’s (2000) work inside the TRC provokes an examination of the TRC’s bureaucratic mentality (Wilson 2003, p. 376). Wilson’s (2001) own work on the TRC in South Africa critiques the favoring of forensic truth over narrative truth. Statements were coded to be broken down to 48 recognized categories of violation, “called ‘the controlled vocabulary’, or the ‘Bible’ by data processors” (p. 377)—at the expense of subjectivities. Ethnographic researchers thus argue that the specific mech-

anisms of the South African TRC privileged the memory of offenses that can be subsumed under bureaucratic categories at the expense of memories of victims as they experienced and gave meaning to their suffering.

Despite such critiques, the South African TRC attracted widespread attention in the South African population, and it gained trust especially among blacks, as documented in extensive survey research by James Gibson (2004). In his examination of the TRC’s effect on collective memory, Gibson further diagnoses that, while many aspects of the apartheid past are still contested, the TRC seems to have had “some influence on creating a South African collective memory,” especially as it helped to “moderate views of the past” (Gibson 2004, p. 115).

In short, while TRCs are meant to overcome institutional constraints of criminal courts, including their selective construction of history, TRCs themselves produce selective, albeit effective, accounts of history. And, while they avoid some shortcomings of legal trials, they are themselves burdened by unintended and counterproductive consequences. Importantly, in practice, trials and TRCs are not necessarily mutually exclusive. Where they interact, post-transition countries often show significantly better human rights records than countries with neither institutional response, at least in Latin America (Sikkink & Booth Walling 2007). The causality of this relationship and the mediating role of collective memory in these processes warrant further investigation.

Indirect Effects: The Regulation of Mnemonic Content by Law

In addition to literature on law’s direct role in the production of collective memory, other research examines how law affects collective memory indirectly by regulating what information can be produced, accessed, disseminated (and to whom), revealed, or kept secret. How and to what degree law interferes in the production and dissemination of

knowledge, thereby influencing knowledge of the past, vary with the legal environment and especially with the political regime in which law is embedded.

Structuring historical memories by controlling access to archival information.

Not only do legal decisions and institutions, such as practices of Internal Review Boards (Feeley 2007) or legislative allocations to science budgets (Heydebrand 1990, Savelsberg et al. 2004), affect the construction of knowledge, including, potentially, knowledge about the past; law also regulates the maintenance of and access to archives in which a nation's history is documented (see Cassin 2001, pp. 16–18 on France). Markovits (2001) examines the history of such laws for Germany, reaching back to the 1934 Decree on Court Files (*Aktenordnung*), which established a hierarchy of durability where the majority of court documents must be destroyed after 30 years, with the exception of court decisions. Markovits sees in this hierarchy a “silencing of the voices of ordinary people” (p. 527). Later, the 1977 Federal Data Protection Act (*Bundesdatenschutzgesetz*), the “most perfectionist system of data privacy in the world” (p. 523), in combination with a 1993 decision by the Constitutional Court (*Bundesverfassungsgericht*) establishing a right to “informational self-determination,” assured that court files would not be publicly accessible (except with permit); these actions thus constitute a further road block to data access. Subsequently, the 1988 Federal Law on Archives (*Bundesarchivgesetz*) determined that files relating to “natural persons” can be viewed only 30 years after the person's death. Public critique that such a law would protect former Nazis from legal claims resulted in an exemption of files relating to “office holders in the exercise of their duties.”

Most recently, with the 1990 unification of two German states, the historical legacy of the German Democratic Republic (DDR) in the East posed new challenges. The 1992 establishment of state archives with all DDR

party records was exempted from the 30-year grace period, except where “unimportant” people are concerned. In the case of the Gauck archives with six million files of the former secret police (*Stasi*), research was restricted by allowing access to event-related files but not to person-related files (with the exception of alleged perpetrators and victims themselves).

Markovits's empirical account feeds informed speculation about the causes and consequences of archival laws. Especially with regard to postunification rules, she sees interests at work that shape laws to selectively restrict access to information with the intent and effect of advancing elite-serving collective memories. Markovits suggests that two forms of memory are favored. First, the focus on event-centered files advances an institutional approach to legal history, the central theme of which is the DDR judiciary's lack of independence; this approach comes at the neglect of considering local actors who may have obstructed the smooth functioning of repressive law. Such interpretation may be in the interest of elites of the new unified Germany who seek to challenge the legitimacy of DDR justice. Second, the preferred access of victims to archival records may advance “history as victims' stories.” Such history, Markovits argues, results in historical accounts that are mixed with emotions and lose sight of the complexities of surrounding situations. Again, this selectivity would strengthen illegitimacy claims against the DDR justice systems, in line with the interests of elites of the new unified Germany.

Markovits's theoretical speculation raises additional questions for future research regarding the conditions and consequences of restrictive record maintenance and access laws. No research empirically assesses the extent to which concealing versus revealing secrets of the past actually influences collective memory. There is also little work examining how laws that regulate knowledge of historical events, which Cohen (1995, p. 47) sees as a ripe subject for the study

of social control, vary across socio-political context.

The dissemination of knowledge. The construction of collective memories is further affected by laws that regulate the use of available information. Justifications for such laws are typically based on concerns for the dignity of individuals or vulnerable groups (for the imposition of enforced silence about a past tyranny as part of an amnesty and for the sake of securing inner peace in ancient Athens, see Cassin 2001, pp. 10–12). The German criminal code, for example, prohibits the dissemination of symbols of political parties proclaimed unconstitutional (paragraph 86a) and the production, dissemination, exhibition, or making available to persons below the age of 18 writings that incite race hatred (paragraph 131). German law also dictates that insult or slander, if directed against a person who was persecuted during the Nazi regime, or against a deceased person who lost his or her life as a victim of the Nazi regime, can be prosecuted without petition by the victim (as opposed to insult and slander generally; paragraph 194). The latter norm is directed against the spreading of the “Auschwitz Lie”; that is, public denial of the existence of extermination camps during the Nazi era. American law, by contrast, has traditionally stressed civil liberties more strongly than the protection of individuals or groups from offensive speech, and much printed neo-Nazi propaganda currently distributed in Germany is produced in the United States (Savelsberg & King 2005).

Libel law, meant to protect a person’s reputation, is a private law mechanism to control speech, including interpretations of a person’s involvement in historic events. Comparative work highlights variations of the use of libel law to control interpretations of the past, as illustrated by work on libel suits by then Israeli Defense Minister Ariel Sharon against an American and an Israeli paper (Adler 1986, Dan 1987, McCormack 1985). In 1983, *Time* magazine published a report

about Sharon’s role in the massacres committed during the 1982 Lebanon war by the Phalangists, a Christian militia group, in the Palestinian communities of Sabra and Shatila, both of which had a history of training terrorist groups. Under political pressure, the Israeli government set up a commission to investigate the charges, staffed with prominent members of Israel’s judiciary that included Yitzhak Kahan, chief justice of the Supreme Court, in addition to a retired general (Kahan Commission). The commission report was critical of Sharon and recommended his resignation. *Time* magazine’s story, based on the Kahan Commission report, however, intensified that critique, its cover reading “Verdict on the Massacre” and the story’s headline “The Verdict is Guilty.” Sharon sued the magazine for damages of \$50 million. Although the American jury was critical of *Time*’s reporting, it denied the charge of libel in light of American law’s strong focus on First Amendment rights, requiring that malicious intent be shown. In a similar trial in Tel Aviv against the daily newspaper *Ha’aeretz*, Sharon fared better. The Israeli court, like its European counterparts less focused on free speech rights, decided that Sharon had indeed been libeled.

Past research has not systematically explored the comparative effects of libel law on the construction of collective memory. The example of the Sharon case illustrates, however, that such work is needed. Both criminal and civil law entail institutional mechanisms to steer information indirectly and thereby affect the construction of collective memory. Such research could be fruitfully guided by Simmel’s (1950) observations on the role of secrecy in society, as have been applied to “legal secrets” in private law by Scheppele (1988). Secrecy’s (and its challengers’) roles in the protection of individual rights, groups’ survival, the stability of transitional democratic regimes, issues of government control over the interpretation of history, and actor-specific access to information are at stake.

Historical consciousness: awareness and discourse about the past in relation to the present, particularly as concerned with causes and consequences of historical eras or events

Analogical device: a past event, typically one in which there exists a unified memory and a clear symbolic meaning, used for drawing a parallel to a current event to legitimate action or intervention

HOW COLLECTIVE MEMORIES SHAPE LAW

Law is not only fertile terrain for constructing collective memory. Memory, in turn, influences the creation and behavior of law and legal institutions. Memory of past injustice, for instance, can influence our expectation of what constitutes justice (Rosenblum 2002, p. 5). Booth (2001, p. 779) observes that “[a trial] is a venue for seeking the victory of the memory of justice over the will to forget,” and he discusses various ways in which collective memory and law are intertwined. Memory can spur feelings of retribution, when law is called upon to dispense criminal punishment. Memories of past atrocity can also inspire related legal and quasi-legal institutions. TCs are created to recognize and publicize memories of wrongdoing, and amnesties are formalized to foster “civil forgetting” (Booth 2001, p. 778; Minow 1998).⁴ Others suggest that laws, themselves, are carriers of the past into the present (Schudson 1997), as laws represent memorials dedicated to past wrongs (Macklem 2005). Yet, collective memory does not automatically beget legal recourse. Some perpetrators of mass atrocity are prosecuted, while others evade. Justice is sometimes dispensed rather quickly following atrocity (Nuremberg), whereas in other cases “righting old wrongs” is delayed (Galanter 2002). In some cases, “collective amnesia” limits the likelihood of legal redress for past injustice altogether (Balfour 2003).

Such variability in the memory-law nexus raises questions of interest to socio-legal scholarship. In particular, how and under what conditions does collective memory influence law? Research germane to that question suggests multiple channels linking memory with the development, implementation, and enforcement of law. We organize this section

⁴Booth (2001) speaks to the connection between memory and justice at a more philosophical level. Arguing that memory serves as “a face of justice itself” (p. 777), he discusses the role, and limits, of collective memory as related to retribution, truth preservation, and amnesty.

around three mechanisms that bridge these concepts, mindful that they are neither exhaustive nor mutually exclusive of one another: (a) analogical narratives, (b) historical consciousness, and (c) carriers of memory.

Collective Memory as Analogical Device

Collective memory and cultural trauma may first influence law via analogy between contemporary social problems with past traumatic events. Research on analogical references to past atrocity in relation to legal institutions represents a nascent and developing line of scholarship, and to date research in this vein has largely focused on the legacy of the Holocaust. A working thesis derived from multiple theoretical lineages is that symbolic depictions of certain atrocities provide a cognitive and moral framework that can impel legal action. This notion is grounded in the sentiment that symbols stand for larger ideas and “evoke an attitude, a set of impressions, or a pattern of events associated . . . with the symbol” (Edelman 1985, p. 6; see also Geertz 1973). The Holocaust has arguably been constructed as the universal symbol of evil in the Western world (Alexander 2002). It thus entails “metaphorical power” (Levy & Sznajder 2006, p. 5) that can inform national and international legal institutions.

Alexander’s (2002) work, in particular, links law with memory of past atrocity. In presenting his theory of collective trauma, Alexander expounds in detail the construction of the Holocaust narrative in the post-World War II era, when the Holocaust ultimately became a universal symbol of evil in the Western world. That moral universal, along with the linguistic and visual symbols thereof, are capable of propelling legal and other (e.g., military) action through analogical reference (see also Levy & Sznajder 2004, 2006). For example, Alexander illustrates how memory of the Holocaust was used to propel American and European intervention in the conflict involving Serbian atrocities in Bosnia and

Herzegovina in the early 1990s. The Balkan conflict coincided with a reinvigorated Holocaust discourse, exemplified by the construction of the Holocaust Museum in Washington, DC, and the release of the Spielberg film *Schindler's List* (Levy & Sznajder 2004, Novick 1999). The choice to intervene in Bosnia was contested, and politicians were not uniform in their resolutions. Some politicians made symbolic analogies between the Holocaust and the Balkan conflict to both motivate and justify intervention, which ultimately took form in a peace settlement that included obligations for all parties under international law.⁵ As Alexander (2002, p. 47) notes, "Senator Joseph Lieberman told reporters that 'we hear echoes of conflicts in Europe little more than 50 years ago,' and presidential nominee Bill Clinton added that 'history has shown us that you can't allow the mass extermination of people and just sit by and watch it happen.'" European politicians made similar pleas. Margaret Thatcher averred, "How many more echoes of horror do Western societies need to hear? Sealed train cars . . . ethnic cleansing . . . concentration camps. Genocidal aggression and callous indifference did not end with the Nazis. The plague has risen with Serbia's devastation of defenseless Bosnia" (*NY Times* 1992). Such political claims were accompanied and buttressed by pictures and descriptions of prisoners that served a similar analogic purpose. One infamous reference depicted an emaciated prisoner named Fikret Alic reaching through barbed wire to shake hands with reporters. "With his rib-cage behind the barbed wire of Trnopolje, Fikret Alic had become the symbolic figure of the war, on every magazine cover and television screen in the world" (Alterman 1997). That picture

conjured up images of Nazi concentration camps, and analogies were made between the Balkan conflict and the years preceding the Holocaust to help mobilize international law.

The Holocaust narrative not only impelled legal intervention in the Balkans. The Holocaust as analogical device also spurred a new vocabulary for human rights law. Although the memory of the atrocities perpetrated during World War II immediately brought about the Universal Declaration of Human Rights, more recent human rights mandates are also products of Holocaust memory. The end of the Cold War removed an obstacle to the lessons of the Holocaust, as Holocaust memory moved from a particular act against those who were victimized to a universal symbol that referenced inhumanity more broadly (Levy & Sznajder 2004). That change in discourse paralleled renewed calls for international law to address human rights violations. As Alexander (2002, p. 49) remarks, "Representatives of various organizations, both governmental and nongovernmental, have made sporadic but persistent efforts to formulate specific, morally binding codes, and eventually international laws, to institutionalize the moral judgments triggered by metonymic and analogic association with the engorged symbol of evil."

The Holocaust as analogical device informs other efforts to reform law as well. The 1970s and 1980s witnessed a new discourse on Japanese internment during World War II, in which internment camps became concentration camps. Parallels between the Holocaust and the treatment of Japanese within the United States yielded formal apologies along with legal recourse in the form of monetary reparations (Alexander 2002, p. 46; see also Yamamoto 2002). With respect to reparations, Torpey (2001, pp. 337–38) further suggests that late-twentieth-century calls for monetary reparations for past injustices "share the common characteristic that the Holocaust is regarded as a standard for judging the seriousness of past injustices and [serves] as a template for claiming compensation for them."

⁵A part of the general framework of the agreement states that "[t]he parties agree to cooperate fully with all entities, including those authorized by the United Nations Security Council, in implementing the peace settlement and investigating and prosecuting war crimes and other violations of international humanitarian law" (Off. Spokesm., US State Dep. 1995, emphasis added).

Research on contemporary U.S. hate crime law also appears consistent with the thesis that analogies to the Holocaust can effectively buttress calls for legislation. Consider the testimony of Kevin Berrill of the National Gay and Lesbian Task Force, who drew an analogy with the Holocaust to underscore his support for the pending hate crime law (cited in Jenness & Grattet 2001, p. 55):

I would like to point out that many of the witnesses at this hearing will be wearing a pink triangle, which was the badge that identified homosexual inmates of Nazi concentration camps. Although it is an often overlooked fact, tens of thousands of gay persons were herded into the camps, and, along with the Jews, gypsies, and others, were gassed and incinerated. We wear the triangle to remember them and to remind people of the terrible cost.

In sum, an evolving body of scholarship suggests that symbols of past evil can serve as analogical references that bolster calls for legal (and other) intervention in conflict. Research to date largely relies on case studies to advance that argument. However, little work investigates negative cases, such as those in which the Holocaust was used as an analogical device to no significant end. The counterfactual is also difficult to estimate. That is, would international law respond to contemporary violent conflict in the absence of analogical links to the Holocaust? And to what end can other past atrocities be drawn upon to generate support for current law and justice? These represent a sampling of unresolved questions that bear on the association between collective memory, analogies to past atrocity, and law.

Collective Memory, Historical Consciousness, and Law

The institutionalization of collective memory as law is further mediated by historical consciousness. By this we mean a society's exploration and evaluation of the past in light of the present (Balfour 2003) that, different

from collective memory, does not imply a shared vision of the past. Law and law enforcement, from a Durkheimian perspective, become tools to confront the past, reestablish moral boundaries, and provide an institution through which the public can express sentiments concerning right and wrong (Mistzal 2003), similar to monuments and memorials as tangible representations of collective memories (Schwartz 1982, Vinitzky-Seroussi 2002, Wagner-Pacifici & Schwartz 1991). Writing on Durkheim's contributions to memory and law, Misztal (2003, p. 132) suggests that "liberal law realizes its potential to construct solidaristic collective memory. The past endures in the present in legislation."

Building on this Durkheimian framework, King (2005) investigates whether U.S. law enforcement responses to hate crime covary with differences in visible collective memories of bigotry. This thesis does not proffer that physical commemorations such as monuments and memorials, themselves, directly cause legal action. Rather, the cultural sentiments that give rise to symbolic commemorations of past atrocities designate a greater awareness, or historical consciousness, of the manifestations and consequences of hatred. In line with work on the cultural representation of collective memories (Schwartz 1982), commemorations of past atrocity are indicative of a culture that is receptive and responsive to issues of hatred and violence. Three axioms are germane to that thesis.

First, commemorations are imbued with meaning. They give tangible form to latent emotions and represent moral consciences, as symbolic commemorations of the past reflect contemporary culture (Schwartz 1982). Second, legacies of the past enable and constrain government decision making. That idea draws on Olick & Levy's (1997) research on collective memory and German political culture; they show that German politicians and prominent members of civil society are constrained in their public discussions and positions on Israeli and Jewish affairs. The past penetrates the social and political sphere, encouraging

new voices and begetting recognition and demands for justice (Vinitzky-Seroussi 2002). In line with these arguments, legacies of past atrocities may enable and constrain not only political claims-making (Olick & Levy 1997), but also law and its implementation. Third, the role of collective memory and cultural trauma in contemporary life varies across social context (Mannheim 1952, Schuman & Scott 1989, Scott & Zac 1993, Weil 1987). Memorials of Martin Luther King, Jr., for instance, vary by region and correlate with the socio-political terrain (Alderman 2000).

Building on these characteristics of collective memory, King's (2005) investigation into variations in hate crime law enforcement finds that Holocaust commemoration is predictive of hate crime law enforcement. Objective commemoration of a traumatic and hate-laden past, such as the Holocaust, is correlated with legal responses to crimes motivated by bigotry. Law, it appears, can legitimize and institutionalize collectively held sentiments about the past.

Although an association exists between Holocaust commemoration and hate crime law enforcement, a less robust correlation is found when commemorations of the U.S. civil rights era and hate crime law enforcement are assessed (King 2005). One interpretation of that duplicity is that commemorations of foreign evil are channeled differently than remembrance of domestic wrongdoing (Savelsberg & King 2005). That argument is consistent with work on remembrance and collective memory in the American context. Kammen (1991) suggests an American tendency to depoliticize the past. That observation aligns with Balfour's (2003) theoretical work on historical consciousness and legal redress concerning U.S. slavery. Balfour draws heavily on the writings of W.E.B. Du Bois to suggest that a "willful national amnesia prevented black citizens from enjoying in fact the freedom and equality they were guaranteed by law" (Balfour 2003, p. 33). Synthesizing a wealth of Du Bois's scholarship, Balfour

rearticulates Du Bois's thesis that the suppression of an overt and critical reflection on slavery in the nation's collective memory serves as an impediment to legal redress (e.g., reparations) for the legacy of slavery. To that end, such "unwillingness to confront the past is connected to the failures of formal equality as an antidote to the poison of racial injustice" (p. 33). Balfour illustrates how consciousness of the past parallels legal and policy debates concerning equality and civil rights. The argument for reparations, she suggests, implicates "a structure of memory and critique" (pp. 39-40) whereby legal redress for slavery via reparations is "centrally a story of memory's suppression" (p. 40). In short, how a nation's collective memory is constructed can limit possibilities for legal change.

The distinction between commemoration of foreign and domestic evil with respect to law and law enforcement is further highlighted in recent comparative work on collective memory and law. In their work on German and American laws concerning hate-inspired crime and violence, Savelsberg & King (2005) suggest that American memorials rarely focus on domestic evil, but instead on great presidents and military accomplishments in combating foreign evil. In contrast, national collective memories of hatred and domestic atrocity (e.g., the Holocaust) are "deeply historicized" (p. 599) in German commemorations. That distinction maps onto nation-specific differences in hate crime law and law enforcement. U.S. federal hate crime law, for instance, avoids references to domestic history in such legislation, although references to foreign atrocity were mobilized by interest groups in the hate crime law movement (Jenness & Grattet 2001). The German equivalent of hate crime law, as evidenced in the Basic Law and criminal code, instead acknowledges Germany's Nazi past and the Holocaust and explicates categories of victims. Moreover, reflecting interpretations of the demise of the Weimar Republic, German law is simultaneously and overtly concerned with protecting the democratic state.

Polletta's (1998) research on commemoration of Martin Luther King, Jr., in the halls of the U.S. Congress raises additional questions about the context in which collective memories are implicated in the lawmaking process and to what extent references to the domestic past, such as the civil rights era, are efficacious in promoting legislation or related legal action. On the one hand, Polletta acknowledges that King's name can be used to bolster calls for legislative action. References to King often surfaced in discussions of legislation to address intergroup conflict, such as federal legislation to assist with church arsons, or in calls for affirmative action (Polletta 1998, p. 486). King is invoked as a moral leader, and references to his teachings are used to legitimate legislation. Yet, the manner in which King's legacy can be employed is constrained, and the meaning of his legacy is contested. African Americans who invoke the memory of Martin Luther King, Jr., to call for redistributive policies sometimes conflict with white speakers who emphasize progress that has already been made (Polletta 1998, pp. 490–91). African American elected officials, in particular, must balance their desire to legitimate themselves as champions of black interest via the lawmaking process with the limits of what they can say to a sometimes unsympathetic audience.

In sum, collective memories both inform and reflect a historical consciousness that is objectified in legal institutions. Savelsberg & King (2005) refer to applied commemorations—commemoration in the context of judicial, legislative, or executive decision-making situations—as opposed to commemorations for their own sake as one crucial mechanism through which such objectification occurs. However, not all collective memories of wrongdoing generate consensus, and contested memories are less likely reflected in law. The role of Holocaust commemoration is markedly different from collective memories of U.S. slavery or civil rights abuses. The context of memory is thus consequential for law.

Carriers of Collective Memory

A line of neo-Weberian scholarship emphasizes the role of carrier groups as intervening in the memory-law nexus. Carrier groups represent bearers of social action (Weber 1976) that maintain a discourse on ideas and promote social values (Kalberg 1994, pp. 58–62). Interest groups, for instance, can act as carrier groups by evoking collective memories to legitimate claims for legal change. The specific collective memories of the past that groups recall, however, differ depending on which social groups are recalling events (Schuman & Scott 1989).

Socio-legal research identifies similar tendencies in the realm of criminal law. Savelsberg & King (2005) suggest that in Germany the state is the primary carrier of collective memory, whereas disparate groups in civil society largely act as carrier groups in the United States. That difference, in conjunction with nation-specific collective memories and political institutions, partly accounts for variation in the framing of each nation's respective laws concerning hatred. The protection of the democratic state as a pronounced theme in Germany contrasts with American law's emphasis on the protection of vulnerable groups. Where the state has been the prominent carrier of collective memory (Germany), laws dealing with hatred and extremism have more directly institutionalized collective memory and protected groups that were victimized by the Holocaust. Differences are also apparent at the level of law enforcement. German law enforcement, in line with the state as carrier of collective memory, is embedded in the context of state protection units (*Staatsschutzdezernate*). By contrast, U.S. prosecutors' working knowledge of hate crime maps onto their exposure to localized interest groups.

Other work cites specific representatives of carrier groups, moral entrepreneurs, as mobilizing collective memory for purposes of lawmaking. Moral entrepreneurs occupy a central place in classic studies of social problems,

and scholars of collective memory employ the related concept of “reputational entrepreneurs” (Fine 2001), actors who frame and deploy images of society and history consonant with a specific agenda in efforts to partly determine or control the memory of individuals. In his discussion of “righting old wrongs,” Galanter (2002) bridges the ideas of moral entrepreneurs, collective memory, and law. He claims that a “proliferation of efforts to reform the past” (p. 108) has characterized recent decades, particularly with respect to prejudicial and often violent injustices in the United States and abroad (see also Torpey 2001). Legal initiatives to right old wrongs include reparations, formal government apologies, and pardons.⁶

This apparent spike in redress for injustices that occurred decades or centuries ago raises numerous questions. Why, for instance, does such action arise at particular times and places? Why are some injustices redressed while others are not? For Galanter (2002), multiple characteristics of modern society account for such institutionalization of collective memory in law, including “the general extension of empathy in the late twentieth-century society” (p. 120), criticism of government power, and optimism about the efficacy of institutions. Still, states formally address some memories of injustice while remaining reticent on others. Galanter suggests that injustices against ascriptive groups are more apt to be recognized through law or other government acts, such as formal apologies. Past wrongs based on ascriptive characteristics (caste, tribe, ethnicity, religion), he suggests, tend to inspire moral entrepreneurs, “organizers who devote themselves to investigating, publicizing and campaigning about old wrongs” (p. 122; see Diner 2000, e.g., p. 233, and Torpey 2001, p. 339, for related

propositions). Memories of injustice against those with “primordial identities” (Galanter 2002, p. 122) are more easily mobilized for legal and other purposes.

Other work suggests that carriers of collective memory are influential when they are representatives of the aggrieved group. For example, Izumi (2005) suggests that collective memory of the Japanese American internment influenced public support for the repeal of the McCarran Internal Security Act of 1950 that limited due process rights concerning detention during a national emergency. Collective memory of internment, in concert with the presence of previously interned Japanese protesters, effectively added credence to the protest movement.

Another body of research suggests that collective memory can inspire micromobilization—interactions among actors in which meanings of past events and identities are formed—which in turn motivates activism. Harris (2002), for instance, examines how collective memories are used as catalysts for an individual’s involvement in collective action. Stories of triumph and tragedy by elders who had witnessed civil rights abuses, such as the murder of Emmett Till, can motivate political participation among younger cohorts. As Dawson (1994, p. 51, cited in Harris 2002, p. 157) articulates, “the collective memory of the African American community continued to transmit from generation to generation a sense that race was the defining interest in individuals’ lives and that the well-being of blacks individually and as a group could be secured only by continued political and social agitation.” For Harris, collective memories of past injustice are used to cement loyalties to a movement, provide inspiration through stories of past successes, and ultimately foster activism. That activism, in turn, can potentially lead to legal change. The narrative of Emmett Till’s slaying reinvigorated a commitment to racial justice and ultimately inspired political activism among some African Americans. Collective memories of traumatic events can thus serve

⁶Galanter (2002) cites numerous examples, such as the Vatican’s pardoning of Galileo in 1984, Wisconsin’s formal apology in 1989 for the 1932 Bad Axe Massacre, or the 1974 class action lawsuit that compensated participants of the 1930s Tuskegee syphilis study.

as catalysts for articulating grievances for purposes of political action and legal change.

BRIEF CONCLUSIONS AND FUTURE DIRECTIONS

A new and growing body of literature on the reciprocal relationship between law and collective memory speaks to direct and indirect ways in which law and collective memory mutually affect and constitute each other. Legal trials evoke collective sentiments, and they may impress memories of past atrocities on groups and peoples. They do so selectively though, given the institutional constraints of law, and they depend on mass media that impose further selectivities, while simultaneously competing with other fields of memory production. A new body of literature also discusses the institutionalization of collective memory as law, specifically how collective memories affect the making and enforcement of law. Although case studies already dominate the field, more such studies are warranted, for cases of atrocities but also regarding other substantive terrain. One example is the cumulative effect of trials of everyday crimes on the collective representation of evil and of large cases in other areas such as corporate crime. Comparative research is also potentially fruitful, particularly studies that systematically analyze the conditions of trials and their conse-

quences relative to their alternatives on collective memories as expressed in mass media, political speeches on memorial days and in decision-making situations, memorial sites, history textbooks, works of art, and public opinion polls over time. The systematic collection of such data would also enhance future work on the effects of collective memories on law and its enforcement, through the use of recognized past evils as analogical devices, via historical consciousness, and through the presence of carrier groups.

Future research should also empirically assess how different types of legal proceedings employed to confront the past—TCs, amnesties, trials, and types of punishments dispensed—influence attitudes and behaviors. That question has been the subject of prior research on what should occur following a conflict (Minow 1998, Wilson 2003). Yet, there is less explanatory work on the impact of legal proceedings, and collective memories articulated therein, on subsequent outcomes such as intergroup violence or respect for attitudes toward law (save Gibson 2004, on South Africa). Especially needed is comparative research to assess how TCs, in comparison with trials, lustration procedures, or outright amnesties, affect attitudes concerning intergroup violence and retaliation and what the consequences are for future escalation or de-escalation of violence.

SUMMARY POINTS

1. Law, through its ritual force, is an effective tool in the construction of collective memory.
2. Law, through its particular logic, contributes to the construction of narratives distinct from those produced in other institutional realms such as diplomacy, politics, religion, or social science. Narratives constructed through legal proceedings tend to focus on individual offenders at the neglect of historical trajectories, larger social and cultural forces, and collective responsibilities.
3. Narratives constructed through legal proceedings are typically mediated by other institutions such as scholarship and mass media before they affect collective memories.
4. Law may affect collective memory indirectly as it regulates the production of, access to, and dissemination of information about the past.

5. Collective memory may become institutionalized as law through diverse mechanisms such as applied commemorations.
6. Carrier groups of collective memory are crucial contributors to lawmaking.
7. Participants in lawmaking processes make use of analogical devices and historical consciousness to affect their outcome.

FUTURE ISSUES

1. More case studies are needed to explore the consequences of different types of legal proceedings and their alternatives for collective memory.
2. Research is needed, including systematic comparative research, to examine the construction of narratives created by different legal forms and alternative responses to atrocities.
3. Research is needed, including systematic comparative research, to examine the interaction of legal narratives with other social and cultural forces in the construction of collective memories.
4. The role of law-induced collective memories as alternatives and contributors to classic functions of criminal law such as deterrence, retribution, rehabilitation, and compensation warrants future investigation.

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