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RETHINKING GROUP RESPONSIBILITY AND STRATEGIC THREATS IN BIBLICAL TEXTS AND MODERN LAW

SAUL LEVMORE*

I. INTRODUCTION

Conventional wisdom has it that ancient laws, and biblical accounts in particular, are more collective and less individualistic than modern perspectives on law and justice.1 Thus, modern legal systems promote the notion of liability for one’s own wrongs or even responsibility for one’s actions and do not formalize the reputational burdens that fall on kin or clan. In contrast, ancient texts often describe adversities that befall a tribe or other group as following the wrongdoing of a member of that group. Such group responsibility may serve to reinforce (or reflect) community bonds, control wrongdoers, extract information about wrongdoers, or perhaps signal to potential travelers the maintenance of law and order.2

There are, of course, counterexamples to the idea of associating ancient law and lore with group responsibility and modern rules with individualized deserts. In modern times, the uncontrolled behavior of criminals, terrorists, armies, political leaders, fanatical groups, and private citizens sometimes elicits legal reactions that penalize seemingly innocent fellow citizens. In biblical texts, there is no shortage of examples of individual insubordination leading to individual punishment. For instance, although both Lot’s wife and Korah are encountered in stories where communal responsibility is said to be a salient feature, there is also unmistakable individual responsibility in

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All references to biblical texts are to The Revised English Bible with the Apocrypha (Cambridge Univ. Press 1992) unless otherwise indicated.

1. See, e.g., 6 ENCYCLOPEDIA JUDAICA 121-22 (1971) (describing divine law as punishing groups as well as individuals); ZE’EV W. FALK, HEBREW LAW IN BIBLICAL TIMES 73 (1964) (ancient societies based on idea of collective responsibility). Even in David Daube, Two Notes on Communal Responsibility, 36 SOC. REV. 24, 24 (1944), where many cases of apparent communal responsibility are described as better characterized as “ruler punishment,” with the community suffering in its role as the wrongdoing ruler’s “property,” ancient actors are described as thinking in terms of communal rather than individual responsibility.

2. See infra part III.D.

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these accounts. Indeed, it is difficult to sustain the view that individual responsibility is a modern construct. Still, the conventional wisdom associating ancient materials with group responsibility is apt even if imprecise.

One aim of this Article is to explore this imprecision and the comparative question of whether group responsibility is indeed a thing of the past. If by group responsibility we mean the calculated infliction of liability or punishment (or the threat of such discipline) on a target group that includes blameless individuals, then it quickly becomes clear that not all examples of such responsibility are alike. We are, for instance, quite accustomed to the loss of innocent life associated with modern military actions against enemies, but it is easy to imagine a legal system condoning such actions while refusing, in its domestic law, to impose criminal or even tort liability on a neighborhood known to contain an unidentified thief. I argue that much of the apparent group responsibility found in biblical texts is really of the first, or "international" kind, in that it is analogous to military actions that gain support even though they are expected to burden relatively innocent people. This sort of group responsibility does not represent evidence of a perspective that is less individualistic than modern law.

A second aim of this Article is to explore the question of strategic threats against innocent and guilty alike. I have suggested elsewhere

3. Genesis 19:17, 19:26 (Lot's wife looked back and turned into a pillar of salt after receiving instructions to flee from the destruction of Sodom and not to look back or stop.); Numbers 16 (Korah protests priestly monopoly and he and his followers are consumed by the earth.). The Korah episode is often described as reflecting communal responsibility because Moses and Aaron question God's wrath in asking "if one man sins, will you be angry with the whole community?" Numbers 16:22. There is, however, no explicit textual indication that innocents (nonfollowers of Korah) were to be stricken; Moses and Aaron may simply have preferred to see the ringleader alone punished. The story has language in it regarding the tension between communal and individual responsibility, but the outcome (and even the threat) seems quite consistent with individual responsibility.

A somewhat similar tension is found in other texts. Thus, in the Book of Esther, Haman's feelings toward Mordecai cause Haman to plan group destruction, but this is hardly offered as a role model for any kind of justice. In turn, Haman and his sons were eventually hanged and "The Jews put all their enemies to the sword. There was great slaughter and destruction, and they worked their will on those who hated them." Esther 9:5. The period of "self-defense" was extended in the provinces, and many more were slaughtered "but they took no plunder." Esther 9:15-16. On the one hand, there appears to be communal responsibility (in reaction to that which was (malevolently) suggested for the Jews by Haman) because the text describes the victims as people who hated Jews, rather than as wicked people who had done particular wrongs. An alternative reading is that the remark about plunder is meant to emphasize that care was taken to inflict losses only on those people who had engaged in wrongdoing in the past (or perhaps crimes of intent were punished). Their families were not only spared but also permitted to keep the property that had been accumulated by the wrongdoers.

4. And this is certainly the definition I think we should use, inasmuch as it captures the attribute of broadly-applied burdens that concerns us the most in the design of legal rules.
that once a legal system employs the tool of group responsibility, it is something of a puzzle why there is not the additional step of "overextraction,"5 threatening both innocent and guilty parties with large enough penalties to induce confessions from rational wrongdoers. Put differently, it is easy to imagine that a legal system might limit its use of group responsibility to international, or war-related, circumstances. The costs or moral discomfort associated with calculated threats or punishments directed against innocent parties along with guilty ones might be palatable only when the burdens are borne outside the community normally governed by the given legal system. When a legal system imposes these costs domestically, employing what we might call "conventional group responsibility," it is then interesting to consider other legal tools that might normally be rejected because they burden innocent parties along with culpable ones.

Part II sets the stage for the comparative exercise by reflecting on the explicit and implicit uses of conventional, or domestic, group responsibility in contemporary law. The discussion also considers the use of threats against innocent and guilty alike by introducing the idea of overextraction and its notable absence from both contemporary and ancient reports. I focus on the biblical text describing Solomon's wisdom in order to provide an example of how the overextraction tool might have been useful. Part III focuses on the international kind of group responsibility and the claim that many biblical texts with striking communal responsibility exhibit the moral reasoning of (even modern) warfare. I focus on the stories of Sodom and Gomorrah and of Gibeah and civil war with the Benjaminites. The analysis temporarily blurs the distinctions among these types of responsibility with some discussion of the treatment of inhospitality in the biblical texts. The discussion in Part IV then turns to ancient narratives in which there is some problem identifying wrongdoers, for it is in these settings that conventional group responsibility is most alluring. The discussion concentrates on the stories of Adam and Eve, Jonah and Nineveh, and Joshua's ferreting out of Achan, but includes some consideration of group responsibility in other biblical texts and in Hammurabi's Code. I try to show that it may be the overextractive kind of threat (against innocent and guilty alike) that is in fact more significant in biblical texts than in modern law. At the same time, I suggest that, inasmuch as there is probably no greater use of conventional

group responsibility in biblical texts than in modern law, the limited presence of strategic threats in these ancient texts seems familiar more than puzzling. Part V offers some concluding comments regarding the comparability of ancient and modern examples.

II. GROUP RESPONSIBILITY AND THREATS

A. Explicit and Implicit Group Responsibility

There are functional and moral overtones to the idea of holding a group responsible for the wrongdoing of one of its members. Where the identity of the wrongdoer is unknown to the legal authority, there is a natural inclination to think of group responsibility in functional terms. Thus, an unsolved crime, tort, or instance of insubordination might generate a curfew, an embargo, a razing of residences, a special tax, or many other collective burdens, because the authority thinks there is some chance that the (threat of a) collective burden will discourage individuals who identify with the group from engaging in wrongdoing and triggering group penalties, persuade members of the group to produce information regarding the identity of the true wrongdoer, encourage the group to take steps to eliminate or control wrongdoers, or even foster group behavior that in the long run reduces this sort of wrongdoing. Other, nonfunctional perspectives are of course possible, but these tend to dominate only where the identity of the wrongdoer is known. In any event, one of the things to look for in ancient and modern sources is this connection between group responsibility and uncertainty regarding the identity of the narrowly-defined wrongdoer. Functional explanations will be driven by the strength of this connection.

In modern legal systems, group liability of the kind we might associate with tort or criminal law is firmly linked to uncertainty, or to

6. Thus, the call for domestic tourists and conventioneers to boycott a city or state for failure to vote for a particular constitutional amendment or national holiday or civil rights measure seems morally defensible even though "innocent" parties will be hurt in those locations and even though the identities of the "wrongdoers" (from the perspective of those who call for the boycott) are, in large part, known. To the extent that the argument for this sort of group responsibility is functional (perhaps the thought is that economic pressure will change the political will), we have an example of what I will call the "international" kind of group responsibility. See infra part III.C and note 42. There is room to argue, however, that this sort of boycott is more moral than functional.

7. I refer to the idea that group responsibility may sometimes be explained as befitting a group because it "allowed" evil to develop in its midst. In such cases, it will be useful to ask whether the group is punished even where the more obvious evildoer is available for individual punishment.

8. There is also group responsibility in the form of overbroad tax and regulatory enactments. Most of these can also be associated with uncertainty about the identity of wrongdoers.
an inability to identify wrongdoing (or simply causal agents) more narrowly. The most striking examples are also the most controversial. In Ybarra v. Spangard,\(^9\) a patient was empowered to sue and collect from a number of health professionals after sustaining an injury during an operation. The injury was almost surely caused by the negligence of one of these defendants. The case has been understood as shifting the burden of proof to a group of defendants where the plaintiff is unlikely to be able to develop much information and where the defendants might otherwise find it worthwhile to protect one another with silence.\(^10\) There are few cases like Ybarra, but it is an interesting example of (potential) group liability where, first, there would be no such resort to the group if there were no uncertainty as to the identity of the more immediate wrongdoer and, second, the members of the group may be encouraged by the prospect of liability to help identify the individual wrongdoer. This "information-forcing" component of (or argument for) group liability is probably the key to any expansion of modern group liability, but it plays less of a role in biblical texts—unless kinship responsibility is a proxy for information-forcing liability.\(^11\)

Subtler examples of group liability abound in modern law, and can also be linked to uncertainty and attempts at influencing wrongdoers and those who know the identity of wrongdoers. For example, tort law often imposes liability on the manufacturer of a product where it is understood that some other party, such as the retailer or a supplier of a component part, should have taken precautionary steps, but where it is costly for the plaintiff and the legal system to identify

But inasmuch as these forms of implicit group responsibility take us yet further away from the ancient texts, I do not include them here.

9. 154 P.2d 687 (Cal. 1944). Lawyers will sympathize with the text's cautious description of the case. The trial court had entered judgments of nonsuit as to all defendants, and the appeals court allowed plaintiff's appeal, thus shifting to defendants the need to explain their conduct and contradict the inference of negligence on their part. Id. at 688, 691.

10. See Levmore, supra note 5, at 1565-75.

11. Kinship responsibility is common in biblical texts. The relationship between family responsibility and the text's functional explanation is that family members (living in what must have been very close quarters) know a great deal about one another's thoughts and actions, and familial responsibility may be a way of expressing the idea that family members should have distanced themselves from evil. On the other hand, none of the biblical stories describe family members' reporting on one another and then escaping punishment. Moreover, a comparison of those texts in which punishment is extended to family members with those in which it is limited to the individual wrongdoer suggests no easy explanation for the incidence of kinship responsibility in biblical texts. Therefore, my strategy in this Article is to avoid the implications of kinship responsibility for group responsibility in general. For an interesting discussion of kinship responsibility—and occasionally neighborly responsibility—as a tool of optimal deterrence in primitive societies. See Richard A. Posner, The Economics of Justice 193-96, 217-24 (1981). See infra note 82 for some discussion of kinship responsibility in biblical texts.
the best precaution taker. To the extent that the manufacturer is relatively innocent, but costs of accidents can be spread, and sometimes reduced, through precautions encouraged by the manufacturer, products liability can be thought of as implicit group responsibility. An alternative, but perhaps not competing, view of such implicit group responsibility in modern law is that it is a form of insurance that has evolved in risk averse societies. I do not pursue this idea here, in part because ancient accounts are not easily described as reflecting a hypothetical bargain among participants to share risks.

In short, modern law makes occasional explicit use of group liability along with frequent implicit use of group liability. Ours is a world with many taxes, regulations, and price increases that can be said to burden groups because of the individual members' wrongs. To take two examples, we are accustomed to the idea that both tort recoveries and undetected shoplifting generate higher prices and in this way create implicit group responsibility for many consumers. Corresponding group criminal punishment is, however, quite unusual. Finally, direct, more explicit, tort liability of this kind is common only as applied to enterprises, which may then share the responsibility with their customers through price increases.

B. Strategic Threats

1. Overextraction

Although modern law routinely departs from individual responsibility by assigning liability in ways that will inevitably impose costs on innocent parties, there is no hint of a second departure in the direction of more ardently extracting information. If a student has a knapsack stolen in a university library, or is pickpocketed in the elevator ascending to the library, we do not gather other library patrons and demand payments or confession. The scheme I explored in an earlier article imagined six passengers in an elevator, with one suffering the loss of a wallet containing $100. The law could demand that every passenger agree to be searched or instead contribute $150 to a fund. The money would be returned to each contributor if the pick-pocketed

12. Similarly, there is a link between vicarious liability (for the actions of one's agents) and group responsibility. See Robert A. Baruch Bush, Between Two Worlds: The Shift from Individual to Group Responsibility in the Law of Causation of Injury, 33 UCLA L. REV. 1473 (1986). Other examples of implicit group responsibility where there is uncertainty include affirmative action plans and a variety of taxes. Levmore, supra note 5, at 1572.

13. For an illustrative exception to this generalization, see infra part IV.E (Hammurabi Code provision as an insurance scheme).

ing thief returned the wallet and the $100 in it, but otherwise the entire fund would be turned over to a worthy cause. The idea is to make the thief rationally prefer to confess (and to return what has been taken) by promising that confession will cost nothing more than the wallet plus the $100, while failing to confess will cost the thief $150. I refer to this strategic threat as "overextraction," because it not only threatens a target group known to contain innocent parties, but also threatens each member of the group with liability exceeding that which is necessary to extract the wrongfully gotten gain. Both steps are necessary in order to be sure that confession will be attractive to the wrongdoer.

This overextraction scheme is unusable in many settings because it requires that the targeted group definitely contain the wrongdoer, that the wrongdoer fear no further penalties, that only the wrongdoer be capable of making a convincing confession, and that there be no opportunity for the wrongdoer to pass on incriminating evidence to an innocent member of the target group. But it is noteworthy, I think, that we do not attempt experiments with such strategic threats even where we might. My sense is that most citizens abhor the notion of using the legal system to extract payments from innocent parties in a calculated or explicit way. Implicit group responsibility, in the form of taxes or higher prices, is apparently far more acceptable.

2. Solomon's Strategic (But Not Overextractive) Threat

One plausible strategy for exploring ancient law is to test the hypothesis that because the distaste for explicit group responsibility is (conventionally said to be) a modern construct, early law might incorporate not only explicit group responsibility but also overextractive threats. If ancient law was more willing to punish the innocent along with the guilty, then it might also have been more willing to threaten (and then overextract from) innocent and guilty alike. I can imagine a legal system drawing the line between explicit group responsibility and overextractive threats in several clever places, but it is quickly apparent that such theorizing has little relationship to known legal systems. Explicitly overextractive threats, followed perhaps by occa-

15. If, for example, the thief in the elevator has an opportunity to pass the wallet to an innocent passenger, then that passenger will know that no one else is capable of producing the wallet and offering a "convincing" confession.

16. I think of overextractive threats as a kind of group responsibility because even when the threatened group is very small there remains the critical feature of knowingly burdening the innocent.
sional liability, are unknown in modern or in ancient rules. I will, however, suggest that such threats can be read into ancient narratives.

Consider as an introductory, albeit negative, example, the well-known trial court decision that caused Solomon’s wisdom to be widely recognized.17 Two women had recently given birth, and one baby soon died. Each woman claimed the live child. The mother in possession of the live baby claimed that the other woman was a liar. She was in turn accused of being both a liar and a kidnapper.18 Solomon dramatically orders the physical partitioning of the live child and then observes the claimants’ responses. One woman pleads for the child’s life, even preferring to see the child awarded to her competitor, while the second woman (imprudently, as it turns out) expresses a willingness to see the infant divided. The unpartitioned baby is awarded to the first woman.

Solomon probably assessed his customers correctly, but I am hardly the first to note that the decision is of little precedential value, except perhaps as a lesson in the ritual of gathering evidence.19 If the

18. She is also “accused” of negligently killing her own child: “During the night this woman’s child died because she lay on it, and she got up in the middle of the night, took my baby from my side while I, your servant, was asleep, and laid it on her bosom, putting her dead child on mine.” 1 Kings 3:19-20. There are aspects of this story that seem a bit contrived but the narrative never tells us whether the truth-teller was the woman who speaks these words or the other, who is in possession of the live baby, and simply says that the story is false.
19. See Steven J. Brams, Biblical Games: A Strategic Analysis of Stories in the Old Testament 118-23 (1980). Brams’s analysis is enriched with the idea, or assumption, that there was some risk in challenging the King’s decree. Id. at 120-21. This assumption makes the second woman’s behavior seem less foolish, for even a clever claimant then has something to lose by following the first woman’s strategy. I find Brams’s analysis interesting (as always), but a bit implausible if only because the punishment for perjury must surely have been as great as that for “challenging” a royal decision. Moreover, the narrator carefully tells us that the true mother of the live child was moved by the horror of the sword to speak first. Brams’s version works best if the other mother is called upon to react first, or if the two react simultaneously, for then the wrongdoer faces a serious strategic decision (assuming still that there is some danger in challenging the royal judgment).

Another line of argument is that Solomon may have gotten the thing wrong, for much the same reason that modern observers do not rush to preempt most litigation by adopting the rule (found, it seems, elsewhere) that when claimants are locked in a dispute over property (or a woman) the subject of their dispute should be destroyed. See Ann Althouse, Beyond King Solomon’s Harlots: Women in Evidence, 65 S. Cal. L. Rev. 1265, 1272 (1992). It is this perspective that causes me to use the word “probably” in the text. And it may be this possibility, however remote, that generates the strange end to this text; the narrator reports that the true mother was awarded the child, but there is no mention of punishment for the other woman. In any event, the argument here is that a seriously strategic threat, in the form of the overextraction idea applied presently, is not only better in terms of strategic players but also does at least as well in terms of accurate fact-finding. But see Martha L. Minow, The Judgment of Solomon and the Experience of Justice, in The Structure of Procedure 447, 447-50 (Robert M. Cover & Owen M. Fiss eds., 1979) (describing Solomon as trying not to elicit the truth of the conflicting claims but the identity of the better caregiver). A nice attribute of the overextraction scheme is
second woman had been more clever, or had known of Solomon's trap in advance, the courtroom theatrics would have accomplished nothing. We are, of course, not told what Solomon's next step would have been in the event that both women had recoiled at the idea of partitioning the infant. In short, Solomon displays great courtroom manner, but the wisdom of his decision underwhelms the modern eye, trained as it is to anticipate crafty wrongdoers with some knowledge of precedent.

Solomon used a strategic threat against innocent and guilty alike, but he might have gone further and tried the overextraction idea. He could have announced that both women were to be put to death (with no need to threaten the infant) unless one could offer a convincing confession, in which case the confessor would suffer some lesser punishment. Only the true wrongdoer might be able to describe the precise manner of the infant's death. Or perhaps the true wrongdoer could relate the time and manner of the death (or the substitution and abduction) in a way that was consistent with corroborating evidence. In any event, the danger of a convincing but dishonest confession—that it maintains much of the force of Solomon's tactic, because the claimant who considers the life of the child will still be more likely to "confess."

This is as good a point as any to acknowledge an awkward feature of the present project. Although I regard the Bible as containing a set of stories that might convey a message to readers, and especially to readers (or internal actors) looking for guidance as to the design of just laws, the Bible's stories themselves (as opposed to the legal pronouncements on a variety of subjects) are astonishingly devoid of both rules and analogies (including references to precedents)—other than the rather general rule that evil and insubordination are punished. See Cass R. Sunstein, On Analogical Reasoning, 106 Harv. L. Rev. 741 (1993). In these stories, God as well as Moses, Joshua, Solomon, and other judges generally seem to decide cases in isolation from other cases that have arisen or that are likely to arise. Indeed, glaring exceptions to this generalization seem so devastating as to belittle the search for rules. See Joshua 9:3-27 (attempting to keep the "rule" agreed to in a treaty with the Gibeonites leads to disaster); Saul Levmore, Unsuitable Bargains (forthcoming) (manuscript on file with author). For this reason, we might simply not expect to find something like overextraction in the Bible because it is the sort of legal strategy that holds the greatest promise when used as part of a system built on precedent. This characteristic of biblical stories makes them more like civil law than common law cases, but it makes them an unlikely guide for human judges in any legal system. We regard judges as wise when they set out useful and lasting precedents. The irony is that in the Bible, the omniscient authority would be supremely capable of such examples of judging, yet God is described as the ultimate case-by-case judge, who is repeatedly annoyed by, and inclined to punish, human failings. The humans in the stories, and those who read these texts, often search for rules, and while they receive many of these in the form of abstract pronouncements or general messages about obedience and insubordination, they do not find rules in the memorable tales.

20. See infra note 107.

21. Alternatively, the claimants and their closest relatives or friends could be threatened with death, in order to leave more room for a substantial punishment for the confessor.

22. The women live in the same house, and it is likely that other adults lived there as well. Many translators describe the women as prostitutes, but the question of their occupations or social status does not affect the analysis in the text. See 1 Kings 3:16; see also Althouse, supra note 19, at 1266.
given to avoid death—could be reduced here by combining Solomon’s insight with the overextraction strategy. The announced threat could be brutal punishment and exile for both unless there was a convincing confession, with the confessor then losing any claim to the child and bearing a lesser punishment. The true mother would then be much less inclined to confess falsely.\(^2\)

In the received narrative, Solomon threatens both the innocent and the guilty, though perhaps not equally; the destruction of the baby would cause (even) the guilty woman to lose some chance of retaining possession of a live baby. Inasmuch as Solomon faced uncertainty, could plausibly have screened out any false confession, and quite plainly was willing to threaten (and perhaps punish) the innocent, he might have tried overextraction. His (nonoverextractive but strategic) threat neither encouraged rational confession nor solved the problem in the event of a well-informed or strategic wrongdoer. It turned out, of course, to generate a solution—not to mention a great reputation, notable works of art, and other signs of success. In short, while the story suggests a potential application of overextraction, we need to look elsewhere for evidence of an overextractive threat in ancient narratives. Still, Solomon’s judgment is perhaps the best early example of a strategic threat made in the face of uncertainty as to the identities of culpable and blameless parties.

III. GROUP RESPONSIBILITY AND WARFARE

A. Sodom and Gomorrah

The theological explanation provided in Genesis for the destruction of cities near the Dead Sea has been said to implicate notions of group responsibility in two distinct ways.\(^2\) First, there is the conventional idea that the wickedness of some inhabitants contaminates the

23. There is also the interesting possibility that both women were wrongdoers in the sense that one knew she had engaged in kidnapping while the other knew only that she found a dead baby in the morning. Thus, the “true” mother may also have been dishonest in asserting that the baby was surely hers. In this case, Solomon’s strategy simply awarded the baby to the more strategic or more humane party. The overextraction idea does not offer an improved solution to this problem.

24. The narrative describes God as sending messengers to the wicked cities of Sodom and Gomorrah, and as puzzling over the question of whether to tell Abraham that he is about to destroy these cities. Genesis 18:18-22. Abraham then asks “Will you really sweep away innocent and wicked together? Suppose there are fifty innocent in the city; will you really sweep it away, and not pardon the place because of the fifty innocent there?” Genesis 18:23-24. After God agrees to pardon the whole place for the sake of fifty innocents, should they be found there, Abraham bargains the number down slowly but surely to ten. Genesis 18:25-33. This bargaining process, or dialogue, has been understood as pitting the possibility of “communal merit” against that of communal responsibility as described presently in the text.
entire community and makes it fit for communal punishment. Second, there is the contrary logic, which might be ascribed to the plain meaning of the text of the Abraham-God dialogue, that the merit of some inhabitants ought to produce benefits for the community. I think it fair to say that (at least) these two views are necessary complements rather than mutually inconsistent. Sodom and Gomorrah are slated for destruction because many of their inhabitants are wicked. If all the inhabitants are wicked (and Lot is saved because of Abraham), then there is no group responsibility at issue. Let us assume, therefore, that there may be a very few innocents in these cities; other cities must also have some wicked people, but perhaps relatively more innocents. In any event, under this rather straightforward view, Abraham is hardly introducing the idea of communal merit—for that is implicit in the sparing of other cities with fewer wicked inhabitants—but is rather credited with compassionately arguing about the dividing line between destruction and forbearance.

Even assuming the presence of a few innocents, there is no overt strategic threat making in the Sodom and Gomorrah episode. Neither God nor Abraham ever suggests that the cities be given an opportunity to mend their ways or confess and change in response to a warning. Nor is there any attempt to use threats in order to identify the

Returning to the story, the angels come to Sodom to visit Abraham's relative, Lot. When they are threatened by the people of the city, they reveal that God is about to destroy the city. Lot and some of his family members are rescued, but the text ends with the statement that Lot's rescue was done with Abraham in mind. Genesis 19:29.

25. Daube, supra note 1, at 24, 28.
26. Id. at 24. The dialogue is summarized, see supra note 24.
27. To sustain this reading, Abraham's reach must be extended fairly far. The text reports that Lot escapes with his two unmarried daughters. The messengers also suggest that Lot take his sons-in-law and other daughters with him, but the sons-in-law do not take Lot's urgings seriously. Genesis 19:12-14. It is unclear whether these sons-in-law were innocent or wicked. If the latter, Abraham's (or Lot's) influence was considerable. If the former, then we have identified several of the (fewer than ten) innocents in the city.
28. An alternative but not terribly dissimilar view is that God is somehow unwilling to separate out the innocent from the guilty. A modern reader might say that the transaction costs of rescuing Lot's family demonstrate the difficulty of separating out other innocents. A more traditional interpretation might be that, where possible, God is depicted in terms of human traits—and these rescue costs are therefore part of the subtext. In any event, under this view the dialogue with Abraham is again about the proper dividing line on one side of which the few innocents will perish because it is too difficult to rescue them.
29. It is a bit awkward to play with hypothetical variations of biblical stories, but it is interesting that Abraham does not suggest that God try first to offer the cities a chance to repent. There is an obvious comparison to the city of Nineveh where such an offer is made and accepted. Jonah 3:1-10. It is also interesting to imagine (by which I mean to use the style and outcomes we know in the present Bible to imagine how alternative situations would have been resolved) what would have happened if in Sodom there had been 992 evil people and 8 innocents, and the 992 had been moved by the threat of destruction to identify themselves. We presume, I think, that the eight innocents would have been spared—and this suggests either that we should not have
innocents. Either there are no innocents, or God knows them and they are too few in number, or their identity simply has no bearing on the decision (and their own deaths).

If there is a hint of a strategic threat in the story, it arises out of our imagining that God’s messengers visited Lot’s house not simply to rescue him but also to offer the neighbors an opportunity to reform. We might wonder what would have happened had some residents come to the guests’ assistance when others surrounded Lot’s house in order to molest them. The messengers might have announced the plan for destruction, and the residents might have perceived that a lesser punishment would be theirs in return for atonement. There are, after all, few biblical texts in which confession and atonement fail to save the day. Thus, it is possible that the messengers’ first task was to try to identify the actual wrongdoers and to secure their confessions. Toward this end, they threaten the destruction of the city, implicitly promising something less if the wrongdoers confess, but the plan fails because the wrongdoers either do not believe the threat or do not care about their fellow inhabitants. Inasmuch as there is not much in the text to support this reading, I will not dwell on it further.

proceeded with the assumption that some innocents were caught up in Sodom or that the story is more about uncertainty than about wrath and control.

30. The text insists, Genesis 19:4, that the entire (male) population of Sodom surrounded Lot’s house, so that the “rules” of group responsibility must be gleaned from the earlier dialogue between God and Abraham. In any event, the hospitality found in Sodom is plainly to be contrasted with that found in Abraham’s tent, although it should be noted that Lot himself is described as an excellent host. Compare Genesis 18:1-16 (describing Abraham’s hospitality in great detail) with Genesis 19:1-8 (describing Lot’s impressive but plainly inferior performance).

31. See, e.g., infra part IV.D (discussion of Jonah and the turnabout accomplished in Nineveh). But cf. infra part IV.B (wrongdoer confesses and dies anyway, but confession occurs only after virtual coercion by awesome lottery).

It is interesting that in the best known Roman Law example of group responsibility, confession plays either no role or an ambiguous role. The senatus consultum Silanianum declares that when a master is murdered, all his slaves who live under the same roof are to be tortured and slain. Alan Watson, Roman Slave Law 134 (1987). Various details of the law indicate that it resembles (rather extreme) direct responsibility more than overextraction. Thus, the law made exceptions for slaves not technically owned by the decedent; an overextraction scheme would not, of course, exclude a slave who had been on location but owned by another. Id. at 135. More remarkably, the rule is said to have applied to the master’s murder by strangling, for example, but not by poison, because the point of the rule is to punish slaves “on the ground that they did not bring help to their master whenever they could have given him help against violence and did not do so. But what could they have done against those who ambushed a man by poison or in some other way?” Id. The concern with defending the master thus plays a role that is independent of the problem of a slave’s murdering the master. Indeed, there is nothing in the rule suggesting that a confession by one slave would ever lead to exculpation for others. Even where the identity of the murderer was known, the slaves of the household were to be killed for their “crime” of failing to prevent the harm. The torture that preceded the death penalty appears to have been meant to raise the threat rather than to extract confessions. Id. at 135-36.
B. Gibeah and Civil War with the Benjaminites

Consider next the remarkable biblical tale of the traveler who goes to the city of Gibeah in the territory of the tribe of Benjamin. A resident alien (from the tribe of Ephraim) serves (again) as the perfect host, when no native rises to the occasion, and the men of the city then come around and threaten the guest. The good host tries unsuccessfully to ward off his neighbors, but in the end the traveler sacrifices his concubine to these local rapists and murderers. The traveler sends the body parts around the country with a call to arms for the disciplining of the Benjaminites. An army is raised, and is then winnowed by lottery, and when the Benjaminites refuse to give up the inhabitants of the wicked city of Gibeah, war begins. Seven hundred of the best marksmen from Gibeah itself join the opposing, defending army. Following some early losses, and what the narrator describes as a divinely inspired battle plan, the disciplinarians eventually prevail, demolishing the wicked city, killing many "valiant" Benjaminites in the process, and then destroying every creature and town within reach.

The end of the episode offers an extra measure of group responsibility. The victorious tribes suddenly worry that they have gone too far; prior to battle they had taken an oath that they would not allow their daughters to marry into Benjamin and now they fear that the tribe of Benjamin will be extinguished because so many Benjaminite women had been killed and the oath prevented intermarriage with

33. Id. The group responsibility aspect of what follows would be yet more provocative if we were told what became of this host (when the city is later destroyed). The narrator simply insists with this detail regarding hospitality that other Israelites were more righteous than the Benjaminites, who could not even generate one decent bit of hospitality. The hospitality theme is revisited infra in part III.D.

Note also that while the story of Gibeah tracks the messengers' visit to Sodom, down to the inhabitants' demand that they be given opportunity to sodomize the guests, compare Genesis 19:5 with Judges 19:22, there is nothing in the Gibeah story corresponding to the spectacular rescue of Lot. See infra text accompanying note 53.
34. Judges 20:6. The story thus serves as a way of explaining subsequent battles, although we might presume that the war against Benjamin had other causes. But whether or not the hospitality tale was concocted, real, or the result of entrapment (for we are told that the traveler chose a Benjaminite city for his rest, Judges 19:10-14), the sensibilities it reflects or anticipates regarding group responsibility are equally useful.
35. Judges 20:9-37. Its inhabitants look back to see it in smoke, Judges 20:40, thus further suggesting the Sodom and Gomorrah story.
They point to the residents of Jabesh-Gilead, who had failed to join in the call to arms and thus did not join in the oath against marriage with Benjamin, and decide that all the men and mature women from that place will be killed, but four hundred girls will be spared and made available to the surviving Benjaminites for marriage. They also rather remarkably encourage the surviving Benjaminites to go to the Shiloh festival and grab women (who could not affirmatively be given to them without the breaking of the oath).

I hesitate to draw too strong a lesson about group responsibility in a legal “system” from this episode because the narrator concludes—as if we could have missed the point—that “in those days there was no king in Israel; every man did what was right in his own eyes.” This may be a warning that group responsibility is to be associated with anarchy rather than with mature lawmaking. On the other hand, the multiple layers of group responsibility, in the sense of innocents suffering along with wrongdoers, deserve some attention. There is group responsibility in the enforcement phase (the lottery emphasizes the random nature of burdens from war), in the punishment of the wicked city (for it is entirely destroyed), in the epilogue regarding those who refused to join in the call to arms, and possibly in the matter of Shiloh. The first of these has an obvious modern counterpart; forced conscription (whether universal or by lottery) follows the fashion of group responsibility to the present day.

In Part III.C, I turn to the destruction of Gibeah and other cities, but it may be useful to comment briefly on the nature of the threat against Gibeah. The Benjaminites might have used a threat, perhaps even of the overextractive kind, in a quest to identify the actual wrongdoers who started the tragic chain of events. In other contexts, serious threats can produce unwanted chilling effects, but this is less of

39. Id. Tribal affiliation followed paternal lines, perhaps because of the economic importance of inherited land.
40. Id. The residents of Shiloh have done no apparent wrong so this is either a majoritarian power-play within the victorious alliance or perhaps a case of legal formalism (with the winking approval of the residents of Shiloh). It may be that “snatching” is what all men did at that festival, and the tribes are simply agreeing to stand back in order to give the Benjaminites the necessary reproductive advantage. The Shiloh and Jabesh-Gilead accounts are often regarded as two alternative epilogues that are blended together in the surviving narrative.
41. Judges 21:25. With little subtlety the narrative also begins with this fact, “In those days when Israel had no king . . . .” Judges 19:1.
42. Note that it is an example that is both explicit and conventional, which is to say it is directly imposed on the target group and is of the domestic rather than the international kind. On the other hand, if group responsibility is about targeting some innocents along with the guilty, military conscription provides an example of such responsibility only if we think of the enemy as the guilty party.
a concern where the habitation of a city is concerned. Nevertheless, the narrative describes no search for the individual wrongdoers and contains no hint of a strategic threat of any kind.

C. Warfare and the Wrath of God

Gibeah and Sodom have more in common than a guesthouse besieged by local toughs. Working backwards, we can describe both stories as offering memorable explanations of large-scale destruction. Only one of the stories leads up to formal warfare, but both stories can be compared to modern nonprofessional descriptions of the causes of wars. Historians and economists study the growing (internal and external) tensions and calculations that lead to armed conflict, but most citizens come to focus on fairly simple causes of war. An assassination, an attack on a holy day of the year, an unprovoked bombing of a major naval base, a defiant act of secession, and an insulting demand for “tribute” are familiar examples of such “causes.” These simple explanations may serve as convenient ex post rationalizations (avoiding as they do any hint of bilateral responsibility) or as helpful rallying points for the war effort itself. The biblical stories of Gibeah and Sodom are of this sort.

More generally, the war component of the Gibeah story draws attention to the fact that modern conceptions of law are full of group responsibility of the “international” kind. We are accustomed to the fact that war claims the lives of innocent people. Our legal culture, not to mention everyday practice, suggests that one nation may be justified in warring against another when the other nation is unable to control the actions of some of its inhabitants. We hardly require unanimity of purpose in a nation before its actions are thought to justify a military response. If the rulers and army of one nation attack another, a military response is often justified even though it can be expected to claim innocent lives in the first nation. Similarly, if terrorists use one nation as a springboard from which to attack another, or if hostages

43. Thus, an overextraction scheme following a crime in an elevator, see supra text accompanying note 14, might lead people to avoid elevators, but it is more difficult to avoid living in a place where evil might be done. Indeed, it is possible that the activity-level effect would be a good one; people might prefer to leave cities where there was greater than average wrongdoing.

44. I explain the connection to Sodom presently. See infra text accompanying notes 50-51.

45. As introduced earlier and discussed presently, this expression refers to losses suffered by innocent people as a result of war or other conflict among entities. Similar burdens might not be thrust upon a legal authority's own subjects. There is, of course, also a sense in which the horror of war makes it the stuff of strategic threats—a category I attempt to treat separately.

46. International law emphasizes the importance of limiting reactions to military targets and responding with no more than proportional force, but the justification for, and the reality of,
from one nation are held in another, our culture has come to accept a response from the aggrieved nation that sadly claims innocent lives in the first nation. It should be noted, however, that the formal, international law rule is quite cautious in this regard.\textsuperscript{47} In any event, innocent lives must have been lost in Gibeah, as in many other wars described in biblical texts.

The use of strategic threats in a legal system is often associated with cases involving unidentified wrongdoers. In contrast, war often takes place where there is no uncertainty as to the source of the threat of instability, but where there is a problem in establishing control over these sources.\textsuperscript{48} This relationship between control and the international kind of group responsibility is emphasized by the closing reminder in the Gibeah episode that, at that time, "there was no king in Israel."\textsuperscript{49} One implication is that, if there had been a strong, intertribal, central government, there might have been opportunity to penalize the individual wrongdoers in Benjamin, rather than resort to warfare, which almost inevitably sweeps in more innocent victims than does domestic, conventional law enforcement. The same can be said of most warfare; a strong European union might have turned many conflicts on that continent into internal police matters, with fewer unintended victims and less loss of innocent life. Similarly, a stronger central government in the United States might have generated other costs, but it might have also avoided the American Civil War. If we think of the story of Gibeah as involving group responsibility of the


47. \textit{Id.} (noting unsettled nature of United Nations Charter provision regarding violence in collective self-defense, and then citing example of a rescue operation); \textit{see Home Frontier Society Claim} (U.S. v. Gr. Brit.), 6 R.I.A.A. 42, 44 (1920) ("No government can be held responsible for the act of rebellious bodies of men committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection."); \textit{Corfu Channel Case} (U.K. v. Alb.), 1949 I.C.J. 4, 22 ("obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States").

48. Where the conventional kind of group responsibility is concerned there is often both uncertainty and some problem of control. In \textit{Ybarra v. Spangard}, 154 P.2d 687 (Cal. 1944), for example, the court was uncertain about the identity of the negligent actor and also able to encourage health professionals to monitor and control one another. \textit{Id.} at 689-91. Similarly, many examples of implicit group responsibility involve both uncertainty and control. In the case of both products and vicarious liability, for instance, the argument for liability is often that while the flagrant wrongdoer could be identified and deterred at great expense, the defendant might more easily be encouraged to control this more narrowly-defined wrongdoer.

The difference between problems of uncertainty and control arises often in biblical rules and stories. One good example of the control feature is the rule in \textit{Leviticus} 20:1-5, where there is first a rule of stoning for one who gives a child to Molech (an Ammonite child sacrifice cult), \textit{Jeremiah} 32:35; \textit{Leviticus} 18:21, and then a warning to anyone who would ignore and fail to punish the violation of this rule.

49. \textit{See supra} note 41 and accompanying text.
international kind, then we are bound to recognize how much of this sort of group responsibility there is in modern law and practice as well.

The comparison between the group responsibility imposed on the Benjaminites and that which is implicit in most warfare is fairly straightforward. It does not, however, incorporate the responsibility associated with either Sodom and Gomorrah or most other biblical stories involving God’s punishment of the wicked or insubordinate, except to the extent that this wrath is often described in the narratives as leading to losses on the battlefield. Modern rulers do not deal with urban crime by destroying wicked cities, and the story of Sodom and Gomorrah might therefore seem qualitatively different from that of Gibeah or modern causes of war. This raises the theological-jurisprudential question of how to think of the relationship between God and humans in biblical stories when exploring the idea of group responsibility in biblical texts. The question is significant because most of the biblical texts that describe group responsibility refer to divine intervention.\(^5\)

There are at least three ways to proceed. First, we might view God in these texts as analogous to a domestic ruler of subjects. Under this view, there is striking conventional group responsibility in Sodom and Gomorrah, assuming some innocents were destroyed; a modern, civil authority would hardly (explicitly) destroy an entire city out of frustration with, or a desire to punish, the many wrongful inhabitants. Second, we might insist that the relationship is unique so that there is no human (or modern legal) analogue. Under this view, we can take note of many biblical examples of group responsibility, but it is pointless to think they have anything to do with group responsibility, of either the conventional or international kind, in earthly lawmaking. Third, we might think of God as treating the Israelites, or mortals in general, as a separate nation. God enters into an alliance with the people whose stories are told in many of these texts. When they break their part of the “bargain,” there are threats and occasionally large-scale penalties that can be compared to warfare between states. The international analogy is fortified by the constant reference to the covenant, or treaty, between God and these people of the Bible, and one

50. Put differently, most of the examples in which individuals design penalties for interpersonal wrongs do not lend themselves to alternatives involving group responsibility. Thus, Potiphar thinks Joseph has wronged him, and there follows individual responsibility in the form of imprisonment—but there is no obvious group to punish because Joseph is separated from his people. *Genesis* 39:1-20.
way to understand this bargain metaphor is as an explanation of God's ability to punish the people as a group even when some individuals have been obedient. In this way, much of the group punishment found in ancient lore resembles modern wartime suffering. Sodom and Gomorrah, like Gibeah, can be seen as casualties of war. Abraham's plea for Sodom and Gomorrah failed, under this view, in the same way that an appeal for mercy might be rejected by an attacking army intent on overrunning a city that contains industrial targets.

As a heuristic device, I will proceed with this third strategy, or metaphor. But whether or not it is an attractive strategy, it is plain that instances of group responsibility for wrongs against God are not easily translated into other legal systems. Solomon's judgment might teach later human judges a thing or two—and it would surely have done so had it suggested an overextractive threat. In contrast, reports of God's ability and willingness to destroy cities because of the wrongdoing of a subset of the population, however large, may convey a great deal of information about the value of obedience and goodness, and perhaps even some lessons about warfare, but they impart little information to human judges who must deal with domestic problems.

D. Inhospitality and Group Responsibility

I have suggested that many of the biblical texts dealing with group punishment reflect the imposition of penalties by external authority (be it divine or human in nature) and that such penalties are equally familiar in contemporary international norms. I turn presently to biblical texts that are not easily analogized to international

51. I use the word metaphor because modern readers who trace their own belief structures to the stories in the text did not, after all, directly enter into these original bargains. A different version of the point in the text is that through the bargain metaphor and one (international) kind of group responsibility some believers are able to regard the disappointments in their own lives as the product of the wrongful behavior of some of their peers.

I do not mean to imply that the international kind of group responsibility does not also include interactions between God and other people in the biblical texts who were not included in covenants. Thus, the plagues dealt to Pharaoh's Egypt can be described in terms of international group responsibility. This example shows the close relationship between this idea and that of ruler responsibility. See supra note 1. Indeed, in the case of the plagues, and several other biblical stories (such as Job's suffering), the plot affirmatively precludes individual responsibility, inasmuch as the idea seems to be to force compliance or to test the will of the "ruler."

52. Abraham can be viewed as a representative of the people, negotiating with a "foreign" ruler. If we were inclined to take this reading seriously, we could ask why Abraham had never taken it upon himself to warn the wicked cities or to try to encourage better behavior among Lot's townspeople. The text might even be understood as hinting that Abraham knew or should have known that action was required. Genesis 18:17-23 (God contemplates disclosure to Abraham and comments on the outcry regarding the wicked cities prior to the time when Abraham, who appears to know now the plan for the cities, takes on the role of advocate).
conflicts. Since there is surely more than one sensible way to categorize the available texts, it is useful first to offer an alternative classification system, under which there appears more conventional group responsibility in biblical texts. The core of this alternative view is that many of these texts can be understood as dealing with examples of inhospitality. Where there are pockets of crime or anarchy, there may be great gains for those who achieve a reputation for offering safety. Travelers will wish to know where there is danger and where there is safety, communities may wish to advertise that they offer relatively secure environments for travel and mutually beneficial trade, and a society may encourage local investments in safety by extolling the virtue of good hosts and by spreading tales of the collapse of inhospitable communities.

The story of Sodom and Gomorrah, and the parallel story of Gibeah, can be seen as tales of inhospitality. Abraham and Lot are depicted as excellent hosts, while Lot's neighbors are extremely inhospitable. The good hosts are rewarded and the bad ones are destroyed. The message is that inhospitality causes an entire population to suffer, although those (like Lot) who affirmatively assist travelers may be rewarded.

This inhospitality theme includes examples of both divine and human law enforcement. Thus, there is the story of Shechem violating Dinah, the daughter of Jacob and Leah, who had migrated and temporarily settled near the town in which Shechem's father was the local prince. When Shechem seeks marriage and an alliance, Jacob's sons deceitfully require that he and all his male fellow-townspeople be circumcised. During their recuperation period, Jacob's sons attack, killing every male in the town and seizing their property and families.

54. In this way the inhospitality theme weakens (or offers an alternative to) the suggested distinction between international and conventional group responsibility.
56. Id. The story ends with Jacob's fearing retribution or perhaps a preemptive strike by other Canaanites, but his sons' enjoying the last word with their rhetorical question "Is our sister to be treated as a common whore?" Genesis 34:31. In this manner, the narrator leaves the impression that the punishment of the bad host and his town was not itself wrongful. It is possible, of course, that individual responsibility would have been preferred but that Jacob's sons were unable to attach individual responsibility to Shechem without eliciting a fatal reaction from his townspeople. Their choice may have been to initiate group responsibility or no responsibility. That is, of course, the choice available to lawmakers in many situations with unidentified wrongdoers.
Another example is found in the reports of Samson's exploits. Samson chooses to marry a Philistine woman, and as a guest in her town he is cheated by thirty locals. The locals win a wager with Samson by threatening his bride to the point where she coaxes out of him the solution to a riddle and disloyally turns it over to these townspeople. Samson responds by killing thirty other Philistines, ostensibly to use their clothes as a means of financing his wagering losses.

Finally, there is the well-known biblical rule dealing with an unsolved homicide out in the field. The elders of the nearest town are instructed to express their sorrow and then to break the neck of a heifer.

These examples suggest that an important subset of the universe of biblical texts in which innocents suffer because of the wrongdoing of others is aimed at inhospitality. This use of group responsibility eclipses modern examples not only because of the severity of the reported ancient penalties, but also because innocents are punished even where there is no uncertainty as to the identity of the wrongdoers. Put differently, if we isolate the inhospitality cases, and think of these cases as dealing with domestic rather than international problems of social control, then we can describe biblical texts as incor-

58. Technically, the event occurs at a feast hosted by Samson during his father’s visit to meet the woman Samson has chosen. Since they have traveled to the woman’s town, it is surely correct to think of them as the guests.
59. Although I offer this as an example of a human response to inhospitality, I should note that the narrator says that Samson responded in this violent way after “the spirit of the Lord suddenly seized him.” Judges 14:19. Either way, innocent people suffer in the aftermath of inhospitality. If Samson’s revenge is viewed as divinely-inspired justice for the inhospitable, then the Shechem story stands out as an example of punishment by human design. If this conclusion is correct, then the inhospitality theme does very little damage to the larger distinction (regarding international and conventional group responsibility) offered in this Article. (I do not count some other stories, such as Rahab’s hospitality for Joshua’s spies, Joshua 2:1-21, or Jael’s deception in offering hospitality to and then hammering Sisera, Judges 5:24-30, because these are examples where the glorified motivation is other than hospitality.)
60. Deuteronomy 21:1-9. See infra note 100 (comparing this rule to that found in Hammurabi’s Code).
porating at least as much group responsibility as modern law.\textsuperscript{61} Moreover, when the inhospitality cases are isolated, the distinction between conventional and international group responsibility is weakened to the point where it may be best viewed as an alternative rather than as a complementary way of thinking about these texts.\textsuperscript{62}

There are, however, reasons to discount the importance of the hospitality theme. In the Sodom and Gomorrah episode, for instance, the extensive dialogue between God and Abraham has too little of a role to play if the story is not about communal responsibility and merit but rather about inhospitality.\textsuperscript{63} And while the good host Lot is rescued from Sodom, when this story is revisited in Gibeah,\textsuperscript{64} there is no mention of what becomes of the good host (from the tribe of Ephraim, who resided in the Benjaminite city of Gibeah).\textsuperscript{65} A tale intended to deliver a message about good and bad hospitality should not leave the reader to wonder whether the good host in Gibeah was not lost in the destruction of that city. Finally, a third story involving the threatened destruction of a city, that of Jonah's mission to Nineveh, contains not a hint of inhospitality in that city.\textsuperscript{66} Moreover, while attempting to escape his mission, Jonah nearly causes a mass disaster at sea—although the sailors on board are remarkably good hosts.\textsuperscript{67}

In short, many of the stories of group responsibility can be interpreted as conveying a message about the value of hospitality. This perspective, however, obscures other notable aspects of these same texts. In any event, I turn next to cases involving fact-finding uncertainty and to suggestions of strategic threats that rise to the level of

\textsuperscript{61} We might say that these inhospitality cases suggest far more serious vicarious liability in biblical texts than in modern law. On the other hand, there is every reason to think that tales of products liability, and other contemporary applications of implicit group liability, would be inconsistent with biblical texts. These texts are, for instance, consistent with the rule of no liability in Ybarra v. Spangard, 154 P.2d 687 (Cal. 1944). See supra note 9 and accompanying text. The instructions to the elders in Deuteronomy, see supra note 60 and accompanying text, are limited to unsolved homicides; the plaintiff-patient in Ybarra was not a sojourner except in the most metaphorical sense; and (if we set aside cases involving international group responsibility) only the story of Samson involves group punishment following something less than rape or murder. Thus, when Laban cannot find the goods that have been taken from him at the time of the departure of Jacob's family, he could have imposed or suggested group responsibility, but the text emphasizes only individual responsibility. See infra note 70.

\textsuperscript{62} But see supra note 59 (interpreting Samson text in a way that lessens the unique role of hospitality theme).

\textsuperscript{63} See supra notes 24, 52.

\textsuperscript{64} See supra part III.B.

\textsuperscript{65} Note also that the people of Shiloh find their daughters at risk in the epilogue to this story even though they were not found wanting as hosts (or otherwise). See supra text accompanying note 40.

\textsuperscript{66} The Book of Jonah is explored at greater length infra in part IV.D.

\textsuperscript{67} See infra text accompanying note 96.
overextraction. This analysis does not depend on sharing my preference for the distinction between international and conventional group responsibility as opposed to the primacy of the hospitality theme.

IV. GROUP RESPONSIBILITY AND STRATEGIC THREATS IN THE PRESENCE OF UNCERTAINTY

A. Introduction

The discussion thus far suggests two reasons for exploring the use of group responsibility and related threats in ancient texts where there is uncertainty about the identity of the wrongdoers. First, many examples of group responsibility in biblical texts can at least arguably be analogized to modern explanations of the horrors and burdens of war. The assessment of the claim that group responsibility is more important in ancient than in modern law suggests therefore that it is useful to consider examples that bear little resemblance to events that generate warfare. Second, it is fairly clear that the most interesting and likely deployment of group responsibility in modern legal systems is where uncertainty or enforcement problems make individual responsibility difficult. I have already described some wars as traced, at least in popular terms, to problems in controlling individuals located in other jurisdictions. I have also alluded to the idea that a legal system might find it attractive to treat the innocent and guilty alike where a domestic wrongdoer is known only (at least with the requisite degree of proof) to abide within a fairly narrow target group. Group responsibility may then be useful in order to encourage witnesses, deter wrongdoing, or both. It is difficult to think of examples where explicit group responsibility would be preferred over more focused individual responsibility that is feasible. The same is true of biblical stories. Solomon’s judgment would hardly have seemed wise if he knew that a witness could be summoned to resolve the conflict between the two claimants. More generally, conventional group responsibility and Solomonic strategic threats run the risk of encouraging false claims because of their settlement value, while Solomonic judgments can also discourage legitimate claims because the truth-teller

68. See Levmore, supra note 5, at 1579. Note that the “group” threatened with responsibility in both Solomon’s court and in the garden of Eden, discussed infra in part IV.C, is not much of a community in the sense of socially interactive participants whose behavior might be influenced with rules aimed at the group. The overextraction idea is, however, promising in such haphazard groups. In any event, I do turn in part IV.D infra to overextraction in the context of a more deliberate group. I have already emphasized that by “group responsibility” I mean the knowing placement of burdens on innocent and guilty alike.
runs the risk of losing something valuable if the adversary does not flinch.\textsuperscript{69}

Unfortunately, few biblical stories encompass fact-finding uncertainty of the kind reported in Solomon’s court, if only because the divine element in most stories is so closely tied to omniscience.\textsuperscript{70} And even where there is interrogation, the reader is told the facts in advance. We are told that Cain killed Abel before the text reports that Cain is questioned regarding his brother’s whereabouts.\textsuperscript{71} Similarly, we learn of Eve and Adam’s eating the forbidden fruit before they are asked to account for their knowledge and actions.\textsuperscript{72} Nevertheless, the mock, or perhaps contingent, uncertainty in these stories can be revealing and I return in Part IV.C to the garden of Eden story, which does involve multiple parties with different information and, therefore, some potential for interesting threats. But I turn first to one of

\textsuperscript{69} See supra note 19.

\textsuperscript{70} Omniscience is of course not entirely inconsistent with fact-finding because the potentially omniscient fact-finder can choose to limit the use of superpowers. This is close to the theological argument often made regarding “free will” in the shadow of an all-knowing God. Nevertheless, most biblical narratives reveal the facts as seen from the omniscient or ex post perspective.

The discussion in the text turns presently to several cases where a human fact-finder faces uncertainty. I do not, however, explore all such cases. Thus, there is the story of Laban searching for his household goods that were stolen and hidden by his daughter, Rachel. \textit{Genesis} 31:19-35. Jacob is pursued by Laban and, when confronted, Jacob declares that anyone possessing these allegedly stolen goods shall be put to death, and (rather anticlimactically) he promises that Laban shall be entitled to take any goods he identifies as his own. The drama unfolds no further because Laban fails to find the goods, and fails to offer an incentive in order to encourage a confession or return. \textit{Id.} An interesting way to read this text is that Jacob has ruined Laban’s investigation by rashly pronouncing a death sentence on the thief (if discovered). This makes it impossible for Laban to offer much of an incentive for a plea (and return of the goods). Alternatively, Laban may sense that Rachel is hiding something (for she fails to rise when he enters her tent), but he does not want to risk his own daughter’s death.

There is mock uncertainty in \textit{Genesis} 44:1-13, where Joseph frames his youngest brother regarding the “theft” of a silver goblet. Joseph’s motives are unclear. Having not yet decided to reveal his identity to them, it is possible that he torments them in return for his own earlier treatment. Another conventional explanation is that he tests them to see whether they will sell yet another brother into slavery (as they sold Joseph earlier). The problem with this is that it would be not a sale, but rather a penalty imposed for theft. In any event, Joseph (as well as the steward sent to retrieve the goblet) has no need to engage in fancy fact-finding because he has planted the goblet at the top of Benjamin’s pack. Indeed, the point of the story may be the brothers’ smugness; they were made vulnerable during their previous trip by the discovery of silver in their packs, \textit{Genesis} 42:25-35, yet they did not cautiously check their packs before departing the next time.

Uncertainty is also the focus of the trial by ordeal legislated for an accused adulteress. \textit{Numbers} 5:11-31. If there were corroborating witnesses, the death penalty would apply. \textit{Leviticus} 20:10. In the absence of witnesses, there is uncertainty, but no incentive for confession. There is also a hint of uncertainty in \textit{Exodus} 21:22, where a woman miscarries as the result of a brawl between two men. There is no doubt, however, that if the injurer is identifiable, it is he who must pay.

\textsuperscript{71} \textit{Genesis} 4:8-9.

\textsuperscript{72} \textit{Genesis} 3:1-24.
the few biblical passages in which a human judge sets out on a fact-finding mission.

B. Joshua's Search for Achan

In the biblical text describing Joshua's leadership in conquering the city of Jericho, the narrative reports that Joshua issued a sacred ban on plundering the city, but that a man named Achan violated this order.\footnote{Joshua 6:17-7:26.} Subsequently, Joshua's army faces a setback and God reveals that Israel has sinned and that lots should be drawn in order to identify and expunge the guilty party and property. The lottery process dramatically focuses attention on one tribe, then one clan, then one family, and finally one man, Achan. Achan is moved to disclose where he has hidden the spoils, and he and his property and children are expunged.\footnote{Id.}

At one level, the story is about group responsibility because thousands of innocents die in battle before the real source of divine displeasure is revealed.\footnote{A charming passage in the Talmud, Bab. Sanhedrin 43b, has it that God operated through the (delayed) lottery because He did not want to be an informer! The matter is taken up in \textit{David Daube, Collaboration with Tyranny in Rabbinic Law} 8-9 (1965). It goes almost without saying that the discussion here takes the text at face value, and sets aside for the moment the critical view that the narrator is finding an ex post explanation for failure in battle.} But, again, if Israel's relationship with God is analogized to relations between nations, then this story reflects the familiar international kind of group responsibility. Another possibility is that the people knew that the ban on plundering Jericho had been violated, and that they are punished for concealing Achan's wrongdoing.\footnote{Under this view the nonindividualistic language of the text (that \emph{Israel} has sinned and that \emph{they} have taken forbidden things) is a straightforward report rather than a clue about group responsibility for individual wrongdoing. \textit{Joshua} 7:10-12.} Another alternative is that the community is viewed as the guarantor of each individual member. The losses in battle are suffered by the guarantor because the individual wrongdoer has not yet been produced. Once the lottery identifies the culprit and he is punished, the guarantor suffers no more. Since this perspective can be folded into the international kind of group responsibility, and does not on its own explain other examples of group responsibility in the Bible,\footnote{The Sodom and Gomorrah story, for example, does not appear to contain the guarantor element.} I will not burden the analysis with an unnecessary category.\footnote{For other examples of the guarantor idea, see \textit{supra} part III.B (Benjaminites suffer until residents of the inhospitable city of Gibeah are wiped out) and \textit{infra} note 101 (severe famine in}
At another level, we can read the story as containing instructions to Joshua about fact-finding. A plausible, nontheological version of the story depicts Joshua (and the priests) formulating the original ban on plundering Jericho and then invoking the mystical tool of divine displeasure in order to explain the military setback. Joshua and the priests might have reckoned on the inevitability of some violations of the Jericho prohibition and found themselves a ready means of both raising morale in the wake of defeat and instilling further respect for authority. My own modern impulse is to imagine that rumors had reached Joshua regarding a violation of the Jericho ban. Joshua needs not only to confront the rumored wrongdoer, Achan, but also to do so in a way that will cause the wrongdoer to reveal any accomplices and to disclose the location of the forbidden items. This extraction of King David's era brought to an end by sacrifice of individuals situated closer to the source of wrongdoing).

There is, however, some tension between the guarantor and communal responsibility notions. The text describing Samson's exploits describes his potential father-in-law as assuming (by his own account) that Samson had no further interest in his daughter after she was disloyal to him. See supra note 59 and accompanying text. This error turned out to be a tragic one because Samson responded to news of her marriage to another by starting a destructive fire. The Philistines learn the source of the fire and kill the would-have-been wife and father-in-law. Samson is perhaps unpredictably displeased and he slaughters Philistines, who in turn threaten war against the tribe of Judah unless Samson is handed over. He is bound over, but he breaks loose and kills many more Philistines. Judges 15:1-16.

The immediate relevance of this example is that Samson is angered by the Philistines' attempt to serve as the guarantor of the potential father-in-law. Perhaps Samson thought that the wrongdoer was his to punish or that the punishment was far too severe. The broader point about this text, however, is that it contains numerous examples of the international kind of group responsibility. It is a story of escalation to warfare more than it is about clever or precedent-setting justice.

79. Put this way, and setting aside the fatal ending, the story is like many in which an elementary school thief is caught by a teacher or parent with a flair for the dramatic.

This interpretation suggests that a very similar story is that of King Saul's son, Jonathan. 1 Samuel 14:27-46. In ignorance of a decree issued by his father, Jonathan refreshes himself between battles by eating honey. He then leads the fasting soldiers to victory, but they eat raw, bloody, plundered animals in violation of higher law. Saul deals out straightforward punishment: each man must slaughter and eat his own ox (which presumably had higher valued uses elsewhere). Saul then wishes to pursue the enemy, but when his inquiries to God go unanswered he holds a lottery to find out the source of divine displeasure. He promises that the sinner will die, "even if the sin lies in my son Jonathan." 1 Samuel 14:39. The lot points to the royal family, as opposed to the soldiers, and then it falls on Jonathan. He confesses, but somewhat strangely emphasizes the small amount of honey he consumed, rather than the fact that he had not heard the interdiction against eating and had consumed nothing at all after learning of it. 1 Samuel 14:27, 43. Jonathan is prepared to die in accord with his father's oath, but the soldiers intervene, pointing to the great victory Jonathan had won that day. The narrative ends with the report that they all made their way home and did not pursue the enemy. 1 Samuel 14:45-46.

The plain meaning of the text offers little in the way of legal rulemaking because the uncertainty is resolved by divine intervention. But it is possible to read the text, and its juxtaposing of threats and punishments as showing Saul as a clever leader (even if an unsuccessful general). Rumors may have reached him about the soldiers' and Jonathan's respective breaches of the rules. He imposes individual responsibility on the soldiers and then dramatically threatens Jonathan with the same. It is of course an exaggerated threat: the soldiers brashly break God's
the booty might serve to discourage future withholding from the fisc or might satisfy a (modern as well as primitive) popular taste for "thing liability" and the belief that forbidden fruits mystically taint and transmit horrors.

Achan is, of course, suitably awed and influenced by the lottery. It may be that his punishment is increased because he dissembled for a period. It is possible that his children would have been spared had he voluntarily come forward before the lottery or even before the battle losses. In contrast to many of our personal experiences in schoolrooms and elsewhere, there is no pre-investigation opportunity for confession.90 Other members of his clan or tribe might easily have seen him do wrong in Jericho, but there is no sense of group responsibility in the punishment phase.

In any event, because Joshua is provided in advance (either by informants or through mystical intervention) with the identity of the wrongdoer, there is at best a limited role for strategic threats. Joshua might have explicitly promised Achan a lesser punishment in return for the disgorgement of the concealed spoils, but this would not have required a threat against innocent and guilty alike.

Joshua's success in extracting a small amount of information from Achan may be the only piece of the story that is of use to later judges.91 Joshua, like Solomon, probably succeeded in frightening a wrongdoer into providing useful information. There is not much else in these examples to guide later judges, nor is there much in the way of group responsibility where modern legal systems would be more inclined to insist on individual responsibility.92 Both examples do en-

90. If the punishment is greater because of the failure to confess more immediately, then the story is like the stories of Adam and Eve and Cain and Abel where there are also hints that immediate honesty might have produced gentler results.

91. Whether or not the reader believes the text's link between losses in battle and Achan's wrongdoing, the most serious loss to Joshua's community is incurred in warfare and therefore provides little help to mortal, domestic judges.

92. This conclusion sets aside, it will be recalled, the punishment of Achan's family and, more generally, the presence of kinship responsibility in ancient texts. See supra note 11. I do not sense that the conventional wisdom about group responsibility in ancient times is satisfied by examples of children suffering along with parents. Put differently, I do not quibble with a conventional claim that there is more explicit kinship responsibility in older law and lore. Among the many examples, there is the story of King David's punishment for bringing about Uriah's
gage the modern reader, and suggest perhaps that we have much in
common with the fact-finders (or wrongdoers) of ancient times. 83

C. Paradise Lost

The discussion thus far intimates that the most provocative or
even useful examples of group responsibility in ancient texts will deal
with attempts to discover the identity of wrongdoers in circumstances
unlike those which give rise to war. This characterization suggests
that we return to the garden of Eden. As noted earlier, the biblical
text does not on its face present a serious fact-finding issue because
the reader is treated to the perspective of an omniscient investigator.
The questioning of Adam and Eve tells us more about them (or our-
selves) than about what transpired. 84 Nevertheless, it is possible to
understand the story as a model of inquiry in which the reader is
meant to consider the role of truth-telling and the appropriateness of
various punishments. Put differently, it seems unexceptional to attach
some meaning to the inquisition of Adam, Eve, and the serpent. The-
ological explanations for the departure from paradise, the burden of
childbirth, the need to work the earth, and the crawling behavior of
dead in battle in order to have Uriah's wife, Bathsheba. The punishment is the death of David
and Bathsheba's first child (after which they had Solomon). 2 Samuel 11:1-12:24. This episode
can also be described as an example of disgorgement or unjust enrichment.

Another striking example of kinship responsibility is when Daniel's malicious and envious
accusers are themselves flung into the lion-pit on the order of King Darius, who was sorry to be
tricked into sentencing Daniel to the pit, the accusers' children and wives are thrown in with
them. Daniel 6:24. This is an example of family responsibility decreed by a mortal lawmaker, see
infra note 101, and it goes beyond the requirements of proportionality inasmuch as the wrongdo-
ers had sought only to be rid of Daniel and not his family as well. Daniel 6:7, 16. Note, however,
that the alternative version of the lion-pit story in the Apocrypha preserves the tit-for-tat feature
and does not refer to the accusers' families. Daniel, Bel, and the Snake 42.

There are, however, biblical stories with no family responsibility, but I will leave for another
day an attempt to make sense of the selective use of family responsibility. There is also the
classic statement opposing family responsibility: "Parents are not to be put to death for their
children, nor children for their parents; each one may be put to death only for his own sin." Deuteronomy 24:16.

83. My sense is that many modern readers identify with the wrongdoer in the Achan story,
while in the Solomon story we envy the judge's quickness in trapping the less clever wrongdoer.

84. The narrative reports that God put a tree of life and a tree of knowledge in the middle
of the garden of Eden. God forms a human being who is instructed not to eat from the "tree of
the knowledge of good and evil; the day you eat from that, you are surely doomed to die." Genesis 2:17. God then brings forth a woman and she is tempted by the serpent, who scoffs at
the idea that she will die if she eats or even touches the tree. The serpent suggests that God
knows that if she eats of the tree, she will be God-like, knowing both good and evil. She eats the
forbidden fruit, gives some to her man, and they then know they are naked. God asks the man if
he has eaten the forbidden fruit, and the man replies that the woman gave it to him. God asks
her what she has done and she, in turn, says that the serpent deceived her into eating it. Genesis
2:7-3:14. The three are then punished as described presently. See infra note 85.
some reptiles could simply have followed the initial report of the temptation and the seduction of Adam and Eve.

One possibility is that Eve was told that she would be killed if she succumbed to the temptation of the forbidden tree, but that the serpent tempted her with the possibility that this rule was but a ruse to protect the divine monopoly on knowledge. After eating the fruit, she soon senses that she has been duped by the serpent. Despite her hiding and marginally shifting the blame, she does essentially confess and, perhaps for that reason, she is punished, but not put to death. In retrospect, we might say that she faces a kind of strategic threat and reacts by giving a full confession in return for a form of life sentence (in the manner of exile and the human condition) that is well short of capital punishment.

85. See Brams, supra note 19, at 22. Indeed, at the close of the narrative, we are given the distinct impression that the serpent, however insubordinate, was in fact quite honest. The serpent suggests that eating the forbidden fruit will generate knowledge and will not cause death. If the reference is to immediate death (rather than long-term mortality), the serpent turns out to be absolutely correct. God comments that Adam and Eve must leave the garden of Eden because if they partake next of the tree of life they will also gain immortality, which combined with knowledge of good and evil will simply be too much. Genesis 3:22-23. Eve might have thought that the penalty for her violation of the rule was immediate death (although the text is careful to say only “doomed to die,” Genesis 2:17), but the serpent correctly anticipates that this will not happen. Under this view, the serpent has tricked Eve only if she understood (incorrectly) either that there would be no penalty for consuming the forbidden fruit or that she would gain immortality. I think the text can be read either way; the serpent is honest, but encourages insubordination, or the serpent tricks her by implying that she will become just like God, rather than like God in but one attribute.

86. But see supra note 85 (suggesting the serpent’s honesty). Yet another view is that it was Adam that duped Eve. God’s original ban was conveyed to Adam prior to Eve’s arrival. We do not know what Eve was told, and there may have been some miscommunication or intentionally excessive caution on Eve or Adam’s part (because Eve tells the serpent that the fruit was neither to be eaten nor touched). Genesis 3:3. Still, when tempted by the serpent, it is plain that Eve knew something was forbidden. More generally, the text is careful to show that Adam was warned and then given a chance to defend himself. It is just as plain that the serpent was neither warned nor charged. And although Eve may not have been directly or accurately warned or charged, she was offered an opportunity to speak. Genesis 3:13 (Eve blames the serpent after being asked only “What have you done?”).

Finally, the serpent’s trickery may have been in encouraging action without further consultation. Once Eve gains knowledge, she is in the difficult position of deciding whether to include Adam. The modern reader might wish Eve and Adam had discussed the matter before taking the first step.

87. Again, this assumes that we should have expected immediate death as the penalty. I think it quite a stretch to interpret “the day you eat from that [the forbidden tree], you are surely doomed to die,” Genesis 2:17, as suggesting that Adam and Eve began the game with immortality, and the eating of the forbidden fruit created the human condition of mortality, because of the text’s subsequent reference to the tree of life. Genesis 3:22. The plain meaning seems to be that one tree’s fruit provides knowledge and the other tree’s fruit provides immortality, rather than that the second provides something the residents already have—but could serve as an antidote for the loss of this immortality as a result of eating from the first tree. On the other hand, there is a hint in the text in favor of this reading; the initial prohibition says nothing about a second forbidden tree, and in fact prohibits but one tree. Genesis 2:16-17. In short, I think a case can be made for the presence of overextraction in this text, but a number of interpretive
seen as a model for plea bargaining, which is especially useful where the state faces difficult fact-finding, but it does not address directly the question of separating the blameless from the culpable.  

If Adam had not also eaten the forbidden fruit, the story would immediately involve this issue and would also suggest the use of a strategic threat. The two humans might be threatened with death and one could then confess convincingly and receive a lesser punishment. This hypothetical suggests that the story as written may involve more of a strategic threat—and perhaps even one rising to the level of over-extraction—than first appears. Omniscience aside, the only fact known to the investigator at the start of the inquiry is that Adam and Eve had both gained the knowledge associated with the forbidden tree. The investigator asks for an explanation and Adam then describes his own wrongdoing, but identifies Eve as the greater wrong-doer. Eve, in turn, might now be described as facing a strategic threat. She might well believe that if she denies any responsibility or blames Adam (with no corroborating evidence) they will both be put to death, and she might also believe that a convincing confession is likely to yield a lesser punishment. The rational thing is therefore to confess either because she can count on God to uncover corroborating evidence or because she senses that so long as the story she tells is consistent with all the facts, including the story already told by Adam, truth-telling will be presumed and death will not follow.

The strategic threat is more intricate, and more suggestive of conventional group responsibility, if we entertain the possibility that one of the parties is relatively innocent. In that case, the parties might

88. Plea bargaining, or the offer of a lesser punishment in return for a confession, is not of course a modern development. See Bernard S. Jackson, Theft in Early Jewish Law 193-94 (1972) (tannaitic principle, not hinted at in the Bible, of “he who confesses to (a matter involving) a fine is exempt” limits confessing thief’s liability to value of stolen property whereas convicted thief paid multiple damages).

89. Eve’s seduction of Adam is a bit awkward to explain under the view put forth here. If Eve knew she had been duped, then why condemn Adam to a few moments of knowledge prior to his own death? One possibility is that she anticipated a lesser punishment and selfishly did not want to go it alone. Another possibility is that Adam did not wish to lose her companionship. Yet another possibility is that Eve learned that knowledge was more valuable than immortality or, if she correctly anticipated the severity of her postconfession penalty, more valuable than the easy life. She may have known that, or promised, Adam that he would feel the same way.

The simplest explanation of Eve’s behavior is that for a short time she thought she had gained knowledge at no cost. The text is careful to leave no gap between her consumption of the fruit and her giving it to her mate. It is after they both have indulged that we are told that their eyes were opened. Genesis 3:6-7.
perceive that death will come to both unless there is a convincing confession by the greater wrongdoer (or by both). In particular, I think the text can be read as intimating that Eve was more blameworthy than Adam, and that Adam could therefore have perceived that his punishment would be something less than death (or less than Eve’s) so long as Eve confessed or was otherwise found out.  

If so, Eve’s confession can be understood as the product of a successful strategic threat of the overextractive kind. Eve and Adam were both threatened with death, and the greater wrongdoer understood that confession would be worthwhile.

I suspect that many readers will be comfortable with the idea that the “trial” of Adam and Eve involved an implicit threat; their punishments are easily thought of as fashioned against the backdrop of their confessions, however hesitant they may have been. But the notion that this threat incorporated the overextraction idea will seem preposterous to most readers. A further thought experiment may therefore be useful. Imagine that the story of Solomon’s judgment had followed the overextraction script suggested in Part II, so that by threatening both claimants with a greater punishment, Solomon had elicited a convincing confession from the actual (and rational) wrongdoer. Imagine further that Solomon had announced, or had used language that suggested, that the idea came to him from the treatment of Adam and Eve in Genesis. He followed the divine example of dramatically threatening a target group containing the primary wrongdoer in order to induce a rational confession from that wrongdoer, who could anticipate a lesser punishment in return for information. I think most readers will agree that the substance of this thought experiment is consistent with the balance of what follows in the books of Genesis and Kings. Solomon would surely have gained his reputation for wisdom. In fact, his wisdom would have special appeal both to traditionalists, who would relish the way he lived by the Book, and to modern jurists and academics, who would enjoy the fact that the (hypotheti-

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90. One possibility is that Adam thought the fruit was harmless since when Eve offered it to him, he could see it had been partly eaten and yet Eve lived. Another possibility is that he should be regarded as less blameworthy than Eve because he may have partaken of the forbidden fruit in order not to leave her to face God or punishment alone.

As for the textual hints of Adam’s lesser culpability, Eve is punished (childbirth pain and husband as master) in ways that Adam is not, while Adam’s penalties (mortality and the need to labor all the days of his life for food) are plainly borne by women as well as men. Furthermore, the serpent is presented as the least sympathetic character, so that when the punishments are handed out in order to the serpent, Eve, and then Adam, there is at least the probabilistic suggestion that Adam, as last, is the least blameworthy. Genesis 3:14-19. An alternative possibility is that the order of sentencing simply corresponds to the chronology of wrongdoing.
cal) judgment had precedential value and could not easily be defeated by a clever wrongdoer. 91 Somehow this thought experiment seems less preposterous than the undiluted remaking of the Adam and Eve story itself, which may seem to require too many leaps away from the common sense of the text to be taken seriously. The intriguing quality of this remake of Solomon's judgment suggests that the strategic threat version of the legal treatment of Adam and Eve is itself interesting.

D. Jonah and Nineveh

We come finally to what may be the best strategic threat, and indeed a more likely example of overextraction, in biblical narratives than the others I have discussed. Most readers will recall that Jonah boarded a ship in an attempt to escape his prophetic mission and God's reach. 92 God then sends a storm so severe that the sailors initiate a lottery to see who is to blame for their imminent death. The lot points to Jonah, who confesses to them, and then insists that they overcome their reluctance to save themselves by throwing him overboard. 93 Jonah survives, in the "fish's belly," but so do his peevish ways; when he finally goes to Nineveh, his assigned destination, he is disappointed when the people there repent in response to his prophecy. 94 Inasmuch as the sailors are reluctant to sacrifice Jonah and the inhabitants of Nineveh repent, Jonah emerges as the most unsympathetic character.

The story contains an easily recognized example of group responsibility of the international kind because the city of Nineveh is threatened with destruction even though we might presume that not every inhabitant was an egregious sinner. 95 Indeed, the story of Nineveh

91. Modern observers might not want to imitate Solomon, because the modern taste is to abhor punishing the innocent through the direct power of the law. Moreover, modern observers might be uncomfortable with the assumption that Eve's behavior was worse than Adam's. See supra note 86. But my claim is only that modern theorists would find this remake of the Solomon story even more compelling than the original.

92. Jonah 1:3.


95. A small textual hint lies in the comparison with Sodom and Gomorrah. In the Genesis story there is the following: "How great is the outcry over Sodom and Gomorrah! How grave their sin must be! I shall go down and see whether their deeds warrant the outcry reaching me. I must know the truth." Genesis 18:20-21. Moreover, when Lot's house is surrounded, we find that "the men of Sodom, both young and old, everyone without exception, surrounded the house." Genesis 19:4. In contrast, there is the command to "go to the great city of Nineveh; go and denounce it, for I am confronted by its wickedness." Jonah 1:2. And in Nineveh, we witness no inhospitality. The comparison suggests better behavior in Nineveh, and perhaps therefore a larger number of innocents. The contrary argument is that Sodom and Gomorrah presented a
veh is perhaps the best example of the successful use of group responsibility, in the sense that remarkable compliance was achieved without the loss of innocent (or any) life. But because we search for more conventional, or domestically applicable, group responsibility or strategic threats, it is the uncertainty at sea that deserves closer attention.

The implicit threat on the ship is strategic to the point of overextraction. Everyone on the vessel is threatened with death, and this threat causes Jonah to confess in convincing fashion. We can describe this confession as rational either in the sense that Jonah had some concern for his fellow passengers or perhaps because Jonah believed that a confession (in the form of self-sacrifice) would raise the chance of divine intervention in the form of his own survival in the sea. Divine involvement prevents the story from serving as a more obvious example of overextraction as a human legal tool, but the story emerges as a subtle and fine example for human authorities. We might even take the obvious similarity of the threats made against Nineveh and Sodom as a reminder that the threat maker was demonstrably willing to carry out the overextractive threat. Jonah’s confession seems perfectly rational to us, and we can easily imagine a human judge’s learning from the story and threatening a target group containing an unidentified wrongdoer in order to extract an analogous confession.

It is perhaps unfortunate that most readers of the story are captivated by Jonah’s survival in the belly of the fish. The most elegant part of the story, I think, is the piece of the plot that makes his confession, and even his survival, so reasonable. Jonah responded to a strategic threat, which appears to have been of the overextractive kind.
E. Hammurabi’s Code

In Hammurabi’s Code we find:

- If a man breaks into a house, they shall kill him and hang(?) him in front of that very breach. If a man commits a robbery and is then seized, that man shall be killed. If the robber should not be seized, the man who has been robbed shall establish the extent of his lost property before the god; and the city and the governor in whose territory and district the robbery was committed shall replace his lost property to him. If a life (is lost during the robbery), the city and the governor shall weigh and deliver to his kinsmen 60 shekels of silver.

This selection is the only segment of Hammurabi’s Code specifying group responsibility. It requires the local enforcers of the law to provide compensation, or an insurance scheme, and presumably gives them some incentive to solve crimes. If this is group responsibility, then it is implicitly so, both because the authorities can presumably raise the necessary funds through taxes and because there is compensation but no attempt to allocate the usual punishment (of death for a robber who has been caught). From the community’s point of view, there is a close analogue in the modern tendency to link shoplifting and other crimes to higher prices in locations with more of these losses from crime. The closest modern counterpart is the occasional provision of compensation to victims of crime. Through a combination of price increases, the development of an insurance industry, taxes, tort liability, and the like, I think it fair to say that there is at least as much implicit group responsibility in modern times as ever was generated by this provision of Hammurabi’s Code. The interesting thing, I think, is how familiar this Code provision can feel to the modern reader.

It is noteworthy that the provision in question may concern not simply one who breaks into a house and is subsequently rather than immediately apprehended, but rather a different sort of offender, a brigand, or a member of an organized, marauding group. The character of this provision is therefore not easily linked to strategies for

97. MARTHA T. ROTH, LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR 85 (1995) (translating Laws of Hammurabi ¶ 21-24). In these sections, the verb (“habatu”) that generates “robbery” in Professor Roth’s translation is different from the earlier verb (“palasu”) that produces “breaks into.” See infra note 98.

98. See Bernard S. Jackson, Some Comparative Legal History: Robbery and Brigandage, 1 GA. J. INT’L & COMP. L. 45, 56-57 (1970) (arguing that the Code’s imposition of civic responsibility where the verb “habatu” (“robbery”) is used, and not where “saraqu” or “palasu” (“breaks into”) is employed, suggests something more than the difference between an individual robber and individual thief, namely an organized group as compared to an individual thief); see also 1 G.R. DRIVER & JOHN C. MILES, THE BABYLONIAN LAWS 110 (1952) (interpreting Code of Ham-
identifying wrongdoers. It may, however, have something to do with a desire to encourage participation in mutual defense pacts or simply to cause officials to internalize the costs of crimes that they are in the best position to prevent.

Driver and Miles report that in ancient Arabia the responsibility for a homicide might be put on the nearest homestead. This strikes the modern observer as information-forcing, certainly, but not as a kind of group responsibility. On the other hand, reports of collective fines where actual offenders cannot be caught should be classified, along with this provision of Hammurabi's Code, as conventional group responsibility in the manner of Ybarra. Group responsibility of this kind, and extending beyond the boundaries of the wrongdoer's own family, is thus not unknown in ancient law but is hardly widespread. Reports of individualized punishment dominate.

Hammurabi's communal responsibility provision as concerning something similar to but other than theft, such as an offense by a "robber, brigand or highwayman").

99. Driver & Miles, supra note 98, at 111.

100. Driver and Miles offer an example of a decree requiring the "men of the city" to replace complainant's ass, which has been struck and killed within the city. Id. at 110. It is noteworthy that the Bible's version of the Hammurabian rule, noted earlier, see supra text accompanying note 60, deals only with an unsolved homicide. If there were also a remedy for an unsolved property crime (as in Hammurabi's Code), I would be tempted to argue that it is a version of group responsibility that avoids false reporting by victims. Inasmuch as the rule is limited to homicide it seems to be a retreat from group liability or simply a kind of communal moral responsibility.

Note also that while the biblical rule can be seen as part of a theme about the treatment of inhospitality, see supra part III.D, the Hammurabian counterpart is about harms suffered locally at the hands of robbers, or perhaps outsiders, and not at all about inhospitalities suffered by outsiders.

101. I have elsewhere discussed the vast amount of individual responsibility in Hammurabi's Code, the Laws of Eshnunna, and other ancient legal systems. See Saul Levmore, Rethinking Comparative Law: Variety and Uniformity in Ancient and Modern Tort Law, 61 Tul. L. Rev. 235, 248-85 (1986). In addition, the present Article has noted a number of examples in which all who are punished (perhaps setting kinship responsibility aside) were characterized as wrongdoers. There are other such examples.

Somewhat similarly, where there is group or familial responsibility, it sometimes inclines in the direction of individual responsibility. In the simplest context, a wrongdoer's family can be seen as punished because this punishes and threatens the wrongdoer. Narrowly tailored talionic rules, such as those found in Hammurabi's Code, can similarly be described as aimed at individual responsibility. Roth, supra note 97, ¶ 230, at 125 (builder who causes the loss of another's child loses his own child). Note, in passing, that talionic rules are extractive rather than overextractive; they may encourage settlement but they neither invite confessions where there is uncertainty nor seek to take more from the wrongdoer than what would be taken if there were no uncertainty.

For a more subtle example of kinship responsibility, bordering on individual punishment, consider the biblical story of a severe famine during David's reign that was traced through divine consultation to Saul's earlier breach of a treaty that Joshua entered into with the Gibeonites. David seeks expiation and the Gibeonites ask for the ritual slaughter of seven of Saul's descendants. David obliges, but there is evidence of his discomfort, perhaps because he played a role in choosing the seven. 2 Samuel 21:1-14. Later, David is offered a choice among three communal penalties (all of the international kind) and this time he refuses to be implicated in the decision.
V. Conclusion

I have been working toward a conclusion that contradicts the conventional wisdom that group responsibility has given way to individual responsibility. Biblical texts in particular, like modern legal systems, appear to prefer individual responsibility when there is a known wrongdoer. It is not impossible to imagine that it is contemporary law, reflecting the very modern view that wrongdoing is not completely separable from social and economic conditions, that is most likely to lean toward group responsibility. There is, of course, group responsibility in many ancient texts, but I have tried to suggest that many of the best known examples have much in common with our own international norms or modest domestic deployments of group responsibility.

This comparison of ancient and modern inclinations to use group responsibility may be warped because of a fundamental difference between these ancient vignettes and modern cases. All ancient stories containing the slightest element of (nonfamilial) group responsibility involve intentional wrongdoing, while modern legal systems are much more inclined toward explicit group responsibility where the wrongdoing is negligent but unintentional. There is a sense in which the modern use of conventional group responsibility is therefore more remarkable; a sense in which the comparison may simply reveal that all legal systems take personal responsibility quite seriously where identifiable, intentional wrongdoers are concerned; and, finally, a sense in which ancient law and modern law are incomparable. As is apparent, my own inclination is to think that the first of these reactions dominates. I discount the second reaction because both ancient and mod-

as to who shall live and who shall die. 2 Samuel 24:10-15. In any event, the seven deaths bargained for by David and the Gibeonites may be an example of humanly designed kinship responsibility, but their deaths averted many more deaths from famine. The story can therefore be seen as substituting something closer to individual responsibility in place of rather serious group responsibility.

There are many striking examples of ancient texts in which community responsibility might have been imposed along with or preceding, see supra note 78 (group as guarantor of members), individual responsibility but was not. Thus, Susanna's false accusers are stoned, as they would have done to her (and according to the law of Moses), but the whole assembly suffers only the indignation of Daniel's criticism even though they might have been punished for too quickly accepting the original evidence against Susanna. Daniel and Susanna 48, 61-62. Note that this detective story is an unlikely setting for overextraction because the target group contains either two truth-tellers or two false accusers.

Stories aside, there are biblical references both to the "rule" of individual responsibility and to the apparent absence of individual responsibility, although these may refer to the absence of a perfect connection between behavior and rewards and punishments. Compare Job 21:7-34 (bemoaning lack of individual responsibility) with Ezekiel 18:1-32 (declaring that each good person lives and is not punished for wickedness of father or son).
ern law do, after all, deal with negligence, and it is only the modern legal systems that use group responsibility in these cases. In ancient law, accidental injuries (including those caused by negligent behavior) normally generate individual responsibility or no responsibility at all.

There is, however, a respectable case to be made for the third reaction above, namely the possibility that the tendencies of modern and ancient law toward conventional, or domestic, group responsibility are largely incomparable. There is even a modern argument for such a conclusion. Modern law has developed alongside the institution of insurance, and it is surely no accident that we use conventional group responsibility where there is insurance. In turn, we are inclined to disallow insurance for intentional and criminal wrongdoing. Without insurance we might be inclined to imitate biblical narratives regarding God’s wrath (and other ancient law), using group responsibility for the most serious wrongs where there is criminal and intentional, rather than negligent, behavior.

Nevertheless, I hope to have cast doubt on the notion that group responsibility once dominated legal thinking and then headed toward extinction. If we set aside group responsibility as it unfolds in international relations, then explicit group responsibility may not be a terribly important part of modern legal systems. But once we set aside losses in war and also allow ourselves to analogize stories of God’s wrath against groups (which often appears in the form of losses in battle anyway) to international conflicts, then biblical law and lore contain even fewer examples of group responsibility.

This characterization of biblical texts, and perhaps a good deal of other ancient materials, may provide the simplest answer to the question presented about strategic threats against innocent and guilty parties alike. In describing overextraction schemes, in which a target group containing a wrongdoer might be threatened with liability in order to extract either a confession from the true wrongdoer or information from otherwise innocent witnesses, I suggested that a legal system willing to use explicit group responsibility ought to be willing on

102. See Levmore, supra note 5, at 1572-73 nn.25-26 and accompanying text (Ybarra and environmental law examples).

103. This is hardly the place to guess whether conventional group responsibility in our legal heritage peaks during the frankpledging era, see William Alfred Morris, The Frankpledge System (1910), or continues to grow (implicitly) through modern times.

104. I continue to emphasize that implicit group responsibility, in the form of price increases, insurance premiums, taxes, and a variety of chilling effects, is an important part of modern law.

105. Again, by group responsibility I mean something more than close kinship responsibility. See supra note 11.
occasion to use these strategic, overextractive threats. The simplest explanation for the scarcity of strategic threats in ancient texts may therefore be that ancient legal systems, like our own, were not generally inclined to use group responsibility.

Finally, and perhaps most provocatively, I have suggested that there are hints of overextractive, strategic threats in biblical stories, and perhaps even an elegant example of this tool in the Book of Jonah. Solomon may not have needed to resort to overextraction; Joshua may also have been lucky to run into clumsy wrongdoers, although one gets the impression that Joshua himself was no Solomon; and the story of Adam and Eve may simply have less uncertainty and less strategic thinking in it than I have tried to imagine. Moreover, the style of the Bible is not to report unsolved problems. There may have been other instances where the leading figures could have used some kind of group responsibility or strategic threat and either did not or unsuccessfully did so.

In the end, thinking about strategic threats enriches our conceptions of a few stories. At the same time, the paucity of group responsibility schemes of human design in biblical texts suggests that ancient attitudes towards this powerful tool may not have been so different from those that dominate in our own time. If this is correct, the real puzzle may be the uniformity of this tool's (modest) presence in different legal systems. In any event, once we see that ancient legal systems may have shared our inclination to use group responsibility and strategic threats sparingly, we are open to the possibility that we can learn a good deal from occasions where those who preceded us did and did not venture to use these tools.

106. See supra part IV.D.

107. His nonoverextractive plan did the job, even though it seems inferior to the overextraction strategy discussed earlier. See supra notes 17-23 and accompanying text. For all we know, Solomon was so wise and quick that he planned next to present an overextractive threat if both women responded to his first move by conceding the live baby to the other claimant. He might in this way have been prepared for one woman to be innocent and the other clever, or for both to be clever. See supra note 23.

108. See supra part IV.C.

109. The puzzle is that we normally think of variety, rather than uniformity, among legal systems as arising where reasonable people could disagree over the wisdom or functional effects of a rule. See Levmore, supra note 101, at 239 n.11; Saul Levmore, Variety and Uniformity in the Treatment of the Good-Faith Purchaser, 16 J. LEGAL STUD. 43, 44-45 (1987). There appears to be room for disagreement as to the utility of group responsibility and overextractive threats, and yet there does not appear to be much variety across legal systems in the use of these tools—at least if one adopts the suggested classification of group responsibility of the international kind.